No. S185544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Ralphs Grocery Company,

Plaintiff and Appellant,

vs.

United Food and Commercial Workers Union Local 8,

Defendant and Respondent.

On Review of an Opinion of the California Court of Appeal
Third Appellate District, No. C060413
Sacramento Superior Court Case No. 34-2008-00008682-CU-OR-GDS
Honorable Loren McMaster

APPLICATION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFF RALPHS GROCERY COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONS

OTHER AUTHORITIES

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND STATEMENT OF INTEREST OF AMICI CURIAE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to rule 8.520(f) of the California Rules of Court, California Retailers Association, California Business Properties Association and International Council of Shopping Centers apply for permission to file the attached Brief of Amici Curiae.

Description of Amici. The California Retailers Association (CRA) is the only statewide trade association representing all segments of the retail industry, including general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drug and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of $571 billion annually and employing 2,776,000 people — nearly one fifth of California's total employment.

California Business Properties Association (CBPA) represents over 10,000 member companies and has served as the voice on legislative and regulatory issues for all aspects of the retail, commercial and industrial property owners in California for almost 40 years. CBPA members include

numerous shopping center owners and property managers, as well as large retailers. Additionally CBPA is the designated legislative advocate for the International Council of Shopping Centers (ICSC), the California chapters of the Institute of Real Estate Management (IREM), the Building Owners and Managers Association (BOMA) of California, the Retail Industry Leaders Association (RILA) and the California Downtown Association (CDA).

International Council of Shopping Centers is a not-for-profit corporation organized under the Not-For-Profit Corporation Law of the State of Illinois. It is the global trade association of the shopping center industry with over 54,300 members worldwide, 46,800 in the United States and over 7,550 in the State of California. Its members include developers, owners, retailers, lenders and others that have a professional interest in the shopping center industry. ICSC's members own and manage essentially all of the more than 13,750 shopping centers in the State of California. In 2008, these shopping centers accounted for $322.1 billion in shopping center combined sales. That same year, these shopping centers employed more than 1.6 million individuals, constituting 11 percent of the total nonagricultural employment in the state, and contributed $20.1 billion in state sales tax revenue.

Interest of Amici. CRA, CBPA and ICSC represent members who either own properties devoted to business purposes or operate businesses on

those properties. They are vitally interested in the rules applicable to the ability of private groups in general, and labor organizations in particular, to use CRA, CBPA and ICSC members' private property to pursue the goals and interests of other parties. Many of their members are routinely approached by organizations claiming the right to use their private properties as though they were public. They thus have a well-defined interest in the development of the applicable law.

Position of Amici. CRA, CBPA and ICSC have carefully reviewed the materials supporting and opposing the petition for review and the merits briefs already filed in this Court, and are familiar with the arguments raised by the parties. The attached Brief of Amici Curiae does not repeat arguments already made but, instead, presents amici's own views on the issues under review. In particular, all amici curiae are vitally interested in the use, application and reconsideration by this Court of the opinion in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899.

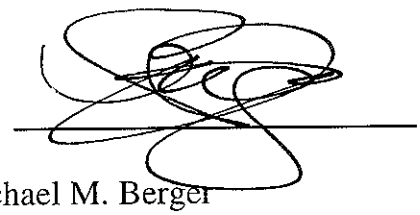
Amici curiae believe it is time for the Court to reexamine its decision in *Pruneyard* in light of the experience in the past three decades and the fact that virtually all other states disagree with it. If not disapproved, *Pruneyard* should be strictly limited to its facts. Amici curiae will also discuss the potential infirmity under the Fifth Amendment to the U.S. Constitution of a broad application of *Pruneyard.* The attached brief will assist the Court in evaluating the continuing vitality of *Pruneyard.*

Amici Disclosure Statement. Pursuant to rule 8.520(f)(4) amici state that no party or counsel for a party has authored the proposed brief in whole or in part. Further, no party or counsel for a party — and indeed no one other than CRA, CBPA, ICSC and their members — has made any monetary contribution to fund the preparation or submission of the proposed Brief of Amici Curiae.

