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 *AMICI CURIAE* ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, AND FEDERAL COURTS PROFESSORS SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are law professors who research, write on, and teach administrative law, constitutional law, and federal courts, among other subjects. *Amici*'s interest arises from their engagement with jurisdictional issues and the proper relationship between state courts and specialized expert agencies created by Congress. *See* Appendix A. This brief addresses issues that are within *amici*'s particular areas of scholarly expertise.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Court's century-old primary jurisdiction doctrine, it is appropriate for courts to stay or dismiss without prejudice claims that Congress intended for a specialized agency to address in the first instance as part of a uniform regulatory scheme. In *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), the Court invoked the principles underlying the primary jurisdiction doctrine to conclude that Congress intended for claims aimed at conduct arguably protected or prohibited by the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151–69, to be heard initially by the National Labor Relations Board (NLRB or Board). Far from an anomaly, *Garmon* in fact rests on longstanding and settled principles aimed at minimizing the potential for conflict among different courts and between courts and agencies.

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief pursuant to U.S. Supreme Court Rule 37.3(a).

The Washington Supreme Court's decision in this case is grounded in these principles. In concluding that the Board should take the initial pass at Petitioner's claims arising out of Respondent's strike activity, the Washington Supreme Court correctly observed that Petitioner's claims require the sort of context-specific and policy-driven inquiry that Congress intended for the specialized agency to take on first. In fact, Respondent had already initiated Board proceedings by the time that Petitioner commenced this action, and the Board's General Counsel has since issued a complaint against Petitioner. The Washington Supreme Court was therefore correct to give the Board the initial opportunity to resolve the parties' dispute, and its prudent decision to do so should be affirmed.

Moreover, neither Petitioner nor its *amici* provide any justification for revisiting or revising the bedrock principles that guided the Washington Supreme Court. Like the primary jurisdiction doctrine on which it relies, *Garmon* is now longstanding and well settled. This Court should not disrupt the careful balance struck in *Garmon* and refined in decades of decisions since, or take any action that might redirect commonplace labor disputes from the Board to the multitude of state courts, and thereby contravene the principles of uniformity and consistency embodied in the Act.

ARGUMENT

I. The Washington Supreme Court correctly determined that Petitioner's claims should be reviewed by the Board in the first instance.

The decision below rests on established and time-honored principles governing the proper allocation of decision making between courts and administrative agencies. In certain areas of regulation, Congress has committed the uniform interpretation and enforcement of the overarching statutory scheme to a specialized agency. To serve Congress's interest in uniformity—and so that courts may obtain the benefit of the agency's expertise and experience—this Court has recognized that the designated agency should have the initial opportunity to adjudicate issues potentially arising within those particular regulatory contexts. Because the Washington Supreme Court correctly applied the foregoing principles in giving the Board the first chance to resolve the parties' underlying labor dispute, this Court should affirm.

A. The Court's primary jurisdiction doctrine has long carried out Congress's intent for certain regulatory schemes to be administered uniformly by expert agencies.

For over 115 years, this Court has recognized that where Congress intends for an area of law to be regulated uniformly by a specialized administrative agency, it is appropriate for that agency to take the initial look at claims potentially falling within the agency's statutory mandate.

The Court first articulated this straightforward principle—which forms the basis of the Court's so-

called primary jurisdiction doctrine—in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). That case involved a state law challenge to an interstate freight rate that had been promulgated by a common carrier pursuant to the Interstate Commerce Act of 1887 (ICA), Pub. L. 49-104, 24 Stat. 379. As the Court explained, the "undoubted … principal purpose[]" of the ICA was "to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference" in interstate freight rate setting. *Abilene Cotton*, 204 U.S. at 439. And "the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a *uniform* application to all." *Id.* (emphasis added).

