

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

GLACIER NORTHWEST, INC.,)
DBA CALPORTLAND,)
Petitioner,)
v.) No. 21-1449
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS LOCAL UNION NO. 174,)
Respondent.)

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Place: Washington, D.C.
Date: January 10, 2023

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3 GLACIER NORTHWEST, INC.,)
4 DBA CALPORTLAND,)
5 Petitioner,)
6 v.) No. 21-1449
7 INTERNATIONAL BROTHERHOOD OF)
8 TEAMSTERS LOCAL UNION NO. 174,)
9 Respondent.)
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11
12 Washington, D.C.
13 Tuesday, January 10, 2023

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15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:05 a.m.

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1 APPEARANCES:

2 NOEL J. FRANCISCO, ESQUIRE, Washington, D.C.; on
3 behalf of the Petitioner.

4 VIVEK SURI, Assistant to the Solicitor General,
5 Department of Justice, Washington, D.C.; for the
6 United States, as amicus curiae, supporting
7 neither party.

8 DARIN M. DALMAT, ESQUIRE, Seattle, Washington; on
9 behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 21-1449, Glacier Northwest versus International Brotherhood of Teamsters.

Mr. Francisco.

ORAL ARGUMENT OF NOEL J. FRANCISCO

ON BEHALF OF THE PETITIONER

MR. FRANCISCO: Mr. Chief Justice, and may it please the Court:

The Court and the Board have long recognized that the intentional destruction of an employer's property in the course of a labor dispute is not protected concerted activity. That's why steelworkers can't walk out in the middle of a molten iron pour. It's why federal security guards can't leave their posts in the middle of a terrorist threat. It's why a ferryboat crew can't drive their boat out into the middle of the river and abandon ship. And it's why in this very case the government agrees that the conduct alleged in this complaint isn't even arguably protected.

The more substantial question then is,

1 who gets to decide whether the facts alleged in
2 the complaint are true? The state court or the
3 Board?

4 This Court answered that question in
5 Bill Johnson's. If the facts alleged aren't
6 even arguably protected, then the court decides
7 the facts. If the allegations are true, it can
8 award relief. And if they're not, the claim
9 fails, either because it's preempted or because
10 it fails under state law.

11 This division of authority makes
12 sense. Garmon held that the Board's interests
13 in ensuring a uniform legal interpretation of
14 the statute is sufficient to override the
15 state's interests in adjudicating state tort
16 claims, but it doesn't have a similar interest
17 in resolving the facts.

18 So, if the complaint alleges clearly
19 unprotected conduct and the only issue is
20 whether those allegations are true, the state
21 court gets first crack at resolving the facts.
22 That's probably why in this very case the
23 regional director didn't even file his
24 complaint until after the Washington Supreme
25 Court's decision, instead of at the outset,

1 which, under the union's view, would have
2 prevented four years of wasteful litigation.

3 The Court should therefore reverse the
4 decision below and allow the state courts to
5 adjudicate Glacier's non-preempted state court
6 complaint.

7 And I'd be happy to address any
8 questions Your Honors may have.

9 JUSTICE THOMAS: The SG suggests that
10 after a hiatus, a jurisdictional hiatus, you
11 could pursue your claims. Why isn't that
12 adequate?

13 MR. FRANCISCO: Because -- well, for a
14 couple of reasons, Your Honor. I think,
15 principally, because it's contrary to how
16 preemption works in virtually every other
17 context. State courts are not typically ousted
18 of jurisdiction to adjudicate tort claims, even
19 in highly regulated areas.

20 Instead, they adjudicate the tort
21 claim. But they're still bound by federal law.
22 So, if it appears that the claim conflicts with
23 federal law, they grant a preemption defense.
24 Under Garmon, if it appears that it arguably
25 conflicts with federal law, they grant a

1 preemption defense. But they're not ousted of
2 jurisdiction to make that threshold
3 determination of whether on the facts it either
4 actually or arguably implicates federal law.

5 Otherwise, Bill Johnson's really
6 should have come out the other way because, in
7 Bill Johnson's, the Board actually found that
8 the employer's allegations in its complaint
9 were false and that the employee was engaging
10 in actually protected conduct. Yet, this Court
11 nonetheless held that it was the state court
12 that got to decide the facts in the first
13 instance, not the Board.

14 CHIEF JUSTICE ROBERTS: Your -- the
15 Board, of course, says that you should, I
16 guess, bring your claim under the rubric of the
17 failure to take reasonable precautions to
18 preserve property. Why -- why -- why is that
19 not sufficient to address your concerns?

20 MR. FRANCISCO: Well, Your Honor, it
21 -- it's not that I have a problem with the
22 Board's test. I just think that our test is a
23 much more specific, concrete, and clear
24 application of that test. I mean, if -- it's
25 hard to imagine a situation where you intend to

1 destroy somebody's property, you actually take
2 actions to effectuate that intent, you succeed
3 in destroying the property, yet nonetheless you
4 have taken reasonable precautions to avoid
5 destroying the property.

6 So I just think it's a particularly
7 clear application. And I would point you to
8 the Board's decision in the International
9 Protective Services case, which helps
10 illustrate this. Now, remember, that was the
11 case where the federal security guards at the
12 courthouse in Alaska walked out in the middle
13 of a terrorist threat.

14 The Board first applied the reasonable
15 precautions standard and said, look, you didn't
16 take reasonable precautions. But then it went
17 further and it said -- here, I'm quoting --
18 "the union's misconduct went beyond a failure
19 to take reasonable precautions."

20 And the Board continued to establish
21 that the union recklessly intended to place the
22 federal buildings and their occupants at risk
23 because, the Board concluded, the strike was
24 "designed to compromise their security." So,
25 again, I think it just illustrates that we've

1 got a particularly clear and concrete
2 application --

3 JUSTICE SOTOMAYOR: I -- I'm sorry --

4 MR. FRANCISCO: -- of that test or --

5 JUSTICE KAGAN: I guess I'm -- I'm not
6 sure --

7 MR. FRANCISCO: -- or an alternative
8 one.

9 JUSTICE SOTOMAYOR: Go ahead.

10 JUSTICE KAGAN: I guess I'm not sure I
11 understand your answer to the question, whether
12 you think that your test captures conduct that
13 the reasonable precautions test does not. So,
14 in your latter half of the answer, you
15 suggested yes. I took the former half to say
16 no. So maybe I was --

17 MR. FRANCISCO: Sure.

18 JUSTICE KAGAN: -- just
19 misunderstanding. But is -- is -- does it go
20 further, does it capture conduct that you think
21 the Board's test does not?

22 MR. FRANCISCO: So it's hard for me to
23 think of in my head a set of facts that would
24 be captured by our test but not their test.
25 So, in that sense, I do think that our test is

1 a subset of their test.

2 But, look, you might --

3 JUSTICE KAGAN: It's a subset of their
4 test?

5 MR. FRANCISCO: I -- I -- I -- I think
6 so, but you might be able to come up with a set
7 of facts where there's not overlap.

8 JUSTICE KAGAN: Yeah.

9 MR. FRANCISCO: I haven't been able to
10 think of one yet.

11 JUSTICE KAGAN: So, if that's the
12 case, why shouldn't we use the -- the doctrine,
13 the standard, the words that have always been
14 used in this sphere before?

15 MR. FRANCISCO: I -- I think the main
16 reason is that when you've got something as
17 clear as this, something as egregious as
18 intentional property destruction, it's
19 important to take that clear category of
20 misconduct off the table.

21 Look, we're dealing with ongoing
22 negotiations here, and the parties need to know
23 the rules of the road, what are legitimate
24 tactics in the course of a lawful negotiation.

25 I worry that something as nebulous

1 as -- as reasonable precautions doesn't really
2 give the parties the guidance they need.

3 JUSTICE SOTOMAYOR: Mr. Francisco, I
4 thought that reasonable precautions was fairly
5 clear. The one items that the Board has said
6 are not covered are those where an individual,
7 a union member, is acting in a way that any
8 citizen in the same position would have been
9 held responsible for.

10 So, if you libel somebody -- somebody,
11 it's not just you but any other citizen with no
12 legal obligation to you would be liable.

13 Similarly, no person who -- who's on
14 strike or not can impose intentionally
15 emotional distress, all right? Those are
16 things that categorically we say can't be
17 arguably protected.

18 But, when it comes to destruction of
19 property, I always thought you needed a duty
20 that you're breaching. If an employee goes on
21 strike, their duty to you has ended. I can
22 walk by your plant and the parking lot and see
23 those trucks running. I have no obligation to
24 tell you there's cement in there. I have no
25 obligation to move the truck. I have no

1 obligation to do anything.

2 That's what the employees at that
3 moment, they went on strike. What the
4 government is saying, however, is intentional
5 destruction of property means that I'm taking
6 an affirmative act, not just merely the -- the
7 property perishing on its own.

8 So I don't know why you're answering
9 Justice Kagan -- you want something further.
10 You're saying you as an employee have to
11 continue an employment duty with me until all
12 of my profits are safe. That's what I see you
13 arguing.

14 MR. FRANCISCO: Not in the slightest
15 am I suggesting that, Your Honor. Here, the
16 employees took affirmative action, the union
17 took affirmative action to put the product in a
18 vulnerable position precisely so they --

19 JUSTICE SOTOMAYOR: But you're
20 saying --

21 MR. FRANCISCO: -- could abandon it to
22 spoil.

23 JUSTICE SOTOMAYOR: Well, could a
24 state tell the union don't go on strike except
25 at the end of the day?

1 MR. FRANCISCO: No, Your Honor. What
2 I'm saying is that it -- it --

3 JUSTICE SOTOMAYOR: Well, what's the
4 difference between that and saying don't go on
5 strike while the truck has cement that you can
6 offload if you want, you can hire people to
7 offload it, you can do what you did, and it's
8 your property. The moment I walked out on
9 strike, I didn't owe you a duty --

10 MR. FRANCISCO: Yeah.

11 JUSTICE SOTOMAYOR: -- to protect your
12 property from self-perishment.

13 MR. FRANCISCO: So it's the same --
14 the same principle that would prevent the
15 ferryboat crew from driving the boat into the
16 middle of the river and then --

17 JUSTICE SOTOMAYOR: No, because
18 that --

19 MR. FRANCISCO: -- merely going on
20 strike.

21 JUSTICE SOTOMAYOR: -- because that's
22 very different in that you have no opportunity
23 to save that property. But, here, that's not
24 the case.

