Case No. 18-1083

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case well-illustrates the lower courts' continued confusion over the scope of preemption under the Labor Management Relations Act ("LMRA") and the National Labor Relations Act ("NLRA"). Despite this confusion, Plaintiffs urge this Court *not* to accept review, devoting most of their brief in opposition to the contention that this case is an inappropriate vehicle for resolving the questions presented. They argue, for example, that the ruling below concerning LMRA preemption is not yet "final" for purposes of 28 U.S.C. § 1257(a), that Garda failed to preserve its LMRA-preemption argument, and that the lower court's "clear and unmistakable" meal-period waiver requirement for collective bargaining agreements ("CBAs") does not implicate any NLRA-preemption concerns.

Plaintiffs are wrong at every turn. Because the opinion below fully and finally decided Garda's LMRA- and NLRA-preemption defenses, the Washington Supreme Court's decision to remand on other issues does not create a "finality" problem. Because the court's "waiver" holding is bound-up with its misreading of the parties' CBAs—and is meritless to boot—it furnishes no "independent" or "adequate" state-law ground that could forestall this Court's review. And because the lower court's "clear and unmistakable" language test for CBA meal-period waivers is an impermissible *state*-law rule, not a *federal* rule endorsed or adopted by this Court, the opinion below squarely raises the NLRA-preemption question presented in the Petition. Certiorari is warranted.

I. THE DECISION BELOW IS "FINAL" FOR PURPOSES OF 28 U.S.C. § 1257(a)

Plaintiffs maintain that the ruling below is not yet "final" within the meaning of 28 U.S.C. § 1257(a) because the Washington Supreme Court "'remanded [Plaintiffs' double-damages claims] to the Court of Appeals to address Garda's remaining statutory defenses …, including whether there was a bona fide dispute based on [non-LMRA] preemption and whether the Plaintiffs knowingly submitted to Garda's meal period violation.'" BIO 9.

But this Court has never adopted any bright-line rule insulating a state court's ruling on federal issues from review merely because it remands on other, non-federal aspects of a case. Instead, the Court takes a "pragmatic approach" to finality. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). According to that approach, there are several circumstances in which the Court will "treat[] the decision on the federal issue as a final judgment for the purposes of" section 1257 and will "take[] jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477.

This case falls neatly into at least one such circumstance:

> [W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, … and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely

> controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue.

Id. at 482-83.

Here, the Washington Supreme Court has finally decided a crucial "federal issue"—namely, whether Plaintiffs' double-damages claims are preempted by the LMRA. There is a possibility that Garda will "prevail" on remand "on nonfederal grounds," which would rob this Court of the ability to cure the lower court's misguided preemption jurisprudence. This Court's "reversal" of the Washington Supreme Court's erroneous preemption holding "would be preclusive of any further litigation" on Plaintiffs' double-damages claims. What's more, the "refusal immediately to review" the lower court's preemption decision "might seriously erode" federal labor policy, including the long-established policy requiring state-law claims that are "substantially dependent upon analysis of the terms of [a CBA]" to be "brought under § 301" of the LMRA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210, 220 (1985). Section 1257(a) thus does not bar this Court's review.

Indeed, this Court frequently has agreed to review questions, like those presented here, concerning the scope of a federal statute's preemptive force *despite* the fact that the state-court decision rejecting preemption contemplates further proceedings. In *Mississippi Power & Light Co. v. Mississippi ex rel.*

Moore, 487 U.S. 354 (1988), for example, respondents argued that the state court's judgment was "not 'final' within the meaning of 28 U.S.C. § 1257 because further proceedings will be held on remand." *Id.* at 370 n.11. This Court rejected that argument, however, explaining that "[t]he critical federal question—whether federal law pre-empts such proceedings …—ha[d] already been answered by the State Supreme Court and its judgment [was] therefore ripe for review." *Ibid.* Similarly, in *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983), this Court found finality where, as here, the state court's decision "finally disposed of the federal preemption issue." *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-79 (1988) (deeming a judgment final "even though further proceedings are anticipated" because "[t]he federal question whether the additional workers' compensation award is barred by federal law has been finally determined by the Ohio Supreme Court").

