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 *AMICI CURIAE* PROFESSORS MATTHEW BODIE, CATHERINE FISK, AND CHARLOTTE GARDEN ET AL. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the professors listed in Appendix A, each of whom has expertise relevant to the issues before the Court in this case. *Amici* are interested in the outcome of this case because it raises important questions about the extent to which employers may respond to strikes by resorting to state-court litigation, instead of seeking an acceptable collectively bargained agreement or exercising their own economic weapons.

The institutional affiliations of the signatories listed in Appendix A are provided for identification purposes only.

SUMMARY OF ARGUMENT

The right to cease work has been part of American law since well before the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA" or "the Act"). Strikes almost always mean economic loss to employers—including when a product spoils or becomes valueless before it can reach customers.

The NLRA federalized broad protections for workers' rights to engage in primary strikes like the one in this case. Outside of healthcare settings, the main restriction on strike timing is a 60-day window

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[1] No counsel for a party authored this brief in whole or in part. No counsel, party, or person other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner Glacier Northwest has filed with the Court its blanket consent to amicus briefs. Respondent Teamsters Local Union No. 174 has given its consent to the filing of this brief.

during which neither party to a collective bargaining agreement ("CBA") may engage in a strike or lockout so that re-negotiation can occur. The end of this window effectively serves as notice that a strike could be coming, at which point the Act gives employers ample tools to guard against economic loss—including the ability to lock out their unionized workers or hire replacement workers, or use their managers and supervisors to perform struck work. That unions and employers have economic weapons available is intended to provide motivation to find common ground, which would be undermined if employers economically harmed by the timing of a strike could instead recoup their losses in a state court tort suit.

Under this Court's preemption caselaw, the National Labor Relations Board ("NLRB") has primary jurisdiction to administer the NLRA, including in determining when a strike should lose statutory protection because it was carried out indefensibly. There is no reason to treat the complaint in this case differently. Nor does this case fall within the "local interest" exception to *Garmon* preemption. That exception has been understood to allow states to respond to intentional torts that do not turn on the existence of an employee-employer relationship. In this case, however, the asserted duty to take affirmative steps to protect an employer's property from loss applies only to employees, and not to citizens generally. If a state could claim that a state law or tort doctrine imposing a duty on employees *qua* employees was deeply rooted in local feeling and therefore could apply even to conduct that is arguably protected by the NLRA, the local-interest exception would swallow the *Garmon* rule and, with it, the congressional

objective of establishing a uniform federal labor policy that the rule was designed to achieve.

Finally, if accepted, Glacier's argument would have far-reaching consequences. Strikes and lockouts involving industries ranging from journalism to professional sports are often timed to cause economic loss, including by rendering an employer's goods valueless. Employers should not be free to convert these labor disputes into lawsuits.

ARGUMENT

I. Economic Harms Caused by Sudden Cessation of Work Were Not Wrongful at Common Law

From the revolutionary era to the present, free labor has meant freedom to cease work. Workers not under contract or in slavery were generally not liable for damages caused by abrupt cessation of work. Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* ch. 9 (2001). In the founding era, associations of workers in every trade struck over wages, work hours, and for the freedoms they took to be their rights as artisans. Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850* (1984) (noting prevalence of strikes by workers between 1780 and 1840s).

The cultural belief that freedom meant freedom to cease work was reflected in the common law, which recognized that most workers not under a contract of employment were free to quit, even when walking off the job would cause product spoilage. Steinfeld, ch. 9.

As Justice John Marshall Harlan, riding circuit, explained in an opinion partially vacating an injunction against employees who struck without advance notice and "with the object and intent of crippling the property" of a railroad, legal prohibition of a strike is tantamount to "involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States." *Arthur v. Oakes*, 63 F. 310, 318 (7th Cir. 1894). The economic harm caused by a peaceful strike, this Court observed a century ago, is *damnum absque injuria* because strikes exist "to exert influence upon" an employer and "by this inconvenience to induce him to make better terms with them." Therefore, this Court concluded, "[t]he right to combine for such a lawful purpose has in many years not been denied by any court." *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921). This Court vacated the portion of an injunction that prohibited inflicting economic harm through peaceful refusal to work and peaceful persuasion to join a strike, and it allowed only the enjoining of actual or threatened physical violence. *Id.* at 207.[2]

Sheep shearers of the mountain west formed the first stable labor union in agriculture in the 1890s and secured favorable wages through effective control

[2] Nineteenth-century employers made sporadic efforts to prosecute some strikes as criminal or civil conspiracies, *see Commonwealth v. Hunt*, 45 Mass. (1 Met.) 111 (Mass. 1842) (rejecting the criminal conspiracy doctrine and reversing convictions of strikers), but the rarity of such suits as compared to the frequency of strikes that caused product loss belies the notion that the common law prohibited peaceful primary strikes even when done with the specific intent to cause product spoilage.

