No. 09-235

In The Supreme Court of the United States

MACERICH MANAGEMENT COMPANY AND MACERICH PROPERTY MANAGEMENT COMPANY,

PETITIONERS,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505; AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR DONAHUE SCHRIBER, FOREST CITY ENTERPRISES, INC., GENERAL GROWTH PROPERTIES, INC., SIMON PROPERTY GROUP, INC., THE TAUBMAN REALTY GROUP LIMITED PARTNERSHIP, AND WESTFIELD, LLC AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici own and operate shopping malls throughout the country. Each has had experiences where speakers have demanded physical access to its malls to spread their messages, some of which directly relate to the mall or its retailers. Amici's experience is that such speakers distract shoppers from the message promoted by the mall—to purchase the goods and services offered by the mall's tenants. The presence of these speakers by authority of law thus alters the ambience and shopping experience that a mall can guarantee its tenants, and costs both the mall and its tenants money.

Donahue Schriber, a privately held REIT, owns and/or operates 93 neighborhood, community, community lifestyle and power shopping centers. The company's 150 employees presently manage a portfolio totaling over 16 million square feet located throughout California, Arizona and Nevada. With more than 40 years of experience in retail property ownership and

[1] The parties' counsel of record received timely notice of the intention to file this brief. Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

development, Donahue Schriber is made up of a highly skilled team of professionals who have consistently been recognized for their expertise in the development, asset management, leasing, and marketing of all retail property formats. Its vision is to create environments of excellence for its customers, tenants, and communities by developing and operating shopping centers recognized for their quality and value.

Forest City Enterprises, Inc. is an $11.7-billion NYSE-listed national real estate company. Forest City is principally engaged in the ownership, development, management, and acquisition of commercial and residential real estate and land throughout the United States. With more than 80 years of experience in property ownership and development, Forest City through its subsidiaries has ownership interest in and/or management responsibility for 52 shopping centers located throughout the United States. As of January 2009, Forest City's retail portfolio totals 27 million square feet of retail space. Forest City has been recognized for its expertise in maintaining a well balanced property portfolio and a team of highly skilled and creative real estate professionals.

General Growth Properties, Inc. owns, develops, operates, and/or manages more than 200 regional shopping malls in 44 states. In California alone, GGP has ownership interests in and/or management responsibility for twenty shopping mall properties located throughout the State. On April 16, 2009, GGP and approximately 166 of its shopping centers and other subsidiaries voluntarily sought

relief under chapter 11 of the United States Bankruptcy Code, and GGP presently operates as a debtor in possession.

Simon Property Group, Inc. is an S&P 500 company and the largest public U.S. real estate company. Simon is a fully integrated real estate company which operates from multiple platforms, including regional and super regional malls, premium outlet centers, and community/lifestyle centers. Simon owns or has an interest in 325 properties in 41 states in the United States, comprising over 245 million square feet of gross leaseable area. In California, Simon owns or has an interest in over 20 shopping centers.

The Taubman Realty Group Limited Partnership, through its affiliates, is engaged in the ownership, development and management of regional and super regional shopping centers. Taubman's 24 U.S. owned and/or managed properties, the most productive in the industry, serve major markets from coast to coast including two in California. Taubman is headquartered in Bloomfield Hills, Michigan and its Taubman Asia subsidiary is headquartered in Hong Kong.

Westfield, LLC and its affiliates currently own interests in 24 shopping centers located in California and 31 shopping centers across 10 other States, all of which are managed by Westfield. Westfield's portfolio in the United States includes approximately 63.2

million square feet of gross leasable area and contains approximately 8,843 retailers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal constitutional right to freedom of speech does not limit the rights of private shopping mall owners to regulate speech on their property. *See Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976) (overruling *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968)).

