December 14, 2022

ATTORNEY GENERAL RAOUL FILES BRIEF TO PROTECT WORKERS' RIGHTS

Chicago — Attorney General Kwame Raoul, as part of a coalition of 16 attorneys general, filed an amicus brief with the U.S. Supreme Court defending workers' rights.

The brief was filed in Glacier Northwest Inc v. International Brotherhood of Teamsters Local Union No. 174, a case that will be heard in the Supreme Court in January 2023.

"The right to strike is fundamental for all workers attempting to fight collectively for better working conditions and benefits," Raoul said. "I will continue to stand with workers across Illinois and will oppose attempts to weaken protections of their rights."

Glacier Northwest, which also does business as CalPortland, provides construction services and building materials, including concrete. In 2017, during a labor dispute between Glacier and Teamsters Local 174, some Glacier drivers were in the process of delivering mixed concrete when a strike was called. The mixed concrete became unusable, and Glacier later filed a lawsuit against the union, arguing the act was an intentional destruction of property not protected by the union's right to strike.

The Washington State Supreme Court disagreed, finding that while "employees must take reasonable precautions to protect an employer's plant, property, and products … economic harm may be inflicted through a strike as a legitimate bargaining tactic." The court noted prior decisions made by the National Labor Relations Board (NLRB) upholding strikes that resulted in loss of perishable products.

The state Supreme Court found that the strike was arguably protected under the National Labor Relations Act, and therefore the NLRB should determine whether the actions taken were reasonable. Glacier subsequently appealed to the U.S. Supreme Court, which accepted the petition in October.

Raoul and the coalition argue that numerous court and NLRB rulings protect strikes exerting economic pressure in the form of product loss, even when a strike is timed to create maximum risk to perishable products. According to Raoul and the coalition, Glacier's arguments would undermine the National Labor Relations Act's protections for both workers and employers and that the act protects employees' "concerted activities," including the right to strike.

Raoul and the coalition further argue that a concerted withdrawal of labor is virtually the only way employees can exert economic pressure on employers in attempting to bargain collectively. If strikes could not threaten economic loss to employers, they would be useless as bargaining tools, and employees would return to the pre-act days of lacking any legally sanctioned bargaining power.

Joining Attorney General Raoul in filing the brief are the attorneys general of Colorado, Connecticut, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin and the District of Columbia.

The U.S. Supreme Court will being hearing arguments in the case in January 2023.

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

AMICUS BRIEF OF THE STATES OF WASHINGTON, COLORADO, CONNECTICUT, ILLINOIS, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, WISCONSIN, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT

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PETITION FOR CERTIORARI FILED MAY 12, 2022
CERTIORARI GRANTED OCTOBER 3, 2022

QUESTION PRESENTED

Does the National Labor Relations Act preempt state tort claims for conversion and trespass to chattels based on loss of perishable products resulting from a strike?

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INTERESTS OF AMICI CURIAE

The States of Washington, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Wisconsin, and the District of Columbia submit this amicus curiae brief in support of respondents.

Amici States have a strong interest in the continued vitality of the National Labor Relations Act, stability of precedent applying the Act, and in avoiding interference with its uniform application by the National Labor Relations Board (NLRB). Since 1935, the Act has helped prevent labor strife by channeling disputes to an orderly and regulated system, ensured the right of workers to increase their bargaining power by self-organization, and facilitated the free flow of commerce by avoiding labor-strife-related disruptions. 29 U.S.C. § 151.

Amici States also are concerned with upholding employees' rights to self-organize and engage in concerted action. Glacier's proposed rule, which effectively would disallow strikes that result in the loss of an employer's product, would greatly weaken employee bargaining power in certain industries, contradicting federal policy and NLRB precedent. Amici States have an interest in protecting employee rights not just for their citizens' sake, but to fulfill the Act's purpose in eliminating "obstructions to the free flow of commerce[.]" 29 U.S.C. § 151.

Finally, Amici States share petitioner's concerns about protecting those interests "deeply rooted in local feeling and responsibility" that the Act, as construed by this Court, does not preempt. *See San*

Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 244 (1959). However, the local interest exception does not apply in this case. In fact, local interests here would be best served by a ruling that petitioner's action was properly dismissed.

STATEMENT

A. The National Labor Relations Act

By 1935, labor relations were at a boiling point in the United States following decades of industrial strife. States, including Amici States, grievously felt this strife, which impacted states' citizens, government, and economic stability. Employers used the court system against workers, spied on unions, stockpiled weapons, employed security forces, and hired strikebreakers. Michael J. Heilman, *The National Labor Relations Act at Fifty: Roots Revisited, Heart Rediscovered*, 23 Duq. L. Rev. 1059, 1075 (1985). Strikes often escalated, leading to violence, riots, and police intervention, and even deployment of the National Guard or federal troops. Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, Faculty Scholarship at Penn Law 427, 433 (2012), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1492&context=faculty_scholarship. The imbalance of power underlying this violence was starkly evident. Nebraska Senator George Norris observed that "[t]he employee has no economic power. The employer holds in his hand the welfare, perhaps even the right to live, not only of the employee but of his family." 79 Cong. Rec. S7668 (1935).

Against this backdrop, Congress passed the National Labor Relations Act, ch. 372, 49 Stat. 449 (29 U.S.C. §§ 151-169). The Act's stated purpose was

to eliminate the "substantial obstructions to the free flow of commerce" caused by labor strife and instead encourage collective bargaining. 29 U.S.C. § 151. As this Court explained, Congress recognized that increasing bargaining power of employees "may produce benefits for the entire economy in the form of higher wages, job security, and improved working conditions" that in the long run would be a net benefit despite "occasional costs of industrial strife[.]" *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 190 (1978).

More specifically, the Act attempts to address the "inequality of bargaining power" between employers and employees who, without the protections of the Act, do not possess "full freedom of association or actual liberty of contract[.]" 29 U.S.C. § 151. Section 7 of the Act provides certain rights to employees, including "the right to self-organization" and "to engage in other concerted activities for the purpose of collective bargaining[.]" 29 U.S.C. § 157. Section 8 prohibits employers and unions from engaging in unfair labor practices, including interfering with, restraining, or coercing employees who are exercising protected rights. 29 U.S.C. § 158.

Strikes are chief among the "concerted activities" by employees that can address the inequality of bargaining power. *E.g.*, *Div. 1287 of the Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of America v. Missouri*, 374 U.S. 74, 82 n.10 (1963). Employers have inherent bargaining power because of their ability to hire, promote, or fire employees, and to set wages and working conditions. As a counterbalance, the purpose of a strike is to collectively withdraw labor to threaten or inflict

economic harm on the employer "to make the other party incline to agree on one's terms[.]" *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960).

Consistent with the purpose of strikes and their protection under the Act, the NLRB and courts have acknowledged that lawful strikes can and do impose economic harm on employers. *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294-95 (1984), *aff'd sub nom. Johnnie Johnson Tire Co. v. NLRB*, 767 F.2d 916 (Table) (5th Cir. 1985); *Falls Stamping & Welding Co. v. Int'l Union, United Auto. Workers, Aerospace & Agric. Implement Workers of America, Region II*, 744 F.2d 521, 524 (6th Cir. 1984). Workers may time their concerted activities for "maximum [economic] pressure," *Ins. Agents' Int'l Union*, 361 U.S. at 496, and generally need not give advance notice of a strike, *Johnnie Johnson Tire Co.*, 271 N.L.R.B. at 295. Conversely, employers generally may impose economic hardships on employees during labor disputes and may time their actions, such as employee lockouts, to maximum effect. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965). These competing economic pressures represent the "clash of the still unsettled claims between employers and labor unions" that the Act was enacted to regulate. *Garmon*, 359 U.S. at 241.

In addition to setting forth rights and prohibited conduct, the Act created and vested jurisdiction with the NLRB to investigate violations, hold hearings, and issue orders. 29 U.S.C. §§ 153-156. Congress confided "primary interpretation and application of its rules to a specific and specially constituted tribunal," because it "evidently considered that centralized administration of specially designed

procedures was necessary to obtain uniform application of its substantive rules[.]" *Garner v. Teamsters, Chauffeurs & Helpers Local Union 776*, 346 U.S. 485, 490 (1953).

In accord with this congressional intent, this Court has acknowledged that, in certain instances, state court regulation of activities addressed in the Act would be preempted. *See Garmon*, 359 U.S. at 245.

II. Facts And Proceedings Below

In the summer of 2017, Petitioner Glacier and Respondent Teamsters Local 174 (who represent the eighty to ninety cement truck drivers employed by Glacier), were in the midst of a labor dispute.[1] The prior collective bargaining agreement had expired, and the parties were in negotiations for a new collective bargaining agreement. JA 140. During these negotiations, the cement truck drivers went on strike by stopping work, which resulted in the loss of concrete that had already been mixed and loaded into the cement-mixing trucks, and which could not be delivered before hardening. JA 140.

Glacier subsequently sued the Teamsters in state court, alleging conversion and trespass to chattel due to the manner in which the strike was conducted. JA 19-20. Specifically, Glacier alleged that the Union had deliberately timed the strike for a time of day "when they knew Glacier's concrete was being mixed and batched, when ready-mix trucks were loaded and being loaded with batched concrete, and when ready-

[1] Because this case was decided on a motion to dismiss, the statement is drawn from Glacier's complaint and associated pleadings, which the court below accepted as true. JA 150.

mix trucks were in the process of delivering batched concrete to Glacier's concrete customers." JA 12. Glacier also alleged that the Teamsters were aware of the perishable nature of the concrete and intended that the strike would result in the destruction of the concrete that had already been loaded onto trucks. JA 12.

Although the Teamsters had not given advance notice of the strike to Glacier, the drivers returned the cement-mixing trucks to Glacier's premises, and per the Teamsters' instruction, the drivers left the cement-mixing trucks with the engines running. JA 34. Leaving the cement-mixing trucks' engines running meant that the revolving drum into which the concrete was loaded would continue to mix the material, significantly delaying the hardening process and reducing the risk of damage to Glacier's equipment. JA 8-9. As alleged by Glacier, however, several drivers did not inform Glacier as to where the trucks were parked nor how full the trucks were. Glacier alleged these circumstances resulted in an "emergency situation" as Glacier attempted to unload the concrete in an environmentally safe manner and to prevent its equipment from being damaged from the hardening concrete. JA 13. Ultimately, Glacier managed to unload the concrete without damage to its equipment, but the already-mixed concrete was rendered unusable. JA 141-42.

The Washington Supreme Court determined that Glacier's state law claims for conversion and trespass to chattel were preempted per *Garmon*. It acknowledged that "employees must take reasonable precautions to protect an employer's plant, property, and products[.]" JA 160. But it also recognized that

"economic harm may be inflicted through a strike as a legitimate bargaining tactic," and noted prior NLRB decisions upholding strikes that resulted in loss of perishable products. JA 160, 165. It concluded that "[b]ecause it is debatable whether the work stoppage resulting in concrete loss was a protected strike, the drivers' conduct is at least arguably protected under section 7," and therefore subject to preemption. JA 166.

The Washington Supreme Court also rejected Glacier's claim that the union's conduct fell into an exception allowing state regulation of "'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'" JA 155 (quoting *Garmon*, 359 U.S. at 243-44).

Shortly after Glacier filed its lawsuit, the Teamsters filed an unfair labor practice charge with the NLRB, alleging, inter alia, that by filing the lawsuit and retaliating against some of the employees participating in the strike, Glacier had interfered with their members' right to strike in support of their collective bargaining demands. JA 63-65. The NLRB deferred consideration of the complaint until resolution of the state court case. JA 169. After the Washington Supreme Court issued its opinion, the NLRB regional director issued a complaint, including charges that Glacier had filed the lawsuit because its employees had engaged in concerted activities and "to discourage employees from engaging in these or other Union and/or protected, concerted activities." U.S. Am. Br. App. 4a.

SUMMARY OF ARGUMENT

The Act has provided great benefits to the states by empowering workers and promoting economic growth and stability. Glacier's lawsuit against workers engaged in arguably protected activities interferes with the NLRB's authority and would diminish the Act's effectiveness.

This Court and the NLRB have long recognized that threatening or causing economic harm to employers through a strike is, at least in some circumstances, a legitimate means of collective bargaining and is protected under the Act. Glacier's proposed interpretation that intentional property destruction—which in its view includes loss of perishable products resulting from an otherwise lawful strike—can never be arguably protected would undermine the text of the statute and its purposes.

There is no principled basis for Glacier's proposal that economic harm through product loss is per se impermissible and unprotected, while the infliction of other economic harm is protected. Given the lack of logical distinction, it is not surprising that the NLRB has held that otherwise lawful strikes may be protected even though they result in product loss. The contrary cases relied on by Glacier reflect aggravated injury or risk to property wholly disproportionate to the employees' legitimate goal. Glacier's overly simplistic interpretation ignores the very purpose of allowing employees to engage in "concerted activities" and would lead to severe weakening of many employees' bargaining power.

In determining that Glacier's state law tort claims were preempted, the Washington Supreme Court correctly determined that the employees' conduct was arguably protected under the Act. While employees must take reasonable precautions to protect an employer's property when engaging in a strike, the court below properly determined that the NLRB should determine the reasonableness of those precautions in light of the legitimate imposition of economic pressure through loss of perishable products.

Finally, this Court's recognized exception to preemption allowing state regulation of those interests deeply rooted in local feeling and responsibility does not apply here because that exception does not apply to cases involving protected conduct under section 7 of the Act, as here, and because the alleged property destruction at issue in this case does not implicate the state's interest in preserving public order.

ARGUMENT

A. Glacier's Lawsuit Improperly Interferes With The NLRB's Authority

Amici States have long benefited from the Act's pursuit of labor peace, empowerment of workers, and economic growth and stability. Before the Act, states suffered violence, riots, disruptive strikes, and police and National Guard intervention. Wachter, *supra*, at 433. In Washington, a general strike in 1919 shut down the entire city of Seattle for five days; in Indiana in 1919, martial law was declared after steelworkers clashed with police; in West Virginia, four men were

shot in 1921 in a "battle between union miners and sheriffs[.]"[2]

But over time, the labor law reforms of the 1930s and 1940s, including the Act and the Taft-Hartley Amendments of 1947, provided the necessary mechanism for transition from a system marred by violent confrontation to a system of routine dispute resolution grounded in ongoing relationships. Wachter, *supra*, at 432-37. For almost ninety years, the Act's legal framework has continued to limit violent strikes, encourage economic prosperity, and protect the rights of employees and employers alike, all to the benefit of state citizens and their governments.

An essential component of the Act's ability to channel previously violent labor disputes into a more orderly and regulated system is the efficacy of the NLRB, which Congress entrusted with implementation of the Act. 29 U.S.C. §§ 153-156; *Garner*, 346 U.S. at 490-91. As this Court explained, "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . . ." *Garmon*, 359 U.S. at 242. Congress did so because it determined that "'centralized administration of specially designed procedures was

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[2] Pub. Broad. Sys., *American Experience: Labor Wars in the U.S.*, https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/ (last visited Nov. 30, 2022); Univ. of Washington, Civil Rights and Labor History Consortium, *Seattle General Strike Project*, https://depts.washington.edu/labhist/strike/ (last visited Nov. 30, 2022).

necessary to obtain uniform application of its substantive rules'" and to avoid conflicts. *Garmon*, 359 U.S. at 242-43 (emphasis added) (quoting *Garner*, 346 U.S. at 490-91).

Similarly necessary to the uniform application of substantive rules and receiving the benefit of the NLRB's expertise in balancing employer and employee interests is avoiding state interference with the federal scheme. *Id.* at 243. This Court therefore determined that "[w]hen an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board[.]" *Id.* at 245.

In the present case, Glacier's lawsuit interfered with the NLRB's authority, as vividly demonstrated by the NLRB's subsequent complaint alleging that Glacier's lawsuit was retaliatory, targeted protected conduct, and was itself an unfair labor practice. U.S. Am. Br. App. at 4a. It is harder to imagine a greater state interference with federal policy than to allow the employer to penalize protected conduct.

B. Glacier's Argument That Intentional Property Destruction Is Never Protected Is Contrary To The Purpose Of The Act, Contradicted By The NLRB's Caselaw, And Would Undermine The Benefits The Act Gives To States

The overarching theme advanced by Glacier is that intentional property destruction, which in Glacier's telling includes product loss resulting from a work stoppage, can never be protected conduct under the Act. This cramped approach ignores the Act's purpose of allowing employees to engage in "concerted

activities," is contrary to decades of NLRB precedent, would thwart the Act by severely weakening many employees' bargaining power, and would encourage evasion of the Act through litigation tactics.

The Act protects employees' "concerted activities" and explicitly recognizes the right to strike. 29 U.S.C. §§ 157, 163; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). The right to strike is essential to a core purpose of the Act to restore "equality of bargaining power between employers and employees." 29 U.S.C. § 151. Indeed, a concerted withdrawal of labor is virtually the *only* way employees can exert economic pressure on employers in attempting to bargain collectively. *E.g.*, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) (describing the strike as labor's "ultimate weapon").

If strikes could not threaten economic loss to employers, they would be useless as bargaining tools, and employees would return to the pre-Act days of lacking any legally sanctioned bargaining power. Thus, the NLRB and this Court have consistently recognized that threatening or causing economic harm to employers through a strike is a legitimate means of collective bargaining and protected under the Act. *E.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 615 (1986); *Ins. Agents' Int'l Union*, 361 U.S. at 496; *Johnnie Johnson Tire Co.*, 271 N.L.R.B. at 294-95. Legitimate economic pressure can be the threat of lost profits, loss of customer relationships or good will, decreased production, or any other of the almost innumerable practical impacts of a work stoppage.

Legitimate economic pressure can also be the loss of perishable products incidental to a strike—what Glacier calls "intentional property destruction." *E.g.*, Br. Pet'r at 22. Accordingly, numerous NLRB decisions reflect the unremarkable proposition that strikes are not rendered unlawful merely because they exert economic pressure in the form of threatened or actual product loss. *E.g.*, *Cent. Okla. Milk Producers Ass'n*, 125 N.L.R.B. 419, 435 (1959), *enforced sub nom. NLRB v. Cent. Okla. Milk Producers Ass'n*, 285 F.2d 495 (10th Cir. 1960); *Lumbee Farms Coop., Inc.*, 285 N.L.R.B. 497 (1987), *enforced by Lumbee Farms Coop., Inc.* v. NLRB, 850 F.2d 689 (4th Cir. 1988) (unpublished), *cert. denied*, 488 U.S. 1010 (1989); *Leprino Cheese Co.*, 170 N.L.R.B. 601 (1968), *enforced sub nom. NLRB v. Leprino Cheese Co.*, 424 F.2d 184 (10th Cir.), *cert. denied sub nom. Leprino Cheese Co. v. NLRB*, 400 U.S. 915 (1970). This is so even when the strike is timed to create maximum risk to perishable products. *Lumbee Farms*, 285 N.L.R.B. at 506; *see also NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976) ("While the strike undoubtedly brought inconvenience and economic loss to the Company in view of its unusually heavy production schedule due to the Easter season, such a result is obviously the very object of any concerted employee action protected by the Act.").

Rather than applying the rigid rule proposed by Glacier, the NLRB has instead typically balanced the threatened harm to an employer against the strikers' legitimate concerns. *E.g.*, *Lumbee Farms*, 285 N.L.R.B. at 506. In *Lumbee Farms*, the NLRB rejected the employer's argument that the strike was unlawful

because it was timed when chickens were being processed, leading to product loss. *Lumbee Farms*, 285 N.L.R.B. at 506. The NLRB reasoned that "[t]he economic pressure flowing from such a strike must be weighed against the goals sought to be achieved by the strikers." *Id.* at 506 (citing *A. Lasaponara & Sons*, 541 F.2d at 998). Similarly, the Second Circuit upheld the NLRB's order finding a strike protected despite the inconvenience and economic loss, distinguishing cases in which the economic pressure was "grossly disproportionate to the goal sought to be achieved[.]" *A. Lasaponara & Sons*, 541 F.2d at 998.

Seen in this light, the cases relied on by Glacier involving strikes that endanger an entire plant because of the timing of the strike do not support Glacier's categorical rule. Rather, they support the traditional rule that only risk that is "grossly disproportionate" to any legitimate goal of the employees is unprotected. The NLRB itself has distinguished some of the cases relied on by Glacier as involving "unusual circumstance[s], such as aggravated injury to personnel or premises[.]" *Cent. Okla. Milk Producers*, 125 N.L.R.B. at 435 & n.10 (distinguishing *NLRB v. Marshall Car Wheel & Foundry Co. of Marshall, Texas, Inc.*, 107 N.L.R.B. 314 (1953)).

Glacier offers no logical difference between employees' strikes causing economic pressure through lost profits or contracts and that caused by lost perishable products. And it cannot cite any NLRB decisions or precedents of this Court supporting its proposed rule that *all* intentional property destruction, including a strike that causes loss of perishable products, is unprotected activity.

Glacier's proposed rule would also deprive workers in vast sectors of the economy of meaningful bargaining power, contrary to the express purposes of the Act. Workers in bakeries, groceries, meat processing facilities, or any other industry in which work stoppages could lead to "intentional property destruction" from perishable products perishing would be deprived of their most powerful—sometimes the only—means of balancing the employer's economic power.

It is no answer to say that Glacier's proposed rule would only include "intentional" property destruction. The torts alleged in Glacier's complaint do not require proof of intent, and in any event, intent may generally be shown if an actor knows that the consequences of his actions are "substantially certain" to result. *Restatement (Second) of Torts* § 8A cmt. b (1965 & WL Oct. 2022 update). It would be a poor lawyer who could not allege "intentional property destruction" in almost any circumstance in which a strike predictably resulted in the loss of perishable products.

Acceptance of Glacier's proposed rule would also encourage employers to explore the boundaries of permissible tort actions related to the economic effects of a strike. Loss of good will, interference with business expectations, loss of value in a stock, and other "intentional" results of economic pressure might be characterized as "property destruction" in future litigation brought by creative counsel. Whether for purposes of redress or in retaliation for protected, concerted activity, the effect would be the same: discouraging employees from engaging in protected,

concerted activities and upsetting the careful balance drawn by Congress in the Act.

Amici States, who have benefited from many decades of relative labor peace engendered by the Act, encourage the Court to leave this Pandora's Box unopened.

C. The Washington Supreme Court Correctly Determined That The Drivers' Strike Was At Least Arguably Protected Under The Act

"When an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board[.]" *Garmon*, 359 U.S. at 245; *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 391 (1986) (noting the Court had "reiterated many times" the *Garmon* preemption standard). An activity is "arguably protected" under the Act if a party advances "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 [NLRB]." *Int'l Longshoremen's Ass'n*, 476 U.S. at 395 (quoting *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 184 (1962)). A party cannot rely on conclusory assertions but must point to evidence sufficient "to enable the court to find that the [NLRB] reasonably could uphold a claim[.]" *Int'l Longshoremen's Ass'n*, 476 U.S. at 395.

Amici States generally agree with the United States that the analysis of whether the conduct at issue here was arguably protected under the Act should address the objective question of whether the

drivers took reasonable precautions to protect Glacier's property, rather than attempting to divine the intent of the drivers. *See* U.S. Am. Br. at 16-18. Amici States similarly agree that there must be some indication in the record of the reasonable precautions taken rather than conclusory assertions. U.S. Am. Br. at 16-18 (citing *Int'l Longshoremen's Ass'n*, 476 U.S. at 394). And it is also true that Washington state courts evaluate motions to dismiss under Washington's Civil Rule 12(b) by accepting the allegations as true as well as allegations consistent with the complaint. JA 150 & n.7. But Washington state courts need not accept legal conclusions in the complaint, such as whether particular conduct was "reasonable" under the circumstances. JA 150 & n.7 (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash. 2d 107, 121, 744 P.2d 1032 (1987)).

Here, even accepting the factual allegations in Glacier's complaint as true, there were indications of precautions taken by the drivers to protect Glacier's equipment. For example, the drivers returned the trucks to Glacier's facilities and left the cement-mixing trucks running. JA 12-13, 34. These actions stand in stark contrast to those in a case similarly involving cement truck drivers ceasing work, and relied on by Glacier: *Rockford Redi-Mix, Inc. v. Teamsters Local 325, Gen. Chauffeurs, Helpers & Sales Drivers of Rockford*, 551 N.E.2d 1333 (Ill. App. Ct. 1990). There, the drivers left the cement-mixing trucks at a jobsite without informing the employer as to their whereabouts, and they turned the trucks'

engines off. *Rockford Redi-Mix, Inc.*, 551 N.E.2d at 1335-36. Predictably, and unlike the present case, the cement hardened in the mixers while the employers searched for the trucks, not only destroying the perishable product, but also damaging equipment. *Id.*

What the Washington Supreme Court was faced with, then, was a situation in which the drivers allegedly timed their strike to cause a loss of perishable product, but in which some precautions were taken to protect Glacier's equipment. Under this Court's test for what is "arguably protected," participating in a work stoppage designed to exert economic pressure in the midst of negotiating a new collective bargaining agreement, even if it results in product loss, is not plainly contrary to the Act's language safeguarding employees' rights to "bargain collectively" and to "engage in other concerted activities[.]" 29 U.S.C. § 157.

Nor have the NLRB or courts authoritatively rejected such an interpretation. To the contrary, as discussed above, numerous cases have held strikes causing the loss of perishable products are protected activities under the Act. *Supra* p. 13.[3] And the caselaw recognizing that workers may properly time strikes

[3] Among the cases relied upon by Glacier is *Boghosian Raisin Packing Co.*, 342 N.L.R.B. 383 (2004). But far from showing that the NLRB has authoritatively rejected the premise that workers may time their strike for maximum economic pressure by threatening loss of perishable products, the NLRB explicitly declined to address that issue. *Id.* at 387 n.13. If anything, the case shows that there has not been an authoritative ruling on the issue.

to increase economic pressure and cause economic harm, *e.g.*, *Johnnie Johnson Tire Co.*, 271 N.L.R.B. at 294-95, and exalting the strike as workers' most effective tactic to increase bargaining power, *Allis-Chalmers Mfg. Co.*, 388 U.S. at 181, reinforces that the case involves an "arguable" judgment call as to whether the conduct here was protected.

It may well be that the NLRB ultimately determines that the conduct here did not amount to reasonable precautions to protect Glacier's property under the circumstances. But as the Washington Supreme Court correctly held, that legal question—not controlled solely by allegations in Glacier's complaint—should be answered in the first instance by the NLRB. *See Garmon*, 359 U.S. at 244-45.

D. The "Local Interest" Exception Does Not Apply Here

This Court has recognized that in some circumstances, states may enforce their laws regarding interests "deeply rooted in local feeling and responsibility," even if such regulation would normally be preempted because it was also regulated under the Act. *E.g.*, *Garmon*, 359 U.S. at 244. But Glacier's argument that the "local interest" exception applies here is doubly wrong.

First, it is wrong for the reasons discussed in the United States' amicus brief: the exception applies in cases involving prohibited unfair labor practices under section 8 of the Act, but not conduct protected under section 7. U.S. Am. Br. 28-29. As the United States explains, states may not prohibit or penalize conduct protected under the Act, as this would

necessarily conflict with federal law. *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984). The exception only allows for additional state remedies for conduct that is also prohibited as an unfair labor practice—state remedies that would normally be preempted but for the exception. *See Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 59-60 (1966) (stating that in absence of "'overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board . . . .'" (quoting *Local 100 of United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690, 693-94 (1963))).

Here, the Washington Supreme Court determined the conduct was arguably protected under section 7 of the Act, and section 8 prohibited conduct was not at issue. JA 158-60. Thus, the "local interest" exception is not applicable.

Second, even if the Court considered the "local interest" exception, the doctrine would not allow state remedies for the spoliation of perishable products incident to an otherwise lawful work stoppage. This Court has never held that spoliation of perishable products incidental to a work stoppage—whether intentional or not—falls within the "local interest" exception. Although Glacier makes much of language in this Court's precedent that "property destruction" is among those interests so deeply rooted in local feeling to fall within the exception, in virtually every instance the Court's use of the phrase arises in the

context of a state's interest in preventing violent conduct. *E.g.*, *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 136 & n.2, 154 (1976) (referencing "actual or threatened violence to persons or destruction of property" and citing exclusively to opinions involving violence and intimidation (cited in Br. Pet'r at 9, *see also* Br. Pet'r at 23)); *Int'l Union, United Auto, Aircraft & Agric. Implement Workers of America. v. Russell*, 356 U.S. 634, 646 (1958) (including "property damage" as recoverable damages in hypothetical, violent overturning of car by picketing workers (cited in Br. Pet'r at 24)); *United Auto, Aircraft & Agric. Implement Workers of America v. Wis. Emp. Rels. Bd.*, 351 U.S. 266, 274 (1956) (describing exception from general rule as allowing states to "prevent mass picketing, violence, and overt threats of violence" immediately before stating the dominant interest of states was in preventing "violence and property damage" in case involving violent coercion (cited in Br. Pet'r at 24)); *United Constr. Workers, Affiliated with United Mine Workers of America v. Laburnum Constr. Corp.*, 347 U.S. 656, 658, 667 n.8 (1954) (noting state may regulate "actual or threatened violence to persons or destruction of property" in case involving loss of profits from threats of violence and intimidation (cited in Br. Pet'r at 23)). Here, there is no indication that any product damage was associated with violent conduct.

Although Amici States agree that the "local interest" exception broadly protects the ability of states and localities to regulate critical sovereign interests, the interests implicated in Glacier's suit do not meet the criteria for that exception.

CONCLUSION

The Court should affirm the opinion below.

RESPECTFULLY SUBMITTED.

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