No. 09-235

In the
Supreme Court of the United States

MACERICH MANAGEMENT COMPANY, et al,

Petitioners,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

HONORABLE EDWIN MEESE III
214 Massachusetts Avenue NE
Washington, DC 20002
Telephone: (202) 546-5400

JOHN C. EASTMAN
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, California 92886

ANTHONY T. CASO
Counsel of Record
Law Office of Anthony T. Caso
8001 Folsom Boulevard
Suite 100
Sacramento, California 95826
Telephone: (916) 386-4432
Facsimile: (916) 307-5164

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTION PRESENTED

Whether a state law requirement for property owners to open their property for use by individuals and organizations to advocate directly against the economic interests of the owners violates the First and Fifth Amendments to the United States Constitution?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND
INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE PETITION 2

I INDIVIDUAL RIGHTS IN PROPERTY WERE VIEWED AS THE BASIS FOR ALL OTHER INDIVIDUAL LIBERTIES 4

II CALIFORNIA'S EXPANSIVE SPEECH MANDATE RAISES IMPORTANT FIRST AMENDMENT QUESTIONS UNANSWERED BY *PRUNEYARD*, AND HAS THUS DISRUPTED KEY FIRST AMENDMENT PRINCIPLES 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Calder v. Bull, 3 U.S. 386 (1798) 7

Citizens United v. Fed. Election Comm'n,
No. 08-205 (U.S. filed Aug. 14, 2008).....1

Fashion Valley Mall, LLC v. NLRB,
42 Cal. 4th 850 (Cal. 2007).....3, 7

Kelo v. City of New London, Connecticut,
545 U.S. 469 (2005).....1

Lynch v. Household Fin. Corp.,
405 U.S. 538 (1972).....5, 7

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974)..... 9-10

Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1 (1986) 10

PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (1980)..... 3-4, 8-11

Robins v. PruneYard Shopping Ctr.,
23 Cal. 3d 899 (Cal. 1979) 2-3

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,
No. 08-1151 (U.S. filed Mar. 13, 2009).....1

United Brotherhood of Carpenters & Joiners of America Local 586 v. NLRB,
540 F.3d 957 (9th Cir. 2008).....3

Wooley v. Maynard, 430 U.S. 705 (1977)..... 8-10

United States Constitution

U.S. Const. amend. I 8, 10
amend. V 4
amend. XIV 4

Rules of Court

U.S. Sup. Ct. R. 37.2(a) 1
37.6 1

Other Authorities

Adams, John, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS (Charles Francis Adams ed., 1851) 6

Blackstone, William, 1 *Commentaries on the Laws of England* (Univ. of Chicago Press 1979) (1765) 5

Jaffa, Harry V., *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (2000) 5

Hamilton, Alexander, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1973) 7

Madison, James, *On Property*, Mar. 29, 1792, *in* 14 THE PAPERS OF JAMES MADISON (William T. Hutchinson et al. eds., 1977) 7

Rutledge, John, 1 *The Records of the Federal Convention of 1787* (Max Ferrand ed., Yale Univ. Press rev. ed. 1937).....7

Sisk, Gregory C.,
Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech,
32 HARV. J.L. & PUB. POL'Y 389 (2009) 3

The Federalist (Clinton Rossiter ed., 1961).....6, 11

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of freedom of speech and the individual rights in property.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005), *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, No. 08-1151 (U.S. filed Mar. 13, 2009) and *Citizens United v. Fed. Election Comm'n*, No. 08-205 (U.S. filed Aug. 14, 2008).

The Center believes the issues before this court in the petition for writ of certiorari raise critical questions going to the foundation of individual liberty—the right to put one's private property to a particular use and the rights of freedom of

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

conscience. The Founders viewed these subjects as inseparable and both freedoms suffer when courts attempt to separate them as was done by the California decision that forms the basis for the decision below.

REASONS FOR GRANTING THE PETITION

California has expanded the *state constitutional* speech rights of one interest group (labor unions seeking to urge a boycott), but at the expense of the *federal constitutional* speech and property rights of others (property owners). Amicus well understands the importance of federalism, and often files briefs in this Court supporting a strong federalist interpretation of the Constitution. On the other hand, amicus also understands that states are not free to expand state-granted rights by constricting rights guaranteed by the federal constitution. Review by this Court is required to strike the proper balance between the individual rights in property and freedom of conscience guaranteed by the United States Constitution and the state-created and expanded rights of speech that convert private property into public foray.

Underlying the decision of the court below is the recent ruling of the California Supreme Court dramatically expanding the state-created rights to engage in speech activities on the private property of others. In *Robins v. PruneYard Shopping Ctr.*, 23 Cal. 3d 899 (Cal. 1979), the California Supreme Court ruled that shopping mall owners could not forbid private groups from soliciting petition signatures or distributing pamphlets at the mall. *Id.* at 910. The pamphleteers in that case sought to engage mall patrons on a social-political issue

unrelated to the mall or its tenants. *Id.* at 902. In so holding, the California Supreme Court repeated its rhetoric from an earlier decision to the effect that constitutionally protected individual rights "are held in subordination to the rights of society." *Id.* at 906.