Dated: April 19, 2011

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: 

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BRIEF OF AMICI CURIAE CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS IN SUPPORT OF RALPHS GROCERY COMPANY

INTRODUCTION

More than three decades ago, this Court decided that there are times when private property must be treated as though it were public property for speech purposes. (*Robins v. Pruneyard Shopping Center* [1979] 23 Cal.3d 899.) In the years since, that concept has drawn no support from sister jurisdictions and has, in fact, been harshly criticized. Almost all state supreme courts to consider the concept have reached the opposite conclusion. Although counting judicial noses is not always the best way to decide issues, the fact that 45 states have adopted a position directly opposite to California's should at least give this Court pause and suggest that it is time to reconsider *Pruneyard*, as forcefully argued by Justice Chin (joined by Justices Baxter and Corrigan) dissenting in *Fashion Valley Mall, L.L.C. v. N.L.R.B.* (2007) 42 Cal.4th 850, 870:

> "*Pruneyard* was wrong when decided. In the nearly three decades that have since elapsed, jurisdictions throughout the nation have overwhelmingly rejected it. We should no longer ignore this tide of history. The time has come for us to forthrightly overrule *Pruneyard* and rejoin the rest of the nation in this important area of the law. Private property should be treated as private property, not as a public free speech zone." (Dissenting opinion.)

CRA, CBPA and ICSC agree that *Pruneyard* was wrongly decided and should be disapproved. In any event, however, reconsideration of *Pruneyard* is required to determine how it is working in the 21st Century. If not disapproved, amici curiae urge the Court to restrict the applicability of *Pruneyard* strictly to its facts, i.e., to the common areas within large shopping centers that can be likened to town squares and public urban gathering places, with large open courtyards where the public is invited to congregate. And only such locations should be treated as the equivalent of public gathering spots.

To treat smaller shopping areas — like the one at bench — or individual retail stores located within larger commercial developments, including the apron and perimeter areas of those stores, as the equivalent of a traditional public forum, subject to what would otherwise be trespass by uninvited third parties, is an infringement on the rights of the property owners (i.e., the owners of both the shopping centers and the individual stores they contain) to such a degree as to be a taking of private property without compensation within the meaning of the Fifth Amendment to the U.S. Constitution.

In short, the Court of Appeal got this one right. Its determination warrants affirmance.

I

IT IS TIME FOR THIS COURT TO RECONSIDER THE VALIDITY OF *ROBINS v. PRUNEYARD SHOPPING CENTER*

Half a century ago, Chief Justice Traynor summed up the necessary criteria for sound decisionmaking:

> "Never forget that [a judge's] explanation must persuade his colleagues, make sense to the bar, pass muster with the scholars, and if possible, allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it." (Roger Traynor, *No Magic Words Could Do It Justice* [1961] 49 Calif. L. Rev. 615, 621.)

With respect, the *Pruneyard* decision satisfies none of those criteria. As this Court noted in *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1016, "courts and commentators have struggled to construe *Robins* [i.e., *Pruneyard*]. . . ."

A 4-3 decision, it never commanded heavy support even in this Court. As noted recently, *Pruneyard* overruled a 5-year old decision due to a "change" in "the composition of this court. . . ." (*Fashion Valley*, 42 Cal.4th at 873 [dissenting opinion].) Three Justices dissenting in *Fashion Valley* would have overruled it. Even the three-Justice plurality that sought to explain *Pruneyard* in *Golden Gateway* applied it "reluctantly, and only due to principles of stare decisis." (*Fashion Valley*, 42 Cal.4th at 875 [dissenting opinion, citing *Golden Gateway*, 26 Cal.4th at 1022].)

Nor has it fared well in the scholarly community. (Numerous

critical commentaries are collected in *Golden Gateway,* 26 Cal.4th at 1020, fn. 4.) This is typical: "*Pruneyard* was too sketchy and ad hoc. . . .The *Pruneyard* court did not explain why this [free speech] burden applied to private parties . . . [and] did not attempt to delineate the scope of California's affirmative right of freedom of expression. . . . The case is more concerned with result than reasons." (Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression* [1985] 33 U. Kan. L.Rev. 305, 326). So is the conclusion that *Pruneyard* does not provide "useful guidance on how this new constitutional journey was to proceed." (Alan E. Brownstein & Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services* [1991] 24 U.C. Davis L.Rev. 1073, 1092.)

