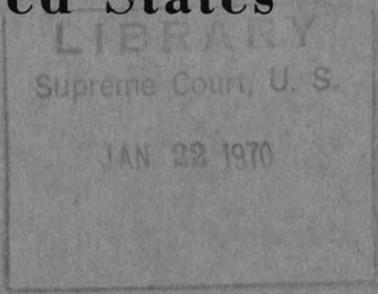


Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

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 :
 CLIFFORD TAGGART, et al., :
 :
 Petitioners :
 :
 vs. :
 :
 WEINACKER'S, INC., :
 :
 Respondent :

Docket No. 74

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SUPREME COURT, U.S.
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Place Washington, D. C.
Date January 12, 1970

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NA 8-2345

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ORAL ARGUMENT OF:

P A G E

Bernard Dunau, Esq., on behalf
of Petitioners

2

Shayle P. Fox, Esq., on behalf of
Respondents

22

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

)	
CLIFFORD TAGGART, ET AL.,)	
)	
Petitioners)	
)	
vs)	No. 74
)	
WEINACKER'S, INC.,)	
)	
Respondent)	
)	

The above-entitled matter came on for argument at 10:14 o'clock a.m., January 12, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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On behalf of Petitioners

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Chicago, Illinois
On behalf of Respondent

1 is proliferated.

2 Q I suppose what you may have in mind is that
3 it's a nutshell we've looked at before, too.

4 A I think so. Our primary concern is that this
5 controversy is controlled by this Court's decision in Logan
6 Valley.

7 Q In which one?

8 A Logan Valley, Your Honor; Amalgamated
9 Food Employees v. Logan Valley Plaza.

10 The store which was picketed is located in Mobile,
11 Alabama. It sold dry goods, groceries, drugs, other merchan-
12 dise. The store building was surrounded by a private sidewalk,
13 publicly used. The sidewalk is surrounded by a parking lot,
14 privately-owned, but publicly used. The parking lot is surroun-
15 ded by public streets. There are seven automobile entrances
16 into this parking lot. The distance from the nearest automobile
17 entrance to the picketed area is 115 feet.

18 Q You say the parking lot is privately-owned, but
19 publicly used; is that it? That is, it's open to all members
20 of the public to park there free?

21 A That is correct, Your Honor.

22 Q Park there free.

23 A I can't say -- the record does not -- those
24 who enter park free; there is no showing that there is any
25 charge for parking on that lot.

1 Q And there is no showing that it's restricted
2 in any way to customers of this or any enterprise?

3 A That's correct. There is no showing of restric-
4 tion to any element of the public.

5 Q Suppose a group of people wanted to have a
6 demonstration in favor of the Vietnam War; could they hold it
7 there?

8 A We do not have in this case, the question
9 whether when you have a public situs you may have picketing or
10 other demonstrations or other exercise of free speech with
11 respect to a matter not connected to that situs. In our case
12 we had a situation in which the protest is related to the
13 operation of the shopping center and therefore we do not have to,
14 and we should not reach in this case, the question of whether,
15 when the situs is public, but the protest relates to a matter
16 other than the situs, whether the locus is appropriate for the
17 expression of free amendment rights.

18 The Second Circuit has decided that it was. I
19 believe the California Supreme Court has also decided that it
20 makes no difference, that we do not have that question in this
21 case.

22 The storey here begins on December 19, 1963. The
23 union filed a petition with the National Labor Relations Board
24 to be certified as the representative of the store's employees.
25 On April 16, '64, the union was certified as the representative.

1 In August and September of '64 an unfair labor practice com-
2 plaint issued alleging massive unfair labor practices, including
3 nine discriminatory discharges from a group of 40 or 50
4 employees and their refusal to bargain in in good faith.

5 On June 25, 1965 the NLRB issued a decision affirm-
6 ing, sustaining the complaint in full. On January 28, 1966 the
7 Court of Appeals for the Fifth Circuit summarily enforced the
8 NLRB's order.

9 Meanwhile, on December 12, 1964 a strike of the store
10 employees was begun. Negotiations for a new agreement had
11 broken down. On January 22, 1965, an ex parte injunction was
12 sought and obtained restraining the picketing, enjoining the
13 picketing in front of the store as a trespass. That ex parte
14 injunction was continued on March 26, 1965 after a non-eviden-
15 tiary hearing.

16 On April 9th an appeal was taken in '65; on November
17 10th the appeal was argued and submitted. On September 19,
18 1968, three-and-a-half years after the appeal was taken and
19 three years after it was argued, the Alabama Supreme Court
20 decided that the injunction should be affirmed; it said that
21 the controversy was not preempted to the Labor Board; the
22 injunction did not prohibit Section 7 rights and it did not
23 violate the First Amendment.

24 Q Does the record show why it took all this time to
25 decide this case?

1 A No, sir, the record is silent with respect to
2 the reason for the delay.

3 Meanwhile, on May 20, 1968, four months before the
4 Alabama Supreme Court decided this case, this Court decided
5 Amalgamated Food Employees v. Logan Valley Plaza. This Court
6 held in that case that peaceful picketing and handbilling could
7 not be prohibited within a shopping center on the ground that
8 the shopping center grounds were owned privately. We think
9 there is no distinction between Logan Valley and this case.

10 Q Was there ever anything but a temporary injunc-
11 tion issued --

12 A The only two orders was the ex parte injunc-
13 tion and the --

14 Q What kind of an injunction was that, temporary
15 or permanent?

16 A At that time it was a temporary injunction;
17 then on two months later it was continued until further modifi-
18 cation in accordance with due process of law. In other words,
19 from a nonevidentiary hearing two months later the injunction
20 was to continue indefinitely unless terminated or modified by
21 the Court.

22 Q And that was still by its terms, a temporary
23 injunction; wasn't it?

24 A I don't know how one would characterize an
25 injunction which is continued indefinitely, sir.

1 Q How did the Court characterize it?

2 A It did not. It's the identical injunction that
3 was before this Court in Logan Valley. It terminated all
4 Federal questions; there is nothing that can go back to the
5 Alabama Supreme Court with respect to any Federal question.
6 In addition, since there is a substantial question of preemp-
7 tion presented in this case, whether or not the injunction
8 would be termed final within this Court's meaning of that term,
9 would not make any difference, because with respect to a pre-
10 emptive question we can get here on a temporary as well as a
11 permanent injunction. But, for the purposes of this Court's
12 jurisdiction, this injunction is final.

