INDEX

AUTHORITIES CITED

CASES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, et al.,

Petitioners,

v.

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereafter referred to as the "Federation") is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

---

* Pursuant to Rule 42, §2 of the Rules of the Court, there have been lodged with the Clerk of the Court the written consents of counsel for the respective parties herein to the filing of this Brief *Amicus Curiae.*

The interest of the Federation, in urging affirmance of the decision of the court below, is predicated upon the potentially substantial and far-reaching consequences that any decision in this case may have for the retail industry.

This case has been phrased by Petitioners, and by the *amicus* briefs in support of Petitioners' position, as a "shopping center" case.[1] This characterization, however, is misleading and an oversimplification; the term "shopping center" simply will not function as a "phrase of art."[2] Rather, although the term has become broadly descriptive of certain business operations—and, indeed, will be used as a term of reference herein—"shopping centers" are not so precisely definable and cannot be so clearly differentiated from other forms of retailing that any rules here enunciated can be regarded as applicable only to a specific and delimited classification of enterprises.[3]

---

[1] See Petitioners' Brief, p. 2; Brief of *amicus* Retail Clerks International Association (hereafter referred to as RCIA, pp. 1-4; Brief of *amicus* National Labor Relations Board (hereafter referred to as NLRB), p. 1 and Brief of *amicus* American Federation of Labor and Congress of Industrial Organizations (hereafter referred to as AFL-CIO), p. vi.

[2] Brief of RCIA, fn. 1. The footnote proceeds to give, for example, "*one* definition" from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY that it is a group of retail stores "*usually* with general parking space and *usually* planned to serve a community or neighborhood" and to further point out that there "are *three of four generally accepted categories of shopping centers, variously defined.*" (All italics supplied.)

[3] Cf., e.g., *Freeman* v. *Retail Clerks Union*, 45 LRRM 2334, 2337 (Super. Ct., 1959), rev'd. on preemption grounds, 58 Wash. 2d 426, 363 P. 2d 803 (1961):

> "The term 'shopping center' can be applied to any number and variety of merchandising and service

Shopping centers can be of practically any size, ranging from large regional shopping centers to local neighborhood centers with but a few small independent stores.[4] In fact, the relatively smaller shopping centers predominate the field.[5] Shopping centers can also be of virtually any shape. Thus, the only common characteristics of all shopping centers are that they (1) offer a variety of

---

[3] (Continued)

operations. What is a shopping center? Does a shopping center become such by reason of having seven, seventeen or seventy places of business? Does it become a shopping center because it is an outdoor operation? One of the reasons that the contention of the defendants cannot be a rule of law is because there is no legally acceptable definition of the phrase 'shopping center.'"

[4] Cf., e.g. the "shopping center" described in *Thomas W. Finucane Corp.* v. *State,* 52 Misc. 2d 462, 276 N.Y.S. 2d 225 (Ct. Cl., 1966) an eminent domain case, which consisted of a one-story masonry block building containing 17,463 square feet. There were three tenants in the building—a drug store, a chain grocery store and a dry cleaning establishment.

[5] As of January, 1965, there were a total of 8,076 shopping centers in the United States. Approximately 60% or 4,925 of the centers had a gross leaseable area of less than 100,000 square feet—which is an area smaller than 500 by 200 feet—with an average leaseable area of 56,000 square feet. Another 25% or 2,066 centers had a gross leaseable area of 200,000 square feet or less (the equivalent of 500 feet by 400 feet). These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,000 centers are "medium sized" (200,000 to 400,000 square feet) and but 400 are large or regional shopping centers. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States,* Michigan State University Business Topics, Summer 1967, pp. 28-29. Similar statistics, prepared by W. Donald Calomiris, president of the Institute of Real Estate Management, are quoted in the magazine of RCIA, *The Retail Clerks Advocate,* August, 1967, p. 6.

goods and services to the public, (2) are located on single tracts of land with definite established boundaries and (3) provide parking area for the customers—significantly, characteristics also present in and not substantially different from those of other types of retail enterprises or establishments which are not generally regarded as "shopping centers."

