No. 21-1449

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 Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 1210
Kansas City, MO 64111
816-931-5559

MATTHEW C. FORYS
Counsel of Record
MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave., Suite 312
Leesburg, VA 20176
703-544-6100
matt@landmarklegal.org

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case because of its history of filing briefs regarding labor law issues.

Landmark urges this Court to grant the petition for a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Washington Supreme Court's interpretation of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the seminal labor preemption case, turns the National Labor Relations Act, 29 U.S.C. § 151 et seq., on its head, conflicts with decades of caselaw, and is against the public interest in safety. The Washington Supreme Court found that the Teamsters' work stoppage, intentionally timed to damage Glacier Northwest's

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for *Amici Curiae* requested consent and provided notices to counsel for parties of its intent to file this brief on May 31, 2022, and received consent from all parties.

trucks, was arguably subject to the NLRA and protected by *Garmon*. Under their reading of *Garmon*, employers' state tort claims for union workers' destruction of employer property should be preempted by the NLRA and thus effectively shielded from consequences. The Washington Supreme Court's erroneous reading of the statute and *Garmon* would ensure that a law passed to prevent industrial strife would increase it, placing workers and the public at risk.

ARGUMENT

I. The NLRA, enacted to prevent industrial strife, does not protect acts of force like intentional destruction of private property.

The Washington Supreme Court held that union destruction of employer property during a work stoppage was arguably protected by the NLRA under *Garmon*. Their interpretation is not supported by the statute, *Garmon* itself, or subsequent caselaw. Turning to the statute first, its focus informs the question of whether it preempts a state claim for tortious destruction of property. The NLRA contains no express preemption of state law. Instead, it provides aims and policy goals "drawn in broad strokes," leaving the courts with the responsibility to ascertain the boundaries between federal and permissible state regulation. *Garmon*, 359 U.S. at 240.

The statute's goals are thus a necessary starting point. The NLRA is specifically concerned with the

prevention of industrial strife and unrest. To diffuse widespread strikes and violence, the statute granted the right to collective bargaining and the right to strike. But as seen in caselaw preceding *Garmon* and following it, these rights came with conditions. They did not shield union workers' concerted activity that included violence and destruction against persons and property.

In the early 20th century, "[r]ecurrency of strikes affected our whole industrial economy." Earle K. Shawe, *The Role of the Wagner Act in Preventing Industrial Strife*, 32 Va. L. Rev. 95, 98 (1945). Collective bargaining was the major issue in these strikes. Id. Many were extremely violent. The Railway Shopcraft strike of 1922 "involved 400,000 strikers, 1,500 cases of violent assault to kill, 51 cases of dynamiting and burning railroad bridges, 65 reported kidnappings, many other incidents of destruction," and was instrumental to the passage of the Railway Labor Act (RLA). Morgan O. Reynolds and D. Eric Schansberg, "*At Age 65, Retire the Railway Labor Act*," Regulation, Vol. 14, No. 3 (Summer 1991), https://www.cato.org/sites/cato.org/files/serials/files/regulation/1991/7/v14n3-8.pdf (last visited June 8, 2022). The RLA granted collective-bargaining rights to railway workers and "was a breakthrough in paving the way for a national labor policy." *Pre-Wagner Act labor relations*, National Labor Relations Board, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/pre-wagner-act-labor-relations (last visited June 8, 2022). A wave of strikes from 1932 to 1935 also occurred in other industries right before the

NLRA's passage. "These strikes had an immediate and devastating impact on the nation's whole economy which affected entire industries." Shawe, at 98.

The National Labor Relations Act of 1935 (Wagner Act), 29 U.S.C. § 151 et seq., was passed explicitly to prevent labor strife and to equalize bargaining power between workers and employers. The NLRA's "findings and declaration of policy" provide that the failure to recognize the right to unionize or engage in collective bargaining will "lead to strikes and other forms of industrial strife or unrest." 29 U.S.C. § 151. Industrial strife, the statute continues, in turn burdens or obstructs commerce. Id. As one observer has noted:

> Industrial strife and unrest at the time of the passage of the Wagner Act meant more than the inconvenient strikes that we sometimes experience today. Instead, it meant violent strikes that paralyzed the national economy and frequently required the deployment of the National Guard or federal troops to restore order.