Plaintiffs nevertheless claim that the decision below is not "final" because "[n]o 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." BIO 12-13. But that argument is built on the (false) premise that the lower court's "waiver" holding is an independent and adequate state law ground that, alone, supports the lower court's no-preemption holding. As described below, that "waiver" holding falls short of both the "independent" and "adequate" marks. *See infra* 5-7; *see also* Pet. 25-26. This Court should accordingly reject Plaintiffs' arguments based on 28 U.S.C. § 1257(a)'s finality requirement.

II. THIS CASE PRESENTS A SUITABLE VEHICLE FOR RESOLVING THE PERSISTENT APPELLATE-COURT CONFLICT OVER THE SCOPE AND APPLICATION OF LMRA PREEMPTION

Plaintiffs resist certiorari on Garda's first question on two grounds. First, they argue that this case is a poor vehicle for addressing the scope of LMRA preemption because the Washington Supreme Court held that Garda "fail[ed] to preserve the essential premise of" its preemption arguments. BIO 14. Second, Plaintiffs contend that there is no real split of authority on the LMRA-preemption issue presented by this case. Neither argument is persuasive.

A. To start, Plaintiffs' alleged vehicle problem is illusory. Under the independent-and-adequate-state-law doctrine, "[t]his Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (citation omitted). Here, the Washington Supreme Court's "waiver" holding is neither "independent" nor "adequate."

On independence: "[W]hen the … independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Here, that presumption weighs in favor of this Court's jurisdiction. After all, the

Washington Supreme Court went on to interpret the language in Plaintiffs' CBAs despite purporting to find "waiver," and fully and finally decided that it had authority to do so under the LMRA. *See* Pet.App. 13a-20a. Because the state court plainly found it necessary to address the LMRA-preemption questions at issue in this Petition, its "waiver" holding is not "clear[ly]" "independent" and does not preclude this Court's review of those same federal questions.

That is doubly so here, where the Washington Supreme Court's "waiver" holding is "'interwoven'" with the preemption issues raised by Garda's Petition. *Long*, 463 U.S. at 1038 n.4 (citation omitted). Contrary to Plaintiffs' claim, this was not a simple matter of "the Washington Supreme Court read[ing] [Garda's] briefs incorrectly." BIO 16. Garda's briefs deliberately used the "on duty"/"off duty" language because that was the language used in the relevant CBAs: "on duty" meal periods in the CBAs were periods that Plaintiffs must work through; "off duty" periods were periods that required no work. *See* Pet.App. 15a-16a. Garda's briefs argued that Plaintiffs waived this latter category of meal periods in their CBAs, in favor of being paid for the former. The Washington Supreme Court nevertheless found that Garda had "waived" its waiver argument *only* because that court leveraged *Washington state law*'s unique understanding of the meaning of the term "on duty" to misinterpret the parties' CBAs and, in turn, Garda's appellate briefs. That reasoning itself contravenes section 301 of the LMRA and this Court's precedents. In these circumstances, "where the non-Federal ground is so interwoven with the other as not to be an independent matter," this Court's

"jurisdiction is plain." *Enterp. Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

Nor is the "waiver" holding an "adequate" basis for the Washington Supreme Court's no-preemption determination. As this Court has long explained, Plaintiffs cannot evade Supreme Court review by relying on a (purported) state-law ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Ibid.* Instead, this Court "insist[s] that the nonfederal ground of decision have 'fair support.'" *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 725 (2010).