For example, there are many single unit department stores or discount houses which offer not only their own merchandise but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise "is essentially a shopping center by itself, under one roof."[6] In addition, there are large single retail stores, frequently a branch of a national chain, located on their own tract of land with a substantial public parking area.[7] There are retail enterprises which, instead of being constructed on a horizontal plane, as in the cases of the sprawling one-story suburban shopping center or free standing store, are constructed on a vertical plane because of space limitations as those which exist in downtown locations.[8] Similarly situated

---

[6] Applebaum, *id.* at 31.

[7] See, for example, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961), *cert. den.*, 368 U.S. 927, involving a Sears, Roebuck and Co. retail store. Such stores are generally described as "free standing" stores. Since these stores (as well as discount stores) are usually large operations, the goods and services offered by them will frequently substantially exceed those offered in the smaller or even medium-size "shopping centers".

[8] See Brief of RCIA, p. 7, referring to shopping centers that "have not only spread out, but they are building up." These centers frequently have customer parking areas constructed on several levels attached to the store with entrance into the store directly from the various levels of the parking area.

also are those multiple stores, shops and offices, located within a single building with a common entranceway, stairwells and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting on a public artery. All such enterprises, regardless of size, shape, or the terms used to describe them, are open to the community that makes the center or store "a market place whose very being inheres in its openness to the public."[9]

The interest of the Federation is predicated on the potentially substantial and far-reaching consequences that any decision herein may have for all methods of retail operation, rather than just "shopping centers" however they may be defined. The concern of the *amicus* is that the Court, in formulating the principles to resolve the instant controversy, should be aware of the ramifications thereof on all of these retail establishments as they may be affected by unlawful entry upon their property, whether by a labor union to picket for a variety of conceivable objectives[10] or by other organizations or individuals to propagandize other messages.[11]

SUMMARY OF ARGUMENT

The states have traditionally exercised a substantial and legitimate interest in regulating unauthorized entry upon the property of its citizens. This responsibility has been recognized not only as a basis for protecting the property rights involved and determining matters of

---

[9] Brief of Petitioners, p. 12.

[10] See, e.g., Brief of RCIA, p. 9.

[11] E.g., the factual situation involved in *State* v. *Quinnell*, ... Minn. ....., 151 N.W.2d 598 (1967), or *Hughes* v. *Superior Court*, 339 U. S. 460.

general state tort and state criminal law affected thereby, but also as a means of maintaining domestic peace and preventing the use of violence.

Petitioners have urged that, notwithstanding this paramount state responsibility, the power of Pennsylvania to regulate trespass has been withdrawn in the instant case by reason of the Federal Constitution and the National Labor Relations Act. This Brief will be addressed to articulating three premises which establish that this contention is without merit:

> First, that the regulation of trespass is a traditional and legitimate state concern;
>
> Second, that the power of states to engage in the reasonable enforcement of this interest, as in the present case, has not been withdrawn by the Federal Constitution; and
>
> Third, that in view of the foundation of the state's interest in deeply-rooted local traditions and responsibilities, the effectuation of valid state policies in this area has not been pre-empted by the National Labor Relations Act.[12]

---

[12] By discussing only these points, the Federation does not, of course, suggest that other points which presumably will be raised and argued by Respondents do not afford additional justifiable grounds for affirming the decision of the Supreme Court of Pennsylvania.

ARGUMENT

I.

TRESPASS IS A MATTER OF SUBSTANTIAL AND LEGITIMATE STATE CONCERN.

One of the principles most firmly embedded in our common law is that the unlawful and unauthorized entry upon the land of another is a trespass.[1] The determination of whether specific conduct constitutes a trespass and the protections to be afforded with respect to or against such conduct are matters of legitimate state concern. Indeed, a state has a paramount interest in the establishment of its applicable public policy in this area: first, to delineate the respective rights and obligations of its citizens as affected by such policies; and second, to maintain domestic peace and prevent public disorder.

This traditional state interest in regulating unjustifiable entrances upon the property of another is the touchstone of the premises presented by the Federation herein. It is precisely because of this concern that the several states, within the framework of their respective declared public policies and the confines of reasonableness imposed by the Federal Constitution, should be permitted to exercise their power to regulate this area.

