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 a Writ of Certiorari to the Supreme Court of Washington

BRIEF IN OPPOSITION

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INTRODUCTION

This case arises out of a one-week strike by International Brotherhood of Teamsters Local 174 against Glacier Northwest, Inc. In response to the strike, Glacier brought this lawsuit alleging, first, that Local 174 had committed torts by commencing the strike without notice during the workday and, second, that a Local 174 official had fraudulently assured Glacier that employees would return to work the night after the strike concluded. The Washington Supreme Court dismissed the first set of claims on the grounds that the strike was arguably protected by the National Labor Relations Act (NLRA) and thus the question of whether it was actually protected was within the primary jurisdiction of the National Labor Relations Board (NLRB). The Washington Supreme Court also affirmed the lower courts' summary judgment for Local 174 on the second set of claims on the basis that those state-law claims were clearly without merit under Washington law.

In petitioning for certiorari, Glacier challenges the Washington Supreme Court's conclusion that the strike was arguably protected by the NLRA. The Company expressly agrees with the legal standard applied by the Washington Supreme Court, contesting only the Court's conclusion that the strike was arguably protected by the NLRA. As noted by the Washington Supreme Court, whether the strike was actually protected by the NLRA will be decided by the Board in a case currently before it on a complaint brought by the NLRB General Counsel. There is no question that the Washington Supreme Court correctly found that the strike was arguably protected by the NLRA and that the question of whether it was actu-

ally protected should be decided by the NLRB. This Court should accordingly deny the petition because the Washington Supreme Court properly found Glacier's strike-related claims preempted.

As Glacier would have it, this case involves "a union . . . intentionally destroying an employer's property in the course of a labor dispute." Pet. i. Nothing could be further from the truth. The labor dispute in question was a strike by cement truck drivers and the property was concrete contained in some of the trucks at the beginning of the strike. The striking drivers returned their trucks to Glacier's yard and left them running precisely so that the concrete would not harden. By so doing, the strikers not only safeguarded Glacier's trucks but they allowed the Company to use the concrete as it saw fit. Glacier decided to dispose of the concrete because it had failed to arrange for replacement workers or additional management personnel, notwithstanding the expiration of the collective bargaining agreement and its no-strike clause. Glacier could have delivered the concrete to customers had it arranged for those contingencies.

STATEMENT

Teamsters Local 174 represents a bargaining unit composed of 80-90 cement truck drivers employed by Glacier Northwest. Pet.App.3a. On August 11, 2017, Local 174 called the drivers out on strike in support of the Union's demands for a collective bargaining agreement to succeed the agreement that had expired on July 31. Pet.App.4a, 47a.

On the day the strike began, 43 drivers were scheduled to work. The drivers arrived at staggered start times running from 2 a.m. to 7 a.m. Pet.App. 4a. Lo-

cal 174 called the strike at 7 a.m., when all of the scheduled drivers had arrived for work. *Id.*

Glacier's drivers typically deliver three to six loads of concrete during each shift, returning for new loads throughout the workday after their trucks are unloaded. Pet.App.4a; CP 206–07 (Declaration of Adam Doyle).[1] Preparation of concrete for loading into the trucks begins before the drivers arrive and continues throughout the day. Pet.App.4a (citing CP 208, Doyle Declaration). Due to this cyclical working day, Glacier and its employees do not know in advance where drivers will be at any particular time or whether their trucks will be loaded with concrete. CP 207 (Doyle Declaration). When the strike began, some trucks were at Glacier's yard waiting to be loaded, some were returning to the yard to be refilled and some were out with loads of concrete to be delivered. Pet.App.4a.