Describing the "fundamental question" presented by the case as "the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate," the Court began by recognizing that the ICA necessarily abrogated "pre-existing right[s] … so repugnant to the statute that the survival of such right[s] would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Id.* at 436, 437. Upon examining the text of the ICA, the Court observed that the statute required common carriers to establish and publish reasonable, uniform rates, and then to file their rates with the Interstate Commerce Commission (ICC). *See id.* at 437–38. The Court further observed that the statute vested the ICC with the power to enforce the ICA, including the power to hear, investigate, and remedy complaints of violations of the statute. *See id.*

Emphasizing "the administrative power conferred upon the Commission, and … the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed," the Court concluded that the ICC must have the first opportunity to address challenges to the reasonableness of interstate rates. *Id.* at 441. Otherwise, "unless all courts reached an identical conclusion, a uniform standard of rates … would be impossible." *Id.* at 440.[2]

Since *Abilene Cotton*, the Court has continually reaffirmed that Congress has created certain specialized administrative agencies with the intention of giving those agencies the first opportunity to resolve issues potentially arising within their purview. As the Court has also repeatedly recognized, not only does Congress's approach prevent "divergent conclusions … by the various courts" and "divergence between the action of the [agency] and the decision of a court," *id.* at 440, 441, but it allows for courts to benefit from the experience and expertise of the specialized agency.

For example, in *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), the Court affirmed the dismissal of federal antitrust claims on the ground that Congress intended for such claims—which alleged that the respondents charged lower maritime shipping rates to shippers who agreed to use

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[2] Although the ICA elsewhere stated that the statute supplemented rather than displaced preexisting rights, the Court concluded that those provisions must be construed narrowly in light of the statute's overriding concern for uniform rate setting and the powers conferred upon the ICC. *See Abilene Cotton*, 204 U.S. at 441–48 (discussing §§ 9 and 22 of the ICA); *see also, e.g.*, *id.* at 446 ("[T]he act cannot be held to destroy itself.").

respondents' shipping lines exclusively—to be heard initially by the United States Shipping Board, the agency tasked with overseeing such rates under the federal Shipping Act. *See id.* at 483–84.

In so doing, the Court again noted Congress's concern for regulatory uniformity as reflected in the statute, especially the powers conferred upon the Shipping Board to interpret and enforce the statute. *See id.* The Court also observed that the Shipping Act gave rise to "questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge." *Id.* at 485. Because such questions were "well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade," the Court concluded that that body should be given primary jurisdiction over "allegations [that] either constitute direct and basic charges of violations of these provisions [of the Shipping Act], or are so interrelated with such charges as to be, in effect, a component part of them." *Id.*

The Court made similar observations in *Far East Conference v. United States*, 342 U.S. 570 (1952), which also involved an antitrust challenge to maritime shipping rates. In concluding that such claims should likewise be dismissed, the Court found that the claims were so closely intertwined with the Shipping Act as to warrant application of the "principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Id.* at 574. Again, the Court emphasized the important purposes served by invoking the agency's primary jurisdiction:

The doctrine effectuates Congress's interest in "[u]niformity and consistency in the regulation of business entrusted to a particular agency," and allows for "the limited functions of review by the judiciary" to be "more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Id.* at 574–75.

These two purposes—"the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions," and "the expert and specialized knowledge of the agencies involved"—thus lie at the heart of the primary jurisdiction doctrine and drive the doctrine's application. *United States v. W. Pac. Ry. Co.*, 352 U.S. 59, 64–65 (1956) (noting that these purposes "have often been given expression by this Court"). Where "the reasons for the existence of the doctrine are present and … the purposes it serves will be aided by its application in the particular litigation," primary jurisdiction "comes into play." *Id.* at 64.[3]

[3] Accordingly, in determining whether an agency's primary jurisdiction should apply, both this Court and the Courts of Appeals have consistently focused on Congress's intent to commit the uniform administration of a statute to a specialized, expert agency. *See, e.g.*, *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 305 (1973) (citing *W. Pac. Ry. Co.*, 352 U.S. at 64–65; *Far E. Conf.*, 342 U.S. at 574–75) ("These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique market-place involved in this case."); *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113, 114–15 (1973) (citing *Ricci*, 409 U.S. 305–07) (similar); *Weinberger v. Bentex Pharms., Inc.*, 412 U.S. 645,

B. *Garmon*'s "arguably protected or prohibited" test is rooted in the same principles as the primary jurisdiction doctrine.

