INDEX

ARGUMENT Page

I. Respondents' Variations On The Conclusory Theme Of Trespass, And Their Fictive View That The Picketing Was Physically Obstructive Rather Than Peaceful 1

II. Respondents' Untenable Position That The Pre-emption Question Is Not Properly Before This Court 10

TABLE OF CITATIONS

CASES:

Appeal of Borough of Schuylkill Haven, 179 Pa. Super. 508, 118 A. 2d 242 12
Carlson v. California, 310 U.S. 106 2
C.I.O. v. McAdory, 325 U.S. 472 14
Cox v. Louisiana, 379 U.S. 536 8
Freeman v. Retail Clerks Union, Local No. 1207, 58 Wash. 2d 426, 363 P. 2d 803 11
Gainesville v. Brown-Cummer Investment Co., 277 U.S. 54 14
Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 14
Hanna Mining Co. v. M.E.B.A., 382 U.S. 181 16
Hood v. Stafford, 213 Tenn. 684, 378 S.W. 2d 766 11
In re Application of Rita T. Chambers, 399 Pa. 53, 159 A. 2d 684 12
In re Gilbert's Estate, 350 Pa. 13, 38 A. 2d 277 12
In re Green, 369 U.S. 689 14
Iron Workers v. Perko, 373 U.S. 701 11
Kesler v. Department of Public Safety, 369 U.S. 153 .. 14
Liner v. Jafco, 375 U.S. 301 .....14, 17
Local No. 438, Construction Union v. Curry, 371 U.S. 542 16
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 .. 11
Local 24, Teamsters v. Oliver, 358 U.S. 283 3
Magel v. Springs, 338 Pa. 452, 12 A. 2d 558 12
Marsh v. Alabama, 326 U.S. 501 3
Matson Navigation Co. v. United States, 284 U.S. 352.. 14
McCann v. Philadelphia Fairfax Corp., 344 Pa. 636, 26 A. 2d 540 11

Page

McCoach v. City of Philadelphia, 372 Pa. 317, 117 A. 71 12
McCulloch v. Sociedad Nacional De Marineros De Honduras, 372 U.S. 10 15
McGrath v. Kristensen, 340 U.S. 162 14
Meat Cutters v. Fairlawn Meats, 353 U.S. 20 10
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 4
Mitchell v. Maurer, 293 U.S. 237 14
Moreland Corp. v. Retail Store Employees Union Local No. 444, 16 Wis. 2d 499, 114 N.W. 2d 876 15
Nash v. Florida Industrial Commission, No. 48, October Term, 1967, December 5, 1967 14
N.A.A.C.P. v. Button, 371 U.S. 415 3
N.L.R.B. v. Hearst Publications, 322 U.S. 111 3
Pennsylvania Labor Relations Board v. Frank, 362 Pa. 537, 67 A. 2d 78 13
People v. Goduto, 21 Ill. 2d 605, N.E. 2d 385, cert. denied, 368 U.S. 927 11
Pittsburgh Railways Case, 357 Pa. 379, 54 A. 2d 891 .. 13
Plumber's Union v. Borden, 373 U.S. 690 11
Provident Tradesmens Bank & Trust Co. v. Patterson, 36 U.S. Law Week 4157 (S. Ct. January 29, 1968) 14
Rabouin v. N.L.R.B., 195 F. 2d 906 (C.A. 2) 3
San Diego Building Trades Council v. Garmon, 359 U.S. 236 .....3, 11
Seaboard Air Line Co. v. Daniel, 333 U.S. 118 14
State Farm Mutual Automobile Ins. Co. v. Semple, 407 Pa. 572, 180 A. 2d 925 12
Staub v. Baxley, 355 U.S. 313 13
Taylor v. Haverford Tp., 299 Pa. 402, 149 A. 639 12
Thornhill v. Alabama, 310 U.S. 88 ..... 5, 8
Tucker v. Bienenstock, 310 Pa. 254, 165 A. 247 11
United Mine Workers v. Gibbs, 383 U.S. 715 ..... 5, 8
Ward v. Love County, 253 U.S. 17 13
Weber v. Anheuser Busch, 348 U.S. 468 3
Youngdahl v. Rainfair, 355 U.S. 131 ..... 5, 8

