No. 25-1322

In the Supreme Court of the United States

MAJESTIC REALTY CO.; REDLANDS JOINT VENTURE, LLC; AND MOUNTAIN GROVE PARTNERS, LLC,
Petitioners,

v.

ALEX SALAZAR,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, contrary to *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a state violates the Takings Clause and the First Amendment when it requires the owners of private commercial property to allow unwanted expressive activity on their land.

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs supporting free speech and property rights.

This case interests MI because *PruneYard* is an aberrant case that is difficult to square with this Court's First Amendment jurisprudence. The Court has drastically eroded the foundations of that dated decision, which is now ripe for overturning.

SUMMARY OF ARGUMENT

Contrary to this Court's interpretation of the First Amendment's Free Speech Clause, *see*, *e.g.*, *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–70 (1972), the California Supreme Court announced in 1979 that the corresponding provision in the state constitution gives activists the right to invade privately owned shopping centers to express their views, Cal. Const. art. I, § 2(a); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd sub nom. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).[2] The same provision even gives protesters the right to advocate for a boycott of one of the stores in the center. *See Fashion Valley Mall, LLC v. NLRB*, 172 P.2d 742, 754 (Cal. 2007).

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel; no person or entity other than *amicus* funded its preparation or submission.

[2] Although the California decision is often referred to as *Pruneyard*, this brief refers to it as "*Robins*" for the sake of clarity. The U.S. Supreme Court decision will be referred to as *PruneYard*.

In this case, Alex Salazar sought to distribute flyers to advertise meetings at which he intended to present his view that men should not be required to pay child support for children born outside of marriage. App. 3a–4a. He referred to his movement as "men's eMANcipation." App. 4a. Petitioners, enforcing their blanket policy against "soliciting, petitions, polling . . . peddling, political causes, [and] distribution of pamphlets," denied Salazar permission to distribute his flyers at their shopping centers. App. 5a. Salazar sought a preliminary injunction requiring Petitioners to permit him to distribute his flyers. App. 6a.

The California Court of Appeal granted the injunction. App. 38a–46a. The court applied *Robins* and held that a private shopping center's blanket exclusion of activists violated the state constitution. Further, the policy was deemed not to be a content-neutral rule subject to intermediate scrutiny, but a content-based restriction subject to strict scrutiny. App. 40a–42a.[3]

The opinion below illustrates the irreconcilability of California's *Robins* line of cases with this Court's recent Takings Clause jurisprudence. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149–50 (2021)

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[3] California courts treat shopping centers as state actors and apply the same tiers of scrutiny to the owners' restrictions on expressive activity that they would to state action. *See Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810 (Cal. 2001) ("[T]he actions of a private property owner constitute state action for purposes of California's free speech clause."); *Savage v. Trammel Crow Co.*, 223 Cal. App. 3d 1562, 1572 (1990) ("[A] shopping center's power to impose time, place and manner restrictions on [expressive] activity is . . . measured by federal constitutional standards."). *See also Fashion Valley Mall*, 172 P.2d at 754 (holding that mall's viewpoint-based rule against protests advocating boycott of stores within mall failed strict scrutiny).

(holding that a state appropriation of private-property owner's right to exclude constitutes a *per se* taking). Under *Robins*, Petitioners cannot limit the license they grant shoppers to the express purpose of entering a shopping center, *i.e.*, shopping. California has thus taken Petitioners' property right to exclude strangers who visit the shopping center to engage in noncommercial expressive activity—even to urge shoppers to take their business elsewhere, *Fashion Valley Mall*, 172 P.2d at 754— without just compensation.