of the labor supply; their strikes and strike threats were powerful because the quality of wool is affected by when sheep are shorn, and the shearing occurred in remote mountain pastures where owners could not easily obtain skilled striker replacements. Bureau of Labor Statistics, *Labor Unionism in American Agriculture*, Bulletin No. 836 (1945), 9-10, 221-31. Conversely, even in some highly seasonal industries such as fruit and vegetable packing, employers often effectively countered strike threats and kept wages low by importing labor from other regions or countries. *Id.* at 74 (describing California growers' reliance on successive groups of Chinese, Japanese, Mexican, and Filipino workers to harvest and pack crops). Where necessary to prevent opportunistic behavior (such as agricultural workers quitting during the harvest or indentured workers or apprentices quitting before the employer recouped its investment in hiring or training), express or implied contracts for a term were used which allowed either party to sue the other for premature termination of employment. But absent that, as the nineteenth-century treatise writer on the constitutional limits on state power Christopher Tiedeman observed in *State and Federal Control*, "free men—whose badge was 'liberty of contract'—must either act in concert or be 'at the mercy of the employer.'" *Quoted in* Amy Dru Stanley, *From Bondage to Contract* 82 (1998).

II. Employers' and Unions' Economic Weapons, Including Strikes, Are Core to the NLRA's Statutory Scheme

The NLRA replaced and federalized common law as the source of workers' rights to strike, and it

established broad protections for workers' collective action, prohibiting employers from "interfer[ing]" with employees' right to "engage in []concerted activities, for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §§ 157 & 158(a)(1). As originally drafted, the NLRA did not impose any limits on when workers could strike, nor did it require workers to time their strikes to minimize their employers' economic loss. *See NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 12 (1962) (NLRA protected workers who engaged in impromptu walkout in response to freezing working conditions). To the contrary, Congress reiterated that "[n]othing in this [Act] shall be construed so as to interfere with or impede or diminish in any way the right to strike." 29 U.S.C. § 163. Importantly, because not every strike tactic is protected, to prevent states from protecting or prohibiting conduct that Congress chose to prohibit, protect, or leave unregulated, and to protect the NLRB's primary jurisdiction to draw lines between protected, prohibited, and unregulated tactics, Congress broadly preempted state regulation of strike activity that federal law protects, prohibits, or even arguably protects or prohibits. *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008); *Wis. Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986); *Machinists v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 140 (1976); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

Later amendments to the NLRA imposed targeted restrictions on how and when unions could strike, but still did not require unions to limit their strikes to times that would minimize economic harm or even product loss to the employer. Instead,

economic weapons such as strikes and lockouts remain at the heart of the NLRA's core purposes: facilitating successful bargaining between unionized employers and employees. 29 U.S.C. § 151 (describing statutory purpose to "encourag[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees"). Strikes empower employees to put economic pressure on the employer to settle; lockouts do the reverse. *See NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960) (observing that "the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side").

A. Amendments to the NLRA Reflect that Congress Structured the Collective Bargaining Process, Allowing Unions and Employers To Resort to Economic Weapons.

Congress has significantly amended the NLRA three times. Each time, it has adjusted the collective bargaining process, the scope of the economic weapons available to unions or employers, or both. Significantly, those changes did not impose on unions any obligation to time their strikes to be less disruptive. Instead, the statutory structure assumes that employers that do not reach agreements with unions will, if necessary, engage in self-help to protect their own economic well-being.

First, in the Labor Management Relations Act ("LMRA"), Pub. L. 80-101 (1947), Congress created a new process intended to facilitate successful renegotiation of existing CBAs, which included a limited restriction on when strikes could occur—but not one that is implicated in this case. Specifically, the Act requires a union or employer that terminates an existing CBA to give notice of the situation to the Federal Mediation and Conciliation Service ("FMCS"), plus any state equivalent. 29 U.S.C. § 158(d). Then, the parties must hold existing contract terms in place "without resorting to strike or lock-out" for sixty days or until the contract has expired, whichever is later. It is an unfair labor practice for either side to violate this provision, and employees that strike anyway lose the NLRA's protection. *Id*.[3]

This 60-day cooling-off period gives unions and employers an incentive to reach a new agreement quickly, as both sides know they are only temporarily insulated from the other's economic weapons. It also serves as notice that a strike or lockout could begin as early as the 61st day. An employer that would be economically harmed by a sudden strike should then be motivated to reach a new CBA relatively quickly, perhaps offering improvements in wages or working conditions in exchange for a no-strike clause.

In addition, the LMRA added to the NLRA unfair labor practices that could be committed by unions, including certain secondary strikes against

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[3] The statute also created a mechanism for the President to intervene in strikes or lockouts that "imperil the national health or safety," including by seeking an injunction in federal district court. *Id*. §§ 176 & 178(a).

