No. 21-1449

IN THE
Supreme Court of the United States

GLACIER NORTHWEST, INC., DBA CALPORTLAND,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL UNION NO. 174,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus United Brotherhood of Carpenters and Joiners of America ("Carpenters Union") represents hundreds of thousands of union tradespeople who provide skilled carpentry and related craftsmanship each day. *See* www.carpenters.org.

Carpenters lay out and construct walls and ceilings, doors and windows, roofing supports, finely detailed cabinets, and other interior and exterior surfaces. Carpenters also work regularly in concrete construction – the subject of this case – laying out and building precise and sturdy forms to hold massive concrete pours delivered by concrete-mixing trucks on myriad projects including high-rise buildings, highway overpass piers, and bridges.

The Carpenters Union is committed to advancing the craftsmanship of its members by proper and ongoing training for each tradesperson. It considers skill, safety, productivity, and attitude to be the keys to success for its union members and contractors, and the Carpenters Union thus is committed to providing its members and signatory contractors a strong competitive advantage in the industry.

Amicus Service Employees International Union ("SEIU") is a union of approximately two million men and women. SEIU members work in a wide range of private-sector industries including healthcare, childcare, homecare, air travel, security, adjunct teaching faculty, and food, janitorial, and building

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in full and that no one other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37.3(a), counsel represent that all parties have consented to the filing of this brief.

services. SEIU members include doctors, nursing professionals, and other essential workers who cared for the sick during the recent pandemic.

Like respondent Teamsters Union, Local No. 174 ("Local 174" or "Union"), *amici* Carpenters Union and SEIU have a statutory right to strike or picket when an employer declines to enter or renew a reasonable collective-bargaining agreement, pursuant to Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. That right is crucial for leveling the playing field for viable labor relations between employers and employees. As Congress found in 1935 when enacting the NLRA:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging 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.

Id. § 151, ¶¶ 2-3 ("Findings and declaration of policy"). The same concerns persist today, particularly with rising and ongoing inflation that reduces the value of wages and benefits. Ongoing vigilance is required to maintain any "equality of bargaining power between employers and employees." *Id.* ¶ 3.

In *San Diego Millmen's Union v. Garmon*, 359 U.S. 236 (1959), this Court held that the NLRA requires a labor dispute to be presented to the National Labor Relations Board ("NLRB" or "Board") in the first instance under the Board's primary jurisdiction, so long as the union's conduct is "arguably" protected by NLRA § 7. *Id.* at 246. That rule long has served to protect the rights of labor employees to bargain collectively and to strike lawfully in seeking better pay, benefits, and working conditions, and to avoid myriad inconsistent state-court adjudications at odds with the NLRA.

The Carpenters Union and SEIU respectfully seek to avoid the unwarranted limitation on *Garmon* and the NLRB's primary jurisdiction sought here by petitioner, based on the erroneous assertion that a mere strategic allegation by an employer of damage from a strike to perishable goods in ongoing production automatically ousts the Board's primary jurisdiction.

INTRODUCTION

Petitioner Glacier Northwest, Inc. ("Glacier") seeks a severe, artificial, and unwarranted limitation of *Garmon* whereby any employer able to allege some damage to ongoing production of company products from a union strike automatically could oust primary jurisdiction from the NLRB. This Court should reject such a facile and categorical evasion of *Garmon*'s assignment of primary jurisdiction to the Board for union conduct that arguably is protected by NLRA § 7.

This case concerns the means by which a lawful strike was carried out by concrete-truck drivers of respondent Local 174. Although Glacier and its *amici* repeatedly assert "intentional destruction of property" by the Union, they rely on inapposite precedents far afield from the facts of this case. Those cases concern extensive destruction or serious threats to steel plants through egregious conduct such as timing a strike when molten lead must be poured off, thus imperiling the entire plant plus grievous bodily injury to those left to deal with the molten lead; a week-long employee seizure of a steel plant resulting in a pitched eviction battle with law enforcement; threats or acts of violence to person or property of non-picketing employees; or inserting a metal tool in the oil tank of a crane and puncturing its tires. While such conduct clearly is unprotected by NLRA § 7, the conduct at issue here is markedly different.

The facts here concern a perishable product – mixed concrete – Glacier makes and delivers every day of the working week. After expiration of the collective-bargaining agreement on July 31, 2017, and the ensuing lack of a new agreement, the Union

called a strike for 7 a.m. on August 11. Even so, the Union instructed its drivers thereafter to return to Glacier's yard and leave their trucks running so no concrete would harden in the mixing drums. The drivers did not abandon their trucks offsite, and they left the drums turning upon return to Glacier's concrete-mixing yard. As a result, Glacier's other personnel were able in five hours to unload the concrete with no damage to a single truck, and Glacier limits its state-court complaint to damages from its perishable-concrete product. The value of that product represents but a few hours of its lawyers' time litigating in this Court.

In multiple cases, the NLRB has found such strikes lawful even when they imperiled or damaged perishable products including cheese, milk, chickens, baked goods, and perishable leather, because a strike in many if not all cases will affect ongoing product production. The NLRA does not require advance notice of a strike, with a lone exception for health-care unions. This Court has held striking workers may exert substantial economic pressure on their employer in bargaining for pay, benefits, and working conditions.