That virtually all other states disagree with the California decision (cases collected in *Golden Gateway*, 26 Cal. 4th at 1021, fn. 5) — some of them rather harshly — shows that the opinion has no chance of allaying the suspicions of any layperson examining the issue. The New York Court of Appeals concluded that *Pruneyard* was "hardly persuasive authority," as it contained "not much analysis and only tangential discussion . . . ." (*SHAD v. Smith Haven Mall* [N.Y. 1985] 488 N.E.2d 1211, 1215, fn. 5.) The Wisconsin Supreme Court concluded that *Pruneyard*'s lack of analysis made it "more a decision of desire rather than analytical conviction."

(*Jacobs v. Major* [Wis. 1987] 407 N.W.2d 832, 841.)

No one lining up the authorities, whether judicial or scholarly, comes away believing that the *Pruneyard* decision provides either a legitimate result or an adequate explanation. At a minimum, it is time for this Court to reassess *Pruneyard*'s validity.

A

In Light Of Contrary Decisions By The Overwhelming Majority Of Sister Jurisdictions, And The Restriction of *Pruneyard* By California Courts Of Appeal, It Is Appropriate For This Court To Reconsider *Pruneyard*

Even in an opinion that applied *Pruneyard* (albeit in a way that upheld the Fifth Amendment rights of an apartment building owner over the free speech claim of a tenants' association to distribute newsletters), this Court acknowledged that "most of our sister courts interpreting state constitutional provisions similar in wording to California's free speech provision have declined to follow [*Pruneyard*]." (*Golden Gateway*, 26 Cal.4th at 1021.) An exhaustive analysis of all the state cases can be found in a Connecticut Supreme Court decision in a case coincidentally involving another local of the same United Food & Commercial Workers Union now before this Court: *United Food & Comm'l Workers Union v. Crystal Mall Assocs., L.P.* (Conn. 2004) 852 A.2d 659. After reconsidering its own earlier decisions, the Connecticut Supreme Court decided to retain its agreement with what it called the "courts in other jurisdictions that . . .

overwhelmingly have chosen *not* to interpret their state constitutions as requiring private property owners, such as those who own large shopping malls, to permit certain types of speech, even political speech, on their premises." (852 A.2d at 667 [emphasis original].)

Nor can it go without saying that the U.S. Supreme Court has rejected the concept of First Amendment rights affecting private property. (*Lloyd Corp., Ltd. v. Tanner* [1972] 407 U.S. 551, 567.)

Indeed, only four states agree with the *Pruneyard* approach — Colorado, Massachusetts, Washington and New Jersey. And even those states have not gone as far as California, even though their constitutional free speech provisions are as broad as California's. These states have been described as "generally retreating" from an absolute *Pruneyard* approach. (*Fashion Valley*, 42 Cal.4th at 875 [dissenting opinion].) Notably:

- The Massachusetts rule is limited to political candidates, and is based on a state constitutional provision dealing with elections, not freedom of speech. (*Batchelder v. Allied Stores Intern., Inc.* [Mass. 1983] 445 N.E.2d 590, 595.)[1]

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[1] *Batchelder* did not consider whether its approach could survive a First Amendment challenge. Under the U.S. Supreme Court's settled law, it is doubtful that discriminating in favor of one type of preferred speech — as *Batchelder* does — could survive such a challenge. (See *Carey v. Brown* [1980] 447 U.S. 455; *Police Dept. v. Mosely* [1972] 408 U.S. 92, both discussed and analyzed in the Answer Brief on the Merits of Ralphs Grocery Company

- Washington's rule now allows some activity to be prohibited completely and requires "state action" to trigger constitutional protection of speech. (*Southcenter Joint Venture v. National Democratic Policy Com.* [Wash. 1987] 780 P.2d 1282, 1292).

- Since adopting a *Pruneyard* style rule, Colorado has allowed substantial regulation by mall owners restricting both time and location of free speech exercise. (*Robertson v. Westminster Mall Co.* [Colo. App. 2001] 43 P.3d 622, 626.)

- Even in New Jersey, the rule seems limited to large commercial centers that had taken the place of traditional public downtown centers, some of which even had public police patrols and police stations within their confines. (*New Jersey Coalition Against War v. J.M.B. Realty Corp.* [N.J. 1994] 138 N.J. 326, 338-340.)

As Justice Chin correctly put it in *Fashion Valley*, "we are virtually alone . . . ." (42 Cal.4th at 876 [dissenting opinion].)

