No. 21-1449

IN THE
Supreme Court of the United States

GLACIER NORTHWEST, INC., D/B/A CALPORTLAND,
Petitioner,

v.

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

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the National Labor Relations Act impliedly preempt a state tort claim against a union for intentionally destroying an employer's property in the course of a labor dispute?

PARTIES TO THE PROCEEDING

Petitioner Glacier Northwest, Inc., d/b/a CalPortland ("Glacier"), was the plaintiff-respondent-cross-petitioner in the Supreme Court of Washington below. Respondent International Brotherhood of Teamsters Local Union No. 174 (the "Union") was the defendant-petitioner-cross-respondent in the Supreme Court of Washington below.

CORPORATE DISCLOSURE STATEMENT

The corporate parent of Glacier is CalPortland Company. The corporate parent of CalPortland Company is Taiheiyo Cement USA, Inc. The corporate parent of Taiheiyo Cement USA, Inc., is Taiheiyo Cement Corporation. Other than the listed entities, no publicly held corporation owns 10% or more of the stock of Glacier or any of its corporate parents.

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INTRODUCTION

The National Labor Relations Act protects the right to engage in "concerted" labor activity, but it does not give unions the right to intentionally destroy private property. In the decision below, however, the Washington Supreme Court held that the Act "impliedly" preempts a state tort claim alleging that a union deliberately orchestrated a scheme to destroy the property of Glacier Northwest. Glacier is a ready-mix concrete company that uses trucks to deliver and pour concrete. The Teamsters Union, which represents Glacier's drivers, carried out the scheme by "intentionally tim[ing]" a "sudden cessation of work" after a fleet of trucks had already been loaded, leaving a large quantity of concrete at risk of hardening in their mixing drums. JA.12. Just as planned, this resulted in substantial destruction of the company's property.

Glacier sued the Union to recover the value of the destroyed property, but the court below held that the claim was "impliedly" preempted by the NLRA under this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, this Court held that the NLRA contains a "penumbral area" that preempts state tort claims not only when they actually conflict with the statute's terms, but when they implicate conduct that the statute "arguably" protects. *Id.* at 240, 245. Even *Garmon* recognized, however, that the NLRA cannot be read to preempt torts that implicate "interests so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act." *Id.* at 243-44.

The decision below is clearly wrong under both *Garmon* and ordinary principles of implied preemption. At the outset, the NLRA does not even "arguably" protect the intentional destruction of property, as this Court has recognized since the 1930s. The NLRB, too, has acknowledged that the NLRA does not protect strike-related conduct that fails to include reasonable precautions to protect employer property, much less deliberately *destroys* it.

In any event, even if the Union's conduct were arguably protected, Glacier's tort claim for intentional property destruction would fall squarely within the "local interest" exception to preemption. It cannot reasonably be inferred that Congress intended to displace traditional state-law remedies for employers whose property is tortiously destroyed, especially because the NLRA itself provides no substitute compensatory remedy. By default, the states have both the power and the responsibility to protect property within their borders, and the local interest exception ensures they can do so.

Ordinary preemption principles underscore that *Garmon* should not be extended to preempt tort claims for the intentional destruction of property. The NLRA's text says nothing about displacing such claims, nor do those claims create any actual conflict with federal law. Accordingly, there is no basis for finding them preempted.

Finally, constitutional avoidance confirms this result. Construing the NLRA beyond its text to authorize unions to destroy employer property with no just compensation would put the law on a collision course with the Takings Clause.

OPINIONS BELOW

The opinion of the Supreme Court of Washington (JA.138-78) is reported at 500 P.3d 119. The initial opinion of the Court of Appeals of Washington is reported at 471 P.3d 880. The opinion of the Washington Court of Appeals superseding the initial opinion on the denial of reconsideration (JA.110-37) is reported at 475 P.3d 1025. The opinion of the Superior Court of Washington, King County, granting a motion to dismiss the claims at issue here (JA.101-02) is unreported. The opinion of the Superior Court of Washington, King County, granting a motion for summary judgment on the other claims in the case (JA.103-07) is unreported but available at 2018 WL 11397914.

JURISDICTION

The Supreme Court of Washington entered its judgment resolving all claims in the case as to all parties on December 16, 2021. On February 11, 2022, Justice Kagan granted an extension of time to file a petition for certiorari up to and including May 13, 2022. No. 21A413 (U.S.). Glacier filed a timely petition for certiorari on May 12. This Court granted review on October 3. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157-158, are set out in the joint appendix (JA.179-91).

STATEMENT

A. The National Labor Relations Act

In 1935, Congress passed the National Labor Relations Act to address the "inequality of bargaining power" between employers and employees, and to "encourag[e] practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. § 151.

Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" *Id.* § 157. In construing this provision, "courts have firmly established" that the category of protected labor activity is limited to lawful bargaining and related activities, and does not include "any right to engage in unlawful or other improper conduct." *NLRB v. Loc. Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 473 (1953) (quoting H.R. Rep. No. 80-510, at 38-39 (1947)).

Section 8 of the NLRA prohibits "[u]nfair labor practices," including interference with protected activity. 29 U.S.C. § 158. The National Labor Relations Board is authorized to hear charges of unfair labor practices. *See id.* § 160(a). If the Board concludes that an unfair labor practice has occurred, it may issue a "cease and desist" order or other injunctive relief. *Id.* § 160(c). But the NLRA "sets up no general compensatory procedure" for parties that are injured by tortious conduct. *United Constr. Workers, Affiliated with United Mine Workers of Am.*

v. Laburnum Constr. Corp., 347 U.S. 656, 665 (1954). Indeed, "[t]he power to order affirmative relief . . . is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Int'l Union, United Auto., Aircraft & Agric. Implement Workers of Am. v. Russell*, 356 U.S. 634, 642-43 (1958).

As a result, "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Id.* at 643. When a party's rights are violated, "[t]he Board can award no damages" to provide redress for the underlying injury. *Linn v. United Plant Guard Workers of Am., Loc. 114*, 383 U.S. 53, 63 (1966).

B. *Garmon* Preemption

In *Garmon*, this Court held that while the NLRA contains no preemption clause, it impliedly preempts some state tort claims based on conduct that the Act "arguably" protects or prohibits. 359 U.S. at 245. The Court recognized that federal labor law "leaves much to the states," but that "Congress has refrained from telling us how much." *Id.* at 240. The Court thus inferred that there is a "penumbral area" of preemption that must "be rendered progressively clear only by the course of litigation." *Id.*

As this Court subsequently explained, "[t]he precondition for pre-emption, that the conduct be 'arguably' protected or prohibited, is not without substance." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 394 (1986). A mere "conclusory assertion of pre-emption" is not enough. *Id.* Rather, "a party asserting pre-emption must advance an

interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board" and show that "the Board reasonably could uphold a claim based on such an interpretation." *Id.* at 395. In short, "those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted." *Id.* at 396.

Even when conduct is arguably protected by the NLRA, state tort claims are not preempted when the conduct in question is "a merely peripheral concern" of federal regulation, or where the "conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress ha[s] deprived the States of the power to act." *Garmon*, 359 U.S. at 243-44. This latter principle is known as the "local feeling" or "local interest" exception to *Garmon* preemption. Under this exception, this Court has said that the "[p]olicing of . . . destruction of property has been held most clearly a matter for the States." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 136 (1976). Thus, while the NLRA protects the use of "peaceful methods of . . . economic pressure," it does not permit a union to "enforce[]" its labor demands through "injury to property." *Id.* at 154.

C. The Union's Intentional Destruction of Glacier's Property[1]

Glacier sells and delivers ready-mix concrete to customers in Washington state. JA.139. For each job, it mixes custom batches of concrete based on the purchaser's specifications. *Id.* Each individual batch of concrete is mixed and immediately loaded onto the mixing drum on a truck, which delivers the concrete to the customer. JA.7-8. Because mixing the concrete triggers an irreversible chemical reaction, only "[a] limited amount of time exists for the concrete to be transported in a ready-mix truck . . . and discharged before the concrete becomes useless." JA.8-9. Moreover, if concrete remains in the truck's mixing drum for too long, it will harden and damage—even destroy—the truck. JA.140.