Consistent with those established principles – and following investigation of Local 174's unfair-labor-practice charge – the NLRB's General Counsel filed a complaint against Glacier now set for hearing before an Administrative Law Judge on January 24, 2023 – two weeks after the January 10 oral argument scheduled here. If, for that reason, the Court does not dismiss the writ of certiorari as improvidently granted, then it should hold the Board has primary jurisdiction and reject Glacier's attempted categorical evasion of *Garmon* by strategic allegation of damage to perishable products in production during a strike.

STATEMENT

The collective-bargaining agreement between Glacier and Local 174 expired on July 31, 2017, with no replacement. JA112. Eleven days later, "[u]nhappy with the company's response to its bargaining demands," the Union called a strike at 7 a.m. on August 11. Glacier Br. 7-8.

According to a sworn declaration by Glacier's Dispatch Coordinator, the Local 174 drivers are not told by Glacier what assignments, or how many assignments, they will have on a given day: "Our drivers are not given their delivery assignments each day until they pull under the batch plant . . . because the work fluctuates greatly every day. We can't predict each driver's work day when it begins." JA76.

In contrast to such normally unpredictable workdays, Glacier does provide advance notice when the scheduled task is a massive "mat pour" for a commercial concrete slab that requires all hands on deck from multiple trades and police officers to direct traffic. JA78 ("[W]e notified our drivers 1–3 weeks in advance of the originally scheduled August 12, 2017 mat pour . . . posted in the Drivers' Room."). The Union first planned the strike for August 12, but then moved it to August 11 to avoid the greater harm from a strike on a mat-pour day. JA142-43 & nn.4-5.

Glacier's Dispatch Coordinator acknowledged "our Dispatchers learned shortly before 7:00 a.m. that the Union had called a strike." JA76. The Union did not delay in clearly communicating the strike to Glacier. At the same time, the Union instructed drivers *to continue working even after 7 a.m.* to return trucks to the Glacier yard rather than abandoning them offsite and to leave mixers running to avoid concrete hardening. Glacier Br. 8; JA72-73.

Return of the trucks took until 7:45 a.m. JA77. Of the approximately 85 Union drivers in Glacier's employ, *see* JA71 (Glacier: "We have 80-90 drivers covered by our contract with Teamsters Local 174."), only 16 (19%) returned to the yard with unpoured concrete – and *all* left their mixers running. JA72-73.

Seven drivers told Glacier managers their trucks were still full, whereas the remaining nine drivers allegedly did not. Nevertheless, Glacier's Production Manager of 34 years stated in a sworn declaration that he knew *as soon as the strike was called at 7 a.m.* that trucks were returning to the yard with unpoured concrete: "I became aware that our Teamsters 174 ready-mix drivers were going on strike at 7:00 a.m. on August 11, 2017, as soon as the strike began. . . . I was informed that the Union leaders . . . were at our yard and that our drivers were all bringing their trucks back to our yard – many with full loads of concrete in the drums. . . . I also saw that a number of our mixer trucks were brought back to our yard with full loads of concrete in them." JA81-82.

As a result, Glacier's other personnel successfully poured out all 16 trucks in five hours with no damage to any truck; as Glacier notes, "add[ing] a retardant" delays concrete hardening. JA72-73, 84; Glacier Br. 9. Glacier's complaint accordingly is limited to damages from perishable concrete, including "lost profits" and costs of containment, but it does *not* seek damages for harm to any truck. JA20-22, ¶ 4.7 (Count I), ¶ 4.14 (Count II), ¶ 4.18 (Count III).

Glacier issued letters of discipline to all 16 drivers, which it later rescinded for the seven drivers who reported their trucks still full. JA72-73. Although Glacier does not quantify its damages, industry data indicate that a 10-yard truck of concrete delivered in

Seattle had a retail value in 2017 of approximately $130 per yard, or $1,300 per truck.[2] Glacier's damages for the loss of its concrete and lost profits on the sales thus appear to be approximately $11,700 for the nine trucks for which the drivers were disciplined. At the same time, Glacier's ultimate parent company reported some $8.2 billion in annual revenues and $9.6 billion in assets.[3]

After the Washington Supreme Court issued its decision, the NLRB's General Counsel issued a complaint against Glacier for unfair labor practices related to the August 11, 2017 strike. *See* U.S. Br. App. 1a-7a. A hearing on the NLRB complaint is scheduled for January 24, 2023. *See* Glacier Br. 13.

SUMMARY OF ARGUMENT

I. Glacier asserts a novel and unwarranted limitation of *Garmon* by excluding from the NLRB's primary jurisdiction any case in which an employer can plausibly allege under state law some sort of "intentional destruction of property" – phrasing that appears in various iterations at least 80 times in Glacier's brief. Such an unprecedented new boundary line against Board review is contrary to decades of Board precedent and should be soundly rejected.

A. The property at issue in Glacier's complaint is not plant facilities but rather a perishable product in daily production – mixed concrete. In various contexts including cheese, milk, baking, chickens, and

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[2] *See* JA72 (claiming 9-10 yards per truck); https://concrete.pro matcher.com/cost/seattle-wa-concrete-costs-prices.aspx (range of $119.28-$133.54 per cubic yard delivered in July 2018).

[3] *See* Taiheiyo Cement Corp., *Annual Report April 1, 2017-March 31, 2018*, *at* https://www.taiheiyo-cement.co.jp/english/ir/annualreport.html; Glacier Br. ii (Taiheiyo owns CalPortland, which owns Glacier).

leather skins, the Board has upheld strikes as lawful under NLRA § 7 even when perishable products were damaged or put at risk. Glacier's petition seeks *sub silentio* to undermine that established line of cases.

