

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,
Second Appellate District, Division One**

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS
AMICUS CURIAE SUPPORTING PETITIONERS**

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

June 29, 2026

QUESTION PRESENTED

Whether *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), should be overruled.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. <i>PRUNEYARD</i> CAN'T FIT THE FIRST AMENDMENT.....	4
II. <i>PRUNEYARD</i> CAN'T FIT THE FIFTH AMENDMENT.....	9
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023).....	3, 6, 8
<i>Austin v. Mich. Chamber of Com.</i> , 494 U.S. 652 (1990).....	1, 2, 5
<i>Cedar Point Nursery v. Hassid</i> , 594 U.S. 139 (2021).....	3, 9, 10, 11
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	3, 4, 5, 8, 9, 11
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994).....	8
<i>FEC v. Mass. Citizens for Life, Inc.</i> , 479 U.S. 238 (1986).....	5
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 U.S. 241 (1964).....	11
<i>Horne v. U.S. Dep’t of Agric.</i> , 576 U.S. 350 (2015).....	3, 9, 10
<i>Hurley v.</i> <i>Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.</i> , 515 U.S. 557 (1995).....	3, 8
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964).....	11

<i>Lloyd Corp. v. Tanner</i> , 407 U.S. 551 (1972).....	2, 10, 11
<i>Manhattan Cmty. Access Corp. v. Halleck</i> , 587 U.S. 802 (2019).....	3, 6, 8
<i>Masterpiece Cakeshop v. Colo. Civil Rts. Comm’n</i> , 584 U.S. 617 (2018).....	4, 6
<i>Miami Herald Publ’ing Co. v. Tornillo</i> , 418 U.S. 241 (1974).....	4, 5
<i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024).....	1, 3, 6, 7, 8
<i>Nat’l Socialist Party of Am. v. Village of Skokie</i> , 432 U.S. 43 (1977).....	11
<i>Pac. Gas & Elec. Corp. v.</i> <i>Pub. Util. Comm’n of Calif.</i> , 475 U.S. 1 (1986).....	7
<i>Penn Cent. Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978).....	2, 9
<i>PruneYard Shopping Ctr. v. Robins</i> , 447 U.S. 74 (1980).....	i, 1–12
<i>Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.</i> , 547 U.S. 47 (2006).....	8
<i>Va. State Bd. of Pharm. v.</i> <i>Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976).....	4

W. Va. State Bd. of Ed. v. Barnette,
319 U.S. 624 (1943).....4

Wooley v. Maynard,
430 U.S. 705 (1977).....2, 3

Constitutional Provisions

U.S. Const. amend. I2, 4, 5, 6, 7, 8

U.S. Const. amend. V2, 3, 4, 9, 10, 11

Other Authorities

Appellants' Br.,
PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (Dec. 1979).....7

Appellees' Br.,
PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (Jan. 30, 1980).....1, 2, 4

Daniel Patrick Moynihan,
Zionism is Not Racism (Nov. 10, 1975).....1

Resolution 3379,
United Nations General Assembly
(Nov. 10, 1975)1, 7

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. Free markets depend on free speech and association because the voluntary exchange of goods requires the free exchange of accurate information that only uncoerced discourse can supply. WLF often appears as an amicus to advance these goals. *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024); *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990).

INTRODUCTION AND SUMMARY OF ARGUMENT

Like a lot of bad law, *PruneYard* came to this Court on sympathetic facts.

At the PruneYard Shopping Center, a group of Jewish students quietly collected signatures on petitions while politely inveighing against United Nations General Assembly Resolution 3379—which our UN ambassador declared an “obscenity” that the United States would “never” “acknowledge . . . abide by . . .” or “acquiesce in.” Daniel Patrick Moynihan, *Zionism is Not Racism* (Nov. 10, 1975); Appellees’ Br. 6, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74

* No party’s counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief’s preparation or submission. Counsel for all parties received timely notice of WLF’s intent to file this brief.

(Jan. 30, 1980) (Robins Br.). “The project was well received by shopping center patrons.” Robins Br. 6. But the students were forced by the shopping center’s control group to leave—their activity violated the company’s rule forbidding “any visitor or tenant to engage in publicly expressive activity.” *PruneYard*, 447 U.S. at 77.

The young and righteous had been set aside by a faceless company. Perhaps it’s not surprising that *PruneYard* wrote around this Court’s venerable compelled-speech caselaw, 447 U.S. at 86–88, and downgraded *Lloyd Corporation v. Tanner*—which eight years earlier vindicated the First and Fifth Amendment rights of a shopping center to bar political activists from its premises, 407 U.S. 551, 570 (1972)—from a precedential holding to a mere curiosity. *PruneYard*, 447 U.S. at 80.

