SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER, ET AL.,
Appellants,

VS.

MICHAEL ROBINS, ET AL.,
Appellees.

On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS

Pursuant to Supreme Court Rule 16 (1) (b), Appellees hereby move to dismiss the appeal in the above entitled case on the ground that it does not present a substantial federal question.

OPINION BELOW

The opinion of the Supreme Court of California, from which this appeal is taken, is entitled *Robins v. Pruneyard Shopping Center,* and is reported at 23 Cal.3d 899, 153

Cal.Rptr. 854, 592 P.2d 341 (1979). The opinion is set forth in Appellants' Jurisdictional Statement as Appendix C.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . .

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Article I, Section 2, California Constitution:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Article I, Section 3, California Constitution:

> The people have the right to instruct their representatives, petition the government for the redress of grievances, and assemble freely to consult for the common good.

Article II, Section 8, California Constitution:

> *Initiative*
>
> (a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election . . . .

Article II, Section 9, California Constitution:

Referendum

(a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

(b) The referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to five percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors . . . .

Article II, Section 14, California Constitution:

Recall Petitions

(a) Recall of a State officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. . . . Proponents have 160 days to file signed petitions.

(b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of five counties equal in number to 1 percent of the

> last vote for the office in the county. Signatures to recall Senators, members of the assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office. . . .

QUESTIONS PRESENTED

1. Does the United States Constitution prohibit the State of California from regulating the use of private property within its borders by requiring that the owner of a shopping center not deny access to individuals seeking to solicit signatures upon petitions to the government, where such conduct is guaranteed by the State Constitution, and where that State has found that the public welfare would be substantially impaired if such access is denied?

2. By invoking the State Constitution to protect the right of individuals to solicit signatures upon petitions to the government upon the premises of a privately owned shopping center, has the State of California adversely affected any First Amendment rights held by the landowner so as to raise a substantial federal question?

STATEMENT OF THE CASE

On November 16, 1975, Appellees went to the Pruneyard Shopping Center for the purpose of soliciting the signatures of members of their community upon a petition they intended to send to their governmental representatives, including the President of the United States. The petition condemned a resolution which had been passed by the United Nations labeling Zionism as a form of racism.

Appellees were at that time students of the 1976 confirmation class at Temple Emanu-El, located in San Jose,

and a teacher of that class. The petition was part of a class project. Other members of the class went to other nearby shopping centers, and a group went to the airport.

Members of Appellees' confirmation class were of high school age. School was then in session, and participation in the project was necessarily restricted to weekends. Appellees had learned from prior experience that publicly owned areas of downtown San Jose, and neighboring municipalities, are inadequate for a petition project by reason of the scarcity of people to be found therein.

Moreover, unlike handbilling and leafleting, which conduct is not at issue herein, Appellees' activity could not be effectively carried out on the public sidewalks surrounding the center, or elsewhere. Where virtually all people drive onto the shopping center premises, and do not have to set foot on its publicly owned surroundings, leafleting is possible only because of its instantaneous nature. The discussion of, and signing of petitions requires personal contact in a manner to which the roadside forums are not conducive.

Upon arriving at the Pruneyard, Appellees went to the central courtyard and set up a card table in one corner of the square. No sign was placed on the table. Appellees proceeded to ask passersby to sign the petitions. The project was well received by shopping center patrons.

Appellees had a self-imposed rule that they would not harrass people at the shopping center, or block entrances to stores. Appellees at all times conducted themselves in a courteous and orderly manner.

After five to ten minutes, Appellees were advised by security personnel of the shopping center that their conduct violated Appellants' regulations. They were asked to leave, and did so.

Upon subsequent contact with Appellants, wherein Appellees offered to submit to any reasonable regulations so as to continue their project, Appellants stated that the activity would not be allowed under any circumstances.

Appellees filed for an injunction to enjoin Appellants from prohibiting the solicitation of signatures for their petitions on shopping center grounds. The Superior Court of California, County of Santa Clara, denied the request. The Court of Appeal affirmed the judgment of the trial court.

