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 Washington

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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November 8, 2022

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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?

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INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. The Buckeye Institute is a leading advocate of protecting private property and promoting policies that utilize fair processes and fair laws to produce just outcomes.

The Buckeye Institute has a particular interest in this case because if other courts apply the Supreme

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[1] Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has obtained written consent to file this amicus brief from all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

Court of Washington's reasoning, it will encourage property destruction as a tactic in labor disputes by removing state remedies and protections against sabotage and vandalism, resulting in the erosion of Fifth Amendment protections across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's recent holding in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) places the National Labor Relations Act ("NLRA") preemption on a collision course with the Fifth Amendment. But the canon of constitutional avoidance allows—and indeed, counsels—the Court to resolve the preemption issue raised in this case by clarifying that property destruction, even when it occurs in the context of a labor dispute, is not "arguably protected" under the NLRA. Such a holding would define the contours of NLRA preemption in the wake of *Cedar Point Nursery* and would reaffirm that public policy does not favor the use of property destruction as negotiating tactic.

The Takings Clause's Just Compensation requirement is unconditional. Its simple and unadorned language provides, "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. That protection, rooted in Magna Carta and applied consistently to the present day, means that when the government takes an interest in property—or allows an interest to be taken by a third party—for some public purpose, its duty to compensate the property owner is "categorical." *Tahoe–Sierra Preservation Council, Inc.*

v. Tahoe Regional Planning Agency, 535 U.S. 302, 324 (2002) (citing *United States v. Pewee Coal Co.,* 341 U.S. 114, 115 (1951)).

When Congress enacted the NLRA, it created a unitary national labor policy that superseded state attempts to regulate the power relationship between employees and their employers. But a statutory national labor policy cannot supplant an enumerated constitutional right. As this Court recently held in *Cedar Point Nursery*, an uncompensated taking is unconstitutional regardless of "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." 141 S. Ct. at 2072.

By tacitly allowing union organizers to destroy personal property and applying NLRA preemption to deny the owner any recourse, the Washington Supreme Court's reading works the same constitutional harm on Glacier Northwest as the California statute at issue in *Cedar Point Nursery*: Employers are made to suffer an uncompensated loss of their property rights for the sake of statutory labor policy.

The Washington Supreme Court's decision that the NLRA preempted any state tort claim for property destruction rests on its reading of *San Diego Building Trades Council, Millman's Union, Local 2020 v. J.S. Garmon*, 359 U.S. 236 (1959). The *Garmon* Court cast a wide net, holding that if labor conduct is "arguably protected" under section 7 of the NLRA, then the

federal statute preempts any state cause of action. *Id.* at 247.

By treating the destruction of Glacier Northwest's personal property as a "labor activity" that is "arguably protected" by the NLRA while simultaneously immunizing the unions from tort liability, the Washington Supreme Court would allow the federal government to affect a categorical *per s*e taking of Glacier Northwest's personal property without compensation. Yet the Washington Supreme Court did not perform any takings analysis in its decision. In so doing, the Supreme Court of Washington's decision overlooked the significance of this Court's decision last term in *Cedar Point Nursery* to NLRA cases. There, this Court explained that when conduct putatively protected by labor laws effectuate a *per se* taking, the Fifth Amendment's takings protections must prevail.

Although *Cedar Point Nursery* appears—at least in some circumstances—to conflict with *N. L. R. B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), this Court can apply the canon of constitutional avoidance to clarify that the property destruction at issue here is not arguably protected conduct under the NLRA. This construction of the NLRA and *Garmon's* local feeling exception is consistent with federal jurisprudence and will serve public policy by removing any incentive for parties to seek to better their position in a labor dispute by destroying the other's personal property.

The Court should reverse the Washington Supreme Court's decision and hold that the Fifth

Amendment's protection of property rights, particularly in the in the wake of *Cedar Point Nursery*, requires that plaintiffs have access to state tort remedies when their property is destroyed.

ARGUMENT

1. The Fifth Amendment's Takings Clause Exists to Protect Against Statutory Appropriations of Property

The Framers' purpose in drafting the Fifth Amendment was to protect citizens against *all* uncompensated takings. This Court has identified that the roots of the Takings Clause extend back at least 800 years to Magna Carta. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015).

