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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.

On a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF RETAIL CLERKS INTERNATIONAL ASSOCIATION AS AMICUS CURIAE

I. Interest Of The Retail Clerks International Association In This Proceeding.

The Retail Clerks International Association (hereinafter, the "RCIA") is an international, parent labor union which represents in excess of one-half million members for purposes of collective bargaining in the United States and Canada. Virtually all of them are employed in the retail industry.

The RCIA estimates that it represents more than 200,000 employees who work in stores located in "shopping centers"[1] in the United States. The kinds of retail establish-

[1] A "shopping center" is a phrase of art. One definition is "a concentration of retail stores and service establishments in a suburban area usually with generous parking space and usually planned to serve a community or neighborhood." Webster, Third New International Dictionary, p. 2101 (1961 ed.). *(Continued p. 2)*

ments in which they are employed include food stores, general merchandise department stores, "5 & 10¢" ("variety") stores, drug stores, "discount" stores, clothing stores, shoe stores, book stores, bakery shops, automotive centers and many others.

Because the RCIA currently represents thousands of persons who work in shopping centers, it has a daily problem of securing access to these centers in order to perform its statutory functions to meet with, counsel, and represent employees for purposes of collective bargaining with their employers, to negotiate and administer collective bargaining contracts, and on behalf of employees to engage in strikes, picketing and other concerted activities.[2]

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There are three or four generally accepted categories of shopping centers, variously defined. See, e.g., R. Myers, Suburban Shopping Centers 1 (U.S. Small Business Bulletin No. 27, U.S. Small Business Administration, 1963), who defines the main categories as follows:

> "The term 'suburban shopping center' . . . is defined as a group of retail stores and service establishments occupying a center in a suburban location that is planned, developed, and promoted as a unit. Neighborhood centers are usually composed of 10-15 stores and service shops selling predominantly convenience goods; such centers need about 1,000 families in their trading areas to support them. Community shopping centers are usually comprised of 15-35 stores and offer some shopping goods as well as convenience goods; they usually have a junior department store, shoe stores, and stores stocking men's furnishings and children's wear. They need about 5,000 families to support them. Regional shopping centers usually have 50-100 business establishments, one or more of which are department store branches. These generally have at least 100,000 people in their trading area."

[2] The RCIA has been a party to a majority of the cases involving the issue of whether labor organizations have a constitutional as well as a federally guaranteed statutory right to communicate with employees on privately owned shopping center property. See e.g., Arlan's Dept. Store of Charleston (Retail Clerks), Case No. 9-CA-3308 (1965); Freeman v. Retail Clerks, 363 P.2d 803 (Wash.

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The RCIA's concern about this problem goes beyond its duty to act as collective bargaining agent for its members who presently work in shopping centers. It is also concerned about the right of *unorganized* workers in shopping centers to receive information from unions about collective bargaining and their federally guaranteed right to engage in self-organization and concerted activities. During the calendar year 1966, the RCIA estimates that it conducted more than 300 organizing campaigns in the United States which involved unorganized employees in shopping centers. Over the last decade, the number of organizing campaigns conducted by the RCIA in shopping centers has risen steeply.

There were 8.140 million non-supervisory employees in the retail industry in 1964. Employment and Earnings Statistics for the United States 1909-1965, p. 611 (U.S. Dept. of Labor Bulletin No. 1312-3, 1965). Some four million unorganized employees are estimated by the RCIA to be within its jurisdiction, a high percentage of whom work in shopping centers. The Court's decision in this case will meaningfully decide whether these workers are to be insulated from the opportunity to choose to be represented for purposes of collective bargaining with their employers.

In this brief we shall not attempt to state the substantive arguments contained in petitioners' brief which show that access to privately-owned shopping centers to communicate facts concerning a labor dispute is guaranteed by the First

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1961); Green v. Retail Store Employees, 49 LRRM 3059 (Pa.Ct. Cm.Pls. 1961); Illinois v. Goduto, 211 Ill.2d 605, 174 N.E.2d 385 (1961), cert. denied 368 U.S. 927 (1961); Illinois v. Mazo, 44 LRRM 2881 (Ill. Cir. Ct. 1959); Maryland v. Williams, 44 LRRM 2357 (Baltimore City Crim. Ct., Md. 1959); Moreland Corp. v. Retail Store Employees, 144 N.W.2d 876 (Wis. 1962); Nahas v. Retail Clerks, 301 P.2d 932, 302 P.2d 829 (Calif. Dist. Ct. App. 1956); and Retail Fruit & Vegetable Clerks (Crystal Palace Market), 116 NLRB 856 (1956), enforced 249 F.2d 591 (C.A. 9 1957).

and Fourteenth Amendments of the Constitution. Neither shall we attempt to state the well-made arguments of petitioners' brief that the subject matter of union activities on privately-owned shopping center property has been preempted from state court jurisdiction by Congress' comprehensive regulation of labor relations in interstate commerce. With those arguments we are in full accord.