When it affirmed *Robins*, this Court acknowledged that there had "literally been a 'taking' of [the right to exclude]." *PruneYard*, 447 U.S. at 82. Under the rule later established in *Cedar Point*, that should have been the end of the inquiry: if there has been a taking of the right to exclude, there has been a taking *per se*, for which the government must compensate the owner. *Cedar Point*, 594 U.S. at 149–50. *PruneYard* is thus inconsistent with *Cedar Point*'s holding that a balancing of interests "has no place" in such a case, *id*. at 149. The *PruneYard* Court concluded that California's interest in promoting free expression justified its allowing the invasion of private property without compensation: "the fact that [activists] may have 'physically invaded' appellants' property cannot be viewed as determinative," *PruneYard*, 447 U.S. at 83–84; *see also Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425, 433 (1999) ("[*Robins*] instructs us to balance the competing interests of the property owner and of the society with respect to the particular property or type of property at issue to determine whether there is a state constitutional right to engage in the challenged activity.").

Under *Cedar Point*, however, that physical invasion *must* be viewed as determinative. 594 U.S. at 149–50. The right to exclude is "the '*sine qua non*' of property." *Id.* at 150 (quoting Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998)). By taking that right, California has taken the Petitioners' property without just compensation.

Because *PruneYard* does not fall under any of *Cedar Point*'s three exceptions, 594 U.S. at 159–63, it is subject to *Cedar Point*'s *per se* rule, *id.* at 149–50. *Stare decisis* factors also favor overruling *PruneYard*. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). Accordingly, the Court should grant the petition and overrule *PruneYard*. If California wants to impose a servitude on mall owners requiring them to permit activists on their private property, it must compensate them for the value of that servitude.

ARGUMENT

I. *CEDAR POINT* CONTROLS THIS CASE

A. The State Has Appropriated Petitioners' Right to Exclude

Appropriation of the right to exclude is a *per se* taking. *Cedar Point*, 594 U.S. at 149. In *Cedar Point*, a California regulation gave union organizers access to an agricultural employer's property three hours a day for up to four 30-day periods per year to solicit employees. *Id.* at 144. The regulation required union organizers to notify the California Agricultural Labor Relations Board and serve a copy of that notice on the employer before taking access. *Id.* The Court held that even this limited-access right "appropriate[d] a right to invade the growers' property and therefore constitute[d] a *per se* physical taking." *Id.* at 149.

Yet the access right approved by *PruneYard* is far more invasive than the one the Court held was a taking in *Cedar Point*. Under the California constitution as interpreted by *Robins* and its progeny, Mr. Salazar has the right to access Petitioners' property to hand out his flyers during all hours of every business day all year long, subject only to reasonable time, place, and manner restrictions. *See* App. 38a–42a (holding that *Robins* was "dispositive"). Moreover, even Petitioners' requirement that Salazar obtain a permit to engage in expressive activity—analogous to the regulation in *Cedar Point* that required notice before taking access—violated the constitutional standard announced in *Robins*. App. 43a–44a. Salazar's right to invade Petitioners' property is thus greater than the right enjoyed by union organizers in *Cedar Point*: the preliminary injunction affirmed his right to access petitioners' property all year and without notice.

That sort of unfettered right of access appropriates shopping centers' right to exclude in the service of what the state has judged to be the public use of enhanced free expression. *Cf. Cedar Point*, 594 U.S. at 149 ("[T]he regulation appropriates for the enjoyment of third parties the owners' right to exclude."). Under the Fifth and Fourteenth Amendments, it must compensate Petitioners for condemning that servitude. *See United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 635–36 (1961) (addressing compensation standard for condemnation of an easement).

B. Openness to the Public Is Not One of the Three *Cedar Point* Exceptions

The *Cedar Point* Court delineated three categories of regulations that do not constitute takings under its holding. *Cedar Point*, 594 U.S. at 159–63. *First*,

"[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." *Id.* at 159. *Second*, invasions that are "consistent with longstanding background restrictions on property rights" are not takings. *Id.* at 160. *Third*, "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." *Id.* at 161.

The Court distinguished *PruneYard* in *Cedar Point*, *id.* at 156–57, but it did not cite *PruneYard* as representing a fourth exceptional category. The Court instead cited: *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012), to exemplify the isolated-invasions exception; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), to exemplify the background-restrictions exception; and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to exemplify the conditional-benefit exception. *Cedar Point*, 594 U.S. at 160–61. By contrast, the Court cited *PruneYard* only to rebut the argument that *PruneYard*'s holding ought to control the case. Instead, *PruneYard* was distinguishable because "the PruneYard was open to the public, welcoming some 25,000 patrons a day." *Id.* at 156–57.