13 Q You say that when the question is one of pre-
14 emption that the rule that there must be a final judgment
15 in a state court goes out the window?

16 A No, sir; I don't say that the rule that there
17 must be a final judgment is eliminated, but the final judgment
18 rule is satisfied in a case of preemption by an order which is,
19 in form, temporary. That meets the final judgment ruling.

20 Q What's your authority for that? Well, never
21 mind; if it's in your brief I can find it.

22 A Yes, it's in the brief, Your Honor. It's --

23 Q I can find it then, don't take the time.

24 Q What's the situation now, after all this delay?
25 Has the underlying labor dispute been disposed of?

1 A The underlying dispute has long been dead,
2 Your Honor. What remains now is that the injunction still is
3 operative to preclude any picketing on those grounds, whether
4 in furtherance of the primary start of the stores which are
5 presently operating, or in furtherance of organizational picket-
6 ing.

7 Q So, the impact of this case is simply in case
8 another labor dispute arises; is that correct?

9 A That's right, Your Honor, a particular labor
10 dispute which gave rise to this --

11 Q Is there any argument here -- this is a pretty
12 dead duck; isn't it?

13 A No, sir. The particular controversy is a dead
14 duck. The injunction is very much alive and is available at
15 any time that the union or another organization or employees
16 would seek to review the picketing within the grounds of this
17 store.

18 Q Does the same labor union still represent
19 these employees?

20 A Well, there has been, since the certification,
21 a change in ownership so that the store which was originally
22 involved, now instead of operating the store, has leased its
23 premises to two others. Whether that lease of the premises and
24 the change of ownership has affected the NLRB certification, is
25 itself a substantial question. But the labor organization as

1 such, still exists and it still represents employees in this
2 general locale and is still certainly available to resume
3 organizational or other picketing with respect to the stores
4 which are now within that shopping center.

5 Q Well, now, you say "within the general locale."
6 How about right within the particular store that was the sub-
7 ject of the controversy?

8 A They are available at any time to start
9 organizing the two employees within the two stores that are
10 now occupying these premises and the injunction as it presently
11 operates would preclude entry upon those premises in order to
12 picket in furtherance of any dispute with those two stores.

13 So that the injunction continues at the present time
14 to be fully operative; to bar the union or representatives of
15 the union or employees from picketing at the entrance of either
16 of the stores which are presently occupying the premises.

17 The injunction reads flatly: "Prohibits trespassing
18 upon Weinacker's property." It remains Weinacker's property;
19 there are stores functioning on WEinacker's property. At any
20 time when it becomes appropriate to picket those stores or to
21 handbill those stores this injunction precludes entry into the
22 property for that purpose and we have and continue to have a
23 live controversy.

24 Now, I said that in our view Logan Valley controls
25 this case. The essence of Logan Valley, as we see it, is that

1 when an employer opens his property to the public, to customers
2 in order to come to his store to buy, the others in the com-
3 munity, in order to operate his store, that employer cannot
4 close that property to employees who seek to publicize that
5 the store has disfavored labor policy.

6 The only difference between Logan Valley and this
7 case is that the real estate here is smaller than it was in
8 Logan Valley. In Logan Valley the distances from the public
9 entrances to the picketed area were from 350 feet to 400 and
10 500 feet. In this case the distances are 115 feet to 385 feet.

11 In a case decided by the Supreme Court of California,
12 in which following Logan Valley the California Supreme Court
13 said with respect to a single shopowner that Logan Valley
14 requires that handbilling be permitted on the private sidewalk
15 serving that individual storeowner, because the sidewalk was
16 publicly used; the distances were 150 feet to 280 feet. We
17 do not think that the appropriateness of the property as a place
18 for the expression of First Amendment rights with respect to a
19 dispute which relates to the operation on that property can be
20 sized by whether it's 350 feet, 400, 500 feet, 150 feet, 280
21 feet, or whatever the distances might be.

22 To us it seems that the only viable standard can be
23 the openness of the property to public entry. Once it is
24 opened it does not matter whether the distances which are open
25 are 115 feet or four to five feet.

1 Q The Supreme Court of Alabama seems to think
2 that Logan Valley involved a "shopping center," and that this
3 case does not involve a shopping center.

4 A Well, it seems to say not that this case does
5 not involve a shopping center, but that it involves a smaller
6 shopping center. At the time it affirmed the injunction it had
7 only one store operating, so of course it is a clear distinction
8 between a one-store operation and a shopping center which has
9 more than one store. That doesn't seem to us to have any
10 relevance of any kind; whether one owner opens the property or
11 several owners open the property could hardly make a difference.

12 At the present time there are, in fact, two stores
13 operating on that property so we have a shopping center in
14 almost the most colloquial notion of that term.

15 Q Well, at the present time, as you say, the
16 Petitioner doesn't himself operate a store; he rents space.

17 A Yes, sir; but we need to remember that insofar
18 as that aspect of the case is concerned, in Logan Valley the
19 action was brought both by the lessor and by the store operator
20 and no one ever suggested that the lessor did not have an
21 adequate interest to preclude entry upon that property.

22 Q Where is this located? In downtown Mobile or
23 in suburbia?

24 A It's not suburbia; it's downtown Mobile, Your
25 Honor.

1 Q Downtown.

2 A Yes, sir.

3 Q I suppose you would not contend that the right
4 to picket is extended to the inside of the store?

5 A No, sir; we make no such claim. The right of
6 picketing extends, as it would, were the store to front on a
7 public street to the immediate entrance to that store, leaving
8 ample room for ingress and egress to the store. We make no
9 claim that we are entitled to be inside the store.

10 Q What if, instead of using the open area as a
11 parking lot, the store undertook, as they do in some parts of
12 the world to set up booths and shops and table out through the
13 parking area and have an open-air shop. Would you then think
14 the parking area had become as you now conceive the inside of
15 the store is?

