Case No. ___

IN THE
Supreme Court of the United States

GARDA CL NORTHWEST, INC. f/k/a AT Systems, Inc.,

Petitioner,

v.

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER, on their own behalves and on behalf of all persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

FRED A. ROWLEY, JR.
Counsel of Record
MALCOLM A. HEINICKE
ERIC P. TUTTLE
AARON D. PENNEKAMP
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
Fiftieth Floor
Los Angeles, CA 90071-3426
(213) 683-9100
fred.rowley@mto.com

Counsel for Petitioner

QUESTIONS PRESENTED

(1) Whether a state labor claim that requires the plaintiff to show that an employer acted with "willfulness," "unreasonableness," or other mental state, which can be resolved only through interpretation of the terms of the pertinent collective bargaining agreement, is preempted by section 301 of the Labor Management Relations Act ("LMRA").

(2) Whether a state-law rule, which imposes a higher burden of proof for establishing waivers of wage-and-hour rights contained in collective bargaining agreements than it does for individual waivers of those same rights outside the collective bargaining context, is preempted by the National Labor Relations Act ("NLRA").

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Garda CL Northwest, Inc., a Washington corporation. Garda CL Northwest, Inc. is a subsidiary of Garda CL Technical Services, Inc. Garda CL Technical Services, Inc. is a subsidiary of ATI Systems International, Inc. ATI Systems International, Inc. is a subsidiary of The Garda Security Group Inc./Le Group de Securite Garda Inc. The Garda Security Group Inc./Le Group de Securite Garda Inc. is a subsidiary of Garda World Security Corporation/Corporation de Securite Garda World. No publicly owned corporation owns 10% or more of the stock of Garda World Security Corporation/Corporation de Securite Garda World.

Respondents are Lawrence Hill, Adam Wise, and Robert Miller, who filed the litigation below on their own behalves and on behalf of all persons similarly situated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL REGULATIONS

CONSTITUTIONAL PROVISIONS

PETITION FOR WRIT OF CERTIORARI

Petitioner Garda CL Northwest, Inc. ("Garda") respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS AND ORDERS BELOW

The opinion of the Washington Supreme Court is reported at 424 P.3d 207 and reproduced at Pet. App. 1a–30a. The opinion of the Court of Appeals of Washington, Division 1 is reported at 394 P.3d 390 and reproduced at Pet. App. 31a–73a. The relevant opinions and orders of the Washington Superior Court are not reported but are reproduced at Pet. App. 74a–97a.

JURISDICTION

The opinion of the Washington Supreme Court was entered on August 23, 2018. Pet. App. 1a. The Washington Supreme Court subsequently denied Garda's timely motion for reconsideration on November 20, 2018. Pet. App. 98a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI of the Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an

industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a).

29 U.S.C. section 151 of the NLRA provides that because:

> "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *
>
> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

29 U.S.C. section 157 of the NLRA provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

> mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

STATEMENT OF THE CASE

The Washington Supreme Court's decision below conflicts with decades of Supreme Court precedent on the scope of LMRA and NLRA preemption and creates conflict with several federal circuits and the California Supreme Court. Federal labor law has long required that state-law disputes that can be resolved only by interpreting the terms of collective bargaining agreements ("CBAs") are preempted. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) ("[Q]uestions relating to what the parties to a labor agreement agreed … must be resolved by reference to uniform federal law."). It has made equally clear that state-law rules that discriminate against the collective bargaining process are likewise preempted. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 755 (1985) (noting that preemption does not extend to state rules so long as they "neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA").

In a 6-3 decision concerning claims for denied meal breaks, the Washington Supreme Court disregarded both of those long-settled preemption principles. The court first allowed Plaintiffs' state-law claims for double damages to proceed, even though Plaintiffs can recover such damages only if Garda withheld

Plaintiffs' meal-break wages "willfully." Resolving that "willful[ness]" question would require the court to determine the reasonableness of Garda's interpretation of the collective agreements between it and Plaintiffs, each of which on its face purports to waive Plaintiffs' usual meal-period rights. The court then compounded this error by adopting a waiver rule that applies *only* to collective agreements, whereby Washington employees may collectively bargain away their meal-period rights only through "clear and unmistakable" language. Pet. App. 19a. Because there is no comparable state rule concerning *individual* waivers of meal-period rights, the Washington Supreme Court's novel collective-agreement rule is preempted.

The majority's contrary determination conflicts with the decisions of other appellate courts. The Fourth, Seventh, and Ninth Circuits, for example, have issued well-reasoned decisions finding that claims that turn on the "willfulness," "reasonableness," or "outrageousness" of an employer's actions, and that therefore require the reviewing court to interpret the terms of the employer's CBAs, are preempted under the LMRA. And on the question of NLRA preemption, the California Supreme Court has (correctly) found that state-law rules—like the Washington Supreme Court's "clear and unmistakable language" rule—that do not apply equally to unionized and non-unionized employees, and that subject unionized employees to "disfavored" status, are preempted.

What's more, the decision below is plainly incorrect as a matter of federal law governing the interpretation of CBAs: Even assuming that

Plaintiffs could collectively waive their usual meal-period rights only through "clear" and "unmistakable" language, the agreements at issue here meet that standard—as three justices of the Washington Supreme Court would have found. *See* Pet. App. 28a. Several agreements, for example, make explicit that "'[t]he Employees hereto waive any meal period(s) to which they would be otherwise entitled.'" Pet. App. 15a–16a.

This Court should intervene. Its guidance is needed to resolve lingering confusion among appellate courts concerning the exact contours of LMRA and NLRA preemption, and to avoid more manifest preemption errors like those made by the court below.

I. FACTUAL BACKGROUND

Garda operates an armored transportation service that transports currency and other valuables using armored trucks and armed employees. Garda has seven branches in Washington State. Garda operates its business in accordance with a series of CBAs that it negotiated and entered with the Drivers Association for each of these seven Garda branches. Pet. App. 12a, 34a.