The Court distinguished *PruneYard* because the facts of *Cedar Point* were distinct enough that they did not force the Court to reevaluate *PruneYard* at that time. This case, which presents facts nearly identical to those in *PruneYard*, offers the Court an opportunity to clarify that openness to the public is not itself an exception to *Cedar Point*'s *per se* rule.

II. *PRUNEYARD* DOES NOT QUALIFY FOR THE ISOLATED-INVASIONS EXCEPTION BECAUSE IT GRANTS A RIGHT OF ACCESS

The *Cedar Point* Court cited *Arkansas Game and Fish* as the case that illustrates how courts should determine whether a government regulation constitutes a series of isolated invasions or a *per se* taking. *Id.* at 160. In that case, the Court held that to determine whether recurrent floodings of the Commission's land by the U.S. Army Corps of Engineers constituted a taking as opposed to a series of isolated invasions, the lower court should consider factors such as (A) the duration of the invasion, (B) the intentionality or foreseeability of the invasion, (C) the character of the land and the owner's reasonable investment-backed expectations, and (D) the severity of the invasion. *Ark. Game and Fish Comm'n*, 568 U.S. at 38–39.

In this case, all four factors indicate the taking of the right to exclude access to Petitioners' property rather than a series of isolated invasions.

A. Duration of the Invasion

Robins's guarantee of a right to access shopping centers to engage in expressive activity is a permanent invasion. "[A]ppropriation of a right to physically invade property may constitute a taking 'even though no particular individual is permitted to station himself permanently upon the premises.'" *Cedar Point*, 594 U.S. at 139 (quoting *Nollan*, 483 U.S. at 832). Salazar did not invoke his right to free expression as a defense against a claim for a series of trespasses; instead, he sought an injunction blocking Petitioners from enforcing their restrictions on the use of their property. App. 6a. The limitation of the right to exclude is not

temporary, confined to the moments in which Salazar or another unwanted activist happens to "station himself" on the property. It is permanent, always authorized by the state constitution and the injunction that enforces it. The permanence of the invasion indicates a taking rather than a series of isolated invasions.

B. Intentionality or Foreseeability

The invasion is inevitable in this case because the appropriated right to exclude constitutes the taking in itself. *Cedar Point*, 594 U.S. at 139. The question of foreseeability, then, is not whether Salazar will actually take advantage of a right to invade (although he presumably intends to take advantage of the injunction that he seeks), but whether he has the right to do so. For that reason, the state-sanctioned invasion is intentional and inevitable, indicating a taking.

C. Character of the Land and Reasonable Investment-Backed Expectations

The appropriation of the right to invade for the purpose of protesting or leafletting interferes with the character of shopping centers and the investment-backed expectations of their owners. Owners of a shopping center seek to open a space for the public to shop and create economic value, not to operate a town square. *See* Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 Wash. L. Rev. 133, 145, 150 (1989). Or, in this Court's words:

> The invitation [to the public] is to come to the Center to do business with the tenants. . . . The obvious purpose [of including spaces open to the public], recognized widely as legitimate and responsible business activity, is to bring potential

> shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.

Lloyd, 407 U.S. at 565.

Owners' investment-backed expectation is that they will be able to control access to their property in such a way as to maximize the property's economic value. *See* Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 Alb. L. Rev. 1229, 1262 (1999) ("Economic freedom, like expressive liberty, cannot be selectively downgraded toward the achievement of ideological objectives currently in vogue."). Being required to host activists, who may dissuade shoppers from patronizing the shopping center, interferes with those investment-backed expectations in addition to imposing other unpredictable costs. *See* Schoepflin, *supra*, at 149, 149 n.122 (noting costs of devising and enforcing regulations and cleaning up after activists).