For close to three decades, however, this Court has permitted state courts to commandeer private shopping malls to provide free space for expressive conduct, including picketing, leafleting, canvassing, and petitioning. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In *PruneYard*, the Court held that a state requirement that a private shopping mall permit access by third parties to the mall's property to express themselves was not a violation of the Fifth Amendment's Takings Clause or the First Amendment's Free Speech Clause. State courts, relying on *PruneYard*, have experimented with ever more onerous and expansive burdens on shopping mall owners to subsidize and host expressive conduct on their private property, including expression of views with which the property owners do not agree, and even ones intended to stop listeners from doing business at that shopping mall. Those experiments have been a failure, and this Court should end them.

This Court's intervening decisions under both the Takings Clause and the First Amendment have turned their back on *PruneYard*, repeatedly distinguishing it, and have ultimately left it without doctrinal support. Only this Court, however, can administer the last rites to this anachronistic decision. Review should be granted to overrule *PruneYard*.

A. As evidenced by this case, and nearly thirty years of experience, state case law requiring access to shopping mall owner's property has often been used by speakers as a forum to urge people not to purchase goods and services from the mall and its tenants. Regardless of whether speech targets a specific store within the shopping mall, requiring malls to host speakers imposes substantial burdens on scarce mall resources and commandeers mall owners to serve as legislator, licensing board, and police for a forum for third-party speakers that they never intended to create.

The detrimental economic effect on mall owners and their tenants significantly undercuts *PruneYard*'s suggestion that forcing owners to give speakers a forum will not unreasonably impair the value or use of property as a shopping mall.

Further, the blossoming of the Internet has made alternative methods of communication available to speakers. Thus, any concern about reduction in the

availability of fora for individuals to express their views to others has been superseded by technological innovation and does not require the impressment of private shopping malls.

B. Since this Court decided *PruneYard* in 1980, this Court's Takings Clause and Free Speech Clause jurisprudence has developed in ways that demonstrate that *PruneYard*'s conclusion is inconsistent with basic precepts of constitutional law.

With regard to the Takings Clause, this Court has clarified that physical invasions of real property are *not* subject to the multi-factor balancing test used in *PruneYard*, but are per se violations of the Takings Clause.

With regard to the Free Speech Clause, this Court has clarified, in cases involving compelled speech and compelled subsidization of private speech, that the First Amendment is violated if someone subjected to government regulation may be forced to respond to speech that the government foists upon him, or if someone is required to subsidize the private speech of another person unless that requirement furthers some broader regulatory program that requires collective action.

C. At the very least, this Court should grant review and confine *PruneYard* to its facts. The Court should hold that the Constitution bars a State from compelling a private shopping mall to allow expressive conduct on its property, when the property owner objects because the expression—such as that

here, which urged patrons to boycott the mall and its stores—supports a cause opposed by the mall and conflicts with the mall's commercial interests.

ARGUMENT

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), should be overruled. Overruling this constitutional opinion is appropriate because in the 29 years since *PruneYard* the "factual assumptions" of the decision have been disproved and subsequent case law has "undermined" *PruneYard*'s "basic legal principles." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion).

A. Contrary To The Factual Assumptions Underlying *PruneYard*, Forcing Property Owners To Host Speakers On Their Property Diminishes Property Values And Imposes Substantial Burdens

As the Court acknowledged in *PruneYard*, the purpose of a shopping mall is to provide retailers with an environment that encourages consumers to purchase their goods and services. In *PruneYard*, the Court justified its holding that compelling owners of shopping malls to permit speakers on their property would not interfere with the mall's commercial functions because shopping malls could adopt reasonable "time, place, and manner regulations." 447 U.S. at 83.

As evidenced by this case, and almost thirty years of experience, however, that is not how access for speakers has worked in practice. The detrimental economic effect on mall owners and their tenants significantly undercuts *PruneYard*'s suggestion that forcing owners to give speakers a forum will not "unreasonably impair the value or use of [the owners'] property as a shopping center." *Ibid*.

1. Compelling shopping malls to host third-party speakers undermines the shopping mall as a commercial enterprise

Notwithstanding that the purpose of shopping mall property is to encourage commercial transactions, state courts (and federal courts interpreting state common law) have relied on *PruneYard* to compel shopping malls to host speech that is inimical to this purpose.