To transport and deliver valuables, Garda employs truck crews of two individuals who rotate in two positions: A driver, who drives the armored truck along its assigned route; and a messenger, who rides in the back of the truck and then securely transfers the valuables to and from Garda's customers in the field. Because the armored truck and the employees who operate them are at risk of attack at all times in the field, safety concerns prevent the employees from

taking extended of periods of time—such as meal breaks—during which they forego basic safety precautions. As a result, Garda's employees maintain vigilance during their meal breaks. Pet. App. 2a.

This arrangement is reflected in the terms of Garda's CBAs, through which the Drivers Associations and Garda have agreed that drivers and messengers will not take "off-duty meal breaks" relieving them of all work duties. *See* Pet. App. 15a–16a. Rather, these employees have collectively agreed to take paid, "on-duty meal breaks" that they must "work through." *Ibid.* Some of the collective agreements expressly provide that employees "waived" their right to a meal period; others state that the employees agreed to an "on-duty meal period" unless they specifically request an off-duty period; and still others provide that "routes will be scheduled without a designated lunch break," but that truck crews could request a "nonpaid lunch break." Pet. App. 14a, 15a.

II. PROCEDURAL HISTORY

Plaintiffs in this case comprise a class of some 500 Garda drivers and messengers. Despite the CBAs' collectively bargained-for meal-period terms, Plaintiffs sued Garda in February 2009, alleging that Garda's policy of having the drivers and messengers take the on-duty meal periods to which they had agreed, and thereby allegedly prohibiting them from taking vigilance-free meal periods, violated Washington law. Pet. App. 4a. Plaintiffs sought not only compensatory damages for their missed meal breaks, but also exemplary double-damages for Garda's allegedly intentional underpayment of its

employees. Under Washington law such double damages are available only if the employer withheld wages "(1) willfully and (2) with intent to deprive the employee of any part of his or wages." Pet. App. 7a (internal quotation marks and brackets omitted); *see* Wash. Rev. Code §§ 49.52.050, 49.52.070.

A plaintiff cannot make this "willful[ness]" showing if there was a bona fide dispute about whether the wages were due. Garda therefore maintained, among other things, that there was a bona fide dispute over Plaintiffs' entitlement to vigilance-free meal periods given the terms of the parties' CBAs. And because Plaintiffs' claims turn on the proper interpretation of those CBA terms, Garda argued that the claims were preempted by federal labor law. *See* Pet. App. 16a.

The trial court rejected Garda's arguments, however, denying Garda's motion for summary judgment on its CBA and LMRA-preemption defenses without issuing any reasoned opinion, and—separately—granting Plaintiffs' motion for partial summary judgment on the question of Garda's liability. On the liability question, the trial court relied on *Pellino v. Brink's Inc.*, 267 P.3d 383 (Wash. Ct. App. 2011), a case decided well after Plaintiffs filed their complaint, which held that a similar "constant vigilance" policy violated Washington's meal-break laws. Pet. App. 86a. Notably, however, *Pellino* did *not* involve CBAs or any agreements that spoke to employee meal breaks. *See* 267 P.3d at 399.

The trial court then held a bench trial to determine damages for the missed breaks, as well as whether Garda owed Plaintiffs double damages. The court

found that—after *Pellino*—there could be no bona fide dispute that Garda's "constant vigilance" policy violated Washington law, and that Plaintiffs had not waived their right to meal periods because such waivers could not be collectively bargained as a matter of law. Pet. App. 93a. The trial court thus awarded Plaintiffs $4,209,596.71 in back-pay damages, $1,668,235.62 in double damages for the period *after* the *Pellino* decision, and $2,350,255.63 in prejudgment interest. Pet. App. 95a–96a.

Garda appealed several aspects of the trial court's judgment. As relevant here, Garda argued that the trial court's decision as to liability was erroneous, because Plaintiffs can (and did) waive their meal-period rights in CBAs, and, in any event, Plaintiffs' meal-break claims were preempted by the LMRA and the NLRA. Pet. App. 32a–33a. Similarly, Garda challenged the trial court's double-damages award on the ground that the terms of the parties' CBAs created a bona fide dispute about whether Plaintiffs were entitled to work-free meal breaks. Pet. App. 33a.

The Washington Court of Appeals affirmed in part and reversed in part. While acknowledging that employees may *individually* waive their rights to duty-free meal breaks under Washington law, it nevertheless held that "Washington does not allow most private employees to waive their right to a meal period through a CBA." Pet. App. 53a. Treating the meal-period right as "nonnegotiable," the court rejected Garda's arguments based on waiver and LMRA preemption. Pet. App. 53a–54a; *see also* Pet. App. 55a ("Because the Plaintiffs cannot waive meal breaks through their CBAs, evidence that the Plaintiffs … understood that they would not receive

meal breaks under the CBAs is not evidence that they voluntarily waived this right.").

The Court of Appeals reversed the trial court's double-damages award, however, holding that Garda's violation of Washington's meal-period laws was not "willful." As the court explained, the law was not clear that employees could not waive their meal-period rights in CBAs, and Garda had reasonably relied on the "purported [meal-period] waivers" in their agreements. Pet. App. 67a. The Court of Appeals declined to take the further step of actually reviewing the terms of the CBAs to decide whether they amounted to "actual[] waivers." Pet. App. 66a.

Both Garda and Plaintiffs filed petitions for review before the Washington Supreme Court. Among other things, Garda asked the Washington Supreme Court to reconsider the Court of Appeals' waiver and preemption holdings, while Plaintiffs asked that court to take up the double-damages dispute. The court denied Garda's petition and granted Plaintiffs' cross-petition. Garda was therefore forced to litigate its arguments before Washington's highest court through the (cramped) lens of Plaintiffs' claims for exemplary double damages. Pet. App. 7a ("The question for us relates solely to Garda's liability for double exemplary damages.").

III. THE WASHINGTON SUPREME COURT DECISION

On August 23, 2018, a six-justice majority of the Washington Supreme Court reversed the Court of Appeals' double-damages decision. Pet. App. 27a. Three justices signed an opinion dissenting in relevant part. Pet. App. 28a–30a.

A. The Majority Opinion

According to the majority, Garda failed to carry its burden of establishing a bona fide dispute concerning Plaintiffs' meal-period rights, and thus its failure to pay all of Plaintiffs' (allegedly) owed wages was "willful" under Washington state law.