B. The three inapposite cases on which Glacier primarily relies concerned highly egregious conduct targeted to cause maximum damage to an employer's capital plant facilities. Two concerned steel plants containing molten lead and ovens operated at 1,600 degrees Fahrenheit, where a strike posed grave risk to persons and plant facilities (*Marshall Car Wheel* and *Joliet Coke Works*); the third concerned a week-long takeover of a steel plant ended only by a "pitched battle" with the evicting sheriff (*Fansteel*).

In contrast, the facts here concern a strike by mixed-concrete truck drivers who acted carefully to protect Glacier's concrete-mixing trucks, and that concerned only loss of a perishable product similar to many strikes the Board has found lawful. Such conduct arguably is protected under NLRA § 7 and subject to the Board's primary jurisdiction under *Garmon*, as the state supreme court correctly concluded.

C. The artificial line sought to be drawn by Glacier based on "intentional destruction of property" would undermine the Board's precedents on perishable products by the simple artifice of pleading some damage to such products in ongoing daily production.

Glacier's purported line-drawing is also illusory. It seeks to distinguish "intentional destruction of property from the ordinary economic harms such as lost profits and other inefficiencies that typically result from a work stoppage," Br. 11, yet the damages it seeks from loss of perishable concrete are no different from the lost profits and economic harms it candidly admits are *not* recoverable from a strike.

II.A. Glacier's asserted line-drawing based on alleged "intentional" destruction of any sort of employer property, including perishable products in daily production, is further contrary to the lack of any statutory requirement for unions (aside from those in healthcare) to provide advance notice of a strike. Glacier's position in effect would require advance notice of a strike anytime an employer's products in production were affected, which is contrary to the NLRA statutory scheme and Board precedent.

B. Further, unions are allowed under the NLRA to time a strike in a way that puts strong economic pressure on the employer to agree to acceptable terms in the collective-bargaining process. Glacier's position would undermine those long-established principles of collective bargaining under the NLRA.

III.A. Based on subsequent development and clarifications in merits briefing that allow the relevant facts and Board precedents on perishable products to be more clearly appreciated, together with the complete inappositeness of the *Marshall Car Wheel* line of cases, the writ of certiorari was improvidently granted and should be dismissed.

B. Glacier will not be prejudiced by Board adjudication because it may appeal any adverse decision to the court of appeals, and, if the Board finds favorably for Glacier that the Union strike conduct was unprotected, Glacier may proceed in state court.

C. The Court should reject the assertion by Glacier (and its acquiescence by the United States) that, in considering *Garmon* preemption, the Court is bound by a state-court rule on motions to dismiss limiting review to the allegations in the employer's complaint and viewing all facts most favorably for the employer.

Under *Garmon*, the Court should consider all relevant facts the Board might consider, and, as the United States properly asserts, that fuller record plainly shows the Union strike conduct arguably is protected under NLRA § 7.

ARGUMENT

I. GLACIER'S CONCOCTED "PROPERTY DESTRUCTION" STANDARD IS CONTRARY TO *GARMON* AND WRONGLY WOULD ERODE THE BOARD'S PRIMARY JURISDICTION

A. The Board Regularly Has Found Strikes To Be Protected Conduct Even When They Imperil Or Damage Perishable Goods

Under *Garmon*, the Board has primary jurisdiction over claims based on conduct that "arguably" is protected by NLRA § 7. 359 U.S. at 246; *see also Sears, Roebuck v. San Diego Carpenters*, 436 U.S. 180, 202 (1978) ("The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board.").

Because the Board regularly has found strikes protected even when they damage or imperil perishable goods, the strike at issue "arguably" is protected by the NLRA. Therefore, the Board has primary jurisdiction over Local 174's conduct.

Glacier's state-law claim for damages is limited to its loss of concrete and consequential cleanup costs. JA20-22 (¶¶ 4.7, 4.14, 4.18). Glacier admits, and the decision below held, no trucks were damaged. *See* Glacier Br. 9 ("Glacier managed to avoid damage to its trucks"); JA142 ("None of the trucks carrying the concrete were damaged because Glacier was able to take the concrete out of the trucks before it hardened."). Glacier admits "[c]oncrete is a highly perishable prod-

uct" it produces each day and "cannot be saved for another day." JA8; *see* Glacier Br. 7.

The Board repeatedly has found that such consequential loss of an employer's perishable goods does not render a strike unprotected, so long as it was in pursuit of legitimate economic aims such as better pay, benefits, or working conditions.

Cheese. In *Leprino Cheese*, the Board held employees of a cheese manufacturer engaged in a protected walkout to protest work hours on Christmas day, even though it "interfered with timed procedures necessary to complete cheese-processing, resulting in deficiency in some of the processed product." 170 N.L.R.B. 601, 606 (1968), *enf'd*, 424 F.2d 184 (10th Cir. 1970). "The Company received some 217,000 'pounds' of milk during the day on December 25, much of it prior to the departure of [the striking employees] from the plant. As of the time they left, a considerable portion was in various stages of conversion into cheese. Once begun, the process is a continuous one, requiring the addition of bacteria, cooking, cooling, and timing of various of the procedures. Failure to complete them with proper timing can result in a spoiled or deficient product." *Id.* at 604.