In August 2017, the Union, which represents Glacier's truck drivers, was engaged in collective bargaining negotiations with Glacier. Unhappy with the company's response to its bargaining demands, the Union devised and executed a scheme to "intentionally sabotage" Glacier's business operations and destroy its property. JA.12.

On the morning of August 11, Glacier had numerous concrete deliveries scheduled, with drivers

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[1] The preemption question presented here was addressed by the Washington courts on a motion to dismiss. Accordingly, like the courts below, this brief presents the facts as alleged in the complaint and construed most favorably to Glacier, including hypothetical facts supporting the complaint. JA.150 & n.7 (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 744 P.2d 1032, 1046 (Wash. 1987) and *Kinney v. Cook*, 154 P.3d 206, 209 (Wash. 2007)).

starting work between 2 AM and 7 AM. JA.140-41. Knowing this, the Union "coordinated with truck drivers to purposely time [a] strike when concrete was being batched and delivered in order to cause destruction of the concrete." JA.141. At 7 AM, once "Union representatives knew there was a substantial volume of batched concrete in Glacier's barrels, hoppers, and ready-mix trucks, they called for a work stoppage." JA.112-13. A Union agent (who was not an employee of Glacier) made a throat-slashing gesture to signal a "sudden cessation of work." JA.34, 140

Glacier's dispatcher reminded the drivers of their duty to finish loads already in progress to avoid destroying the concrete or damaging the trucks. JA.34. But Union agents countermanded those warnings. They directed the drivers to abandon their assignments "immediately" and to "go park [their] truck[s]." *Id.* They told drivers to "[l]eave the f***er[s] running," and that "[w]e will not be dumping them or rinsing them out," since that was "[s]omebody else's problem," and "[c]onsequences are [c]onsequences." *Id.* At the Union's direction, a group of drivers left their trucks "fully loaded" with concrete. JA.113.

Just as intended, this coordinated sabotage produced "complete chaos" for Glacier. JA.142 n.3. The company was forced to scramble "to dispose of the concrete in a timely manner to avoid costly damage to the mixer trucks and in a manner so as not to create an environmental disaster." JA.142 & n.3. The company had to construct a series of "bunkers" to hold the concrete that had to be dumped out of all the trucks before congealing. Once the

concrete had hardened, Glacier "had to hire trucks, break up the concrete, and haul it off-site." JA.141-42. Although Glacier managed to avoid damage to its trucks through the heroic efforts of its remaining staff—and at considerable additional expense for the emergency dumping and disposal—the concrete was destroyed, just as the Union had intended. *Id.*

D. The Proceedings Below

1. Glacier sued the Union under Washington state law for intentionally destroying its property. The Union sought dismissal on the ground that the state-law claims were impliedly preempted under this Court's decision in *Garmon*.

The state trial court accepted the Union's argument that *Garmon* immunized it from state tort liability for the intentional destruction of Glacier's property. The court held that the Union's conduct was "arguably protected" by the NLRA because it occurred in the course of a "work stoppage." JA.96. The court also held that the local interest exception did not apply because, in its view, while the destruction of Glacier's property was "unfortunate," it did not involve "vandalism or violence[.]" JA.95.

2. The Washington Court of Appeals reversed in relevant part. JA.108-37. It found it "clear" that "the intentional destruction of property during a lawful work stoppage is not protected activity under section 7 of the NLRA." JA.125. As the court recognized, under the local interest exception, "[p]olicing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States." *Id.* (quoting *Lodge 76*, 427 U.S. at 136). "Moreover," the court continued, "the

NLRB, as well as reviewing federal courts, ha[ve] explicitly stated that workers who fail to take reasonable precautions to prevent the destruction of an employer's plant, equipment, or products before engaging in a work stoppage" are not protected by the NLRA. *Id*. (citing *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314, 315 (1953), *aff'd in relevant part*, 218 F.2d 409 (5th Cir. 1955)). It follows that the Union's *intentional* destruction of Glacier's property is not protected. *Id*.

The Washington Court of Appeals noted Glacier's allegations that "the Union ordered Glacier's truck drivers to wait to stop work until Glacier had batched a large amount of concrete and loaded it into the drivers' waiting trucks, and the Union did so with the intention of causing maximum product loss to Glacier." JA.128. Accordingly, the court held that "this conduct was clearly unprotected under section 7 of the NLRA," and that "[t]he trial court erred in concluding to the contrary." JA.128-29.

3. The Washington Supreme Court reversed, reinstating the dismissal order. JA.138-78. The court held that the NLRA impliedly preempts Glacier's claim because the Union's intentional destruction of Glacier's property was arguably protected as a "legitimate bargaining tactic," and because the traditional state-law interest in protecting against the intentional destruction of property did not qualify for the local interest exception.

As to whether the Union's intentional destruction of property was arguably protected, the court held that "the preemption standard [is] whether the activity is 'potentially subject to federal regulation.'"

JA.154 (quoting *Beaman v. Yakima Valley Disposal, Inc.*, 807 P.2d 849, 853 (Wash. 1991)). Applying this test, the court found preemption based on perceived tension between two supposedly "competing principles." The court agreed that the NLRA does not protect employees if they fail to "take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." JA.160. Nevertheless, the court discerned a "competing principle[]" that "economic harm may be inflicted through a strike as a legitimate bargaining tactic." *Id.* Surveying cases from the NLRB and lower courts—none of which found intentional property destruction protected—the court concluded that the Union's conduct was arguably protected because it was "unclear where the strike in this case falls on the spectrum between these two principles[.]" *Id.*

The court did not consider whether the two supposedly "competing" principles could be reconciled, including by distinguishing the intentional destruction of property from the ordinary economic harms such as lost profits and other inefficiencies that typically result from a work stoppage. Instead, the court held that this question could be resolved only by "balancing the economic pressure [caused by intentionally destroying Glacier's property] against the strikers' legitimate interest" in the strike. JA.165. And despite this Court's holding that the proponent of preemption "must carry the burden of showing at least an arguable case" for protection, *see Davis*, 476 U.S. at 396, the court concluded that a state-court inquiry into whether the facts presented such an arguable

case "would potentially interfere with important federal interests." JA.166.

As to the local interest exception, the Washington Supreme Court deemed the Washington Court of Appeals' ruling "too expansive" in preserving states' traditional authority to use tort law to protect against property destruction. JA.159. The court admitted that Glacier and the Washington Court of Appeals were "correct that the United States Supreme Court . . . ha[s] included the destruction of property in describing matters over which states may exercise jurisdiction" under this exception. JA.157. But the Washington Supreme Court cast this authority aside because—in its view—"the focus" of the exception "is on whether the conduct involved intimidation and threats of violence" *in addition to* the intentional destruction of property. JA.155 (quotation marks omitted). The court also emphasized that the Union's intentional destruction of property in this case took place "during a strike, as opposed to property damage for its own sake[.]" JA.158. Ultimately, the court found that the state's interest in protecting against the intentional destruction of property was not strong enough to overcome implied *Garmon* preemption. JA.158-60.

E. The Subsequent NLRB Proceedings

In addition to filing suit against the Union that orchestrated the scheme to destroy Glacier's property, the company issued written warnings to 16 employees who participated in the strike. JA.142. After Glacier filed its state lawsuit, the Union filed charges with the NLRB alleging that these written warnings were unfair labor practices and that

Glacier's filing of the lawsuit against the Union was itself an unfair labor practice. JA.145-46.