Notably, "eminent domain"—the physical taking of land—arose in Anglo-American jurisprudence as a function of Parliament," rather than as a prerogative of the Crown. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 564 (1972). Thus, from its beginning, the protection against uncompensated takings has applied to legislative acts.

The right to private property is no ordinary right. It is bound up in the historical Anglo-American struggle for liberty and was viewed by the Framers as pre-condition to other rights. In fact, this Court begins its analysis in *Cedar Point Nursery* by quoting John Adams' famous aphorism—"[p]roperty must be secured, or liberty cannot exist." *Cedar Point Nursery*, 141 S. Ct. at 2071 (internal citation omitted). Adams' understanding that property and liberty went hand-

in-hand was hardly unique at the Founding or in the years that followed. *See, e.g.*, James Madison, Address to the Virginia Convention, Dec. 2, 1829 ("Persons and Property, are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property are the objects for the protection of which Government was instituted. These rights cannot well be separated.").

Modern scholars agree:

> Historically, the right to private property has been regarded as the central paradigm for rights in general, and the essential precondition for the creation of a private sphere of autonomy that forms the foundation of the pluralistic liberal order.

Brett Boyce, *Property As A Nat. Right & As A Conventional Right in Constitutional Law*, 29 Loy. L.A. Int'l & Comp. L. Rev. 201, 202 (2007).

> [P]rivate property gives the right to exclude others without the need for any justification. Indeed, it is the ability to act at will and without need for justification within some domain which is the essence of freedom, be it speech or of property.

Richard Epstein, *Takings, Private Property and the Power of Eminent Domain* 65 (1985).

Consistent with the Framers understanding of the Takings Clause, Justice Thomas Cooley, in his 1871 *Treatise on Constitutional Limits*, noted that the government is never justified in taking more than it needs:

> The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made * * * The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain.

Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 1147 (1871).

While Cooley and William Blackstone focused on physical takings of land, this Court has held that the Fifth Amendment requires compensation for the taking of personal property as well, pointing out that "nothing in [the Takings Clause's] history suggests that personal property was any less protected against physical appropriation than real property." *Horne*, 576 U.S. at 359.

In *Horne*, a raisin grower challenged a Department of Agriculture regulation that required growers to give a portion of their crop to the government, free of charge. *Id.* at 354. The

government, through the Raisin Administrative Committee, then disposed of the raisins by "selling them in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donating them to charitable causes; releasing them to growers who agree to reduce their raisin production; or disposing of them by 'any other means' consistent with the purposes of the raisin program." *Id*. at 355 (cleaned up).

In finding that the regulation appropriated personal property as surely as the physical invasion of land, the Court provided a detailed exposition on the history of the Takings Clause, noting that John Jay "complained to the New York Legislature about military impressment by the Continental Army of 'Horses, Teems, and Carriages,' and voiced his fear that such action . . . might extend to 'Blankets, Shoes, and many other articles" and that according to early constitutional scholar St. George Tucker, "the Takings Clause was 'probably' adopted in response to the 'arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment . . . .'" *Id*. at 359 (citations omitted).

More importantly for the purposes of this case, the *Horne* Court held that the appropriation of personal property through the Department's regulation was—just like the physical occupation of land—a "clear physical taking." *Id.* at 361. The Court explained that regardless of what reasonable expectations a business ought to have regarding government regulation of its activities, "people still do not expect their property, real or personal, to be actually occupied or taken

away." *Id*. And when the government effects a physical taking for a public purpose, "it has a categorical duty to compensate the former owner . . . ." *Id.* at 363; *see also Tahoe-Sierra Preservation Council*, 535 U.S. at 322 (collecting cases).

The raisin growers in *Horne* lost their "entire 'bundle' of property rights" in the raisins that were appropriated under the Department of Agriculture's regulation. They were forced to surrender their personal property to the government to satisfy a national agricultural policy. And although the Horne family's raisins were taken by the government itself, *Cedar Point Nursery* teaches that a statute authorizing a third party's uncompensated occupation of private property is as much of a taking as if the government had seized the land itself. 141 S. Ct. at 2074 ("The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.").

