No. 21-1449

IN THE

Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has an interest in ensuring that the Takings Clause of the Fifth Amendment is interpreted in a manner consistent with its text and history and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Labor Relations Act ("NLRA") protects employees' right to strike—that is, to withhold their labor and thereby cause economic harm to their employer—for mutual aid or protection. On August 11, 2017, eleven days after their collective bargaining agreement expired, members of Respondent Local Union No. 174 ("Union") employed by Petitioner Glacier Northwest, which sells and delivers ready-mix concrete, exercised that right. J.A. 112. When the strike commenced that morning, a Glacier representative was informed that its drivers "were all bringing their trucks back to [its] yard—many with full loads of concrete in the drums." *Id.* at 81. All striking drivers returned the company trucks and concrete to Glacier

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

premises. *Id.* at 12-13. A Union representative informed drivers to leave their trucks running, *id.* at 34, which kept the loaded trucks' drums revolving and helped to prevent the concrete from quickly hardening. Glacier then offloaded the concrete from these trucks without damaging its trucks, plant, or equipment. *Id.* at 13. The concrete hardened in the yard and bunkers where it was offloaded by Glacier and subsequently disposed of. *Id.*

Notwithstanding the Union's efforts to minimize damage to Glacier's trucks and other property, Glacier brought state-law tort claims against the Union, claiming that the strike constituted "sabotage, ruination, and destruction of Glacier's batched concrete." *Id.* at 19. Although Glacier claims that it seeks damages "for the initiation of destruction of property by the Union," not "for strike activity," *id.* at 49, the core of Glacier's complaint is that the Union "immediately and suddenly ceas[ed] all concrete delivery activity work, and abandon[ed] or discharg[ed] at the Glacier facilities the batched concrete under their control"—in other words, that Union members returned employer property to employer premises and went on strike. *Id.* at 12-13.

The Washington Supreme Court concluded that Glacier's suit should be dismissed, holding that Glacier's claims seeking damages connected to the employees' strike were preempted by the NLRA under *Garmon* preemption, under which state courts generally may not hear claims based on conduct that is protected or arguably protected by Section 7 of the NLRA (or prohibited or arguably prohibited by Section 8 of the Act). *Id.* at 150-70; *see* Resp. Br. 15-37 (explaining why Glacier's claims are preempted by the NLRA). Petitioner now claims, among other things, that the principle of

constitutional avoidance requires reversal of the decision below because federal preemption of Glacier's claim for strike-related damages would "raise serious constitutional doubts under the Takings Clause." Pet'r Br. 47-48. As the Union explains, the National Labor Relations Board ("NLRB") has yet to rule on whether the Union's conduct is protected, which means that no taking could have occurred at this time. Resp. Br. 11-12, 48. But even if the NLRB were ultimately to conclude that the conduct here is protected, Petitioner's claim would still be without merit: allowing federal labor law protections to preempt Petitioner's state law claims is consistent with the Takings Clause's text and history.

As originally understood, the Takings Clause applied only to the direct physical appropriation of private property. This reading of the Takings Clause is consistent with that of similar provisions in colonial and state constitutions, and it is well established that the Framers, including James Madison, who drafted the Clause, understood that it too would be so limited. Indeed, for decades after the Clause's adoption, this Court interpreted it as applying only to direct physical appropriations. As Justice Scalia recognized, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

Toward the end of the nineteenth century, however, this Court began to hold that the Takings Clause may also apply in cases involving the functional equivalent of a direct physical appropriation of property. Yet even in these cases, the Court was careful to cabin the Clause's application to regulations that could reasonably be considered tantamount to the sorts of direct appropriations that were within the scope of the

Clause's original meaning. Thus, for most of the nation's history, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870), and *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

This Court has recognized two categories of regulations that fit within those parameters and are thus considered takings *per se*: (1) "regulations that compel the property owner to suffer a physical 'invasion' of his property," *id.* at 1015, and (2) regulations that "den[y] *all* economically beneficial or productive use of *land*," *id.* (emphasis added); *see id.* at 1017 (suggesting that the justification for the latter rule might be "that *total deprivation* of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (emphasis added)). These categories "share a common touchstone," as "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

Regulations that do not fall within these two categories of takings *per se* are generally evaluated under a multifactor test established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538-39. Under that test, a court considers, among other things, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as the "character of the governmental action." *Penn Central*, 438 U.S. at 124. This analysis looks to a regulation's

impact on the entirety of one's property—courts do not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," but instead focus "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id*. at 130-31.