The NLRB held these charges in abeyance for four years while Glacier's tort suit was pending in Washington state court. *See Glacier Nw., Inc.,* Nos. 19-CA-203068, 19-CA-211776 (N.L.R.B. Jan. 31, 2022). After the Washington Supreme Court dismissed Glacier's suit as preempted, a regional director of the NLRB filed a complaint against the company alleging that the written warnings and the lawsuit were unfair labor practices. *See id.* According to the complaint, the NLRA not only preempts Glacier's claim for intentional property destruction, but also subjects the company to legal penalties for even *trying* to assert such a claim.

The Board scheduled a hearing on the complaint for November 15, 2022. After this Court granted certiorari in October, the regional director vacated the hearing date and postponed it pending this Court's review. *Id*. On October 20, however, the Union sought reconsideration, arguing that the Board proceedings should go forward even while this Court considers the preemption issue. On October 28, the regional director granted the reconsideration motion and set a hearing for January 24, 2023. The regional director did not explain why holding the case in abeyance during four years of state court litigation was appropriate, but waiting an additional few months for this Court's review was not.

SUMMARY OF ARGUMENT

I. In order to find Glacier's claims for the intentional destruction of property preempted under *Garmon*, the Washington Supreme Court had to find both that the NLRA arguably protects intentional property destruction and that such conduct does not "touch[] interests so deeply rooted in local feeling and responsibility that . . . [courts] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244-45. Neither conclusion is tenable.

A. To show that conduct is "arguably protected" under the NLRA, a party must advance an "interpretation of the [statute] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Davis*, 476 U.S. at 395. The Union cannot do so here. Its theory that the NLRA protects its intentional destruction of Glacier's property is contrary to the NLRA's text, which focuses on non-destructive conduct tied to the bargaining process. The Union's theory is also contrary to the consistent decisions of this Court, lower courts, and the Board itself. Longstanding precedent recognizes that the NLRA provides no protection to employees who fail to take reasonable precautions to protect employer property in connection with a strike. It follows *a fortiori* that the NLRA cannot possibly protect a union's scheme to *intentionally destroy* an employer's property. Because the complaint's allegations, which state law requires to be accepted at this stage, identify such plainly unprotected conduct, *Garmon* preemption is inapplicable here.

B. Even if the Union's conduct were arguably protected by the NLRA, the local interest exception also makes clear that Glacier's claim is not preempted. *Garmon* recognized that Congress did not intend to preempt tort claims based on conduct that "touche[s] interests so deeply rooted in local feeling and responsibility that . . . [courts] could not infer that Congress had deprived the States of the power to act." 359 U.S. at 244-45. And this Court has recognized that intentional property destruction fits squarely within this category. *See Laburnum*, 347 U.S. at 667 n.8; *Lodge 76*, 427 U.S. at 136. The lack of any compensatory remedy under the NLRA, moreover, makes it patently unreasonable to infer that Congress meant to preempt tort claims for intentional property destruction—especially given the serious constitutional concerns addressed below.

C. In deeming Glacier's claims preempted, the Washington Supreme Court misapplied both components of the *Garmon* inquiry. For both prongs, it divined limitations on this Court's precedent that conflict with the actual decisions of this Court.

1. As to the "arguably protected" analysis, the court held that intentional property destruction during a labor strike is arguably protected due to the supposedly "competing" principle that strikes may result in some economic loss to employers. But that ignores the fundamental distinction between incidental loss of profit and intentional destruction of property. Property enjoys special protection, and when a union deliberately orchestrates a scheme for the very purpose of destroying an employer's property, there is no plausible argument that this conduct is protected under the NLRA.

2. The court below also wrongly held that the "local interest" exception does not apply to intentional property destruction unless it is "violent" or "outrageous." There is no basis to infer any such distinction. To the contrary, *all* intentional property destruction undermines the strong state interest in protecting property rights. The Union's scheme to destroy Glacier's property is thus plainly covered.

II. Even if *Garmon*'s own logic did not make the lack of preemption clear, ordinary principles of implied preemption and the doctrine of constitutional avoidance foreclose extending *Garmon* to cover intentional property destruction.

A. As this Court has recognized, preemption requires either a clear statement from Congress or an actual conflict between state and federal law. But *Garmon* preemption rests on only an "arguable" conflict rather than an actual one. And far from relying on any clear statement in the text, *Garmon* found preemption based on statutory "penumbra[s]" and "Delphic" inferences of congressional intent. 359 U.S. at 240-41. There is no reason to extend this freewheeling approach any further by preempting tort claims for intentional property destruction.

B. Finally, the NLRA should be construed to avoid constitutional difficulties. If the statute were read to preempt state tort claims for intentional property destruction without providing any substitute remedy, it would raise serious questions under the Takings Clause. That provision prohibits the government from taking away property rights without just compensation, which is exactly what the lower court's reading of the NLRA accomplishes.

ARGUMENT

I. *GARMON* DOES NOT IMPLIEDLY PREEMPT STATE TORT CLAIMS FOR INTENTIONAL PROPERTY DESTRUCTION.

To establish its preemption defense under *Garmon*, the Union had to establish that the NLRA arguably protects its conduct *and* that the local interest exception does not apply. 359 U.S. at 244-45. Glacier's claim for intentional property destruction should have survived under both prongs. The NLRA does not even arguably protect the intentional destruction of property. And even if it did, the local interest exception would apply due to the strong state interest in protecting property rights. The court below erred on both points.

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

For *Garmon* preemption even potentially to apply here, the Union's conduct must be "arguably protected" by the NLRA. *Davis*, 476 U.S. at 394. This "precondition for pre-emption" is "not without substance" and cannot be "satisfied by a conclusory assertion of pre-emption." *Id.* *Garmon* contemplates preemption of only a "narrow area" of state law. 359 U.S. at 246. Thus, "[i]f the word 'arguably' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor." *Davis*, 476 U.S. at 395. "[A] party asserting pre-emption must advance an interpretation of the [NLRA] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Id.*

Under *Garmon*, there is no preemption here because the NLRA cannot reasonably be construed to protect the intentional destruction of property. No plausible reading of the statutory text could protect such flagrantly tortious and unlawful union conduct that is so disconnected from the statutory goals of promoting collective bargaining and fostering labor peace. To the contrary, an unbroken 80-year string of decisions from this Court, the lower courts, and the Board all reject that view.

1. The NLRA protects the right to strike but not the right to damage other people's property. Under the statute, employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. § 157.

This language cannot plausibly be read to encompass intentional property destruction. As this Court recently explained, the protected category of "other concerted activities" must be read in light of the other specific "bargaining" activities mentioned in the text. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018). Those specific activities—such as forming or joining unions, choosing bargaining representatives, and actually bargaining with employers—all refer to lawful, orderly, and non-destructive conduct. Nowhere does the text say anything about authorizing unions to engage in conduct that would violate others' property rights.

2. Consistent with the text, this Court has recognized from the beginning that the "right to strike" under the Act "plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work" by employees due to "the failure of the employer to meet their demands." *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939). This right, however, in no way "invest[s] those who go on strike with an immunity from [consequences] for acts of trespass or violence against the employer's property," or for the "conversion of its goods, or the despoiling of its property." *Id.* at 253, 255.

It could hardly be otherwise, because federal labor law does not deprive employers of their "legal rights to the possession and protection of [their] property." *Id.* at 253. The NLRA thus provides no "license" for unions to "commit tortious acts" against property to enforce their labor demands, nor does it "protect them from the appropriate consequences of unlawful conduct" when they violate an employer's property rights. *Id.* at 258. Indeed, "courts have firmly established the rule that . . . employees are not given any right to engage in unlawful or other improper conduct." *Loc. Union No. 1229*, 346 U.S. at 473 (quoting H.R. Rep. No. 80-510, at 38-39).