D. Severity of the Invasion

The right of access guaranteed by *Robins* severely affects the character of privately owned shopping centers. *Robins* effectively turned private shopping centers into public town squares. *See id.* at 149–51 ("A distinction between an easement where individuals may come and go at will and a right of speech activists to enter shopping centers with permission only, where the owners are not allowed to withhold that permission, is a distinction without a difference."). A rule that prevents owners from requiring that visitors to the

shopping center adhere to conduct that is conducive to the purpose of the enterprise—shopping—is severe.

Additionally, First Amendment values show that dictating how private actors choose whether to engage with speech is a severe restriction. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasizing severity of wrong of compelled speech); *id.* at 646 (Murphy, J., concurring) (same); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that forcing driver to carry slogan on license plate was less "serious" violation than *Barnette* only in degree); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995) ("[T]he choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control."). A rule that requires owners of a shopping center to host speech is a severe restriction of control over their property even if the Court concludes that it does not run afoul of the First Amendment.

All four *Arkansas Game and Fish Commission* factors support the proposition that applying the *Robins* rule constitutes a taking rather than a series of isolated invasions.

III. REQUIRING A SHOPPING CENTER TO HOST SPEECH IS NOT SUPPORTED BY BACKGROUND RESTRICTIONS ON PROPERTY OWNERSHIP

Members of the public access Petitioners' shopping centers by virtue of Petitioners' granting them licenses to do so. Principles of property ownership dictate that those licenses are revocable at will. *E.g.*, *Richardson v. Franc*, 233 Cal. App. 4th 744, 751 (2015). That a property is generally open to the public does not change

that the public's right to enter can be revoked at any time. *See Lloyd*, 407 U.S. at 569 ("Nor does property lose its private character merely because the public is generally invited to use it for designated purposes."). Because private property open to the public remains private, the *Cedar Point* Court's distinguishing of *PruneYard* based on the latter shopping center's having been open to the public, *Cedar Point*, 594 U.S. at 156–57, is inconsistent with *Lloyd*.

Cedar Point referenced a few exceptions to this general principle, including the law of nuisance, the privilege of necessity, and reasonable searches and seizures. *See id.* at 160–61. A right to enter the property for the purpose of expression does not fall traditionally within any of those categories. The closest category on a conceptual level may be necessity, but redefining necessity so broadly as to include the right to express oneself on a particular tract of private property would be a radical departure from centuries of constitutional and common-law jurisprudence. *Cf., e.g.*, *United States v. Schoon*, 971 F.2d 193, 196–99 (9th Cir. 1991) (holding that balance of harms inherent in necessity defense could never excuse criminal conduct committed as part of indirect civil disobedience); *id.* at 196 (citing cases from Eighth, Ninth, and Tenth Circuits suggesting same). In any case, California does not claim that the right to enter private property to express oneself is an extension of the common-law privilege of necessity. Instead, the state claims that it is an independent right guaranteed by the California constitution's protection of free expression. *Robins*, 592 P.2d at 347.

Two other areas of law might otherwise qualify as background restrictions: common-law obligations incumbent on common carriers and inns, and

antidiscrimination laws that apply to public accommodations. Neither applies to this case.

Under the common law, common carriers and inns had to serve all guests because of their monopolistic characteristics. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 590 (2023). A shopping center is unlike common carriers because it neither exercises a monopoly power nor hosts or transports people or their belongings like a bailee. *See id.* A privately owned forum that did exercise monopoly-like powers would present a separate question. *Contrast Marsh v. State of Ala.*, 326 U.S. 501, 505–08 (1946) (requiring a privately owned town that "does not function differently from any other town" to respect First Amendment rights), *with Lloyd*, 407 U.S. at 568–69 (holding that privately owned shopping center did not have to respect First Amendment rights and limiting *Marsh* to when a company town "perform[s] the full spectrum of municipal powers and st[ands] in the shoes of the State").