25 JUSTICE JACKSON: So --

1 JUSTICE SOTOMAYOR: Here, you'd want
2 them to continue working for you.

3 MR. FRANCISCO: That -- that most
4 manifestly is the case here, Your Honor. Once
5 the --

6 JUSTICE SOTOMAYOR: So what do we do
7 with the cases --

8 MR. FRANCISCO: -- once the concrete
9 was batched --

10 JUSTICE SOTOMAYOR: -- what do we do
11 with the NLRB case of the cheese people that
12 left in the middle of the cheese processing, so
13 the cheese --

14 MR. FRANCISCO: Sure. So a couple of
15 --

16 JUSTICE SOTOMAYOR: -- disappeared?

17 MR. FRANCISCO: -- a couple of
18 responses. First, in that case, there was --

19 JUSTICE SOTOMAYOR: Or flower delivery
20 or any other perishment of a product.

21 MR. FRANCISCO: Yeah. So, first, in
22 that case, there was no allegation of an intent
23 to destroy property. If I recall --

24 JUSTICE SOTOMAYOR: Well, I mean --

25 MR. FRANCISCO: -- there --

1 JUSTICE SOTOMAYOR: -- you're not --
2 the intent is leaving.

3 JUSTICE JACKSON: Mr. --

4 JUSTICE BARRETT: Mr. Francisco, can I
5 ask you following up on Justice Sotomayor, if
6 we just put aside the reasonable precautions
7 versus intentional test, let -- let's say that
8 we decide to stick with the Board's formulation
9 of reasonable precautions.

10 Can you talk a little bit more about
11 this jurisdictional hiatus principle? Because
12 it seems to me that if conduct is arguably
13 protected, that might be because of a dispute
14 about the law, like we're not sure what the
15 statute means, or it might mean because there's
16 a dispute about the facts.

17 MR. FRANCISCO: Right.

18 JUSTICE BARRETT: You know, and so the
19 government points out that, you know, the --
20 the standard for a motion to dismiss assumes
21 the facts are true, that the Board here is
22 engaged in some factual discovery, and -- and
23 showed that maybe it's not as clear-cut as it
24 might reflect on the pleadings.

25 So can you address that?

1 MR. FRANCISCO: I -- I think it
2 addresses whether there's a dispute about the
3 law. And I think it makes sense when you
4 understand Garmon in the context of -- of how
5 preemption works in virtually every other
6 context. State courts adjudicate tort claims
7 all the time, including in areas of intense
8 federal regulation.

9 But they're still bound by federal
10 law. So a state court will adjudicate the
11 claim, and on the motion to dismiss, it'll look
12 at the facts alleged and it will say, is there
13 a conflict with federal law or, in the case of
14 Garmon, is there an arguable conflict with
15 federal law.

16 JUSTICE BARRETT: Doesn't Garmon do
17 something a little bit different? Didn't
18 Garmon route both these potentially factual
19 disputes and legal disputes? Garmon is a very
20 different kind of -- well, not very different,
21 but it's certainly a different and more
22 expansive kind of preemption.

23 MR. FRANCISCO: It is a different kind
24 of preemption but not in the way I think Your
25 Honor is suggesting.

1 What Garmon did was it said that in
2 addition to having to grant a preemption
3 defense in the face of an actual conflict --
4 that's the rule virtually everybody --
5 everywhere else -- you also have to grant a
6 preemption defense in the face of an arguable
7 conflict.

8 But I don't understand Garmon to be a
9 wholesale overturning of how preemption works
10 in every other context. And in every other
11 context, states' courts still get to adjudicate
12 the claim and they grant a preemption defense
13 once it becomes clear that on the facts alleged
14 or the facts proved, there's either an arguable
15 conflict or an actual conflict with the NLRA.

16 JUSTICE BARRETT: So it's summary
17 judgment then. You know, there's -- there's
18 summary judgment. Then that would be the time
19 --

20 MR. FRANCISCO: Absolutely.

21 JUSTICE BARRETT: -- let's say. Okay.

22 MR. FRANCISCO: If -- if -- if at
23 summary judgment it became clear that on the
24 facts, you know, under the applicable summary
25 judgment standard there was an arguable

1 conflict, you grant the preemption defense at
2 that time.

3 JUSTICE JACKSON: But, Mr. Francisco,
4 in this --

5 JUSTICE KAGAN: But part of the --

6 JUSTICE JACKSON: -- in this
7 situation, we have a complaint by the regional
8 director, and I guess I'm a little confused as
9 to why you think or your brief suggests that
10 that's irrelevant to the issue of whether or
11 not there is an arguable protected scenario
12 here.

13 MR. FRANCISCO: Yeah, sure, for two
14 reasons, Your Honor, first theoretical and
15 second from the case law.

16 The theoretical reason is that the
17 Board's overriding interest is ensuring a
18 legally uniform interpretation of the NLRA.
19 That's why its interest is sufficient to
20 override the state's interest in adjudicating a
21 tort claim, where the actual facts are arguably
22 protected. The Board then gets to determine
23 whether the actual facts are actually protected
24 as opposed to arguably protected.

25 Second is the case law reason. Bill

1 Johnson's --

2 JUSTICE JACKSON: Can I just -- I'm
3 sorry. I -- I'm not sure that I understood the
4 reasons for arguably protected in the same way.
5 I thought arguably protected was our
6 recognition of Congress's intent to allow the
7 Board to take first crack at these kinds of
8 scenarios. So what we say is, as long as it is
9 possible, it is arguable that we have protected
10 conduct here, then the states need to stand
11 down and allow the Board to go forward.

12 So I -- I -- I hear you sort of
13 suggesting that the states can get to make that
14 initial determination about arguable, and that
15 -- that's not how I understood what was
16 happening.

17 MR. FRANCISCO: Well, Your Honor, I
18 think I do have a slightly different
19 understanding of it than you do. The states
20 always -- almost always in these cases make the
21 threshold determination as to whether the
22 alleged facts arguably -- are arguably
23 protected under the NLRA.

24 JUSTICE JACKSON: But just because
25 there's going to be a dispute about whether or

1 not they should step aside, not because they
2 inherently are the ones to make that
3 determination.

4 MR. FRANCISCO: Sure, sure. And --
5 and I think that the way I understand Garmon at
6 least is that when you've got a set of facts
7 and on those facts there's an arguable conflict
8 with the federal statute, it's the Board that
9 gets first crack at determining whether it's,
10 in fact, an actual conflict.

11 JUSTICE JACKSON: But the Board does
12 not --

13 MR. FRANCISCO: They get to make that
14 legal --

15 JUSTICE JACKSON: -- but the Board's
16 assessment by the filing of a complaint that
17 here we arguably -- this is the -- the regional
18 director and the general counsel, they've
19 looked at all the facts, and they file a
20 complaint which indicates that someone has made
21 an initial assessment along the same lines as
22 arguable that we have protected conduct here.

23 MR. FRANCISCO: Right.

24 JUSTICE JACKSON: I don't understand
25 why the easiest way for all of us to be looking

1 at this is in this particular kind of scenario
2 where we have a complaint, then the issue of
3 arguable --

4 MR. FRANCISCO: Right.

5 JUSTICE JACKSON: -- is satisfied.

6 And we allow the Board to continue to
7 investigate and it can reach the actual
8 determination that you're talking about.

9 MR. FRANCISCO: I think it's because
10 we'd be taking the extraordinary step of
11 ousting a state court of jurisdiction to
12 adjudicate a state tort complaint that on its
13 face alleges facts --

14 JUSTICE SOTOMAYOR: Mr. Francisco, the
15 -- the government says --

16 MR. FRANCISCO: -- that, as all agree,
17 aren't even arguably protected.

18 JUSTICE SOTOMAYOR: -- the government
19 says that all the state court has to do is stay
20 the action pending the Board's determination.
21 So I don't understand what you're talking
22 about, ousting jurisdiction.

23 Now, when I was a federal court judge,
24 I could dismiss the action pending the Board
25 decision or I could stay the action. It wasn't

1 that I was ousted of jurisdiction, but I was
2 giving Garmon's primary jurisdiction to the
3 Board.

4 MR. FRANCISCO: Well -- well, sure,
5 Your Honor. What we're suggesting is that in
6 the context of where you have a complaint,
7 state law complaint that on its face alleges
8 conduct that both we and the government agree
9 is not even arguably protected, then our
10 position is it's the flip side of the
11 government's: State courts get to proceed in
12 the ordinary course, just like they do in
13 virtually every other area of preemption law --

14 JUSTICE KAGAN: Well, why is it --

15 MR. FRANCISCO: -- and would --

16 JUSTICE KAGAN: I'm sorry, Mr.
17 Francisco.

18 MR. FRANCISCO: I was going to say,
19 with respect, I don't know how Bill Johnson's
20 could have come out the way that it did if what
21 I was saying wasn't accurate, because, there,
22 the Board actually entered findings -- findings
23 that the employer's complaint, his malicious
24 libel complaint, was false, the facts were
25 false, and that the employee was, in fact,

1 engaging in protected conduct.

2 JUSTICE JACKSON: But Bill Johnson's

3 --

4 JUSTICE KAGAN: So why is it that --

5 JUSTICE JACKSON: -- was not a Garmon
6 scenario.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: Why -- why -- why is
9 it that there is such a sharp distinction in
10 your mind between the legal questions and the
11 factual questions? I mean, I suspect, in most
12 of these cases, what is going to happen in the
13 end is that it's going -- the critical question
14 is going to be a mixed question of law and
15 fact, and the -- whoever is the decisionmaker
16 is going to have to figure out what the
17 appropriate law is and is going to have to
18 figure out what the appropriate facts are --

19 MR. FRANCISCO: Right.

20 JUSTICE KAGAN: -- and apply the one
21 to the other. And I would think that, as a
22 controversy gets more and more factual, you
23 might think that that's where the Board's
24 expertise more and more comes into play because
25 the Board has seen, like, a thousand --

1 MR. FRANCISCO: Mm-hmm.

2 JUSTICE KAGAN: -- of these strikes in
3 a different way like a general court sees once
4 every few years --

5 MR. FRANCISCO: Right.

6 JUSTICE KAGAN: -- they get a case
7 like this. The Board has seen thousands of
8 them and can -- can fit a case like this into a
9 broader map of strike conduct and what's
10 protected and what's not.

11 And it would seem that if the idea of
12 Garmon is a little bit of an exhaustion idea,
13 first bite idea to get your expertise, your
14 special expertise, it should apply all the more
15 so in a case where there are also factual
16 issues at stake.

17 MR. FRANCISCO: Mm-hmm. So I've got
18 two responses to that, Your Honor. The -- the
19 first is that on the fact/law question, I agree
20 to this extent: If it becomes clear as the
21 state court finds the facts that it's unclear
22 whether it actually is protected by the
23 statute, then you kick it over to the Board
24 because it's arguably protected. That's the
25 work that Garmon does. But I don't think it

1 overrides the state court's traditional
2 fact-finding function.

3 My second point, which is related, is
4 I guess maybe I just don't understand Garmon to
5 be --

6 JUSTICE KAGAN: It seems -- it seems
7 very artificial. You know, you find the facts
8 until --

9 MR. FRANCISCO: Yeah.

10 JUSTICE KAGAN: -- you face the
11 dispositive question --

12 MR. FRANCISCO: Sure.

13 JUSTICE KAGAN: -- of how the facts
14 fit the law.

15 MR. FRANCISCO: Sure. And this is my
16 second response to your question. I don't
17 understand Garmon to be as strong an
18 overturning of traditional preemption
19 principles as you're suggesting, because what
20 I'm suggesting is how preemption works in
21 virtually every other area, including highly
22 federally regulated areas.