3. In *Garmon*, this Court held that the NLRA shielded a union from being sued in state court for "peacefully . . . picket[ing]" outside of a business in order to "persuade" its "customers and suppliers" to "stop dealing with" the company unless it signed a union contract. 359 U.S. at 237. But because *Garmon* did not involve any property destruction, it did not disturb the rule that the NLRA provides no

immunity from the ordinary state-law consequences of intentionally destroying property.

To the contrary, shortly after *Garmon* was decided, the Third Circuit noted that "[a]t least two Courts of Appeals" had already held "that employees engaged in a work stoppage deliberately time[d] to cause maximum damage [to employer property] are not engaged in a protected activity." *NLRB v. Morris Fishman & Sons, Inc.*, 278 F.2d 792, 795 (3d Cir. 1960).

One of these cases—the Fifth Circuit's frequently cited decision in *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409—involved facts strikingly similar to those here. In *Marshall Car Wheel*, which affirmed an NLRB decision in relevant part, a union of foundry workers devised a scheme to destroy their employer's property in order to advance their "wage demands[.]" *Id.* at 411. To carry out the scheme, they planned a strike and "intentionally chose a time for their walkout when molten iron in the plant cupola was ready to be poured off," knowing that the "lack of sufficient help" during the "critical pouring operation" threatened to cause "substantial property damage and pecuniary loss" to their employer. *Id.*

The union claimed that its conduct was protected as a legitimate form of "concerted activity" under the NLRA. *Id.* But citing *Fansteel*, the court disagreed, holding that the activity was "illegitimate" because "the union deliberately timed its strike without prior warning and with the purpose of causing maximum plant damage and financial loss" to the employer. *Id.* at 413. Accordingly, the union's conduct fell into the category of "unprotected activity condemned by the

Supreme Court as effectively removing the guilty employees from statutory protection." *Id.* (citing *Fansteel*, 306 U.S. at 255-59); *see also U.S. Steel Co. (Joliet Coke Works) v. NLRB*, 196 F.2d 459, 461, 467 (7th Cir. 1952) (NLRA did not protect steel plant workers who went on strike knowing that they were leaving the plant's ovens unmanned, creating a grave risk of "uncontrolled cooling" that would "cause great damage to the ovens, accompanied by danger and loss from explosion and fire").

The NLRB itself has also "long" agreed that the NLRA does not protect employees who fail to take reasonable precautions to avoid damaging employer property in the course of an otherwise protected strike. *Boghosian Raisin Packing Co.*, 342 N.L.R.B. 383, 397 (2004) (ALJ decision adopted by the Board on other grounds) (citing the underlying 1953 NLRB decision in *Marshall Car Wheel*). It necessarily follows that the use of a strategically timed strike as a means to *intentionally destroy* an employer's property is also not protected. Indeed, while a strike will "[n]ecessarily . . . cause some economic loss to an employer, as well as to the employees[,] . . . damage to the company's property goes beyond such loss and where strikers deliberately time their strike to cause product damage, then their activity is unprotected." *Id.*; *see also, e.g.*, *Int'l Protective Servs., Inc.*, 339 N.L.R.B. 701, 702-03 (2003); *M&M Backhoe Serv., Inc.*, 345 N.L.R.B. 462, 471 (2005).

Multiple circuits, too, have reiterated the obvious conclusion that the NLRA does not protect the intentional destruction of property. For example, the Second Circuit, after finding a strike by construction workers unprotected by the NLRA, added that even

if the strike had been otherwise lawful, "it would not have been protected activity if it occurred while an order of concrete was being delivered" because "[o]nce a load of concrete is delivered, it cannot be returned, saved for another day[,] or simply left to harden," but "must be finished." *NLRB v. Marsden*, 701 F.2d 238, 242 & n.4 (2d Cir. 1983) (citing *Marshall Car Wheel*, 218 F.2d at 411); *cf. Del. & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 622 (D.C. Cir. 1971) (Railway Labor Act does not protect "such actions as a deliberate timing of a strike without prior warning, with the purpose of enhancing plant damage" (citing *Marshall Car Wheel*, 218 F.2d at 413)).

4. Under these principles, this case is straightforward. The Union "coordinated with truck drivers to *purposely* time the strike when concrete was being batched and delivered in order to cause destruction of the concrete." JA.141 (emphasis added). Using a throat-slashing gesture to "signal[] the beginning of the action to damage Glacier's property," JA.34, the Union "intentionally timed" the "cessation of work" "[w]ith the improper purpose of sabotaging, ruining and destroying Glacier's batched concrete[.]" JA.12. The Union thus "acted tortiously and indefensibly by sabotaging, ruining and destroying Glacier's undelivered and perishable batched concrete." JA.11. The NLRA does not even arguably protect such intentional property destruction.

B. Intentional Property Destruction Falls Within the Local Interest Exception.

Even if the Union's intentional destruction of Glacier's property could somehow be deemed "arguably protected" by the NLRA, Glacier's claim against the Union still would not be preempted. Under the local interest exception, "the Court has construed the Act as not preempting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'" *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (quoting *Garmon*, 359 U.S. at 244). This Court has expressly recognized that, under this exception, the "[p]olicing of . . . destruction of property has been held most clearly a matter for the States." *Lodge 76*, 427 U.S. at 136.

1. Even before *Garmon*, this Court recognized that the NLRA could not be read to preclude state tort claims for property destruction. Indeed, there was "no doubt that if agents of [unions] . . . damaged property through their tortious conduct" in the course of a labor strike, "the persons responsible [were] liable to a tort action in state courts for the damage done." *Laburnum*, 347 U.S. at 666. Accordingly, the NLRA is entirely "consistent with . . . the liability of such organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices." *Id.* at 666-67. The Court specifically noted that the "tortious conduct" that states may continue to regulate includes the "actual or threatened violence to persons *or destruction of property*." *Id.* at 667 & n.8 (emphasis added).

Accordingly, the "[p]olicing of such conduct is left wholly to the states." *Id.*

Indeed, since the NLRA was first enacted, this Court has repeatedly recognized that its protection for "concerted" labor activity does not extend to the violation of employers' property rights. In *Fansteel*, for example, in considering whether the NLRA protected union members who took control of an employer's factory in the course of a strike, the Court took as a given that the employer "could resort to the state court to recover damages or to procure punishment" for the violation of its property rights. 306 U.S. at 254. Likewise, just a few years before *Garmon*, the Court again confirmed that "[t]he dominant interest of the State in preventing violence *and property damage* cannot be questioned" because "[i]t is a matter of genuine local concern." *United Auto., Aircraft & Agric. Implement Workers of Am. v. Wis. Emp. Rels. Bd.*, 351 U.S. 266, 274 (1956) (emphasis added); *see also Russell*, 356 U.S. at 646 ("state jurisdiction to award damages for [a list of recoveries including "property damages"] is not pre-empted").

2. It was against this backdrop that *Garmon* recognized that, with regard to state laws "deeply rooted in local feeling and responsibility," it is improper to "infer" preemption absent a "compelling" reason to do so. 359 U.S. at 244. When it comes to state tort liability, in particular, preemption turns on "the nature of the activities . . . involved, and the interest of the State in regulating them." *Id.* at 248 n.6. In making this point, the Court specifically quoted *Laburnum*'s statement that the "'[p]olicing of' . . . 'actual or threatened violence to persons *or*

destruction of property,' is left to the States." *Id.* (emphasis added) (quoting *Laburnum*, 347 U.S. at 667 n.8). In such cases, "the compelling state interest" in protecting against intentional torts "is not overridden in the absence of clearly expressed congressional direction." *Id.* at 247.

To be sure, *Garmon* also noted that the facts of *Laburnum* involved not only property destruction but also "violence and threats of violence." *Id.* at 248 n.6. But because the facts of *Garmon* involved only "peaceful" picketing without any property destruction, *id.* at 239, the Court did not have occasion to address whether the NLRA would preempt a state court claim based on intentional property destruction unaccompanied by any further violence.