Under the original understanding of the Takings Clause, there is simply no merit to Petitioner's argument that preemption of its state law tort claims for incidental property damage that occurred as a result of a strike protected by the NLRA is a taking, and it is plainly not a taking under this Court's precedents either. It does not effect an actual physical appropriation of employers' property, nor does it effect the functional equivalent thereof. Significantly, when striking employees take over a plant or smash company equipment—actually physically appropriating property—their actions are not protected by the Act and *Garmon* preemption does not apply. In those instances, employers are free to bring state law claims based on "acts of trespass or violence against the employer's property," as this conduct is not federally protected. *See NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939). But the Takings Clause does not prohibit federal protections for strikes and associated preemption of state law claims over damages that result from employees withholding their labor. This Court should affirm the judgment of the court below.

ARGUMENT

I. The Text and History of the Takings Clause Demonstrate That the Clause Applies Only to the Direct Appropriation of Property or the Functional Equivalent Thereof.

As this Court has recognized, for most of the nation's history, it has been understood "that the Takings Clause reache[s] only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551, and *Transportation Co.*, 99 U.S. at 642); *accord Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting). But here, Glacier claims that the Takings Clause's scope is much broader—so broad that the NLRA cannot preempt state law tort claims arising out of incidental harm to perishable products that results when workers exercise their right to strike under the NLRA. This view of the Takings Clause cannot be squared with either its text or history. Any extension of the Takings Clause to render unions liable to state law claims for damages resulting from strike-related incidental property damage would not be "grounded in the original public meaning of the Takings Clause of the Fifth Amendment," *Murr*, 137 S. Ct. at 1957 (Thomas, J., dissenting), and must be rejected.

A. The Takings Clause Was Originally Understood to Apply Only to the Direct Physical Appropriation of Property.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. By its terms, the Clause's scope is quite narrow: it applies only when the government takes private property, and it does not prevent such takings but rather

requires the government to provide just compensation when those takings occur. *See First Eng. Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 314 (1987). While the Constitution does not define the term, a "taking" most naturally means an appropriation of property, such as when the government exercises its eminent domain power to physically acquire private property to build a road, military base, or park. *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Envt'l Aff. L. Rev. 509, 515 (1998).

This plain-language interpretation of the Clause is consistent with the Framers' understanding that the Takings Clause would prohibit only actual appropriations of private property. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 782 (1995) ("[T]he Takings Clause and its state counterparts originally protected property against physical seizures, but not against regulations affecting value."). Indeed, "the limited scope of the [T]akings [C]lause[] reflected the fact that, for a variety of reasons, members of the framing generation believed that physical possession of property was particularly vulnerable to process failure," necessitating a compensation requirement specifically for the direct appropriation of private property. *Id.*

Historical circumstances preceding the adoption of the Takings Clause support this understanding of the Clause's original meaning. Prior to the ratification of the Fifth Amendment, "there was no [federal] rule requiring compensation when the government physically took property or regulated it. The decision whether or not to provide compensation was left entirely to the political process." *Id.* at 783; *see id.*

("[T]he framers did not favor absolute protection of property rights."). Thus, during the Revolutionary War, the military regularly seized private goods without providing compensation. *See* 1 William Blackstone, *Commentaries with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305-06 (St. George Tucker ed., 1803) (statement by Tucker); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (upholding uncompensated seizure of provisions from private citizens during the war).