The Board nevertheless held such "[e]conomic loss, both to employers and striking employees, is often a byproduct of labor disputes" and the employees' right to strike "in pursuit of legitimate aims does not depend on whether they protect their employer against consequential loss in the quality or price of his product." *Id.* at 606-07.

In *NLRB v. A. Lasaponara & Sons*, the union struck on Palm Sunday, "customarily a work day for the Company since it falls one week before Easter

Sunday and the Easter season is one of the busiest of the year in the cheese industry." 541 F.2d 992, 997 (2d Cir. 1976). The court enforced the Board's order finding that firing the striking employees was an unfair labor practice because, "[w]hile the strike undoubtedly brought inconvenience and economic loss to the Company in view of its unusually heavy production schedule due to the Easter season, such a result is obviously the very object of any concerted employee action protected by the Act." *Id.* at 998.

Chickens. In *Lumbee Farms*, the Board upheld a poultry processing plant walkout by 100 employees at 8 a.m., "chosen because by that time all employees would have reported to work and [the employer] would be in full operation with its largest number of chickens on the line"; the plant in fact "sustained some loss of its product on the line when the strike occurred." 285 N.L.R.B. 497, 503, 506 (1987), *enf'd*, 1988 WL 68378 (4th Cir. June 28, 1988) (per curiam) (judgment noted at 850 F.2d 689 (table)). As the Board reasoned: "that the strike occurred during the workday when chickens were on the line and vulnerable to loss does not mean employees automatically lost protection under the Act." *Id.* at 506. "The economic pressure flowing from such a strike must be weighed against the goals sought to be achieved by the strikers" who had "legitimate concerns regarding their working conditions and pay." *Id.*

Similarly, in *Ablon Poultry & Egg*, the Board held a poultry plant unlawfully had terminated an employee who led a walkout that "had resulted in some spoilage because of delay in processing." 134 N.L.R.B. 827, 829 (1961). Despite the loss of perishable goods, the walkout was protected because it was "in protest against existing working conditions." *Id.*

Baking. In *Barkus Bakery*, the Board found employee conversations about striking were protected even though a strike would result in "spoilage of products in process of baking." 214 N.L.R.B. 478, 480 (1974), *enf'd*, 517 F.2d 1397 (3d Cir. 1975).

In *M&M Bakeries*, the Board similarly found a strike protected over the complaint of the baking company that the strike "began at midnight, November 25," when the company "had planned on 'double production' on November 26, in view of the fact that November 28 was Thanksgiving," such "that the strike 'was called for a time when it would do most damage to the Company.'" 121 N.L.R.B. 1596, 1605 (1958), *enf'd*, 271 F.2d 602 (1st Cir. 1959).

Milk. In *Central Oklahoma Milk Producers*, the Board found that a milk-processing company unlawfully had discharged a group of milk truck drivers who refused to make deliveries until they received better wages and hours. *See* 125 N.L.R.B. 419, 435-36 (1959), *enf'd*, 285 F.2d 495 (10th Cir. 1960).

Perishable leather. In *Morris Fishman & Sons*, the Board found a strike at a leather company was protected even though the timing jeopardized $15,000 worth of perishable leather skins.[4] *See* 122 N.L.R.B. 1436, 1445-46 (1959), *enf'd*, 278 F.2d 792 (3d Cir. 1960). The Board distinguished between "property[] which might have been lost because of its perishable nature" and cases involving the possibility of "considerable damage to both plant and equipment and . . . a plant shutdown for consequent repairs." *Id.* at 1447.

This case. Here, the Union drivers' strike was based on a legitimate bargaining interest and damaged

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[4] $15,000 in 1959 is equivalent to about $145,000 in today's dollars. *See* https://www.dollartimes.com/inflation/.

no Glacier facilities. The drivers stopped work in support of Union demands during negotiations for a successor collective-bargaining agreement. JA112. As Glacier admits (at 7), the drivers were "[u]nhappy with the company's response to [the Union's] bargaining demands." The loss of perishable concrete does not render the strike unprotected.

As the Board repeatedly has explained, economic loss is a common byproduct of labor disputes, and the drivers' right to strike "in pursuit of legitimate aims does not depend on whether they protect their employer against consequential loss in the quality or price of his product." *Leprino*, 170 N.L.R.B. at 606-07. Under longstanding Board precedent, the strike "arguably" is protected conduct even though perishable concrete was lost. The Board has primary jurisdiction to adjudicate the conduct of the striking drivers – just as the regional director concluded when issuing the Board complaint against Glacier.

B. Glacier Ignores The Distinction Between Incidental Damage To Perishable Goods And Serious Damage To Plant Facilities

1. Glacier relies on a trio of cases involving egregious conduct that are entirely inapposite to the incidental damage to perishable concrete at issue here.

In *NLRB v. Marshall Car Wheel*, 218 F.2d 409 (5th Cir. 1955) (*cited in* Glacier Br. 10, 20, 21, 22, 31), employees of an iron foundry "intentionally chose a time for their walkout when molten iron in the plant cupola was ready to be poured off," threatening "substantial" harm because, when the cupola is "full of molten metal[,] [it] must be emptied immediately or severe damage to plant and equipment will result." *Id.* at 411 & n.3. Thus, if the cupola were

not emptied quickly, then molten iron would "come off the cupola and run off down the sides [of] the railroad tracks," burn the wooden structure supporting the cupola, and "run everybody out of there." *Id.* at 413 n.7. As a result, "the plant would have been out of operation for a period of several months" and the employer would have suffered "substantial property damage" to its plant facilities. *Id.* at 411, 414 n.9.