As in this case, courts have compelled shopping malls to host speakers that explicitly discourage purchases from retailers within the shopping mall, despite efforts of the malls to exclude such speech. For example, in *Fashion Valley Mall, LLC v. National Labor Relations Board*, 172 P.3d 742 (Cal. 2007), *cert. denied*, 129 S. Ct. 94 (2008), a sharply-divided California Supreme Court held that speakers had "the right to urge customers in a shopping mall to boycott one of the stores in the mall" despite a mall regulation to the contrary. *Id*. at 743. (The dissenters, by

contrast, would have overruled *PruneYard* entirely.); *see also Glendale Assocs. v. National Labor Relations Bd.*, 347 F.3d 1145 (9th Cir. 2003).

An illustration outside the labor context is mall owners' recent experiences in California dealing with animal rights groups that are opposed to the sale of puppies from so-called "puppy mills." Their members protest inside malls that have pet store owners as tenants. Their intent is to dissuade shoppers from patronizing the malls' pet store tenants and ultimately cause the closure of those stores. Their website lauds the success of earlier mall protests that resulted in the closure of pet stores at another Southern California mall, and identifies multiple malls where protests are on-going or planned.[2]

Lack of control over the shopping mall's environment impairs the ability of the mall's owner to

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[2] "Since holding the first peaceful demonstration back in December 2007, a number of pet stores selling mill puppies have closed their doors, including two Posh Puppies stores, Pets of Bel Air and Pet Love in the Beverly Center. Puppies and Babies, owned by the same person who owned Pets of Bel Air, also closed down. * * * The work continues. Peaceful demonstrations are now being held in areas near Just Paws at the Glendale Galleria, Pet World at the Northridge Fashion Center and Puppy and Me in Sherman Oaks, and near the Barkworks stores at the Mission Viejo Mall, Westside Pavilion and the Brea Mall. Demonstration applications are pending at two other malls that house Barkworks stores." Sandy Miller, Best Friends Animal Society, *The Power of Information*, July 31, 2009, http://network.bestfriends.org/campaigns/puppymills/news.aspx?pID=11897.

meet its obligations to its lessees to create an environment to encourage consumers to purchase goods. Under their lease agreements, the mall owners are obligated to protect tenants in the quiet enjoyment of their premises. Tenants could also contend that mall owners should not permit the distribution of defamatory materials on their property. But how can owners fulfill these obligations when they are forced to allow speakers whose avowed purpose is to put certain tenants out of business and, according to the court below, cannot prescreen the materials? Potential litigation from speakers and tenants is a burden that, under *PruneYard*, mall owners face on a daily basis.

The ability of the property owner to create a particular ambiance that attracts consumers and encourages those consumers to make purchases is essential to the shopping mall's economic livelihood. Even when the speech does not target a specific store within a shopping mall, third parties speaking in the mall results in decreased commercial activity and generally detracts from the shopping mall's ability to serve its purpose.

For example, in *Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987), a dance troupe sought permission to "perform a choreographed depiction of the results of nuclear warfare as a political statement." *Id*. at 834. The day the troupe performed and handed out leaflets to mall patrons, "several stores within the mall suffered identifiable reductions in sales." *Id*. at 835; *see also Lam v. Ngo*, 111 Cal. Rptr. 2d 582, 586-587

(Cal. Ct. App. 2001) (demonstrators in restaurant parking lot challenging restaurant owner's political views caused the restaurant to suffer a 40 percent decline in revenues).

Customers may blame the mall, rather than state law, for the intrusion they experience and thus decrease their visits to that mall. *See Costco Companies, Inc. v. Gallant*, 117 Cal. Rptr. 2d 344, 352 (Cal. Ct. App. 2002) (noting that Costco had received complaints from customers because of the speakers' presence). Amici have all received numerous calls from customers who are livid that the mall would allow certain speakers to use the mall property. Some of these irate customers leave contact information, permitting the mall to explain that they do not select the speakers, but many of these customers do not leave contact information, and thus constitute lost customers.

