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 Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Since 1968 the National Right to Work Legal Defense Foundation, Inc., has been the nation's leading advocate for employees' freedom to choose or reject unionization in their workplace. Foundation staff attorneys have represented individual employees before this Court in many free speech and association cases. *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Loc. 1000*, 567 U.S. 298 (2012); *Commc'ns Workers v. Beck*, 487 U.S. 735 (1988); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984).

The Foundation submits this brief because its mission includes protecting employees, especially non-union employees, from threats, coercion, violence, and economic loss caused by labor unions holding monopoly bargaining power in the workplace. Foundation staff attorneys have litigated a variety of tort cases for employees injured by union mayhem or violence. *E.g.*, *Clegg v. Powers*, No. 97-cv-0006, 1997 WL 672641 (W.D. Va. Oct. 22, 1997) (court denied union's preemption defenses in case brought by non-union workers injured in a strike; case remanded to state court after wrongful removal); *Loc. Lodge 1297 v. Allen*, 490 N.E.2d 865 (Ohio 1986) (employees filed state tort claims for invasion of privacy and intentional infliction of emotional distress against a union after a

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[1] Under Supreme Court Rule 37.3(a), the parties consented to the filing of this brief. Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus curiae made a monetary contribution to its preparation or submission.

strike); *DiLuzio v. United Elec. Workers, Loc. 274*, 435 N.E.2d 1027 (Mass. 1982) (employee sued union for mental suffering and property damage after being assaulted during a strike); *Hinote v. OCAW, Loc. 4-23*, 777 S.W.2d 134 (Tex. App. 1989) (tort suit filed after non-striking worker was shot five times with a .22 caliber rifle); *Richardson v. Commc'ns Workers*, 443 F.2d 974 (8th Cir. 1971), *further proceedings*, 486 F.2d 801 (1973) (employee who opposed the union and became a nonmember filed suit after experiencing harassment and abuse both within the plant and outside); *Drobena v. NLRB*, 612 F.2d 1095, 1097 (8th Cir. 1980) (employees who crossed picket lines were "met by threats, harassment, some violence and a substantial amount of property damage").

This brief is filed to highlight the Washington Supreme Court's error in granting labor unions a new immunity from state tort actions when they intentionally damage private property, if the damage occurs during something characterized broadly as a "labor dispute." Pet. App. 15–16. This case involves a union's destruction of an employer's property, but the immunity the Washington Supreme Court created would apply equally to the destruction of employees' property.

SUMMARY OF ARGUMENT

For a century, labor unions have been granted broad and unwarranted legal privileges and immunities not held by any other citizen or entity. *See, e.g.*, *Care One Mgmt. LLC v. United Healthcare Workers E.*, 43 F.4th 126, 147 (3d Cir. 2022) (recognizing unions "have historically been granted special protec-

tions because they sometimes employ tactics that often inflict economic loss"). This includes everything from antitrust exemptions to prohibitions on federal court injunctions to the power to force nonmembers to pay dues or fees as a condition of their employment.

The Washington Supreme Court has misread this Court's preemption cases to conjure yet another special privilege only for unions: an exemption from state tort law for intentional and wanton property destruction, if the destruction occurs in the context of a "labor dispute." This new exemption from common law tort liability is both unwise and unnecessary. If allowed to stand, this new immunity could deprive parties, including individual employees, of the ability to seek compensation from unions that *intentionally* destroy their property. Given unions' already extensive exemptions from the normal rules of civil and criminal law, the Court should not expand federal preemption principles to allow labor unions another avenue to escape liability for their tortious acts.

ARGUMENT

I. The Washington Supreme Court misapplied and unwisely expanded this Court's preemption principles.

This Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), held that the National Labor Relations Act ("Act"), 29 U.S.C. § 141 *et seq*., impliedly preempts many state regulations of conduct "arguably" encompassed by the Act. *Id.* at 246. But this Court's preemption cases also recognized that states' interest in protecting life, limb and private

property must be respected under principles of federalism, and that victims of union misdeeds must have a state court remedy because they generally have no federal remedy. *See, e.g.*, *Lodge 76 v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 136 (1976) (recognizing "destruction of property has been held most clearly a matter for the States"); *Linn v. United Plant Guard Workers, Loc. 114*, 383 U.S. 53, 61–62 (1966) (holding claim for malicious libel not preempted); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (holding contractor's state tort lawsuit for damages to redress union threats and intimidation not preempted); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939) ("The employees had the right to strike but they had no license to . . . seize their employer's plant."). Yet the Washington Supreme Court erroneously limited Washington's power to protect its citizens when it immunized unions from tort liability for intentional destruction of an employer's private property.

