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 TORT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

Amici are law professors who study and teach American tort law.[1]

Our interest is to clarify the role of tort in evaluating the preemption question at issue here. Petitioner devotes much of its brief to the claim that torts alleging "intentional property destruction" are inappropriate for preemption under the National Labor Relations Act (the Act). Petr. Br. 17 & *passim*. Petitioner asserts further that intentional destruction is a categorically more serious offense than negligence torts. *Id.* at 21. These fundamentally inaccurate claims badly distort the background tort principles on which this Court has relied in interpreting the scope of preemption under the Act.

Amici take no position on other issues raised in this case. This brief has been prepared by individuals affiliated with New York University School of Law and Yale Law School. Institutional affiliations are provided for identification purposes only. The brief does not purport to present any school's institutional views.

SUMMARY OF ARGUMENT

Petitioner makes two fundamental mistakes about tort doctrine that if adopted by this Court would introduce conceptual confusion into the law of preemption under the National Labor Relations Act ("the Act"). First, petitioner misapprehends the doctrinal struc-

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[1] This brief was prepared entirely by amici and their counsel. United Food and Commercial Workers Union, Local 3000 made a financial contribution to the preparation and submission of this brief. No other person made any monetary contribution. Petitioner filed a letter of blanket consent with the Clerk of the Court. Respondent provided written consent for the submission of this brief.

ture of the law of intentional torts, which operates between parties in an economic relationship to allocate contractual rights and responsibilities. Second, petitioner mischaracterizes the law of intentional torts by attributing to it a clumsy and long-rejected prohibition on what petitioner awkwardly and misleadingly labels as "intentional property destruction." These two grave doctrinal errors would badly distort the preemption analysis of state law claims under the Act.

Petitioner styles this case as being about sabotage and intentional property destruction. But in cases arising out of contractual relations, the law of intentional torts to chattels is an exercise in gap-filling or default-rule application. Tort law's terms in such cases set the rights and obligations of the parties absent contractual specification to the contrary. The law of trespass to chattels and the law of conversion are, in particular, finely tailored to the economic relationship between the parties and, moreover, attentive to the terms of parties' agreements with one another, allowing the parties to contract with one another to vary the background or default tort rules as they see fit. In the absence of such contractual agreements, tort law's gap-filling function presents courts with open-ended questions of economic policy, allocating economic tools to one side or another in the parties' contractual relationship.

In a case like this one, the gap-filling policy function of tort means that claims of intentional torts to chattels in collective bargaining situation disputes would vest fifty different state courts with the power to decide the scope of employees' right to engage in concerted activities, a right that the Act vests principally in the National Labor Relations Board ("the Board").

The difficulty with petitioner's effort to carve out its claims from preemption under the Act is compounded

by the further problem that the crude concept "intentional destruction" brings a blunt sledgehammer to do the work of a finely-honed scalpel. Tort law notoriously and crucially permits certain intentional destruction of property, as for example between economic competitors, including between employers, employees, and unions. Such destruction is not a violation of the rights of market actors. It is the essence of a market economy. "Intentional destruction" is thus famously not a doctrinal concept in tort because, if it were, it would indiscriminately sweep together non-tortious, protected, and socially valuable conduct, on the one hand, with undesirable and tortious conduct, on the other.

Importantly, intentional tort claims like those petitioner asserts reach much wider than willfully or purposefully wrongful conduct. The law of intentional torts is quintessentially a form of strict or no-fault liability in which innocent actors may be held liable for tort damages notwithstanding that their conduct was reasonable or even praise-worthy. Allowing state law tort claims against such conduct to proceed would grossly interfere with the Board's authority to distinguish between protected strike conduct and unprotected sabotage.

Finally, petitioner's effort to characterize preemption of its state tort claims as a constitutional taking under the Fifth Amendment is defeated by long-standing decisions in this Court that protect the police power of state legislatures to enact legislation defining the rights and duties of persons, as well as the Article 1, Section 8 powers of Congress. Moreover, petitioner's argument once again badly misapprehends tort law, in this instance by assuming that preemption would knock out an otherwise valid tort claim. Proper analysis of the relation between the Board's exercise of its

statutory authority and the common law of torts shows that any employee conduct the Board deems to be protected under the Act would also be privileged under the common law, thereby foreclosing the possibility that preemption could amount to a constitutional taking of a vested tort right.

ARGUMENT

I. The tort claims at issue here concern default rules for the collective bargaining relationship, which the parties were free to alter.

Petitioner's complaint presents this case as being about "sabotage," J.A. 10 & *passim*, and its brief centers on "intentional property destruction," Petr. Br. 17-29 & *passim*. But on the face of the complaint, this case is about the collective bargaining question of how to fill gaps in the allocation of rights and responsibilities between an employer and a union. Petitioner is actually seeking to get the courts to intervene on its side in an economic competition over the allocation of the proceeds from concrete delivery—a competition that petitioner had (and has) ample contracting resources to manage on its own, subject to the Board's authority to define protected activity and unfair labor practices.

