

No. 25-1322

IN THE
Supreme Court of the United States

MAJESTIC REALTY CO., *et al.*,

Petitioners,

v.

ALEX SALAZAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL FOR THE SECOND DISTRICT

**BRIEF *AMICUS CURIAE*
OF THE GOLDWATER INSTITUTE
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Should *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), be overruled?

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INTEREST OF AMICUS CURIAE¹

The Goldwater Institute (“GI”) is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients’ objectives are implicated. Among GI’s priorities is the degree to which states can protect individual rights more broadly than does the federal government. GI has often appeared, both as amicus and representing parties, in state and federal courts to address such matters. *See, e.g., State v. Beaver*, 887 S.E.2d 610 (W. Va. 2022) (state protection of right to education); *State v. Mixton*, 478 P.3d 1227 (Ariz. 2021), *cert. denied*, 142 S. Ct. 184 (2021) (state protection of privacy rights); *Ladd v. Real Est. Comm’n*, 230 A.3d 1096 (Pa. 2020) (state protection of economic freedom); *Jackson v. Raffensperger*, 843 S.E.2d 576 (Ga. 2020) (state protection of economic freedom); *Yim v. City of Seattle*, 451 P.3d 675 (Wash. 2019) (state protection of property rights); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (state protection of free speech).

GI scholars have also published important research on the degree to which state constitutions can protect rights

1. Pursuant to Rule 37.6, counsel for amicus affirms that no counsel for any party authored this brief in whole or part and no person or entity, other than amicus, their members, or counsel, made a monetary contribution toward its preparation or submission. All parties received notice of amicus’ intention to file at least ten days before the due date.

more broadly than does the federal Constitution. *See, e.g.*, Christina Sandefur, *Safeguarding the Right to Try*, 49 Ariz. St. L.J. 513 (2017); Timothy Sandefur, *State Powers and the Right to Pursue Happiness*, 21 Tex. Rev. L. & Pol. 323 (2017); Nicholas C. Dranias, *50 Bright Stars: An Assessment of Each State's Constitutional Commitment to Limited Government*, Goldwater Inst. Policy Report No. 233 (Sept. 17, 2009).²

GI believes its legal experience and public expertise will assist this Court in deciding this petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Since this Court's opinion in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the jurisprudence of free speech has suffered from a major internal contradiction: specifically, while the Constitution protects the right to speak, and, of course, the right not to speak, private property owners are often effectively forced against their will to speak or at least facilitate speech by allowing others to speak on their land, even though these property owners would prefer not to allow this. That, indeed, is what the California Supreme Court held in *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979), and which this Court declared unobjectionable in its own *PruneYard* ruling.

Both rulings were wrong, however, and in the years since, the theory endorsed by *PruneYard* – that freedom of

2. <https://www.goldwaterinstitute.org/wp-content/uploads/2014/11/09.17.20092c-50-bright-stars-Report.pdf>.

speech can be construed as compelling property owners to allow others to speak on their land – has been rejected by multiple state courts and drastically undermined by this Court in cases such as *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). It’s time now for the Court to overturn it.

Yes, states have power to provide greater protections for individual rights than are accorded by the federal Constitution. But they may not do so in a way that violates the individual rights of others – as the California mandate in *PruneYard* did. By blessing laws that contradict that principle, *PruneYard* set the stage for confusion and legal inconsistency that has plagued the law ever since. In fact, *PruneYard*’s incoherence has led most state courts to reject it, and even in California, where *PruneYard* was born, courts have limited it significantly, due to the fact that it authorizes the violation of speech and property rights, and leads to arbitrary and irrational results.

Property owners have both the moral and constitutional right to decide what messages they will let their property be used to propagate. To deprive them of these rights is wrong and unconstitutional, and cannot be rationalized by labeling such intrusions an “expansion” of “rights” – because there can be no right to trespass on another’s property for purposes of self-expression. *PruneYard* contradicts the Fifth Amendment, is poorly theorized, and is obsolete. The Court should take this case to overrule it.

