

No. 25-1322

In the Supreme Court of the United States

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

v.

ALEX SALAZAR,
Respondent.

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

**BRIEF OF THE CATO INSTITUTE AND
NATIONAL FEDERATION OF INDEPENDENT
BUSINESS SMALL BUSINESS LEGAL
CENTER, INC. AS *AMICI CURIAE* IN SUPPORT
OF PETITIONERS**

Elizabeth Milito
Rob Smith
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th St., N.W.
Ste. 1001
Washington, DC 20004

Thomas A. Berry
Counsel of Record
Dan Greenberg
Harrison Prestwich
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

Dated: June 29, 2026

QUESTION PRESENTED

The question presented is:

Whether, contrary to *PruneYard*, a State violates the Takings Clause and the First Amendment when it requires the owners of private commercial property to allow unwanted expressive activity on their land?

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INTEREST OF *AMICI CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

This case interests *amici* because it concerns the application of basic First Amendment principles. The First Amendment prohibits compelled speech, and all Americans, including property owners and small

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

businesses, should enjoy the full breadth of that protection.

SUMMARY OF ARGUMENT

A private shopping mall is forced to host protesters who display graphic images of abortions. *Ctr. for Bio-Ethical Reform, Inc. v. Irvine Co., LLC*, 249 Cal. Rptr. 3d 391 (Cal. Ct. App. 2019). A photography company is forced to photograph an event whose message its owners oppose. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). Private citizens are forced to fund the political donations of strangers. *Elster v. City of Seattle*, 444 P.3d 590 (Wash. 2019). What do all these cases have in common? Each was upheld by a court as a permissible exercise of government power consistent with the First Amendment, and each decision relied on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The decision below is the newest entry on this ignominious list. Petitioners own and operate two adjoining shopping centers in Redlands, California. Pet. Br. 1. Petitioners enforce a policy that prohibits “soliciting, petitions, polling, . . . peddling, political causes, [and] distribution of pamphlets.” Pet. App. 5a. Any expressive activity on Petitioners’ land requires prior approval, but in practice the policy acts as a “blanket ban.” *Id.* at 21a. Respondent—a “men’s rights” activist—sought permission to distribute flyers on Petitioners’ property. *Id.* at 3a. His flyers inform passersby of meetings where men can learn about their “reproductive rights and responsibilities.” *Id.* Petitioners denied his request to distribute flyers on their property. *Id.* at 2a.

Respondent sued in California state court, asking for a preliminary injunction that would compel Petitioners to allow him onto their property. *Id.* at 12a. After the trial court denied the preliminary injunction,

Respondent appealed. *Id.* at 47a. The Court of Appeal of California reversed, holding that the shopping centers’ ban violated the California right of access to private property that this Court upheld in *PruneYard*. *Id.* at 38a.

PruneYard has been wrong since the day it was decided. Its reasoning conflicted with this Court’s contemporaneous First Amendment jurisprudence. Just three years earlier, in both *Wooley* and *Abood*, this Court had recognized the Constitution’s robust protections against compelled speech. *Wooley v. Maynard*, 430 U.S. 705 (1977); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). But *PruneYard* put forth a more qualified view, focusing on the potential for the false appearance of endorsement as if it were the only relevant harm from compelled speech. *PruneYard*, 447 U.S. at 87. *PruneYard*’s holding fit uneasily with the logic of previous decisions. Since then, the Court has decided numerous compelled speech cases. *See, e.g., Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). And *PruneYard*’s inconsistency with established First Amendment doctrine has only grown starker with each additional decision.

Properly understood, the First Amendment protects all individuals and businesses from being forced to endorse, platform, subsidize, or disseminate the speech of others. Although this Court has been moving in the right direction on compelled speech, the Court has so far confined this protection to those who have previously engaged in expressive activity of their own. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024). But the First Amendment’s “concomitant freedom *not* to speak publicly” should be categorical. *See*

Harper & Row, Publr. v. Nation Enters., 471 U.S. 539, 559 (1985). The compelled speech doctrine is circular if the right to be silent hinges on being a speaker. This Court should overrule *PruneYard* to ensure that those who want to stay silent are left with more than a hollow right.

If this Court grants certiorari, it should address *PruneYard*'s First Amendment holding directly. Lower courts are still bound to follow *PruneYard*, despite its holding's subsequent erosion. *See* Pet. App. 42a. Holding that *PruneYard* erred in its Takings Clause analysis would clear away *some* of *PruneYard*'s error, but the First Amendment contains no just compensation clause. Because speech rights cannot be purchased, a Takings-only ruling is structurally inadequate to remedy First Amendment deprivations.