23 You always have state courts
24 adjudicating state tort claims. They still are
25 bound by federal law. So, here, the state

1 court is still bound by the NLRA, including the
2 Board's reasonable interpretations of it. So,
3 if, as it adjudicates that case in the ordinary
4 course, it becomes clear there's either an
5 actual or, under Garmon, an arguable conflict,
6 it's got to grant the preemption defense.

7 But I do not understand Garmon to go
8 further than that, and this Court has never
9 taken Garmon further than that, to say that
10 state courts are also ousted of the traditional
11 authority just to adjudicate that state tort
12 complaint up and until a preemption defense is
13 properly presented and established.

14 And, again, I don't know how Bill
15 Johnson's comes out the way it did unless you
16 agree with me, because, again, in Bill
17 Johnson's, the Board actually found that the
18 facts in the employer's complaint were false --

19 JUSTICE JACKSON: But there was no
20 Garmon --

21 MR. FRANCISCO: -- and this Court
22 still said that the state court --

23 JUSTICE JACKSON: -- there was not a
24 Garmon issue in Bill Johnson, right?

25 MR. FRANCISCO: But -- but that's only

1 because it alleged conduct, malicious libel,
2 that wasn't arguably protected. And, here, the
3 government agrees with us that the conduct
4 alleged in this complaint isn't arguably
5 protected. The only issue is whether the
6 Board's disagreement over what the actual facts
7 are, as opposed to the alleged facts, changes
8 that.

9 That was the exact posture of Bill
10 Johnson's, where the Board thought that the
11 actual facts were different from the alleged
12 facts. Yet, this Court nonetheless held that
13 it was up to the state court to determine what
14 the actual facts were, not the Board.

15 That's all we're asking for here.
16 And, again, I think it is a straightforward
17 application of how preemption works in
18 virtually every other context.

19 JUSTICE JACKSON: Could a state court
20 decide -- if this was sent back to them, could
21 the state court say what Justice Sotomayor
22 suggested, which is now that we have a pending
23 complaint, we're going to step aside, either as
24 a matter of abstention or whatever?

25 MR. FRANCISCO: Mm-hmm. Certainly not

1 if you resolve this issue my way. And even if
2 you just stay silent on it, I'll make the same
3 argument anyhow.

4 JUSTICE JACKSON: Why not?

5 MR. FRANCISCO: Because, as a matter
6 of federal law, if this Court says that it's
7 for the state court to decide and not the
8 Board, I don't know how the state court could
9 then say otherwise.

10 JUSTICE JACKSON: That's not what we'd
11 be saying. We'd be -- we're talking about
12 preemption here, meaning does the federal court
13 -- or does the federal law preclude the state.
14 What I'm asking is, fine, we say -- even if we
15 agree with you that Garmon preemption apply --
16 does not apply and, therefore, we return it to
17 the state, could the state say, in light of the
18 fact that the Board is now considering this, we
19 are going to abstain?

20 MR. FRANCISCO: Well, I -- I think I
21 understand the question. And what I'm saying
22 is, if you issue an opinion along the lines of
23 what you said in Bill Johnson's and what you
24 say is that where there's this factual dispute,
25 the Board should stay its hand because it's up

1 to the state court to determine what the facts
2 are in the first instance, I don't think it
3 would be up to the state court to say otherwise
4 and to essentially thumb its nose at the
5 Court's decision.

6 Put another way, I think it would be a
7 gross abuse of discretion if the state court
8 were to do that.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 JUSTICE THOMAS: Mr. Francisco, the --
13 can you tell me any other area where preemption
14 works as it works in -- in this area? How does
15 it -- how does it normally work, let's say in
16 Wyeth or some of the other preemption cases?
17 How does it come into play?

18 MR. FRANCISCO: So it normally
19 works -- you know, I -- I litigate a lot of
20 cases, including in state courts, where --
21 where they're subject to federal regulations,
22 and, typically, if the claim is filed in state
23 court, somebody raises a preemption defense.

24 At the motion to dismiss, the court
25 assesses the complaint, resolves the facts most

1 favorably to the non-moving party, and then
2 says, on those facts, is this conduct
3 preempted? It either is or it isn't.

4 Garmon takes it a step further. It
5 moves that preemption analysis up not just to
6 an actual conflict but also to an arguable
7 conflict. That's Garmon's innovation. But I'm
8 not aware of any case that has ever taken
9 Garmon further than that and said that, in
10 addition, we're depriving state courts of
11 making the threshold factual determination in
12 the first place.

13 Now, look, the state court can get it
14 wrong. State courts get it wrong all the time.
15 It can get it wrong on the arguable protection
16 prong. It can get it wrong on the actual
17 protection prong. In fact --

18 JUSTICE THOMAS: I think what I'm --
19 what I'm more interested in is the operation.
20 Normally, we get a preemption case and someone
21 has asserted preemption as a defense to, say,
22 for example, a state tort action.

23 MR. FRANCISCO: Right.

24 JUSTICE THOMAS: The -- but going back
25 to your point about the determination of a

1 preemption -- of preemption, is there any case
2 similar to this? I mean, we've had field
3 preemption, obstacle --

4 MR. FRANCISCO: Mm-hmm.

5 JUSTICE THOMAS: -- preemption,
6 conflict preemption. Is there any other case
7 where we have had this arguably protected
8 preemption?

9 MR. FRANCISCO: Not that I am aware
10 of, Your Honor. I don't know that the Court
11 has taken it beyond a actual conflict. There
12 is field preemption. But, when you're talking
13 about preemption based on a conflict with the
14 law, I'm not aware of another area where we've
15 said an arguable conflict also results in
16 preemption. That's Garmon's innovation.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Alito?
19 Justice Sotomayor?

20 JUSTICE SOTOMAYOR: I -- I'm a little
21 confused. This was decided on a motion to
22 dismiss, correct?

23 MR. FRANCISCO: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: So there was no
25 fact-finding or shouldn't be any fact-finding

1 by the state court. The state court just has
2 to read the complaint and see if there's an
3 arguable basis for liability, correct?

4 MR. FRANCISCO: Correct.

5 JUSTICE SOTOMAYOR: All right. Now,
6 if the Court does what the SG says and says,
7 yes, there are some facts here that would
8 suggest that this action wasn't preempted, now
9 what happens?

10 MR. FRANCISCO: We'll go on to summary
11 judgment and --

12 JUSTICE SOTOMAYOR: Assuming -- or you
13 do discovery --

14 MR. FRANCISCO: -- we have discovery
15 and summary judgment.

16 JUSTICE SOTOMAYOR: -- or something.

17 But then what happens, as occurred
18 here, less than a month later, the Board files
19 a complaint. You seem to be suggesting that
20 that's irrelevant. And why is that? Why can't
21 that provide the basis for the district -- for
22 the court to say: Hmm, I see the facts as
23 alleged by the NLRB. If the facts aren't that
24 way, then this is -- satisfies Garmon and this
25 is arguably protected?

1 MR. FRANCISCO: For -- for the same --

2 JUSTICE SOTOMAYOR: It -- I mean,
3 that's -- basically, I think that's what
4 Justice Jackson was trying to say to you, which
5 is we're now at a point further than the motion
6 to dismiss. We're at the point --

7 MR. FRANCISCO: Sure.

8 JUSTICE SOTOMAYOR: -- where the court
9 should look at this now, the court below, think
10 about what the SG is saying, and then decide
11 what its next steps should be or not be.

12 MR. FRANCISCO: For -- so my answer is
13 you ought to proceed as I'm suggesting for
14 basically the same reasons as Bill Johnson's.

15 Now, look, if the NLRB --

16 JUSTICE SOTOMAYOR: No, because you're
17 asking us --

18 MR. FRANCISCO: -- general counsel
19 actually has facts to come forward with that
20 can be introduced in trial before the state
21 court that then show you have conduct that is
22 arguably protected at the summary judgment
23 stage or at the trial stage, then I would
24 agree, at that point, then it would be
25 appropriate to consider and, if established,

1 grant a preemption defense under Garmon.

2 But it's still the state court's
3 authority in the course of adjudicating a state
4 tort claim to determine what the facts are and
5 to determine whether on those facts there's
6 either arguable or actual protection under the
7 statute. Again, it's how preemption works in
8 just about every other area.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: I think this might be
11 related, but when you were talking to Justice
12 Thomas, you were in the middle of a sentence,
13 and I was hanging on every word. And I want
14 you to finish the sentence, if you can remember
15 it, because you said something like now, look,
16 the state court can get it wrong. So --

17 MR. FRANCISCO: Yes. So state --
18 state --

19 JUSTICE KAGAN: -- so what's the end
20 of that?

21 MR. FRANCISCO: -- state courts can
22 certainly get both the actual protection
23 question wrong and the arguable protection
24 question wrong. We're here because we believe
25 that the Washington State Supreme Court got the

1 arguable protection wrong. But that's not
2 unique to Garmon. That happens in all areas of
3 potential federal preemption.

4 The remedy is you come to this Court
5 when it arises out of the state courts --

6 JUSTICE KAGAN: I see.

7 MR. FRANCISCO: -- and you go to the
8 courts of appeals when it arises out of the
9 federal courts.

10 JUSTICE KAGAN: I see. But, to go
11 back then to Justice Sotomayor's question, if
12 the Board now has done an investigation into
13 this matter and has a different view of the
14 facts than -- than your client has, what is the
15 relevance of that in the state court
16 proceeding?

17 I would think, as Justice Sotomayor
18 was suggesting, that that's where -- well, it
19 -- it -- it becomes appropriate to say no, now,
20 you know, something has changed.

21 MR. FRANCISCO: And, again -- so I --
22 I -- I -- I'd have two responses. The first is
23 that that's completely contrary to Bill
24 Johnson's because that's the exact situation --

25 JUSTICE KAGAN: Okay. Put -- put the

1 Bill Johnson's --

2 MR. FRANCISCO: -- of Bill Johnson's.

3 JUSTICE KAGAN: -- aside.

4 MR. FRANCISCO: Secondly, what I would
5 say is that the state court can certainly hand
6 over those facts to the union and those facts
7 can be introduced in the state court
8 proceeding, and if based on those facts it
9 becomes clear at summary judgment or a later
10 stage that there's arguable protection or
11 actual protection, then you grant the
12 preemption defense, unless, of course, the
13 local interest exception applies, but you
14 proceed in the ordinary course the way you do
15 in every other or almost every other federal
16 preemption case.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 JUSTICE GORSUCH: What's at stake in
20 allowing state courts to proceed in the
21 ordinary course as -- as you're talking about?

22 MR. FRANCISCO: The -- the stake is
23 that you preserve, one, the state's traditional
24 authority to adjudicate tort claims.
25 Preemption is -- is a big deal. That's why we

1 don't just assume preemption willy-nilly, and
2 there are rules that make clear that preemption
3 applies when certain clear statements are made.

4 Now I agree Garmon goes further, but
5 it still respects the fact that state courts
6 have an overriding interest in adjudicating
7 state tort claims.