Moreover, California's Courts of Appeal have for the most part limited *Pruneyard*'s application to the kind of large shopping center with central public areas akin to traditional "town squares" or "downtown" areas. Free standing, individual stores or places of business have been held not subject to *Pruneyard*. (*Trader Joe's Co. v. Progressive Campaigns,*

Inc. [1999] 73 Cal.App.4th 425; *Allred v. Harris* [1993] 14 Cal.App.4th 1386, 1388, 1392; *Planned Parenthood v. Wilson* [1991] 234 Cal.App.4th 1662, 1671-1672; *Allred v. Shawley* [1991] 232 Cal.App.3d 1489, 1501-1502.) This is true even if the stores are of the "big box" variety. (*Costco Companies v. Gallant* [2002] 96 Cal.App.4th 740, 754-755.)

And Courts of Appeal have also held that individual stores — including the aprons and perimeters of those stores — are not subject to *Pruneyard* even if they are located within larger shopping centers. (*Van v. Target Corp.* [2007] 155 Cal.App.4th 1375, 1390; *Albertson's, Inc. v. Young* [2003] 107 Cal.App.4th 106, 122; *Bank of Stockton v. Church of Soldiers* [1996] 44 Cal.App.4th 1623, 1627-1628.)

Federal courts have reached the same conclusion under California law. (*Waremart Foods v. N.L.R.B.* [D.C. Cir. 2004] 354 F.3d 870, 874-875; *Slevin v. Home Depot* [N.D.Cal. 2000] 120 F.Supp.2d 822, 834.)

In light of what has been referred to as California's " 'magnificent isolation' in the face of this tide of history" (*Fashion Valley*, 42 Cal.4th at 878 [dissenting opinion]), it is appropriate to reconsider *Pruneyard*.

B

Upon Reconsideration, *Pruneyard* Should Be Disapproved

Pruneyard required this Court to revisit its paired decisions in *Diamond v. Bland* (1970) 3 Cal.3d 653 (*Diamond I*) and *Diamond v. Bland*

(1974) 11 Cal. 3d 331 (*Diamond II*). Both dealt with the interface of First Amendment and Fifth Amendment rights.

Pruneyard began its analysis with an erroneous premise and followed that line to an erroneous conclusion. The focal point of the analysis was the U.S. Supreme Court's decision in *Lloyd,* 407 U.S. 551. *Lloyd* was the key because it was decided between *Diamond I* and *Diamond II* and was held in the latter to require reversal of the former. *Pruneyard* re-addressed the question of *Lloyd*'s impact and, reading that case differently in 1979 than it had in 1974, reversed *Diamond II.*

Pruneyard's erroneous premise was that *Lloyd* was "primarily a First Amendment case." (23 Cal.3d at 904.) But here is how the U.S. Supreme Court characterized the question it addressed in *Lloyd*:

> "We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments." (*Lloyd*, 407 U.S. at 552-553.)

Lloyd thus addressed — and answered — a Fifth Amendment question, deciding that the Fifth Amendment rights of the property owner, even in the context of a large (50-acre) shopping center, prevailed over the First Amendment rights of Vietnam War protesters to distribute handbills. Two points were paramount in that determination. *First*, the First Amendment guards against restrictions by the *government*, not private

property owners.[2] *Second*, even creation of a large shopping center which the public is generally invited to use, does not automatically result in "dedication of private property to public use." (407 U.S. at 569.) In a companion case, argued and decided on the same days as *Lloyd*, the Supreme Court elaborated:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes." (*Central Hardware Co. v. N.L.R.B.* [1972] 407 U.S. 539, 547.)

Curiously, *Pruneyard* leapt over the first issue and went right to the second, disagreeing with the U.S. Supreme Court about the protection accorded property owners and holding that California Constitution, Article I, sections 2 and 3 accord greater protection to speakers than the First Amendment and thus must prevail even in private shopping centers.