REASONS FOR GRANTING THE PETITION

I. *PruneYard* was wrong when it was decided and is anomalous today.

A. *PruneYard* is incoherent and has been accordingly rejected by many state courts.

In *PruneYard*, this Court affirmed a California Supreme Court decision (592 P.2d 341) concerning a shopping center whose owner sought to bar a group of petition circulators from gathering signatures relating to a United Nations resolution about Syria. The petitioners sued in state court, and the state's high court held that California's state constitutional guarantee of free speech, being more broadly worded than the federal First Amendment, entitled the petitioners to enter someone else's land to express themselves against the owners' will. (592 P.2d at 347.) It reached that conclusion on the theory that shopping malls had become the modern equivalent of the public square or the community at large. This Court then said that the California court's ruling did not deprive the owner of his federal property or speech rights, and that the owner was not entitled to compensation. *PruneYard*, 447 U.S. at 82–85, 87–88.

The result is a fatally flawed jurisprudence that is increasingly anomalous today and has led to incoherent results. This Court should overrule its *PruneYard* decision.

The state court's reasoning was incoherent from the outset, and most other courts to consider the question have subsequently rejected its notion that free speech includes

a right to trespass. Indeed, California itself has drastically limited *PruneYard* in the years since. Even its original decision dimly recognized the unworkability of the idea that one person can have a free-speech right to trespass on another person’s constitutionally protected property, and tried in vain to cushion the rule by insisting that the decision was not giving “free rein” to all speakers. *See* 592 P.2d at 347. The court claimed that the purported constitutional right-to-trespass was limited to only the “reasonably exercised” right to circulate petitions for ballot initiatives, because initiatives are part of the California political system. *Id.* at 347, 345. But that effort to pull punches did not work, for several reasons.

First, that purported distinction was a content-based speech distinction: it granted a trespass right to some speakers and not others, based on the content of the messages those trespassers wished to communicate. Second, the court gave no clue as to what “reasonably exercised” means. Similarly, it said that this right-to-trespass would not apply to “modest retail establishment[s],” *id.* at 347, although it gave no guidance as to how to differentiate “modest” from not-so-modest establishments, or why retail should be treated differently from wholesale. *See Bank of Stockton v. Church of Soldiers*, 52 Cal. Rptr.2d 429, 433 (App. 1996) (noting that the state supreme court “has never elaborated on” what this category means). Third, although the court claimed its rule would not require mall owners to submit to trespasses that “interfere with normal business operations,” 592 P.2d at 347–48, it later said that *PruneYard* requires “a privately owned shopping center [to] permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center’s business

interests.” *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 750 (Cal. 2007).³ That was because the court thought those particular speakers had “a strengthened interest” in their speech. *Id.*

In other words, California courts have struggled since the day *PruneYard* was decided to draw the lines between the rights of property owners and the constitutional right-to-trespass that *PruneYard* authorized.

For example, in *Trader Joe’s Co. v. Progressive Campaigns, Inc.*, 86 Cal. Rptr.2d 442 (App. 1999), the court was forced to decide whether Trader Joe’s – a chain of stores, each of which is relatively small – was a “‘behemoth’ shopping center,” *id.* at 444, as the plaintiffs claimed, or only a “modest” establishment. It ultimately chose the latter, after consulting such factors as the square footage, the number of shopping carts in the parking lot, and the fact that it had no cinema (as the mall in *PruneYard* did). It is plainly absurd for constitutional rights to hinge on such matters. Worse, other California courts have said that quite large facilities, such as a two-story medical office with a pharmacy and a sizeable parking lot, are also “modest,” and thus exempt from the *PruneYard* principle. *See, e.g., Feminist Women’s Health Ctr. v. Blythe*, 39 Cal. Rptr.2d 189 (App. 1995).