The interest of the state goes far beyond the single question of whether picketing by a labor union in any specific case is enjoinable. It is reflected in and related to other areas which are clearly the recognized primary

---

[1]Restatement (Second), Torts, Sec. 158; *Donovan* v. *Pennsylvania Company,* 199 U.S. 279; *State* v. *Quinnell,* ..... Minn. ....., 151 N.W. 2d 598 (1967).

concern of the states. For example, determination of liability under the general tort law of a state may often turn on the status of owners and occupiers of property in a shopping center *vis-a-vis* "intruders" or "bare licensees",[2] and may even involve the respective rights of third parties while on the parking area of the center.[3] Similar issues, involving whether there is an "implied license to enter upon the premises of another to engage in extraordinary activity *hostile* to the business of the owner", may also arise under state criminal laws.[4] All of these issues have traditionally, and properly, been resolved by the prevailing policies of the states.

The interest of the state is also inextricably entwined with its responsibility to maintain peace and order. This responsibility is not merely limited to preventing the continuance of force and violence or threats thereof; it also involves preventing the possible breaches of the peace or public disorders which are likely to occur as a result of the unauthorized invasion of property of another. The function of trespass actions in preventing violence has long been recognized. The particular concern of the states is well illustrated in the opinion of the Supreme Court of Illinois in *People* v. *Goduto,* 21 Ill. 2d 605, 609, 174 N.E. 2d 385, 387 (1961); *cert. den.,* 368 U.S. 927. In affirming the conviction for unlawful trespass of a union organizer in the parking lot of a retail store, the court stated:

> "It is apparent therefore that the criminal sanctions of the common law were not imposed primarily for

---

[2] E.g., *Nocar* v. *Greenberg,* 210 Md. 506, 124 A.2d 757 (1956) and *Clark* v. *Rich's Inc.*, 114 Ga. App. 242, 150 S.E. 2d 716 (1966).

[3] *Reed* v. *State Farm Mutual Automobile Insurance Company,* 188 So.2d 756 (Ct. App. La., 1966).

[4] *State* v. *Quinnell,* ..... Minn. ....., 151 N.W. 2d at 602 involving demonstrators in a stockyards which was "traversed by various roadways."

> the protection of property rights but were imposed for the protection of public safety. This was a recognition of the fact that trespass can lead to violence. Indeed the owner or occupant of land has the right to use any force necessary to remove a trespasser in situations where there is no time to resort to the law. (See Prosser, Torts 2d ed., sec. 21). . . .
>
> "When a person refused to leave another's property after he has been ordered to do so, a threat of violence becomes imminent. It was for this reason that the legislature made this type of trespass subject to criminal prosecution. The basic purpose of the statute is the prevention of violence or threats of violence."

State courts have historically and consistently acted to determine their applicable public policies and the appropriate remedy to be afforded under such policies, whether criminal or civil, when conduct involved entry upon the property of another without consent, even though such cases involved picketing by labor unions or claims of justification based upon constitutional guarantees.[5] The

---

[5] *People ex rel. Koester* v. *Rozensweig,* 171 Misc. 702, 13 N.Y.S. 2d 795 (1939); *Hotel and Restaurant Employees Local 802* v. *Asimos,* 216 Ark. 694, 227 S.W. 2d 154 (1950); *Millmen Union, Local 324* v. *MKT Railroad Co.,* 253 S.W. 2d 450 (Tex. Civ. App., 1952); *People* v. *Goduto,* 21 Ill.2d 605, 174 N.E. 2d 385 (1961); *cert. den.,* 368 U.S. 927; *Moreland Corp.* v. *Retail Store Employees Union, Local 444,* 16 Wis. 2d 499, 114 N.W.2d 876 (1962); *Amalgamated Clothing Workers* v. *Wonderland Shopping Center,* 370 Mich. 547, 122 N.W.2d 785 (1963); *Stafford* v. *Hood,* 213 Tenn. 684, 378 S.W. 2d 766 (1964); *Schwartz-Torrance Investment Corp.* v. *Bakery Workers, Local 31,* 61 Cal. 2d 766, 40 Cal. Reptr. 233, 394 P.2d 921 (1964); *cert. den.,* 380 U.S. 906; *People* v. *Poe,*

states, of course, may not always act uniformly.[6] But, "[t]hat is precisely what is meant by recognizing the [the relevant considerations] . . . are within the domain of a State's public policy."[7]

II.

THE DECISION OF THE COURT BELOW DOES NOT ABRIDGE ANY RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION.