The year after *Far East Conference* was decided, the Court considered whether state labor law could prohibit conduct that federal labor law also prohibited. *See Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776 (A. F. L.)*, 346 U.S. 485, 486 (1953). Concluding that such a state law impermissibly conflicted with the NLRA as amended, the Court echoed many of the same observations it had made in its earlier primary jurisdiction decisions regarding the import of Congress committing the administration of a uniform regulatory scheme to a specialized, expert agency:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and

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654 (1973) (noting "peculiar expertise of … administrative agency" and need for "uniformity and consistency" (second quotation quoting *Far E. Conf.*, 342 U.S. at 574)); *Conservation L. Found., Inc. v. Exxon Mobil Corp.*, 3 F.4th 61, 72 (1st Cir. 2021); *Palmer v. Amazon.com, Inc.*, 51 F.4th 491, 506 (2d Cir. 2022); *Consol. Rail Corp. v. Grand Trunk W. R.R. Co.*, 607 F. App'x 484, 491 (6th Cir. 2015); *United States ex rel. Sheet Metal Workers Int'l Ass'n, Loc. Union 20 v. Horning Invs., LLC*, 828 F.3d 587, 592 (7th Cir. 2016); *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 909 (8th Cir. 2015); *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015); *Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1277 (10th Cir. 2018); *Sierra v. City of Hallandale Beach*, 904 F.3d 1343, 1351 (11th Cir. 2018).

> notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.... *A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.*

Id. at 490–91 (emphasis added); *see W. Pac. Ry. Co.*, 352 U.S. at 64–65; *Far E. Conf.*, 342 U.S. at 573–75; *Cunard*, 284 U.S. at 480–85; *Abilene Cotton*, 204 U.S. at 237–38. In fact, the Court expressly recognized in *Garner* that its decision was consistent with the principles set forth in *Abilene Cotton*, which first established the primary jurisdiction doctrine in the context of the ICA. *See Garner*, 346 U.S. at 496–97 & 497 n.21 (citing *Abilene Cotton*, 204 U.S. at 443–44) (noting that in both labor law and rate setting, Congress intended for "federal statute law applied by administrative procedures" to displace "individual suits in courts to enforce common-law doctrines of private right").

The NLRA reflects a similar structure to the ICA, and *Garmon* flows directly from the same principles set forth in *Abilene Cotton* and its progeny. By reserving "activity ... arguably subject to § 7 or § 8 of the Act" for the Board's initial review, *Garmon* gives the same due "regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed

with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Garmon*, 359 U.S. at 242 (calling this fact "the unifying consideration of [the Court's] decisions" in this area); *see id.* at 242–43 (quoting *Garner*, 346 U.S. at 490–91). As the Court has frequently emphasized, courts must "recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life[,] and of '[appraising] carefully the interests of both sides of any labor management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations.'" *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (citations omitted and second alteration in original).[4]

Accordingly, as in the Court's earlier primary jurisdiction cases, "courts are not primary tribunals" to

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[4] See also, e.g., *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990) ("This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy.... This Court therefore has accorded Board rules considerable deference." (citations omitted)); *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 100 (1985) ("Because of the Board's 'special competence' in the field of labor relations, its interpretation of the Act is accorded substantial deference."); *NLRB v. Loc. Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350 (1978) ("Courts may prefer a different application of the relevant sections, but '[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'"); *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 180 (1962) ("The [policy] considerations involved in answering these questions are largely of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.").

determine "whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections." *Garmon*, 359 U.S. at 244. Rather, "[i]t is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 244–45; *see also id.* at 242 ("To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration."). Thus, "the considerations underlying *Garmon* are similar to"—if not the same as—"those underlying the primary-jurisdiction doctrine." *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 199 n.29 (1978).

Garmon's "arguably protected or prohibited" test also operates, at least initially, in much the same way that the primary jurisdiction doctrine has historically operated. Similar to other contexts where the Court has invoked an agency's primary jurisdiction, *see, e.g.*, *Cunard*, 284 U.S. at 252 (invoking Shipping Board's primary jurisdiction even where "[i]t may be … that in an original proceeding before the Board, the allegations upon which petitioner relies may not be sustained"), *Garmon* applies even to "ambiguous situations" where the NLRA's reach is not immediately clear, *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 389–90 (1986). In fact, the Court has used the same terms as in *Garmon* to describe the potential reach of other agencies' primary jurisdiction. *See Ricci*, 409 U.S. at 299–300 (noting, in case involving Commodity Exchange Commission, that primary jurisdiction concerns "arise[] when conduct seemingly

within the reach of [certain] laws is also *at least arguably protected or prohibited* by another regulatory statute enacted by Congress" (emphasis added)).

