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 UNITE HERE INTERNATIONAL AND INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI AND SUMMARY OF ARGUMENT[1]

This Court has restricted state authority in the domain of labor relations under two general categories of preemption: (1) "those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal,' and (2) those that reflect the concern 'that the (application of state law by) state courts would restrict the exercise of rights guaranteed by the Federal Acts.'" *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Rel. Comm'n*, 427 U.S. 132, 138 (1976) (*Machinists*). "[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board." *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 396, 383 n.19 (1969); *see also Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 65 (2008).

The Washington Supreme Court and Petitioners understood this case as raising a question of preemption under the *Garmon* doctrine, which "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation'

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, made any monetary contribution intended to fund the preparation or submission of this brief. Both parties consented in writing to the filing of this brief.

established by the NLRA." *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 613 (1986); *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon*). But this neglects the two more direct and powerful forms of preemption that preclude Petitioner's attempt to impose tort liability on striking workers and their unions: direct conflict and *Machinists* preemption. The Court does not need to get to the *Garmon* arguments at all.

Imposing state tort liability for withholding labor would conflict directly with the substantive right to strike guaranteed in Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. Section 13 of the NLRA, 29 U.S.C. § 163, makes clear that courts and administrative agencies may not impose further limitations on the right to strike beyond those specifically added through the 1947 Taft-Hartley amendments[2] or already in place at the time Congress enacted those amendments. The "irresponsible strike" doctrine invented by the National Labor Relations Board after 1947 and applied sporadically since then is incompatible with Section 13. Petitioner's attempt to back this rudderless administrative doctrine with state tort damages conflicts directly with the Act.

To the extent it is not entirely foreclosed by Section 7 and Section 13, Petitioner's tort theory runs headlong into *Machinists* preemption, which "forbids both the National Labor Relations Board ("NLRB")

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[2] Labor Management Relations Act, 1947 ("LMRA"), 61 Stat. 136.

and States to regulate conduct that Congress intended 'be unregulated because left "to be controlled by the free play of economic forces."' [Citations]" *Chamber of Commerce*, 554 U.S. at 65. Congress intended to deregulate peaceful labor conflict and leave the economic weapons available to labor and management unburdened. What Congress left unregulated—activity beyond the express restrictions contained in the Labor Management Relations Act and the existing limitations on striking maintained by Section 13—is as important as what was regulated. Congress's choices in "equitably and delicately structuring the balance of power" between labor and management are not subject to second-guessing by state courts and juries. *See Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 286 (1971).

UNITE HERE and SMART have significant interests in maintaining the private ordering of collective bargaining and resolution of labor disputes. UNITE HERE represents over 300,000 workers across Canada and the United States in the hotel, gaming, food service, airport, and other industries. Many of the products that UNITE HERE members handle are perishable and their workplaces are often 24/7 operations. UNITE HERE's collective bargaining power comes from its members' ability to withhold their labor and cause their employers to lose revenues, including on these perishable goods.

SMART represents over 200,000 construction, manufacturing and transportation employees. SMART members work on complex construction projects with coordinated, time-sensitive phasing (and frequently

with price tags in the billions of dollars), and use expensive, precision equipment and materials vulnerable to the elements in carrying out their jobs. SMART's members are able to bargain for better wages and working conditions due in large part to their ability to threaten and actually to withhold skilled labor from such projects.

ARGUMENT

I. Petitioner's Theory of State Tort Liability Directly Conflicts with the Rights and Limitations Contained in the Labor Management Relations Act.

Petitioner's theories of state-law tort liability are foreclosed because they conflict directly with the right to strike guaranteed by the LMRA. "If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally-protected rights creates an actual conflict and is preempted by direct operation of the Supremacy Clause." *Brown v. Hotel Employees*, 468 U.S. 491, 501, 503 (1984). *See also Livadas v. Bradshaw*, 512 U.S. 107, 116-17 (1994); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239 (1967). Supremacy Clause limits on States' authority to *substantively* regulate the strike is distinct from the question of *jurisdictional* primacy that informs the *Garmon* preemption doctrine. *Machinists*, 427 U.S. at 138.

The federal right to strike's scope is defined by Section 7, which protects workers' "concerted activity" generally, and in Section 13. "Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress. . . ." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963) (fn. om.) "While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgment in exacting detail, *e.g.*, §§ 8(b)(4), 8(d), by indicating the precise procedures to be followed in effecting the interference, *e.g.*, § 10(j), (k), (l); §§ 206-210, Labor Management Relations Act, and by preserving the positive command of § 13 that the right to strike is to be given a generous interpretation within the scope of the labor Act. The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike. [Citations]." *Id.* at 234-35.