16 A Well, assuming you had stands open rather than
17 stores which have a cover on them, I see no difference. There
18 have to be public ways to get to those places within the shop-
19 ping area. So long as there are public ways and there is a
20 public way in front of a particular stand that you have a dis-
21 pute with, it would be our position that you would be entitled
22 to go in front of that open stand so long as it was open
23 property and it would necessarily have to be because there is
24 no other way for a customer to reach that stand to buy.

25 Q Do you see any difference in the standing

1 invitation to the public to use the parking lot and the side-
2 walk and a standing invitation to the public to come in and
3 look around and --

4 A I think they are all part of the same package
5 with respect to a shopping center, Your Honor. The window-
6 shopper is a potential customer and you would just as soon have
7 him in there taking a look at what you have in your windows,
8 and ultimately he's going to get into that store. It's the
9 openness of the property. The very fact that the Federation in
10 its amicus brief put it, with respect to the character of four
11 stores which have private property on which they front, but
12 that private property is intended for use to enable the cus-
13 tomer to come. It put it this way in its amicus brief:

14 SMALLER: "Such retail establishments have in common
15 with large shopping centers a desire to maximize the accessi-
16 bility of the public to their premises. It is an integral com-
17 ponent of every retail business that it be freely open to the
18 public. And therefore, our position as to whether the open
19 property happens to be smaller or larger cannot be the criterion.
20 So long as it's open, then it has to be open to employees to
21 publicize the disfavored policy of a particular employer
22 operating within the real estate."

23 Now, in this case I think this is particularly plain,
24 because here we have employees of that very store who want to
25 picket or handbill and are barred from those very premises.

1 Now, when they are working for that store they are parking their
2 car on that parking lot, they are using those walkways and
3 they are entering the same entrance in order to get to work.
4 Now, it doesn't seem to us that those employees, when they are
5 dissatisfied with the employment terms, become trespassers
6 instead of invitees, when they park their car on that same
7 parking lot, walk over the same walkways, but this time picket
8 in front of the store. You don't become a trespasser rather
9 than an invitee when you change from a working employee to a
10 striking employee.

11 It was held by the Alabama Supreme Court that picket-
12 ing is more than speech. Sure it's more than speech, but it was
13 more than speech in Logan Valley, as well. And "more than
14 speech" means only that the patrol in front of the store may be
15 regulated with respect to the number of pickets, if there are
16 too many there or if they are too close to the doorway and in-
17 terfere with the ingress and egress, then you tell them to get
18 away from the doorway and picket on the far side of the side-
19 walk. That's what we mean by the regulation of the plus aspect
20 of picketing; we do not mean that you can ban it altogether from
21 an otherwise appropriate open place.

22 It is suggested in this case that there was actually
23 obstructive picketing. We'll pass the question whether on this
24 record it is possible for anyone to say there was obstructive
25 picketing. There were six identically-worded affidavits which

1 which said there was obstructive picketing. There was an
2 answer filed by the union which said there was no obstructive
3 picketing, sworn to by two officers of the union. I do not
4 know how, as between six paper swearers on the one side, and
5 two paper swearers on the other, one could ever find a fact one
6 way or the other. You need an evidentiary hearing.

7 But, suppose -- suppose there was obstructive picket-
8 ing in that case, all that that would authorize would be the
9 elimination of the instruction; not the elimination of picketing;
10 and that's the point of this case here.

11 The Court says, the Alabama Supreme Court, "It doesn't
12 look to us as if the picketing at the entrance to the parking
13 lot would be less effective than the picketing in front of the
14 store." Our fundamental answer is that that's the wrong ques-
15 tion. If a place is otherwise appropriate for the exercise of
16 free speech rights, that place does not become inappropriate
17 because there are other places as well that want to exercise
18 free speech rights.

19 But, if one is to look to comparative effectiveness
20 it's perfectly clear that the picketing and handbilling cannot
21 possibly be nearly as effective at the entrance to the parking
22 lot as it is at the front of the store.

23 First of all, with respect to handbilling. I don't
24 care how slowly a car moves from a public street through an en-
25 trance into a parking lot, it's still moving. You cannot very

1 well distribute handbills to a moving vehicle and you sure
2 can't distribute handbills to a moving vehicle on a cold day
3 when those windows are up tight and no one is lowering windows
4 to receive handbills on a cold day. And once those people are
5 in the parking lot you can't get to them to distribute hand-
6 bills. So, handbill distribution is very much enfeebled by this
7 kind of injunction.

8 Take picketing itself, again, when you're driving a
9 car through an entrance into a parking lot you are not paying
10 much attention to pickets or what's said on the side. When you
11 park that car and you are moving to the store those pickets are
12 in back of you. When you get to the entrance there is no
13 message. We want the message at the place that means something:
14 at the entrance to the store.

15 Now, it's perfectly clear, the union strenuously wants
16 to get into these premises; the employer strenuously wants to
17 keep us out; neither the union nor the employer are engaging in
18 abstractions with respect to the philosophical reach of free
19 speech. We want in because that's where the picketing and hand-
20 billing is effective; the employer wants us out for the same
21 reason. And that seems to me to be perfectly obvious.

22 Q Mr. Durau, is there a map of the premises any-
23 where in the record?

24 A Yes. Well, not in the record, sir, but as an
25 appendix to our brief we have appended a diagram of the property

1 and there are like diagrams in the appendixes to the Respon-
2 dent's brief.

3 Q They are in agreement.

4 A Beg pardon?

5 Q They are in agreement?

6 A Yes, sir; there is no difference with respect
7 to the diagrams.

8 Q I thought the Respondent's brief took you to
9 task for your diagram.

10 A Well, they say ours is indecipherable; I think
11 theirs is, but I don't think either of us claim that the other's
12 are inaccurate and there is a slight difference with respect to
13 how many feet from the picket area to the entrance, but that
14 depends on where you are measuring from, at what terminal
15 point. There is no difference in the accuracy of either dia-
16 gram.

17 Q Would you mind telling me just where on the
18 premises the picketing was taking place?

19 A Yes, sir. The picketing was in front of the
20 main entrance to the store.

21 Q Did that have a shelter in front of it?

22 A I'm not sure now whether the record shows there
23 was an overhanging porch; there may or may not have been.

24 Q Is that immediately where the customers drive
25 up?

1 A No, sir.

2 Q To pick up their packages?

3 A In this shopping center there is no showing
4 on this record that there is a particular pick-up zone. So
5 far as it appears the customer simply still walks out of the
6 store and goes to wherever he has parked his car. There is no
7 showing of a pick-up zone in this case.