To be sure, the courts in *Jacobs*, *Lam,* and *Costco Companies* (as in some of the other cases cited in this brief) ultimately upheld the owners' right to exclude the speakers from their property. The cases nevertheless demonstrate the economic effect of *PruneYard*'s legacy, for two reasons. First, in some jurisdictions the speakers' conduct will be protected and similar burdens will be borne by property owners in those States. Second, even in situations where no state court ultimately would hold that property owners are required to host such speakers on their property, until the issue is finally resolved, the property owners are forced to endure significant

burdens based on the speakers' assertion that they have the right to speak on the owners' private property.

2. Compelling shopping malls to host third-party speakers requires property owners to subsidize private speech

Requiring shopping mall owners to provide access to speakers has imposed continuing burdens on scarce resources. For many shopping malls, parking is in particularly short supply, and speakers can consume that resource. In *Slauson Partnership v. Ochoa*, 5 Cal. Rptr. 3d 668 (Cal. Ct. App. 2003), a retail tenant (other than the one being targeted by the protestors) asked the property owner for a rent abatement because the protestors were occupying numerous parking spaces in the complex, making it more difficult for its customers to use the mall. *Id*. at 676.

Requiring shopping malls to host speakers imposes substantial burdens on malls, commandeering them to serve as legislator, licensing board, and police force for a forum for third-party speakers that they never intended to create.

"Time, place, and manner regulations do not grow on trees." Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of* PruneYard v. Robins, 64 U. CHI. L. REV. 21, 48 (1997). Property owners must bear the significant expense of formulating and enforcing regulations, which often will

involve consultation with attorneys, tenants, and local authorities.

Once the shopping mall has established the rules, it must still allocate limited space to competing special interest groups, which can cause additional administrative burdens. In *Costco Companies,* "on a regular basis" organizations conducted "fax wars" wherein they would "apply to every location in a particular area and block" out all other organizations. 117 Cal. Rptr. 2d at 352-353. It is also a frequent occurrence that property owners must repeatedly inform speakers that they are not permitted to speak on the property because the speakers are not abiding by established rules. *See*, *e.g.*, *Glendale Assocs.*, 347 F.3d at 1149-1150; *Jacobs*, 407 N.W.2d at 498-500.

Moreover, because organizations that seek to use the mall owners' property are often composed of highly ideological members, there is sometimes a risk of violence when one organization believes it is being treated unfairly by the mall owner. In *Cologne v. Westfarms Associates*, 469 A.2d 1201, 1205 (Conn. 1984), for example, once the trial court ordered the property owner to grant the National Organization for Women access to its mall for advocacy work, a variety of other groups, including the Ku Klux Klan, sought access to the mall. Though these requests were denied, members of the Klan appeared at the mall and clashed with anti-Klan demonstrators. *Ibid*. To quell the "heated demonstration," the property owners had to rely on state and local police as well as police from surrounding towns, and even then some of

the stores in the mall had to close for the remainder of the day. *Ibid*. Other courts have likewise recognized the "substantial problem" faced by property owners due to "altercations between the proponents and opponents of particular petition gathering efforts" who are fighting over the right to use a particular location. *Costco Companies,* 117 Cal. Rptr. 2d at 353.

In addition, property owners and their tenants must sometimes hire additional security guards to protect both their employees and their customers from the speakers. In *Costco Companies*, employees of the store were "verbally and physically abused by petition gatherers." 117 Cal. Rptr. 2d at 352. Likewise speakers outside the restaurant in *Lam* "physically accosted prospective patrons." 111 Cal. Rptr. 2d at 587. Speakers can also cause property damage both to target stores and to property of the consumers patronizing those establishments. *See*, *e.g.*, *ibid*; *Slauson P'ship*, 5 Cal. Rptr. 3d at 673-674.