The Court settled long ago the question of whether the states may regulate peaceful strikes in the industries subject to the Act. In *Auto. Workers v. O'Brien*, 339 U.S. 454, 458-59 (1950), *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 391 (1951), and *Bus Employees v. Missouri*, 374 U.S. 74, 81-82 (1963), the Court held that they may not because of direct conflict with the rights given in the LMRA.

Auto. Workers v. O'Brien dealt with a Michigan labor mediation law that prohibited a strike until after unsuccessful mediation and a majority strike vote. The Court held that Michigan's limitations on the right to strike conflicted with the right granted—and regulated—in the NLRA and LMRA. "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. . . . None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. [Citations]." 339 U.S. at 456-57 (fn. om.). The Court also noted that the LMRA prescribes in Section 8(d) the timing for when a strike may take place, and "permit[s] strikes at a different time and usually earlier time than the Michigan law." *Id.* at 458. Because "Congress and has protected the union conduct which the State has forbidden . . . the State legislation must yield." *Id.* at 459 (quoting *Auto. Workers v. Wisconsin Bd.*, 336 U.S. 245, 252 (1949)).

Bus Employees v. Wisconsin Board involved a Wisconsin law altogether prohibiting strikes in public utilities. Wisconsin tried to defend its law as necessary to protect the public interest and pointed out the national emergency provisions of the Act. *See* 29 U.S.C. §§ 176-179. The Court responded: "[C]ongressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce," 340 U.S. at

394 (citing *O'Brien*, 339 U.S. at 457.) The Court saw that in crafting the 1947 amendments, Congress "was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised," and demonstrated "that it knew how to cede jurisdiction to the states" and "its ability to spell out with particularity in those areas in which it desired state regulation to be operative." *Id.* at 397-98. The Court invalidated the Wisconsin law because it impinged on the LMRA by forbidding the exercise of rights protected by Section 7. *Id.*

In *Bus Employees v. Missouri*, the State of Missouri purported to take over a public transit business operated by a private corporation and then to prohibit a threatened strike on the grounds that it was a strike against the government. The State's action was justified under a state law defining certain public utilities as "life essentials of the people" and allowing the State to take control in order to prevent strikes. 374 U.S. at 78-79. The Court saw through this fiction of 'seizure' and held that the Supremacy Clause preempted Missouri's attempt to forbid the exercise of rights explicitly protected by Section 7. *Id.* at 82. As in the Wisconsin case, the Court rejected the argument that Missouri was justified in taking this action because of what it perceived to be a local "emergency." *Id.* at 81-82.

As in these early cases, this case involves workers who merely withheld their labor, and not other, affirmative unlawful acts that might be done in addition to or later during a strike, such as sit-downs and violence.

Such additional affirmative acts—and only these—may be within States' power to regulate, as shown in the next section. In this case, however, the drivers simply stopped work and turned their equipment over to their employer, so protection of their right to strike against state-law interference is in full force.

In *Bus Employees v. Wisconsin Board*, the Union and its officers who represented employees of a gas company were fined $250 each for violating a restraining order against the strike. 340 U.S. at 386. The Michigan law in *Auto Workers v. O'Brien* was enforceable through criminal prosecution. 339 U.S. at 456, n.2. Tort liability is an equal affront to the federally guaranteed right to strike, with the specter of damages which might destroy the employees' union.

II. The "Irresponsible Strike" Doctrine is Incompatible with Section 13.

Petitioner's theory proceeds by assuming the validity of the National Labor Relations Board's doctrine that employees engaged in a peaceful strike over their wages, terms and other conditions of employment may be unprotected if they fail to take what NLRB imagines to be "reasonable precautions" to protect their employer's property. Petitioner seeks to expand the NLRB's doctrine to permit state courts to impose tort damages when workers do not take such precautions.

But the NLRB doctrine on which Petitioner bases its theory is invalid. The NLRB has invoked the doctrine only sporadically. It establishes a limitation on

the right to strike that goes beyond the restrictions and limitations that the LMRA imposes on this right and flies in the face of Section 13. It also lacks defined contours and predictability. It comes from an era when the NLRB thought incorrectly that it had the power to decide administratively what "economic weapons" of management and labor were acceptable or not. This Court put an end to that era in *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960). The Court should similarly recognize the doctrine of "irresponsible" strikes as an anachronism which may not be used as the basis for decision in this case, much less extended through state tort law.

A. Section 13 guarantees the right to strike except as provided in the LMRA or limited and qualified in the existing jurisprudence.

The text of the LMRA only allows for two categories of limitations on the right to strike: those specifically listed in the Act itself and those in existence at the time the Act was passed in 1947. As amended in the LMRA, Section 13 provides:

> Nothing in this Act, 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.