A. The law of intentional torts to chattels in cases like this one is determined by the contracts between the relevant parties.

Conversion is "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Restatement (Second) of Torts § 222A (1965). Trespass to chattels—which Prosser famously

called the "little brother of conversion," W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, *Prosser and Keeton on the Law of Torts* § 14, at 86 (5th ed. 1984) (hereineafter *Prosser and Keeton on Torts*)—consists of intentionally "dispossessing another of [a] chattel," or "using or intermeddling with a chattel in the possession of another." Restatement (Second) of Torts § 218 (1965).

It is axiomatic that neither conversion nor trespass to chattels requires a showing of wrongful intent or intent to harm. "It is enough if the defendant had an intent to act upon the property . . . ." Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, *The Law of Torts* § 6.2, at 105 (2d ed. 2011) (hereinafter Dobbs, *Law of Torts*). Such a defendant "is liable even though he had no intent to harm or even to invade another's interests." *Id.* In neither cause of action "is the defendant's bad motive or good faith ordinarily relevant." *Id.* at 129.

Wrongful intent and intent to harm are irrelevant to liability in intentional tort claims because the law of intentional torts to chattels serves not only to sanction wrongful conduct, but to define the rights and duties of the parties. Dobbs, *Law of Torts* § 5.2, at 88 (trespass actions "may serve to establish the plaintiff's title or right to possession"); *Prosser and Keeton on Torts* § 13, at 75 (trespass actions are "directed at the vindication of the legal right, without which the defendant's conduct, if repeated, might ripen into prescription").

Intentional torts to chattels are thus quintessentially relational fields of the law, defining the terms of parties' relationships with one another. In particular, the law of intentional torts to chattels makes a fundamental distinction between cases among strangers, on the one hand, and cases among parties with a contractual relationship around the chattel in question, on the oth-

er. At common law, the distinction was stark; the early modern tort of trespass to chattels was not available against anyone "who had obtained possession of a chattel with the plaintiff's consent." 1 Fowler Harper, Fleming James, Jr., & Oscar S. Gray, *The Law of Torts* § 2.4, at 108 (3d ed. 2006) (hereinafter *Harper, James, and Gray on Torts*). Still today, "[c]onversion works best in stranger cases where [defendant] has no ownership interest and [plaintiff] has full title." Richard A. Epstein, *Torts* 34 (1999) (citing Restatement (Second) of Torts §§ 227-228 (1965)). "[T]he tort [of conversion] is more difficult to administer when [plaintiff] voluntarily places [defendant] in possession," *id.*, because such cases are decided by reference to the terms of the relationship between the parties. Conversion cases in such settings, as Harper, James, and Gray explained in their classic treatise, are "to be determined by the terms and conditions of the license." *Harper, James, and Gray on Torts* § 2.4, at 174; *see also* Restatement (Second) of Torts § 228 & § 228 cmts. a & b (1965) (conversion liability by one authorized to use a chattel turns on the scope of the authorization).

Parties in relationships can and do contract with one another as they see fit to arrange and rearrange the rights and duties set by the law of intentional torts to chattels. As the Restatement puts it, "[t]he limits of the permitted use" by a bailee, servant, independent contractor, or other person permitted to use a chattel "ordinarily are determined by the terms, express or reasonably to be implied, of the contract or other agreement between the parties, and the question becomes one of whether there is a material breach of the agreement." Restatement (Second) of Torts § 228 cmt. c (1965); *see also id.* § 252 (consent of person seeking recovery is a defense to conversion liability). Between parties to contractual relationships, the law of inten-

tional torts to chattels alternately adopts the terms of the parties' agreements and fills gaps in those agreements when the parties have left certain arrangements unspecified. *See* Dobbs, *Law of Torts* § 6.3, at 109 (observing that "many conversion cases turn primarily on the law of personal property ownership, or on the law of secured transactions, warehouse receipts, or other rules under the Uniform Commercial Code").

From a torts perspective, the crucial feature of this case is that petitioner could have, but did not, bargain for the tort protections it now asks this Court to allow a state court to insert into its contractual dealings with its employees and the union. Moreover, the tort standard that petitioner seeks to insert into the collective bargaining relationship between employers and unions raises an open-ended, multi-factor policy question of the kind that the Act entrusts to the Board.

B. Parties contracting over chattels have ample opportunity to protect themselves by negotiating to mitigate the risks attendant on such contracting.