To support this conclusion, the majority first held that Garda "never argued" that Plaintiffs had waived their right to "on duty" meal periods as that term had been recently defined in state law. According to the majority, under Washington law (as annunciated in the 2011 *Pellino* decision), "[a]n '*on duty*' meal period is one during which the employee is *relieved of all work duties*—the employee need only remain 'on the premises or at a prescribed work site in the interest of the employer.'" Pet. App. 12a (emphasis added). It reasoned that it was "undisputed that Garda failed to provide the Plaintiffs with *that type* of *work free*, 'on duty' meal period," Pet. App. 13a (emphasis added). Instead, Garda had argued that Plaintiffs—through their CBAs—had waived "*off duty* meal periods," and "that [Plaintiffs] received their *on duty* meal periods" (that is, work periods that Plaintiffs would be expected to "work through," but for which they would be paid). Pet. App. 12a. Because Garda's understanding of what counted as an "on duty" meal period did not exactly match Washington law's new definition for that term, the majority held, Garda "never actually argued there was waiver of the particular type of rights the Plaintiffs sought to enforce here." Pet. App. 13a.

Second, the majority rejected Garda's arguments that Plaintiffs' double-damages claims were

preempted by federal law. It held that Plaintiffs' claims were not preempted by the LMRA because "Garda raised the [CBAs'] language" in support of its *defense* to double-damages liability, and thus "the need to interpret [those agreements]" did not "inhere in the nature of [Plaintiffs'] claim[s]." Pet. App. 17a (citation and internal quotation marks omitted). It reasoned that, even if the Court of Appeals was wrong that meal-period rights are not collectively negotiable, Plaintiffs' claims *still* survived preemption because a CBA can waive Plaintiffs' rights only if the agreement uses "'clear and unmistakable language'" to do so—a standard that it applied uniquely to CBAs even though no such rule applies to individual waivers. Pet. App. 18a.

The majority then went on to analyze the CBAs through the same state-law lens applied to the waiver issue. It concluded that "the language in the Plaintiffs' CBAs … did not waive [meal-period rights] in clear and unmistakable language," because the CBAs said the employees would receive "on duty meal periods"—which the majority believed must mean "*true* on duty meal periods" (*i.e.*, *work-free* meal periods)—within the meaning of recently articulated Washington law. Pet. App. 19a (emphasis added).

B. The Dissenting Opinion

By contrast, three justices would have held that "double damages [were] inappropriate" in this case. Pet. App. 28a. As the minority saw things, Garda did not "willfully withhold wages" for meal periods, because "[t]he language in the CBAs is *clear*: 'Employees hereto waive any meal period(s) to which they would otherwise be entitled.'" Pet. App. 28a

(emphasis added). It therefore was "not unreasonable for Garda to perceive this language as a clear waiver of employees' meal periods and not merely an agreement to on-duty meal periods" as defined by Washington law. Pet. App. 28a. Indeed, the minority felt that "there should be no question that [Plaintiffs] understood the need for a constant state of vigilance when they agreed to work for Garda." Pet. App. 29a.

Because "Garda operated according to the CBAs signed by its employees," the minority explained, Garda could not be said to have *willfully* withheld Plaintiffs' wages. Pet. App. 29a. The majority's contrary decision "undermines the right of employees to bargain collectively with their employers" by signaling that CBAs "are no longer binding" on employers and employees. Pet. App. 30a.

REASONS FOR GRANTING THE PETITION

The Washington Supreme Court's 6-3 decision not only conflicts with decades of Supreme Court precedent concerning preemption of state-law claims under both the LMRA and the NLRA, it also creates multiple conflicts with the decisions of other appellate courts and is flat-out wrong. Because the decision below "undermines the right of employees to bargain collectively with their employers," Pet. App. 30a, this Court should grant Garda's petition and correct the Washington Supreme Court's multiple, manifest errors.

I. THE DECISION BELOW FINDING NO LMRA PREEMPTION CONFLICTS WITH THIS COURT'S PRECEDENTS AND CREATES AN APPELLATE-COURT SPLIT

As this Court repeatedly has explained, a state-law claim that is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," "must be brought under § 301 [of the LMRA] and be resolved by reference to federal law." *Allis-Chalmers*, 471 U.S. at 210, 220; *see also Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988) ("[I]f the resolution of a state-law claim depends upon the meaning of a [CBA], the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute.").

The rationale for this broad federal preemption rule is plain:

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements…. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation … [and] might substantially impede the parties' willingness

> to agree to contract terms providing for final arbitral or judicial resolution of disputes."

Teamsters v. Lucas Flour Co., 369 U.S. 95, 103–04 (1962).

Given this purpose, any preemptive effect "must extend beyond suits alleging contract violations," so that "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement" are resolved by uniform federal law whether they arise in "a suit for breach of contract or in a suit alleging liability in tort." *Allis-Chalmers*, 471 U.S. at 210–11. To hold otherwise, this Court has explained, "would elevate form over substance" and allow parties to evade federal law by "relabeling their contract claims" as tort claims. *Id.* at 211.

In the face of these long-standing rules, the Washington Supreme Court allowed Plaintiffs' double-damages claims to proceed, even though those claims *depend* on the meaning of Plaintiffs' CBAs. That holding conflicts with this Court's precedents and with the decisions of other appellate courts, and warrants a grant of certiorari.

A. Under the clear holdings of *Allis-Chalmers*, *Lucas* Flour, and other decisions of this Court, Plaintiffs' claims for double damages must be preempted. The Washington Supreme Court itself acknowledged that employees may only recover "exemplary [*i.e.*, double] damages" under Washington law "if the employer withheld the wages (1) *willfully* and (2) with intent to deprive the employee of any party of his or her wages and (3) the employee did not knowingly submit to such violations." Pet. App. 7a

(emphasis added; internal quotation marks and brackets omitted). As a result, "[t]he critical determination in a case … for double damages is whether the employer's failure to pay wages was 'willful.'" *Schilling v. Radio Holdings, Inc.*, 961 P.2d 371, 375 (Wash. 1998) (*en banc*). And under Washington law, an employer's conduct cannot be called "willful" when there is "a 'bona fide' dispute … between the employer and employee regarding the payment of wages"; that is, when it is "'fairly debatable' … whether all or a portion of the wages [claimed] must be paid." *Id.* at 375, 376.[1]

Here, Plaintiffs cannot establish the "critical" "willful[ness]" element of their double-damages claims, because the terms of their CBAs create a "bona fide" dispute about whether Garda even owed Plaintiffs duty-free meal breaks. Those agreements state, among other things, that:

- "The employees hereto agree to an *on-duty* meal period. Employees may have an *off duty* meal period if they make arrangements with their supervisor in advance of the need or provide[] the supervisor with a written request to renounce the on-duty meal period in exchange for an off-duty meal period." Pet. App. 15a (emphasis added).
- "The Employees hereto waive any meal period(s) to which they would be otherwise entitled. Employees will be paid at their

[1] Washington courts have held that the employer bears the burden to show the existence of a bona fide dispute. Pet. App. 8a.