Two clauses were added to Section 13 as it appeared in the 1935 Wagner Act: "except as specifically provided

for herein" and "or to affect the limitations or qualifications on that right." The "limitations or qualifications" on the right to strike to which Section 13 refers are those in effect at the time of the law's passage in 1947. *NLRB v. Drivers Local Union No. 639*, 362 U.S. 274, 281-82 (1960) (Section 13 "provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right, as these were understood prior to 1947, unless 'specifically provided for' in the Act itself.");[3] *see United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."). In *NLRB v. Drivers*, the Court held that where "[t]he Board makes no claim that prior to 1947 it was authorized, because of any 'limitation' or 'qualification,' to issue a cease-and-desist order against peaceful 'recognitional' picketing[,]" the NLRB's use of such orders could "only be sustained if such power is 'specifically provided for'" in the LMRA. 362 U.S. at 281-82.

This plain language interpretation of Section 13 is supported by the accompanying report of the Committee on Labor and Public Welfare, which described the "limitations and qualifications" preserved in the clause. It explained that the clause was intended to endorse only the restrictions the NLRB and Supreme

[3] The Court continues to rely on *NLRB v. Drivers*. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 311 (2010).

Court had imposed on the right to strike prior to the passage of the LMRA. S. Rep. 80-105 at 428. Specifically, the report cited rulings holding that the right to strike did not protect: (1) strikes with an illegal objective, *id.* (citing *American News Co.*, 55 NLRB 1302 (1944) and *Thompson Products, Inc.*, 72 NLRB 886 (1947)); (2) strikes in breach of contract, *id.* (citing *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939)); (3) strikes in breach of other Federal laws, *id.* (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942)); and (4) those who "engage in illegal acts while on strike[,]" *id.* (citing *Fansteel Metal. Co. v. NLRB*, 306 U.S. 240 (1939)).

B. The drivers' strike did not violate any express LMRA prohibition nor did it come within any of the limitations or qualifications on the right to strike preserved in the final clause of Section 13.

There is no contention in this case that the strike at issue violated any of the LMRA's specific prohibitions on strike activity, such as the proscription against strikes with secondary objectives (29 U.S.C. § 158(b)(4)(i)(B)) or that the strike violated the LMRA's express timing or notice requirements (29 U.S.C. §§ 158(d), (g)). If the strike is to be found unprotected, it must fall into one of the other "limitations and qualifications" imposed on the right to strike at the time of the LMRA's passage. Petitioner does not argue

that the strike had an illegal objective or that it was in breach of contract.

This case is thus whittled down to the question whether this strike was conducted in an "unlawful manner" in a way that would remove the protection of the LMRA as understood at the time of its passage. *See Drivers*, 362 U.S. at 282. It was not. The "unlawful manner" exception dealt exclusively with affirmative illegal acts taken in addition to striking and had never been found to apply to the simple withholding of labor or the consequences to an employer that resulted from workers doing so.

The two cases referenced in the Senate Report, *Fansteel* and *Southern Steamship*, have strikingly similar facts. In both cases, the striking employees violated the law, not simply going on strike but occupying their employers' premises after doing so. In *Fansteel*, the employees occupied their employer's premises and refused to leave after a state court ordered them to do so, leading to two battles with the local sheriff before they were ousted. 306 U.S. at 249. The Court observed the strike was "illegal in its inception and prosecution." *Id.* at 256. Rather than "a mere quitting of work and statement of grievances" it was instead "an illegal seizure of the buildings to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit." *Id.*

In *Southern Steamship*, some of a ship's crew refused to work and remained on board. 316 U.S. at 34. The Court found that the manner in which the

crewmembers carried out their strike was a violation of the Federal statute against mutiny because "they did what they could to prevent the ship from sailing," *id.* at 41, because like sit-down strikers they remained in their shipboard rooms and prevented the employer from giving the rooms to replacements. *Id.* at 47-48.

C. The NLRB invented the "irresponsible" strike limitation in the era before *Insurance Agents*.

The pre-LMRA cases limited the unlawful-manner exception to the right to strike to affirmative illegal acts going beyond the cessation of work, and Section 13 prohibited courts or the NLRB from creating new exceptions to the right to strike. Yet soon after the Taft-Hartley amendments, the Board expanded the unlawful-manner exception substantially through an "irresponsible" strike doctrine. The doctrine first appears in *Carnegie-Illinois Steel Corporation*, where the Board held that *supervisors* owed a duty to their employer to "comply with all reasonable instructions designed to protect the Respondent's physical plant from imminent damage or destruction." 84 NLRB 851, 853 (1949). In support of this doctrine, the Board relied on several inapposite decisions of this Court and the Circuit Courts, which it claimed stood for the proposition that "the Act does not protect concerted activities of employees which violate property or contract rights of the employer, or which are designed to compel illegal conduct by him, or which are otherwise contrary to law." *Id.* at 852 (footnotes omitted).

