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 FOR RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Respondent is not a nongovernmental corporate party that has a parent corporation or has stock that is held by any publicly held company.

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INTRODUCTION

The protection for a "concerted stoppage of work" lies at the heart of federal labor law. 29 U.S.C. § 142(2). Congress knew such work stoppages might "interrupt[] operations" or interfere with the "flow of raw materials or manufactured or processed goods." *Id.* § 151. But Congress nonetheless protected them as the core of the federal system of collective bargaining. *Id.* §§ 157, 163; *Bus Employees v. Missouri*, 374 U.S. 74, 82 (1963).

Yet petitioner seeks damages from respondent under state tort law for the results of a garden-variety "concerted stoppage of work." And petitioner insists not only that its suit may proceed but also that it may do so in the face of an ongoing case before the National Labor Relations Board—the body charged with administering federal labor law—that will determine whether respondent's work stoppage was in fact protected.

Petitioner is wrong. Six decades of this Court's precedents require that, in order to ensure uniform application of federal law, state-court jurisdiction must yield to the NLRB if the conduct at issue is even "arguably" protected by federal law. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

That showing is meant to be modest. After all, it is just a threshold determination that the Board, rather than a state court, should have the first word on whether the National Labor Relations Act regulates the conduct at issue. If the Board finds respondent's conduct was not, in fact, protected, the "jurisdictional hiatus" will end, allowing petitioner to proceed with its state tort suit. *See Sears, Roebuck &*

Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 203 (1978). Conversely, if the Board finds respondent's conduct is actually protected, that decision ousts the state court of jurisdiction, subject to federal court review.

A party can show conduct is "arguably protected" simply by advancing a position, supported by evidence or admissions, that is "not plainly contrary" to statutory text or precedent. *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986). Respondent easily clears that hurdle. When negotiations over a collective bargaining agreement broke down, respondent union's members—concrete truck drivers who worked for petitioner—applied economic pressure by collectively stopping work. They promptly returned the delivery trucks to petitioner's care, with the drums still rotating to prevent the concrete from prematurely setting. After investigating those facts, the NLRB's General Counsel determined that federal labor law protected the work stoppage. Even independent of that determination, text and precedent make clear that respondent's conduct is at least arguably protected.

Petitioner's argument to the contrary turns entirely on the label "intentional property destruction," variants of which it incants more than sixty times in its forty-nine-page brief. But that phrase is misleading. This case is not about an act of vandalism that happens to take place during a strike—something no one argues is protected by federal law. It's instead about whether merely stopping work can result in financial liability for any spoilage of perishable products that may follow. It cannot.

STATEMENT OF THE CASE

A. Legal background

1. *Statutory provisions.* In 1935, Congress enacted the National Labor Relations Act, declaring it the "policy of the United States" to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. The NLRA built on prior statutes designed to "give laborers opportunity to deal on an equality with their employer." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937); *see Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921). The NLRA thus aimed to secure employees' rights to "organize and bargain collectively." 29 U.S.C. § 151. Congress amended and supplemented the Act over the next few decades. *E.g.*, Pub. L. 80-101, 61 Stat. 136 (June 23, 1947); Pub. L. 86-257, 73 Stat. 519 (Sept. 14, 1959); Pub. L. 93-360, 88 Stat. 395 (July 26, 1974).

The Act includes substantive and procedural regulations of labor disputes. Section 7, the heart of the NLRA, safeguards workers' rights "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Among the "concerted activities" protected by Section 7 is the "right to strike." *Id.* § 163; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963). Federal law defines "strike" to mean any "concerted stoppage of work by employees" and "any concerted slowdown or other concerted interruption of operations by employees." 29 U.S.C. § 142(2). Recognizing the central role that

strikes play in facilitating collective bargaining, Congress protected the right to strike even as it acknowledged that strikes "have the *intent* or the necessary effect of burdening or obstructing commerce," including by "materially affecting . . . the flow of raw materials or manufactured or processed goods." *Id.* § 151 (emphasis added). Doing so, Congress found, would increase employees' bargaining leverage, raise wages and purchasing power, and stabilize competitive wages and working conditions while discouraging more disruptive "forms of industrial strife or unrest." *Id.*

Section 8 prohibits both employers and unions from engaging in certain unfair labor practices. As relevant here, employers are barred from interfering with employees' Section 7 rights. 29 U.S.C. § 158(a)(1). And unions must navigate the Act's extensive regulation of strikes. For instance, a union must notify an employer as well as federal and state mediation agencies that it intends to terminate or modify its contract—and thus that a strike is possible—at least sixty days before striking. *Id.* § 158(d). In the healthcare industry, a union must give the employer ten days' notice of the date and time of the strike's commencement. *Id.* § 158(g). Workers cannot strike for specified objectives (for example, to impose certain forms of economic pressure on parties other than the primary employer). *Id.* § 158(b)(4). But the NLRA does not "interfere with or impede or diminish in any way the right to strike" beyond the statute's express limitations and specific qualifications that existed in the case law prior to the NLRA's amendment in 1947. *Id.* § 163.

The NLRA "did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties"; it also "confide[d] primary interpretation and application" of federal labor law in the Board and "prescribed a particular procedure for investigation, complaint and notice, and hearing and decision." *Garner v. Teamsters, Local 776*, 346 U.S. 485, 490-491 (1953); *see also NLRB v. UFCW, Local 23*, 484 U.S. 112, 118-22 (1987) (describing procedure). The Board consists of five members who adjudicate labor cases, which a separately appointed General Counsel prosecutes. 29 U.S.C. § 153. The NLRB is charged with "prevent[ing] any person from engaging in any unfair labor practice." 29 U.S.C. § 160(a). That power may not "be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." *Id.*

Federal labor law carves out discrete areas of labor-management relations that entities other than the NLRB may regulate. For instance, the NLRA permits federal courts to enjoin violent or fraudulent conduct during labor disputes, *see* 29 U.S.C. §§ 104(e), 104(i), and creates a federal damages action for certain unfair labor practices, *id.* § 187. It allows states to provide remedies to aggrieved members of labor organizations, *id.* § 523(a); prohibit union membership as a condition of employment, *id.* § 164(b); and administer general criminal laws for certain serious offenses, *id.* § 524. States may also adjudicate any labor dispute over which the NLRB "decline[s] to assert jurisdiction," *id.* § 164(c), and any "unfair labor practice" over which the NLRB by agreement "cede[s] . . . jurisdiction," *id.* § 160(a).

2. *Precedent.* This Court's landmark decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), clarified when and whether states can regulate labor relations without infringing on federally protected rights or the Board's jurisdiction.

As relevant here, *Garmon* set out a test to determine when a "jurisdictional hiatus" is required of state courts pending the Board's review of whether the conduct underlying a litigant's claim is protected. *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 203 (1978); *see also Makro, Inc. & Renaissance Props. Co., d/b/a Loehmann's Plaza*, 305 N.L.R.B. 663, 671 n.56 (1991). Should the Board conclude that the conduct is not protected, state courts may proceed to adjudicate the claim. *See Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 188-91 (1965). If the Board concludes—subject to federal judicial review—that the conduct is protected, the Supremacy Clause ousts the state courts of jurisdiction. *Brown v. Hotel Emps.*, 468 U.S. 491, 501 (1984).

When an employer files a lawsuit in state court before NLRB proceedings have run their course, *Garmon* instructs state courts to ask whether the challenged conduct is "arguably protected" under Section 7 or "arguably prohibited" under Section 8. 359 U.S. at 245. If the challenged conduct is arguably regulated by the Act, the state court lacks jurisdiction until the Board first has the opportunity to determine whether the conduct is in fact so regulated. *Id.* A party can show conduct is arguably protected or arguably prohibited by "advanc[ing] an interpretation of the Act that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or

the Board" and pointing to "enough evidence to enable the court to find that the Board reasonably could uphold a claim." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986) (citation omitted).

Garmon's framework serves several functions. First, it creates an administrable rule for what had previously been "one of the most teasing and frequently litigated areas of industrial relations." *Garmon*, 359 U.S. at 241. Second, it diminishes the "potential for jurisdictional conflict" between state courts and the NLRB. *Brown*, 468 U.S. at 502-03; *see also Sears*, 436 U.S. at 201. Third, *Garmon* allows for "uniform application of [the NLRA's] substantive rules" by "avoid[ing] these diversities and conflicts likely to result from a variety of local procedures, and attitudes towards labor controversies." 359 U.S. at 243. And fourth, it honors Congress's choice to "entrust[] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures and equipped with its specialized knowledge and cumulative experience." *Id.* at 242.