Sixteen of the striking drivers returned trucks containing undelivered concrete to Glacier's yard. *Id.* These drivers left their trucks running so that Glacier could dispose of the concrete as the Company saw fit. Pet.5 (citing Pet.App.111a). Because it had not arranged for delivery of the concrete by striker replacements, Glacier disposed of the undelivered concrete by washing out the trucks and offloading the concrete into bunkers. Pet.App.5a. Glacier accomplished those tasks without damage to the environment or its trucks, plants, or equipment. *Id.* The

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[1] "CP" refers to the Clerk's Papers, which constitute the record for the Washington appellate courts. In the trial court, Glacier sought and obtained leave to supplement the record on Local 174's motion to dismiss with declarations from three Glacier managers—Justin Denison, Adam Doyle, and David Siemering—which Glacier had previously filed with the NLRB in response to Local 174's unfair labor practice charge.

offloaded concrete, however, was no longer usable and could not be delivered to customers. *Id.*

Glacier disciplined some of the striking drivers and sued Local 174 for conversion and trespass to chattels, along with a conspiracy to commit such conversion and trespass. Pet.App.5a, 154a–157a.[2] It alleged that Local 174 committed these torts by calling a sudden work stoppage at a time when concrete was being "batched and delivered," Pet.App.5a, even though concrete is batched and delivered throughout the workday and all striking drivers returned their trucks to Glacier's yard. Pet.App.4a–5a. Local 174 responded by filing unfair labor practice charges with the NLRB, alleging that by disciplining the strikers and by filing and prosecuting the lawsuit, Glacier had interfered with the right of its employees to strike in support of their Union's collective bargaining demands. Pet. 28 n.4; *see also Glacier Northwest d/b/a Calportland & Teamsters Union Local 174*, NLRB Nos. 19-CA-203068; 19-CA-211776. The NLRB General Counsel held the charges in abeyance until the Washington courts had finally disposed of Glacier's lawsuit. *Id.* The General Counsel then issued a complaint alleging that Glacier had interfered with its employees exercise of their NLRA § 7 rights by disciplining some of the strikers and by filing a preempted and meritless lawsuit against their Union in response to the strike. *Id.* (discussing *Glacier Northwest, Inc.*, Nos. 19-CA-203068, 19-CA-211776 (NLRB Jan. 31, 2022)). The NLRB case is currently scheduled to go before an administrative law judge for hearing in November 2022.

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[2] Glacier also previously asserted a claim for intentional interference with contractual performance but abandoned that claim on appeal.

ARGUMENT

1. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), stands for the proposition that "[w]hen 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." As the Washington Supreme Court recognized, "labor conduct is 'arguably protected' under section 7 when the party asserting preemption 'advance[s] an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or by the Board.'" Pet.App.17a quoting *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986).

There is no question that a strike in support of collective bargaining demands is, as such, arguably protected by NLRA § 7. Section 7 guarantees employees the right to "engage in . . . concerted activities for the purpose of collectively bargaining," 29 U.S.C. § 157, and another section of the Act expressly preserves "the right to strike," 29 U.S.C. § 163.

Glacier maintains that the strike called by Local 174 lost its protected status because its timing led the Company to destroy undelivered concrete. However, as the Washington Supreme Court noted, "the fact that conduct brings 'inconvenience and economic loss' does not render it unprotected." Pet.App.27a, quoting *ABC Concrete Co.*, 233 NLRB 1298, 1304 (1977), *enf'd* 619 F.2d 620 (6th Cir. 1980).

"The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA] ha[s] recognized." *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960). "[T]he use of economic weapons[] frequently

ha[s] the most serious effect upon individual workers and productive enterprises." *Ibid.* Nevertheless, "our national labor relations policy" contemplates "the availability of economic pressure devices to each to make the other party incline to agree on one's terms." *Ibid.*

"The fact that [a] strike occurred during the workday when [some products] were . . . vulnerable to loss does not mean employees automatically los[e] protection under the Act." *Lumbee Farms Cooperative, Inc.*, 285 NLRB 497, 506 (1987), *enf'd* 850 F.2d 689 (4th Cir. 1988). *See also Leprino Cheese Co.*, 170 NLRB 601, 606–07 (1968), *enf'd* 424 F.2d 184 (10th Cir. 1970) (cheesemakers' walkoff protected even after cheesemaking began, causing deterioration in cheese quality).