Pruneyard's failure to deal with the question of whether either the First Amendment or the slightly expanded California equivalent was restricted to state action was regularly criticized by both courts in sister jurisdictions and legal commentators. (See comments collected by the

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[2] Even public property is not universally available for "free speech" activities, as the high court noted in *Lloyd*, 407 U.S. at 568. Just last year, that court confirmed that different levels of speech restrictions may apply at different kinds of public facilities. (*Christian Legal Society Chapter of the Univ. of Calif. v. Martinez* [2010] __ U.S. __, 130 S.Ct. 2971, 2984.)

plurality opinion in *Golden Gateway*, 26 Cal.4th at 1020, fn. 4 and the dissenting opinion in *Fashion Valley*, 42 Cal.4th at 874.) When this Court addressed the question again (in the context of an apartment complex, rather than a shopping center), only a plurality of the Court concluded that state action — rather than private action — was a necessary element of the California Constitution, like its federal counterpart, with the only exception being if the private property had become "functionally equivalent to a traditional public forum . . . ." (*Golden Gateway*, 26 Cal.4th at 1033.)[3] The *Golden Gateway* plurality reached that conclusion in an effort to retain *Pruneyard* as precedent,[4] but keep it closely tied to the Federal Constitution's restriction of free speech protections to public fora.

Pruneyard was wrong in its generalized characterization of shopping centers as having become the functional equivalent of public parks and town squares. *First*, implicit in the rationalization for considering shopping centers quasi-public spaces was the perceived need for the ability of citizens to communicate broadly and easily. The focus of the analysis was on the idea that more and more people congregated in shopping centers (*Pruneyard*, 23 Cal.3d at 907, 910 fn. 5), making access to those people

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[3] That conclusion drew only a plurality because Chief Justice George, while agreeing with the result, believed it unnecessary to reach the state action issue at that time. (26 Cal.4th at 1036 [concurring opinion].)

[4] A member of that plurality later explained that retention was based "reluctantly" on *stare decisis*. (*Fashion Valley*, 42 Cal.4th at 875 [dissenting opinion].)

essential to the dissemination of ideas and the collection of signatures on petitions. If nothing else, technology has overtaken that need. Not only has the Internet expanded apace, but (as recent events in the middle east have shown) social networking sites like Twitter and Facebook have transformed the way in which people are able to communicate with vast numbers of others on an almost instantaneous basis. People no longer need to congregate in town squares to commune with one another. *Second*, to the extent that *Pruneyard's* generalized characterization of shopping centers as having become the functional equivalent of public parks and town squares can have meaning, it may have application only to the largest shopping centers, like the one involved in *Pruneyard*, that are perceived to have become focused gathering spots and that contain centralized courtyards that serve as places for general public gathering (in contrast to the shopping centers' primary function of providing places to shop). *Pruneyard's* failure to specifically define the contours of a public forum leaves businesses and property owners and lower courts, as well as those seeking to exercise free speech, guessing as to what private property is quasi-public and what is strictly private.

Pruneyard was also wrong to subjugate the Fifth Amendment rights of property owners to the free speech provision of Cal. Const., Art. I, §§ 2 and 3. As shown *post*, pp. 20-24, there is a price for doing so, and compensation must be paid under the Fifth Amendment.

II

IF NOT DISAPPROVED, *PRUNEYARD* SHOULD BE NARROWLY APPLIED AND RESTRICTED TO ITS FACTS

Pruneyard dealt with an exceptional fact situation — one that is not present in this case, nor in many others that have been and will be litigated. As this Court summarized it:

> "Pruneyard Shopping Center is a privately owned center that consists of approximately 21 acres — 5 devoted to parking and 16 occupied by walkways, plazas, and buildings that contain 65 shops, 10 restaurants, and a cinema." (23 Cal.3d at 902.)

By any definition, the Pruneyard Shopping Center was large. It also contained common areas set aside for public gathering. The petition gatherers set up their table in the center's "central courtyard." Thus, when analyzing the "public v. private" nature of the shopping center, *Pruneyard* relied heavily on what it viewed as the functional equivalence of the shopping center to a traditional public forum, i.e., replacing the "central business district" of an ordinary city or becoming a "miniature downtown." (23 Cal.3d at 907, 910, fn. 5.) Indeed, it was the large size and heavy use of the Pruneyard center (drawing daily crowds of 25,000 people to its "congenial environment" and "numerous amenities") and the consequent fact that such a property — with such intense uses — could not seriously be impacted by a "handful of additional orderly persons" operating under "reasonable regulations adopted by the shopping center owner" that

impelled *Pruneyard* to its conclusion that the Pruneyard center must allow the handbillers in the public areas.

Nothing, however, in either the facts of *Pruneyard* or the ratio decidendi of the opinion requires *all* shopping centers — of whatever size or configuration — or individual retail stores, including the stores' aprons and perimeters (whether in or out of shopping centers), to accept third parties picketing or soliciting their customers for any reason.

