No. 21-___

IN THE

Supreme Court of the United States

GLACIER NORTHWEST, INC., D/B/A CALPORTLAND,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Labor Relations Act impliedly preempt a state tort claim against a union for intentionally destroying an employer's property in the course of a labor dispute?

PARTIES TO THE PROCEEDING

Petitioner Glacier Northwest, Inc., d/b/a CalPortland ("Glacier"), was the plaintiff-respondent-cross-petitioner in the Supreme Court of Washington below. Respondent International Brotherhood of Teamsters Local Union No. 174 (the "Union") was the defendant-petitioner-cross-respondent in the Supreme Court of Washington below.

CORPORATE DISCLOSURE STATEMENT

The corporate parent of Glacier is CalPortland Company. The corporate parent of CalPortland Company is Taiheiyo Cement USA, Inc. The corporate parent of Taiheiyo Cement USA, Inc., is Taiheiyo Cement Corporation. Other than the listed entities, no publicly held corporation owns 10% or more of the stock of Glacier or any of its corporate parents.

STATEMENT OF RELATED PROCEEDINGS

Superior Court of Washington, King County:

- *Glacier Northwest, Inc. d/b/a CalPortland v. International Brotherhood of Teamsters Local Union No. 174*, No. 17-2-31194-4 KNT (motion to dismiss claims at issue in this petition granted Apr. 20, 2018; motion for summary judgment on other claims granted Nov. 19, 2018).

Court of Appeals of Washington, Division 1:

- *Glacier Northwest, Inc. d/b/a CalPortland v. International Brotherhood of Teamsters Local Union No. 174*, No. 79520-1-I (reversing Superior Court of Washington with respect to claims at issue in this petition and affirming

with respect to other claims Aug. 31, 2020); (superseding prior order on denial of reconsideration but again reversing Superior Court of Washington with respect to claims at issue here and affirming on other claims Nov. 16, 2020).

Supreme Court of Washington:

Glacier Northwest, Inc. d/b/a CalPortland v. International Brotherhood of Teamsters Local Union No. 174, No. 99319-0 (reversing Washington Court of Appeals with respect to claims at issue here and affirming with respect to other claims Dec. 16, 2021).

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STATUTES

OPINIONS BELOW

The opinion of the Supreme Court of Washington (Pet.App.1a-42a) is reported at 500 P.3d 119. The initial opinion of the Court of Appeals of Washington is reported at 471 P.3d 880. The opinion of the Washington Court of Appeals superseding the initial opinion on the denial of reconsideration (Pet.App.43a-72a) is reported at 475 P.3d 1025. The opinion of the Superior Court of Washington, King County, granting a motion to dismiss the claims at issue here (Pet.App.78a-79a) is unreported. The opinion of the Superior Court of Washington, King County, granting a motion for summary judgment on the other claims in the case (Pet.App.73a-77a) is unreported but available at 2018 WL 11397914.

JURISDICTION

The Supreme Court of Washington entered its judgment resolving all claims in the case as to all parties on December 16, 2021. On February 11, 2022, Justice Kagan granted an extension of time to file this petition up to and including May 13, 2022. No. 21A413 (U.S.). Jurisdiction in this Court exists under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157-158, are set out in the appendix (Pet.App.92a-104a).

INTRODUCTION

Shortly after Congress enacted the National Labor Relations Act, this Court made clear that the law's protection for concerted labor activities does not extend to violence or other unlawful conduct such as the intentional destruction of an employer's property. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939). That commonsense proposition has endured for nearly a century, with virtually no court ever suggesting otherwise. Until now.

In the decision below, the Washington Supreme Court held that the NLRA "impliedly" preempts a state tort claim against the Teamsters Union for intentionally destroying the property of Petitioner Glacier Northwest. Glacier is a ready-mix concrete company that uses mixing trucks to deliver and pour concrete. In this case, the Union waited until the company's trucks were fully loaded for delivery and then called for a work stoppage that was deliberately timed and intended to destroy the company's property by leaving the concrete to harden in the mixing drums. The scheme succeeded, causing significant destruction of Glacier's property.

After Glacier filed a tort suit in state court, the Washington Supreme Court held that the claim was impliedly preempted under this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), because the Union's conduct was purportedly "arguably protected" by the NLRA. In that court's view, it is "arguable" that the NLRA protects intentional property destruction as long as the union does not engage in some additional act of "violence."

The Washington Supreme Court's decision defies this Court's precedent and creates a direct conflict with at least two federal circuit courts and other state high courts. Both the Fifth and Seventh Circuits have held that even when a union conducts an otherwise peaceful labor strike, it cannot plan and execute the strike in a way that is deliberately timed to destroy an employer's property. Several state high courts have likewise held that *Garmon* preemption does not apply when a union intentionally violates an employer's property rights. These courts have specifically rejected the argument that such conduct becomes "arguably protected" under the NLRA as long as the union refrains from engaging in some further "violence."

Those decisions directly follow from this Court's teaching that, whatever the NLRA might preempt, policing the "actual or threatened violence to persons *or destruction of property* has been held most clearly a matter for the States." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Relations Comm'n*, 427 U.S. 132, 136 (1976) ("*Lodge 76*") (emphasis added). Thus, while the NLRA protects the use of lawful "economic pressure," it does not protect a union from liability when it tries to "enforce[]" its demands through unlawful means such as the deliberate "injury to property." *Id*. at 154.

By reaching a contrary result, the decision below presents an exceptionally important issue. If allowed to stand, it will not only put private property at the mercy of deliberate sabotage, but will also cast the NLRA into serious constitutional doubt by inviting the destruction of employers' property rights while leaving them with no means of just compensation.