"neutral" businesses whose labor practices were not the subject of the strike. *Id.* § 158(b)(4). This change was aimed at protecting the economy from the consequences of labor unrest by insulating "neutral" employers from strikes, but it did not limit the scope of primary strikes. In fact, it left some scope for unions to engage in activity that might be characterized as secondary when that activity was integral to carrying out the primary strike. For example, a proviso states that the statute is not intended to "make unlawful a refusal by any person to enter upon the premises of any employer . . . if the employees . . . are engaged in a strike ratified or approved by" a union the employer was required to recognize, an unqualified statement that is not limited to situations where the products to be picked up or delivered are not perishable. *See NLRB v. Int'l Rice Milling Co.*, 341 U.S. 665, 669-71 (1951) (picketers in a labor dispute with a grain mill did not violate § 158(b)(4) by convincing a delivery driver to turn back without picking up his load of rice or bran); *see also Local No. 1426, Int'l Longshoremen's Ass'n*, 198 N.L.R.B. 1076 (1972) at *8 (holding that longshoremen's strike was lawful primary activity, although a ship carrying fertilizer that would "deteriorate" if allowed to remain in the ship for too long had to travel to a different port to unload).

In adding these unfair labor practices, the LMRA did not change the NLRA's enforcement mechanism, meaning the NLRB remained the primary venue for anyone aggrieved by a possible unfair labor practice. But it also created two new federal causes of actions that private parties could bring against labor unions, neither of which is implicated by this case. First, it created a federal

cause of action to enforce the terms of a collective bargaining agreement, including a no-strike clause. 29 U.S.C. § 185; *see also Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (federal common law, not state law, applies to lawsuits under this provision).[4] And second, it authorized employers to sue unions in federal court to recoup damages incurred as the result of unlawful secondary—but not primary—picketing. 29 U.S.C. § 187.

Congress next significantly amended the NLRA in 1959, when, several months after this Court's decision in *Garmon*, it passed the Labor-Management Reporting and Disclosure Act ("LMRDA"). Among other things, the LMRDA imposed additional restrictions on certain forms of secondary and recognitional activity by unions. 29 U.S.C. §§ 158(b)(4) (ii) & (b)(7). But Congress also calibrated the remedies available under these provisions, declining to allow damages suits in recognitional picketing cases. 105 Cong. Rec. 17719, 17720 (Sept. 2, 1959) (statement by Senator Kennedy that, in reconciling House and Senate versions of bill, "[w]e eliminated a section of the Landrum-Griffin bill which would have permitted damage suits against unions which might have picketed for organizational purposes").

Despite its temporal proximity to *Garmon*, the LMRDA reflected little congressional interest in opening labor relations to state regulation. One

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[4] Relatedly, this Court has held that union-represented workers may bring claims alleging breaches of a union's duty of fair representation in federal court. *See, e.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967).

LMRDA provision explicitly defined a limited role for states in establishing or enforcing labor policy: 29 U.S.C. § 164(c)(1) allows the NLRB to decline jurisdiction "over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce" is insubstantial. If the Board does this, then states are permitted to "assum[e] and assert[] jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction." *Id.* § 164(c)(2). But the statute also barred the Board from declining jurisdiction "over any labor dispute over which it would assert jurisdiction under the standards prevailing" at the time the statute was enacted. *Id.* § 164(c)(1). As Senator Kennedy explained, the final bill rejected "House language [that] might have permitted the Board to yield and have permitted State laws to prevail over vast areas of interstate commerce. That cannot be done." 105 Cong. Rec. 17719, 17720 (Sept. 2, 1959).

In 1974, Congress again amended the NLRA, this time to cover non-profit hospitals. The amendment imposed specific limits on the timing of healthcare workers' strikes. First, it extended the cooling-off period mandated by § 158(d) from 60 to 90 days, and required parties negotiating an initial CBA to give the FMCS 30 days' notice of a dispute. 29 U.S.C. § 158(d) (1)-(3). Second, it required unions to give ten days' notice to both the employer and the FMCS before "any strike, picketing, or other concerted refusal to work." 29 U.S.C. § 158(g); *In re Alexandria Clinic, P.A.*, 339 N.L.R.B. 1262 (2003) (discussing the importance of accurate notice of the date when a strike will commence but holding that a 4-hour delay

in commencing a strike on the scheduled day did not violate § 158(g)). That notice must "state the date and time that such action will commence." But this advance-notice obligation does not otherwise limit employees' discretion over when to strike. Even in this potentially life-or-death setting, Congress chose a method of regulating strikes that strengthened employers' ability to prepare to weather a strike; it did not impose an independent obligation on employees to minimize economic harm to the employer.

The 1974 amendments also did nothing to empower state courts to hear disputes related to strikes. This was so despite Congress's awareness of *Garmon* preemption. When a witness observed that while "the NLRB claims to preempt jurisdiction in this field, . . . I cannot imagine a situation, given a strike at a non-profit hospital, where you cannot go to a judge of the Supreme Court, or the superior court" to seek an injunction, Gene Mittleman, identified in the transcript as representing the minority staff, responded that "the Supreme Court has in a series of cases in the 1950's . . . ruled that coverage under the [NLRA] effectively does preempt the States from invoking police power to enjoin or otherwise interfere with the right to strike, even where a public utility is involved, and that it has been assumed, I think, by many up here that that rule would also apply if S. 794 became law, and that this would then be a matter within the exclusive prerogative of Federal law." *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, U.S. Senate, 93rd Cong. 155-56 (1973). Mittleman then added that "State courts do retain some police power to control mass picketing and violence," but that "Federal law

preempts the States from interfering with . . . basic rights [to strike]." *Id*. at 156.

