No. 18-1083

IN THE

Supreme Court of the United States

GARDA CL NORTHWEST, 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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the petition seeks review of a non-final decision of a state court.

2. Whether the Washington Supreme Court's decision that the petitioner failed to preserve its federal preemption claims obviates any reason for this Court to address those issues.

3. Whether, contrary to this Court's decision in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), and consistent federal appellate authority construing it, § 301 of the Labor Management Relations Act preempts a claim for statutory penalties for denial of workers' rights under state wage laws when an employer asserts as a defense that it believed a collective bargaining agreement waived those rights.

4. Whether any issue of preemption under the National Labor Relations Act is presented by the Washington Supreme Court's adoption of a standard based on *federal* law for determining whether a collective bargaining agreement waives rights under state wage-and-hour laws.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other

INTRODUCTION

Petitioner Garda CL Northwest, Inc., an armored-car company, denied its drivers their right under Washington wage-and-hour laws to a paid, on-duty lunch period: that is, a period of break time when they had to remain at their place of duty but could not be required to work. Garda has contested this litigation for a decade through multiple appeals, including a previous, unsuccessful petition for certiorari raising an issue that it no longer pursues. Now, with its liability to a class of employees for violating Washington law clearly established, and millions of dollars of compensatory damages awarded, Garda challenges only a small part of the outcome below—a holding rejecting defenses it asserted to liability for double damages as a penalty for willful violations during part of the period at issue. Specifically, Garda asks this Court to consider whether either § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, or the National Labor Relations Act (NLRA) preempts the Washington Supreme Court's decision that Garda cannot avoid penalties by claiming that there was a good-faith dispute over whether the drivers' collective bargaining agreements (CBAs) validly waived the right to a meal period.

Garda, however, overlooks a glaring jurisdictional problem: the lack of a final decision on the issue of Garda's liability for penalties. The Washington Supreme Court remanded the case to the state's intermediate court of appeals to address additional arguments raised by Garda in support of its claimed defenses to double damages. This Court has certiorari jurisdiction only over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be

had." 28 U.S.C. § 1257(a). Thus, this Court lacks jurisdiction to review the state-court decision below because that decision is not "final as an effective determination of the litigation," *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997), and withholding immediate review in the circumstances of this case would not "seriously erode federal policy," *Florida v. Thomas*, 532 U.S. 774, 780 (2001).

In addition, the principal basis of the Washington Supreme Court's decision was that Garda waived any defense based on the content of the CBAs by repeatedly and expressly acknowledging that the agreements did not waive employees' entitlement to an on-duty meal period. Thus, Garda had conceded away the essential premise of its LMRA and NLRA arguments. Garda argues that the Washington Supreme Court's waiver ruling was itself somehow intertwined with Garda's federal preemption claims, but it was not: The court's decision was based on a straightforward reading of the statements Garda had repeatedly made in its briefs, and the court's understanding of Garda's arguments was not premised in any way on the resolution of any issue of federal law. Thus, addressing the LMRA and NLRA preemption issues Garda seeks to raise would not affect the outcome in the state court. This Court should not grant certiorari to address issues that will have no bearing on the outcome of the limited double-damages issue in this case.

Even aside from these obstacles to review, Garda's LMRA and NLRA preemption arguments do not merit review. Garda's argument that the LMRA precludes a court from entertaining a state-law claim for penalties for a statutory violation if a proffered defense of good faith involves any examination of the terms of a CBA is neither supported by the decisions of this Court nor

the subject of a disagreement among federal courts of appeals and/or state supreme courts. Indeed, this Court's decision in *Livadas v. Bradshaw*, 512 U.S. 107 (1994)—which Garda virtually ignores—contradicts Garda's assertion that a court cannot examine a CBA to determine whether a state statutory claim has been waived.

As for NLRA preemption, the essential premise of Garda's argument is erroneous: Garda claims that the Washington Supreme Court applied a state-law clear-statement principle to the question whether a CBA waives workers' statutory rights, in contravention of federal standards. The court's discussion of that issue, however, clearly explains that the court derived the clear-statement principle from *federal* law regarding construction of CBAs, including *Livadas* and other decisions of this Court. Preemption, therefore, cannot possibly come into play.

STATEMENT

Under Washington law, set forth in regulations promulgated by the state's Department of Labor and Industries, an employee must be allowed a meal period of at least 30 minutes, and an employer may not require an employee to work for more than five consecutive hours without a meal period. Wash. Admin. Code (WAC) 296-126-092(1) & (2). If the employee is allowed to leave the premises or work site, the meal period is an "off-duty" break and the employer is not required to pay the employee's time during the break. However, if the employer requires the employee to remain "on duty" on the premises or work site during the break, the employee must be paid for the meal period: "Meal periods shall be on the employer's time

when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer." WAC 296-126-092(1). An individual employee may consent on a day-to-day basis to forgo a meal period, but may not enter into a binding contractual waiver of the right to meal periods: An employee may revoke any waiver of the right to a meal period at any time. *See* Pet. App. 53a.