Acting on that philosophy, the California Supreme Court in *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850, 854-55 (Cal. 2007), ruled that mall owners also must suffer the presence of protestors for the purpose of urging a boycott of the mall and its tenants. This ruling provided the basis for the Ninth Circuit ruling that Macerich Management Company's removal of union protestors was an invalid time, place, and manner restriction. *United Brotherhood of Carpenters & Joiners of America Local 586 v. NLRB*, 540 F.3d 957, 973 (9th Cir. 2008).

California's ruling keeps it the leader of just five other states in determining private property owners must permit third party speech. *Fashion Valley Mall*, 42 Cal. 4th at 875-76 (Chin, J., dissenting); *see also* Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 391-92 (2009). But the *Fashion Valley Mall* ruling represents a dramatic expansion in the state rule that private property owners must donate space on their land for speech activities. Instead of speech unrelated to the commercial interests of the property owner, the mall must now host speakers who seek to put it out of business. This holding enters an area unsettled in federal jurisprudence, as the holding in *PruneYard Shopping Ctr. v. Robins* only dealt with third-party advocacy of interests unrelated to the

commercial interests of the shopping mall owner. 447 U.S. 74, 77 (1980). Review by this Court is necessary to preserve the liberties that formed the basis of the nation's founding.

I

INDIVIDUAL RIGHTS IN PROPERTY WERE VIEWED AS THE BASIS FOR ALL OTHER INDIVIDUAL LIBERTIES

The California *PruneYard* decision rests in part from a state decision for the 1920's that elevates the collective rights of society over individual rights. Whether or not such experimentation with different balance between collective and individual rights is good policy, it is clear that the states may not expand collective rights at the expense of individual rights protected by the federal constitution. This Court must act to protect those rights—especially the individual right to property.

The right to property—to control, use, and exclude—is not only rooted within the Constitution, *see* U.S. Const. amend. V, XIV, but it is part and parcel with the first principles of republican government. Justice Stewart summarized the philosophic and constitutional harmony between property rights and all other rights:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. *In fact, a fundamental interdependence exists between the personal*

> *right to liberty and the personal right in property.* Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citations.]

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (emphasis added). Justice Stewart, in his citations, draws on the original understanding of property rights at the American Founding, citing, among others, John Locke and William Blackstone.

As Professor Harry V. Jaffa, a preeminent scholar of the American Founding and Civil War, noted, "For [President] Lincoln (following the Founding Fathers), the origin of the right of property, antecedent to civil society, was the natural right of every man to own himself and thus to own the product of his labor." *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* 320 (2000). The Founders recognized that an individual's "dominion over his property is absolute because" all persons have dominion over themselves and their own faculties. *Id.* at 24.

The colonists brought their views of individual rights in property with them from England. William Blackstone noted that the right to property is an "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries on the Laws of England* 135 (Univ. of Chicago Press 1979) (1765) .

This view that individual rights in property were the key to other personal rights was recognized

by the Founders as being a primary concern of government. James Madison commented on the compelling importance of protecting property rights and human faculties: "The protection of these faculties is the *first object* of government. From the protection of different and unequal faculties of acquiring property, the possession of the different degrees and kinds of property immediately results." *The Federalist No. 10*, at 74 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The differing and diverse "faculties of men," from which property rights "originate," require protection from unjust interference by both government and private action. *Id.*; *see also The Federalist No. 70*, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (expressing the need for a strong executive for the "protection of property" and "security of liberty").

The Founders believed that individual rights in property are the basis for all other rights, whether it is speech, religion or any other right held by individuals. John Adams emphasized, "Property must be secured, or liberty cannot exist." *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Madison summarized this view as a person has a right to property and also property in his rights:

> A man's land, or merchandize, or money is called his property. A man has property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions . . . he has a property very dear to him in the safety and liberty of his person.

James Madison, *On Property*, Mar. 29, 1792, *in* 14 THE PAPERS OF JAMES MADISON 266-68 (William T. Hutchinson et al. eds., 1977). John Rutledge, delegate of South Carolina, argued that "property was the main object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Ferrand ed., Yale Univ. Press rev. ed. 1937). Hamilton remarked that, without this "main object," "adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973).

The primary "object of government" is to protect the property rights—physical and intellectual—of every American, especially when the laws promote interference with these rights. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.") (Opinion of Chase, J.). The right to property is the civil and natural right that protects and guarantees all other rights. As Justice Stewart pronounced, the "interdependence" between these two rights requires protection for both, without either losing to the other. *Lynch*, 405 U.S. at 552. And from the original understanding of property rights, it certainly "is wrong to compel a private property owner to allow an activity that contravenes the property's purposes." *Fashion Valley Mall*, 42 Cal. 4th at 870 (Chin, J., dissenting).