In later cases, however, this Court has made clear that the local interest exception applies to both violent and non-violent tortious conduct. Indeed, this Court has "repeatedly . . . held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute." *Bill Johnson's Rests.*, 461 U.S. at 742 (citing cases involving tortious but nonviolent conduct). And the Court has continued to state that the "[p]olicing of actual or threatened violence to persons *or destruction of property* has been held most clearly a matter for the States." *Lodge 76*, 427 U.S. at 136 (emphasis added).

This Court's continued application of the local interest exception confirms that it is not limited to circumstances where a union engages in violence. In *Farmer v. United Brotherhood of Carpenters &*

Joiners of America, Local 25, for example, the Court held that the NLRA did not preempt a state tort claim for intentional infliction of emotional distress based on conduct that did not involve violence. 430 U.S. 290, 301-06 (1977). Likewise in *Linn*, this Court held that the NLRA does not preempt a state tort claim for libel, again without any allegation that the union had engaged in violence. 383 U.S. at 62. Simply put, "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*." *Id.* Just so for intentional property destruction.

3. The local interest exception is particularly necessary because, as the Court has noted, the NLRA provides no general compensatory remedy for parties injured by tortious behavior. Although the Board has power to enjoin unfair labor practices, including those committed by unions, it cannot provide damages to compensate victims whose rights may have been violated. *See Laburnum*, 347 U.S. at. 665; *Linn*, 383 U.S. at 64 n.6 (recognizing that "the Board has no authority to grant effective relief" for tortious conduct, which "aggravates the State's concern" and threatens to "create[] disrespect for the law" if preemption is found).

Given that "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct[,]" it cannot reasonably be inferred that Congress intended "to cut off the injured [party] from th[e] right of recovery." *Laburnum*, 347 U.S. at 663-64. Even if the NLRA's protection of collective bargaining might impliedly

preempt damages claims based on "peaceful" labor activity involving ordinary economic pressure, *Garmon*, 359 U.S. at 239, 247-48, that inference is wholly unreasonable for claims based on the intentional destruction of property. In this situation, denying an employer the right to a state tort remedy would effectively "deprive it of its property without recourse or compensation." *Laburnum*, 347 U.S. at 664; *cf. Linn*, 383 U.S. at 63 (reasoning that preemption could not be inferred in part because "[t]he Board can award no damages . . . to the defamed individual"); *Farmer*, 430 U.S. at 299 (recognizing this as part of *Linn*'s reasoning). Indeed, the doctrine of constitutional avoidance forecloses any such inference here, as authorizing property destruction without any avenue for just compensation would raise serious Takings Clause issues. *See infra* Section II.B.

4. Like this Court, the lower courts have thus consistently recognized that destruction of property falls squarely within the local interest exception. As the Third Circuit has observed, the NLRA does not protect "threats to public order such as violence, threats of violence, intimidation *and destruction of property*." *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 803 (3d Cir. 1996) (emphasis added). The Supreme Court of Mississippi has similarly acknowledged this Court's teaching that "[t]he dominant interest of the State in preventing violence *and property damage* cannot be questioned" because "[i]t is a matter of genuine local concern." *Miss. Gulf Coast Bldg. & Constr. Trades Council v. Brown & Root, Inc.*, 417 So. 2d 564, 566 (Miss. 1982) (emphasis added); *see also City Line Open Hearth,*

Inc. v. Hotel, Motel & Club Emps.' Union Loc. No. 568, 413 Pa. 420, 431 (1964) ("State Courts have the power, the right and the duty to . . . preserve and protect public order and safety *and to prevent property damage*—even if, absent such conduct," the underlying labor activity would be protected by the NLRA. (emphasis added)); *Barbieri v. United Techs. Corp.*, 771 A.2d 915, 938 (Conn. 2001) (local interest exception "'most often involv[es] threats to public order such as violence, threats of violence, intimidation and *destruction of property*,' as well as trespass and certain personal torts" (emphasis added) (quoting *Pa. Nurses Ass'n*, 90 F.3d at 803)).

As the Illinois Court of Appeals explained on facts nearly identical to those here—involving defendants who intentionally damaged property through a strike involving already-mixed liquid concrete—*Garmon* is no barrier to a suit that seeks damages "not . . . for striking or any other 'economic coercion' contemplated by the NLRA but for the destruction of property, an activity . . . [that] is not protected and, therefore, not subject to being preempted by Federal labor law." *Rockford Redi-Mix, Inc. v. Teamsters Loc. 325, Gen. Chauffeurs, Helpers & Sales Drivers of Rockford*, 551 N.E.2d 1333, 1338 (Ill. App. Ct. 1990).

Indeed, multiple state high courts have applied the exception even to lesser intrusions on property, such as trespass. *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 162 A.3d 909, 919 (Md. 2017) (NLRA does not preempt suit alleging a union's trespassory interference with Walmart's property rights, even absent any violence or actual destruction of property); *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 504

S.W.3d 573, 576-78 (Ark. 2016) (same, and collecting similar cases from "appellate courts in California, Colorado, Florida, Maryland, and Texas [that] have issued opinions in similar cases . . . and expressly rejected the Union's preemption argument").

That is in line with *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), which held that the NLRA did not preempt a state trespass claim against unions for picketing on company property. Although trespassory picketing might be "arguably protected" in some circumstances, such cases would at most be exceedingly "rare." *Id*. As a result, allowing "state jurisdiction" over trespassing claims does "not create a significant risk of prohibition of protected conduct[.]" *Id.* at 207. Here, the lack of preemption is even clearer: The intentional *destruction* of property is *never* protected, so there is no risk of imposing liability on protected activity. And at bottom, when "there is no federal protection for [alleged] conduct," allowing "the exercise of state jurisdiction" to hear tort claims based on such conduct "does not result in state regulation of federally protected conduct." *Farmer*, 430 U.S. at 302.

C. The Decision Below Misapplied Both Prongs of *Garmon*.

To find Glacier's tort claim preempted under *Garmon*, the Washington Supreme Court had to conclude *both* that the Union's intentional destruction of Glacier's property was "arguably protected" by the NLRA and that the "local interest" exception was inapplicable. The court erred on both fronts.

1. The Lower Court Misapplied the "Arguably Protected" Test

The Washington Supreme Court started on the right track by correctly observing that the NLRA does not protect employees who fail to "take reasonable precautions to protect an employer's plant, property, and products," JA.160—much less unions that intentionally destroy an "employer's plant, property, and products." But the court then went off the rails by holding that Glacier could not sue the Union for intentionally destroying its property due to the supposedly "competing principle[]" that "economic harm may be inflicted through a strike as a legitimate bargaining tactic." *Id*. In the Washington Supreme Court's view, the only way to resolve whether the Union's conduct was protected would be by "balancing the economic pressure [caused by intentionally destroying Glacier's property] against the strikers' legitimate interest" in the strike. JA.165. According to the court, any judicial attempt at such "balancing" would be improper because it "would potentially interfere with important federal interests." JA.165-66.

That analysis is wrong for several reasons.

a. Most fundamentally, the supposed tension that the court perceived in the NLRA is illusory. There is a clear and obvious distinction between an ordinary work stoppage (which may have a negative economic impact by preventing an employer's sales or reducing its profits) and a work stoppage that is deliberately planned and timed to destroy the employer's *property*. The deliberate destruction of property crosses the line from the mere withholding of labor

into the realm of destructive behavior that is at least intentionally tortious, if not criminal. *See, e.g.*, *Marshall Car Wheel*, 218 F.2d at 412 ("risk of property damage occasioned by the precipitate nature of the walkout during a critical stage of respondent's manufacturing process" rendered conduct during an otherwise lawful strike unprotected).

Any supposed tension between protected strike activity and unprotected property destruction can be easily reconciled: "Necessarily a strike will cause some economic loss to an employer, as well as to the employees. But *damage to the company's property* goes beyond such loss and where strikers deliberately time their strike to cause product damage, then their activity is unprotected for which they can be disciplined or discharged." *Boghosian*, 342 N.L.R.B. at 397 (emphasis added).