Indeed, only two foundational documents from the colonial era included even limited recognition of a right to compensation for the taking of private property, and both covered only physical appropriations of property. Treanor, *supra*, at 785. First, the Massachusetts Body of Liberties, adopted in 1641, imposed a compensation requirement that applied only to the seizure of personal property: "No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Mass. Body of Liberties § 8 (1641), *reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 149 (Richard L. Perry & John C. Cooper eds., 1959) [hereinafter *Sources of Our Liberties*]; *see* Treanor, *supra*, at 785 n.12 ("This provision of the Body of Liberties appears to have been modelled on Article 28 of Magna Carta, which barred crown officials from 'tak[ing] anyone's grain or other chattels, without immediately paying for them in money.'" (quoting Magna Carta art. 28 (1215), *reprinted in Sources of Our Liberties* 16)).

Likewise, the 1669 Fundamental Constitutions of Carolina, which were drafted by John Locke and never fully implemented, would have mandated compensation for the direct seizure of real property. Treanor, *supra*, at 785-86. These documents sought to authorize public construction of buildings and highways, so long as "[t]he damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint." *Id.* at 786 (quoting Fundamental Constitutions of Carolina art. 44 (1669), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 115 (1971)).

Although colonial governments commonly regulated land use and business operations, *see id.* at 789 (collecting examples including requiring inspection of goods prior to sale or export, imposing fee schedules, and barring commodity speculation), no colonial charter required compensation for property owners affected by those regulations—even when the regulations affected a property's value, *id.* at 788-89; *see also* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U.L. Rev. 1099, 1100 (2000) ("American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights."). Indeed, as Justice Scalia recognized, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas*, 505 U.S. at 1028 n.15. After the American Revolution, most state constitutions echoed their colonial predecessors in this respect, as "[n]one of the state constitutions adopted in 1776 had just compen-

sation requirements" for physical takings or for regulations that affected property rights. Treanor, *supra*, at 789.

As state constitutions later began to provide compensation for the taking of property, those protections applied only to physical appropriations of property. *See id.* at 791. The Vermont constitution, for example, provided that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. of 1777, ch. I, art. II, *reprinted in* 6 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3740 (Francis N. Thorpe ed., 1909) (hereinafter *The Federal and State Constitutions*). Similarly, the Massachusetts Constitution of 1780 stated that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, part I, art. X, *reprinted in* 3 *The Federal and State Constitutions*, *supra*, at 1891. Further, the Northwest Ordinance of 1787 stated that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." Northwest Ordinance of 1787, art. 2, *reprinted in Sources of Our Liberties*, *supra*, at 395. Significantly, "[i]n each case, a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way." Treanor, *supra*, at 791. Most state courts accordingly held that damages "from activities that did not involve physical invasions or appropriations of property for a public use, but that nonetheless had physical consequences,

such as subsidence occasioned by a road-building project—were not compensable takings." *Id.* at 792.

Ultimately, when the Framers adopted the federal Takings Clause, "the right against physical seizure received special protection . . . because of the framers' concern with failures in the political process." *Id.* at 784. For various reasons, the Framers feared that the ordinary political process would not adequately protect physical possession of property. *Id.* at 827; *see, e.g.*, *id.* at 829-30 (explaining how Vermont's Takings Clause and other state analogues were "designed to provide security against the type of process failure to which majoritarian decisionmaking processes were peculiarly prone"—namely "real property interests").

The statements of James Madison, who drafted the Takings Clause, "uniformly indicate that the clause only mandated compensation when the government physically took property." Treanor, *supra*, at 791; *see Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) ("James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government."); *accord* Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 Okla. L. Rev. 417, 420 (1994). Madison believed that physical property needed special protection in the form of a compensation requirement "because its owners were peculiarly vulnerable to majoritarian decisionmaking." Treanor, *supra*, at 847. Madison wrote, for instance, of the need for a means to protect physical property ownership separate from the political process because, "[a]s the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe the rights of the latter." James Madison, *Note to His*

Speech on the Right to Suffrage (1821), *in* 3 *The Records of the Federal Convention of 1787*, at 450-51 (Max Farrand ed., 1911). He described "[t]he necessity of . . . guarding the rights of property," a matter that he observed "was for obvious reasons unattended to in the commencement of the Revolution." James Madison, *Observations on the "Draught of a Constitution for Virginia" (ca. Oct. 15, 1788)*, *in* 11 *The Papers of James Madison* 287 (Robert A. Rutland et al. eds., 1977). Thus, Madison was concerned that the political process would be insufficient to preserve physical property rights, and he drafted the Takings Clause to protect against political-process failures. *See* Treanor, *supra*, at 854.

