ORIGINAL

In the

Supreme Court of the United States

PRUNEYARD SHOPPING CENTER AND FRED SAHADY,

APPELLANTS

V.

MICHAEL ROBINS, ET AL.,

APPELLEES

No. 79-289

Washington, D. C.
March 18, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

PRUNEYARD SHOPPING CENTER AND FRED SAHADI, Appellants	:	
v.	:	No. 79-289
MICHAEL ROBINS, ET AL., Appellees	:	

Washington, D. C.

Tuesday, March 18, 1980

The above-entitled matter came on for oral argument at 11:16 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MAX L. GILLAM, JR., ESQ., 1333 New Hampshire Ave., N.W., Washington, D.C. 20036; on behalf of the Appellants

PHILIP L. HAMMER, ESQ., Bledsoe & Rucka, 300 West Hedding Street, San Jose, California 95110; on behalf of the Appellees

MRS. ELINOR H. STILLMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Gillam, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MAX L. GILLAM, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GILLAM: Mr. Chief Justice, and may it please the Court:

The issue before the Court posed by this appeal is a narrow, very simple issue. This arises on an appeal from a judgment of the California Supreme Court.

First a trial court's rejection of a request for an injunction that the PruneYard and its owner Fred Sahadi be enjoined from denying access to its customers. In other words the Appellees here moved for an injunction in the lower court enjoining Mr. Sahadi from refusing to allow them to circulate petitions on his property. There was a trial of this request for an injunction. Specific findings were made by the trial court as to the existence of adequate available alternatives in that Santa Clara County. This was coupled with a conclusion of law framed in basically the terms of Lloyd v. Tanner to the effect that other effective means of communication existed in the community.

The denial of the injunction was affirmed by the District Court of Appeals and when the case reached the California Supreme Court, that Court reversing its prior

holding in what is adverted to in the brief as Diamond 2, asserted the free speech portion of the California Constitution, required a reversal of the trial court and the admission to Mr. Sahadi's premises of the persons who wished to circulate petitions.

This Court, as it did in the Miami Herald case, deferred a question of jurisdiction until the time of the hearing on the merits.

We would -- we have briefed pursuant to this Court's Rule 16 -- at the outset of our brief, the jurisdictional question. It seems obvious that the decision below upheld the validity of a free speech portion of the California Constitution against a contention that the construction sought of that constitutional provision denied Mr. Sahadi and the PruneYard their rights under the Fifth, Fourteenth and First Amendments.

We would therefore submit that appeal is the proper remedy, that there is Federal jurisdiction and not insubstantial Federal jurisdiction and that in the alternative, as we requested in our jurisdictional statement, if this Court should feel that appeal was not the proper route to please accept certiorari.

I stated at the outset that this was a simple, narrow -- it does not involve any attempt to regulate the content of speech. It does not relate to any ability on the part of Mr. Sahadi to deny his shopping center customers the

receipt of any view which the Appellees would choose to put upon them.

The adequate available alternatives finding we think is extremely important when it is coupled with the finding that the policy against solicitation was uniformly and disinterestedly applied by the Center.

I would like to call your attention to the specific finding on adequate alternatives in Santa Clara County. The finding of fact which was entered by the trial court and which was never contested at the trial or any appellant level was stated in the following manner: The county in which the Center is located has many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights including, without limitation, distribution of hand bills and seeking signatures on petitions.

QUESTION: Do I understand that you can distribute hand bills in post offices?

MR. GILLAM: On the sidewalks adjoining post offices.

QUESTION: Well, you said buildings.

MR. GILLAM: Yes, sir.

QUESTION: Now I understand.

MR. GILLAM: Mr. Justice Marshall, I think it is

important to focus on this from the standpoint of language you used in Hudgens, because we read your opinion in Hudgens as being concerned with the availability of the means for communicating ideas.

QUESTION: It didn't involve post offices.

MR. GILLAM: Yes, sir; it did not.

But we think this is a very key finding of fact which, as I say, was never challenged. And the conclusion of law which then followed after the trial was never challenged. And that conclusion was that there are adequate effective channels of communication for Plaintiffs other than soliciting property of this Center. The Center was capital C and it was defined to mean the PruneYard Shopping Center and its owner Mr. Fred Zahedi.

The alternate adequate available other places in which to solicit. That is the state of the record which is before the Court in this case.

QUESTION: Well, Mr. Gillam, couldn't you equally well attack a zoning ordinance by saying that there are other places you could build this same kind of factory and therefore the State's prohibition of your it here is unconstitutional?

MR. GILLAM: No, sir. I would assume that there could be a set of circumstances or facts which might permit you that kind of attack. I cannot conceive them as I sit here right now. I know that Agins v. Tiberon is coming up on this

Court's docket, which deals with a similar question of whether after engaging in a condemnation proceeding and running out of money the city of Tiberon could then zone the land it was prepared to condemn.

So under certain circumstances I think you could make that argument. But ordinarily speaking, the right to zone would not involve anything with respect to the property right to the extent that is at issue in this case.

QUESTION: Isn't it basically the Mahon v. Pennsylvania Coal case, that the State can limit the use of private property or place certain restrictions on it up to a point. But if it virtually destroys its use or comes close to significantly destroying its use, then it has to pay just compensation. And it is kind of a hard line to draw?

MR. GILLAM: I do not believe that it would have to go to the extent to which the Court refers in virtually destroying the value of the land as in a condemnation case, zoning is an effective condemnation.