The right to property, like the right to life and liberty, enjoys special protection that is deeply rooted not only in the traditional protections of state tort law but also in multiple provisions of the Constitution. That is why courts and the NLRB have always recognized the principle that employees lose protection for a work stoppage unless they abide by an affirmative duty to take reasonable steps to prevent property damage. *E.g.*, *Marshall Car Wheel*, 107 N.L.R.B. at 315; *Int'l Protective Servs.*, 339 N.L.R.B. at 702.

The Union could have fulfilled its duty by directing the drivers not to load the trucks before striking—avoiding putting the company's concrete in a vulnerable position before walking off the job. Or it

could have timed the strike to begin before the concrete was scheduled to be mixed and loaded. *See Morris Fishman*, 278 F.2d at 796 ("[t]he strike began in the morning before the day's work started"). Or it could have directed the employees to take other reasonable precautions, such as "consult[ing] their supervisor" and "follow[ing] his directions in preparation for the work stoppage," *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 258 (6th Cir. 1990). But instead the Union did the opposite, instructing its drivers to ignore dispatchers' directions, JA.34, because it sought to destroy the company's property rather than preserve it. That makes the Union's conduct clearly unprotected. Indeed, the duty to take reasonable steps to *avoid damaging* employer property would be rendered nonsensical if unions had a federally protected right to time a strike to *willfully destroy* it.

Once this simple distinction is understood, the "arguably protected" analysis is quite easy. The Union intentionally orchestrated a scheme to destroy Glacier's property. This Court and the lower courts have recognized that the NLRA does not protect such conduct, even when it occurs in connection with an otherwise protected labor strike, and even when other supposedly "competing principles" are in play.

b. The Washington Supreme Court was wrong to hold that it could not reconcile "competing principles" to determine whether the Union's conduct was arguably protected. As this Court has recognized, courts have an affirmative responsibility to determine whether it is truly arguable that the NLRA protects the conduct in question. This requirement is "not without substance." *Davis*, 476

U.S. at 394. It requires both "an interpretation of the [NLRA] that is not plainly contrary to its language" or binding precedent, plus a "reasonabl[e]" prospect that the Board could find the conduct protected. *Id.* at 395. Courts thus must engage in a robust statutory analysis to determine whether "the Board could legally decide" in favor of protection. *Id.*

This approach tracks other doctrines regarding deference to administrative agencies, under which "a court cannot wave the ambiguity flag" without first conducting a genuine textual analysis. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Thus, for example, agencies receive deference in interpreting regulations "only if [the] regulation is genuinely ambiguous." *Id.* at 2414. Likewise, in the realm of statutory interpretation, *Chevron* deference applies only if genuine ambiguity remains after the court "employ[s] traditional tools of statutory construction." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The same approach is required here. As emphasized in *Davis*, the "arguably" in "arguably protected" does real work. Only after determining that the law could reasonably be interpreted to protect the conduct at issue can a court properly decline to hear an otherwise viable state tort claim. 476 U.S. at 394-95.

The proper approach is illustrated by this Court's decision in *Linn*, which held that a libel claim based on union organizing speech was not preempted. In that case, the Court recognized that although the NLRA protects some "intemperate, abusive and inaccurate statements made by [a] union during attempts to organize employees," it does not give a union a "license to injure [an employer] *intentionally*

by circulating defamatory or insulting material known to be false." 383 U.S. at 61 (emphasis added). In other words, *Linn* reconciled "competing principles" and concluded that *Garmon* does not bar a libel claim where the plaintiff alleges "that the defamatory statements were circulated with malice and caused him damage." *Id.* at 65. Accordingly, it is the trial court's role to determine whether there was *intentional and malicious* defamation that made the statements both unprotected and amenable to state tort liability. *See id.* at 66 (remanding for plaintiff to allege facts that would make the conduct tortious and unprotected, and noting that he would "bear[] the burden of proof of such allegations" at trial).

Likewise in *Farmer*, the Court held that a state tort claim for the intentional infliction of emotional distress was not preempted. The court recognized that unions have a right to engage in "the type of robust language and clash of strong personalities that may be commonplace in various labor contexts." 430 U.S. at 306. But since "there is no federal protection" for "outrageous" intentional conduct, allowing tort claims based on such conduct "does not result in state regulation of federally protected conduct." *Id.* at 302. The Court then remanded for the state court to determine whether any such conduct occurred. *Id.* at 307 & n.15.

All the way back in 1939, *Fansteel* recognized that although "employees could lawfully cease work at their own volition," strikers' "seizure and retention of [the employer's] property were unlawful." 306 U.S. at 252, 256. Indeed, even if the employer engaged in "unfair labor practices," that would "afford[] no excuse for the seizure and holding" of its property.

Id. at 254. The employer thus retained "its normal rights of redress[,]" including "resort to the state court to recover damages or to procure punishment," notwithstanding any protection the employees would otherwise have had but for their violation of the employer's property rights. *Id.*

c. Nothing in the various NLRB and circuit cases the Washington Supreme Court cited justifies its finding of preemption in this case. For one thing, neither NLRB nor circuit precedent can cloud the clarity with which the NLRA's text and this Court's own precedent shows that intentional property destruction is not protected, even in the context of an otherwise lawful strike. *See, e.g.*, *Fansteel*, 306 U.S. at 255-59; *Laburnum*, 347 U.S. at 666. When the text of the statute as interpreted by this Court is clear, that is the end of the matter.

In any event, even on their own terms, none of the cases cited by the Washington Supreme Court even remotely support the notion that intentional property destruction is arguably protected. To the contrary, they acknowledge and apply the principle that activity during a strike is protected only if employees take reasonable precautions to avoid damaging employer property. *See, e.g.*, *Columbia Portland Cement*, 915 F.2d at 257-58 (NLRA protection only because employees took "reasonable precautions" to prevent damage to property by consulting supervisor and "follow[ing] his directions in preparation for the work stoppage"); *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294-95 (1984) (activity protected due to "reasonable precautions to avoid eminent [sic] danger to the employer's physical plant which foreseeably would result from the work

stoppage" (emphasis added)).[2] By contrast, if a union orchestrates a scheme to *intentionally destroy* employer property, it is obviously not taking reasonable precautions to *avoid damaging* employer property, and its conduct is clearly unprotected.

d. Finally, it is of no moment that, after the Washington Supreme Court issued its decision finding preemption, an NLRB complaint issued against Glacier for suing the Union and for issuing warnings to its employees. *See Glacier Nw., Inc.*, Nos. 19-CA-203068, 19-CA-211776 (N.L.R.B. Jan. 31, 2022). The unreasonable legal assertions of a regional director cannot overcome the clear meaning of the NLRA and this Court's recognition that it does not protect intentional property destruction. *Cf., e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 529 (1992) (refusing to enforce a Board decision that misinterpreted "the relationship between the rights of employees under [the NLRA] and the property rights of their employers").

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[2] *See also Falls Stamping & Welding Co. v. Int'l Union, United Auto. Workers, Aerospace & Agric. Implement Workers of Am.*, 744 F.2d 521, 523-25 (6th Cir. 1984) (interference with business, not destruction of property); *Lumbee Farms Coop.*, 285 N.L.R.B. 497, 503, 506-07 (1987) (employer had advance notice in order to take steps to "lessen the impact of the strike on production"); *Leprino Cheese Co.*, 170 N.L.R.B. 601, 606-07 (1968) ("walkout . . . not designed to damage the product"); *Cent. Okla. Milk Producers Ass'n*, 125 N.L.R.B. 419, 435 (1959) (no indication of actual destruction); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976) (delayed production schedule, not damage to property).

