

In the

Supreme Court of the United States

LLOYD CORPORATION, LTD.,

Petitioner,

v.

DONALD M. TANNER, et al.,

Respondents.

No. 71-492

Washington, D. C.
April 18, 1972

Pages 1 thru 51

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Washington, D. C.,

Tuesday, April 18, 1972.

The above-entitled matter came on for argument at
11:51 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
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, MR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

GEORGE BLACK, JR., ESQ., Black, Kendall, Tremaine,
Boothe & Higgins, 520 S.W. Sixth Avenue, Portland,
Oregon 97204; for the Petitioner.

CARL R. NEIL, ESQ., c/o American Civil Liberties
Union of Oregon, 1331 S. W. Broadway, Portland,
Oregon 97201; for the Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
George Black, Jr., Esq., for the Petitioner	3
Carl R. Neil, Esq., for the Respondents	26

[Afternoon session - pg. 7]

Court:

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State of Oregon

Department of the Interior

Circuit

County of Clatsop

Center of the County

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Marsh v. Alabama

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-492, Lloyd Corporation against Tanner.

Mr. Black, you may proceed whenever you're ready.

ORAL ARGUMENT OF GEORGE BLACK, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here upon the issuance of a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Now, the case involves a controversy between shopping center owner and an anti-war handbiller. I believe, if I'm able to properly describe the factual situation in this case, it will be found not to be the same factual situation as in Marsh v. Alabama, nor in Logan Valley, nor in Central Hardware.

The petitioner, Lloyd Corporation, is the owner of a number of pieces of land divided by public streets in Portland, Oregon, used for shopping centers, as a shopping center, and known generally as Lloyd Center in Portland, Oregon.

The respondents in this case are individuals who represented what they termed the resistance, advocating resistance to the military draft. Their handbills were anti-war, anti-draft handbills.

These respondents sought to distribute their handbills on certain portions of petitioner's land in a mall or walkway in the main building of the petitioner, in Lloyd Center.

May I refer briefly to the Appendix, in which we have copied photographs of the Center, and there's a map, real estate map at page 115. Also at page 116 is an aerial photograph, Exhibit No. 4, of the Center; and, similarly, another aerial photograph at page 117.

The area that is the entire area, including the various buildings and the public streets in the Center and the main building are said to compose something in the neighborhood of 50 acres.

Q There are how many public streets run through this, five or six as I remember?

MR. BLACK: Yes, there are. They run through the various parts of the Center, Mr. Justice Douglas; none run through the main building, which is really the subject of this particular handbilling.

Q Are the public streets identifiable in any way, marked in any way that we can see them on there?

MR. BLACK: There are pictures of the malls and of the public areas, but I don't think that there is a picture of the street as such in the exhibits, Mr. Chief Justice.

Q Well, your exhibit on page 115 shows Broadway, Weidler, Halsey; they are all public, aren't they?

MR. BLACK: Yes, the map that I understood you to mean in addition to that map on page 115, that will show the public streets, and I think probably will answer your question. That's Exhibit No. 3, and in referring to it you will note that the Center on the north is bound by what is known as Broadway. The next street that runs through the Center is known as Weidler Street; the second one, proceeding on down the map, is known as Halsey Street.

And on the west or lefthand side of the map as one is looking at it, is Ninth Street; on the east is , I think, Sixteenth Avenue; and on the south, the bottom part of the map here, it will be noted, is Multnomah Street, plus an indentation of a public park called the Holladay Park, and some other streets.

Referring further to this map, which is maybe the easiest way to explain this, there is a dark line around the perimeter of Lloyd Center, which includes the private areas and the public areas. That perimeter is approximately one and a half miles.

With reference to the -- this was not a suburban operation as such when it was created, these lots and streets were there at the time Lloyd bought that property. Not in the Appendix but in the record is a map of the City of Portland, which I think is No. 3-A, Exhibit 3-A, which shows the approximate location here of Lloyd Center in the City

of Portland.

If I may take a moment to further describe the -- this particular area, I will point out that there are some 39 blocks, and the blocks there are 200 feet by 200 feet, with streets on each side of them, some 39 blocks were intended to be devoted to this enterprise in 1954. There were certain vacations of the streets in some of the area. That will be noticed on the map as the large building. There was not a vacation of other streets in the area, and instead Lloyd Corporation, following usual provisions of the city ordinance of Portland, donated and dedicated other properties to permit the widening of the streets and sidewalks in other parts of the area.

I don't think that that street vacation question is material in this case, but it may be considered material by the respondents in the case.

The construction of the Center, which is important, so I'll give it one more moment here, there were two buildings built with streets adjoining them; at the top of the map there were two more buildings built later on, then another building, each with public streets surrounding them.

Then the large building, which we call the main building, which has in it what has been referred to as a mall, a mall or a walkway, a lobby, a corridor, whatever one calls it.

MR. CHIEF JUSTICE BURGER: We'll take up there after lunch.

MR. BLACK: Thank you, sir.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

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AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Black.

MR. BLACK: Thank you, Mr. Chief Justice.

I would like to say just one more word about the setting, then I will get into the incident and discuss a little law, if I may.

The place where this handbilling occurred is photographed and appears at page 134 and 135 of the Appendix. That's in one of the interior malls or walkways in front of the Meier & Frank entrance to that mall, in the main building that I had described, which is one of four, in this Lloyd Center, which in turn is in Portland, Oregon.

Now, I would like to say --

Q Who owns the ice rink?

MR. BLACK: The Lloyd Corporation owns the ice rink. The ice rink is located in the basement, and there is a big opening on the first floor where people who are walking in

the mall can look down.

Q Did this activity take place entirely within a building?

MR. BLACK: Within this structure which we call a -- which is a building, yes, the main building. However, it's a large building. The building is maybe -- it's built in the form of a Latin or Greek cross, and it's about 900 feet on the length and about 500 feet or thereabouts on the cross. And this is a mall area, the interior of the building, which leads from the public streets on the various sides, except that it doesn't take anything on the west side.