Forty-six years ago, a shopping center asked this Court to protect its First Amendment right to be free from compelled speech. As evidenced by nearly every compelled speech decision since, there is good reason to believe that *PruneYard* was wrongly decided. Petitioners make the same request today, and they deserve a better response. This Court should grant certiorari and reverse.

ARGUMENT

I. THIS COURT'S OPINIONS DEMONSTRATE THAT *PRUNEYARD* WAS WRONGLY DECIDED.

One Saturday afternoon in 1975, two high school students set up a table in the outdoor courtyard of the *PruneYard*, a privately owned shopping center. The students distributed pamphlets and asked passersby to sign petitions opposing a then-recent U.N. resolu-

tion. A PruneYard security guard asked the students to leave because their pamphleting violated the shopping center's rules. The students left, but they later sued the PruneYard in California state court, alleging a violation of their right to freedom of speech. Although these students lost in the lower state courts, they won at the California Supreme Court. That court held that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979).

PruneYard appealed to this Court, asking whether the right of access found within California's Constitution violated PruneYard's rights as protected by the First Amendment to the *federal* Constitution. PruneYard argued "that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *PruneYard*, 447 U.S. at 85. Regrettably, the Court ruled against PruneYard, finding that California had not violated PruneYard's First Amendment rights. *Id.* at 88.

This Court's decision in *Pruneyard* was incompatible with other First Amendment opinions it had previously issued. See *Wooley*, 430 U.S. at 717; *Abood*, 431 U.S. at 209. The Court had held three years earlier that New Hampshire could not compel its car owners to display the state motto on their license plates. *Wooley*, 430 U.S. at 717. That same year, the Court also held that Michigan could not compel workers to pay union dues that furthered ideological causes. *Abood*, 431 U.S. at 235. This Court attempted to distinguish *PruneYard*'s fact pattern from these other

cases, but the reasoning it produced was and is difficult to defend. Since then, *Pruneyard*'s doctrinal footing has become even more uneasy. This Court should grant certiorari to overrule *Pruneyard* and to harmonize the compelled speech doctrine.

A. *PruneYard* was incompatible with contemporaneous First Amendment jurisprudence.

The Court tried to distinguish the compelled speech in *Pruneyard* from that in *Wooley* in several respects. First and “[m]ost important,” the Court noted that the PruneYard is open to the public. *PruneYard*, 447 U.S. at 87. That openness was relevant because, the Court suggested, “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.” *Id.* Second, the Court noted that the Pruneyard could “expressly disavow” connection to third-party speech by posting signs. *Id.* Both reasons hinged on the absence of what one might call an “appearance of endorsement” of the compelled speech. The Court treated the appearance of endorsement as a critical factor. Its decision reiterated that the PruneYard’s owners were “free to publicly dissociate themselves from the views of the speakers and handbillers.” *Id.* at 88.

This focus on the appearance of endorsement was the *PruneYard* Court’s attempt to distinguish the PruneYard fact pattern from *Wooley*’s. It is unconvincing. The car owners in *Wooley* were just as unlikely to be publicly identified with their license plates’ speech as the shopping center was to be publicly identified with the speech of petitioning high school students. Similarly, the car owners in *Wooley* had ways to disa-

vow any endorsement of the compelled speech that were at least as viable as those of the shopping center's owners. Indeed, the suggestion that the general public might misconstrue the state motto as expressing the actual views of the car owners was notably absent from the *Wooley* opinion. That opinion never even mentioned the problem of mistaken inference—the lever of *PruneYard's* reasoning—as a foundation for the injuries borne by the car owners of New Hampshire.

Instead, the Court in *Wooley* described the harm as the forced *distribution* of a message, not the forced *endorsement*. The Court found that the car owners were “coerced by the State into advertising a slogan” that they found “morally, ethically, religiously, and politically abhorrent.” *Wooley*, 430 U.S. at 713. The harm lay in “forc[ing] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.” *Id.* at 721. The Court described New Hampshire’s law as “requir[ing] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.” *Id.* at 713. More colorfully, the Court described the law as requiring car owners to “use their private property as a ‘mobile billboard’ for the State’s ideological message.” *Id.* at 715.

