No. 99-1413

In the Supreme Court of the United States

GARY E. CALKINS AND ANNA ROSA CALKINS,
DBA INDIO GROCERY OUTLET, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board and the court of appeals properly interpreted California law to conclude that, in the circumstances of this case, state law did not afford the employer supermarket the right to exclude, from the privately owned property surrounding the supermarket, union representatives who wished to peacefully picket and handbill in support of a labor dispute with the employer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B28) is reported at 187 F.3d 1080. The decision and order of the National Labor Relations Board (Pet. App. C1-C20) is reported at 323 N.L.R.B. 1138.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on November 16, 1999 (Pet. App. A1). The petition for a writ of certiorari was filed on February 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a retail supermarket located in Indio, California. The supermarket occupies a free-standing, 20,500 square-foot building, and is not part of a shopping mall. Pet. App. B2-B3, C3.[1] The parking lot, located on the west and south sides of the building, has two entrances and is surrounded on three sides by a public sidewalk. *Id.* at B3, C3. Across the public sidewalk, the property is bordered by public streets and a state highway. The supermarket itself has two entrances, which can be accessed only through the parking lot. A walkway runs in front of the store. *Ibid.* While the supermarket is open to the general public, persons other than customers and employees are generally excluded from the premises. *Ibid.* Petitioner's employees are not represented by a union. *Id.* at B3, C16 n.3.

On December 13, 1994, eight or nine representatives of Local 1167, United Food and Commercial Workers International Union (Union), who were not employees of petitioner, engaged in peaceful picketing and handbilling in the supermarket's parking lot and on the walkway in front of the store, as well as on the public sidewalk. Pet. App. B3-B4, C4, C16 n.3. The Union representatives' activity did not interfere with the supermarket's operations or with customers' ingress to and egress from the store. *Id.* at C17 n.13. The picketers carried signs which read: "Please Do Not Shop Grocery Outlet. UFCW Local 1167." The picketers also distributed a handbill to customers and em-

[1] Petitioner operates the supermarket pursuant to a lease agreement with another entity, Canned Foods, Inc., which in turn leases the building and surrounding real property from the owner, Read Properties. Pet. App. B2, C15 n.1.

ployees of the store, which read: "Don't Shop Canned Foods Grocery Outlet Indio. SUPPORT YOUR UNION NEIGHBORS! UFCW Local 1167." The handbill listed the names and addresses of four unionized stores in the area. *Id.* at B4, C4. Gary Calkins, petitioner's proprietor, asked the picketers to leave the parking lot and the walkway in front of the supermarket, but they refused. *Id.* at B2, B4, C4. Later in the day, Calkins summoned the police and asked them to remove the picketers from the premises. The police declined to arrest or interfere with the picketers. Nonetheless, Calkins told the picketers that if they did not leave the premises, he would ask the police to make a "citizens' arrest." The picketers then relocated to the public sidewalk. *Id.* at B4-B5, C4-C5.

On March 29, 1995, approximately the same number of Union representatives resumed peaceful picketing and handbilling on the walkway in front of the supermarket and in its parking lot. Calkins again asked the picketers to leave and advised one of them, Joe Duffle, that he had called the police. Pet. App. B5, C5, C16 n.3. When the police arrived, all of the picketers except Duffle relocated to the public sidewalk. When Duffle refused to move to the sidewalk, Calkins asked a police officer to arrest him. The police officer did so, but the matter was later dropped. *Id.* at B5, C16 n.5.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging, *inter alia*, that petitioner's threat to seek the arrest of any picketers who failed to remove themselves from the parking lot or the walkway in front of the supermarket contravened Section 8(a)(1) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(1). That provision makes it an unfair labor practice for an employer "to interfere with,

restrain, or coerce employees in the exercise of" rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, including the right "to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * other mutual aid or protection." Pet. App. C1-C2. The General Counsel, petitioner, and the Union agreed to waive a hearing before an administrative law judge, and submitted the matter to the Board for decision on a stipulated record. *Id.* at B6, C2.

The Board sustained the allegations of the complaint. Pet. App. C1-C20. First, the Board concluded that, apart from the location of the activity, the Union representatives' picketing and handbilling was protected by the Act. *Id.* at C12, C17 n.12.[2] Next, the Board explained that, "in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with [an employer's] private property rights, there is a threshold burden on the [employer] to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property." *Id.* at C10 (quoting *O'Neil's Mkts., Inc., d/b/a Food For Less*, 318 N.L.R.B.