In 2011, the Washington Court of Appeals held in *Pellino v. Brink's Inc.*, 267 P.3d 383, that an employer violates the right to a paid, on-duty meal period if the employer requires the employee both to remain on the work site in the employer's interest and to perform work duties during that time. *See id.* at 393–98. *Pellino* relied on the text of the regulation and administrative policies promulgated by the Department of Labor and Industries, and also on prior appellate decisions establishing that while an employer may require employees to remain "on call" during paid, on-duty meal breaks, it may not require them to engage in work duties during that time. *See Frese v. Snohomish County*, 120 P.3d 89 (Wash. Ct. App. 2005); *White v. Salvation Army*, 75 P.3d 990 (Wash. Ct. App. 2003); *see also Wingert v. Yellow Freight Sys., Inc.*, 50 P.3d 256 (Wash. 2002) (employer may not require work during rest breaks required under same regulation). In *Pellino*, the court applied this principle to hold that a class of armored-car drivers and messengers had been deprived of their right to a paid, on-duty meal period because they were required to be constantly guarding their vehicles during the supposed breaks: "[T]he class members were always on active duty and never received lawful breaks." 267 P.3d at 394.

The respondents in this case are representatives of a class of armored-car-company workers who filed a

class action against their employer, Garda, based on the same type of violation as in *Pellino*: failure to provide a paid, on-duty meal period conforming to Washington law's prohibition on requiring employees to engage in work duties during the required break. The class also claimed denial of rights to 10-minute rest breaks under Washington law. Although the case was filed before the appellate decision in *Pellino*, the litigation was delayed for several years by Garda's abortive attempt to require individual arbitration of the claims after the trial court had certified the class. That effort ended when the Washington Supreme Court held the arbitration agreement on which Garda relied unconscionable, *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635 (2013), and this Court denied certiorari, 573 U.S. 916 (2014). Meanwhile, however, Garda continued the challenged practice of requiring armored-car crews to work while they were eating, thus depriving them of their right to a paid, on-duty meal period as defined by Washington law.

After the litigation resumed in the state trial court, that court granted summary judgment to the class based on undisputed facts demonstrating that they were denied paid, on-duty meal periods and rest breaks under Washington law. The court rejected, as a matter of law, various defenses proffered by Garda, including its arguments that the class's claims were preempted by § 301 of the LMRA and by the Federal Aviation Administration Authorization Act (FAAAA). After a trial on damages issues, the court awarded the class $4,209,596.61 in backpay damages and $1,668,235.62 in double damages as a statutory penalty for willful (that is, knowing and intentional) violations of both meal- and rest-period requirements, as well as prejudgment interest and attorneys' fees. The

double-damages penalty was limited to the time after *Pellino* made clear that Garda's actions violated Washington law.

Garda appealed, and the Washington Court of Appeals affirmed in part and reversed in part. As relevant here, Garda argued that the LMRA preempted the class's meal-period claims in their entirety because the right to a meal break was subject to waiver through collective bargaining, and thus, according to Garda, determining whether it had been waived would necessarily require examination of CBAs between Garda and its workers. The court pointed out that claims based on negotiable state-law rights are not preempted if those rights are independent of a CBA, but ultimately rejected Garda's preemption argument based on its conclusion that, as a matter of Washington law, the right to a meal period could not be bargained away. Pet. App. 48a–54a. Thus, the court had no need to examine the CBAs to decide the workers' claim that Garda had denied them their rights under Washington law. The court further held that the trial court had properly certified the class and, under *Pellino*, correctly granted summary judgment.

The court reversed the trial court in one respect relevant here: It set aside the award of double damages as to the meal-period violations. Although it declined to examine the CBAs to determine whether there was a real basis for the claim of waiver, the court held that Garda had established a statutory defense to double damages by identifying a "bona fide dispute" over whether the class's claim for paid meal-period rights under Washington law had been waived in the CBAs. Pet. App. 66a. The court did not reach other bases asserted by Garda for finding a bona fide dispute, including its claim of such a dispute over FAAAA

preemption. In addition, the court reversed the award of prejudgment interest as to the rest-break claims based on its view that Washington law did not permit recovery of both double damages and prejudgment interest for those claims.

Garda petitioned for review by the Washington Supreme Court, and the class representatives cross-petitioned. The court denied Garda's petition, but granted the class's petition challenging the lower court's rulings on double damages and prejudgment interest. The court reversed the court of appeals on both grounds. Only the ruling on double damages is relevant here.

As to double damages, the court held that Garda had not raised a bona fide dispute over whether the CBAs waived the workers' right to a paid, on-duty meal period, because it had conceded on appeal that it never in fact disputed that point: "Instead, Garda argued that the Plaintiffs waived their right to *off duty* meal periods and that they received their *on duty* meal periods." Pet. App. 12a. The court quoted Garda's repeated statements in its briefs that what the CBAs waived was only "the unpaid off-duty meal period contemplated by WAC 296-126-082." *Id*. Indeed, the court quoted Garda's own concession that it had consistently argued only that the CBAs waived off-duty meal periods:

> Garda argued below, as it has consistently throughout this litigation, that the Drivers intentionally and knowingly waived *off-duty* meal periods either in the agreements negotiated by the Drivers Associations or by individually signing the acknowledgments of the same. … Garda also argued that there was no wage violation because

> the Drivers were paid for such on-duty meal breaks.

Id. (emphasis added by court).

Because the workers' claim in this case was for their on-duty meal-period rights and Garda had not claimed waiver of those rights, "Garda's assertion of a bona fide dispute based on collective waiver was objectively unreasonable." Pet. App. 13a. The court made clear that it reached this conclusion "without focusing on the specific language of the" CBAs. *Id*. The court also noted that its disposition of the issue did not require it to consider whether meal-period rights could be waived in a CBA, a point on which it reserved judgment. Pet. App. 13a n.6, 19a.