In *U.S. Steel Co. (Joliet Coke Works) v. NLRB*, 196 F.2d 459 (7th Cir. 1952) (*cited in* Glacier Br. 21), a steel-plant strike threatened "crippling damage" from cooling of ovens kept at 1,600 degrees Fahrenheit, including "danger and loss from explosion and fire." *Id.* at 461, 463. A strike at the same plant in 1919 had caused "damage . . . so great that the ovens had to be rebuilt at a cost of $2,000,000, and the rebuilding took three years." *Id.* at 461.[5]

In *NLRB v. Fansteel Metallurgical*, 306 U.S. 240 (1939) (*cited in* Glacier Br. 19, 20, 21, 24, 34, 35, 37, 43, 44), steel-plant employees staged a "sit-down strike" seizing "key" buildings and shutting down operations for more than a week. *Id.* at 248-49. The strikers ignored a court injunction ordering them to leave and engaged in a "pitched battle" to "resist[] the attempt by the sheriff to evict and arrest them"; most were arrested and received jail sentences. *Id.* at 249. "The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant." *Id.* at 253.

2. In its perishable-products line of cases, the Board readily and properly has distinguished the *Marshall Car Wheel* line of cases.

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[5] $2 million in 1919 is equivalent to nearly $34 million in today's dollars. *See* https://www.dollartimes.com/inflation/.

In *Oklahoma Milk*, the Board rejected applicability of *Marshall Car Wheel* because "[n]o unusual circumstance, such as aggravated injury to personnel or premises, was created by the fact that the milk handled is perishable and loss might be sustained; loss is not uncommon when a strike occurs." 125 N.L.R.B. at 435 (footnote omitted).

In *Leprino*, the Board reasoned that loss of perishable cheese was "far different" from *Marshall Car Wheel* and cases "involving a danger of 'aggravated' injury to persons or premises." 170 N.L.R.B. at 607.

In *Morris Fishman*, the Board reasoned that "[t]he material element in [*Marshall Car Wheel* and other] cases is the *threat of aggravated physical injury to plant premises*, an element not present in the instant case." 122 N.L.R.B. at 1447 (emphasis added; footnote omitted).

In *Lumbee*, the Board reasoned that, "[a]side from stopping work[,] the employees here did nothing affirmatively to cause physical damage to" plant facilities. 285 N.L.R.B. at 507.

In *Lasaponara*, a strike on the busiest day of the year "clearly failed to reach a degree so grossly disproportionate to the goal sought to be achieved that it renders the conduct unprotected." 541 F.2d at 998 (distinguishing *Marshall Car Wheel*). The "employees' conduct . . . was not simply an attempt to deliberately inflict economic harm on the Company without compensatory gain to themselves. It served a legitimate work-related goal and was therefore protected by the Act." *Id.* The same is true here.

3. The Washington Supreme Court's decision, notwithstanding Glacier's extensive derision of it, is fully consistent with those Board and court of

appeals precedents concerning perishable products. JA150-70. In sum, the court properly reasoned:

> (1) employees must take reasonable precautions to protect an employer's plant, property, and products and (2) economic harm may be inflicted through a strike as a legitimate bargaining tactic. Because it is unclear where the strike in this case falls on the spectrum between these two principles, the strike is, at least, arguably protected conduct under section 7.

JA160; *see* JA160-66. That reasoning is correct.

Similarly, "incidental destruction of products during a strike, as opposed to property damage for its own sake, has not been sufficient to invoke the 'local feeling' exception in any United States Supreme Court case." JA158. That "exception" is inapplicable to conduct arguably protected by § 7 because "a presumption of federal pre-emption applies even when the state law regulates conduct only arguably protected by federal law"; and for conduct held to be "actually protected," "pre-emption follows . . . as a matter of substantive right" under the Supremacy Clause. *Brown v. Hotel Emps.*, 468 U.S. 491, 502-03 (1984); *see* U.S. Br. 28-29 (under the "local feeling" exception, States may provide additional remedies for conduct clearly *prohibited* by § 8, but States may not impose liability for conduct *protected* by § 7).

4. The other cases relied on by Glacier and its *amici* are even more inapposite. For example, in *United Mine Workers v. Laburnum Construction*, 347 U.S. 656 (1954) (*cited in* Glacier Br. 15, 23, 24, 25, 26, 27, 35, 38, 39, 40, 43, 44, 47), the union allegedly "threatened and intimidated [the employer's] officers and employees with violence to such a degree that [the employer] was compelled to abandon . . . its

projects." *Id.* at 658. No such conduct is at issue here, which concerned a purely peaceful and lawful strike.

In *Rockford Redi-Mix v. Teamsters Local 325*, 551 N.E.2d 1333 (Ill. App. Ct. 1990) (*cited in* Glacier Br. 28), drivers abandoned concrete trucks in secret offsite locations, "letting the cement sit in the drums without turning." *Id.* at 1340. As Glacier admits (Br. 8; JA72-73, 76-77), here the drivers carefully *avoided* such harm by returning their trucks and leaving them running to avoid hardening.