In support of the proposition that the Act does not protect employees who violate the employer's property rights, the Board cited two cases that involved employees occupying the employer's property. The first was *Fansteel*. The second was the Fourth Circuit's decision in *NLRB v. Clinchfield Coal Corporation*, 145 F.2d 66 (4th Cir. 1944). But just like *Fansteel*, that case concerned a strike that was "more than a stoppage of work" and instead "amounted for the time being to a seizure of control" of the employer's property. *Id.* at 72. In that case, the striking employees placed an electric motor at the entrance to a mine so that no cars could haul material out, effectively ceasing the operation of the mine. *Id.* at 71.

The cases cited in favor of the contention that the Act did not protect employees who acted in violation of the employer's contract rights provided no support for the "irresponsible" strike doctrine either. All concerned strikes in violation of a no-strike clause or intended to make the employer change the terms of a collective-bargaining agreement mid-term. *See Sands Mfg.*, 306 U.S. at 342-43 (strike for demands in conflict with collective-bargaining agreement); *Hazel-Atlas Glass Co. v. NLRB*, 127 F.2d 109, 117 (4th Cir. 1942) (strike in violation of no-strike and arbitration clause); *United Biscuit Co. v. NLRB*, 128 F.2d 771, 775-76 (7th Cir. 1942) (strike in violation of no-strike clause); *Scullin Steel Co.*, 65 NLRB 1294, 1317-18 (1946) (same); *Fafnir Bearing Co.*, 73 NLRB 1008, 1008-09 (1947) (same); *Nat'l Elec. Prods. Corp.*, 80 NLRB 995, 999 (1948) (same).

The sole case cited concerning strikes "designed to compel illegal activity" similarly did not support the "irresponsible" strike doctrine. In *American News Company*, the strike attempted to force the employer to pay more than it was legally permitted to under the Wage Stabilization Act. 55 NLRB 1302 (1944). Under the "irresponsible" strike doctrine, the Board policed the manner in which workers withheld their labor, not the purpose that the strike sought to achieve.

Finally, in support of the contention that the Act did not protect acts that "are otherwise contrary to law" the Board cited three cases, again involving the seizure of the employer's premises. The first was *Southern Steamship*, discussed above. The second was *NLRB v. Perfect Circle Company*, in which the NLRB upheld the discharge of four strikers because they prevented managers from entering the employer's property. 162 F.2d 566, 572-73 (7th Cir. 1947) ("[T]he equivalent of a seizure of the employer's property.") The third was *NLRB v. Indiana Desk Company* where picketing strikers surrounded the employer's property and prohibited non-striking workers from entering the building at all. 149 F.2d 987, 995 (7th Cir. 1945).

The cases cited in *Carnegie-Illinois Steel* are all fully consistent with the "limitations and qualifications" that Congress intended to preserve through Section 13: that strikers are not protected when they seize and occupy the employer's property while striking or strike in violation of a contractual commitment. But, as explained above, Section 13 did not countenance the *invention of a new exceptions* to the right to strike; it

limited exceptions to those already in existence at the time of the LMRA's passage. The "irresponsible" strike doctrine effects an expansion of the unlawful manner exception beyond the cases the Board cited; rather than merely requiring employees to vacate their employer's premises as in *Fansteel*, it requires them to vacate their employer's premises in certain ways, at certain times, and to take various affirmative actions to preserve the employer's property or lose the protection of the Act.

Despite its lack of support and its conflict with Section 13, the Board expanded the irresponsible strike doctrine from applying to supervisors to safety-related personnel like firemen in *Reynolds & Manley Lumber Company*, 104 NLRB 827, 828-29 (1953). *See also U.S. Steel Co. v. NLRB*, 196 F.2d 459, 466-67 (7th Cir. 1952) (plant guards). The final extension, a great leap, was *Marshall Car Wheel & Foundry Co., Inc.*, where the Board decided that the duty to take reasonable precautions "extends as well to ordinary rank-and-file employees whose work tasks are such to involve responsibility for the property which might be damaged." 107 NLRB 314, 315 (1953).

