No. 09-_____

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,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that states may require private shopping malls to grant third parties access to the malls' common areas for purposes of engaging in certain expressive activity. The third-party activity at issue in *PruneYard* – solicitation of signatures on a political petition – was in support of a cause that the mall did not oppose and that did not conflict with the mall's commercial interests. The present case raises the following questions, unanswered by *PruneYard*:

1. Does a state law requirement that a private shopping mall provide third parties access to the mall for expressive activity violate the shopping mall's property rights under the Fifth Amendment where the activity – here, urging patrons to boycott the mall and its stores – conflicts with the mall's commercial interests?

2. Does a state law requirement that a private shopping mall provide third parties access to the mall for expressive activity violate the shopping mall's First Amendment free speech rights where the expressive activity is in support of a cause opposed by the mall?

RULE 29.6 STATEMENT

The parties to the proceedings are identified in the caption of the case. In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, petitioners Macerich Management Company, a California corporation, and Macerich Property Management Company, LLC, a Delaware limited liability company, state they are both fully owned by The Macerich Partnership, L.P., a Delaware limited partnership. The Macerich Company, a Maryland corporation, is a publicly traded company and is the one percent general partner and eighty-seven percent limited partner of The Macerich Partnership, L.P. The other limited partners of The Macerich Partnership, L.P., are individuals.

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CONSTITUTIONAL AND STATUTORY PROVISIONS:

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PETITION FOR A WRIT OF CERTIORARI

Macerich Management Company and Macerich Property Management Company (collectively, MPM) respectfully petition this Court for a writ of certiorari to review the published decision of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on June 2, 2009, in which the court affirmed in part an order by the National Labor Relations Board (NLRB or the Board) and in which two judges, over a dissenting opinion, reversed the remaining portion of the NLRB order. The Ninth Circuit denied rehearing on May 26, 2009, with one judge dissenting.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-54, is reported at 540 F.3d 957. The NLRB order, Pet. App. 55-134, which was the subject of the enforcement action in the court of appeals under 29 U.S.C. § 160(e) and (f), is reported at 345 NLRB 514. The underlying decision of the Administrative Law Judge (ALJ), Pet. App. 85-134, is incorporated in the Board's order.

JURISDICTION

The court of appeals' opinion was filed, as corrected, on October 28, 2008. A timely petition for rehearing and rehearing en banc was denied on May

26, 2009, Pet. App. 139-141, and a final judgment was entered on June 2, 2009, Pet. App. 142-159. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution of the United States provides in relevant part that "[t]his Constitution . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The First Amendment to the Constitution of the United States provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ." U.S. Const. amend. I.

The Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 7 of the National Labor Relations Act provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all such activities" with a limited exception not relevant here. 29 U.S.C. § 157 (2008).

Section 8(a)(1) of the National Labor Relations Act provides in relevant part that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7 of the Act]." 29 U.S.C. § 158(a)(1) (2008).

Article I, section 2 of the California Constitution provides in relevant part that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2(a).

STATEMENT OF THE CASE

A. Jurisdiction

Jurisdiction is premised upon a petition by the NLRB for enforcement of a Board order, pursuant to 29 U.S.C. § 160(e), and cross-petitions by the United Brotherhood of Carpenters and Joiners of America

Locals 586 and 505 (collectively, the Union) and MPM for review of the Board's order, pursuant to 29 U.S.C. § 160(f).

B. Summary of Proceedings

The Board order reviewed in the court of appeals addresses the validity of six rules adopted by two privately-owned shopping malls in California to regulate public use of the mall's common areas for expressive activities. The Board found that three of these rules violated federal labor law when applied to certain protest activities of the Union, while the other three rules did not. One Board member dissented from the latter finding.

On cross-petitions for review, the court of appeals held that all six of the mall rules violated federal labor law. The court held that any property rights that the malls might have are subordinated to a requirement of California law that the common areas of a shopping mall must be available for third-party expressive activities. The court did not address MPM's position that the federal constitution limits the extent to which states may interfere with private property rights. One panel member dissented from the majority's invalidation of the rules that the Board had approved. The panel, by a 2-1 vote, denied rehearing. The court denied en banc review.

C. Factual and Procedural History[1]

1. MPM's rules governing expressive activities at its malls

MPM operates shopping malls in California. As part of its operations, MPM has adopted a number of rules governing the public's use of its malls' common areas. These rules are designed to provide reasonable access to the malls' common areas for non-commercial expressive activities by members of the public while regulating conduct that MPM considers to be unduly disruptive to mall business and public safety.

The six MPM rules at issue, as numbered and labeled by the court of appeals, are as follows:

Rule 1 (identification ban): the mall will not approve expressive activities that identify the mall owner or tenants.

Rule 2 (commercial purpose rule): signs, posters, and other written materials "may not interfere with the commercial purpose" of the mall or its tenants.

Rule 3 (signage ban): participants in expressive activities "may not carry or wear any signs, posters or placards."

[1] Unless indicated otherwise, the factual history is derived from the court of appeals' opinion.

Rule 4 (application requirement): a written application must be submitted prior to participants' engaging in expressive activities.