Q Well, Mr. Black, it's actually, though, an extension, isn't it, of the streets? I mean the walkways, the promenades or --

MR. BLACK: No. They are not an extension of the streets, as we see it.

Q But they are -- people getting back and forth from one --

MR. BLACK: People can come from a public street into the mall, yes.

Q Yes. And cross it to the opposite, to the street on the opposite side, don't they?

MR. BLACK: They cross the street, correct.

Q Yes.

MR. BLACK: They cross the street. Now, on the left

side, for example, in order to get in, why, they'll have to go up on an escalator to get to this particular level where this handbilling took place.

Q Is there any vehicular traffic --

MR. BLACK: There's a difference in levels.

Q -- in the mall?

MR. BLACK: Pardon, sir?

Q Any vehicular traffic?

MR. BLACK: No, there is no vehicular traffic in the mall.

Q But there's a great deal of pedestrian traffic?

MR. BLACK: Well, --

Q The public generally.

MR. BLACK: -- we hope there's a great deal. For business purposes.

Q Everyone who patronizes one of these shops, the skating rink, and so forth?

MR. BLACK: Well, one of the various buildings, either across the public streets or in this main building in the mall there.

Now, I would like to say a word about the policy of the petitioner, Lloyd Corporation, because that was one of the allegations in the complaint, which I'll refer to in a moment.

Before the Logan Valley case was decided in 1968,

the Lloyd Corporation had a policy of barring all handbilling of every kind and character in that area: handbilling by tenants, commercial, noncommercial, or handbilling by anyone, because it was considered to be detrimental to their business and detrimental particularly to what they call customer motivation. That was the policy.

When Logan Valley was decided, I think it was about March in 1968, we changed our policy to permit any handbilling could come in there that wanted to come in there, if it was related directly in its purpose to some use that was being made there of the premises by Lloyd Corporation or by its tenants.

For example, picketing would have been permitted, and actually was conducted inside of the mall where the relationship factor was present, and also where it was, there was not an alternative because -- and it was necessary to allow the person to come in to get to the particular store in order to do the picketing.

So that policy was changed.

Then in the fall of 1968, November 1968, about six months after the Logan Valley case, this incident occurred in which the respondents, as I stated they were advocating what they called the resistance, anti-war. We got a telephone call that they would be coming to the place, and the police had been alerted, and matters of that kind.

Q You showed us where the picketing -- where the leafleting occurred --

MR. BLACK: I did.

Q -- on pages 134 and 135 --

MR. BLACK: Correct.

Q -- in front of the Meier & Frank Company.

MR. BLACK: That's right.

Q Now, where can we find that on Plaintiff's Exhibit No. 3 on page 115?

MR. BLACK: Is that the map?

Q Where on page 115, where in this area would it be, looking down?

MR. BLACK: It's --

Q I've got the Lloyd Center --

MR. BLACK: -- approximately in the center.

Q In the center of --

MR. BLACK: Can you see 138 there? That block which was formerly block 138?

Q Yes.

MR. BLACK: About there, within 20 or 30 feet of that, I can't tell you exactly.

The mall area extending east and west is not a prolongation of the streets, as such, but it goes from the east to the west, however to go from one to the other you have to change levels.

But that's about where it occurred.

Also there are entrances up -- three entrances, I think, up to Halsey Street to the north, at the top of the map, and there are two or three entrances down to Multnomah Street, to the south of the map.

Q Right.

Q Mr. Black, I take it there's no problem of littering in this case?

MR. BLACK: There was no problem of littering in connection with the incident involved, that is of any consequence. However, littering is a factor, one of the many factors, not an all-important one, on private property. Littering, of course, has been held not to be a reason to deprive a person of his constitutional rights when it's on public property, but littering is one of the factors in the case.

Now, the incident here is -- I might say as I go through here that there are really no factual questions on anything that is brought to the Supreme Court here. The whole matter is a matter of conclusion of the law. And in regard to the exact character of the incident involved, why, that can be found on page 17 of the Appendix, because it's copied in from an agreed statement of facts in the pretrial order. So there isn't any question whatever as to what happened. And that's the second division of the agreed facts, starting

on page 16 and page 17.

The situation briefly was one that these people came to this area and starting making distribution of their bills in this private mall area, and they were asked by the guards, security guards of Lloyd Corporation, to remove themselves, to make the distribution on the public streets in that area; and they refused to do so. And there was -- at first -- and there was a controversy. Subsequently, however, they did leave, and they were -- they finished their handbilling, or at least some of it on the public streets that were there, available for that purpose.

Now, the matter of legal controversy results from a suit filed by the respondents against the petitioner in the United States District Court for Oregon, asking for a declaratory judgment and injunction. Complaint was made of the particular incident that I described, and there was also added a statement that it was a policy of the Lloyd Corporation not to permit noncommercial handbilling of any character in these private malls, and that they asked for a declaratory judgment from the District Court to the effect that non-commercial handbilling could be conducted as long as it was peaceful and orderly, and as long as whenever the premises were open for public access.

Now, the case was tried in the District Court, and the court held -- the decision, by the way, of the court is

copied in as part of the Appendix that is attached to the petition in this case for the writ of certiorari; it's at page 14a, is the particular part of the decision that I want to comment on.

The court held that the privately owned mall there, petitioner's main building there, that is the mall, called it the malls and walkways, were "the functional equivalent of a public business district", citing Logan Valley decision, and stating that respondents had a First Amendment constitutional right under free speech provisions of it, to distribute handbills there when the property was open to public access, as long as it was peaceful and orderly.

And that --

Q Did this property, to start with, belong to the city?

MR. BLACK: Yes. Well, not all of it.

Q Part of it?

MR. BLACK: The Lloyd Corporation bought some 39 blocks, 200 feet on a side; and those blocks were already laid out with streets and sidewalks. And they took part of those, I think 18 blocks and made their main building. The other -- of which there was a fourth building built -- the other buildings were left on the lots, except for one or two instances. And so that's how it happened that there were public streets and sidewalks in part of the area, but not in

all of it.