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[2] See, *e.g.*, *D'Alessandro's, Inc.*, 292 N.L.R.B. 81, 83 (1988) (picketing and handbilling by nonemployees of employer, informing the public that employer is nonunion and requesting customers to patronize unionized stores, "clearly is concerted activity that falls within the 'mutual aid or protection' language of Section 7" of the Act, 29 U.S.C. 157); *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 438 n.8 (1993) (such activity is "clearly protected" by the second proviso to Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C), which permits "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization").

646, 649 (1995), enforced in relevant part, 95 F.3d 733 (8th Cir. 1996)). To determine "the nature and extent of [petitioner's] property interest" in the parking lot and the walkway in front of the supermarket, the Board "look[ed] to the law of the State of California, the state where [petitioner's] store is located." *Id.* at C11.

The Board concluded that, under California law, petitioner "did not have a right to exclude the union agents from the walkway in front of its store and from its parking lot," and that petitioner "would not have possessed such a right even if it had possessed complete ownership of the walkway and parking lot." Pet. App. C12. See also note 1, *supra*; note 9, *infra*. The Board explained that, in *Robins* v. *PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979), aff'd, 447 U.S. 74 (1980), "the California Supreme Court concluded that a shopping center's property right was limited by the free speech and petition sections of the California constitution." Pet. App. C11. The Board further observed that the California Supreme Court has held that "[t]he sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store," and, "[i]n such context the location of the store whether it is on the main street of the downtown section . . . in a suburban shopping center or in a parking lot, does not make any difference." *Id.* at C12-C13 (quoting *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 599 P.2d 676, 687 (Cal. 1979)). The Board rejected petitioner's contention that it fell within an exception, recognized by the California Supreme Court for "modest retail establishment[s]." *Id.* at C12. Rather, the Board found the present case analogous to *In re Lane*, 457 P.2d 561 (Cal. 1969), where the

California Supreme Court permitted handbilling by a union official on a privately owned sidewalk outside an entrance to a free-standing supermarket roughly the same size as petitioner. Pet. App. C11-C12; see also *id.* at C18 n.15. The Board further concluded that, because "the union agents engaging in Section 7 activities on [the] walkway and parking lot did not interfere with any property right of [petitioner] * * * [t]he law concerning conflicts between Section 7 rights and property rights," as articulated in *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), was not implicated in this case. Pet. App. C12.[3]

As a remedy, the Board ordered petitioner to cease and desist, *inter alia*, from "[t]hreatening to have representatives of [the Union] arrested if they do not cease picketing and distributing union-related literature on [petitioner's] premises," provided that the Union's activity "is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with [petitioner's] store." Pet. App. C14-C15.

3. The court of appeals enforced the Board's order. Pet. App. B1-B28. The court agreed with the Board that, apart from the location of the activity, the Union representatives' picketing and handbilling was pro-

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[3] In *Lechmere*, this Court reaffirmed the general rule of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). As the Court explained in *Lechmere*, when the exercise of Section 7 rights by nonemployee union representatives conflicts with private property rights, "an employer may validly post his property against nonemployee distribution of union literature," except where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." See 502 U.S. at 531-538.

tected by the Act. *Id.* at B14-B15. The court also agreed that *Lechmere* was inapplicable to this case. *Id.* at B9-B13. It explained that *Lechmere* "did not speak to the situation where, as here, an employer's state law property right does not entitle it to exclude organizers." *Id.* at B12-B13. The court noted that the Supreme Court "has since clarified * * * that employers may exclude union organizers in deference to state common law, but not because [the] NLRA itself restricts access." *Id.* at B12 (citing *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994)).[4]

Turning to the state-law question, the court of appeals agreed with the Board that, under California law, petitioner did not possess "an interest which entitle[s] [it] to exclude Union organizers from the property." Pet. App. B16. The court explained that "California courts have granted broad protections to the peaceful exercise of free speech rights over property owners' exclusive control of their property" once such property is opened to members of the shopping public. *Id.* at B17. Thus, in *PruneYard*, *supra*, "the California Supreme Court held that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." Pet. App. B17 (internal quotation marks omitted).

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[4] In *Thunder Basin*, this Court explained: "The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union employees to obtain access to an employer's property under limited circumstances." 510 U.S. at 217 n.21. See also note 3, *supra*.

