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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER AND FRED SAHADI,
Appellants,

v.

MICHAEL ROBINS, ET AL.,
Appellees.

On Appeal From the Supreme Court of the State of California

REPLY BRIEF OF APPELLANTS

I. THE TAKINGS CLAUSE AND THE FIRST AMENDMENT ARE PROPERLY BEFORE THIS COURT AS SOURCES OF THE CENTER OWNER'S RIGHT TO PROHIBIT APPELLEES FROM SOLICITING PETITION SIGNATURES ON THE PREMISES OF THE PRUNEYARD.

Appellees now contend that this Court is without jurisdiction to consider what they style "the taking issue" or to consider whether the action of the court below violates the Center owner's First Amendment rights, asserting that neither argument was properly

raised in the state courts.[1] In so contending, appellees misconstrue the record in the present case and the precedents of this Court.

A. The PruneYard and Its Owner Relied At Every Stage Upon Their Property Rights as Recognized in *Lloyd* v. *Tanner*. As *Lloyd* v. *Tanner* Made Clear, the Takings Clause Is a Source of the Property Rights of a Shopping Center Owner.

This case was not brought by the State of California as a condemnation case. Nor was it brought by Mr. Sahadi, the owner of PruneYard Shopping Center ("Center"), to challenge a property regulation as an "inverse condemnation." Rather, it was brought by appellees to compel Mr. Sahadi to furnish the Center as a forum for their petitioning. All parties knew from the outset that the governing cases were *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), and *Diamond* v. *Bland,* 11 Cal. 3d 331 (1974) (*Diamond II*), in which the California Supreme Court followed *Lloyd* v. *Tanner*. *Lloyd* v. *Tanner* explicitly described the source of the private property rights of a shopping center owner as including the Due Process Clauses of the Fifth and Fourteenth Amendments and the Fifth Amendment proscription "against the taking of 'private property . . . for public use, without just compensation.' " 407 U.S. at 567. Thereafter, the Court made shorthand reference to "the Fifth and Fourteenth Amendment rights of private owners", 407 U.S. at 570, a reference which can only reasonably be understood as including the Takings Clause. In short, *Lloyd* v. *Tanner* did not fragment constitutionally protected property rights in so minute or artificial a manner as appellees now suggest.

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[1] Brief of Appellees at 26-29.

Thus the "taking issue" has been with the parties and the courts literally from the beginning of this case. Frequent references to private property rights protected under *Lloyd* or *Diamond II* appeared at every stage of the proceedings, references which under the language of *Lloyd* must be read to refer to all of the property rights emanating from the Fifth and Fourteenth Amendments, including the Takings Clause. *Lloyd* v. *Tanner,* 407 U.S. at 567. In the Superior Court, appellees themselves first raised the question in their Memorandum of Points and Authorities in Support of Application for Preliminary Injunction, by quoting a passage from *Lloyd* which includes the phrase "unwarranted infringement of private property rights."[2] At oral argument, counsel for the Center began his opening statement by arguing that this case is not different from "a United States Supreme Court case, the Lloyd Center case, which has been cited in our briefs."[3] And the Superior Court's Findings of Fact and Conclusions of Law were framed in terms drawn from *Lloyd.* For example, the Superior Court found that "There has been no dedication of the CENTER's property to public use, such as to entitle plaintiffs to exercise the asserted First Amendment rights."[4]

In the Court of Appeal, appellees themselves framed the issue of the case by stating that "This case poses a conflict between appellants' rights of speech and petition under the First Amendment to the Constitution

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[2] Memorandum of Points and Authorities in Support of Application for Preliminary Injunction at 4, March 30, 1976.

[3] Reporter's Transcript on Appeal at 8.

[4] J.S. App. A-2. *Compare Lloyd* v. *Tanner,* 407 U.S. at 570.

of the United States and respondents' private property rights under the 14th Amendment."[5] In response, the Center and its owner argued extensively that the owner's private property rights must prevail over the First Amendment rights of appellees under the test formulated in *Lloyd, Diamond II,* and *Hudgens* v. *NLRB,* 424 U.S. 507 (1976).[6] The Court of Appeal affirmed the judgment of the Superior Court, relying upon *Diamond II.* J.S. App. B-11.