Congress's judgment to allow unions broad latitude in deciding when to strike is underscored by comparing the NLRA to the Railway Labor Act ("RLA"). Under the RLA, strikes and lockouts in the airline and railroad industries are rare and occur only after a great deal of advance notice. A cornerstone of this process is that a federal agency, the National Mediation Board ("NMB"), can play a role in negotiations at a union's or employer's request, or on its own initiative. 45 U.S.C. §§ 155(a)-(b). The NMB then continues mediating the dispute until it issues a notice indicating that "its mediatory efforts have failed," *id*. § 155(b), which allows the agency a measure of control over the timing of any subsequent strike.[5] Still, where these and other measures fail to produce an agreement, a union is free to strike and the employer is free to lock workers out, using a range of economic weapons that is even broader than those available under the NLRA—a reality that might help spur the two sides to reach an agreement. *See Burlington N. R.R. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 451-52 (1987) ("the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures"). But where a work stoppage threatens harm to the national economy, the National

[5] https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1647/Railway%20Labor%20Act%20Overview.pdf ("The NMB can time the release of the parties from mediation to coincide with a period when Congress is in session and able to deal with the dispute.")

Emergency provisions may be invoked. *See United Steelworkers of Am. v. United States*, 361 U.S. 39 (1959) (upholding the President's ability to enjoin a strike to protect the national interest in health and safety).

B. The NLRA's Notice Provisions Allow Employers To Avoid Economic Harm by Settling Labor Disputes or Resorting to Their Own Economic Weapons.

Often, a union and employer will successfully negotiate a collective agreement without the need for a strike. But if not, employers have their own economic weapons with which to defend themselves. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), grants employers the right to hire workers to replace strikers, and then retain them at the expense of strikers once the strike concludes. Lower courts have protected employers' power to replace striking workers, holding that neither states nor federal executive orders can deny employers the protections afforded by permanent replacements, even when permanently replacing striking workers causes grievous economic harms to workers and their communities. *Emps. Ass'n v. United Steelworkers of Am.*, 32 F.3d 1297 (8th Cir. 1994) (holding NLRA preempts state law prohibiting permanent replacement of strikers); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (holding NLRA bars executive order banning use of permanent replacements by government contractors).

Additionally, employers may protect themselves from product loss that might occur during

a strike by locking out workers in advance of a potential strike date. In *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), a shipyard employer wished to avoid a strike during the peak winter months for ship repair. Therefore, when the collective bargaining agreement expired in the summer, the employer shut the shipyard down and locked out the workers, anticipating that the workers facing loss of income at a time that cost the shipyard little would come to terms more favorable to the employer. This Court reasoned that the NLRA does not prohibit a lockout timed to deny workers of the ability to inflict maximum economic loss through a strike, finding "nothing in the statute which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages." *Id.* at 310.

Lower courts have recognized that the combination of advance notice of a possible strike under either 29 U.S.C. § 158(d) or the more restrictive healthcare-related provisions of § 158(g), plus the availability of these economic weapons, give employers significant tools to protect themselves from economic harm. For example, in *NLRB v. Special Touch Homecare Services*, the Second Circuit held that striking home health aides lost NLRA protection—but only because they affirmatively misled the employer into thinking they would not strike. 708 F.3d 447, 463 (2d Cir. 2013). Observing that the union had given the notice of intent to strike required under § 158(g), the court wrote that but for the fact that the employer had obtained assurances that workers would be at their posts, it would have had to treat the strike notice as advance "notice of

1400 absences," which would have precluded its ability to later claim that the strike caused "foreseeable imminent danger." *Id*. at 462-63.

A rule requiring unions to avoid strikes that could cause product loss would allow employers to forestall strikes indefinitely simply by refusing to prepare—especially if employers could then sue unions who struck anyway. This cannot be the right result, as caselaw implicitly recognizes. For example, in *Keserich v. Carnegie-Illinois Steel Corp.*, a steel mill dealt with a union's notice of a prospective strike by calling on supervisors to stay on the premises to ensure safety and maintain production. 163 F.2d 889 (7th Cir. 1947). When a supervisor who was scheduled to perform a safety-sensitive duty nonetheless left the premises, the employer was permitted to fire him. *Id*. at 891. But the employer could not then have insisted that the strikers return to work to prevent damage to the plant, or that subsequent damage should be attributed to the union.