This Court in determining whether an interest which the State has denominated an interest in property or the non-existence of it has historically applied Federal standards to determine whether that which was involved constituted property. And imposing a new legal disability on any prior freedom or property invites Federal examination. The situation here is that with respect to soliciting at shopping centers the

California Supreme Court in reliance on this Court's opinion in Logan Valley had held that the shopping center could not exclude expressive activity.

Subsequent to this Court's opinion in Lloyd v. Tanner the California Supreme Court reversed that position and held that the shopping centers could under the Federal principle of Lloyd v. Tanner exclude expressive activity of this type on the assumption if -- I should say -- if there were adequate available opportunities in the community for expressive activity.

It was only in this case in which the California Supreme Court by a 4 to 3 majority changed that rule and, in effect, deprived Mr. Sahadi of what had been regarded as a property right up to that time.

QUESTION: This fell under the California Constitution ostensibly.

MR. GILLAM: Yes, sir.

QUESTION: Did that under the California Constitutional provision -- do you feel that an affirmance here will necessitate an overruling of Lloyd v. Tanner?

MR. GILLAM: It would not necessitate an overruling of the precise holding in Lloyd. However, it would necessitate an overruling or a refusal to apply the principles which formed the underpinning of the Lloyd decision. The question in Lloyd really is whether the shopping center was such

a creature of the State or the equivalent of a municipality as to the position of the State for First Amendment purposes. That is the specific issue that was before Lloyd.

QUESTION: And if the Center isn't an arm of the State, why no matter how many free speech rights the individual has he hasn't got them against a private person?

MR. GILLAM: On the assumption that this Court applies the principles as articulated in Lloyd, and that is that there are adequate available alternatives. That is part of the analysis on the closeness of a shopping center to the State.

QUESTION: But in Lloyd and Hudgens the people who wanted to distribute leaflets were coming here simply claiming that the First and Fourteenth Amendments gave them that right. Here you are saying that property law gives them that right. They don't have to rely on the Federal Constitution.

MR. GILLAM: No, sir, and this is a new found California property right which is asserted against what this Court historically viewed as Federal due process and First Amendment rights.

QUESTION: It may be new found but haven't we historically attributed to State law the boundaries of property rights? I sympathize with you when you get a 4 to 3 decision in your court with very strong --

MR. GILLAM: The interests are created by State

law. There is no question about that. But their characterization as property for due processes is determined by Federal standards.

QUESTION: Well, suppose a man owns a shopping center or a grocery store or something and there are no relevant statutes at all and someone comes in and wants to pass out leaflets and he says, "Get off my property." And he can throw them off, even if the fellow says, "I have got -- just think of my speech rights." And he says, "Tell it to the State, it protects you against State interference. You just get out of my place."

What if there is then a statute passed by the State that says that all owners of shopping centers will -- must let onto their property people who want to picket their lessees?

MR. GILLAM: I think, Your Honor --

QUESTION: And then the State has some power to regulate property rights.

MR. GILLAM: Yes, Mr. Justice White, they do have power to regulate property rights but they do not have the power in an unreasonable manner and subject to the Federal test on what constitutes property, the right to take away. May I give an example?

QUESTION: Well, just forget that. In my example there is no Federal interest yet whatsoever. There is just a State law that says that let picketers come on your property.

MR. GILLAM: What basically this Court talked about in Lloyd and in Hudgens and Babcock and Wilcox and the labor cases is what kind of accommodation must there be between statutory matters such as set forth in the NLRA and the interest of the property owner or in this case the speaker or non-speaker. And this Court in those decisions has sought for an accommodation such that the historic rights of property, the things generally associated with property, would not be diluted except to the extent necessary to fulfill the purposes of the Act, in the NLRA industrial peace.

And this Court has consistently, now, looked to adequate available alternatives before stating that the union could enter onto private property either for organizational activity or for picketing and protest of a strike.

QUESTION: So you are just saying that if a State had a statute like I just suggested that it would be unconstitutional on its face.

MR. GILLAM: No, sir, it would not be unconstitutional on its face.

QUESTION: Well, for failure to be more precise.

MR. GILLAM: I can anticipate the possibility of a small State such as Rhode Island holding legislative hearings and having testimony of fact appear before it and the legislature coming to factual conclusions in the legislative history to the effect that in the absence of access to shopping

centers there were no alternative available opportunities to persons for expressive activity.

We have the exact opposite in this case. The California --

QUESTION: Would that Rhode Island conclusion mean that the Rhode Island legislature was mandated to put a limitation on property rights or only that it could?

MR. GILLAM: It would only indicate that it could. That would not, I hasten to add, immunize it from attack by somebody who differed with that conclusion.

But in this case California used an absolutist simplistic label of "Shopping Center" and used statistics that indicated that shopping centers had increased greatly. But they were faced with a finding of fact and conclusion of law below as to the existence of quantities of available adequate alternatives and a conclusion that effective means of communication for expressive activity existed outside of Mr. Sahadi's shopping center.

QUESTION: You would take the same approach if there was a statute which says at Christmastime the Salvation Army and other charitable organizations may set up little stands to raise money in shopping centers?

MR. GILLAM: Yes, sir, I would certainly take the same position.

I would analogize that to Wooley v. Maynard.

QUESTION: That the State is dis-entitled under its many powers to limit your property rights to that extent?

MR. GILLAM: Yes, sir, absent some adequate basis which would indicate that accommodations of conflicting rights would require a diminution in my free speech rights and in my property rights.

QUESTION: Are you relying in this case on the free speech rights of the property owner?