The union points out correctly that even under the distinctions drawn by the Board in these cases, the conduct of its members – engaging in a peaceful strike that had no more serious consequence than product spoilage – was clearly protected activity. But unsurprisingly, given its lack of grounding in the Act, the Board's application of the doctrine has been

episodic and erratic.[4] *Compare M&M Backhoe Serv., Inc.*, 345 NLRB 462, 471 (2005) *with Leprino Cheese Co.*, 170 NLRB 601, 606 (1968), enfd. *NLRB v. Leprino Cheese Co.*, 424 F.2d 184, 186-87 (10th Cir. 1970) and *Lumbee Farms Coop*., 285 NLRB 497, 506 (1987) enfd. 850 F.2d 689 (4th Cir. 1988), cert. denied, 488 U.S. 1010 (1989).[5]

The Board's "irresponsible" strike doctrine cannot be reconciled with Section 7 or Section 13's prohibition against new exceptions to the right to strike. Petitioner seeks to *expand* an already untenable doctrine to include state-law tort remedies.

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[4] The NLRB has only cited to *Marshall Car Wheel & Foundry Co., Inc.* 30 times in the 70 years that the doctrine has applied to rank-and-file workers. The NLRB has apparently found a work stoppage to be unprotected in only three cases during those 70 years. *Int'l Protective Servs., Inc.*, 339 NLRB 701, 702 (2003); *M&M Backhoe Serv., Inc.*, 345 NLRB at 471; *Gen. Chem. Corp.*, 290 NLRB 76, 83-84 (1988).

[5] Petitioner has cited *NLRB v. Marsden*, 701 F.2d 238, 242 (2d Cir. 1983), Pet. Br., at 22, a case that involved a strike timed to coincide with a time-sensitive concrete delivery. But the court there did not hold the strike unprotected because of its timing and impact on the employer's concrete, but on the workers' failure to articulate any grievance or collective-bargaining demand. *Id.* at 243 ("The walkout here expressed no such grievance but was merely an *ad hoc* reaction to one day's weather.")

III. Petitioner's Tort Theory is Preempted Under *Machinists*.

If the strike here is not seen as affirmatively protected by Sections 7 and 13, state regulation is nevertheless preempted under *Machinists*, 427 U.S. 132. That case involved a type of "partial strike"—refusal to work overtime—which the NLRB has held to be actually unprotected.[6] 427 U.S. at 134-35. The Court nevertheless found that it was beyond the power of the States to regulate. *Machinists* was the culmination of a series of cases in which the Court took the NLRB out of the business of balancing the economic weapons used by management and labor. The Court understood that Congress deregulated the arena of peaceful labor conflict. Instead of governments, at any level, dictating the outcome of negotiations over terms and conditions of employment, this was left to the "free play" of the economic forces brought to bear by management and labor.

A. The Court's decisions leading to *Machinists*.

In the 1950s, at the time it was inventing the "irresponsible" strike doctrine, the NLRB lost sight of this core principle. It became involved heavily in deciding which weapons were "fair." The Court brought this adventure to a halt in *Insurance Agents*, *supra.* Using its authority to adjudicate unfair labor practices, the Board condemned the Union's "partial strike" tactics

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[6] *See*, *e.g.*, *John S. Swift Co.*, 124 NLRB 394, 398 (1959).

as a violation of the its good-faith bargaining duty under LMRA Section 8(b)(3), 29 U.S.C. § 158(b)(3). The Union's members did some parts of their jobs but not others, instead of stopping work completely. But the Court rejected the very idea that economic weapons could be regulated in this manner. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and the Taft-Hartley Acts have recognized." *Id.* at 489. The Board exceeded its powers by attempting to limit the use of economic weapons consonant with its views of what constituted "good faith" bargaining: "[I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in the position to exercise considerable influence upon the substantive terms on which the parties contract," which would lead to more direct Government involvement in the negotiating process. *Id.* at 490. National labor policy does not "contain a charter for the National Labor Relations Board to act at large at equalizing disparities of bargaining power between Employer and Union." *Id*.

The Court observed the trend in Board decisions to "label particular Union economic weapons inconsistent" with the duty to bargain in good faith and concluded that the Board's claim to this authority "is without foundation." *Id.* at 491-92. The Board had "sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into the bargaining duty imposed by

the Act" which was "entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *Id.* at 497-98.[7]

The principle works to free both management and labor from government restraint on their peaceful economic weapons. In *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), the Court rejected the entire NLRB jurisprudence on employers' use of "offensive" lock outs, *i.e.*, those intended to put pressure on employees in order to accomplish the employer's objectives in collective bargaining. The NLRB had generally forbidden such lock outs as unfair labor practices, except in certain "defensive" situations. *Id.* at 306-07. The Court concluded, however, that even though the Act does not establish any *right* for an employer to use an offensive lockout, there is no prohibition on the use of this weapon and it cannot be an unfair labor practice where it is "merely to bring about a settlement of the labor dispute on favorable terms." *Id.* at 313-14.