There is no such "fair support" here. As the court below acknowledged, Garda argued that Plaintiffs had affirmatively waived their right to a "meal period … during which the employee is *relieved of all work duties*." Pet.App. 12a (emphasis added). Although Garda might not have used particular state-law magic words in making that argument, the substance of Garda's argument was broad enough to cover the meal-period rights Plaintiffs seek to enforce in this case—that is, meal periods during which Plaintiffs are *so* "relieved of all work duties" that they need not even be present at the workplace. *See* Pet. 25-26; BIO 3. This Court should therefore reject the Washington Supreme Court's "waiver" argument as inadequate to support its no-LMRA-preemption conclusion. *See Wright v. Georgia*, 373 U.S. 284, 289-91 (1963) (finding "no adequate state ground" based on "abandon[ment]" because "[o]bviously petitioners did in fact argue the point which they press in this Court").

B. Plaintiffs' attempts to reconcile the decision below with this Court's precedents and the other appellate decisions discussed in Garda's Petition likewise fall flat.

Plaintiffs first discuss *Livadas v. Bradshaw*, 512 U.S. 107 (1994), claiming that the holding in that case fully supports the Washington Supreme Court's no-preemption determination. *See* BIO 19-21. That is wrong. *Livadas*, in fact, says little of merit about the preemption issues involved here. There, unlike here, the Court considered whether enforcement of a *non-negotiable* state-law right was preempted by section 301 of the LMRA. *Livadas*, 512 U.S. at 125. And there, unlike here, the CBA was "irrelevant to the dispute" because "there [was] no suggestion [] that [plaintiff's] union sought or purported to bargain away her protections under" state law. *Ibid.* Here, the Washington Supreme Court expressly assumed that the state-law right *could* be bargained away, and the crucial question became whether the CBAs should be interpreted to accomplish that. It then erred in applying state law to interpret terms in the CBAs and to require greater clarity and specificity in CBAs than in individual contracts.

Indeed, *Livadas* only underscores the magnitude of the Washington Supreme Court's error: *Livadas* notes that while state courts may "interpret[] the terms of [CBAs] in resolving non-pre-empted claims," they "must apply *federal* common law" when doing so. *Id.* at 123 n.17 (emphasis added). The court below did not follow that command; instead, it applied "[a] state rule that purports to define the meaning or scope of a term in" the parties' CBAs—a tack that "is pre-

empted by federal labor law." *Allis-Chalmers*, 471 U.S. at 210.

Plaintiffs next contend that the appellate decisions cited in Garda's Petition "fail[] to support any claim of decisional conflict" because none of those cases "address[] issues of asserted CBA waiver of actionable state statutory rights." BIO 23; *see also id.* at 22-23. But any differences concerning the *context* in which the LMRA-preemption issue arises does not ameliorate the tension between the LMRA-preemption *rules* announced in Garda's cited cases and the holding below. As Garda explained in its Petition, the Fourth, Seventh, and Ninth Circuits have correctly held that state-law claims are *preempted* when they require the plaintiff to show that the defendant's conduct was "willful," "wrongful," or otherwise unreasonable and thus depend on whether the defendant's behavior violated the terms of a CBA. *See* Pet. 21-22. Here, by contrast, the Washington Supreme Court adopted a different preemption rule, finding no LMRA preemption despite the fact that Plaintiffs must establish that Garda's failure to pay them for meal periods was "willful," and despite the fact that resolving that "willfulness" question would require close examination of the parties' CBAs. *Id.* at 23.

Finally, Plaintiffs protest that Garda's understanding of the scope of LMRA preemption is "extreme" and cannot be correct. BIO 24-25. But that is a merits argument, and does nothing to change the need for this Court's intervention. In any event, there is nothing "extreme" in suggesting that the lower courts should uniformly apply the LMRA-preemption rules described in *Allis-Chalmers* and its progeny,

whereby state-law claims that, as here, are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" "must be brought under § 301 and be resolved by reference to federal law." 471 U.S. at 210, 220.