State jurisdiction over tort claims against unions is not simply an "employer versus union" issue. Rather, state courts provide the primary forum for *employees* seeking compensation when injured by tortious union activity. *Farmer v. United Bhd. of Carpenters, Loc. 25*, 430 U.S. 290, 301–03 (1977) (holding employee's intentional infliction of emotional distress claim not preempted given the lack of a federal remedy); *UAW v. Russell*, 356 U.S. 634 (1958) (holding state court retains jurisdiction of employees' tort suit against union arising out of a violent strike).

Unions faced with employees' state tort claims often raise exaggerated preemption defenses to try to

avoid liability. For example, in *Clegg v. Powers*, employees sought damages in state court for union violence and property damage during a strike. The union raised preemption defenses and, based on those defenses, removed the case to federal court to try to defeat the claims. 1997 WL 672641, at *1. The case was later remanded when the employees' tort claims were found not preempted. Cases like *Clegg* demonstrate that the Court should limit the reach of *Garmon* preemption in all situations of union violence or intentional property damage, and not countenance the creation of a new immunity for labor unions. As shown next, unions already possess more than enough immunities and exemptions from the normal rules of civil and criminal law.

II. Unions possess and use unique legal privileges and exemptions that should be narrowed, not expanded.

The Washington Supreme Court's decision to carve out a new and broad immunity for unions should not be analyzed in a vacuum. This Court should consider that newfound immunity from tort claims in light of the extraordinary privileges and exemptions already granted to unions, by both Congress and this Court. *See* Morgan O. Reynolds, *Labor Unions*, The Library of Economics and Liberty, https://www.econlib.org/library/Enc/LaborUnions.html (last visited Nov. 2, 2022) ("We have now reached a state where [unions] have become uniquely privileged institutions to which the general rules of law do not apply." (quoting Friedrich A. Hayek)); *id.* ("The long and short of trade union rights is in fact the right to proceed against the

strikebreaker with primitive violence." (quoting Ludwig von Mises)); *see generally* Felix Frankfurter, *Legal Immunities of Labor Unions*, *in Labor Unions and Public Policy* 122 (1958) (recounting union immunities enjoyed by no other actors); Armand Thieblot et al., *Union Violence: The Record and the Response by Courts, Legislatures and the NLRB* (Herbert R. Northrup ed., George Mason Univ. 1999) (1983).

Unions' special privileges and exemptions, possessed by no other citizens or entities under the law, include the following:

1. Union officials are exempt from the Hobbs Act's criminal penalties, 18 U.S.C. § 1951, when violence is used "to achieve legitimate union objectives." *United States v. Enmons*, 410 U.S. 396, 400 (1973). In practice, this immunizes union officials' threats and violence in a way not tolerated from any other citizen. As Justice Douglas's dissent in *Enmons* recognized:

> Seeking higher wages is certainly not unlawful. But using violence to obtain them seems plainly within the scope of 'extortion' as used in the Act, just as is the use of violence to exact payment for no work or the use of violence to get a sham substitution for no work.

Id. at 418. This immunity for union officials' threats of violence or vandalism has led to shocking results. For example, in *United States v. Burhoe*, 871 F.3d 1, 8–9 (1st Cir. 2017), the First Circuit relied on *Enmons* to overturn union officials' conviction for extorting non-union contractors to pay for superfluous unionized workers.

2. Unions are granted the extraordinary privilege of exclusive representation over the entire bargaining

unit, including non-members who do not want union representation. *See, e.g.*, 29 U.S.C. § 159(a) (exclusive representation under the Act); 45 U.S.C. § 152, Fourth (exclusive representation under the Railway Labor Act); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944) (holding individual employment contracts voided by collective bargaining agreement). Exclusive representation includes the power to control the grievance process for all employees, including non-members and dissidents. *USW v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975). Yet employees have little recourse to defend themselves against a union's abuse of its exclusive representation powers. *See Janus*, 138 S. Ct. at 2468 ("[W]hen a union controls the grievance process, it may, as a practical matter, effectively subordinate 'the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit.'" (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974))).

