*National Labor Relations Act — Administrative Law — Preemption — Primary Jurisdiction* — Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174

Under the long-standing doctrine of primary jurisdiction, courts temporarily abstain from resolving certain issues that an agency, entrusted by Congress to decide the question in the first instance, has yet to address.[1] In *San Diego Building Trades Council v. Garmon*,[2] the Supreme Court clarified the National Labor Relations Board's primary jurisdiction to decide labor disputes,[3] holding that "state jurisdiction must yield" to the Board when conduct that the state appears to regulate "is arguably subject to § 7 or § 8" of the National Labor Relations Act[4] (NLRA).[5] Last Term, in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*,[6] the Supreme Court held that *Garmon* did not strip Washington courts of jurisdiction over Glacier's tort claims for concrete lost during a strike. The Court concluded that, according to the facts alleged in Glacier's complaint, the strike was clearly unprotected under section 7 because the Union failed to take reasonable precautions to protect Glacier's equipment.[7] Although the majority's deeply fact-specific decision left *Garmon* intact, it called the doctrine "unusual,"[8] and two concurring Justices propounded its reconsideration.[9] *Glacier* thus left the sixty-four-year-old doctrine with an uncertain future. But, rather than being overruled, *Garmon* should be justified as the combined application of two well-established doctrines: conflict preemption and primary jurisdiction.

Glacier Northwest, Inc. sells concrete in Washington.[10] It is able to

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[1] *See, e.g.*, United States v. W. Pac. R.R. Co., 352 U.S. 59, 63–64 (1956); Reiter v. Cooper, 507 U.S. 258, 268 (1993); Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 673–74 (2003) (Breyer, J., concurring in part and concurring in the judgment); Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61, 72 (1st Cir. 2021); Fairless Energy, LLC v. Fed. Energy Regul. Comm'n, No. 21-1195, 2023 WL 5156846, at *4 (D.C. Cir. Aug. 11, 2023).

[2] 359 U.S. 236 (1959).

[3] *See* Diana R.H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 542 & n.6 (2017); Brief of Amici Curiae Administrative Law, Constitutional Law, and Federal Courts Professors Supporting Respondent at 8–15, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404 (2023) (No. 21-1449).

[4] 29 U.S.C. §§ 151–169.

[5] *Garmon*, 359 U.S. at 244–45; 29 U.S.C. §§ 157–158.

[6] 143 S. Ct. 1404.

[7] *Id.* at 1414. Specifically, the Union "*prompted the creation*" of the perishable concrete "by reporting for duty and pretending as if they would deliver [it]." *Id.*

[8] *Id.* at 1410.

[9] *See id.* at 1417 (Thomas, J., concurring in the judgment).

[10] Order Consolidating Cases, Consolidated Complaint and Notice of Hearing at 2, Glacier Nw., Inc., No. 19-CA-203068 (N.L.R.B. Jan. 31, 2022) [hereinafter Consolidated Complaint]. Because Congress has entrusted the Board — not courts — with primary factfinding authority in labor disputes, *see Glacier*, 143 S. Ct. at 1426 (Jackson, J., dissenting); *cf.* Far E. Conf. v. United States, 342 U.S. 570, 574 (1952), this comment relays the facts as they were determined through the Board's detailed investigation. *See generally* Consolidated Complaint, *supra*.

do so through the work of its truck drivers, who are represented in King County by Teamsters Union Local 174.[11] On July 22, 2017, amidst negotiations over a new collective bargaining agreement, Glacier's drivers authorized a strike.[12] Although Glacier was aware that its drivers had voted to strike, the company did little to prepare.[13] Then, in the early morning of August 11, still with no contract in hand, Glacier's truck drivers stopped working.[14] Drivers returned their trucks to their respective storage yards, asked for directions about what to do with the concrete, and complied with managers' instructions.[15] No trucks were damaged.[16] After Glacier disciplined several "of its employees . . . for leaving their trucks" during the strike,[17] the Union filed an unfair labor practice (ULP) charge with the Board against Glacier for unlawfully retaliating against drivers who participated in the strike.[18]