The reason the California Supreme Court felt compelled to hedge its *PruneYard* opinion with these (vague and permeable) boundaries is precisely because it

3. The *Fashion Valley Mall* case, of course, antedates this Court’s contrary decision in *Cedar Point Nursery*.

recognized that, taken to its logical conclusion, the right-to-trespass notion would mean the elimination of property rights entirely. But the ambiguity of these purported limits obviously rendered them inadequate. Witness the constant struggles by California’s courts to decide when property owners do and don’t have the right to exclude others.⁴

This makes it unsurprising that most states have rejected California’s attempt (blessed by this Court) to create what Washington’s Supreme Court called “*an entirely new kind* of free speech right – one that can be used not only as a shield by private individuals against actions of the state but also as a sword against other private individuals.” *Southcenter Joint Venture v. Nat’l Democratic Pol’y Comm.*, 780 P.2d 1282, 1286 (Wash. 1989) (emphasis in original).

Indeed, along with Washington, states that have refused to follow California in making constitutional speech rights into a sword against private property owners include Alaska,⁵

4. Recall that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Cedar Point Nursery*, 594 U.S. at 150 (citation omitted). *Cedar Point*, of course, reversed a Ninth Circuit ruling which upheld a right-to-trespass based on the *PruneYard* principle. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 531–32 (9th Cir. 2019).

5. *Fardig v. Mun. of Anchorage*, 785 P.2d 911, 915 (Alaska App. 1990).

Arizona,⁶ Connecticut,⁷ Georgia,⁸ Hawai'i,⁹ Illinois,¹⁰ Iowa,¹¹ Michigan,¹² Nevada,¹³ New York,¹⁴ North Carolina,¹⁵ Pennsylvania,¹⁶ South Carolina,¹⁷ Texas,¹⁸ and Wisconsin.¹⁹

6. *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 723 (Ariz. App. 1988).

7. *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1208–10 (Conn. 1984); *see also United Food & Com. Workers Union v. Crystal Mall Assoc., L.P.*, 852 A.2d 659 (Conn. 2004).

8. *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., L.P.*, 392 S.E.2d 8, 10 (Ga. 1990).

9. *State v. Viglielmo*, 95 P.3d 952 (Haw. 2004).

10. *People v. DiGuida*, 604 N.E.2d 336, 346–47 (Ill. 1992).

11. *City of W. Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002).

12. *Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 358 (Mich. 1985).

13. *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 250–51 (Nev. 2001).

14. *SHAD All. v. Smith Haven Mall*, 488 N.E.2d 1211, 1215–16 (N.Y. 1985).

15. *State v. Felmet*, 273 S.E.2d 708 (N.C. 1981).

16. *W. Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A.2d 1331, 1338 (Pa. 1986).

17. *Charleston Joint Venture v. McPherson*, 417 S.E.2d 544, 548 n.7 (S.C. 1992).

18. *Zarsky v. State*, 827 S.W.2d 408, 411–12 (Tex. App. 1992).

19. *Jacobs v. Major*, 407 N.W.2d 832, 842 (Wis. 1987).

The reason they have given is the basic “compossibility” problem with *PruneYard*. That is, one necessary element for the acceptability of any purported individual right is that it is “compossible” with other rights – i.e., that one person can exercise her rights while another person exercises hers. Hillel Steiner, *The Structure of a Set of Compossible Rights*, 74 J. Phil. 767 (1977). Only when rights are poorly formulated – that is, when one alleged right is not actually a right in the first place – do they come into intractable conflict, as with the purported “right” of speakers to trespass on the property of another. Poorly formulated rights-claims make conflict inevitable. And courts rejecting the *PruneYard* principle have remarked upon this in various ways.

The Pennsylvania Supreme Court, for example, observed that to view free speech as entitling a person to use or enter the property of another for expressive purposes would not only “deprive individuals of important rights of freedom” – specifically, depriving property owners of their right to express themselves by excluding those they disagree with – but would make “significant governmental intrusion into private individuals’ affairs and relations [more] . . . likely to routinely occur.” *Conn. Gen. Life Ins. Co.*, 515 A.2d at 1335.