This brief will be limited to two points. First, in the last decade shopping centers have become a major mode of economic behavior in the retail industry; they are growing in size, number and importance, and by 1975, they will dominate all other forms of retail organization; increasingly, they are taking on the characteristics and functions of public squares in the familiar shopping districts of the past. Second, the claim of unions to access to privately-owned shopping centers is a realistic claim rooted in the economic exigencies of our time, a claim which is entitled to priority under contemporary constitutional and statutory standards. The claim of shopping center owners to exclude employees and unions as trespassers is a hyper-technical claim rooted in feudal concepts of property rights designed to protect the integrity of home and person, a claim which bears no realistic relationship to the property owner's full commercial enjoyment of his property.

II. The Economic Use and Importance Of the Contemporary Shopping Center Vest It with A Quasi-Public Character.

Justice Cohen of the Pennsylvania Supreme Court commented in his dissent below that the law has always "recognized the principle that even owners of private property must observe and conform to certain community standards in the use and maintenance of their land, as witness the law of nuisance, zoning and negligence of property owners, . . . most especially, as witness the law of labor relations." *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 227 A.2d 874, 878 (Pa. 1967). In weighing the

competing claims of employees and unions for access to the streets and sidewalks of shopping centers against the claims of center owners and tenants to exclusive control of center property, the touchstone of analysis must be the economic use of shopping center property. A modern shopping center is not after all "a forty-acre pasture for contented cows,"[3] but a complex, emerging economic phenomenon involving new uses of private land for commercial and public purposes, the "most significant development in retailing since . . . the supermarket."[4]

In 1949 there were 75 shopping centers in the United States, but by 1961 *new* shopping centers were opening at the rate of about 1,000 each year.[5] By the end of 1966 there were 10,512 shopping centers,[6] and it has been estimated that there will be 25,000 by the end of 1977.[7]

Shopping centers vary in size. The shopping center in the instant case has 17 stores (Pet. for Cert. 4, n. 2), may be entered only from busy public highways (R. 45, 50, 86-88), and its perimeter spans 1.1 miles (R. 86). Many shopping centers have paved streets, traffic signs and traffic lights, sidewalks and the other characteristics of public-owned shopping streets.[8]

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[3] Freeman v. Retail Clerks, 363 P.2d 803, 807 (Wash. 1961) (concurring opinion).

[4] R. Myers, Suburban Shopping Centers 1 (Small Business Bulletin No. 27, U.S. Small Business Administration, 1963).

At Tyson's Corner in Fairfax County, Virginia, newspaper accounts have reported that a gigantic shopping center is being erected which will include both office and apartment buildings as part of a single, self-contained community. This is doubtless the economic wave of the future.

[5] Ibid.

[6] National Research Bureau, 9 Directory of Shopping Centers in the U.S. and Canada (1967).

[7] Feinberg, From Where I Sit, Women's Wear Daily, Aug. 22, 1967.

[8] For a recent study of the size of shopping centers in terms of

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A typical shopping center was described in a recent case. *Amalgamated Clothing Workers* v. *Wonderland Shopping Center,* 50 LRRM 2160, 2161 (Mich. Cir. Ct. 1962), *affirmed by equally divided court* 122 N.W.2d 785 (Mich. 1963):

> "It is a large shopping center, approximately four blocks square, consisting of 55 acres. Defendants lease to over 60 different tenants, including a large store operated by Montgomery-Ward Company. A parking lot is maintained to park approximately 5500 American-made automobiles. . . . On occasion it has been estimated that over 60,000 people from Livonia and adjacent areas have visited the shopping center in a single day."

Shopping centers have been growing not only in number and size, but also in their share of the sales in the retail industry. In 1966, it was estimated that shopping centers accounted for $78.7 billion in annual sales, equal to 36.84% of the total retail trade in the United States and Canada. Between 1964 and 1966 shopping centers increased their share of total retail sales by more than 2% per year. By 1970, assuming the present growth rate, shopping centers will account for more than 45% of the total retail sales in this country.[9]

In a number of States shopping centers have already become the principal method of retailing. In 1964 sales in shopping centers accounted for more than 50% of all retail sales in Arizona, Colorado, Delaware, Florida, Nevada and Texas; more than 40% of all retail sales in Hawaii, Ohio and Oklahoma; and more than 35% of all retail sales in California, Connecticut, New Mexico and Oregon.[10]

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"gross leasable area," which is smaller than total acreage, see Kaylin, A Profile of the Shopping Center Industry, Chain Store Age E 17 (May, 1966). He observes that the larger centers are increasing their share of all shopping center sales.