Q Were there any covenants running to the city on that grant?

MR. BLACK: No. You mean was it a clean deal?

Q Yes.

MR. BLACK: It was a clean deal, and there is copied into this Appendix --

Q They retained no jurisdiction?

MR. BLACK: They retained no interest of any kind or character.

Q I notice that the special agents of the Lloyd Center are commissioned by the City of Portland as policemen.

MR. BLACK: That's right. That's Lloyd's action; no requirement of the city. That's Lloyd's action, in order to facilitate their acting as guards in keeping order in the place.

Q Is that a common thing in Portland for private security guards to be commissioned?

MR. BLACK: I can't answer that accurately. I'm sure it's --

Q It's common here in Washington.

MR. BLACK: I'm sure it's done in places where it's large enough to have security guards and things of that character. For example, people in bank lobbies, and things like that. I think they're commissioned; but I can't make

that representation to you, because I don't know.

Q Why doesn't that fact alone make the Lloyd's equivalent to the city? Or isn't that fact alone enough to show the city is participating in whatever Lloyd's, whatever restrictions Lloyd placed on the property?

MR. BLACK: I don't think so. I don't think so. I think that's just for the maintenance of order. I don't think that that has anything to do with making it a municipality.

Q Well, didn't the Court say so in the case involving an amusement park just outside of Washington a few years ago?

Q Glen Echo Park?

Q Glen Echo Park.

MR. BLACK: I don't know that case, I'm sorry.

Q Well, that was a situation in which the private owner of the park used local police.

MR. BLACK: Well, I think that --

Q And the Court held this would constitute State action.

MR. BLACK: Well, I think this, I think, for example, if I personally owned that entire place and I put somebody out physically with my own hands, I suppose they wouldn't have any right to sue me for violation of their constitutional rights. But, on the other hand, if I called a policeman, and if I had a policeman do it, and I charged the man with trespass

under the Oregon State law, and he was arrested on that basis, that would constitute State law, but it wouldn't make that place a public place or --

Q Well, may your security guards, under this city commission, arrest for violations of that kind on the property?

MR. BLACK: No. They have never done so, and did not do so.

Q Do they have any authority to do so?

MR. BLACK: Excuse me, sir?

Q Do they have any authority to do so, under their commission from the city?

MR. BLACK: To arrest for trespass?

Q Yes.

MR. BLACK: I don't think any specific authority.

Q I thought, looking at page 120 of --

MR. BLACK: They were instructed not to do any arresting, and they didn't do any arresting.

Q Page 120 indicates they do have specific authority. Plaintiffs' Exhibit No. 8.

MR. BLACK: Yes.

Q "If a misdemeanor is committed in the presence of the officer, arrest is proper."

Q Can a misdemeanor committed in the presence of a private person be the subject of a citizen arrest in Oregon?

MR. BLACK: I think so, yes.

Q Well, then, does this add anything to the -- does the commission add anything to the power to make an arrest for it?

MR. BLACK: I don't think so. I haven't thought so. I haven't felt that that had anything to do with the question of whether this place is considered to be a sort of municipality like Logan Valley.

Q Well, I take it, a private citizen can't do what the second paragraph says here, "the officer has every reason to believe that a suspect participated in a felony," even though it's out of his presence, "arrest is proper." A private citizen couldn't do that, could he?

MR. BLACK: Well, I don't know that I exactly get your point.

Q Were these arrests made on the basis of offenses committed in the presence of the security guards?

MR. BLACK: There were no arrests made.

Q Well, I mean, I mean for the removal, the efforts to remove them.

MR. BLACK: The guards were there, and --

Q They witnessed the act, that's what I'm trying to get at.

MR. BLACK: Yes, that's right; they witnessed the acts, and they were the ones that told -- that asked the people to do their handbilling on the public street.

Q Mr. Black, the respondents simply left after a warning, did they?

MR. BLACK: Yes. And did their handbilling on the public streets.

Q And why were they asked to leave?

MR. BLACK: They were asked to leave because it was our private property, and we had a policy against handbilling, and the handbilling bore no relation whatever to anything that was --

Q Well, were they asked to leave because they were committing a trespass under the city ordinance, or were they asked to leave because they were violating some rule that Lloyd had?

MR. BLACK: They were violating a rule, a policy that Lloyd had.

Q And so city police were enforcing that rule?

MR. BLACK: Well, it wasn't the city police, we have these security guards. And, as far as that's concerned, it was the manager of the place, too, discussing the matter with them; but it wasn't a matter where local police were called as such.

Q Yes.

MR. BLACK: They were just told that it was a policy and had been a policy for eight years, and were asked to --

Q Well, to most people -- do they wear the uniform

of city police?

MR. BLACK: They have a uniform, but not the uniform of the city police.

Q Do people think they have the authority to arrest for violations of the law?

MR. BLACK: I wouldn't think so.

Q Yes.

MR. BLACK: People generally, I don't know.

Q But the record doesn't show?

Q Yes, it shows on page 142: "We have a silver badge where the City is gold. The button on our uniform are all silver where the City police are all gold. The City has a two-inch stripe down the britches that we don't have." It's all in the record here, on 142.

Q Mr. Black, do you regard this factual aspect of the case involving the security guards as any different than if the owner of a single standing private hardware store, finding someone leafleting inside his store that he didn't want, called the police and asked them to eject him?

MR. BLACK: I don't find it any different than if the owner had simply asked people to leave. That's all that happened. Just asked them to leave. There was no arrest made, they were just asked to do their handbilling -- told of the policy of the company. They were told that they could be arrested for trespassing. They were told that.

And there was some testimony, Your Honor, in the case that was a little bit different than the stipulated facts. One witness testified that he had been threatened with arrest, and the District Judge considered that to be sufficient State action in order to justify the United States District Court having jurisdiction under the Civil Rights Statute in order to hear the case.