Rule 5 (designated areas rule): expressive activities are limited to designated areas on mall property.

Rule 6 (peak traffic rule): no expressive activities are permitted during 30 days that the mall designates as "peak traffic days."

The rules state further that they do not bar any activities that are protected by state or federal labor law. Pet. App. 169. The rules, which are the same at both malls on all relevant points, are provided in full in the appendix. Pet. App. 169-89.

According to MPM, the purpose of its shopping malls is to sell goods and services. Pet. App. 278. MPM contends that its rules were designed to ensure a safe and secure environment for shoppers and to honor the expressive rights of others without unduly jeopardizing the commercial interests of mall tenants. Pet. App. 281. MPM's stated policy is to allow non-commercial expressive activity on a neutral basis – even if the subject matter is unpopular – subject to reasonable time, place, and manner rules. Pet. App. 210, 212. In the event someone disputes the application of the rules to a particular expressive activity, MPM instructs mall management to offer that person a document that describes his or her rights under this Court's holding in *PruneYard*, 447 U.S. 74. Pet. App. 237, 242-44.

2. The Union's activities promoting a boycott of the malls

From December 1999 to May 2000, the Union engaged in expressive activities at two MPM malls to protest the use of non-unionized labor in the construction of mall tenant stores. During the course of these activities, the Union distributed handbills, picketed, and encouraged a consumer boycott of the malls and certain stores within the malls.

According to Union officials, the protests, which drew up to forty-five participants, were specifically designed to discourage mall customers from buying goods and services at the malls. *See* Pet. App. 260-65. Most of the activity targeted two stores (Sears and Gottschalks), both of which were located near areas that were designated for authorized activity under MPM's Rule 5. *See* Pet. App. 189, 258. The Union refused to submit applications for the use of such areas because it viewed that requirement (i.e., Rule 4) as a violation of its rights.[2]

In response to the Union's protests, MPM enforced its expressive activity rules, thereby limiting Union activity on mall property. MPM told the protesters that their actions were disruptive to business and were not supported by duly filed applications.

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[2] An attorney for the Union purported to submit an application for expressive activity on one occasion, but did not offer a list of participants or copies of the materials that it planned to use, as required by Rule 4. *See* Pet. App. 261-67, 269-70.

The interactions between mall officials and the protesters were often contentious. One mall official testified to being afraid and several arrests were made. Pet. App. 273-75.

3. The conflicting ALJ and NLRB decisions

The Union responded to MPM's enforcement of its rules by filing a charge with the NLRB, alleging that the six rules described above constituted unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (NLRA). The ALJ found that Rule 1 (identification ban), Rule 2 (commercial purpose rule), Rule 3 (signage ban), and Rule 4 (application requirement) are content-based rules that violate California law and, thus, their use violates Section 8(a)(1). Pet. App. 119-20. The ALJ also found that Rule 5 (designated areas rule) and Rule 6 (peak traffic rule) violate Section 8(a)(1) because they bar use of sidewalks within the mall and, as such, are not valid time, place, and manner rules. Pet. App. 120-22.

The NLRB agreed with the ALJ in rejecting Rule 1 (identification ban), Rule 2 (commercial purpose rule), and Rule 4 (application requirement) as improper content-based rules. Pet. App. 61-63. The Board, however, upheld Rule 3 (signage ban), Rule 5 (designated areas rule), and Rule 6 (peak traffic rule) as valid time, place, and manner rules. Pet. App.

64-71. Member Liebman dissented as to the Board's approval of the latter three rules. Pet. App. 76-81.

4. The split Ninth Circuit decision, reversing the NLRB in part, and the NLRB's change of position on the validity of the malls' rules

On October 24, 2005, the NLRB filed a petition for enforcement of its order with the court of appeals. The Union and MPM filed cross-petitions for review. The cases were consolidated and the parties submitted briefs. On October 15, 2007, the court of appeals deferred submission until the Supreme Court of California issued its opinion in *Fashion Valley Mall, LLC v. NLRB*, which it did on December 24, 2007. 42 Cal. 4th 850, 172 P.2d 742 (2007). Pet. App. 137-38. Pursuant to a December 28, 2007 order of the court of appeals, Pet. App. 135-36, the parties filed supplemental briefs to address the impact of *Fashion Valley*.[3]

On August 25, 2008, the Ninth Circuit issued its decision: *United Brotherhood of Carpenters & Joiners of America v. NLRB*, 540 F.3d 957 (9th Cir. 2008). The court later re-issued its opinion, but only to correct an

[3] The Union and NLRB moved to strike the part of MPM's supplemental brief contending that the application of the *Fashion Valley* holding would result in a taking in violation of the Fifth Amendment. The court of appeals did not grant the motion. The brief section is provided in the appendix at pages 164 to 168.

error in the caption. Pet. App. 51-54. The panel majority rejected all six of the mall rules as follows:

Rule 1 (identification ban): The court held that Rule 1 is content-based and thus subject to strict scrutiny. The court held that Rule 1 fails strict scrutiny because its stated purpose of "protect[ing] the 'good name' of the mall and its tenants" was not a compelling interest. Pet. App. 15-16.