STATEMENT OF THE CASE

Since the Washington courts addressed the preemption issue on a motion to dismiss, the facts alleged by Glacier were taken as true. Pet.App.13a.

1. Glacier sells and delivers ready-mix concrete to customers in Washington state. Pet.App.3a. For each job, it mixes custom batches of concrete based on the purchaser's specifications. *Id.* This mixing begins in barrels and hoppers at Glacier's facility and then continues in the mixing truck as it is delivered to the customer. *Id.* Because concrete begins to harden shortly after being mixed, "Glacier must deliver the concrete on the same day it is mixed or else it becomes useless." *Id.* Moreover, if concrete remains in the truck's mixing drum for too long, it will harden and damage the truck. *Id.*

In August 2017, the Union, which represents Glacier's truck drivers, was engaged in collective bargaining negotiations with Glacier. Unhappy with the company's response to its bargaining demands, the Union devised and executed a scheme to "intentionally sabotage" Glacier's business operations and destroy its property. Pet.App.147a. On the morning of August 11, Glacier had numerous concrete deliveries scheduled, with drivers starting work between 2 AM and 7 AM. Pet.App.4a. Knowing this, the Union "coordinated with truck drivers to purposely time [a] strike when concrete was being batched and delivered" with the specific purpose "to cause destruction of the concrete." Pet.App.5a. At 7 AM, once "Union representatives knew there was a substantial volume of batched concrete in Glacier's barrels, hoppers, and ready-mix trucks, they called

for a work stoppage." Pet.App.47a-48a. A Union agent made a throat-slashing gesture to signal a "sudden cessation of work." Pet.App.4a, 111a.[1]

Glacier's dispatcher reminded the drivers of their duty to finish loads already in progress to avoid destroying the concrete or damaging the trucks. Pet.App.111a. But Union agents disregarded those warnings. They directed the drivers to abandon their vehicles "immediately" and to "go park [their] truck[s]." *Id.* They told drivers to "leave the f***er[s] running," and that "[w]e will not be dumping them or rinsing them out," since that was "[s]omebody else's problem." *Id.* "Consequences are [c]onsequences." *Id.* At the Union's direction, "at least 16 drivers" left trucks "fully loaded" with concrete. Pet.App.48a.

Just as intended, this coordinated sabotage produced "complete chaos" for Glacier. Pet.App.5a n.3. The company was forced to scramble "to dispose of the concrete in a timely manner to avoid costly damage to the mixer trucks and in a manner so as not to create an environmental disaster." Pet.App.5a & n.3. To prevent the trucks from being damaged, the company had to hastily construct a series of "bunkers" that could hold the concrete that had to be

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[1] The Washington Supreme Court acknowledged that the motion to dismiss standard requires "accept[ing] the factual allegations in the complaint as true." Pet.App.13a (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 744 P.2d 1032, 1046 (Wash. 1987)). The Court also acknowledged that the standard requires courts to accept "hypothetical facts supporting the complaint." Pet.App.13a n.7 (citing *Kinney v. Cook*, 154 P.3d 206, 209 (Wash. 2007)). This includes such facts raised in opposing a motion to dismiss. *See* Pet.App.105a-139a.

dumped out of all the trucks before congealing. After it was dumped out, "the concrete was destroyed when it was left to harden" in the bunkers. Glacier then "had to hire trucks, break up the concrete, and haul it off-site." Pet.App.5a. Although Glacier managed to avoid damage to its trucks through the heroic efforts of its staff—and at considerable additional expense for the emergency dumping and disposal—the concrete itself could not be salvaged and was destroyed. *Id.*

2. Glacier sued the Union under Washington law for intentionally destroying its property. The Union sought dismissal on the ground that the state-law claims were impliedly preempted under this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

In *Garmon*, this Court held that although the NLRA contains no express preemption provision, it nonetheless impliedly preempts some state tort claims based on conduct that the Act either arguably protects or arguably prohibits. As this Court subsequently explained in *International Longshoremen's Ass'n v. Davis*, "[t]he precondition for pre-emption, that the conduct be 'arguably' protected or prohibited, is not without substance." 476 U.S. 380, 394 (1986). A mere "conclusory assertion of pre-emption" is not enough. *Id.* Thus, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board" and "must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Id.* at 395. In short,

"those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted." *Id*. at 396.

Even when conduct is arguably protected or prohibited by the NLRA, state lawsuits are not preempted when the conduct in question is "a merely peripheral concern" of federal regulation, or where the "conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress ha[s] deprived the States of the power to act." *Garmon*, 359 U.S. at 243-44. This latter principle is known as the "local feeling" or "local interest" exception to *Garmon* preemption. Under this exception, this Court has held that the "[p]olicing of . . . destruction of property has been held most clearly a matter for the States." *See Lodge 76*, 427 U.S. at 136. Indeed, while the NLRA protects the use of "peaceful methods of . . . economic pressure," it does not permit a union to "enforce[]" its labor demands through "injury to property." *Id*. at 154.

3. The state trial court, however, accepted the Union's argument that *Garmon* immunized it from state tort liability for the intentional destruction of property. In its view, "while the economic losses from the strike were unfortunate," *Garmon* foreclosed any tort remedy because the destruction of property did not (in the court's view) involve "vandalism or violence." Pet.App.55a.