MR. GILLAM: Yes, sir. This was raised before the California Supreme Court in --

QUESTION: That you don't need to provide a forum for views with which you don't agree?

MR. GILLAM: No, sir, the same that we are not required to speak, that we had a constitutional right to remain silent.

Remember the finding in the lower court that Mr. Sahadi had a uniform policy against any form of non-business-related expressive activity. And we asserted his right to remain silent and to not permit his property to be utilized for the expression of any ideas.

QUESTION: Under this opinion as it stands now of the California Supreme Court, if 25 different groups wanted to hand out leaflets or get petitions signed on the same Saturday, could they do it?

MR. GILLAM: Under this opinion each shopping center

is directed to be a municipality and pick out reasonable places and manners. And I assume if it was a shopping center that was sufficiently profitable so that it could employ lawyers the lawyers could come up with a set of such standards which would permit it to limit the number at any given time or any place.

QUESTION: Sort of a licensing program?

MR. GILLAM: Yes, sir.

QUESTION: Like for a parade?

MR. GILLAM: What the California Supreme Court has done is make every shopping center, however labeled, the functional equivalent of a municipality.

QUESTION: Didn't the Supreme Court say they could establish reasonable regulations?

MR. GILLAM: Yes, sir. The same way --

QUESTION: And wouldn't the reasonable regulation be that you have got 25 groups at one time it wouldn't be possible for us to run our business?

MR. GILLAM: Yes, sir.

QUESTION: Wouldn't that be considered reasonable?

MR. GILLAM: I would think it would, Your Honor.

QUESTION: But I suppose some content differentiation wouldn't be reasonable. If he said, "Well, there are some people I will let on my property but some people I just don't agree with."

MR. GILLAM: In the California Supreme Court opinion there is no control over content at all.

QUESTION: Yes.

MR. GILLAM: Also implicit is no right to remain silent, even if there are adequate alternatives available.

It is our contention, Your Honors, that under the opinion of the California Supreme Court the supremacy clause stops at the California border. And we would respectfully request that this Court reverse that opinion.

QUESTION: Where did the Supreme Court say this activity could take place, in the public areas in the mall?

MR. GILLAM: Areas in the Shopping Center that constituted private property, subject to reasonable regulation as to time, place and manner.

QUESTION: What about in the stores? It didn't say?

MR. GILLAM: No indication, sir.

Under the reasoning of the California Supreme Court if I were to hold a garage sale --

QUESTION: You can go into the stores; you can go into the stores and hand out leaflets?

MR. GILLAM: I am not certain, because it is not clear.

But if I were to hold a garage sale and open it to the public, there is no way as I view the logic of this opinion that I could keep out a saffron-robed bookseller. It is part

of the Hari Krishna religion to sell books.

QUESTION: I misunderstood you. I thought you said a minute ago it is limited to shopping centers.

MR. GILLAM: The California Supreme Court --

QUESTION: You didn't say that? I misunderstood you, then.

MR. GILLAM: No, sir, they said shopping centers. And they quoted in their opinion, Judge Newman, the portion of Judge Mosk's prior dissent in Diamond 2, in which he stated this is not to say that these rules would apply to modest retail establishments or private homes.

That is the only indication we have. But if I have a garage sale at my private home, by the logic of the California Supreme Court I have invited people onto my property to purchase. And I don't know what a "modest retail establishment" is. When I am in Los Angeles I work in the Bank of America Tower. Perhaps the Bank of America would be regarded as an immodest commercial establishment because there are three floors of stores in there.

QUESTION: I also think that Madison Square Garden would not be, too, but that doesn't have anything to do with this case.

MR. GILLAM: Yes, sir, except for the fact that under the logic of the Supreme Court if you are conducting a business you must permit expressive activity, as I read it, because

there is no definition of a shopping center.

QUESTION: Would that include a dentist's office?

MR. GILLAM: Sir?

QUESTION: Would that include a dentist's office?

MR. GILLAM: If he invites the public, I would have to assume that it would.

QUESTION: Mr. Gillam, I don't really read the California Supreme Court opinion quite as broadly as that. This case involves a 21-acre shopping center. And I just wanted to ask you, is it your position that if there were a California statute or a California zoning regulation that said in all shopping centers of over 20 acres there must be allowed a reasonable opportunity for picketing or leafleting, that that would be unconstitutional?

MR. GILLAM: Yes, sir. It could happen --

QUESTION: If we don't make any findings about adequate alternatives --

MR. GILLAM: Yes, sir.

QUESTION: -- that would be on its face an unjustified interference of property rights.

MR. GILLAM: If I could go before a court and establish as a fact in an adversary proceeding that 20 acres was an unreasonable limitation because with respect to my property there were adequate available alternatives, I would think it would be unconstitutional in its application to me,

because I would think that in that case there --

QUESTION: Would you say the same thing about a statute that said that union picketing is -- shall be permitted in shopping centers over this size?

MR. GILLAM: That is one interesting aspect of the California Supreme Court opinion, because under this opinion now union picketing would be allowed, which would not be permitted under the National Labor Relations Act. And you are going to have an interesting pre-emption question that you will have to face in the future, assuming the California Supreme Court opinion stands.

I am not sure I ended up reserving as much time as I would like.

Thank you.

MR. CHIEF JUSTICE BURGER: Yes, you have 5 minutes remaining.

Mr. Hammer.

