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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As Glacier's opening brief explained, the NLRA does not impliedly preempt a state tort claim alleging that a union intentionally destroyed an employer's property by specifically designing a work stoppage for that very purpose. Rather than respond directly, the Union spends the first half of its brief spinning a new theory: Even if *Garmon* does not fully "extinguish" a claim for intentional property destruction, it still imposes an implied "jurisdictional hiatus" that precludes the state court from resolving the truth of Glacier's factual allegations. Only then does the Union pivot to arguing that the NLRA immunizes it from liability even if it did intentionally destroy Glacier's property as alleged. The Union is wrong on both counts.

Under ordinary preemption principles, federal law displaces state law only when they *actually* conflict—as when a state tort claim seeks to punish conduct that is actually protected by federal law. *Garmon* went further—displacing state court jurisdiction if the alleged tortious conduct is even "arguably" protected—in order to promote uniform interpretation of the NLRA by preserving the Board's authority to resolve *legal* ambiguities in the scope of the law's protections. Thus, where the NLRA is ambiguous about whether it protects alleged tortious conduct, the Board typically resolves the ambiguity first. But where the statute is clear and the conduct that is alleged (at the pleading stage) or proved (later in the case) is not even arguably protected, *Garmon* does not displace traditional state court jurisdiction to resolve a state law claim.

The dispositive question here, then, is whether the NLRA arguably protects a union that intentionally designs a work stoppage to destroy employer property, as alleged in this case. It does not. For over eight decades, this Court and others have recognized that the right to strike is limited by the duty not to destroy employer property. As the government has explained, the NLRA does not arguably protect strikes—including the one alleged here—that fail to take reasonable precautions to avoid destroying property. And *a fortiori*, the NLRA does not arguably protect strike activity orchestrated for the very *purpose* of destroying property.

Since intentional property destruction is clearly unprotected as a matter of law, *Garmon* does not divest state courts of jurisdiction to determine the pure factual issue of whether the Union engaged in such intentional destruction. Where there are "genuine factual issues" that mark the boundary between protected and unprotected conduct, "the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens" have led this Court "to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 745 (1983).

By contrast, every case the Union cites to support its "jurisdictional hiatus" theory involves alleged conduct the NLRA would arguably cover even if the employer's allegations were entirely true. In such

cases, *Garmon* generally gives the Board the first crack at resolving the legal ambiguity. But this Court has never applied *Garmon* to divest state courts of jurisdiction over factfinding just because the state defendant invokes an NLRA defense. The Court should not further extend *Garmon*'s implied-preemption doctrine in that novel fashion.

ARGUMENT

I. AS A MATTER OF LAW, THE NLRA DOES NOT IMMUNIZE UNIONS FROM LIABILITY FOR INTENTIONALLY DESTROYING PROPERTY.

Although the Union tries to muddy the waters with its own account of the facts, the primary legal issue is whether the NLRA impliedly shields a union from tort liability for intentionally destroying employer property during the course of a strike, which is the set of facts Glacier alleged. The answer is particularly straightforward here because the government and NLRB general counsel agree that the allegations in Glacier's complaint do *not* involve arguably protected conduct. Under any plausible reading of the NLRA, intentional property destruction is clearly unprotected. And even if there were some doubt on that front, the local-interest exception would still preclude any inference of preemption due to the vital state interests at stake.

A. The NLRA Does Not Arguably Protect Intentional Property Destruction.

As Glacier explained, courts have understood from the start that the NLRA's protection of "concerted activities" does not authorize the intentional destruction of employer property. Br. 17-22, 30-36. Shortly after the law's enactment, this Court

recognized that it does not protect "despoiling of … property," "depredations upon the property of the[] employer," or "conversion of its goods" in the course of a labor dispute, and that neither the NLRA nor Board action protects unions from "the appropriate consequences" of such "unlawful conduct." *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253-54, 258 (1939). The Union tries various ways to argue that *some* types of intentional property destruction are arguably protected, but none holds water.

First, trying its hand at a textual argument, the Union points to a provision stating that the NLRA should not be construed "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." 29 U.S.C. § 163. But that provision hurts, not helps, the Union: It makes clear that the right to strike is not absolute, but has always been subject to "limitations" and "qualifications." *Id.* As the Union itself admits (at 46 n.14), *Fansteel* reflects one such recognized limit. *See NLRB v. Drivers, Chauffeurs, Helpers, Loc. Union No. 639*, 362 U.S. 274, 281 (1960) (same). Under the NLRA, then, the "right to strike" is limited by the duty not to "deprive[]" the employer "of its legal rights to the possession and protection of its property." *Fansteel*, 306 U.S. at 253. Intentional property destruction is clearly out.