Appellees' Petition for Hearing in the California Supreme Court was granted, and after consideration of the parties' briefs, several amicus briefs on both sides of the matter, and oral argument by both sides, that court reversed the Judgment of the trial court. After considering and denying Appellants' Petition for Rehearing, the California Supreme Court remitted the cause to the trial court with instructions that the injunction be issued as requested.

Appellants immediately sought from this honorable Court a stay of the mandate of the California Supreme Court. That application was denied by Mr. Justice Rehnquist.

The California Supreme Court had been briefed at length by Appellees as to the socio-economic circumstances

existing in California which make access to shopping centers necessary for the effective exercise of the conduct at issue. The evidence indicated that shopping centers are the gathering places for California communities, and that privately owned shopping centers, because of their planned convenience, wide range of goods and services, and attractiveness to businesses which formerly were situated in downtown areas, not only have replaced the traditional public forums but were the principal cause of their demise.

The Fair Political Practices Commission, a California administrative agency established by the legislature to oversee the State's electoral processes, appeared before the California Supreme Court as an amicus curiae, and urged the court to rule in favor of Appellees. The California Supreme Court expressly noted the position of that state regulatory body that "because of the large number of signatures required to succeed in an initiative, referendum or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." (*Robins v. Pruneyard*, 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, 858-859 (footnote 4)).

Having duly considered the record before it, and the arguments on each side of the issue, the California Supreme Court modified the findings of the trial court as to the availability and adequacy of alternative forums, and found instead that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum to exercising [the right to petition and speech incidental thereto]." (*Robins v. Pruneyard,* 23 Cal.3d 899, 910, 153 Cal.Rptr. 854, 860)

SUMMARY OF ARGUMENT

The State of California has imposed, by way of injunction, a specific restriction upon the use of real property within its borders. The Supreme Court of California imposed the restriction after finding that fundamental rights guaranteed by the State Constitution were being substantially impaired, and that the restriction was reasonable and necessary for the preservation of such rights, and that Appellees and the general public in California would otherwise suffer irreparable injury.

The power of the states to impose reasonable restrictions upon the use and control of private property is firmly established, and no interpretation of Fifth and Fourteenth Amendment rights by this Court, including those decisions relating specifically to access to shopping centers, support Appellants' argument that State law may not provide a basis for the restrictions imposed upon Appellants herein. The decision of the Supreme Court of California to grant injunctive relief in order to protect Appellees and the general public from irreparable injury, after a full and fair hearing on the issues, is not, therefore, repugnant to Appellants' Fifth and Fourteenth Amendment rights.

The similarity Appellants say exists between the conduct at issue herein and that involved in previous shopping center decisions by this Court is irrelevant. Where a matter may have been decided upon both federal and state grounds, appellate review of the federal question asserted is improper if the action of the State court can rest upon an adequate and independent State ground. Given the freedom of the States in interpreting the pro-

visions of their own constitutions, the action of the California Supreme Court which is expressly based upon the State Constitution, does not present a matter for review by this Court.

Nor can it reasonably be said that the restrictions imposed upon Appellants' use and control of private property raise a substantial question as to Appellants' First Amendment rights. The record in the case contains no indication that any idea or philosophy espoused by Appellees has been attributed to Appellants, or was in any way forced upon them for adoption. It cannot reasonably be said that the forced espousement of ideas, found to be objectionable in the cases cited by Appellants, is present in this situation where the interplay takes place in a common area of a shopping center between members of the public and individuals who are in no way identifiable as representatives of the property owner.

There being no substantial federal question warranting review by this Court, it is respectfully requested that the appeal be dismissed.

I

THE DECISION OF THE SUPREME COURT OF CALIFORNIA THAT THE STATE CONSTITUTION PROTECTS THE RIGHT TO SOLICIT SIGNATURES ON PETITIONS TO THE GOVERNMENT ON THE PREMISES OF A PRIVATELY OWNED SHOPPING CENTER IS NOT REPUGNANT TO APPELLANTS' RIGHTS UNDER THE FIFTH OR FOURTEENTH AMENDMENTS

A. The Power of the States to Impose Reasonable Restrictions Upon the Use and Control of Private Property Has Not Been Diminished By Decisions of This Court Concerning Access to Shopping Centers

The validity of Appellants' jurisdictional contentions depends on whether *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and subsequent decisions of this Court, vested owners of shopping centers with an absolute and unassailable constitutional right to deny access to individuals seeking to use such property as a forum of expression. That contention, as applied to this case, would bar States from imposing reasonable restrictions on the use and control of shopping center property in spite of a finding that such restrictions were necessary to prevent irreparable injury and to protect the general welfare of the State.