ORAL ARGUMENT OF PHILIP L. HAMMER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. HAMMER: Mr. Chief Justice, and may it please the Court:

The California Supreme Court has ruled in this case that the State constitution protects the right of individuals to solicit signatures on a petition to their government on the premises of a privately-owned shopping center. We contend

that the United States Constitution does not prohibit the State of California from so regulating the use of private property within its borders, since the California Supreme Court specifically found that the public welfare would be substantially impaired if that right were denied.

QUESTION: Is this confined in your view to petitions to the government?

MR. HAMMER: Well, the reference by the California Supreme Court was to Article 1, Section 3, which is our State constitutional right of petition to our government; yes, sir. That is --

QUESTION: What if on its face it was a petition to the government but in fact that was spurious, that it really was just a propaganda measure in favor of the PLO, let us say, or the Irish Republican Army?

MR. HAMMER: Well, I don't know whether such petitions would on their face be spurious but a -- the right of California citizens to petition their government, which consists of government at many levels, is a very vital right and the petitioning in this case --

QUESTION: Do you think that California under our system has anything to do with relations with the PLO or the IRA?

MR. HAMMER: Well, the State government may not although the State government may declare itself on inter-

national issues. The petitions in this case were addressed to the national Government, to President Ford and to Congress.

We are seeking to uphold the right to petition in California. Our Supreme Court's decision stresses the very vital nature of that right in the California scheme of things. In our State,perhaps different from other places, the citizen uses the petition for direct access to the process of self-government. In recent times the people have seen fit to restructure the property tax base for financing local government, they have adopted a protective mechanism for our coastline and have enacted far-reaching campaign reforms, just to mention a few.

QUESTION: Is this related to your tradition of public referenda on many, many issues?

MR. HAMMER: Yes, sir, that is in California referenda, initiatives, recall and simply the broad right to petition government is a part of our life.

The Supreme Court determined that the right of petition is threatened if it is not accessible in the common areas of shopping centers.

Here also the decision of our highest court goes to great pains to describe how vital that access is. Shopping centers dominate retail commerce in our State and particularly the community in which this case arose. The traditional forums for public discussion, the public streets, town squares, public

parks and the like are dead or fast dying. As the California court found, central business districts of municipalities have yielded their functions to suburban shopping centers. Having cause the demise of the traditional forum in California and reasonable access to a forum having been found essential to the public welfare, shopping centers in California are as a result of the decision in this case subject to a rule of law prohibiting them from denying the right to circulate a petition, subject of course to the reasonable restrictions as to time, place and manner.

QUESTION: Nothing on content, though.

MR. HAMMER: Nothing on content.

QUESTION: What if a shopping center was owned by a church organization --

MR. HAMMER: Yes.

QUESTION: -- let us say the Archdiocese of San Francisco, if that is an archdiocese, and the petitions are petitions that are pro-abortion or some other issue which is directly in conflict with the philosophy and dogma of the owner. What is the situation under the California decision?

MR. HAMMER: Well, sir, Mr. Chief Justice Burger, I think that that is a different situation but it is one that the California Supreme -- it might raise a conflict between two rights that are not present in this case. And the California Supreme Court or the State court system would be well-equipped

under its constitution and under the Constitution of the United States to resolve what might be a conflict of rights if the center were well known as being a place owned by a religious body.

In this -- in the situation that the Court is reviewing here of course there is no such identification.

QUESTION: I suppose it is the same kind of a conflict on content might arise if, for example, an international union owned a 21-acre shopping center, which it might as a matter of investment.

What would you say then about the right to work, petitions for the right to work which are certainly in conflict with organized labor's views, must they allow them or not under this decision?

MR. HAMMER: I think under this Court's decision no matter who owns the shopping center the rule applies within California. I pointed to the religious ownership problem as one that might raise other constitutional issues.

But I think implicit in what the Appellant is trying to argue with respect to its First Amendment right is that somehow the Shopping Center is in the communications business as to ideas and that --

QUESTION: He is just suggesting the owner objects to presenting a forum or a pedestal for views that he doesn't necessarily agree with, or for any views. Isn't that a perfectly

legitimate claim by the property owner?

MR. HAMMER: The property owner may object to the regulation that is now applicable in California as a result of --

QUESTION: Well, most property owners, if you are not talking about shopping centers, you are talking about your front yard, somebody comes along and wants to make a speech in your front yard, you say: "Well, what are you going to say?" He says, "Well, I am going to say so and so." I say, "Great, come on, let's have a big speech right in my front yard, we will get a crowd."

The next guy comes along and says, "I would like to speak in your front yard." "What are you going to say?" He tells me and I say, "I am awfully sorry, I am not the least bit interested in that and just stay off my property." Now, that is what most property owners can do, I suppose.

MR. HAMMER: Yes, most property owners --

QUESTION: Why can't this man do it when he says, "I don't want anybody coming on my property, to say anything."?

MR. HAMMER: Because the law in California now imposes a regulation, a restriction of what might otherwise have been his arbitrary power based upon the role he plays, that particular owner of that particular kind of property in our society.

QUESTION: What if the law in California imposed a

restriction upon householders, upon the property right of householders? You said anybody can come onto anybody's front yard and picket the way they did here with shopping centers.

Would that present any question or problem?

MR. HAMMER: In my mind, sir, that might well present due process problems.

QUESTION: If that does, why doesn't this?

MR. HAMMER: Because the California court which is --

QUESTION: Well, I am assuming the California court had done the same thing with regard to the front yards of householders. So you can't rely on the California court did. I am assuming in both cases the California court did precisely what it --

MR. HAMMER: But in this case --

QUESTION: -- what it did in this case and what it did in my hypothetical case.