The Washington Court of Appeals reversed in relevant part. Pet.App.43a-72a.[2] It found it "clear" that "the intentional destruction of property during a lawful work stoppage is not protected activity under section 7 of the NLRA." Pet.App.60a. As the court recognized, under the local feeling exception, "[p]olicing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States." *Id*. (quoting *Lodge 76*, 427 U.S. at 136). "Moreover," the court continued, "the NLRB, as well as reviewing federal courts, ha[ve] explicitly stated that workers who fail to take reasonable precautions to prevent the destruction of an employer's plant, equipment, or products before engaging in a work stoppage" are not protected by the NLRA. *Id*. (citing *Marshall Care Wheel & Foundry Co.*, 107 N.L.R.B. 314, 315 (1953), *aff'd*, 218 F.2d 409 (5th Cir. 1955)). It follows that *intentional* property destruction is not protected. *Id*.

The Washington Court of Appeals noted Glacier's allegations that "the Union ordered Glacier's truck drivers to wait to stop work until Glacier had batched a large amount of concrete and loaded it into the drivers' waiting trucks, and the Union did so with the intention of causing maximum product loss to Glacier." Pet.App.63a. Accordingly, the court held that "this conduct was clearly unprotected under section 7 of the NLRA," and "[t]he trial court erred in concluding to the contrary." Pet.App.63a-64a.

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[2] Glacier's appeal followed the trial court's entry of final judgment rejecting all of Glacier's claims, including some that are not at issue in this petition. *See* Pet.App.73a-77a.

The Washington Supreme Court reversed, reinstating the trial court's dismissal order. Pet.App.1a-42a. The court held that the NLRA impliedly preempts Glacier's claim because the Union's intentional destruction of Glacier's property was arguably protected as a "legitimate bargaining tactic," and the traditional state-law interest in protecting against the intentional destruction of property does not qualify for the local feeling exception.

As to whether the Union's intentional destruction of property was arguably protected, the Washington Supreme Court invoked its own precedent to hold that "the preemption standard [is] whether the activity is 'potentially subject to federal regulation.'" Pet.App.17a (quoting *Beaman v. Yakima Valley Disposal, Inc.*, 807 P.2d 849, 853 (Wash. 1991)). To support that expansive standard, the court quoted this Court's statement in *Davis* that the party seeking preemption must "advance[] an interpretation of the [NLRA] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Id.* But the court ignored the ensuing language requiring that the party seeking preemption also must show that it "reasonably could" prevail. *Davis*, 476 U.S. at 395.

Applying the *Beaman* test, the Washington Supreme Court found preemption based on two supposedly "competing principles" that potentially could apply. The court agreed that the NLRA does not protect employees if they fail to "take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent

danger due to sudden cessation of work." Pet.App.23a-24a. Nevertheless, the court discerned a "competing principle[]" that "economic harm may be inflicted through a strike as a legitimate bargaining tactic." Pet.App.23a. Surveying cases from the NLRB and lower courts—none of which found the intentional destruction of property to be protected—the court concluded that the Union's conduct was arguably protected because it was "unclear where the strike in this case falls on the spectrum between these two principles." *Id*.

The court did not consider whether the two supposedly "competing" principles could be reconciled by distinguishing the intentional destruction of property from the ordinary economic harms such as lost profits and other inefficiencies that typically result from a work stoppage. Instead, the court held that this question could be resolved only by "balancing the economic pressure [caused by intentionally destroying Glacier's property] against the strikers' legitimate interest" in the strike. Pet.App.28a. And despite this Court's holding that the proponent of preemption "must carry the burden of showing at least an arguable case" for protection, *see Davis*, 476 U.S. at 396, the Washington Supreme Court concluded that a state-court inquiry into whether the facts presented such an arguable case "would potentially interfere with important federal interests." Pet.App.29a.

As to the local feeling exception, the Washington Supreme Court deemed the Washington Court of Appeals' "discussion of when intentional destruction of property invokes the 'local feeling' exception . . . too expansive." Pet.App.23a. The court

admitted that Glacier and the Washington Court of Appeals were "correct that the United States Supreme Court . . . ha[s] included the destruction of property in describing matters over which states may exercise jurisdiction" under this exception. Pet.App.20a. But the Washington Supreme Court cast this authority aside because—in its view—"the focus" of the exception "is on whether the conduct involved intimidation and threats of violence" *in addition to* the intentional destruction of property. Pet.App.19a (quotation marks omitted). The court also emphasized that the Union's intentional destruction of property in this case took place "during a strike, as opposed to property damage for its own sake." Pet.App.22a. Ultimately, the court found that the state's interest in protecting private property rights in this circumstance was not strong enough to overcome implied *Garmon* preemption. Pet.App.22a-23a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted for four reasons. First, in holding that the NLRA impliedly preempts state tort claims for the intentional destruction of property during a labor dispute, the decision below conflicts with multiple circuits and state high courts. Second, the decision below also conflicts with this Court's precedents, which have specifically recognized that intentional property destruction falls outside the realm of lawful conduct protected by the NLRA. Third, the question presented is exceptionally important. And fourth, this case provides an excellent vehicle because the decision below is a final judgment based on a clean set of alleged facts on a motion to dismiss.

I. THE DECISION BELOW CONFLICTS WITH MULTIPLE CIRCUITS AND STATE HIGH COURTS.

The decision below creates a stark split in authority as to whether the NLRA impliedly displaces traditional state-law protections for private property. In order to hold that Glacier's claims for intentional destruction of property were preempted under *Garmon*, the Washington Supreme Court had to conclude *both* that such conduct is "arguably protected" by the NLRA *and* that it falls outside the "local feeling" exception. Each of these holdings conflicts with numerous decisions from federal appellate courts and state high courts across the country. This Court's review is thus needed to resolve the disagreement as to whether the NLRA protects unions from liability when they intentionally destroy an employer's property, and how *Garmon* preemption applies to such claims.