In *Cranshaw Construction v. Ironworkers*, 891 F. Supp. 666 (D. Mass. 1995) (*cited in* Buckeye *Amicus* Br. 12, 17), an "ironworker's tool" was inserted "in the crane's oil tank" and its "tires . . . were drilled." *Id.* at 675. No such egregious property vandalism is at issue here.

In *Lodge 76 Machinists v. Wisconsin Employment Commission*, 427 U.S. 132 (1976) (*cited in* Glacier Br. 15, 23, 25, 37, 38, 39, 43), this Court in fact found the union conduct to be arguably protected under *Garmon*. *See id.* at 154 ("It is not contended, and on the record could not be contended, that the Union policy against overtime work was enforced by violence or threats of intimidation or injury to property.").

"Breath spent repeating dicta does not infuse it with life." *Metropolitan Stevedore v. Rambo*, 515 U.S. 291, 300 (1995). A similar conclusion follows from the repeated citations by Glacier and its *amici* to cases that incidentally may mention "property damage" or concern egregious threats of violence to property, but that factually are entirely inapposite to the perishable-concrete labor strike at issue here.

5. It is undisputed the Union strike involved no aggravated injury to Glacier's facilities or personnel. Glacier admits (at 9) it "managed to avoid damage to its trucks" precisely because the drivers returned their loaded trucks to Glacier's yard *after* the strike was called and *before* they stopped working, rather than leaving the trucks unattended offsite or shutting down their mixers. JA72-73, 76-78.

Further, the Union *moved* its original strike date to avoid the pre-announced August 12 mat pour. Although Glacier complains it nevertheless timed the August 11 strike at an especially inopportune time on a typical workday, Glacier's own Dispatch Coordinator stated Glacier does *not* tell drivers in advance how any given day will proceed, JA76, and its Production Manager stated he knew the returning trucks had unpoured concrete *as soon as they re-entered the yard*, JA81. *See supra* pp. 6-8.

Glacier's self-serving rhetoric in its complaint asserts "heroic efforts" to dispose of the concrete, which included hiring trucks to haul concrete offsite. Br. 9. But the Board has found strikes to be protected conduct even when employers had to make special efforts to avoid economic loss from perishable products. In *Morris Fishman*, the Board found the strike protected even when the employer had to "specially hire[]" a team to work all night to save perishable leather skins. 122 N.L.R.B. at 1445-46. And in *Oklahoma Milk*, the Board found a truck-driver strike protected even though the employer "had to take action to get the milk to market" and "[s]uch action was readily and promptly taken." 125 N.L.R.B. at 435.

This case easily falls under the Board's precedent concerning acceptable consequential loss of an employer's perishable goods, rather than cases

such as *Marshall Car Wheel* involving "aggravated" damage to an employer's equipment, facilities, or personnel.

C. Glacier's "Intentional Destruction Of Property" Tagline Is Unlawful And Unworkable

Glacier erroneously proposes a line supplanting the Board's primary jurisdiction based on any alleged "intentional destruction of property." That elastic standard would allow complete evasion of the factually nuanced decisions by the Board on perishable goods, by the simple artifice of pleading some damage to perishable products in ongoing daily production. Nothing in the NLRA or precedent warrants such a radical change ousting perishable-goods cases long heard by the Board under its primary jurisdiction and consigning them instead to state court.

Even on its own terms, Glacier's line is discordantly malleable. Glacier complains the decision below erred by not "distinguishing the intentional destruction of property from the ordinary economic harms such as lost profits and other inefficiencies that typically result from a work stoppage." Br. 11; *see* Br. 15, 30, 44 (same distinction). Yet Glacier concedes "the Act *protects* ordinary strikes that may result in *lost profits and economic opportunities*." Br. 44 (emphases added). At the same time, Glacier's complaint repeatedly seeks "lost profits." JA14-15, 19-22.

The loss of perishable concrete Glacier intended to sell falls into Glacier's own protected category of "lost profits and economic opportunities." Yet the line it seeks to draw would supplant the Board's primary jurisdiction to consider such admittedly protected conduct. The logic of Glacier's tagline is thus at odds

with the bottom-line result it seeks, which should be rejected.[6]

II. THE NLRA DOES NOT REQUIRE ADVANCE NOTICE OF A STRIKE AND IT ALLOWS STRONG ECONOMIC PRESSURE BY A UNION FOR BETTER PAY, BENEFITS, AND WORKING CONDITIONS

A. The NLRA Does Not Require Advance Notice Of A Strike And States May Not Indirectly Require Such Advance Notice

Glacier does not contend the Union drivers were precluded from striking, but asserts they had to avoid any risk to its perishable concrete in production every workday. Glacier thus advances a novel rule that employees must provide advance notice of a strike whenever a perishable product produced each workday is in production.

1. Such advance notice is *not* a requirement of the NLRA. Only healthcare unions must give advance notice. *See* NLRA § 8(g), 29 U.S.C. § 158(g) (10 days). That limited exception shows Congress intended to allow strikes without notice in *other* industries. *See Jama v. ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intend to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute

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[6] At oral argument below, Glacier conceded "a grocery store employee walkout that resulted in the foreseeable loss of perishable fish . . . might be protected activity because it merely caused 'production loss' rather than being intentionally timed to cause the concrete loss." JA166 n.9 (quoting Glacier's counsel). That concession further shows Glacier's line is elusive and unworkable, and "highlights why factual distinctions should be drawn by the Board and not by state courts." *Id.*

that it knows how to make such a requirement manifest.").