MR. HAMMER: In this case, sir, we are faced with a finding about a situation in California that specifically involves shopping centers and --

QUESTION: Well, what if there were a finding that specifically involved the front yards of householders?

MR. HAMMER: I think --

QUESTION: Why would that -- if that presents a constitutional question, why doesn't this? A serious one?

MR. HAMMER: That would -- a rule that it applied

to individual householders would offend, I suppose, decent standards of fairness and decency.

QUESTION: Well, this offends your brother and his client.

MR. HAMMER: The -- I guess I am saying as to the regulation here which was geared to the public welfare of the people of California.

QUESTION: Well, let's assume a hypothetical case, that all of that was mouthed by the Supreme Court of California but that the factual context of the case was it was not a shopping center but rather somebody's front yard.

MR. HAMMER: Yes. I would assume this Court could, as it does with States' efforts to deal with local problems, assume the legislative enactment or the regulation to be a valid one. If it offended the Court's basic sense of justice --

QUESTION: No, no, it has to offend the Constitution.

MR. HAMMER: Well, but the due process clause as applied to economic regulation and this Court's application of that --

QUESTION: Would that be a taking without compensation?

MR. HAMMER: Well, it again falls back upon the basis of the regulation. Is it a reasonable regulation based upon --

QUESTION: California found that it was.

MR. HAMMER: O.K. And if California found that such a regulation applicable to an individual household was related to a public -- to the public welfare, health, safety and morals, then I would think the assumption would be that it would not be a taking. But there are other inquiries in connection with the taking clause and that would be --

QUESTION: The householder's own speech rights --

MR. HAMMER: Yes.

QUESTION: -- as well as --

MR. HAMMER: The reasonable expectations of a homeowner would be that the front yard is --

QUESTION: Well, it wouldn't be in California, after that decision until it was reversed by this Court.

MR. HAMMER: But the reasonable expectations of a shopping center owner are very different from those --

QUESTION: Well, they are now after the decision of the Supreme Court of California.

MR. HAMMER: But were for years before Diamond 2. The shopping center owner, as was pointed out in one of the briefs, pre-1974, pre-Diamond 2 shopping centers have been subject to this kind of rule of law for --

QUESTION: Well, you do agree, don't you, that it is just not a property right question, it just isn't that California may limit -- may define property rights and say, "Look, all private properties owned in this State are subject

to some limitations and one of the limitations is that leaflets may be passed out on any privately owned property in this State." What if the legislature just passed that and said under California law the owner of property just does not have the right to keep people off for that purpose. But there would be another interest involved, wouldn't there, in the property owner, his First Amendment rights --

MR. HAMMER: Well, there would be --

QUESTION: -- which doesn't depend on California law at all?

MR. HAMMER: This matter of private residences, obviously there are many interests of individuals involved in that kind of situation that are not present here: the right to privacy, the very notion of having a private home.

QUESTION: The First Amendment, I am talking about --

MR. HAMMER: And the First Amendment right.

QUESTION: -- to be quiet on my property and not to spread the word that I don't want spread.

QUESTION: The right to privacy flows from the First Amendment, haven't we suggested that?

MR. HAMMER: Yes, sir.

QUESTION: Well, the right to privacy is exactly what the Supreme Court of California majority is trying to, in effect, minimize by this regulation. Because to take a finding that the Belair area in Los Angeles which the only way to reach

Belair residents is by leafleting on their property since they all have 5-acre estates and they never leave them except in Mercedes-Benz cars, that would be in a sense an attack on their right to privacy and yet it would open up the channels of First Amendment communication.

MR. HAMMER: Justice Rehnquist, the -- when business is regulated by government private decisions that theretofore had been that of the proprietor are in a sense removed. That is what has occurred as a result of this rule of law, what otherwise had been discretionary to the property owner, the right to exclude and control the kind of communication on this particular kind of property is now subject to a regulation if it --

QUESTION: Well, if J. C. Penney is the lessee in this shopping center, he is subject to this same rule, isn't he?

MR. HAMMER: No, sir, the rule applies to the common areas of shopping centers. The shopping center --

QUESTION: But under your approach it would be -- it would take you right into the store, wouldn't it?

MR. HAMMER: No, sir.

QUESTION: Your principle?

MR. HAMMER: No, sir.

QUESTION: Where would you stop? What would keep leafleting out of the J. C. Penney store?

MR. HAMMER: Well, first of all, it is not a question of where would I stop. It would be where would the California court stop.

QUESTION: No. I am asking you where would your principle stop?

MR. HAMMER: My principle applies to the common areas of shopping centers. This is not --

QUESTION: Why not to the J. C. Penney store?

MR. HAMMER: Because the common area of shopping centers is what has been found to have replaced the public forum. This is the place where without requirement of buying anything, doing any commerce the public is invited. Shopping centers in our area send out flyers, advertised fashion shows, band concerts, a whole variety of activities in the common area where people are just urged to come and be. And when they are there it is hoped by the Center owner that they will shop. But common areas of shopping centers are a phenomena themselves in California.

QUESTION: I am not sure anyone can legally define a shopping center and know precisely what it is.

Let me give you this hypothetical: There are now areas, shopping centers if you want to call them that, as much as say a square block of open area surrounded by shops but covered over entirely. Now, is that common area open to this

kind of picketing under the California decision, this kind of leafleting by the California decision?

MR. HAMMER: If I understand your question -- simply the covering of a common area, would that make a distinction -- I think no, it is still the common area in which commerce does not take place but where people congregate because of the beauty of the place, because it is part of the attractiveness of the Center.