Thus, for more than six decades, this Court has emphasized that "[w]hile the Board's decision is not the last word [on the NLRA], it must assuredly be the first." *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).

B. Factual background

Concrete consists primarily of cement, sand, rock, and water. J.A. 7-8. Once concrete is mixed, it hardens over time. *Id.* 8-9. The hardening process can be slowed by the addition of retardants. *See id.* 72. Concrete is usually transported in mixing trucks with

revolving drums "specifically designed to maintain the integrity of the batched concrete." *Id.* 8. If the drums stop rotating, the setting process commences, and the concrete "begins to harden inside the drum." *Id.* 9. Drivers who have concrete left in their trucks after delivery either use "reclaimer[s]" to convert the concrete back into sand and rock or use forms to create ecology blocks for use in construction. *See id.* 77, 113.

Petitioner Glacier Northwest, Inc., is a ready-mix concrete company. J.A. 111. Petitioner employs around 215 employees in Washington State, including eighty-five mixing truck drivers who deliver concrete to petitioner's customers. *Id.* 67, 71. Respondent Teamsters Local 174 is the labor union that represents those drivers in all dealings with petitioner regarding wages, hours, and working conditions. *Id.* 140.

Respondent's collective bargaining agreement with petitioner—including its no-strike clause—was set to expire on July 31, 2017. J.A. 112. The drivers, through respondent, negotiated with petitioner in the hopes of implementing a successor agreement, but the parties were unable to come to consensus, and the existing agreement expired. *Id.*

"Unhappy with the company's response to its bargaining demands," Petr. Br. 7, respondent began helping the drivers plan a strike to break the impasse in negotiations. Respondent initially planned to call the strike on August 12, 2017, but changed course because petitioner had scheduled a "mat pour" that day. J.A. 142-43 & n.5. A mat pour is a delivery of "a large amount of concrete to pour a concrete slab that acts as the foundation for a commercial building." *Id.* 143 n.4. To avoid interrupting such a "substantial undertaking," *id.*, respondent elected to begin the

work stoppage a day earlier than initially planned. *Id.* 143 n.5.

On the morning of August 11, the drivers collectively ceased work. J.A. 71. Since the eighty-five drivers worked staggered shifts starting between 2:00 a.m. and 7:00 a.m., they were at different stages of their workdays when the strike began. *Id.* 76. Some were waiting to load their trucks with concrete, others had returned from completing their deliveries, and still others were en route to fulfill delivery orders. *Id.* 113.

From 7:00 a.m. to 7:45 a.m., the drivers returned all of petitioner's trucks and concrete. Petr. Br. 8; J.A. 77. Respondent's agents instructed the drivers to keep their trucks running, thus leaving the drums rotating and delaying the hardening process. Petr. Br. 8; J.A. 9.

Aware that some trucks still had concrete in them, petitioner's agents watched as drivers returned their trucks and left the premises. J.A. 72, 77. Of the eighty-five striking drivers, sixteen returned trucks fully loaded with concrete. *Id.* Like the other drivers, those sixteen left the drums rotating. Petr. Br. 8. Before departing, seven of those sixteen drivers also specifically asked supervisors for instructions. J.A. 73.

Petitioner's non-striking employees and managers offloaded the concrete into bunkers. J.A. 72-73. The concrete gradually hardened over a five-hour period. J.A. 84. There was no damage to the trucks or petitioner's facilities. Petr. Br. 8-9.

In response to the work stoppage, petitioner sent disciplinary letters to the sixteen drivers who had returned their trucks with full loads of concrete. J.A. 73.

C. Proceedings below

On September 6, 2017, respondent brought an unfair labor practice charge alleging that the disciplinary letters were unlawful retaliation. U.S. Br. App. 2a, 4a.[1] Petitioner then withdrew the discipline from the seven drivers who communicated with supervisors about the trucks. J.A. 73.

On December 4, petitioner filed this lawsuit. J.A. 5. As relevant here, petitioner sued respondent for conversion and trespass to chattels for failing to deliver the concrete. *Id.* 145.[2]

Respondent then filed an additional Board charge, alleging that petitioner's lawsuit unlawfully retaliated against respondent. J.A. 63-65. The Board charges were consolidated.

Meanwhile, respondent moved to dismiss the state lawsuit for failure to state a claim and for lack of subject matter jurisdiction, arguing that because its conduct was arguably protected, the state lawsuit could not proceed. J.A. 146. Petitioner submitted declarations from three of its employees in response to the motion to dismiss. *Id.* 71-84, 122-23.

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[1] That charge amended a prior charge against petitioner, which alleged unlawful labor practices that occurred during pre-strike negotiations. U.S. Br. App. 2a.

[2] Petitioner also asserted a civil conspiracy claim entirely derivative of those torts and a claim for tortious interference with contract, which it later abandoned. *See* J.A. 20-21, 121 n.7. Petitioner additionally raised a series of claims related to events that occurred after the strike, all of which petitioner lost at summary judgment. J.A. 22-26. None of those claims are at issue in this case.

The trial court agreed with respondent and dismissed petitioner's claims related to the August 11 strike. J.A. 100. The Washington Court of Appeals sided with petitioner and reversed. *Id.* 122.

The Washington Supreme Court unanimously reinstated the trial court's dismissal. J.A. 177-78. The court explained that any loss of petitioner's concrete "was incidental to a strike arguably protected by federal law." *Id.* 139. Granting respondent's motion was thus necessary "to avoid even the potential risk of interference with the development of national labor policy under the expertise of the Board." *Id.* 152. It also rejected petitioner's argument that the "local feeling" exception to *Garmon* applied. *Id.* 152 n.7. It thus concluded that the state courts did not have jurisdiction over petitioner's case and dismissed the suit.[3] *Id.* 178.

In January 2022, an NLRB regional director, acting for the General Counsel, filed a complaint against petitioner. U.S. Br. 9. The complaint followed an independent investigation, which included taking sworn statements and documentary evidence from both parties. The General Counsel concluded from the

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[3] Because the dismissal was on jurisdictional grounds, it does not prejudice petitioner's ability to refile the same complaint should the NLRB find that respondent's conduct is not protected by the Act. *See Beaman v. Yakima Valley Disposal, Inc.*, 807 P.2d 849 (Wash. 1991) (describing *Garmon* dismissal as jurisdictional, not on the merits); *Davis*, 476 U.S. at 391 (holding that, as a matter federal law, a state court must treat *Garmon* preemption as a question of jurisdiction, not merits); *Noll v. Am. Biltrite Inc.*, 395 P.3d 1021, 1025 (Wash. 2017) (citing *State v. Nw. Magnesite Co.*, 182 P.2d 643 (Wash. 1947)) (jurisdictional dismissal is without prejudice because "court has no power to pass upon the merits of the case").

investigation that there was merit to respondent's claim that Section 7 protected its work stoppage and that petitioner unlawfully retaliated for that protected activity. U.S. Br. App. 4a-5a.

Petitioner sought and received two continuances in the NLRB proceeding. *See Glacier Northwest d/b/a CalPortland (19-CA-211776)*, NLRB, https://www.nlrb.gov/case/19-CA-211776. The NLRB has scheduled a hearing on the complaint for January 24, 2023. Petr. Br. 13.

SUMMARY OF ARGUMENT

I. Under this Court's precedent, petitioner's claim can proceed in state court only if the Board first determines the challenged conduct is not protected.

A. Under *Garmon* and its progeny, state courts must wait for the NLRB to act first whenever an employer sues over conduct that is "arguably protected" by the NLRA. Respondent has shown that its conduct is at least "arguably protected" by "advanc[ing] an interpretation of the Act that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or the Board" and pointing to "enough evidence to enable the court to find that the Board reasonably could uphold a claim." *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 394-95 (1986) (citation omitted).

1. To resolve this case, this Court need look no further than the General Counsel's complaint. Following an independent investigation, the General Counsel concluded that respondent's work stoppage was protected under the Act. As the D.C. Circuit and the Board have both held, a General Counsel's complaint asserting that the strike was *actually*

protected conclusively establishes that the strike was at least *arguably* protected. *See Davis Supermarkets, Inc. v. NLRB,* 2 F.3d 1162, 1179 (D.C. Cir. 1993); *Makro, Inc. & Renaissance Props. Co., d/b/a Loehmann's Plaza*, 305 N.L.R.B. 663, 670-71 (1991).

2. Irrespective of the General Counsel's complaint, respondent's conduct was arguably protected. Far from being "plainly contrary" to the text of the NLRA, respondent's position is supported by the statutory language, which protects "concerted stoppages of work." As the Board and federal courts have made clear, workers do not forfeit the Act's protections simply by stopping work at a time when the loss of perishable products is foreseeable. *See, e.g.*, *Lumbee Farms Coop.*, 285 N.L.R.B. 497, 506 (1987), *enforced*, 850 F.2d 689 (4th Cir. 1988) (unpublished opinion).