The Board defended its unfair labor practice finding against the employer in *American Ship Building* "and its general approach to the legality of lockouts on the basis of its special competence to weigh the competing interests of employers and employees and to

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[7] The Court did *not* agree with the Board that the employees' tactics were unprotected concerted activity. It merely assumed this, without deciding the question, and found it irrelevant to the decision that the Board had no authority to find them to be illegal. 361 U.S. at 483, n.6, 492, n.19. The Board relied on *Autoworkers v. Wisconsin Board*, 336 U.S. 245 (1949) ("*Briggs-Stratton*"), which was overruled in *Machinists*.

accommodate these interests according to its expert judgment." *Id.* at 315. As in the *Insurance Agents* case, the Court rejected the Board's assumption of the role as the arbiter of economic weaponry. "[W]e think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." *Id.* at 316. Because "the Act also contemplated resort to economic weapons should more peaceful measures not avail," the Court concluded that the unfair labor practice provisions of the law do not give the Board authority to "deny weapons to one party or the other because of its assessment of that party's bargaining power." *See also NLRB v. Brown*, 380 U.S. 278 (1965) (lawful for employers in a multiemployer bargaining unit to use temporary replacements to continue operating after locking out in support of an employer subjected to a union "whipsaw" strike); *NLRB v. Truck Drivers Union Local 445*, 353 U.S. 87 (1957) (lawful for employers in a multiemployer bargaining unit to lock out in response to a "whipsaw" strike).

At the same time the Court was freeing up labor and management in their use of economic weapons in pursuit of their negotiating goals, the Court moved to protect Congress's *laissez faire* policy for industrial conflict against state interference. In *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964), a union engaged in various forms of secondary activity in support of a strike and the employer brought a damages action under Section 303 of the LMRA, 29 U.S.C. § 187, and under the common law of Ohio. Some of the union's activities

consisted of inducing the employees of secondary employers to stop work. This was clearly illegal under LMRA Section 303, 29 U.S.C. § 187, and the Court quickly affirmed this aspect of the damages award against the union. *Id.* at 256. But the union also requested the management of secondary employers to stop doing business with the struck business, which is not forbidden by Section 303 and its corollary unfair labor practice provision, Section 8(b)(4). *Id.* at 259. Although this conduct is neither protected or prohibited by the Act, allowing the use of this weapon of self-help "is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." *Id*. Therefore, the Court concluded that the Ohio law of secondary boycott was preempted because otherwise "the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and upset the balance of power between labor and management expressed in our national labor policy." *Id*.

B. *Machinists* overruled *Briggs-Stratton* and established the freedom of collective bargaining—and the economic weapons underlying it—from state regulation.

These cases foreshadowed *Machinists*. The employer did not discipline the employees for engaging in the overtime strike but filed charges with the NLRB and the Wisconsin Employment Relations Commission. *Id.* at 135. The Commission concluded that the

concerted refusal to work overtime was neither arguably protected under Section 7 nor arguably prohibited under Section 8 of the Act. The Commission therefore concluded that it was free to apply state law prohibiting any "concerted effort to interfere with production" and found the union guilty of an unfair labor practice. *Id.* at 135-36.

In rejecting this conclusion, the Court identified two lines of preemption analysis, the first one resulting in the *Garmon* doctrine, and the second "focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.'" *Id.* at 140 (citing *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). The Court explained that this second line of analysis started with *Insurance Agents* (*id.* at 141) and "came full bloom" in *Teamsters v. Morton*. *Id.* at 145-46. The Court recognized that "self-help is of course the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable." *Id.* at 147 (citing *H.K. Porter Co. v. NLRB*, 375 U.S. 99, 109 (1970) and *American Ship Building*, 380 U.S. at 317). The Court summarized this history, stating:

> Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as

> unlawful." [NLRB *v.* Insurance Agents, at 498]. Rather, both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power," *id.*, at 497 (footnote omitted), or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." *Id.*, at 500.

Id. at 149-150 (fn. om.).

The Court concluded that the *Garmon* analysis, which looks to whether conduct is arguably protected under Section 7 or arguably prohibited under Section 8, "is largely inapplicable to the circumstances of this case." *Id.* at 155. Instead, the Court held that "the Union's refusal to work overtime is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated. . . ." *Id*.

The Court considered a prior case that adopted a theory quite similar to Petitioner's. In *Briggs-Stratton*, a union put economic pressure on the employer by "calling repeated special meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend." 336 U.S. at 249. "It was an essential part of the plan that this should be without warning to the employer or notice as to when or whether the employees would return," and this prevented the employer "from making any dependable production plans or delivery commitments." *Id.* A state administrative body and state courts held

the union's tactics illegal. Anticipating the *Garmon* doctrine, the Court concluded that because the tactic was "neither forbidden by Federal statute nor was it legalized and approved thereby," state courts could regulate the union's strike as they saw fit. *Id.* at 265.

