

**Walmart v. Progressive Campaigns, Inc., 67029-3 (1999)**

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
No. 67029-3**

**WARMART, INC., an Idaho corporation, Respondent,  
v.  
PROGRESSIVE CAMPAIGNS, INC., a California corporation;  
JOHN DOES I through 50, and JANE DOES 1 through 50, Appellants.**

**Filed December 16, 1999  
Supreme Court of the State of Washington**

**Opinion Information Sheet**

**Docket Number: 67029-3  
Title of Case: Walmart Inc. v. Progressive Campaigns Inc.  
File Date: 12/16/1999  
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**SOURCE OF APPEAL**

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**Appeal from Superior Court of Clark County  
Docket No: 96-2-02778-6  
Judgment or order under review  
Date filed: 06/22/1998  
Judge signing: Hon. John F. Nichols**

**JUSTICES**

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Concurring: Richard P. Guy  
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ALEXANDER, J. - Waremart, Inc. (Waremart) brought an action in Clark County Superior Court for declaratory and injunctive relief against Progressive Campaigns, Inc. (Progressive), a corporation which manages initiative petition signature gathering campaigns. Waremart sought to enjoin Progressive and its employees from gathering signatures for initiative petitions on its property, asserting that Progressive had no legally protected right to enter its property for the purpose of soliciting signatures for initiative petitions. The Clark County Superior Court agreed with Waremart and permanently enjoined Progressive, and persons acting in concert with it, from entering Waremart's premises for the above described purposes. We granted Progressive's petition for direct review and now affirm the superior court in all respects.

I

Progressive, the appellant, is a profit-making California corporation engaged in "political work" primarily consisting of: (1) gathering signatures for the purpose of "qualifying initiatives for the ballot"; and (2) "field campaign work." Report of Proceedings (RP) at 19. As a part of its business, Progressive hires "petitioners," and pays them every valid signature that they gather in support of the initiative campaign in which Progressive is engaged. RP at 21. Waremart, the respondent, is an Idaho corporation which owns and operates three retail grocery stores in Washington. Two of these stores are called "Cub Foods" and are located in the Vancouver, Washington area. One of the Vancouver area stores is located in the Vancouver Plaza and the other is in the community of Hazel Dell. The third store is located in Kennewick. The record indicates that the "Hazel Dell and Kennewick stores are located in single free-standing buildings, and the Vancouver Plaza store is located in a strip mall." Resp. Br. of Resp't at 41.

Each of Waremart's stores attracts approximately 30,000 customers per week and carries essentially the same product base of grocery items and other goods commonly sold in large retail grocery outlets.<sup>1</sup> Waremart focuses, however, on "sell{ing} groceries" at what it claims is "the cheapest price, or the lowest prices that {it} can in the market area." RP at 133-34.

All of Waremart's stores have essentially the same physical layout. The trial court made findings in that regard that {e}ach store is basically surrounded by an extensive parking area with only a narrow sidewalk bordering the store. There is no plaza or communal area for the public to congregate either inside or on the exterior. Immediately adjacent to the sidewalk is a traffic lane which{,} due to the high volume of vehicles, requires numerous warning signs to warn pedestrians.

Clerk's Papers (CP) at 133. It also found that "Waremart has chosen not to utilize mass advertising. {Waremart's} Washington stores do not promote any public services on their locations nor do they open up areas within their stores to such activities as mall walkers or choir groups." CP at 133-34.

In 1996 and 1997, petitioners hired by Progressive entered the properties upon which the Waremart's stores are located and solicited some of Waremart's customers to sign initiative petitions. The management at all three stores subsequently received complaints from some customers regarding being approached by Progressive's employees. Waremart informed Progressive that its policy was "to prohibit all initiative petitioning on its premises, and . . . requested them to tell the persons whom it ha{d} recruited not to engage in petitioning activity at {its} stores." CP at 4. Progressive refused to comply with this request. Waremart then brought suit against Progressive in Clark County Superior Court, seeking a declaratory judgment that it had the legal right to deny entry to the premises of its Cub Foods and Waremart stores in Washington to persons who seek entry to those premises for purposes of soliciting signatures on petitions to place issues or measures on election ballots, and that it has the legal right to direct such persons to leave its premises.