Moreover, both *Garmon* and the Court's earlier primary jurisdiction cases contemplate that an action may be dismissed pending review by the specialized administrative agency designated for such task by Congress. *Compare, e.g.*, *Sears*, 436 U.S. at 203 (characterizing *Garmon* as requiring state courts to take "jurisdictional hiatus" pending completion of Board proceedings and any subsequent federal appellate review), *with Far E. Conf.*, 342 U.S. at 577 (ordering district court to dismiss action after discerning "no purpose" in "hold[ing] the … action in abeyance … while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued"), *and Cunard*, 284 U.S. at 252 (affirming motion to dismiss on primary jurisdiction grounds). And just as primary jurisdiction preserves the jurisdiction of state (and federal) courts to resolve claims after the specialized administrative agency has conducted its initial review, *see, e.g.*, *W. Pac. Ry. Co.*, 352 U.S. at 63–64; *Far E. Conf.*, 342 U.S. at 576–77, the same result obtains under *Garmon* if the Board concludes that the activity is neither protected nor prohibited by the Act. *See Davis*, 476 U.S. at 397 ("[I]f the Board decides that the conduct is not protected or prohibited … the court [may] entertain the litigation.").

The Court's primary jurisdiction precedents also contemplate that the agency's decision—like the decisions of the NLRB—may be the final word in some matters, insofar as the agency's decision (and any related relief) may eliminate the need for further litigation. *See Far E. Conf.*, 342 U.S. at 577 (noting

that complainants may refile suit after "the proceeding before the [agency] and subsequent judicial review or enforcement of its order"… "if appropriate" to do so). And even where the agency's decision does not end the dispute, the matters that remain for judicial resolution may be "limited": As the Court has explained, the role of the judiciary in primary jurisdiction cases is to assign "legal consequences" to "facts after they have been appraised by specialized competence." *Id.* at 574; *see, e.g.*, *Abilene Cotton*, 204 U.S. at 440 (explaining how it would be "impossible" to achieve Congress's goal of uniformity if "various courts [were] called upon to consider the subject as an original question").

Finally, consistent with general principles governing agency decision making, decisions rendered by the NLRB and decisions rendered by agencies pursuant to their primary jurisdiction are both subject to review by the Courts of Appeals and this Court. *Compare, e.g.*, *Garmon*, 359 U.S. at 245 (emphasizing that NLRB decisions are "subject to appropriate federal judicial review"), *with, e.g.*, *Far E. Conf.*, 342 U.S. at 577 ("An order of the [agency] will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari.").

To be sure, the "consequences" of the primary jurisdiction doctrine may differ from those of *Garmon* in certain respects. *Sears*, 436 U.S. at 199 n.29. As noted, under the traditional primary jurisdiction doctrine, courts may retain jurisdiction to decide a matter after the agency proceedings draw to a close, presuming that the agency's decision (and any subsequent appellate review) does not resolve the dispute. *But see Far E. Conf.*, 342 U.S. at 574 (emphasizing "limited"

nature of court's role after agency's factfinding). Under *Garmon*, where "the Board decides, subject to appropriate federal judicial review, that conduct *is* protected by § 7, or prohibited by § 8," the state courts lack jurisdiction to hear claims arising from such conduct or activity. *Garmon*, 359 U.S. at 245 (emphasis added); *see id.* at 243–44 (describing narrow exceptions to these rules). Moreover, whereas courts may have some discretion whether to invoke an agency's primary jurisdiction in certain circumstances, *see Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673–74 (2003) (Breyer, J., concurring in part and concurring in judgment), *Garmon* gives courts no such discretion, *see Garmon*, 359 U.S. at 245 ("When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts *must* defer to the exclusive competence of the National Labor Relations Board ...." (emphasis added)).

But to the extent that these features of *Garmon* are materially distinctive, *see, e.g.*, *Far E. Conf.*, 342 U.S. at 577 (noting that primary jurisdiction doctrine may also preclude further judicial proceedings), they are either grounded in "[c]onventional conflict pre-emption principles," *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (noting that such principles "require pre-emption 'where compliance with both federal and state regulations is a physical impossibility, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (alteration in original)), or otherwise warranted by Congress's heightened concern for "state interference with national [labor] policy," *Garmon*, 359 U.S. at 245.