Having reached its decision on the basis of Garda's concessions in its briefs, the court briefly examined the terms of the CBAs and found that they provided "further support for our conclusion that there was no bona fide dispute based on waiver," Pet. App. 13a, because all of the CBAs specifically preserved rights to a paid on-duty meal period.

The court further rejected Garda's assertion that the LMRA would foreclose any such consideration of the CBAs to consider an issue about whether they arguably waived rights based on state law. Citing federal authority including *Livadas v. Bradshaw*, 512 U.S. 107, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), *Valles v. Ivy Hill Corp.*, 410 F.3d 1071 (9th Cir. 2005), and *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2003), the court noted that the LMRA does not foreclose the assertion of rights grounded in state law independent of a CBA, and does not prohibit examination of a CBA to consider an employer's defense that a CBA waived state-law rights

asserted by an employee. Pet. App. 17a–18a. Indeed, the court pointed out, federal-court case law mandates that, when faced with such a claim that a CBA waives asserted state statutory rights, a court must consider whether the CBA "include[s] 'clear and unmistakable language' waiving the covered employee's state right." Pet. App. 19a (quoting *Valles*, 410 F.3d. at 1076 (citations omitted)).

Accordingly, the court concluded that Garda had failed to demonstrate a bona fide dispute over waiver both because it had failed to argue that the rights actually at issue had been waived and because a claim of waiver would have been unreasonable given that the CBAs did not waive those rights in clear and unmistakable language. Pet. App. 19a–20a. The court's reasoning also necessarily foreclosed any assertion that there was a bona fide dispute over LMRA preemption of the workers' claims (one of the other defenses to double damages Garda had asserted in the court of appeals). However, the court did not address other arguments Garda had made in the lower court in attempting to demonstrate an exception that would foreclose double damages. Accordingly, the court "remanded to the Court of Appeals to address Garda's remaining statutory defenses to double damages, including whether there was a bona fide dispute based on FAAAA preemption and whether the Plaintiffs knowingly submitted to Garda's meal period violation." Pet. App. 20a.

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction because the decision of the state supreme court is not final.

Garda asserts that this Court has jurisdiction over its petition under 28 U.S.C. § 1257(a), Pet. 1, but makes no attempt to explain how the decision below satisfies § 1257(a)'s express requirement of finality. Section 1257(a)'s very first word limits this Court's jurisdiction to "final" decisions of state supreme courts. As this Court stressed in *Johnson v. California*, 541 U.S. 428, 431 (2004), "[c]ompliance with the provisions of § 1257"—including the finality requirement—"is an essential prerequisite to [this Court's] deciding the merits of a case brought here under that section." Thus, "[a] petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment," *id.*, and "[i]t behooves counsel" to show "that the decision for which review is sought is indeed a '[f]inal judgmen[t]' under § 1257." *Id.* at 432. Garda's petition, however, neither acknowledges that the decision below did not finally dispose of the case, nor makes any attempt to demonstrate that the case falls within the "four exceptional categories of cases to be regarded as 'final' on the federal issue despite the ordering of further proceedings in the lower state courts." *Id.* at 429–30.

To begin with, the judgment below was not final in any ordinary sense: It *remanded* the case to the Washington Court of Appeals for consideration of additional defenses to double damages raised by Garda (including an additional defense implicating federal preemption)—a fact that Garda's statement of the case notably fails to mention. Such a disposition not only fails

to resolve the entire case, it does not even fully resolve the issue of double damages that Garda seeks to litigate in this Court.

As this Court has explained, § 1257(a) generally requires a decision that *terminates* litigation of the merits:

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Jefferson, 522 U.S. at 81. Under that standard, the Washington Supreme Court's decision remanding for further proceedings in the Washington Court of Appeals was not final because it "did not determine the final outcome of the litigation." *Pierce County, Wash. v. Guillen*, 537 U.S. 129, 141 (2003).

Moreover, jurisdiction cannot be premised on the theory that the decision below falls within the "limited set of situations in which [this Court] ha[s] found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (*per curiam*). As the Court explained in *Florida v. Thomas*, 532 U.S. at 777,

those limited situations comprise only cases falling within "four categories," *id*. at 777, identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Here, as in *Pierce County*, the Washington Supreme Court's remand decision does not fall into any of the four categories.

The first *Cox* category is inapplicable because the decision is not "conclusive" of the outcome of the remand proceedings that will determine whether Garda is liable for double damages. *Pierce County*, 537 U.S. at 141 n.5. With respect to the second category, the federal issue will not necessarily "survive and require decision regardless of the outcome of future state-court proceedings," *Thomas*, 532 U.S. at 778 (quoting *Cox*, 420 U.S. at 480), because an outcome favorable to Garda on remand would "moot" the issues it raises here, *Pierce County*, 537 U.S. at 141 n.5. The third category, which includes those rare cases (usually criminal proceedings) where there is some insurmountable bar to "later review of the federal issue …, whatever the ultimate outcome," *Thomas*, 532 U.S. at 779 (quoting *Cox*, 420 U.S. at 481), likewise does not apply under these circumstances, *Pierce County*, 537 U.S. at 141 n.5.