1. As far as Glacier is aware, no other appellate court has ever endorsed the radical notion embraced by the court below that the NLRA protects unions from tort liability for planning and executing a strike that is deliberately designed to destroy an employer's property. But plenty of courts have said the opposite. As the Third Circuit explained shortly after *Garmon* was decided, "[a]t least two Courts of Appeals" by that time had already "ruled that employees engaged in a work stoppage deliberately time[d] to cause maximum damage [to employer property] are not engaged in a protected activity." *NLRB v. Morris Fishman & Sons, Inc.*, 278 F.2d 792, 795 (3d Cir. 1960). The two cited cases came from the Fifth and Seventh Circuits.

The Fifth Circuit's decision in *NLRB v. Marshall Car Wheel & Foundry Company*, 218 F.2d 409 (5th Cir. 1955), involved facts strikingly similar to those here. In *Marshall Car Wheel*, a union of foundry workers devised a scheme to destroy their employer's property in order to advance their "wage demands." *Id.* at 411. To carry out the scheme, they planned a strike and "intentionally chose a time for their walkout when molten iron in the plant cupola was ready to be poured off," knowing that the "lack of sufficient help" during the "critical pouring operation" threatened to cause "substantial property damage and pecuniary loss" to their employer. *Id.* The union claimed that the strike was protected as a legitimate form of "concerted activity" under the NLRA. *Id.* The court disagreed, holding that the activity was "illegitimate" because "the union deliberately timed its strike without prior warning and with the purpose of causing maximum plant damage and financial loss" to the employer. *Id.* at 413. Accordingly, the union's conduct fell into the category of "unprotected activity condemned by the Supreme Court as effectively removing the guilty employees from statutory protection." *Id.* (citing *Fansteel*, 306 U.S. at 255-59).

The Seventh Circuit reached a similar conclusion in *U.S. Steel Co. (Joliet Coke Works) v. NLRB*, 196 F.2d 459 (7th Cir. 1952). In that case, the workers at a steel plant went on strike knowing that they were leaving the plant's ovens unmanned, creating a grave risk of "uncontrolled cooling" that would "cause great damage to the ovens, accompanied by danger and loss from explosion and fire." *Id.* at 461. The court concluded that by "wil[l]fully abandoning in time of

great emergency the duties which they were hired to perform, . . . they were not engaged in concerted activities protected by" the NLRA. *Id.* at 467.

Those cases remain good law in the Fifth and Seventh Circuits, and it has become widely accepted that the NLRA does not protect the right of a union to use a well-timed strike as a means to intentionally destroy an employer's property. The NLRB itself has "long" agreed. *Boghosian Raisin Packing Co.*, 342 N.L.R.B. 383, 397 (2004). And multiple circuits have recognized this proposition as obviously correct, even if few have had occasion to squarely decide it because unions typically are not audacious enough to dispute the point. *See, e.g.*, *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 803 (3d Cir. 1996) (explaining that the NLRA does not protect "threats to public order such as violence, threats of violence, intimidation *and destruction of property*" (emphasis added)); *NLRB v. Marsden*, 701 F.2d 238, 242 n.4 (2d Cir. 1983) (even if strike were otherwise protected, "it would not have been protected activity if it occurred while an order of concrete was being delivered" (citing *Marshall Car Wheel*, 218 F.2d at 411)); *Del. & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 622 (D.C. Cir. 1971) (NLRA does not protect the "deliberate timing of a strike without prior warning, with the purpose of enhancing plant damage" (citing *Marshall Car Wheel*, 218 F.2d at 413)).

2. Multiple state high courts have also recognized in recent years that *Garmon* preemption does not preclude state tort claims based on the intentional violation of an employer's property rights. In *United Food & Commercial Workers International Union v.*

Wal-Mart Stores, Inc., the Maryland Court of Appeals held that the NLRA did not preempt a suit alleging a union's trespassory interference with Walmart's property rights, even absent any violence or actual destruction of property. 162 A.3d 909 (Md. 2017). In doing so, Maryland's high court expressly "reject[ed] [the union's] contention that the local interest exception is strictly limited to cases involving violence, threats of violence, or malicious conduct." *Id.* at 922. Instead, the court held that the NLRA did not preempt the state-law claim because of the "significant state interest involved"—"namely, the interest in protecting private property rights." *Id.* Indeed, in explaining why that interest was sufficient, the court took as a given that conduct that involved "violence, threats of violence, or *property damage*" would trigger the local feeling exception. *Id.* (emphasis added).

Similar controversies have played out in several other states. Like Maryland's high court, the Arkansas Supreme Court rejected a union's argument that a trespass suit "does not fit the deeply rooted local interest exception to NLRA preemption because the exception applies only to violent conduct." *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 504 S.W.3d 573, 576 (Ark. 2016). As that court noted, "appellate courts in California, Colorado, Florida, Maryland, and Texas have issued opinions in similar cases . . . and expressly rejected the Union's preemption argument." *Id.* at 578 (collecting cases). Indeed, only in Washington state did a court conclude a "state-court suit was preempted by the NLRA," *id.*, and even there, the court implied that the result might

have been different had there been any "actual violence, threats of violence, *or property damage*." *Wal-Mart Stores, Inc. v. United Food & Com. Workers Int'l Union*, 354 P.3d 31, 37 (Wash. Ct. App. 2015) (emphasis added).