That move was no doubt well intended, and though contrary to cases like *Lloyd* and *Wooley v. Maynard*, 430 U.S. 705 (1977), even plausible. Back then, corporate speech rights were in flux. Indeed, soon after *PruneYard*, in *Austin v. Michigan Chamber of Commerce*, this Court came perilously close to suggesting that corporations carry no inherent political-speech rights at all. 494 U.S. at 668–69. Ditto the Fifth Amendment—*PruneYard* was decided just two years after *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), and treated the physical occupation of business premises under color of law as a light regulatory taking.

But time has proven that *PruneYard* was a constitutional shipwreck. First Amendment caselaw

now clarifies that corporations may choose whether to weigh in on political controversies, *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010) (“*Austin* is overruled”), including a full-spectrum right to disassociate from messages they disagree with or decline to endorse. *Moody*, 603 U.S. at 743; *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 818–19 (2019). This holds true even when the association involves a commercial transaction. *303 Creative LLC v. Elenis*, 600 U.S. 570, 579–80 (2023). *PruneYard*’s Fifth Amendment holding has taken a similar drubbing. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Horne v. U.S. Dep’t of Agric.*, 576 U.S. 350 (2015).

PruneYard is fundamentally alien to our constitutional tradition—and dangerous if ever given its due. So it’s not surprising that it hasn’t been. The Court keeps running into cases where *PruneYard* should control but has (thankfully) flinched from giving the case full force and effect. *E.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579–80 (1995) (distinguishing *PruneYard*); *Moody*, 603 U.S. at 730, 740 (same); *Cedar Point*, 594 U.S. at 156–57 (same). *PruneYard* is ostensibly good law, but the Court’s efforts to “keep the precedent alive” are less-and-less convincing each time. *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring).

Yet it hangs there above us still. *PruneYard* gives a “right to refrain from speaking at all,” *Wooley*, 430 U.S. at 714, unless somebody says otherwise. It supplies a right to exclude unwanted messengers, unless they’d like to stay. And despite being bypassed in the pages of this Court’s opinions, *PruneYard* reaps the whirlwind still—evidenced now by a shopping

center trying to keep itself from being associated with Mr. Salazar’s far less sympathetic speech than that brought to the PruneYard by “students of the 1976 confirmation class of Temple Emanu-El.” Robins Br. 6.

PruneYard was wrong the day it was decided—and its reasoning hasn’t improved since. It stalks our jurisprudence as the speech-compeller’s best friend, the property-taker’s preferred precedent. *Masterpiece Cakeshop v. Colo. Civil Rts. Comm’n*, 584 U.S. 617, 662 (2018) (Thomas, J., concurring) (noting Colorado court of appeals’ reliance on *PruneYard*). *PruneYard* doesn’t fit with the First Amendment. It can’t be saved under the Fifth Amendment. The Court should stop trying “to shore up the original mistake.” *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). It should end it.

ARGUMENT

I. *PRUNEYARD* CAN’T FIT THE FIRST AMENDMENT.

If you squint a little, *PruneYard* is almost forgivable. It involved a commercial concern—whose First Amendment rights had only recently been acknowledged. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). And while *PruneYard* came armed with cornerstone cases like *Wooley v. Maynard*, *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)—one could be excused at the time for questioning whether they applied to a profit-seeking enterprise.

Wooley and *Barnette* involved humans, not corporations. And while *Miami Herald* held that a newspaper company couldn't be forced to carry an unwanted political message, the Court decided that case under the Press Clause. 418 U.S. at 243. Whether any other company had a First Amendment right to stay silent as a matter of the Speech Clause or associational liberty was unclear.

And, indeed, the post-*PruneYard* Court embarked on a series of decisions suggesting that businesses held no inherent First Amendment right to political expression. Cases like *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), parceled out strictly limited speech rights to only qualified nonprofits. And in *Austin v. Michigan Chamber of Commerce*, the Court held that “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form” justified banning a company’s political messaging. 494 U.S. at 660. *PruneYard* might make some sense in a world where a business has no expressive rights equal to that of an individual activist—at a minimum, it wouldn’t be so obviously wrong that it must be overruled.