> regular hourly rate to *work through* any such meal period(s). Notwithstanding this waiver, employees may eat meals within their vehicles while on route so long as they can do so in a safe manner. Employees may take an unpaid *off-duty* meal period if they make arrangements with their supervisor … or provide their supervisor with a written request to renounce the *on-duty* meal period in exchange for an *off-duty* meal period." Pet. App. 15a–16a (emphasis added).

- "Street routes will be scheduled without a designated lunch break; thus employees will not be docked for same. In the event a truck crew on a street route wishes to schedule a *nonpaid* lunch break, they must notify their supervisor." Pet. App. 14a (emphasis added).

Based on these terms, Garda contends it did not "willfully" violate any Washington wage laws governing meal breaks, because its employees had plainly *bargained away* the right to duty-free meal breaks in their CBAs. The employees expressly agreed that they would be entitled only to a paid, *on-duty* break (which employees must "work through," and during which employees must remain vigilant for their safety), unless they made special arrangements with a supervisor to schedule an alternative, unpaid, and safe off-duty meal period. Accordingly, Garda quite reasonably read these agreements to absolve it of any state-law requirement that it provide vigilance-free meal breaks.

Plaintiffs disagree about the meaning of these agreements' meal-break terms. But that dispute

underscores the need for LMRA preemption in this case: The Washington courts could not determine whether Garda's failure to pay wages was "willful" without determining whether Garda's interpretation of the operative CBAs was reasonable.

In reversing the Court of Appeals on Plaintiffs' double-damages claim, the Washington Supreme Court necessarily reached various conclusions concerning the CBAs' meaning. It held, for example, that—based on recent judicial interpretation of a provision of the Washington code discussing meal periods—when the CBAs referred to an "*on duty* meal period," what they really meant was a meal period "during which the employee is *relieved* of all work duties," not (as Garda argued) a meal period during which employees were permitted to eat while remaining vigilant and safe. Pet. App. 12a (emphasis added); *see also* Pet. App. 19a (holding that the agreements "retained the protection of *true* on duty meal periods" (emphasis added)). And based on that state-specific understanding of the term "on duty meal period," the court concluded that each of Plaintiffs' agreements "reaffirm[ed] that [they] had *not* waived 'on duty' meal periods." Pet. App. 14a (emphasis added). But this kind of *state-law-specific* interpretation of the collective agreements' terms is exactly what section 301 of the LMRA was meant to avoid.

Allis-Chalmers is instructive. There, plaintiff was a member of a union that was a party to a CBA. 471 U.S. at 203–04. Plaintiff attempted to bring a Wisconsin-state-law cause of action against his employer for "bad-faith handling" of his disability claim, alleging that the employer "intentionally,

contemptuously, and repeatedly failed to make disability payments under the negotiated disability plan, without a reasonable basis for withholding the payments." *Id.* at 203, 206 (internal quotation marks omitted). Although the Wisconsin Supreme Court considered plaintiff's bad-faith claim to be "independent" of the underlying CBA (and thus not preempted by the LMRA), *see id.* at 207, this Court reversed. It held that resolving whether the employer acted in bad faith would "inevitably … involve contract interpretation," because "[t]he parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner." *Id.* at 218. Because "Congress has mandated that federal law govern the meaning given [CBA] terms," this Court held, a Wisconsin "state tort [that] purports to give life to th[o]se terms in a different environment" must be "pre-empted." *Id.* at 218–19.

The Washington Supreme Court's reasoning reprises the Wisconsin Supreme Court's error: It held that Garda "willfully" withheld its employees' wages, and that Garda could not have reasonably believed that those employees had waived their right to work-free meal periods, *merely* because Washington state law gives some special meaning to a term found in the operative CBAs—namely, "on duty meal period." Pet. App. 11a–12a (rejecting Garda's argument that "Plaintiffs waived their right to *off duty* meal periods and that they received their *on duty* meal periods," because Garda's understanding of what counts as an "on duty meal period" conflicted with a provision of the Washington state code). In light of *Allis-*

Chalmers, however, whatever special meaning Washington gives to the terms in Plaintiffs' CBAs is preempted by the LMRA. *See* 471 U.S. at 210 ("A state rule that purports to define the meaning or scope of a term in a contract suit … is pre-empted by federal labor law.").

Indeed, preemption is especially important in this case, for Washington's understanding of the term "on duty meal period" is directly at odds with how other jurisdictions read that term. *See Lucas Flour*, 369 U.S. at 104 (federal preemption is necessary in order to avoid "the possibility of conflicting substantive interpretation [of a CBA] under competing legal systems"). According to the court below, "[a]n 'on duty' meal period" can only be "one during which the employee *is* relieved of all work duties—the employee need only remain 'on the premises or at a prescribed work site in the interest of the employer.'"[2] Pet. App. 12a (emphasis added; quoting Wash. Admin. Code § 296-126-092(1)).