Finally, this case does not fall within *Cox*'s fourth category, encompassing cases in which review of the issues presented may become unnecessary later (because the party seeking review may prevail on other grounds), but "refusal immediately to review the state-court decision might seriously erode federal policy." *Thomas*, 532 U.S. at 780 (quoting *Cox*, 420 U.S. at 482–83). No federal policy would be seriously eroded by leaving in place the Washington Supreme Court's holding that Garda failed to preserve its CBA-based arguments while the Washington appellate

courts complete their consideration of Garda's other defenses to double damages—including another argument related to federal preemption. To hold otherwise would suggest that any assertedly erroneous decision involving a federal preemption claim—or, indeed, any issue of federal law applicable in state court under the Supremacy Clause—"erodes" federal policy enough to call *Cox* into play. Such a view "would permit the fourth exception to swallow the rule." *Johnson*, 541 U.S. at 430 (quoting *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (*per curiam*)).

The inapplicability of the fourth *Cox* exception is demonstrated by the contrast between this case and *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), where the Court found that a decision concerning preemption of a state cause of action fell within the fourth *Cox* exception under the circumstances of the case. *Id.* at 497 n.5. In *Belknap*, the state court's decision had "finally disposed" of the petitioner's preemption defenses, *id.*, whereas here there has been a remand for consideration of another argument involving preemption. Moreover, in that case, the preemption argument, if accepted, would have precluded the state-court litigation altogether, *id.*, while here it affects only a defense to one remedy (double damages) on a claim whose underlying merits is not before the Court.

Most significantly, in *Belknap*, the preemption issue was whether a state-court action involved claims about the substantive scope of the NLRA that were within the exclusive jurisdiction of the National Labor Relations Board. Thus, "to permit the proceedings to go forward in the state court without resolving the preemption issue would involve a serious risk of eroding the federal statutory policy of '"requiring the subject matter of respondents' cause to be heard by the ...

Board, not by the state courts."'" *Id.* (citations omitted). Here, that policy is not implicated: Garda does not contend that this case involves any issue that should properly be adjudicated by the NLRB, and it does not contest that the state courts are the "proper forum," *id.*, for respondents' state-law action. Rather, Garda asserts that federal preemption principles prevent imposition of the double-damages aspect of the remedy. Under such circumstances, forgoing immediate review of the state court's holding that Garda did not properly preserve its argument, and allowing completion of the state-court appellate proceedings concerning double damages, poses no serious risk of eroding NLRB authority or any other aspect of federal labor policy.

II. The state supreme court's decision rests principally on a state-law basis: Garda's failure to preserve the essential premise of the arguments it now seeks to present.

Review here is unwarranted for the additional reason that the decision below, although touching on Garda's LMRA and NLRA preemption arguments, rested principally on a state-law determination that Garda failed to preserve those arguments because it forfeited any claim that the CBAs purported to waive employees' rights under Washington law to a paid on-duty meal period meeting Washington's statutory requirements. Specifically, the court pointed out that Garda had consistently argued only that the CBAs "waived *off-duty* meal periods"; and far from asserting that the agreements waived employees' right to paid on-duty meal periods, Garda argued (unsuccessfully) that the employees had received such breaks. Pet. App. 12a. Because "there was no argument that the Plaintiffs waived 'on duty' (as opposed to 'off duty')

meal periods in their CBAs," *id*. at 13a, the court held that Garda had not properly asserted any claim of a bona fide dispute based on the CBAs—a conclusion that did not rest in any way on construction of the "specific language" of the CBAs, *id*., and therefore did not implicate Garda's assertions that preemption bars the state courts from construing the CBAs.

The court's holding that Garda completely failed to present the argument that was the essential premise of its LMRA and NLRA preemption claims will remain intact, and will suffice to sustain the court's decision to reject Garda's CBA-based defenses to double damages, regardless of any decision by this Court on the substance of Garda's preemption arguments. This Court should therefore decline to grant certiorari to consider those arguments. *Cf. Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986) ("[W]e have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment.").

Garda tries to evade the point by asserting that the Washington Supreme Court's determination that Garda failed to preserve any argument that the CBAs waived the right claimed by the employees "was bound up with the substantive LMRA preemption that warrants review here." Pet. 25. Garda bases this assertion on the argument that "[t]he 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." Pet. 25.

Garda's argument is nonsensical. The Washington Supreme Court's holding that Garda failed to preserve

or present the argument that is the necessary premise of its claims was not based on an interpretation of the CBAs; it was based on the Court's reading of the plain words in Garda's *briefs*. Even if the LMRA preempted the court from interpreting the CBAs, it surely did not preempt the court from reading and interpreting Garda's briefs.

Moreover, although the court's understanding of Garda's references to off-duty and on-duty breaks undoubtedly reflected the meaning of those terms under Washington law, Garda does not argue (and could not credibly argue) that the LMRA preempts the "interpretation of Washington meal-period regulations," Pet. 25, adopted in *Pellino*, under which the statutory right to an on-duty meal period means a meal period during which the employee remains on the worksite, and on call, but does not perform any work duties. That the Washington Supreme Court understood the claims in Garda's briefs about what the CBAs assertedly waived (off-duty breaks) and did not waive (on-duty breaks) in light of this established meaning of the terms under Washington law does not make its holding "derivative of the recurring preemption questions presented here." Pet. 25. Those preemption questions have no bearing on the propriety of either the *Pellino* construction of "on-duty meal period" under Washington law or the Washington Supreme Court's understanding that Garda's briefs used that terminology in the same way. The Washington court's reading of the concessions in Garda's briefs does not "implicat[e] an underlying question of federal law" and thus provides nothing for this Court to review. *Davis*, 476 U.S. at 388.