Rule 2 (commercial purpose rule): The court held that Rule 2 is content-based because it "requires that the regulating authority examine the content of the written material to determine whether it complies" with the rule and that the rule fails strict scrutiny because it "is entirely motivated by hostility towards messages critical of the mall or its tenants." Pet. App. 16.

Rule 3 (signage ban): The court held that Rule 3 is content-neutral, but can only be enforced if (1) it is "justified without reference to the content," (2) it is "narrowly tailored to serve a significant interest," and (3) alternative communication channels remain. Pet. App. 20-21. The court held that the ban is not narrowly tailored to promote a significant mall interest and does not leave open ample alternative means of communication. Pet. App. 24-25.

Rule 4 (application requirement): The court held that Rule 4 was invalid, albeit only to enforce Rules 1 and 2, because it requires

"examination of a speaker's message." Pet. App. 19.

Rule 5 (designated areas rule): The Union conceded that Rule 5 is content-neutral, but the court held that its ban on mall sidewalk use is not narrowly tailored to traffic flow and fire code compliance and that the sidewalk ban and distance of designated areas from the stores does not leave open ample alternative means of communication. Pet. App. 29-31.

Rule 6 (peak traffic rule): The court held that Rule 6 is content-neutral, but that the total ban during the 30 peak shopping days is not narrowly tailored to promote pedestrian traffic flow or safety, or to minimize congestion. The court also held the rule did not provide sufficient alternative means of communication because 75 percent of mall sales occur during the peak traffic days, i.e., during the holidays. Pet. App. 32-33.

Judge Callahan dissented from the majority's holding to strike down Rule 3 (signage ban), Rule 5 (designated areas rule), and Rule 6 (peak traffic rule). Pet. App. 34-35 (Callahan, J., concurring in part, dissenting in part). She concluded that each of these rules constitutes a reasonable time, place, and manner regulation, as the NLRB had found in its order. Judge Callahan asserted that, even if free speech rights are extended to expression in private shopping malls, such malls, unlike municipalities, "have an

interest in avoiding interference with the commercial purposes of property." Pet. App. 38-39.

MPM filed a timely petition for panel rehearing and rehearing en banc. Shortly thereafter, the NLRB indicated that it would no longer support Rules 3, 5, and 6, as it had in its order and in its briefing to that point. MPM moved to intervene to continue the defense of those rules. The court granted MPM's motion. Pet. App. 141.

On May 26, 2009, the panel majority, with Judge Callahan dissenting, denied MPM's petition for panel rehearing and announced that there was insufficient support on the court for rehearing en banc. Pet. App. 139-41. The court's final judgment, which incorporated a revised NLRB order to strike down all six mall rules, was entered on June 2, 2009. Pet. App. 142-59.

REASONS FOR GRANTING THE PETITION

This case raises critical, recurring questions about the extent to which a private shopping mall may limit expressive activities of third parties in the mall's common areas, particularly where those activities clash with the mall's commercial purposes and those of its tenants. Some of these questions arise under the Fifth Amendment, which generally protects private malls against unwanted invasions of their property. The other questions arise under the First Amendment, which generally protects private mall

owners in *their* exercise of speech, including their decision to refrain from speaking or sponsoring the messages of another.

The Court recognized a narrow exception to the foregoing constitutional guarantees in *PruneYard*, 447 U.S. 74. The Court held that even though the federal constitution does not require mall owners to grant the public access to mall property to engage in expressive activities, a state may impose such a requirement. The expressive activity at issue in *PruneYard*, however, was unrelated to mall business, was in support of a cause not opposed by the mall, and was not contrary to the mall's commercial interests. Also, in *PruneYard*, the California Supreme Court had indicated that malls would be permitted to adopt reasonable regulations to protect their commercial operations.

PruneYard left open the federal constitutional issues that are squarely presented here, where state law requires a shopping mall to permit third-party expressive activity that encourages conduct – here, a boycott of the mall – that the mall opposes and that conflicts with the mall's commercial interests. *PruneYard* likewise reserved the federal constitutional issues arising where state law seriously limits the extent to which the mall may adopt reasonable time, place, and manner restrictions on expressive activity. Here, for example, the Ninth Circuit has held that state law precludes a mall from either limiting expressive activities to designated areas within the

mall or prohibiting such activities on the mall's peak traffic days.

Answers to these open questions are sorely needed, not only by the thousands of private shopping malls and mall tenants that are affected, but also by those groups and individuals seeking to engage in expressive activities at malls as well as the government agencies (the NLRB in this case) charged with protecting expressive activity while limiting the conscription of private property.

I. CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT FIFTH AMENDMENT "TAKING" QUESTIONS LEFT OPEN BY THE COURT IN *PRUNEYARD*.

A. The *PruneYard* Decision, Which Permits Physical Invasions of Shopping Malls, Has Been Rejected in Several States, But Adopted in Several Others, Reflecting a Need for Guidance by this Court on the Constitutional Limits of the Doctrine.