And the Connecticut Supreme Court observed that the *PruneYard* principle is so unworkable that it forced courts to distinguish between different kinds of property, such as “modest” stores and “large” ones, and to apply different rules to both – whereas “[w]e are unable . . . to discern any legal basis distinguishing this commercial complex from other places where large numbers of people congregate, affording superior opportunities for

political solicitation, such as sport stadiums, convention halls, theatres, country fairs, large office or apartment buildings, factories, supermarkets or department stores.” *Cologne*, 469 A.2d at 1209.

B. This Court has struggled in vain to make sense of *PruneYard*.

It obviously violates the private property rights of a landowner to compel her against her will to let another onto her land to speak – as this Court acknowledged in *Cedar Point Nursery*, 594 U.S. at 158–62. Labeling such a trespass a “speech right” under the state Constitution does not change this; after all, the purported right to trespass at issue in *Cedar Point* was *also* granted by state law. And when such a trespass goes uncompensated, it is the equivalent of a compelled subsidy from the owner to the speaker – in the form of the absent just compensation – which is also unconstitutional. *See, e.g., Janus v. AFSCME*, 585 U.S. 878, 893 (2018).

This Court confronted a similar question in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) – where it (inevitably) found *PruneYard* a stumbling block. In that case, the state sought to force social media companies to convey messages they did not agree with, in violation of their First Amendment rights. In declaring this unconstitutional, the Court tried to distinguish *PruneYard* on the grounds that “the compelled access” in *PruneYard* “did *not* affect the complaining party’s own expression,” because “[t]he mall owner did not claim that he (or the mall) was engaged in any expressive activity” with which the trespassing speaker interfered. *Id.* at 730. But that distinction doesn’t work, because this Court has recognized that “expressive

activity” also includes the “freedom not to speak,” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985), and a right not to be forced “to subsidize a private message with which [one] disagree[s].” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005). The fact that the mall owner did not claim to be engaging in expression is irrelevant, because he had the constitutional right not to engage in any expression at all – or to subsidize the speech of the trespassing speaker.

Indeed, in *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 584 U.S. 617 (2018), the Court rejected the idea that compulsory subsidization of speech is somehow rendered constitutionally acceptable by the fact that (in *Moody*’s words) “compelled access [does] not affect the complaining party’s own expression.” 603 U.S. at 730. In *Masterpiece Cakeshop*, the Colorado state court held that the bakery owner could be forced to bake a cake celebrating a same-sex wedding, because nobody would think that his doing so was endorsement of the message – and it cited *PruneYard* for that proposition. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 ¶ 63 (Colo. App. 2015). But this Court said that factor did not justify the right-to-trespass theory of speech that the Colorado courts had endorsed. Indeed, Justices Thomas and Gorsuch said “this Court has never accepted” such an idea. 584 U.S. at 661 (Thomas and Gorsuch, JJ., concurring). But that’s not quite true – the Court *did* accept it, in *PruneYard*.

In other words, efforts to keep *PruneYard* on the books require unpersuasive and strained re-interpretations of that case, and *Masterpiece Cakeshop* shows why the *Moody* Court’s effort to that effect was so unconvincing.

The *Moody* Court – by upholding the First Amendment’s “protection” against being forced “to accommodate messages [one] would prefer to exclude” – was actually contradicting *PruneYard*, and necessarily so, because the right-to-trespass theory of speech is incompatible with such protections. 603 U.S. at 710. Had the *Moody* Court faithfully enforced the *PruneYard* rule, it would have been confronted with a rash of unwieldy line-drawing problems exactly like those California courts have been forced to deal with in the past half-century: what kinds of messages are worthy of entitling a speaker to override someone else’s property rights? What kinds of social media companies are big enough to be stripped of their property rights in this way – and which are the equivalent of “modest retail establishment[s]”? 592 P.2d at 347. These problems are intractable – precisely because *PruneYard* is incoherent.