Garda's complaint that the Washington Supreme Court read its briefs incorrectly does not remotely

merit review. What a party's state-court briefs meant by the use of a particular phrase is a "fact-bound issue of little importance" to anyone other than the parties to the case. *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984). Furthermore, Garda's suggestion that the Washington Supreme Court misunderstood what it said and imposed an unexpected meaning on the words it used is thoroughly unconvincing given the history of this case.

Specifically, Garda suggests that its lawyers below somehow "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. 26. But the appeal in this case was briefed long after the Washington Court of Appeals affirmed that construction in *Pellino*, and the central issue in this case was whether Garda had denied its employees the right to a paid, on-duty meal period within the meaning of Washington law as construed in *Pellino*—not whether Garda had denied them the right to an *unpaid*, off-duty meal period. Given that background, Garda's repeated statements in its briefs that the CBAs "intentionally and knowingly waived *off-duty* meal periods" and "agreed to waive the unpaid off-duty meal period requirement," Pet. App. 12a, and its failure similarly to assert that the CBA's waived the requirements applicable to paid, *on-duty* meal periods, cannot be explained away by asserting that Garda's counsel did not expect the Washington courts to view this case as being about the denial of on-duty meal periods.

Garda's current counsel may wish that its attorneys in the state courts had made a different argument using different words, but in the context of this case, the meaning of what Garda did and did not say

was unmistakable. Because the outcome below was determined by the court's wholly justified finding that Garda failed to argue that the CBAs purported to waive the right claimed here, and not by the construction of the CBAs that Garda claims raises preemption concerns, there is no need to go further: The petition should be denied.

III. Garda's LMRA preemption argument is meritless and presents no decisional conflict requiring review by this Court.

Garda contends that the LMRA preemption issue it seeks to present—whether § 301 of the LMRA preempts a court from examining a CBA to determine whether a defendant has a bona fide claim that the CBA waives the state statutory right that is the basis of a plaintiff's claim—involves a decisional conflict that requires resolution by this Court. But Garda identifies no decision of this Court or any federal or state appellate tribunal holding that a court may not examine a CBA to address a defendant's arguments that the CBA waives a statutory right that is the basis of a claim: None of the "conflicting" decisions it cites addresses that issue.

Instead of identifying a conflict, Garda offers a 17-page merits argument for extending this Court's holdings to the circumstances of this case. *See* Pet. 13–29. Absent a true decisional conflict, such a claim of error in the application of this Court's precedents rarely presents the "compelling" circumstances necessary to justify this Court's exercise of its discretionary jurisdiction. S. Ct. R. 10. This Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Address of Chief Justice Vinson before the Am. Bar Ass'n, Sept. 7, 1949 (quoted

in Stephen M. Shapiro, *et al.*, Supreme Court Practice Ch. 4.1, at 236 (10th ed. 2013)).

The claim of error in this case is, in any event, wholly groundless, in large part because Garda's argument on the point almost completely ignores this Court's most pertinent decision, *Livadas*. *Livadas* holds emphatically that actions, like this one, that are based on state employment-law requirements that exist independently of a CBA are not preempted by § 301 of the LMRA. *See* 512 U.S. at 123–25.[1] *Livadas* further makes clear that in cases, like this one, that involve claims based on independent requirements of state law, "§ 301 does not disable state courts from interpreting the terms of collective-bargaining agreements in resolving non-preempted claims." *Id.* at 123 n.17.[2]

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[1] Contrary to Garda's assertion, nothing on the face of a claim for damages under Washington law for the deprivation of meal-period rights, or for double damages, places a CBA in issue. Establishing the willfulness required for a double-damages claim requires a showing of knowing and intentional conduct. *Schilling v. Radio Holdings, Inc.*, 961 P.2d 371, 375 (Wash. 1998). The plaintiff need not show the absence of a bona fide dispute to prove willfulness; rather, the existence of a bona fide dispute is an affirmative defense on which the defendant bears the burden of proof. *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 287 P.3d 516, 521 (Wash. 2012).

[2] *See also Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 n.12 (1988) ("[A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby preempted."). Here, as discussed below, to the extent that the Washington Supreme Court discussed the interpretation of the CBAs,

(*Footnote continued*)

Livadas thus squarely contradicts Garda's argument that the need for any such interpretation in resolving a claim results in preemption.

Moreover, *Livadas* specifically addresses the possibility that a defendant might contend that a CBA waives a state-law right that is the basis of an independent, and thus otherwise non-preempted, claim asserted by a plaintiff. *See id.* at 125. In such circumstances, *Livadas* states, the state-law claim is not preempted merely because of the interposition of a waiver-based defense that requires interpretation of the CBA. Rather, the court must determine whether the waiver is "clear and unmistakable," and, if so, "consider whether it could be given effect." *Id.* If, as *Livadas* indicates, a court entertaining a state-law claim may interpret a CBA to determine whether it waives the state-law rights at issue, it necessarily follows that a court in such a case may take the less intrusive step of looking to the CBA to determine whether it even *arguably* waives those rights in adjudicating a good-faith defense afforded the defendant under state law.