Machinists overruled *Briggs-Stratton* and held that state courts had no power to regulate unions' timing of their strikes to disable employer production, even if the tactic was neither protected nor prohibited by the Act. 427 U.S. at 154. The union's decision about strike tactics was beyond state authority to regulate even if it was unprotected under Section 7 "because it is an activity Congress meant to leave unregulated," and the "availability or not of economic weapons that federal law leaves the parties free to use cannot 'depend upon the forum in which the (opponent) presses its claims.'" *Id*. at 152-53 (quoting *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249, 256 (1974)).

Machinists has been undisturbed but it was not the end of the story in this line of analysis. The Court followed *Machinists* in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). In *Golden State Transit*, taxi drivers struck on the same day the Los Angeles City Council was considering renewal of their employer's franchise from the City. *Id.* at 610. The strike and the renewal became intertwined and the City Council effectively conditioned renewal of the franchise on settlement of the strike. *Id.* at 610-11. The Court found that this action was invalid under the *Machinists* doctrine. It noted that 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 Golden State," just as "Golden State was entirely justified in using its economic power to withstand the strike in an attempt to obtain bargaining concessions from the union." *Id.* at 615. "But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help." *Id*. "[S]uch a condition—by a city or the National Labor Relations Board—contravenes congressional intent. . . ." *Id.* at 616. The Court referred to *Bus Employees v. Missouri* and *Bus Employees v. Wisconsin Board* and said that just as "a State may not ensure uninterrupted service to the public by prohibiting a strike by the unionized employees of a privately owned local transit company," a city may not "restrict a transportation employer's ability to resist a strike" by imposing a durational limit on its ability to withstand the strike economically. *Id.* at 618. Under Federal law, the employer and the union are "free to use their economic weapons against one another." *Id.* (citing *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983)).

The *Machinists* doctrine is fully applicable in this case. Even if there were truly a valid doctrine that employees must take affirmative precautions when they strike not to harm their employer's property by their cessation of work, this would only mean that failing to do so left the strike *unprotected* by Section 7. But failing to take such "reasonable precautions" is not an unfair labor practice under the Act, at least since *Insurance Agents* dispelled the view that striking

improperly (in the NLRB's view) amounted to bad-faith bargaining. The most that one can say is that a strike that fails to take such affirmative, property-saving actions is in that zone intended by Congress to be left unregulated by either federal or state law under *Machinists*.

An employer is not defenseless against unprotected activity. Strikes are rarely a complete surprise. "[A]n employer may 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.'" *NLRB v. Brown*, 380 U.S. at 283 (fn. om.). The employer may also steal the march on the union and lock out. *American Ship Building*, *supra*. If the activity is really unprotected, the employer may deal with it severely by firing the employees involved and taking many other types of punitive measures. *See*, *e.g.*, *Yale University*, 330 NLRB 246, 247 (1999).

C. *Machinists* distinguished non-violent strike conduct from affirmative acts to harm persons or property.

The Court in *Machinists* noted the "deeply rooted" or "peripheral concern" exceptions in its summary of *Garmon* but cautioned that "care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor

Relations Board," 427 U.S. at 138 (quoting *Bhd. of R.R. Trainmen, supra*, 394 U.S. at 383 n.19) and stated that the *Garmon* analysis "is largely inapplicable to the circumstances of this case." 427 U.S. at 155. It recognized, however, that there is a limit to the non-regulation of economic weapons. The States may "[p]olic[e] actual or threatened violence to persons or destruction of property." *Machinists*, 427 U.S. at 136. Each case cited for this proposition dealt with affirmative violent acts committed by strikers, not merely the withholding of labor. *See id*. at 136 n.2 (collecting cases). None of these cases—or any subsequent decisions of this Court—allowed regulation of non-violent striking because of its consequences. Instead, the Court stressed in *Machinists* that regulation was not allowed because the strike activity, although highly disruptive to plant operations, did not include "violence or threats of intimidation or injury to property," 427 U.S. at 155. Refusing overtime work and leaving the plant was "peaceful conduct . . . which must be free of regulation by the States. . . ." *Id*.

The Court had held previously that the violence exception should be construed quite narrowly in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). There, in the first two days of a miners strike, armed strikers "forcibly prevented the opening of the mine, threatened [the mine's superintendent], and beat[ ] an organizer for the rival union." *Id.* at 718. The mine's superintendent sued alleging a violation of LMRA Section 303 and a state law claim for "unlawful conspiracy . . . to maliciously, wantonly and willfully interfere

with his contract of employment and with his contract of haulage." *Id.* at 720. The Court held that the superintendent could recover from the union only by showing that it had conspired to commit violence or threats of violence. *Id.* at 729-35. The Court explained that the same cases later cited in *Machinists* "recognized the right of States to deal with violence and threats of violence appearing in labor disputes[.]" *Id.* at 729 (emphasis added). But it held that "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct." *Id.* The Court noted that in *Garmon*, "we read our prior decisions as only allowing 'the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order[.]'" *Id.* at 730 (citing *Garmon*, 359 U.S. at 247; emphasis added); *see id.* at 735 (describing "violence or threats of violence" as an "essential predicate" to recover against a union for strike-related misconduct).