QUESTION: Well, now, a variation of that would be some of the modern hotel lobbies, which are huge lobbies, again surrounded by 15, 20, 25 stores on the ground floor accessible from the hotel, also accessible from the street. Leafleting in that lobby of the hotel?

MR. HAMMER: It is the phenomenon of the shopping center that the California court found has replaced the traditional forum. It is not the lobbies of hotels.

QUESTION: Well, is what I have described to you the functional equivalent of a shopping center?

MR. HAMMER: No, it is not, Your Honor, because it is -- well, I suppose under certain fact situations, if I know some of our hotels where there are a circle of retail stores that do surround the lobby, it might be a factual matter for the State court to weigh whether that falls within the ambit of Robins v. the PruneYard as the case is known in California.

But clearly the decision is related to shopping

centers and not hotels. But I think the State court could deal with it.

The scene in California is really quite different as compared to this beautiful city. The people in many of our areas of California are rarely found on public property. They are in their homes and work places, their automobiles and their privately-owned shopping centers. They are rarely on the public streets.

And the ruling in this case is really responsive to that local situation.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

MR. HAMMER: Thank you.

AFTERNOON SESSION

(1:00 P.M.)

MR. CHIEF JUSTICE BURGER: Mrs. Stillman, you may proceed whenever you are ready.

ORAL ARGUMENT OF ELINOR H. STILLMAN,

AS AMICUS CURIAE

MRS. STILLMAN: Mr. Chief Justice and may it please the Court:

Appellants have been making some arguments here which sound like the type of privacy arguments customarily made by individuals. I think it is important to focus on what we have in this case.

What we have is someone who is engaged in a business operation, a business operation which the California Supreme Court has found has altered the urban suburban landscape of California in a way that has diverted the additional audiences that used to assemble in parks.

Now, this Court as far back as Nebbia has recognized that if one embarks in a business which public interest demands shall be regulated he must know regulations will ensue.

QUESTION: How much regulation? Are you speaking of regulation in the sense of utilities, railroads, airlines?

MRS. STILLMAN: No, regulation in the interest of promoting the public health, safety, welfare and morals.

QUESTION: Of course in that sense every man's home

is regulated, too.

MRS. STILLMAN: But obviously there are characteristics of a home which are different from the business operation which invites in the general public to -- and conducts operations on such a scale that raise problems that are -- can be expected to bring about the interest of State regulation.

QUESTION: Well, for my part, Mrs. Stillman, I am interested -- no one can tell us the whole scope of this opinion -- but I am interested in specific points. You heard my question to your colleague about the large hotel lobby, twice as big, three times as big as this room, surrounded by 25-30-35 stores. They invite the public very anxiously, they are anxious to have them.

Now, may they pass out leaflets in the lobby of that hotel?

MRS. STILLMAN: Well, to some degree hotel lobbies perhaps don't issue quite the same invitation that the owner of a shopping center does. But to the extent that the --

QUESTION: They have access doors going from the shop. That is some kind of an invitation for people in the lobbies to go into the shops. And hotels do not limit access to the lobby to guests of the hotel.

MRS. STILLMAN: Well, Your Honor, I think it would be proper for the California Supreme Court if they made the kind of findings about large hotel lobbies of the kind you are talking

about that they made about shopping centers to have -- and if they found that the State broad free speech right, which is not restricted to simply limiting government restraints, could not be effectuated otherwise, I don't know that it would be proper for this Court to reexamine the wisdom of that finding. But I think --

QUESTION: You are here for the Government, Mrs. Stillman, I take it, not on behalf of the State of California --

MRS. STILLMAN: No.

QUESTION: -- but for the Federal Government?

MRS. STILLMAN: Correct. And I --

QUESTION: This doesn't create property rights or doesn't --

MRS. STILLMAN: No, and I think I would like --

QUESTION: What is the United States' interest, by the way?

MRS. STILLMAN: Mr. Justice White, the United States entered this case in large part because one of the arguments, several of the arguments that Appellants were making are so broad and so extreme in their implications that if they were accepted by this Court they would put in doubt constitutionality of Federal laws about which I think this Court has no doubts. And I --

QUESTION: Give me one

MRS. STILLMAN: I can give you several.

QUESTION: I just asked for one.

MRS. STILLMAN: The civil rights statutes upheld in Heart of Atlanta Motel.

Now, in those statutes the right of a property owner, someone who engages in opening his public accommodations to the general public, he is restricted from conditioning access on the grounds of the race of the person who desires access.

The National Labor Relations Act in some of its applications requires that under certain circumstances someone who does not want --

QUESTION: Both of those you are talking about are exercise of the commerce power.

MRS. STILLMAN: Correct. But I don't think --

QUESTION: They are not in the services for free speech.

MRS. STILLMAN: That is correct, Your Honor, but I don't understand that to be -- we are talking here about a State policy and --

QUESTION: Yes.

MRS. STILLMAN: -- and under this Court's decisions it usually does not examine the wisdom of the State policies. The State has the -- the highest Supreme Court -- the highest State of California has --

QUESTION: Well, I am just suggesting to you that this case could come out either way and the Federal exercise

of its commerce clause wouldn't be affected in the least.

MRS. STILLMAN: It would be possible to decide this case in a way which --

QUESTION: No, no, either way it was decided wouldn't affect the commerce clause.

MRS. STILLMAN: Yes, but the Appellants have been suggesting --

QUESTION: I take it your entering the case indicates that if it is decided one way, it might really rub off on the commerce clause.