The drafting history of the Takings Clause is also consistent with its limited scope. As originally drafted, the Clause read, "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Lucas*, 505 U.S. at 1028 n.15 (quoting Speech Proposing Bill of Rights (June 8, 1789), *in* 12 J. Madison, *The Papers of James Madison* 201 (C. Hobson et al. eds., 1979)). Although no legislative history exists that explains why a select committee, of which Madison was a member, altered the wording before the Amendment's adoption, "[i]t is . . . most unlikely that the change in language was intended to change the meaning of Madison's draft Takings Clause." Schwartz, *supra*, at 420.

As one scholar has argued, "[t]he substitution of 'taken' for Madison's original 'relinquish' did not mean that something less than acquisition of property would bring the clause into play," *id.*, because Samuel Johnson's *Dictionary*—a prominent Founding-era dictionary—defined "to take" in 1789 as, among other things, "[t]o seize what is not given"; "[t]o snatch; to seize"; "[t]o get; to have; to appropriate"; [t]o get; to procure";

and "[t]o fasten on; to seize," *id.* at 420-21 (quoting 1-2 Samuel Johnson, *A Dictionary of the English Language* (1755-56)). Moreover, because no one besides Madison advocated for the inclusion of a Takings Clause in the Bill of Rights, and there is no record of anyone advocating to expand the scope of Madison's original draft, there is no reason to think the final draft was meant to be more robust than the original. *See* Treanor, *supra*, at 834 ("Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government." (footnote omitted)).

Accounts from shortly after the adoption of the Clause confirm that it was understood to apply only to physical appropriations. "[A]lthough 'contemporaneous commentary upon the meaning of the compensation clause is in very short supply,'" *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) (quoting Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 58 (1964)), an 1803 treatise recognized that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war," 1 William Blackstone, *Commentaries, supra*, at 305-06. Another treatise writer observed in 1857 that "[i]t seems to be settled that, to entitle the owner to protection under [the Takings] [C]lause, the property must be actually taken in the physical sense of the word." Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* 519 (1857).

Moreover, the few Supreme Court decisions prior to 1870 interpreting the Takings Clause held that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property,

though their consequences may impair its use, are universally held *not* to be a taking within the meaning of the constitutional provision." *Transportation Co.*, 99 U.S. at 642 (emphasis added). In fact, until the last few decades of the nineteenth century, this Court steadfastly refused to extend the Clause beyond actual appropriations. In 1870, this Court affirmed that the Takings Clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations . . . .").

B. This Court Has Since Held That the Takings Clause Also Applies to the Functional Equivalent of a Physical Appropriation of Property.

The notion that the Takings Clause may apply to government actions beyond the traditional physical appropriation of property emerged gradually over the next century as this Court considered cases in which government action very closely resembled the appropriation of property. The first of these cases, *Pumpelly v. Green Bay & Mississippi Canal Co.*, involved a state-authorized dam that completely flooded the petitioner's property. 80 U.S. 166 (1871). This Court, analyzing the similar Takings Clause in the Wisconsin

constitution, noted that "[i]t would be a very curious and unsatisfactory result" if the government "can, in effect, subject [real property] to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use." *Id.* at 177-78. To avoid such a result, the Court held that, "where real estate is *actually invaded* by superinduced additions of water, earth, sand, or other material, . . . so as to *effectually destroy or impair its usefulness*, it is a taking, within the meaning of the Constitution." *Id.* at 181 (emphases added). The Court made clear, however, that "[b]eyond this we do not go, and this case calls us to go no further." *Id.*

Nearly fifty years later, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court again narrowly expanded the reach of the Takings Clause. This time the Clause was expanded to encompass regulations that the Court viewed as particularly oppressive. Yet this Court was once again careful to limit its newly recognized regulatory takings doctrine to instances in which the effect of a regulation is tantamount to the direct appropriation of property contemplated in the text of the Fifth Amendment. *See Lingle*, 544 U.S. at 539 (noting that to bring a successful regulatory takings claim, a plaintiff must "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