Michael L. Wachter, *The striking success of the National Labor Relations Act in* Research Handbook on the Economics of Labor and Employment Law 427 (Cynthia L. Estlund & Michael L. Wachter eds., 2012). The NLRA thus came about during the Great Depression in response to an era of severe labor unrest and violence that threatened the national economy. As one of the early courts interpreting the NLRA stated, "The primary purpose of the act of Congress is to obviate appeals to brute force which are too often the

accompaniment of labor disputes." *NLRB v. Del.-New Jersey Ferry Co.*, 90 F.2d 520, 520 (3d Cir. 1937).

To meet the law's explicitly stated goal of achieving labor peace, "the Wagner Act provided for a legal strike mechanism which channeled concerted activity into a peaceful form: employees were given the right to strike, but that right was required to be exercised in a peaceful fashion." Wachter, *supra*, at 440. See NLRA §§ 7 (granting right to form or join unions and engage in "concerted activities" for collective bargaining), 13 (granting right to strike), 29 U.S.C. §§ 157, 163. Thus, the grant of a right to strike was not limitless. Instead, "[i]t was assumed that violence would render strike activity unprotected and subject to existing state criminal and civil laws." Wachter, *supra*, at 440. This assumption was confirmed in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), a case holding that not just criminal conduct, but tortious conversion of property, was outside the NLRA's protection.

In *Fansteel*, workers at a manufacturing plant engaged in an unlawful "sit-down" strike where they refused to leave the employer's buildings. Unlike a lawful strike involving a stoppage of work and statement of grievances, "[i]t was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit." Id. at 256. The Court referenced the NLRA's purpose and noted: "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the

law of the land." Id. at 257-58. It is important to emphasize that the Court used the terms "force" and "violence" to describe the seizure of the building and property destruction, indicating a broad understanding of unlawful conduct unprotected by the NLRA. Legally, "the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands." Id. at 253. These acts could not be justified because of an underlying labor dispute or unfair labor practice. To do so "would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." Id.

By improperly sanctioning the resort to force in the collective bargaining process, the holding of the court below subverts the principles of law and order. Not only can the Washington Supreme Court find no support for its opinion in the NLRA, the holding directly conflicts with the statute's theoretical framework.

There is another area where the statute is silent that is relevant here: the states' police power. In *Allen-Bradley v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740 (1942) the Court discussed the absence of a statutory intent for the displacement of traditional state police powers against violence and property destruction. In a case arising out of a union violation of state labor law, a union had been "threatening employees desiring to work

with physical injury or property damage," along with mass picketing, picketing at employees' homes, obstructing access to the company's factory, and obstructing the streets and public roads around the factory. Id. at 748. The Court held that "the [NLRA] was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity." Id. Instead, it continued, "this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.'" Id. at 749 (citations omitted).

Thus, courts have refused to find in the statute what is not there. Most notably, the NLRA is also silent on the issue of whether employers are barred from recovering damages from all intentional torts destructive to their persons and property committed during the course of a strike simply by virtue of § 7. Under the doctrine of constitutional avoidance, the statute should not be read in a way that allows such wholesale trampling of property rights. Furthermore, as stated in *Garmon*, state tort claims for damages from conduct "marked by violence and imminent threats to the public order" have been allowed because "the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Garmon*, 359 U.S. at 247. In short, the statute does not support the holding of the court below.

II. Petitioner's state tort claims fit squarely within the local interest exception to *Garmon* preemption.

Turning to *Garmon*, Justice Frankfurter's majority opinion established the general rules for labor preemption. Prior to *Garmon*, the Court was forced to address issues piecemeal in a series of labor cases. Passage of the Labor Management Relations Act, 1947 (Taft-Hartley), 29 U.S.C. § 141 et seq., had expanded unfair labor activity to include union misconduct and states asserted jurisdiction over labor disputes through their own state labor statutes. These cases arising under state labor statutes threatened the intended uniformity of labor policy under the NLRA. *Garmon* held that labor activity that is either protected by § 7 of the NLRA or prohibited by § 8 (conduct by employer or labor organization constituting "unfair labor practices") preempts state regulation. *Garmon*, 359 U.S. at 244. But *Garmon* also tipped the scale in federal jurisdiction's favor. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Id. at 245.