MISCELLANEOUS:

Restatement, Torts, § 779 (1939) 5

9 Standard Pennsylvania Practice 339, 340, 362-363 ..11, 12

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

REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS' VARIATIONS ON THE CONCLUSORY THEME OF TRESPASS, AND THEIR FICTIVE VIEW THAT THE PICKETING WAS PHYSICALLY OBSTRUCTIVE RATHER THAN PEACEFUL.

At the premises of a store located within a shopping center union workmen engaged in peaceful picketing informing the public that the store "is Non-Union, these employees are not receiving union wages or other

union benefits." "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. . . . [P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." *Carlson* v. *California,* 310 U.S. 106, 112-113. A state court injunction which prohibits that picketing therefore prima facie clashes with freedom of expression and hence requires the proponents of the ban to justify the suppression. But respondents do not confront the issues which this clash poses. For, on the analytical level, they do no more than play variations on the conclusory theme of trespass, and, on the factual level, they indulge the fiction that the picketing that was prohibited was physically obstructive rather than peaceful.

1. Because the picketing was conducted on privately-owned but publicly-used property, the courts below characterized it as a trespass, and respondents would justify prohibition of the picketing in reliance on that bare classification (res. br. pp. 23-24, 52). To affix the local label of trespass to the enjoined conduct does not answer the question whether the State has impaired freedoms protected by the Federal Constitution or taken in hand activity that Congress has by statute preempted or safeguarded. "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties. . . . And similarly the technical distinctions on which a finding of 'trespass' so often depends are too tenuous to control decisions

regarding the scope of the vital liberties guaranteed by the Constitution." Mr. Justice Frankfurter concurring in *Marsh* v. *Alabama,* 326 U.S. 501, 511. And so, as this Court held in the latter case, "determination of the issue of 'dedication' does not decide the question under the Federal Constitution here involved" (*id.* at 505, n. 2).

The same is true of the question under the National Labor Relations Act. "Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated local problems. Consequently, . . . 'the federal law must prevail no matter what name is given to the interest or right by state law.'" *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 123-124. The "vagaries of state rules of law may not override provisions of a federal act geared to the effectuation of an important national labor policy." *Rabouin* v. *N.L.R.B.,* 195 F.2d 906, 910 (C.A. 2). "Controlling and therefore superseding federal power cannot be curtailed by the state even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber* v. *Anheuser Busch,* 348 U.S. 468, 480; see also, *Local 24, Teamsters* v. *Oliver,* 358 U.S. 283, 297; *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 244 and n. 3.

In short, "a state cannot foreclose the exercise of constitutional [or other federal] rights by mere labels." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429. Here peaceful picketing was conducted on privately-owned but publicly-used property; the occasion for the picketing

was the disfavored labor policy practiced by the store in front of which the picketing was conducted; the message which the picketing imparted publicized the store's disapproved non-union status; and the vicinity of the store was the natural and effective place to communicate that message pertaining to that store and its labor policy. And so, the picketing was peaceful; the place was public; and the nexus of the picketing to that public place was direct in relationship to the originating cause of the picketing, the disfavored condition at which the picketing was aimed, and the audience that it was designed to reach. This was in pristine form peaceful persuasion through picketing and it takes more than the cry "trespass to property" to justify its ban.