Such a reading of this Court's decisions concerning access to shopping centers would constitute a severe divergence from well established principles in which private property rights are subject to the State's power to impose reasonable restrictions on the use and control of land.

No clearer statement of the fundamental principle underlying this case can be found than that of Chief Justice Shaw of the Supreme Judicial Court of Massachusetts:

> "We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All the property in this commonwealth, as well that in the interior as that bordering on the tidewaters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."
>
> *Commonwealth v. Alger,* 7 Cush. 53, 84, 61 Mass. 53, 84.

Relying principally on *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972), and *Hudgens v. NLRB,* 424 U.S. 507 (1976), Appellants contend that "the controlling decisions establish that a shopping center owner has a right under the Fifth and Fourteenth Amendments to bar those who would conduct speech activities over his objection." (Jurisdictional Statement at page 6).

A closer examination of *Lloyd,* as clarified by *Hudgens,* shows it not to be controlling herein.

Lloyd involved an action by a group of individuals seeking to enjoin a shopping center from denying them access for the purpose of handbilling on the basis that such conduct was protected under the First Amendment. This Court there held that, under the facts presented, the First Amendment could not offer protection as against private, as opposed to state action.

> "The basic issue in this case is whether respondents in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only."
>
> *Lloyd Corp. v. Tanner,* 407 U.S. at 567.

After discussing the distinctions which allowed a finding of state action as to private property, such as in *Marsh v. Alabama,* 326 U.S. 501 (1946), this Court in *Lloyd* found the necessary state action ingredient of First Amendment protection to be lacking:

> "We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." (407 U.S. at 570)

Any confusion as to whether *Lloyd* was decided upon the inapplicability of the First Amendment or upon an expansion of the shopping center owner's property rights was put to rest in *Hudgens v. NLRB,* 424 U.S. 507 (1976). In *Hudgens* the Court gave exclusive emphasis to above-discussed language in Lloyd concerning the non-dedication of property to public use, the absence of state action, and the resulting nonavailability of First Amendment protection. (424 U.S. at 518-520). Having so clarified the meaning of *Lloyd,* the Court in *Hudgens* concluded as follows:

> "It conversely follows, therefore, that if respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.
>
> "We conclude, in short, that under the present state of the law the constitutional guarantee of full expression has no part to play in a case such as this." (424 U.S. at 520-521).

This extensive examination of the *Lloyd* decision, as clarified by *Hudgens,* has been necessary to demonstrate that it is not applicable and therefore not controlling as to the issues in this case. The decision in *Lloyd* that a First Amendment right of access to shopping centers does not exist because state action is absent, did not establish a new constitutional right of shopping center owners to bar all expressive activity under any circumstances. There has been no controlling pronouncement in any case which immunizes shopping center owners from reasonable access

regulations properly based on grounds other than the First Amendment.[1]

It is clear, therefore, that *Lloyd* does not prohibit a state from imposing an otherwise proper regulation upon the use and control of a privately owned shopping center.

Appellees do not question the fact that the owners of private shopping centers possess constitutional rights under the taking and due process clauses of the Fifth and Fourteenth Amendments. But to say that the constitutional value of protecting private property is "relevant", as this Court did in *Lloyd* in determining the reach of the First Amendment (407 U.S. at 567), is certainly not to hold that either the due process or taking clause is violated when access to a shopping center is mandated upon an adequate and independent state ground, or any other permissible basis. Indeed, in *Hudgens* this Court specifically disavows any such implication, noting that "[S]tatutory or common

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[1]The possibility of mandated access and other regulations as to the use and control of shopping center property, on grounds other than the First Amendment, was recognized in *Lloyd:* "This is not to say that no differences may exist with respect to government regulation or rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes. We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assume due protection of both, are not easy. But on the facts presented in this case, the answer is clear." *Lloyd Corp. v. Tanner,* 407 U.S. at 569-570 (1972).

law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others," (424 U.S. at 513) and by remanding the case to the NLRB to decide because "the rights and liabilities of the parties in this case are dependent *exclusively* upon the National Labor Relations Act" (424 U.S. at 527, emphasis added).