In light of *Livadas*'s discussion of the issue, it is not surprising that those federal courts that have considered the question have held that a state-law claim based on employees' statutory rights is not preempted merely because a court must look at a CBA to determine whether those rights have been waived. *See Valles*, 410 F.3d at 1076; *Cramer*, 255 F.3d at 692. As the court stated in *Cramer*:

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it properly applied federal-law principles of construction in considering whether they arguably waived employees' state-law rights.

> Where a party defends a state cause of action on the ground that the plaintiff's union has bargained away the state law right at issue, the CBA must include "clear and unmistakable" language waiving the covered employees' state right "for a court even to consider whether it could be given effect." *Livadas*, 512 U.S. at 125 (citing *Lingle*, 486 U.S. at 409–10 n.9). Thus, a court may look to the CBA to determine whether it contains a clear and unmistakable waiver of state law rights without triggering § 301 preemption.

255 F.3d at 692. *Cramer* further states unequivocally that "'look[ing] to' the CBA merely to discern that none of its terms is reasonably in dispute does not require preemption." *Id.*

Garda points to no appellate decisions, before or after *Livadas*, that disagree with *Cramer* and *Valles* by holding that the LMRA preempts an inquiry into whether a CBA arguably waives a state statutory entitlement that is the basis of an action brought by workers. The decisions on which Garda rests its claim that the Washington Supreme Court erred address very different types of claims.

For example, this Court's decision in *Allis-Chalmers* holds that a claim of bad-faith breach of a CBA, although pleaded as a state-law tort, falls within the scope of § 301 of the LMRA because the duty it seeks to enforce "ultimately depends upon the terms of the agreement between the parties." 471 U.S. at 216. Thus, the claim is subject to what the Court has labeled "complete preemption" (that is, it is deemed to arise under federal law and is actionable only under the terms of § 301, *see El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484 n.6 (1999)). Notably, even

Garda does not contend that the claims here, which seek to enforce obligations arising solely under state statutes independent of any CBA, fall into that category. *See* Pet. 27.

Allis-Chalmers, unlike *Livadas*, does not expressly discuss whether claims that arise exclusively under state law must be deemed preempted if a defendant claims that a CBA waived, or even arguably waived, protected rights under state law. Importantly, however, *Allis-Chalmers* does recognize that the LMRA does not "delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavor[]," or "grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." 471 U.S. at 212. Thus, "it would be inconsistent with congressional intent … to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.* Garda's position, however, would have just that consequence: All a defendant charged with violating such rules would have to do would be to assert that a CBA waived them, and a court would be disabled from considering whether the CBA in fact did so, and, if so, whether the waiver was valid.

Garda's reliance on *National Metalcrafters v. McNeil*, 784 F.2d 817 (7th Cir. 1986), is equally unavailing. *National Metalcrafters* held that a state right of action to enforce a CBA (specifically, to enforce its terms regarding payment of wages) was preempted because "[t]he *only* basis of the state-law claim in this case is that the company broke its contract to grant vacation pay of a certain amount." *Id.* at 824. The case did not concern obligations based on state law; indeed,

it emphasized that there was "[n]o state law" that required the payments at issue. *Id.* Accordingly, it said nothing about whether or under what circumstances a remedy for a violation of a state law could be preempted based on the defendant's claim that a CBA waived the state-law rights.

Garda's citation of *Foy v. Giant Food Inc.*, 298 F.3d 284, 288 (4th Cir. 2002), and *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 573 (7th Cir. 1989), likewise fails to support any claim of decisional conflict. Garda's own description of those cases as holding "that section 301 of the LMRA preempts state-law torts turning on questions of 'reasonableness' that are bound up with CBA terms," Pet. 22, itself reveals how far afield they are. In both cases, the claims turned on whether the defendant's conduct was "wrongful," which under the circumstances of those cases could only have been established if that conduct violated the CBAs. *Foy*, 298 F.3d at 288; *Douglas*, 877 F.2d at 571–72. Again, neither case addressed issues of asserted CBA waiver of actionable state statutory rights.

Garda's attempt to find support in two Ninth Circuit decisions predating *Livadas*, *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), and *Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1350 (9th Cir. 1985), is especially weak. Not only do those cases address different circumstances altogether, but they can hardly establish a conflict over the specific issue here—whether a court can examine a CBA to assess arguments concerning possible waiver of the state-law entitlements that are the basis of the action—given the Ninth Circuit's explicit post-*Livadas* holdings in *Cramer* and *Valles* that a court entertaining a state-law claim may examine a CBA for that purpose.

As an afterthought, Garda cites a handful of federal appellate decisions that it claims evidence a split over whether defenses to state-law claims may be considered in determining whether the claims are preempted by the LMRA. Pet. 29. Regardless of whether the holdings of those cases are reconcilable with each other, any disagreement among them is not implicated here. At most, some of the cases suggest that, under some circumstances, a defense may show that a plaintiff's claim rests on a CBA. But none suggests that such circumstances are present here. None addresses issues arising from claims that a CBA waives a state-law statutory entitlement, and none contradicts the recognition in *Livadas*, *Cramer*, and *Valles* that, faced with such an argument, a court adjudicating a state-law claim may consider whether the CBA clearly and unmistakably waives the rights at issue.