CP at 10. In addition, Waremart sought an order "{e}njoining {Progressive} and all persons in active concert and participation with them from entering the premises of plaintiff's Cub Foods and Waremart stores in Washington for the purpose of soliciting plaintiff's customers and prospective customers to sign initiative petitions." CP at 11.

After a hearing, the trial court held that:

1. {Waremart's} Washington stores are not 'the functional equivalent of a downtown area or other public forum,' and they do not perform 'a traditional public function by providing the functional equivalent of a town square or community business block' . . . .

2. {Waremart} is not required to allow {Progressive's} petitioners to

solicit signatures inside its three Washington stores or on the sidewalks and parking lots adjacent to its three Washington stores.

3. {Waremart} has a clear legal and equitable right to preserve, maintain, and use its property at its three Washington stores for its own retail sales operations. As a private owner and lessee of the property at those three locations, {Waremart} has power to preserve the property under its control for the use to which it is lawfully dedicated, and is under no obligation to permit {Progressive} to engage in petitioning activity on its property.

4. By their conduct in entering the premises of {Waremart's} Washington stores for the purpose of soliciting {Waremart's} customers to sign initiative petitions, persons recruited and paid by {Progressive} have caused and threaten to continue to cause an immediate invasion of {Waremart's} right to preserve, maintain, and use the property at its three Washington stores for its own retail sales operations.

CP at 134-35. The trial court permanently enjoined Progressive, and all persons in active concert with it, "from entering the premises of plaintiff's Washington stores for the purpose of soliciting plaintiff's customers and prospective customers to sign initiative petitions." CP at 139. Progressive sought direct review from this court, contending that the initiative provision of the state constitution provides them with the right to engage in the aforementioned activities on Waremart's property. We granted its petition.

## II

A party seeking injunctive relief must establish: (1) that the movant has a clear legal or equitable right; (2) that the movant has a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to the movant. *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). The trial court, as previously noted, found that Waremart had satisfied the aforementioned criteria, and, therefore, granted its request for a permanent injunction against Progressive. In reviewing this decision, we are mindful of the principle that the "granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of each case." *Washington Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). Furthermore, the "trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary." *King*, 125 Wn.2d at 515; see also *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986) (stating that it is a fundamental principle that a "trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that discretion." ). Accordingly, we must accord the trial court great deference

and review its decision only for an abuse of discretion.

### III

There are two cases that have emanated from this court, *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn.2d 413, 780 P.2d 1282 (1989) and *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn.2d 230, 635 P.2d 108 (1981), which have a particular bearing upon our decision in this case. In *Alderwood*, the issue before us was whether "Washington law {2} permits signature solicitation {for an initiative} at privately owned shopping centers." *Alderwood*, 96 Wn.2d at 240. There, a four member plurality held that both article I, section 5 (the free speech provision)<sup>3</sup> and article II, section 1(a) (amend. 7) (the initiative provision) of the state constitution both protected the right of initiative petitioners to gather signatures upon the private property of the Alderwood shopping mall in Snohomish County, "a regional shopping center with more than 1,000,000 square feet of store area on 110 acres of land." *Alderwood*, 96 Wn.2d at 232.

In concluding that article I, section 5 and article II, section 1(a) (amend. 7) each provided initiative petitioners with a right to gather signatures at the Alderwood shopping mall, the plurality noted that "{d}etermining when the Washington speech and initiative guaranties will apply to private conduct must evolve with each decision, for an all inclusive definition is not practicable. The approach, however, involves balancing several factors." *Alderwood*, 96 Wn.2d at 244. These factors, according to the four justices are: (1) the nature and use of the property; (2) the nature of the speech activity; (3) the potential for reasonable regulation of the speech; and (4) whether barring the activity would significantly undermine free speech or the effectiveness of the initiative process. *Alderwood*, 96 Wn.2d at 244-46. In regard to this last factor, the plurality found it particularly important that:

The shopping center now performs a traditional public function by providing the functional equivalent of a town center or community business block. There are, as of 1980, 139 shopping centers in the Seattle metropolitan area. *Seattle Post-Intelligencer, Shopping Center Directory* (1980). (Area includes the 60-mile corridor between Everett and Tacoma). The ability to gather the requisite number of initiative signatures, and to communicate ideas, would be greatly reduced if access to those centers were denied.