Q But I suppose the Portland police are available to any private property owner who finds someone on his property that he doesn't want, on a trespass complaint, aren't they?

MR. BLACK: It would be, yes.

Q Mr. Black, who selects the guards, who pays their salaries, who has the right to fire them?

MR. BLACK: The Lloyd Corporation selects them and hires them, and would have the right to fire them.

Q Does the city have any control over what the guards do?

MR. BLACK: None at all. Absolutely none.

Q Mr. Black, why did Lloyd have them commissioned by the city?

MR. BLACK: I think it's a matter of convenience, there's shoplifting in a place of that character, and other disturbances. And if these men were just attendants, as such, they wouldn't have the, at least they demonstrated the apparent power to cause the incident to be taken care of.

Q So they did have the apparent power of the city police? Or did you mean to say that?

MR. BLACK: Well, I think the evidence shows that they had what they call a special police commission authorizing them; but they didn't exercise it in this case, other than to explain the policy.

Q But they did ostensibly have it?

MR. BLACK: Well, they --

Q Indeed, one man though they had it, because he said he was threatened with arrest.

MR. BLACK: Well, anybody could threaten anybody with arrest, as such, it wouldn't have to be a policeman.

Q Well, wouldn't it be a little different if a man in uniform did?

MR. BLACK: Pardon, sir?

Q Would it be a little different if the man was in uniform, with a gun and a club?

MR. BLACK: Yes. But I don't know that they had any guns. Nobody had any guns, I don't think.

Q But it says here --

Q The record indicates that they had guns, on page 142.

MR. BLACK: Well, this is a large place. It's for the protection of the public, things of that character. We pay the taxes and administer the entire situation, as such;

there.

Now, just proceeding, I think I told you that the Ninth Circuit decided -- rather, the District Court had failed to give any attention to our contention that this handbilling had no relation at all to the use that we were making of the premises. And also that --

Q I see on page 146 of the record, Mr. Black, that there are a number of exceptions to the soliciting or handing out literature or picketing. I see one for the American Legion; another is the Volunteers of America; another is the Salvation Army. And there's --- I thought perhaps one other.

But, anyway, there are a few.

MR. BLACK: There were some -- yes. Between pages 185 and 195 there is the statement of the president of the corporation. He was asked about that, and said that he felt that that was a charitable feature that was engaged in. They allowed the Salvation Army to put their kettles there once a year, at Christmas. They allowed the Veterans, I believe, to sell their poppies on one occasion. There were two or three things of that kind, and limited to that of a charitable character.

I will say that there was other evidence in the case of promotional activities, and there was substantial testimony in the case to the effect that the promotional activities -- or the only evidence really in the case about it

was that the promotional activities were put on on purpose for the purpose of bringing people there. Everything from an Ella Fitzgerald concert to an antique car parade; things like that.

Q I see that President Johnson and Vice President Humphrey were invited to --

MR. BLACK: Once every four years they ask them to come in order to bring people to the place; and that was the extent, all other political speeches and talks were turned down, they were not permitted. It was generally not permitted.

Q But isn't that all irrelevant unless this is a public place?

MR. BLACK: I think it's all irrelevant. I think that phase is irrelevant, just like it is --

Q But if it is the equivalent of Logan Plaza, it is relevant, isn't it?

MR. BLACK: Well, I think this, Mr. Justice White: I don't know of a department store or any merchant that doesn't put on some kind of promotion in order to get people into his place, and these were promotions.

Q Some of these Vietnam demonstrations attract quite a lot of people.

MR. BLACK: Well -- but we want to attract the kind of people that we think will be customers there; and others are not that. I think that's quite possible in any crowd.

Q Isn't it equally irrelevant if it isn't a public place, because if it's a public place the First Amendment takes over.

MR. BLACK: Yes, I think the First Amendment would take over if it were a public place, and that would be entirely different than in a private setup, I think. But I think the fact that operating a store setup, with your various tenants, I think the promotional feature is completely incompetent, and irrelevant in this case.

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

MR. BLACK: Thank you.

Q Could I ask before you sit down, the ordinance that is printed on page 194, is applicable only to the Lloyd Center, is it not? The city ordinance. It's not applicable to other private units?

MR. BLACK: No, that -- on page 193?

Q Pages 194 and 195.

MR. BLACK: Yes, it refers to various -- well, like that ordinance and the one that -- that was one of the ordinances; they're all copied there. 193 is the last one, on page 193, that's the one where the city certified that Lloyd had completed all of its obligations in connection with exchange of properties.

Q It's not a general ordinance, just an ordinance

that applied to Lloyd's?

MR. BLACK: Yes. A specific ordinance applicable to the application for vacation.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Black.

Mr. Neil.

ORAL ARGUMENT OF CARL R. NEIL, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I suppose I could begin facetiously by saying that Mr. Black says the purpose of building the shopping center was to get people to come and buy things, and it succeeded. These plaintiffs did buy something. When told to leave the premises, they said, "Where can we eat?" And a nice security guard said, "Down at Manning's, right in the chopping center", and they went there and purchased food. But --

Q Well, they couldn't refuse them service, could they, under the holdings of this Court?

MR. NEIL: No, of course not, Your Honor; and I don't suggest that's a controlling factor.

Q Well, that doesn't help us one way or the other, does it?

MR. NEIL: No, it does not.

I think, Your Honor, in view of the questions of the

Court, though, that it is worthwhile spending some additional time on the facts of this case.

It does involve a large urban shopping center, and I think I can perhaps assist the Court in getting the relationship to the city and --

Q Was there a postal substation in Lloyd Center at one time?

MR. NEIL: If there is within the shopping center, I'm not aware of it, Your Honor; the record doesn't show.

If the Court could look at Exhibit 3 on page 115 of the Appendix again, the map, I think you can relate it to the aerial photographs which appear on the following two pages. You will note on Exhibit 3 this main 18-square block or formerly 18-square block area, which we call the main part of Lloyd Center, and where the picketing -- or the handbilling took place.