MRS. STILLMAN: Well, some of the arguments that are -- the logic of some of the arguments that Appellants are making in service of their claim that the State is prevented from making this kind of limitation on an owner's right to restrict access would put in doubt the constitutionality of this Federal --

QUESTION: The First Amendment certainly restricts the commerce clause.

MRS. STILLMAN: Certainly. Certainly.

And the commerce power is also tested under the takings clause. If there is a complete destruction of the property, which I might say we have nothing even approaching that here. But appellants stated in their opening brief, and although I thought they had retreated in their reply brief, it seems to me this is still at the core of their argument. They are

saying at pages 11 and 12 of their opening brief the right to exclude is such a central element of private property that the Government even in the name of reasonable regulation cannot diminish that right without paying compensation.

Now, what that is saying is that the State of California is not free to have a broad, free expression policy and to effectuate that policy because it might place one restriction on the owner's right to condition an invitation he has extended to the general public.

QUESTION: How about in the private residence of the 5-acre type which someone mentioned this morning; can the State of California limit the owner's right to exclude the public from that 5 acres or 10 or 100?

MRS. STILLMAN: Your Honor, I think the private residence is a totally different situation. In the first place, there is no business operation which has extended a general invitation to the public.

In the second place, there are privacy interests involved in the private residence that just are not present here in the owner of a business property who is conducting an operation of this kind.

QUESTION: I wonder what your answer would be to some of the hypotheticals I put to Mr. Hammer this morning. For example, we have now the new phenomenon of minority business enterprises. Suppose you have a minority business enterprise,

a corporation made up of American Indians, Eskimoes, Negroes, Mexican-Americans -- across the board -- and all minority groups. They own this shopping center.

MRS. STILLMAN: Yes.

QUESTION: Must they allow the Ku Klux Klan to come on or the American Nazi Party passing out leaflets for the master race and for anything that the Klan and the American Nazis believe in?

MRS. STILLMAN: Well, as I read the opinion of the California Supreme Court the owner -- we are talking about the minority enterprises and their role as owners of a Center that is engaged in regulation, that is engaged in operating a business --

QUESTION: Content regulation?

MRS. STILLMAN: Excuse me.

QUESTION: Content regulation?

MRS. STILLMAN: I believe that they said time, place and manner, and I assume that they mean time, place and the manner in the sense that that -- that those terms are used in the Federal First Amendment decisions of this Court which does not include content regulation.

QUESTION: So if the Nazi Party wanted to put on a demonstration such as they had down in Illinois a couple of years ago --

MRS. STILLMAN: I think a demonstration might raise

significantly different problems which could be regulated.

QUESTION: Well, let us say a very orderly demonstration.

MRS. STILLMAN: Standing but --

QUESTION: Nazis are very disciplined people.

MRS. STILLMAN: Well, if they stood in the corner and simply handed out their leaflets, probably under our -- I hate to anticipate the Supreme Court of California but I would suggest that their use of the phrase "time, place and manner" would mean exactly what this Court has meant in the First Amendment decisions. And there is no doubt that shopping center owners might have persons on their property who would pass out literature that they disagree with. But they are certainly free to place placards up saying "These people don't represent our views."

No one assumes that persons passing literature out at the Dulles Airport represents views of the Dulles Airport Authority. And I think it is unlikely that these views would be attributed to the owner.

I might also add that this Court's decision in Eastex is relevant to this point. It may -- it is highly likely that the owner of the enterprise in Eastex did not agree that the Texas right to work statute was a bad idea or that the Federal minimum wage shouldn't be raised to $2 an hour. But that was not a reason for saying that this literature which is protected

by Section 7 of the National Labor Relations Act could not be passed out by his employees on his property.

QUESTION: Under this decision suppose there was an organization that was dead set against having a certain product marketed in California. Could under this decision they enter this property and leaflet and picket against this particular product?

MRS. STILLMAN: Yes, Your Honor, I think under the Logan Valley decision there probably was boycott grape picketing on shopping center property in California. I think that would be within the rule.

As I said, I think time, place and manner regulation is by reference to the First Amendment. And we suggest that it does not exceed -- that the --

QUESTION: But none of NLRA cases rests on the First Amendment.

MRS. STILLMAN: No, they don't, they rest on the National Labor Relations Act. But I am saying that the claims of the owner against that, that nobody perceived any First Amendment claims of him against --

If there are no more questions --

MR. CHIEF JUSTICE BURGER: You have 5 minutes remaining.

REBUTTAL ARGUMENT OF MAX L. GILLAM, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GILLAM: Mr. Chief Justice, and may it please the Court:

QUESTION: May I ask, Mr. Gillam?

MR. GILLAM: Yes, sir.

QUESTION: Did you say something earlier that after Tanner the California courts followed Tanner in leafleting by labor unions or picketing on premises of this kind?

MR. GILLAM: Yes, sir, that was the Diamond 2 case.

QUESTION: Oh, yes. And now you say that is overruled by this case?

MR. GILLAM: Yes, sir. This case overruled Diamond 2, which came down after Tanner.

QUESTION: Have any of these labor union leafletings or picketings arisen since this case was decided?

MR. GILLAM: Yes, sir. It is not in the record. I would be happy to answer your question, because we are intimately involved in the Ari Krishna's, in Cal-OPEC, which is an initiative process related to putting a surtax on oil companies who are above a certain size, this decision has spawned a variety of things, some of which are public records such as --

QUESTION: What was the first on you mentioned?