Second, the Union argues that property destruction may be unprotected if caused by "conduct that occurs during a work stoppage," but not by "the work stoppage itself." Br. 33. That distinction is nonsensical and contrary to decades of precedent. *See* Glacier Br. 20-22. Courts applying *Fansteel* have

long recognized "that employees engaged in a work stoppage deliberately time[d] to cause maximum damage [to employer property] are not engaged in a protected activity." *NLRB v. Morris Fishman & Sons, Inc.*, 278 F.2d 792, 795 (3d Cir. 1960) (citing cases). Indeed, if the union were correct, the workers in *Marshall Car Wheel* were, in fact, engaging in protected activity when they "intentionally chose a time for their walkout when molten iron in the plant cupola was ready to be poured off." 218 F.2d 409, 411 (5th Cir. 1955). The same for the federal security guards who abandoned their posts at a time "'designed' to compromise the security of the Federal buildings and their occupants." *Int'l Protective Servs.*, 339 N.L.R.B. 701, 702 (2003). Even the Union, elsewhere in its brief, recognizes this cannot be correct. *See* Br. 29.

In any event, this is not a case involving mere inaction in the form of a work stoppage and nothing else. The Union did not direct the employees to simply refuse to show up to work and withhold their labor from the employer. If it had, no concrete would have been batched and then destroyed. Instead, the Union orchestrated a scheme where its members showed up for work starting at 2 am and affirmatively took possession of concrete by having it loaded onto their trucks, putting it in a vulnerable position where it would be destroyed if it was not properly delivered. At 7 am, once its members had induced a substantial amount of concrete to be loaded onto their trucks, the Union ordered them to abandon the trucks so that the concrete would be destroyed. Indeed, to ensure the destruction of the concrete, the Union directed its members to disobey

supervisors' instructions to complete delivery, which is the only way destruction could have been avoided.

Third, the Union insists that, since a strike may permissibly cause *economic* harms such as lost profits, intentional property destruction is no different. Br. 25-26. But that disregard of property rights has no purchase in American law. This Court has repeatedly recognized that property rights are entitled to unique solicitude. *E.g.*, *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 666 (1954) (unions that "damage[] property through their tortious conduct" are "liable to a tort action in state courts for the damage done"). Both the Board and the lower courts have also long recognized as much: That is why unions have a duty to take "reasonable precautions" to protect employer *property* when going on strike, even though they have no such duty to avoid purely economic harms. *See, e.g.*, *Bethany Med. Ctr.*, 328 N.L.R.B. 1094, 1094 (1999); *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314, 315 (1953), *aff'd in relevant part*, 218 F.2d 409. The Union may regard property rights as a quaint relic of the past, but the law does not agree.

Fourth, the government (at 17-19) argues that the subjective intent to destroy property is irrelevant and that, instead, the only inquiry should be an objective "reasonable precautions" test. But the two are not mutually exclusive. While a union loses protection if it fails to take reasonable precautions to avoid property damage, that test is necessarily satisfied for strikes designed to destroy property. Recognizing the lack of protection for intentional property destruction thus comports perfectly well with the reasonable precautions test. Indeed, the

Board itself has drawn the common-sense inference that when a union "design[s]" a strike to bring about foreseeable risk to property, it necessarily does not take reasonable precautions to protect it. *Int'l Protective Servs.*, 339 N.L.R.B. at 702-03.

For its part, the Union argues that, since the NLRA prohibits strikes for some purposes such as inducing secondary boycotts, and allows federal lawsuits for the same, the statute must be read to protect strikes for all other purposes, including when intentionally designed to destroy employer property. Br. 5, 26 (citing 29 U.S.C. §§ 158(b)(4)(B), 187). But that does not follow. Prohibiting strikes for some purposes does not override other longstanding "limitations or qualifications" on strikes that this Court and others have always recognized. 29 U.S.C. § 163. Nor is *UAW v. O'Brien*, 339 U.S. 454 (1950), to the contrary. It simply recognized protection for "peaceful strikes for higher wages," without addressing property destruction. *Id* at 457.