In practice, the federal government mandates that employees accept exclusive representation even from unions that practice racial or religious bigotry and are personally hostile to them. *See, e.g.*, *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) (requiring black firemen to accept a racially discriminatory union as their representative); *Goldstein v. CUNY*, No. 22-cv-00321 (filed Jan. 12, 2022, S.D.N.Y.) (arguing exclusive representation by an anti-Semitic union violates Jewish professors' free speech and association rights). No other private entity in America is granted such expansive and exclusive power over other citizens' speech, free association, and workplace contract and

property rights. Unions "avidly" seek this government-granted monopoly power precisely because it increases their control over employees' economic and political interests. *Janus*, 138 S. Ct. at 2467–68; *see Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014) ("[T]he Union alone gets a seat at the negotiation table." (citing *IAM v. Street*, 367 U.S. 740, 761 (1961))).

3. Unions are granted not only monopoly bargaining power over workers, but also permanent incumbency with no term limits. Federal labor law does not require periodic recertification elections, so unions, once installed in a workplace, enjoy virtual life tenure. This leads to sclerotic legacy unions remaining permanently in power, even when plagued by vast cultures of corruption. The Department of Justice's on-going experience with the United Auto Workers' leadership readily confirms this. United States Attorney's Office, *Former International UAW President Gary Jones Sentenced to Prison for Embezzling Union Funds*, United States Department of Justice (June 10, 2021), https://www.justice.gov/usao-edmi/pr/former-international-uaw-president-gary-jones-sentenced-prison-embezzling-union-funds. By some estimates 94% of workers have never voted for the union representing them, precisely because decertifying an incumbent union is so difficult and there are no automatic recertification requirements. James Sherk, *Unelected Representatives: 94 percent of Union Members Never Voted for a Union*, Heritage Foundation (Aug. 30, 2016), https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union. Federal law leaves employees with little recourse to vindicate their associational rights.

Making matters even worse, the National Labor Relations Board ("NLRB") has created a procrustean bed of non-statutory "bars" and administrative hurdles for employees who seek a decertification vote. These include: the contract bar, which locks employees into union representation for up to three years after a contract is signed, *Mountaire Farms, Inc.*, 370 N.L.R.B. No. 110 (April 21, 2021); the successor bar, which prevents employees from ousting the incumbent union if their employer's identity changes through a sale or reorganization, *UGL-UNICCO Serv. Co.*, 357 N.L.R.B. 801 (2011); and the settlement bar, which blocks employees' decertification votes after unfair labor practice charges are settled, *Geodis Logistics, LLC*, 371 N.L.R.B. No. 102, at *8, n.9 (May 24, 2022) (Member Ring, concurring). The Board interprets these bars broadly to dismiss employee-led decertification efforts based on even minor technicalities, locking employees into unwanted representation (and in many cases unwanted dues payments) for years. *See, e.g.*, *Bendix Corp.*, 210 N.L.R.B. 1026 (1974) (employee decertification petition dismissed when filed on the same day a letter of agreement was signed by the union and employer); *Rieth-Riley Constr. Co.*, 371 N.L.R.B. No. 109 (June 15, 2022) (unproven allegations by a union are enough to dismiss employee's decertification petition).

4. Unions are empowered by federal law to compel private-sector workers to join as members or pay fees to retain their employment. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Beck*, 487 U.S. 735 (1988); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1998). Despite this Court's recognition that forcing

employees to pay compulsory dues is an "extraordinary *state* entitlement to acquire and spend *other people's* money," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007), which is unconstitutional in the public sector, *Janus*, 138 S. Ct. at 2467–68, union compulsion remains intact for millions of employees under the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and the Railway Labor Act, 45 U.S.C. § 152, Eleventh. *See generally Producers Transp., Inc. v. NLRB*, 284 F.2d 438 (7th Cir. 1960) (upholding employee's discharge for nonpayment of union dues).

"[F]reedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.' The right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463 (citations omitted) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Yet the injustice of forced union support persists for private-sector employees even though "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.*

5. Unions have been granted the power to create dues checkoff authorizations that are *irrevocable* for up to one year. 29 U.S.C. § 186(c)(4). This means that employees are locked in to financially supporting a union even when they are not otherwise required to do so. *Frito-Lay, Inc.*, 243 N.L.R.B. 137 (1979) (holding, contrary to the plain text of 29 U.S.C. § 186, employees can be required to submit their revocations during a short window period before the termination of a collective bargaining agreement).