The Petitioners have sought to insulate their conduct by a simple, all-inclusive declaration: any infringement on the right to peacefully communicate their message at which they unilaterally determine to be its most "natural and effective" site abridges their Constitutionally-guaranteed rights. The state, according to Petitioners, is required to tolerate peaceful communication in all places; there is an unfettered right to propagandize views whenever and however and wherever one pleases.

This concept of constitutional law has been "vigorously and forthrightfully rejected" by this Court. *Adderley* v. *Florida,* 385 U.S. 39, 48. Initially, with respect to picketing,

---

[5] (Continued)
236 Cal. App. 2d Supp. 928, 47 Cal. Reptr. 670 (1965); *People* v. *Weinberg,* 6 Mich. App. 345, 149 N.W. 2d 248 (1967); *Blue Ridge Shopping Center* v. *Schleininger,* 65 LRRM 2911 (S.Ct. Mo., July 10, 1967); and *State* v. *Quinnell,* ..... Minn. ....., 151 N.W.2d 598 (1967). See also *Whittlesey* v. *United States,* 221 A.2d 86 (Ct. App., D.C., 1966).

[6] Cf., e.g., *Moreland Corp.* v. *Retail Store Employees Union, Local 444,* with *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers, Local 31, supra* n. 5.

[7] *Teamsters Union* v. *Hanke,* 339 U.S. 470, 478.

while it cannot be gainsaid that it "is *in part* an exercise of the right of free speech guaranteed by the Federal Constitution",[8] it is also incontrovertible that "since picketing is more than speech . . . this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket . . ."[9] "Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."[10] As the Court stated in *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490, 500-501, quoting, in part, *Bakery Drivers Local* v. *Wohl,* 315 U.S. 79:

> "'A state is not required to tolerate in all places . . . even peaceful picketing by an individual' . . . picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation. No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate the valid laws designed to protect important interests of society."

These principles were reaffirmed by this Court in *Cox* v. *Louisiana,* 379 U.S. 559, 563, thusly: "The conduct which is the subject of the statute—picketing and parading —is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited."

---

[8] Brief of Petitioners, p. 19, quoting *Building Service Union* v. *Gazzam,* 339 U. S. 532, 536-537 (italics supplied).

[9] *Id* at 537.

[10] *Hughes* v. *Superior Court,* 339 U.S. 460, 465-466.

The right to communicate, whether by picketing or otherwise, affords no sweeping immunity against an assertion by a state of its legitimate public policies. Nor does freedom of speech impart a license to trespass. These principles were recognized again by this Court in *Adderley,* 385 U. S. at 47:

> "Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . .'"

The solution to the clash of competing interests in this "deceptive and opaque"[11] area lies only in a careful recognition of all the competing rights involved which "must be obtained with as little destruction of one [right] as is consistent with the maintenance of the other [right]." *National Labor Relations Board* v. *Babcock & Wilcox,* 351 U. S. 105, 112. *Babcock & Wilcox* did not, of course, have at issue the question involved in the instant case. It did not hold, nor even suggest, that states may not enforce their public policies as to trespass, or that the Board, as opposed to the state, is the proper forum to determine such policies. So far as the present case is concerned, the significance of *Babcock & Wilcox* lies in its recognition that an employer, even in an organizing campaign, may "validly post his property" insofar as there is

---

[11] *Teamsters Union* v. *Hanke,* 339 U. S. 470, 478.

no unreasonable infringement upon the rights of the union. In contrast, what is involved here is the state's duty to protect the property rights involved, and prevent violence or potential violence as the result of, such valid posting.[12] This area is one in which states traditionally have been required to recognize and balance various conflicting interests, with the framework of constitutional guarantees, in effectuating varied state policies.[13]

The foregoing is not meant to suggest that all states would, or should, reach a similar result as that arrived at by the courts below. As discussed above, the relevant

---

[12] This distinction was recognized by the court in *People* v. *Goduto,* 21 Ill. 2d 605, 174 N.E. 2d, at 388 thusly:

> "In addition to the State's interest in preserving domestic peace, the law recognizes the company's right to protect its property interests. . . . In [*Babcock & Wilcox*] . . . the court recognizes the property interest of the employer to be superior to the interest of the union in having a convenient means of communicating with employees. The notice or order of the employer is of little consequence, however, if it cannot be enforced."