Fifth, the Union suggests (at 22-23) that property destruction is protected as long as it targets only the employer's "products" and not its facilities or plant. The Union, however, offers no principled basis for distinguishing between types of property in this way. It is also contrary to longstanding precedent since, as the government explains, "[i]n various contexts, [the Board] has held that Section 7 does not protect workers' conduct to the extent the workers fail to take 'reasonable precautions to protect the employer's plant, equipment, *or products* from foreseeable imminent danger due to sudden cessation of work.'" Br. 13 (emphasis added); *see, e.g.*, *Bethany Med. Ctr.*, 328 N.L.R.B. at 1094 (same); *Int'l*

Protective Servs., 339 N.L.R.B. at 703 (same). If the rule were otherwise, workers would be licensed to abandon millions of dollars worth of products—from computers to vaccine doses—with impunity.

Sixth, reprising the Washington Supreme Court's error, the Union (at 22-25 & n.8) points to Board and lower court decisions that it says mean that the reasonable precautions doctrine applies only to particularly egregious forms of property destruction. The government itself refutes this and makes clear, in this very case, that the rule applies to the conduct alleged in Glacier's complaint. Br. 13-17, 23-24. Regardless, as Glacier has explained (at 35-36 & n.2), these cases represent nothing more than applications of the reasonable precautions rule that the Union's alleged conduct plainly violated. They are all readily distinguishable from the circumstances here because reasonable precautions were taken, no property destruction occurred, or some combination thereof. None involved, as here, actual, intentional destruction of employer property.

The Union's treatment of these cases (at 25 n.8) overlooks this critical point. In *Leprino Cheese Co.*, the strike "was not designed to damage the product." 170 N.L.R.B. 601, 607 (1968). In *Lumbee Farms Cooperative*, the Board's analysis noted the employer's notice of the strike, its "steps … on hearing of the strike possibility[] to lessen the impact," and that the employer's claims of property loss "appear[ed] to be substantially exaggerated, if not entirely fabricated." 285 N.L.R.B. 497, 506-07 (1987). In *Central Oklahoma Milk Producers Ass'n*, there was no loss of property at all, as the circumstances of the strike allowed the company to

act "readily and promptly" to preserve its property. 125 N.L.R.B. 419, 428, 435 (1959). Likewise, *NLRB v. A. Lasponara & Sons, Inc.* involved alleged "inconvenience and economic loss to the Company," not property damage or destruction. 541 F.2d 992, 998 (2d Cir. 1976). Here, by contrast, Glacier's complaint plainly alleges the strike was designed to (and did) destroy Glacier's concrete. JA.19.

Seventh, the Union observes (at 26-28) that the NLRA imposes no general requirement to give precise notice of a strike's timing. The lack of a general notice requirement, however, does not preclude the lack of notice from being used as evidence to show that a union failed to take reasonable precautions to protect employer property. *E.g.*, *Int'l Protective Servs.*, 339 N.L.R.B. at 703 (lack of notice and "element of surprise" contributed to finding that union failed to take reasonable precautions).

Finally, the Union asserts (at 29-31) that, even under the facts alleged, reasonable precautions were taken. But as the government—including the NLRB's general counsel—agrees, "the record does not contain evidence from which the Board could reasonably conclude that the employees took precautions that were reasonable under the circumstances." Br. 24. The Union ignores both the relevant allegations and the rule drawing inferences in Glacier's favor at this stage. As alleged, the Union affirmatively designed the strike to destroy property, choosing a time just after it induced substantial quantities of concrete to be mixed and loaded, and countermanding dispatcher orders that would have preserved the property. JA.34.

B. The Local Interest Exception Applies to Intentional Property Destruction.

As Glacier explained in its opening brief (at 23-29, 37-40), the local-interest exception eliminates any doubt about the lack of preemption for claims of intentional property destruction.