Despite the intent to create regulatory uniformity, *Garmon* created two notable exceptions. First, where the regulated activity "was a merely peripheral concern of the Labor Management Relations Act." Id. at 243-44 (citing *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958)). Thus, the boundaries of what is arguably preempted were tightened. Second,

"where the regulated conduct touched interests 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, (citing *United Auto. Workers v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957); *United Auto. Workers v. Wisconsin Emp. Rel. Bd.*, 351 U.S. 266 (1956) (*Kohler*); *United Constr. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954)). On its face, Justice Frankfurter's phrase suggests that, unlike the states' new labor policies, the states' criminal laws and common law tort system would not be displaced.

It is important to emphasize at the outset that *Garmon*'s facts are very different from those in the instant case. As seen in the state supreme court's opinion, *Garmon* involved state claims for purely economic damages resulting from peaceful, not violent, picketing. *Garmon v. San Diego Bldg. Trades Council*, 45 Cal. 2d 657 (1955). The Garmons had a lumber and building material business. As a result of peaceful picketing, they incurred expenses from additional man hours and trucking facilities to transfer goods at other locations. Id. at 667. They also lost profits when at least one prospective buyer went elsewhere. Id.

The workers did not jump out of Garmon's running trucks, thereby causing damage to the trucks and the truckloads of lumber. Their peaceful conduct in *Garmon* is obviously protected by the statute because, logically, any strike, even a lawful one, is likely to

cause incidental economic damages of some kind to employers. (And the NLRA was passed in part to equalize bargaining power between worker and employer, making it unlikely that it was contemplated that workers would have to pay for economic damages incidental to their strikes.) But damages from the destruction of property are not inherent to the act of striking. "Conduct tortious under state law, in that it is destructive of property or personally injurious, and conduct traditionally criminal are outside the ambit of section 7." Harry H. Wellington, *Labor and the Federal System*, 26 U. Chi. L. Rev. 542, 546-47 (1959). This suggests why Justice Frankfurter created the local interest exception to carve out unlawful or improper conduct from the federal statute's protection. To do otherwise would be similar to claiming that the terroristic threats made by a lawyer in negotiations against opposing counsel were protected as confidential communications during a settlement agreement. (Claiming they would be "arguably" protected would be just as implausible.)

This case fits squarely within the local interest exception, as made clear by the cited cases. In *Laburnum*, the Court affirmed the state's award for damages arising from unfair labor practices. The workers had "threatened and intimidated respondent's officers and employees with violence to such a degree that respondent was compelled to abandon all its projects in that area," causing lost profits. *Laburnum*, 347 U.S. at 658. The Court observed that prior to the Labor Management Relations Act, there had been no prohibitions of

unfair labor practices against unions. "Yet there is no doubt that if agents of such organizations at that time had damaged property through their tortious conduct, the persons responsible would have been liable to a tort action in state courts for the damage done." Id. at 666. This suggests that a state tort claim would have been appropriate even in the *Allen-Bradley* case.

In *Russell*, the Court "extended the *Laburnum* rationale to permit a state to redress a tort comprising an unfair labor practice for which the NLRB was assumed to have a parallel remedy." *State Jurisdiction over Torts Arising from Federally Cognizable Labor Disputes*, 68 Yale L.J. 308, 313 (1958). In this case, a worker was denied access to his job site due to a union picket line. The union strikers made "threats of bodily harm to Russell and of damage to his property, prevented him from reaching the plant gates" and "one striker took hold of Russell's automobile." *Russell*, 356 U.S. at 636. The Court held that the state court's jurisdiction to award compensatory and punitive damages was not preempted by the NLRA. *Laburnum* and *Russell* explicitly allow state tort claims for conduct that included unfair labor practices.

The two other supporting cases for the local interest exception allow states to use injunctive power to prevent violence. In *Kohler*, the conduct at issue included mass picketing which blocked access to the plant; interfering with the use of public roads; preventing jobseekers from entering the plant; and coercing employees who desired to work, and threatening them and their families with physical injury. *Kohler*, 351

U.S. at 268-69. The Court reasoned that the Taft-Hartley amendments to the NLRA did not preclude state jurisdiction over violence and, furthermore, that jurisdiction was not limited to criminal statutes. *Kohler*, 351 U.S. at 274. Generally, the state could not enjoin conduct that was an unfair labor practice under federal law, but that did not preclude state power over mass picketing, violence, and threats of violence. Id.