The relational specificity of the law of intentional torts to chattels allows parties to tailor the terms to the specific relationships at issue by letting such parties choose their own arrangements. *See Fujifilm N. Am. Corp. v. D/C Export & Domestic Packing, Inc.*, 339 F. Supp. 3d 790, 797-98 (N.D. Ill. 2018) (no conversion when goods entrusted to bailee are destroyed if terms of contract between bailor and bailee contain enforceable limitation on the bailee's liability); *Rock v. Sear-Brown Assocs.*, 136 App. Div. 2d 894, 895, 524 N.Y.S.2d 935, 935 (4th Dept. 1988) (employer's reduction of redemption price for employee's shares in the

company is no conversion when reduction is permitted by stock purchase agreement).

In such cases, the decisive point is that a plaintiff gets the protections for which it bargains. *Fujifilm*, 339 F. Supp. 3d at 798; *see also Cleveland, C, C, & St. L. Ry. v. Dettlebach*, 239 U.S. 588, 594-95 (1916) (plaintiff's conversion claim against shipper as warehouseman limited by agreement as to valuation of goods).

Of course, if a tenant, bailor, pledgor, or employer seeks protection against risks arising out of a course of dealings with counterparties, such a party is free to negotiate for that protection. The law, in other words, allows parties to use the occasion of the contracting process to protect themselves by negotiating the terms they prefer under the circumstances. Restatement (Second) of Torts §§ 252-256 (1965).

The same principles apply in the collective bargaining context. An employer has myriad tools at its disposal if it wishes to mitigate the risks of economic harms or the loss of property arising out of its employees' right to strike. An employer may choose to enter into a new collective bargaining agreement with a no-strike clause. *E.g.*, *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 292 (2010). Alternatively, employers especially concerned to protect themselves from strikes that could impose special costs can bargain for protections in addition to the statutory sixty-day notice required to terminate a CBA and bargain a successor. 29 U.S.C. §§ 158(d)(1), (4)(requiring notice prior to possibility of strike). Such protections could include an evergreen clause which survives the expiration of the main agreement requiring notice prior to strike activity, bargaining rules requiring notice prior to strike activity, or an interim agreement with a no-strike clause.

Such an employer may also "legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strikeproof.'" *N.L.R.B.. v. Brown*, 380 U.S. 278, 283 (1965).

Alternatively, the employer may engage in a defensive lockout "to avoid spoilage of materials which would result from a sudden work stoppage." *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300, 307 (1965) (citing *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943)), or to "to avert the immobilization of automobiles brought in for repair," *id.* (citing *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951)). Indeed, employers may engage not only in such defensive lockouts, but also offensive lockouts designed to exercise economic leverage over a union by inflicting economic harm on the union and its members. *See American Shipbuilding*, 380 U.S. at 317 (recognizing employers' authority to "resort to economic weapons").

The record in this case shows that Northwest Glacier and its customers engaged in precisely such contractual self-help against the eventuality about that it now complains. Petitioner and at least one buyer-contractor made arrangements for who would bear certain costs in the eventuality of cancellation. J.A. 145. The record in the state court below indicates further that Glacier and its buyer-contractor made specific arrangements about Glacier's duty to maintain "labor harmony" and the allocation of any costs arising out of "labor discord." C.P. 1102.[2]

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[2] "C.P." refers to "Clerk's Papers," which constitute the record in the Washington appellate courts.

To reiterate, an employer who wishes to protect itself from the risks attendant to the operation of its business has numerous economic tools at its disposal with which to do so. In this case, petitioner utilized some such tools. But now petitioner seeks to have the courts fill the gap in its contractual relationships with respondent so as to confer on it an economic weapon for which it did not bargain in its relationship with its employees. That's not how bargaining in the market works. Petitioner was aware of and took certain limited economic steps to manage the risks of going forward without also negotiating a contractual arrangement to limit its employees' right to strike. Petitioner chose not to pay for the cost of such arrangements. The law of intentional trespass to chattels does not serve to offer bailouts to employers seeking entitlements for which they have not bargained.

C. Gap filling for intentional torts to chattels between contract parties requires courts to resolve the same open-ended policy questions that the Act leaves to the Board.

Given the contract-specific sensitivity of intentional torts to chattels, petitioner's position invites state courts—rather than the Board—to decide the default rules around which employers and unions contract and prepare for strikes and lockouts. Any state court effort to fill the gap in contractual relations between petitioner, its employees, and respondent union would thus require the state court to decide on the economic weapons available to parties in collective bargaining and to determine the scope of the federal right to strike under sections 7 and 13 of the Act. 29 U.S.C. §§ 157, 163.