A physical invasion of an owner's property generally constitutes a taking under the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). The "'right to exclude'" others is "universally held to be a fundamental element of the property right" in this context. *Id*.

"[A] 'permanent physical occupation' has occurred" for taking purposes if there is a continual

right to invade, even if each instance of invasion by a person or group is temporary. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987). Private property does not lose its constitutional protection, moreover, "merely because the public is generally invited to use it for designated purposes." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972).

In *PruneYard*, the Court created a narrow exception to the well-established rule that a physical invasion of private property generally constitutes a taking. The Court upheld a state law requirement that private shopping malls allow public access for expressive activity. The activity in that case, however, was in support of a cause that was not opposed by the mall or contrary to its commercial interests. In upholding the state requirement, moreover, the Court expressly limited the scope of its holding, noting that the "sort of activity" at issue – solicitation of signatures on petitions opposing a U.N. resolution against "Zionism" – *did not "impair the value" of the mall*. 447 U.S. at 83 (emphasis added). Furthermore, the Court emphasized that the California Supreme Court had provided assurances that shopping malls may "restrict expressive activity by adopting time, place, and manner regulations that will *minimize any interference with [their] commercial functions*." *Id*. (emphasis added).

The Court readily acknowledged in *PruneYard* that requiring the owner of a shopping mall to grant members of the public access to the mall's common areas to engage in expressive activities constitutes a

taking in the literal sense, but held that requiring a mall to permit non-commercial, political activities in support of a cause that is not contrary to the mall's commercial interests does not result in a compensable taking. The Court left open the question whether a state law requirement that a mall permit non-political speech that is demonstrably contrary to the mall's commercial interests and opposed by the mall might be a taking.

After *PruneYard*, the states and lower federal courts have reached conflicting decisions about the extent to which a shopping mall must permit its property to be open to the public to promote causes that are contrary, and in some cases inimical, to the mall's commercial interests. Only this Court has the power to conclusively resolve these troublesome questions.

On one end of the post-*PruneYard* spectrum, about fifteen states have protected private shopping malls from harmful physical invasions by declining to extend any state law protection to expressive activity in malls. *See Reimers v. Super Target of Grand Forks*, 363 F. Supp. 2d 1182 (D. N.D. 2005); *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (1988); *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984); *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 260 Ga. 245, 392 S.E.2d 8 (1990); *State v. Viglielmo*, 105 Haw. 197, 95 P.3d 952 (2004); *City of W. Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002); *Woodland v. Mich. Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999); *SHAD*

Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 488 N.E.2d 1211 (1985); *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981); *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 626 N.E.2d 59 (1994); *Stranahan v. Fred Meyer, Inc.,* 331 Or. 38, 11 P.3d 228 (2000); *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986); *Charleston Joint Venture v. McPherson*, 308 S.C. 145, 417 S.E.2d 544 (1992); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

At the other end of the spectrum, several other states (including California and New Jersey, which consist of about fifteen percent of the national population) have treated private shopping malls as virtually indistinguishable from municipalities in requiring them to host expressive activity even if contrary to the mall's commercial interests. *See Fashion Valley*, 42 Cal. 4th at 869-70, 172 P.3d at 754 (construing state law to require mall to offer access for a boycott of one of its stores because, according to state court, mall was a public forum); *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 362, 650 A.2d 757, 775 (1994) (construing state law to require mall to permit anti-war leafletting; malls' general invitation to the public constituted an invitation for the activity).[4] Puerto

[4] The need for guidance is even more acute in light of decisions of New Jersey courts to extend the *PruneYard* holding beyond shopping malls to include private colleges and private condominium complexes. *See State v. Schmid*, 84 N.J. 535, 423

(Continued on following page)

Rico has similarly allowed mall protests based on its understanding of malls as the new town squares – at least in a case where the mall housed a public agency to which the protest was directed. *Empresas Puertorriqueñas de Desarrollo, Inc. v. Hermandad Independiente de Empleados Telefonicos*, 2000 PRSC 71 (2000).

The Ninth Circuit opinion in this case, applying California law, is the most extreme application of *PruneYard* to date, not only requiring a shopping mall to host expressive activities endorsing a boycott of the mall and its tenant stores, but also barring it from enforcing reasonable time, place, and manner rules. *See* Pet. App. 3-6, 34.

In addition to the courts in New Jersey, California, and Puerto Rico, a number of other states, including Colorado, Massachusetts, and Washington have extended protection for expressive activity in private malls in support of non-commercial, election-related activities. *See, e.g., Strahan v. Fraier*, 156 F. Supp. 2d 80 (D. Mass. 2001); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991); *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983); *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 197 (1981); *accord*

A.2d 615 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982); *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 297 N.J. Super. 404, 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996).

Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 780 P.2d 1282 (1989) (limiting *Alderwood* to petitioning context).[5]

Despite the seemingly limited nature of the last group of cases, those states have essentially adopted the rationale underlying the decisions of the New Jersey and California courts. For example, in *Alderwood*, the Supreme Court of Washington upheld the right of an environmentalist group to solicit signatures on mall property, concluding that "[t]he only offsetting consideration is the mall owners' private autonomy interests, *which are quite minimal* in the context of shopping centers." 96 Wash. 2d at 246 (emphasis added). In any event, having required shopping malls to provide access to the public for expressive activities, these states, no less than California and New Jersey, also require guidance on the issue whether expressive activity on a mall's property that is contrary to the mall's commercial interests constitutes an unconstitutional taking of mall property.