The very important distinction and difference between determining that there is no federal *constitutional* access right and a decision that a state unconstitutionally infringes upon property rights if it provides such a right is illustrated by the series of cases dealing with racial discrimination in privately owned public accommodations. Prior to the enactment of the Civil Rights Act of 1964, this Court was faced in several cases with the question whether there was sufficient state action to invoke the Fourteenth Amendment's equal protection guarantee when a private proprietor refused to serve or accommodate blacks. See, e.g., *Griffin v. Maryland,* 378 U.S. 130 (1964); *Robinson v. Florida,* 378 U.S. 153 (1964); *Lombard v. Louisiana,* 373 U.S. 267 (1963); *Bell v. Maryland,* 378 U.S. 226 (1964). Those members of the Court who insisted that there was insufficient state involvement in particular instances to invalidate trespass convictions were very careful to note that their state action views did not implicate or restrict

> "the power of Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race. Our sole conclusion is that Section 1 of the Fourteenth Amendment does not prohibit privately owned restaurants from choosing their own customers . . . as long as some valid regulatory statute does not tell him to do otherwise." (*Bell v.*

Maryland, supra, 378 U.S. at 343 (Black, J. dissenting, joined by Harlan, J. and White, J.)

And when the issue of the validity of the nationwide public accommodations statute of 1964 was presented in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), the Court unanimously rejected the contentions that the statute violated substantive due process or constituted a taking (379 U.S. at 258-261). Indeed, Mr. Justice Black, who had vigorously maintained in *Bell* that there was no state action in simply invoking the general trespass laws to oust a black from a restaurant, wrote separately in *Heart of Atlanta* to note that

> "this court has consistently held that the regulation of the use of property by the Federal Government or by the States does not violate either the Fifth or the Fourteenth Amendment . . . A regulation such as that [in the] 1964 Civil Rights Act *does not even come close* to being a 'taking' in the constitutional sense . . . Nor does any view expressed in my dissenting opinion in *Bell v. State of Maryland,* 378 U.S. 226, 318, 84 S.Ct. 1814, 1864, 12 L.Ed.2d 822, in which Mr. Justice Harlan and Mr. Justice White joined, affect this conclusion in the slightest for that opinion stated only that the Fourteenth Amendment in and of itself . . . does not bar racial discrimination in privately owned places of business in the absence of state action." (379 U.S. at 277-278 (Black, J. dissenting, emphasis added)).

Similarly, in this case, the decision in *Lloyd* that the First Amendment in and of itself does not bar shopping center owners from prohibiting access for expressive activity in the absence of state action, does not have the slightest bearing on the question as to whether a state may

compel access on the basis of state constitutional guarantees which do not require the presence of state action.

The power of the State of California to restrict the use and control of private property so as to provide access thereto by the public for a specific purpose is supported both by decisions of this Court, and by the traditional legal principles that empowers the states to impose reasonable restrictions over the use and control of private property.

In *Agricultural Labor Relations Board v. Superior Court,* (1976) 16 Cal.3d 392, 128 Cal.Rptr. 183, 546 P.2d 687, app. dism. for want of substantial federal question, 429 U.S. 802, the Supreme Court of California held that the use of private property may be restricted because of the public interest in collective bargaining, specifically noting that "all private property is held subject to the power of the government to regulate its use for the public welfare" (16 Cal.3d 392, 403). In that case where union organizers were granted access to private property under state law, this Court dismissed the appeal for lack of a substantial federal question.[2]

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[2]The absence of a substantial federal question in *ALRB v. Superior Court,* supra, clearly demonstrates that appellants' reliance on National Labor Relations Act cases, including, primarily, *NLRB v. Babcock and Wilcox Co.,* 351 U.S. 105 (1956), is misplaced. The appeal in *ALRB v. Superior Court,* supra, was taken precisely on the ground that the NLRA access cases set constitutional limits beyond which states may not go without infringing property owners rights (See, Jurisdictional Statement in *Kubo v. Agricultural Labor Relations Board,* No. 75-1734, 429 U.S. 802 (1976)). This Court's decision that no substantial federal question was presented in *ALRB* indicates that the *Babcock and Wilcox* line of cases do not purport to determine the constitutional limit to which Congress could go in assuring union access or to which the states may go in assuring access generally; rather, they simply construe the NLRA.