Appellees' Petition for Hearing in the California Supreme Court articulated the operative test under *Lloyd* and *Diamond II* to be in part "whether such rights of the individual and of the public, outweigh the private property rights of the land owner [sic] . . . ."[7] In a subsequent brief, they discussed the entire nexus of Fifth and Fourteenth Amendment property rights, explicitly including the Takings Clause.[8] The Center owner likewise argued extensively with respect to his federally protected property rights.[9]

The California Supreme Court took full, explicit cognizance of the reliance of the PruneYard and its

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[5] Appellants' Opening Brief in the Court of Appeal, First Appellate District, Division Four at 6, April 6, 1977.

[6] Brief for Respondents in the Court of Appeal, First Appellate District, Division Four at 11-18, June 3, 1977.

[7] Petition for Hearing before the California Supreme Court at 8, February 8, 1978.

[8] Brief of Appellants in Response to Brief of *Amicus Curiae* Taubman Company, Inc., and Other Briefs Filed Herein at 6-7, July 9, 1978 (filed in the California Supreme Court).

[9] Brief in Response to *Amicus Curiae* Brief of People's Lobby at 17-20, May 2, 1978; Brief in Response to *Amicus Curiae* Brief at 27-35, July 10, 1978 (filed in the California Supreme Court).

owner on their Fifth and Fourteenth Amendment property rights. In subordinating those property rights to its novel interpretation of the California Constitution, the court below addressed and rejected the contention that "*Lloyd* . . . recognized identifiable property rights under the Fifth and Fourteenth Amendments." J.S. App. C-3, 23 Cal. 3d at 903.

This Court has instructed that a federal claim need not be raised in state court in any particular, talismanic way:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

New York ex rel. Bryant v. *Zimmerman,* 278 U.S. 63, 67 (1928). As the record set forth above reflects, the taking argument was in fact brought to the attention of the state courts "with fair precision and in due time."

The cases cited by appellees only confirm this Court's jurisdiction. In *Street* v. *New York,* 394 U.S. 576 (1969), the defendant argued that a New York statute making it a crime to defy or cast contempt upon the American flag by words alone violated the First Amendment by reason of overbreadth. The test for determining proper presentation was "whether [the] question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed ap-

pellant's conviction." 394 U.S. at 581-82. This Court held that counsel's recitation of the offending words, together with references to "the First Amendment of the United States Constitution" and "the New York State Constitution on freedom of speech," were adequate to raise the issue. 394 U.S. at 582-83.

In *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969), this Court dismissed a writ of certiorari seeking constitutional review, citing "petitioner's admitted failure to raise the issue he presents here in any way below." 394 U.S. at 439. In the present case, the Center owner's reliance on *Lloyd* subsumed the taking argument, clearly affording the California Supreme Court a full opportunity to pass upon the constitutionality of its revised interpretation of the California Constitution.[10]

B. The Contention That the First Amendment Is a Source of the Right of the PruneYard and Its Owner to Prohibit Petitioning Was Properly Presented to the California Supreme Court.

In the California Supreme Court, the Center owner raised and relied upon his First and Fourteenth Amendment right to control the use of his property for expressive purposes, stating, for example, that

> "The Constitutional right to exclude potential communicants from private property . . . which has been recognized as deriving from the owner's status as an owner, also derives from the owner's

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[10] *Tacon* v. *Arizona,* 410 U.S. 351 (1973), also cited by appellees, has no bearing on this case. The constitutional question involved there was a state's authority to try in absentia a criminal defendant who left the state and was unable for financial reasons to return. This Court held that neither that constitutional question, any other constitutional question, nor indeed, any other related question of law had been raised below. 410 U.S. at 352.

> status himself as a potential communicant. Defendant urges that his constitutional right to free speech would be infringed if he were required to make his property available to others for the purpose of their expressive activity." [11]

The Center owner raised the issue again in his Petition for Rehearing,[12] and appellees responded on the merits to the argument.[13] The argument was properly raised under state procedure and this Court's decisions, was implicitly rejected by the California Supreme Court, and is now properly before this Court.

It is of no consequence to this Court's jurisdiction that the argument was first raised in the California Supreme Court, as an alternative ground of affirmance. As a matter of California procedure, "it is settled that a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record. . . .' " *Ward* v. *Taggart,* 51 Cal. 2d 736, 742 (1959), quoting *Panopulos* v. *Maderis*, 47 Cal. 2d 337, 341 (1956).[14] The constitutional argument regarding the Center owner's First and Fourteenth Amendment rights contemplated no issue of fact left unsettled or disputed at trial.[15]

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[11] Brief in Response to *Amicus Curiae* Briefs at 39, July 10, 1978. *See generally id.* at 35-42.

