

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Francisco.

ORAL ARGUMENT OF NOEL J. FRANCISCO
ON BEHALF OF THE PETITIONER

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

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

The more substantial question then is,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 got a particularly clear and concrete
2 application --

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

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

5 JUSTICE KAGAN: I guess I'm not sure

6 --

7 MR. FRANCISCO: -- or an alternative

8 one.

9 JUSTICE SOTOMAYOR: Go ahead.

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

17 MR. FRANCISCO: Sure.

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

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

1 a subset of their test.

2 But, look, you might --

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

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

8 JUSTICE KAGAN: Yeah.

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

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

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

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

25 I worry that something as nebulous

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

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

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

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

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

1 obligation to do anything.

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

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

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

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

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

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

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

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

10 MR. FRANCISCO: Yeah.

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

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

17 JUSTICE SOTOMAYOR: No, because
18 that --

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

21 JUSTICE SOTOMAYOR: -- because that's
22 very different in that you have no opportunity
23 to save that property. But, here, that's not
24 the case. Here, you'd want them to continue
25 working for you.

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

4 JUSTICE SOTOMAYOR: So what do we do
5 with the cases --

6 MR. FRANCISCO: -- once the concrete
7 was batched --

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

12 MR. FRANCISCO: Sure. So a couple of
13 --

14 JUSTICE SOTOMAYOR: -- disappeared?

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

17 JUSTICE SOTOMAYOR: Or flour delivery
18 or any other perishment of a product.

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

22 JUSTICE SOTOMAYOR: Well, I mean --

23 MR. FRANCISCO: -- there --

24 JUSTICE SOTOMAYOR: -- you're not --
25 the intent is leaving.

1 JUSTICE JACKSON: Mr. --

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

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

15 MR. FRANCISCO: Right.

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

23 So can you address that?

24 MR. FRANCISCO: I -- I think it
25 addresses whether there's a dispute about the

1 law. And I think it makes sense when you
2 understand Garmon in the context of how
3 preemption works in virtually every other
4 context. State courts adjudicate tort claims
5 all the time, including in areas of intense
6 federal regulation.

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

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

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

24 What Garmon did was it said that in
25 addition to having to grant a preemption

1 defense in the face of an actual conflict --
2 that's the rule virtually everybody --
3 everywhere else -- you also have to grant a
4 preemption defense in the face of an arguable
5 conflict.

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

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

18 MR. FRANCISCO: Absolutely.

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

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

1 JUSTICE JACKSON: But, Mr. Francisco,
2 in this --

3 JUSTICE KAGAN: But part of the --

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

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

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

23 Second is the case law reason. Bill
24 Johnson's --

25 JUSTICE JACKSON: Can I just -- I'm

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

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

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

21 JUSTICE JACKSON: But just because
22 there's going to be a dispute about whether or
23 not they should step aside, not because they
24 inherently are the ones to make that
25 determination.

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

8 JUSTICE JACKSON: But the Board does
9 not --

10 MR. FRANCISCO: They get to make that
11 legal --

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

20 MR. FRANCISCO: Right.

21 JUSTICE JACKSON: I don't understand
22 why the easiest way for all of us to be looking
23 at this is in this particular kind of scenario
24 where we have a complaint, then the issue of
25 arguable --

1 MR. FRANCISCO: Right.

2 JUSTICE JACKSON: -- is satisfied.

3 And we allow the Board to continue to
4 investigate and it can reach the actual
5 determination that you're talking about.

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

11 JUSTICE SOTOMAYOR: Mr. Francisco, the
12 -- the government says --

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

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

20 Now, when I was a federal court judge,
21 I could dismiss the action pending the Board
22 decision or I could stay the action. It wasn't
23 that I was ousted of jurisdiction, but I was
24 giving Garmon's primary jurisdiction to the
25 Board.

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

11 JUSTICE KAGAN: Well, why is it --

12 MR. FRANCISCO: -- and would --

13 JUSTICE KAGAN: I'm sorry, Mr.
14 Francisco.

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

24 JUSTICE JACKSON: But Bill Johnson's
25 --

1 JUSTICE KAGAN: So why is it that --

2 JUSTICE JACKSON: -- was not a Garmon
3 scenario.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

16 MR. FRANCISCO: Right.

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

23 MR. FRANCISCO: Mm-hmm.

24 JUSTICE KAGAN: -- of these strikes in
25 a different way like a general court sees once

1 every few years --

2 MR. FRANCISCO: Right.

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

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

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

25 My second point, which is related, is

1 I guess maybe I just don't understand Garmon to
2 be --

3 JUSTICE KAGAN: It seems -- it seems
4 very artificial. You know, you find the facts
5 until --

6 MR. FRANCISCO: Yeah.

7 JUSTICE KAGAN: -- you face the
8 dispositive question --

9 MR. FRANCISCO: Sure.

10 JUSTICE KAGAN: -- of how the facts
11 fit the law.

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

20 You always have state courts
21 adjudicating state tort claims. They still are
22 bound by federal law. So, here, the state
23 court is still bound by the NLRA, including the
24 Board's reasonable interpretations of it. So,
25 if, as it adjudicates that case in the ordinary

1 course, it becomes clear there's either an
2 actual or, under Garmon, an arguable conflict,
3 it's got to grant the preemption defense.

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

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

16 JUSTICE JACKSON: But there was no
17 Garmon --

18 MR. FRANCISCO: -- and this Court
19 still said that the state court --

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

22 MR. FRANCISCO: But that's only
23 because it alleged conduct, malicious libel,
24 that wasn't arguably protected. And, here, the
25 government agrees with us that the conduct

1 alleged in this complaint isn't arguably
2 protected. The only issue is whether the
3 Board's disagreement over what the actual facts
4 are, as opposed to the alleged facts, changes
5 that.

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

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

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

22 MR. FRANCISCO: Mm-hmm. Certainly not
23 if you resolve this issue my way. And even if
24 you just stay silent on it, I'll make the same
25 argument anyhow.

1 JUSTICE JACKSON: Why not?

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

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

17 MR. FRANCISCO: Well, I -- I think I
18 understand the question. And what I'm saying
19 is, if you issue an opinion along the lines of
20 what you said in Bill Johnson's and what you
21 say is that where there's this factual dispute,
22 the Board should stay its hand because it's up
23 to the state court to determine what the facts
24 are in the first instance, I don't think it
25 would be up to the state court to say otherwise

1 and to essentially thumb its nose at the
2 Court's decision.