8 The second stake is the plaintiff's
9 right to petition the courts. You know,
10 frankly, we'd prefer not to be before an
11 administrative agency where the agency is the
12 judge, jury, and executioner. We prefer to be
13 in a court system where we have a -- a -- a
14 neutral judge and the potential for a jury.
15 And so that's why it also protects, as -- as
16 Bill Johnson's also made clear, the plaintiff's
17 right to petition the courts for redress.

18 JUSTICE GORSUCH: What do you say to
19 the argument that the NLRB has a lot of
20 expertise in this area and does see a lot more
21 of these cases than a state court?

22 MR. FRANCISCO: And that's precisely
23 the work I think that the arguable protection
24 prong does. If the facts show that the facts
25 are arguably protected by the statute, then,

1 unless the local interest exception applies, it
2 is the Board that gets to decide whether it's
3 not just arguable protection, but it's actual
4 protection.

5 But the Board's interest in ensuring
6 that legal uniformity isn't enough in my view
7 to override the state's traditional interest in
8 adjudicating tort claims up until the point
9 where it becomes clear then on the actual facts
10 there's either an arguable or an actual
11 conflict with federal law.

12 Again, it's how preemption generally
13 works. And while the Board does have strong
14 interests here, federal agencies have strong
15 interests in a lot of different areas, yet we
16 don't do a wholesale overturning of how federal
17 preemption works in those other areas.

18 JUSTICE GORSUCH: You keep talking
19 about how federal preemption normally works,
20 suggesting Garmon's a bit of an outlier. And
21 we've been struggling this morning with
22 understanding just how far its penumbras --

23 MR. FRANCISCO: Yeah.

24 JUSTICE GORSUCH: -- extend. I think
25 that was out of Garmon itself.

1 Does it extend so far as to require a
2 hiatus of a state court proceeding even when
3 the pleadings are arguably outside of the
4 statute? And I guess I'm wondering, do you --
5 do you -- do you still pursue the -- the
6 suggestion that we ought to rethink Garmon?

7 MR. FRANCISCO: Your Honor, I -- we
8 don't think that in order to resolve this case
9 in favor of our client you have to revisit
10 Garmon. But what I am quite confident on is
11 that you can either interpret Garmon as it
12 stands as being a huge departure from ordinary
13 principles or a medium departure from ordinary
14 principles. Right now, I think it's a medium
15 departure from ordinary principles.

16 If you take it the step that my
17 friends on the other side are suggesting and
18 say that state courts are actually ousted of
19 the authority to make that basic factual
20 determination of whether the facts do, in fact,
21 arguably conflict with the law, then you're
22 turning it into a huge departure from ordinary
23 principles.

24 JUSTICE GORSUCH: So it's a medium
25 penumbra, not a huge penumbra.

1 MR. FRANCISCO: Yeah. Your -- your
2 words, Your Honor, the Court's words.

3 JUSTICE GORSUCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 Justice Barrett?

7 JUSTICE BARRETT: I take it that your
8 position means that if the Board beats the
9 state court to it, let's imagine that here the
10 Board concludes its proceedings first and
11 decides that, in fact, your client had engaged
12 in an unfair labor practice, that doesn't bind
13 the state court. The state court can go on and
14 continue to resolve the facts a different way?

15 MR. FRANCISCO: I think that's right,
16 Your Honor. Our position is essentially the
17 flip side of the government's. They -- and the
18 union's. They claim that after four years of
19 state court litigation you can require the
20 state courts to take a hiatus.

21 Our position is that if you've got a
22 state complaint that alleges clearly
23 unprotected conduct, the state court gets to
24 adjudicate it. Now I think whatever the Board
25 found is going to be extraordinarily useful to

1 the union in the state court proceedings, but I
2 -- I think that the state court still gets to
3 proceed.

4 JUSTICE BARRETT: Okay.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: Can I just get a
8 clarification on Justice Barrett? I -- I guess
9 I'm not understanding what you mean.

10 So, if the Board, before there's any
11 tort suit brought, looks at this very situation
12 and resolves it, are -- is it -- what's your
13 position about whether the tort suit can go
14 afterwards?

15 MR. FRANCISCO: I think that the tort
16 suit can go afterwards. You will have to deal
17 with a couple of issues. You have to deal with
18 whether there are any claim or issue preclusion
19 issues that flow from the Board's proceeding,
20 and that's a pretty complicated area.

21 You'd also have to deal with whatever
22 evidence the Board proceeding generated, which
23 might well be extraordinarily useful to the
24 union in the state court proceedings.

25 JUSTICE JACKSON: All right. So then,

1 if that's the case, why are we talking in terms
2 of ousting the state court of its jurisdiction
3 even in this regard? If it can go afterwards,
4 then there really isn't -- we're not really at
5 base talking about Garmon being an ousting kind
6 of thing.

7 MR. FRANCISCO: So I'll use a
8 different term. You're forcing the state court
9 to go on, to use their term, a jurisdictional
10 hiatus, again, not something that I'm aware
11 that we do in virtually any other area of
12 preemption.

13 JUSTICE JACKSON: All right. But --
14 but -- but understanding that our precedent
15 recognizes congressional intent to allow the
16 Board to develop a uniform body of law for the
17 very -- various reasons that Justice Kagan
18 pointed out, that might be a good thing, but at
19 least it looks as though that's what Congress
20 intended, all right?

21 So, if that's the situation and now we
22 have precedent that allows for that kind of
23 Board taking the front lead on these things, I
24 guess I'm a little confused about your
25 suggestion that there is arguable protection

1 versus actual protection as different kinds of
2 analyses.

3 I thought -- I thought that this is a
4 spectrum that when it comes to the state court
5 and the state court is asked to stand down, we
6 have preemption, instead of having to litigate
7 the whole issue and get to make the
8 determination about whether the conduct is
9 actually protected, the state court can look at
10 it and say: Well, it looks arguable, and so
11 that's enough.

12 If I'm right about that, I'm still
13 confused as to why an intervening Board
14 determination that we have protected conduct
15 here would be irrelevant to the state's
16 assessment of whether or not there's arguably
17 protected conduct --

18 MR. FRANCISCO: Sure, Your Honor.

19 JUSTICE JACKSON: -- and why that's
20 problematic --

21 MR. FRANCISCO: For -- for --

22 JUSTICE JACKSON: -- in any way.

23 MR. FRANCISCO: -- for -- for a couple
24 of reasons. First, to the extent you're
25 focused on precedent, I'd make two points.

1 One, Bill Johnson's is a precedent of this
2 Court that --

3 JUSTICE JACKSON: Let's not focus on
4 precedent. Let's -- just logic. Logic.

5 MR. FRANCISCO: Okay. So I'll --

6 JUSTICE JACKSON: Let me --

7 MR. FRANCISCO: -- focus on logic --

8 JUSTICE JACKSON: -- let me put it
9 this way. Can I just give you --

10 MR. FRANCISCO: Yeah.

11 JUSTICE JACKSON: So, if the opposite
12 were true, if you find out in the course of the
13 Garmon preemption debate that the Board has
14 taken a look at it and they have passed,
15 they've taken a look at it and they've said
16 somehow, in a -- in a memo or whatever, we
17 think this is not protected conduct, so we're
18 not going to file a complaint --

19 MR. FRANCISCO: Mm-hmm.

20 JUSTICE JACKSON: -- are you saying
21 that you would not bring that to the state
22 court's attention as it addressed the Garmon
23 situation? Wouldn't you say, look, look, the
24 Board says not protected, therefore, no Garmon?

25 MR. FRANCISCO: You know, I guess, if

1 I could get that in under the Rules of
2 Evidence, which I'm not sure I could --

3 JUSTICE JACKSON: Right.

4 MR. FRANCISCO: -- I might -- I might
5 try to bring it.

6 JUSTICE JACKSON: It would be
7 relevant. So my point is --

8 MR. FRANCISCO: And that's why I'm
9 saying they could still bring --

10 JUSTICE JACKSON: -- why isn't the
11 opposite relevant?

12 MR. FRANCISCO: -- they can still
13 bring the evidence that -- as I've been saying,
14 they can still bring the evidence that the
15 Board found before the state court proceeding.
16 And I would suspect that it would be pretty
17 persuasive evidence if it were sufficient for
18 the -- the Board to go the other way.

19 JUSTICE JACKSON: All right. Mindful
20 of my time --

21 MR. FRANCISCO: But it doesn't --

22 JUSTICE JACKSON: -- can I just ask
23 you about another -- way back to the beginning,
24 when we were talking about the difference
25 between reasonable precaution and intentional

1 destruction, I have to admit that I looked at
2 your brief and I saw you pleading a -- or
3 arguing a subset, that intentional destruction
4 was a subset of reasonable precaution.

5 If -- if I'm right about that, do we
6 need to do -- is reasonable precaution the
7 broader standard? And couldn't we resolve it
8 in your favor on the -- what I thought was the
9 narrower ground?

10 MR. FRANCISCO: I -- yes and yes. But
11 the reason why I think it's important to get to
12 the narrower ground is because, if -- if you
13 just have this world of reasonable precautions,
14 I do not believe that it gives unions or
15 management sufficient guidance to know that a
16 clear category of egregious conduct, where you
17 actually intend to destroy property and you're
18 successful in carrying out that intent, you're
19 -- you're not giving them clear guidance that
20 there's this particularly egregious category of
21 conduct that's off the table.

22 That's why I would suggest you do what
23 the Board did in the International Protective
24 Services case. You could say something like,
25 look, they failed the reasonable precautions

1 test and, in particular, they failed the
2 reasonable precautions test because -- and,
3 here, to quote -- "the union's misconduct went
4 beyond a failure to take reasonable
5 precautions" and "established that the union
6 recklessly intended to place the federal
7 buildings and their occupants at risk."

8 I think that would be a perfectly
9 appropriate resolution of this case.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Suri.

13 ORAL ARGUMENT OF VIVEK SURI
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING NEITHER PARTY

16 MR. SURI: Mr. Chief Justice, and may
17 it please the Court:

18 I wonder if I could begin with the
19 line of questioning that seems to have taken up
20 most of the morning so far -- namely, this
21 distinction between factual and legal issues --
22 and explain why it is that we think even the
23 factual issues should be resolved by the Board.

24 There are both legal and practical
25 reasons for so holding, and contrary to what

1 Mr. Francisco has said, I don't think the Bill
2 Johnson's decision stands in the way of that.

3 If I could start with the legal
4 reasons, the first and most important legal
5 reason is this Court's decision in Longshoremen
6 against Davis. In that case, the Court said
7 that Garmon preemption is established when the
8 party asserting preemption presents evidence
9 from which the Board could reasonably conclude
10 that the conduct is protected.

11 And it separated that from a separate
12 basis for establishing preemption; namely, the
13 party can offer a legal interpretation that the
14 Board could reasonably accept. So I think that
15 decision pretty squarely establishes that the
16 Board is meant to resolve factual as well as
17 legal disputes.

18 And that's consistent with the
19 structure of the statute. If you look at
20 Sections 10(e) and 10(f) of the National Labor
21 Relations Act, those provisions say that the
22 Board makes factual findings to be resolved
23 under the substantial evidence standard. That
24 suggests that Congress wanted the Board to make
25 these factual decisions as well as the legal

1 ones.