The court of appeals further observed that "the California courts have recognized that speech is protected not only in 'shopping malls' but also on the privately-owned sidewalk of a stand-alone grocery store," Pet. App. B17 (citing *In re Lane*, *supra*), and that the California Supreme Court has "approved the broader principle that 'the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference.'" *Ibid.* (quoting *Sears, Roebuck & Co.*, 599 P.2d at 687). The court of appeals therefore concluded that "California law prohibits owners of shopping malls and general access supermarket stores from excluding speech activity on their private adjacent sidewalks and parking lots." *Id.* at B18.

The court of appeals, like the Board, rejected petitioner's contention that it fell within an exception, recognized in the California Supreme Court's *Prune-Yard* decision, for "modest retail establishments." Pet. App. B18-B21. The court explained that the California intermediate appellate courts, applying that exception, "have distinguished supermarket-type stores, which invite the public at large to shop and congregate," from medical clinics and banks, "which do not invite the general public or have other attributes of a public forum." *Id.* at B20-B21. The court of appeals concluded that, under California law, "[w]hatever 'modest retail establishment' means, it does not include . . . a 'large 'supermarket-type' grocery store,'" such as petitioner. *Id.* at B21 (quoting *Bank of Stockton* v. *Church of Soldiers of the Cross of Christ*, 52 Cal. Rptr. 2d 429, 434 (Cal. Ct. App. 1996)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The decision, moreover, rests primarily on an interpretation of California—not federal—law. Further review is therefore not warranted.

1. Petitioner concedes (Pet. 1) that "the Board and the Ninth Circuit correctly applied this Court's holding in *Lechmere*" to conclude that California law "controlled the issue of whether the non-employee union members could gain access to the property." However, petitioner asserts (Pet. 6-7) that review is necessary in this case because, in addressing that question of state law, "the Ninth Circuit failed to consider a factually similar California Court of Appeal case," *Trader Joe's Co.* v. *Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425 (1999), which was issued after oral argument but before the Ninth Circuit decided this case. Petitioner contends that, by failing to address that decision expressly, the Ninth Circuit contravened the principle, set forth in *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464, 467 (1940), that federal courts are "to follow the decisions of intermediate courts of th[e] state 'in the absence of convincing evidence that the highest court of the state would decide differently.'" Pet. 7.

That contention lacks merit. The Ninth Circuit was fully cognizant of its obligation to follow relevant decisions of California's appellate courts addressing the state-law question posed by this case. See Pet. App. B16, B18 n.5. Indeed, the court's opinion extensively cites and discusses relevant California appellate decisions. See *id.* at B16-B22. And while the Ninth Circuit's opinion does not address the California Court

of Appeal's decision in *Trader Joe's*, that omission was the result of petitioner's failure to bring the *Trader Joe's* decision to the Ninth Circuit's attention in a timely fashion. *Trader Joe's*, in any event, does not undermine the correctness of the Ninth Circuit's construction of California law.

a. As petitioner acknowledges (Pet. 5-6), *Trader Joe's* was decided on July 8, 1999, approximately two months after oral argument in this case, but about one month *before* the Ninth Circuit rendered its decision. See also Pet. App. B1. Even though petitioner had adequate means for bringing that decision to the Ninth Circuit's attention, see, *e.g.*, Fed. R. App. P. 28(j), petitioner did not do so. Instead, as petitioner concedes (Pet. 2, 6), it waited until the Ninth Circuit issued its opinion, and then in its petition for rehearing raised *Trader Joe's* for the first time. See Pet. App. A1. It is well established that the courts of appeals are not obligated to address matters raised for the first time on rehearing, where those matters could have been raised earlier. See *United States* v. *Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970) (Only "extraordinary circumstances * * * would justify our considering on petition for rehearing, issues which were not previously presented."). This Court, moreover, rarely reviews matters that, like petitioner's contentions based on the *Trader Joe's* decision, were not properly raised before, and were not passed upon by, the court of appeals. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

b. Besides, contrary to petitioner's assertions (Pet. 12), *Trader Joe's* does not accord petitioner "a state law property right to exclude the union handbillers." *Trader Joe's* merely held that, under the balancing test established by the California Supreme Court in *Prune-*