Here, there is no allegation that the union failed to give the notice required by 29 U.S.C. § 158(d), that it struck before the end of the 60-day cooling off period, or that management was not aware that a strike had begun. Glacier could have prepared to hire replacement workers for the concrete pour in anticipation of a strike or once the strike began. *Mackay Radio*, 304 U.S. at 345-46. It could have locked out the drivers before scheduling the concrete pour to force them to come to terms. *In re Duluth Bottling Ass'n*, 48 N.L.R.B. 1335, 1336 (1943) (holding employer permissibly locked out employees to prevent product spoilage that might be caused by a strike); *see*

NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen), 353 U.S. 87, 97 (1957) (holding a temporary lockout is permissible where it serves employer interest in maintaining multiemployer bargaining). Absent an antiunion purpose, Glacier could have locked out the employees and used temporary replacements for the concrete pour. *NLRB v. Brown*, 380 U.S. 278, 288 (1965) (holding a member of a multiemployer association anticipating a whipsaw strike could hire temporary replacements during a lockout). It could have sought the union's assurances that it would not strike before a certain date, while negotiations continued. Or it could have agreed to a new contract with a no-strike clause before scheduling certain projects. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970) (allowing injunction of strike in breach of no-strike clause); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956) (observing that no-strike clause waives right to engage in economic strike). Glacier chose to do none of those things.

III. Congress Conferred on the NLRB Primary Jurisdiction To Regulate Union and Employer Economic Weapons, Including Harms Caused by Strikes.

A. The NLRB's Primary Jurisdiction Doctrine Facilitates Consistent, National Rules Governing Labor Relations.

Glacier's effort to revive tort liability for any refusal to work "done with an improper purpose and by an improper means," J.A. 21, seeks to revive a strain of Gilded Age law that Congress repudiated in

the NLRA. To evaluate the legality of strikes according to a court's ad hoc views about the proper means and ends of a strike would embroil the judiciary in the very practices that rained opprobrium on this and other courts in late nineteenth and early twentieth centuries when courts made themselves the arbiters of the permissible means and ends of workplace disputes. *See, e.g., Lawlor v. Loewe*, 235 U.S. 522 (1915) (allowing boycotted manufacturer to collect damage award by seizing bank accounts and houses of union members). It was in response to claims such as Glacier asserts here that Congress stripped federal courts of jurisdiction to issue injunctions in labor disputes, Norris-LaGuardia Act of 1932, 29 U.S.C. § 107, and protected the right to unionize and strike. 29 U.S.C. § 163. Having stripped courts of jurisdiction to decide which strikes or lockouts are permissible, Congress conferred upon the NLRB the primary jurisdiction to determine limits of the statutory right to strike.

As we explain below, eight decades of NLRB case law draw a careful line between, on the one hand, permissible (whether NLRA-protected or unprotected) strikes and, on the other, conduct that is not a consequence of a work stoppage and therefore punishable by states through tort or criminal liability. The example of dairy worker strikes, which often cause product spoilage, illustrates this distinction. A strike by milk truck drivers was held to be protected concerted activity even though milk is perishable and the work stoppage might ruin it. *Cent. Okla. Milk Producers Ass'n*, 125 N.L.R.B. 419 (1959), *enf'd*, 285 F.2d 495 (10th Cir. 1960). When milk drivers struck without advance notice in New York City in 1979,

distributors used managers to drive the trucks, and customers experienced shortages. Although management complained to the *New York Times* about being surprised by the strike, it conceded that because there was no violence, dairies and distributors could not recover for milk that went sour. Laurie Johnston, *Supplies of Milk Being Depleted in Drivers Strike*, N.Y. Times, Feb. 26, 1979, at B3. In contrast, legal redress has been allowed where dairy workers' picketing was "enmeshed with contemporaneously violent conduct" such as window smashing, arson to buildings, and destruction of trucks. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 292 (1941) (rejecting First Amendment protection for picketing which was inextricably entwined with campaign of violence).

Whether workers are employed by a dairy or a construction contractor, the line between what the NLRA regulates and what states can regulate is the same. The states can criminally prosecute workers, or the company can sue in tort, if strikers intentionally cause property damage that is not a necessary consequence of a refusal to work. If they hurl bricks through factory windows or slash truck tires, states can punish that conduct. If they trespass on employer property while striking or picketing, tort or criminal remedies are available. But, with a narrow exception, the losses caused by the cessation of work itself are not recoverable.

The narrow exception is that the NLRB has identified a limited category of cases where the timing of an abrupt strike can make it unprotected. These are

cases where the strike risks damage beyond ordinary product spoilage. Thus, the Board held unprotected a sudden work stoppage that occurred in the middle of pouring molten iron because it would cause safety hazards, not only loss of the iron. *NLRB v. Marshall Car Wheel & Foundry Co.,* 218 F.2d 409 (5th Cir. 1955). Likewise, the Board ruled unprotected a group who left a chemical plant without turning off equipment and a union of federal-court security guards who threatened to strike on the anniversary of a terrorist attack. *General Chem. Corp.*, 290 N.L.R.B. 76 (1988); *Int'l Protective Serv.*, 339 N.L.R.B. 701 (2003). Conversely, the Board has proscribed certain employer weapons, such as hiring of permanent replacements in unfair labor practice strikes or locking out and then permanently replacing newly unionized employees. *See Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 769 (D.C. Cir. 1988).