By contrast, other jurisdictions have adopted the opposite meaning for that term. For example, under California law, "[a]n on-duty meal period is one in which an employee is *not* 'relieved of all duty' for the entire 30-minute period." *Brinker Restaurant Corp.*

---

[2] Notably, as the Washington Supreme Court acknowledged, it was not even clear before the 2011 *Pellino* decision that this was the *only* permissible understanding of the term "on duty meal period" under Washington state law. Pet. App. 5a. It therefore makes little sense to infer that the term "on duty meal period" as used in Garda's CBAs—most of which pre-date *Pellino*, *see* Pet. App. 15a–16a (quoting agreements from 2006, 2008, 2009, and 2010—must be read in light of *Pellino*'s unique definition of that term.

v. Super. Ct., 273 P.3d 513, 533 (Cal. 2012) (emphasis added); *see also McFarland v. Guardsmark, LLC*, 538 F. Supp. 2d 1209, 1211 (N.D. Cal. 2008) (similar). And the same goes for federal law: "On duty meal periods" are those where employees are expected to continue working in some capacity. *See* 5 C.F.R. § 551.411(c) ("Bona fide meal periods are not considered hours of work, except for *on-duty meal periods* for employees engaged in fire protection or law enforcement activities who receive compensation for overtime hours *of work*.").

Because what counts as an "on duty meal period" under specific statutes can vary from jurisdiction to jurisdiction, the application of a particular state's law to construe that term in a CBA directly implicates the uniformity concerns underlying LMRA preemption. *See Lingle*, 486 U.S. at 405–06 (noting that "federal labor-law principles … must be employed to resolve [an interpretation] dispute" to avoid "inconsistent results"); *Lucas Flour*, 369 U.S. at 102–03 (holding "that … incompatible doctrines of local law must give way to principles of federal labor law," and rejecting argument that "States remain free to apply individualized local rules when called upon to enforce [collective] agreements"). Here, Plaintiffs' double-damages claims turn on whether Garda acted willfully—that is, whether Garda interpreted the CBAs' "on duty meal period" terms in good faith—and thus the Washington Supreme Court's use of state law to resolve those claims is preempted.

In holding otherwise, the Washington Supreme Court plainly misapplied *Allis-Chalmers* and its progeny. This Court should grant Garda's petition, both to clarify its precedents and to make clear that

the Washington Supreme Court's reasoning flatly contravenes those precedents.

B. Certiorari is doubly appropriate here, as the Washington Supreme Court's erroneous holding irreconcilably conflicts with the decisions of other appellate courts applying LMRA preemption principles to similar claims turning on the defendant employer's (allegedly) "willful," "unreasonable," or "outrageous" behavior.

For example, the Seventh Circuit has held that a claim for "*willful* nonpayment of money due for past work" does not survive LMRA preemption. *Nat'l Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil*, 784 F.2d 817, 823 (7th Cir. 1986) (emphasis added). The *Nat'l Metalcrafters* court held that "a determination that a contract is so clear as to make a breach willful … *is* an interpretation of the contract": Resolving the state-law claim would require the court to determine whether plaintiff's reading of the CBA was "incontestable" or was, instead, "fairly debatable." *Id.* at 823, 825. Accordingly, the Seventh Circuit deemed such a state-law claim preempted by the LMRA.

The *Nat'l Metalcrafters* decision coheres with the decisions of numerous other federal circuit courts, all of which stand in contrast to the Washington Supreme Court's decision here. In *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), for example, the Ninth Circuit considered the claims of an employee whose working conditions were governed by a CBA. The employee alleged that his employer had discriminated against him, and he brought various state-law claims against his employer,

including intentional infliction of emotional distress. *Id*. at 545. The Ninth Circuit correctly held that the employee's tort claim was preempted by the LMRA. As that court explained, the emotional-distress claim required the plaintiff to demonstrate outrageous conduct by the employer, and "[t]he outrageousness of [the employee's] reassignment and dismissal could depend on whether the behavior violated the terms of the CBA." *Id.* at 551. "Because the … claim requires consideration of reasonableness of [the employer's] behavior, which in turn *could* depend on whether that behavior violated the [CBA], *the claim is preempted*." *Ibid.* (emphasis added); *see also Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1350 (9th Cir. 1985) (similar).

Similarly, both the Fourth and the Seventh Circuits have held that section 301 of the LMRA preempts state-law torts turning on questions of "reasonableness" that are bound up with CBA terms. *See Foy v. Giant Food Inc.*, 298 F.3d 284, 288 (4th Cir. 2002) (finding state-law claim for emotional distress preempted because "whether Giant's actions are wrongful can be determined only by interpreting the collective bargaining agreement"); *Douglas v. Am. Info. Tech. Corp.*, 877 F.2d 565, 573 (7th Cir. 1989) (holding that where emotional distress claim "consists of allegedly wrongful acts directly related to the terms and conditions of her employment," such that it "will be substantially dependent on an analysis of the terms of the [CBA]" and require the court to "determine whether her employer's conduct was authorized by the explicit or implicit terms of the agreement," the "claim is preempted and must be pursued as a section 301 claim").

These holdings cannot be squared with the Washington Supreme Court's decision in this case. As in *Nat'l Metalcrafters*, Plaintiffs must establish that Garda's failure to pay them for meal periods was "willful," and resolving that "willful[ness]" element of Plaintiffs' claims cannot help but require "interpretation of the" operative CBAs' meal-period terms. And as in *Miller* and other cases, Plaintiffs' double-damages claims depend on the "reasonableness of [the employer's] behavior," 850 F.2d at 551, including whether Garda reasonably believed that Plaintiffs had bargained away their right to duty-free meal periods, *see Schilling*, 961 P.2d at 375 ("The critical determination in a case … for double damages is whether the employer's failure to pay wages was 'willful.'"). But the Washington Supreme Court broke with these precedents to nevertheless find that Plaintiffs' claims fell outside the scope of LMRA preemption.

By its decision, then, the Washington Supreme Court has taken the wrong side in a decades-long debate among appellate courts over the scope of federal labor preemption. Absent guidance from this Court, the confusion over whether state-law claims requiring showings of, for example, "willfulness" that turn on CBA terms promises to grow.[3]

---

[3] Of course, states may set standards for working conditions that are categorically *nonnegotiable*, whether collectively or individually. In that case, a claim for willful violation of the state standard may not turn on the CBA, and the claim may not be preempted. *See Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994); *Allis-Chalmers*, 471 U.S. at 213, 217–18 & n.11; *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076, 1080–82 (9th Cir. 2005). That is not the case here. Washington law allows meal periods

C. Despite *Allis-Chalmers* and the wealth of precedent concerning the scope of LMRA preemption in cases like the present one, the Washington Supreme Court concluded that Plaintiffs' double-damages claims were *not* preempted because: (1) "Garda never argued that [] Plaintiffs' waived the 'on duty' meal period right that [] Plaintiffs are seeking to enforce," Pet. App. 11a (some emphasis and capitalization omitted); and (2) "[t]he fact that Garda 'refers to the CBA[s] in mounting a defense' does not turn [Plaintiffs' claims] into … LMRA claim[s]," Pet. App. 17a (quoting *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005)). The Court was wrong on both counts, however, and neither rationale poses an obstacle to this Court's review.