Yard, the owner of a free-standing retail store (*i.e.*, a store not part of a shopping center) was, in the circumstances of that case, privileged to deny access to individuals who wished to solicit signatures for voter initiative petitions. 73 Cal. App. 4th at 432-434. In reaching that conclusion, the court made it abundantly clear that "picketing by a labor union" would present a different case from the one before it because, under decisions of the California Supreme Court, such union activity may "justif[y] the impingement on private property rights." *Id.* at 435 (citing *In re Lane*, 457 P.2d 561 (Cal. 1969), and *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 599 P.2d 676 (Cal. 1979)). Accordingly, there is no reason to believe that the *Trader Joe's* court would have disagreed with the court of appeals' conclusion in this case. And, given the fact that *Trader Joe's* expressly distinguishes union handbilling and picketing cases like this one, the court of appeals certainly did not abuse its discretion by declining to address that case explicitly after petitioner raised it for the first time on rehearing.

Petitioner also cites (Pet. 14 n.4) a number of other California appellate decisions that were resolved in favor of the property owner and against persons seeking access. To the extent petitioner cites those cases in an effort to show that the court of appeals' interpretation of *Robins* v. *PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979), aff'd, 447 U.S. 74 (1980), was erroneous, petitioner merely seeks review of the court of appeals' construction of state law. This Court rarely (if ever) grants certiorari to review questions of state law. Petitioner, moreover, never distinguishes *Lane*, 457 P.2d at 561, a California Supreme Court decision addressing union activity that—like the activity in this case—occurred in the privately owned area sur-

rounding a free-standing store. Nor does it cite any case of that court, or of the California Court of Appeal, that permits a large, free-standing supermarket to prevent peaceful union picketing and handbilling in the parking lot or on walkways opened to use by members of the shopping public. Indeed, as the Ninth Circuit correctly observed here (Pet. App. B21), in one of the decisions cited by petitioner, the California Court of Appeal indicated that a "large 'supermarket-type' grocery store," such as petitioner, does *not* fall within the class of "modest retail establishment[s]" that the state supreme court's decision in *PruneYard* exempts from the right of access. See *Bank of Stockton* v. *Church of Soldiers of the Cross of Christ*, 52 Cal. Rptr. 2d 429, 434 (Cal. Ct. App. 1996). Although petitioner contends (Pet. 13 n.3) that *Bank of Stockton* "has little or no precedential value," the court below properly looked to that decision for guidance as to how the California courts would resolve the state-law question posed by the instant case.[5]

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[5] Petitioner argues (Pet. 13 n.3) that the *Bank of Stockton* court's statement was "mere dictum" and thus should have been accorded little weight by the Ninth Circuit. But the statement constituted an important part of the state court's reasoning, *i.e.*, of its *ratio decidendi*. The question in *Bank of Stockton* was whether the bank in that case fell within the "modest retail establishment" exception. To make that determination, the court was called upon to define what does, and does not, constitute such an establishment. Summarizing the holdings of the California courts, the court concluded that, "[w]hatever 'modest retail establishment' means, it does not include . . . a large supermarket-type grocery store." 52 Cal. Rptr. 2d at 434 (internal quotation marks omitted). The court further concluded, however, that the bank was not akin to such a grocery store, but rather was "comparable to the modest retail establishments" in other California decisions. *Ibid.*

Petitioner's reliance (Pet. 14-15) on decisions from other jurisdictions in support of its construction of California law is likewise misplaced. The court of appeals was not obligated to follow those decisions to the extent they are contrary to the decisions of the California courts. Moreover, the out-of-state authority cited by petitioner is inapposite. None of the cases addresses whether (much less holds that) an employer is privileged to exclude peaceful labor picketers and handbillers from the property immediately surrounding a large, free-standing retail supermarket.

2. Petitioner next contends (Pet. 17-21) that California law, by recognizing a right of access to the private property surrounding a free-standing retail store, effects a "taking" of property without just compensation, in violation of the Fifth Amendment. That contention, however, is not properly before this Court and, in any event, lacks merit.

a. As an initial matter, petitioner is jurisdictionally barred from raising its claim in this Court, because petitioner did not raise it before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has alleged no "extraordinary circumstances" excusing its failure to raise its claim before the Board. Accordingly, petitioner is jurisdictionally barred from raising the claim in this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3. (1975).