Antidiscrimination laws that regulate places of public accommodation by statute might constitute longstanding background restrictions, *see 303 Creative*, 600 U.S. at 590–91, and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–59 (1964), but they tend to regulate only status-based, not conduct-based, discrimination, *see, e.g.*, 42 U.S.C. § 2000a(a); Cal. Civ. Code § 51(b). In this case, Petitioners seek to exclude Salazar because of his conduct of distributing flyers, not because of any protected status.[4] A ban on excluding visitors based on their conduct while on the

[4] Excluding Salazar from shopping on the basis of his views on child support would be status-based discrimination if political ideology were a protected class. Excluding Salazar from distributing flyers is conduct-based discrimination.

premises is inconsistent with background restrictions on property ownership.

Finally, this Court's recent opinion in *Wolford v. Lopez* supports Petitioners and the common-law background principles important to this case. In that case, the Court invalidated a Hawaii law that required those bearing arms to obtain the "express and affirmative consent" of an owner whose property was open to the public before entering that property. *Wolford v. Lopez*, No. 24-1046, slip op. at 1 (June 25, 2026). That law, the Court noted, "depart[ed] sharply from the standard common-law rule," under which "*everyone* . . . may enter unless expressly prohibited from doing so." *Id.* (emphasis in original). Of course, the Court did not question the right of owners of private property to "expressly prohibit[]" their patrons from bearing arms if they chose to do so in accordance with the common law. And Petitioners do not contest Salazar's implied license to enter their shopping centers before that license is revoked by them. They argue only that they retain the right to revoke his license and treat him as a trespasser once he attempts to engage in unpermitted, noncommercial expression in violation of their rules. Nothing in *Wolford* weakens that argument.

Moreover, the *Wolford* decision was motivated at least in part by the Court's concern that Hawaii's deviation from the common law would *harm* property owners: "Some proprietors who do not themselves object to entry by carry permit holders may be reluctant to post a sign welcoming such individuals for fear of alienating other customers." *Id.* at 14. It is difficult to imagine that those property owners who wish to welcome free expression on their property would have similar qualms about putting up signs to that effect.

IV. *PRUNEYARD* ENDORSES A REQUIREMENT, NOT A CONDITION TO RECEIVE A BENEFIT

In California, anyone who operates a shopping center open to the public is required to abide by *Robins*. *See Robins*, 592 P.2d at 347; *Fashion Valley Mall*, 172 P.2d at 754. Doing so is not a condition for some state-issued benefit "such as a permit, license, or registration" conditioned on allowing health and safety inspections. *See Cedar Point*, 594 U.S. at 161–62. The right to exclude was appropriated by the California constitution; it was not bargained for in exchange for a license to operate a shopping center.

Contorting *Robins* to fit the mold of a conditional benefit would be unreasonable. Suppose California reformulated the *Robins* rule as requiring the cession of the right to exclude activists in exchange for the privilege of operating a shopping center—or, more broadly, in exchange for the privilege of admitting the general public to one's property. That would present at least two problems.

First, neither operating a shopping center nor keeping one's property generally open to the public is a government benefit. The conditional-benefit exception is for a statutory or administrative permitting regime, *see id.* at 161, not to justify *de facto* conditions for operating certain kinds of properties or admitting a certain number of guests.

Second, if California did impose such a statutory or administrative permitting condition on shopping centers—or all properties in the future on the basis of their being open to the public—or if the exception were expanded to include *de facto* conditions rather than just statutory ones, it would fail the *Nollan*/*Dolan* test

that controls this exception. *See Cedar Point*, 594 U.S. at 161. Under *Nollan*, the condition must have an "essential nexus" with the prohibition by "further[ing] the end advanced as the justification for the prohibition." *Nollan*, 483 U.S. at 837. Under *Dolan*, the exaction required must bear "rough proportionality" to the impact of the proposed development. *Dolan*, 512 U.S. at 391. If it fails to meet these requirements, the condition effects a taking. *See Nollan*, 483 U.S. at 837.