Garda's inability to find support for its position in the case law is unsurprising, because the consequences of its position are extreme. Taken to its logical conclusion, Garda's position would imply that claims seeking to enforce negotiable statutory rights could never be brought by workers subject to a CBA. By Garda's logic, such a claim would necessarily, on its "face," Pet. 27, implicate a CBA, because it would depend on the absence of a waiver in the CBA. Under Garda's view, "the preemptive force of § 301" would be "so strong that preemption must occur simply because the state right in question 'is a properly negotiable subject for purposes of collective bargaining'"—a result that "would expand the scope of § 301 preemption far beyond the limits established in *Lingle* and *Livadas*, both of which caution against such a sweeping interpretation." *Cramer*, 255 F.3d at 692–93. States

would have only two choices: make their statutory rights nonnegotiable, or surrender their ability to enforce those rights with respect to unionized workers—even when applicable CBAs did not in fact waive them.

In the absence of any decision holding that LMRA preemption extends so far, there is no reason for this Court to give plenary consideration to such an inflated view of LMRA preemption. Even absent the procedural barriers to review here, Garda's LMRA preemption argument falls well short of justifying exercise of this Court's certiorari jurisdiction.

IV. Garda's NLRA preemption argument is unfounded because the clear-statement requirement for waivers of statutory rights in collective bargaining agreements comes from federal law, not state law.

Garda's claim that the Washington Supreme Court applied a state-law clear-statement rule to determine whether a CBA waives employees' statutory rights, and that such a rule is preempted by the NLRA, does not merit review because its premise is incorrect. The state court did not apply a state-law rule of construction. As the court stated unambiguously, its observation that "a CBA cannot waive the employees' right to the protection of even a *negotiable* state law right unless it does so in 'clear and unmistakable language'" relied on federal appellate authority that in turn was based "solely on controlling United States Supreme Court law." Pet. App. 19a.

Specifically, the court quoted the Ninth Circuit's opinion in *Valles*, 410 F.3d at 1076, which in turn was based on this Court's recognition in *Livadas* that, as a matter of federal common law governing CBAs under

§ 301 of the LMRA, any waiver of workers' rights under state labor laws "would … have to be clear and unmistakable." 512 U.S. at 125. *Livadas* itself invoked previous decisions stating that this Court—not state law—would require a clear and unmistakable statement to infer that the parties to a CBA intended a waiver of individual workers' statutory rights. *See id.* (citing *Lingle*, 486 U.S. at 409–10 n.9 (1988); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)). Later decisions of this Court have continued to enforce the same requirement, even as to rights that are not "substantive." *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258–59 (2009); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79–80 (1998).

Garda asserts that, in adopting this federal standard, the Washington Supreme Court "misconstrued federal precedent." Pet. 35. But even if true, that assertion could not salvage Garda's second question presented, which is expressly premised on the erroneous proposition that the Washington court announced a "state-law rule," Pet. i, and which raises only a question of preemption that is by its terms inapplicable to the federal-law standard cited by the court.

Moreover, Garda's claim that the Washington court (and the Ninth Circuit in *Valles*) misconstrued the principle derived from *Livadas* and this Court's other decisions is meritless. Garda contends that *Livadas* said only that if a state labor standard were "*nonnegotiable*," then it would take a "clear and unambiguous" CBA to override it. Pet. 34. That interpretation is absurd: If the state labor standard were nonnegotiable, then a CBA would not override it regardless of the CBA's clarity, as *Livadas* recognized. 512 U.S. at 123.

Garda's misreading of *Livadas* is only possible because of its insertion of the phrase "making state rights nonnegotiable" into the sentence it quotes from *Livadas*. Pet. 34 (citing *Livadas*, 512 U.S. at 125). Read fairly and without the insertion of an extraneous reference to nonnegotiable rights, the critical sentence in *Livadas* means that CBA language would have to be clear and unmistakable "for a court even to consider whether it could be given effect," 512 U.S. at 125—that is, to consider whether the right it purported to extinguish was a *negotiable* one that could be overridden by contract. Garda's citation of *Wright*, Pet. 34–35, only underscores that its position is incorrect. In that case, the Court applied the "clear and unmistakable" standard to waiver of a right that was clearly *negotiable*: the right to a particular forum for asserting a claim. Indeed, *Wright* stated unambiguously that that procedural right could be waived by contract, 525 U.S. at 80, unlike the underlying substantive right to pursue statutory discrimination claims, which cannot be prospectively waived regardless of the clarity of contractual language purporting to do so, *see Pyett*, 556 U.S. at 258–59.

If Garda's illogical reading of *Livadas* were correct, presumably some appellate court would have adopted it in the quarter-century since the case was decided. Tellingly, Garda does not purport to cite any decision holding that the clear-and-unmistakable standard for waivers of statutory rights in CBAs applies only to nonnegotiable rights. The best Garda can do is assert that a solitary state intermediate appellate court has "expressed uncertainty on this same point." Pet. 35 (citing *Ehret v. WinCo Foods, LLC*, 236 Cal. Rptr. 3d 572, 575 (Cal. Ct. App. 2018)). But *Ehret* expressed lit-

tle uncertainty: It questioned only "whether a collective bargaining agreement can *ever* waive a *nonnegotiable* right" and suggested that "only a negotiable right can be waived, and the clear and unmistakable standard applies to such a waiver." *Id*. It went on to "assume that … the clear and unmistakable standard applies to *any* waiver in a collective bargaining agreement of *any* statutory right." *Id*. In other words, Garda's best authority for the existence of "uncertainty" took a view diametrically opposed to Garda's, and fully consistent with *Valles* and the decision below.