Other state high courts have likewise recognized that property damage lies within the heartland of the local feeling exception to *Garmon* preemption. The Supreme Court of Mississippi, for example, has acknowledged this Court's teaching that "[t]he dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern." *Miss. Gulf Coast Bldg. & Constr. Trades Council v. Brown & Root, Inc.*, 417 So. 2d 564, 566 (Miss. 1982) (quoting *United Auto., Aircraft & Agric. Implement Workers of Am. v. Wis. Emp. Rels. Bd.*, 351 U.S. 266, 274 (1956)). The Pennsylvania Supreme Court, too, has recognized that "State Courts have the power, the right and the duty to . . . preserve and protect public order and safety and to prevent property damage—even if, *absent* such conduct," the underlying labor activity would be protected by the NLRA. *City Line Open Hearth, Inc. v. Hotel, Motel & Club Emps.' Union Loc. No. 568*, 413 Pa. 420, 431 (Pa. 1964) (emphasis added); *see also Barbieri v. United Techs. Corp.*, 771 A.2d 915, 938 (Conn. 2001) (local feeling exception "'most often involv[es] threats to public order such as violence, threats of violence, intimidation and *destruction of property*,' as well as trespass and certain personal torts" (emphasis added) (quoting *Pa. Nurses Ass'n*, 90 F.3d at 803)).

3. In terms of its methodology, the decision below also created a split with six circuits by holding that

conduct is "arguably protected" under *Garmon* anytime it implicates two "competing principles" under the NLRA. By contrast, the dominant view takes seriously this Court's admonition that "[i]f the word 'arguably' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor," which requires *both* "an interpretation of the [NLRA] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board" *and* "enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Davis*, 476 U.S. at 395. The mere fact that two competing principles may exist does not excuse the court from closely scrutinizing whether one of the principles is actually controlling.

Thus, in *Voilas v. General Motors Corp.*, the Third Circuit rejected claims of *Garmon* preemption where employees had sued their employer for fraudulently inducing them to accept early retirement offers by falsely insisting a plant would be closed. 170 F.3d 367 (3d Cir. 1999). The Third Circuit observed the competing principles that an employer has no duty to bargain over closing a facility, but does have "a duty to bargain over the effects of such a closure." *Id.* at 379. Unlike the Washington Supreme Court in the decision below, however, the Third Circuit did not treat the mere identification of competing principles as the end of the matter. Instead, the court looked to the actual case before it and concluded that, because the complaint did "not allege that [the employer] breached its duty to bargain," the claim "cannot be

recast as an unfair labor practice . . . [and] there is no NLRA preemption." *Id.*

The Fifth and Ninth Circuits have also assessed how the particular cases before them fit within two competing principles. Instead of finding the mere existence of competing principles dispositive, they have analyzed which principle actually controls in order to find claims not preempted. *See E.I. Dupont de Nemours & Co. v. Sawyer*, 517 F.3d 785, 792-98 (5th Cir. 2008); *Milne Emps. Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1414-15 (9th Cir. 1991).

The Seventh Circuit similarly requires more than the mere identification of competing principles to establish *Garmon* preemption. In *Loewen Group International, Inc. v. Haberichter*, 65 F.3d 1417 (7th Cir. 1995), the court recognized that individual employment contracts are generally allowed, but not if used "to circumvent a union or undermine a collective bargaining agreement." *Id.* at 1426. But again, rather than treating these conflicting principles as establishing preemption of the employer's contract claims, the court looked to the particulars of the case before it, concluded that "the individual employment agreements . . . were negotiated in compliance with" the NLRA, and thus held that the claims were not preempted. *Id.*

The D.C. and Second Circuits have likewise recognized that conduct is not "arguably protected" just because it implicates two competing principles. In *UAW-Labor Employment & Training Corp. v. Chao*, a union argued that a state regulation requiring employers to post a particular notice was preempted under *Garmon* because an employer's

choice not to post the notice was arguably protected by the NLRA. 325 F.3d 360, 365 (D.C. Cir. 2003). The D.C. Circuit acknowledged that the relevant NLRA provision "'implements the First Amendment' in the labor relations area," and that "the First Amendment includes not only the right to speak, but also the right not to speak." *Id.* But it also recognized the competing principle that "an employer's right to silence is sharply constrained in the labor context." *Id.* And under the relevant NLRB precedent, the court concluded that the "Board found only that it was not an unfair labor practice for the employer to not post the [notice], not that there was a right to silence or any [NLRA] protection." *Id.* (citation omitted). Despite the general protections for silence and the absence of NLRB or judicial authority rejecting the claim that the conduct in question was protected, however, the court evaluated the competing principles and found preemption unwarranted. *Id.*; *see also Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 101-05 (2d Cir. 2006) (reconciling competing NLRA doctrines permitting states to impose restrictions on grant funds and employer's right to use other funds for speech activities).

In the decision below, the Washington Supreme Court followed a different approach based on its own unique precedent. Instead of trying to reconcile competing principles to determine whether the Union's conduct was arguably protected, the court ruled that the mere *existence* of competing principles was enough to establish preemption by making the Union's conduct "potentially subject to federal regulation." Pet.App.17a (quoting *Beaman*, 807 P.2d

at 853). First, the court recognized that strike activity is not protected under the NLRA when employees fail to take "reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." Pet.App.23a-24a. But then, the court quickly threw up its hands after discerning a supposedly "competing" principle that "employees are allowed to cause some economic harm to effectuate a strike and gain leverage in bargaining." Pet.App.24a. The court made no attempt to reconcile these principles. It did not, for example, consider whether intentional property destruction might be distinct from the usual "economic harm" of lost profits or productivity in a typical work stoppage. Nor did it ask whether any court had ever recognized the intentional destruction of property to be a form of "economic harm" that the NLRA protects. By failing to conduct that analysis, the Washington Supreme Court diverged sharply from the majority approach.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court's precedent makes clear that the NLRA does not grant unions a license to engage in unlawful conduct by immunizing them from traditional state tort liability when they intentionally destroy an employer's property. Especially since the NLRA itself provides no remedy for property destruction, it cannot sensibly be read to displace the traditional tort remedies provided by state law. In holding otherwise, the decision below defied this Court's precedent and declared open season on employers' property rights.