2 And as for the practical reasons, if
3 the state court gets the law wrong, then it
4 won't be finding the right facts. In other
5 words, if it misunderstands what the Board's
6 precedents require in a particular area, then
7 it may focus on immaterial facts or ignore the
8 material facts.

9 And, finally, just as an
10 administrative matter, it's going to be very
11 difficult to draw lines between mixed
12 questions, legal questions, and factual
13 questions. It's much easier simply to adopt a
14 clear rule that the Board resolves these
15 arguable cases.

16 Now Mr. Francisco says that the Bill
17 Johnson's decision supports his position, and I
18 don't think that's right. The issue in Bill
19 Johnson's is, under what circumstances can
20 someone be punished simply for bringing a
21 lawsuit? A Bill Johnson's claim is analogous
22 to a malicious prosecution claim. It's a claim
23 that you've brought a baseless charge for a
24 retaliatory reason.

25 And in that unique context, the Court

1 has said there are First Amendment interests,
2 right to petition interests that are in play,
3 and in that context, we don't want the Board
4 making judgments before the state court, in
5 fact, determines that the suit is baseless.

6 There's nothing like that going on
7 here, and, therefore, the Court should adopt
8 the standards that it set.

9 JUSTICE KAGAN: Well, Mr. Suri -- your
10 -- your light is off, right?

11 MR. SURI: Yes.

12 JUSTICE KAGAN: Okay. I mean, what
13 you said about not making too much of the
14 difference between facts and law in this area,
15 you know, seems pretty sensible to me. But
16 then I guess I'm -- I'm a little bit confused
17 about what you're suggesting the disposition in
18 this case should be.

19 Even putting aside the Board complaint
20 for the moment, and I want to hear your views
21 about the relevance of the Board complaint, but
22 even putting that aside, it seems to me that
23 what the trial court did here was to say, you
24 know, I -- I -- I -- I -- there are a set of
25 allegations, but I'm pretty convinced that

1 there's a really murky, complicated factual
2 issue here, and so I don't want to take those
3 allegations just -- you know, just assume that
4 they're true. I really think that this is a
5 case that ought to go to the Board because
6 people are going -- people are arguing right
7 now about the facts and how the law applies to
8 the facts, and -- and I'm better off sending it
9 over there.

10 So, if you're right about everything
11 that you said, why wasn't that the right call?

12 MR. SURI: That may have been a
13 sensible way to set up the preemption system in
14 this area, but that's not the approach the
15 Court took in its decision in Longshoremen.
16 The Court said that the application of Garmon
17 preemption does not depend on a predictive
18 judgment by the court about whether facts are
19 likely to be in dispute. Rather, the standard
20 is whether a party has presented evidence from
21 which the Board could reasonably conclude that
22 the conduct is protected.

23 And, in our view, that simply wasn't
24 done here.

25 JUSTICE KAGAN: So -- so the -- the --

1 the -- the court says that at the outset or is
2 supposed to, and you're saying it was wrong not
3 to say it. And then what happens? As the suit
4 goes forward, what's supposed to happen?

5 MR. SURI: May -- may I suggest how we
6 think this could and should perhaps have played
7 out? The Court has held that Garmon preemption
8 is jurisdictional, a matter of subject matter
9 jurisdiction. That's not just a drive-by
10 holding. That's a square decision of this
11 Court.

12 And what I -- I understand Washington
13 courts to allow and most courts to allow is
14 that you can bring a factual 12(b)(1) motion at
15 the motion to dismiss stage. In other words,
16 you don't just focus on the allegations in the
17 complaint. You say here's this additional
18 evidence showing that the state lacks
19 jurisdiction.

20 And if that had been done, it would
21 have been permissible for the state court to
22 look outside the pleadings, look at this other
23 evidence, and say, yes, there are factual
24 disputes and, therefore, let's wait for the
25 Board to resolve them.

1 CHIEF JUSTICE ROBERTS: You --

2 JUSTICE BARRETT: Mr. Suri -- oh.

3 CHIEF JUSTICE ROBERTS: -- you think,
4 if I understand the position correctly, that
5 Garmon does not cover the failure to take
6 reasonable precautions to protect property,
7 right?

8 MR. SURI: Yes, Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: Well, it seems
10 to me that if it doesn't cover that, it surely
11 cannot cover the intentional destruction of
12 property. Does that seem reasonable?

13 MR. SURI: That certainly seems
14 reasonable, but we have additional qualifiers
15 on this reasonable precaution standard that
16 illustrate the difference between it and
17 Mr. Francisco's standard.

18 The first is that our standard applies
19 --

20 CHIEF JUSTICE ROBERTS: Well, I --
21 just to make sure you're -- we're walking down
22 the same road here, what I'm looking for is
23 reasons that intentional destruction of
24 property would not follow a fortiori from
25 failure to take reasonable precautions to

1 protect property.

2 MR. SURI: It depends on what
3 "destruction" means, Mr. Chief Justice. If by
4 "destruction" you mean the type of imminent
5 harm that we're talking about, then, yes, we
6 agree that intentional destruction is a subset
7 of our standard.

8 But it's not clear that Mr.
9 Francisco's standard is limited to that type of
10 imminent harm. For example, let us say that
11 grocery workers walk out of the grocery store
12 and the food in the store spoils. I'm not
13 certain whether Mr. Francisco would describe
14 that as destruction of property or not. We say
15 --

16 CHIEF JUSTICE ROBERTS: Well, but, I
17 mean, the same ambiguity it seems to me would
18 accompany reasonable caution to protect -- to
19 preserve property. I mean, if you're a --
20 you're striking against a grocer maybe, sure,
21 it's -- it's sort of inevitable that, you know,
22 the milk is going to go sour if you're not
23 there. But, in other words, that ambiguity
24 doesn't seem to me to justify the distinction
25 between those two categories.

1 MR. SURI: And it is precisely to deal
2 with that problem that the Board has added a
3 few additional words beyond just reasonable
4 precautions. It's reasonable precautions to
5 protect property from foreseeable imminent harm
6 caused by the sudden cessation of work.

7 That, we think, has allowed the Board
8 to say that there is a meaningful distinction
9 between the spoilage of products that happens
10 in the ordinary course and the type of harm
11 that is alleged in this case.

12 CHIEF JUSTICE ROBERTS: Well, but what
13 you're saying is Garmon might not cover -- may
14 or may not cover the fact that the milk is
15 going to go sour or whatever it is, but we know
16 that it doesn't -- I always get these mixed up
17 -- but it does cover somebody who deliberately
18 opens all the containers of milk and pours them
19 down the drain.

20 It just seems to me that intentional
21 destruction of property is a much more serious
22 concern than failure to take reasonable
23 precautions, even if you want to add imminent
24 and all that other stuff, but, as I understand
25 your position, you want to compel Mr.

1 Francisco's client to squeeze its intentional
2 destruction claim into failure to take
3 reasonable precautions?

4 MR. SURI: I think we must
5 distinguish, Mr. Chief Justice, between
6 affirmative acts like pouring the milk down the
7 drain and merely stopping work.

8 Now we accept there are some
9 circumstances in which the union chooses an
10 inopportune moment to stop work that is
11 unreasonable under the circumstances, and
12 that's what our reasonable precautions test is
13 meant to address.

14 But, if you're concerned about pouring
15 milk down the drain or affirmative acts like
16 that, we have no objection to the notion that
17 that is unprotected entirely apart from the
18 reasonable precautions test that we have been
19 advancing.

20 JUSTICE JACKSON: And isn't that what
21 Mr. Francisco is saying? I mean, that -- I
22 guess that's why I thought this was a subset
23 and that the reasonable precaution was
24 problematic because it would sweep in the
25 merely stopping, walking away, the milk

1 spoilage scenario.

2 I thought that the government -- I was
3 confused by why the government accepted
4 reasonable precautions or thought it was
5 necessary in order to come out the way you did.

6 MR. SURI: The reason we have used the
7 reasonable precautions formula is not so much
8 the words "reasonable precautions" but, rather,
9 the rest of the test, namely, sudden cessation
10 of work resulting in imminent and foreseeable
11 harm. That's the part that we think is doing
12 the work in illuminating the --

13 JUSTICE JACKSON: But why isn't that
14 the milk scenario? I mean, I still feel like
15 that could be inconsistent with some of our
16 precedents, if you have a union that without
17 deliberately timing it -- I -- I -- I thought
18 the real problem, you know, in some of our
19 cases, in the -- in the molten metal case, was
20 the sort of conspiratorial deliberate timing of
21 this to inflict maximum property damage, but it
22 seems to me that imminent, you know, problem to
23 the product covers milk too.

24 If you walk off and you know that the
25 milk is going to spoil, why isn't reasonable

1 precaution triggered in that case?

2 MR. SURI: In this?

3 JUSTICE JACKSON: Yeah.

4 MR. SURI: It isn't triggered because
5 the Board has understood the concept of
6 imminent harm not to apply. The milk is going
7 to spoil either way if it's left there, whether
8 or not the people leave. It's not caused by
9 their sudden cessation of work. That's the
10 first point.

11 And the second point is that that is
12 the sort of routine consequence that attends
13 any strike.

14 Now I accept the verbal formulations
15 that the Board have used may not be the most
16 perfect ones. It may be that some other words
17 need to be used to describe those scenarios,
18 but the key point that I would like to convey
19 to the Court is that the mere spoilage of a
20 perishable product after people walk off from
21 the job is not something that the striking
22 employees can be held responsible for.

23 JUSTICE GORSUCH: Counsel, if I might
24 return to the -- the question of proceedings
25 going forward and your suggestion that this

1 should go through a hiatus in the state court.

2 Would that be -- it sounds like you're
3 suggesting to the Court that that might be
4 appropriate if a 12(b)(1) motion or a summary
5 judgment motion or some motion were filed
6 before the state court and not something we
7 should do sua sponte?

8 MR. SURI: Correct.

9 JUSTICE GORSUCH: Okay.

10 JUSTICE BARRETT: Mr. Suri, do you
11 know why the Board investigator took four years
12 to file the complaint? Because it seems to me
13 that Mr. Francisco's point about jurisdictional
14 hiatus is there is, you know, a -- a -- a
15 matter of allowing them to vindicate their tort
16 claim, assuming it's a good one.

17 MR. SURI: I do, Justice Barrett.
18 There is in the union's charge in this case a
19 separate Bill Johnson's claim that is not at
20 issue in this Court. In other words, there
21 were two claims that the union brought -- that
22 Mr. Francisco's client brought in state court.

23 And, potentially, with respect to one
24 of those claims that is not at issue here,
25 there's a question about whether that was

1 baseless and filed in a retaliatory way.
2 That's been resolved by the state courts.

3 And although there's nothing in the
4 record definitively establishing this, that is
5 the most natural explanation for why the
6 general counsel issued her complaint one month
7 after the Washington Supreme Court finally
8 resolved that issue.

9 JUSTICE BARRETT: Is the potential for
10 that kind of delay something that we should
11 take account of in thinking about this
12 jurisdictional hiatus argument, given that, you
13 know, it could take the Board quite a long time
14 to decide whether to pursue a complaint?