The power of the states to regulate the control of private property is further demonstrated by their ability to enjoin nuisances (Prosser, *Law of Torts*, 4th Ed. (West), "Nuisance", p. 603: "The power of a court of equity, in a proper case, to enjoin a nuisance is of long standing, and apparently never has been questioned since the earlier part of the eighteenth century."), to prohibit discriminatory denials of access into amusement parks, (*Orloff v. Los Angeles Turf Club,* 30 Cal.2d 110, 180 P.2d 321 (1947)), and to establish and enforce zoning regulations and other land use restrictions, (See, e.g., *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974)).

Nor can it reasonably be said that the restriction herein imposed upon the use of private property by the State of California is clearly arbitrary or unreasonable, or that it bears no substantial relation to a legitimate state goal. In the decision below, the California Supreme Court found, on the basis of evidence in the record, that the establishment and expansive development of suburban shopping centers in California has resulted in the coinciding demise of the traditional public forums. (*Robins v. Pruneyard,* 23 Cal.3d 899, 907, 153 Cal.Rptr. 854, 858, 592 P.2d 341 (1979)).

It is also important to note, as did the California Supreme Court, that Appellees' conduct herein involved the circulation of petitions to the government for the redress of grievances:

> "In assessing the significance of the growing importance of shopping centers we stress also that to pro-

> hibit expressive activity in the centers would impinge upon constitutional rights beyond speech rights. Courts have long protected the right to petition as an essential attribute of governing. (*United States v. Cruikshank*, (1976) 92 U.S. 542, 552 [23 L.Ed. 588, 591].) The California Constitution declares that 'people have the right to . . . petition government for redress of grievances . . .' (Art. I, § 3). That right in California is, moreover, vital to a basic process in the state's constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall. (Cal.Const. Art. III, §§ 8, 9 and 13)" *Robins v. Pruneyard*, 23 Cal.3d 899, 907-908, 153 Cal. Rptr. 854, 858 (1979)

The California Supreme Court, in determining the importance of the state goal for which protection was sought, specifically referred to an amicus brief filed by the California Fair Political Practices Commission which urged that Court to grant the requested relief, pointing out that "because of the large number of signatures required to succeed in an initiative, referendum or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." *Robins v. Pruneyard*, 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, 858-859 (footnote 4).

Having so recognized the need for the State to protect and guarantee the exercise of rights essential to the State's process of government, and having found that "[s]hopping centers to which the public is invited can provide an *essential and invaluable forum* for exercising those rights," (23 Cal.3d at 910, 153 Cal.Rptr. at 860), the California Supreme Court preserved and advanced a legitimate state goal by concluding the "Sections 2 and 3 of Article I of

the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (23 Cal.3d at 910, 153 Cal. Rptr. at 860).

Since the constitution does not prohibit the states from imposing reasonable restrictions upon the use and control of private property, and since the restriction imposed by the California Supreme Court is not arbitrary or unreasonable, and is substantially related to a legitimate state goal, the Fifth and Fourteenth Amendment contentions of Appellants do not raise a substantial federal question.

B. Even if the Conduct Appellees Seek to Protect Is Substantially the Same As That For Which First Amendment Protection Has Been Sought Before in This Court, the Presence of Adequate and Independent State Grounds Preclude Review of the Federal Question

Appellants contend that the determination of First Amendment limits in *Lloyd v. Tanner*, 407 U.S. 551 (1972), controlls the resolution of this case, basing that contention upon their characterization of Appellee's conduct as being substantially similar to that involved in *Lloyd*. (Jurisdictional Statement, page 11.)

However, even if the rights sought to be protected were the same, which they are not, and even if the Supreme Court of California had relied also on the First Amendment, jurisdiction would not lie.

Where a case may have been decided upon two grounds, one federal, the other non-federal, this Court's first inquiry must be whether the non-federal ground is independent of

the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

Clearly, the Constitution of the State of California constitutes a body of law independent of any federal doctrine. And this Court has recognized that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. National Tea Company,* 309 U.S. 551 (1940).