The boundaries between protected and unprotected strikes and lockouts are not always clear, and the Board has adjusted them to some degree over time. But this Court's preemption decisions, including *Garmon*, promote uniformity by requiring those boundaries to be defined and delimited by one federal agency rather than by fifty state courts.

The Board's primary jurisdiction preserves its ability to determine the scope of protected or prohibited strikes and lockouts based on different sets of facts. The alternative would allow different states to reach their own conclusions about the legality of union and employer tactics, potentially in conflict with each other and the NLRB. As Archibald Cox—one of the preeminent labor-law scholars of the post-

war era—explained, clear labor-preemption rules are "requisite to avoid endless case-by-case adjudication" by having "'relatively easy application, so that lower courts may largely police themselves in this regard.'" Archibald Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1356 (1972) (quoting *Amalgamated Ass'n of St., Elec. Ry., & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 289-90 (1971)). As Cox explained, "[d]ecisional rules developed as particular applications of general tort principles are likewise preempted because particular application results from weighing the competing interests in a labor dispute." *Id*. at 1356.

B. This Case Does Not Fall Within *Garmon*'s Local-Interest Exception.

Glacier argues that, even if the Union's strike was arguably protected under the NLRA, its tort suit against the Union can proceed under the local-interest exception to *Garmon* preemption. Petitioner's Br. 23-29. We agree with the Government that this argument is inconsistent with *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union, Local 54*, 468 U.S. 491, 503 (1984), which held that the local-interest exception cannot apply where the conduct at issue "is actually protected by federal law." *See* United States Br. 29. Nonetheless, there is an independent reason why Glacier cannot invoke the exception: The exception has been understood to allow states to respond to intentional torts that, while arising in the labor context, do not impose duties that depend on the existence of an employee-employer relationship. In this case, however, the asserted duty to take affirmative steps to protect another's property from

loss applies only to employees, and not to citizens generally, and thus arises in the heartland of the field occupied by the NLRA.

While *Garmon* held that, as a general matter, a state cannot regulate conduct that is arguably protected or prohibited under the NLRA, it also set forth an exception: States may act "where the regulated conduct touched interests 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. 236, 243-44. In articulating this exception, the Court pointed to cases upholding states' prohibition of conduct "defined by the traditional law of torts," *id.* at 247, citing cases allowing tort claims arising from violent conduct occurring during a labor dispute. *Id.* at 247 (citing, *inter alia*, *United Auto Workers v. Russell*, 356 U.S. 634 (1958)).

This Court has consistently applied this local-interest exception to preserve states' ability to protect their citizens from conduct traditionally understood to constitute intentional torts, even when that conduct arises in the labor-relations context. In *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53 (1966), for example, the Court held that unions can be sued for defamation for public statements made in the course of a labor dispute, relying on the "overriding state interest in protecting [ ] residents from malicious libels." *Id.* at 61 (internal quotation marks omitted). The Court has also held that states can apply their tort laws of intentional infliction of emotional distress and trespass, respectively, to labor-related

controversies. *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180 (1978).

Nevertheless, where the Court has applied the local-interest exception to permit a state to regulate conduct occurring in the labor or employment context, the defendant's conduct would have been equally tortious outside that context. No citizen may assault another (*Russell*), spread malicious libels (*Linn*), intentionally inflict emotional distress through outrageous conduct (*Farmer*), or trespass (*Sears*).

Conversely, the Court has never applied the local-interest exception where the conduct was wrongful only because it occurred in the context of an employer/employee relationship and breached a duty arising out of that relationship. This makes sense: If a state could claim that an employment-specific rule was "deeply rooted in local feeling," *Garmon*, 359 U.S. at 244, and therefore could apply even to conduct that is arguably protected or prohibited by the NLRA, the local-interest exception would threaten to swallow the *Garmon* rule. *Garmon*, in other words, presupposes that the local law in question will not make the wrongfulness of the conduct at issue turn on the nature of the employer/employee relationship, since the "central aim" of the national regulatory scheme that Congress enacted through the NLRA is to set the

rules of conduct and the remedies that speak to that relationship. *Id.*[6]

Here, Glacier's complaint alleges that, on August 11, 2017—eleven days after the CBA expired, J.A. 112—Glacier had planned to "servic[e] a number of Glacier's contracts . . . through the batching and delivery of concrete." J.A. 9. Shortly before 7 a.m. that morning, when Glacier was in the process of servicing those contracts, the Union called a strike without providing Glacier prior notice. J.A. 76. As the *sine qua non* of a strike is "quit[ting] work," *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939), the striking drivers promptly "brought all of their mixer trucks back to their yards," many of which contained "partial or full loads of concrete." J.A. 77. But, unlike the striking workers in *Fansteel* who did not merely quit work but seized the employer's plant and denied the employer access to its own premises, the strikers