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[5] Courts in Delaware, Florida, and Illinois have indicated a willingness to expand speech protection in large shopping malls, although cases have yet to present themselves. *See State v. Elliott*, 548 A.2d 28, 33 (Del. Super. Ct. 1988); *Publix Shopping Markets, Inc. v. Tallahasseans for Practical Law Enforcement*, No. 2004 CA 1817, 2005 WL 3673662, at *4 (Fla. Cir. Ct. Dec. 13, 2005); *People v. DiGuida*, 152 Ill. 2d 104, 126, 604 N.E.2d 336, 349 (1992).

Given the sweeping decisions in cases such as *Fashion Valley* and the present case, and the similarly sweeping *dicta* in decisions such as *Alderwood*, there is a compelling need for this Court to address the extent to which states may require malls to provide access to their facilities for non-political speech, contrary to the mall's commercial interests, without depriving the shopping mall of the protection against takings guaranteed by the Fifth and Fourteenth Amendments. As the Supreme Court of Ohio has observed, "[a] state may adopt greater protections for free speech on private property than the First Amendment does, *so long as* those broader protections do not conflict with the private property owner's constitutional rights under the First, Fifth and Fourteenth Amendments." *Eastwood Mall*, 68 Ohio St. 3d at 222, 626 N.E.2d at 60-61 (emphasis added). The question presented as to that Fifth Amendment limit affects numerous states, with millions of citizens and thousands of businesses involved. It is a pressing one that cries out to the Court for an answer.[6]

[6] Certiorari was denied in *Fashion Valley Mall, LLC v. NLRB*, 129 S. Ct. 94 (2008). MPM submits that the present case offers stronger reasons for a grant of certiorari than did *Fashion Valley* because it raises multiple issues not present in *Fashion Valley*, including the proper test for determining content-neutrality and, as described below, the rejection of reasonable time, place, and manner restrictions.

B. The Ninth Circuit's Approach to the Unanswered Questions of *PruneYard* Ignores Fundamental Differences Between Public and Private Property Under the Fifth Amendment.

1. The Ninth Circuit's decision should be reviewed because it prevents a mall from barring expressive activities that are inimical to the mall's commercial interests.

As explained by the dissent in *Fashion Valley*, 42 Cal. 4th at 878, 172 P.3d at 760 (Chin, J., dissenting), private property owners should not be prevented from "controlling expressive activity on their property . . . that is *inimical* to the purpose for which the property is being used." Promoting business on private property "is not only a compelling interest, it is the property owner's primary concern; doing business is the reason the shopping center exists." *Id.* at 881, 172 P.3d at 762; *see also Union of Needletrades, Indus. & Textile Employees v. Superior Court (UNITE)*, 56 Cal. App. 4th 996, 1000, 65 Cal. Rptr. 838 (Ct. App. 1997) (upholding mall's right to review speakers' written materials to prevent interference with mall's commercial purpose; "the right to conduct expressive activities in a shopping center is not absolute"). As the Supreme Court of Wisconsin has observed, a private mall "concerns itself only with one facet of its patrons' lives – how they spend their money." *Jacobs*, 139 Wis. 2d at 523.

Justice Black captured the point in his dissent in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), where the majority had required handbilling at a private shopping center under the First Amendment. He wrote: "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." *Id*. at 332-33 (Black, J., dissenting). In *Lloyd*, 407 U.S. 551, the Court abrogated its holding to the contrary, thereby vindicating Justice Black. *Id.* at 562-63, 565; *see Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) (noting abrogation of *Logan Valley*).

PruneYard distinguished *Lloyd*, but it did not go nearly so far as the Ninth Circuit opinion in this case or the California Supreme Court's 4-3 holding in *Fashion Valley*, which both sanction a physical invasion of the owner's property for the purpose of engaging in activities that are directly contrary to the owner's commercial interests. An isolated petition to the United Nations by a group of high school students that is merely marketed on mall property, as in *PruneYard*, is quite different than a concerted effort by union professionals to bring mall business to a halt.

The facts in this case demonstrate the need for an approach to takings analysis that permits courts to give meaningful consideration to a shopping mall's

commercial interests before upholding a state-sanctioned invasion of mall property. At a minimum, in applying the "compelling state interest" test to private businesses, it seems both logical and proper to replace the word "state" with the word "business" when evaluating the validity of regulations of expressive activity. *See Fashion Valley*, 42 Cal. 4th at 881, 172 P.3d at 762 (Chin, J., dissenting) (positing that, when applied to private businesses, "[t]he compelling *state* interest test would have to yield to . . . [a] 'compelling landowner interest' test"). As the Court pointed out in *PruneYard*, "the Taking Clause requires an examination of whether the restriction on private property forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 447 U.S. at 83 (internal quotation marks and alterations omitted).

