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 Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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REPLY BRIEF FOR PETITIONERS

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1. The importance and recurrence of the questions presented, requiring determination by this Court, are illustrated by two cases reported since the petition was filed. In *Weis Markets* v. *Retail Store Employees' Union, Local No. 692,* 66 LRRM 2166 (Md. Cir. Ct.,

August 18, 1967), which involves the very respondent-employer in this case and concerns its operation of a store at Hagerstown, Maryland, the court dismissed an action seeking to enjoin nonemployee union members from handing out leaflets at the store's leased premises located on a tract of land shared by another store and adjacent to a shopping center. The court observed that (*id.* at 2167):

> The Court finds there was no trespass. A modern shopping center has characteristics differentiating it from private property. A shopping center, inviting the public to come patronize it, takes on the nature of a quasi-public place. The owner's rights become secondary to broad use by the public, which includes the right of a labor union to engage in peaceful picketing.

The court alternatively concluded that "it does not have jurisdiction" because exclusive power to adjudicate the controversy rests with the NLRB (*id.* at 2167-2168).

Similarly illustrative of the recurrence of the questions is *Blue Ridge Shopping Center* v. *Schleininger,* 65 LRRM 2911 (Mo., July 10, 1967), in which the Missouri Supreme Court declined on state procedural grounds to entertain an appeal from an injunction prohibiting union officers, agents, members and employees "from soliciting or distributing handbills, printed matter or leaflets in and upon the Blue Ridge Shopping Center . . . or in any way interfering with the customers, invitees, or other persons thereon" (*id.* at 2912).

Reported cases are merely the visible cap of the iceberg, for there are many unreported *nisi prius* deter-

minations, as exemplified by the references in the opinion of the Court of Common Pleas in this case to numerous unreported Pennsylvania decisions (Pet. pp. 15a, 16a, 17a). This case, furthermore, is entirely typical of the generality of shopping center cases. As with all the cases cited at pp. 12-13 of the petition, so with this case, nonemployees picket or handbill the premises of a store within a shopping center communicating the store's disfavored labor policy.

2. The decision below of course does not rest upon an adequate and independent nonfederal ground. 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 dispo-

sition 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; *Local 24, Teamsters* v. *Oliver,* 358 U.S. 297.

3. The brief in opposition urges that, while the preemption question was raised at the trial level, it was not pursued on appeal and therefore cannot be presented to this Court (br. in opp. pp. 9-10). But the preemption question was plainly before the court below. It was contained in the printed record on appeal in the precise form that it had been presented to the trial court (R. 26). Preemption was an explicit alternative ground articulated in the dissenting opinion (Pet. p. 11a). And its inapplicability was forcefully argued by respondents themselves in their brief below. In reliance on this Court's reservation of the question in *Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, and 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). In these circumstances, to contend that the preemption question was not sufficiently presented to the court below, particularly in view of its conceded explicit tender to the trial court incorporated in the printed record on appeal in the precise form that it had been raised in the trial court (R. 26), is to "resort to an arid ritual of meaningless form." *Staub* v. *Baxley,* 355 U.S. 313, 320.

Furthermore, preemption goes to the power of the state court over the subject matter of the controversy (*In re Green,* 369 U.S. 689), and is therefore jurisdictional. "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. See also, *Seaboard Air Line Co.* v. *Daniel,* 333 U.S. 118, 122-123, where this Court *sua sponte* passed upon a state court's jurisdiction although it had been conceded below and not questioned in this Court.

The questions tendered are important and recurrent; judicial opinion is divided; the record presents the

questions in typical context and unclouded fashion; this Court should therefore grant certiorari.

Respectfully submitted,

LESTER ASHER
228 North LaSalle Street
Chicago, Illinois 60601

BERNARD DUNAU
912 Dupont Circle Building
Washington, D. C. 20036

Attorneys for Petitioners

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