MR. GILLAM: The Ari Krishna's, part of whose religion

is selling books.

QUESTION: Was this on a shopping center?

MR. GILLAM: Oh, yes, sir.

Rhode Island has a statute before its legislature now which would prohibit any business from excluding any politician who is running for office or wants to run for office, as an example. Any business.

Wisconsin has a proposed statute on its books.

QUESTION: You mean on the public parts of the shopping center or --

MR. GILLAM: No, just a business. If you have a business which is open to the public, you cannot exclude any politician who wants to come in and campaign.

QUESTION: You mean by that a retail department store?

MR. GILLAM: Yes, sir. I can give the Court the cite to that if you would like.

QUESTION: It has not been enacted, I gather.

MR. GILLAM: It has not been enacted.

One State has enacted it. It was referred to in the Homart friend of the court brief.

This decision has wide ramifications if this Court --

QUESTION: Do you have any State court decisions that are in your favor now that --

MR. GILLAM: Yes, sir, Oregon --

QUESTION: -- now that the decision in

your favor in California has been overruled?

MR. GILLAM: Yes, sir, the Oregon Court was faced with the precise same issue as the California Supreme Court and upheld what we would call the principles and the reasoning of --

QUESTION: Was that a Hippocrates-based decision or a speech-based decision based on the owner's speech?

MR. GILLAM: As near as I can determine it was a property-based decision.

QUESTION: Have there been any based on the owner's speech?

MR. GILLAM: I am not aware of any. As I said, we raised in the California Supreme Court, both before argument and in our petition for rehearing.

QUESTION: But they did not address to that?

MR. GILLAM: They did not address the issue.

QUESTION: Are you placing principal reliance on your property ground here, or not?

MR. GILLAM: Sir, I would like not to designate either of my grounds as principal. I think they are both very significant and of equal importance.

QUESTION: Do you think your property ground is supported by our cases?

MR. GILLAM: Yes, sir, I think it is supported by Lloyd v. Tanner.

QUESTION: You mean at the end of --

MR. GILLAM: Yes, sir, the accommodation between --

QUESTION: I thought that just meant that the shopping center was not the State.

MR. GILLAM: I am sorry sir?

QUESTION: I just thought that meant the shopping center was not the State.

MR. GILLAM: Its reasoning is based on the fact that in First Amendment situations the rights to expressive activity are weighed against the rights of the property owner to make sure that no greater inroad --

QUESTION: If the property owner isn't the State, there doesn't have to be any weighing unless there is some legislation or something. The property owner can just keep them off, because the First Amendment doesn't protect anybody against the property owner, against private action.

MR. GILLAM: Mr. Justice Powell made the point in that case --

QUESTION: The Court made it.

MR. GILLAM: I mean in his opinion, and the Court made it as it has made it in Babcock and Wilcox and others that where you are advancing a particular right, whether in the commerce clause or otherwise to the extent that it interferes with what are thought to be property or speech rights, the Court goes through a balancing to see that it does not interfere

unreasonably with it.

QUESTION: I suppose you have cited our live free or die case, that New Hampshire licensing.

MR. GILLAM: Yes, sir, to the extent that that made a movie billboard -- out of that specific State model the California Supreme Court would make a permanent billboard out of every shopping center for any idea.

QUESTION: Mr. Gillam, you wouldn't go through any balancing operation if somebody wanted to come on my property at home and make a speech and I said, "Get off." And he says, "Well, look, we have got to stop and make a big balance here. I have a very important message and you are going to be away from home when I want to be here anyway." You know, I could just keep him off.

MR. GILLAM: Well, not if the State Supreme Court had held that --

QUESTION: I agree with that.

MR. GILLAM: -- fee simple in our State means it is qualified by your obligation to let anybody come on your lawn and make a speech.

QUESTION: But I wasn't including that. I wasn't including that. And that wasn't in our case. Our case just simply said that that shopping center didn't happen to be the State, in which event it was just an ordinary -- an ordinary homeowner or property owner keeping somebody off that he didn't

want to let on.

MR. GILLAM: That is correct. But it also adopted the principles which you have used in your NLRA cases with respect to reasonable available adequate alternatives.

I would like to close with just one point, if it please the Court:

QUESTION: Nobody has mentioned the captive audience aspects so far as I recall anywhere here. People going to supermarket are going there to buy groceries and meat and whatnot. Are they in your view something of a captive audience?

MR. GILLAM: They are a captive audience only to the extent that they go to shopping centers which are deemed desirable by the person engaging in a particular form of expressive activity. If I have a Center that is attractive and draws a large number of people, there is no question in my mind that extensive expressive activity on that shopping center may drive away business.

However, it is a free choice as it sits now. In the record in this case there were stipulations as to the nine largest shopping centers in Santa Clara County. It appears on pages 6 and 7 of the record. The first item of business was a stipulation that out of the 9 largest shopping centers in Santa Clara County one was forbidden by local ordinance from permitting expressive activity, 4 permitted it, 4 did not. The stipulation went on that the plaintiffs had conducted a

survey of Santa Clara County. Some Centers permitted expressive activity, some did not, some of those who did permit it did it subject to reasonable regulation. It is in the face of that that the California Supreme Court's assumption is so egregious. Implicit in that opinion is the assumption that expressive activity is barred from all shopping centers. That is why that fact is so significant, which we contend makes this a very narrow case, the existence at great length of the adequate available alternative.

Thank you.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Gillam.

Thank you, counsel.

The case is submitted.

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