[9] Ibid.

[10] Id. at E 18.

There were 944 shopping centers in California alone in 1965, which contained 22,700 individual retail stores, covered 15,405 acres of land, and had parking space to accommodate 836,040 automobiles.[11]

A further indicator of the economic importance of shopping centers is the number of new chain store branches which are being located in shopping centers. In 1965 some 9,330 new chain stores were opened. The industry reported that 59.5% of them (5,550 stores) were opened in shopping centers. Certain kinds of chains are locating new units in shopping centers at an even more dramatic rate. For example, in 1964 variety store chains opened nearly 94% of all new units in shopping centers; drug chains opened 75% of their new units in shopping centers; and shoe store chains opened 90% of their new units in shopping centers.[12]

Shopping centers have not only spread out, but they are building up. There is "a definite trend toward multi-level shopping centers with the future centers moving toward three rather than two levels."[13]

Shopping centers today are more than mere combinations of single retail stores on private acreage. In order to attract and to hold customers, they have facilities which make them centers for recreation and community functions as well. Professor Robert H. Myers of Miami University has related:[14]

> "Shopping center managements are adding to the image of their businesses as community centers by providing such things as meeting rooms, amusement

[11] Id. at E 19.

[12] Chain Store Age, Jan. 1966, E 28.

[13] Slom, Urban Shopping Centers On Rise, Home Furnishings Daily, pp. 1-2, March 18, 1966.

[14] R. Myers, Suburban Shopping Centers 2 (Small Business Bulletin No. 27, U.S. Small Business Administration, 1963).

"In a survey of shopping center customers made in Cincinnati in 1962, it was found that 45 percent of them had not been downtown to shop in over 6 months." Id. at 1.

parks, movie theaters, bowling alleys and assembly halls. Centerwide events such as art exhibits, flower shows, fashion events and symphony concerts as well as promotions more specifically identified with merchandise offerings are being utilized increasingly by shopping centers to identify these centers with their communities and to give more people in their trading areas more reason for coming to the centers."

III. The Use of Trespass Laws to Limit Free Speech and to Circumscribe Activities Protected by Federal Law on Shopping Center Property is Contrary to Decisions of This Court and to Modern Industrial Realities.

The court below restrained peaceful communication of the facts of a labor dispute at the situs of that dispute, contrary to this Court's declaration that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U.S. 147, 161; *Hague* v. *CIO,* 307 U.S. 496, 515, 516. As the California Supreme Court recently said, "The prohibition of the picketing [on shopping center property] would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers,* 394 P.2d. 921 (Calif. 1964), cert. denied 380 U.S. 906. Employees and unions seek to communicate with their fellow workers and the public in front of the involved employer's premises for reasons that are not only historical;[15] it is also based on the reality that other methods of communication—newspaper, radio and television—are usually too expensive and too diffuse.[16] Moreover, this union and many

[15] See Bornstein, Organizational Picketing in American Law, 46 Ky. L.J. 25 (1957).

[16] See Forkosch, Informational, Representational and Organizational Picketing, 6 Lab.L.J. 843, 861 (1955). Professor Forkosch says: "The real question is not whether any alternative exists,

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others have been turned down as advertisers of the facts about labor disputes by newspapers, radio and television stations.

In contemporary labor relations in the United States, employees and unions seeks access to privately-owned shopping center property in several major kinds of labor relations situations: 1) Initial efforts to communicate with employees;[17] 2) Communication with employees during the course of organizing campaigns;[18] 3) Administering collective bargaining agreements;[19] 4) During economic strikes;[20] 5) During unfair labor practice strikes;[21] 6) During disputes involving second employers which involve employers located in shopping centers;[22] 7) Consumer boycotts against employers or products.[23] In these situations, employees and unions seek to communicate with fellow employees and the consuming public, the only economic groups of people who enter shopping centers. Thus, denying employees and unions access to shopping centers to convey the facts of a labor dispute would deprive employees and unions of the only suitable place to communicate facts to the only people who would be interested in those facts.[24]

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but whether an effective and available alternative is found. For example, even if financially available, a newspaper may be published outside the locality involved and not be read by many of the workers, so that it is not an effective alternative to disseminate information at the plant.''

[17] The instant case is typical.