2. The Lower Court Misapplied the "Local Interest" Exception

The Washington Supreme Court's reasoning was equally flawed in its explanation of how—even if the Union's intentional destruction of property were somehow arguably protected—the "local interest" exception did not save Glacier's intentional-destruction claim from preemption. The court had no choice but to admit that "the United States Supreme Court . . . ha[s] included the destruction of property in describing matters over which states may exercise jurisdiction." JA.157 (citing *Lodge 76* and *Fansteel*). But the court nonetheless deemed the exception inapplicable because, in the court's view, the property destruction here was not "violent or outrageous." JA.159. According to the court, the "focus of th[e] exception" is on "'intimidation and threats of violence.'" JA.155. And, the court said, because "*Garmon*'s reference to destruction of property was articulated *primarily* in terms of the violence of the labor conduct," any property destruction that is not "violent or outrageous" cannot qualify. JA.157-58 (emphasis added).

As explained above, however, the local interest exception is not so narrowly limited. To the contrary, the Court has applied the exception to torts involving conduct such as defamation and trespass occurring in the course of otherwise protected labor activity. *See Linn*, 383 U.S. at 65; *Sears*, 436 U.S. at 196. And as courts routinely understand, *supra* Section I.B, intentional interference with property rights—and especially the intentional destruction of property—is unquestionably the type of tortious conduct for which it is impossible to "infer that Congress ha[s] deprived

the States of the power" to regulate. *Garmon*, 359 U.S. at 243-44. That is especially clear because, both before and after *Garmon*, this Court has expressly referred to the "destruction of property" by itself as the type of misconduct for which state tort claims remain available. *See Lodge 76*, 427 U.S. at 136; *Laburnum*, 347 U.S. at 666.

Moreover, "violence," however understood, has never been a prerequisite for the conversion and trespass to chattels torts Glacier raises here. JA.19. Both torts are venerable means of recovering for intentional property destruction, with deep common-law roots. As the Restatement makes clear, neither requires "violence." *See* Restatement (Second) of Torts §§ 217, 226 (1965). Indeed, one of the Restatement's "Illustrations" proves the opposite: "A has a large number of cakes of ice stored in an ice-house. B intentionally opens the wall of the room in which the ice is stored, exposing it to a current of warm air. As a result part of the ice is melted, and the cakes of ice are solidified into a mass. This is a conversion . . . of all of the ice." *Id.* § 226 cmt. d. So too here—just as the defendant intentionally put the ice in a position where it would melt, the Union here intentionally put the concrete in a position where it would harden and be destroyed.

Courts, too, have long understood that intentionally destroying property is every bit as actionable regardless of whether it is committed with violence or in any other manner. For example, if a neighbor "ha[s] provisions in my cellar," but "I consume his provisions, or destroy them in any other manner," then "it is quite immaterial whether I consume them, or destroy them by casting them into

the street, or by opening my cellar and causing their destruction by the action of the elements," because "[t]he result to the owner is the same, and my liability to him is the same, in either case." *Aschermann v. Philip Best Brewing Co.*, 45 Wis. 262, 267-68 (1878); *Eley v. Mid/E. Acceptance Corp. of N.C., Inc.*, 614 S.E.2d 555 (N.C. Ct. App. 2005) (conversion liability for allowing watermelons to spoil in an otherwise lawfully repossessed truck). Indeed, the "malicious destruction of property" by abandoning it and letting it go to waste can even be criminal. *E.g.*, *People v. Cook*, No. 193488, 1998 WL 1990468, at *3 (Mich. Ct. App. July 31, 1998) (conviction of truck driver who abandoned shipment of produce, leaving it to spoil).

These examples show that a defendant is liable regardless of whether he smashes property with a sledgehammer or destroys it in another way, such as by leaving it exposed to the elements. Here, therefore, the Union is no less liable for destroying Glacier's concrete because it did so by ensuring that concrete was mixed in Glacier's trucks before calling a sudden strike aimed at "sabotaging, ruining[,] and destroying" the concrete. JA.11-12. Regardless of how the destruction is accomplished, the interpretive presumption underlying the local interest exception—that Congress could not have meant to foreclose the States from protecting property against such intentional destruction—applies with equal force. That is why this Court has—both before and after *Garmon*—repeatedly described the exception as applying to "destruction of property," without requiring that violence be involved. *See, e.g.*, *Lodge 76*, 427 U.S. at 136; *Laburnum*, 347 U.S. at 666.

As noted above, this interpretive presumption is especially important because the NLRA lacks a "general compensatory" remedy. *Laburnum*, 347 U.S. at 665. Both *Linn* and *Farmer* took note of this lack of authority as reason to conclude that Congress could not have intended to preempt state jurisdiction over these issues of core local concern. *Linn*, 383 U.S. at 63-64 ("The Board can award no damages, impose no penalty, or give any other relief to the defamed individual. On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption."); *Farmer*, 430 U.S. at 304 ("the Board could not award . . . damages for pain, suffering, or medical expenses"). In the present context, moreover, not only common sense but also constitutional avoidance precludes interpreting the NLRA's silence in such a way as to cut off the only effective compensatory remedy for intentional property destruction. *See infra* Section II.B.

II. *GARMON* SHOULD NOT BE EXTENDED TO COVER INTENTIONAL PROPERTY DESTRUCTION.

As described in Section I, *Garmon*'s own terms leave no doubt that Glacier's claim for intentional property destruction is not preempted. But even if any ambiguity remained, two ordinary interpretive principles counsel against expanding *Garmon* to displace the states' authority to protect against intentional property destruction.

First, *Garmon* rests on an idiosyncratic approach that relies on congressional silence and federal statutory "penumbras" to impliedly preempt state law. Ordinary preemption doctrine, however, recognizes that state law should not be displaced without a clear textual basis or an actual conflict with federal law—especially where traditional state interests such as the protection of property rights are implicated. Due respect for federalism requires that, if state and federal law can be read to coexist in harmony, they should be. And *Garmon* should be read in accordance with that basic principle.

Second, if *Garmon* were extended to foreclose any compensatory remedy for intentional property destruction, it would raise serious constitutional questions under the Takings Clause. This Court has repeatedly stated that *Garmon* preemption rests, at most, on ambiguous congressional silence. But that only underscores that Congress has not spoken clearly enough to attribute such a constitutionally dubious meaning to the NLRA.

A. Ordinary Preemption Principles Counsel Against Extending *Garmon* to Intentional Property Destruction.

1. This Court's ordinary approach to preemption counsels against expanding *Garmon* to cover intentional property destruction. *Garmon* allows state law to be displaced based on a mere "arguable" conflict with federal law instead of an actual conflict. And it defines the NLRA's preemptive scope in order to avoid the "*potential* frustration of national purposes," without requiring any actual frustration of congressional purposes stated in the statutory

text. 359 U.S. at 244 (emphasis added). This makes *Garmon* an outlier within this Court's implied preemption jurisprudence.

As this Court has recognized, implied preemption "cannot be based on a freewheeling judicial inquiry into whether [state law] is in tension with federal objectives." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (quotation marks omitted). Rather, especially in fields that the "States have traditionally occupied," such as the protection of private property rights, preemption should not be implied absent "the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

Garmon's approach departs from this standard, by resting preemption on "arguabl[e]" or "potential" conflicts, rather than actual ones. 359 U.S. at 244-45. Moreover, *Garmon* itself admitted that the NLRA lacks anything approaching the clarity typically required to displace state law in an area of traditional state concern such as protecting property rights. In *Garmon*'s own words, "the statutory implications [of the NLRA] concerning what has been taken from the States and what has been left to them are of a Delphic nature." *Id.* at 241. The Court recognized that "Congress has refrained from telling us how much" state law is displaced by federal law, but nonetheless found that there is a "penumbral area" of preemption that must be "rendered progressively clear" through "the course of litigation." *Id.* at 240 (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480-81 (1955)). *Garmon* thus has no firm basis in text, but is instead an exercise in "giving application to congressional incompletion" based on the supposed unwritten

"purposes" of Congress. *Id*. That is exactly the type of "freewheeling judicial inquiry" this Court ordinarily rejects. *Garcia*, 140 S. Ct. at 801.