And you look on the next page in the aerial photograph, and that's the same area that's shown right in the center, the same 18-block area, and you get an idea of the structure that's situated on that 18-block area.

Q Is it the block right under the letter C of Lloyd Center on the map?

MR. NEIL: It's right under the word --

Q The letter C.

MR. NEIL: The letter N -- are you talking about the

map on page 115, Your Honor?

Q Yes, 115.

MR. NEIL: Yes, it's bounded by Halsey Street on the north, Multnomah on the south, Ninth and Fifteenth Streets on the east and west.

Q Now, are Halsey and -- well, the streets bounding it, Halsey, Multnomah, and the others, are they public streets?

MR. NEIL: Yes, they are, Your Honor. And as I say --

Q So that this is an area completely surrounded by public streets?

MR. NEIL: Yes, it is, Your Honor.

Q This has -- this building is surrounded by public streets?

MR. NEIL: Yes.

You can see the same 18-block area on the aerial photograph on the following page, Exhibit 4, right in the center portion of the photograph.

The building does have several levels, or at least more than one level, since the land is sloping somewhat, and that photograph does not show it. In the following photograph, Exhibit 5 on page 117, if you refer back to the map, that photograph is looking from the upper righthand corner of the map toward the lower lefthand corner. In other words, looking toward the west side of the City of Portland. In the background you can see the main downtown district on the west side of

the Willamette River in the photograph.

So the city is bisected by the Wilamette River, its main downtown business area is on the west side of the river; this shopping center is situated on the east side of the river, in what is another commercial district of the city.

Now, this main part of the shopping center, this former 18-square block area, is, as the evidence shows, the portion of the shopping center which gets the main traffic both in terms of pedestrian traffic, in terms of automobile parking, and this sort of thing. There are other portions of the shopping center, but this is the main portion of it, where the handbilling took place.

This main portion, as well as some of the other portions, is made possible by the city vacating and conveying to Lloyd Corporation about 8.838 acres of former public streets and sidewalks, and those of course again are shown on the map, at 115 of the Appendix. You can see the dotted lines on that map that indicate the former city streets.

Q In your view, would it make any difference in this case whether this was all acquired from a private party or some of it was acquired from the public domain?

MR. NEIL: Well, it might make some difference, Your Honor, because here we have government assisting in the creation of a private shopping center in a way that probably wouldn't have been possible to create a shopping center

but for the vacation of the streets.

Q Well, is that legally and fundamentally different from a great number of the farms in the United States that derive from government patents?

MR. NEIL: Well, in the sense that all title derives from the government, no, it is not different.

Q Was this property simply by deed from the city, or was it, some of it taken by eminent domain?

MR. NEIL: The street and sidewalk property the city conveyed was all city public property, simply -- I don't know if they had a deed, they at least vacated it. The law may automatically say the adjoining property owner gets the property in a case of vacation, and they were, of course, the adjoining property owner on both sides of the street.

Q And then Lloyd acquired it from the property owners?

MR. NEIL: No, they acquired the streets and sidewalks from the city.

Q No, I'm speaking of the lots, the blocks.

MR. NEIL: Oh, yes. The property, the former private property was indeed acquired from those people.

As I say, this main area is about 8.838 acres of former streets and sidewalks. The shopping center has within it, as Mr. Black mentioned, a skating rink, which is open to the public, it has a public auditorium, which the evidence shows

is sometimes rented out by Lloyd Corporation, and is sometimes donates to use.

The District Court found below the malls and walkways within the shopping center are open to the public at all times. Those malls, the principal malls, run north and south and east and west, and they are about 50 feet wide, and some of the photographs in Plaintiffs' Exhibit 11, and some of the photographs offered by the other side also in the Appendix, show these broad malls and walkways within the shopping center.

The interior parking on this main part of the shopping center affords parking for not less than 1,000 automobiles, about 850,000 square feet, so the record shows. There is also evidence in the record that additional parking on Lloyd Center property is available elsewhere in the shopping center, but in this area about 1,000 cars.

Q Mr. Neil, where on Exhibit No. 3, at page 115, with relation to that main building, is the parking? Where do people park for that area?

MR. NEIL: Well, first of all, Your Honor, they park throughout this main part. It's a multilevel structure. You can see some of the parking on the following page, an aerial photograph. That is the upper level parking you can see. In addition to that, there is also a lower level parking, which you cannot see on this photograph, that underlies, so far as I know, the entire 18-block area, except for the skating rink,

I think, which goes down into the ground further. So there is underground parking under this entire 18-block area, substantially, in addition to the parking you see on the upper level on Exhibit 4.

Q Is there any vehicular traffic to and from the parking area within the building itself, the part used for retail merchandising?

MR. NEIL: I didn't quite understand your question.

Q Well, the question probably wasn't too clear. Within the part of the building that is used for retail merchandising, where people circulate back and forth from the stores, is there any vehicular traffic?

MR. NEIL: I see. No, in general no, although if you look at some of the photographs, Plaintiffs' Exhibit 11, on page 131, for example; there are two photographs on that page. If you look at the bottom photograph, and also the upper one, you can see that there are pedestrian walkways right adjacent to parking and vehicle movement areas. This is the upper level, one of the upper level parking lots, shown in both of these photographs.

So in some cases you do have sidewalks adjacent to the parking areas. And the underground area, you have great, vast parking lots that probably are not, do not have sidewalks going through them.

Q Looking at page 136, I see a camper there. Is

that a street or is that a --

MR. NEIL: No. The record doesn't explain that, but since I've been there a few times when that kind of thing was there, I think it's a display, Your Honor, of camping automobiles.

Q I see.

MR. NEIL: As one of the questions indicated, the Lloyd Corporation has permitted a variety of outside activities to take place, nonprofit activities, on its malls and walkways of its shopping center. Some of these involve great crowds of people, such as football rallies, political rallies for presidential candidates, various kinds of displays, musical performances. There is evidence that they once had a crowd of 20,000 people there in the shopping center for an Ella Fitzgerald concert.