In this case, the California Supreme Court has interpreted the State Constitution as protecting Appellees' activities. On that non-federal basis, California has enjoined Appellant from prohibiting such activity.

By so interpreting the State Constitution, thereby obviating the state action constraint faced by this Court under the First Amendment (*Lloyd v. Tanner, supra*), California has taken the asserted federal question out of the case and posited the matter squarely and entirely on state grounds.

II

THE PROTECTION OF THE RIGHT OF PETITION AND INCIDENTAL SPEECH IN A PRIVATELY OWNED SHOPPING CENTER PURSUANT TO ADEQUATE AND INDEPENDENT STATE GROUNDS DOES NOT VIOLATE APPELLANTS' FIRST AMENDMENT RIGHTS

Appellants' next assert jurisdiction upon a theory that their own First Amendment rights are violated in that they are required to allow members of the public to use their shopping center as a forum for the expression of ideas. Appellants contend that they have a right, under

the First Amendment, to withhold their property from any expressive use.

Upon examination, it appears that Appellants, recognizing the lack of substance contained in their primary argument (previously discussed herein), are attempting to bootstrap "negative" speech rights onto property rights. Appellants do not, and cannot, argue that they are being forced to say, espouse, or believe anything; nor is there anything in the record which would indicate that ideas expressed by Appellees or other members of the public would be attributed to Appellants by shopping center patrons.

Appellees respectfully submit that Appellants' "negative" First Amendment argument is nothing more than a reassertion of their primary argument of absolute control over private property, couched in different, but equally unsubstantial terms.

This secondary argument by Appellants is ostensibly based upon principles announced in *Wooley v. Maynard,* 430 U.S. 705 (1977); *Board of Education v. Barnette,* 319 U.S. 624 (1943); and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). To extend the principles announced in those cases to the situation at hand would be torturous.

In *Wooley v. Maynard,* 430 U.S. 705 (1977), the issue presented is whether an individual could be compelled by the State of New Hampshire to display an ideological message on the license plate of his personal automobile. Clearly, where a state requires an individual to say something or to appear to say something, by mandating its dis-

play on his personal vehicle, the bounds of legitimate state control over property are overstepped. In such a situation, there is a distinct possibility that the idea may be attributed to the car owner as being his own. Furthermore, in *Wooley, supra,* there was no conceivable legitimate state goal which required or supported the State's regulation.

Here, the legitimate and compelling state objective of protecting the exercise of rights essential to the state's system of government by the people warrants protection of Appellees' activity in an "essential and invaluable forum." *Robins v. Pruneyard,* 23 Cal.3d 899, 910, 153 Cal. Rptr. 854, 860 (1979).

A final distinction between the situation in this matter and that in *Wooley,* deserves special emphasis. In *Wooley,* the State had created the medium of expression, i.e., the motto bearing license plate required for placement on the vehicle. In the instant case, however, the forum was not created by the State, it already existed as an inherent characteristic of the shopping center. California is not requiring Appellants to say or espouse any belief. Rather, the State is protecting the rights of the citizens by restricting Appellants' control over property which they have put to a forum-creating use—the interest of the State is one of guaranteeing access to an essential forum which happens to be, as is generally the case in suburban California, on private property. California's protection of fundamental expressive activity in preexisting forums is quite different from New Hampshire's unnecessary creation of "mobile billboards."

Appellants' reliance on *Board of Education v. Barnette,* 319 U.S. 624 (1943), is also misplaced. In *Barnette*, the issue is whether a state could compel a student to salute the flag and recite the "Pledge of Allegiance." In striking down that state regulation, this court held that "the action of local authorities in *compelling* the flag *salute* and *pledge* transcended constitutional limitations on their power and invades the sphere of intellect and spirit . . ." *Board of Education v. Barnette*, 319 U.S. at 642. (emphasis added)

Unlike the student in *Barnette,* Appellants are not required to speak, nor were they compelled to build the shopping center and thereby create a forum. But, having done so, they now argue that they have a right under the First Amendment to sterilize that forum, or devote it exclusively to their own views. That, Appellees submit, is not a question of Appellants' First Amendment rights, but one of land use. Appellants have been prohibited from using their land in a manner that is detrimental to the general welfare, and in a way that causes irreparable injury to the citizens of California, including Appellees, whose need to have access to that forum was found to outweigh Appellants' desire to control and/or sterilize it.