The need for private security is enhanced because of confusion about the extent of speakers' rights in shopping malls under state case law like that sanctioned in *PruneYard*. As a result, police may refuse to enforce generally applicable laws governing trespass and noise restrictions. In various instances, local authorities have refused to arrest or interfere with speakers based on the authorities' understanding that the speakers had the right to be present, even when courts later disagreed. *See*, *e.g.*, *Cologne*, 469

A.2d at 1205 n.4; *see also National Labor Relations Bd. v. Calkins*, 187 F.3d 1080, 1084 (9th Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). For example, union organizers in hospitals falsely, though sometimes successfully, claim immunity from trespass laws based on the rights bestowed to them under *PruneYard* and its progeny. *See* William J. Emanuel, *Union Trespassers Roam The Corridors Of California Hospitals: Is A Return To The Rule Of Law Possible?*, 30 WHITTIER L. REV. 723, 724 (2009).

These cases reflect the on-the-ground reality faced by amici in their shopping malls on a regular basis. Almost thirty years of litigation and practice have not established a workable system. To the contrary, the shopping malls are regularly forced to host speakers that injure their profits and reputation, and have obtained little certainty from courts regarding any limits that can be imposed on speakers. The experiment of *PruneYard* has borne only bitter fruit.

B. *PruneYard* Should Be Overruled Because Subsequent Cases Have Undermined Its Doctrinal Foundations

Since this Court decided *PruneYard* in 1980, this Court's Takings Clause and Free Speech Clause jurisprudence have developed in ways that show the inconsistency of *PruneYard*'s conclusion with basic

precepts of constitutional law. Indeed, *PruneYard* has been discussed by this Court in only four majority opinions involving the Takings Clause and three majority opinions involving the First Amendment and in virtually every instance, *PruneYard* has been distinguished and narrowed. It is time to bury *PruneYard* once and for all.

1. PruneYard's holding that compelling a mall owner to permit people to enter its property to engage in expressive conduct does not constitute an unconstitutional taking of property has been undermined by this Court's confirmation that the deprivation of the right to exclude constitutes a per se taking

a. In *PruneYard*, the Court held that a state requirement that a private shopping mall permit third parties to come onto and use its property to express themselves was not a violation of the Takings Clause.

The Court acknowledged that "there has literally been a 'taking'" of "the right to exclude others." 447 U.S. at 82. But the Court held that it was appropriate to apply a multi-factor test that examined "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id*. at 83. With regard to the latter two factors, the Court concluded on the record before it that there was "nothing to suggest that preventing [the shopping mall owners]

from prohibiting this sort of [expressive] activity will unreasonably impair the value or use of their property as a shopping mall." *Ibid*. The character of the governmental action, forcing the shopping mall to allow speakers to "'physically invade[ ]' appellants' property," was held not to be "determinative" in light of the other factors. *Id*. at 84.

b. After *PruneYard*, however, this Court has clarified in several cases that physical invasions of real property are *not* subject to a multi-factor balancing test, but are instead per se violations of the Takings Clause. "The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

This per se rule first became clear only after *PruneYard*, in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). *Loretto* held there was a per se taking when the government required a property owner to permit installation of cable television equipment on the roof of a private building. Even though the cable occupied at most only 1 ½ cubic feet of the property and even though the equipment would enhance the value of the building, the Court concluded that physical invasion "is a government action of such a unique character that it

is a taking without regard to other factors." *Id*. at 432.

Adhering to *Loretto*, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that imposing an easement so that the public could travel on the landowner's property was a per se taking. And in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court held that imposing a "recreational easement" so that people could hike next to the landowner's commercial property was a per se taking.

In each of those cases, the Court has sought to limit the seemingly contrary holding of *PruneYard*, albeit with little success.[3]

c. One tack for limiting *PruneYard* has been to describe the invasion in that case as "temporary," as opposed to "permanent." Thus, in *Loretto*, the Court distinguished *PruneYard* on the ground that the physical invasion by the speaker was "temporary and limited in nature," 458 U.S. at 434, even while noting that "the distinction between a permanent physical occupation and a temporary invasion will not always

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[3] Although the Court has cited *PruneYard* in four other Takings Clause cases, it did so in the context of merely describing the multi-factor takings test, not in relying on the application of that test in *PruneYard*. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *United States v. Security Indus. Bank*, 459 U.S. 70, 75, 78 (1982).

be clear," *id*. at 435 n.12. And in *Nollan*, the Court distinguished *PruneYard* on the ground that "permanent access was not required." 483 U.S. at 832 n.1.