Importantly, in NLRA § 7, Congress "expressly safeguarded for employees" the "'right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection,' e.g., to strike." *Motor Coach Emps. v. Wisconsin Emp't Bd.*, 340 U.S. 383, 389 (1951) (quoting 29 U.S.C. § 157) (cleaned up). The right to strike is crucial to the collective-bargaining process and allows a union to time a strike to apply substantial economic pressure. It promotes Congress's policy to achieve "equality of bargaining power between employers and employees." 29 U.S.C. § 151, ¶ 3.

Further, NLRA § 13 expressly preserves "the right to strike," with *no* qualification requiring advance notice for strikes affecting perishable products:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Id. § 163; *see id.* § 142(2) (defining "strike" to encompass a "concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement)").

In all events, "[t]he economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms." *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 181 (1967).

2. Although the Local 174 drivers were aware a strike necessarily would affect perishable concrete, they demonstrably took reasonable precautions to protect Glacier's concrete trucks, which were not damaged, including moving the strike date to avoid

a pre-announced mat pour. It is for the Board to balance the Union's statutory right to bargain and strike in seeking better pay, benefits, and working conditions, against the incidental loss of perishable products in daily production.

Intent, to the extent it ever may be relevant, is a matter for Board adjudication, not artful pleading via employer rhetoric about "intentional destruction of property." As the United States explains: "Glacier's focus on the strikers' intent is misplaced. The whole point of a strike to secure a collective bargaining agreement is to threaten the employer with economic losses in order to pressure it to accept the strikers' terms. It follows that strikers inherently intend to cause a degree of economic harm through their refusal to work." U.S. Br. 17 (citation omitted).

Indeed, "[a] strike characteristically causes inconvenience and economic loss to the employer. Striking employees are under no general duty to minimize the disruption by, for example, notifying the employer in advance of the strike to enable the employer to prepare for the strike." *Columbia Portland Cement v. NLRB*, 915 F.2d 253, 257 (6th Cir. 1990) (subsequent history omitted). In *Columbia Portland*, the court upheld a Board ruling that a cement-kiln strike with no advance notice was protected even though it resulted in "permanent[]" kiln damage, because employees "took reasonable precautions to prevent equipment damage." *Id.* at 255, 258. If even unsuccessful attempts to prevent damage to plant facilities are protected conduct, then certainly the Board may conclude the successful prevention measures taken by Local 174 are protected.

The Carpenters Union – which as noted above builds forms for concrete pours – is vitally interested

in preventing Glacier's unwarranted attempt to oust consideration of strikes from the Board to state court when the employer merely alleges some damage to perishable concrete. Likewise, Glacier's approach is so elastic that any industry involving perishable products or products that can degrade during normal storage – from lettuce to carnations to batteries – would be exempt from the normal operations of the Board. SEIU members work routinely with such products and so would be seriously limited in their ability to strike. Glacier offers no support for such a widespread circumvention of Congress's intended labor-management relations regime.

B. Unions May Strike Without Notice To Apply Strong Economic Pressure

"The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that [Congress has] recognized" in promulgating and amending the NLRA over the years. *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960).

Importantly, "use of economic weapons" and "economic pressure devices" is permissible "to induce one party to come to the terms desired by the other." *Id.* The NLRA permits unions, in bargaining collectively, to exert "maximum pressure on the employer at minimum economic cost to the union" to get better pay, benefits, and working conditions. *Id.* at 496.

In *Golden State Transit v. Los Angeles*, 475 U.S. 608 (1986), taxi drivers timed a strike for the eve of a crucial city council decision whether to renew the employer's taxi franchise. This Court held the "drivers were entitled to strike – and to time the strike to coincide with the Council's decision – in an attempt to apply pressure on [the employer]."

Id. at 615. "There is no question that the Teamsters . . . employed permissible economic tactics," and local governments are "prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts." *Id.* at 614-15.[7]

Similarly, in *Dayton Newspapers v. NLRB*, 402 F.3d 651 (6th Cir. 2005), the court held a strike protected even though "timed . . . with an eye toward maximum impact, because the Sunday paper is [the employer's] most profitable of the week." *Id.* at 656.

In concrete construction and other industries, perishable products are produced on an ongoing basis, and the means of a strike that affects such products in production should be for the Board to assess based on a full evidentiary record. The Court should reject Glacier's repeated invocation of its "intentional destruction of property" tagline that seeks to upset long-established statutory provisions and precedents to oust the Board from its primary jurisdiction as designated by Congress by statute in the NLRA.

III. THE NLRB, UNDER ITS PRIMARY JURISDICTION, FIRST SHOULD ADJUDICATE THE COMPLAINT AGAINST GLACIER SET FOR HEARING ON JANUARY 24, 2023

A. The Court Could Dismiss The Writ Of Certiorari As Improvidently Granted

This case presents facts highly disparate from the dramatic damages to steel plants or their seizure by

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[7] Glacier could have locked out the Union drivers but it did not, thus electing to risk a lawful strike without advance notice. *See Golden State*, 475 U.S. at 615 ("at bargaining impasse employer may use lockout solely to bring economic pressure on union") (citing *American Ship Bldg. v. NLRB*, 380 U.S. 300, 318 (1965)).

striking employees implicated in the cases primarily relied upon by Glacier. Rather, the Union drivers' conduct shows clear and careful measures to protect Glacier's trucks and is protected under decades of Board and court precedent. *See supra* pp. 6-8.