But things have changed. The Court thankfully repudiated that misbegotten era of political censorship. *Citizens United* overruled *Austin*, 558 U.S. at 365–66, and so the Court’s modern First Amendment jurisprudence gives *PruneYard* no succor. In the years since *Citizens United*, the Court has repeatedly found that the First Amendment protects the right of a corporate actor to disassociate from political messages it disagrees with or declines to endorse, because “[t]he First Amendment envisions

the United States as a rich and complex place where all *persons* are free to think and speak as they wish, not as the government demands.” *303 Creative*, 600 U.S. at 603 (emphasis supplied); *Moody*, 603 U.S. at 743.

The Court has held that a public access cable station can refuse to platform a disfavored speaker. *Manhattan Community*, 587 U.S. at 818–19. It has held that a for-profit business can refuse to join a customer’s political or religious opinions—even if those opinions come dressed as a less protected commercial transaction. *303 Creative*, 600 U.S. at 579–80, *Masterpiece Cakeshop*, 584 U.S. at 626–27. And in those cases, it didn’t—*contra PruneYard*—matter that “the government itself” hadn’t “prescribed the [compelled] message.” *PruneYard*, 447 U.S. at 87. Or that the targeted company could always “expressly disavow any connection with the message” through other channels. *Id.*

Moody v. NetChoice is especially instructive. As much as any shopping center, a social networking app exists to make money. And those platforms are open to all comers who wish to enter and browse. But *PruneYard* didn’t dictate the outcome in *Moody*. The Court instead held that a commercial speaker holds an inalienable First Amendment right to curate its own messaging—and evict those who don’t keep to the code. 603 U.S. at 743. This salutary outcome flatly contradicts *PruneYard*, not just in the holding, but in the particulars of its reasoning. As just one example, the *PruneYard* Court found no First Amendment injury to the shopping center because “views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will

not likely be identified with those of the owner.” 447 U.S. at 87. Yet the *Moody* Court concluded that “the major social-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post.” 603 U.S. at 739.

To paper this over, *Moody* relied on yet another excuse for *PruneYard*: the shopping center didn’t object to the students’ expressive activity or plead a loss of its “own expression.” *Moody*, 603 U.S. at 730 (citing *Pac. Gas & Elec. Corp. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 12 (1986) (Powell, J., plurality) (similarly distinguishing *PruneYard*)). But of course it did. The PruneYard evicted the students from the premises: it’s hard to find a clearer example of disassociation than that. As for its “own expression,” *Moody*, 603 U.S. at 730, the PruneYard’s ownership objected to being “deprived of the choice guaranteed . . . by the First Amendment to remain silent or indifferent.” Appellants’ Br. 14, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (Dec. 1979).

We may not know whether the PruneYard privately thought UN Resolution 3379 wise or foolish, but we know it wished not to take a stand or stand around those who did. Declining to speak is itself an expressive act. Choosing to evict those who do talk sends a message: “No politics here, please.” That abstention by a private company is protected by the First Amendment.

These efforts to “downplay, if not forget” *PruneYard* to keep it from swallowing the First Amendment haven’t gone unnoticed. *Moody*, 603 U.S. at 784 (Alito, J., concurring in the judgment). Yet they

continue all the same. A destabilizing precedent like *PruneYard* loses its stare decisis value when “the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.” *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring).

This recent caselaw also demolishes prior efforts by this Court to save *PruneYard* by differentiating it. Take *Hurley*, which found a First Amendment right for parade organizers to keep unwanted marchers from the final show. 515 U.S. at 581. For the organizers to win, the Court needed to write around *PruneYard*’s holding that one speaker can foist herself onto another’s platform. So the *Hurley* Court cabined *PruneYard* as a case about (1) others’ speech (2) in a public-facing space run by a for-profit corporation, (3) with no misattribution risk, (4) that a company could always disavow on the backend. *Id.* at 579–80. Yet all those *PruneYard*-saving excuses have fallen away thanks to cases like *Moody*, *303 Creative*, and *Manhattan Community*. In fact, *Hurley* and *PruneYard* are now obviously irreconcilable.

Other possible saving interpretations founder. In other contexts, the Court has stressed the size of the PruneYard Shopping Center or the number of its patrons, presumably to indicate that the burden imposed against the company was permissibly small. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *infra* at 10. But that’s not how First Amendment tailoring works. A targeted deprivation of a right might quail before a mighty state interest, like raising or supporting the armed forces in wartime. See *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547

U.S. 47, 67 (2006). But the government must demonstrate that pressing need; the Constitution doesn't bless an unlawful imposition just because the infringement doesn't last forever. Otherwise, the government could ban corporations from airing 30-second political ads (because they have other forms of speech available) right before an election (because the company can speak its mind the rest of the year). But it can't. *Citizens United*, 558 U.S. at 372.