*Alderwood*, 96 Wn.2d at 246. Finally, the plurality in *Alderwood* concluded that:

After balancing all these factors and having found that the owners' constitutional rights were not violated, we believe that petitioners' activities were protected. As already noted, free speech is accorded considerable weight in the balance. Added to that is this State's vital interest in the initiative process. The only offsetting consideration is

the mall owners' private autonomy interests, which are quite minimal in the context of shopping centers.

Alderwood, 96 Wn.2d at 246.

Justice Dolliver concurred with the result reached by the plurality, indicating that he agreed with the four justices insofar as they concluded that article II, section 1(a) (amend. 7) of the state constitution precluded the owners of the Alderwood Mall from excluding the proponents of the initiative from gathering signatures on mall property. He based his conclusion to a large extent upon this court's reasoning in *Maple Leaf Investors, Inc. v. Department of Ecology*, 88 Wn.2d 726, 731, 565 P.2d 1162 (1977), wherein we stated that "the question essentially is one of social policy which requires the balancing of the public interest in regulating the use of private property against the interests of private landowners not to be encumbered by restrictions on the use of their property." Alderwood, 96 Wn.2d at 252 (Dolliver, J., concurring) (quoting *Maple Leaf Investors*, 88 Wn.2d at 731).

Justice Dolliver expressed disagreement, however, with the plurality to the extent that it concluded that the initiative petitioners had a right to gather signatures on private property pursuant to article I, section 5 of the Washington Constitution. Justice Dolliver reasoned that this provision was not implicated because there was no state action. He observed in that regard that in holding Const. art. 1, sec. 5 may be used by one individual to enforce action against another, the majority has made an unprecedented change in the application of this state's constitution. It interprets the constitution in a way which has never been done since that document was adopted in 1889.

Alderwood, 96 Wn.2d at 247 (Dolliver, J., concurring).

In short, the five justice majority in Alderwood coalesced only on the conclusion that article II, section 1(a) (amend. 7) of the state constitution provides protection to initiative petitioners to gather signatures at large shopping malls, such as the Alderwood Mall, which have become "the functional equivalent of a downtown area or other public forum." Alderwood, 96 Wn.2d at 244. The four dissenting justices, on the other hand, disagreed with the majority in all respects. They concluded that "state action" was necessary to invoke the protections of either article I, section 5 or article II, section 1(a) (amend. 7) and that those provisions may not be used by one private citizen to enforce action against another. Alderwood, 96 Wn.2d at 254 (Stafford, J., dissenting).

Eight years later, in *Southcenter Joint Venture v. National Democratic Policy Comm.*, this court again visited article I, section 5, this time to determine "whether a political organization has a right under the free speech provision of the Constitution of the State of Washington to solicit contributions and sell literature in a privately owned shopping mall."<sup>4</sup>

Southcenter, 113 Wn.2d at 415 (emphasis omitted). We took note there of our decision in Alderwood and observed that five members of this court (Justice Dolliver and the four dissenters) concluded in Alderwood that in order to invoke the protections of the free speech provision of our state constitution there must be "state action." Southcenter, 113 Wn.2d at 428. A majority in Southcenter reaffirmed the view espoused by Justice Dolliver in Alderwood, to the effect that "the free speech provision of our state constitution protects an individual only against actions of the State; it does not protect against actions of other private individuals. The {defendant} thus has no right under Const. art. 1, sec. 5 to solicit contributions and sell literature at the mall." Southcenter, 113 Wn.2d at 430. The Southcenter majority went on to note that the holding in Alderwood was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners. We expressly do not here disturb that holding.

Southcenter, 113 Wn.2d at 428-29 (footnotes omitted). Significantly, as Justice Utter noted in a concurring opinion, the majority in Southcenter left "undisturbed the result in Alderwood which recognizes the State's duty to enforce an individual's right to petition on certain private property {i.e., large shopping malls}." Southcenter, 113 Wn.2d at 435 (Utter, J., concurring in the result).