[13] See, e.g., *Breard* v. *Alexandria,* 341 U. S. 622; *Hall* v. *Virginia,* 188 Va. 729, 49 S.E. 2d 369 (1948); *app. dism.* 335 U. S. 875, *reh. den.,* 335 U. S. 912; *State* v. *Martin,* 199 La. 39, 5 So. 2d 377 (1941). Cf. *Marsh* v. *Alabama,* 326 U. S. 501, where the balance struck by the state was held to be unreasonable since it applied to a company owned town. *Marsh* did not hold, however, that the states may not reasonably enforce their policies, where, as here, other means of communication are available. As one commentator stated respecting shopping centers and residential developments: "Some of these are undoubtedly larger in terms of volume of business or population than the town of Chicasaw. But a town, whatever its size, as a center in which its people conduct their business and exchange ideas is unlike either a shopping center or a large apartment development." Lewis, *The Meaning of State Action,* 60 Col. L. Rev. 1083, 1098, fn. 54 (1960).

considerations in this area necessarily involve "a knowledge and appraisal" of deeply-rooted local "social and economic policies," and local feelings and responsibilities which may vary considerably from state to state.[14] But the Constitution does not command "logical symmetry";[15] "[t]hat other states have chosen a different path in such situations indicates differences of social views in a domain in which states are free to shape their own local policy." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 296.

The result reached by the courts of Pennsylvania in this case was a reasonable one.[16] The injunction

---

[14] *Teamsters Union* v. *Hanke*, 339 U. S. at 475.

[15] *Hughes* v. *Superior Court*, 339 U. S. at 468.

[16] The Pennsylvania Supreme Court thus analyzed the nature and the physical description of the shopping center and the fact that Weis and Sears were the only tenants, the nature and location of the picketing, the non-employee status of the pickets, the limited, restricted invitation to the public on the part of the Respondents, and other similar, relevant considerations. The Court of Common Pleas of Blair County also exercised its "authority to balance the equitable considerations and to impose reasonable controls." The court not only also considered the factors analyzed by the Supreme Court, but also expressly noted the alternative channels of communication open to the Petitioners:

> ". . . nothing in the Great Leopard Case (*Great Leopold Market Corporation, Inc.* v. *Amalgamated Meat Cutters*, 413 Pa. 143, 196 A. 2d 675 (1964) clearly shows that an equally suitable area outside of the shopping center but in the immediate vicinity thereof existed which could be effectively utilized as a situs for picketing; in the present case, however, plaintiffs have affirmatively shown that access to the subject property may be had only from the two highways hereinbefore described and that both have berms of sufficient width appropriate to accommodate pickets." Pet. for Cert., p. 16a.

issued does not unduly restrict picketing, speech, or any form of communication. It is not an unwarranted "broadside against all picketing, the kind of general assault condemned by *Thornhill* v. *Alabama*";[17] rather, it is a limited decree "tailored to prevent a specific violation of state law."[18] All the injunction does—and nothing more—is to prohibit the Petitioners from entering and remaining upon the property of the Respondents and using it for the purpose of urging the public to shop elsewhere. Picketing and all other forms of lawful communication are otherwise available to the Petitioners without restriction.

Despite this limited form of restraint it is nevertheless argued that the court below did act unreasonably: that it failed to recognize that "[t]he vicinity of the store is the natural and effective place to communicate the picket's message"[19] and, therefore, "the only suitable place."[20] In short, the argument is that a union must have an absolute right to choose both its means and place of communication. The fallacy inherent in this approach is that it assumes the law to be rigid and absolute whereas, conversely, its hallmark in this area is the skillful adaptability and recognition of all interests. Labor organizations have often been required to accept allegedly less desirable or suitable means of communication where the method desired would either unduly infringe on the rights of other parties[21] or violate the

---

[17] Mr. Justice Douglas, dissenting, in *Plumbers Union* v. *Graham*, 345 U. S. 192, 204-205.

[18] *Ibid.*

[19] Brief of Petitioners, p. 24.

[20] Brief of RCIA, p. 9.