15 MR. SURI: The -- that delay has
16 arisen only because of the coincidence that in
17 this particular case, there's both a claim
18 raising a Bill Johnson's issue and a claim
19 raising a Garmon issue, so it's a fortuity that
20 that has happened in this case. That wouldn't
21 necessarily happen in the normal case.

22 JUSTICE KAGAN: Well, how long --

23 JUSTICE BARRETT: Or if it --

24 JUSTICE KAGAN: -- does something
25 typically take?

1 MR. SURI: My understanding is that
2 the Board would typically take something like
3 four to five months to get from the charge to
4 the general counsel's complaint, and that's not
5 all investigation. That's also settlement
6 efforts that are being made by the general
7 counsel and the parties.

8 JUSTICE BARRETT: Mr. Suri, what would
9 happen if the state court proceedings are
10 filed, nothing is filed, the union hasn't filed
11 anything before the Board? Presumably, then
12 the state court doesn't have to stay its hand
13 because --

14 MR. SURI: Correct.

15 JUSTICE BARRETT: -- there's nothing
16 proceeding before the Board. The state court,
17 you know, doesn't dismiss it on the pleadings,
18 moves into discovery, discovery is starting to
19 happen, but it's not -- no summary judgment
20 motion, no opportunity yet to decide the
21 preemption on the facts question, and then the
22 Board starts.

23 The state court just stops then?

24 MR. SURI: In principle, yes, but
25 there are practical reasons why that scenario

1 is unlikely to arise. In the first place,
2 there's a six-month statute of limitations for
3 filing an unfair labor practice charge with the
4 Board, and, therefore, it is unlikely that the
5 charge will be filed in a -- years after the
6 case has begun, for example.

7 And then, once the charge has been
8 filed, the general counsel would typically move
9 in an expeditious fashion. So it does seem
10 quite improbable that the Board proceedings
11 would take that long.

12 In addition, the party asserting
13 preemption doesn't have to wait until the
14 general counsel's complaint is brought. We're
15 saying that is a sufficient condition for
16 preemption, not that it -- it is a necessary
17 condition. That party could simply file with
18 the state court a motion providing the evidence
19 showing that the conduct is arguably protected.

20 JUSTICE SOTOMAYOR: So tell me how to
21 write this decision.

22 MR. SURI: I'd suggest copying our
23 brief, Your Honor.

24 (Laughter.)

25 JUSTICE SOTOMAYOR: I know, but your

1 brief was whatever number of pages, 30-odd
2 pages. Give it to me in two paragraphs.

3 JUSTICE KAGAN: A summary of the
4 argument.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: Summary of the
7 argument.

8 (Laughter.)

9 MR. SURI: The National Labor
10 Relations Act protects the right to strike, but
11 workers have a corresponding responsibility to
12 take reasonable precautions to prevent
13 foreseeable, imminent harm to the employer's
14 property.

15 In this case, accepting the
16 allegations in the employer's complaint as
17 true, such precautions were not taken.
18 Therefore, the conduct was not even arguably
19 protected, and the Washington Supreme Court's
20 decision is reversed.

21 JUSTICE KAGAN: Well, go on a little
22 --

23 CHIEF JUSTICE ROBERTS: Thank you.

24 JUSTICE KAGAN: -- bit and just say --
25 I'm sorry.

1 CHIEF JUSTICE ROBERTS: No, go ahead.

2 I was just about to move in to our next --

3 JUSTICE KAGAN: If -- if -- if -- if
4 you would go on and -- and say whether you
5 would say anything and, if so, what you would
6 say about the presence of the Board complaint.

7 MR. SURI: I recommend that the Court
8 not address that issue because there are
9 significant complications that the lower courts
10 have not addressed, namely, what is the
11 relevance of the general counsel complaint in
12 the first place.

13 If the Court wanted to address that
14 issue, what I would recommend it say is that
15 there is a general rule that the issuance of
16 the general counsel's complaint suffices to
17 establish that everything asserted in that
18 complaint is arguably so.

19 So, if the complaint states that
20 particular conduct is protected, then it's at
21 least arguably protected, and that's enough for
22 Garmon preemption.

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas?

25 JUSTICE THOMAS: We -- I have heard

1 the terms "preemption," "exhaustion," and
2 "jurisdictional hiatus." Two of the -- the
3 latter two have never come up in a preemption
4 case to my knowledge.

5 Is there any analogous area to this in
6 our -- our preemption jurisprudence?

7 MR. SURI: Yes, Justice Thomas. The
8 closest analogy I've been able to find is with
9 the Interstate Commerce Commission. The Court
10 developed the doctrine of primary jurisdiction,
11 which required state courts under some
12 circumstances to await the Interstate Commerce
13 Commission's decisions as to whether a
14 particular rate is reasonable.

15 And that primary jurisdiction doctrine
16 has been applied more broadly in federal courts
17 with respect to administrative agencies.

18 JUSTICE THOMAS: Did that disappear
19 with the ICC?

20 MR. SURI: I think it's been a while
21 since this Court has applied the primary
22 jurisdiction doctrine. That's fair.

23 CHIEF JUSTICE ROBERTS: Justice Alito?
24 Justice Sotomayor, anything further?
25 Justice Kagan?

1 Justice Gorsuch, anything further?

2 Justice Kavanaugh?

3 JUSTICE BARRETT: I just want to
4 quickly clarify your interchange with Justice
5 Sotomayor and Kagan about what this opinion
6 should say. You recommend it not say
7 anything -- not saying anything about the
8 effect of the complaint before the Board. So
9 are you recommending, in -- in the government's
10 view, the ideal opinion would just stop at
11 correcting the Washington Supreme Court's
12 dismissal of the suit and not say anything
13 about this jurisdictional hiatus part?

14 MR. SURI: Yeah. That's correct.

15 JUSTICE BARRETT: Okay.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: So, if we are
19 concerned that saying that employees have a
20 duty to take reasonable precautions to prevent
21 imminent, foreseeable harm could subsequently
22 be read or considered as the milk spoilage
23 situation, that is, putting on employees the
24 duty when they strike to pay attention to
25 what's happening with the property and mitigate

1 damages, if there's a concern that that
2 formulation might lead to that, would you
3 object in your statement of the holding to,
4 instead of saying employees have a duty to take
5 reasonable precautions, saying employees have a
6 duty not to engage in a scheme to intentionally
7 destroy the employer's property, which is what
8 was alleged in this case? And saying that, if
9 we think it's narrower, would the government
10 object?

11 MR. SURI: We would not object so long
12 as it's clear that, by destruction of property,
13 you don't mean the milk spoiling because the
14 workers have gone off work.

15 If the Court is concerned, there is
16 another -- another type of qualification that
17 it could add to its opinion. It could limit
18 the opinion to equipment and premises of the
19 employer -- here, the trucks themselves were
20 threatened -- and leave the issue of perishable
21 products aside entirely.

22 JUSTICE JACKSON: What about the focus
23 on the intent, on the conspiratorial nature of
24 this, on the attempt to hurt the employee --
25 the -- the -- the -- as opposed to just the

1 attempt to exercise my right to strike and the
2 incidental damage that happens to that, so be
3 it?

4 MR. SURI: Yeah, I -- I -- I accept
5 that that is a subset of reasonable precautions
6 if you just focus on that part of it. We're,
7 again, more concerned about the back half of
8 the test, whether it's being limited in an
9 appropriate way to make sure it doesn't sweep
10 in spoilage.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Dalmat.

15 ORAL ARGUMENT OF DARIN M. DALMAT

16 ON BEHALF OF THE RESPONDENT

17 MR. DALMAT: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 Glacier sued Local 174 over a
20 concerted work stoppage, conduct at the heart
21 of the Act's protections. Under settled law,
22 strikers lose those protections if they fail to
23 take reasonable precautions to avoid
24 aggravated, imminent, foreseeable harm to
25 employer property.

1 Applying that test, the Board has
2 never found a forfeiture merely because
3 perishables spoil.

4 On the 12(b) record then, this walkout
5 was at least arguably protected, as the
6 issuance of the general counsel complaint later
7 confirmed. The 12(b) record shows the union
8 instructed the drivers to return their trucks
9 to Glacier's facility, which all the drivers
10 did, thereby putting Glacier in a position to
11 use its ordinary tools for handling leftover
12 concrete, such as reclaimers, ecology block
13 forms, and retardants. The union also told
14 drivers to return their trucks with the drums
15 running.

16 As Glacier itself observes -- and this
17 is paragraphs 3.8 and 3.9 of the complaint --
18 the concrete does not even begin to harden
19 until the drums stop turning. As a result, no
20 harm came to Glacier's trucks or facility.

21 These pleaded facts show reasonable
22 precautions. At a minimum, there's enough
23 evidence in the record to allow the Board
24 lawfully to conclude that it -- to rule in our
25 favor. And that's all Davis requires to oust

1 state court jurisdiction temporarily, as the
2 Washington Supreme Court so held.

3 And now that the Board has taken up
4 the case and exercised its primary jurisdiction
5 over this labor dispute, the grounds for
6 affirmance are even clearer.

7 I welcome the Court's questions.

8 CHIEF JUSTICE ROBERTS: What if the --
9 you're, I gather, disputing your friend on the
10 other side's categorization of the conduct in
11 this case as something a fortiori beyond the
12 reasonable precautions, moving into intentional
13 destruction.

14 Assuming that the facts do, in fact,
15 show intentional destruction, how would you
16 analyze that situation?

17 MR. DALMAT: So I think intent is not
18 the critical element to the scope of the
19 Board's protection. Some intentional
20 destruction, we certainly admit, would be
21 unprotected. Acts of vandalism, I agree with
22 my friend from the government, an affirmative
23 act of vandalism, clearly unprotected.
24 Similarly, this Court held in Fansteel a
25 takeover of employer property, a building, that

1 excluded the employer from access to its
2 property, clearly unprotected.

3 But the Board has also held that a
4 walk-off often does have an intent to cause
5 maximum harm to the -- economic harm to the
6 employer and sometimes, for example, in Lumbee
7 Farms, even includes an intent to hurt
8 perishables, and those have been held to be
9 protected. So --

10 CHIEF JUSTICE ROBERTS: But -- but --
11 but there certainly is a distinction between
12 economic harm to the employer, which is at the
13 heart of many strikes anyway, and intentional
14 destruction of property. The difference
15 between the milk spoiling and killing the cow.

16 So, again, take a case where -- not
17 recharacterizing the -- the claim of
18 intentional destruction as opposed to failure
19 to take reasonable precautions. How would that
20 be analyzed? Or are you saying that anything
21 like that, the infliction of economic harm, has
22 to be squeezed into the failure to take
23 reasonable precautions?

24 MR. DALMAT: I think the critical
25 distinction is the nature of the conduct,

1 whether it's an affirmative act of vandalism or
2 whether it's the result of the withdrawal of
3 labor. And so --

4 JUSTICE JACKSON: But isn't he --
5 isn't that what's being alleged here? I mean,
6 I appreciate that distinction, but I guess I'm
7 not sure I understand what you mean when you --
8 when you talk about the distinction. I mean,
9 the -- the -- the allegation in this case, and
10 you could imagine even hypothetically, is that
11 the union certainly has the right to walk away.

