No. 20-1744

IN THE

Supreme Court of the United States

GOOGLE, INC., ALPHABET, INC.,
AND ADECCO USA, INC.,

Petitioners,

v.

JOHN DOE, DAVID GUDEMAN,
AND PAOLA CORREA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (FIRST APPELLATE DISTRICT)

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

The Statement Pursuant to Rule 29.6 set forth in the Petition for a Writ of Certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Statutes and Other Authorities

I. THIS COURT HAS JURISDICTION UNDER WELL-ESTABLISHED FINALITY RULES.

Respondents (the Plaintiffs below, hereafter referenced as "Plaintiffs") concede, as they must, that a state-court decision may be a final judgment within the meaning of 28 U.S.C. section 1257 if it has "finally determined the federal issue in the case, but there are still proceedings to be had in the lower courts." Opp. 15. But Plaintiffs assert that the decision below did not finally determine the question of NLRA preemption; it merely overruled Google's and Adecco's demurrers "based on California's permissive pleading standard." *Id.* 15.

Plaintiffs' assertion has no basis in the text of the decision. The majority opinion contains not a single line suggesting that the case turned on a "pleading standard."[1] And the decision on the preemption issue—based on a demurrer ruling or otherwise—stands as law of the case in all subsequent proceedings.[2]

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1. Plaintiffs mischaracterize a line from Justice Brown's dissenting opinion as a comment on California's pleading standards. Opp. 15-16. In fact, Justice Brown succinctly stated why certiorari should be granted. Here is Justice Brown's point, with the context restored: "As the trial court here recognized, if a complete overlap of elements were a prerequisite under *Garmon*, then any state law claim with even a single different element from an NLRA unfair labor practice charge would avoid preemption. The Supreme Court has never taken this sort of formulaic approach to *Garmon* preemption—an approach that would make preemption easily avoidable by all but the most inept of complaint-drafters." Pet. App. 48a-49a. Justice Brown's objection to the majority's analysis rested on its misstatement of substantive law, not the procedural posture of this case.

2. *Nally v. Grace Cmty. Church*, 47 Cal. 3d 278, 301 (1988). Plaintiffs cite *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997),

That the decision below finally disposed of the NLRA preemption issue is unmistakable. Relying on the local interest exception to *Garmon* preemption, the majority held that "our courts retain the power to decide these claims." Pet. App. 33a. Therefore, this case fits squarely within the fourth category of finality identified in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 482-83 (1975): "[T]he 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] reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." "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 483.

Cox Broadcasting specifically cited preservation of the NLRB's exclusive jurisdiction against state-court intrusion as an appropriate application of this finality rule. 420 U.S. at 483 (quoting *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963) (overturning state-court preliminary injunction against labor union picketing)).

Subsequent cases have found state-court decisions on NLRA preemption to be especially ripe for this Court's immediate review. That's because *Garmon* preemption "is a choice-of-forum rather than a choice-of-law question.

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for its holding that the law of the case doctrine under state law does not bar later Supreme Court review of a final judgment. Opp. 16 n.7. But here the California Court of Appeal decision *is* a final judgment under *Cox Broadcasting*, whereas the decision in *Jefferson* was not.

As such, it is a question whether the State or the Board has jurisdiction over the dispute. If there is pre-emption under *Garmon*, then state jurisdiction is extinguished." *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391 (1986) (explicating *Curry*). "'[W]here the proper forum for trying the issue joined in the state court depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court, if it is to be decided at all, *sooner rather than later* in the course of the litigation.'" *Belknap, Inc. v. Hale,* 463 U.S. 491, 497-98 n.5 (1983) (emphasis added; citation omitted) (treating as a final judgment a state appellate decision reversing a summary judgment that had been granted on NLRA preemption grounds).