As far as Petitioner is aware, no appellate court—let alone this Court—has ever previously found *Garmon* preemption of a claim for the intentional destruction of property. Accordingly, upholding the decision below would rest a novel finding of preemption "not on the strength of a clear congressional command, or even on the strength of a judicial gloss requiring that much of [the Court], but based only on a doubtful extension of a questionable judicial gloss." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905 (2019) (plurality opinion).

Refusing to extend *Garmon* to this novel context is entirely consistent with statutory stare decisis and this Court's previous decisions. After all, this Court has consistently said that the NLRA does *not* impliedly preempt state tort claims for intentional property destruction. *Fansteel*, 306 U.S. at 254; *Laburnum*, 347 U.S. at 667 n.8; *Lodge 76*, 427 U.S. at 136. Lower courts have universally embraced that principle in this type of case. And there is no basis to upset that settled understanding.

2. Under this Court's ordinary approach, there is no preemption here because the text of the NLRA says nothing about the preemption of state tort claims for intentional property destruction, and allowing Glacier to assert such a claim does not conflict with federal law in any way.

First, nothing in the NLRA's text gives any indication—much less a "clear" indication, *Wyeth*, 555 U.S. at 565—that Congress meant to displace

traditional state tort claims for intentional property destruction. Neither the Washington Supreme Court nor the Union has ever pointed to any textual provision that could support preemption. Instead, they have simply relied on the freewheeling theory of "penumbral" preemption that *Garmon* adopted. But that is no sound guide to congressional intent. If anything, as this Court has recognized, the fact that the NLRA provides no substitute compensatory remedy for intentional property destruction is strong evidence that Congress did *not* mean to preempt such claims. *See Laburnum*, 347 U.S. at 665; *Linn*, 383 U.S. at 66; *Farmer*, 430 U.S. at 304.

Second, state tort claims against unions for intentional property destruction create no actual conflict with federal law. While *Garmon* allows state law to be preempted based on an "arguable" conflict with federal law, normal implied preemption doctrine requires an *actual* conflict. *Garcia*, 140 S. Ct. at 801. The only way there could be an actual conflict here is if the NLRA *actually* protected the right of unions to intentionally destroy property in the course of a labor strike. But as explained above, the NLRA confers no such extraordinary protection.

Although the Act protects ordinary strikes that may result in lost profits and economic opportunities, it generally provides no "license . . . to commit tortious acts" and no immunity against "the appropriate consequences of unlawful conduct," including the "conversion of [an employer's] goods, or the despoiling of its property." *Fansteel*, 306 U.S. at 253, 258. Property destruction is not in any way a necessary or reasonable incident of the right to strike. As explained above, there are many ways that

the Union here could have conducted a strike *without* intentionally planning and timing it for the very purpose of destroying Glacier's property. There was no legitimate reason to put the company's property in a vulnerable position before walking off the job. *See supra* at 31-32. This type of intentional property destruction has never been understood as part of the right to strike that the NLRA protects. Accordingly, because "there is no federal protection for [such] conduct," "permitting the state courts to exercise jurisdiction over such [claims] does not result in state regulation of federally protected conduct." *Farmer*, 430 U.S. at 290-91.

This Court's decision in *Bill Johnson's Restaurants* illustrates the absence of any inherent conflict in allowing both a state tort suit against a union and a Board proceeding where the union claims that the underlying labor activity was protected by the NLRA. When a tort claim is not preempted and is based on allegations of unprotected conduct, "the Board should allow [the disputed] issues to be decided by the state tribunals if there is any realistic chance that the plaintiff's legal theory might be adopted" to establish tort liability. 461 U.S. at 747. "If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed." *Id.* That solution preserves both the power of the Board to act as well as the plaintiff's "interest in petitioning the state court for redress of his grievance," the right to a jury trial, and "the State's interest in protecting

the [rights] of its citizens" by providing a compensatory remedy. *Id.* at 745. There is accordingly no need to displace "the traditional fact-finding function of the state-court jury or judge." *Id.*

Even when there may be common factual issues that could be relevant both to whether the union's conduct was tortious and whether it was unprotected by the NLRA, the state tribunal is entirely competent to resolve those issues while leaving room for the NLRA's remedial scheme to function. That explains why, even after *Garmon*, this Court has "refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.'" *Farmer*, 430 U.S. at 297 (quoting *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 297-98 (1971)); *see also Linn*, 383 U.S. at 66 (remanding for state trial court to resolve facts relevant to both state tort liability and protected status of labor activity under the NLRA). There is no textual basis to conclude that Congress so distrusted state courts that it intended to obliterate state tort claims for the sake of making the Board the exclusive tribunal to resolve factual disputes relevant to a tort claim against a union.

In short, as this Court's precedent confirms, state tort claims and Board proceedings can easily co-exist even when they share disputed factual issues. There is thus no actual "conflict" between state law and the NLRA that could support the implied preemption of state tort claims. *Garcia*, 140 S. Ct. at 801.

B. Constitutional Avoidance Counsels Against Preemption

When "fairly possible," federal statutes should be read in a way that avoids putting their constitutionality in "serious doubt." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). This is yet another reason not to find preemption here.

If the NLRA were construed to preempt state tort claims for intentional property destruction despite providing no alternative compensatory remedy, its constitutionality would be in serious doubt. The Takings Clause of the Fifth Amendment prohibits the government from depriving people of their property without "just compensation." But as this Court has recognized, if the NLRA were construed to preempt tort claims for property destruction, it would do just that—"cut off the injured [employer] from [the] right of recovery [and] deprive it of its property without recourse or compensation." *Laburnum*, 347 U.S. at 664.

As Justice Kavanaugh recently observed, the NLRA "should be interpreted to avoid unconstitutionality" in light of "the Constitution's strong protection of property rights[.]" *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (Kavanaugh, J., concurring). That admonition is all the more urgent now, in light of *Cedar Point*'s recognition that the Court's previous labor law decisions may have failed to afford adequate respect for employers' property rights. *Id.* at 2077 (majority opinion) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)).

In *Babcock*, this Court interpreted the NLRA to override certain core property rights, holding that the traditional "right to exclude from property" must "yield to the extent needed" for the sake of a union's "right to organize." 351 U.S. at 112. But in *Cedar Point*, this Court recognized that *Babcock* allowed only a "highly contingent access right" to employer property, and indicated that even this limited incursion on property rights is constitutionally dubious. 141 S. Ct. at 2077. As the Court explained, "*Babcock* did not involve a takings claim" and thus did not consider the "specific takings issues" that arise when labor law is construed to deprive employers of their property rights. *Id*. The Court then went on to hold that an "access regulation" entitling unions to "invade" an owner's property for the sake of labor organizing is a "per se" taking under the Takings Clause. *Id*. at 2079-80.

Here, the takings concerns with authorizing unions to *intentionally destroy* an employer's property are even clearer. An access regulation like the one in *Cedar Point* imposes only a temporary occupation of property. But the actual *destruction* of property completely deprives the owner of all possession and use. Even the dissenters in *Cedar Point* recognized that a taking occurs when "the right[] to possess, use and dispose of" property is "effectively destroy[ed]." *Id*. at 2084 (Breyer, J., dissenting) (quotation marks omitted) (quoting *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982)). There is thus no question that reading the NLRA to authorize property destruction without just compensation would raise serious constitutional doubts under the Takings Clause.

The lack of any congressional indication of a desire to raise such a serious constitutional question—let alone the clear statement required to read the statute in such a constitutionally dubious fashion—is yet another reason to reject the decision below and affirm the traditional authority of the States to protect their citizens' property rights.

CONCLUSION

The decision of the Washington Supreme Court should be reversed.

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Respectfully submitted,

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