When the U.S. Supreme Court affirmed *Pruneyard*, it relied on the fact that the property owner retained the right to enforce reasonable time, place and manner restrictions "that will minimize any interference with its commercial functions." (*PruneYard Shopping Center v. Robins* [1980] 447 U.S. 74, 83.)

Care must be taken not to allow generic facts — like the existence of a large parking lot or the presence of large numbers of people — to cause a leap to the conclusion that a shopping center or store has acquired a quasi-public nature. That, as the U.S. Supreme Court concluded in *Central Hardware*, 407 U.S. at 547, is "an argument that could be made with respect to almost every retail and service establishment in the country, regardless of its size or location." That argument proves too much and sweeps too much into its net. See also *Lloyd*, 407 U.S. at 569, noting that neither the general invitation to the public nor the provision of substantial parking lots is sufficient to transform private into public property.

Pruneyard itself noted that it would not apply to "modest retail establishments" or privately owned commercial developments that do not assume the societal role of a town center. (23 Cal.3d at 910.) After all, as Justice Chin later noted, "the fact remains that [shopping centers] are not Hyde Park in London, Central Park in New York, or the National Mall in Washington, D.C., areas that are quintessential public free speech zones." (*Fashion Valley*, 42 Cal.4th at 878 [dissenting opinion].) When the U.S. Supreme Court affirmed, it likewise emphasized the importance of the size and scope of the center, covering "several city blocks." (*PruneYard,* 447 U.S. at 83-84.) Justice White's concurring opinion emphasized that the Court "was dealing with the *public or common areas* in a large shopping center and *not* with an individual retail establishment within . . . the shopping center." (*Id.* at 95 [concurring opinion] [emphasis added].) Likewise, Justice Powell: "I join . . . on the understanding that our decision is limited to the type of shopping center involved in this case." (*Id.* at 96 [concurring opinion].)

The rationale of private property somehow transmogrifying into public or quasi-public property becomes even more attenuated, if not eliminated altogether, in the context of individual stores (either within or without a shopping center). "The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center."

(*Lloyd*, 407 U.S. at 569.)

With respect to individually targeted stores, like the one at bench, the area around the store, "including the store apron and perimeter areas" (*Van*, 155 Cal.App.4th at 1390) are not quasi-public areas within the meaning of *Pruneyard* unless they satisfy stringent criteria:

> "To establish a right to solicit signatures at the entrance to a specific store, it must be shown that the particular location is impressed with the character of a traditional public forum for purposes of free speech. . . . More specifically, a location will be considered a quasi-public forum only when it is the functional equivalent of a traditional public forum as a place where people choose to come and meet and talk and spend time." (*Van*, 155 Cal.App.4th at 1386 [quoting with approval from *Albertson's*].)

Thus, if *Pruneyard* is to remain the law of California, amici curiae urge that the Court clarify the narrow nature of its holding and the limited scope of its coverage, i.e., to large shopping centers that maintain centralized public gathering areas, with the "free speech" zones limited to such areas.

III

IF *PRUNEYARD* IS NEITHER DISAPPROVED NOR NARROWLY APPLIED, IT WILL DEPRIVE PROPERTY OWNERS OF PRIVATE PROPERTY FOR PUBLIC USE IN VIOLATION OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION

In *Dolan v. City of Tigard* (1994) 512 U.S. 374, 392, the U.S. Supreme Court, in no uncertain terms, equated the protections due under

the specific Bill of Rights clauses at issue here:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ."[5]

Dolan's rejection of "poor relation" status for the Fifth Amendment brought a *déjà vu* memory of *Pruneyard*, whose dissent began:

> "The majority relegates the private property rights of the shopping center owner to a secondary, disfavored, and subservient position vis-à-vis the 'free speech' claims of the plaintiffs. Such a holding clearly violates *federal* constitutional guarantees announced in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 55. . . ." (*Pruneyard*, 23 Cal.3d at 911 [dissenting opinion] [emphasis original].)

The *Pruneyard* majority clearly refused to accord Fifth Amendment protection to property owners if doing so "would place a state's interest in strengthening First Amendment rights in an inferior rather than a preferred position." (23 Cal.3d at 906.) Under the high court's *Dolan* decision, it is clear that free speech rights are not automatically elevated above Fifth Amendment property rights.

It is time for the second class status of property rights to end.