B. Petitioner contends that even if the conduct at issue here was arguably protected, its claims fall within an exception to *Garmon* for state torts "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U.S. at 244. Petitioner is mistaken.

1. The local feeling exception applies only to conduct that is arguably *prohibited* under Section 8 of the Act, not conduct that is arguably *protected* under Section 7. In arguably prohibited cases, there is "no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect." *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 298 (1977). When the conduct challenged in state court is

arguably *protected*, by contrast, there is *always* such a risk.

2. Even if this Court were to extend the local feeling exception to arguably protected conduct, that exception still would not apply here. The mere act of stopping work has never qualified as a matter of "local feeling and responsibility." Nor should it now. Petitioner argues that the local feeling exception applies because the torts it alleges—conversion and trespass to chattels—have "deep common-law roots." *See* Petr. Br. 38. But the common-law forms of those torts would not have encompassed respondent's conduct.

II. This Court should reject petitioner's invitation to revise *Garmon*.

A. Congress has implicitly ratified *Garmon*'s arguably protected standard by amending the NLRA—including to overrule other parts of *Garmon*'s holding—while leaving the arguably protected standard intact. And the arguably protected standard ensures that the NLRA receives a uniform interpretation while balancing the interests of employers and employees.

B. Petitioner's textual argument fails. The Act channels jurisdiction over labor relations to the NLRB, except for several explicit and specific grants of jurisdiction to state entities. The absence of such an express grant of state-court jurisdiction over cases like this one is thus conspicuous. Further, the Act commands that the Board's power "to prevent any person from engaging in an unfair labor practice" shall not "be affected by any other means of adjustment or prevention," including state law. *See* 29 U.S.C. § 160(a).

C. Petitioner also claims "ordinary preemption" principles preclude *Garmon* from applying in this case. But the cases it cites involve a far more permanent incursion on state-court jurisdiction than the one at issue here. And even if petitioner's "ordinary preemption" standard were relevant, petitioner overlooks several NLRA provisions that conflict with any state law imposing liability for respondent's conduct.

III. The canon of constitutional avoidance is inapposite. Petitioner's invocation of the doctrine rests on speculation that a Takings Clause issue might arise if the Board were to side with respondent. But the Board has not done so yet. Nor has petitioner explained how respondent's conduct could effect a taking without physically appropriating any of petitioner's property.

ARGUMENT

I. Under this Court's precedent, petitioner's claim can proceed in state court only if the NLRB first determines the challenged conduct is not protected.

Respondent's conduct was at least arguably protected by the NLRA and does not fall within this Court's narrow "local feeling" exception. This Court should thus affirm the decision to impose a "jurisdictional hiatus," *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 203 (1978), on petitioner's state lawsuit pending the outcome of the parallel NLRB proceeding. If the Board concludes respondent's conduct was protected, petitioner may appeal that decision, including to this Court. And if the Board concludes that respondent's

conduct was *not* protected, *Garmon* imposes no bar to petitioner's state tort suit. But the Board must first adjudicate whether respondent's conduct was actually protected.

A. Respondent's strike was arguably protected.

To decide whether the state court's jurisdiction was ousted pending the NLRB adjudication, the Washington Supreme Court followed the framework set out in *Garmon.* Even when it is not "clear whether the particular activity regulated by the States" falls under the NLRA, *Garmon* recognized that it is "essential to the administration of the Act" that the determination be "left in the first instance" to the Board. 359 U.S. at 244-45.

Thus, under *Garmon*, "[w]hen an activity is arguably subject to" Section 7's protection for concerted activities, "courts must defer to the exclusive competence of the National Labor Relations Board." 359 U.S. at 245. To show that conduct is arguably protected, a party need only "advance an interpretation of the Act that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or the Board," and point to "enough evidence to enable the court to find that the Board reasonably could uphold a claim." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986) (citation omitted).

Notwithstanding petitioner's repeated invocation of "intentional property destruction," the *Garmon* inquiry does not turn on a "ritualistic incantation" of a conclusory allegation. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 49 (1998). "It is the conduct being regulated, not the formal description of governing

legal standards, that is the proper focus of concern." *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 292 (1971).

The drivers' conduct was arguably protected. First, the General Counsel's issuance of an administrative complaint—representing her office's position that the drivers' conduct was *actually* protected—dispels any doubt that the conduct was at least *arguably* protected. And second, the statute and relevant precedent independently make clear that the drivers' conduct here was arguably protected.

1. The issuance of the General Counsel's complaint establishes that the conduct here is at least arguably protected.

The General Counsel has issued a complaint alleging that petitioner retaliated against employees who "exercise[d] the rights guaranteed in § 7" of the NLRA. U.S. Br. App. 5a (reprinting General Counsel's complaint). Her determination that the drivers in fact "exercise[d] the rights guaranteed in § 7" resolves any doubt that their conduct was at least arguably protected.

a. To determine whether the drivers here "exercise[d] the rights guaranteed in § 7," the General Counsel conducted an independent investigation. The investigation involved interviews with witnesses offered by both parties and provided petitioner with a chance to respond to respondent's allegations. *See* 29 C.F.R. § 101.4. The General Counsel also had access to the full state-court record, which contained evidence that respondent rescheduled the strike to a day that would impose a less substantial disruption to petitioner's operations and that rumors had been

circulating in the construction community about respondent's upcoming strike. CP 674-78, 962-67.[4]

If the General Counsel had found insufficient evidence following that investigation, respondent's charges would have been dismissed. 29 C.F.R. §§ 101.5-101.6. Instead, the complaint was issued, reflecting the agency's determination that the "charge[s] appear[] to have merit" and that the evidence was sufficient to "substantiate the charge[s]." *Id.* §§ 101.5, 101.8.

Petitioner "cannot credibly contend that a claim that makes it through this gauntlet does not concern conduct 'arguably' protected by the NLRA." *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993). The General Counsel's determination that the charges have merit establishes that they are not based on a legal theory that is "plainly contrary" to the NLRA's text or that has been "authoritatively rejected" by precedent. *See Davis*, 476 U.S. at 395. And her conclusion that the evidence "substantiate[s] the charge[s]" establishes that there is "enough evidence" from which the Board "reasonably could uphold a claim." *Id.*

Petitioner's characterization of the agency complaint as the "unreasonable legal assertions of a regional director," Petr. Br. 36, is doubly wrong. Far from bare "legal assertions," the complaint is based on both parties' submissions and an investigation by NLRB staff. 29 C.F.R. §§ 101.4-101.6. It therefore more reliably reflects the realities of the underlying dispute than do the conclusory allegations of one

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[4] "CP" refers to the Clerk's Papers, which constitute the record for the Washington appellate courts.

party's pleadings. And it is the presidentially appointed, Senate-confirmed General Counsel, not a regional director, who has "final authority" on the "issuance of complaints." 29 U.S.C. § 153(d).

b. Both the D.C. Circuit and the NLRB have held that the "arguably protected" test is automatically satisfied by the issuance of a complaint from the General Counsel. *Davis Supermarkets*, 2 F.3d at 1179; *Makro, Inc. & Renaissance Props. Co., d/b/a Loehmann's Plaza*, 305 N.L.R.B. 663, 671 (1991); *see also Sears*, 436 U.S. at 214 (Powell, J., concurring).

c. That rule makes sense. Once a General Counsel complaint has issued, the possibility of adjudicatory conflict has materialized, and any attempt to impose state liability runs headlong into the Supremacy Clause.

Recall that *Garmon* is intended to avoid the "*risk* of overlapping jurisdiction." *Sears*, 436 U.S. at 201 (emphasis added). But with the complaint's issuance, the NLRB has actually asserted jurisdiction, so any state-court proceeding by definition produces "overlapping jurisdiction." Indeed, this Court has never seen a case where a party argued it could proceed in state court when there was a pending NLRB charge, let alone a General Counsel-issued complaint.[5]

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[5] *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983), is not to the contrary. As petitioner concedes, Petr. Br. 45, that case did not "deal[] with a suit that [wa]s claimed to be beyond the jurisdiction of the state courts," *Bill Johnson's*, 461 U.S. at 737 n.5. Here, of course, respondent claims precisely that the suit is "beyond the jurisdiction of the state courts."