With that background in mind, we now confront an issue that is not directly resolved by the aforementioned cases, i.e., whether article II, section 1(a) (amend. 72) of our state constitution protects the gathering of signatures on initiative petitions on private property having the characteristics of Waremart's stores. Southcenter is not directly applicable because article II, section 1(a) (amend. 72) was not at issue in that case. Furthermore, while Alderwood is instructive, it is not dispositive because the private property at issue there was significantly different from Waremart's property. As noted above, we observed in Alderwood that the Alderwood Mall was a large regional shopping center which "now performs a traditional public function by providing the functional equivalent of a town center or community business block." Alderwood, 96 Wn.2d at 246. Here, the trial court found that Waremart's stores "bear none of the characteristics of a town center" and determined that Waremart's stores "are not 'the functional equivalent of a downtown area or other public forum.'" CP at 134. Although the trial court denominated the latter determination a "conclusion{} of law," we believe that, at best, it is a mixed question of fact and law. CP at 134. To the extent that it is a finding of fact, though, we are satisfied that it is supported by substantial evidence in the record. Therefore, it is a verity, as are the other trial court findings of fact that we have set forth above.<sup>5</sup> See *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)

("Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal.").

Progressive has, however, assigned error to the aforementioned conclusion of law, stating that it is "contrary to the law in Washington." Br. of Appellant at 3. It contends that article II, section 1(a) (amend. 72) of the state constitution provides it with a broad right of access to large retail stores, like Waremart's stores, for the purpose of gathering signatures on initiative petitions. Accordingly, Progressive asserts that this court should reverse the trial court's decision to grant Waremart's request for an injunction and conclude that "petitioners such as Progressive Campaigns should be permitted access to the sidewalks in front of Waremart's stores subject to reasonable time, place and manner restrictions." Br. of Appellant at 18. Progressive supports its contention by asserting that: (1) Alderwood and Southcenter demonstrate that article II, section 1(a) (amend. 72) of the Washington Constitution provides it with a right of access, for the purpose of soliciting signatures for an initiative, to private sidewalks in front of large retail stores; and (2) a balancing of the factors listed in Alderwood, regarding the benefits of allowing petitioning against the burdens upon Waremart, also supports granting it access to Waremart's private property. Waremart responds that we should affirm the trial court. It contends that: (1) this court should overrule "what is left of Alderwood"; (2) "if Alderwood is not overruled, it should be limited to its facts"; (3) "recognizing and enforcing a 'right' to gather signatures at Waremart's stores would violate Waremart's free expression rights"; and (4) an "extension of the Alderwood holding to Waremart's stores would constitute a taking without just compensation." Resp. Br. of Resp't at 13, 31, 39, 42. Waremart's contention that we should overrule "what is left of Alderwood" is based on its view that "{t}here is nothing in {that} . . . opinion that specifically recognizes an independent right to petition on private property under {the initiative provision of the state constitution} alone without the crucial free speech and balancing analysis that was based on Article I, section 5." Resp. Br. of Resp't at 14. We disagree with Waremart. As we have observed above, the state constitutional provision that protects a person's right to circulate initiative petitions on private property is article II, section 1(a) (amend. 72), which provides, in relevant part, that the "first power reserved by the people is the initiative." Contrary to Waremart's assertion, we concluded in Alderwood that this provision specifically guarantees the right to gather signatures for initiatives at large shopping malls. Furthermore, in Southcenter we reviewed our decision in Alderwood and expressly stated that we "do not here disturb {the aforementioned} holding {in Alderwood}." Southcenter, 113 Wn.2d at 429. Waremart's assertion that Alderwood did not establish an independent right, based upon article II, section 1(a) of the state constitution, to gather signatures for initiatives on certain types of private property ignores the plain letter of our decision in Alderwood and

our holding in Southcenter.

We can, of course, overrule our decision in Alderwood if we have good reasons for doing so. Indeed, one justice of this court has suggested in her concurring opinion that we do just that, decrying what she describes as this court's "remarkable state constitutional interpretation" in Alderwood. Concurring Op. at 2. Despite the urging of our colleague we are not inclined to overturn Alderwood because the "doctrine {of stare decisis} requires a clear showing that an established rule is incorrect and harmful before it is abandoned." In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Waremart has not met this substantial burden, particularly in light of our decisions which have recognized the importance of protecting the public's access to the initiative process. See, e.g., State ex rel. Booth v. Hinkle, 148 Wash. 445, 451, 269 P. 818 (1928) (stating that the initiative provision in the state constitution should be "preserved and rendered effective"); Alderwood, 96 Wn.2d at 252 (Dolliver, J., concurring) ("The overriding public interest here involved is to make the initiative process available to all."). The holding in Alderwood, i.e., that citizens may enter commercial property, which is the functional equivalent of a public forum, in order to engage in initiative petitioning, rather than being "incorrect and harmful," effectuates and complies with the express mandate of this court to preserve the people's right to engage in the initiative process. To overturn Alderwood would substantially diminish the ability of Washington's citizens to participate in the initiative process in a meaningful way. We, therefore, reject Waremart's suggestion that we overrule Alderwood.