12 MR. DALMAT: Yes.

13 JUSTICE JACKSON: And if they're
14 walking away and their responsibilities involve
15 perishable goods --

16 MR. DALMAT: Yes.

17 JUSTICE JACKSON: -- that as a result
18 of their walking away are going to spoil --

19 MR. DALMAT: Right.

20 JUSTICE JACKSON: -- then that's an
21 incidental harm that is occurring.

22 But you can also imagine a situation
23 in which the union says we have evidence that
24 we're going to time our walking away --

25 MR. DALMAT: Yes.

1 JUSTICE JACKSON: -- at the very point
2 in which we've poured the thing that can't be
3 recovered because, if we do it at that point,
4 we're going to destroy the machines, and that
5 is our intent.

6 I don't understand how that is
7 protected and why that isn't any -- you know,
8 the same as -- as -- as the arsonist who says,
9 I'm going to walk away, but, as I do, let me
10 strike the match and burn down the factory.

11 MR. DALMAT: So what's always been
12 critical to the Board's cases is the extent of
13 the harm, so the aggravated nature of the harm,
14 the foreseeable imminence of the harm, not the
15 intent. And to give an --

16 JUSTICE JACKSON: But I'm asking what
17 should be. I -- okay, I appreciate that --
18 that it hasn't been clear, but that, I think,
19 is part of the problem.

20 So, in terms of the logic of this,
21 shouldn't the line be drawn around the intent
22 in the sense of are -- is the union engaging in
23 conduct for the purpose of destroying the
24 property of the factory, or is the union just
25 striking, and if some of the property gets

1 damaged because they're walking away, that's
2 incidental, that's totally protected?

3 MR. DALMAT: So that should not be the
4 test for two reasons, a doctrinal and a
5 statutory. So let me give you the statutory
6 first.

7 Congress in Section 151, the very
8 first section of the Act, observed that strikes
9 generally have the "intent or necessary effect"
10 of causing a variety of economic harm,
11 including a stoppage of the flow of raw
12 materials and interruptions of operations.

13 And, certainly, Congress was aware of
14 perishables, like cheese and milk and concrete,
15 and they --

16 JUSTICE JACKSON: Okay. But that's
17 still not getting to me -- yes, economic harm
18 is being inflicted when you stop work.

19 MR. DALMAT: Intentionally.

20 JUSTICE JACKSON: You intentionally
21 stop the work, but the question is, can you do
22 something that actually intends to affect the
23 property directly to make it -- the property
24 unsalvageable. We can't get new people in here
25 as a result of the strike and pick up where we

1 left off because you literally burned down the
2 factory.

3 We agree that you can't burn down the
4 factory, right?

5 MR. DALMAT: We absolutely agree you
6 cannot burn down the factory.

7 (Laughter.)

8 JUSTICE JACKSON: Okay. All right.

9 MR. DALMAT: You cannot smash things.

10 JUSTICE KAGAN: Can I try something?
11 What I hear you saying is that the focus on
12 intent is wrong because workers, unions, do
13 things all the time intentionally to maximize
14 economic harm. You know, that if there's a
15 seasonal component of a business, workers will
16 try to time their strike in order to maximize
17 the economic harm because, you know, more of
18 the business is conducted in the summer than in
19 the winter, things like that, that there are
20 all kinds of things which are perfectly
21 intentional to maximize economic harm.

22 And so you're saying that when we
23 start focusing on intent without more, it -- it
24 -- it pulls in pretty much, you know, every
25 strategic decision that a union makes as to

1 when to conduct a work stoppage.

2 MR. DALMAT: That's absolutely right.
3 And Congress has told us in 8(b) which intents
4 are off limits. Congress has proscribed
5 certain forms of secondary economic pressure.
6 That's an intent unions are not allowed under
7 the law to have. It's proscribed certain forms
8 of recognitional picketing. Those are certain
9 intents that the union is not allowed to have.

10 But what it has not done -- and in --
11 in this Court's decision in Curtis Brothers,
12 the Court said what it -- the off limits
13 intents in 8(b) are the only ones that are off
14 limits. It doesn't regulate intents beyond
15 those expressly proscribed.

16 And the reason for that goes back to
17 Section 1, because Congress recognized that
18 inherent in the notion of a strike is an intent
19 to inflict economic harm. That's what brings
20 parties to resolution, that -- the availability
21 of the threat, as this Court recognized even
22 before the NLRA in -- in American Steel.

23 And so -- and going back to Justice
24 Jackson's question on the doctrinal point, when
25 a state court or -- or any court is analyzing

1 the scope of protections to figure out if
2 Garmon preemption should apply, it takes Board
3 law as it finds it. So this Court will
4 certainly have the last say on the matter. The
5 Board's decisions are always subject to
6 judicial review.

7 JUSTICE JACKSON: Yes, I appreciate
8 that, but can I quickly just ask you this,
9 because I -- I -- I understand that there are
10 problems with perhaps focusing on intent, as
11 Justice Kagan points out, you know, that -- but
12 you've said that there are circumstances in
13 which there are certain intents that we can
14 identify and say are inappropriate.

15 I want to focus on the problems that
16 at least I see with respect to the aggravated
17 nature of the harm. I'm actually trying to
18 understand the difference between the union
19 walking away and letting the milk spoil and the
20 union in this case letting the concrete harden
21 and letting it, you know, tear up the truck
22 because, at the end of the day, it all boils
23 down to money for -- for companies. And what
24 if the truck, you know, is -- is not that
25 expensive and so its replacement value is a

1 little bit? I don't -- I don't understand how
2 we can draw the line around aggravated harm in
3 any meaningful way when you talk about what the
4 union is allowed to do and what they don't --

5 MR. DALMAT: So let me begin --

6 JUSTICE JACKSON: -- what they're not.

7 MR. DALMAT: -- with just a couple
8 factual points about the record. There's been
9 no harm to any truck in this case, and Glacier
10 alleges there was no harm to any truck or the
11 environment or its facilities. In fact,
12 there's \$11,000 of concrete --

13 JUSTICE JACKSON: Yes, I understand
14 that, but just -- just what is your position as
15 -- so is your view that the union can -- can
16 walk away at any time, at any point in any
17 circumstance no matter what the harm? What is
18 the line for union appropriate versus not for
19 you?

20 MR. DALMAT: The line that the drawn
21 -- the Board has drawn is that harm to
22 perishables has never been sufficient to
23 constitute aggravated harm.

24 Now I agree, if -- if our actions
25 truly presented a material risk of harm to the

1 trucks or the facility, I would agree that that
2 would not be protected. But where I part ways
3 with my friends at the government is that I
4 believe they've, respectfully, overlooked the
5 two key precautions that Glacier itself
6 alleged, namely, that we put the trucks back in
7 Glacier's facility in a position where every
8 day it deals with leftover concrete. This is
9 JA 77 through 80. And it uses a variety of
10 tools to do that. It uses reclaimers. These
11 are centrifuges that separate batch concrete
12 and allow the cement, the rock, the water to be
13 pulled apart and used another day.

14 JUSTICE JACKSON: So your bottom line
15 is the concrete is a perishable? It -- it --
16 it equals the milk for the purpose of your
17 argument?

18 MR. DALMAT: Absolutely, and their
19 complaint alleges as much.

20 JUSTICE JACKSON: All right. All
21 right.

22 MR. DALMAT: So the concrete itself,
23 we -- I believe we did take precautions to
24 avoid that, both putting it in their possession
25 with all their ordinary tools. And also,

1 again, 3.8 and 3.9 of their complaint, the
2 concrete does not begin to harden until the
3 drums stop turning.

4 And, here, we put the -- the union
5 instructed the drivers to keep the drums
6 running when they returned the trucks. There
7 were 15 personnel at the Duwamish facility to
8 handle the 20 trucks that came back, in
9 addition to managers.

10 They were in a position to avoid harm
11 to the concrete and to the trucks based on
12 their own pleadings. So it's our submission
13 that at a minimum, there was enough evidence
14 from which the Board lawfully could rule in our
15 favor.

16 JUSTICE SOTOMAYOR: Counsel -- sounds
17 quite logical, but you didn't put this evidence
18 in. You were relying on the allegations in the
19 complaint, correct?

20 MR. DALMAT: Yes, but everything I've
21 told you is in the complaint. The complaint --

22 JUSTICE SOTOMAYOR: But the complaint
23 doesn't say all of the things you just said.
24 The complaint --

25 MR. DALMAT: It does, Your Honor.

1 JUSTICE SOTOMAYOR: -- the complaint
2 says that if you keep the truck running, that
3 the concrete won't spoil?

4 MR. DALMAT: 3.8 and 3.9 of the
5 complaint, yes, Your Honor. And -- and the
6 other facts that I've mentioned to you today,
7 in Washington, the complaint incorporates the
8 declarations that Glacier itself admitted, and
9 it also incorporates these so-called
10 hypothetical facts, factual representations
11 that Glacier made in its briefs.

12 I have not mentioned a single fact to
13 you today that is not either directly on the
14 face of the complaint or incorporated into the
15 complaint through Glacier's own declarations or
16 through the hypothetical --

17 JUSTICE SOTOMAYOR: What do we do with
18 their complaint that the truck was at risk
19 of -- the trucks were purposely put at risk to
20 have the concrete hard -- harden and destroy
21 the trucks?

22 MR. DALMAT: Well, we know that the
23 trucks were not, in fact, harmed, so that's one
24 fact. And Glacier itself has pled that fact
25 which you just asserted, that's true, Glacier

1 pleads that, but it also pleads several of the
2 precautions that we took to avoid harm to the
3 trucks.

4 And so, given the tension in Glacier's
5 own factual assertions --

6 JUSTICE SOTOMAYOR: But I think the
7 government's position is, if there is tension,
8 it's your obligation to come forth with
9 evidence under our command in Davis that you
10 have to submit enough evidence to enable the
11 Court to find that the conduct is arguably
12 protected.

13 MR. DALMAT: And we're certainly
14 allowed to rely on the -- the other side's
15 pleadings. In this Court's decisions in Jones
16 and in Curry, the Court found --

17 JUSTICE SOTOMAYOR: So, if the
18 pleading is you simply did this intentionally
19 at a time to ensure that the -- that's how I
20 read the pleadings -- you did it intentionally
21 at the time to ensure that the trucks -- now
22 you can argue all you want that you really
23 didn't do that, but we have to accept the
24 complaint as is, and I think it says that you
25 did it intentionally at a time to blow up the

1 trucks.

2 MR. DALMAT: It says two --

3 JUSTICE SOTOMAYOR: That the
4 likelihood was going to be great or was going
5 to be great.

6 MR. DALMAT: It says two things. It
7 says what you just said, Your Honor.

8 JUSTICE SOTOMAYOR: Once it says that,
9 isn't it enough?

10 MR. DALMAT: No, because it also
11 details in particular the precautions we took
12 to avoid those very harms that it says we had
13 in our head. So what it's alleging is we had a
14 bad scheme in our head.