Unions have leveraged this irrevocability to create byzantine roadblocks in the path of employees seeking to stop dues payments. *See, e.g.*, *Felter v. S. Pac. Co.*, 359 U.S. 326 (1959); *Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488, 493 (4th Cir. 1981) ("additional requirement [imposed by the union] clearly could dampen the employee's freedom to choose or revoke checkoff of his union dues"); *Loc. 58 v. NLRB*, 888 F.3d 1313, 1319 (D.C. Cir. 2018) (requiring employees to appear in person at the union hall with picture identification and written request to revoke dues deductions held to violate the Act's right to refrain); *Int'l Bhd. of Teamsters Loc. 385 (Walt Disney Parks & Resorts U.S., Inc.)*, 366 N.L.R.B. No. 96, *1 (June 20, 2018) (union "repeatedly and deliberately failed to respond in any manner to the Charging Parties' letters, telephone calls, and/or in-person inquiries regarding revocation of their dues checkoff authorizations").

Moreover, the NLRB has upheld union rules that burden employees' ability to revoke checkoffs, and that require them to meet short "window periods" to do so. *Ruisi v. NLRB*, 856 F.3d 1031 (D.C. Cir. 2017). If the employees miss their minuscule target, they must keep paying dues for a full year before they have the right to try again. This grants unions the ability to compel dues from employees who do not owe a cent, yet find themselves bound by a method of payment they cannot stop, with no recourse for seeking a refund.

6. Union activities are protected by the "broad anti-injunction provisions of the Norris-LaGuardia Act." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 704 (1982); *Burlington N.R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S.

429 (1987) (affirming federal courts have no jurisdiction to enjoin secondary picketing in railway labor disputes); *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947) (conspiracy to monopolize certain lumber products); *see* Ralph K. Winter, Jr., *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 Yale L.J. 70 (1960). In practice, this means unions are excused from complying with many "tort-law doctrines" that apply to other citizens and entities. *Jacksonville Bulk Terminals*, 457 U.S. at 715 (finding that under Norris-LaGuardia an employer cannot seek an injunction even where the union violates a no-strike clause for a non-labor related purpose). Under the current state of the law, "common-law principles of agency and *respondeat superior* have no place in assessing liability of labor unions for the acts of their members or officers," *Care One Mgmt.,* 43 F.4th at 141, even though these established legal doctrines apply to every other member of our society.

7. Unions are exempt from antitrust law on both a statutory and non-statutory basis. Comment, *Labor's Antitrust Exemption After* Pennington *and* Jewel Tea, 66 Colum. L. Rev. 742 (1966). Congress exempted labor unions from antitrust liability in Section 6 of the Clayton Act, 15 U.S.C. § 17 (formation and operation of labor unions), Section 20 of the Clayton Act, 29 U.S.C. § 52 (injunctive relief restrictions) and Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (injunctive relief restrictions). Congress thereby created a statutory exemption for labor unions from the antitrust laws, as "long as a union acts in its self-interest and does not combine with non-labor groups." *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

In addition, this Court has created a non-statutory labor union exemption from antitrust liability. This exemption shields from antitrust liability the actual agreements between and among employers and unions. For example, in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996), this Court extended the non-statutory labor exemption beyond collective bargaining, to include joint action by employers—and presumably unions—that is ancillary to the collective bargaining process. Ultimately, these exemptions from antitrust laws prevent courts from providing a check on anti-competitive union activity that can be characterized as related to collective bargaining or a labor dispute.

* * *

Against this tableau of special privileges the Washington Supreme Court created yet another unique privilege, effectively immunizing labor unions from state tort actions for intentional destruction of innocent citizens' property and livelihoods. That court excused the union's actions and refused to call them what they were—a conspiracy to commit vandalism. And it created a new union-only exemption from tort liability that goes far beyond what *Garmon* requires. This is both unwise and unnecessary. Unions need no further exemptions and special legal privileges. Indeed, those they now possess should be scrutinized and restricted. This Court should treat unions like all other citizens or entities, clarifying that they can be liable for damages in state courts under "the common law rule that a man is held to intend the foreseeable consequences of his conduct." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954).

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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