2. A variant on the trespass theme departs from reliance on bare title to property as the identifying attribute of the trespass, and invokes instead avoidance of violence and preservation of domestic peace as the ends served by curbing trespass (res. br. pp. 57-58; ARF br. pp. 8-9, 21-24). But what the injunction in this case curbs as trespass is peaceful picketing. And it has been a very long time—and rarely even in the distant past—since it has been said that a risk of violence inheres in peaceful picketing and its outright ban is therefore justified on that account. This Court has upheld, only once and over vigorous dissent, a ban of peaceful picketing because it was enmeshed in a pattern of actual violence which gave the picketing a coercive effect whereby it would operate destructively as force and intimidation. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287. This ban of future peaceful picketing because of its past enmeshment in violence is highly exceptional. The usual

course, even when picketing is marred by violence, is to prohibit the violence but permit the picketing. *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139-140; *U.M.W.* v. *Gibbs,* 383 U.S. 715, 729-732. But neither approach even comes to the fore unless there is actual violence. As here, therefore, when there is nothing but peaceful picketing, with no violence attendant upon its conduct, this Court has never sanctioned its ban because of an unmaterialized risk of violence supposedly inherent in all picketing at all times and everywhere. It has, indeed, expressly rejected just this view. *Thornhill* v. *Alabama,* 310 U.S. 88, 105. It is late in the day to resurrect the argument now. In our industrial society peaceful picketing has long since been identified with unimpeachable orthodoxy as "fair persuasion."[1]

In short, what respondents come down to saying is that peaceful picketing on publicly-used but privately-owned land is a trespass, that trespass is prohibitable in order to prevent violence, and that therefore peaceful picketing may be banned as a means of preserving domestic peace. This argument begins with a question-begging conclusory characterization, fills that abstraction with a content foreign to the actual conduct which it is supposed to classify, and ends with a conclusion which incorporates a faulty premise and an erroneous deduction from it. Concretely stated, banning peaceful picketing on publicly-used but privately-owned property serves whatever interest there may be in bare dominion over property but has nothing to do with preventing violence. It takes more than respondents' illogical shift from bare title to violence to justify the suppression of peaceful picketing.

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[1] Restatement, Torts, § 779 (1939).

3. The main burden of respondents' defense of the ban of picketing at the store's premises is based on the view that the picketing, said to have been conducted by thirteen pickets walking four abreast, physically obstructed access to the pick-up zone and seriously impeded its normal functioning (res. br. pp. 3, 11, 12, 16, 17, 56). This version is foreign to the record, in conflict with the findings, and at odds with the rationale adopted by the courts below to support the injunction.

The Court of Common Pleas found that (R. 89-90):

> (7) Commencing on December 17, 1965 defendant union through its representatives, none of whom are employees of either plaintiff, engaged with continuity in the following acts of picketing on the Mall premises, inter alia:
>
> (a) *small groups* of men and women wearing placards reading "Weis Mkt is Non-Union these employees are not receiving union wages or other union benefits" walked back and forth in front of the Weis supermarket, more particularly in the pick-up zone adjacent to the covered porch [emphasis supplied];
>
> (b) occasional picketing as above described has taken place on the covered porch itself. . . .
>
> * * *
>
> (8) While such picketing has been persisted in and may have infrequently caused temporary congestion near the supermarket entrances or sporadic stoppage of the flow of vehicles in the pick up zone, and while the pickets refused a request by the Assistant General Superintendent for Weis Markets to move off the Mall proper, the picketing has been peaceful and unaccompanied by either oral threats or actual violence.

The Court of Common Pleas thus flatly found that "the picketing has been peaceful and unaccompanied by either oral threats or actual violence." This unequivocal finding was introduced by the pale qualification that the picketing "*may have infrequently* caused *temporary* congestion . . . or *sporadic* stoppage of the flow of vehicles in the pick up zone . . ." (emphasis supplied). To find that picketing "may have" caused a condition is very far from finding that it did; and to find that the condition that "may have" been caused was brought about "infrequently" and was "temporary" or "sporadic" is very far from finding that it had a meaningful duration, much less that it continued uninterruptedly.