III. THE WASHINGTON SUPREME COURT IMPOSED AN IMPERMISSIBLE *STATE-LAW* "CLEAR AND UNMISTAKABLE" TEST ON COLLECTIVE MEAL-BREAK WAIVERS

Plaintiffs next contend that there is no NLRA-preemption issue for this Court to resolve because the Washington state law that Garda complains of—that is, the requirement that *collective* waivers of meal-period rights be stated in "clear and unmistakable" language—is not really a *state* law at all, but is, instead, a *federal* rule of CBA interpretation. BIO 25-26. Wrong again. The Washington Supreme Court's clear-statement rule is wholly a creature of *state* law, and because that rule applies only to CBAs, the rule runs afoul of the NLRA.

As an initial matter, contrary to Plaintiffs' claim, there is no federal clear-statement rule that governs collectively bargained waivers in cases like this one, where state law plainly allows individual employees to negotiate away their meal-period rights. Here, Plaintiffs do not, and cannot, dispute that Washington's meal-period rights are "negotiable." The Washington Court of Appeals held as a matter of state law that these rights were *individually* negotiable, but not *collectively* negotiable. *See* Pet.App. 51a-54a. The Washington Supreme Court

attempted to soften this blatant discrimination against collective bargaining by adopting a slightly more subtle rule: It explicitly *assumed* as a matter of state law that the rights were collectively negotiable, but then applied a heightened standard that CBAs uniquely must meet to actually negotiate those rights. *See* Pet.App. 19a.

As a result, the cases Plaintiffs cite to support the Washington Supreme Court's clear-statement rule are entirely inapposite. Each of Plaintiffs' cases concerned either *non-negotiable* state rights or certain fundamental *federal* labor rights. For example, *Livadas* considered whether a plaintiff had "bargain[ed] away [certain employee] protections" under California law. 512 U.S. at 125. This Court held that any such "waiver … would (*especially in view of Labor Code § 219*) have to be clear and unmistakable." *Ibid.* (emphasis added; internal quotation marks omitted). The driving force behind this Court's "clear and unmistakable" test was therefore a California statute that made the rights in question *non-negotiable*. *See* Cal. Labor Code § 219(a) ("[N]o provision of this article can in any way be contravened or set aside by a private agreement."). Other decisions of this Court confirm this limited application of the federal clear-statement rule. *See, e.g.*, *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-10 n.9 (1988) ("We note that under Illinois law, the parties to a [CBA] may not waive the prohibition against retaliatory discharge…. Before deciding whether such a state-law bar to waiver could be pre-empted under federal law by the parties to a [CBA], we would require 'clear and unmistakable'

evidence … in order to conclude that such a waiver had been intended.").

Valles v. Ivy Hill Corp., 410 F.3d 1071 (9th Cir. 2005), is consistent with this limited view of the federal clear-statement rule's scope. Plaintiffs suggest that *Valles* "h[eld] that the clear-and-unmistakable standard applies 'where … under state law waiver of state rights may be permissible.'" BIO 28 (quoting *Valles*, 410 F.3d at 1076). That is wrong. The *holding* in *Valles* could not possibly have said anything about whether *negotiable* state rights can be waived only through "clear and unmistakable" language because the meal-period rights at issue in that case—unlike in this case—were *non-negotiable*. *See* 410 F.3d at 1082.

Plaintiffs' opposition to certiorari is thus fundamentally flawed. There is no basis in federal law for the discriminatory standard that the Washington Supreme Court applied in finding waiver of *negotiable* rights in CBAs, but not in individual contracts. Instead, that court adopted an expanded *state* clear-statement rule of CBA construction that improperly discourages the collective-bargaining process. That rule is therefore preempted by the NLRA. *See Cal. Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019, 1031 n.7 (Cal. 2011) ("[R]egulations aimed solely at unionized workers may intrude into aspects of organizing and bargaining Congress intended the states not to regulate.").

This Court should accordingly grant certiorari not only to correct the Washington Supreme Court's error, but also to cure the appellate courts' continued confusion over the proper scope and application of the

clear-statement rule described in *Livadas* and *Lingle*. *See* Pet.App. 18a-20a; *Ehret v. WinCo Foods, LLC*, 26 Cal. App. 5th 1, 6 (2018).

CONCLUSION

The Court should grant Garda's petition.

Respectfully submitted,

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