15 JUSTICE SOTOMAYOR: Well, there were
16 at least nine drivers that didn't tell their
17 supervisors that the trucks were there running.

18 MR. DALMAT: According to their
19 allegations, that's --

20 JUSTICE SOTOMAYOR: Well, that -- that
21 --

22 MR. DALMAT: -- correct. Ninety
23 percent --

24 JUSTICE SOTOMAYOR: -- but we have to
25 accept -- we have to accept that on its face.

1 MR. DALMAT: Absolutely, but
2 90 percent of the --

3 JUSTICE SOTOMAYOR: So assume we get
4 to where the SG is, which is, on the face of
5 the complaint, you didn't put in enough. What
6 remains of your argument? Meaning, do we just
7 reverse on -- that's the ground that the SG is
8 suggesting we reverse on.

9 MR. DALMAT: So, if you agree with
10 them on the first position, then I still think
11 you should either affirm because of the
12 issuance of the general counsel complaint,
13 which, under Davis Supermarkets, shows that the
14 Board has taken up the case and is currently
15 exercising its primary jurisdiction --

16 JUSTICE SOTOMAYOR: Why should we make
17 that decision? Why shouldn't the court below
18 decide what it's going to do?

19 MR. DALMAT: Well, one reason is I
20 think it's fundamentally undisputed between the
21 parties, the government and we agree here, and
22 Glacier at Clerk's Paper 283 and 84 below
23 relied on the same case, Loehmann's Plaza --

24 JUSTICE SOTOMAYOR: So why don't you
25 put in evidence like the way Davis did?

1 MR. DALMAT: Davis allows a party to
2 either rely on the other side's admissions or
3 --

4 JUSTICE SOTOMAYOR: Why aren't you
5 doing that?

6 MR. DALMAT: If we are remanded, we
7 will certainly do that on remand, but just the
8 other disposition, if you disagree with me that
9 this Court has -- that it would be proper to
10 address the significance of the complaint, the
11 general counsel complaint, in the first
12 instance, I think a more appropriate
13 disposition than a reversal is a vacatur with
14 instructions to stay in light of the general
15 counsel complaint. And the reason for that is
16 that the government is essentially asking for
17 an advisory opinion. It's asking this Court to
18 ignore current reality. And this Court has
19 often taught that --

20 JUSTICE SOTOMAYOR: Well, I don't know
21 if it's the government. It's certainly your
22 adversary.

23 MR. DALMAT: Well, I think both of
24 them are -- are asking for a reversal, is what
25 I heard today. And so I think this Court

1 should not ignore current reality. It should
2 take into account current reality, and it
3 should decide the case on the narrowest grounds
4 possible.

5 JUSTICE SOTOMAYOR: Thank you,
6 counsel.

7 MR. DALMAT: Thank you.

8 JUSTICE JACKSON: What -- do you agree
9 or disagree with the following statement? And
10 this is from opposing counsel's brief: "When a
11 union deliberately orchestrates a scheme for
12 the very purpose of destroying an employer's
13 property, there is no plausible argument that
14 this conduct is protected under the NLRA."

15 MR. DALMAT: I think it's an overbroad
16 statement because property could be anything.
17 Property could be goodwill. Property could be
18 money. Property could be intangibles. And so,
19 stated at that level of generality, it's simply
20 too overbroad.

21 I think the proper test is the one
22 that the Board has articulated time and time
23 again and that I stated at the opening, namely,
24 that a concerted action, a concerted walk-off,
25 in order to advance wages and benefits is

1 protected unless the strikers fail to take
2 reasonable precautions to avoid aggravated,
3 imminent, foreseeable harm to employer
4 property. That's the correct test.

5 And that's the one that squares with
6 Section 1 of the Act and --

7 JUSTICE SOTOMAYOR: Why do you go so
8 broadly to protect the building and equipment?
9 Because what you're saying is letting the goods
10 perish is okay.

11 MR. DALMAT: Well, "aggravated" is a
12 key part of the test, and -- and the Board has
13 never found spoilage of perishables to be
14 aggravated harm. So I think the aggravated
15 line does track what Your Honor is suggesting
16 in terms of --

17 JUSTICE SOTOMAYOR: I -- I have not
18 found an NLRB case that has said a strike was
19 wrong if it involved perishable products or the
20 loss of perishable products.

21 MR. DALMAT: Correct. There is no
22 such case.

23 JUSTICE SOTOMAYOR: So it has to be
24 equipment or a building?

25 MR. DALMAT: That's the current law,

1 yes, Your Honor.

2 I'd like to address Justice Thomas's
3 question about jurisdictional hiatus. That
4 concept started in Garmon itself. And this is
5 at page 245 of the opinion. It indicates, if
6 the Board decides, subject to appropriate
7 federal judicial review, that conduct is
8 protected by Section 7 or prohibited, the
9 matter is at the end.

10 But it goes on to say that if the
11 Board decides that an activity is neither
12 protected nor prohibited, then it raises the
13 question whether states can regulate that. And
14 Sears used -- this Court in Sears used the
15 concept of jurisdictional hiatus, and this
16 Court applied it in Hanna Mining.

17 What we have in Garmon, it is a
18 different rule than the -- the typical rule of
19 preemption, but what it does is it's a choice
20 of forum rule. It makes sure that the dispute
21 goes to the forum that Congress chose to
22 adjudicate a labor dispute.

23 And their own complaint centers on --
24 in paragraph 319 on the reasonable precautions
25 test. They're fundamentally asking a state

1 court to apply Board doctrine. And the Board
2 is obviously the best institution and the
3 institution Congress chose to apply that
4 doctrine.

5 So unless --

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 JUSTICE THOMAS: Under your test, if
10 the driver simply discharges cement or stop the
11 drums from rotating, would you agree with
12 Petitioner?

13 MR. DALMAT: Yes, Your Honor.

14 JUSTICE THOMAS: Okay. Now you make
15 the point about the judicial -- the
16 jurisprudential hiatus, and as I've said
17 before, these other terms, "exhaustion" and
18 "preemption," have come up.

19 Could you give me your best textual
20 basis for any of those, for either of those?

21 MR. DALMAT: Sure. What the Court
22 relied on in Guss was principally 160, Section
23 160. We've offered in our brief two different
24 statutory sections. Section 160 gives the
25 Board the power to adjudicate labor disputes

1 and prevent unfair labor practices, and it
2 carves out a limited exception to that. The
3 exception is that the Board can cede to states
4 by agreement that jurisdiction in certain
5 circumstances. And so, in this Court's
6 decision in Guss, it said that -- it read a
7 negative inference into that exception, and it
8 said, absent a cession agreement, the Board is
9 the entity Congress chose to adjudicate.

10 There's a similar structure in
11 Section 164. There, again, the Board has
12 primary jurisdiction over labor disputes, but
13 it's allowed to decline that jurisdiction over
14 a class of employers when the Board finds
15 insubstantial interstate commerce, and only at
16 that point can the states step in and exercise
17 jurisdiction to adjudicate labor disputes.

18 So those two provisions are the -- the
19 key textual basis on which we rely.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 Justice Sotomayor?

23 Justice Kagan?

24 Justice Barrett?

25 Justice Jackson?

1 Thank you, counsel.

2 MR. DALMAT: Thank you, Your Honors.

3 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
4 Francisco?

5 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO
6 ON BEHALF OF THE PETITIONER

7 MR. FRANCISCO: Thank you, Mr. Chief
8 Justice. Just four basic points.

9 First, this is not a case about the
10 mere stoppage of work. Here, the union had the
11 workers show up, accept possession of the
12 concrete, begin deliveries of the concrete,
13 abandon those deliveries when it was too late
14 to save the concrete, and then countermand
15 supervisor instructions to complete the
16 deliveries that had already been started, which
17 at that point in time was the only way to save
18 the concrete.

19 It's really no different than the
20 riverboat crew that drives out into the middle
21 of the river and then abandons ship. That is
22 not merely a stoppage of work.

23 Now my friend draws a distinction
24 between the trucks on the one hand and the
25 concrete on the other. Well, imagine the

1 ferryboat that's loaded with the trucks. Are
2 they suggesting that the ferry -- you couldn't
3 destroy the ferryboat, but you could destroy
4 the trucks?

5 The fact of the matter is that our
6 complaint alleges destruction of the concrete,
7 not the trucks. It may be that keeping the --
8 the drums rotating delayed or avoided the
9 destruction of the trucks for a certain amount
10 of time. It didn't avoid the destruction of
11 the concrete because, once concrete is batched
12 up, it's got to be delivered and used, or else
13 it's going to spoil.

14 You can add chemicals to slow down
15 that process, but adding the chemicals
16 themselves undermine the integrity of the
17 concrete. So, once they were batched and
18 loaded, they had to be delivered or abandoned.
19 They put us in a position of putting that
20 concrete in a vulnerable position precisely so
21 they could abandon it. This is not a mere
22 stoppage of work.

23 Point two, my friend from the
24 government relied on the Longshoremen against
25 Davis case. That case did not involve any

1 disputed facts. That was a case about the
2 difference between -- the meaning of the words
3 "supervisors" versus "employees." The union
4 never put in any evidence at all that the --
5 that the people at issue fell within the -- I
6 -- I think it was the -- the -- the employee
7 category. And the Court simply said that on
8 the basis of the facts as we have them, it's an
9 arguable question. That's exactly how we think
10 that the Court ought to proceed in this
11 context.

12 The only case -- and this is my third
13 point -- the only case that this Court has
14 issued that comes close to addressing these
15 facts is the Bill Johnson decision, where you
16 did have a complaint on the one hand in state
17 court alleging malicious libel, clearly
18 unprotected conduct, and you had a Board
19 finding on the other hand that the allegations
20 in the complaint were false.

21 Now my friend from the government
22 suggests that Bill Johnson isn't on point. I
23 would submit precisely the opposite. The whole
24 issue in Bill Johnson's was whether the Board
25 could issue a cease-and-desist order against

1 the state court.

2 Well, under the government and the
3 union's position, it shouldn't have even had to
4 do that. The Board should have required --
5 been required to pause that proceeding, the
6 jurisdictional hiatus, because the Board had
7 issued findings that the allegations in the
8 state court complaint were true.

9 Even if you were to think that it's
10 not on all fours, it's the closest decision
11 that this Court has ever issued that's even
12 remotely on point, which leads me to my final
13 point. In the face of that precedent, why on
14 earth would you take Garmon any further than
15 you've already taken it?

16 All we're asking for is an application
17 of Garmon in the context of ordinary preemption
18 principles. I think it's quite clear that
19 they're asking at the very least that you take
20 it a step further than it's ever gone. That
21 would bring it into greater tension with
22 ordinary preemption principles. And I have yet
23 to hear a reason grounded in the text of the
24 statute, precedent, or practical concerns that
25 would justify ousting a state court of the

1 ordinary authority to adjudicate a tort claim
2 in the ordinary course where a complaint
3 alleges conduct that, as we and the government
4 agree, doesn't even arguably implicate the
5 statute.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:31 a.m., the case
9 was submitted.)

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