Similarly the auditorium is used, as I mentioned before, on a nonrental basis with the Lloyd Corporation's permission by some groups: Cancer Society, Campfire Girls, Girl Scouts. But it rents it out on a charge basis to other groups. In any event, there are a large number of outside people coming to the shopping center to use that auditorium or participate in some activity taking place there.

They have also permitted a number of charitable, frankly charitable solicitations, which the court below found were not put on to induce customer motivation but were put

on because the Lloyd Center thought they were worthwhile charities, such as the Salvation Army, the Volunteers of America, the American Legion selling Buddy Poppies, and the like. Other groups, similarly considering themselves charities, were refused such permission, such as, the record shows, the March of Dimes and Hadassah.

Now, coming to the incident in question, the police officers are employees of the corporation and they do hold commissions, a copy of which is in evidence, vesting them with full police authority. That comes out of the commission. I have no doubt that these police officers have the same authority as a regular policeman does in the City of Portland. And I also have, I think it is clear in the record, that these policemen, as the District Court found, caused the plaintiffs to believe that they would be arrested for trespass if they did not cease and desist from their handbilling and go out to the exterior public sidewalks, which they did, in order to avoid arrest.

Q Mr. Neil, if single store owner found someone inside his store leafleting, whom he felt was trespassing and called the Portland police to eject him, would you feel that brought him within the Logan Valley rule?

MR. NEIL: No, you're talking about single store, inside the business premises, where business is conducted; is that right?

Q Yes.

MR. NEIL: No, that's not within the Logan Valley rule.

Q How does the presence of police officers here by itself help your case?

MR. NEIL: I'm not sure it adds anything to my case, except the Court's questions indicated, I guess, what is the basis for color of law under Section 1983, under which this case arose. And one basis you could answer is the presence of deputy police officers threatening people with arrest unless they abandoned what they considered to be their constitutional right.

That I think is the relevance of that evidence, probably.

So they left, to avoid arrest. They were distributing leaflets. The evidence shows no more than five people throughout this 20 or 25-acre main part of the Lloyd Center at different places, I think two of them were somewhere near each other, at the Meier & Frank entrance, which counsel pointed to in the photograph, the rest of them were in different places throughout this large area.

There is no evidence whatever, in fact the findings in evidence are to the contrary, of any violence, any disturbance, any upset, even the reaction, evidence is very, very slim. One lady asked the shopping center manager, "What's

going on here?" And he told her, and she said, "Well, I don't like those views." Another lady told one of the leafletters to "Drop dead", and a third lady said, "Stop bothering her." So that isn't much public reaction, I think, for the nature of the activity that was going on here.

Q Do you share Mr. Black's response to my inquiry about littering?

MR. NEIL: The evidence shows there was no littering, Your Honor. Mr. Black's response was that littering is a concern of the Lloyd Corporation, and they argue in their brief, of course, that if the rule we contend for is allowed, they will have littering expense, expense to clean up litter.

Well, they also have expense to clean up litter when there are football rallies, a lot more. They have expense to clean up litter if no distribution takes place, public, in passing through these walkways, obviously are going to drop some candy wrappers. And I'm not -- there is no evidence in this record that shows the cost of cleanup of whatever litter might result from handbilling is any greater than the cost of cleaning up candy wrappers and the like that will be dropped by the public in any event.

Now, I think it important to emphasize, in addition to what this case is about, what it is not about. It does not involve disturbance, upset, picketing, obstruction of the normal use of the property, such as was present in Adderly vs.

Florida, Cox vs. Louisiana, or Cameron vs. Johnson.

Q How much do you rely on the fact that these men, these security officers held commissions from the city police?

MR. NEIL: It is one basis for showing the color of law under Section 1983.

Q Well, suppose they gave them the same uniforms and just turned in their badges --

MR. NEIL: No, I would argue the result should not be different.

Q Then it isn't very important, is it?

MR. NEIL: I don't believe it is in this case, Your Honor, no.

Q They could be plainclothes guards or they could be uniformed guards, marked "Private Security, Lloyd Center" or whatever.

MR. NEIL: Well, take Mr. Black's example, that he personally kicks them out if he's the president of the corporation. He would do so, undoubtedly, under the trespass laws of the city or the State. Now, that seems to me to invoke this Court's decision in Dickey vs. S. H. Kresge, a private party making use of the public statutes to enforce his policies, in this case against First Amendment rights. I would think that --

Q Well, would you say it's State action if -- suppose someone came in, assume that there's a bank there, and

some bank robbers came in to rob the bank, and the bank tellers took some clubs or guns and resisted the robbery; would you say that's State action?

MR. NEIL: No, I'd say that's self-defense.

Q Self-help, isn't it?

MR. NEIL: Self-help, yes.

Q Suppose this Lloyd Center has a staff of men highly trained in "self-help"?

MR. NEIL: Well, I could conceive of that happening, but it seems to me --

Q It would be very easy, wouldn't it, for them to convert if the case were to turn on that kind of a point?

MR. NEIL: Yes, but it seems to me that wherever that occurs, that party is likely to invoke the trespass laws, too. He probably isn't --

Q Well, what if he doesn't invoke any law, he just grabs them by the scruff of the neck and throws him off, he doesn't identify the statute or the common law that he's acting under, he just says, "This is my property; off!" How does that --

MR. NEIL: Well, I suppose he could do that. If you're asking me if that is permissible, does that change --

Q No, I'm just asking -- I'm trying to find out how important it is that these men have commissions, that they have uniforms, or whatever.

MR. NEIL: It is something you could hang your hat on, but I don't think it's that important, I agree with you, Your Honor. I have an even broader --

Q Well, I'm not sure what I'd do about it, I'm just trying to find out where we're going.

MR. NEIL: All right.