Applying these general principles to this case, MPM's Rule 2, which bans signs and written materials that interfere with the "commercial purpose" of the mall, is a constitutionally-protected exercise of property rights and the Ninth Circuit's decision invalidating Rule 2 therefore improperly sanctions a taking of mall property. Likewise, the Ninth Circuit's invalidation of Rule 1, which protects against identification of the mall and its stores, similarly interferes with the mall's commercial interests and, therefore, constitutes an unconstitutional taking. To the extent that Rule 4's application process supports Rules 1 and 2, that rule should similarly be constitutionally protected.

2. The Ninth Circuit's test for determining whether a mall's rules are "content-neutral" should be reviewed because it prevents malls from "examining" expressive activities in attempting to regulate such activities.

The test applied by the Ninth Circuit to determine whether a mall's rules are "content-neutral" under California law effectively precludes mall owners from rejecting *any* expressive activities based on content, once again bringing California state law into conflict with the mall's Fifth Amendment property rights. Under the test articulated by the Ninth Circuit to determine whether a mall's rules are content-neutral, a mall may not "examine" the content of proposed expressive activities for *any* business purpose. Pet. App. 13. The Ninth Circuit applied this test to strike down Rule 1 (precluding expressive activities that identify the mall or its tenants) and Rule 2 (precluding use of written materials that interfere with the "commercial purpose" of the mall), holding that because the implementation of the rules requires the mall to examine the content of the proposed expressive activity, the rules are invalid under the "strict scrutiny" test applied to strike down state action in First Amendment cases. Pet. App. 14-17.

The Ninth Circuit's test for determining whether a mall's rules are "content-neutral" merits review by this Court. A shopping mall has a compelling interest

in *examining* speech for many legitimate purposes, including the prevention of activities designed to bring about the destruction of its business or to provoke disturbances on mall property. As explained by the dissent in *Fashion Valley*, if the speech is directly contrary to the mall's commercial interests, the mall has a valid basis for excluding the speech. 42 Cal. 4th at 880-81, 172 P.3d at 761-62; *see also UNITE*, 56 Cal. App. 4th at 1018, 65 Cal. Rptr. 2d at 838 ("wearing its hat as a center of commerce, [a mall] has the right (if not the obligation) to take steps to avoid a breach of the peace which is substantially likely to flow from [a speaker's] use" of illicit or inflammatory materials likely to provoke a disturbance on the mall's property).

Under the Ninth Circuit's test, a mall owner would be unable to engage in the following conduct, all of which is consistent with protecting the mall's commercial interests and many valid public policies:

- Examining speech to determine if it is a pretext for unfair competition (e.g., advertising or other commercial promotions by third parties, appropriation of name or likeness)
- Examining speech relating to a boycott to confirm that it is not illegal secondary boycott activity under federal labor law
- Examining speech to determine if it is defamatory
- Examining speech to determine if it violates common law privacy rights, such as public

disclosure of private facts or presentation in a false light

Examining speech to determine whether it is obscene, contains fighting words, grisly displays inappropriate for a shopping mall, racial or ethnic slurs likely to provoke a disturbance, or violates civil rights laws

Such blind application of the content-neutrality test to private shopping malls ignores the fundamental nature and purposes of such entities and exceeds the limited scope of *PruneYard*.

Worse yet, the Ninth Circuit's test imposes a standard of free speech accommodation that even the government itself is not required to meet. The government is allowed to regulate commercial speech, outlaw secondary boycotts, protect citizens against defamation, and proscribe fighting words or obscenity. *See Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) (secondary boycotts); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). Under the Ninth Circuit's test, however, private shopping malls are not afforded the same privilege in analogous situations.

Moreover, even if it were otherwise appropriate to treat private shopping malls as state actors for free speech purposes, the court of appeals also mistakenly

equates shopping malls to traditional public forums or designated public forums that otherwise are subject to such scrutiny. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983). The comparison is inapt.

In *Perry*, the Court reserved strict scrutiny to "places which by long tradition or by government fiat have been devoted to assembly and debate" or to "public property which the state has opened for use by the public as a place for expressive activity." *Id.* at 45. The Court distinguished these two types of forums from more limited public forums, particularly those where business is conducted, in which a much lower level of scrutiny is applied. *Id*. at 46-47. When the state acts as a proprietor rather than a regulator, it is given wide discretion. As such, the regulation need only be reasonable and viewpoint neutral. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Pertinent examples of limited public forums have included airports, city buses, and the federal workplace. *See id*. (airports); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (federal workplace); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (city transit systems).

As the Court observed in *Adderley v. Florida*, 385 U.S. 39, 47 (1966), "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." If private mall owners are to be subjected to the same burdens as the government, they should

at least share the same level of discretion in conducting their affairs as does the government.

3. The Ninth Circuit's broad rejection of commercially reasonable time, place, and manner rules gives rise to a taking in this case and sets a harmful precedent in support of takings in many others.

In allowing a limited physical invasion of private property in *PruneYard*, the Court relied upon the state's assurances that the shopping mall "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." 447 U.S. at 83.