If California conditioned operating a shopping center open to the public on allowing activists onto the property, the "justification for the prohibition" would be promoting free expression. Since ample avenues for expression not on private property exist, such a condition would be out of proportion with the state's goal. *Cf. Lloyd*, 407 U.S. at 566–67 (limiting First Amendment rights' application to private property to cases in which nearby public property is not easily accessible).

California has no such permitting regime. And if it did, it would be a taking under *Nollan*/*Dolan* anyway.[5]

V. *STARE DECISIS* FACTORS FAVOR OVERRULING *PRUNEYARD*

When it decides whether to apply *stare decisis*—a principle that is at its weakest when the Court

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[5] Overruling *PruneYard* would have no effect on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), a case that shares some similarities with *PruneYard*, based at least on this exception to *Cedar Point*. The takings question would not arise in the context of *FAIR* because that case concerned funding that was contingent on law schools' affording military recruiters the same access as other recruiters—a conditional benefit. *See id.* at 52. In light of Congress's broad power to legislate in support of raising and supporting armies, *see id.* at 58, such a condition would easily satisfy *Nollan*/*Dolan*.

interprets the Constitution, *Dobbs*, 597 U.S. at 264—the Court considers factors such as the nature of the earlier Court's error, the quality of its reasoning, the workability of the rule, the effect of the rule on other areas of law, and "concrete" reliance interests created by the precedent. *See id.* at 268. Although *PruneYard* was not a case in which the Court removed a policy question from the democratic process—so the nature of the *PruneYard* Court's error was not as egregious as the error described by *Dobbs*, *see id.* at 269—the other factors favor overruling *PruneYard*.

A. Quality of Reasoning

In the context of the Court's later takings jurisprudence, *PruneYard* was poorly reasoned. The *PruneYard* Court acknowledged that there had "literally been a 'taking' of [the] right [to exclude]." 447 U.S. at 82. Nevertheless, it dismissed the possibility that such a conclusion would lead to anything other than a balancing test because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

But a destruction of the right to exclude by governmental action has since been held to constitute a *per se* taking. *Cedar Point*, 594 U.S. at 149–50. Since *PruneYard* contains no reasoning that would distinguish *Cedar Point*, it does not contain reasoning strong enough to support upholding its precedent now that its sole justification has been contradicted by the Court.

B. Workability of the Rule

PruneYard's rule is unworkable. There is no satisfying distinction between the shopping centers covered by *PruneYard* and other private spaces open generally

to the public for specific purposes such as theaters, sports stadiums, or freestanding supermarkets. See Schoepflin, *supra*, at 150. It has long been recognized that those venues offer admission to the public on a revocable basis. *E.g.*, *Marrone v. Wash. Jockey Club of D.C.*, 227 U.S. 633, 636–37 (1913).

The unworkability of the *PruneYard* rule has forced courts to qualify *PruneYard* on an *ad hoc* basis. *Cedar Point*, for example, distinguished *PruneYard* because the PruneYard's was open to the public and "welcom[ed] some 25,000 patrons a day." 594 U.S. at 156–57. This standard cannot reliably be applied by lower courts. How open to the public is open enough? What if the PruneYard were less popular and welcomed 1,000 patrons a day? What if no patrons actually came but were always welcomed? Must the property be open to the public in fact or only in name? What if the property describes itself as closed to the general public and open only to shoppers?

A far more workable rule would maintain that private property is private, no matter which or how many people the owner chooses to license to visit the property at any given time. *See Lloyd*, 407 U.S. at 569.

C. Effect on Other Areas of the Law

The Court's aberrant ruling in *PruneYard* has muddled no fewer than three areas of constitutional-law doctrine. First, and most important, it has muddled the Court's doctrine on regulatory takings. The Court has had to distinguish *PruneYard* several times, and it has had repeatedly to update the earlier distinctions as it has overruled the premises on which they relied. The Court distinguished *PruneYard* in its first *per se* takings case by arguing that the invasion

authorized by *PruneYard* "was temporary and limited in nature." *Loretto v. Tel. Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982). But *Cedar Point* foreclosed that distinction by holding that appropriation of the right to exclude effected a taking even if the invasions that resulted were temporary. *See Cedar Point*, 594 U.S. at 152–54. And *Cedar Point*'s new distinction of *PruneYard* on the ground that the PruneYard was open to the general public conflicts with the Court's statements in *Lloyd*. *Lloyd*, 407 U.S. at 569.