C. Even California courts have tried and failed to make *PruneYard* work.

In fact, these and similar problems are *so* intractable that California courts have *themselves* striven in vain to interpret and to limit *PruneYard*. In *Golden Gateway Center v. Golden Gateway Tenants Ass’n*, 29 P.3d 797 (Cal. 2001), a plurality of the California Supreme Court held that *PruneYard* did not entitle a tenants’ association to distribute its newsletter in a privately owned apartment complex²⁰ – and in the process, it criticized and limited

20. *But see Guttenberg Taxpayers & Rentpayers Ass’n v. Galaxy Towers Condo. Ass’n*, 688 A.2d 108 (N.J. App. Div. 1996) (holding, based on *PruneYard* principle, that outside political solicitors have right to express themselves in a residential complex against owner’s wishes).

the *PruneYard* decision. Noting that *PruneYard* had been “less than clear” about what kinds of speech would entitle a speaker to trespass, or what kinds of property could be trespassed upon, *id.* at 801, it set out to “rectify[]” *PruneYard*’s errors. *Id.* at 809. *See also Fashion Valley Mall*, 172 P.3d at 757 (Chin, J., dissenting) (“*PruneYard* was controversial when decided. In the three decades since then, it has received scant support and overwhelming rejection around the country.” (citation omitted)).

Most significantly, *Golden Gateway* recognized that interpreting one person’s speech rights as permitting trespass onto the land of another undermines “private autonomy” and “den[ies] to individuals the freedom to make certain choices” – specifically, the right of property owners to say no to speakers of whose messages or conduct they disapprove. 29 P.3d at 808 (quoting Laurence Tribe, *American Constitutional Law* 1691 (2d ed. 1988)).

The pivotal point in *PruneYard*’s reasoning, said the *Golden Gateway* plurality, lay in its assertion that a shopping mall is the “functional equivalen[t]” of a public area or forum due to “the public’s unrestricted access to the privately owned property.” *Id.* at 809. Thus, the court said, where a property owner “limits access” – as the owner in *Golden Gateway* did – the *PruneYard* principle could not apply. *Id.* at 810.²¹

21. The court was also careful to reject the *PruneYard* decisions’ claim that government involvement in restricting access – through an injunction, for example – could not qualify as the kind of state action triggering the First Amendment or other constitutional provisions: “[that] would effectively eviscerate the state action requirement because private property owners, for the most part, enforce their property rights through court actions.” *Id.* at 811.

Consequently, in *Albertson's, Inc. v. Young*, 131 Cal. Rptr.2d 721 (App. 2003), the California Court of Appeal also refused to extend the *PruneYard* principle to a group of petition circulators who stood at entrances to a grocery store. It remarked on the vagueness of the multi-factor “balancing” that *PruneYard* requires: “in balancing the competing interest of the owner and society,” it observed, “no single factor is determinative.” *Id.* at 731–32. Instead, “[t]he extent to which private property is actually used for expressive purposes by members of the public is relevant, together with all of the surrounding circumstances.” *Id.* at 737. But as the number of factors to be considered increases, the subjectivity and unpredictability of the law increases, too. See Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989) (“at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law”).

In sum, the *PruneYard* principle generates so many intractable problems that it invites – even requires – judicial policymaking. It requires courts to decide which speech is important enough (in the court’s eyes) to entitle speakers to trespass, what kinds of property are valuable enough (in the court’s eyes) to entitle owners to exercise the right to exclude, and then to weigh these factors in light of (the court’s own views of) public policy.

These and other problems arise from the *PruneYard* principle’s fundamental flaw: its violation of the compossibility requirement. As Justice Chin observed in calling for the overruling of that case, “free speech

rights and private property rights can and should coexist.” *Fashion Valley Mall*, 172 P.3d at 760 (Chin, J., dissenting). They *can* coexist – but only by following the compossibility requirement. Speakers have a right to speak, but *not* on the property of another. In the case of real property, would-be speakers wishing to express themselves “simply [have] to do so on public property or seek permission from private property owners.” *Id.* Or, of course, they can use their own property, or pursue other means, of which there is no shortage in the age of social media, including websites, blogs, etc.