3 Put another way, I think it would be a
4 gross abuse of discretion if the state court
5 were to do that.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

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

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

21 At the motion to dismiss, the court
22 assesses the complaint, resolves the facts most
23 favorably to the non-moving party, and then
24 says, on those facts, is this conduct
25 preempted? It either is or it isn't.

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

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

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

20 MR. FRANCISCO: Right.

21 JUSTICE THOMAS: The -- but going back
22 to your point about the determination of a
23 preemption -- of preemption, is there any case
24 similar to this? I mean, we've had field
25 preemption, obstacle --

1 MR. FRANCISCO: Mm-hmm.

2 JUSTICE THOMAS: -- preemption,
3 conflict preemption. Is there any other case
4 where we have had this arguably protected
5 preemption?

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

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Alito?
16 Justice Sotomayor?

17 JUSTICE SOTOMAYOR: I -- I'm a little
18 confused. This was decided on a motion to
19 dismiss, correct?

20 MR. FRANCISCO: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: So there was no
22 fact-finding or shouldn't be any fact-finding
23 by the state court. The state court just has
24 to read the complaint and see if there's an
25 arguable basis for liability, correct?

1 MR. FRANCISCO: Correct.

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

7 MR. FRANCISCO: We'll go on to summary
8 judgment and --

9 JUSTICE SOTOMAYOR: Assuming -- or you
10 do discovery --

11 MR. FRANCISCO: -- we have discovery
12 and summary judgment.

13 JUSTICE SOTOMAYOR: -- or something.

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

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

24 JUSTICE SOTOMAYOR: It -- I mean,
25 that's -- basically, I think that's what

1 Justice Jackson was trying to say to you, which
2 is we're now at a point further than the motion
3 to dismiss. We're at the point --

4 MR. FRANCISCO: Sure.

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

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

12 Now, look, if the NLRB --

13 JUSTICE SOTOMAYOR: No, because you're
14 asking us --

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

24 But it's still the state court's
25 authority in the course of adjudicating a state

1 tort claim to determine what the facts are and
2 to determine whether on those facts there's
3 either arguable or actual protection under the
4 statute. Again, it's how preemption works in
5 just about every other area.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

14 MR. FRANCISCO: Yes. So state --
15 state --

16 JUSTICE KAGAN: -- so what's the end
17 of that?

18 MR. FRANCISCO: -- state courts can
19 certainly get both the actual protection
20 question wrong and the arguable protection
21 question wrong. We're here because we believe
22 that the Washington State Supreme Court got the
23 arguable protection wrong. But that's not
24 unique to Garmon. That happens in all areas of
25 potential federal preemption.

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

3 JUSTICE KAGAN: I see.

4 MR. FRANCISCO: -- and you go to the
5 courts of appeals when it arises out of the
6 federal courts.

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

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

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

22 JUSTICE KAGAN: Okay. Put -- put the
23 Bill Johnson's --

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

25 JUSTICE KAGAN: -- aside.

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

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

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

19 MR. FRANCISCO: The -- the stake is
20 that you preserve, one, the state's traditional
21 authority to adjudicate tort claims.
22 Preemption is -- is a big deal. That's why we
23 don't just assume preemption willy-nilly, and
24 there are rules that make clear that preemption
25 applies when certain clear statements are made.

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

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

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

19 MR. FRANCISCO: And that's precisely
20 the work I think that the arguable protection
21 prong does. If the facts show that the facts
22 are arguably protected by the statute, then,
23 unless the local interest exception applies, it
24 is the Board that gets to decide whether it's
25 not just arguable protection, but it's actual

1 protection.

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

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

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

20 MR. FRANCISCO: Yeah.

21 JUSTICE GORSUCH: -- extend. I think
22 that was out of Garmon itself.

23 Does it extend so far as to require a
24 hiatus of a state court proceeding even when
25 the pleadings are arguably outside of the

1 statute? And I guess I'm wondering, do you --
2 do you -- do you still pursue the -- the
3 suggestion that we ought to rethink Garmon?

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

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

21 JUSTICE GORSUCH: So it's a medium
22 penumbra, not a huge penumbra.

23 MR. FRANCISCO: Yeah. Your -- your
24 words, Your Honor, the Court's words.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 Justice Barrett?

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

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

18 Our position is that if you've got a
19 state complaint that alleges clearly
20 unprotected conduct, the state court gets to
21 adjudicate it. Now I think whatever the Board
22 found is going to be extraordinarily useful to
23 the union in the state court proceedings, but I
24 -- I think that the state court still gets to
25 proceed.

1 JUSTICE BARRETT: Okay.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 JUSTICE JACKSON: Can I just get a
5 clarification on Justice Barrett? I -- I guess
6 I'm not understanding what you mean.

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

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

17 You'd also have to deal with whatever
18 evidence the Board proceeding generated, which
19 might well be extraordinarily useful to the
20 union in the state court proceedings.

21 JUSTICE JACKSON: All right. So then,
22 if that's the case, why are we talking in terms
23 of ousting the state court of its jurisdiction
24 even in this regard? If it can go afterwards,
25 then there really isn't -- we're not really at

1 base talking about Garmon being an ousting kind
2 of thing.

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

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

17 So, if that's the situation and now we
18 have precedent that allows for that kind of
19 Board taking the front lead on these things, I
20 guess I'm a little confused about your
21 suggestion that there is arguable protection
22 versus actual protection as different kinds of
23 analyses.

24 I thought -- I thought that this is a
25 spectrum that when it comes to the state court

1 and the state court is asked to stand down, we
2 have preemption, instead of having to litigate
3 the whole issue and get to make the
4 determination about whether the conduct is
5 actually protected, the state court can look at
6 it and say: Well, it looks arguable, and so
7 that's enough.

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

14 MR. FRANCISCO: Sure, Your Honor.

15 JUSTICE JACKSON: -- and why that's
16 problematic --

17 MR. FRANCISCO: For -- for --

18 JUSTICE JACKSON: -- in any way.

19 MR. FRANCISCO: -- for -- for a couple
20 of reasons. First, to the extent you're
21 focused on precedent, I'd make two points.
22 One, Bill Johnson's is a precedent of this
23 Court that --

24 JUSTICE JACKSON: Let's not focus on
25 precedent. Let's -- just logic. Logic.

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

2 JUSTICE JACKSON: Let me --

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

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

6 MR. FRANCISCO: Yeah.

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

15 MR. FRANCISCO: Mm-hmm.

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

21 MR. FRANCISCO: You know, I guess, if
22 I could get that in under the Rules of
23 Evidence, which I'm not sure I could --

24 JUSTICE JACKSON: Right.

25 MR. FRANCISCO: -- I might -- I might

1 try to take it.