I have an even broader ground for --

Q We held in the Griffith case, the Glen Echo Case they were talking about a few minutes ago, that if that deputized private guard makes the arrest, it's State action.

MR. NEIL: I agree with that, Your Honor.

Q Yes, but if the same private guards have turned in his badge and made it -- and ejected someone or made a citizen's arrest the following week, then would that be State action?

MR. NEIL: That might not be State action, but my next argument would be that that doesn't necessarily change the result that should occur in this case.

Q Well, then, the State action is not an important factor in your view?

MR. NEIL: Yes, it is an important factor, but that isn't the only thing that may create State action in this case.

For example, --

Q Well, I would suppose that the fact that the officers were deputized agents of the State would have something

to do, perhaps, for purposes of 1983 jurisdiction; but since there was no arrest here, I would suppose you're simply relying on the doctrine of Marsh vs. Alabama and Logan Valley, that this complex was government in itself --

MR. NEIL: Yes, that's what I was about to point out, that you --

Q -- in that there is no such thing as trespassing on public sidewalks?

MR. NEIL: Right. That's exactly the rationale of Diamond vs. Bland, the California Supreme Court, where they say once you have found functional equivalency of the private property in question to the sidewalks of a public business district, you've answered the State action question right there.

That is the rationale of Diamond vs. Bland. I think it's probably a similar kind of rationale of Burton vs. Wilmington Parking Authority, where you had the lease of public property to a private authority.

That, in effect, you had a functional equivalent of the public parking thing being operated now by a private party. And once you've reached that, you've got State action.

Q Isn't there this difference, though, that in Wilmington Parking Authority there was State involvement, whereas in Logan Valley I take it there really wasn't any State involvement, it was your notion of equivalency --

MR. NEIL: Well, the difference, Your Honor, is that

the property initially was owned by a public body in Wilmington and it was not initially owned, all of it at least, by a public body in either Logan Valley or this case.

Q Well, but do you think if the property had been conveyed in fee simple in Wilmington, the same result would have obtained?

MR. NEIL: Well, yes, I think it might have; for example, suppose it was impossible to build that type of parking structure in the Burton case without that happening, for some reason or another. That's what I contend is the case here. You could not build this type of shopping center without vacating public streets and sidewalks. There had to be State aid, State participation by conveying property to the Lloyd Corporation here in order to permit this kind of shopping center to be built.

It is more than just granting them a zone change, or anything of that sort.

Q Does your Portland Zoning Code require site plan approval for most major retail construction?

MR. NEIL: The record doesn't show that, Your Honor, but I think it probably does. The record does show that the ordinance vacating the streets expressly recited that it was to permit the creation of a general retail business district by Lloyd Corporation.

I started to talk about things this case doesn't

involve. Another thing that it doesn't involve is, it doesn't involve regulation, any question, in my opinion, of reasonable regulation. It's a question of whether the Lloyd Corporation may flatly and completely, totally prohibit free speech or any kind of free speech that it doesn't approve or it doesn't like on its own interior malls and walkways when they are, as the District Court found, the functional equivalents of public sidewalks in a public business district.

Q Well, your suggestion introduces a new factor, when you said free speech which they don't like. Laying aside whatever this record shows on other types of things allowed, suppose they said all political demonstrations are out, they don't want people for the war, against the war, or for public housing or against public housing; so that there's no discrimination. Does that change the situation?

MR. NEIL: No, I don't think it does, Your Honor. I think once --

Q Well, it doesn't make any difference that they're excluding things that they don't like, either.

MR. NEIL: Well, I think it does in result, Your Honor, because one of the things I'm arguing is that if the rule that Lloyd Corporation seeks is adopted here, the result is not just total prohibition, the result, as the American Retail Federation amicus brief clearly says, is the right to choose which speech, which activity, which noncommercial

enterprise will take place on these malls and walkways, and not merely the right to say that none shall.

So, while it isn't an essential to my position, I think that it is a result that will occur if my position is not adopted.

Q Would you think that Logan Valley just automatically decides this case?

MR. NEIL: Well, yes, --

Q Well, what about -- Logan Valley at least said, noted that the activity was connected with the operations of the --

MR. NEIL: Well, I agree, just as Mr. Justice Marshall has expressed the statement that he is not commenting, the Court is not commenting on "unrelated speech", so --

Q Was this unrelated speech?

MR. NEIL: Well, I suppose we could get in an argument about what is related and unrelated.

Q Well, it isn't related in the sense that the activity was in Logan Valley?

MR. NEIL: That's true. It is not related in the sense that it has anything particularly to do with any tenant of the shopping center. But let's examine that for a moment. Suppose we had written on our invitations, or the literature handed out here, 'To the employees of Meier & Frank: Please join us tonight at the church for a potluck supper and help us

express our position of the war in Vietnam". Is that related now?

Do the leafletters have it in their power to determine what is related and unrelated by doing something like that?

Q Then let's assume that it isn't related, your argument certainly covers that, doesn't it?

MR. NEIL: Yes.

Q Let's assume it isn't related, then what?

MR. NEIL: Well, I think that once you get over the functional equivalents point, that we're then just talking about reasonable regulations rather than prohibition. Now, in --

Q In Marsh v. Alabama, there were Jehovah's Witnesses, and I don't know how related that was --

MR. NEIL: Yes.

Q -- to the business of that company town.

MR. NEIL: Completely unrelated.

Q Unrelated; the same as in Logan Valley?

MR. NEIL: Yes.

But notice how much we've jumped, Your Honor, when we have said functional equivalent. We've ruled out all kinds of premises. We've ruled out hotel-apartment lobbies, private residences, interiors of businesses, industrial plants for the most part; we're down to a pretty narrow class of property.

Q Hardware stores?

MR. NEIL: Hardware stores; interiors of hardware stores, at least.

I don't know enough about the factual record in the Central Hardware case to comment on how appropriate or how close a factual situation that is.

Q What is the definition of a functional equivalent?