[21] See, e.g., *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722.

legitimate public policies of the states.[22] Significantly, Petitioners have implicitly recognized this principle. They do not here contend that they should have what is clearly their most "effective" means of communication to the public—a privileged right of entry on the porch and interior of the Weis property in order to freely propagandize their message to Weis' customers. On the contrary, as observed by the court below, they recognize that picketing *at these locations* would constitute an enjoinable trespass.[23] The National Labor Relations Board, as *amicus,* has likewise conceded that in such a case "the interest of the State in providing a remedy for that conduct is so great . . . that the State would not be barred from acting."[24] A union may also be restricted from picketing in the immediate vicinity of certain establishments located in multi-story buildings notwithstanding that an incidental effect thereof may be some insulation of such enterprises from some forms of concerted activities.[25] Similarly, limitations have been imposed by the Board and courts on what has been alleged to be the most effective and desirable means of communication in other situations.[26]

---

[22] See, e.g., *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287.

[23] 425 Pa. 382, 227 A. 2d 874 at n. 5.

[24] Brief of amicus *NLRB,* p. 17.

[25] Cf. *NLRB* v. *District 65, Retail, Wholesale Department Store Union,* 375 F. 2d 745 (C.A. 2, 1967); *Gimbel Brothers, Inc.,* 100 NLRB 870.

[26] E.g., the limitations imposed on the absolute right to communicate in cases of solicitation and distribution (*NLRB* v. *Babcock & Wilcox, supra; Stoddard-Quirk Manufacturing Co.,* 138 NLRB 615; Gould, *The Question of Union Activity on Company Property,* 18 Vand. L. Rev. 73 (1964)), "common situs" picketing (*NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S.

Effectiveness and suitability, accordingly, are not the sole criteria. Reasonable imposition of legitimate state policies may justifiably preclude utilization of what a union unilaterally determines to be "the natural and effective place to communicate the picket's message."

The corollary argument that "other methods of communication . . . are usually too expensive and too diffuse"[27] cavalierly disregards the countless, varied means of communication that have been utilized by labor organizations, the advertising industry, political organizations, charitable and religious solicitors, and others in the many years that they have dealt with their similar problem of communicating a message to the public.[28] Similar forums are

---

[26] (Continued)
675; *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*), 92 NLRB 547), and the availability of an employer's premises for "captive audience" organizational speeches as opposed to the availability of lists of the names and addresses of all eligible voters (*General Electric Co.*, 156 NLRB 1247 and *Excelsior Underwear, Inc.*, 156 NLRB 1236).

[27] Brief of RCIA, p. 8. See also Brief of *amicus* American Civil Liberties Union, pps. 8-9 and Brief of AFL-CIO, pps. 7-8.

[28] The Petitioners thus not only have alternative, effective places in which to communicate their message to the Weis public through picketing but numerous other methods of communication as well. There are the traditional communication weapons, for example, of handbill distributions, mailings, house-to-house solicitations, newspaper and magazine advertisements, telephone calls and public meetings or speeches. In addition, an examination of the *Retail Clerks Advocate* for last year alone reveals communication of the Union's message to the public through a multitude of additional devices: a national consumer boycott involving "hundreds of picket demonstrations, tens of

equally available, and, if utilized,[29] would no doubt prove

---

[28] (Continued)
millions of leaflets, balloons and bumper stickers . . . to tell the story" (June, 1967, p. 3); announcements on a national television network "to advise customers of the benefits of shopping where they see the RCIA store card" (July, 1967, p. 18); state and county fairs, holiday celebrations and other summer festivals to provide "the opportunity to publicize the RCIA and the union store card" (October, 1967, p. 12); extensive distribution of RCIA shopping bags (June, 1967, p. 5 and October, 1967, p. 12); outdoor billboards in "strategic locations" (July, 1967, p. 14); sponsorship of local radio or television programs (October, 1967, p. 12, and April, 1967, p. 16); sponsorship of local sports teams (October, 1967, pp. 12, 27); floats entered in holiday parades (November, 1967, pps. 12, 26); Union Label Week in New York City (October, 1967, p. 28); union-industry show exhibits (July, 1967, p. 14); a "mile-long caravan" of automobiles to protest the Sunday selling of cars (January, 1967, p. 28) and even skywriting, "a new idea in publicizing the 'shop union' theme" (November, 1967, p. 26).