But that distinction simply cannot explain the different outcomes. In *Loretto* itself, the Court explained that a physical invasion was to be treated as permanent even if the invasion might subside at the option of the third party whose equipment the private property owner was being required to host. The Court held that the physical invasion was "permanent," even though the cable equipment would remain only "[s]o long as the property remains residential *and a CATV company wishes to retain the installation*." 458 U.S. at 439 (emphasis added).

Even if that distinction was colorable at the time, it was undermined by *Nollan*. The Court in that case held that the easement was "permanent" "even though no particular individual is permitted to station himself permanently upon the premises" because "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." 483 U.S. at 832. "*Nollan*'s language substantially expands the definition of a permanent physical occupation." 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*, 24 U.C. DAVIS L. REV. 1073, 1161 (1991).

Under *Nollan*'s holding, the access to the shopping malls in *PruneYard* cases is permanent because it does not expire. The owner will never have the right to deny speakers access. At many malls, there is often someone occupying the space designated for private speakers. Such a series of legally-sanctioned temporary invasions constitutes a permanent invasion. The mall's ability to close its door at night and (at least in theory) regulate the speakers' disruptive behavior hardly makes the obligation to provide access to speakers when it is open any less temporary. The holding in *Nollan*, concerning an easement on private property for the public to travel to the beach, "surely would not have turned the other way had the government restricted the easement to daytime use, limited the noise produced, or capped the number of public users at any one time." 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, 410 (2009).

d. Another distinction relied on by the Court in *Loretto* and *Nollan* was that the shopping mall owner was already willing to allow people to enter the property if they wanted to shop. *See Loretto*, 458 U.S. at 434 ("the owner had not exhibited an interest in excluding all persons from his property"); *Nollan*, 483 U.S. at 832 n.1 ("the owner had already opened his property to the general public"); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 531 (1992) (relying on *PruneYard* for the proposition that because the

property owners "voluntarily open their property to occupation by others, [they] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.").

But persons invited to be on property for a limited purpose do not possess the right to engage in conduct that exceeds the scope of their invitation. That a diner is open to the public twenty-four hours a day for serving food does not give the public a right to sleep in its booths. The invitation to the public "is to come to the [shopping mall] to do business with the tenants. * * * There is no open-ended invitation to the public to use the [mall] for any and all purposes" that the public might desire. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 564-565 (1972).

Further, even if tenable at the time, that distinction of *Loretto* and *Nolan* has not survived the Court's subsequent decision in *Dolan*. In *Dolan*, this Court held that requiring an easement for the public to travel next to the property owner's commercial building was a per se taking. This was so, the Court reasoned, even though the owner "want[ed] to build a bigger store to attract members of the public to her property," because she "would lose all rights to regulate the time in which the public entered onto the [property]." *Dolan*, 512 U.S. at 394. In *PruneYard* cases, likewise, a property owner effectively loses all rights to exclude the non-shoppers from the property when the mall is open to the public.

2. PruneYard's holding that a private property owner has no First Amendment right not to be forced by the States to use his property as a forum for the speech of others has been undermined by this Court's subsequent decisions prohibiting compelled speech and compelled subsidization of private speech

a. *PruneYard* also rejected the claim that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." 447 U.S. at 85. The Court reasoned that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition * * * will not likely be identified with those of the owner" and that the owner could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id*. at 87.

Developments in two strands of First Amendment law—concerning compelled speech and compelled subsidization of private speech—demonstrate that *PruneYard* incorrectly applied core First Amendment principles.

b. Since *PruneYard*, this Court has clarified that the First Amendment is violated if someone subject to government regulation may be forced to speak to respond to speech that the government foists upon him. In "a number of instances," this Court has "limited the government's ability to force one speaker to host or accommodate another speaker's message."