To be sure, the State of California is free to dispense with any "extra" state law protections of

property that it has granted in order to promote the collective interests of society. It may not, however, dispense with rights guaranteed by the federal Constitution that the Founders considered essential to the protection of all individual liberty. Those federally guaranteed individual rights in property and freedom of conscience are endangered by the California ruling and the Ninth Circuit decision below that is based on that state ruling.

II

CALIFORNIA'S EXPANSIVE SPEECH MANDATE RAISES IMPORTANT FIRST AMENDMENT QUESTIONS UNANSWERED BY *PRUNEYARD*, AND HAS THUS DISRUPTED KEY FIRST AMENDMENT PRINCIPLES

In *PruneYard*, this Court held that the federal Constitution does not prevent a state from requiring a shopping mall owner to allow third-party speech where that activity will not "impair the value or use of [the] property as a shopping center." 447 U.S. at 83. Justice Powell wrote in his concurrence that some of the language of the Court's decision raised troubling questions: "In my view, state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." *Id.* at 97 (Powell, J., concurring). The questions that concerned Justice Powell have come to fruition in this case.

Justice Powell cited the Court's ruling in *Wooley v. Maynard*, 430 U.S. 705 (1977), as one provoking questions for the result in *PruneYard*. In *Wooley*, this Court ruled that the state could not compel

motorists to host the state's political message on their private automobiles. *Id.* at 714. As Justice Powell noted, "I do not believe that the result in *Wooley v. Maynard*, *supra*, would have changed had the State of New Hampshire directed its citizens to place the slogan "Live Free or Die" in their shop windows rather than on their automobiles." *PruneYard*, 447 U.S. at 97 (Powell, J. concurring in part and in the judgment). Justice White also concurred in the *PruneYard* decision, but joined Justice Powell's concurrence and added his own cautionary note:

> I concur in this judgment, but I agree with Mr. Justice Powell that there are other circumstances that would present a far different First Amendment issue. May a State require the owner of a shopping center to subsidize any and all political, religious, or social-action groups by furnishing a convenient place for them to urge their views on the public and to solicit funds from likely prospects? Surely there are some limits on state authority to impose such requirements.

Id. at 95 (White, J., concurring in part and concurring in the judgment). Those limits that Justice White believed would be required in a future case are certainly tested in this action. A review of the Court's cases considering "compelled access" demonstrate how far afield the California decision has gone and the danger it presents to individual rights in property and speech.

In *Miami Herald Publ'g Co. v. Tornillo*, the Court was faced with the issue whether a Florida

law may require a newspaper to allow a politician, free of charge, to place within the newspaper a reply to any criticism the newspaper published against said politician. 418 U.S. 241, 243 (1974). The Court first held that the "statute exacts a penalty on the basis of the content of a newspaper." *Id.* at 257. Space that would otherwise be used by the newspaper for other substance—advertisements, promotions, or other articles—is then used for speech of a third party. *Id.* The Court then found that "the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* The Court concluded that the state may not require the newspaper to hold open its pages for the views of others.

Later, in *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 5-7 (1986), the Court dealt with the issue of a California requirement that a utility company allow a consumer group to put its leaflet in the utility's billing statement mailed out to customers. Interpreting *Tornillo*, the Court observed that "compelled access" is impermissible under the Constitution. *Id.* at 11-12 (plurality opinion). It is simply an infringement of the owner's First Amendment rights that the owner "is still required to carry speech with which it disagreed, and might feel compelled to reply or limit its own speech in response to" the third party's speech. *Id.* at 12 n.7.

Wooley, *Tornillo*, and *Pacific Gas & Electric*, take a different path than the one blazed in *PruneYard*. Seen in this context, *PruneYard* does not serve to enhance individual liberty—it instead restricts that liberty. The decision below, however,

allows a significant expansion of *PruneYard*, so that the property owner must now hold its property open to those who "will unreasonably impair the value or use of their property as a shopping center." *PruneYard*, 447 U.S. at 83.

CONCLUSION

The ruling by the Supreme Court of California endangers the "first object of government," *The Federalist No. 10*, at 74, that a private property owner truly owns private property. The questions that concerned Justice Powell are raised in this case as is the need for limits foreseen by Justice White. This Court should grant review in order to protect

the federally guaranteed rights in property and speech.

DATED: September, 2009.

Respectfully submitted,

THE HONORABLE
EDWIN MEESE III
214 Massachusetts
Avenue NE
Washington, DC 20002
Telephone:
(202) 546-5400

JOHN C. EASTMAN
Center for
Constitutional
Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92886

ANTHONY T. CASO
Counsel of Record
Law Office of
Anthony T. Caso
8001 Folsom Boulevard
Suite 100
Sacramento, CA 95826
Telephone: (916) 386-4432
Facsimile: (916) 307-5164

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence