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

REPLY TO BRIEF IN OPPOSITION

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

CHRISTOPHER S. DINKEL
JONES DAY
250 Vesey Street
New York, NY 10281

NOEL J. FRANCISCO
Counsel of Record
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The Union's opposition brief does not dispute that this case presents a clean vehicle to resolve a split on an exceptionally important question of federal law. To deem Glacier's claims impliedly preempted, the Washington Supreme Court held both that the Union's intentional destruction of Glacier's property was "arguably protected" by the NLRA and that this intentional destruction of property falls outside of the "local feeling" exception to *Garmon* preemption. As Glacier's petition explains, each holding splits with multiple circuits or state high courts and conflicts with this Court's precedent.

Instead of disputing any of this, the Union's response argues (1) that it did not actually intend to destroy Glacier's property; (2) that some (but not all) of the cases involved in the splits are factually distinguishable; and (3) that the subsequent decision of an NLRB regional director to file an NLRB complaint somehow retroactively validates the Washington Supreme Court's implied-preemption holding. All three arguments fail.

The first improperly seeks to litigate the facts at the motion-to-dismiss stage, where the allegations of intentional property destruction must be taken as true. The second fails to meaningfully distinguish the cases it addresses, and it entirely fails to address several of the cases discussed in the petition. And the third amounts to no more than an implausible merits argument that the mere filing of an NLRB complaint is enough to impliedly preempt an employer's claim for intentional property destruction, even though the NLRB can provide no substitute remedy.

Just as notable is what the Union's brief does not say. Not only does it completely ignore many of the cases with which the Washington Supreme Court's decision splits, but it also never once mentions the "local feeling" or "local interest" exception to *Garmon* preemption. Nor does it address this Court's statement in *Lodge 76* that "destruction of property has been held most clearly a matter for the states." 427 U.S. 132, 136 (1976). Indeed, the Union fails to so much as mention the case. *See* BIO at iii-iv. And the Union has no response at all to the obvious importance of the issues this case raises, or this case's suitability as a vehicle.

ARGUMENT

I. THE UNION FAILS TO UNDERMINE THE SPLITS GLACIER IDENTIFIED

As Glacier's petition explains, the Washington Supreme Court's decision creates three stark splits. *First*, it conflicts with decisions holding that the NLRA does not protect work stoppages intentionally timed to destroy property. Pet. 12-14. *Second*, it conflicts with state high courts' holdings that the local feeling exception to *Garmon* preemption covers state tort claims based on the intentional violation of property rights. Pet. 14-16. *And third*, by asking only whether the Union's conduct implicated "competing principles," rather than applying and reconciling those principles, the decision splits from the consensus approach to gauging whether conduct is "arguably protected" under *Garmon*. Pet. 16-20.

The Union offers only unconvincing responses to the first two splits, and no response at all to the third.

1. The Union does not dispute—nor could it—that the Fifth and Seventh Circuit cases Glacier cites "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, 795-96 (3d Cir. 1960) (citing *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409 (5th Cir. 1955) and *U.S. Steel Co. (Joilet Coke Works) v. NLRB*, 196 F.2d 459 (7th Cir. 1952)). The Union observes that these cases involved circuit review of the NLRB's determination of whether the NLRA protected the conduct at issue. BIO 11-12. But that is irrelevant. Each case squarely held that intentionally timing a work stoppage to destroy an employer's property is not protected. Regardless of the procedural posture, these decisions establish that such conduct is not protected—actually, arguably, or otherwise.

Indeed, in yet another case the Union fails to mention, the NLRB itself relied on the Fifth Circuit's *Marshall Car Wheel* decision to explain that "[t]he Board has long held that employees have the duty to take reasonable precautions when striking in order to avoid damage to the company's property." *Boghosian Raisin Packing Co.*, 342 N.L.R.B. 383, 397 (2004). It plainly follows that a strike *deliberately designed* to destroy property is not protected. And courts uniformly recognize as much, including in cases reviewing decisions of lower courts rather than the NLRB. *See, e.g.*, *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 803 (3d Cir. 1996) (NLRA does not protect "threats to public order such as . . . destruction of property").

In short, prior to the Washington Supreme Court's decision, the common-sense principle that the NLRA does not shield unions from liability for intentionally destroying employer property was well settled in both the NLRB and the courts. The split created by the decision below requires this Court's attention.

2. The Union fares no better in trying to minimize the conflict with state court decisions recognizing that the NLRA does not impliedly preempt state tort claims for the intentional violation of property rights. According to the Union, these cases are irrelevant because they concerned "arguably prohibited" conduct rather than "arguably protected" conduct. *See* BIO 13. But while the analysis of "arguably prohibited" and "arguably protected" conduct may vary, "the considerations underlying the two categories [also] overlap[.]" *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 162 A.3d 909, 918 n.6 (Md. 2017). Both recognize the "local feeling" or "local interest" exception. *See id.* at 925-26; *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 504 S.W.3d 573, 578 (Ark. 2016). And that exception defeats implied preemption when the state tort claim at issue vindicates "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [courts] could not infer that Congress had deprived the States of the power to act." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). Providing a tort remedy for intentional violation of property rights is unquestionably "deeply rooted in local feeling and responsibility," and that is enough to preclude any flavor of implied preemption.