Mahon involved a challenge to the Kohler Act, a Pennsylvania law that prevented coal companies from mining coal that formed the support for surface-level land. 260 U.S. at 416-17. Pennsylvania law recognized this support property as a distinct property interest, and this Court stated that the Act "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate." *Id.* at 414. The

Court declared that the Pennsylvania law had "very nearly the same effect for constitutional purposes as appropriating or destroying [the estate]," *id.*, and, again relying on this analogy to an appropriation of property, declared that a regulation can be considered a taking when it "goes too far," *id.* at 415; *see Lucas*, 505 U.S. at 1014 (reiterating the "oft-cited maxim" from *Mahon* that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (quoting *Mahon*, 260 U.S. at 415)); *accord Tahoe-Sierra Preservation Council*, 535 U.S. at 325 n.21.

This Court concluded in *Mahon* that "[b]ecause the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the *complete destruction of rights* claimant had reserved from the owners of the surface land, . . . the statute was invalid as effecting a 'taking' without just compensation." *Penn Central*, 438 U.S. at 127-28 (emphasis added) (describing the holding in *Mahon*); *cf. Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that although "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," the government's "*total destruction*" of the full value of certain liens by taking possession of the underlying property constituted a "taking" (emphasis added)); *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (explaining that the government can limit the heights of buildings in a city without compensation, unless the limit goes "so far as to make an ordinary building lot *wholly useless*" (emphasis added)).

This Court summarized the status of its regulatory takings jurisprudence to date in *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 123. It acknowledged that the question of when a regulation

is sufficiently akin to an appropriation to require compensation under the Takings Clause "has proved to be a problem of considerable difficulty," *id.*, and "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons," *id.* at 124. The Court explained that it relies primarily on a balancing of three factors: (1) the economic impact of the regulation, (2) the extent the regulation interferes with "distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.* Under *Penn Central*'s balancing test, no one factor alone is determinative. *See id.* at 124-25. Significant diminutions in property value are generally permissible without compensation, and takings are less readily found "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *See id.* at 124-25.

This Court has sought to clarify its regulatory takings doctrine in recent years, and it has continued to recognize that there are limits on applying the Takings Clause beyond direct physical appropriations of property. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court emphasized the "right to exclude" and held that an unconstitutional *per se* taking occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832. In *Nollan*, California had conditioned a couple's purchase of a beachfront lot and the grant of a coastal development permit on the couple providing a "classic right-of-way

easement," *id.* at 832 n.1, across their property so that members of the public could access the beach at all times, *see id.* at 827-29. The Court determined that requiring such an easement without compensation violated the Takings Clause.

The Court based its holding in *Nollan* in part on its previous determination in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that "where governmental action results in '[a] permanent physical occupation' of the property," *Nollan*, 483 U.S. at 831 (quoting *Loretto*, 458 U.S. at 432-33 n.9), that action effects an unconstitutional taking *per se*, regardless of "whether the action achieves an important public benefit or has only minimal economic impact on the owner," *id.* at 831-32 (quoting *Loretto*, 458 U.S. at 434-35); *accord Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The *Loretto* Court had made clear, however, that "deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking," 458 U.S. at 436, and it noted the case law's consistent distinction between "permanent physical occupation" and "government action outside the owner's property that causes consequential damages within," *id.* at 428.

In *Lucas v. South Carolina Coastal Council*, the Court explained that it has recognized two categories of regulations that are takings *per se*, regardless of the public interest furthered by the governmental action: (1) "regulations that compel the property owner to suffer a physical 'invasion' of his property," *Lucas*, 505 U.S. at 1015—"at least with regard to permanent invasions," such as those requiring landlords to allow the permanent placement of cable facilities in their apartment buildings, *id.* (citing *Loretto*, 458 U.S. at 419), and (2) regulations that "den[y] *all* economically beneficial or productive use of *land*," *id.* (emphasis added)

(citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), and *Nollan*, 483 U.S. at 834); *see id.* at 1017 (suggesting that the justification for the latter rule might be "that *total deprivation* of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (emphasis added)). The Court thus emphasized that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019. For these "total regulatory takings," the Court distinguished real property from personal property, explaining that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* at 1026-28. The Court ultimately held that a South Carolina law that prevented the petitioner from erecting any permanent habitable structures on his land, rendering the parcels "valueless," *id.* at 1007 (internal quotation marks and citation omitted), "accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation,'" *id.* (quoting U.S. Const. amend. V).