First, the Washington Supreme Court's "waiver" point hinges on the same error described in Part I.A, *supra*. That is, the court held that Garda had waived any argument that Plaintiffs were not entitled to "on duty meal periods" under the terms of their CBAs only by using Washington state law, post-dating many of those CBAs, to re-define what "on duty meal period" means. As the court acknowledged: "Garda argued below, *as it has consistently throughout this litigation*, that [Plaintiffs] intentionally and knowingly waived *off-duty* meal periods either in the agreements negotiated by [Plaintiffs'] Associations or by individually signing the acknowledgments of the same," and "Garda also argued that there was no

---

to be individually waived, and the Washington Supreme Court *assumed* (without deciding) that meal periods were also collectively negotiable and went on to interpret the CBAs' terms. Pet. App. 13a–16a.

wage violation because [Plaintiffs] were paid for [] *on-duty* meal breaks." Pet. App. 12a (some emphasis added; internal quotation marks omitted). The court deemed these arguments insufficient merely because the off-duty/on-duty terminology in Garda's arguments and in the CBAs did not match Washington law's novel understanding of what counts as an "on duty meal period." Pet. App. 12a.

This purported "waiver" poses no obstacle to review, for it is bound up with the substantive LMRA preemption that warrants review here. The very same interpretation of Washington meal-period regulations, resting on the very same case (*Pellino*), grounds both the court's interpretation of the CBA (which is preempted), and the court's holding that Garda "waived" its competing interpretation of the CBAs. Because this "waiver" holding is purely derivative of the recurring preemption questions presented here, it furnishes no adequate or independent state ground that could forestall this Court's review. *Cf. Sanders v. Cotton*, 398 F.3d 572, 580 (7th Cir. 2005) ("Because the appellate court's discussion of waiver is intertwined with its merits analysis …, the state court's decision does not rest on an independent and adequate state law ground [for purposes of federal habeas law].").

This is especially so because the "waiver" argument makes no sense on its own terms. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 725 (2010) ("To ensure that there is no 'evasion' of our authority to review federal questions, we insist that the nonfederal ground of decision have 'fair support.'"). Garda plainly argued that Plaintiffs had waived their right to a "meal

period … during which the employee is *relieved of all work duties*." Pet. App. 12a (emphasis added). Garda simply (and reasonably) called that kind of meal period an "*off*-duty" meal period—both in its briefs and in its CBAs. Garda likewise (reasonably) referred in its briefs and CBAs to meal periods in which employees were required to work in exchange for pay as "on-duty" meal periods. *See* Pet. App. 15a–16a (quoting a CBA that contrasts an "on-duty" meal period, for which Plaintiffs would "be paid at their regular hourly rate to *work through* any such meal period(s)," with an "off-duty" meal period (emphasis added)).

That Garda did not anticipate the Washington courts' counterintuitive redefinition of "on duty meal period" under state law to mean "one during which the employee is relieved of all work duties," Pet. App. 12a, cannot avoid the fact that Garda indisputably argued that Plaintiffs had *waived* their usual meal-period rights in exchange for a collectively bargained-for system with two kinds of meal periods: "On duty" periods that Plaintiffs must work through (but for which they will be paid); and "off duty" periods, which—like "on duty" meal periods under Washington state law—require no work, but which Plaintiffs expressly *waived* in their CBAs. *See* Pet. App. 15a–16a ("The Employees hereto waive any meal period(s) to which they would be otherwise entitled.").

Second, the Washington Supreme Court erred when it held that LMRA preemption does not apply to Plaintiffs' claims because the CBAs' terms are relevant only to Garda's "defense." Pet. App. 17a. The court relied on *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), which concerned federal removal

jurisdiction and the complete preemption doctrine. Defendants in that case had removed plaintiffs' state-law claims to federal court based on defenses tied to a CBA not mentioned in the complaint. This Court held that the complete preemption doctrine could not overcome "the paramount policies embodied in the well-pleaded complaint rule," and that "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law." *Id.* at 398–399 (emphasis omitted).

But that is not what happened here. To start, the need to interpret the terms of Plaintiffs' CBAs appeared "on the face of the complaint." *Id.* at 399. After all, *Plaintiffs* seek double damages from Garda, and to prove their right to recover such damages, *Plaintiffs* must show that Garda's failure to pay them their requested meal periods was done "'[w]illfully and with intent to deprive' within the meaning of" Washington law. Pet. App. 9a. This is crystal clear from Washington precedents which establish that "there are two instances when an employer's failure to pay wages is not willful: the employer was careless or erred in failing to pay, or a 'bona fide' dispute existed between the employer and employee regarding the payment of wages." *Schilling*, 961 P.2d at 375; *see also Pope v. Univ. of Wash.*, 852 P.2d 1055, 1062 (Wash. 1993) (*en banc*) ("Nonpayment of wages is willful … 'when it is … not the result of a bona fide dispute as to the obligation of payment.'").