8 Q But the picketing was right there where they
9 walk down --

10 A The picketing was in front of the entrance
11 to the store. According to one set of affidavits it was so
12 close to the store entrance that it obstructed ingress and
13 egress. According to our version of it it was sufficiently
14 removed so that it did not obstruct ingress and egress.

15 We would take the position with respect to that
16 matter that there was an available sidewalk in front of the
17 store and we were surely entitled to picket on the far edge of
18 that sidewalk, leaving ample room for ingress and egress to
19 the store.

20 Q No findings on that, or no map?

21 A Not in the record; no, sir.

22 We think that this case and Logan Valley come down to
23 the same thing. On the one side we have property which is
24 open to the public. We have employeed who seek to make a labor
25 appeal. They want to make it on that open property and they want

1 to make it a natural and effective place; and on the other side
2 you have nothing, again, but naked title. On that equation
3 this Court in Logan Valley said the First Amendment right
4 prevails. I think it prevails in this case here, too.

5 Now, with respect to this preemption question in
6 this case, this Court said in its Hornbook Law at the present
7 time: "When an activity is arguably subject to Section 7 or
8 Section 8 of the Act, the States, as well as the Federal Courts
9 must defer to the exclusive competence of the National Labor
10 Relations Board. If the danger of State interference with
11 national policy is to be averted.

12 Now, clearly we have in this case, conduct which is
13 surely arguably protected by the National Labor Relations Act.
14 Primary picketing in support of a primary strike is arguably
15 protected; indeed, it cannot be arguably said to be anything
16 but protected. Now, does it make a difference with respect to
17 the preemptive character of the controversy that it take place
18 on private but open property, the board day-in-and-day-out,
19 must decide, and does decide just these very questions: when
20 does private property yield to the realization of a Section 7
21 right? It seems to us that the

22 It seems to us that the conflict; the very conflict
23 that Garmon seeks to avoid can no better be illustrated by
24 reading to you what the order of the Board was in the case
25 called: "Fashion Fair, Inc.," which is on page 2 to 3 of our

1 reply brief. Employees were discharged by an employer; they
2 picketed in front of his premises. His premises were located
3 in a shopping center with two or three other stores. The
4 employer evicted those employees from the premises and the
5 NLRB said that was an 8(b)1 violation and this is the order it
6 entered: "Cease and desist from ordering employees to leave
7 public or quasi-public areas where they are lawfully engaged in
8 peaceful picketing of the employer's premises or in other law-
9 ful concerted activity."

10 Q How else would the employer ever get the
11 question before the Board except by eviction?

12 A We have no complaint with respect to getting
13 the question before the Board. He could get before the Board
14 for example, simply by asking those pickets to leave. That was
15 enough for us to file an unfair labor practice toward charge
16 with the Board and to get the controversy there.

17 We have no objection to raising the question in that
18 fashion.

19 Q Would you raise it if he just asked you to
20 leave and would you then file a complaint or what?

21 A Well, if he asked us to leave and nothing else
22 was done and we still were there, presumably --

23 Q Well, would you leave? I gather -- I don't
24 suppose you would; would you?

25 A That depends on individual situations. If you've

1 got -- if you want to avoid a physical encounter, you leave,
2 obviously.

3 Q But if he really wanted to find out the
4 Board -- if this was protected. "You say here it's arguably
5 protected; I'd like to find out whether it was or not." The
6 only way he could insure that, I suppose, would be to evict you
7 from the premises.

8 A He must take action adverse to our exercise
9 of handbilling --

10 Q So, he must use self-help, rather than the
11 courts in order to insure getting before the board.

12 A Sir, in no case does anyone ever go to a court
13 until he first asks the people to get off his premises. In
14 fact, the requirement that you get off would be a condition
15 precedent to any state trespass.

16 Q That isn't my point, though. Then you don't
17 leave.

18 A Yes.

19 Q Then you don't leave; what does he do then?
20 He must evict you in order to make sure that the question gets
21 before the Board.

22 A Yes. But that's the way these questions get
23 before the Board all the time. This is no isolated case.

24 Q I was just wondering, Mr. Dunau.

25 A Sir, that's the way the question gets before

1 the Board, by activity by the employer adverse to the SECTION 7
2 rights that makes it possible to complain there is an inter-
3 ference; yes, sir. And there has got to be some overt activity.
4 For us it's sufficient overt activity to be asked to leave a
5 public place.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dunau.

7 Mr. Fox.

8 ORAL ARGUMENT BY SHAYLE P. FOX, ESQ.

9 ON BEHALF OF RESPONDENT

10 MR. FOX: Mr. Chief Justice, and may it please the
11 Court: In answer to Petitioner's argument I'd like to briefly
12 go into a few of the salient facts which have not been emphasized
13 to discuss further from these facts how they indicate that the
14 character and nature of this property is private and not public.

15 Q What does this store sell?

16 A This store sells groceries and drugs.

17 Q Only?

18 A Yes, sir, Your Honor. I think at the time of
19 the hearing there were small hardware items as well, but it was
20 in the traditional style of today's supermarket, including
21 groceries and drugs.

22 Q And how large was it?

23 A I don't know the square feet involved. There
24 is a picture of the store building as an appendix to the
25 Respondent's brief.

1 Q It was a large store, good sized; wasn't it?

2 A Yes; good-sized grocery store. A very large-
3 sized supermarket grocery store.

4 Going on from the argument that this property was
5 private, rather than public under any concept of this Court, it
6 is our contention that even if the property were to be held
7 quasi-public under the previous decisions of this Court, that
8 the State of Alabama did no more than reasonably regulate the
9 First Amendment rights of the Petitioners and finally, that
10 in doing so, the Alabama Court exercised its proper jurisdic-
11 tion in accordance with its traditional rights to remedy a
12 wrong against property and persons within its jurisdiction,
13 subject to its protection.

14 Now, the facts in this case that we discussed a
15 moment ago: the building was set back from the street. This is
16 a supermarket with a parking lot; it is large. The parking lot
17 is large, as well. However, the major portion of the parking
18 lot is not between the public street and the store. The parking
19 lot surrounds the store. At the front of the store there is
20 room for two rows of parking; one facing the store; one facing
21 the street, and an aisle between them for cars to maneuver
22 within the parking lot.