MR. NEIL: All right. It seems to me -- first of all, we don't stop at functional equivalent. Functional equivalent of a public sidewalk and a public business district. Now, let's go back. First of all, a business district. The Lloyd Center, I would say is a business district in the same sense that the company town in Marsh vs. Alabama was a business district, or Logan Valley Plaza was a business district.

Secondly, the functional equivalent of a public sidewalk in such a district. Clearly these pedestrian malls and walkways serve the same function of carrying pedestrians between businesses that a public sidewalk does. And what's more, the activities that took place on them are much akin to the activities that might take place on public sidewalks. Perhaps they're even greater, because they're broader and they can accommodate things like automobile displays, where the public sidewalk could not.

Q There's one functional difference with Logan Valley is that you admit you had sidewalks all around this place.

MR. NEIL: Yes, I do, Your Honor.

Q And you didn't in Logan Valley.

MR. NEIL: That's true. In the Logan Valley case, as your opinion points out, --

Q Well, couldn't you have reached everybody in that mall?

MR. NEIL: No -- in this case?

Q Yes.

MR. NEIL: No, Your Honor, we could not. A large number of people, the exact number not shown by the record, arrive and leave solely by automobile.

Q But do those automobiles come down the public street?

MR. NEIL: Yes, they do, Your Honor, but if you --

Q Well, could you picket there?

MR. NEIL: Pardon me?

Q Could you leaflet there?

MR. NEIL: Well, I think that would be very difficult. Here's automobiles entering and leaving --

Q Oh, I agree; it would be less difficult if you had gone into Lloyd's store, wouldn't it, it would be less difficult.

MR. NEIL: Right.

Q I don't think that's the point.

MR. NEIL: Well, maybe it is. Because I think it's

so difficult that there actually are hazards to the safety of a person, if you're trying to do it, and it's ineffective, secondly. Because you can't really hand a leaflet to a driver of a moving automobile. They say, stand on the other side. Well, if I were a driver leaving --

Q Where does the record --

Q Go ahead.

I just wanted to know if there's anything in the record to show how many people walk on that sidewalk.

MR. NEIL: The numbers are not shown as to how many come by bus --

Q No, I mean are walking on the sidewalk.

MR. NEIL: Well, the only people that are going to walk on that sidewalk are people who do not enter and leave from the shopping center by automobile. Therefore, they arrive by bus or on foot. The record --

Q But you don't know how many?

MR. NEIL: The record does not show that.

Q Is the swimming pool here the functional equivalent of a public swimming pool of the same size and depth?

MR. NEIL: You're speaking of the skating rink, are you?

Q Well, isn't there a swimming pool here too?

MR. NEIL: A skating rink.

Q Oh, the skating rink, that's right. There's a girl figure-skating on it, yes. Is that the functional equivalent --

MR. NEIL: Well, I don't think --

Q -- of a public counterpart?

MR. NEIL: I don't think so.

Q What's the difference?

MR. NEIL: They charge admission, for one thing, to this thing.

Q Well, they do in some public rinks.

MR. NEIL: Yes. And I suppose you'd put it to me, what if they were to exclude people on the basis of race or religion or something of that sort; and I might be able to argue that it was, but I don't think it's crucial to whether the malls and walkways are functional equivalents of sidewalks.

Q Well, I'm trying to test what Justice Rehnquist was driving at. And I'll be perfectly candid in saying I don't understand the concept of functional --

MR. NEIL: Of functional equivalents?

Q Yes. I don't see any boundaries on it.

MR. NEIL: Well, first of all, I limited it to the business districts; secondly, I limit it to the functional equivalent of sidewalks, in the sense that sidewalks, you know, they're being used to carry pedestrian traffic between businesses within the business district. And I think you've

then got the functional equivalent, provided that there are a couple of other conditions that don't exist, like in Taggart vs. Weinacker's, apparently the sidewalk there was so narrow that any exercise of First Amendment speech or whatever would have unreasonably interfered with the owner's use of the property normally.

I can conceive that in that situation the property right balance is greater than the right of free speech. Similarly, if the physical conditions are such that I can distribute my leaflet to everyone Justice Marshall was talking about, they're going to be out on the sidewalk and I can distribute to every one of them, then there's no need for me to go on the private property to accomplish it. I can do it just as easily on the public sidewalk. But I think this record shows that there are a substantial number of people that are not going to be reached by distributing on the public sidewalk around the shopping center.

Q But is it conceivable that some people, customers I'm speaking of now, would refrain from going to a place in order to avoid having people harass them with pamphlets and leaflets?

MR. NEIL: Well, yes, it is conceivable. It is also conceivable to me that Lloyd Corporation of the City of Portland may adopt regulations that prevent people from handing out leaflets in any manner that harasses people.

So that you must do it, if you do it at all, peacefully.

You must --

Q Well, if you read the recent decisions of this Court, you will find that the enforcement of such statutes is not as easy as the writing of them.

MR. NEIL: In what sense? I don't follow you.

Q I'm thinking of some of the cases in which we've struck down city ordinances because of the difficulty of describing the limitations.

MR. NEIL: That's true.

Q I'm speaking now of some holdings in which I've joined, addressing myself to the difficulty which you --

MR. NEIL: Yes.

Q -- moved over rather rapidly.

MR. NEIL: Well, I agree that in First Amendment cases, even on public sidewalks, that there are difficulties of regulation. This Court has had many cases, like Cox vs. New Hampshire, Schneider vs. State, and all this line of cases where you've got permits, and the question is, is the permit valid, or is the statute valid because it's too broad or too vague. And there are difficulties in regulating anything relating to First Amendment speech and activity.

But we do it in the case of public sidewalks, it seems to me it can be done in the case of the functional equivalents of public sidewalks that happen to be on private

property.

Thank you.

MR.CHIEF JUSTICE BURGER: Very well, your time is up.

Your time has been consumed, Mr. Black.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:58 o'clock, p.m., the case was submitted.]

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