Here, as the Washington Supreme Court's own analysis shows, courts can only determine the existence of such a "bona fide" dispute by referring to the terms of the operative CBAs. As a result, fully

resolving the elements of *Plaintiffs*' double-damages claims could not help but "inject[]" the terms of those agreements into this litigation, regardless of Washington's rule that the employer bears the burden of proof on establishing the bona fide dispute.[4]

More important, this case does not concern removal jurisdiction or the complete-preemption principles at issue in *Caterpillar*. And this Court's and other courts' jurisprudence make clear that an employer's defenses are entirely relevant in a conventional preemption case like this one. In *Lingle*, for example, this Court considered whether a tort for retaliatory discharge was preempted by the LMRA. *See* 486 U.S. at 406–07. To determine whether such a claim could proceed, the Court not only considered the "elements" of the plaintiff's claim, but also examined whether the employer's "*defen[se]* against a retaliatory discharge claim … turn[ed] on the meaning of any provision of a collective-bargaining agreement." *Id.* at 407 (emphasis added). Thus, whether interpretation of Plaintiffs' CBAs comes up as a result of Plaintiffs' affirmative case for "willful[ness]" or as a result of Garda's defense to

[4] The cases the Washington Supreme Court relied upon to reject Garda's preemption argument are not to the contrary. For example, *Valles* merely restated the long-standing LMRA complete-preemption test: "[I]n order for complete preemption to apply, 'the need to interpret the CBA must *inhere in the nature of the plaintiff's claim*.'" 410 F.3d at 1076 (quoting *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (emphasis added)). And here, as just described, the "nature" of Plaintiffs' double-damages claims requires interpretation of the operative CBAs, and thus this is not a case where Garda has simply "refer[red] to th[ose] [agreements] in mounting [its] defense." *Cramer*, 255 F.3d at 691.

double damages makes no difference: Resolving Plaintiffs' double-damages claims requires interpretation of the CBAs, and so those claims are preempted. *See Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 838 n.8 (10th Cir. 1996) ("*Caterpillar* does not change the general rule that if a CBA must be interpreted to resolve the claim, even if the CBA interpretation is initiated by the defense, the federal or state court must hold the claim preempted.").

Indeed, in focusing on whether LMRA preemption arose solely by way of Garda's "bona fide dispute" defense, the Washington Supreme Court's reasoning implicates yet another area of confusion weighing in favor of this Court's review. That is because the "Circuits are split as to whether a defense, as opposed to a claim, that is substantially dependent on the terms of a CBA compels § 301 preemption." *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1181 n.14 (11th Cir. 2010) (citing *Williams v. Nat'l Football League*, 582 F.3d 863, 872–73, 879 & n.13 (8th Cir. 2009); *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 996–98 (9th Cir. 2007); *Fry*, 88 F.3d at 838 n.8; *Smith v. Colgate–Palmolive Co.*, 943 F.2d 764, 770–71 (7th Cir. 1991); *Hanks v. Gen. Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988)).

II. THE DECISION BELOW REQUIRING THAT WAIVERS OF MEAL-BREAK RIGHTS IN CBAs BE "CLEAR AND UNMISTAKABLE" IS PREEMPTED BY FEDERAL LAW AND CONFLICTS WITH DECISIONS OF OTHER APPELLATE COURTS

This Court should also intervene for a second, independent reason: In the decision below, the Washington Supreme Court held that *collective* waivers of state meal-period rights must be "clear and unmistakable." Because there is no similar requirement for *individual* meal-period waivers under Washington law, the Washington Supreme Court's new rule unfairly discriminates against the collective bargaining process—as the dissenting opinion below recognized. That rule is therefore preempted by the NLRA, and the court's failure to apply federal law conflicts directly with the decisions of other appellate courts.

A. The NLRA provides, among other things, that it is "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce … by *encouraging* the practice and procedure of collective bargaining." 29 U.S.C. § 151 (emphasis added). And that Act further provides that "[e]mployees shall have the right to self-organization" and "to bargain collectively through representatives of their own choosing." *Id.* § 157. In light of these provisions, this Court has repeatedly explained that the NLRA preempts any state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress's collective-bargaining policies, *Livadas*, 512 U.S. at 120 (internal

quotation marks omitted), and that state laws may be preempted if they, for example, "discourage the collective-bargaining process," *Metro. Life*, 471 U.S. at 755.

The Washington Supreme Court's decision flouts these well-settled principles. The court held that Plaintiffs' state-law rights to meal periods could not be waived *in a CBA* unless Plaintiffs' agreements used "'clear and unmistakable language'" to waive those rights. Pet. App. 18a. The court further held that there was no such waiver in Plaintiffs' CBAs, because those agreements "retained the protection of *true* on duty meal periods," Pet. App. 19a (emphasis added)—that is, "on duty meal periods" as defined under Washington law to mean "one during which the employee is relieved of all work duties," Pet. App. 12a.

That analysis was wrong, *see infra* part iii, and is plainly preempted by federal law. It is undisputed that there is no comparable "clear and unmistakable" requirement for *individual* waivers of Washington's meal-period rights. The court of appeals expressly recognized below that "individual employees *may* waive their meal periods" under Washington state law. Pet. App. 51a (emphasis added); *see also Pellino*, 267 p.3d at 399 ("employees can waive the meal break requirements" imposed by Washington law.). And such individual waivers are enforceable *regardless* of whether they are accomplished through "clear and unmistakable language." Indeed, such individual-employee waivers need not even be *written down* to be given full force and effect: "'if an employee wishes to waive that meal period, the employer may agree to it.... *While it is not required*, the [Washington department of labor and industries] *recommends*

obtaining a written request from the employee[] who chooses to waive the meal period.'" pet. App. 52a (emphasis added).

The Washington Supreme Court nevertheless adopted a stringent "clear and unmistakable language" test for collective meal-period waivers. That heightened test cannot but discourage the process of collectively bargaining employees' meal-period rights: Individual employees can easily choose to have paid meal periods in which they retain some or all of their duties; but under the Washington Supreme Court's approach, employees cannot make the same election so easily on a collective basis. The court's "clear and unmistakable language" test—which applies *only* to CBAs—is therefore preempted, and this Court should grant certiorari to correct that court's error. *See* Pet. App 30a (dissenting op., concluding that "[t]he majority's decision undermines the right of employees to bargain collectively with their employers").

B. What's more, the lower court's error is at odds with the decisions of other appellate courts that have resolved similar NLRA preemption claims. For example, in *California Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019, 1022 (Cal. 2011), the California Supreme Court considered whether a city ordinance survived in light of the national policies in favor of CBAs announced in the NLRA. While acknowledging that "the NLRA regulates … the process of organizing and bargaining," and that "federal labor law … supplant[s] [state law] when it prevents the accomplishment of the purposes of the federal Act," the California Supreme Court upheld the ordinance because its benefits "appl[ied] … to all

employees equally, irrespective of union or nonunion status." *Id.* at 1028, 1031. Indeed, the California Supreme Court held that:

> "The [o]rdinance's neutrality [was] *essential to its validity*. Just as employment regulations aimed solely at unionized workers may intrude into aspects of organizing and bargaining Congress intended the states not to regulate, so may regulations that apply only to nonunionized workers and select out unionized workers for disfavored status be preempted as forcing employees to choose between exercising their right to enter a collective bargaining agreement and having their state-granted employment rights enforced."