[29] Petitioners note, for example, that in *Honolulu Typographical Union No. 37* (*Hawaii Press Newspapers*), 167 NLRB No. 150, "the police refused to permit the union representatives to enter the shopping center. . . . The union therefore picketed and distributed handbills to the public at the entrance to the shopping center." Brief of Petitioners, p. 45. The union in that case, however, did not restrict itself only to these alternative uses of the handbill and the picket sign. As described by the Board Trial Examiner (TXD, sl. op. p. 6):

> ". . . the Union arranged that a flat-bed truck be parked in front of Market Place. On this truck a series of Hawaiian, Tahitian and Samoan musicians and dancers gave a free performance, which at the place, approximately the center of Waikiki, attracted a large and appreciative audience. This audience, it is undisputed, was of such size that it filled the sidewalk, from building line to curb, all across the entrance to Market Place. It was such a dense crowd

to be equally effective,[30] to Petitioners in the instant case.

III.

THE DECISION OF THE COURT BELOW WAS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The Petitioners have further sought to immunize their conduct from state regulation by asserting that the area here involved has been pre-empted by the National Labor Relations Act[31] and thereby withdrawn from state power. This issue, "a variant of a familiar theme", requires that the Court once again "render . . . progressively clear" that "penumbral area" in which the Act has "left

---

[29] (Continued)

> that some pedestrians crossing Kalakaua Avenue at the crosswalk at that location had difficulty reaching safety on the curb, and the police had to manage the audience, so that street traffic and pedestrian traffic would not be impeded.
>
> * * *
>
> "On another occasion, when picketing occurred . . . the truck had musicians with Tahitian and Somoan drums and horns. The truck was equipped with electronic amplifiers which were turned up to extremely high volume. The amplification system drowned out Beach's [a shopping center tenant] own music system in his lounge, and annoyed three specific customers to the point that the three men left the lounge, after complaining to Beach."

[30] Although the RCIA alleges it "has a daily problem of securing access" to shopping centers, it nevertheless estimates that it presently "represents more than 200,000 employees who work in stores located in 'shopping centers' in the United States." Brief of *amicus* RCIA, pp. 1-2.

[31] 61 Stat. 316, 29 U.S.C. § 141 *et seq.* (hereafter referred to as the "Act").

much to the states." *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 239-40. Its resolution, to paraphrase *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 57, "entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against [trespass]."

This "penumbral area," as recognized by *Garmon* and subsequent decisions, extends beyond regulation of that activity which is not arguably subject to either Section 7 or 8 of the Act. The pre-emption doctrine also has "due regard for the presuppositions of our embracing federal system,"[32] and, accordingly, "has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to be with the NLRB."[33] The recognized area in which "this Court has refused to hold state remedies pre-empted" thus includes state regulation where either "the activity regulated was a merely peripheral concern of the . . . Act", or alternatively, and clearly indicated by Garmon[34] to be a distinct, separate criterion, where the activity "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] . . . could not infer that Congress has deprived the States of the power to Act." *Vaca* v. *Sipes,* 386 U.S. at 180, and cases cited therein.

The Federation is in agreement with the Respondents' position that the conduct involved in the instant case is not arguably subject to either Section 7 or 8 and is also

---

[32] *San Diego Building Trades Council* v. *Garmon,* 359 U. S. at 243.

[33] *Vaca* v. *Sipes,* 386 U. S. 171, 179.

[34] 359 U. S. at 244, and also recognized as a separate test in *Linn* v. *United Plant Gaurd Workers,* 383 U. S. at 62-63.

a "merely peripheral concern" of the Act.[35] These arguments of Respondents, therefore, need not be emphasized again. Rather, the main thrust here will be that the valid state policies enforced by the court below touch interests deeply rooted in local responsibility and affect matters of compelling state concern. Accordingly, this area of traditional state regulation should not be deemed one in which state jurisdiction must yield.

This Court has repeatedly recognized that there is an "overriding state interest . . . involved in the maintenance of domestic peace." *Plumbers Union* v. *Borden,* 373 U.S. 690, 693. As stated by the Court in *Garmon*:

> ". . . we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and *imminent*

---

[35] Cf. Organizing And The Law, A Handbook For Union Organizers, by Stephen I. Schlossberg, General Counsel, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), 1967, at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does so *without the protection of the Labor Act.* The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. There is, however, *no section of the Taft-Hartley Act available to the employer in this situation.*" (Italics added.)