Indeed, the Board's General Counsel filed a complaint against Glacier now set for hearing on January 24, 2023, soon after argument in this Court. *See supra* p. 8. Based on the process for such complaints, the regional director first investigated and gathered evidence that Glacier committed unfair labor practices and the strike is protected conduct under NLRA § 7. *See* U.S. Br. 25-27 (discussing process for investigation and issuance of a complaint); U.S. Br. App. 1a-7a (NLRB General Counsel complaint against Glacier); Local 174 Br. 17-19.

As the United States correctly notes: "When the agency issues a complaint alleging that a given activity is protected, that allegation, at least in the absence of exceptional circumstances, establishes that the activity was at least *arguably* protected – meaning that state courts may not resolve claims concerning that activity." U.S. Br. 26; *see Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993) (finding *Garmon* "preemption is triggered by the issuance of a complaint by the General Counsel, if not earlier").

Further, the state courts could not consider the effect of the NLRB General Counsel's complaint because it was issued only *after* the Washington Supreme Court issued the decision under review. *See* U.S. Br. 28 ("[I]n our view the agency complaint should establish that the truck drivers' conduct was at least arguably protected. But because this Court is a 'court of review, not of first view,' it should allow

the state courts to consider the agency complaint in the first instance on remand.") (citation omitted).

At this stage of the case, therefore, it is clear the petition did not warrant a grant of certiorari. This Court at times has dismissed writs as improvidently granted after merits briefing or oral argument, once the issues become better crystallized and the Court is able to focus more on the particulars of the case than at the certiorari stage. "Examination of a case on the merits, on oral argument, may bring into proper focus a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident." *The Monrosa v. Carbon Black Exp.*, 359 U.S. 180, 184 (1959) (internal quotations omitted). This is one of the relatively rare cases in which the writ could be dismissed as improvidently granted.

Deciding the issue presented by Glacier at this stage threatens to incite completely unnecessary litigation over previously well-established law on when the Board has primary jurisdiction, when incidental damage to perishable products can give rise to damages, and on what sequence labor-management cases should proceed. Glacier offers no good reason to scramble labor law over an $11,700 damages claim.

B. Glacier Will Not Be Prejudiced By The Board's Primary-Jurisdiction Adjudication

If the Board finds the conduct underlying the strike to be protected, then Glacier may appeal to a federal court of appeals. *See* 29 U.S.C. § 160(f). And if the Board finds the Union conduct unprotected, then, subject to any appeal rights the Union might exercise, Glacier may pursue a state-law damages claim. *See Longshoremen v. Davis*, 476 U.S. 380, 397 (1986) ("[O]nly if the Board decides that the conduct

is not protected or prohibited may the court entertain the [state-court] litigation."); U.S. Br. 4; Local 174 Br. 1-2. Either way, Glacier is not prejudiced.

C. The Court Should Reject The Artful Pleading Assertion That Review Under *Garmon* Is Limited To Allegations In Glacier's Complaint And Construed In Its Favor

If the Court does proceed to the merits of the primary-jurisdiction question under *Garmon*, then it should reject Glacier's erroneous assertion (in which the United States mistakenly acquiesces) that review should be limited to Glacier's complaint because the case procedurally is at the motion-to-dismiss stage.

Indeed, the United States *correctly* asserts that the *complete* record before this Court *does show* arguably protected conduct by the Union, such that the Board adjudication now scheduled should alone proceed. *See* U.S. Br. 22-23. On that point, the United States is plainly correct. *See supra* pp. 6-8.

Neither Glacier nor the United States cites any NLRA requirement that primary-jurisdiction analysis must follow a state-law rule governing rulings on a motion to dismiss by assuming the allegations of the plaintiff employer to be true, construing all facts favorable to the employer, and entirely ignoring any union rebuttal claims. Such a rule would provide employers with a facile way to evade Board adjudication by pleading claims that strategically omit facts favorable to the union and leaving the union powerless to provide the rebuttal facts the Board would consider. Nothing in *Garmon* compels that skewed result, and its logic – safeguarding the Board's primary jurisdiction against potentially conflicting state-law decisions – counsels against it.

The United States (at 24) cites *Longshoremen v. Davis* for the proposition a union must submit "evidence" to show the conduct arguably is protected, but *Davis* was decided after a trial below so any statements about evidence should be viewed in that context. Moreover, *Davis* held a state-court procedural rule on waiver of affirmative defenses was unenforceable such that the state court "erred in declining to address th[e] [union's *Garmon*] claim on the merits." 476 U.S. at 399. *Davis* does not support review based lopsidedly on the employer's allegations and favorable inferences only, but rather an even-handed review of the expected presentations from both sides to the Board. It calls only for a "factual or legal showing" of the union's case for primary jurisdiction under *Garmon*, *id.* at 398, which the complete record here easily contains.

Whether the Court dismisses the writ or proceeds to resolve the merits of the *Garmon* question presented, the result should be the same – the Board should be held to have primary jurisdiction to adjudicate the strike conduct of Local 174 based on the NLRB General Counsel's complaint set for hearing in January 2023.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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