As *Garmon* explains, "[w]hen it is clear or may fairly be assumed that the activities which a State

purports to regulate are protected by § 7 … or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield," because "leav[ing] the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* at 244. That same danger is present even where the Board has failed "to define the legal significance under the Act of a particular activity": In such circumstances, "[t]he governing consideration" remains that "allow[ing] the States to control activities that are *potentially* subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246 (emphasis added).

C. The Washington Supreme Court's decision is driven by the same concerns underlying *Garmon* and the primary jurisdiction doctrine as a whole.

In applying *Garmon* below, the Washington Supreme Court did not stray from the principles animating *Garmon* or the Court's earlier primary jurisdiction decisions. To the contrary, the Washington Supreme Court expressly (and correctly) observed that "courts are not the proper forum for deciding whether particular conduct is subject to section 7 or section 8 in the first instance," J.A. 153 (citing *Garmon*, 359 U.S. at 244–45), and cited "the need to avoid even the potential risk of interference with the development of national labor policy under the expertise of the Board" as a basis for its decision, J.A. 152 (citing *Garmon*, 359 U.S. at 243–44). The Washington Supreme Court's decision is thus firmly rooted in both

Garmon and this Court's primary jurisdiction precedents, and should be affirmed.

Indeed, as the Washington Supreme Court explained, resolving Petitioner's claims would eventually require precisely the type of inquiry that might lead to impermissible "divergence" among courts and between courts and the Board, *Abilene Cotton*, 204 U.S. at 441:

> To fully analyze whether the conduct is unprotected under section 7 in this case, we would need to engage with the facts as a matter of first impression, balancing the economic pressure against the strikers' legitimate interest. Based on a full factual analysis, we might determine that the strike activity was unprotected because the drivers did not take reasonable precautions to protect Glacier's product or trucks. On the other hand, the strike could also be viewed as protected because the concrete loss was incidental damage given the perishable nature of the concrete. In any event, *Garmon* makes clear that this kind of fact-specific determination is a function of the Board *in the interest of uniform development of labor policy*.

J.A. 165 (emphasis added). Accordingly, rather than apply its own "procedures and attitudes towards [the parties'] labor controvers[y]," the Washington Supreme Court properly yielded to the Board's "centralized administration" of the Act. *Garmon*, 359 U.S. at 242–43; *see also, e.g.*, *id.* at 245 ("It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner.").

The Washington Supreme Court's cautious approach below is similar to that taken by the Court in *Cunard*, which was likewise before the Court on a motion to dismiss. *See* 284 U.S. at 478. In affirming dismissal of the complaint, the Court rejected the argument that simply because the agency had "already determined that an agreement similar to the one here involved is unlawful under the Shipping Act … the courts may take jurisdiction of the case without further preliminary resort to the [Shipping] Board." *Id.* at 487–88. Besides noting that the agency's prior decision "did not involve *this* agreement or *these* parties," the Court also placed particular emphasis on the fact that the prior case "was decided after a full hearing," whereas the instant case "arises upon a motion to dismiss, which admits the facts, so far as they are well pleaded, only for the sake of the argument." *Id.* at 488 (emphases added). And because the Court did not know "[w]hat might be disclosed … upon a hearing," the Court declined "to conjecture" as to how the agency might rule. *Id.* (noting that "in an original proceeding before the [Shipping] Board, the allegations upon which petitioner relies may not be sustained, or may be so qualified as to render the [prior] decision entirely inapplicable").

The Washington Supreme Court's refusal to engage in similar conjecture here was especially prudent, as related proceedings before the NLRB had already been initiated at the time that Petitioner filed its complaint. *Compare* U.S. Br. App. 2a (reflecting that Respondent filed initial charge against Petitioner regarding underlying dispute on July 24, 2017, and filed amended charge on September 6, 2017), *with* J.A. 27 (reflecting that Petitioner filed its state court complaint on December 4, 2017). And the NLRB General

Counsel has since issued a complaint against Petitioner, alleging that Petitioner's conduct in the parties' dispute violated the Act. *See* U.S. Br. App. 1a–7a. The risk of "incompatible or conflicting adjudications"—and the resulting "danger of conflict with national labor policy"—is thus particularly high in this case, and the Washington Supreme Court was right to avoid such hazards. *Garmon*, 359 U.S. at 243, 246; *see Davis*, 476 U.S. at 398 (noting that Board's initial jurisdiction under *Garmon* may properly be invoked where there is sufficient "factual or legal showing").[5]

In sum, although there may be some circumstances where a court may reasonably discern from the pleadings that adjudicating the action will not lead to any potential conflict with related Board proceedings, *see, e.g.*, *Sears*, 436 U.S. at 201–02 (finding "no risk of overlapping jurisdiction" where "employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board"), this case does not present those circumstances. The Court should therefore affirm the decision below.