The *PruneYard* principle has many other fatal objections. As Gregory Sisk observed in an especially cogent analysis, the result of blurring the state action doctrine by interpreting constitutional rights as applicable to private as well as public actors is typically that it dilutes the nature of the right. *Uprooting the PruneYard*, 38 Rutgers L.J. 1145, 1202 (2007). Because courts will anticipate that the speech doctrines they develop must also apply to private parties, they will tend to shape such doctrines in accordance with the needs of those private parties – yet these differ from the considerations that should apply to the government. For example, courts typically don’t “elevate efficiency and order, much less good etiquette, above liberty in the constitutional hierarchy of values,” but they might do so if they know that their precedents will govern private as well as public entities. *Id.* at 1203.

The result would be to embed these considerations in speech jurisprudence in ways that “infect judicial evaluation of the public sphere,” too. *Id.* That would weaken free speech protections *vis-à-vis* the government:

if free speech obligations are imposed on property owners, Sisk concludes, courts would begin “to allow regulation of speech on the basis of its content,” and it would then “be difficult to securely shut that splintered door when governmental agents later seek to constrain expression based upon its potential for offense and outrage.” *Id.* at 1204–05.

D. *PruneYard* never adequately addressed objections to its theory – and crucial underpinnings of *PruneYard* have already been overruled.

When the California Supreme Court’s *PruneYard* decision was appealed, this Court upheld it despite having reached an almost exactly contrary conclusion eight years earlier, in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Lloyd Corp.* said the First Amendment does not entitle “a trespasser or an uninvited guest [to] exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.” *Id.* at 568.

It rejected the argument that a shopping mall is the functional equivalent of the town square, noting that there was no analogy to the “company town” in *Marsh v. Alabama*, 326 U.S. 501 (1946), because there, the private owner “was performing the full spectrum of municipal powers and stood in the shoes of the State,” whereas shopping mall owners do nothing of the sort. *Lloyd Corp.*, 407 U.S. at 569. They don’t purport to exercise anything like sovereignty, are not organizing an entire community, or regulating land use, or operating social or educational services: they’re simply running social media

companies – and competing against many other social media companies.

Lloyd Corp. observed that private property doesn't "lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* Just because the public is invited to shop doesn't make a private store or group of stores into a public park. "Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large." *Id.*

And, emphasizing the compossibility rule, *Lloyd Corp.* concluded that "the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected." *Id.* at 570. The Constitution's authors "certainly did not think" that speech and property rights "are incompatible. . . . There may be situations where . . . the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear." *Id.*

PruneYard did not purport to overrule *Lloyd Corp.*, or even limit it. Instead, it said the *Lloyd Corp.* decision did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." 447 U.S. at 81. This was *the entirety* of its effort to reconcile its ruling with *Lloyd Corp.* After that, the Court just moved on to discuss whether granting speakers a right to take access to the land was a compensable taking. *Id.* at 81–85. It said

no, because this right to take access did not “unreasonably impair the value or use of [the] property.” *Id.* at 83.

That takings analysis was plainly incorrect, and has since been superseded. When, two years later, the Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that being forced to install a one-inch cable on an apartment building was a per se compensable taking, it tried to distinguish *PruneYard* by saying that *Loretto* involved a permanent taking, and *PruneYard* only a temporary one. But after that, the Court said temporary takings “are not different in kind from permanent takings, for which the Constitution clearly requires compensation.” *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987). And then, in *Cedar Point Nursery*, it made clear that when the state gives a speaker even a temporary “right to take access” to another person’s property, it *does* commit a compensable taking. 594 U.S. at 154.²² So, once again, efforts to distinguish *PruneYard* failed – because of *PruneYard*’s incoherence.

What’s more, the expressive rights of the mall’s owner went largely ignored in *PruneYard*, as this Court later acknowledged in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 12 (1986): “Notably absent from *PruneYard* was any concern that

22. To be precise, *PruneYard* erred in applying the *Penn Central* regulatory takings test – when, as *Cedar Point Nursery* observed, a mandated trespass is not a regulatory taking, but a “physical taking,” *id.* at 148 (emphasis added), which means the “flexible test developed in *Penn Central*” is not applicable. *Id.*; see also *Horne v. Dep’t of Agric.*, 576 U.S. 350, 361 (2015).

access to [the mall] 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 [being distributed]." And, as noted above, subsequent decisions have sought to downplay or, as in *Moody*, even to ignore the fact that the property owner in *PruneYard* actually did object to being forced to subsidize speech.²³

In sum, keeping *PruneYard* on life-support has required drastically rewriting both the law and that case's facts.