An interference with property is no conversion when it has a lawful justification. Restatement (Second) §§ 252-273 (1965); *Harper, James and Gray on Torts*

§§ 2.39-2.45, at 284-302; *see Potter v. Washington State Patrol*, 196 P.23d 691, 696 (Wash. 2008) ("Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession.") (internal quotation marks and brackets omitted). Petitioner asserts an interference with its property arising out of respondent's decision to call its members out on strike. (J.A. 11-12.) The conduct alleged here is therefore activity that will have a lawful justification if the Board concludes that the union's conduct around petitioner's property constituted protected concerted activity. As a result, any effort to adjudicate petitioner's tort claims in the state courts will turn on the contours of respondent's right to strike.[3] Absent preemption, in other words, state court adjudication of tort claims will, in the first instance, determine which economic weapons are available to the parties to a collective bargaining arrangement in the absence of specifications or arrangements to the contrary.

Such determinations have been vested in the Board for good reason. They are irreducibly policy-laden. The common law of intentional torts to chattels relies on broad, multi-factor balancing tests. The Second Restatement, for example, establishes that "[c]onversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."

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[3] This feature of the case makes it different from cases in which this Court declined to preempt tort causes of action that were not plausibly attached to the right to strike. *E.g.*, *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 195 (1978) (state tort action against picketing activities while trespassing on employer property not preempted).

Restatement (Second) § 222A (1965). Elaborating on the standard, the Restatement provides further that at least six separate factors are "important" in "determining the seriousness of the interference and the justice of requiring the actor to pay the full value." *Id.* The factors to consider are:

(a) the extent and duration of the actor's exercise of dominion or control;
(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
(c) the actor's good faith;
(d) the extent and duration of the resulting interference with the other's right of control;
(e) the harm done to the chattel; [and]
(f) the inconvenience and expense caused to the other.

Id.

The first edition of Harper and James listed different (if overlapping) factors, but agreed that courts would need to employ an open-ended multifactor test to identify the tort of conversion:

> In many cases it may be a close question whether abusive acts of the bailee are sufficiently in excess of the bailment agreement to amount to conversion. The factors which are important in the determination of this question are the character of the chattel, its adaptability to the use to which it is put, the customary conduct of persons in similar situations and the probability that the contract of bailment would have provided for such use had the parties thought of it at the time of the contract.

1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 2.26 at 168 (1956).

The policy considerations cited in the Restatement and listed by Harper and James for conversion have tight parallels in the little sibling tort of trespass to chattels. The latter tort requires courts, for example, to distinguish a technical trespass from one that causes sufficient harm of the right kind to the plaintiff's property. *E.g.*, *Intel Corp. v. Hamidi*, 71 P.3d 296, 303 (Cal. 2003). Moreover, the same Harper and James factors cited above reappear in the trespass to chattels inquiry, including factors such as "the character of the chattel," the "customary conduct of persons in similar situations," and the "contract of bailment" in similar situations.

There are strong reasons to conclude that the best gap-filler in the relationship between unions and employers would allocate the risk of damages arising out of a strike to the employer in the absence of contractual specification to the contrary. In the aggregate, employers are almost certainly in the best position to know the distinctive risks that strikes will pose to their businesses. *See Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854); *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 101-104 (1989).

But the important point is that this gap-filling determination is precisely the kind of policy-laden choice that the Act leaves to the Board. To do otherwise with such open-ended and policy-driven considerations is to invite state courts to produce precisely the "inconsistent standards of substantive law and differing remedial schemes" that tort law can inject into a federal system. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959). Absent preemption, some courts may decide to insert a pro-employer term into the open contractual space. *E.g.*, *Rockford Redi-Mix,*

Inc. v. Teamsters Local 325, 551 N.E.2d 1333 (Ill. App. 1990). Others, however, might choose to adopt a term more favorable to the union. *E.g.*, Restatement (Second) of Torts § 224 cmt. a (1965) (bailor's failure to keep goods under refrigeration is no conversion even though he agreed to refrigerate the goods and even if his intentional failure caused complete destruction of the goods). Trespass and conversion determinations that diverge from state to state would defeat the uniformity contemplated by the Act and protected by this Court's preemption cases.[4]

II. "Intentional destruction" is not a category of analysis in tort law and cannot bear the weight of a preemption exception because it is a famously flawed tool for identifying legally salient harms.

Petitioner asserts that its complaint is about the "intentional destruction of property," Petr. Br. 2, and moreover that "all intentional property destruction undermines the strong state interest in protecting property rights," *id.* at 16.

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[4] *E.g.*, *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 76 (2008) (preempting state law on grounds that letting it stand would "open[] the door to a 50–state patchwork of inconsistent labor policies."); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 291 (1971) (describing the "important federal interests in a uniform law of labor relations"); *Garmon*, 359 U.S. at 242 (citing the value of a "centralized administrative agency"); *Garner v. Teamsters Local No. 776*, 346 U.S. 485, 490 (1953) ("Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.")