As the Washington Supreme Court recognized, "under Board precedent, 'employees [must] 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 NLRB 1094, 1094 (1999). To determine what is "reasonable" in this regard, the extent to which the employer "sustained some loss of its product . . . separate from labor losses resulting from the strike" must "be weighed against . . . the strikers' legitimate concerns." *Lumbee Farms Cooperative, Inc.*, 285 NLRB at 506. It is only when "the economic pressure brought to bear . . . reach[es] a degree so grossly disproportionate to the goal sought to be achieved that it renders the conduct unprotected." *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976). *See also Columbia Portland Cement Co*, 294 NLRB 410, 422 (1989), *enf'd in relevant part*, 915 F.2d 253, 258 (9th Cir. 1990) (analyzing walkoff resulting in damage to kiln based on a fact-intensive analysis of the machinery at issue, person-

nel required to safely control production, and employees' efforts to confer with management regarding shutdown process).

As the Washington Supreme Court observed, "two competing principles [are] recognized in the cases: (1) employees must take reasonable precautions to protect an employer's plant, property, and products and (2) economic harm may be inflicted through a strike as a legitimate bargaining tactic." Pet.App.23a. Finding it "unclear where the strike in this case falls on the spectrum between these two principles," the Court concluded that "the strike is, at least, arguably protected conduct under section 7." *Ibid.*

Glacier acknowledges that "[t]he 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'" and "recogniz[ing], 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.'" Pet. 26, quoting Pet.App.24a. However, the Company maintains that there can be no question that the strikers failed to "take reasonable precautions." Pet. 27.

The strikers clearly did take steps to protect Glacier's property from unnecessary damage by returning the loaded trucks to the Company's yard and leaving them running so that they could be safely unloaded. Indeed, by leaving the trucks running, the strikers allowed Glacier to actually deliver the concrete, if the Company had arranged for replacement drivers. Had the strikers not returned the trucks to Glacier's yard

and not left them running, the concrete would have started to harden within 20 to 30 minutes, risking destruction of both the undelivered concrete and the trucks. Pet.App.3a.

It is difficult to imagine what further steps the Union could have taken to protect Glacier without seriously undermining the effectiveness of the strike. Given the staggered start times and the repeated concrete deliveries throughout the day, beginning the strike at a different time would not have avoided the destruction of a similar amount of concrete. On the day of the strike, drivers were scheduled to begin work at staggered start times running from 2 a.m. to 7 a.m., setting off for deliveries as their trucks were loaded. CP 207 (Doyle Declaration, ¶ 4). Even if the strike had been called at 2 a.m., there is no reason to think that fewer than 16 trucks would have been loaded with concrete at the beginning of the work stoppage.

Since concrete must be prepared before it can be loaded into trucks, some concrete would necessarily have to be prepared before drivers began arriving for work. In order to avoid any loss of materials, the Union would have had to warn Glacier sufficiently in advance of 2 a.m. to allow the Company to prepare for the strike either by not mixing concrete for delivery that day—effectively locking out the drivers—or by arranging for striker replacements. Allowing Glacier to take either move would have seriously undermined the effectiveness of the strike.

The NLRA requires advance notice of strikes or picketing only at certain healthcare facilities. 29 U.S.C. § 158(g). In other contexts, the Board has, accordingly, held that "the absence of advance notice of the concerted action" does not "remove the protection of the Act." *Johnnie Johnson Tire Co.*, 271 NLRB

293, 295 (1984). Thus, the Union's failure to give Glacier advance notice of its plans does render the strike unprotected per se.

As the Washington Supreme Court recognized, to determine whether the strikers had taken "reasonable precautions," the Court would have had to "fully analyze whether the conduct is unprotected under section 7 in this case" and "engage with the facts as a matter of first impression, balancing the economic pressure against the strikers' legitimate interest." Pet.App.28a. "*Garmon* makes clear that this kind of fact-specific determination is a function of the Board in the interest of the uniform development of labor policy." Pet.App.29a.