Id. at 1031 n.7 (emphasis added).

Under the California Supreme Court's (correct) analysis of federal law, the Washington Supreme Court's "clear and unmistakable language" requirement for collectively negotiated meal-period waivers is preempted by the NLRA. This is because the Washington Supreme Court's rule applies *only* to employees who elect on-duty meal periods through a CBA, as opposed to individual employees that negotiate for those rights on an individual basis. In this way, the Washington Supreme Court's "clear and unmistakable language" requirement for collective meal-period waivers necessarily "select[s] out unionized workers for disfavored status." *Ibid.* That requirement is accordingly preempted by the NLRA.

Nor does the case the Washington Supreme Court cited in support of its "clear and unmistakable

language" rule save that rule from NLRA preemption. Pet. App. 19a (citing *Valles*, 410 F.3d at 1076). *Valles* involved only an *LMRA* preemption challenge, and did not consider whether the *NLRA* would preempt the application of a discriminatory "clear and unmistakable" requirement to collective waivers when under state law individual waivers were permissible under a lower standard. *Valles* had no occasion to consider that question, because the meal-period rights at issue were held to be entirely "nonnegotiable" as a matter of state law. 410 F.3d at 1080–82.[5]

Indeed, the "clear and unmistakable" language in *Valles* derives from a line of this Court's precedent holding that a CBA would have to use such language before it could possibly preempt a *nonnegotiable* state-law right or certain fundamental federal labor rights. *See Livadas*, 512 U.S. at 125 ("in view of [Cal.] Labor Code § 219," making state rights nonnegotiable, waiver of those rights in CBA would "have to be 'clear and unmistakable'"); *Lingle*, 486 U.S. at 409–10 n.9 (where state law makes rights nonnegotiable, "[b]efore deciding whether such a state-law bar to waiver could be pre-empted under federal law by the parties to a collective-bargaining agreement, we would require 'clear and unmistakable' evidence … that such a waiver had been intended"); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998) (waiver of federal right

[5] As a result, *Valles* held that it "need not, indeed may not, construe the [defendant's] collective bargaining agreement … because any provision of the [CBA] purporting to waive the right to meal periods would be of no force or effect." 410 F.3d at 1082.

to a judicial forum for claims of employment discrimination must be clear and unmistakable).

Valles can thus be reconciled with this Court's precedents indicating that a waiver of a *nonnegotiable* state-law right would have to be "clear and unmistakable." But it has no application to this case, which involves a meal-period right that state law clearly allows to be bargained away.

That the Washington Supreme Court misconstrued federal precedent to impose a "clear and unmistakable" standard for collective waivers of rights that as a matter of state law may be negotiated away individually without such "clear and unmistakable" language—and that other appellate courts have expressed uncertainty on this same point, *see Ehret v. WinCo Foods, LLC*, 26 Cal. App. 5th 1, 6 (2018)—underscores the need for this Court's review.

III. THE DECISION BELOW INCORRECTLY INTERPRETS THE CBAs, IN CONFLICT WITH OTHER COURTS APPLYING THE FEDERAL LAW OF CBA INTERPRETATION

Finally, even assuming that Plaintiffs could only waive their right to off-duty meal breaks "clearly and unmistakably," Plaintiffs did just that in their CBAs. Indeed, as described above, at least three of the operative agreements made clear that "'[t]he Employees hereto waive *any* meal period(s) to which they would be otherwise entitled'" and that employees "will be paid at their regular hourly rate to *work through* any such meal period(s)." Pet. App. 15a–16a (emphasis added). Several other agreements explicitly noted that "[t]he Employees hereto agree to

an on-duty meal period," and that employees could only have "an off duty meal period if they make arrangements … in advance" for such a meal period, Pet. App. 15a.

Other jurisdictions correctly applying the federal law of CBA interpretation have held similar language sufficient to establish waiver. In *Ehret*, for example, the California Court of Appeal assumed without deciding that "the clear and unmistakable standard" applied, but held that the CBAs at issue had "clearly and unmistakably" waived the plaintiffs' meal-period rights because the agreements "discuss[ed] meal breaks" and provided for meal breaks that were "flatly irreconcilable with the provision of" the California labor code that required such breaks. 26 Cal. App. 5th at 9. It mattered not that those CBAs did not reference the state meal-period statute or use the word "waiver," or that those CBAs referenced the company's "policy not to mutually agree with employees to waive their lunch period." *Ibid.*

Here, the parties' CBAs more than meet even the improper "clear and unmistakable" waiver test: Several of the agreements explicitly mention "waiver"; all of them "discuss meal breaks"; and all of them provide for meal breaks that are "flatly irreconcilable" with Washington law's version of an "on duty meal break." The agreements, after all, contemplate "on-duty meal breaks" that Plaintiffs must "work through," and provide that employees can get "off-duty" meal breaks only if they get advance approval on a case-by-case basis. As the dissent below found, Plaintiffs' therefore "clearly and unmistakably" waived their usual meal-break rights, and the Washington Supreme Court erred in

concluding otherwise. Pet. App. 28a; *cf. Int'l Bhd. of Elec. Workers, Local 803, AFL-CIO v. NLRB*, 826 F.2d 1283, 1295–98 (3d Cir. 1987) (finding that plaintiffs clearly waived their right to strike when they agreed that "there shall be no strikes or walkouts by the Brotherhood or its members").

CONCLUSION

The Court should grant Garda's petition for certiorari.

Respectfully submitted,

FRED A. ROWLEY, JR.
Counsel of Record
MALCOLM A. HEINICKE
ERIC P. TUTTLE
AARON D. PENNEKAMP
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071-3426
(213) 683-9100
fred.rowley@mto.com

Counsel for Petitioner