1. The NLRA protects the right of employees to engage in concerted labor activities, but it does not authorize them to resort to unlawful means such as violence or the intentional destruction of property. Among the forms of "lawful conduct" protected by the NLRA is the "right to strike," which allows employees to "cease work at their own volition because of the failure of the employer to meet their demands." *Fansteel*, 306 U.S. at 255-56. At the same time, however, this Court has recognized that "'the right to strike' plainly contemplates a *lawful* strike," which does not extend beyond the "unquestioned right to quit work." *Id.* at 256 (emphasis added). Accordingly, the NLRA does not authorize striking employees to engage in the "conversion of [an employer's] goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands." *Id.* at 253. "To justify such conduct because of the existence of a labor dispute" would "subvert the principles of law and order which lie at the foundations of society." *Id.*

Of particular relevance here, federal labor law does not deprive employers of their "legal rights to the possession and protection of [their] property." *Id.* The NLRA thus does not provide a "license" for unions to "commit tortious acts" against property to enforce their labor demands, nor does it "protect them from the appropriate consequences of unlawful conduct" when they violate an employer's property rights. *Id.* at 258. This Court reinforced the same point just last term under the Takings Clause, holding that the interest in union organizing does not override "the importance of safeguarding the basic property rights that help preserve individual

liberty." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021).

When it comes to *Garmon* preemption, specifically, this Court has made clear that the NLRA should not be read to impliedly displace traditional state-law protections for property rights. In particular, the "[p]olicing of actual or threatened violence to persons *or destruction of property* has been held most clearly a matter for the States." *Lodge 76*, 427 U.S. at 136 (emphasis added). Thus, the infliction of deliberate "injury to property" cannot be a protected "method[]" of "economic pressure" that the NLRA immunizes from state tort liability. *Id.* at 154. That holds true even when it comes to less drastic violations of property rights such as trespass, which does not involve the actual *destruction* of property. Thus, as this Court has explained, the NLRA typically does not preempt state-law claims of trespass against unions that engage in picketing on company property, because it is exceedingly "rare" that such trespassory picketing could ever be "protected" by federal law. *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978).

This Court has also made clear that the NLRA should not lightly be read to impliedly preempt state tort remedies when the NLRA itself does not supply any alternative remedy of its own. "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." *United Constr. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954). Thus, if the NLRA were interpreted "to cut off the injured [employer] from

this right of recovery," it would "deprive [the employer] of its property without recourse or compensation." *Id.* at 664. This would, "in effect, grant [unions] immunity from liability for their tortious conduct" during a strike, and there is "no substantial reason for reaching such a result" in the absence of any clear support in the statutory text. *Id.*

Based on similar reasoning, this Court has held that the NLRA does not preempt state tort claims for defamation and the intentional infliction of emotional distress, which likewise involve intentional injuries that cannot be remedied under the NLRA. *See Farmer v. United Bhd. of Carpenters & Joiners of Am.*, 430 U.S. 290, 299 (1977) (finding no preemption where "the Board would lack authority to provide the [plaintiff] with damages or other relief"); *Linn v. Plant Guard Workers*, 383 U.S. 53, 64 n.6, 86 (1966) ("The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law.").

2. In light of the above, the Washington Supreme Court clearly erred in holding that the NLRA preempts state tort claims for the intentional destruction of property. The entire point of the "local feeling" exception to *Garmon* preemption is to preserve state tort claims "where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 243-44. And this Court has specifically explained that, under this

exception, the "[p]olicing of . . . destruction of property has been held most clearly a matter for the States." *Lodge 76*, 427 U.S. at 136.

Nevertheless, the Washington Supreme Court disregarded this Court's description of "destruction of property" as falling squarely within the local feeling exception because it perceived the "focus of th[e] exception" to be on "intimidation and threats of violence." Pet.App.19a. According to the court, "*Garmon*'s reference to destruction of property was articulated *primarily* in terms of the violence of the labor conduct," meaning that conduct that was not "violent or outrageous" could not qualify. Pet.App.21a (emphasis added).

No source of law, however, permits a lower court to narrow the plain import of this Court's decisions merely because it discerns a different "focus" or "primar[y]" application. To the contrary, as courts routinely understand, *see supra* at 12-16, the intentional destruction of property is unquestionably the type of tortious conduct that it is impossible to "infer that Congress ha[s] deprived the States of the power" to regulate, prevent, and punish. *Garmon*, 359 U.S. at 243-44; *Lodge 76*, 427 U.S. at 136; *Fansteel*, 306 U.S. at 253. Indeed, the lack of preemption here is even clearer than it was in *Sears*, which held that the NLRA does not usually preempt state tort claims based on peaceful trespassory picketing, which involves only the temporary *occupation* of property. 436 U.S. at 205. By contrast, the *destruction* of property permanently deprives the owner of it, thus implicating an even stronger state interest. Moreover, since the NLRA does not provide any "damages" remedy for property destruction,

there is no indication that Congress intended "to cut off the injured [owner] from this right of recovery," which would "deprive [the owner] of its property without recourse or compensation." *Laburnum*, 347 U.S. at 664. This would turn the NLRA into a tool of unlawful "coercion," authorizing unions to "destroy property without liability." *Id.* at 669. And that concern is present regardless of whether the property destruction is accompanied by any further "violence."