23 Directly adjacent to this parking lot is a broad
24 public sidewalk, running the full length of the street, the
25 public street upon which this store faces.

1 Q Mr. Fox, among the various exhibits attached
2 to the appendix to your brief or your fellow-counsel's brief,
3 which, in your opinion, gives us the best picture of what you
4 are trying to decide now?

5 A I think the plat on 40, if you would like a
6 diagram,--

7 Q Forty? Your brief?

8 A A-40; yes, Your Honor. A-40 shows the store
9 and diagrams the distances between the store and the public
10 street. I think the best picture of the premises is probably
11 A-7, which is a photograph indicating exactly what I am dis-
12 cussing now, the two rows of parking in the public street.

13 Q Where did the picketing take place?

14 A As far as I'm able to ascertain from the
15 opinions of the Court in the record, it took place on the side-
16 walk, the public sidewalk first, and then various places in the
17 parking lot as well as the sidewalk directly in front of the
18 main entrance to the store building.

19 According to the Supreme Court of Alabama, in affirming
20 the Lower Court, they found that the pickets were in the way of
21 people coming in and out of the store, so, presumably they
22 were --

23 Q On the sidewalk?

24 A Right on the sidewalk in front of the front
25 door. They did not come into the store.

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Q They did not come into the store?

A No; they did not come into the store.

Q If I understand Petitioner, they say there is no basis for that finding.

A I think I have difficulty with it, either quarreling with it or accepting it in this Court. It was based upon affidavits in support of a petition for temporary judgment which said --

Q Which said they were obstructing; was that the word?

A That was the word.

Q What does that mean?

A It could mean that their presence was in the way of those -- their physical presence was in the way of those coming in and out of the store.

Q Couldn't you say that if they were out in the street they were obstructive? Couldn't you say if they were half a block down the street they were obstructing?

A I suppose they could have. It would be a fair construction that anywhere on the lot they may have been obstructing the conduct of Respondent's business. However, I don't think the burden is on me to substantiate that finding in this Court when, on two occasions in the lower court, Petitioners failed to avail themselves of statutory provisions for supplying counter-affidavits. They could have had their

1 hearing if they wanted it then.

2 Q Was there any provision for live testimony?

3 A I do not think there is, unless the court
4 wants it. I think that is a discretionary matter; but I do
5 know that under two sections of the Alabama Code they would
6 have filed counter-affidavits and did not do so.

7 Q But they could have had a hearing, too;
8 couldn't they?

9 A They had a hearing. They had a hearing based
10 upon the record in front of the Court at that time.

11 Q Which consisted of five affidavits.

12 A The affidavits of Respondent only.

13 Q That's a hearing?

14 A That's a hearing.

15 Q Sufficient for permanent injunction?

16 A Sufficient for permanent injunction under
17 Alabama law.

18 Q Under Alabama law.

19 A Yes, sir. It hasn't been challenged in this
20 Court as a failure to grant Petitioners due process of law
21 under the United States Constitution. That has not been
22 challenged in this Court.

23 Q Were they offered an opportunity to offer
24 counter-affidavits?

25 A Two separate provisions of the Alabama Code

1 gives them that right.

2 Q What did the judge do about it?

3 A The judge accepted the evidence before him,
4 which were the affidavits of Respondent --

5 Q Did he suggest or ask about any affidavits?

6 A The record does not indicate.

7 Q Did the lawyers ask for the right to offer
8 any counter-evidence?

9 A It is not so indicated in the record. It
10 appears in the record that the only argument raised by
11 Petitioners in the Lower Court is not a factual argument; they
12 quarreled with the jurisdiction of the court and that was their
13 sole contention before the court below.

14 Q What are you claiming here that the court had
15 a right to enjoin? At what place?

16 A I claim that the court in precluding the
17 pickets from coming onto this limited property, were within
18 their jurisdiction and acted properly and they had the right to
19 move the pickets, in effect, 100 feet away by moving them out
20 to a public sidewalk, a safe and proximate place to stand, only
21 100 feet from the front door of the Respondent's premises.

22 Q I understood you to say that the court en-
23 joined picketing on a public sidewalk.

24 A No. I did not make myself clear.

25 Q I thought that's what you said.

1 A The court did not enjoin picketing per se.
2 The court said, "There will be no picketing allowed on the
3 premises of the Respondent only." What the effect --

4 Q Was that the only injunction?

5 A That's the only injunction.

6 Q But it does not enjoin picketing on the side-
7 walk?

8 A Not at all. Pickets have every right today
9 to get out to the public sidewalk, 100 feet from the front door
10 of the Respondent's property, and picket.

11 Q You construe that as meaning enjoined from
12 being anywhere -- picketing anywhere in the parking lot?

13 A Anywhere in the parking lot at all; anywhere
14 within the lot lines and --

15 Q Well, where did it actually take place,
16 according to the record?

17 A Within that parking lot and on the Petitioner's
18 lot directly in front of the front door of its premises. The
19 picketing took place right at the store. The public sidewalk
20 open to the pickets now is 100 feet away from the front door.
21 They are moved 100 feet by this injunction that is presently
22 pending.

23 Now, our contention is that this is private property,
24 by virtue of the fact that, unlike Petitioner's claim, we do
25 not believe that openness to the public is the only viable

1 standard. That principle brings us smack into a dichotomy
2 with their position on no claim to coming into the store
3 itself. The same standard being applied in the two circum-
4 stances: the store and the parking lot, would allow the pickets
5 into the store. This is not a reasonable standard, and this is
6 not, in our opinion, what the court in its decision in Logan
7 Valley, calling private property quasi-public or available for
8 public use or open to the public.

9 In that case, as well as in the case of Marsh versus
10 Alabama, it wasn't the openness to the public which was the
11 sole standard; it was the use by the public in a particular
12 way. The public used the property in the previous cases as a
13 sidewalk; as a park, as a thoroughfare to go from one place to
14 another, or as the Court said in Logan Valley, "freely open to
15 the public in the area and those passing through."