The Court ruled for the car owners in *Wooley* because the coerced *distribution* of a message was itself a First Amendment violation, even in the absence of any compelled appearance of endorsement. The Court held that there is a First Amendment “right to decline to foster” concepts such as “religious, political, or ideological causes.” *Id.* at 714. Throughout *Wooley*, the Court described the resultant harm consistently—the

car owners were forced into “advertising,” “fostering,” “participat[ing] in the dissemination of,” “becoming the courier for,” and “us[ing] their private property as a ‘mobile billboard’ for” a message to which they objected. *Id.* at 713–17.

All these various turns of phrase consistently support one interpretation: the First Amendment harm lay in forcing the car owners to *spread* a message, not causing others to draw false inferences that the car owners *believed* the message. “This principle on its face protects a person who refuses to allow use of his property as a marketplace for the ideas of others.” *Pruneyard*, 447 U.S. at 97 (Powell, J., concurring in part and concurring in the judgment). Just as the car owners in *Wooley* were forced to become “mobile billboards” for a foreign message, the PruneYard was forced to become an outdoor stage. Like those car owners, PruneYard’s owner faced a choice: to be “compelled to affirm someone else’s belief” or to publicly disavow that belief by “speak[ing] when he would prefer to remain silent.” *Id.* at 99. Thus, to reject PruneYard’s First Amendment claim, the Court had to ignore a core premise of *Wooley*’s holding.

Pruneyard’s holding is also irreconcilable with the Court’s decision in *Abood v. Detroit Board of Education*, 431 U.S. at 209. In *Abood*, this Court held that the First Amendment prohibits states from requiring someone “to contribute to the support of an ideological cause he may oppose.” *Id.* at 235. The Court held that a union’s political expression may only be funded by dues “paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will.” *Id.* at 236. The logic of *Abood*, like that of *Wooley*, cannot be reconciled with *PruneYard*’s

premise that the appearance of endorsement is the only harm that matters in compelled-platforming cases.

In *Abood*, the Court found a First Amendment violation while never suggesting that the general public would mistakenly view the plaintiffs as endorsing the speech they were forced to support. The *PruneYard* opinion’s attempts to distinguish *Wooley* were weak, but its approach to *Abood* was far weaker: It did not mention *Abood* at all. See David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1002 (1982). Justice Powell’s *PruneYard* concurrence noted the incongruity between the two decisions: “In [*Abood*], we held that a State may not require a person ‘to contribute to the support of an ideological cause he may oppose’ To require a landowner to supply a forum for causes he finds objectionable also might be an unacceptable ‘compelled subsidization’ in some circumstances.” *PruneYard*, 447 U.S. at 98 n.2 (Powell, J., concurring in part and concurring in the judgment).

Justice Powell was right. *Abood* established that a compelled *subsidy* of speech is a First Amendment injury, even in the absence of any false appearance of endorsement. Similarly, when government commandeers one’s property so that it serves as a platform for the speech of others, that creates an analogous First Amendment harm. As one scholar explained, “requiring the shopping center owners in *Pruneyard* to permit use of their property as a forum for speech by others constitutes a similar compulsion to subsidiz[ing] ideological activity.” Gaebler, *supra*, at 1002; see also Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 374 (2018) (“If having to turn over your

money to speakers who will then use it to speak is an impermissible compulsion, why should it be constitutional to have to turn over (even temporarily) your real estate to speakers who will then use it to speak?”).

California’s rule forced the *PruneYard* to become a physical stage for the speech of others. It thus led to the same fundamental harm as forcing people to use their property as a mobile billboard for others’ speech or to use their money as amplifiers of others’ speech. As Justice Powell recognized, “the right to control one’s own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.” *PruneYard*, 447 U.S. at 100 (Powell, J., concurring in part and concurring in the judgment). In all three cases, the plaintiffs were forced to support speech despite their desire not to do so. In two of the three cases, that was enough for the plaintiffs to win. Only in *PruneYard* did this Court require that compelled support, to be unconstitutional, must *also* create the false appearance of endorsement. The Court should have rejected this requirement in *PruneYard*, as it did in *Wooley* and *Abood*.

B. This Court’s subsequent decisions have further eroded *PruneYard*.

PruneYard was incompatible with two foundational compelled-speech precedents on the day it was decided. Furthermore, its doctrinal infirmities have only become more evident over time. This Court has decided many compelled speech cases since *PruneYard*, and those cases only further reinforce *PruneYard*’s outlier status in First Amendment doctrine.