Second, *PruneYard* has unnecessarily complicated the Court's compelled-speech doctrine. In direct compelled-speech cases, the Court has recognized the right not to speak at all. *See Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 642. But in cases that involve compelled *hosting* of speech, the Court has limited the right against compelled speech to those cases in which the hosting entity engages in expressive activity of its own. *See Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8–9 (1986) (*PG&E*); *Hurley*, 515 U.S. at 569–70; *Moody v. NetChoice, LLC*, 603 U.S. 707, 716–17 (2024) (dicta). *PruneYard* stands in the way of a unified compelled-speech doctrine that states clearly that the government cannot force private individuals to support speech with which they disagree, whether by professing adherence to it or by hosting it on their property. *See PG&E*, 475 U.S. at 12 (distinguishing *PruneYard* because it involved no "concern that access to this area might affect the shopping center owner's exercise of his own right to speak").[6]

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[6] In *FAIR*, the Court held that a funding condition that required law schools to afford military recruiters the same access as other recruiters did not unconstitutionally compel speech. *FAIR*, 547 U.S. at 70. Although *FAIR* included the reasoning that the law

Finally, the California courts' treatment of private individuals who own shopping centers as state actors defies the logic and utility of the state-action doctrine. Under the state-action doctrine, a private entity cannot violate the First Amendment unless it exercises a function "traditionally exclusively reserved to the State." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)). Operating a shopping center is not such a function. *Lloyd*, 407 U.S. 567–70. Nevertheless, the California courts have taken a doctrine of scrutiny developed specifically with state actors in mind and applied it uncritically to private individuals. *See Savage v. Trammel Crow Co.*, 223 Cal. App. 3d 1562, 1572 (1990) (adopting "federal constitutional standards" for assessing shopping center's time, place, and manner restrictions). But private individuals who own shopping centers do not have the same interests as actual state actors, so applying the same test that requires certain interests to permit substantially related or necessary restrictions makes little sense. Maximizing profit is not a compelling state interest, but it is a compelling interest—far and away the principal interest—for the owner of a shopping center. Applying heightened scrutiny to private actors

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schools were not themselves speakers whose message would be affected by the speech of recruiters, *id.* at 63–64, it could survive the overruling of *PruneYard* because its holding was also based on other grounds. Those included judicial deference to Congress's "authority to raise and support armies," *id.* at 58, and the recruiters' engaging in conduct that was not inherently expressive, *id.* at 65–67; *see United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). *PruneYard* did not involve legislation to raise armies, and the conduct that it required shopping centers to permit was inherently expressive (which was itself the reasoning for the *Robins* rule, *Robins*, 592 P.2d at 346–47).

mistakes the particular circumstances of *state* action for which those tiers of scrutiny were developed.

D. Reliance Interests

Overturning *PruneYard* would not interfere with reliance interests. Only reliance interests that are "conventional" and "concrete" support applying *stare decisis*. *Dobbs*, 597 U.S. at 288. There are no such reliance interests in this case. Neither Salazar nor similarly situated activists have invested "advance planning of great precision" in reliance on the Court's *PruneYard* rule. *See id.* at 287 (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion)). With almost no effect on their advance planning, Salazar and activists like him can hand out flyers outside the entrance of shopping centers on public property rather than within shopping centers on private property. Requiring activists to hand out flyers on public property outside shopping centers would have at most a negligible effect on any advance planning on their part.

CONCLUSION

Because *PruneYard* is inconsistent with *Cedar Point* and the *stare decisis* factors favor overruling *PruneYard*, the Court should grant the petition.

Respectfully submitted,

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