The Union insists that this Court's decision in *Sears* requires "distinguishing arguably protected and prohibited conduct." BIO 13. But *Sears* itself acknowledged—in the section of the opinion addressing the "arguably protected" ground of *Garmon* preemption—that "state jurisdiction to enforce its laws prohibiting . . . obstruction of access to property is not pre-empted by the NLRA." *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 202-04 (1978). As Glacier's petition explains, and the Union again entirely ignores, the same is obviously true of the intentional *destruction* of property, since destruction is irrevocable. *See* Pet. 24. Accordingly, the Union is mistaken to claim that the decision below can be squared with other state high courts that have properly held the NLRA does *not* impliedly preempt state-law claims for the intentional violation of employers' property rights. This split, too, warrants review.

3. Finally, as Glacier's petition explains, the decision below deviates from previously well-established law in the manner in which it assesses whether conduct is "arguably protected." According to the Washington Supreme Court, the key question is "whether the activity is potentially subject to federal regulation." Pet.App.17a (quotation marks omitted). Under that test, conduct is "arguably protected" by the NLRA whenever it "involves two competing principles," because courts supposedly lack the authority to "harmonize[]" competing principles or evaluate where a "case falls on the spectrum" between them. Pet.App.23a.

By contrast, at least six circuits follow this Court's admonition that "[i]f the word 'arguably' is to mean anything" for *Garmon* preemption purposes, "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." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986). Thus, in the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits, the proponent of implied preemption must come forward with more than just "competing principles" that might, hypothetically, implicate the NLRA. *See* Pet. 16-20.[1]

This split is critical: As explained in the petition, the two principles identified by the Washington Supreme Court are easily reconciled. While unions may impose some economic costs by striking, they may not intentionally destroy an employer's property. The Union here is alleged to have done just that.

---

[1] The Union baldly asserts that Glacier "expressly agrees with the legal standard applied by the Washington Supreme Court." BIO 1. Not so. True, the court "started off on the right foot" by acknowledging that work stoppages are not protected when employees fail to take "reasonable precautions" to protect employer property. Pet. 26 (quoting Pet.App.24a). But it applied the wrong legal standard by deeming itself powerless to proceed once it identified a supposedly "competing principle[]."

* * *

In short, this case implicates one conceded split in which a necessary part of the lower court's holding deviated from the majority position. This case would thus merit certiorari even if it did not also implicate the two additional splits the Union only half-heartedly disputes. And these additional splits further confirm the need for the Court's review, as the Washington Supreme Court's decision can stand only if it correctly broke from the prior consensus on those grounds as well.

II. THE DECISION BELOW IS GRIEVOUSLY WRONG.

As Glacier's petition explains, this Court's own precedent from both before and after *Garmon* establishes that the numerous federal circuits and other state high courts from which the decision below divides have it right. The NLRA does not authorize unions to intentionally destroy employer property by immunizing them from traditional state tort liability for such unlawful conduct, just because it occurs in connection with an otherwise lawful strike.

1. As far back as 1939, the Court explained in *NLRB v. Fansteel Metallurgical Corp.* that while the NLRA permits employees to strike, it does not protect their "conversion of [an employer's] goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands." 306 U.S. 240, 253 (1939). Congress did not, through the NLRA, "license [employees] to commit tortious acts" or "protect them from the appropriate consequences of unlawful conduct." *Id.* at 258.

If that were not clear enough, the Court's statement in 1986 that, notwithstanding *Garmon* preemption, the "[p]olicing of actual or threatened violence to persons *or destruction of property* has been held most clearly a matter for the States" erases any possible doubt. *Lodge 76*, 427 U.S. at 136 (emphasis added). As the Court has explained, where, as is true here, "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct," *Garmon* preemption would essentially "grant [unions] immunity from liability for their tortious conduct" during a strike. *United Constr. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954). Absent clear textual support, there is "no substantial reason for reaching such a result." *Id.* at 664; *see also Farmer v. United Bhd. of Carpenters & Joiners of Am.*, 430 U.S. 290, 299 (1977) (finding no preemption of IIED claim 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) (similar for defamation claim).

These repeated holdings of this Court make clear that the conduct alleged here—intentional destruction of an employer's property—is not even arguably protected, and that even if it were, it would fall squarely within the local feeling exception to preemption. The Washington Supreme Court badly erred in reaching the contrary conclusion on both questions and granting the Union the very "license" to destroy property that this Court's cases foreclose.

2. Again, the Union cannot and does not meaningfully dispute any of this. Indeed, the Union does not even try. Its brief in opposition cites *none* of these cases, even though Glacier's petition explained their importance and applicability in detail. *Compare* Pet. 16-20 *with* BIO at iii-iv. Instead of confronting them, the Union offers two red herrings.