Plainly, nothing in Petitioner's complaint comes anywhere close to meeting this standard. Its theory amounts to a resurrection of *Briggs-Stratton*.

IV. Petitioner's Theory Lacks Any Coherent Contours.

The contours of the alleged union duty to protect an employer's property are elusive, and not at all answered by the NLRB's existing "irresponsible" strike doctrine. Must there be developed, in every industry

and in every State and territory, some code of conduct, a set of rules a union must follow in order to avoid the implication of an intent to harm to physical plant and equipment and any personal property used in or produced by their work? Is a union required to give the employer enough advance notice that the employer can take steps to prevent such harm (which would of course also enable it to take other steps to minimize the effect of the strike by advance preparation)? Congress has specifically provided for this kind of notice in one industry, and only one. 29 U.S.C. § 158(g). Must employees time their strike actions to eliminate the risk of these harms? Congress has made specific provisions concerning the timing of strikes, 29 U.S.C. § 158(d), and the Court held that this precludes the States from imposing their own rules on timing. *Auto Workers v. O'Brien*, *supra*. What affirmative steps must employees take to guard the property against injury from natural elements, spoilage, theft and other hazards? Petitioner would have the state and territorial courts develop these industry strike codes on a trial-and-error basis with tort liability in the balance. To state the proposition shows its utter inconsistency with maintenance of the right to strike Congress has granted and protected, and its intent that employer and union economic weapons remain deregulated.

It should not be thought that risks to property from strikes exist uniquely in a few cases such as this one involving ready mix concrete. They are omnipresent in every industry. Take the employees represented by *Amicus* UNITE HERE, for example. It represents

about 100,000 workers in the hotel-casino business. These enterprises run 24 hours a day, 7 days a week. Many perishables are in stock to serve the food and beverage needs of customers.[8] When could hotel-casino employees strike without the risk that some product will be spoiled?

Take *Amicus* SMART's construction work as another example. Much of this work is conducted outdoors, exposed to potential degradation from sun, rain, snow and particulate-laden winds. When construction workers strike and leave a job in progress, what must they do to make sure that none of the equipment or materials of the job is harmed? What prior warning must they give and how much of their time should they take in battening down the job? Must they take these measures even though the measures may not be part of their normal job duties and not requested or even desired by their employers? Are they permitted (or required) to negotiate with their employers over the extent of the precautions they are required to take?

[8] *E.g.*, according to the Nevada Gaming Control Board, the 19 largest Las Vegas Strip casinos food sale cost was $236,689,473 in 2021—an average food sale cost of $648,464.31 per day. Nevada Gaming Control Board, *Nevada Gaming Abstract 2021* 58 (2021).

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed or the petition should be dismissed.

The implications of Petitioner's theory are not confined to restraints on the strike weapon. The lockout is clearly not prohibited or protected by the NLRA and cannot be saved from state regulation by *Garmon*. It is therefore particularly vulnerable to new theories of liability unless it is saved by *Machinists*. If an employer locks out by surprise, it could be held liable under some inventive tort theory—just as Petitioner is trying to establish a new tort theory in this case. An employer that timed its lockout to coincide with the expiration of a rent moratorium to maximize pressure might face a jury on whether this intentionally interfered with its workers' leases. Tort law is notoriously mutable. But even absent creative lawyering, an employer might fall victim to state fair-scheduling, reporting-pay, or WARN laws. *See*, *e.g.*, S.F. Police Code Art. 33G (requiring premium pay if "formula retail" employer changes work schedule with less than a week's notice); Cal. Lab. Code, §§ 1400 *et seq*. (California WARN Act, containing no express exception for lockouts); *cf*. 29 U.S.C. § 2103 (federal WARN Act "shall not apply to a plant closing or mass layoff if . . . the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter."). The same sort of regulatory interference could be imposed on employers exercising another weapon in management's arsenal: unilaterally changing working conditions

after an impasse is reached. *See Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 425-26 (1982). One thing that is certainly true about labor law and labor struggles is that all economic warfare is a two-way street, as will be attempts to upset the balance that Congress struck, based on labor's and management's relative state or local political power, the varying approaches to the law of torts, and the notions of juries.

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