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Plaintiffs entitle Part II of their Opposition, "The Petition's Question Presented Misrepresents The Proceedings Below." Opp. 18. But below this eye-catching heading, Plaintiffs do not cite a single "misrepresentation" anywhere in the Petition. This case is well suited for resolution of the Question Presented.[3]

Plaintiffs attempt to sever—or at least obscure—the link between the NLRB case that Plaintiff John Doe launched and successfully pursued, and his state-court lawsuit. To this end, Plaintiffs note that Doe was later joined by two other plaintiffs, who did not file their own

3. "Where plaintiff has sought and obtained relief under the National Labor Relations Act, does the Act preempt plaintiff's state-law claim for penalties for the same conduct?" Pet. *i.*

unfair labor practice charges. Opp. 18. They also point out that no charge was filed against Adecco or Google's parent company, Alphabet. *Id.* And they say that their lawsuit would encompass supervisors and others not subject to the NLRA. *Id.*

The same response applies to all of these contentions: They ignore the applicable test of *Garmon* preemption. As this Court explained in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971), "Pre-emption[] . . . is designed to shield the system from *conflicting regulation of conduct.* It is *the conduct being regulated*, not the formal description of governing legal standards, that is the proper focus of concern." (Emphasis added.) The Petition highlights *Lockridge,* noting both the majority opinion's failure to cite it and this Court's subsequent reliance upon it in *Wisconsin Department of Indus. v. Gould*, 475 U.S. 282 (1986). Pet. 7-8. It is telling that Plaintiffs relegate *Lockridge* to a footnote, and make no effort to address its holding that "the conduct being regulated" governs the preemption analysis.

What is "the conduct being regulated" here? It is Google's and Adecco's allegedly overbroad policies. As the trial judge correctly stated, "[H]ere we have an NLRB complaint which attacks *the same policies* at issue in the state case." Pet. App. 81a (emphasis added). And as Justice Brown stressed, "[T]he regional director's settlement *has already caused Google to change the same policies about which plaintiffs now complain*." *Id.* 58a (emphasis in original).

Disputing these observations by the trial judge and Justice Brown, Plaintiffs assert that the Board considered

only a narrow slice of the Google policies about which Plaintiffs complain in their lawsuit. Opp. 8-9. Not true. Plaintiffs' complaint[4] challenges Google's "Code of Conduct" (Opp. App. 21), "Data Classification Guidelines" (*Id.* 22), and "Employee Communication[s] Policy" (*Id.*). Google's settlement agreement with the NLRB documents Google's rescission of the allegedly overbroad provisions in all of these policies: Google's "Code of Conduct"; "Data Classification Guidelines" (and related "Data Security Policy"); and "Employee Communications Policy[.]" Pet. App. 177a.[5]

Similarly, Plaintiffs point to state-law causes of action that they say are outside the exclusive jurisdiction of the NLRB—"illegal restraints of trade" (Opp. 5), "whistleblowing claims" (*Id.* 6), and "freedom of speech claims" (*Id.*). Plaintiffs thus ignore, yet again, this Court's

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4. Plaintiffs have included their Fifth Amended Complaint in the Appendix to their Opposition. This is an odd choice, as the trial court sustained without leave to amend Google's demurrer to the Third Amended Complaint, and Adecco's demurrer to the Fourth Amended Complaint. Pet. 4. If this Court, as it should, reverses the erroneous court of appeal opinion, the Fifth Amended Complaint will be moot. Accordingly, this Reply Brief addresses only the claims operative at the time of the demurrers now at issue.

5. Plaintiffs argue that Google's "NDA" (styled "Confidentiality Agreement" in the state-court complaint (Opp. App. 18)) was dropped from the regional director's amended complaint. Opp. 9. That Plaintiff John Doe did not get all the relief he sought from the NLRB changes nothing. NLRA preemption is often found where the NLRB declines to act altogether, as happened in *Garmon* itself. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). The test is whether the conduct at issue "*arguably*" violates the NLRA, not whether upon final analysis it *actually does*. *Id.*

teaching in *Lockridge*. That plaintiff argued that his breach of contract claim was not subject to the NLRB's jurisdiction, because elements of a breach of contract claim differ from those of an unfair labor practice. The Court rejected this contention out of hand: "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U.S. at 292.