The constitutional prohibition on direct physical appropriation of property without just compensation via regulations also applies to personal property. In *Horne v. Department of Agriculture*, this Court heard a challenge to a marketing order that required "a percentage of a grower's crop [to] be *physically set aside* in certain years for the account of the Government, free of charge." 576 U.S. 350, 354 (2015) (emphasis added). Under the scheme, a government entity "acquires title

to the reserve raisins" and subsequently "sells, allocates, or otherwise disposes" of them as it determines is appropriate to protect the market. *Id.* at 354-55. While noting that *Lucas* suggested that "different treatment of real and personal property" was appropriate for regulatory takings, the Court explained that "direct appropriations of real and personal property" should be treated alike because individuals "do not expect their property, real or personal, to be actually occupied or taken away." *Id.* at 361. Thus, because the scheme was a "clear physical taking," with "[a]ctual raisins . . . transferred from the growers to the Government," it was a *per se* physical taking requiring just compensation. *Id.* at 361-62.

This was the case even though the petitioners conceded that "the government may prohibit the sale of raisins without effecting a per se taking." *Id.* at 362. The Court explained that even though a physical taking and a regulatory limit "may have the same economic impact . . . . [t]he Constitution, however, is concerned with means as well as ends." *Id.*

And most recently, this Court held in *Cedar Point Nursery v. Hassid* that actual physical appropriations of property directly authorized by government regulations need not be permanent or continuous to constitute "*per se* physical taking[s]." 141 S. Ct. 2063, 2074-75 (2021). The majority explained that to distinguish between *per se* physical takings and regulatory takings where *Penn Central*'s balancing test applies, "[t]he essential question is . . . . whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* at 2072.

In *Cedar Point*, California granted labor unions a "right to take access" to agricultural employers' property, permitting them to send organizers into the employers' property for up to 120 days per year. *Id.* at 2069. This Court held that the regulation "appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking." *Id.* at 2072. It situated the access regulation in Court precedent involving "government-authorized invasions of property," explaining that this precedent does not require physical invasions to be permanent or continuous. *Id.* at 2074-75.

Thus, this Court has primarily applied the Takings Clause to prevent uncompensated physical appropriations of property, and while it has held that some regulations amount to takings *per se*, it has been careful to limit that classification to regulations that are tantamount to direct appropriations because they either effect a physical appropriation or invasion of property (as in *Nollan*, *Loretto, Horne,* and *Cedar Point*) or render real property entirely valueless (as in *Mahon* and *Lucas*). Where a challenged regulation does not fit into either of these categories of takings *per se*, this Court generally applies the multifactor test articulated in *Penn Central*. *See Lingle*, 544 U.S. at 538-39.

II. Under This Court's Precedents, Federal Strike Protections and Associated Preemption of State Law Tort Claims Do Not Effect a Taking.

Because the Fifth Amendment, as originally understood, applied only to physical takings of property, this Court should continue to carefully limit constitutional liability for regulatory takings. Under the original meaning of the Takings Clause and this Court's precedents, regulations may be considered takings *per se* only when they permit a physical appropriation of

property or deprive real property of all economic value. The preemption of state law tort claims arising out of conduct that is protected under the NLRA, even when that conduct results in incidental economic harm to the employer because the employer cannot sell perishable products as originally intended, does neither. The regulation thus does not effect a taking *per se*.

Petitioner argues to the contrary because, in its view, this Court's decision in *Cedar Point* indicates that "the Court's previous labor law decisions may have failed to afford adequate respect for employers' property rights." Pet'r Br. 47. And it argues that the protections at issue here raise "even clearer" takings concerns than California's regulation allowing off-site union organizers to take access to employer property. Pet'r Br. 48; *see also* Buckeye Institute Amicus Br. 17-18 (arguing a *per se* taking occurred). This is wrong. While this Court concluded that the regulation at issue in *Cedar Point* was a *per se* taking because it stripped away employers' right to exclude organizers from their property, the strike protections at issue in this case do not permit the physical invasion of company land or complete elimination of employers' real property value. Instead, they merely provide that employees' right to strike can still be protected, even if a strike causes some incidental economic harms to the employer because the employer was unprepared to continue operations and perishable products were therefore rendered unfit for their intended sale. This is not a taking.

First, the workers' protected work stoppage did not physically appropriate or invade employer property, unlike regulations found to be physical takings such as requiring landlords to allow the permanent placement of cable facilities in their apartment buildings, *Loretto*, 458 U.S. at 435-40, or requiring employers to allow

non-employee union organizers access to their property regardless of necessity, *Cedar Point*, 141 S. Ct. at 2069. Significantly, this Court explained in *Fansteel* that NLRA protections do not "invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property." 306 U.S. at 255 (holding that strikers' multi-day occupation of company buildings resulting in battles with sheriff's deputies was unprotected). That means that conduct by striking workers who, for example, occupy their workplaces in a sit-down strike or burn down facilities is not protected or "arguably protected" by the Act, and state law claims regarding such activity would not be preempted by *Garmon*.

But that is not what happened here. Far from occupying or destroying employer property, employees "immediately and suddenly ceas[ed] all concrete delivery activity work, and abandon[ed] or discharg[ed] at the Glacier facilities the batched concrete under their control." J.A. 12-13.[2] Petitioner notes that *Cedar Point*'s dissenting justices "recognized that a taking occurs when 'the right[] to possess, use and dispose of" property is "effectively destroy[ed]." Pet'r Br. 48 (quoting *Cedar Point*, 141 S. Ct. at 2084 (Breyer, J., dissenting)). But this is irrelevant to the present case, where Glacier physically "possessed" its property, could have

[2] When considering whether NLRA preemption is appropriate, "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 292 (1971) (explaining that preemption was warranted over a state law claim framed as a "breach of contract rather than an unfair labor practice"). As such, the underlying alleged conduct is relevant to the *Garmon* analysis, regardless of Glacier's framing that it seeks damages "for the initiation of destruction of property by the Union," not "for strike activity," J.A. 49.

"used" the property had it been prepared to respond to a strike, and indeed actually "disposed" of the concrete at issue.

As such, this case is distinguishable from *Rockford Redi-Mix Inc. v. Teamsters Local 325*, where an Illinois state court held that *Garmon* preemption did not apply. 551 N.E.2d 1333, 1338 (Ill. App. Ct. 1990). There, a union officer informed an employer that drivers' "trucks were parked down the road and that the drivers would not return unless he signed the union contract." *Id.* at 1335. The drivers eventually left their trucks off-site "with the ignitions off, drums stopped," and the employer was forced to launch "a search . . . for the missing trucks." *Id.* Once the trucks were found, their engines were cold, and their cement had hardened in their drums, damaging several trucks. *Id.* at 1336. Unlike Glacier, this employer lacked the ability to possess, use, and dispose of its concrete because its employees physically took employer property from its possession.

Second, a total regulatory taking did not occur because Glacier's entire economic interest or value in its real property has not been eliminated. This Court has held that a *per se* taking exists when a regulation "denies *all* economically beneficial or productive use of *land*." *Lucas*, 505 U.S. at 1015 (emphasis added); *id.* at 1017 (suggesting that "*total deprivation* of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (emphasis added)); *see also Murr*, 137 S. Ct. at 1944 (explaining that in determining whether *all* economically beneficial use of land is denied, courts must look at the entire property, rather than "divid[ing] a single parcel into discrete segments and attempt[ing] to determine whether rights in a particular segment have been entirely abrogated" (internal quotation marks omitted)); *Tahoe-*

Sierra, 535 U.S. at 331 ("[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question" (internal quotation marks omitted)).