Because the Board has not yet resolved whether the workers' conduct was protected by the NLRA, it would be premature for this Court to analyze the question. This Court has held that a General Counsel's decision regarding issuance of a complaint is "unreviewable." *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967). But petitioner is functionally asking this Court to review that decision by holding respondent's work stoppage was actually unprotected. Should the Board ultimately side with the General Counsel, petitioner may *then* seek judicial review in the court of appeals and, if unsatisfied, before this Court.[6]

2. Irrespective of the General Counsel's complaint, respondent's conduct was arguably protected.

a. Petitioner acknowledges that the drivers engaged in a concerted work stoppage to support their

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[6] The United States argues that this Court should side with petitioner based solely on the material before the state court at the motion-to-dismiss stage, vacate the decision below, and remand for consideration in light of the General Counsel's complaint. U.S. Br. 20, 28. Respondent respectfully disagrees. First, the Court should not ignore factual and legal information that arises subsequent to the decision below. *See, e.g.*, *Patterson v. Alabama*, 294 U.S. 600, 607 (1935). The General Counsel's complaint is important intervening information, and it makes clear that the strike was at least arguably protected. Second, even if this Court agrees with the United States that it cannot consider the complaint at this juncture, it should still affirm the decision below. *See infra* Part I.A.2-I.B. Third, if the Court has any doubt that the conduct here was arguably protected and agrees with the United States that the state court should consider the General Counsel's complaint in the first instance, it should vacate and remand without resolving petitioner's arguments in support of state-court jurisdiction. *See* U.S. Br. 28.

economic demands. Petr. Br. 7. Respondent contends such conduct was protected, even if its timing made product loss foreseeable. That contention is "not plainly contrary" to the language of the statute, "has not been authoritatively rejected by the courts or the Board," and is supported by the evidence set forth in the pleadings and declarations considered below. *See Davis*, 476 U.S. at 395.

First, far from being "plainly contrary" to the language of the statute, *Davis*, 476 U.S. at 395, respondent's position conforms to the text. The NLRA is broadly worded to protect "concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. As petitioner acknowledges, Petr. Br. 45, Section 7 protects the right to strike. *See also* 29 U.S.C. § 163 (expressly preserving the "right to strike"). A "strike" is defined to include any "concerted stoppage of work," even if it results in an "interruption of operations." *Id.* § 142(2).

Second, neither courts nor the Board have "authoritatively rejected," *Davis*, 476 U.S. at 395, respondent's position. Quite the opposite. This Court has repeatedly affirmed the "integrity of the strike weapon," which "is to be given a generous interpretation." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234-35 (1963); *see also UAW v. O'Brien*, 339 U.S. 454, 457 (1950); *Bus Employees v. Wis. Emp't Rels. Bd.*, 340 U.S. 383, 389 (1951); *Bus Employees v. Missouri*, 374 U.S. 74, 82 (1963). And it has done so acknowledging that strikes may "interrupt[] operations." *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Rel. Comm'n*, 427 U.S. 132, 150 n.12 (1976) (citing 29 U.S.C. § 142(2)).

The Board, moreover, has held time and again that workers do not forfeit the Act's protections simply by commencing a work stoppage at a time when the loss of perishable products is foreseeable. For example, in *Lumbee Farms Coop.*, 285 N.L.R.B. 497, 506-07 (1987), *enforced*, 850 F.2d 689 (4th Cir. 1988) (unpublished opinion), a walkout at a poultry processor resulted in chicken spoiling. Employees specifically chose to stop working on a "large volume day" at 8 a.m. when the company's "largest number of chickens" would be on the line. *Id.* at 502-03. The Board nevertheless held the strike was protected because "[a]side from stopping work the employees here did nothing affirmatively to cause physical damage." *Id.* at 507. The Board specifically rejected the employer's argument that the strike was not protected "because it was clearly timed to cause" an "actual product loss." *Id.* at 506.

Similarly, in *Central Oklahoma Milk Producers Ass'n*, 125 N.L.R.B. 419, 435 (1959), *enforced*, 285 F.2d 495 (10th Cir. 1960), milk truck drivers went on strike even though the milk would spoil if not delivered in a limited time. The Board found the strike protected despite the risk of product spoilage because "loss is not uncommon when a strike occurs." *Id.*

Likewise, in *Leprino Cheese Co.*, 170 N.L.R.B. 601, 606-07 (1968), *enforced*, 424 F.2d 184 (10th Cir. 1970), employees at a cheese factory struck after the process of converting 217,000 pounds of milk to cheese had begun. *Id.* at 604. The employees walked out despite a supervisor's plea for them to stay because the strike would jeopardize "the milk on hand and the cheese-processing in progress." *Id.* at 603. The employer argued that the strike was unprotected

because the "sudden departure of the employees created a risk of spoliation" and ultimately resulted in a deficient product. *Id.* at 605-07. The Board disagreed, recognizing that "economic loss" is "often a byproduct of labor disputes." *Id.*

Courts and the NLRB have similarly found other work stoppages protected notwithstanding the risk of loss to perishable products. *See Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 655 (6th Cir. 2005) (newspaper delivery drivers' strike protected although newspapers are a "perishable commodity" that "become[] worthless" if not delivered on time); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 997-98 (2d Cir. 1976) (cheese workers' strike protected despite occurring during Easter season, one of the busiest seasons for cheese industry); *Morris Fishman & Sons, Inc.*, 122 N.L.R.B. 1436, 1447 (1959), *enforced*, 278 F.2d 792 (3d Cir. 1960) (strike at wool and hide company protected despite potentially causing loss of perishable pickled animal hide); *M&M Bakeries, Inc.*, 121 N.L.R.B. 1596, 1605 (1958), *enforced*, 271 F.2d 602 (1st Cir. 1959) (bakery workers' strike protected despite occurring on "double production" day ahead of Thanksgiving).

Far from "authoritatively rejecting" respondent's position, courts and the Board have repeatedly held that strikes in similar circumstances are actually protected. And if the work stoppages of poultry workers, milk truck drivers, and cheesemakers are all actually protected, it follows that the actions of the concrete truck drivers here were, at a minimum, arguably protected.

Finally, there is "enough evidence to enable the court to find that the Board reasonably could uphold a

claim." *Davis*, 476 U.S. at 395.[7] On petitioner's telling, the drivers "suddenly cease[d] all concrete delivery activity work." J.A. 12-13. They did so for the purpose of furthering collective bargaining. Petr. Br. 7 (strike was because respondent was "[u]nhappy with the company's response to its bargaining demands"). And the drivers did nothing affirmative to cause physical damage. J.A. 5-27; *see Lumbee Farms*, 285 N.L.R.B. at 507. The NLRA and the case law interpreting it deem such conduct protected. The Board thus "reasonably could uphold" respondent's claim solely based on the motion-to-dismiss record.

b. Petitioner mounts five counterarguments, none of which disprove that the conduct here is at least arguably protected.

First, petitioner attempts to distinguish *Lumbee Farms*, *Leprino Cheese*, *Central Oklahoma Milk Producers Association*, and *Lasaponara*. Petr. Br. 36 n.2. But that effort gets things backward. Respondent needs to show only that its position has not been "authoritatively rejected," not that it has been

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[7] Where, as here, *Garmon* is invoked at the motion to dismiss stage, the moving party may rely on the allegations in the complaint to make a showing of arguable protection. *See, e.g.*, *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 673-74 (1983); *Local 438 Constr. Union v. Curry*, 371 U.S. 542, 546 (1963). In addition, petitioner submitted three declarations in opposition to the motion to dismiss, which this Court may rely on in assessing whether respondent's conduct was arguably protected. J.A. 63-84.

authoritatively *approved*. *Davis*, 476 U.S. at 394-95. In any event, petitioner's distinctions are unavailing.[8]

Second, petitioner concedes that the NLRA "protects ordinary strikes that may result in lost profits" but argues that damage to tangible property is different. Petr. Br. 44. Petitioner's concession gives away the game. Petitioner provides no principled reason why—much less precedent holding that—loss of concrete should be treated differently from revenue losses, losses of customer goodwill, or costs incurred in hiring replacement workers. *See* U.S. Br. 15. Nor does the Act's text, which recognizes that strikes affect not only profits but also "the flow of raw materials or manufactured or processed goods." 29 U.S.C. § 151. And Board precedent has long rejected a distinction between lost profits and damage to tangible property. *See Lumbee Farms*, 285 N.L.R.B. at 506.