16 The parking lot in this store is not freely open to
17 the public and those passing through. Nobody passes through
18 this parking lot that is not going into the Weinacker's store
19 building.

20 Q The difficulty here is that it is not in the
21 record; is it?

22 A Oh, yes. Oh, there is no statement in the
23 record that the general public does not use this property. The
24 only statement in the record is that it's private property and as
25 private property, without an indication that it is used as a

1 public thoroughfare, the fact that there is a public thorough-
2 fare directly adjacent to it, a public sidewalk directly ad-
3 jacent to it, would indicate that there is no need for this
4 private property to be used as public property.

5 Q Well, would these employees have been excluded
6 if they had not had the picket signs?

7 A They would not. They would be allowed to walk
8 into the store.

9 Q That makes it public; doesn't it?

10 A No; because any store, then, is public.

11 Q What about the parking lot?

12 A What is the difference? I see no difference
13 between --

14 Q So, the only way that they become trespassers
15 is when they pick up the sign.

16 A It is when they conduct themselves in a manner
17 that is inimical to the conduct of the business on the premises.

18 Q Which is carrying a picket sign?

19 A Carrying a picket sign; throwing a bomb.

20 Q Well, was a bomb thrown here?

21 A No, no; but anything that --

22 Q The only thing that made their action illegal
23 was the picket sign?

24 A That is correct. The picket sign, because of
25 its effect of being inimical to the conduct of the business.

1 And we submit that Petitioner is entitled to as much protec-
2 tion of his conduct of the business as the pickets are to come
3 on and utilize their most effective economic weapon against
4 the Respondent.

5 Q Suppose there had been a fence around the
6 place with a guard at the fence.

7 A That would have tended to indicate that the
8 property was less open to the public. It wouldn't be a usual
9 manner of conducting a retail business. We do concede that this
10 is a retail business, open generally to the public to come on
11 the property and shop. We wanted the public in our premises.

12 Q You mean the general public, including pickets?

13 A No, because there the general public is con-
14 ducting themselves detrimental to our conduct of our business.
15 They are interfering with our right to conduct the business.
16 They are not there to buy.

17 Q But your contention is that any part of that
18 property was to be freed by the law from people who did not come
19 to buy goods from the store?

20 A There was no part of it being used by the
21 general public, other than the instance of the pickets or the
22 people who came to buy in the store. There is no evidence in
23 the record that people walked across this property to go from
24 one place to another; there is no evidence that people came onto
25 this property to park their car while they went to visit friends

1 in the neighborhood. This was just a grocery store, and the
2 only instance in the record of people using it, other than to
3 shop is the use by the pickets here.

4 Q How many pickets were there?

5 A I think they varied from time to time. I
6 don't really know what the maximum was. I don't submit to this
7 Court that that is a contention here or that is an issue. We
8 believe that we have the right to exclude every single one of
9 them for two reasons: one, that this is private property and
10 the private property-owner has the right to seek remedy from the
11 presence of a person who is disrupting its business in any way
12 and two, that even if, under the standards of this Court, this
13 property, because it is a retail business, the parking lot, is
14 held to be quasi-public, is still reserved to the lower court
15 the right to reasonably regulate the exercise of First Amendment
16 rights. And it is our contention that moving the pickets 100
17 feet where they are still within sight and sound of the front
18 door, is a reasonable regulation. Now, how do we distinguish
19 this from Logan Valley?

20 Q Does one have to agree with that argument of
21 yours to agree with you?

22 A No; you could find this is private property.
23 If this is private property they could be excluded. That's
24 traditional; the man who owns the property can exclude anybody
25 whose interests are opposed to himself.

1 Q As I understood you you were arguing the
2 reason, so long as you hamper the right to freedom of speech
3 in a reasonable way you can hamper it.

4 A I agree. That's a secondary contention.

5 Q That's what you are arguing. Does one have to
6 decide -- to be on your side, to agree with you on that handi-
7 cap to the exercise of free speech?

8 A I think you could agree with me on my prior
9 contention and come to the same results, whether or not the
10 regulation is reasonable.

11 Q You mean the private property aspect?

12 A That's right, because the general public does
13 not have free speech rights on private property. There is no
14 free speech right --

15 Q Well, I may say to you that there would have
16 to be something like that before I would agree with you, because
17 I do not agree that the judges or the Congress can reasonably,
18 according to their judgment of what's reasonable, handicap the
19 right of free speech.

20 A Handicap is right; I agree with that. But they
21 could regulate the place in which free speech is to be conducted.
22 The place, the location, as may have been --

23 Q What you are saying is that they don't have the
24 right to exercise free speech anyplace, at any time, at any way
25 they choose. I can understand that argument.

1 A That's exactly what I'm saying, and I'm saying
2 that an injunction which merely moves people 100 feet with
3 nothing intervening along that 100-foot distance to block the
4 reading of a picket sign or to listen to the sound of the voice
5 coming from 100 feet away, does not unreasonably interfere with
6 the communication of ideas.

7 Q It's all right for other members of the Court,
8 I presume, but I can get along better with my understanding
9 if I don't have to bring in your "reasonably."

10 A Well --

11 Q If there is a right to handicap free speech
12 when the Court thinks it's reasonable, then I don't understand
13 the First Amendment.

14 A I don't say handicap, but I see no handicap
15 when the exact channel of communication that's being requested
16 by the pickets is still open to them and all they are being told
17 is to move 100 feet. That is not a handicap to communications.
18 Petitioners are alleging that that makes their communication
19 less effective.

20 Q It might be a handicap, but that doesn't settle
21 it; does it? It would be a handicap to keep people from coming
22 into your home day or night in order to argue with you on
23 public questions. What would be a handicap; wouldn't it?

24 A Well, it would be a handicap that this Court,
25 I am sure, would find to serious that they would be willing to

1 then handicap free speech and preserve the rights in the home.
2 The idea when we have a conflicting constitutional right being
3 claimed by two parties is that this Court and other courts
4 have looked to the detriment to one by upholding the other.
5 In the case of a home; somebody coming into a home, I think it
6 would be clear that the damage to the privacy of the home, a
7 right guaranteed to the homeowner, would be so severe that the
8 handicap to free speech would be added.

9 Q What you're saying, in effect, is they wouldn't
10 have a right to go into the home in order to exercise the right
11 of free speech against the owner's consent.