On appeal, the Supreme Court of Pennsylvania was emphatic that the picketing at issue was peaceful. It described the picketing as "concededly peaceful in nature" (R. 101); it observed that the "court below found, and it is established by the evidence, that the picketing was peaceful in nature" (R. 102); and it sustained the injunction "even though [the workmen] engaged in picketing of a peaceful nature" (R. 106). The Court of Common Pleas had enjoined the picketing because it constituted a trespass and was designed in part to coerce union membership (pet. br. pp. 7-8), and the Supreme Court of Pennsylvania upheld the injunction on the trespass ground alone (pet. br. pp. 9-10). Neither court, however, acted in any wise upon the view that the picketing was in any degree physically obstructive.

Respondents thus place their main reliance upon a mythical view of the picketing.[2] But even if the picketing were physically obstructive, all that respondents would be able to demonstrate on that premise would be a reason for limiting the number of pickets and delineating the particular places in the vicinity of the store at which they could walk. It would not justify the prohibition of all picketing at the store's premises. As a matter of constitutional right (*Thornhill* v. *Alabama,* 310 U.S. 88, 105-106), as well as of federal statutory protection (*Youngdahl* v. *Rainfair,* 355 U.S. 131, 137-140; *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 729-732), an injunction must be narrowly drawn to reach only the physically obstructive aspects of the picketing, leaving its continuance at the situs of the

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[2] Illustrative is respondents' claim that thirteen pickets walked four abreast from December 17, 1965, when the picketing began, until December 27, 1965, when the picketing was enjoined *ex parte.* Respondents' own witness testified, however, that thirteen persons picketed only "on the night of December 21st, a Tuesday night", and walked on that night "Two [abreast], and sometimes they would go into 3 or 4" (R. 32; see also, R. 47). The same witness placed the average number of pickets at "6 and 7" (R. 39). The pick-up zone at which the workmen primarily picketed was 4-5 feet in width and 30-40 feet in length (R. 55, 101, n. 2). Parts (c), (d), (e), and (f) of the injunction are in terms addressed to physically obstructive picketing (R. 3, 20-21), but that injunction was issued *ex parte* (R. 102), and was continued in effect unchanged after an evidentiary hearing without advertence to the lack of correspondence between parts (c), (d), (e), and (f) of the injunction and the record (R. 99-100). The casualness with which these parts of the injunction were entered and continued is illustrated by the fact that the blank space in part (c) of the injunction specifying the number of pickets has never been filled in (R. 3, 20). We need hardly add that in adjudicating "a claim of constitutionally protected right" this Court's responsibility is "'to make an independent examination of the whole record.'" *Cox* v. *Louisiana,* 379 U.S. 536, 545, n. 8.

dispute otherwise unmolested. The situation is identical to that which would obtain if the Weis store fronted on a municipally-owned street. In that event, physically obstructive picketing would be controlled by limiting the number and location of the pickets in front of the store to allow unimpeded access, but unobstructive picketing in reasonable numbers at the store's premises would be permitted. The situation is no different because the Weis store fronts on a publicly-used but privately-owned street rather than on a publicly-used but municipally-owned street. Indeed, in this case, as would be true on municipally-owned ground, the ideal appropriate place to picket would be on the sidewalk in front of the Weis store, thereby eliminating any question of interruption of auto traffic flow at the pick-up zone.[3]

4. We return in the end to the question which this case presents. May a State prohibit peaceful picketing at the premises of a store within a shopping center because the property is privately-owned although publicly-used? It is that issue which must be faced and which respondents do not confront.

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[3] Part of the sidewalk in front of the Weis store is overhung by a roof, and therefore called an "open but covered porch" (R. 88, res. br. p. 4), which presumably is designed to serve the same function as an awning. Based on the fact that picketing on the sidewalk was "occasional" (R. 89), the court below stated that, "We do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass" (R. 103, n. 5). The inference of the court below as to the Union's position is mistaken. There is no reason to distinguish for trespass purposes between a publicly-used sidewalk, a publicly-used pick-up zone, or a publicly-used parking lot within a shopping center.