In petitioner's only cited case that actually distinguishes product damage from economic loss, the discussion is pure dicta—expressly not relied upon by the Board—in an administrative law judge's decision. *See* Petr. Br. 31; *Boghosian Raisin Packing Co.*, 342

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[8] Petitioner notes that in *Lumbee Farms*, the employer had advance notice of the strike. However, the notice played no part in the Board's reasoning. 285 N.L.R.B. at 506-07. Next, petitioner tries to distinguish *Leprino Cheese* because the NLRB found the walkout was not designed to damage the product. But the Board found that "the exercise of Section 7 rights by employees in pursuit of legitimate aims does not depend on whether they protect their employer against consequential loss in the quality or price of his product." 170 N.L.R.B. at 606-07. Finally, petitioner claims *Central Oklahoma Milk Producers* and *Lasaponara* are different from this case because the product in those cases was not fully lost. But petitioner cites no authority supporting its proposed distinction between full and partial loss.

N.L.R.B. 383, 387 n.13 (2004). Petitioner's other cases do not distinguish between product damage and economic loss and, in any event, find conduct unprotected on entirely unrelated grounds.[9]

Third, petitioner argues that respondent's "improper purpose" of "destroying Glacier's batched concrete" rendered the strike unprotected. Petr. Br. 22. But even accepting petitioner's allegations, the plain text of the NLRA and precedent don't support petitioner's legal conclusion. The statute's text already puts certain "improper purposes" off limits. *See, e.g.*, 29 U.S.C. § 158(b)(4)(B) (forbidding strikes where "an object thereof is" to force a third party to cease doing business with employer). Product damage is not among them. *See UAW v. O'Brien*, 339 U.S. 454, 457 (1950) (only the objectives listed in the statute are forbidden). Moreover, economic loss is "obviously the very object of any concerted employee action protected by the Act." *Lasaponara*, 541 F.2d at 998; *see also Lumbee Farms*, 285 N.L.R.B. at 506-07.

Fourth, petitioner argues that respondent should have struck at a different time or given petitioner notice of the time its members would stop working. Petr. Br. 21-22, 31-32, 36 n.2. Neither the timing nor the lack of notice rendered the strike unprotected.

To begin, case law does not require respondent to time its strike to minimize economic harm. To the

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[9] *See NLRB v. Local 1229, IBEW*, 346 U.S. 464, 476-77 (1953) (conduct not protected because unrelated to terms or conditions of employment); *NLRB v. Marsden*, 701 F.2d 238, 242 (2d Cir. 1983) (ad hoc decision not to work in the rain not protected because unrelated to collective bargaining); *Del. & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 604 (D.C. Cir. 1971) (interpreting Railway Labor Act, not NLRA).

contrary, courts and the Board have upheld strikes intentionally conducted at times selected to "apply pressure" to the employer. *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 615 (1986); *see also Dayton Newspapers, Inc.*, 402 F.3d at 656, 660 (newspaper drivers entitled to strike "with an eye toward maximum impact" on the most profitable delivery day); *Lumbee Farms*, 285 N.L.R.B. at 506 (recognizing that protected strikes are often "timed to ensure the greatest impact on an employer"); *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294-95 (1984) (concerted activity protesting working conditions "protected regardless of the time of day it occurs or the impact of such activity on production").[10]

In particular, respondent had no obligation to begin a strike outside of the workday. *See NLRB v. Wash. Aluminum*, 370 U.S. 9, 14-18 (1962). And within the workday, it's not clear how respondent could have selected a different time with less impact. As petitioner itself explained, neither the drivers nor the managers can "predict each driver's workday when it begins" because workflow "fluctuates greatly every day." J.A. 76. And petitioner does not allege that

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[10] Indeed, petitioner doesn't appear to believe its own argument. Following respondent's NLRB charge alleging that petitioner had retaliated against drivers for protected activity, petitioner withdrew discipline it imposed on seven of the drivers after finding they had "taken appropriate steps to try to protect their assigned mixer trucks." J.A. 73. In so doing, petitioner implicitly acknowledged that the seven drivers had engaged in protected activity. But those seven drivers stopped work at precisely the same time as their co-workers. If their conduct was protected, the timing of the drivers' strike cannot have stripped it of protection.

striking at 7:00 a.m. resulted in greater economic loss than striking at another time during the workday.

Petitioner's request for specific notice fares no better. When Congress meant to require unions to give notice of a strike's specific timing, it did so: Section 8(g) provides that health care unions must notify an employer of the timing of a strike ten days beforehand. In other industries, employees need only notify an employer of the possibility of a strike—no details of timing needed—at least sixty days before actually striking (a requirement with which respondent complied). *See* 29 U.S.C. §§ 158(d)(1), (4). The NLRA imposes no notice requirements beyond those required expressly by Section 8. *See UAW v. O'Brien*, 339 U.S. 454, 458 (1950) (states may not supplement NLRA's express notice requirements); *Columbia Portland Cement Co. v. NLRB,* 915 F.2d 253, 257 (6th Cir. 1990), *supplemented*, 919 F.2d 140 (6th Cir. 1990) ("Striking employees are under no general duty to minimize the disruption by, for example, notifying the employer in advance of the strike to enable the employer to prepare for the strike."); *Johnnie Johnson*, 271 N.L.R.B. at 295 (absence of advanced notice does not "remove the protection of the Act from concerted activity").

Finally, petitioner argues that work stoppages are not protected when striking workers do not take "reasonable precautions" to safeguard property. Petr. Br. 21. But a failure to take reasonable precautions has rendered a work stoppage unprotected only in "situations involving a danger of aggravated injury to persons or premises"—that is, where the failure to take such precautions would endanger people or prevent the business from continuing to operate.

Leprino Cheese Co., 170 N.L.R.B. at 607. The cases petitioner cites all fall into that category. *See NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955) (reasonable precautions not taken when walkout created risk that cupola of molten iron would melt plant and injure employees); *NLRB v. Reynolds & Manley Lumber Co.*, 212 F.2d 155, 158 (5th Cir. 1954) (reasonable precautions not taken when worker walked out without notice, leaving boiler at risk of explosion); *U.S. Steel Co. (Joliet Coke Works) v. NLRB,* 196 F.2d 459, 461, 467 (7th Cir. 1952) (reasonable precautions not taken when workers left ovens unattended, creating risk of explosions and fire); *Int'l Protective Servs., Inc.*, 339 N.L.R.B. 701, 702-03 (2003) (reasonable precautions not taken when security guard walkout exposed federal building occupants to "imminent" danger).

By contrast, absent such dangers, neither courts nor the NLRB have ever held that a failure to take "reasonable precautions" renders a strike unprotected. *See, e.g.*, *Leprino Cheese Co.*, 170 N.L.R.B. at 607; *Cent. Okla. Milk Producers Ass'n*, 125 N.L.R.B. at 435 (not evaluating reasonable precautions because "no unusual circumstance, such as aggravated injury to personnel or premises, was created"); *Morris Fishman*, 278 F.2d at 796 (similar); *Johnnie Johnson*, 271 N.L.R.B. at 295 (similar); *M&M Backhoe Serv., Inc.*, 345 N.L.R.B. 462, 470-71 (2005) (reasonable precautions taken when backhoe was locked before walkout).

In any event, precedent makes clear that respondent took reasonable precautions here. For example, in *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253 (6th Cir. 1990), the Board held, and the

Sixth Circuit agreed, that employees took reasonable precautions when they turned off equipment before leaving. *Id.* at 257. Some employees turned off mill pumps and a conveyor belt; although turning off that machinery risked damage, leaving the equipment running would have presented a "greater risk of danger." *Id.* at 258. Others consulted with supervisors and turned off a kiln that would have been dangerous if left unattended. *Id.* Turning the equipment off allowed the company to decide how to manage its own operations.

Respondent's conduct hews closely to *Columbia Portland*. As there, the drivers put petitioner in a position to decide what to do with the concrete by returning all trucks to petitioner's facility, where supervisors and other workers were present. *See* Petr. Br. 8. Petitioner could decide whether to add retardants to slow the concrete's hardening, use replacement drivers, pour the concrete into "reclaimers or ecology block forms" (as is "normal[]" in its business), or do anything else petitioner saw fit. *See* J.A. 72, 77. And as in *Columbia Portland*, several drivers consulted with their supervisors, and those that didn't nonetheless avoided a "greater risk of danger," 915 F.2d at 258, by leaving petitioner's trucks running. J.A. 71-72 (around eighty-five drivers stopped work; of sixteen drivers who had fully loaded trucks, all left trucks running, and seven additionally "asked for instructions" from supervisors). As petitioner notes, when a truck's "revolving drum is not rotating," the concrete "begins to harden inside the drum." J.A. 9. Here, all the drivers, at respondent's instructions, returned the trucks with the drums still rotating. Petr. Br. 8. As a result, no damage occurred to petitioner's trucks. *Id.* at 9.