PruneYard should be overruled.

II. **PRUNEYARD CAN'T FIT THE FIFTH AMENDMENT.**

PruneYard sanctioned the regular, physical occupation of a private business as permissible regulation. The decision issued shortly after *Penn Central* ushered in a new era for understanding regulatory takings. 438 U.S. at 124–28, 135–38. And so, at the time, perhaps this holding was reasonable.

But again, things have changed. Twice in the last decade this Court has ruled that such regular, physical occupations aren't regulatory matters at all, but per se physical takings. A state-backed physical occupation—even if it's delimited in time—is now always understood as an actual seizure, subject to just compensation. *Cedar Point*, 594 U.S. at 162; *Horne*, 576 U.S. at 370.

In both those cases, dissenting members of this Court argued that the majority was trampling on *PruneYard*. *Cedar Point*, 594 U.S. at 169–70 (Breyer, J., dissenting) (*PruneYard* should give victory to the government); *Horne*, 576 U.S. at 379 (Sotomayor, J.,

dissenting). In turn, the majorities gamely tried to distinguish the case by emphasizing that the PruneYard Shopping Center was an “‘already publicly accessible’ business” “welcoming some 25,000 patrons a day.” *Cedar Point*, 594 U.S. at 156–57 (quoting *Horne*, 576 U.S. at 364). That may have separated *PruneYard* from the facts in those cases, which involved raisin and strawberry growers rather than open-to-the-public shopping malls. But it makes *PruneYard* quite the curious holding: a private business forfeits its Fifth Amendment rights if it lets customers onto its premises.

In 1972, when asked to stare into that exact abyss, the Court declined. *Lloyd*, 407 U.S. at 569–570. *Lloyd v. Tanner* was *PruneYard*-before-*PruneYard*: a case about whether a shopping center could exclude political activists. Donald Tanner and his comrades wanted to occupy a portion of a 50-acre “modern retail shopping center in Portland, Oregon” to “quiet[ly] and orderly” invite passersby to an organizing meeting “to protest the draft and the Vietnam war.” *Id.* at 553–56. Tanner insisted he could do so because the mall was generally open to the public. The *Lloyd* Court rebuffed him, because that logic ends with a private business unable to expel “trespassers” and “uninvited guests.” *Id.* at 564–70 (pluralization supplied).

Given the disparate outcomes, it’s tough to distinguish *Lloyd* from *PruneYard* at any time. But it’s remarkable that through its repeated efforts to save *PruneYard* as a Fifth Amendment precedent, the Court has recast that case into precisely the horror the *Lloyd* Court objected to. Now “property [does] lose its private character merely because the public is generally invited to use it for designated purposes.”

Id. at 569. It can't be so that, to salvage *PruneYard*, “most retail stores and service establishments across the country” are closed to Fifth Amendment protection by being open for business. *Id.* at 565. Since *PruneYard* threatens to “subvert” private ownership so—“and because its logic threatens to undermine our [Fifth] Amendment jurisprudence and the nature of [property rights] more broadly—the costs of giving it stare decisis effect are unusually high.” *Citizens United*, 558 U.S. at 380–82 (Roberts, C.J., concurring) (italics omitted).

Even if you think that's overstated, at a minimum, *PruneYard*'s rule lets any member of the public physically occupy any sufficiently exposed enterprise for that citizen's non-commercial, activist purpose—no matter how much the actual property owner may resist. And California isn't doing this as the last resort to directly advance some venerable, constitutional purpose, such as countering racial discrimination in public accommodations or the point-of-sale. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

In fact, *PruneYard* forces a business to give space to hateful political speech upon request. There's an obvious cost to this compelled *Skokie*ization of the Nation's privately owned businesses. *Cf. Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977). Even if such a thing can be constitutionally cognized as “public use,” U.S. Const. amend. V, “the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation” for such a direct (and unwanted) occupation. *Cedar Point*, 594 U.S. at 147. Yet

PruneYard holds otherwise—and so the precedent must go.

CONCLUSION

Left to stand, *PruneYard* will remain the property-taker's preferred holding and the speech-compeller's best friend. It's time to show *PruneYard* the door. The Court should grant the writ.

Respectfully submitted,

Cory L. Andrews

Zac Morgan

Counsel of Record

WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave., NW

Washington, DC 20036

(202) 588-0302

zmorgan@wlf.org

June 29, 2026