This Court has repeatedly reaffirmed that requiring someone “to support financially an organization with whose principles and demands he may disagree . . . constitute[s] a form of compelled speech and association that imposes significant impingement on First Amendment rights.” *Knox v. SEIU*, *Loc. 1000*, 567 U.S. 298, 310–11 (2012) (cleaned up). The Court has explained that “being forced to fund someone else’s private speech unconnected to any legitimate government purpose violates personal autonomy.” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 565 n.8 (2005). The doctrine’s animating principle is that “except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.” *Harris v. Quinn*, 573 U.S. 616, 656 (2014). And the Court reaffirmed in *Janus v. AFSCME* that “[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns” to directly compelling speech itself. *Janus*, 585 U.S. at 893 (emphasis in original).

In other cases involving compelled speech, the Court’s modern decisions have continued to distance themselves from *PruneYard*’s logic without ever confronting the anomaly that the opinion created. In *303 Creative LLC v. Elenis*, a website designer had been compelled to create websites for marriages she did not endorse. 600 U.S. at 578–79. The Court found that the public accommodation laws at issue were not “immune from the demands of the Constitution.” *Id.* at 592. It does not matter “whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech All that of-

fends the First Amendment just the same.” *Id.* at 586–87.

This Court further repudiated *PruneYard*’s underlying logic in *Moody*, 603 U.S. at 707. In that case, several states restricted social media platforms’ ability to control the content of their websites. *Id.* at 717. The Court noted that individuals “do not lose their First Amendment protection just because no one will wrongly attribute to them the views” of third parties. *Id.* at 739. Despite much language in *PruneYard* suggesting otherwise, the Court insisted that it had “never hinged a compiler’s First Amendment protection on the risk of misattribution.” *Id.* Nonetheless, a fair reading shows that the risk of misattribution—or the lack thereof—was a central distinction at play in *PruneYard*’s logic. It is telling that *Moody* had to reject the relevance of this distinction to avoid overruling *PruneYard* altogether.

In the context of the Court’s compelled-speech cases, *PruneYard* is inconsistent with *Wooley*, *Abood*, and the Court’s many cases in this realm since. Those cases demonstrate that *PruneYard*’s logic was and is unworkable. Individuals suffer First Amendment injuries when they are forced to “foster . . . concepts” by facilitating the spread of ideas. *Wooley*, 430 U.S. at 714. “Liberty interests are infringed where the speech uttered, presented, or funded is not the freely chosen expression of the speaker or funder.” Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 192 (2002). That holds true whether such compulsory facilitation of speech infringes on another’s expression, or another’s financial resources, or on another’s real or personal property. The right to refrain from speaking rings “hollow if a

landowner must make his property a platform for expression he finds offensive.” Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J. L. & PUB. POL’Y 389, 397 (2009). The time has come for this Court to recognize that *PruneYard* is incompatible with its other foundational compelled speech decisions.

II. THE HARM OF COMPELLED PLATFORMING HAS NOT BEEN FULLY ADDRESSED.

Freedom of speech is a term “necessarily comprising the decision of both what to say and what *not* to say.” *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 797 (1988). The Court has recognized “time and time again” that there is an *independent* right to silence. *Janus*, 585 U.S. at 892 (listing cases). Yet the Court has also interpreted *PruneYard* as adding a condition to First Amendment protection: being actively engaged in speech. *See Moody*, 603 U.S. at 730. We are all entitled to the First Amendment’s guarantee of silence, whether or not we are already engaging in expressive conduct. Until *PruneYard*’s doctrinal anomaly is directly addressed, those who wish to remain silent will be forced to forgo essential First Amendment protections.

A. The First Amendment protects silence independent of any expressive activity.

The First Amendment right to silence exists before—not because—speech begins. Just as “freedom of thought and expression” protects speech, “there is necessarily . . . a concomitant freedom *not* to speak publicly.” *Harper*, 471 U.S. at 559 (quoting *Est. of Hemingway v. Random House, Inc.*, 23 N.E. 2d 250, 255 (Ill.

App. Ct. 1968)); *see also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 471 U.S. 1, 10–11 (1986). But this freedom was overlooked in *PruneYard*, and the Court has since accepted it without justification. The result is a self-defeating doctrine that conditions every person's right to silence on the existence of that person's prior speech.