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 63 (2006).[4]

In *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 475 U.S. 1 (1986), the Court invalidated compelled access to the envelope of a private utility's bill and newsletter. A plurality of the Court reasoned that the compelled access violated the First Amendment because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." *Id.* at 15 (plurality opinion). A disclaimer was not sufficient because a disclaimer "serves only to avoid giving readers the mistaken impression that [the] words are really those" of a third party and "does nothing to reduce the risk that [the property owner] will be forced to respond when there is strong disagreement with the substance of [the third-party's] message." *Id.* at 15 n.11. "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to

[4] Although this Court in *Rumsfeld* cited *PruneYard* with approval, the statute at issue in that case involved a situation where the property owner already had created a forum for speech, and federal law imposed a non-discrimination requirement to assure that the federal government (in particular, the military) was not excluded from the forum. 547 U.S. at 64. It did not address the predicate question, involved in this case, about the First Amendment limitations of requiring a private property owner to create a forum for speech of third parties in the first instance.

speak includes within it the choice of what not to say." *Id*. at 16 (citations and footnote omitted).

The plurality distinguished *PruneYard* as a case in which there was no allegation "that access to this area might affect the shopping center owner's exercise of his own right to speak." *Id*. at 12. Then-Justice Rehnquist, writing for the dissenters, by contrast, stated that he "believe[d] that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard*." *Id*. at 26.

Subsequently, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Court held that a state could not compel a private organization to include a group in its parade. The Court embraced the plurality opinion in *Pacific Gas & Electric* as governing law. The Court distinguished *PruneYard* on the ground that "speaker's autonomy was simply not threatened in that case." *Id.* at 580. By "autonomy," the Court appears to have meant "the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id*. at 573 (quoting *Pacific Gas & Elec.*, 475 U.S. at 16 (plurality opinion)).[5]

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[5] In addition to the cases cited in the section of the text, the Court has cited *PruneYard* in First Amendment cases for the proposition that a state "enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). The Court cited *PruneYard* with a "Cf." signal for the proposition that a challenged statute did not "require [businesses] to be publicly

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But again, the empirical tenet that was the basis for *PruneYard*, and was the basis for its distinction in *Pacific Gas & Electric* and *Hurley*, was wrong at the time and is currently untrue. Shopping mall owners are compelled to counteract the message of speakers and assure customers that they do not agree with their views. *See*, *e.g.*, *Calkins*, 187 F.3d at 1084 (explaining that, to respond to the presence of union picketers, store employees stood at the front of the store and distributed handbills explaining that they were not on strike).

c. Another strand of First Amendment protection, not addressed in *PruneYard*, is the protection against compelled subsidization of private speech. This Court has held that the First Amendment prohibits the government from compelling a person to subsidize the private speech of an organization unless in furtherance of some broader regulatory program that requires the existence of the organization (such as a labor union or bar association) to overcome a collective action problem. *See United States v. United Foods, Inc.*, 533 U.S. 405, 415-416 (2001) (collecting cases).

As a result of *PruneYard*, mall owners are compelled to subsidize the private speech of individuals and organizations who use owners' property free of charge rather than renting it at market rates. But

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identified or associated with another's message." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997).

this compelled subsidy is not linked to any collective action problem (indeed, the mall and the speakers are generally strangers to one another). The subsidy requirement is a stand-alone program unlinked to anything but a purported state interest in furthering speech on private property. But this Court observed in *United Foods* that it has not "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id*. at 415.

C. At A Minimum, *PruneYard* Should Be Limited To Its Peculiar Facts

As petitioners explain (Pet. 21-24, 33-38), unlike the situation addressed in *PruneYard*, this case involves the much more common situation in which the property owner *does* object to the message being presented. 447 U.S. at 101 (Powell, J., concurring in part and concurring in judgment).

At a minimum, then, this Court should grant *certiorari* to confine *PruneYard* to its precise facts. The Court should hold that the Constitution bars a State from compelling a private shopping mall to permit expressive conduct on its property when the property owner objects because the expression—like that here, which urged patrons to boycott the mall and its stores—supports a cause that is opposed by the shopping mall owner and that conflicts with the mall's commercial interests.

CONCLUSION

For the foregoing reasons and those in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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