II. There is no reason for this Court to disrupt the careful balance struck by *Garmon* and its progeny.

The foregoing discussion establishes that the Washington Supreme Court faithfully applied the principles set forth in *Garmon* and the Court's earlier primary jurisdiction cases, and its decision should be

[5] As noted, if the Board's ultimate decision regarding the parties' dispute proves to be erroneous, then the Courts of Appeals and this Court would have ample opportunity to review that decision.

affirmed on that basis. But insofar as Petitioner and its *amici* are urging the Court to revisit or revise the principles on which that decision is based, the Court should decline to do so.

Besides drawing from the primary jurisdiction doctrine, the Court's decision in *Garmon* was also informed by its past experience with previous failed approaches to federal labor law preemption. *See Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 291 (1971). That experience "taught" the Court "that each of these [previous] methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application." *Id.* Thus, in adopting the "arguably protected or prohibited" standard in *Garmon*, the Court sought not only to give effect to Congress's directive that the Board establish a national uniform labor policy, but also to promulgate "a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." *Id.* at 290.

The Court's efforts have largely succeeded: Over time, the lower courts have developed a consistent understanding of *Garmon*'s application and a consensus has emerged regarding the local interests that justify certain exceptions to the Board's exclusive jurisdiction over conduct arguably prohibited by the Act. *See, e.g.*, *Davis*, 476 U.S. at 389 (*Garmon* "set out the now well-established scope of NLRA pre-emption"); *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 801 (3d Cir. 1996) (same); *Richardson v. Kruchko & Fries*, 966 F.2d 153, 156 (4th Cir. 1992) (same); *Connell v. U.S. Steel Corp.*, 516 F.2d 401, 404 (5th Cir. 1975) (same); *Sears, Roebuck & Co. v. Solien ex rel. NLRB*, 450 F.2d

353, 355 (8th Cir. 1971) (similar); *Senter v. Hughes Aircraft Co.*, 53 F.3d 340, at *3 (9th Cir. 1995) (Table) (same); *see also, e.g.*, *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Loc. 54*, 468 U.S. 491, 502–03 (1984) (discussing established exceptions); *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 162 A.3d 909, 918–24 (Md. 2017) (similar); *Weise v. Wash. Tru Sols., LLC*, 192 P.3d 1244, 1248–49, 1252–53 (N.M. Ct. App. 2008) (similar); *Foreman v. AS Mid-Am., Inc.*, 586 N.W.2d 290, 300–01 (Neb. 1998) (similar).

At the same time, *Garmon* has also amply served the federal interests animating the Act by efficiently funneling labor-management disputes arising under the Act to the Board for its initial expert review. And while this case involves a *labor union*'s assertion of *Garmon* preemption, *Garmon*'s scope is of course not so limited. In fact, *Garmon* is also often invoked by *employers* seeking to preempt lawsuits by unions and workers on the ground that such actions are more appropriately suited for resolution by the Board rather than state courts. As Judge Wilkinson has noted, "[s]tate law affords an almost limitless variety of claims that could be asserted against the activities of both labor and management, and through the years both sides have invoked the principles of *Garmon* preemption to avoid the specter of inconsistent legal obligations, procedures, and remedies." *Richardson*, 966 F.2d at 156.

Indeed, courts frequently address—and dismiss as preempted under *Garmon*—state statutory or common law claims by workers who allege that they were disciplined or fired for engaging in protected, concerted activity, holding that the Act assigns the Board

exclusive jurisdiction to adjudicate such claims.[6] Meanwhile, adverse employer actions continue to generate thousands of Board charges each year.[7] Were it