At the very least, whether the drivers' precautions were reasonable is the sort of fact-intensive inquiry that Congress entrusted to the NLRB. That is why almost all the cases petitioner cites are ones in which the Board evaluated—after a full hearing and investigation—whether the conduct was actually protected or unprotected. Here, that evaluation has not yet occurred. Respondent thus need only show that its conduct was arguably protected, a modest threshold respondent more than clears. And if the Board ultimately disagrees that the conduct was protected, petitioner will be free to return to state court.

B. *Garmon*'s local feeling exception does not apply.

Petitioner wrongly contends that even if the conduct at issue here was arguably protected, its claims fall within an exception to *Garmon* for certain state torts "deeply rooted in local feeling and responsibility." 359 U.S. at 244. That exception does not apply where, as here, the conduct at issue was arguably protected by Section 7. Even if the Court were to extend the local feeling exception to arguably protected conduct, it still would not apply here.

1. The local feeling exception does not apply to arguably protected conduct.

This Court has applied the local feeling exception only in cases involving "arguably *prohibited*" conduct—that is, where the conduct challenged in state court might also amount to an unfair labor practice under Section 8. In arguably prohibited cases, there is "no risk that permitting the state cause of action to proceed would result in state regulation of

conduct that Congress intended to protect." *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 298 (1977). In these cases, there may also be a difference between the damages available in state court and the remedies available before the NLRB. The local feeling exception thus sometimes closes that gap by allowing state courts to award damages even where the Board may also provide a remedy. *Id.*

When the conduct challenged in the state-court suit is arguably *protected*, by contrast, there is *always* a "risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect." *See Farmer*, 430 U.S. at 298. And there is no remedial gap in a case like this one. If respondent's conduct *is* protected, the state court cannot award petitioner any remedy without running afoul of the Supremacy Clause. *See Brown v. Hotel Emps.*, 468 U.S. 491, 502-03 (1984). Conversely, if the Board finds respondent's conduct unprotected, petitioner may at that point take advantage of all available state-court remedies.

Unsurprisingly, this Court has never applied the local feeling exception to any arguably protected case. Petitioner provides no reason to change course here.

2. Should this Court choose to extend the local feeling exception to arguably protected conduct, it still would not apply here.

Even if the local feeling exception applied to arguably protected cases, it would not matter. That exception allows state litigation over claims "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we

could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. Petitioner does not meet any of the conditions for applying that exception. The conduct at issue does not implicate "local feeling and responsibility"; the claims at issue are not "deeply rooted"; and there has been "compelling congressional direction" barring states from regulating respondent's conduct.

a. This Court has carefully delimited the boundaries of "local feeling and responsibility." It has never found state regulation of the mere act of stopping work to be such an area of "local feeling and responsibility." After all, the right to collectively stop work is at the heart of the NLRA. *Supra* at 21.

Petitioner's cases are inapposite. Some impose liability for conduct that occurs *during* a work stoppage but not for the work stoppage itself. In *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), striking employees not only stopped work but *also* occupied the employer's factory for nine days, preventing the employer from operating its business and culminating in a "pitched battle" with law enforcement. *Id.* at 248-49. In *UAW v. Wisconsin Employment Relations Board*, 351 U.S. 266 (1956), striking employees not only stopped work but *also* blocked other employees from entering the employer's plant. *Id.* at 268-69; *see also UAW v. Russell*, 356 U.S. 634, 636 (1958) (employees not only stopped work but also threatened bodily harm to plaintiff and "took hold of" his automobile). In this case, however, petitioner challenges nothing beyond the work stoppage itself.

Petitioner's lower-court cases are similarly off-base. *See* Petr. Br. 27-29. For instance, petitioner claims *Rockford Redi-Mix, Inc. v. Teamsters Local*

325, 551 N.E.2d 1333 (Ill. App. Ct. 1990), involved "nearly identical" facts to this case. Petr. Br. 28. But in *Rockford Redi-Mix*, concrete truck drivers parked their trucks in an undisclosed location, turned off the trucks so the drums stopped rotating, and attempted to blackmail the employer into signing a new contract in exchange for information about the trucks' locations. 551 N.E.2d at 1334-36.

Petitioner's other cases are yet further afield, involving no work stoppages at all. *See, e.g.*, *Sears*, 436 U.S. at 182-83 (picketing on employer's private property); *Farmer*, 430 U.S. at 292 (hiring hall discrimination); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 56-57 (1966) (passing out leaflets); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 646, 657-58 (1954) (threatening workers who did not join union).

Petitioner ultimately falls back on a series of cases that reference "destruction of property" in dicta. Petr. Br. 23-27. But as this Court has explained, all of those cases involved "conduct marked by violence and imminent threats to the public order," not mere work stoppages. *United Mine Workers v. Gibbs*, 383 U.S. 715, 729-30 (1966) (citing *Garmon*, 359 U.S. at 247).[11]

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[11] *Compare* Petr. Br. 23-24 (citing *Laburnum*, *Fansteel*, and *Russell*) *with Garmon*, 359 U.S. at 248-49 n.6 (no compensation in *Laburnum* for "anything more than the direct consequences of the violent conduct"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (same); *Gibbs*, 383 U.S. at 721 (same); *Wash. Aluminum Co.*, 370 U.S. at 17 & n.15 (conduct in *Fansteel* fell within "violent" exception to NLRA); *and Lockridge*, 403 U.S. at 297 n.7 (only "narrower rationale" of *Russell*—"maintenance of domestic peace"—survives today).

b. Petitioner's argument that state regulation of "intentional property destruction" is "deeply rooted" fares no better. "Intentional property destruction" is not a cause of action under Washington law. Petitioner is thus left to argue that state regulation of "intentional property damage" is "deeply rooted" because that rootless label bears some resemblance to conversion and trespass to chattels. Petr. Br. 38. Petitioner is wrong.

First, conversion and trespass to chattels are not equivalent to "intentional property destruction." Neither tort requires a showing of wrongful intent. Conversion, for instance, requires "neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance"; the tort does not depend "in any way" on a showing of "wrongful motives." *Judkins v. Sadler-Mac Neil*, 376 P.2d 837, 838 (Wash. 1962) (citation omitted); *see also* Restatement (Second) of Torts § 217 cmt. b (1965). Pegging the local feeling exception to those torts would thus encompass far more than "intentional" property damage. A worker who had absolutely no reason to know that her protected conduct would result in property damage might be liable for conversion or trespass to chattels under Washington law. But even petitioner does not maintain the local feeling exception should allow suit against such a worker.

Second, petitioner may be correct that conversion and trespass to chattels are "venerable" causes of action with "deep common-law roots." Petr. Br. 38. But the conduct petitioner alleges in its complaint is miles away from the "venerable" forms of those torts.

Common-law conversion traditionally required an "affirmative act" by the tortfeasor. Restatement

(Second) of Torts § 224 cmt. a (1965). Thus, "a bailee who has made a contract with his bailor by which he has agreed to keep perishable goods under refrigeration does not become a converter when he fails to do so, *even though his failure is intentional and results in the complete destruction of the goods*." *Id.* (emphasis added). Petitioner's analogy to a defendant who intentionally opens the door to an ice-house, melting the ice, is thus inapt. *See* Petr. Br. 38 (citing Restatement (Second) of Torts § 226 cmt. d, illus. 1 (1965)). The ice-house defendant took an affirmative act (opening the door). Here, petitioner's suit is not based on any affirmative act but on the drivers' failures to fulfill their delivery assignments and to assist petitioner in disposing of the concrete after returning the trucks. The "venerable" form of conversion would not have covered respondent's conduct.

Trespass to chattels actions, meanwhile, historically required "direct and immediate force" or "intermeddling" with the affected chattels. William L. Prosser, Handbook of the Law of Torts § 14 (1941); Restatement (Second) of Torts § 217 (1965); *United States v. Jones*, 565 U.S. 400, 426 (2012) (Alito, J., concurring) ("Trespass to chattels has traditionally required a physical touching of the property."). In this case, no driver applied any "force," let alone "direct and immediate force," to petitioner's concrete. The "venerable" trespass to chattels tort would not cover respondent's conduct, either.

c. Even assuming state regulation of respondent's conduct were "deeply rooted in local feeling and responsibility," such regulation would be appropriate only "in the absence of compelling congressional

direction" barring it. *See Garmon*, 359 U.S. at 244. In this case, there is just such "compelling congressional direction": States cannot regulate property damage that is incurred as the result of a "concerted stoppage of work" because the Act expressly protects such a "concerted stoppage of work." *Supra* at 21. And Congress contemplated that work stoppages might "interrupt[] operations" or interfere with the flow of "raw materials" or "processed or manufactured goods," yet still chose to protect those work stoppages. *Supra* at 21, 25.