Here, the Supreme Court of Washington's interpretation of the NLRA as authorizing unions to intentionally destroy private property has compelled Glacier Northwest to sacrifice its entire "bundle" of property rights in the destroyed concrete in service of national labor policy, where such loss is not *needed* to effectuate the policy. *See Causby v. United States*, 75 F. Supp. 262, 264 (Ct. Cl. 1948) ("We see no difference in the destruction of personal property and real property, where is either case the owner is deprived of its use, not by a negligent act, but as the natural consequence of the deliberate, intended exercise of an

asserted power. In each case there is a taking for which the Constitution requires just compensation."); *see also* Cooley, *supra*. But for the quick action of its management, Glacier Northwest would have lost numerous cement-mixing trucks as well.

Moreover, NLRA preemption has also deprived Glacier Northwest of any right to sue in state court for its loss. *See Maslonka v. Pub. Util. Dist. No. 1 of Pend Oreille Cnty.*, 505 P.3d 1190, 1214 (Wash. Ct. App. 2022) (recognizing under Washington law that "the right to damages for an injury to property is a personal right belonging to the property owner"); *Puget Const. Co. v. Pierce Cnty.*, 64 Wash. 2d 453, 464 (1964) (recognizing the right to be free from the tortious damaging of personal property). As this Court has long recognized, there can be "no right without a remedy to secure it." *Hawkins v. Barney's Lessee*, 30 U.S. 457, 463 (1831); *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.") (internal citations omitted).

This lack of remedy, coupled with the interpretation of the NLRA permitting the destruction of property, not only prevents Glacier Northwest from recovering any compensation for its property from those who destroyed it, but in essence gives workers the ability to take property with impunity. Like the California statute in *Cedar Point Nursery*, the Washington Supreme Court's application of the NLRA

amounts to a "government-authorized" taking of Glacier Northwest's personal property.

The wisdom of the agricultural policy in *Horne* or the national labor policy embodied in the NLRA are immaterial, as is whether the policy arises from a state government, as in *Cedar Point Nursery*, or from the federal government as it does here. The principles announced in *Cedar Point Nursery* apply with equal vigor to the NLRA as they did to California's labor regulations. As such, the Takings Clause prohibits federally sanctioned destruction of property without compensation.

2. *Garmon* Preemption and the *Babcock* Test

The Washington Supreme Court's decision is overbroad in equating any conduct related to a labor dispute with "concerted activities in collective bargaining." *Glacier Northwest, Inc. v. Int'l Bhd. Of Teamsters Loc. Union No. 174*, 198 Wash. 2d 768, 783 (2021). Numerous federal courts—including this one—have held that property destruction is not even arguably a protected concerted activity. *See, e.g.*, *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Relations Comm'n*, 427 U.S. 132, 136 (1976) ("*Machinists*") ("[A]ctual or threatened violence to persons or destruction of property has been held most clearly a matter for the States."). For example, courts have held worker sabotage of the employer's products to lie outside of NLRA preemption. *See Printpack Inc. v. Graphic Communications Union, Local 761-S,* 988 F. Supp. 1201, 1204 (S.D. Ind. 1997). Likewise, the NLRA did

not preempt state claims against striking workers who trespassed and damaged an employer owned crane—even when the property damage occurred in the context of a labor dispute. *Cranshaw Const. of New England, L.P. v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local No. 7*, 891 F. Supp. 666 (D. Mass. 1995).

Contrast these activities, and the alleged activities of the employees here, with tactics like strikes, typical temporary work stoppages (where there is no immediate threat of property damage because of the work stoppage) and employer lockouts. Here, the loss to the employer was not merely a loss in productivity or potential profits that might be occasioned by a work stoppage implied in the phrase "economic pressure." The loss was instead the physical destruction of personal property. Thus, while "the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining," the Washington Supreme Court's holding would make "economic pressure" a euphemism for vandalism and intimidation. *See*, *N. L. R. B. v. Insurance Agents' Int'l. Union, AFL-CIO,* 361 U.S. 477, 495 (1960). Certainly, a brick through the window or sugar in the gas tank of a company vehicle will bring to bear some economic pressure on an employer, but destruction of property is not the type of legitimate economic pressure that the NLRA embraces or protects.