It is evident from the holding in Alderwood, however, that the right to petition does not extend to all commercial private property which is open to the public. See Alderwood, 96 Wn.2d at 239-40 ("It is undisputed that gathering initiative signatures in some manner, at some place, is a constitutionally guaranteed practice."); see also Southcenter, 113 Wn.2d at 428-29 ("{T}he holding in Alderwood was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners."); Initiative 172 v. Western Wash. Fair Ass'n, 88 Wn. App. 579, 583, 945 P.2d 761 (1997) (stating that the right to gather initiative signatures on certain private property "is limited").

As noted above, in Alderwood we determined that the question of whether Washington's speech and initiative guaranties apply to private conduct must "evolve with each decision" and "involve{s} balancing several factors." In engaging in this balancing, we acknowledge that two of the factors we set forth in Alderwood (i.e., the nature of the speech activity, and the potential for reasonable regulation of the speech) primarily relate to the protection of speech and do not lend themselves well to an analysis of the protections provided by the initiative provision. Two of the factors we identified in Alderwood (i.e., the nature and use of the property, and the

impact of the decision upon the effectiveness of the initiative process) do, however, apply well to an analysis of article II, section 1(a). We are also of the view that the factors we identified in Alderwood were not intended to be exclusive. Accordingly, we believe that the related factor of the scope of the invitation that the owner of the property has extended to the public is a relevant consideration.

Progressive strains in its effort to compare the use and nature of Waremart's stores to that of the Alderwood shopping center. The Alderwood shopping center, as we have observed, is a traditional shopping mall "with more than 1,000,000 square feet of store area on 110 acres of land." Alderwood, 96 Wn.2d at 232. In addition, we noted that the mall contained parking for more than 6,000 automobiles and that impact statements in the record "project 22,000 automobiles entering the mall on an average day in 1978, increasing to 39,600 by 1985." Alderwood, 96 Wn.2d at 232 (emphasis added).

Waremart's properties are simply not comparable to the Alderwood Mall. Indeed, Progressive concedes that each of the Waremart stores contains only approximately 80,000 square feet of interior space and the parking lot for each store can accommodate only about 600 cars. Opening Br. of Appellant at 25. Moreover, as the trial court found, the public is expressly not invited to enter Waremart's stores for any noncommercial purpose, as is the case with some large regional shopping malls. In that regard, the trial court observed that Waremart's stores "do not promote any public services on their locations nor do they open up areas within their stores to such activities as mall walkers or choir groups" and they do not engage in "mass advertising."<sup>6</sup> CP at 128, 133. Further, as we noted above, the trial court found that in Waremart's stores, "{t}here are no areas for citizens to congregate; no large common areas; nor plaza to sit, wait or converse. In contrast to the mall, there is no intent to provide public services, entertainment or meeting space." CP at 134 (emphasis added). Based on those findings, and the absence of any evidence or findings that Waremart has in the past tolerated activities similar to those which Progressive now seeks to conduct on Waremart's premises, the trial court's conclusion that the "Waremart stores bear none of the characteristics of a town center{,}" is well founded.<sup>7</sup> CP at 130. Progressive is, thus, asking us to extend our holding in Alderwood to include large retail grocery stores, such as Waremart's, which do not extend an invitation to the public to visit its stores for noncommercial purposes and are not the equivalent of a "town square,"<sup>8</sup> "community business block," or other public forum. We are not inclined to do so due to the limited scope of the invitation that Waremart extends to its customers.

We are also persuaded that barring initiative petitioning on Waremart's private property does not seriously undermine the effectiveness of the initiative process due to the fact that, as we have previously noted, Alderwood and Southcenter protect initiative petitioning upon the many commercial properties in the state of Washington which have the earmarks of

a town square, downtown area, or other public forum.