II. RESPONDENTS' UNTENABLE POSITION THAT THE PREEMPTION QUESTION IS NOT PROPERLY BEFORE THIS COURT.

Respondents contend that the question of federal preemption was not properly pursued by petitioners on appeal before the Pennsylvania Supreme Court, and therefore may not be entertained by this Court (res. br. p. 29). The short answer is that, as preemption divests the state court of subject matter jurisdiction, the issue was sufficiently raised before the court below to comply with state standards for tendering a jurisdictional question, and that, even if it were not, this Court must decide a jurisdictional question whether or not raised below.

1. As respondents conceded in their opposition to certiorari (p. 9), the "Petitioners in their 'Motion to Dissolve or Modify Preliminary Injunction' before the Court of Common Pleas did raise the issue of preemption arguing that the complained of activity was removed from the sphere of state action by virtue of the Labor Management Relations Act." The conceded explicit tender of the preemption question to the trial court was incorporated in the printed record on appeal in the precise form that it had been raised at the *nisi prius* level (R. 26). Furthermore, in addition to its inclusion in the record on appeal, preemption was an express alternative ground articulated in the dissenting opinion below to support reversal (R. 111). And the view that preemption did not apply was forcefully argued by respondents themselves in their brief below.[4] In reliance on this Court's reservation of the question in *Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, and

[4] Respondents have lodged this brief with the Clerk of the Court.

invoking the concurring opinion in *Freeman* v. *Retail Clerks Union, Local No. 1207,* 58 Wash. 2d 426, 363 P. 2d 803, respondents urged that the power of the lower court to issue an injunction addressed to trespass had not been preempted (res. br. below pp. 17-19). They similarly cited and quoted *People* v. *Goduto,* 21 Ill. 2d 605, 610, 174 N.E. 2d 385, cert. denied, 368 U.S. 927, and *Hood* v. *Stafford,* 213 Tenn. 684, 378 S.W. 2d 766, to sustain state power to regulate picketing as a trespass notwithstanding preemption (*id.* at 20-22). And they argued "tacit approval" by this Court, said to be inferable from this Court's denial of certiorari in *Goduto,* urging that the "Supreme Court has never hesitated to grant certiorari when it believes a state entered a forbidden area of labor relations. See e.g. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 . . .; *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 . . .; *Plumber's Union* v. *Borden,* 373 U.S. 690 . . .; *Iron Workers* v. *Perko,* 373 U.S. 701 . . ." (*id.* at 21). The preemption question was therefore plainly before the court below.

2. In these circumstances only a court that would not see could not see. The Pennsylvania Supreme Court is not that sightless court which puts on procedural blinders to shut from view what all men must perceive. ". . . [W]e cannot close our eyes", it says, to a "clearly disclosed" defect.[5] Even if not properly raised, it notices "a vital or fundamental error",[6] such as the illegality of a business[7] or the discretionary avail-

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[5] *McCann* v. *Philadelphia Fairfax Corp.,* 344 Pa. 636, 26 A.2d 540, 542 (contributory negligence).

[6] 9 Standard Pennsylvania Practice 339 (rev. ed. 1962).

[7] *Tucker* v. *Bienenstock,* 310 Pa. 254, 165 A. 247, 249.

ability of the declaratory judgment remedy.[8] More to the point, whatever may be said of important but non-jurisdictional errors, the Pennsylvania Supreme Court always considers questions of subject matter jurisdiction although not embraced by the statement of questions involved or otherwise suggested by the parties. As it states, "Objections to jurisdiction over the subject matter at issue have been considered by this Court even where the question was not presented to the court below or initially raised on appeal."[9] Over and again it has noticed and decided as a matter of course questions of subject matter jurisdiction imperfectly raised or not raised at all.[10] In conformity

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[8] *Taylor* v. *Haverford Tp.,* 299 Pa. 402, 149 A. 639, 641; *State Farm Mutual Automobile Ins. Co.* v. *Semple,* 407 Pa. 572, 180 A.2d 925, 927.