[18] See, e.g., Illinois v. Goduto, 211 Ill.2d 605 (1959), cert. denied 368 U.S. 927 (1961).

[19] See, e.g., Market Basket, 144 NLRB 1462 (1963).

[20] See Green v. Retail Store Employees, 49 LRRM 3059 (Pa. Ct. Cm. Pls. 1961).

[21] See, e.g., Arlan's Dept. Store of Charleston, NLRB Case No. 9-CA-3308 (1965).

[22] See NLRB v. Fruit and Vegetable Packers, 377 U.S. 58 (1964).

[23] Ibid.

[24] The right to communicate a message is not only the speaker's but just as significantly the right of the interested citizen ''to receive it.'' Martin v. City of Struthers, 319 U.S. 141, 143, (1943).

In the present case, as in virtually all other shopping center trespass cases, the owners and tenants of shopping centers have contended that their common law right of possession entitles them to exclude any person who is not a business invitee. But "this abstract proposition gets us nowhere." *Adderly* v. *Florida,* ..... U.S. ....., 87 S.Ct. 242,245 (1966).

The property owner's claim of exclusive right to control the use of his premises is historically rooted in property concepts of rural, feudal societies, concepts closely identified with the sanctity of the home and person. If employees and unions sought access to the front lawns of the homes of shopping center owners, historical notions of the sanctity of privately owned property would be relevant. But the claim of employees and unions for access to the streets and sidewalks of vast commercial shopping centers arises from the economic "circumstances of our times." *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940). The notion of a number of stores, combined in a single economic complex situated on a large tract of privately-owned land, was unknown before World War II. It is a phenomenon of the last two decades; it is the counterpart to the "company town" of the early decades of this century. Faced with identical contentions by property owners in the Court's noted "company town" case, Justice Black, speaking for the Court said, *Marsh* v. *Alabama,* 326 U.S. 501, 506 (1946):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793."

The shopping center owners' claim to absolute control and possession is hyper-technical, not real. Neither here nor in the dozens of other shopping center cases decided by the state courts has there been any serious contention that "a clear and present danger of destruction of life or prop-

erty, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities'' of employees or union agents on shopping center property. *Thornhill* v. *Alabama,* 310 U.S. 88, 105 (1940). Certainly it is not contended by the petitioner nor by this *amicus curiae* that unions have a constitutional or statutory right to interfere with employees, customers or others who choose to enter shopping center premises.[25]

The real claim of the property owner in this case is his claim to be free from a message which he does not like. This claim "lies in the shadow cast by a property right worn thin by the public usage.'' *Schwartz-Torrance Investment Corp.* v. *Bakery Workers,* 394 P.2d 921, 926 (Calif. 1964), cert. denied 380 U.S. 906. The shopping center owner, in other words, really seeks to regulate union activity, not to protect private property, for he has no immediate, legitimate business need to protect—except insulation from concerted activities of employees and unions. In this sense, he seeks a special immunity from the rules of peaceful labor disputes which apply to all other retail employers whose premises are located on public streets.

The claim of employees and unions is real, not technical. If they were required to picket or to distribute handbills outside the premises of the shopping center, they would suffer the following disabilities: 1. They would be removed both in time and in distance from the premises of the employer with whom they have a dispute, and as a consequence their message would be diluted. 2. They would run the risk of injuring innocent, secondary employers in the shopping center with whom they have no dispute. 3. They would subject themselves to secondary boycott charges before the National Labor Relations Board. 4. They would

[25] Many decisions of this Court sustain state court jurisdiction to protect employers from violations of the peace and from interference with the normal conduct of their business affairs. See e.g., Laburnum Construction Co. v. Construction Workers, 347 U.S. 656 (1954).

subject themselves to private suits for secondary boycott damages in acts brought under Section 303 of the National Labor Relations Act, as amended, 29 U.S.C. § 303. 5. They would subject themselves to the risk of harm from traffic if they were required to picket on busy, modern, suburban highways.

Today's shopping center is fast replacing the familiar shopping districts of the city center. The mobility of the citizenry resulting from the mass production of automobiles and the concomitant proliferation of the suburbs are, for better or worse, changing the physical face of America. The irreversible movement of our population to the suburbs and their shopping centers dictates that the law apply contemporary standards to community institutions. "In approaching this problem, we cannot turn the clock back to 1868," when the shopping center was unknown, but we "must consider" this problem "in the light of its full development and its present place in American life throughout the Nation." *Brown* v. *Board of Education,* 347 U.S. 483, 492-493 (1954).

Conclusion

For the reasons stated here and in petitioners' brief, the decision below should be reversed.

Respectfully submitted,

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