Because respondent engaged in a concerted work stoppage—conduct protected by the Act's plain text—applying the local feeling exception here would allow a state to impose damages for the very action the NLRA protects. "Compelling congressional direction" forbids doing so.

II. *Garmon* does not need revision.

Petitioner argues that principles of statutory interpretation require this Court to read *Garmon*'s arguably protected test narrowly, casting doubt on *Garmon* and six subsequent decades of jurisprudence. Petr. Br. 40-47. But Congress has amended the NLRA since *Garmon*, expressing its understanding that the arguably protected standard continues to apply. Rightly so: *Garmon* has long facilitated the uniform interpretation of federal labor law while balancing the rights of employers and employees. And petitioner's claim that *Garmon* is inconsistent with the plain text of the Act and with "ordinary preemption" principles ignores the language and structure of the Act, as well as the difference between the effects of *Garmon* and the effects of other preemption doctrines. Petr. Br. at 41.

A. Congress has effectively ratified *Garmon*, which serves an important function.

Garmon's role in the last half-century of labor law belies petitioner's argument that the case is somehow on shaky footing.

1. *Stare decisis* has "special force" with respect to this Court's decisions interpreting statutes because "Congress remains free to alter what [the Court] ha[s] done." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (citation omitted). More than 50 years ago, this Court acknowledged that *Garmon* is not "without imperfection" but explained that "until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect." *Lockridge*, 403 U.S. at 302.

The presumption in favor of *stare decisis* is even stronger where Congress has amended a statute but has left a judicial construction intact. "The long time failure of Congress to alter the Act after it had been judicially construed . . . is persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940). That's precisely what happened here. *Garmon* issued in April 1959, as Congress was formulating the Landrum-Griffin Act. Pub. L. 86-257, 73 Stat. 519 (Sept. 14, 1959). The Landrum-Griffin Act overruled the portion of *Garmon* preempting state suits where the Board declined jurisdiction. *Compare id.* at 541-42, *with Garmon*, 359 U.S. at 245-46. The new law allowed states to exercise jurisdiction where the Board declines it. 29 U.S.C. § 164(c)(1)-(2). But it left

Garmon's "arguably protected" test intact. No congressional action since 1959 has done otherwise.

2. This decades-long embrace of *Garmon* accords with Congress's pre-NLRA approach of giving a regulatory body the first opportunity to adjudicate certain types of disputes. Prior to enacting the NLRA, Congress passed the Interstate Commerce Act of 1887, Pub. L. 49-104, 24 Stat. 379, which created the Interstate Commerce Commission and vested jurisdiction over any conflicts about rate-setting for common carriers in that agency. *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907). This Court interpreted that grant of authority to mean that courts must defer adjudicating disputes over rate-setting and instead allow the Commission to make an initial determination of the appropriate rate. *See United States v. W. Pac. R.R.*, 352 U.S. 59, 63-65 & n.7 (1956). Before the NLRA became law in 1935, the Court had reaffirmed that rule on multiple occasions. *See, e.g.*, *Tex. & Pac. Ry.*, 204 U.S. at 440-41; *N. Pac. Ry. v. Solum*, 247 U.S. 477, 483-84 (1918).

The NLRA mirrored the Interstate Commerce Act by creating a new regulatory body and vesting it with jurisdiction over particular conflicts. This Court interpreted the NLRA accordingly, assuming that Congress intended the NLRA's new regulatory body also to have the first opportunity to adjudicate disputes within its jurisdiction. *See Sears*, 436 U.S. at 199 n.29. In the ensuing decades, the two bodies of law informed one another. *See, e.g.*, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-85 (1965) (citing Interstate Commerce Act in determining NLRB jurisdiction); *Int'l Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 238 (1971).

3. In the sixty years since *Garmon*, its framework has proven judicially administrable, furthered the statutory goal of uniformity, and benefited employers and employees alike.

Before *Garmon*, courts struggled to discern "the area in which state action [was] still permissible" in light of the enactment of the NLRA. *Garner v. Teamsters, Local 776*, 346 U.S. 485, 488 (1953). In the decade before *Garmon*, "almost a score of cases" about federal labor law crowded this Court's docket, raising "difficult problems of federal-state relations." 359 U.S. at 239. *Garmon* articulated an administrable standard for when state courts must decline jurisdiction, thereby avoiding "ad hoc inquiry into the special problems of labor-management relations." *Id.* at 242.

Garmon's framework also helps realize Congress's goal of "obtain[ing] uniform application of its substantive rules." 359 U.S. at 243. The arguably protected standard ensures that a single body applies the NLRA. It also reflects Congress's intent that the Board's expertise in the "complexities of industrial life," amassed over eighty years of adjudicating the "actualities of industrial relations," be brought to bear on applying the NLRA. *See Erie Resistor Corp.*, 373 U.S. at 236.

Finally, the *Garmon* framework has benefited employers and employees alike. It reflects a "balanced" and "carefully calibrated approach that has stood the test of time." Br. for the Chamber of Commerce of the United States of America as *Amicus Curiae* at 13, 15. Indeed, employers routinely rely on *Garmon* to argue that a state court should not adjudicate claims against them. *See, e.g.*, *Moreno v. UtiliQuest, LLC*, 29 F.4th 567, 577 (9th Cir. 2022); *Hrones v. Rideout Mem'l*

Hosp., 2022 WL 159034, at *2 (E.D. Cal. Jan. 18, 2022); *Andrewsikas v. Supreme Indus., Inc.*, 2021 WL 1090786, at *2-*3 (D. Conn. Mar. 22, 2021); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 784 (9th Cir. 2001).

B. Petitioner's suggestion that *Garmon* departs from the NLRA's plain text ignores the Act's jurisdictional provisions.

Petitioner nonetheless urges this Court to interpret *Garmon* narrowly because, it claims, *Garmon* is inconsistent with the plain text of the Act. *See* Petr. Br. 41. But petitioner itself sidesteps the Act's plain text. (Indeed, petitioner cites the actual text of the NLRA only once in its entire argument. *Id.* at 18.) And petitioner simply ignores the Act's various provisions channeling jurisdiction to the NLRB.

1. It is a "familiar principle of statutory construction" that "a negative inference may be drawn" from the "exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107, 111 (2012). Grants of jurisdiction to state courts in limited circumstances imply the absence of state-court jurisdiction elsewhere. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2478 (2020) (without express authorization, state courts have no criminal jurisdiction under Major Crimes Act). This canon is especially persuasive when interpreting federal regulatory statutes that give jurisdiction to agencies. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 13 (2012)

(without express authorization, federal district court had no jurisdiction under Civil Service Reform Act).

The canon applies no less to the NLRA. *See Bus Employees v. Wis. Emp't Rels. Bd.*, 340 U.S. 383, 393-94 (1951) (applying canon to NLRA). The Act grants state courts jurisdiction in specific, limited instances, thereby suggesting the absence of state-court jurisdiction elsewhere.

2. Consider the provisions of the NLRA granting jurisdiction to the Board over labor disputes and unfair labor practices. In each provision, the statute grants the NLRB jurisdiction but allows the Board to decline that jurisdiction over a class of employers. *See* 29 U.S.C. § 164(c)(1) (NLRB may "decline to assert jurisdiction over any labor dispute" involving specified classes of employers); *Id.* § 160(a) (NLRB is "empowered . . . to cede to such agency jurisdiction" over unfair labor practices in some instances). Each provision grants states jurisdiction only where the NLRB has declined it. *See id.* § 164(c)(2) (statute does not "prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction"); *id.* § 160(a) ("Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction" in some instances).

The inclusion of those explicit, but limited, grants of state jurisdiction indicates that Congress did not intend state courts to have jurisdiction otherwise. As this Court has explained, those provisions strongly suggest that cession is the "exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor

Relations Board." *Guss v. Utah Lab. Rels. Bd.*, 353 U.S. 1, 9 (1957).

Applying the negative inference principle to the rest of the federal labor code bolsters the conclusion that Congress contemplated only limited, expressly defined, state-court jurisdiction over labor relations. Title 29 of the United States Code includes several savings clauses which permit state jurisdiction in specific situations, such as internal union affairs (29 U.S.C. § 523(a)), specified criminal laws (29 U.S.C. § 524), and certain union membership laws (29 U.S.C. § 164(b)). Congress knew how to permit state-court jurisdiction. It drafted no such provision giving state courts jurisdiction over the suit at issue here.