The Union (at 31-32) and the government (at 28-29) both argue that the local-interest exception applies only in cases of arguably *prohibited* conduct, not arguably *protected* conduct. But the main case they rely on, *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491 (1984), says the opposite. Specifically, while the exception does not apply "[i]f the state law regulates conduct that is *actually protected* by federal law," "when the state law regulates conduct only *arguably protected* by federal law," preemption "properly admits to exception" for "'deeply rooted' local interests." *Id.* at 502-03 (emphases added); *see also, e.g.*, *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 297 (1971) (exception "permit[s] the exercise of judicial power over conduct *arguably protected* or prohibited by the Act" (emphasis added)); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 60-61 (1966) (exception allows intentional defamation claims even though some defamatory statements made in organizing campaigns may be protected). As *Brown* explains, this distinction makes sense because, absent actual conflict, "appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their … jurisdiction over such matters." 468 U.S. at 503.

The Union's other arguments against the local interest exception likewise fail.

First, the Union echoes the lower court by arguing that intentional property destruction does not fall into the exception unless "violence" is also involved. Br. 34 & n.11. But that distinction makes no sense and flouts this Court's precedent. As Glacier has already explained, the Court has expressly and repeatedly described wrongful property destruction by itself as the type of traditional state concern that is sufficient to qualify for the exception, without any qualification as to violence. Br. 37-38 (citing and quoting cases). It has also recognized that the exception applies to other types of wrongful conduct—such as malicious libel and intentional infliction of emotional distress—that involve no violence. *Id.*

Second, the Union argues that intentional property destruction should not fall within the local interest exception because the relevant state torts traditionally required an affirmative act, but did not necessarily require any intent to destroy. But intentional property destruction has long been recognized as a subset of conversion. *See* Restatement (Second) of Torts § 226 (1965) ("One who intentionally destroys a chattel … is subject to liability for conversion."); Dobbs, The Law of Torts § 65 (2d ed. July 2022 update) ("Intentional destruction, major alteration, or serious damage … count as a conversion."). And the tort of trespass against property allows a claim for "harm intentionally, though indirectly, caused by the actor's misconduct, whether of act or omission". Restatement (Second) of Torts § 217 cmt. d.

In any event, the act/omission distinction does not help the Union because it took multiple affirmative acts in its scheme to destroy Glacier's property. The Union planned a strike for the purpose of destroying property, put the property in danger by having its members show up for work and take possession of concrete that was loaded onto their trucks over several hours, and *then* instructed drivers to abandon the trucks in order to cause the destruction of the concrete, while affirmatively countermanding the orders of Glacier's dispatchers. JA.34. Those are acts of *mis*-feasance, not *non*-feasance.

It is irrelevant that the torts alleged by Glacier might also allow recovery for *negligent* property destruction. That is not the theory of Glacier's complaint, and this Court has recognized that a claim for *intentionally* tortious conduct can proceed even if a negligence theory of the same state tort would be preempted. *See Linn*, 383 U.S. at 664-65 (libel claims alleging intent not preempted).

Finally, the Union argues (at 36-37) that there is a "compelling congressional direction" to override the traditional state interest here and protect intentional property destruction because the NLRA protects strikes that cause the "interruption of operations," 29 U.S.C. § 142(2), or interfere with "the flow of raw materials or manufactured or processed goods," *id.* § 151. But those provisions say nothing about intentional property destruction. As explained above, and as the government agrees (at 12-13), there is a distinction between disrupting "operations," or "*the flow* of raw materials" and products on one hand, and intentionally *destroying* them as the Union did here. Congress clearly did not protect such destruction.

C. Constitutional Avoidance Reinforces This Result.

The Union and the government fail to dispel the serious constitutional concerns that would arise from construing the NLRA to protect intentional property destruction, thus stripping employers of property rights without compensation. Glacier Br. 47-49.

The government argues (at 30-31) that federal law can generally preempt state remedies without any taking, but neither of the cases it cites involved the total preclusion of any compensatory remedy for property destruction. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1347, 1348 n.2 (2020) (CERCLA preempted only supra-compensatory damages, not compensatory damages); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495-97 (1987) (Clean Water Act did not completely preempt claims, but simply determined which state's law would govern).

The Union denies any taking because, it says, Glacier's concrete was not appropriated and its value was not entirely destroyed. Br. 49. But the concrete's destruction did make it worthless, and destruction is even *more* clearly a taking than the temporary trespass in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). Indeed, *Fansteel* recognized that there would be a "question of … constitutional validity" if the NLRA granted "immunity" for "trespass or violence against the employer's property." 306 U.S. at 255; *see also id.* at 265 (Stone, J., concurring in part) (such an interpretation would be of "sufficiently dubious constitutionality to require us to construe its language otherwise"). At the very least, the Union's reading would raise serious constitutional concerns.

II. A FACT DISPUTE ABOUT ALLEGATIONS OF CLEARLY UNPROTECTED CONDUCT DOES NOT PREEMPT STATE COURT JURISDICTION.

Instead of defending the lower court's holding that the NLRA precludes liability for intentional property destruction as a matter of law, the Union spends the front part of its brief trying to recast the lower court's preemption holding in a more palatable form. The Union now argues that even if the NLRA does not fully "extinguish" Glacier's claim alleging intentional property destruction, it impliedly requires the truth of those allegations to be resolved by the Board in the first instance, imposing a "jurisdictional hiatus" on the state courts.

This argument has no basis in the NLRA's text, which says nothing about pausing state court jurisdiction to resolve allegations of clearly unprotected conduct. It is also directly contrary to this Court's precedent, which holds that when an employer alleges intentionally tortious conduct that either is clearly unprotected by the NLRA or falls within a traditional area of state concern, the state court properly resolves any factual disputes. Defendants may raise preemption at each stage of the state proceedings—but as long as facts sufficient to establish such conduct are alleged and supported with evidence as required under state procedural law, the NLRA provides no basis to impliedly displace or "pause" state court jurisdiction. The Court has never applied *Garmon* in this scenario, and it should not so extend it for the first time in this case.

A. Claims Alleging Clearly Unprotected Conduct May Proceed in State Court.

This Court has held on three separate occasions that when a plaintiff alleges intentionally tortious conduct that is clearly unprotected by the NLRA or falls within a traditional area of state concern, there is no preemption and the relevant facts must be resolved in state court. It makes no difference if a regional director or any other Board functionary disagrees with the facts alleged.

This principle goes back more than fifty years to *Linn*. In that case, an employer sued a union in state court "seeking damages for defamatory statements published during a union organizing campaign by the union and its officers." 383 U.S. at 55. The union disputed the allegations and argued that the state court's jurisdiction was ousted under *Garmon*. *Id*. This Court rejected that argument, holding that "the [state] court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." *Id*. Indeed, the state court retained jurisdiction to resolve the factual dispute even though that dispute would be dispositive of whether the union's conduct was protected under the NLRA. Although the NLRA protects some false statements made during an organizing campaign, it does not protect "intentionally" defamatory statements that are "known to be false." *Id*. at 61. To determine whether such clearly unprotected and intentionally tortious conduct occurred, the state court should hold a trial. *Id*. at 66.

This Court reached the same result in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977). In *Farmer*, an employee sued a union for intentional infliction of emotional distress after it targeted him with a "campaign of personal abuse and harassment" due to his disagreement with "internal Union policies." *Id.* at 292. The Court recognized that the NLRA could protect the union's concerted opposition to the employee if the union engaged in nothing more than "the type of robust language and clash of strong personalities that may be commonplace in various labor contexts." *Id.* at 306. But if the union went further and engaged in intentional misconduct giving rise to a tort of "intentional infliction of emotional distress," then its conduct would be unprotected. *Id.* at 302. After all, "there is no federal protection [under the NLRA] for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'" *Id.*

Once again, the Court made clear that the state court—and not the Board—had jurisdiction to resolve the factual dispute about whether the union engaged in such clearly unprotected and intentionally tortious conduct. *Id.* at 307 & n.15. That conclusion followed, the Court explained, from "our decisions permitting the exercise of state jurisdiction in tort actions" due to "the nature of the State's interest in protecting the health and well-being of its citizens." *Id.* at 302-03. Given the core state concern and the clear lack of federal protection for the alleged tortious conduct, there was no sound reason to infer that the NLRA displaced the state court's jurisdiction.

The Court made this principle even clearer in *Bill Johnson's Restaurants*, 461 U.S. 731, holding that state courts retain jurisdiction to resolve the facts relevant to a state tort claim even in the face of not just a Board *complaint*, but a Board *order* affirmed by the court of appeals. As in *Linn*, the employer filed suit alleging defamation with "malicious intent to injure" in the course of organizing activity. *Id.* at 734. As in the present case, the employees then filed a Board charge alleging the employer's lawsuit was itself an unfair labor practice to punish them for concerted activity. *Id.* at 734-35. The Board's general counsel agreed that the suit was factually baseless—and retaliatory—and filed a complaint against the employer. *Id.* at 735. An ALJ and the Board agreed, finding the alleged defamatory statements were true, and ordered the employer to "withdraw its state-court complaint." *Id.* at 737. The court of appeals affirmed. 660 F.2d 1335 (9th Cir. 1981).

This Court, however, vacated the Board's order, holding that the state court rather than the Board should have resolved the facts relevant to the defamation claim. Citing *Linn*, the Court emphasized that it could not "infer a congressional intent" to oust state court jurisdiction. 461 U.S. at 742. "When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge." *Id.* at 745.

The Court's reasoning forecloses the Union's argument here. Even when disputed facts make the difference between whether alleged tortious conduct is protected or unprotected, Board proceedings "must be structured in a manner that will preserve the state plaintiff's right to have a state court jury or judge resolve genuine material factual or state-law legal disputes pertaining to the lawsuit." *Id.* at 749. It is only "[i]f judgment goes against the employer in the state court, … or if his suit is withdrawn or is otherwise shown to be without merit"—after "the employer has had its day in court," and "the interest of the state in providing a forum for its citizens has been vindicated"—that the Board may "proceed to adjudicate the … unfair labor practice case." *Id.* at 747. As the Court has since explained, "the Board may not decide that a suit is baseless by making credibility determinations … when genuine issues of material fact or state law exist." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 527 (2002); *see also id.* at 538 (Scalia, J., concurring) (expressing concern over agency determining party's motive "insulated from *de novo* judicial review by the [NLRA's] substantial-evidence standard").

The Union tries to dismiss the import of *Bill Johnson's* by saying that it does not preserve state court jurisdiction when a tort suit is "claimed to be beyond the jurisdiction of the state courts" because of federal preemption. Br. 19 n.5 (quoting *Bill Johnson's*, 461 U.S. at 737 n.5). But the only reason the tort suit in *Bill Johnson's* was *not* "beyond the jurisdiction of the state courts" is because it alleged conduct—malicious libel—that as a matter of law was not "arguably protected" by the NLRA. If mere

factual disputes over the truth of the alleged facts were sufficient to oust state court jurisdiction, then *Bill Johnson's* necessarily would have come out the other way, since the Board complaint alleged (and the Board found as a matter of fact) that the employees did not say anything maliciously libelous but were instead engaged in speech that was protected labor activity. *See* 660 F.2d at 1342 (affirming Board finding that state defendants had "engag[ed] in protected activity"). As *Bill Johnson's* shows, the Board can displace the state court's jurisdiction only if it claims that the plaintiff's tort claim is "foreclosed as a matter of law" based on a reasonable interpretation of the NLRA. 461 U.S. at 747. After all, the Board's "interpretations of the Act are entitled to deference" as long as they are reasonable. *Id.* at 742. But when a plaintiff alleges conduct that is clearly unprotected under *any* reasonable interpretation of the Act—as in *Linn*, *Farmer*, *Bill Johnson's*, and the present case—then federalism and other constitutional principles mean that the state court's jurisdiction cannot properly be "usurp[ed]." *Id.* at 745.

In the wake of *Bill Johnson's*, the Board itself has recognized that when an employer files a defamation claim, Board proceedings do not put state court proceedings on hiatus—even if the difference between protected and unprotected conduct turns solely on a factual dispute about whether the defendant acted with malicious intent. *Beverly Health & Rehab. Servs., Inc.*, 336 N.L.R.B. 332, 332-33 (2001); *see* NLRB Gen. Counsel Memo. 08-02, *Guideline Memorandum Concerning BE & K Construction Co., 351 NLRB No. 29 (September 29,*

2007), 2007 WL 4623445, at *3 (N.L.R.B.G.C. Dec. 27, 2007) ("[T]he Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge."). There is no reason to treat intentional property destruction differently.

B. No Precedent Supports the Union's "Jurisdictional Hiatus" Theory.

Contrary to the Union and the government's argument, this Court has never held that *Garmon* preempts a state tort claim based on alleged conduct that is clearly unprotected by the NLRA. In the cases they cite, the allegedly tortious conduct would have been at least arguably protected as a matter of law even if the complaint's allegations were entirely true.

Most of the cases the Union and the government cite involved allegations of trespassory picketing. *See, e.g.*, *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180 (1978); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993); *Makro, Inc. & Renaissance Props. Co.*, 305 N.L.R.B. 663, 671 (1991). But under this Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (only recently called into question in *Cedar Point Nursery*, 141 S. Ct. at 2077), trespassory picketing is sometimes protected as a matter of law. In each of these cases, then, the underlying conduct was arguably protected by the NLRA even on the facts alleged. Here, by contrast, the alleged conduct is not arguably protected, and the only issue is whether the facts alleged are true. As *Linn*, *Farmer*, and *Bill Johnson's* make clear, that is an issue for the state court.

The same point explains this Court's holding in *Marine Engineers*. There were no relevant factual disputes; the protected status of the defendants' conduct turned on whether they were "labor organizations" and whether the employees they sought to enlist were "supervisors" under the NLRA. *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 176-77 (1962). That implicated a legal issue for the Board—it could reasonably interpret the statutory terms either way based on the facts in the record—and thus the Board "assuredly" had to be the "first" to address the question. *Id.* at 185.

Likewise in *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), the protected status of the alleged conduct turned on whether the plaintiff was an "employee" or a "supervisor." *Id.* at 394. The Court held there was no preemption because the union did not even try to make "any factual *or legal* showing" on that point. *Id.* at 398 (emphasis added). But the Court did not say (much less hold) that a pure factual dispute would have ousted the state court of jurisdiction.

In short, this Court has never held that the NLRA impliedly imposes a "jurisdictional hiatus" on state courts' authority to resolve allegations of clearly unprotected conduct. Instead, the rule is that a state suit is not preempted where "no arguable violation [of the NLRA] exists if [the state plaintiff's] proof lives up to its allegations." *Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 191 (1965). And even where arguable protection exists, the local interest *exception* to *Garmon* preemption preserves state court authority to proceed in cases like this one where core state interests are in play.

C. The Union's Textual Arguments Fail.

Since no precedent supports the Union's "jurisdictional hiatus" theory for claims alleging clearly unprotected conduct that implicate traditional state concerns, the question is whether to extend *Garmon* into this new realm. The answer is no. Doing so would fly in the face of *Linn*, *Farmer*, and *Bill Johnson's*, and would have no textual basis. While the Union tries to muster some textual support, its arguments wither under scrutiny.

First, the Union argues that ordinary preemption principles requiring an actual conflict do not apply when displacing state court jurisdiction to resolve factual disputes, instead of "extinguishing" a claim altogether. Br. 11 n.3, 45. That is absurd. Blocking state courts from resolving the facts of tort claims implicating clearly unprotected conduct or core state interests is a severe intrusion on state sovereignty, which cannot be countenanced without a firm basis in the text of federal law.

Second, the Union points to a provision allowing the Board to decline jurisdiction over "labor disputes" that do not substantially affect interstate commerce. Br. 42 (quoting 29 U.S.C. § 164(c)). But a state tort claim is not a "labor dispute," as it is not a dispute about the "terms, tenure or conditions of employment," or "the association or representation of persons" for bargaining purposes. 29 U.S.C. § 152(9). Regardless, allowing the Board to decline jurisdiction over insubstantial "labor disputes" does not impliedly oust state courts of jurisdiction over tort disputes that, as here, allege conduct that isn't even arguably protected by the NLRA. Instead, Section 164(c)(2)

simply makes clear that the Board's affirmative decision to decline such jurisdiction doesn't bar a state court from assuming it, which, if anything, presumes the state has such jurisdiction in the first place.

Third, the Union points to the provision stating that the Board's power to prevent "unfair labor practices" may not be "affected" by other "means of adjustment or prevention." Br. 42-43. But intentional property destruction is not itself an unfair labor practice under federal law, so this point is irrelevant. And in any event, as *Linn*, *Farmer*, and *Bill Johnson's* make clear, state courts are the proper forum to resolve any *factual* issues relevant to a claim alleging clearly unprotected tortious conduct. Letting the state court decide the facts in such a case does not at all affect the Board's power to act if an unfair labor practice occurred. *See* Glacier Br. 45-46.

In short, Congress has never said anything to divest state courts of their full, ordinary power to hear state tort claims alleging conduct clearly unprotected by the NLRA. Under ordinary preemption principles and *Garmon*, that power is thus reserved to the states. No precedent says otherwise, and this Court should so hold.

CONCLUSION

The decision below should be reversed.

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Respectfully submitted,

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