The Washington Supreme Court also suggested that the Union's intentional destruction of Glacier's property was shielded by the NLRA because it could be viewed as "the incidental destruction of products during a strike, as opposed to property damage for its own sake." Pet.App.22a. But as the Washington Supreme Court acknowledged, the facts alleged by Glacier at this stage of the litigation on a motion to dismiss had to be accepted as true. Pet.App.13a & n.7. And the complaint clearly alleges that the strike was "intentionally" timed and designed to maximize the destruction of Glacier's property. Pet.App.147a. Those facts—including the Union agent's directions to "[l]eave the f***er running," and "[w]e will not be dumping them or rinsing them out" because that was "[s]omebody else's problem" and "[c]onsequences are [c]onsequences," Pet.App.111a—make clear that there was nothing the least bit "incidental" about the Union's property destruction here. To the contrary, as the complaint alleges, the destruction of Glacier's property was the conscious and deliberate purpose of the Union's conduct. And that squarely tees up the issue of intentional property destruction.

3. Even putting aside the "local feeling" exception, the decision below was wrong to conclude

that the NLRA even "arguably" protects the intentional destruction of property during a labor dispute. On this point, the Washington Supreme Court deemed it "unclear" which of two supposedly "competing principles" would govern this case. But under the proper approach, the cases the Washington Supreme Court itself cited make clear that the NLRA does not protect the Union's intentional destruction of Glacier's property in the course of a labor dispute.

The Washington Supreme Court started off on the right foot by acknowledging that strike activity is not protected when employees fail to take "reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." Pet.App.24a (quoting *Bethany Med. Ctr.*, 328 N.L.R.B. 1094, 1094 (1999)). As the Court recognized, conduct during a strike can become unprotected even when "there was no damage to the property" so long as "the employees fail[] to take reasonable precautions to protect the plant from imminent danger." *Id.* (citing *Marshall Car Wheel*, 107 N.L.R.B. at 315).

But it then took a wrong turn, suggesting that the existence of a supposedly "competing" principle—that "employees are allowed to cause some economic harm to effectuate a strike and gain leverage in bargaining"—was enough to render the Union's intentional property destruction "arguably protected." Pet.App.23a-24a. None of the six NLRB or circuit decisions that the court cited as applying this principle, however, involved the actual and intended destruction of the employer's property.

Nothing in these cases undermines the principle that employees lose statutory protection if they fail to "take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work."[3] Indeed, the Washington Supreme Court's own cited cases refer to and apply this principle. *See Columbia Portland Cement Co. v.*

[3] *See Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294-95 (1984) (incidental interference with "production . . . does not preclude protection of the Act so long as the employees involved take reasonable precautions to avoid eminent [sic] danger to the employer's physical plant which foreseeably would result from the work stoppage"); *Falls Stamping & Welding Co. v. Int'l Union, United Auto. Workers, Aerospace & Agric. Implement Workers of Am.*, 744 F.2d 521 (6th Cir. 1984) (allegations of interference with business, not destruction of property); *Lumbee Farms Coop., Inc.*, 285 N.L.R.B. 497, 503, 506-07 (1987) (employer had advance notice of the strike in time to take steps to "lessen the impact of the strike on production" and later publicly denied that the company suffered "monetary losses from product contamination," leading the Board to find the "claim of significant losses . . . substantially exaggerated, if not entirely fabricated"); *Leprino Cheese Co.*, 170 N.L.R.B. 601, 606-07 (1968) ("walkout . . . was not designed to damage the product"); *Cent. Okla. Milk Producers Ass'n*, 125 N.L.R.B. 419, 435 (1959) (no indication of actual damage or destruction of products or other property); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976) (delayed production schedule, not damage to property); *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 257-58 (6th Cir. 1990) (employees took "reasonable precautions" to prevent damage to property by consulting supervisor and "follow[ing] his directions in preparation for the work stoppage," and the record rebutted the employer's claims that their actions risked damaging property).

NLRB, 915 F.2d 253, 257-58 (6th Cir. 1990); *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294-95 (1984).[4]

The Washington Supreme Court incorrectly insisted that it was helpless to evaluate these supposedly "competing principles" to determine whether the Union's intentional destruction of Glacier's property was arguably protected. But this Court's precedent makes clear that the state court has an affirmative responsibility to conduct that inquiry. The proponent of preemption must not only advance "an interpretation of the [NLRA] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the [NLRB]" but also must show "that the Board reasonably could uphold [its] claim based on such an interpretation." *Davis*, 476 U.S. at 395. This latter requirement—completely unmentioned in the decision below—requires an assessment of whether any competing principles would remove the conduct from the realm of even arguable protection.

Had the Washington Supreme Court conducted the proper inquiry, it could only have concluded that the NLRA does not protect—even arguably—the Union's intentional destruction of Glacier's property. As the Illinois Court of Appeals explained on facts

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[4] After the Washington Supreme Court issued its decision finding preemption, one of the NLRB's regional directors filed a complaint against Glacier for filing suit against the Union and for issuing warnings to the employees involved in the intentional destruction of its property. *See Glacier Northwest, Inc., Nos.* 19-CA-203068, 19-CA-211776 (N.L.R.B. Jan. 31, 2022). That complaint is irrelevant here, however, as it cannot retroactively make the Union's conduct arguably protected.

nearly identical to those here—involving defendants who intentionally damaged property through a strike involving already-mixed concrete—*Garmon* is no barrier to a suit that seeks damages "not . . . for striking or any other 'economic coercion' contemplated by the NLRA but for the destruction of property, an activity . . . [that] is not protected, and, therefore, not subject to being preempted by Federal labor law." *Rockford Redi-Mix, Inc. v. Teamsters Loc. 325, Gen. Chauffeurs, Helpers & Sales Drivers of Rockford*, 551 N.E.2d 1333, 1338 (Ill. App. Ct. 1990); *see also Marsden*, 701 F.2d at 242 n.4 (even if walkout were otherwise protected, "it would not have been protected activity if it occurred while an order of concrete was being delivered").[5]