In both *Wooley, supra,* and *Barnette, supra,* the actual wrong in question was not the expression itself, but the invasion of the individual's privacy as to his thoughts, statements, and beliefs. It cannot reasonably be said that ideas passed between members of the public in a shopping mall generally open to the public, invade the privacy of Appellants' own intellect and spirit. There is nothing in the record which indicates that anyone did, or would, at-

tribute Appellees' beliefs to Appellants by virtue of their ownership of the shopping center. It is absurd to say that the citizens of California, knowing that they as individuals may circulate petitions in privately owned shopping centers, would think that such expressive activity is instigated, fostered or espoused by the landowner, simply by virtue of his status as such.

Appellants cite *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), for the proposition that government may not coerce speech where one desires not to speak. In *Tornillo,* this court struck down a state law requiring newspapers to publish replies of political candidates whom they criticize. Appellants fail to demonstrate the applicability of *Tornillo* to this case.

Tornillo involved what was essentially a penalty imposed upon newspapers for having said something in print. The newspaper was required to take affirmative action, i.e., to publish a response. Again, Appellants herein are not required to say anything, nor are they being penalized for having said anything.

The "forum" involved in *Tornillo,* the press, is simply not analogous to that herein. It is a unique institution which enjoys the protection of a specific constitutional guarantee, and a distinct body of constitutional law. Obviously, the forum of the press is separate and distinct from the forum of the community. The latter is to be found where the individuals of society gather on a day-to-day basis. It is the place where members of the public may exchange ideas.

Tornillo, supra, does not support the proposition that anyone has a First Amendment right to restrain access

to, or otherwise control the democratic exchange that takes place in the gathering places of the public. Nor does *Tornillo* support the contention that expression of beliefs by individuals within such a forum offends the First Amendment rights of an individual upon whose property the forum exists.

Finally, Appellees refer the court to *Marsh v. Alabama*, 326 U.S. 501 (1946), not as precedent for the right of access to Appellants' shopping center, but in support of the proposition that where access is properly mandated there is not a violation of the private landowner's First Amendment rights.

Both in *Marsh,* under the First Amendment, and in this case, under the adequate and independent state constitutional grounds, expressive activity by individuals is protected on what is clearly private property. Given that basic fact of protected access, the alleged First Amendment rights of Appellants herein would be the same as those possessed by the landowner in *Marsh.* Yet *Marsh,* which has been relied on by Appellants in other contexts throughout this litigation, does not make the slightest reference to the issue.

Appellees submit that if this issue had been raised in *Marsh,* the result would not have differed.

Admittedly, this reference to *Marsh* presses upon the court a negative inference. For that reason, Appellees do not consider *Marsh* to be a case of precedence on this issue, but rather an illuminating example fostered by this Court

as to the lack of substance behind Appellants' negative First Amendment argument.

Since the cases cited by Appellants do not support their proposition that the decision below infringes upon their First Amendment rights; since the record does not contain any evidence tending to show that Appellants are compelled to personally engage in any expressive activity, or that Appellees' activity could reasonably be attributed to Appellants; and since *Marsh v. Alabama,* 326 U.S. 501 (1946), allowed access to private property without restriction as to the First Amendment rights asserted by Appellants herein, it is respectfully submitted that Appellants do not by such argument raise a substantial federal question.

CONCLUSION

California's ruling that the solicitation of signatures upon a petition to the government on the premises of a privately owned shopping center rests upon adequate and independent state grounds.

The states have the power to impose reasonable restrictions on the use and control of private property in order to protect fundamental rights guaranteed by state law, and to protect the general welfare of their residents.

The restriction imposed in this case does not compel expression by Appellants, nor does it invade the privacy of their own beliefs, or their right to express that which they choose.

The decision below affects Appellants' property in a manner that is not repugnant to the Constitution, and it does not adversely affect Appellants' First Amendment rights. Appellees, therefore, respectfully request that this appeal be dismissed in that no substantial federal question is presented.

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