More to the point, no federal appellate court or state supreme court has disagreed with or criticized *Valles*'s holding that the clear-and-unmistakable standard applies "where … under state law waiver of state rights may be permissible." 410 F.3d at 1076. In the absence of any appellate authority supporting Garda's idiosyncratic view, there would be no need for this Court to address the issue, even if Garda's petition had asked the Court to address the proper federal standard for CBA waiver of statutory rights rather than presenting only an irrelevant question about preemption of state law.

Garda's reliance on the California Supreme Court's decision in *California Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019 (Cal. 2011), does nothing to salvage its claim. *California Grocers* held that an ordinance requiring grocery stores to retain staff for 90 days after a change in ownership was not preempted by the NLRA. The court found that nothing in the NLRA indicated congressional intent to dictate that such matters be unregulated under state law, that the ordinance did not impermissibly regulate labor organizations or collective bargaining, and that the neutral

terms of the ordinance neither favored nor disfavored unionized workers and employers. *See id.* at 1030–37. The decision neither addresses the standard of clarity that a CBA must meet to waive statutory rights, nor suggests that adoption of a clear-and-unmistakable standard based on federal decisional law is inconsistent with the NLRA.

Finally, Garda's claim that the state court applied a more stringent standard to the claimed waiver in the CBAs than it would have applied to a waiver in an individual employment agreement fails on the facts. Although Washington law allows an individual employee to waive required meal periods, such a waiver is revocable at any time. Pet. App. 53a. Thus, an individual employment agreement cannot contain a contractually binding waiver of meal-period rights—the employee must always be free to claim his or her right to a meal period. Moreover, any waiver by an individual must be either express or demonstrated by "unequivocal acts or conduct evidencing an intent to waive." *Pellino*, 267 P.3d at 399. Garda is therefore flatly wrong that Washington would permit the rights at issue to "be negotiated away individually" more readily than in a CBA. Pet. 35. Rather, the clear-and-unmistakable standard helps ensure parity between the statutory rights of unionized and nonunionized workers.[3]

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[3] Holding that the rights cannot be collectively bargained away, as the court of appeals did, is the only way to ensure full parity by guaranteeing that an individual worker always has the right to claim a meal break regardless of any prior waiver.

V. The Court should reject Garda's suggestion that it grant certiorari to construe the collective bargaining agreements.

Lastly, Garda's petition argues that the Court should grant certiorari to determine whether the CBAs in fact waive workers' rights to paid, on-duty meal periods meeting the requirements of Washington law. That request has nothing to do with the issues of federal law that the petition identifies as the questions presented, *see* Pet. i, and the Court should disregard it for that reason alone.

Even if the petition had sought to present the question of contract construction, such an issue would not merit review. As the Court stated in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651 (1986), "it is usually not our function in the first instance to construe collective-bargaining contracts." Thus, in *AT&T*, the Court, having held that the lower courts should have applied a clear-and-unmistakable standard in determining whether a CBA waived the right to a judicial determination of issues of arbitrability, left it to the lower courts to construe the CBA under that standard. Likewise, here, the Court should not take on the task of reviewing contract language in the absence of a properly presented question of federal law that merits review.

Garda nonetheless insists that the Court should review the construction of the CBAs because "[o]ther jurisdictions correctly applying the federal law of CBA interpretation have held similar language sufficient to establish waiver." Pet. 36. Again, Garda cites only the intermediate appellate court decision in *Ehret*, which found different language sufficient to clearly and unmistakably waive different statutory rights under

California law. Specifically, *Ehret* concluded that the contracts at issue included language about meal periods that was "irreconcilable" with the otherwise applicable requirements of California law. 236 Cal. Rptr. 3d at 573. That conclusion may or may not have been correct on the facts of *Ehret*, but it has nothing to do with whether the CBAs here waived the rights available under Washington law. *Ehret* certainly does not present the type or degree of decisional conflict that calls for resolution by this Court.

Moreover, Garda's insistence that its CBAs must be construed so that its obligations to its workers are the same in every state, Pet. 19–20, reflects a fundamental failure to understand that any state-to-state differences do not reflect that the same CBA terms mean different things in different states, but rather that background obligations of state law differ from state to state. Garda's CBAs likely would not waive a right to paid, on-duty meal periods free from work obligations in any state—but not all states confer such a right. The LMRA and NLRA do not guarantee employers that worker protections will not vary from state to state. *See Lingle*, 486 U.S. at 409.

Finally, Garda's request that the Court construe its CBAs assumes that the rights at issue are subject to collective bargaining and, potentially, waiver in a CBA. But the Washington Supreme Court reserved that question, Pet. App. 19a, and it is doubtful that, if forced to address it, the court would resolve it in favor of Garda. *See* Pet. App. 51a–54a (intermediate appellate court's opinion explaining its view that the right is nonnegotiable). A holding on remand that the right is nonnegotiable would render a decision by this Court construing the CBAs in Garda's favor—or ruling in Garda's favor on its preemption claims, which likewise

assume that the right can be waived in a CBA—a waste. Even if the issues raised by Garda had some arguable merit, this Court should address them only in a case where there is a substantial basis for believing that doing so would make a difference to the ultimate outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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