In *Barnette*, the Court struck down a compulsory flag salute without asking whether it contradicted the schoolchildren's own expressive activity. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628 (1943). Because the Constitution requires the government to pass an extremely demanding test if it is to be allowed to censor or suppress the expression of opinion, "[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.* at 633. The Court held, without qualification, that compelled speech "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642. The harm it identified lay in forced participation as such. In *Wooley*, the reasoning is much the same. Just as the Constitution "secures the right to proselytize religious, political, or ideological causes," it also secures the right "to decline to foster such concepts." *Wooley*, 430 U.S. at 714. The Court did not have to ask if the Maynards were speakers. Rather, the protection was categorical.

Neither opinion turned on editorial control or expressive activity. Both held that the freedom "to refrain from speaking" is part of a "broader concept of 'individual freedom of mind.'" *Id.* (quoting *Barnette*, 319 U.S. at 637). The harm of compelled speech operates in "at least two distinct ways: first, it may inter-

ferre with the individual's ability to define the persona he presents to the world; and, second, it may interfere with the individual's freedom of conscience." Gaebler, *supra*, at 1004. Neither is contingent on whether the compelled speech burdened someone who was a previous speaker. "[W]hat suffers . . . is the capacity for the unwilling speaker to remain silent, *without* any correlated effect on whether she also wants to express speech of her own." Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2362 (2020) (emphasis added). The First Amendment protects, at its core, "a right to be left alone by the government, protected in the privacy of one's preference for silence." *Id.*

It is remarkable that the *PruneYard* Court paid so little attention to the shopping center's independent right to silence. The majority relied on *PruneYard*'s public nature and the lack of a state-mandated viewpoint. *PruneYard*, 447 U.S. at 87. In his *PruneYard* concurrence, Justice Powell highlighted this problem. As Powell explained, when a property owner is forced to platform a speaker, he faces a dilemma: He must either accept false endorsement of a message or disavow it through compelled speech. Either way, "he has lost control over his freedom to speak or not speak on certain issues." *Id.* at 99 (Powell, J., concurring in part and concurring in the judgment). The majority opinion's reasoning hinged on his freedom to dissociate, but that freedom "cannot restore his right to refrain from speaking at all." *Id.*

"The compulsion in *Barnette* was so repugnant to any concept of individual freedom of conscience that careful analysis of the nature of the infringement would have seemed almost pedantic." Gaebler, *supra*, at 1004. And in more recent cases, compelled speech

irrespective of expressive conduct seems plainly unconstitutional. *See Janus*, 585 U.S. at 892 (“No one, we trust, would seriously argue the First Amendment permits this.”). Yet courts addressing *PruneYard* still justify compelled platforming on the grounds that the shopping center was not engaged in expressive conduct. *See, e.g., Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 580 (1995); *Moody*, 603 U.S. at 740 (“the key fact” in *PruneYard* was that the shopping center “was not itself engaged in expression.”).

Barnette and *Wooley* demonstrate that the right to silence is categorical. The difference between compelled silence and compelled speech “is without constitutional significance.” *Riley*, 487 U.S. at 798. And any effort to “compel[] individuals to mouth support for views they find objectionable violates that cardinal constitutional command” and would surely be “universally condemned.” *Janus*, 585 U.S. at 892. Yet *PruneYard* continues to slip through the cracks, producing a unique harm that this Court has yet to address directly.

B. *Moody* Did Not Fully Address the Distinct Harm of Compelled Platforming.

For years this Court has had to distinguish *PruneYard* from its other First Amendment jurisprudence. *See, e.g., Pac. Gas & Elec. Co.*, 475 U.S. at 12; *Hurley*, 515 U.S. at 579–80; *Moody*, 603 U.S. at 730. In *Moody*, the Court found that ordering “a party to provide a forum for someone else’s views implicates the First Amendment,” even though social media platforms had feasible means to avoid misattribution of third-party views. *Moody*, 603 U.S. at 730. Yet the Court held that such a requirement implicates the First Amendment

“if, though only if, the regulated party is engaged in its own expressive activity.” *Id.* at 728. “To the extent that social-media platforms create expressive products, they receive the First Amendment’s protection.” *Id.* at 716. The Court thus reduced *PruneYard*’s distinguishing factors to one remaining point: the lack of expressive activity.