Equally important, *PruneYard* simply *assumed* the legitimacy of the proposition that a shopping mall constitutes a public area. But that assumption is invalid. As Professor Sisk notes, malls lack virtually *any* of the indicia of public commons. *See supra* at 1190. A mall has no "government-owned and constructed edifice at [its] heart," and is funded by "the patronage of customers," not tax dollars. *Id.* Mall owners must pay taxes on their land, hire their own employees to provide security and maintain the premises; must pay for insurance out of their own pockets – and risk liability "if patrons are injured by disruptive activists." *Id.* at 1191. The public isn't invited to do what they please on the land; "[i]ndeed, most shopping malls do not allow people even to walk their dogs there." *Id.* (quoting *New Jersey Coal. Against War in the Middle*

23. *See* Brief of Appellants, *PruneYard v. Robins*, No. 79-289, 1979 WL 199940 (Dec. 1979) *14 ("Mr. Sahadi is being forced by the state to use his private property as a forum for the expression of views, and that he is deprived of the choice guaranteed him by the First Amendment to remain silent or indifferent.").

E. v. J.M.B. Realty Corp., 650 A.2d 757, 794 (N.J. 1994) (Garibaldi, J., dissenting)). Malls close and exclude the general public at the end of every business day, something public streets don't do. Sisk, *supra* at 1191.

In short, this Court's *PruneYard* decision makes no more sense than the California Supreme Court's decision did. It failed to address the central issue – whether private property becomes public just because people shop there – and its takings analysis is now entirely obsolete. Most importantly, the decision disregarded the compossibility requirement and the rights of property owners who should be free to exclude expressive trespassers. *PruneYard* remains in place only because its vagueness makes it malleable enough to be distinguished by subsequent cases. But that's a bug, not a feature. *PruneYard* should be overruled.

II. State power to expand protections for individual rights cannot warrant violating individual rights.

States certainly can provide greater protections for rights than are accorded by the federal Constitution. The framers understood that “[i]n the compound republic of America,” power would be divided between the state and federal governments in a way that provided “a double security . . . to the rights of the people.” *The Federalist* No. 51 at 351 (J. Cooke, ed., 1961) (James Madison).

This principle of federalism is sometimes confused with the principle of “states rights.” The distinction is that federalism is oriented around protecting individual rights – whereas “states rights” is organized around

protecting the states’ “attributes of sovereignty.” *Id.* No. 45 at 309 (James Madison). Genuine federalism willingly “sacrifice[s]” the “sovereignty of the States” to the protection of individual rights. *Id.* That’s why a “laboratory of the states” argument cannot justify the continuation of *PruneYard*. The freedom to speak includes the freedom not to speak or be associated with the speech of others, *Pub. Utilities Comm’n of Cal.*, 475 U.S. at 11 (plurality opinion), and the freedom not to be forced to subsidize others’ speech. *Janus*, 585 U.S. at 893. These cannot be overridden in order to “benefit” the “marketplace of ideas.” No doubt the marketplace for goods and services would also “benefit” from more people engaging in commerce, but that doesn’t warrant forcing people to engage in commerce, *cf. NFIB v. Sebelius*, 567 U.S. 519, 660 (2012) (joint dissent), or condemning every Motel 6 to build a Ritz-Carlton. *Cf. Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O’Connor, J., dissenting).

Likewise, alleged benefits to the “marketplace of ideas” cannot justify depriving the owners of shopping centers of their speech and property rights by forcing them to convey messages they disagree with – especially when those wishing to speak have plenty of alternatives. Simply put, “the State cannot advance some points of view by burdening the expression of others.” *Pub. Utilities Comm’n of Cal.*, 475 U.S. at 20 (plurality opinion).

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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