Rather, NLRA preemption preserves Congress' goal of balancing bargaining power between management and labor by forbidding local regulation of "areas that have been left 'to be controlled by the

free play of economic forces.'" Brian Garrison & Joseph Pettygrove,"*Yes, No, & Mayb": The Implications of A Fed. Circuit Court Split Over Union-Friendly State & Local "Neutralit" Laws*, 23 Lab. Law. 121, 126 (2007) (citing *Machinists*, 427 U.S. at 140). This "free play of economic forces" that the *Machinists* Court championed involves workers withholding labor or employers locking workers out.

Each side must deal with economic consequences of its decisions as determined by the relevant market for labor or the relevant market for wages. A government policy that allows the intentional destruction of property—even if tangentially related to bargaining activity—is the opposite of allowing the "free play of economic forces" to determine the economic contest between labor and management. It is instead—like the California statute at issue in *Cedar Point Nursery*—an example of the government placing its finger on the scale in violation of the Fifth Amendment's Takings Clause.

Well before *Cedar Point Nursery,* this Court had held that NLRA preemption does not apply to prevent a state from enforcing its laws prohibiting "violence, defamation, the intentional infliction of emotional distress, or obstruction of access to property." *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 204–205 (1978) (internal citations omitted). The rationale was that none of those violations of state law involved conduct protected under the NLRA. *Id.*

But the Court recognized that in some cases, an employer's right to exclude union organizers from its private property through the enforcement of state trespass laws "may actually be protected" and thus preempted. *Id.* (citing *Babcock*, 351 U.S. 105). Like *Cedar Point Nursery*, *Babcock* involved union organizers' ability to enter onto an employer's property to engage in organizing activities. *Babcock*, 351 U.S. at 106. There, the National Labor Relations Board found that several employers had violated the NLRA's prohibition against unfair labor practices by preventing nonemployee union organizers from entering onto company property to distribute literature. *Id.* at 109. The Court held in favor of the employer, holding that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112.

The *Babcock* court implied a rough balancing test, weighing an employer's right to exclude union organizers from its property against the objectives of the NLRA:

> Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little

> destruction of one as is consistent with the other.

Id. at 112. The *Babcock* court nevertheless endorsed preemption, holding that the determination of those "proper adjustments" at least initially rests with the National Labor Relations Board. *Id.* at 112-113.

Subsequent courts relied on *Babcock*'s balancing test to determine that rights under the NLRA versus "private property rights . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Hudgens v. N. L. R. B.*, 424 U.S. 507, 522 (1976).

However, as this Court explained in *Cedar Point Nursery*, *Babcock* was not a takings case. *Cedar Point Nursery*, 141 S. Ct. at 2077. The *Babcock* Court therefore did not analyze the union intrusion onto the employer's property under the Takings Clause, but rather looked exclusively at whether an employer may absolutely prohibit nonemployee union organizers from entering its property. *Babcock*, 351 U.S. at 112. Looking at *Babcock* in the wake of *Cedar Point Nursery* raises a significant question of whether *Babcock's* balancing or accommodation can survive after the Court has recognized unauthorized entrance onto employer property as a *per se* taking.

3. The Court Should Clarify that *Babcock* Does not Authorize Vandalism

In *Cedar Point Nursery*, this Court described the right to access property under the NLRA discussed in

Babcock as "highly contingent." *Cedar Point Nursery*, 141 S. Ct. at 2077. The contingency, explained in *Babcock* itself, was whether the union organizers had other channels available to them to reach employees with their message. 351 U.S. at 112. While this contingency echoes Cooley's maxim that takings must be no greater than necessary, the NLRA's permissible right to access property does not square with the property owner's categorical right to compensation for *per se* takings. Cooley, *supra*. Certainly the *Babcock* Court did not conceive of the notion that unions would extrapolate that holding to sanction intentional vandalism of an employer's property.

First, the statutory interest in a coherent and uniform national labor policy is certainly substantial. *Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485, 490–491 (1953). But as *Cedar Point Nursery* showed, an interest in a state labor policy and statutory rights granted by the state must give way to enumerated constitutional rights. The same is true of a federal statutory policy.