Adopting Progressive's position and extending Alderwood to include private property such as Waremart's stores would, in our judgment, constitute an unwarranted extension of our holding in that case. We agree with the trial court that Waremart's stores are basically "the present-day version of the old grocery store" and placing them into the same category as a large regional shopping mall or forum for assembly by the community would be imprudent. CP at 133. While one could argue that Progressive's attempt to extend Alderwood makes sense from a policy standpoint, it does not reflect the current status of the law in Washington. Progressive's argument, therefore, is more properly addressed to the Legislature rather than this court.<sup>9</sup> See *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (stating that a public policy argument, which does not reflect the current status of the law in Washington, "is better addressed to the Legislature"); *In re Personal Restraint of Mayner*, 107 Wn.2d 512, 519, 730 P.2d 1321 (1986) ("This court has . . . cautioned against . . . judicial activism in areas of legislative concern."); *State v. Smith*, 93 Wn.2d 329, 339, 610 P.2d 869 (1980) ("It is not our proper function to substitute our judgment for that of the legislature . . .").

Finally, we note that our ruling here is consistent with decisions of the appellate courts in Oregon and California. We are of the view that the case law of these states is particularly relevant and persuasive because courts in each of those states have used analysis similar to that used by this court in Alderwood when dealing with analogous issues. See, e.g., *State v. Cargill*, 100 Or. App. 336, 786 P.2d 208, 214 (1990), *aff'd* by an equally divided court, 316 Or. 492, 851 P.2d 1141 (1993) (citing Alderwood, 96 Wn.2d 230); *Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662, 286 Cal. Rptr. 427, 431-33 (1991) (citing Lopez, 50 Wn. App. 786). In *Lloyd Corp. v. Whiffen*, 315 Or. 500, 849 P.2d 446, 453 (1993), the Oregon Supreme Court held that the initiative provision of its state constitution guaranteed initiative petitioners the right to gather signatures in the common areas of large shopping centers, such as the Lloyd Center, subject to reasonable time, place, and manner restrictions. The Oregon court observed, however, that

{t}his opinion does not hold that Article IV, section 1, {the initiative provision of the Oregon constitution,} confers on persons seeking signatures on initiative petitions the right to go on any private property to which the public has been invited. This holding is limited to the facts of this case, which involve the common areas of a large shopping center such as the Lloyd Center." {10}

*Lloyd Corp*, 849 P.2d at 454 (emphasis added).

In *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341, 342-47 (1979), *aff'd*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), the California Supreme Court held that a group of students could solicit signatures for a petition at a privately owned shopping

center, which contained 65 shops, 10 restaurants, and a cinema, because the property at issue had essentially become a public forum. Several subsequent decisions of the California Court of Appeals indicate, however, that the Robins decision is limited to the context of large regional shopping malls. For example, in *Planned Parenthood*, 286 Cal. Rptr. at 432, the California Court of Appeals stated that in Robins, the court recognized that large retail shopping centers today serve as the functional equivalent for the suburban counterpart of the traditional town center business block . . . . However, the court's contrary language implies that smaller businesses or commercial establishments which do not assume this societal role by public invitation and dedication of private property should not fall within the scope of the Robins rule.

(Emphasis added.) In addition, in *Judlo, Inc. v. Vons Cos.*, 211 Cal. App. 3d 1020, 259 Cal. Rptr. 624, 625, 628 (1989), the California Court of Appeals held that a grocery store, which was located in a "shopping center" with about 20 other stores and restaurants, was "not the functional equivalent of a municipality."<sup>11</sup>

#### IV

In summary, in prior cases we have indicated that when determining whether article II, section 1(a) (amend. 72) of the Washington constitution permits persons to enter the private property of another for purpose of initiative petitioning, a court must balance several factors. Among the useful factors to consider in making this determination are the nature and use of the property, the scope of the invitation that the owner of the private property has extended to the public, and the impact that the case at issue will have on the initiative process.

After balancing these factors, we hold that Progressive does not have a constitutionally protected right under article II, section 1(a) (amend. 72) to enter Waremart's private property to solicit signatures for initiative petitions. We conclude, therefore, that the trial court did not abuse its discretion when it enjoined Progressive and its employees from entering Waremart's stores for the purpose of soliciting initiative petitions. In reaching our decision, we wish to emphasize that we are firm in our view that an owner of private property should generally have the right to determine what lawful activities take place on the privately owned premises. We have, as noted above, recognized a narrow exception to the property owner's sovereignty over the property in favor of the activities of initiative petitioners in cases where the private property on which they seek to gather signatures is a shopping center that bears the earmarks of a town square or public forum. For reasons set forth above, we agree with the trial court that the property in question here does not fall into that category. The property owner's decision to deny the petitioner's entry onto its property for the purpose of conducting this activity does not, therefore, run afoul of the petition gatherers' rights under article II,

section 1(a) (amend. 72) of the Washington Constitution.