In addition, petitioner did not timely raise its taking argument in the court of appeals, and that court did not

address the claim. This Court ordinarily will not address a contention that has not been properly presented to or addressed by the court of appeals in the first instance. See, *e.g.*, *Youakim*, 425 U.S. at 234; *Yee*, 503 U.S. at 533.[6]

b. California law does not in any event effect a taking of petitioner's property. According to petitioner, permitting the Union's representatives to "physically occupy" the property belonging to a free-standing retail store is a per se taking. Pet. 18. That contention cannot be squared with this Court's decision in *PruneYard*, which rejected the argument that the physical presence of third parties on property is "determinative" of the takings question. 447 U.S. at 83-84. Rather, the Court explained that there is no "unconstitutional infringement of * * * property rights under the Takings Clause" in circumstances where, as here, nothing suggests that permitting the activities in question (on property that the owner has otherwise made "open to the public at large") "will unreasonably impair the value or use of th[e] property," the owner may "adopt[] time, place, and manner regulations that will minimize any interference with its commercial functions," and the individuals who come onto the property conduct them-

[6] In its petition for rehearing, petitioner suggested that California law would effect an unconstitutional taking of property if it were construed to recognize a right of access to property other than the type of large shopping center involved in this Court's decision in *PruneYard* (citing *PruneYard*, 447 U.S. at 96-97 (Powell, J., concurring)). Because that claim was not timely raised, the court of appeals was not obligated to address it; the court of appeals thus properly denied the petition for rehearing without comment.

selves in an "orderly" fashion. *Ibid.*[7] The other decisions of this Court cited by petitioner (Pet. 19-20) likewise do not support its contention that a physical taking of property occurred here.[8]

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[7] To the extent petitioner relies (see Pet. 13-14, 21) on Justice Powell's concurring opinion in *PruneYard*, that reliance too is misplaced. Justice Powell (together with Justice White) joined the bulk of the Court's opinion "on the understanding that [the] decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." 447 U.S. at 96. Justice Powell did not indicate, however, how a takings claim in that different context should be resolved, see *id.* at 96-101 (Powell, J., concurring), and nowhere indicated that a State in fact would violate the Takings Clause if it were to grant a right of access to union representatives who wished to picket and handbill peacefully on the privately owned walkway and parking area surrounding a large, free-standing retail supermarket, in support of a labor dispute with the supermarket's operator.

[8] *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 832 (1987), cited at Pet. 19, involved "a classic right-of-way easement." This Court held that "a 'permanent physical occupation'" of property, for purposes of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 831-832. The *Nollan* court concluded that its decision was "not inconsistent" with *PruneYard*, "since there the owner had already opened his property to the general public, and in addition permanent access was not required." *Id.* at 832 n.1. The same is true here. The Ninth Circuit's decision does not grant third parties "permanent access" to petitioner's premises and, as the court of appeals found, petitioner has extended a "broad" invitation to the general public "for the purpose of browsing and shopping." Pet. App. B21. In *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), cited at Pet. 20, the Court drew a similar distinction between the case before it and *PruneYard*. See *id.* at 394

Petitioner's suggestion (Pet. 21) that California law may effect a "regulatory" taking (rather than a physical occupation) under *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), is likewise misplaced. In *Del Monte Dunes*, the Court concluded that the "rough-proportionality" test of *Dolan* v. *City* of *Tigard*, 512 U.S. 374 (1994), which "considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts," was "not designed to address, and is not readily applicable to, the much different questions arising where * * * the landowner's challenge is based not on excessive exactions but on denial of development." 526 U.S. at 703. The instant case, of course, does not involve a denial of the right to develop property.[9]

(noting that, unlike in *PruneYard*, the recreational easement at issue in *Dolan* would have deprived the property owner of "all rights to regulate the time in which the public entered onto the greenway," regardless of the interference that access might have posed to the property).

[9] Even if one were to assume that permitting peaceful union expression on property opened to the shopping public would effect a taking, it is far from clear that petitioner would have standing to raise that claim, since petitioner has not shown that its *own* property rights were taken or affected. Petitioner's sublease—its lease with the lessee of the property's owner—gave it the right to operate the supermarket, but the sublease did not expressly give petitioner the right to exclude third parties at the time of the events underlying this case. See Pet. App. C15 n.1, C16 n.11. See also note 1, *supra*. It was only after the events at issue in this case that petitioner's sublease was amended to give it that right expressly. See *id.* at C15 n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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