Accordingly, the Washington Supreme Court badly erred when it concluded that the mere existence of these two supposedly "competing principles" would require it to engage in impermissible "balancing" to determine whether the NLRA protects the Union's conduct. Glacier has no quarrel with the principle that a protected strike may permissibly cause some economic harm by slowing down or stopping ongoing work. But there is a clear distinction between an ordinary work stoppage and intentional conduct that is *deliberately planned and timed to destroy the employer's property*. The deliberate destruction of property crosses the line from the mere withholding

[5] The Washington Supreme Court sought to distinguish *Rockford Redi-Mix* because there the employer's trucks were damaged in addition to the concrete. Pet.App.27a. But there is no basis to distinguish the intentional destruction of concrete from that of trucks, nor does *Rockford Redi-Mix* suggest one.

of labor into the realm of actively destructive behavior that is at least intentionally tortious, if not criminal. The right to property, like the right to life and liberty, enjoys special protection that is enshrined not only in the traditional protections of state tort law but also in multiple provisions of the Constitution. That is why courts and the NLRB have always recognized the principle that employees lose protection for a work stoppage unless they abide by an affirmative *duty* to take reasonable steps to prevent property damage. That principle would be rendered utterly nonsensical if employees had a federally protected right not only to disregard their employers' property rights but to *intentionally and willfully destroy* them.

In short, in light of this Court's precedent, fundamental principles of American law, and basic common sense, the Washington Supreme Court clearly erred by holding that the NLRA provides unions with a license to intentionally destroy property while enjoying immunity from tort liability.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

This Court's review is also warranted in light of the exceptional importance of the question presented. In *Sears*, the factor that "led [the Court] to grant certiorari" was the "obvious importance" of the question "whether, or under what circumstances, a state court has power to enforce local trespass laws against a union's peaceful picketing" under the *Garmon* framework. 436 U.S. at 184. In this case, the question is even more obviously important because the intentional destruction of property imposes an

even greater intrusion on property rights. Unlike trespassing, which involves only a temporary interference with property, an act of intentional destruction permanently deprives the owner of its property altogether. As a result, states and their citizens have an even more acute interest in upholding the traditional protections of state tort law in this type of case. If this Court does not intervene, unions will be emboldened to make property destruction a standard feature of their "bargaining" tactics, putting the property rights of countless more employers at risk.

The importance of this issue is underscored by the serious constitutional concerns that would arise from interpreting federal labor law to deprive employers of any compensatory remedy for the intentional destruction of their property. The Takings Clause of the Fifth Amendment prohibits the federal government from depriving people of their property without "just compensation." And as this Court recently explained, labor law cannot be construed to override property rights, since "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery*, 141 S. Ct. at 2071. Indeed, this Court has long held that the NLRA "should be interpreted to avoid unconstitutionality," and in particular that it must be read "[a]gainst the backdrop of the Constitution's strong protection of property rights." *Id.* at 2080 (Kavanaugh, J., concurring) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956)). But the decision below disregards that admonition, steering the NLRA into a collision with that constitutional bulwark.

The constitutional concern is particularly stark in light of this Court's recognition that the NLRA does not provide "any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." *Laburnum*, 347 U.S. at 663-64. Thus, if the NLRA is read to "cut off the injured [employer] from this right of recovery" for the intentional destruction of property during a strike, it would effectively "deprive [employers] of [their] property without recourse or compensation." *Id.* at 664. That is a textbook Takings violation.

Finally, the Washington Supreme Court's sweeping extension of *Garmon* in this case also raises important issues of state sovereignty because it contradicts "this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part). As this Court has recognized, implied preemption "cannot be based on a freewheeling judicial inquiry into whether [state law] is in tension with federal objectives." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (quotation marks omitted). Rather, preemption should be found only when state law actually "conflict[s]" with "either the Constitution itself or a valid statute enacted by Congress." *Id.* That is especially so in a field that the "States have traditionally occupied" such as the protection of private property rights, where preemption should not be implied absent "the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

By today's standards, *Garmon* itself is questionable because it does not rest on any actual

conflict of state and federal law but only on the "*potential* frustration of national purposes" embodied in the NLRA. 359 U.S. at 244 (emphasis added). But the decision below goes even farther: It extends *Garmon* to displace state tort claims for intentional property destruction that no other court has ever before found preempted. Simply put, this novel finding of preemption "based not on the strength of a clear congressional command . . . but based only on a doubtful extension of a questionable judicial gloss" is "a significant federal intrusion into state sovereignty" with no basis in law. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905 (2019) (opinion of Gorsuch, J.).

IV. THIS CASE IS AN IDEAL VEHICLE.

This case provides an excellent vehicle to determine whether the NLRA impliedly preempts state tort claims for the intentional destruction of property in the context of a labor strike. The Washington Supreme Court entered a final judgment disposing of all claims in the case, Pet.App.41a, so this Court's jurisdiction is not in doubt. *See* 28 U.S.C § 1257(a). And because the court resolved the preemption issue on a motion to dismiss, it presents the clean legal question of whether the facts alleged justify preemption under *Garmon*.

Moreover, because the decision below expressly addressed both the "arguably protected" component of *Garmon* preemption and the "local feeling" exception to that doctrine—and because its analysis on each of these aspects of the *Garmon* inquiry was necessary to its result—this case offers the Court the opportunity to consider and clarify both together.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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