In explaining the need to balance the NLRA's statutory right to organize with employers' property rights, the *Babcock* Court stated that "[o]rganization rights are granted by the same authority, the National Government, that preserves property rights." 351 U.S. at 112. Therefore, "[a]ccomodation between the two must be obtained with as little destruction of one as is consistent with maintenance of the other." *Id.* This formulation is correct as far as it goes, but as *Cedar Point Nursery* makes clear, it is woefully incomplete. From a practical standpoint, statutory rights cannot

supersede constitutional rights if the two are in conflict. *Marbury*, 5 U.S. at 177. From a more philosophical perspective, while the federal government has granted organizational rights by statute, the property rights enshrined in the Fifth Amendment are "natural and pre-political." Boyce, *supra*, at 203–204. Applying Cooley's necessity principle, preempting state remedies for the destruction of personal property—that is, recognizing a carte blanche right to destroy property as part of "concerted activity" in the context of collective bargaining—is not necessary to achieve the NLRA's aims. Numerous cases have found that the NLRA does not preempt state remedies for destruction of property, and yet the NLRA has been able to effectively promote uniform labor policy which grants labor organizations certain rights. *Machinists*, 427 U.S. at 136; *Printpack Inc.*, 988 F. Supp. at 1204; *Cranshaw*, 891 F. Supp. at 674.

Second, if—as *Cedar Point Nursery* teaches—the temporary occupation of another's property by a third party pursuant to statutory authorization is a *per se* taking, then the permanent destruction of property by a third party with no recourse must also be a per se taking. *See Horne*, 576 U.S. at 352 (treating physical appropriation of personal property as a per se taking); *see also Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177—78 (1871) (no distinction, for purpose of takings analysis, between "absolute conversion of real property" and "total destruction" of property). Again, like the raisin growers in *Horne*, Glacier Northwest's loss of its personal property was total.

Although the *Babcock* court did not perform a takings analysis, in the wake of *Cedar Point Nursery*, the contingent right to enter onto another's property under certain circumstances—such as to damage or destroy property—would seem to require one. In other words, even if *Babcock's* contingencies are satisfied, *Cedar Point Nursery* and the Fifth Amendment logically would require compensation.

4. The Canon of Constitutional Avoidance Counsels Reversal on the Grounds that Destruction of Property is Not "Arguably Protected" by the NLRA.

In his concurrence in *Ashwander v. Tennessee Valley Auth.*, Justice Brandeis laid out seven principles that guide the Court in its review of constitutional issues and counsel restraint in making significant constitutional proclamations. 297 U.S. 288 (1936). Among those principles is that the Court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," and that it "is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 348. Given this Court's decision in *Cedar Point Nursery*, and the abundantly clear taking that occurred because of the Supreme Court of Washington's interpretation of the NLRA, which it found to both authorize the destruction of property and preempt of state tort claims to recoup losses, this case raises a serious constitutional question. However, the Court need not—and under

the canon of constitutional avoidance, arguably should not—reach the constitutional question. If the Washington Supreme Court's interpretation were to stand, it would conflict with the Fifth Amendment's protections. This Court should instead clarify that the destruction of property is never "arguably protected" conduct under the NLRA.

This construction is consistent with the Court's decision in *Machinists* and the numerous cases cited by Petitioners holding that the local feeling exception set forth in *Garmon* encompasses the destruction of personal property. It is also consistent with this Court's holding in *Sears, Roebuck & Co.*, 436 U.S. 180. There, the Court held that the NLRA did not preempt the employer's state trespass suit, which challenged employees right to picket in a certain location, rather than the picketing itself. *Id.* at 198. The Court explained that the controversy presented in the state trespass action was different from the labor controversy regarding whether the picketing was related to a collective bargaining issue that would be properly heard by the NLRB. *Id.* A similar distinction is evident here. The issue of whether the work stoppage—by itself—constituted an unfair labor practice under the NLRA can be separated from the actions that led to the property destruction. *See id.* ("Although the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same.").

At the same time, such a statutory construction would have the salutary public policy effect of

clarifying that destruction of property is not protected conduct under the NLRA and is punishable by appropriate state remedies. It will remove any incentive to engage in vandalism or threats of property destruction to gain the upper hand in a labor dispute that the Washington Supreme Court's decision may have inadvertently created. Labor conflicts should be resolved through the free play of economic forces—that is, the withholding of labor or economic benefits—not by destroying personal property.

CONCLUSION

For all the forgoing reasons, the Washington Supreme Court's decision should be reversed.

Respectfully submitted,

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November 8, 2022