In light of our holding, we need not reach Waremart's contentions that forcing it to allow Progressive to solicit signatures for an initiative upon its private property would violate its First Amendment rights, and that an extension of the Alderwood holding to encompass its stores would constitute a taking under the Fifth Amendment.

We affirm the trial court's decision in all respects.

WE CONCUR:

1The record indicates that the range of products that Waremart's stores sell are the same kinds of items that you could "buy at a typical Safeway or Albertson's" store. RP at 186.

2In Alderwood, we noted that "the first amendment to the United States Constitution does not require shopping malls to tolerate the signature practice." Alderwood, 96 Wn.2d at 240 (citing *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972)).

3Article I, section 5 of Washington's constitution provides that "{e}very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

4In Southcenter, the applicability of article II, section 1(a) (amend. 72) was not at issue.

5In regard to the trial court's findings that described the physical features of Waremart's properties, Progressive has assigned error only to the trial court's finding that the sidewalks bordering Waremart's stores are "narrow." Opening Br. of Appellant at 2.

6Although the application of the article II, section 1(a) (amend. 72) was not an issue in Southcenter, it is worth noting that the mall in that case was a large regional mall, which, unlike Waremart's stores, "maintained a policy of allowing charitable, civic and political groups to use designated 'public service centers' within the mall." Southcenter, 113 Wn.2d at 416.

7It is noteworthy that the United States Supreme Court appears to agree with this conclusion because in *Lloyd Corp v. Tanner*, 407 U.S. 551, 569, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), it stated that "{n}or does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there."

8Progressive asserts that the "trial court . . . erred by applying the 'town square' paradigm" and that it should have applied the "business block paradigm." Opening Br. of Appellant at 20. This argument is meritless and dwells on a distinction without a difference because there is no indication from this court's opinion in Alderwood or Southcenter that there is a

difference between the "town square" and "business block" paradigms.

9Our conclusion that article II, section 1(a) (amend. 72) does not grant initiative petitioners the right to gather signatures on Waremart's property is furthered by the fact that there are no published cases in Washington that require the owner of private property, other than a large shopping mall, to allow initiative petitioners to solicit signatures upon their property. It is worth noting, however, that the Court of Appeals, in *City of Sunnyside v. Lopez*, 50 Wn. App. 786, 794, 751 P.2d 313 (1988), did, albeit while relying on the now overruled free speech portion of *Alderwood*, hold that a business complex, which was situated on an acre and a half of land and had 110 parking spaces, "was not the functional equivalent a public place." This case, while not directly on point, benefits Waremart to a certain extent because its stores certainly resemble this complex, in terms of their size and function, to a much closer degree than they do a large shopping mall like *Alderwood* or *Southcenter*.

10Significantly, in a similar lawsuit involving Waremart's stores in Oregon, a trial court in Oregon issued a declaratory judgment in which it determined that "plaintiff's Cub Foods and Waremart stores in Oregon are not forums for assembly by the community where individuals have a constitutionally protected right to engage in initiative petitioning and consequently plaintiff has a legally enforceable right to remove individuals from inside the Cub Foods store and its adjoining sidewalk at the Beaverton Mall, and from the inside of all other Cub Foods and Waremart stores in Oregon and from their adjoining sidewalks and parking lots, if they enter or remain on those premises for the purpose of soliciting signatures on initiative or referendum petitions." Resp. Br. of Resp't at app. 14 (emphasis added).

11In addition, we note that a trial court in California, in a suit similar to the one here, entered a judgment in favor of Waremart, concluding that "{b}ecause {Waremart's} premises are not the functional equivalent of {a} municipality or public forum, plaintiff has the legally enforceable right to prevent persons from entering or remaining on plaintiff's premises for purposes that are outside the scope of plaintiff's invitation to the public" and that, as a result, Waremart "has a legally enforceable right to prevent defendant VOTER REVOLT from entering, or remaining, on {its} premises for the purpose of soliciting persons to sign initiative petitions." Resp. Br. of Resp't at app. 16.