2 JUSTICE JACKSON: It would be
3 relevant. So my point is --

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

6 JUSTICE JACKSON: -- why isn't the
7 opposite relevant?

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

15 JUSTICE JACKSON: All right. Mindful
16 of my time --

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

18 JUSTICE JACKSON: -- can I just ask
19 you about another -- way back to the beginning,
20 when we were talking about the difference
21 between reasonable precaution and intentional
22 destruction, I have to admit that I looked at
23 your brief and I saw you pleading a -- or
24 arguing a subset, that intentional destruction
25 was a subset of reasonable precaution.

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

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

18 That's why I would suggest you do what
19 the Board did in the International Protective
20 Services case. You could say something like,
21 look, they failed the reasonable precautions
22 test and, in particular, they failed the
23 reasonable precautions test because -- and,
24 here, to quote -- "the union's misconduct went
25 beyond a failure to take reasonable

1 precautions" and "established that the union
2 recklessly intended to place the federal
3 buildings and their occupants at risk."

4 I think that would be a perfectly
5 appropriate resolution of this case.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Suri.

9 ORAL ARGUMENT OF VIVEK SURI
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING NEITHER PARTY

12 MR. SURI: Mr. Chief Justice, and may
13 it please the Court:

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

20 There are both legal and practical
21 reasons for so holding, and contrary to what
22 Mr. Francisco has said, I don't think the Bill
23 Johnson's decision stands in the way of that.

24 If I could start with the legal
25 reasons, the first and most important legal

1 reason is this Court's decision in Longshoremen
2 against Davis. In that case, the Court said
3 that Garmon preemption is established when the
4 party asserting preemption presents evidence
5 from which the Board could reasonably conclude
6 that the conduct is protected.

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

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

23 And as for the practical reasons, if
24 the state court gets the law wrong, then it
25 won't be finding the right facts. In other

1 words, if it misunderstands what the Board's
2 precedents require in a particular area, then
3 it may focus on immaterial facts or ignore the
4 material facts.

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

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

21 And in that unique context, the Court
22 has said there are First Amendment interests,
23 right to petition interests that are in play,
24 and in that context, we don't want the Board
25 making judgments before the state court, in

1 fact, determines that the suit is baseless.

2 There's nothing like that going on
3 here, and, therefore, the Court should adopt
4 the standards that it set.

5 JUSTICE KAGAN: Well, Mr. Suri -- your
6 -- your light is off, right?

7 MR. SURI: Yes.

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

15 Even putting aside the Board complaint
16 for the moment, and I want to hear your views
17 about the relevance of the Board complaint, but
18 even putting that aside, it seems to me that
19 what the trial court did here was to say, you
20 know, I -- I -- I -- I -- there are a set of
21 allegations, but I'm pretty convinced that
22 there's a really murky, complicated factual
23 issue here, and so I don't want to take those
24 allegations just -- you know, just assume that
25 they're true. I really think that this is a

1 case that ought to go to the Board because
2 people are going -- people are arguing right
3 now about the facts and how the law applies to
4 the facts, and -- and I'm better off sending it
5 over there.

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

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

19 And, in our view, that simply wasn't
20 done here.

21 JUSTICE KAGAN: So -- so the -- the --
22 the court says that at the outset or is
23 supposed to, and you're saying it was wrong not
24 to say it. And then what happens? As the suit
25 goes forward, what's supposed to happen?

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

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

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

22 CHIEF JUSTICE ROBERTS: You --

23 JUSTICE BARRETT: Mr. Suri -- oh.

24 CHIEF JUSTICE ROBERTS: -- you think,
25 if I understand the position correctly, that

1 Garmon does not cover the failure to take
2 reasonable precautions to protect property,
3 right?

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

5 CHIEF JUSTICE ROBERTS: Well, it seems
6 to me that if it doesn't cover that, it surely
7 cannot cover the intentional destruction of
8 property. Does that seem reasonable?

9 MR. SURI: That certainly seems
10 reasonable, but we have additional qualifiers
11 on this reasonable precaution standard that
12 illustrate the difference between it and
13 Mr. Francisco's standard.

14 The first is that our standard applies
15 --

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

23 MR. SURI: It depends on what
24 "destruction" means, Mr. Chief Justice. If by
25 "destruction" you mean the type of imminent

1 harm that we're talking about, then, yes, we
2 agree that intentional destruction is a subset
3 of our standard.

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

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

22 MR. SURI: And it is precisely to deal
23 with that problem that the Board has added a
24 few additional words beyond just reasonable
25 precautions. It's reasonable precautions to

1 protect property from foreseeable imminent harm
2 caused by the sudden cessation of work.

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

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

16 It just seems to me that intentional
17 destruction of property is a much more serious
18 concern than failure to take reasonable
19 precautions, even if you want to add imminent
20 and all that other stuff, but, as I understand
21 your position, you want to compel Mr.
22 Francisco's client to squeeze its intentional
23 destruction claim into failure to take
24 reasonable precautions?

25 MR. SURI: I think we must

1 distinguish, Mr. Chief Justice, between
2 affirmative acts like pouring the milk down the
3 drain and merely stopping work.

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

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

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

23 I thought that the government -- I was
24 confused by why the government accepted
25 reasonable precautions or thought it was

1 necessary in order to come out the way you did.

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

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

20 If you walk off and you know that the
21 milk is going to spoil, why isn't reasonable
22 precaution triggered in that case?

23 MR. SURI: In this?

24 JUSTICE JACKSON: Yeah.

25 MR. SURI: It isn't triggered because

1 the Board has understood the concept of
2 imminent harm not to apply. The milk is going
3 to spoil either way if it's left there, whether
4 or not the people leave. It's not caused by
5 their sudden cessation of work. That's the
6 first point.

7 And the second point is that that is
8 the sort of routine consequence that attends
9 any strike.

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

19 JUSTICE GORSUCH: Counsel, if I might
20 return to the -- the question of proceedings
21 going forward and your suggestion that this
22 should go through a hiatus in the state court.

23 Would that be -- it sounds like you're
24 suggesting to the Court that that might be
25 appropriate if a 12(b)(1) motion or a summary

1 judgment motion or some motion were filed
2 before the state court and not something we
3 should do sua sponte?

4 MR. SURI: Correct.

5 JUSTICE GORSUCH: Okay.

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

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

19 And, potentially, with respect to one
20 of those claims that is not at issue here,
21 there's a question about whether that was
22 baseless and filed in a retaliatory way.
23 That's been resolved by the state courts.

24 And although there's nothing in the
25 record definitively establishing this, that is

1 the most natural explanation for why the
2 general counsel issued her complaint one month
3 after the Washington Supreme Court finally
4 resolved that issue.

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

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

18 JUSTICE KAGAN: Well, how long --

19 JUSTICE BARRETT: Or if it --

20 JUSTICE KAGAN: -- does something
21 typically take?

22 MR. SURI: My understanding is that
23 the Board would typically take something like
24 four to five months to get from the charge to
25 the general counsel's complaint, and that's not

1 all investigation. That's also settlement
2 efforts that are being made by the general
3 counsel and the parties.

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

10 MR. SURI: Correct.

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

19 The state court just stops then?

20 MR. SURI: In principle, yes, but
21 there are practical reasons why that scenario
22 is unlikely to arise. In the first place,
23 there's a six-month statute of limitations for
24 filing an unfair labor practice charge with the
25 Board, and, therefore, it is unlikely that the

1 charge will be filed in a -- years after the
2 case has begun, for example.

3 And then, once the charge has been
4 filed, the general counsel would typically move
5 in an expeditious fashion. So it does seem
6 quite improbable that the Board proceedings
7 would take that long.

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

16 JUSTICE SOTOMAYOR: So tell me how to
17 write this decision.

18 MR. SURI: I'd suggest copying our
19 brief, Your Honor.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: I know, but your
22 brief was whatever number of pages, 30-odd
23 pages. Give it to me in two paragraphs.

24 JUSTICE KAGAN: A summary of the
25 argument.

1 (Laughter.)

2 JUSTICE SOTOMAYOR: Summary of the
3 argument.

4 (Laughter.)

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

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

17 JUSTICE KAGAN: Well, go on a little
18 bit and just say -- I'm sorry.

19 CHIEF JUSTICE ROBERTS: No, go ahead.
20 I was just about to move in to our next --

21 JUSTICE KAGAN: If -- if -- if you
22 would go on and -- and say whether you would
23 say anything and, if so, what you would say
24 about the presence of the Board complaint.

25 MR. SURI: I recommend that the Court

1 not address that issue because there are
2 significant complications that the lower courts
3 have not addressed, namely, what is the
4 relevance of the general counsel complaint in
5 the first place.

6 If the Court wanted to address that
7 issue, what I would recommend it say is that
8 there is a general rule that the issuance of
9 the general counsel's complaint suffices to
10 establish that everything asserted in that
11 complaint is arguably so.

12 So, if the complaint states that
13 particular conduct is protected, then it's at
14 least arguably protected, and that's enough for
15 Garmon preemption.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas?

18 JUSTICE THOMAS: We have heard the
19 terms "preemption," "exhaustion," and
20 "jurisdictional hiatus." Two of the -- the
21 latter two have never come up in a preemption
22 case to my knowledge.

23 Is there any analogous area to this in
24 our -- our preemption jurisprudence?

25 MR. SURI: Yes, Justice Thomas. The

1 closest analogy I've been able to find is with
2 the Interstate Commerce Commission. The Court
3 developed the doctrine of primary jurisdiction,
4 which required state courts under some
5 circumstances to await the Interstate Commerce
6 Commission's decisions as to whether a
7 particular rate is reasonable.

8 And that primary jurisdiction doctrine
9 has been applied more broadly in federal courts
10 with respect to administrative agencies.

11 JUSTICE THOMAS: Did that disappear
12 with the ICC?

13 MR. SURI: I think it's been a while
14 since this Court has applied the primary
15 jurisdiction doctrine. That's fair.

16 CHIEF JUSTICE ROBERTS: Justice Alito?
17 Justice Sotomayor, anything further?
18 Justice Kagan?
19 Justice Gorsuch, anything further?
20 Justice Kavanaugh?

21 JUSTICE BARRETT: I just want to
22 quickly clarify your interchange with Justice
23 Sotomayor and Kagan about what this opinion
24 should say. You recommend it not say
25 anything -- not saying anything about the

1 effect of the complaint before the Board. So
2 are you recommending, in the government's view,
3 the ideal opinion would just stop at correcting
4 the Washington Supreme Court's dismissal of the
5 suit and not say anything about this
6 jurisdictional hiatus part?

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

8 JUSTICE BARRETT: Okay.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: So, if we are
12 concerned that saying that employees have a
13 duty to take reasonable precautions to prevent
14 imminent, foreseeable harm could subsequently
15 be read or considered as the milk spoilage
16 situation, that is, putting on employees the
17 duty when they strike to pay attention to
18 what's happening with the property and mitigate
19 damages, if there's a concern that that
20 formulation might lead to that, would you
21 object in your statement of the holding to,
22 instead of saying employees have a duty to take
23 reasonable precautions, saying employees have a
24 duty not to engage in a scheme to intentionally
25 destroy the employer's property, which is what

1 was alleged in this case? And saying that, if
2 we think it's narrower, would the government
3 object?

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

8 If the Court is concerned, there is
9 another -- another type of qualification that
10 it could add to its opinion. It could limit
11 the opinion to equipment and premises of the
12 employer -- here, the trucks themselves were
13 threatened -- and leave the issue of perishable
14 products aside entirely.

15 JUSTICE JACKSON: What about the focus
16 on the intent, on the conspiratorial nature of
17 this, on the attempt to hurt the employee --
18 the -- the -- as opposed to just the attempt to
19 exercise my right to strike and the incidental
20 damage that happens to that, so be it?

21 MR. SURI: Yeah, I -- I -- I accept
22 that that is a subset of reasonable precautions
23 if you just focus on that part of it. We're,
24 again, more concerned about the back half of
25 the test, whether it's being limited in an

1 appropriate way to make sure it doesn't sweep
2 in spoilage.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Dalmat.

7 ORAL ARGUMENT OF DARIN M. DALMAT

8 ON BEHALF OF THE RESPONDENT

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

11 Glacier sued Local 174 over a
12 concerted work stoppage, conduct at the heart
13 of the Act's protections. Under settled law,
14 strikers lose those protections if they fail to
15 take reasonable precautions to avoid
16 aggravated, imminent, foreseeable harm to
17 employer property.

18 Applying that test, the Board has
19 never found a forfeiture merely because
20 perishables spoil.

21 On the 12(b) record then, this walkout
22 was at least arguably protected, as the
23 issuance of the general counsel complaint later
24 confirmed. The 12(b) record shows the union
25 instructed the drivers to return their trucks

1 to Glacier's facility, which all the drivers
2 did, thereby putting Glacier in a position to
3 use its ordinary tools for handling leftover
4 concrete, such as reclaimers, ecology block
5 forms, and retardants. The union also told
6 drivers to return their trucks with the drums
7 running.

8 As Glacier itself observes -- and this
9 is paragraphs 3.8 and 3.9 of the complaint --
10 the concrete does not even begin to harden
11 until the drums stop turning. As a result, no
12 harm came to Glacier's trucks or facility.

13 These pleaded facts show reasonable
14 precautions. At a minimum, there's enough
15 evidence in the record to allow the Board
16 lawfully to conclude that it -- to rule in our
17 favor. And that's all Davis requires to oust
18 state court jurisdiction temporarily, as the
19 Washington Supreme Court so held.

20 And now that the Board has taken up
21 the case and exercised its primary jurisdiction
22 over this labor dispute, the grounds for
23 affirmance are even clearer.

24 I welcome the Court's questions.

25 CHIEF JUSTICE ROBERTS: What if the --

1 you're, I gather, disputing your friend on the
2 other side's categorization of the conduct in
3 this case as something a fortiori beyond the
4 reasonable precautions, moving into intentional
5 destruction.

6 Assuming that the facts do, in fact,
7 show intentional destruction, how would you
8 analyze that situation?

9 MR. DALMAT: So I think intent is not
10 the critical element to the scope of the
11 Board's protection. Some intentional
12 destruction, we certainly admit, would be
13 unprotected. Acts of vandalism, I agree with
14 my friend from the government, an affirmative
15 act of vandalism, clearly unprotected.
16 Similarly, this Court held in Fansteel a
17 takeover of employer property, a building, that
18 excluded the employer from access to its
19 property, clearly unprotected.

20 But the Board has also held that a
21 walk-off often does have an intent to cause
22 maximum harm to the -- economic harm to the
23 employer and sometimes, for example, in Lumbee
24 Farms, even includes an intent to hurt
25 perishables, and those have been held to be

1 protected. So --

2 CHIEF JUSTICE ROBERTS: Yeah, but --
3 but there certainly is a distinction between
4 economic harm to the employer, which is at the
5 heart of many strikes anyway, and intentional
6 destruction of property. The difference
7 between the milk spoiling and killing the cow.

8 So, again, take a case where -- not
9 recharacterizing the claim of intentional
10 destruction as opposed to failure to take
11 reasonable precautions. How would that be
12 analyzed? Or are you saying that anything like
13 that, the infliction of economic harm, has to
14 be squeezed into the failure to take reasonable
15 precautions?

16 MR. DALMAT: I think the critical
17 distinction is the nature of the conduct,
18 whether it's an affirmative act of vandalism or
19 whether it's the result of the withdrawal of
20 labor. And so --

21 JUSTICE JACKSON: But isn't he --
22 isn't that what's being alleged here? I mean,
23 I appreciate that distinction, but I guess I'm
24 not sure I understand what you mean when you --
25 when you talk about the distinction. I mean,

1 the -- the -- the allegation in this case, and
2 you could imagine even hypothetically, is that
3 the union certainly has the right to walk away.

4 MR. DALMAT: Yes.

5 JUSTICE JACKSON: And if they're
6 walking away and their responsibilities involve
7 perishable goods --

8 MR. DALMAT: Yes.

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

11 MR. DALMAT: Right.

12 JUSTICE JACKSON: -- then that's an
13 incidental harm that is occurring.

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

17 MR. DALMAT: Yes.

18 JUSTICE JACKSON: -- at the very point
19 in which we've poured the thing that can't be
20 recovered because, if we do it at that point,
21 we're going to destroy the machines, and that
22 is our intent.

23 I don't understand how that is
24 protected and why that isn't any -- you know,
25 the same as -- as -- as the arsonist who says,

1 I'm going to walk away, but, as I do, let me
2 strike the match and burn down the factory.

3 MR. DALMAT: So what's always been
4 critical to the Board's cases is the extent of
5 the harm, so the aggravated nature of the harm,
6 the foreseeable imminence of the harm, not the
7 intent. And so, given --

8 JUSTICE JACKSON: But I'm asking what
9 should be. I -- okay, I appreciate that --
10 that it hasn't been clear, but that, I think,
11 is part of the problem.

12 So, in terms of the logic of this,
13 shouldn't the line be drawn around the intent
14 in the sense of are -- is the union engaging in
15 conduct for the purpose of destroying the
16 property of the factory, or is the union just
17 striking, and if some of the property gets
18 damaged because they're walking away, that's
19 incidental, that's totally protected?

20 MR. DALMAT: So that should not be the
21 test for two reasons, a doctrinal and a
22 statutory. So let me give you the statutory
23 first.

24 Congress in Section 151, the very
25 first section of the Act, observed that strikes

1 generally have the "intent or necessary effect"
2 of causing a variety of economic harm,
3 including a stoppage of the flow of raw
4 materials and interruptions of operations.

5 And, certainly, Congress was aware of
6 perishables, like cheese and milk and concrete,
7 and they --

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

11 MR. DALMAT: Intentionally.

12 JUSTICE JACKSON: You intentionally
13 stop the work, but the question is, can you do
14 something that actually intends to affect the
15 property directly to make the property
16 unsalvageable. We can't get new people in here
17 as a result of the strike and pick up where we
18 left off because you literally burned down the
19 factory.

20 We agree that you can't burn down the
21 factory, right?

22 MR. DALMAT: We absolutely agree you
23 cannot burn down the factory.

24 (Laughter.)

25 JUSTICE JACKSON: Okay. All right.

1 MR. DALMAT: You cannot smash things.

2 JUSTICE KAGAN: Let me try something.

3 What I hear you saying is that the focus on
4 intent is wrong because workers, unions, do
5 things all the time intentionally to maximize
6 economic harm. You know, that if there's a
7 seasonal component of a business, workers will
8 try to time their strike in order to maximize
9 the economic harm because, you know, more of
10 the business is conducted in the summer than in
11 the winter, things like that, that there are
12 all kinds of things which are perfectly
13 intentional to maximize economic harm.

14 And so you're saying that when we
15 start focusing on intent without more, it -- it
16 -- it pulls in pretty much, you know, every
17 strategic decision that a union makes as to
18 when to conduct a work stoppage.

19 MR. DALMAT: That's absolutely right.
20 And Congress has told us in 8(b) which intents
21 are off limits. Congress has proscribed
22 certain forms of secondary economic pressure.
23 That's an intent unions are not allowed under
24 the law to have. It's proscribed certain forms
25 of recognitional picketing. Those are certain

1 intents that the union is not allowed to have.

2 But what it has not done -- and in --
3 in this Court's decision in Curtis Brothers,
4 the Court said what it -- the off limits
5 intents in 8(b) are the only ones that are off
6 limits. It doesn't regulate intents beyond
7 those expressly proscribed.

8 And the reason for that goes back to
9 Section 1, because Congress recognized that
10 inherent in the notion of a strike is an intent
11 to inflict economic harm. That's what brings
12 parties to resolution, that -- the availability
13 of the threat, as this Court recognized even
14 before the NLRA in -- in American Steel.

15 And so -- and going back to Justice
16 Jackson's question on the doctrinal point, when
17 a state court or -- or any court is analyzing
18 the scope of protections to figure out if
19 Garmon preemption should apply, it takes Board
20 law as it finds it. So this Court will
21 certainly have the last say on the matter. The
22 Board's decisions are always subject to
23 judicial review.

24 JUSTICE JACKSON: Yes, I appreciate
25 that, but can I quickly just ask you this,

1 because I -- I -- I understand that there are
2 problems with perhaps focusing on intent, as
3 Justice Kagan points out, you know, but you've
4 said that there are circumstances in which
5 there are certain intents that we can identify
6 and say are inappropriate.

7 I want to focus on the problems that
8 at least I see with respect to the aggravated
9 nature of the harm. I'm actually trying to
10 understand the difference between the union
11 walking away and letting the milk spoil and the
12 union in this case letting the concrete harden
13 and letting it, you know, tear up the truck
14 because, at the end of the day, it all boils
15 down to money for -- for companies. And what
16 if the truck, you know, is -- is not that
17 expensive and so its replacement value is a
18 little bit? I don't -- I don't understand how
19 we can draw the line around aggravated harm in
20 any meaningful way when you talk about what the
21 union is allowed to do and what they don't --

22 MR. DALMAT: So let me begin --

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

24 MR. DALMAT: -- with just a couple
25 factual points about the record. There's been

1 no harm to any truck in this case, and Glacier
2 alleges there was no harm to any truck or the
3 environment or its facilities. In fact,
4 there's \$11,000 of concrete --

5 JUSTICE JACKSON: Yes, I understand
6 that, but just what is your position as -- so
7 is your view that the union can -- can walk
8 away at any time, at any point in any
9 circumstance no matter what the harm? What is
10 the line for union appropriate versus not for
11 you?

12 MR. DALMAT: The line that the drawn
13 -- the Board has drawn is that harm to
14 perishables has never been sufficient to
15 constitute aggravated harm.

16 Now I agree, if -- if our actions
17 truly presented a material risk of harm to the
18 trucks or the facility, I would agree that that
19 would not be protected. But where I part ways
20 with my friends at the government is that I
21 believe they've, respectfully, overlooked the
22 two key precautions that Glacier itself
23 alleged, namely, that we put the trucks back in
24 Glacier's facility in a position where every
25 day it deals with leftover concrete. This is

1 JA 77 through 80. And it uses a variety of
2 tools to do that. It uses reclaimers. These
3 are centrifuges that separate batch concrete
4 and allow the cement, the rock, the water to be
5 pulled apart and used another day.

6 JUSTICE JACKSON: So your bottom line
7 is the concrete is a perishable? It -- it
8 equals the milk for the purpose of your
9 argument?

10 MR. DALMAT: Absolutely, and their
11 complaint alleges as much.

12 JUSTICE JACKSON: All right. All
13 right.

14 MR. DALMAT: So the concrete itself,
15 we -- I believe we did take precautions to
16 avoid that, both putting it in their possession
17 with all their ordinary tools. And also,
18 again, 3.8 and 3.9 of their complaint, the
19 concrete does not begin to harden until the
20 drums stop turning.

21 And, here, we put the -- the union
22 instructed the drivers to keep the drums
23 running when they returned the trucks. There
24 were 15 personnel at the Duwamish facility to
25 handle the 20 trucks that came back, in

1 addition to managers.

2 They were in a position to avoid harm
3 to the concrete and to the trucks based on
4 their own pleadings. So it's our submission
5 that at a minimum, there was enough evidence
6 from which the Board lawfully could rule in our
7 favor.

8 JUSTICE SOTOMAYOR: Counsel, it sounds
9 quite logical, but you didn't put this evidence
10 in. You were relying on the allegations in the
11 complaint, correct?

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

14 JUSTICE SOTOMAYOR: But the complaint
15 doesn't say all of the things you just said.
16 The complaint --

17 MR. DALMAT: It does, Your Honor.

18 JUSTICE SOTOMAYOR: -- the complaint
19 says that if you keep the truck running, that
20 the concrete won't spoil?

21 MR. DALMAT: 3.8 and 3.9 of the
22 complaint, yes, Your Honor. And -- and the
23 other facts that I've mentioned to you today,
24 in Washington, the complaint incorporates the
25 declaration that Glacier itself admitted, and

1 it also incorporates these so-called
2 hypothetical facts, factual representations
3 that Glacier made in its briefs.

4 I have not mentioned a single fact to
5 you today that is not either directly on the
6 face of the complaint or incorporated into the
7 complaint through Glacier's own declarations or
8 through the hypothetical --

9 JUSTICE SOTOMAYOR: What do we do with
10 their complaint that the truck was at risk
11 of -- the trucks were purposely put at risk to
12 have the concrete hard -- harden and destroy
13 the trucks?

14 MR. DALMAT: Well, we know that the
15 trucks were not, in fact, harmed, so that's one
16 fact. And Glacier itself has pled that fact
17 which you just asserted, that's true, Glacier
18 pleads that, but it also pleads several of the
19 precautions that we took to avoid harm to the
20 trucks.

21 And so, given the tension in Glacier's
22 own factual assertions --

23 JUSTICE SOTOMAYOR: But I think the
24 government's position is, if there is tension,
25 it's your obligation to come forth with

1 evidence under our command in Davis that you
2 have to submit enough evidence to enable the
3 Court to find that the conduct is arguably
4 protected.

5 MR. DALMAT: And we're certainly
6 allowed to rely on the -- the other side's
7 pleadings. In this Court's decisions in Jones
8 and in Curry, the Court found --

9 JUSTICE SOTOMAYOR: So, if the
10 pleading is you simply did this intentionally
11 at a time to ensure that the -- that's how I
12 read the pleadings -- you did it intentionally
13 at the time to ensure that the trucks -- now
14 you can argue all you want that you really
15 didn't do that, but we have to accept the
16 complaint as is, and I think it says that you
17 did it intentionally at a time to blow up the
18 trucks.

19 MR. DALMAT: It says two --

20 JUSTICE SOTOMAYOR: That the
21 likelihood was going to be great or was going
22 to be great.

23 MR. DALMAT: It says two things. It
24 says what you just said, Your Honor.

25 JUSTICE SOTOMAYOR: Once it says that,

1 isn't it enough?

2 MR. DALMAT: No, because it also
3 details in particular the precautions we took
4 to avoid those very harms that it says we had
5 in our head. So what it's alleging is we had a
6 bad scheme in our head.

7 JUSTICE SOTOMAYOR: Well, there were
8 at least nine drivers that didn't tell their
9 supervisors that the trucks were there running.

10 MR. DALMAT: According to their
11 allegations, that's --

12 JUSTICE SOTOMAYOR: Well, that --

13 MR. DALMAT: -- correct. Ninety
14 percent --

15 JUSTICE SOTOMAYOR: -- but we have to
16 accept -- we have to accept that on its face.

17 MR. DALMAT: Absolutely, but
18 90 percent of the --

19 JUSTICE SOTOMAYOR: So assume we get
20 to where the SG is, which is, on the face of
21 the complaint, you didn't put in enough. What
22 remains of your argument? Meaning, do we just
23 reverse on -- that's the ground that the SG is
24 suggesting we reverse on.

25 MR. DALMAT: So, if you agree with

1 them on the first position, then I still think
2 you should either affirm because of the
3 issuance of the general counsel complaint,
4 which, under Davis Supermarkets, shows that the
5 Board has taken up the case and is currently
6 exercising its primary jurisdiction --

7 JUSTICE SOTOMAYOR: Why should we make
8 that decision? Why shouldn't the court below
9 decide what it's going to do?

10 MR. DALMAT: Well, one reason is I
11 think it's fundamentally undisputed between the
12 parties, the government and we agree here, and
13 Glacier at Clerk's Paper 283 and 84 below
14 relied on the same case, Loehmann's Plaza --

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

17 MR. DALMAT: Davis allows a party to
18 either rely on the other side's admissions or
19 --

20 JUSTICE SOTOMAYOR: Why aren't you
21 doing that?

22 MR. DALMAT: If we are remanded, we
23 will certainly do that on remand, but just the
24 other disposition, if you disagree with me that
25 this Court has -- that it would be proper to

1 address the significance of the complaint, the
2 general counsel complaint, in the first
3 instance, I think a more appropriate
4 disposition than a reversal is a vacatur with
5 instructions to stay in light of the general
6 counsel complaint. And the reason for that is
7 that the government is essentially asking for
8 an advisory opinion. It's asking this Court to
9 ignore current reality. And this Court has
10 often taught that --

11 JUSTICE SOTOMAYOR: Well, I don't know
12 if it's the government. It's certainly your
13 adversary.

14 MR. DALMAT: Well, I think both of
15 them are -- are asking for a reversal, is what
16 I heard today. And so I think this Court
17 should not ignore current reality. It should
18 take into account current reality, and it
19 should decide the case on the narrowest grounds
20 possible.

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 MR. DALMAT: Thank you.

24 JUSTICE JACKSON: What -- do you agree
25 or disagree with the following statement? And

1 this is from opposing counsel's brief: When a
2 union deliberately orchestrates a scheme for
3 the very purpose of destroying an employer's
4 property, there is no plausible argument that
5 this conduct is protected under the NLRA.

6 MR. DALMAT: I think it's an overbroad
7 statement because property could be anything.
8 Property could be goodwill. Property could be
9 money. Property could be intangibles. And so,
10 stated at that level of generality, it's simply
11 too overbroad.

12 I think the proper test is the one
13 that the Board has articulated time and time
14 again and that I stated at the opening, namely,
15 that a concerted action, a concerted walk-off,
16 in order to advance wages and benefits is
17 protected unless the strikers fail to take
18 reasonable precautions to avoid aggravated,
19 imminent, foreseeable harm to employer
20 property. That's the correct test.

21 And that's the one that squares with
22 Section 1 of the Act and --

23 JUSTICE SOTOMAYOR: Why do you go so
24 broadly to protect the building and equipment?
25 Because what you're saying is letting the goods

1 perish is okay.

2 MR. DALMAT: Well, "aggravated" is a
3 key part of the test, and -- and the Board has
4 never found spoilage of perishables to be
5 aggravated harm. So I think the aggravated
6 line does track what Your Honor is suggesting
7 in terms of --

8 JUSTICE SOTOMAYOR: I have not found
9 an NLRB case that has said a strike was wrong
10 if it involved perishable products or the loss
11 of perishable products.

12 MR. DALMAT: Correct. There is no
13 such case.

14 JUSTICE SOTOMAYOR: So it has to be
15 equipment or a building?

16 MR. DALMAT: That's the current law,
17 yes, Your Honor.

18 I'd like to address Justice Thomas's
19 question about jurisdictional hiatus. That
20 concept started in Garmon itself. And this is
21 at page 245 of the opinion. It indicates, if
22 the Board decides, subject to appropriate
23 federal judicial review, that conduct is
24 protected by Section 7 or prohibited, the
25 matter is at the end.

1 But it goes on to say that if the
2 Board decides that an activity is neither
3 protected nor prohibited, then it raises the
4 question whether states can regulate that. And
5 Sears used -- this Court in Sears used the
6 concept of jurisdictional hiatus, and this
7 Court applied it in Hanna Mining.

8 What we have in Garmon, it is a
9 different rule than the -- the typical rule of
10 preemption, but what it does is it's a choice
11 of forum rule. It makes sure that the dispute
12 goes to the forum that Congress chose to
13 adjudicate a labor dispute.

14 And their own complaint centers on --
15 in paragraph 319 on the reasonable precautions
16 test. They're fundamentally asking a state
17 court to apply Board doctrine. And the Board
18 is obviously the best institution and the
19 institution Congress chose to apply that
20 doctrine.

21 So unless --

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas, anything further?

25 JUSTICE THOMAS: Under your test, if

1 the driver simply discharges cement or stop the
2 drums from rotating, would you agree with
3 Petitioner?

4 MR. DALMAT: Yes, Your Honor.

5 JUSTICE THOMAS: Okay. Now you make
6 the point about the judicial -- the
7 jurisprudential hiatus, and as I've said
8 before, these other terms, "exhaustion" and
9 "preemption," have come up.

10 Could you give me your best textual
11 basis for any of those, for either of those?

12 MR. DALMAT: Sure. What the Court
13 relied on in Guss was principally 160, Section
14 160. We've offered in our brief two different
15 statutory sections. Section 160 gives the
16 Board the power to adjudicate labor disputes
17 and prevent unfair labor practices, and it
18 carves out a limited exception to that. The
19 exception is that the Board can cede to states
20 by agreement that jurisdiction in certain
21 circumstances. And so, in this Court's
22 decision in Guss, it said that -- it read a
23 negative inference into that exception, and it
24 said, absent a cession agreement, the Board is
25 the entity Congress chose to adjudicate.

1 There's a similar structure in
2 Section 164. There, again, the Board has
3 primary jurisdiction over labor disputes, but
4 it's allowed to decline that jurisdiction over
5 a class of employers when the Board finds
6 insubstantial interstate commerce, and only at
7 that point can the states step in and exercise
8 jurisdiction to adjudicate labor disputes.

9 So those two provisions are the -- the
10 key textual basis on which we rely.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 Justice Sotomayor?

14 Justice Kagan?

15 Justice Barrett?

16 Justice Jackson?

17 Thank you, counsel.

18 MR. DALMAT: Thank you, Your Honors.

19 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

20 Francisco?

21 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO

22 ON BEHALF OF THE PETITIONER

23 MR. FRANCISCO: Thank you, Mr. Chief

24 Justice. Just four basic points.

25 First, this is not a case about the

1 mere stoppage of work. Here, the union had the
2 workers show up, accept possession of the
3 concrete, begin deliveries of the concrete,
4 abandon those deliveries when it was too late
5 to save the concrete, and then countermand
6 supervisor instructions to complete the
7 deliveries that had already been started, which
8 at that point in time was the only way to save
9 the concrete.

10 It's really no different than the
11 riverboat crew that drives out into the middle
12 of the river and then abandons ship. That is
13 not merely a stoppage of work.

14 Now my friend draws a distinction
15 between the trucks on the one hand and the
16 concrete on the other. Well, imagine the
17 ferryboat that's loaded with the trucks. Are
18 they suggesting that the ferry -- you couldn't
19 destroy the ferryboat, but you could destroy
20 the trucks?

21 The fact of the matter is that our
22 complaint alleges destruction of the concrete,
23 not the trucks. It may be that keeping the --
24 the drums rotating delayed or avoided the
25 destruction of the trucks for a certain amount

1 of time. It didn't avoid the destruction of
2 the concrete because, once concrete is batched
3 up, it's got to be delivered and used, or else
4 it's going to spoil.

5 You can add chemicals to slow down
6 that process, but adding the chemicals
7 themselves undermine the integrity of the
8 concrete. So, once they were batched and
9 loaded, they had to be delivered or abandoned.
10 They put us in a position of putting that
11 concrete in a vulnerable position precisely so
12 they could abandon it. This is not a mere
13 stoppage of work.

14 Point two, my friend from the
15 government relied on the Longshoremen against
16 Davis case. That case did not involve any
17 disputed facts. That was a case about the
18 difference between -- the meaning of the words
19 "supervisors" versus "employees." The union
20 never put in any evidence at all that the --
21 that the people at issue fell within the -- I
22 think it was the employee category. And the
23 Court simply said that on the basis of the
24 facts as we have them, it's an arguable
25 question. That's exactly how we think that the

1 Court ought to proceed in this context.

2 The only case -- and this is my third
3 point -- the only case that this Court has
4 issued that comes close to addressing these
5 facts is the Bill Johnson decision, where you
6 did have a complaint on the one hand in state
7 court alleging malicious libel, clearly
8 unprotected conduct, and you had a Board
9 finding on the other hand that the allegations
10 in the complaint were false.

11 Now my friend from the government
12 suggests that Bill Johnson isn't on point. I
13 would submit precisely the opposite. The whole
14 issue in Bill Johnson's was whether the Board
15 could issue a cease-and-desist order against
16 the state court.

17 Well, under the government and the
18 union's position, it shouldn't have even had to
19 do that. The Board should have required --
20 been required to pause that proceeding, the
21 jurisdictional hiatus, because the Board had
22 issued findings that the allegations in the
23 state court complaint were true.

24 Even if you were to think that it's
25 not on all fours, it's the closest decision

1 that this Court has ever issued that's even
2 remotely on point, which leads me to my final
3 point. In the face of that precedent, why on
4 earth would you take Garmon any further than
5 you've already taken it?

6 All we're asking for is an application
7 of Garmon in the context of ordinary preemption
8 principles. I think it's quite clear that
9 they're asking at the very least that you take
10 it a step further than it's ever gone. That
11 would bring it into greater tension with
12 ordinary preemption principles. And I have yet
13 to hear a reason grounded in the text of the
14 statute, precedent, or practical concerns that
15 would justify ousting a state court of the
16 ordinary authority to adjudicate a tort claim
17 in the ordinary course where a complaint
18 alleges conduct that, as we and the government
19 agree, doesn't even arguably implicate the
20 statute.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:31 a.m., the case
24 was submitted.)

25

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