First, the Union suggests without meaningful citation that the factual details of the strike mean that it did not intentionally destroy Glacier's property. *See* BIO 5-9. The Union is certainly free to advance that argument as the factual record develops in the trial court. But as the decision below acknowledges, Washington law requires that a plaintiff's allegations—as well as any "hypothetical facts supporting the complaint"—must be taken as true at the pleading stage. Pet.App.13a & n.7. As the Washington Supreme Court summarized, Glacier's allegations included that the Union "had coordinated with truck drivers to purposely time the strike when concrete was being batched and delivered in order to cause destruction of the concrete." Pet.App.5a. Or, in the complaint's own words: "Rather than taking reasonable precautions to protect Glacier's equipment, plant and batched concrete from the foreseeable imminent danger resulting from the . . . sudden cessation of work, the Union . . . acted tortiously and indefensibly by sabotaging, ruining and destroying Glacier's undelivered and perishable batched concrete." Pet.App.146a-147a.

The Union's insistence that "[i]t is difficult to imagine what further steps [it] could have taken to protect Glacier," *see* BIO 8, rings hollow given the facts taken as true on a motion to dismiss. For

example, the complaint makes plain that the Union "intentionally timed the August 11, 2017 sudden cessation of work" "[w]ith the improper purpose of sabotaging, ruining and destroying Glacier's batched concrete." Pet.App.147a. And the motion-to-dismiss response elaborates that the Union agent used a throat slashing gesture to "signal[] the beginning of the action to damage Glacier's property" and told the employees to "Leave the f***** running" without "dumping them or rinsing them out" because "Consequences are Consequences." Pet.App.111a. This led to "ready-mix trucks loaded with concrete parked everywhere." *Id.* In short, the Union's improper factual argument that any other strike would have destroyed just as much property is as implausible as it is irrelevant at this stage.

Second, the Union argues that Glacier's claim is preempted because, after the Washington Supreme Court issued its decision, an NLRB regional director filed a complaint seeking to penalize Glacier for bringing suit against the Union and for issuing written warnings to the employees involved in the destruction of its property. *See* BIO 9-10. But this argument is both wrong and irrelevant at this stage.

It is not plausible that Congress *impliedly* meant for the mere filing of an NLRB complaint to cut off traditional state-law remedies for the destruction of property. That is especially true because 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. Indeed, the need to preserve a damages remedy under state law is exactly why the

local feeling exception forecloses any finding of implied preemption in this type of case. Pet. 22-23.

In any event, this merits issue is not relevant at the certiorari stage. To the extent there is any question about what effect, if any, an NLRB complaint may have on *Garmon* preemption, that is no reason to deny review. If anything, it is a reason to grant: If this Court denies review, then the parties in the NLRB proceeding will be permanently bound by the Washington Supreme Court's dubious preemption holding—and Glacier will be permanently deprived of any remedy *regardless* of whether the NLRB ultimately finds that the Union unlawfully destroyed the company's property.

III. THE UNION CONCEDES THAT THIS CASE PRESENTS AN EXCEPTIONALLY IMPORTANT ISSUE IN A CLEAN VEHICLE.

The Union does not even attempt to dispute that the question presented is exceptionally important. Pet. 30-33. Nor could it in light of *Sears*, where this Court granted review due to the "obvious importance" of "whether . . . a state court has power to enforce local trespass laws against a union's peaceful picketing." 436 U.S. at 184. The importance is even more obvious here, as this case involves state-law claims based on the even more egregious permanent *destruction* of property.

The Union also has nothing to say about how foreclosing any remedy for property destruction would steer the NLRA toward dangerous constitutional shoals, given this Court's recent holding that labor law cannot override "the

protection of private property." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021); *id.* at 2080 (Kavanaugh, J., concurring) (NLRA should be read to "avoid unconstitutionality" in light of "the Constitution's strong protection of property rights").

The Union is equally silent on the importance of the decision below in bucking this Court's recent guidance that courts should decline to find implied preemption "based not on the strength of a clear congressional command . . . but based only on a doubtful extension of a questionable judicial gloss." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905 (2019) (opinion of Gorsuch, J.).

Again, the Union does not even attempt a response to any of this. Its brief fails to address the issue of importance generally, much less explain away the recognition of importance in *Sears*, the constitutional concerns raised by the decision below, or its departure from modern preemption principles. In short, the Union concedes this case's importance.

Finally, the Union does not raise a single objection to this case's suitability as a vehicle for this Court's review. The Union thus concedes that this case's clean motion-to-dismiss posture presents an excellent vehicle to resolve the critically important question presented. *See* Pet. 33.

CONCLUSION

The petition for a writ of certiorari should be granted.

August 2, 2022

Respectfully submitted,

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

CHRISTOPHER S. DINKEL
JONES DAY
250 Vesey Street
New York, NY 10281

NOEL J. FRANCISCO
Counsel of Record
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioner