No. 21-1449

In the Supreme Court of the United States

GLACIER NORTHWEST, INC., D/B/A CALPORTLAND,
Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 174,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF *AMICI CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INDEPENDENT ELECTRICAL CONTRACTORS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL RETAIL FEDERATION, AND RESTAURANT LAW CENTER IN SUPPORT OF PETITIONERS

Steven P. Lehotsky
Counsel of Record
Adam Steene*
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lehotskykeller.com

Andrew B. Davis
Michael C. Cotton
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

*Admitted in New York. Not admitted in D.C., but being supervised by D.C. Bar members.

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 3

Argument 6

I. This Court's Precedent is Clear that the NLRA Does Not Immunize the Intentional Destruction of an Employer's Property. 6

A. Intentional destruction of property is not arguably protected by the NLRA. 7

B. Suits to vindicate the intentional destruction of property fall comfortably within the local interest exception. 10

C. The decision below rewrites this Court's precedents.. 12

II. Preempting State Tort Claims for the Intentional Destruction of Property Would Leave Employers Without a Remedy, Encourage Unlawful Behavior and Upset the Careful Balance of Power Between Employers and Employees. 13

A. Preempting state tort claims would leave employers without a remedy for the intentional destruction of their private property. 13

B. The consequences of stripping employers of a remedy counsel against preemption. 14

Conclusion 20

TABLE OF AUTHORITIES

Page(s)

CASES

Amalgamated Ass'n of Motor Coach Emps v. Lockridge,
403 U.S. 274 (1971) 6

Auto. Workers of Am. v. Russell,
356 U.S. 634 (1958) 13

Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.,
507 U.S. 218 (1993) 17

Boghosian Raisin Packing Co.,
342 N.L.R.B. 383 (2004) 8

Cedar Point Nursery v. Hassid,
141 S. Ct. 2063 (2021) 13

Chamber of Com. of U.S. v. Brown,
554 U.S. 60 (2008) 17, 18

Del. & Hudson Ry. Co. v. United Transp. Union,
450 F.2d 603 (D.C. Cir. 1971) 8

Gen. Chem. Corp.,
290 N.L.R.B. 76 (1988) 9

Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174,
500 P.3d 119 (Wash. 2021) 12, 13

Int'l Ass'n of Machinists v. Gonzales,
356 U.S. 617 (1958) 15

Int'l Longshoremen's Ass'n, AFL-CIO v. Davis,
476 U.S. 380 (1986) 6, 7, 8

Linn v. United Plant Guard Workers of Am.,
383 U.S. 53 (1966) 13, 15

Lodge 76, Int'l Ass'n. of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't. Rels. Comm'n,
427 U.S. 132 (1976) ....*passim*

Marshall Car Wheel & Foundry Co.,
107 N.L.R.B. 314 (1953) 8

N.Y. Tel. Co. v. N.Y. State Dep't of Labor,
440 U.S. 519 (1979) 17

NLRB v. Fansteel Metallurgical Corp.,
306 U.S. 240 (1939) ....*passim*

NLRB v. Fed. Sec., Inc.,
154 F.3d 751 (7th Cir. 1998)... 9

NLRB v. Loc. Union No. 1229, Int'l Bhd. of Elec. Workers,
346 U.S. 464 (1953) 8

NLRB v. Marshall Car Wheel & Foundry Co. of Marshall, Tex.,
218 F.2d 409 (5th Cir. 1955)... 9

NLRB v. Special Touch Home Care Servs., Inc.,
708 F.3d 447 (2d Cir. 2013) 9

San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon,
359 U.S. 236 (1959) 6, 7, 11, 18

Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180 (1978) ....*passim*

Special Touch Home Care Servs., Inc., 357 N.L.R.B. 4 (2011) 8

Taggart v. Weinacker's Inc., 397 U.S. 223 (1970) 14, 15

U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) 14, 19

U.S. Steel Co. (Joliet Coke Works) v. NLRB, 196 F.2d 459 (7th Cir. 1952)... 9

United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 351 U.S. 266 (1956) 10

United Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656 (1954) 10, 14

United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc., 162 A.3d 909 (Md. 2017) 12, 16, 17

United Food and Commercial Workers Int'l Union v. Wal-Mart Stores, Inc., 504 S.W.3d 573 (Ark. 2016).....................................12, 16

United States v. Dougherty, 98 F.Supp.3d 721 (E.D. Pa. 2015), *aff'd*, 706 F. App'x 736 (3d Cir. 2017) 16

OTHER AUTHORITIES

74 Am. Jur. 2d Torts § 2 13

Cameron Sheppard, *Carpenters Union Strike on Pause After "Illegal Picketing Activity,"* SEATTLE WEEKLY (Sept. 24, 2021) 16

H.R. Rep. No. 80-510 (1947) 8

Jonathan Turner, *Deere Wins Temporary Injunction Against Striking Union Workers in Davenport* (Oct. 20, 2021), https://tinyurl.com/2p82jtyc 16

INTEREST OF *AMICI CURIAE*

Amici curiae are the Coalition for a Democratic Workplace ("CDW"), the National Federation of Independent Business ("NFIB"), Associated Builders and Contractors ("ABC"), the Associated General Contractors of America ("AGC"), Independent Electrical Contractors ("IEC"), the National Association of Wholesaler-Distributors ("NAW"), the National Retail Federation ("NRF"), and the Restaurant Law Center.[1]

The CDW represents employers and associations and the interests of their employees, including nearly 500 member organizations and businesses of all sizes. The majority of CDW's members are covered by the National Labor Relations Act ("NLRA") or represent organizations covered by the NLRA and therefore have a strong interest in the way that the NLRA is interpreted and applied by the National Labor Relations Board.

NFIB is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small

[1] Pursuant to this Court's Rule 37.3(a), *amici* affirm that all parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae*, their members, and their counsel made such a monetary contribution.

business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

ABC is a national construction industry trade association representing more than 21,000 members. Founded on the merit shop philosophy, ABC and its 68 Chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

AGC is a nationwide trade association of construction companies and related firms. It has served the commercial construction industry since 1918 and has become the recognized leader of the construction industry in the United States. The association provides a full range of services to meet the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest. AGC now has more than 27,000 member firms in 89 chapters. It represents union- and open-shop employers engaged in building, heavy, civil, industrial, utility, and other construction.

IEC is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,700 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition, and economic opportunity for all.

NAW is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW

is made up of direct member companies and a federation of national, regional, state and local associations which together include approximately 35,000 companies operating at more than 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. The wholesale distribution industry generates more than $7 trillion in annual sales volume and provides stable and well-paying jobs to more than 6 million workers.

NRF is the world's largest retail trade association and the voice of retail worldwide. NRF's membership includes retailers of all sizes, formats, and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF files *amicus curiae* briefs in support of the retail community on dozens of topics, including labor issues.

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is composed of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. Through *amicus* participation, the Restaurant Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Restaurant Law Center's *amicus* briefs have been cited favorably by state and federal courts.

SUMMARY OF ARGUMENT

I. This Court has long held that unions are not immune from state tort suits when they intentionally destroy an employer's property. The NLRA does not "arguably

protect" such unlawful behavior and, even if it did, the "local feeling" exception saves state tort suits alleging the intentional destruction of private property. The decision below reached the opposite conclusion only by rewriting this Court's precedents.

A. Since the 1930s, this Court has been clear that the NLRA does *not* protect the "despoiling of [] property" or similar unlawful activity. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939). Unions that intentionally destroy their employer's property may therefore be held to account for their unlawful actions without a preemption defense. *See id.* at 254. For decades, the NLRB and lower courts applied this precedent without issue: the NLRB confirmed in 1953 that employees are not protected when they time their strikes to inflict foreseeable property damage, the lower federal courts agreed, and both have maintained this understanding for more than half a century. There is no reason for this Court now to depart from—or introduce ambiguity into—its own precedent or the established practice that followed.

B. In any event, this Court has explained that the "destruction of property" falls within the 'local feeling' exception to preemption. *Lodge 76, Int'l Ass'n. of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't. Rels. Comm'n*, 427 U.S. 132, 136 (1976) ("*Lodge 76*"). Indeed, it has held that interference with property rights that is *less* intrusive than physical property damage, such as trespass, comes within this exception. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978). So, whatever the outer bounds of the local interest exception, intentional physical destruction of private property falls comfortably within them.

C. The Washington Supreme Court nonetheless held that the NLRA preempts Petitioner's tort suit alleging the intentional, physical destruction of its property. That

holding twice mangled this Court's precedent: first by concluding that the NLRA arguably protects conduct *Fansteel* said was unprotected, and second by rewriting the local feeling exception to apply only to violent actions.

II. Employers would be left wholly without a remedy for the intentional destruction of their property if this Court were to hold that the NLRA preempts Petitioner's state tort suit. Not only would this harm businesses across the country and encourage unlawful behavior, it would upset the congressionally established balance of power between unions and employers.

A. The decision below leaves employers that suffer intentional property damage—whether that damage is to their product (as in this case), machinery (as the Respondents in this case allegedly intended), structures, or other tangible or real property—without a remedy. If the Court were to affirm, employers nationwide would no longer be able to bring tort suits against unions that intentionally destroy their property. And the NLRA does *not* create a remedy to fill this void. Accordingly, businesses across the country will be left holding the bag whenever unions unlawfully swap negotiations for vandalism.

B. It is vital that businesses be permitted to vindicate their property rights in state court.

First, stripping employers of any remedy would encourage unions to unlawfully inflict harm on employers by destroying their property. Many local unions across the country are already using unlawful tactics, including violence and harassment. And many unions not willing to cross this line have demonstrated that they are nonetheless willing to push for an ability to engage in any activity short of violence. Affirming the decision below would only exacerbate these problems.

Second, the lack of a remedy would create a significant imbalance in power between unions and employers.

Congress in the NLRA has attempted to strike a balance between employers and workers. But so long as unions are allowed to engage in lawless activity and employers lack recourse, any union willing to destroy or threaten to destroy an employer's property will have the upper hand in negotiations.

Third, preemption would harm local communities, which have a traditionally recognized interest in protecting local businesses, and union and non-union employees alike who suffer collateral damage when an employer's property is destroyed.

ARGUMENT

I. THIS COURT'S PRECEDENT IS CLEAR THAT THE NLRA DOES NOT IMMUNIZE THE INTENTIONAL DESTRUCTION OF AN EMPLOYER'S PROPERTY.

When Congress passed the National Labor Relations Act in 1935, it legislated with "broad strokes" and left "the judicial process" to fill in the details. *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 240 (1959). "The principle of pre-emption . . . was [accordingly] born of this Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority" under the NLRA. *Amalgamated Ass'n of Motor Coach Emps v. Lockridge*, 403 U.S. 274, 286 (1971).

This Court first set out the relevant framework for analyzing NLRA preemption in *Garmon*, where it held that the NLRA ordinarily preempts state efforts to regulate activity that is protected under §7 of the Act, prohibited under §8 of the Act, or "arguably" protected or prohibited under those sections. 359 U.S. at 245. An interpretation of those provisions is arguable when it is "not plainly contrary to [the Act's] language and [it] has not been authoritatively rejected by the courts or the Board." *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 395

(1986) (internal quotation marks omitted). But even when the NLRA arguably protects or prohibits conduct, there is no preemption where "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [courts] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. This is often referred to as the "local feeling" or "local interest" exception.

This Court's precedents unmistakably establish that the NLRA does not immunize unions that intentionally destroy their employer's property by preempting state tort suits seeking to hold unions liable for their unlawful actions. In holding otherwise, the Washington Supreme Court rewrote this Court's precedents.

A. Intentional destruction of property is not arguably protected by the NLRA.

This Court has long and "authoritatively rejected," *Davis*, 476 U.S. at 395, the position that the NLRA protects the intentional destruction of property.

Only four years after the NLRA was enacted, this Court, in *Fansteel*, made clear that a union's intentional destruction of an employer's property falls outside the NLRA's protection. The Court emphasized that the Act does not "deprive" an employer "of its legal rights to the possession and protection of its property." *Fansteel*, 306 U.S. at 253. So while a union has the "unquestioned right to quit work" to support its bargaining position, it manifestly does *not* have the ability to engage in "unlawful acts"—including "the seizure and conversion of [] goods[] or the despoiling of [] property"—"to force compliance with demands." *Id.* at 253, 256. Those unlawful actions fall "outside the protection of the statute." *Id.* at 256.

Moreover, even though *Fansteel* was not itself a preemption case, the *Fansteel* court emphasized that

because the NLRA does not protect unlawful activity, it does not protect those who "commit tortious acts" "from the appropriate consequences of [their] unlawful conduct." *Id.* at 258. Rather, the employer "ha[s] its normal rights of redress," *id.* at 254—rights that include the full panoply of appropriate state causes of action and remedies.

Fansteel left no room to quibble over whether the NLRB protects unlawful actions like the destruction of property. A 1947 House Conference Report emphasized that "courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct." H.R. Rep. No. 80-510, at 38-39 (1947) (quoted with approval by *NLRB v. Loc. Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 473 (1953)).

The NLRB followed suit in 1953, concluding that intentional torts—like those Respondents are alleged to have committed—are unprotected. The Board determined that when "ordinary rank-and-file employees" have "work tasks" that "involve responsibility for [] property which might be damaged" by "their sudden cessation of work," those employees have a "duty to take reasonable precautions to protect the employer's physical plant from [any] imminent damage as foreseeably would result" from such a cessation. *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314, 315, 321 (1953). "Employees who strike in breach of [the] obligation engage in unprotected activity." *Id.* at 315. This "authoritative[]" interpretation of the Act, *see Davis*, 476 U.S. at 395, has routinely been reaffirmed, *see, e.g.*, *Special Touch Home Care Servs., Inc.*, 357 N.L.R.B. 4, 8 (2011); *Boghosian Raisin Packing Co.*, 342 N.L.R.B. 383, 397 (2004); *Gen. Chem. Corp.*, 290 N.L.R.B. 76, 83 (1988).

So too for decades the circuit courts have recognized the same principle. *See, e.g.*, *NLRB v. Special Touch Home Care Servs., Inc.*, 708 F.3d 447, 457 (2d Cir. 2013); *NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 755 (7th Cir. 1998); *Del. & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 622 (D.C. Cir. 1971); *NLRB v. Marshall Car Wheel & Foundry Co. of Marshall, Tex.* 218 F.2d 409, 413 (5th Cir. 1955). Consider *Marshall Car Wheel & Foundry Co.* The Fifth Circuit reviewed a Board petition for enforcement based on findings that an employer discharged striking employees who intentionally timed their walkout for when molten iron in the plant cupola was ready to be poured, leaving the employer vulnerable to "substantial property damage and pecuniary loss." 218 F.2d at 411. Relying on this Court's early NLRA cases, and specifically citing *Fansteel*, the Fifth Circuit held that the walkout was "akin to that type of irresponsible and unprotected activity condemned by the Supreme Court as effectively removing the guilty employees from statutory protection." *Id.* at 413. It did not matter that non-striking employees were able to "pour off the molten metal and prevent any actual damage," *id.* at 411—the intent to damage property brought the striking employees outside of the NLRA, and thus outside its preemptive scope.

Two years prior, the Seventh Circuit similarly held that the NLRA did not protect steel workers who went on strike, intentionally leaving ovens unattended and knowing that doing so created serious risk of property damage. *U.S. Steel Co. (Joliet Coke Works) v. NLRB*, 196 F.2d 459, 467 (7th Cir. 1952). Moreover, as in *Marshall Car Wheel*, the court in *Joliet Coke Works* held that the intentionally tortious activity was unprotected even though great physical damage was avoided thanks to tremendous effort. 196 F.2d at 467.

In short, since the ink on the NLRA dried, this Court—and, in turn, the NLRB and lower courts—have

been unmistakably clear that the Act does not, even arguably, protect unlawful actions like the intentional destruction of property.

B. Suits to vindicate the intentional destruction of property fall comfortably within the local interest exception.

Even if it were arguable that intentionally destroying property is protected activity—and it is not—this Court has stated on multiple occasions that preventing the destruction of private property is a compelling local interest that Congress did not intend to remove from local control. In *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board*, this Court stated explicitly that "[t]he dominant interest of the State in preventing violence and *property damage* cannot be questioned." 351 U.S. 266, 274 (1956) (emphasis added). And in *United Construction Workers v. Laburnum Construction Corporation*, it explained that despite changes in labor law, localities maintain their ability to regulate property destruction through civil tort suits: "there is no doubt that [prior to Taft-Hartley in 1947] if agents of [labor] organizations . . . had damaged property through their tortious conduct, the persons responsible would have been liable to a tort action in state courts for damage done" and that the Taft-Hartley Act "increased, rather than decreased, the legal responsibilities of labor organizations." 347 U.S. 656, 666 (1954).

Roughly two decades later, this Court removed any lingering doubt that the local feeling exception permits employers to hold unions accountable through state tort suits for intentionally destroying property. In *Lodge 76, International Association of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, the Court explained in the context of discussing the local interest exception that because the "Act leaves

much to the [S]tates," "a State still may exercise historic powers over such traditionally local matters as public safety[,] . . . for policing of such conduct is left wholly to the states." 427 U.S. 132, 136 & n.2 (1976) (cleaned up). And it noted that "[p]olicing of actual or threatened violence to persons or *destruction of property* has been held most clearly a matter for the States." *Id.* at 136 (emphasis added).

This Court went even further in *Sears, Roebuck & Co. v. Carpenters* by holding trespass actions unpreempted. 436 U.S. 180 (1978). In *Sears*, the union engaged in peaceful picketing but ignored Sears's request to remove the pickets from company property. *Id.* at 182-83. "[A]s a matter of state law," "the picketing itself was unobjectionable," but "the location of the picketing was illegal." *Id.* at 185. Sears sued in state court for trespass, and the Court, applying *Garmon*, concluded that the NLRA did not preempt the suit. *See id.* at 207. The Court determined that it was "'arguable' that the Union's peaceful picketing, though trespassory, was protected." *Id.* at 205. But it reasoned that the trespass action fell within the local interest exception, noting that under the exception the Court had previously "held that state jurisdiction to enforce its laws prohibiting violence, defamation, the intentional infliction of emotional distress, or obstruction of access to property [was] not pre-empted by the NLRA." *Id.* at 204 (footnotes omitted). Of course, trespass is a lesser violation of an employer's property rights than is intentional destruction because trespass is temporary. It follows then that the policing of intentional destruction, like the policing of trespass, "is left wholly to the states." *Lodge 76*, 427 U.S. at 136 n.2.[2]

---

[2] The thrust of this Court's caselaw has not gone unnoticed. Before the Washington Supreme Court's misguided decision below, the Court of Appeals of Maryland and the Arkansas Supreme Court both held that claims for trespass fell within the local interest exception and were not

C. The decision below rewrites this Court's precedents.

The Washington Supreme Court twice rewrote this Court's precedents when it held that the NLRA preempts a state tort suit against a union for the intentional destruction of an employer's property. *First*, the Washington Supreme Court rewrote this Court's precedents when it concluded that intentional destruction of property is "arguably protected" by the NLRA, reasoning that there are two competing principles at play that only the NLRB can resolve: (1) conduct is not protected when workers fail to take "reasonable precautions to protect an employer's plant, property, and products," and (2) "economic harm may be inflicted through a strike as a legitimate bargaining tactic." *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, 500 P.3d 119, 131 (Wash. 2021).

This Court, however, meant what it said in *Fansteel*: "to justify [despoiling property] because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." 306 U.S. at 253. The Washington Supreme Court had no license to disregard this precedent.

Second, the Washington Supreme Court rewrote this Court's precedent by redefining the scope of the local feeling exception to include only "intimidation and threats of

---

preempted by the NLRA. *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 162 A.3d 909, 925-26 (Md. 2017) (hereinafter *United Food* (Md.)); *United Food and Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 504 S.W.3d 573, 577-78 (Ark. 2016) (hereinafter *United Food* (Ark.)). And, relying on *Sears*, both courts rejected union arguments "that the local interest exception is strictly limited to cases involving violence, threats of violence, or malicious conduct." *United Food (Md.)*, 162 A.3d at 922; *see United Food (Ark.)*, 504 S.W.3d at 578.

violence." *Glacier Nw.*, 500 P.3d at 129; *see also id.* at 130 (limiting "local feeling" exception to "violent or outrageous conduct"). This holding cannot be reconciled with *Lodge 76*'s statement that "[p]olicing of actual or threatened violence to persons *or destruction of property* has been held most clearly a matter for the States." 427 U.S. at 136 (emphasis added). Nor can it be reconciled with *Sears*'s holding that the NLRA did not preempt a trespass claim for a union's peaceful picketing. 436 U.S. at 207. More still, it cannot be reconciled with multiple precedents holding non-violent conduct not preempted. *E.g.*, *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966) (defamation); *Auto. Workers of Am. v. Russell*, 356 U.S. 634 (1958) (obstruction of access to property).

II. PREEMPTING STATE TORT CLAIMS FOR THE INTENTIONAL DESTRUCTION OF PROPERTY WOULD LEAVE EMPLOYERS WITHOUT A REMEDY, ENCOURAGE UNLAWFUL BEHAVIOR AND UPSET THE CAREFUL BALANCE OF POWER BETWEEN EMPLOYERS AND EMPLOYEES.