12 A They would be required to stand out on the
13 public sidewalk in front of the home, or the nearest area
14 traditionally available for the exercise of First Amendment
15 rights.

16 Q And if they were using a sound truck, as ad-
17 vertisers sometimes do, and candidates for political office
18 sometimes do, they might not be free to do that at three o'clock
19 in the morning.

20 A They might not be free to do it at all, This
21 Court has upheld regulation of these sound trucks, even on
22 city streets.

23 Q I'm assuming a case where they are permitted,
24 they might not be permitted at three o'clock in the morning.

25 A It may be only permitted on certain streets

1 and not others, and it always seems to occur in public streets.
2 Here we're taking them off the public street, even though a
3 public street is right there for their use and seeking to put
4 them onto private property or even quasi-public property. The
5 idea in the previous cases of putting them on public property
6 was -- on private property, was the purpose of avoiding the
7 substantial detriment to the exercise of free speech rights,
8 because of the unavailability of public property in the area.
9 That is the rationale, the underlying theme in Logan Valley.
10 "We'll let them onto the shopping center premises, because they
11 can't stand in the middle of the highway and even if they were
12 there the message could not be brought to the people entering
13 the store." We don't have this situation here. The message
14 can be brought. It is not the duty of the property-owner --

15 Q -- How about the parking entrances that appear to
16 be behind the building?

17 A There appear to be some there --

18 Q Where is the public sidewalk?

19 A You would have to cover seven entrances. I
20 think the pictures indicate that the front of this -- and we
21 have a picture of back of the store, too.

22 Q I'm talking about the automobile entrances.
23 There are seven; is that correct?

24 A Yes, and there are some in front, too.

25 Q But you would have to have pickets at seven

1 entrances.

2 A Seven pickets.

3 Q And if the people driving the cars looked at
4 the picket signs what would happen, while they were driving?

5 A They would have to be looking in that direc-
6 tion anyhow. They are crossing a public sidewalk to get into
7 the lot. So, they are looking for pedestrians.

8 Q But, I'm talking about these that are driving
9 in.

10 A They have to cross the public sidewalk to
11 drive in.

12 Q And if they drive by the picket sign and they
13 read the picket signs while driving, what happens?

14 A Those who are sympathetic to the message being
15 imparted to them will turn around and drive out, and those who
16 are not sympathetic --

17 Q And hit the other one that's looking.

18 A Pardon me?

19 Q And hit the other one that's just reading.

20 A No, this is what I called attention to in my
21 brief, as well. In Logan Valley they drove in across an
22 earthen berm into a large shopping center. There was no reason
23 to assume they were slowing down substantially after leaving
24 the highway.

25 In this physical situation the car has to cross a

1 public sidewalk. It goes up onto a driveway, crosses a public
2 sidewalk and goes into --

3 Q And stops and reads the sign?

4 A Well, he certainly is going slow enough to
5 read the sign from there, but --

6 Q But, this is the downtown area of Mobile?

7 A It's, I believe, a residential area near the
8 center of town.

9 Q Considerably traffic, I would assume, if you
10 have seven entrances.

11 A Well, according to the pictures in the record,
12 it appears that most people use the front entrances, although--

13 Q How does that appear from the picture?

14 A The pictures I have here -- I'm not submitting
15 this as a fact --

16 Q Oh, I see; I see, I see.

17 A But the back of the store in Exhibit A-5
18 indicates that there's no store windows; there is no entrances
19 to the major selling areas; it's really the back end of the
20 building where the next and several photographs indicate the
21 front door, which is the only probably used by most of the
22 people, although it's not clear in the record.

23 Q Do you know enough about Mobile to know just
24 about where it is in reference to the center of the town?

25 A No, but I have --

1 Q The Hawthorne Hotel and --

2 A No, Your Honor, I really don't, but what I
3 have done is I have included diagrams of the City of Mobile so
4 that the store can be picked out of the map itself. They are
5 not easy to read, I must confess. I am not familiar with the
6 city, myself.

7 The question has been raised, and I must address
8 myself to it as to whether or not the entire area of the con-
9 duct here has been preempted by the National Labor Relations
10 Act, and therefore the National Labor Relations Board has ex-
11 clusive jurisdiction to try this matter.

12 I do not have any excuse for not raising as it was
13 found in previous cases. I think the issue is clearly before
14 this Court. The major contention in support of a finding that
15 there was jurisdiction in the Alabama Supreme Court, is that
16 once they have concluded that there was no impairment of First
17 Amendment rights and once the Court has concluded that the
18 property rights of the Respondent to conduct its lawful business,
19 are being jeopardized by the conduct of the Petitioners, the
20 court below has come to the conclusion that Petitioners are
21 engaging in an unlawful act.

22 Once that conclusion is reached, and properly so, if
23 that is -- if that conclusion is properly so, it is the tradi-
24 tional right of the state courts to provide a remedy for that
25 wrong. The cause of action for remedying an unlawful trespass

1 are amongst the oldest in our laws.

2 The State of Alabama below followed the test enun-
3 ciated by this Court for the determination as to whether
4 Petitioners were validly exercising First Amendment rights.
5 They found that it would not interfere with the First Amendment
6 rights of the Petitioners, to move them away 100 feet and that
7 it would seriously impair the operation of Respondent to allow
8 them on the property. This is the balancing test earlier des-
9 cribed. They followed the law in that respect.

10 And then they found that there was a trespass, an
11 unlawful, interfering trespass on the property. Now, to say
12 that after such a finding the court would be powerless to act
13 would mean that there is no law if there is no enforcement of
14 it here.

15 Petitioner, in his argument -- counsel in his argument,
16 says he doesn't know whether they asked him to leave or how
17 it would get up before the board or not. I think at laest in
18 this respect the record is clear as stated in the Alabama
19 Supreme Court decision. Petitioners were asked to leave and
20 refused. Their failure to leave the premises left the property
21 owner here with nothing to do but to go to the Supreme Court of
22 Alabama to be assured of self-help.