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[6] See, e.g., *Carr v. Metals*, 351 F. App'x 128, 129–30 (7th Cir. 2009) (claim of retaliation for participating in union activities subject to NLRB's primary jurisdiction); *Satterfield v. W. Elec. Co.*, 758 F.2d 1252, 1253–54 (8th Cir. 1985) (tortious interference claim against third-party business based on termination allegedly at third-party's request for distributing anti-union literature preempted); *Moreno v. UtiliQuest, LLC*, 29 F.4th 567, 574–75 (9th Cir. 2022) (terminated worker's claims for intentional misrepresentation, fraud, whistleblowing retaliation, and wrongful termination in violation of public policy preempted); *Guinan v. Dean Foods of Cal., Inc.*, 16 F. App'x 627, 629 (9th Cir. 2001) (claims of wrongful discharge for complaints about employer's violations of law covered in collective bargaining agreement preempted); *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348, 1350 (9th Cir. 1984) (claim of retaliatory discharge for passing out petitions and voicing employee complaints preempted); *Viestenz v. Fleming Cos., Inc.*, 681 F.2d 699, 701–02 (10th Cir. 1982) (claim of wrongful discharge because of union activity in violation of public policy preempted); *Bimler v. Stop & Shop Supermarket Co.*, 965 F. Supp. 292, 297–99 (D. Conn. 1997) (claim of wrongful suspension for discussing concerns with management preempted); *Veal v. Kerr-McGee Coal Corp.*, 682 F. Supp. 957, 960–61 (S.D. Ill. 1988), *aff'd*, 885 F.2d 873 (7th Cir. 1989) (claim of retaliatory discharge for joining union preempted); *Smith v. Westlake Vinyls, Inc.*, 403 F. Supp. 3d 625, 633–35 (W.D. Ky. 2019) (claim of wrongful discharge for using grievance process preempted); *Smith v. Excel Maint. Servs.*, 617 F. Supp. 2d 520, 525–27 (W.D. Ky. 2008) (claim of wrongful discharge for organizing meeting to discuss issues affecting job performance and morale preempted); *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479, 482–83 (E.D. Mich. 1982) (former employee's breach of contract claim for discharge without good cause preempted because discharge allegedly based on union activity); *Elliott v. Tulsa Cement, LLC*, 357 F. Supp. 3d 1141, 1151–54 (N.D. Okla. 2019) (claim of wrongful termination for filing NLRB charges and union grievances preempted); *Class v. Ranger Am. Armored Servs., Inc.*, 245 F. Supp. 2d 370, 373–74 (D.P.R.

2003), *aff'd sub nom. Martinez-Class v. Ranger Am. Armored Servs., Inc.*, 89 F. App'x 746 (1st Cir. 2004) (former employee's claim that he was discharged for union activity, among other reasons, preempted); *Luke v. Collotype Labels USA, Inc.*, 72 Cal. Rptr. 3d 440, 444–45 (Cal. Ct. App. 2008) (wrongful termination claim based on discussions with fellow employees about workplace safety preempted); *Rodriguez v. Yellow Cab Coop., Inc.*, 253 Cal. Rptr. 779, 782–83 (Cal. Ct. App. 1988) (wrongful termination claim by employee claiming retaliation for testimony before utilities commission and instigating class action against employer preempted); *Young v. Caterpillar, Inc.*, 629 N.E.2d 830, 830, 833–34 (Ill. App. Ct. 1994) (class of individual employees' breach of contract claims based on failure to reinstate some striking employees preempted); *Humphries v. Pay & Save, Inc.,* 261 P.3d 592, 596–97 (N.M. Ct. App. 2011) (terminated employee's contract, misrepresentation, wrongful termination, and tortious interference with contractual relations claims preempted); *De Los Santos v. Heldenfels Enters., Inc.*, 632 S.W.3d 584, 588, 596–97 (Tex. Ct. App. 2020) (claim of retaliation by employee who passed along co-worker's petition seeking more vacation time preempted); *Robbins v. Harbour Indus., Inc.*, 556 A.2d 55, 58 (Vt. 1988) (claims of breach of contract and wrongful discharge based on union organizing preempted).

[7] See, e.g., NLRB, NLRB Case Activity Reports: Unfair Labor Practice Cases by Filing Party per Fiscal Year (2022) (more than 18,000 charges by individuals and unions per year in 2017 to 2019), https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-case-intake-by-filing-party (last visited Dec. 6, 2022); NLRB, Statistical Tables – FY 2010, tbl. 2 (6,531 charges in fiscal year 2010 under section 8(a)(3), for unlawful changes in conditions of employment, discharge, or discipline), https://www.nlrb.gov/sites/default/files/attachments/pages/node-149/table2.pdf (last visited Dec. 6, 2022); see also McNicholas et al., Economic Policy Institute, Unlawful: U.S. employers are charged with violating federal law in 41.5% of all union election campaigns, at 5-6 & tbl. 1 (Dec. 11, 2019) (reporting that in 3,620 NLRB union elections in 2016 or 2017, 19.9% involved at least one charge for illegally terminating workers for union activity and 29.6% involved charges for illegal retaliation, changes in employment conditions,