Nothing justifies that distinction. “[T]he First Amendment’s protection extends beyond the right to speak.” *Rumsfeld v. FAIR*, 547 U.S. 47, 68 (2006). It should thus extend beyond the right to control one’s messaging. *Moody* rightly notes that “there are few greater” dangers than “allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.” *Moody*, 603 U.S. at 741–42; *see also Wooley*, 430 U.S. at 714 (“Government enforced right of access inescapably dampens the vigor and limits the variety of public debate.” (internal citation omitted)). But the danger is the same when the government compels speech from individuals who wish to remain silent. Yet the Court in *Moody* limited its holding to those already engaged in expressive activity.

There is no persuasive reason that this distinction should persist. Post-*Moody*, the public nature of a shopping mall is no longer the “key fact” in *PruneYard*’s holding. *See Moody*, 603 U.S. at 740. And First Amendment protection does not hinge on risks of misattribution. *Id.* at 739. Even if it did, disclaimers cannot cure the injury—the answer to compelled speech is not more compelled speech. Gaebler, *supra*, at 1007 (“freedom to disavow a message one has been compelled to express is simply irrelevant to the injury inflicted by such compulsion.”); *Pac. Gas & Elec. Co.*,

475 U.S. at 16 (“forced response is antithetical to the free discussion that the First Amendment seeks to foster.”). All that remains after *Moody* is the sole fact that the PruneYard shopping center—like today’s Petitioners—was not engaged in expressive activity.

“The Court, then, has broadly condemned requirements that people utter speech, display speech, or pay for others’ speech. But it has also . . . upheld laws that require people to host speech on their property.” Volokh, *supra*, at 372. This Court should grant certiorari to resolve that discrepancy and ensure that the First Amendment protects silence as fully as speech.

III. PRUNEYARD SHOULD BE OVERRULED ON FIRST AMENDMENT GROUNDS.

In the years since *PruneYard* was decided, several state courts have relied on that opinion to uphold mandates that force private property owners to disseminate speech they oppose. See *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994); *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590, 590 (Mass. 1983); *Commonwealth v. Tate*, 432 A.2d 1382, 1390 (Pa. 1981). Since *Moody*, lower courts—including the decision below—are still compelled to allow third-party speakers access to some private property. See Pet. App. 42a (“Disagreeing with decisions of courts of higher jurisdiction is not within our wheelhouse as a court of inferior jurisdiction.”); *Harris v. City of Los Angeles*, 2025 U.S. Dist. LEXIS 147676, at *29–30 (C.D. Cal. Jul. 31, 2025) (using *PruneYard* to dismiss a landlord’s First Amendment claim over notices posted on their property).

If the Court found that a Takings Clause remedy was appropriate here, that would certainly alleviate

some of the injuries that *PruneYard* has created, but it would not cure them outright. Justice Powell noted that *ex post* remedies “cannot restore [one’s] ‘right to refrain from speaking at all.’” *PruneYard*, 447 U.S. at 99 (Powell, J., concurring in part and concurring in the judgment) (quoting *Wooley*, 430 U.S. at 714). The Fifth Amendment lists “just compensation” as the appropriate remedy for takings. U.S. CONST. amend. V. The First Amendment does not include similar language. *Id.* amend. I. If the Framers intended “just compensation” to serve as a remedy for First Amendment violations, they would presumably have written it into the Amendment’s text. A state cannot use “just compensation” to purchase the right to compel speech.

The Fifth Amendment cannot become part of a playbook that encourages an end run around the First Amendment. One must choose “whether one reads the First Amendment in opposition to the Fifth Amendment or in harmony with it.” Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 51 (1997). And that choice suggests a question: “Why would anyone draft a document whose neighboring commands systematically operate at cross-purpose?” *Id.* Allowing the government to transform the First Amendment’s prohibitions into a payoff scheme would violate a cardinal constitutional command: The government “cannot do indirectly what [it] is barred from doing directly.” *NRA of Am. v. Vullo*, 602 U.S. 175, 190 (2024). If the government may not compel speech, then that holds true regardless of any compensation it provides after the fact. This Court should grant certiorari to overrule *PruneYard* on First Amendment grounds.

CONCLUSION

For the foregoing reasons, and those described by Petitioners, this Court should grant the petition.

Respectfully submitted,

Elizabeth Milito
Rob Smith
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th St. N.W.
Ste. 1001
Washington, DC 20004

Thomas A. Berry
Counsel of Record
Dan Greenberg
Harrison Prestwich
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

Dated: June 29, 2026