23 Q You could have removed them.

24 A I could have removed them and if they would
25 have resisted then I suppose I would have had to hire people to

1 help me or to get a gun and shoot them. That would have been
2 left had they failed to leave -- had the state court no juris-
3 diction under the circumstances. All I could do was exert
4 greater physical force and they were capable of resisting, in
5 order to get them off the property. There is no procedure by
6 which an property owner can apply to the National Labor Relations
7 Board to have pickets removed, and this would be true if they
8 were in the middle of the store or sitting on the check-out
9 counters with their signs, and saying, "Don't shop here; don't
10 pay for what you buy; we don't like this store." There is no
11 way to go to the Board to do this.

12 Q And the picketing is not an unfair labor
13 practice by the union; is it?

14 A It is not; it is not.

15 Q Whether it is violent, or otherwise?

16 A Well, now we get into an area where there is
17 jurisdiction between the state courts and the board.

18 Q Well, I know, but --

19 A I could be, yes --

20 Q What if there was mass picketing or extensive
21 picketing. Does the employer have a remedy before the board?

22 A If it has an effect on other employees he
23 would be able to bring a charge under 8(b)1. If it was for
24 some unlawful purpose specified in the act, such as a secondary
25 boycott, he could bring it; but the mere fact that the mass

1 picketing interfered with his business would not give the board
2 jurisdiction of the matter. There would have to be additional
3 facts.

4 Q I see.

5 A Now, these facts are not in this record here,
6 and we submit that once the Court finds an unlawful trespass
7 it's no different than this Court has found before with regard
8 to libels which would tend to provoke violence, mass picketing
9 which would tend to provoke violence, threats -- mere threats
10 of imminent violence when it was reasonable to anticipate that
11 violence would follow, the Supreme Courts of several states
12 have held that failure to remedy a trespass leads to imminent
13 violence. This is the traditional area for the exercise of
14 state jurisdiction. Absence of state jurisdiction the property-
15 owner would find him remediless.

16 In conclusion, we submit that the Alabama Supreme
17 Court followed the concepts enunciated by this Court in prior
18 decisions in determining whether its removal of the pickets
19 from this parking lot impaired the free speech rights of the
20 Petitioners, finding it did not; and finding their presence on
21 the premises of Respondent was inimical to the conduct of
22 Respondent's business, they precluded them.

23 Q How do distinguish this case from Logan Valley?

24 A The availability of proximate public area from
25 which the message could be imparted to those walking in and out

1 of the store, for one thing; and second, the fact that this
2 property was not open to the general public to the extent of
3 the Logan Valley Plaza because it didn't replace a business
4 district. It was merely a store in a district set back from a
5 public street.

6 Logan Valley, if you didn't find the way you did,
7 there would be no street or sidewalks in the area from which
8 people could exercise the First Amendment rights. This is the
9 traditional place to exercise First Amendment rights and the
10 shopping center, the size of it, eliminated the traditional
11 place for the exercise of the rights.

12 On the other hand, here the traditional place is
13 available. It's 100 feet away. You can see from there; you
14 can hear from there. There's been no impairment whatsoever of
15 communication, which is, we submit, the test of First Amendment
16 rights. Absent some protection being offered by jurisdiction
17 of the state courts, there would be absolutely no remedy, and
18 as Mr. Justice White points out, there would be a necessary
19 resort to self-help and the concomitant threat to the public
20 order.

21 Q You would concede, I take it, that the message
22 gets through better on the private sidewalk right in front of
23 the door.

24 A I certainly do, but I don't think --

25 Q And still better if it's inside the store.

1 A Clearly, because there would be a greater
2 interference with the business relationship, which is what is
3 intended. But that is not the obligation of preservation of
4 First Amendment rights to do it in the most effective place;
5 merely, to maintain a channel of communications.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fox.

7 Mr. Dunau, you have two minutes.

8 MR. DUNAU: Unless there are questions, I have no
9 argument.

10 Q Yes, I have one, Mr. Dunau. If, in fact, you
11 have concluded on the issue of obstruction on this record, if
12 we are, I take it he would not be entitled to a reversal -- a
13 complete reversal of this injunction?

14 A Sir, the --

15 Q Accept my premise; don't argue with me.

16 A No, I just want to address it to the specific
17 injunction. We would be entitled, even on the assumption of
18 obstructive picketing, to the elimination of that part of the
19 injunction which prohibits trespassing upon the property of
20 Weinacker, because the obstructive picketing would authorize
21 only enough injunction reaching the obstruction, not the
22 elimination of picketing.

23 Now, there is a further provision in the injunction
24 which says, "And interfering with Weinacker's property and right
25 of ingress and egress to the property and place of business is

1 that means physical obstruction, that part of the injunction
2 would stand if the findings stand. I am not sure how to read
3 that part of the injunction. It's imprecise and I think,
4 fatally imprecise with respect to --

5 Q Well, at the very least, then, I gather, you
6 would agree there would have to be a remand for a tailoring of
7 that provision to deal with the issue of obstruction.

8 A That's correct, sir; so that we are taking
9 the findings as they now are, that is, if there was obstruc-
10 tion, if we are correct on our general proposition, if trespass-
11 ing on property goes out and the injunction must be tailored to
12 fit the obstructive picketing.

13 Q Mr. Dunau, you don't live in Mobile; maybe you
14 couldn't answer this question, but I know a little about Mobile
15 and I am wondering, if one here on your side, from Mobile, if
16 they could place this spot, as far as I am concerned, in relation
17 to the center of the town where they have the hotels?

18 A I have tried, Your Honor, with respect to the
19 maps used, which are in the Respondent's brief, to pinpoint
20 where the property is. Now, if you look on A-38 of Respondent's
21 brief, and at the top of that page you will see Government
22 Street, running somewhat diagonally across the top of the page,
23 and there is a number 246. It's within that area of 246 that the
24 store appears. If you will note, Government Street, Catherine
25 Street, in 246.

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Q What street?

A Catherine Street and Government Street. It's 248 at the right margin of the page; if one works inward from 248 you find the location of the store.

Q Is it adjacent to Government Street?

A That's correct, sir. It faces Government -- it faces on Government and Catherine Streets.

Q I think I understood you to answer a question of mine by saying it is in town; it's not out in the suburbs.

A It's not suburbia.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dunau. Thank you for your submissions. The case is submitted.

(Whereupon, at 11:15 o'clock a.m. the argument in the above-entitled matter was concluded)