[12] Petition for Rehearing at 3-4, April 16, 1979.

[13] Answer to Petition for Rehearing at 4-5, April 30, 1979.

[14] *See also UFITEC, S.A.* v. *Carter,* 20 Cal. 3d 238, 249 n.2 (1971); *Burdette* v. *Rollefson Construction Co.,* 52 Cal. 2d 720, 725, 726 (1959).

[15] Where it has denied the right to raise new points on appeal, the California Supreme Court has justified its decision by explicit-

Thus, as a matter of California procedure, the Center owner's raising of his First Amendment argument for the first time on appeal to the state supreme court was proper and timely. In fulfillment of the requisites of this Court, the California Supreme Court was given the first opportunity to consider questions of the constitutionality of a state statute. *Cardinale* v. *Louisiana,* 394 U.S. at 439. In addition, the silence of the California Supreme Court does not affect this Court's ability to review the question. While a decision by a state court is required for review by this Court, "it is not necessary that the rule shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. at 67; *see also Street* v. *New York,* 394 U.S. at 581-82. By applying the California Constitution to require access to the Center for expressive purposes, the California Supreme Court implicitly and necessarily abrogated the First and Fourteenth Amendment rights of the owner to control expressive use of the premises.[16]

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ly specifying the new factual basis contemplated by the new theory. *See, e.g., Gyerman* v. *United States Lines Co.,* 7 Cal. 3d 488, 499-500 (1972). No such new factual basis was contemplated here. The Superior Court specifically found that the Center's policy prohibited all handbilling and circulation of petitions. Superior Court Findings of Fact, J.S. App. A-2. Decision of the California Supreme Court, J.S. App. C-1, 23 Cal. 3d at 902.

[16] The California appellate doctrine of the law of the case by analogy provides some guidance for the determination of whether a given point has been impliedly decided on appeal. In determining whether a point has been impliedly decided, the California Supreme Court has held, for example, that the mutuality of obligation of a contract was decided in an earlier appellate opinion which made no mention of mutuality or indeed even of contract validity. *Steelduct Co.* v. *Henger-Seltzer Co.,* 26 Cal. 2d 634, 642-43 (1945).

Moreover, when the highest court of a state, as in this case, renders an unexpected interpretation of state law or reverses its prior interpretation, a federal question raised for the first time even in a petition for rehearing in the state court is timely presented.[17] In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930), for example, the Supreme Court of Missouri reversed its prior interpretation of a state statute governing the powers of the state tax commission. This Court held that a federal due process challenge presented for the first time in a petition for rehearing was "timely" presented to the Supreme Court of Missouri and thus was properly before this Court. A party is not "bound to anticipate a construction of the highest state court." *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U.S. 313, 320 (1930).

In the present case, the Center owner argued in the Superior Court and the Court of Appeal that *Lloyd* and *Diamond II* were controlling, and both courts so held. It was not until the California Supreme Court ventured its new view of the state constitution that the Center owner could reasonably have seen the need to raise a federal First Amendment challenge, or indeed any federal constitutional challenge, to that interpretation. In fact, he raised the issue before the decision in the California Supreme Court, against the possibility that the court had granted review to re-examine *Diamond II.* Thus, the First and Fourteenth Amendment argument was raised prior to the overturning of recent definitive precedent and in more than "due

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[17] *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U.S. 313, 320 (1930); *Saunders* v. *Shaw,* 244 U.S. 317, 320 (1917).

time." *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. at 67.

II. A DECISION IN FAVOR OF THE CENTER OWNER WOULD NOT THREATEN THE CONSTITUTIONALITY OF THE FEDERAL CIVIL RIGHTS LAWS OR THE NATIONAL LABOR RELATIONS ACT.

The United States as *amicus curiae* would have it that the Center owner can prevail only if property rights are absolute and, in that event, that two major civil rights acts and the National Labor Relations Act may be unconstitutional.[18] Their argument dresses a straw man as a scarecrow.