Setting aside the preemption-dispositive fact that all of Plaintiffs' state-law claims against Google arise from the policies that the Board addressed, Plaintiffs' invocation of supposedly NLRA-free causes of action fails for an additional reason. That is, the subject matter of the NLRB's exclusive jurisdiction is inextricably woven into these claims, as it is throughout the lawsuit as a whole. The two "Illegal Restraint of Trade" counts allege that Google's policies prohibit employees from disclosing "their own and other employees' working conditions and wages" (Opp. App. 41) and other information "about their wages and working conditions[]" (*Id.* 42). Three of the "whistleblowing" counts are captioned, "Illegal Prohibition on Whistleblowing About Working Conditions" (*Id.* 48); "Illegal Prohibition on Whistleblowing about Wages" (*Id.* 50); and again, "Illegal Prohibition on Whistleblowing about Wages" (*Id.* 52). Even the so-called "free speech" count based upon California Labor Code section 96(k) alleges that Google's policies prohibit "disclosing information about wages and working conditions." Opp. App. 55. All of these alleged wrongs were remedied in Google's settlement with the NLRB, and all implicate a core NLRA issue: protected concerted activity.

III. THE COURT OF APPEAL MAJORITY IGNORED OR MISAPPLIED THIS COURT'S CASES.

A. The NLRA Protects Employee Speech About Wages And Working Conditions.

Where the NLRB has obtained the employer's rescission of policies allegedly restricting employee speech, it is passing strange to be told that the Board has no power to do what, in fact, it did. But, echoing the majority below, Plaintiffs insist that PAGA safeguards individual rights, whereas the NLRA narrowly protects only group action. Opp. 11-12, 28-29.

Plaintiffs do not even mention, much less attempt to distinguish, the numerous Board and circuit-court cases protecting employees' right to disclose and discuss their wages and working conditions. Pet. 14-16. Plaintiffs' suggestion that this right may be limited to discussions among co-workers (Opp. 28) is wrong. Employees have a Section 7 right to discuss their wages and working conditions with customers, advertisers, news reporters, "and the public in general." *Kinder-Care Learning Ctrs., Inc.*, 299 NLRB 1171, 1171 (1990). An employer's rule denying employees these fundamental Section 7 rights is "invalid on its face." *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919-20 (3d Cir. 1976).

Plaintiffs argue that employees may choose to "speak about their employers, wages, or working conditions for reasons unrelated to section 7 rights—e.g., to negotiate a higher salary with a new employer, impress a date, write a book, see a therapist, or complain, on an individual basis, about their wages." Opp. 28-29. But the *purpose* to which

employees may put their freedom to speak is immaterial to the preemption analysis. "'[T]he proper focus of concern'" is "'the conduct being regulated.'" *Gould*, 475 U.S. at 289 (quoting *Lockridge*, 403 U.S. at 292). In the present case, Google has settled with the NLRB and rescinded the allegedly overbroad rules. Therefore, that employees may disclose their wages and working conditions to "impress a date, write a book, [or] see a therapist," or for any other reason, has no bearing on preemption.

B. *Gould* Prohibits Piling State-Law Penalties Upon The NLRA's Remedies.

The Petition details how *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986), prohibits state-law penalties from being piled on top of NLRA remedies for the same conduct. Pet. 6-10. Plaintiffs respond: "*Gould* Did Not Silently Eliminate *Garmon*'s Exceptions." Opp. 23. But Google and Adecco have never claimed that *Gould* eliminated *Garmon*'s local interest exception—silently or otherwise. *Gould* is not only consistent with *Garmon*, but is itself an application of *Garmon*'s preemption principles. "[T]he *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Gould*, 475 U.S. at 286. *Gould* further teaches that, because the NLRA is a remedial statute, conflict with the NLRA "is made all the more obvious" when state law imposes penalties on top of the NLRA's remedies. *Id.* at 288 n.5.