The "exceptional circumstances" referred to include entry on shopping center property based on *Amalgamated Clothing Workers* v. *Wonderland Shopping Center, supra,* n. 5, where in the factual situation there involved, there was held to be no trespass under Michigan law.

> *threats to the public order.* United Automobile Workers v. Russell, 356 U.S. 634. United Construction Workers v. Laburnum Corp., 347 U.S. 656. We have also allowed the States to enjoin such conduct. Youngdahl v. Rainfair, 355 U.S. 131; Auto Workers v. Wisconsin Board, 351 U.S. 266. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." 359 U.S. at 247. (Italics supplied.)

More recently, in *Linn,* this Court noted that, in the area of libel suits, the alternative to the exercise of state power was a serious threat to the maintenance of domestic peace:

> ". . . the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized." 383 U.S. at 64, n. 6.

The Court, therefore, concluded that the states' concern was " 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon.*" (p. 62).

The function of trespass actions in maintaining the public order is no different. The substantial number of cases in which states have regulated unauthorized invasions of property reflects the deep concern and traditional responsibility of the states in this area.[36] The state's "duty," as recognized by the court below, is not only imposed to "preserve the property rights of its citizens";[37] of even greater significance, it is also exercised to "protect . . . its citizens," 425 Pa. at 386, 227 A. 2d at 876-7

---

[36] See Section I of this Argument at pp. 7-10 *supra.*

[37] See *Adderley* v. *Florida,* 385 U. S. at 47.

(1967). The alternative to the use of state power in this area is, as in the case of libel suits, self help and a concommitant imminent threat of violence. "The basic purpose of the [trespass] statute is the prevention of violence or threats of violence." *People* v. *Goduto,* 21 Ill. 2d 605, 609, 174 N.E. 2d 385, 387 (1961), *cert. den.* 368 U.S. 927. "Intimidation and threats of violence", no less than actual violence, affect "such compelling state interest as to permit the exercise of state jurisdiction."[38] A finding of exclusive Board jurisdiction, and a resulting displacement of state power, would result in a regulatory vacuum in the present case closely coincident to that described by the Court in *United Auto, A. & A.I.W.* v. *Wisconsin Emp. Rel. Bd.,* 351 U.S. 266, 274-5:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

As in *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 620, "[s]uch a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national labor policy, [should] require a more compelling indication of congressional will than can be found in the interstices of the . . . Act." Moreover, there is no inconsistency between any overriding federal labor policy and a state reasonably applying its state policies with respect to trespass. As in *Linn,* state action

---

[38] See *Linn* v. *United Plant Guard Workers,* 383 U. S. at 62.

would "reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy." 383 U.S. at 64.[39]

The Board, as *amicus,* recognized that "a state has a legitimate interest in protecting private property against trespass" and conceded that if entry had been made upon the selling area of the Weis store, the interest of the State would be "so great and the danger of interference with the federal regulatory scheme . . . so slight, that the State would not be barred from acting."[40] The difference between that situation and the instant one is explained only on the basis that, in the former instance, the state is protecting its citizens against unwarranted intruders, but, in the latter case, the protection afforded is "only" against economic injury. This distinction begs the question. In both cases presumably the intruders are unwanted, and in both cases presumably the union's entry was for the purpose of bringing about economic injury. The appropriate issue, therefore, is not where the line of trespass is to be drawn, but, rather, may the state draw it at all. In either case, to deny the state the power to determine and enforce its own valid state powers, and prevent imminent violence, would result in a rejection of the principle that a state may properly regulate conduct which touches interests deeply-rooted in local feelings and responsibility.

---

[39] As this Court observed in *Hanna Mining Co.* v. *District 2, MEBA,* 382 U. S. 181, 191, n. 13, ". . . sometimes offensive conduct may be restrained by a state remedy that has no impact at all on related activity arguably within the Board's exclusive province."

[40] Brief of NLRB, p. 17.

CONCLUSION

For the above-stated reasons, as well as those set forth by the Respondents, the decision of the court below should be affirmed.

Respectfully submitted,

PHILIP C. LEDERER
CHARLES J. BARNHILL
LAWRENCE M. COHEN
33 South Clark Street
Chicago, Illinois 60603
Attorneys for the
American Retail Federation

LEDERER, BARNHILL AND FOX
33 South Clark Street
Chicago, Illinois
Of Counsel.