2. To be sure, there are occasions where a state court must decide whether arguably protected conduct is actually protected by the NLRA. "The primary jurisdiction rationale" of *Garmon* "requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978). Thus, "the primary-jurisdiction rationale does not provide a sufficient justification for pre-empting state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board had not done so and the other party to the dispute has no acceptable means of doing so." *Id*. at 202-03. That exception to *Garmon* does not apply in a case, such as this one, where "the Union's filing of an unfair labor practice charge" would seem to be "sufficient in and of itself to trigger preemption." *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993). *See Loehmann's Plaza*, 305 NLRB 663, 670 (1991) (state court proceedings are preempted at the point that the

NLRB General Counsel acts upon charges by issuing a complaint alleging that the prosecution of the state law claim constitutes an unfair labor practice).

Local 174 has filed charges with the NLRB alleging, among other things, that the calling of the strike was protected activity and that the claims in this lawsuit are thus preempted. Pet. 28 n.4. The NLRB General Counsel has investigated those charges and decided to issue a complaint bringing that issue before the Board. *Id.* Whether the strike was actually protected by NLRA § 7 is a matter assigned by Act to the NLRB for determination. As the Company acknowledges, resolution of those issues depends on application of NLRB precedents, and the Board has the authoritative voice on that matter. And if the NLRB finds that Local 174's strike was protected by the NLRA, that federal protection will necessarily preempt Glacier's claims "as a matter of substantive right" on account of the Supremacy Clause. *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Loc. 54*, 468 U.S. 491, 503 (1984). These "[c]onsiderations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is prohibited." *Sears*, 436 U.S. at 199.

"While the Board's decision is not the last word, it must assuredly be the first." *Marine Engineers Beneficial Ass' v. Interlake S. S. Co.*, 370 U.S. 173, 185 (1962). If the NLRB finds that Local 174's strike was protected by the NLRA and that Glacier committed unfair labor practices by disciplining strikers and filing a preempted and meritless lawsuit against the Union, the Company can petition for review of that decision by a federal court of appeals and, if necessary, this Court.

3. The federal cases cited by the petition for certiorari as conflicting with the decision below generally involved circuit court review of findings by the NLRB.

Pet.12-14.[3] Thus, those precedents support the Washington Supreme Court's decision to defer the question of whether the strike was actually protected to the processes provided by the NLRA. Presumably for this reason, Glacier did *not* cite most of those cases in its briefs to the Washington Supreme Court.

In the one federal case that Glacier did cite below, *Marshall Car Wheel and Foundry Co.*, it was the NLRB that determined that "some strikers engaged in unprotected activity," because they did not "take reasonable precautions to protect the employer's physical plant from such imminent damage as forseeably would result from their sudden cessation of work." *Marshall Car Wheel and Foundry Co.,* 107 NLRB 314, 315-16 (1953). The circuit court agreed with the NLRB that "at least some of the strikers engaged in unprotected activity," while overturning the Board's ruling that the employer had waived its right to deny reinstatement to these strikers by condoning their unprotected conduct. *NLRB v. Marshall Car Wheel and Foundry Co.*, 218 F.2d 409, 412-413 (5th Cir. 1955). There is nothing in the circuit court opinion to suggest that the Board should not have, in the first instance, determined whether the strike was protected subject to review as provided for in the NLRA.