The constitutional test for time, place, and manner rules is that they must (1) be content-neutral, (2) be narrowly tailored to serve a significant interest, and (3) leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This "intermediate scrutiny" test balances the regulation at issue, and the purpose to which it is directed, with the level of speech affected and the alternatives available.

In *PruneYard,* the expressive activity at issue was orderly and limited to common areas, and contained a message not otherwise hostile to mall operations. The same cannot be said in the present case. Here, in rejecting Rule 3 (signage ban), Rule 5

(designated areas rule), and Rule 6 (peak traffic rule), the Ninth Circuit not only misunderstood the nature of the rules, it improperly substituted its own judgment for that of the malls, in violation of *Ward*.

The "signage ban" is not in fact a ban, but a limit on size and placement – i.e., signs must be smaller than twenty-two by twenty-eight inches and mounted on tables – so as not to block or compete with commercial activities. The "designated areas rule" does not place expressive activity hundreds of yards from the public, but rather limits it to reasonable places to minimize disruption and congestion; the areas were in fact close to the targeted stores in this case. The peak traffic rule is not a tactic to keep expressive activity at bay, but a response to predictable safety and congestion problems that arise at certain times of the year, like the holiday season. Versions of such rules had previously been sanctioned in California courts. *See Costco Cos., Inc. v. Gallant*, 96 Cal. App. 4th 740, 753, 117 Cal. Rptr. 344 (Ct. App. 2002) (peak traffic days); *UNITE*, 56 Cal. App. 4th at 1010, 1014, 65 Cal. Rptr. at 838 (designated areas peak traffic days); *H-CHH Assocs. v. Citizens for Representative Gov't*, 193 Cal. App. 3d 1193, 1216, 1220, 238 Cal. Rptr. 841 (Ct. App. 1987), *disapproved on other grounds by Fashion Valley*, 42 Cal. 4th at 869 n.12, 172 P.3d at 754 n.12 (sign and peak traffic limits).

In *Ward*, the Court stressed that in assessing time, place, and manner rules, courts must defer to the reasonable determination of the regulator as to

whether a rule meets a stated property interest. 491 U.S. at 799. Moreover, as Judge Callahan observes in dissent, contrary to the majority's approach, shopping malls have different interests than municipalities. "Private property owners have an interest in avoiding interference with the commercial purposes of property." Pet App. 38-39 (Callahan, J., concurring in part, dissenting in part); *see also In re Hoffman*, 67 Cal. 2d 845, 852 n.6, 64 Cal. Rptr. 97, 101 n.6 (1967) (holding that "any appreciable interference with the orderly carrying on of business may suffice" to support expression limits in a rail station). In his concurring opinion in *PruneYard*, Justice Powell included "substantial annoyance to customers" as a factor that distinguishes legitimate private mall interests from those of a public square. 447 U.S. at 96 (Powell, J., concurring).

Even if a property owner has an obligation under state law to permit expressive activities on its property that are contrary to the owner's commercial interests and those of its many tenants, the owner should have the right to impose reasonable, content-neutral rules on usage of the property, including those that require visitors to not block or compete with mall activities, stay within designated areas, and limit their activities to off-peak times. If not, the mall effectively has no right to regulate its property to prevent inconvenience, annoyance, and perhaps even relevant harm to mall patrons, all of which would jeopardize the purposes of the mall and its tenants and their duties to all visitors.

C. Resolving the Constitutional Question of Private Property Ownership in this Case is Critical to Effective and Peaceful Labor-Management Relations Under the NLRA.

The NLRA is designed to promote industrial peace, *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401 (1952), and the NLRB is chiefly responsible for the development and application of national labor policy, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

In the present context, "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Consequently, "the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights." *Hudgens*, 424 U.S. at 521. In fulfilling its proper role it is therefore critical that the Board be equipped with a clear and consistent standard so as to protect collective labor activity within a constitutional system that protects private property from physical invasions.

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court held that state law, and not federal labor law, largely determines whether or not non-employee unions can access company property. *See id.* at 535.

However, the Court's deference to states in *Lechmere* does not foreclose other federal limits on property access (e.g., protections of time, place, and manner, or distinctions based on the type of property at issue). The NLRB is not immune from the requirements of the Fifth Amendment.

The Ninth Circuit's ruling fosters the undue expansion of NLRB authority through the constitutional violations described above. This case is not merely a free speech case, but is also a labor dispute ultimately governed by federal law. The non-representative union's activities were not limited to peacefully passing out leaflets, but included active picketing and a boycott that could have resulted in illegal secondary activity, or worse. Clear direction from the Supreme Court is needed to ensure that the NLRB properly handles free speech matters that potentially impair private property rights.

One need only consider the differences between the ALJ's opinion, the majority finding and partial dissent at the NLRB, and the majority holding and partial dissent at the court of appeals – not to mention the call for supplemental briefing after *Fashion Valley* – to conclude that guidance is needed. Indeed, the NLRB itself showed a lack of comfort with the current system by switching its position on the time, place, and manner rules at the rehearing stage after having defended them at every earlier point of the litigation.