Glacier has asserted no such destruction of its real property value—and it cannot. None of its real property was taken. This alone shows no total taking occurred: *Lucas* limits its *per se* rule to real property, and this Court has never applied it to personal property. As this Court explained in *Horne*, "*Lucas* recognized that while an owner of personal property 'ought to be aware of the possibility that new regulation might even render his property economically worthless,' such an 'implied limitation' was not reasonable in the case of land." 576 U.S. at 361 (quoting *Lucas*, 505 U.S. at 1027-28). Indeed, in *Andrus v. Allard,* this Court concluded that completely prohibiting the sale of products from protected birds, including those from already-killed birds, did not constitute a taking. 444 U.S. 51, 66 (1979). *Lucas* therefore suggests "different treatment of real and personal property in a regulatory case," unlike in a physical taking case. *Horne*, 576 U.S. at 361; *see also Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 365-66 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2595 (2021) (holding that *per se* total regulatory takings do not apply equally to real and personal property).

But even assuming—contrary to *Lucas*—that a *per se* total taking of personal property can occur, preemption of Petitioner's state law tort claims still not would result in a taking here. *Lucas* holds that a total taking occurs when regulations force someone to "leave his property economically idle." 505 U.S. at 1019. This is

not the case under the NLRA scheme. Strikes are economic warfare, and federal labor law grants employers economic weapons of their own that they can use to continue operations. For example, they can choose to lock out their workers and operate using temporary replacement labor to gain leverage for negotiations. *NLRB v. Brown*, 380 U.S. 278, 283, 290 (1965) (holding lawful store owners' lockout and use of temporary replacement workers in part "to save their considerable stock of perishable food produce"). And if a strike occurs, employers can lawfully continue operations using replacement workers. *See American Baptist Homes of the West*, 364 N.L.R.B. No. 13, at 3-7 (2016). If an employer fails to prepare for a strike and is unable to sell its perishable goods as originally intended after a strike occurs, the employer's inability to recover the value of such goods does not render the NLRA's regulatory scheme a total taking.

And third, *Cedar Point* was grounded in the importance of the "right to exclude" individuals from property. The challenged regulation in that case did not set rules on what *employees* already present on employer property could do; it forced the employer to permit *outsiders* on to their property that was otherwise closed to the public. 141 S. Ct. at 2077. Its reasoning applies no further. Regulations granting labor protections to employees who voluntarily relinquish employer property and go on strike—like labor protections for employee conduct on employer grounds—do not raise the same Takings Clause concerns, just as "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Id.*; *cf. Yee v. City of Escondido*, 503 U.S. 519, 526-32 (1992) (holding

that the combination of mobile home eviction protections and a rent control ordinance was not a physical taking because "tenants were invited by petitioners, not forced upon them by the government"); *FCC v. Florida Power Corp.*, 480 U.S. 245, 250-53 (1987) (holding that a government order reducing rents for cables on utility poles was not a physical taking and noting "the unambiguous distinction between a commercial lessee and an interloper with a government license"). To hold otherwise could place countless other workplace protections at risk by transforming, for example, laws barring employers from firing employees because of their race or because of whistle-blowing activity into *per se* takings, under the theory that the employer is being forbidden from enforcing a right to exclude certain individuals from his property.

Because the NLRA's strike protections do not extend to occupation of employer premises or violence against employer property, they are nothing like the actions this Court has concluded might amount to takings *per se*. Protecting employees' right to withhold their labor even when this results in perishable products being made unavailable for sale does not constitute a taking. The challenged protection and preemption scheme neither authorizes a physical occupation of employer property, nor eliminates entirely the value of an employer's real property. *Lucas*, 505 U.S. at 1015.

* * *

In short, the text and history of the Takings Clause demonstrate that it was designed to apply only to actual physical appropriations of private property. Although this Court has recognized that the Clause also covers regulations that are tantamount to a physical appropriation because they effect a physical invasion

of property or render the entirety of someone's real property valueless, *Lucas*, 505 U.S. at 1015, Glacier is wrong to claim that a *per se* taking is implicated in this case. The NLRA's protection of employees' right to strike, even when withholding labor results in product loss, and associated preemption of certain state law claims does not effect such a taking, and constitutional avoidance principles have no role to play here.

CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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