3. Petitioner's plain-text suggestion also ignores the text of 29 U.S.C. § 160(a). That section mandates that the power of the Board to "prevent any person from engaging in any unfair labor practice" shall not "be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." *Id.*

That power would be undermined by state-court adjudication. State courts and the NLRB may have to decide the same question. The NLRB's power to prevent unfair labor practices often turns on whether employees exercised protected rights, and protection by a federal statute would be an absolute defense to a state tort claim. A state-court judgment penalizing conduct the Board deems protected would hamper the Board's ability to prevent unfair labor practices that interfere with the exercise of that protected conduct. And in some circumstances, the state-court ruling might have collateral estoppel effects, directly impinging on the Board's ability to make decisions.

See, e.g., *NLRB v. Heyman*, 541 F.2d 796, 799 (9th Cir. 1976); *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 33 (1st Cir. 1987).

The Board's "power" would thus be "affected by a means of adjustment or prevention," precisely what the statute forbids. *See, e.g.*, *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969) (state law is a means of adjustment or prevention); *Wis. Emp't Rels. Bd. v. Teamsters, Local 200*, 66 N.W.2d 318, 324 (Wis. 1954) ("Such comprehensive language certainly expressly excludes state courts from taking jurisdiction of unfair labor practices as defined in the act.").[12]

C. Petitioner's suggestion that *Garmon* departs from "ordinary preemption" principles is also wrong.

Finally, petitioner calls on this Court to apply "ordinary preemption" principles. Petr. Br. 41. But the cases petitioner cites involve far more permanent incursions on state-court jurisdiction than the "jurisdictional hiatus" at issue here. And even if the standard from those cases were the relevant one, petitioner's argument suffers from the same defect as before—a failure to consult the text.

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[12] Petitioner's citation to *Bill Johnson's*, 461 U.S. 731 (1983), is entirely off base. Petr. Br. 45. That case held that where a state tort suit does *not* seek to impose liability for protected conduct, it must be allowed to proceed—even if motivated by retaliation—unless there is no "realistic chance" the state court will side with the plaintiff. *Bill Johnson's*, 461 U.S. at 746-47. To the extent petitioner claims that *Bill Johnson's* hews more closely to the text of the NLRA, petitioner has not explained how—the words "realistic chance" appear nowhere in the statute.

1. Preemption stems from the Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2. Where state and federal law clash, preemption means the state law must yield. In the cases petitioner cites, a permanent displacement of state law was at issue. *See Kansas v. Garcia*, 140 S. Ct. 791 (2020); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (plurality opinion). This Court accordingly required an actual conflict between the state and federal law before ousting the state law.

The "ordinary preemption" cases petitioner cites are thus inapposite. At this juncture, finding respondent's conduct arguably protected imposes only a "jurisdictional hiatus" on the state court's ability to hear petitioner's claim. *See Sears,* 436 U.S. at 203.[13] The sort of permanent ouster that petitioner's cases address would materialize only if the Board deems respondent's conduct actually protected. The arguably protected standard therefore serves only a gatekeeping function wholly unlike the claim-extinguishing function operative in petitioner's cited cases.

2. Even if petitioner's cases applied here, petitioner's state-court suit could not proceed.

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[13] *See also Loehmann's Plaza,* 305 N.L.R.B. at 671 n.56 (state court action should be "held in abeyance pending the Board's decision"); *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 188-91 (1965) (NLRB determination that workers were not subject to Section 7 permitted state jurisdiction over previously arguable conduct); *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 755-56 (1963) (similar); *Incres S.S. Co. v. Int'l Mar. Workers Union*, 372 U.S. 24, 27 (1963) (similar).

Petitioner protests that the NLRA does not "say anything about" preempting petitioner's claims. Petr. Br. 18. But Congress is not required "to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 99 (2017). A state law is preempted when a federal statute "confers rights on private actors" and state law "imposes restrictions that conflict with the federal law." *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018).

Petitioner's "ordinary preemption" principles would thus lead to the same result here as *Garmon* and its progeny dictate. The plain text of the NLRA "confers rights" on the drivers, and petitioner's suit seeks to "impose[] restrictions that conflict with" those rights. *See Murphy*, 138 S. Ct. at 1480. As explained above, the NLRA guarantees employees the "right" to engage in "concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157; *supra* at 21. One of those rights is the "right to strike," which the Act also separately preserves.[14] 29 U.S.C. § 163. A "strike," in turn, includes a "concerted stoppage of work." *Id.* § 142(2); *see supra* at 21. Imposing state tort liability on respondent's "concerted stoppage of work" is a clear restriction on that federal right.

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[14] To be sure, the relevant provision also recognizes "limitations or qualifications" on the right to strike. 29 U.S.C. § 163. But the limitations are only those "specifically provided for" in the NLRA and imposed by pre-1947 case law. *NLRB v. Teamsters, Local 639*, 362 U.S. 274, 281-82 (1960). The only such pre-1947 limitation that petitioner mentions is from *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939), which, as discussed above, is not relevant here. *See supra* at 33-34.

3. Notwithstanding petitioner's exhortation that "ordinary preemption" principles require a "firm basis in the text," petitioner's own arguments for state-court jurisdiction have no such "firm basis." *See* Petr. Br. 42. First, petitioner argues that respondent's work stoppage is unprotected because it resulted in property damage. But the text of the statute protects work stoppages even as it acknowledges that they interrupt operations or disrupt the flow of "raw materials or manufactured goods." *Supra* at 25.

Second, petitioner's appeal to the text is out of joint with its reliance on the local feeling exception, which has no basis in the statute itself and was instead "judicially developed." *See Farmer*, 430 U.S. at 290, 297 n.8. The statutory text standing alone does not countenance a freestanding local feeling exception. Congress knew how to create space for courts to police labor-related conduct. *See, e.g.*, 29 U.S.C. §§ 104(e), 104(i) (exempting conduct marked by "fraud or violence" from bar against federal-court injunctions); *Id.* § 524 (provisions regarding internal union affairs in no way "impair or diminish the authority of any State to enact and enforce general criminal laws" covering specific serious offenses, such as robbery, arson, and murder). Congress provided no similar carveout for state-law property torts.

III. The Takings Clause is not implicated here.

Finally, petitioner suggests this Court should construe the NLRA's protection narrowly under the canon of constitutional avoidance to avoid a "collision course with the Takings Clause." Petr. Br. 47. But the canon of constitutional avoidance sets a high bar: It comes into play only when one interpretation of a statute "raises serious constitutional doubts."

Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018); *see also Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 148-49 (2005) (Thomas, J., concurring in part and dissenting in part); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 173 (2010). Petitioner's Takings Clause argument is both premature and wrong; it does not come close to meeting that high bar.

The Takings Clause states that "private property" shall not be "taken for public use, without just compensation." U.S. Const. amend. V. "[G]overnment-authorized" deprivations of property qualify as takings under the clause. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021). In this case, there has been no "government authoriz[ation]," nor will there be unless the Board decides that the strike is protected. Furthermore, the drivers' conduct did not deprive petitioner of its property.

1. The question currently before this Court is only whether the Board should have the first opportunity to evaluate whether respondent's conduct is protected. Petitioner argues that if the Board *were* to find respondent's conduct protected, *that* decision would be a government authorization, which could then implicate the Takings Clause. Petr. Br. 47-48. The Board has yet to rule on respondent's conduct. And this Court should "not anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (citation omitted). If the Board finds in respondent's favor, petitioner may *then* raise its Takings Clause argument, appealing all the way to this Court if it wishes.

2. Even assuming such a Board decision amounted to a "government authorization," it still would not constitute a taking because respondent did not physically appropriate petitioner's property. During the work stoppage, drivers returned the vehicles so that petitioner retained its full possessory interest in the concrete and had the right to use, not use, sell, or move that property. *See* J.A. 72. A Board determination that the strike was protected would not limit petitioner's right to exclude others, *see Cedar Point Nursery*, 141 S. Ct. at 2072, nor appropriate possession, control, or disposition rights for the Board or respondent.

Petitioner does not even attempt to argue that a hypothetical NLRB finding that respondent's conduct was protected would "den[y it] all economically beneficial or productive use" of the concrete. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Nor could it: Among other things, petitioner made no allegations about when the concrete could no longer be delivered to customers; how long it would have taken to harden and whether retardants or other techniques would have slowed the hardening; whether putting the concrete into a reclaimer or form to create ecology blocks would have allowed for a different commercial use; or whether it could have sold the concrete even after it hardened. *Cf. Andrus v. Allard*, 444 U.S. 51, 66 (1979) (regulation banning sale of eagle feathers did not leave owner "unable to derive economic benefit" because owner could still exhibit the feathers for an admissions fee).

Petitioner has thus raised no "serious constitutional doubts" about the lower court's decision to allow the Board first stab at deciding whether

respondent's conduct is protected. *See Jennings*, 138 S. Ct. at 836.

CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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