not for *Garmon*, it is likely that many of those charges would be brought instead as lawsuits raising claims such as wrongful termination, breach of contract, and tortious interference with contract or business relations. Similarly, supervisors who are currently barred under *Garmon* from bringing wrongful termination claims based on allegations that they were fired for refusing to engage in anti-union conduct would also find a newly opened pathway for litigating their claims.[8]

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or discharge); Schmitt & Zipperer, Ctr. for Econ. & Pol'y Rsch,, Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007 at 1 (2009) ("In 2007, the most recent year for which data is available, 30 percent of union election campaigns had an illegal firing. Pro-union workers faced about a 2.3 percent chance of being illegally fired during the course of the campaign.").

[8] See, e.g., *Chavez v. Copper State Rubber of Ariz., Inc.*, 897 P.2d 725, 731–33 (Ariz. Ct. App. 1995); *Kelecheva v. Multivision Cable T.V. Corp.*, 22 Cal. Rptr. 2d 453, 456–57 (Cal. Ct. App. 1993); *Henry v. Intercontinental Radio, Inc.*, 202 Cal. Rptr. 328, 331–33 (Cal. Ct. App. 1984); *Venable v. GKN Auto.*, 421 S.E.2d 378, 380–81 (N.C. Ct. App. 1992); *Kilb v. First Student Transp., LLC*, 236 P.3d 968, 971–73 (Wash. Ct. App. 2010); *Lontz v. Tharp*, 647 S.E.2d 718, 722–23 (W. Va. 2007). For examples of other types of claims against employers commonly held preempted, see also, e.g., *Kolentus v. Avco Corp.*, 798 F.2d 949, 960–62 (7th Cir. 1986) (claim of common law fraud preempted); *Larranaga v. Nw. Defs. Ass'n*, 4 F. App'x 391, 393 (9th Cir. 2001) (claims based on alleged breach of obligation to grant pay increases and benefits preempted); *Barbieri v. United Techs. Corp.*, 771 A.2d 915, 933–36 (Conn. 2001) (class of breach of contract claims based on wage cuts preempted because arguably, even if not clearly, covered by Act); *Chung v. McCabe Hamilton & Renny Co., Ltd.*, 128 P.3d 833, 842–45 (Haw. 2006) (claims of abuse of process and malicious prosecution by shop steward against whom restraining order was obtained preempted); *Hotel Emps.*

But courts have repeatedly held—and Congress reaffirmed shortly after *Garmon* was decided, *see* Resp. Br. 38–39—that these are matters for the Board to resolve, not the "multiplicity" of state courts.[9] *Garmon*, 359 U.S. at 243 (emphasizing "diversities and conflicts" that would result). Thus, the Court should reject any suggestion to narrow *Garmon*, either by limiting the scope of conduct that *Garmon* reaches or by expanding the local-feeling exception. *See* U.S. Br. 28–30; Resp. Br. 32–47. Otherwise, the Court risks upsetting the careful balance that *Garmon* initially struck—and subsequent decades of caselaw have since refined—and shifting the battleground for many common labor disputes from the Board to state courts, potentially leading to a flurry of state court suits by employers, employees, and unions alike.

CONCLUSION

The Court should affirm the Washington Supreme Court's decision.

& Rest. Emps., Loc. 8 v. Jensen, 754 P.2d 1277, 1281–83 (Wash. Ct. App. 1988) (claim for tortious interference with contract and business expectancy based on transfer of restaurant ownership in course of negotiation for new collective bargaining agreement preempted).

[9] See, e.g., *Kolentus*, 798 F.2d at 961 (common law fraud); *Lumber Prod. Indus. Workers Loc. No. 1054 v. W. Coast Indus. Rels. Ass'n, Inc.*, 775 F.2d 1042, 1049 (9th Cir. 1985) (tortious interference with prospective contractual relationship); *Barbieri*, 771 A.2d at 937–38 (breach of contract); *Kilb*, 236 P.3d at 974–75 (wrongful discharge in contravention of express state public policy).

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