The category of "intentional property destruction" is not a doctrinal category in tort because such a standard would be clumsily overinclusive as a measure of tortious conduct. The law notoriously permits the intentional destruction of property in appropriate instances. If adopted as a test for limiting the scope of preemption under the Act, the same crude over-inclusiveness that makes the concept of intentional destruction a poor tool in torts analysis would dangerously interfere with the operation of the Act by inviting state courts to exercise open-ended policy discretion in determining the scope of the right to strike.

A. The law of intentional torts—like collective bargaining under the Act and like economic competition generally—routinely permits the lawful intentional infliction of economic harms including property damage.

Oliver Wendell Holmes, Jr., observed more than a century ago that "[i]n some cases, [a man] even may intend to do the harm and yet not have to answer for it." Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 2 (1894). The "justification" in such cases "is that the defendant is privileged knowingly to inflict the damage complained of." *Id.* at 3. And the question of "whether, and how far, a privilege shall be allowed" is quintessentially "a question of policy." *Id.*

The paradigmatic example of non-tortious intentional destruction is economic competition. As Holmes put it, "a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already." *Id.*; *see also* Restatement (First) of Torts § 708 (1938). In law, such losses from competition are "*damnum absqua injuria*," or

harm without a legal injury. Edward P. Weeks, *The Doctrine of Damnum Absque Injuria: Considered in Its Relation to the Law of Torts* § 4 (San Francisco: S. Whitney 1879). The law does not compensate these intentional harms because "[t]he individualistic philosophy of capitalist society adopts as one of its basic premises the social desirability of free competition." 2 *Harper, James & Gray on Torts* § 6.13, at 420. "The theory is that, in the long run, competition promotes efficiency and economic general welfare and that to subject a person to liability merely for competing would result in preventing competition." Restatement (First) of Torts § 708 cmt. d (1938).

Since at least the canonical case of *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842), American courts have recognized the principle of harm without legal injury in economic competition between employers and employees. Thus, in *Arthur v. Oakes*, 63 F. 310 (7th Cir. 1894), Justice John Marshall Harlan reversed that part of an order enjoining employees from "'so quitting' as to cripple the property or prevent or hinder the operation" of the employer. *Id.* at 317. "Undoubtedly the simultaneous cessation of work by any considerable number of the employe[e]s of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public." *Id.* at 318-19. But Justice Harlan explained that such injury, though undoubtedly intentional, was not tortious. To the contrary, the "peaceable co-operation . . . in asserting the right of each and all to refuse further service . . . would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public." *Id.* at 321. Such employees "cannot be legally charged with any loss" to the employer arising

out of "their cessation of work in consequence of the refusal of the [employer] to accede to the terms upon which they were willing to remain in the service." *Id.* In sum, "the exercise by employe[e]s of their right to quit . . . could not be made to depend upon considerations of hardship or inconvenience to those interested in the trust property or to the public." *Id.* at 319.[5]

It is thus well-settled that employees "under no contractual restraint may lawfully combine, and by prearrangement quit their employment in a body . . . even though they know at the time that such action will be attended with injury and damage to the business of their employer, provided that the strike is carried on in a lawful manner; that is, in a manner free from force, intimidation, and false representation." *Karges Furniture Co. v. Amalgamated Woodworkers' Local*, 75 N.E. 877, 880 (Ind. 1905); *see also Gray v. Bldg. Trades Council*, 97 N.W. 663, 666 (Minn. 1903); *Greenfield v. Cent. Labor Council of Portland*, 192 P. 783, 789-90 (1920), *modified on other grounds*, 207 P. 168 (1922); *Nat'l Fireproofing Co. v. Mason Builders' Ass'n*, 169 F. 259, 265 (2d Cir. 1909); *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 F. 730, 738 (C.C.N.D. Ohio 1893); *Iron Molders' Union v. Allis-Chalmers Co.*, 166 F. 45, 51 (7th Cir. 1908).

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5 Justice's Harlan's opinion in *Arthur* contemplated that such action might be tortious or otherwise unlawful when carried out collectively, 63 F. at 320-22, but the Act's section 7 protection of concerted activities has superseded that now-archaic dimension of *Arthur*. Still vital, however, is Justice's Harlan's observation that an employer's remedy, if any, was an action on the express terms of its contract. *See id.* at 317 ("If an employ[e]e quits without cause, and in violation of an express contract to serve for a stated time, then his quitting would not be of right, and he would be liable for any damages resulting from a breach of his agreement.").

Such cases of privileged intentional destruction are hardly isolated to the labor relations context; they appear all across the law of torts. Property owners are not liable for harm from the flow of dirt, soil, or water onto a neighboring parcel arising out of the ordinary and non-negligent use of their property, even where the harm is substantially certain to follow from such use. *Middlesex Co. v. McCue*, 21 N.E. 230, 231 (Mass. 1889); *Rielly v. Stephenson*, 70 A. 1097, 1099 (Pa. 1908); *Strauss v. Allentown*, 63 A. 1073, 1073-74 (Pa. 1906); Restatement (Second) of Torts § 363 (1965). "[O]ne is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is, or is reasonably believed to be, necessary to protect the actor's land or chattels." *Id.* § 260 (1965). Self-defense and the defense of third persons justify "otherwise trespassory of conversionary acts." 1 *Harper, James, and Gray on Torts* § 2.39, at 284. Privileges to cause intentional property destruction arise in the event of public necessity, Restatement (Second) of Torts § 262 (1965), or private necessity, *id.* § 263, or for the abatement of a nuisance, *id*. § 264, or emergency, *id*. §§ 62, 892D.[6]

In short, "intentional destruction" is not and has not been a category of analysis in tort law because it cannot distinguish between privileged and unprivileged conduct. By the same token, because all strikes are economic weapons intending to cause economic harm to an employer, the petitioner's "intentional de-

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[6] Chapter 2 of sixth Tentative Draft of the Restatement (Third) of Torts: Intentional Torts to Persons lists privileges for self-defense and defense of third persons, defense of land and personal property, arrest, and discipline or control of children. *See* Restatement (Third) of Torts: Intentional Torts to Persons (Tentative Draft No. 6) §§ 20-46 (April 26, 2021); *see also id*. § 17 (describing privilege of otherwise tortious conduct where emergency prevents acquisition of consent).

struction" torts offer too crude a tool for distinguishing between the kinds of tort claims that are preempted under the Act and those that are not.

The spoilage cases decided by the Board over the years stand for same proposition: right to strike is about the privilege to inflict economic harm in the competition between employers and labor, even when a union calls such strikes knowing to a substantial certainty that damage to the property of an employer will result. *See, e.g.*, *Lumbee Farms Cooperative, Inc.*, 285 N.L.R.B. 497, 506-507 (1987), *enforced*, 850 F.2d 689 (4th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) (poultry); *Leprino Cheese Co.*, 170 N.L.R.B. 601, 604-605 (1968), *enforced*, 424 F.2d 184 (10th Cir.), *cert. denied*, 400 U.S. 915 (1970) (cheese); *Central Oklahoma Milk Producers Ass'n*, 125 N.L.R.B. 419 (1959), *enforced*, 285 F.2d 495 (10th Cir. 1960) (truck drivers' strike protected even though milk was "perishable and loss might be sustained"); *Morris Fishman & Sons, Inc.*, 122 N.L.R.B. 1436, 1445-1447 (1959), *enforced*, 278 F.2d 792 (3d Cir. 1960) (perishable leather).

Indeed, there is no way to resolve labor disputes over the right to strike without either (1) restricting the employees' interest in their labor power, or (2) restricting the employer's putative entitlement to put employees' labor to work in protection of its property. *See* Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. L. & Econ. 201, 209-10 (1971) (explaining why intentional tort claims between economic rivals require a decision about how to reconcile conflicting property interests). The policy of the Act entrusts the scope of the right to strike to the Board because underlying tort decisions by the state courts will inevitably destroy one or another of the parties' property claims—either the interests of the employees

and their union, on the one hand, or the property claims of the employer, on the other.

B. As a category, intentional torts are neither morally nor legally worse than negligence torts.

Petitioner alleges intentional destruction of its property and characterizes respondent union's conduct as "sabotage." J.A. 10 & passim. Reasoning that the negligent destruction of property is an unprotected activity, petitioner concludes that the intentional destruction of property must also be unprotected. Rather than being a logical syllogism as petitioner would have it, this argument badly misstates the legal structure of the tort claims petitioner alleges.

Commentators observe that liability for trespass to chattels and conversion is "a type of liability without fault." 1 *Harper, James, and Gray on Torts*,§ 2.5, at 176. The law of intentional torts to chattels requires a showing of "conduct intended to affect the chattel." *Prosser and Keeton on Torts* § 15, at 92. But in neither conversion nor trespass to chattels "is the defendant's bad motive or good faith ordinarily relevant" to liability. Dobbs, *Law of Torts* § 6.4, at 110. Indeed, an actor "engaging in a generally proper activity for generally proper reasons" may be liable in intentional tort "even though the activity produces harm as an unavoidable but unwanted byproduct" of the actor's activity. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 1 cmt. a (2010). The necessary intent is therefore "not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights." *Prosser & Keeton on Torts* § 15, at 92. For example, a "defendant is liable for an intentional entry although he has acted in good

faith, under the mistaken belief, however reasonable, that he is committing no wrong." *Id.* § 13, at 74.

Petitioner notes that "[l]ongstanding precedent recognizes that the NLRA provides no protection to employees who fail to take reasonable precautions to protect employer property in connection with a strike." Petr. Br. 14. Petitioner further asserts that it "follows *a fortiori* that the NLRA cannot possibly protect a union's scheme to intentionally destroy an employer's property." *Id.* But this argument misapprehends the basic conceptual relationship between intentional torts and torts of negligence. The former are not simply torts of greater moral and legal gravity than the latter. Instead, intentional tort claims are a conceptually distinctive species of tort with their own logic and structure.

Negligence torts require a showing of failure to exercise reasonable care. Restatement (Third) of Torts: Physical & Emotional Harm § 3 (2010). They are paradigmatic fault-standard torts. *Prosser and Keeton on Torts* § 28, at 160. But intentional torts to property, by contrast, require no such failure to conform to a standard of reasonable or ordinary care. Intentional torts to property may be morally innocent. For example, "[d]elivery of property by a bailee to a person not authorized by the owner is of itself a conversion, rendering the bailee liable without regard to the question of due care or negligence." *Blaisdell v. Hersum & Co.*, 95, 123 N.E. 386, 387 (Mass. 1919). Intentional torts to property may advance valuable interests. A vessel is liable, for example, for costs to a dockowner arising out of the vessel's use of the dock while sheltering during a storm, notwithstanding that the vessel's crew acted prudently throughout. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Min. 1910). Intentional torts

to property may even be morally required, as when an actor injures another's property for the benefit of a third party. *E.g.*, *Allen v. Camp*, 70 So. 290 (Ala. 1916) (liability where defendant killed plaintiff's dog to have it tested for rabies, where dog had bitten defendant's child). In any event, authorities agree that such torts require only intentional conduct the fact of which violates the plaintiff's rights, regardless whether such a violation of rights is itself intended. *Prosser and Keeton on Torts* § 15, at 92.[7]

To be sure, the law of intentional torts may often function as a form of aggravated negligence liability, in which the conduct complained of is more culpable than ordinary negligence. Someone who viciously hits another illustrates the point. But many intentional torts create liability for policy reasons absent any fault or culpable behavior whatsoever on the part of the defendant.

Petitioner's proposed standard for preemption under the Act would thus allow tort actions to go forward not only in violence and sabotage cases, but also in intentional tort cases that involve economic competition rather than wrongdoing. If petitioner's proffered "intentional destruction" standard were taken seriously, the Act would not preempt suits arising out of protected striking activity substantially certain to spoil crops, damage goods, lose customers, or otherwise cost the employer economic value. The result would be to leave

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[7] Other leading examples of morally nonculpable intentional torts include the law of mistake of fact or law, which does not relieve an actor of "liability to another for trespass to chattel or for conversion," Restatement (Second) of Torts § 244 (1965), and the law of innocent trespass, which holds a trespasser to real property liable "even though he acts under a reasonable but mistaken belief that the land is his own or that he has a right or privilege to enter it." 1 *Harper, James, and Gray on Torts* § 1.4, at 14.

crucial policy-making decisions to the open-ended discretion of the state courts rather than to the uniform decision-making of the Board. Such an approach would allow state courts to determine economic power in the labor relations context by deciding what are essentially strict liability causes of action.

III. Preemption of petitioner's tort claims does not raise plausible constitutional questions.

A. It is well-settled that parties do not accrue vested rights in basic tort background rules.

In the American law of tort "'[a] person has no property, no vested interest, in any rule of the common law.'" *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 50 (1912) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)). Thus "the law itself, as a rule of conduct, may be changed at the will . . . of the legislature." *Id.* (upholding state statute abolishing certain employer defenses in tort suits by injured employees)*; see also New York Cent. R. Co. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.") (internal quotation marks omitted); *Grand Trunk Western Ry Co. v. Industrial Commission*, 125 N.E. 748, 750 (Ill. 1919) (upholding workers' compensation law on ground that a legislature "may modify this right of action, extend it or limit it, or even abolish it altogether" because "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit"). Indeed, some of the lowest and most quickly-overruled moments in the history of courts involved misguided efforts to impose constitutional constraints on the legislative alteration of state law tort causes of

action. *See* John Fabian Witt, *The Accidental Republic* 152-86 (2004) (describing *Ives v. South Buffalo Railway*, 94 N.E. 431 (N.Y. 1911) and its aftermath).

B. Petitioner has no vested tort right that could be preempted.

In arguing that federal preemption would amount to a constitutional taking of a vested state tort right, petitioner misconstrues how a Board decision would impact the tort claims. If the Board were to decide that some of the employee conduct is not protected under the Act, then that conduct would not be privileged as a matter of federal law, in which case the states would be free to determine whether the conduct is privileged as a matter of state tort law—the issues discussed in Parts I and II of this brief. The only potential taking of a vested tort right would have to occur in the alternative scenario in which the Board decides that some specified conduct is protected. But in that event, conventional tort doctrine in state courts would defer to the Board's decision as a matter of institutional comity, thereby privileging the conduct as a matter of state tort law. Once again, petitioner would have no vested state tort right that the Board could be "taking" by exercising its statutory authority.

Recognizing the compelling reasons of institutional comity that favor legislative decision-making over the adjudicative resolution of an identical policy question, state courts defer to any legislative policy decision that is relevant for resolving a tort claim. *See generally* Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 Iowa L. Rev. 957 (2014) (showing that this principle of common-law deference is embodied in a wide range of tort doctrines). Out of respect for the role of the legislature in the "pattern of distribution of governmental functions," courts deem a legislative policy decision to

be a reasonable resolution of that same policy issue when posed by a tort claim, thereby eliminating the need to place that decision in the relatively "inexpert hands" of the jury. *Weiss v. Fote*, 167 N.E.2d 63, 65–66 (N.Y. 1960) (discussing the common-law rule granting sovereign immunity to governmental policy decisions). Having deemed the legislative policy decision to be a reasonable resolution of the tort issue, courts conclusively resolve that aspect of the tort claim by deferring to the legislative determination.

This principle of common-law deference undergirds the doctrine of negligence per se. In these cases, the defendant violated a safety statute or regulation that does not give the plaintiff a statutory right to compensatory damages, but courts will nevertheless permit the plaintiff to rely on the statutory violation to establish negligence per se. *See* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 14 (2010). The judicial decision to do so is fully discretionary. *See, e.g.*, *Clinkscales v. Carver*, 136 P.2d 777, 778 (Cal. 1943) (observing that "the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it"). Although these statutes do not obligate courts to apply the safety standard in a tort suit, courts do so for reasons of "institutional comity," recognizing that "the judgment of the legislature, as the authoritative representative of the community, takes precedence over the views of any one jury." Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 14 cmt. c (2010).

The principle of common-law deference also fully determines the conditions under which regulatory compliance constitutes a complete defense to a tort claim. Regulatory compliance does not ordinarily preclude tort liability due to "the traditional view that

the standards set by most product safety statutes or regulations generally are only minimum standards." Restatement (Third) of Torts: Products Liability § 4 cmt. e (1998). A safety regulation serves only as a floor or minimal safety requirement when it does not account for the full range of risks encompassed by the common-law tort duty. Deference to this type of legislative safety decision does not foreclose courts from concluding that the common-law duty required a defendant to make safety expenditures in excess of the amount required by the regulators. So, too, a defendant's unexcused failure to comply with such a minimal safety requirement conclusively establishes negligence per se, even though courts are not statutorily obligated to make this finding. By implication, regulatory compliance is a complete defense to the tort claim when it resolves the same policy question a court must answer to decide a tort claim. *See id.* (recognizing that "a court *may* properly conclude that a particular product safety standard set by statute or regulation adequately serves the objectives of tort law and therefore that the product that complies with the standard is not defective as a matter of law"); *see also* Geistfeld, *supra,* at 991-1003 (rigorously demonstrating this point). The common-law principle of deference fully explains the manner in which regulatory compliance and noncompliance affect a tort claim.

This principle of common-law deference shapes tort law in numerous other ways. For example, it supplies the reason why courts do not subject governmental actors to negligence liability for making policy decisions. By deeming these policy decisions to be reasonable as a matter of tort law, courts categorically immunize the conduct from negligence liability, even when the legislature has otherwise waived sovereign immunity. *Cf. United States v. S.A. Empresa de Viacao Aerea Rio*

Grandense (Varig Airlines), 467 U.S. 797, 810 (1984) (observing that Congress adopted the discretionary function exception to the Federal Tort Claims Act even though "[i]t was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction").

The principle of common-law deference would extend to any decision by the Board that certain forms of employee conduct are protected under the Act. Such a decision is a policy determination that the employer cannot retaliate against the employees for having engaged in the protected conduct. Retaliation can take many forms, including the filing of a tort suit seeking to hold the employees liable for having engaged in the protected conduct. But because the protected conduct is justified by the legislative policy embodied in the Act, state courts would defer to that legislative policy determination and deem the conduct to be privileged as a matter of state tort law. *Cf.* Dobbs, *Law of Torts* § 24 ("Some privileges, like self-defense, are well-established, but courts may recognize new privileges whenever they believe the defendant's conduct was justified."). No determination the Board might make with respect to protected conduct, therefore, will deprive petitioner of a vested tort right, eliminating the possibility that such a determination could amount of a constitutional taking of petitioner's property.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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