U.S. Steel Co. v. NLRB, 196 F.2d 459 (7th Cir. 1952), which Glacier did *not* cite in its briefs to the Washington Supreme Court, is another case involving circuit

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[3] *Del. & Hudson Ry. Co. v. United Transportation Union*, 450 F.2d 603, 607-23 (D.C. Cir. 1971), did not involve the NLRA at all. Rather, that case concerned the scope of the Railway Labor Act's requirement that covered employers and unions "exert every reasonable effort to make and maintain agreements . . . in order to avoid any interruption to commerce or to the operation of any carrier." *Id.* at 609, 622–23 quoting 45 U.S.C. § 152, First.

court review of an NLRB determination that a strike was protected by the NLRA. In the portion of that case cited by Glacier, the issue was the NLRB's factual findings, which differed from those of its trial examiner. Pet.13-14 citing *U.S. Steel*, 196 F.2d at 467. The court agreed with the trial examiner's findings that plant guards "knew the hazards of fire and explosion when they abandoned their work of protecting the plant" but nonetheless willfully abandoned the plant-protection duties they were "hired to perform," giving cause for their discharge. *Ibid.* "[T]he Board found that when the guards walked out they acted reasonably and engaged in a concerted activity protected under the Act." *Id.* at 466. Unlike *U.S. Steel*, this case does not involve guards hired specifically to protect an employer's plant.

In *Rockford Redi-Mix, Inc. v. Teamsters Local 325*, 195 Ill. App.3d 294, 551 N.E.2d 1333 (1990), which Glacier also relied on below, the Illinois courts did determine that a strike was not protected by the NLRA in the course of ruling on a tort claim brought by the struck employer. However, there is no indication that the union defendant in that case had filed charges with the NLRB. Thus, as in *Sears*, "the State court's jurisdiction to provide relief to the plaintiffs [did] not run a realistic risk of interference with the labor board's jurisdiction." 551 N.E. 2d at 1339. Here the question of whether the strike was protected is before the NLRB and a state court determination would most certainly interfere with the Board's jurisdiction.

Rockford Redi-Mix does shed some light on whether the Glacier strikers took reasonable precautions to protect the Company's product and equipment. The drivers in that case parked "their trucks away from the [employer's] premises" and "decided to leave the

trucks with the ignitions off, drums stopped, with the keys in the ignition." 551 N.E.2d at 1335. The employees were aware that their action could cause the concrete to "harden in the drum" of the trucks. *Id*. at 1336. And, this is precisely what happened, requiring that "the concrete [be] jackhammered out of the drum" of one truck and that "[t]hree [other] trucks had to have their drums replaced" altogether. *Ibid*. By contrast, the Glacier drivers returned all of the loaded to Glacier's yard and left them running. The *Rockford Redi-Mix* opinion strongly suggests that such steps would be considered "reasonable precautions." Pet.App.24a quoting *Bethany Med. Ctr.*, 328 NLRB at 1094. Thus, to the extent the state court opinion has any bearing on this case it supports the Washington Supreme Court's conclusion that "the strike is, at least, arguably protected conduct under section 7." Pet.App.23a.

The other state court decisions cited in the Petition, which were *not* cited in Glacier's briefs to the Washington Supreme Court, do not concern arguably protected conduct at all and thus have no relation to the issue decided below. *See* Pet. 14-16. If anything, those cases illustrate that state courts appropriately follow this Court's teachings in *Sears* to evaluate the risk that a state-court proceeding would interfere with the NLRB's exclusive jurisdiction over unfair labor practices by distinguishing arguably protected and prohibited conduct. *See UFCW v. Wal-Mart Stores, Inc.*, 162 A.3d 909, 918 n. 6 (Md. 2017) ("The Supreme Court has made clear that the preemption analysis for arguably protected conduct under section 7 of the NLRA is distinct from the analysis for arguably prohibited conduct under section 8 of the NLRA.") (citing *Sears*).

Here, adjudication of the conversion and conspiracy claims in the Washington state court presents a sig-

nificant risk of interference with the NLRB's jurisdiction because the conduct at issue—a concerted work stoppage in support of a new collective bargaining agreement—is at least arguably protected and Glacier cannot establish its state torts without affirmatively showing that the strike was *not* protected by the NLRA. That is so because in Washington conversion requires proof that interference with property lacks lawful justification. *See, e.g., Potter v. Washington State Patrol*, 165 Wash. 2d 67, 78, 196 P.3d 691 (2008). It is hard to imagine a sharper risk of interference with the NLRB's jurisdiction through state-court proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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