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[6] The fact that a particular statute or common-law doctrine is one of general applicability is not sufficient for the statute or doctrine to survive preemption. *See Sears*, 436 U.S. at 193 (observing that state antitrust laws cannot enjoin collective activity that is arguably protected by NLRA). But, as this Court explained, it is "evident that enforcement of a law of general applicability is less likely to generate rules or remedies which conflict with federal labor policy" than other laws. *Id.* at 197 n.27. To that end, the Court in *Farmer* repeatedly underscored the state's interest in protecting its *citizens*—not a particular class of citizens, let alone those with a particular employment status—from the type of intentionally outrageous conduct regulated by the state's intentional-infliction-of-emotional-distress tort. 430 U.S. at 302 ("[t]he State . . . has a substantial interest in protecting *its citizens* from the kind of abuse of which Hill complained" (emphasis added)), 304 ("potential for interference [with NLRA] is insufficient to counterbalance the legitimate and substantial interest of the State in protecting *its citizens* (emphasis added)).

here left the employer's property and vacated the premises. Thereafter, because Glacier had not found replacement workers to deliver the batched concrete before it hardened, it had to destroy and dispose of the concrete. J.A. 13.

As relevant here, Petitioner sued Respondent for the intentional torts of "conversion and/or trespass to chattels." J.A. 19. But calling product spoilage caused by a primary strike "conversion" or "trespass to chattels" does not change the fact that the harm is the consequence of a primary strike that is arguably protected under federal law.

Glacier does not contend that the Union instructed its members to take any affirmative act of *mis*feasance to destroy Glacier's property that, if engaged in by a non-employee citizen, would be criminal or tortious. Glacier does not contend, for example, that employees were instructed to deflate the tires of Glacier's trucks or tamper with the batched concrete being mixed in those trucks. Glacier instead predicates its claims on *non*feasance—i.e., on the fact that the employees, after quitting work and returning Glacier's property to the worksite, failed to "tak[e] reasonable precautions" to prevent Glacier's already-batched concrete from hardening. J.A. 11.

Based on these allegations, Glacier's state-law claims sound in common-law negligence arising from a breach of a duty that an employee owes to an employer, even though their complaint failed to raise a negligence claim. J.A. 19-26. They do not sound in the intentional torts of conversion or trespass to chattels as traditionally understood, which apply equally whether the wrongdoer is a stranger to the

plaintiff or someone who owes the plaintiff a special duty. It is blackletter law that a conversion or trespass to chattels requires an intent to exercise dominion and control over the plaintiff's property; "[f]or merely negligent interference with it, *such as failure to protect it against loss, damage, or theft*, the remedy is an action for negligence but there is no conversion, and trover would not lie." Dan Dobbs, *Prosser & Keeton on Torts* § 15, at 92 (5th ed. 1984) (emphasis added); *see also* Restatement (Second) of Torts § 224 cmt. a (1965) (conversion "requires an affirmative act on the part of the defendant, as distinguished from a mere omission to act or to perform a duty"). "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." Restatement (Second) of Torts § 224 cmt. a; *see also SEC v. JNT Investors, Inc.*, 1978 WL 1137, at *2 (S.D.N.Y. Feb. 9, 1978) (broker who intentionally failed to place order to sell plaintiff's stock not liable for trespass to chattels; "[t]he proper remedy . . . would appear to be an action for breach of contract for damages"). Indeed, even an individual whose *reckless* actions toward a chattel result in its destruction cannot be sued for conversion under the common law. *Id.* § 226 illus. 6.

Because Glacier's claim that its employees quit work without "taking reasonable precautions" to avoid the destruction of Glacier's concrete, J.A. 11, sounds in negligence and not conversion, the local-interest exception cannot shield the claim from preemption. An essential element of the tort of negligence is that

the defendant owed an affirmative duty to the plaintiff that was breached by the defendant's actions. *See Prosser and Keaton* § 53, at 356 ("A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to confirm to a particular standard of conduct toward another"). If Glacier's drivers owed a duty of care to prevent damage to Glacier's concrete, it could only be because they were Glacier's employees. *See id.* § 56, at 374 (for citizen to be held liable for "nonfeasance, it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act").

"It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (going on to describe *Garmon* as "central" to the preemptive scope of the NLRA). As discussed *supra* at 19-20, the NLRB has recognized that certain strikes may lose the Act's protection. In those narrow circumstances, the employee's conduct is considered "indefensible" and loses the protection of the NLRA. *Bethany Med. Ctr.*, 328 N.L.R.B. 1094, 1094 (1999). In that case, an employer may bring a tort suit sounding in negligence to recover the damages it suffered *after* NLRB proceedings have concluded. *See Sears*, 436 U.S. at 199 n.29. Thus, employers are safeguarded by the NLRB's own substantive rules from the prospect that employees will misbehave as employees, rather than as citizens, and thereby cause property losses that result from non-compliance with the NLRB's reasonable-precautions standard.

It follows from all of this that where, as here, the employees or their union have asked the NLRB to decide whether strike conduct resulting in property damage was protected (or instead was indefensible and thereby unprotected), it would undermine *Garmon*—and the congressional purpose of national uniformity in the law governing industrial relations that *Garmon* embodies—to allow each of the fifty states to apply their own views as to the scope of the duty that striking employees owe their employer with respect to employer property.

IV. If Adopted, Glacier's Position Would Have Far-Reaching Consequences.

Glacier's argument that strikes timed intentionally to cause economic loss may be punished through state law would wreak havoc in every industry in which seasonal or other fluctuations in demand for labor may result in product loss or spoilage during a strike. Such a rule would jeopardize established labor relations practices not only in the construction industry, as in this case, but also in entertainment, professional sports, journalism, hospitality, transportation, shipping and freight handling, and food production, among many other industries. A few examples of notable strikes and lockouts that were timed to inflict unrecoverable economic loss illustrate the point.

Strikes in the entertainment industry have often used the seasonal nature of film and television production and the awards seasons for leverage. Ronald Reagan, as president of the Screen Actors Guild, led Hollywood actors in a six-week strike in 1960 that shut down film and television production at

a crucial time in the production schedule and caused millions of dollars of unrecoverable losses. The strike also won actors the right to residuals, a form of compensation for re-use of their work. Wayne Federman, *What Reagan Did for Hollywood*, The Atlantic (Nov. 14, 2011), https://www.theatlantic.com/entertainment/archive/2011/11/what-reagan-did-for-hollywood/248391/. Reagan and the other leaders obviously intended the 1960 strike to be effective precisely because it deprived film and television producers of actors at a time they were needed. More recently, the 100-day Writers Guild of America strike of 2007-08 forced many shows off the air and caused the cancellation of the Golden Globes awards ceremony, but those losses ultimately won writers the right to residual payments and union-scale payments in the then-new media of internet streaming. *Hollywood Writers Vote To Return to Work*, N.Y. Times (Feb. 13, 2008), https://www.nytimes.com/2008/02/13/business/worldbusiness/13iht-13writers.9996422.html?searchResultPosition=3.

Work stoppages in professional sports are likewise timed by both labor and management to maximize the risk to the other. The Major League Baseball strike that started (not accidentally) late in the 1994 season imposed economic losses on team owners, players, and broadcasters (not to mention hot dog and peanut vendors), eliminated the 1994 World Series, and denied some players (and, some say, the Montreal Expos) unrecoverable opportunities. Athlete strikes have been rare since, but team owners across professional sports have sought to force the losses of negotiating disputes onto players through lockouts. All lockouts have started during the off-season when

players lose salary but teams do not lose game revenue, although some lockouts lasted into the regular season. A 161-day lockout shortened the 2011-12 season of the National Basketball Association from 82 to 66 regular-season games. Owners locked out players for 18 weeks in the National Football League in 2011, and the next year locked out referees, for a time attempting to use replacement referees to commence the season. Howard Beck, *Two Lockouts, Each with a Different Playbook*, N.Y. Times, Jul. 10, 2011, at SP8; Howard Beck, *N.B.A. Reaches a Tentative Deal To Save the Season*, N.Y. Times, Nov. 27, 2011, at A1. The National Hockey League player lockout in 2012-13 reduced the regular season from the normal 82 games to 48, but the lockout eventually forced a settlement. Jeff Z. Klen & Stu Heckel, *Despite Lockout, Fans of NHL Have Tuned In*, N.Y. Times, June 23, 2013, at SP9.

In journalism, strikes and lockouts necessarily cause unrecoverable loss from spoilage; nothing is more stale than yesterday's news. Strikes in the news business once were common (a story of one famous news distributor strike is told in the movie and stage musical "Newsies"; David Nasaw, *Children of the City: At Work and at Play* ch. 5 (1985)). Strikes in news production and distribution have occurred before and since the enactment of the NLRA; indeed, news and production staff of the *Fort Worth Star-Telegram* and the *Pittsburgh Post-Gazette* are on strike as of this writing. Angela Fu, *Fort Worth Journalists Launch First Open-Ended Strike at McClatchy*, Poynter (Nov. 28, 2022), https://www.poynter.org/business-work/2022/fort-worth-journalists-launch-first-open-ended-strike-at-mcclatchy/; *Pittsburgh Post-Gazette*

Journalists Go on Strike, All Things Considered, NPR.org (Oct. 23, 2022, 5:06 p.m.), https://www.npr.org/2022/10/23/1130843157/pittsburgh-post-gazette-journalists-go-on-strike. If a newspaper strike in late October of an election year in a swing state could be punished in tort because it destroys the value of the daily news, states would be able to outlaw strikes in the news business entirely.

CONCLUSION

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

Respectfully submitted,

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