The constitutional stakes are too high to vest the NLRB with unfettered discretion to decide the important constitutional law issues raised herein.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE MOUNTING TENSION BETWEEN THE STATE FREEDOMS OF SPEECH RECOGNIZED IN *PRUNEYARD* AND A MALL'S FIRST AMENDMENT RIGHT TO REFRAIN FROM SPEAKING.

As Justice Powell asserted in his concurrence in *PruneYard*, "state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." 447 U.S. at 97 (Powell, J., concurring). Although Justice Powell did not find enough of a conflict between the speech and property interests at issue in *PruneYard*, he argued that requiring a property owner to subsidize speech that is antithetical to the owner's interest could place the owner "in an intolerable position." *Id*. at 99. The Ninth Circuit's rejection of MPM's rules (particularly Rules 1, 2, and 4) presents the very dilemma predicted by Justice Powell and left open by *PruneYard*. In his dissent in *Fashion Valley*, Justice Chin described activity similar to the Union's here as follows: "Urging a boycott of [a mall's] businesses contradicts the very purpose of the shopping center's existence." 42 Cal. 4th at 870, 172 P.3d at 755 (Chin, J., dissenting).

The Ninth Circuit's ruling violates MPM's rights under the First Amendment by requiring it to effectively sponsor messages on its own property that are inimical to its commercial purpose. Likewise, the Ninth Circuit's "content-neutral" analysis of the malls' rules fails to recognize that a shopping mall may have expressive interests of its own. One scholar recently observed that, through the approach adopted by the state supreme court in *Fashion Valley* and thereby the Ninth Circuit in this case, "California obliges the commercial landowner to serve as the host for his own roasting." 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, 396 (2009).

MPM's argument finds further support in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995), in which the Court unanimously held that, under the First Amendment, a state could not require private parade organizers to include a third-party's banner which contained a message with which the organizers disagreed. The Court observed that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id*. at 576.

The "forced speech" aspect of the First Amendment is also reflected in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), where the Court held that a state cannot

require inclusion of a message from a third party with an energy company's bill, and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where the Court struck down a right-of-reply statute that the state attempted to impose on newspapers. In *Pacific Gas*, the Court observed that such First Amendment protection applies to corporations as well as individuals: "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." 475 U.S. at 16.

In *PruneYard*, the Court held that the First Amendment did not protect the mall there because (1) it was open to the public and therefore it was unlikely that the activity would be identified with the mall owner, (2) the state did not require any particular message, and (3) the mall had the ability to "disavow any connection with the message." 447 U.S. at 87. In *Pacific Gas*, however, the Court emphasized that, "[n]otably absent from *PruneYard* was any concern that access to [the mall] area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based." 475 U.S. at 12; *see also Hurley*, 515 U.S. at 580 (citing *Pacific Gas* in distinguishing *PruneYard* because, *inter alia*, the owner there did not object to the speech at issue). The same cannot be said for the activity in the present case, which involves speech that directly attacks the very purpose for which the malls exist.

As the Court observed in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the right to free speech includes the "right to refrain from speaking at all." In *PruneYard*, the Court held that this right to silence was not violated in the context of a shopping mall where it had the opportunity to respond. 447 U.S. at 88. However, by being forced to respond, the mall may actually offend many of its tenants' customers, thereby potentially damaging its own commercial interests as well as those of its tenants. Indeed, "private landowners suffer a loss of their free speech rights when forced to open their doors to controversial social or political expression, including opinions that they – or in the case of commercial enterprises, their customers – may find offensive." Sisk, *supra*, at 394. Perhaps, as in *PruneYard*, a mall can waive such rights if it does not object to the speech at issue. But that does not mean that the rights do not exist.

As Justice Powell observed in his concurring opinion in *PruneYard*, the rule in *Wooley* is implicated when a property owner finds the ideas being communicated on his property "objectionable enough to compel a response." 447 U.S. at 100 (Powell, J., concurring). Justice Powell cited a union being "compelled to supply a forum to right-to-work advocates" as but one example. *Id*. at 99. MPM would submit that a boycott of its entire operation would similarly demand a response. Furthermore, to the extent that the Union's activity targeted the practices of one of its tenants, it is also understandable that MPM would prefer not to get involved at all – the

right to neutrality is one of the chief reasons behind the NLRA's prohibition of secondary activity. *See NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692 (1951) (describing the "shielding [of] unoffending employers and others from pressures in controversies not their own" as a main objective of 29 U.S.C. § 158(b)(4)).

The Union's activity in this case was not isolated or temporary. It was a concerted effort to boycott the malls and their stores. MPM appreciates its state law responsibility to allow orderly expression that is not hostile to mall business, pursuant to *PruneYard*. It similarly recognizes the rights of mall employees to organize and to engage in collective action, including action on mall property, pursuant to *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Neither situation lies here.

The Ninth Circuit's opinion undercuts MPM's message to the public to come and shop in a safe, secure, and welcoming environment. As such, it violates the malls' rights to free speech under the First and Fourteenth Amendments.

CONCLUSION

For all of the foregoing reasons, MPM respectfully submits that this Petition for a Writ of Certiorari should be granted.

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