Plaintiffs argue, "*Gould* did not involve the state's police power." Opp. 23. This is a distinction without a difference, as *Gould* makes clear: "That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when 'two separate remedies are brought to bear on the same activity.'" *Gould*, 475 U.S. at 289 (citation omitted). The Court continued: "To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. 'It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.'" *Id.* (citing *Lockridge*, 403 U.S. at 292).

C. Nothing In The Local Interest Exception Applies Here.

Plaintiffs argue that a union leader who murders an employee for refusing to join the union has committed an unfair labor practice, but can nevertheless be charged with the crime of murder, and sued for wrongful death. Opp. 3-4. Of course that is true. But far from serving as an "analogy" to the present case, as Plaintiffs claim, this story proves Google's and Adecco's point. The state's interest in punishing murder is the paradigmatic example of a local interest "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. Here, as Justice Brown pointed out, the claimed local interest "is substantially different on its face from the state interests the Supreme Court has so far recognized as supporting the exception." Pet. App. 44a. The majority, Justice Brown noted, cited no authority

suggesting that "the United States Supreme Court would view the Labor Code provisions here as implicating interests similar to the state's desire to prevent violence or protect property from trespass." *Id.* 44a-45a.

Plaintiffs cite several well-known examples of this Court's application of the local interest exception, all of which feature common-law claims. Opp. 21. To be sure, some common-law claims, under some circumstances, can be exempt from NLRA preemption. But that is the case only where the claim is "deeply rooted in local feeling and responsibility," as opposed to claims under recent statutory enactments like California's Private Attorneys General Act, effective January 1, 2004.

Plaintiffs principally rely on *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), in which the Court held that the NLRA did not preempt a defamation claim arising out of a labor dispute. Opp. 20-22. But *Linn* rejected the preemption claim based on the malice test of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); the high bar set by the stringent malice test "effectuate[d] the statutory design with respect to pre-emption." *Linn*, 383 U.S. at 65. Further to avoid conflict with the NLRA, *Linn* held that there could be no recovery on a theory of libel *per se*, absent proof of actual harm. *Id.* By contrast, California's PAGA requires no proof of wrongful intent, or actual harm, to recover penalties.

Plaintiffs' discussion of *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), misstates the relationship between the state-law claims, which the Court held not preempted, and the unfair labor practice case. Opp. 22. In *Belknap*, the plaintiffs had been hired as "permanent" replacements

for strikers. When the employer settled the strike with the union, terminating the replacements, the replacement workers sued for misrepresentation. Neither the union's ULP charge, nor the Board's complaint based on that charge, alleged that the employer's representations to the replacement workers violated the Act. The Board was not concerned with "whether the employer deceived replacements," which was the subject of the lawsuit. *Belknap*, 463 U.S. at 510. Here, by contrast, Plaintiff Doe filed a charge challenging Google's allegedly overbroad policies, obtained relief from the Board, and then attempted to pile on with a lawsuit seeking state-law penalties for the same policies.[6]

The majority opinion treated PAGA claims (of which California law authorizes at least 151 varieties) as categorically subject to the local interest exception. Pet. 19-20. This Court has never countenanced such a sweeping exception to *Garmon* preemption. To the contrary, where the Court has recognized the exception, it has taken great care to delimit its scope. *See Linn,* 383 U.S. at 65-66. This Court should carefully weigh Justice Brown's warning that "[b]y defining the local interest exception so broadly, the majority opinion allows it to swallow the intentionally wide rule of *Garmon* preemption and defeat its purpose." Pet. App. 49a.

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6. Plaintiffs' purpose in raising *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), is not evident. Opp. 21-22. In a straightforward application of the Supremacy Clause, *Nash* held that the State of Florida could not penalize employees for filing unfair labor practice charges. The decision does not mention *Garmon* preemption or the local interest exception.

IV. CONCLUSION

It is respectfully submitted that the Court should grant the petition for certiorari. The Court should also consider summarily reversing the Court of Appeal's decision, reinstating the trial court's orders sustaining Google's and Adecco's demurrers without leave to amend, and thereby terminating the entire action. Alternatively, the Court should consider summarily reversing and remanding for the correct application of *Garmon* preemption principles.

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Respectfully submitted,

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