The rights of a shopping center owner are no more absolute than the rights of other property owners. This Court has recognized that Congress may, under the commerce clause, order access to private property in order to put an end to racial discrimination. *See e.g., Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964). Similarly, Congress may order access to private property under narrowly defined circumstances to foster the important national goal of furthering industrial peace. *See, e.g., NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956). Property rights, like other constitutional rights, may be forced to yield to competing rights in proper circumstances. The strength of the state interest involved in a particular case will affect the power of the state or of Congress to infringe upon a property owner's right to exclude unwanted guests from his property. When a state interest is strong and cannot be served by any means less drastic than an invasion of a property

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[18] Brief for the United States as *Amicus Curiae* at 2-3, 17-18. *See also* Brief of Appellees at 23-24.

right, the property right may be forced to yield. Thus, the national interest in assuring racially nondiscriminatory access to public accommodations could not be served without forcing a motel or restaurant owner to receive all guests regardless of race. *Heart of Atlanta Motel, supra.* That property rights must yield to other rights in some circumstances is self-evident. But the issue here is whether, under the circumstances of this case, the rights of the shopping center owner must be surrendered to the state interest, asserted here, in the use of shopping centers as public forums. On this specific issue, *Lloyd* v. *Tanner* is dispositive.

Lloyd rested on alternative holdings (1) that the action of the shopping center in excluding the handbillers was not state action because the shopping center was not the functional equivalent of a municipality and (2) that constitutional property rights of shopping center owners prevail over even the First Amendment rights of speakers when the speakers have other adequate alternative forums for expressions. The second holding controls here.

Hudgens v. *NLRB,* 424 U.S. 507 (1976), unequivocally reaffirmed *Lloyd*'s state action holding and did not, despite appellees' suggestion to the contrary, disturb *Lloyd*'s property rights holding. That property rights holding remains controlling when speakers, handbillers, or petitioners claim a right of access under state law.

Appellees take comfort from Mr. Justice Stewart's statement in *Hudgens* that that case should be decided "exclusively upon [section 7 of] the National Labor Relations Act." 424 U.S. at 521. But this Court, in interpreting section 7, has long recognized that the

balancing process under section 7 is mandated precisely because unlimited union access to private property would constitute an "unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Central Hardware Co.* v. *NLRB,* 407 U.S. 539, 547 (1972).

The reasons for reaffirming the balance struck by *Lloyd* are as compelling in this instance as the reasons propounded by appellees for changing that balance are insubstantial. *Lloyd* instructs that where the property owner's rights can be protected without significantly impinging upon asserted rights of speech, they must be protected. Appellees suggest that the protection of the rights of both the owner and the speakers was not possible here because "the students knew that publicly owned areas of downtown San Jose and neighboring municipalities were inadequate" for their purposes.[19] Whatever the students thought they knew, the Superior Court specifically determined that they had adequate alternative avenues of communication,[20] making possible accommodation of their interests without sacrificing Mr. Sahadi's constitutional rights.

Appellees also belabor the sociological data ostensibly supporting the decision below, and augment it with miscellaneous quotations from trade journals of the shopping center industry.[21] The same arguments about the special character of shopping centers were

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[19] Brief of Appellees at 7.

[20] J.S. App. A-3.

[21] Brief of Appellees at 47-59.

made in Mr. Justice Marshall's *Lloyd* dissent, 407 U.S. at 580-81, and rejected by the majority.

> "In terms of being open to the public, there are differences only of degree—not of principle—between a freestanding store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping."

407 U.S. at 565-66.[22]

III. THE CENTER OWNER'S RIGHTS HAVE MULTIPLE SOURCES IN THE CONSTITUTION.

Appellees fragment the constitutional rights of a property owner. These rights rest on a number of constitutional sources, each of which separately protects property owners against different forms of encroachment by the state, and which, when viewed together, unquestionably prevent *this* state-mandated infringement of Mr. Sahadi's rights.