[9] *In re Application of Rita T. Chambers,* 399 Pa. 53, 159 A.2d 684, 687.

[10] *McCoach* v. *City of Philadelphia,* 273 Pa. 317, 117 A. 71, 73 ("True, the question upon which we decide this case was not raised in the lower court, nor by counsel here; but, as it goes to the jurisdiction to grant the relief sought, we cannot ignore it."); *Magel* v. *Springs,* 338 Pa. 452, 12 A.2d 558, 559 ("While this objection was not made in the court below, the point is jurisdictional and should be noticed here."); *In re Gilbert's Estate,* 350 Pa. 13, 38 A.2d 277, 279 ("We note that the question of jurisdiction was not presented to the . . . court below . . . . We must, however, consider it."); 9 Standard Pennsylvania Practice 340 (rev. ed. 1962) ("A question which goes to the jurisdiction of the lower court to grant the relief sought, however, cannot be ignored on appeal even though it was not raised by counsel on the appeal."); *Id.* at 362-363 ("Jurisdiction of the subject matter cannot be conferred by estoppel, consent, or waiver. An objection of want of jurisdiction over the subject matter may even be raised for the first time on appeal."). And see, *Appeal of Borough of Schuylkill Haven,* 179 Pa. Super. 508, 118 A.2d 242, 243 ("The question of jurisdiction of the court of quarter sessions to make the order from which this appeal is taken would be considered by this Court although not presented to the court below or initially raised on this appeal.")

with that practice it has considered the question of the lack of jurisdiction of the Pennsylvania Labor Relations Board by reason of the exclusive jurisdiction of the National Labor Relations Board, although the question was not raised until after argument before the Pennsylvania Supreme Court,[11] or not raised before the State Board.[12]

There is, accordingly, no reasonably tenable basis for imputing to the court below a failure to consider the preemption question because of claimed insufficient adherence to state procedural rules. The preemption question was in plain view of the court below and it regularly considers and decides jurisdictional issues even if inartistically presented or not raised at all by the parties but noted *sua sponte.* Furthermore, in these circumstances, had the court below invoked a procedural bar as the reason for declining to consider the preemption question, the assertion of such a ground would be "without any fair or substantial support" in state rules (*Ward* v. *Love County,* 253 U.S. 17, 22), and therefore would not constitute an adequate nonfederal basis of decision (*Staub* v. *Baxley,* 355 U.S. 313, 318-320). There is, hence, no state procedural impediment to review here.

3. But even if the preemption question were insufficiently raised below, and that defect were the reason actually and justifiably invoked by the court below as the basis for not considering the question, review here would not be barred. Preemption goes to the power of the state court over the subject matter of the contro-

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[11] *Pittsburgh Railways Case,* 357 Pa. 379, 54 A.2d 891, explained in *Pennsylvania Labor Relations Board* v. *Frank,* 362 Pa. 537, 67 A.2d 78, 81.

[12] *Pennsylvania Labor Relations Board* v. *Frank,* 362 Pa. 537, 67 A.2d 78, 81.

versy (*In re Green,* 369 U.S. 689), and is therefore jurisdictional. It "involves the fundamental question of whether the . . . [state] courts *had any power whatever* to adjudicate the dispute between the parties. Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act." *Liner* v. *Jafco,* 375 U.S. 301, 306 (emphasis supplied). "Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time." *Gainesville* v. *Brown-Cummer Investment Co.,* 277 U.S. 54, 59. This Court has *sua sponte* passed upon a state court's jurisdiction although it had been conceded below and not questioned in this Court. *Seaboard Air Line Co.* v. *Daniel,* 333 U.S. 118, 122-123. It is this Court's unbroken practice to consider and decide a jurisdictional question even if not raised below or here.[13] In keeping with this practice this Court