Holding that the NLRA preempts tort claims alleging the intentional destruction of property would have significant negative consequences for employers across the country. It would also be antithetical to the Court's approach to NLRA preemption and to the Act itself.

A. Preempting state tort claims would leave employers without a remedy for the intentional destruction of their private property.

"The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). State tort law is the primary way that our system promotes this freedom by "protecting society as a whole from physical harm to a person or property." 74 Am. Jur. 2d Torts § 2. "[T]respass laws," for example, have

"historically" served to "protect[] . . . private property, whether a home, factory, or store." *Taggart v. Weinacker's Inc.*, 397 U.S. 223, 227 (1970) (Burger, C.J., concurring). Indeed, a trespass action under state law—whether trespass to real property or trespass to chattel—is often the primary way to ensure that those engaged in wrongdoing through the intentional destruction of property are held accountable for their actions and that the victims of those actions are compensated.

Treating tort actions as preempted, however, would remove this powerful and important protection from employers because it would "cut [them] off" from their "right of recovery," and "deprive" them of their "property without recourse or compensation." *Laburnum*, 347 U.S. at 664. This latter aspect is particularly concerning. Because "Congress [in the NLRA] has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct," employers robbed of their state tort rights would be left without *any* remedy. *Id.*

B. The consequences of stripping employers of a remedy counsel against preemption.

Neither this Court's approach to NLRA preemption nor the NLRA itself countenance such a result. This Court does not lightly assume that federal law displaces traditional state law over private property. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020) ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.").

In the context of the NLRA in particular, where "[t]he statutory implications concerning what has been taken from the States" is, at best, "of a Delphic nature," the Court should be particularly reluctant to infer that kind of

preemption. *See Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958); *accord Sears*, 436 U.S. at 188 n.12. As this Court put it in *Sears*, "the history of the labor preemption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." 436 U.S. at 188.

The impact of stripping away businesses' sole means of redress would be three-fold. *First*, it would encourage the intentional destruction of employer property. *Second*, it would upset the balance of power in labor disputes in favor of unions willing to engage in lawless acts. *Third*, it would harm local communities and workers.

1. Stripping businesses of a remedy would encourage the intentional destruction of employer property.

Removing tort liability for intentionally destroying private property is particularly concerning in the labor relations context because "[l]abor disputes are ordinarily heated affairs." *Linn*, 383 U.S. at 58. When tensions run high and unions seek any form of leverage available to bolster their bargaining position against employers, they will be emboldened to use the destruction of property—or the threat thereof—against employers as a means to an end, knowing that unions and their members cannot be held to account in the artificial "no-law area" created by the remedy-stripping consequences of preemption. *See Taggart*, 397 U.S. at 228 (Burger, C.J., concurring).

That union members may engage in unscrupulous behavior is not speculative. For example, in September 2021, in Oregon, a Northwest Carpenters Union strike was paused after strikers engaged in threats of violence, harassment, and other illegal picketing activity, accompanied

by near-physical altercations.[3] According to the union, these "roaming protests" were unsanctioned and included both union and non-union members.[4] Only a month later, a company in Iowa won a temporary injunction against union members who not only trespassed—blocking customers and contractors from entering the building—but verbally and physically harassed vendors, customers, and non-striking employees.[5] And perhaps one of the most prominent recent examples was the 2015 conviction of a Philadelphia union leader and eleven union members who engaged in a systemic pattern of extortions, arsons, and assaults in an attempt to force non-union companies to hire union workers. *United States v. Dougherty*, 98 F.Supp.3d 721, 725, 727, 737 (E.D. Pa. 2015) (noting criminal activities "were aberrational, but not novel"), *aff'd*, 706 F. App'x 736 (3d Cir. 2017). These and similar incidents of unions using physical harassment and intimidation to achieve their goals raise strong concerns that they might also sanction destruction of employers' property if they know there will be no consequences.

Moreover, even unions that do not engage in violence or intimidation have demonstrated a willingness to push the boundaries of lawful conduct. In *United Food* (Md.) and *United Food* (Ark.), unions occupied the employer's property despite the employer's insistence that they leave the premises, arguing that they were entitled to violate the employer's private property rights with impunity unless the trespass was violent, *United Food* (Ark.), 504 S.W.3d

[3] *See* Cameron Sheppard, *Carpenters Union Strike on Pause After "Illegal Picketing Activity,"* SEATTLE WEEKLY (Sept. 24, 2021), https://tinyurl.com/bdzzva9w.

[4] *Id.*

[5] *See* Jonathan Turner, *Deere Wins Temporary Injunction Against Striking Union Workers in Davenport*, OURQUADCITIES.COM (Oct. 20, 2021), https://tinyurl.com/2p82jtyc.

at 576, or in the Maryland case, unless the trespass was violent or caused property damage. *United Food* (Md.), 162 A.3d at 919. Here, the Respondent attempts to push the boundaries of preempted conduct *even further*—arguing that, even if property is intentionally destroyed, employers have no recourse in State courts because of NLRA preemption.

The consequences of preemption would be undeniable: preventing employers from holding lawbreaking employees accountable is likely to lead to more unions intentionally destroying employers' private property.

2. Preemption would upset the balance of power in labor disputes in favor of unions willing to engage in lawless acts and against law-abiding businesses.

This Court has repeatedly stressed that, in enacting federal labor laws, Congress attempted to effectuate a balance in bargaining power between labor and management. *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 74 (2008); *Lodge 76*, 427 U.S. at 146; *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993). And Congress has recalibrated that balance when necessary, as when it passed the Taft-Hartley Act in 1947 out of "[c]oncern[] that the [NLRA] had pushed the labor relations balance too far in favor of unions." *Chamber of Com. of U.S.*, 554 U.S. at 67.

This Court has recognized that there is congressional sanction for "economic warfare between labor and management" wherein each side uses "economic weapons" governed generally by "the free play of economic forces" in the bargaining process. *See N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 530-531 (1979). This balance prevents both the NLRB and States from regulating certain aspects of labor disputes—leaving the bargaining

parties and market forces free to work. *Chamber of Com. of U.S.*, 554 U.S. at 65. Of course, each side is permitted the use of *lawful economic* weapons only. *Fansteel*, 306 U.S. at 256. Arming one side with patently unlawful *physical* weapons would wildly throw off the balance struck by Congress.

A preemption holding here would do just that. It would create a fundamentally uneven playing field by gifting unions an additional and unlawful weapon—the intentional destruction of property—while simultaneously removing an essential shield held by employers. That is, it would "make abortive [the NLRA's] plan for peaceable procedure" by "licens[ing] [employees] to commit tortious acts" while "protect[ing] them from the appropriate consequences of [that] unlawful conduct." *Id.* at 258.

This would be no minor alteration: the financial, logistical, and reputational harms that attend the destruction of property at the hands of employees who know the lynchpins of a business can be incalculable. Even the mere threat of destruction of property will be enough to fundamentally alter the bargaining positions between labor and management, and therefore fundamentally alter the substance of the resulting collective bargaining agreement. Critically, this imbalance will reverberate for years to come because collective bargaining agreements last for years at a time, and future agreements build on prior agreements.

3. Allowing the intentional destruction of employer property would harm local communities and workers.

Preemption would harm local communities by barring them from prohibiting intentional tortious activity. As the Court recognized in *Garmon*, Congress did not intend to regulate conduct touching on "interests . . . deeply rooted in local feeling and responsibility." 359 U.S. at 244.

Intentional destruction of property is inherently local—precisely the type of lawlessness that localities should be able to address and that state courts should be able to remedy.

A contrary result would strip States of their traditional responsibility of protecting their citizens' rights, all without a clear command—or any command—from Congress. *Contra Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1849-50.

Preemption would also affect local communities by harming workers. Non-union employees will not be able to continue working if unions destroy property that is necessary for the continuing operation of a businesses. The same is true for union members when they wish to return to work after a strike. And workers of other businesses relying on the timely operation of the directly affected company—such as the construction workers of Petitioner's customers, who were waiting for delivery of concrete to do their own jobs—could also be affected. The destruction of necessary equipment and supplies will slow work and drain resources, potentially depriving workers of jobs and communities of the goods and services that they need. Plus, businesses appropriately managing risk may price in the cost of potential property destruction when negotiating wages and benefits, not to mention setting prices for customers of goods and services.

CONCLUSION

The Court should reverse the judgment of the Washington Supreme Court.

Respectfully submitted,

Steven P. Lehotsky
Counsel of Record
Adam Steene*
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lehotskykeller.com

*Admitted in New York. Not admitted in D.C., but being supervised by members of the D.C. Bar.

Andrew B. Davis
Michael C. Cotton
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

Counsel for Amici Curiae

NOVEMBER 8, 2022