Dolan's strong statement about the Fifth Amendment rights of property owners was wholly in harmony with earlier decisions of the Supreme Court involving both shopping centers and picketing or leafleting,

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[5] That the reference to the First Amendment was no accident is evident in Justice Stevens' dissent, where he questioned the equation of these rights. (*Dolan*, 512 U.S. at 409 [dissenting opinion].)

whether by labor unions or others. In *Lloyd*, 407 U.S. at 570, for example, the high court prevented the distribution of political handbills in a shopping center. In weighing the Fifth Amendment rights of the shopping center owner against the First Amendment rights of those who wanted to distribute leaflets, the court concluded:

> "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."

See also *Central Hardware*, 407 U.S. at 547 which, on the same day as *Lloyd*, concluded that care must be taken by courts to avoid "unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments."

In other words, "freedom of speech" does not ipso facto override the Fifth Amendment. Indeed, the U.S. Supreme Court was blunt in recognizing the inherent constitutional problem in compelling store owners to provide space for union picketers:

> "To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." (*Hudgens v. N.L.R.B.* [1976] 424 U.S. 507, 517 [quoting with approval].)

Property, as the high court has held, is not a thing, but is the "group of rights inhering in the citizen's [ownership]. . . . The constitutional

provision is addressed to every sort of interest the citizen may possess." (*United States v. General Motors Corp.* [1945] 323 U.S. 373, 377-378.)

Repeatedly, the high court has affirmed that one of the most essential sticks in the bundle of rights we call "property" is the right to exclude others. (*Dolan*, 512 U.S. at 393; *Kaiser Aetna v. United States* [1979] 444 U.S. 164, 176; *Nollan v. California Coastal Com.* [1987] 483 U.S. 825, 831.) That essential property right would be relegated to insignificance by an expansive reading of *Pruneyard*. Its repeated protection by the U.S. Supreme Court shows that the owners of such rights are entitled to protection. That commercial property owners voluntarily open their property to use *for the designated purpose of encouraging commerce with either themselves or their tenants* does not mean that they have waived their general right to exclude third parties. To take that right without compensating for it would violate the Fifth Amendment.

Perhaps presciently, the high court's decision in *Nollan*, involving the attempted imposition of an easement by the California Coastal Commission, explained that forcing a private property owner to submit to repeated crossings of the property by third parties could be a taking requiring compensation because:

> "a 'permanent physical occupation' has occurred where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to

station himself permanently on the premises." (*Nollan*, 483 U.S. at 832.)

Allowing unrestricted use of private property by the public violates the Fifth Amendment and requires compensation.

CONCLUSION

Pruneyard has been ripe for reconsideration for some time. In *Golden Gateway*, a majority could not be mustered for such reconsideration, perhaps because it was not needed to decide that case in favor of the property owner.

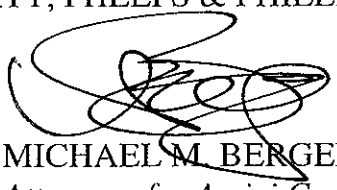
Now is the right time. *Pruneyard* has undergone three decades of consideration by courts and commentators and repeatedly has failed that intellectual and jurisprudential scrutiny.

Amici curiae pray that the Court reconsider *Pruneyard* and disapprove it. At a minimum, they ask that the Court restrict it to a point that it does no harm to the country's Fifth Amendment jurisprudence.

Respectfully submitted,

Dated: April 19, 2011

MANATT, PHELPS & PHILLIPS, LLP

By: 

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[CRC 8.204(C)(1)]

The foregoing Application for Leave to File a Brief Amici Curiae by California Retailers Association and California Business Properties Association in Support of Plaintiff Ralphs Grocery Company was produced on a computer. According to the word count program on the computer used to prepare the brief, it contains 4,646 words, including footnotes but excluding tables and this certificate.

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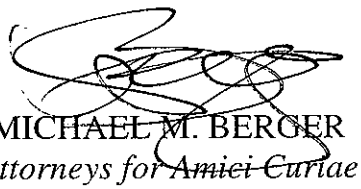

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PROOF OF SERVICE BY MAIL

I, BESS HUBBARD, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **April 19, 2011**, I served a copy of the within document(s):

APPLICATION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFF RALPHS GROCERY COMPANY

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **April 19, 2011**, at Los Angeles, California.

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