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[13] *Gutierrez* v. *Waterman Steamship Corp.,* 373 U.S. 206, 209; *Kesler* v. *Department of Public Safety,* 369 U.S. 153, 155; *McGrath* v. *Kristensen,* 340 U.S. 162, 167; *Mitchell* v. *Maurer,* 293 U.S. 237, 244; *Matson Navigation Co.* v. *United States,* 284 U.S. 352, 359. See also, *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 36 U.S. Law Week 4157 (S. Ct. January 29, 1968), where the Court of Appeals for the Third Circuit *sua sponte* raised an indispensable party point, and therefore a jurisdictional defect, and where this Court reversed, not because the Court of Appeals should not have raised the question, but because it decided it erroneously. Respondents' reliance (br. pp. 32-33) on *C.I.O.* v. *McAdory,* 325 U.S. 472, 477, is misplaced. *McAdory* presented a question of conflict of a state statute with the National Labor Relations Act. A conflict question presupposes the power of a State to act, but requires that it act compatibly with federal standards (*Nash* v. *Florida Industrial Commission,* No. 48, October Term, 1967, December 5, 1967), unlike a pre-emption question, which if well-taken deprives the State of any power to act, whether it would act harmoniously or inconsistently with federal standards.

examined the jurisdiction of a court to enjoin action of the National Labor Relations Board in a representation proceeding although "no challenge was made by the parties" to judicial intercession. *McCulloch* v. *Sociedad Nacional De Marineros De Honduras,* 372 U.S. 10, 16. Accordingly, as preemption goes to the subject matter jurisdiction of the state court, there is on any hypothesis no tenable basis for barring review of that question here.[14]

4. The reason for reaching the preemption question is emphasized by respondents' virtual confession that the injunction could not survive were the power to issue it examined under preemption standards. For, while urging that the picketing is not arguably prohibited by the National Labor Relations Act, respondents are eloquently silent upon the essential companion inquiry into whether the picketing is arguably protected. They do not treat at all with the protected branch of the conduct, and of course preemption independently applies whether the conduct which a State seeks to take in hand is either arguably protected or arguably prohibited. Indeed, since respondents do not even suggest that the picketing is not arguably protected, there is

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[14] As the Wisconsin Supreme Court has held, in rejecting the claim that the issue of federal preemption of state prohibition of peaceful picketing within a shopping center could not be considered because not raised below, "Federal pre-emption deprives the state courts of subject matter jurisdiction. The question of whether the circuit court has subject matter jurisdiction to determine a controversy may be raised at any time, including for the first time on appeal . . . . Thus, it is permissible for the appellants to raise the issue of federal pre-emption for the first time in this court." *Moreland Corp.* v. *Retail Store Employees Union Local No. 444,* 16 Wis. 2d 499, 114 N.W. 2d 876, 878.

patently present here "the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." *Hanna Mining Co.* v. *M.E.B.A.*, 382 U.S. 181, 193.

Furthermore, respondents' claim that the picketing is not arguably prohibited is curious in view of the fact that one ground on which the Court of Common Pleas, but not the court below (R. 106), supported the issuance of the injunction was that the "picketing in this case is being conducted . . . for an unlawful purpose, that is, it . . . is designed, at least in part, to pressure Weis Markets, Inc. to compel its employees to join a union" (R. 99). This conclusion, to say the least, spells out an arguable violation of the National Labor Relations Act, and consequently places adjudication of the controversy within the exclusive power of the National Labor Relations Board. *Local No. 438 Construction Union* v. *Curry,* 371 U.S. 542. It is, therefore, more than a little difficult to urge that the picketing at issue in this case is not even arguably prohibited when one judge on this very record has concluded that its purpose was to coerce union membership.

The activity in this case is accordingly within the heartland of the NLRB's regulatory reach. The purpose of preemption is to avert the danger of state interference with national policy. Hence, "this is particularly a case in which 'we should be astute to avoid hindrances in the way of taking' up . . . [the

preemption] question." *Liner* v. *Jafco,* 375 U.S. 301, 306.

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