The Takings Clause, through the Due Process Clause of the Fourteenth Amendment, protects against state encroachments on property interests by condi-

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[22] Indeed, these arguments applied with greater force to the center in *Lloyd* than they do to the PruneYard. If ever a shopping center had achieved the status of substitute for the traditional downtown shopping area, it was the center involved in *Lloyd*. The Lloyd Center was, in the parlance of the shopping center industry, a "super-regional" center situated on 50 acres of land, designed as a "multilevel complex of buildings, parking facilities, submalls" with all the predictable accoutrements. 407 U.S. at 571. In contrast, the PruneYard is a specialty center occupying only 21 acres of land. J.S. App. C-1, 23 Cal. 3d at 902.

tioning the state's power to regulate property in certain ways upon the payment of compensation to affected property owners. The Center owner does not here contend that the Superior Court should have awarded compensation for a taking of his property; rather he contends, as this Court in *Lloyd* recognized, that the Takings Clause was a source of the Fifth and Fourteenth Amendment rights of private property owners that must be balanced against any state interest purporting to justify state-coerced trespass on private property. 407 U.S. at 567.

As the decision this term in *Kaiser Aetna* v. *United States,* No. 78-738, 48 U.S.L.W. 4045 (Dec. 4, 1979), reemphasized, this Court has been especially careful to protect the property owner's right to control access to and use of his property. Whatever the scope of the government's power to diminish other incidents of property ownership without paying compensation—such as the right to develop affected by the regulation in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978), or the right to put property to any conceivable use affected by the zoning ordinance at issue in *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), it is clear that this Court views the extent of "physical invasion by government" of the owner's land as especially telling evidence that a taking has occurred. *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 124 (1978). Here, the California Supreme Court has compelled Mr. Sahadi to admit unwanted solicitors on to his property. Whether Mr. Sahadi could establish in another proceeding that the Court's order below amounted to a taking is beside the point. The constitutional protection the Takings Clause provides for property owners against state ac-

tion that deprives these owners of the core incidents of property ownership is, as *Lloyd* recognized, but a source, and but one source, of the protection the Constitution affords the property owner against state interference undertaken in the interest of fostering speech.

The Due Process Clause is another source of the property owner's protection from the state. Once a state has created a property right, it may not arbitrarily deprive the citizen of that right, whether the deprivation is caused by arbitrary substantive actions or by arbitrary procedures that deprive the property owner of his interest. Although for procedural due process purposes, a citizen is entitled to protection from arbitrary deprivation of his property by the state only if the interest of which he is deprived has some source in state property law,[23] it certainly does not follow that the state may, in the name of any available state interest, avoid due process scrutiny of its actions simply by labeling all its actions affecting property as simple redefinitions of property. A state would not free its actions from due process scrutiny simply by declaring that henceforth property ownership did not include the right to control access. The deprivation of such a preexisting property right would entitle the affected owner to review of the state's action under the Due Process Clause.[24]

Finally, the First Amendment provides the property owner with protection against state law that would force him to place his property at the service of the

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[23] *See, e.g., Bishop* v. *Wood,* 426 U.S. 341 (1976).

[24] *See* Monaghan, Of "Liberty" and "Property", 62 *Cornell L. Rev.* 405, 434-35 (1977).

state's idea of proper, good, beautiful, or socially useful speech. Appellees attempt to denigrate this source of the owner's rights by noting that some patrons of the PruneYard may wear political or other buttons while shopping at the Center. The conduct of persons permissibly on the PruneYard's premises is not relevant to the rights of unwanted guests to use the machinery of the state to compel access to the PruneYard. As the majority opinion in *Lloyd* noted, the shopping center involved in that case regularly permitted some speakers to use the center as a forum. 407 U.S. at 555. Nor does it matter that the PruneYard would welcome the appellees as customers. Certainly a homeowner may invite a guest to come to dinner but not to put political signs on his front lawn. And the scope of a restaurant owner's invitation to the public need not extend to allowing the distribution of handbills among the tables. Should the state compel the owner to tolerate the guest's speech activities, that state compulsion would run afoul of the owner's First Amendment right to remain silent, and to exclude

those whose actions interfere with that right. That is exactly what the California Supreme Court has done here.

Respectfully submitted,

LATHAM & WATKINS

MAX L. GILLAM
ROBERT E. CURRIE
JAMES W. DANIELS
WILLIAM C. KELLY, JR.
DAVID R. KEYSER
EDWARD SONNENSCHEIN, JR.

555 South Flower Street
Los Angeles, California 90071
(213) 485-1234

1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 828-4400

RUFFO, FERRARI & MCNEIL

THOMAS P. O'DONNELL
101 Park Center Plaza
Suite 1300
San Jose, California 95113
(408) 287-2233

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