Kohler emphasized the role of the states with language similar to Justice Frankfurter's. "The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern." Id. In the Court's view, "The States are the natural guardians of the public against violence." Id. In *Youngdahl*, the final exception case cited, a state injunction was upheld to prevent not just threatening violence, but abusive language likely to provoke violence. The fact that the incidents at issue in *Kohler* and *Youngdahl* were sufficiently violent to warrant their inclusion in the local interest exception discredits the Washington Supreme Court's attempt to minimize the violence involved in the instant case. See Pet'r's App. at 21a-23a.

Since *Garmon*, the Supreme Court found in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1962) that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*." *Linn*, 383 U.S. at 62. A remedy for malicious libel was necessary because the "Board can award no damages, impose no penalty, or give any other relief to

the defamed individual." Id. at 63. The *Linn* decision "certainly broadens the concept of 'compelling state interests.'" William J. Dunaj, *Labor Law: The "Compelling State Interest" Exception to the Federal Preemption Doctrine*, 51 Marq. L. Rev. 89, 95 (1967). And the Court later upheld a state action for intentional infliction of emotional distress. *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977). This begins to get far afield from the original constraints of the local interest exception. Even so, the Petitioner's claim for tortious conversion of property meets even the original standards of the local interest exception.

III. The opinion below invites private property destruction and conflicts with the public interest in public safety.

"Protection of the health and safety of the public is a paramount governmental interest." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981). In the Labor Management Relations Act's declaration of purpose and policy, it states that industrial strife is lessened if employers, employees and unions "recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." 29 U.S.C. § 141. Any interpretation of the NLRA that prevents tort liability for work stoppages timed for destruction ultimately incentivizes them. A review of the facts of many cases cited by the Petitioner shows that poorly-timed work stoppages can create dangerous or unsafe situations for workers.

In *U.S. Steel Co. (Joliet Coke Works) v. NLRB*, 196 F.2d 459 (7th Cir. 1952), the opinion relates the facts of a strike during which there was a "serious danger of fires and explosions . . . as 82,373 gallons of benzol, 18,532 gallons of toluol, 7,144 gallons of xylol, 5,251 gallons of crude solvent naphtha, and 1,189 gallons of naphthalene, all of which was explosive and highly combustible, were stored at the plant." Id. at 461. Aside from the risk of physical harm to workers and bystanders resulting from the possible combustion of tons of corrosive chemicals, rebuilding efforts from a prior strike ran into the millions of dollars. Id.

Even in cases where massive damage to person and property were averted by union activity, the state interest in preventing even the possibility of such destruction is great. According to the court in *NLRB v. Marshall Car Wheel & Foundry Company*, 218 F.2d 409 (5th Cir. 1955), it was "practically undisputed that the striking employees intentionally chose a time for their walkout when molten iron in the plant cupola was ready to be poured off, and that a lack of sufficient help to carry out the critical pouring operation might well have resulted in substantial property damage and pecuniary loss to respondent." Id. at 411. Fortunately, in this case, non-striking employees working with the supervisory staff "were able to pour off the molten metal and prevent any actual damage." Id. Forcing workers who do not honor a strike into situations where they must deal with molten metals and other dangerous substances in crisis circumstances simply should not become commonplace.

The same is true for cases that led to destruction of property and, by force of luck, not physical harm to workers, as in *Rockford Redi-Mix, Inc. v. Teamsters Loc. 325, Gen. Chauffeurs, Helpers & Sales Drivers of Rockford*, 551 N.E.2d 1333 (Ill. App. Ct. 1990). This case involved a highly similar cement worker strike where cement was left to harden in trucks to inflict property damage to the employers. "The cement had hardened in the trucks, and an attempt to rotate the drums resulted in blowing the hydraulic lines." Id. at 1336. Although injuries to the workers were not recorded in the case, it is apparent how workers do not always possess the specialized skills to recover property in instances of intentional misuse. This can lead to unforeseen workplace dangers and damage extending far beyond what may have been the original intent of the striking union. To the extent that the opinion below incentivizes tortious conduct during a strike, it is against the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 1210
Kansas City, MO 64111
816-931-5559

MATTHEW C. FORYS
Counsel of Record
MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave., Suite 312
Leesburg, VA 20176
703-544-6100
matt@landmarklegal.org

Attorneys for Amicus Curiae