On December 4, 2017, Glacier filed several tort claims against the Union in King County Superior Court in Washington, alleging that the Union and its members deliberately destroyed Glacier's concrete and failed to take reasonable precautions to avoid damage to Glacier's trucks,[19] claiming that nine drivers "abandoned their trucks with no notice."[20] The trial court dismissed Glacier's property-damage claims as preempted under *Garmon*.[21] The Washington Court of Appeals reversed the dismissal,[22] noting the Board's clear precedent that "workers who fail to take reasonable precautions to prevent the destruction of an employer's plant, equipment, or products before engaging in a work stoppage" fall outside of the Act's protections.[23] Thus, given Glacier's allegations, including that the Union and its members "consciously acted

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[11] Counsel for the General Counsel's Brief to the Administrative Law Judge at 1, 12, *Glacier*, No. 19-CA-203068 (May 26, 2023) [hereinafter GC Brief].

[12] *Id.*

[13] *See id.* at 12–14.

[14] Consolidated Complaint, *supra* note 10, at 3; GC Brief, *supra* note 11, at 16.

[15] GC Brief, *supra* note 11, at 27, 34, 68. Those instructions were not always polite. In one case, a driver returned his truck, got out, and told the superintendent that his truck had concrete in it. *Id.* at 23–24. The superintendent replied, "get the fuck out of here." *Id.* at 24.

[16] *Id.* at 36.

[17] Consolidated Complaint, *supra* note 10, at 4. Glacier issued these disciplines without first giving disciplined drivers a chance to give their own account of what happened, as the company had previously done before taking disciplinary action. GC Brief, *supra* note 11, at 45, 52.

[18] Signed Amended Charge Against Employer at 1, *Glacier*, No. 19-CA-203068 (Sept. 6, 2017).

[19] Complaint for Damages at 7, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, No. 17-2-31194-4 (Wash. Super. Ct. filed Dec. 4, 2017). Glacier also sued the Union for negligent misrepresentation, fraudulent misrepresentation, and intentional interference with contract arising from statements allegedly made by the Union's Secretary Treasurer assuring Glacier that its drivers would be reporting to a mat pour on the morning of August 19. *See id.* at 17–19.

[20] Joint Appendix at 72, *Glacier*, 143 S. Ct. 1404 (No. 21-1449).

[21] *See* Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 475 P.3d 1025, 1031–32 (Wash. Ct. App. 2020). However, the trial court refused to dismiss the misrepresentation claims arising from the mat pour incident. *Id.* at 1032.

[22] *Id.* at 1038.

[23] *Id.* at 1034.

together . . . to sabotage, ruin and destroy Glacier's batched concrete," the Court of Appeals concluded that Glacier had pleaded a claim alleging conduct that was not arguably protected by the NLRA.[24] The Washington Supreme Court reversed again,[25] noting that the Board traditionally balanced its "reasonable precautions" principle against another principle: that "economic harm may be inflicted through a strike as a legitimate bargaining tactic."[26] And the Board could plausibly find the drivers' actions protected on the basis that "the concrete loss was incidental damage given the perishable nature of the concrete."[27] The strike was therefore "at least arguably protected" by the NLRA.[28]

Meanwhile, the Board's local Regional Director concluded his investigation and issued a Board complaint against Glacier on behalf of the General Counsel's office.[29] An administrative law judge (ALJ) concluded that the complaint "now independently establishes that the truck drivers' conduct was at least arguably protected" under *Garmon*.[30]

Less than a week after the parties submitted their post-hearing briefs to the ALJ,[31] the United States Supreme Court reversed the Washington Supreme Court's decision,[32] concluding that the latter "erred in dismissing Glacier's tort claims as preempted on the pleadings."[33] Writing for the Court, Justice Barrett[34] explained that under *Garmon*, Glacier's tort claims would be preempted only if the Union had presented "'enough evidence to enable the court to find that' the NLRA arguably protects the drivers' conduct."[35] But, based on the facts alleged in Glacier's

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[24] *Id.* at 1035 (omission in original).

[25] Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 500 P.3d 119, 123 (Wash. 2021).

[26] *Id.* at 131, 133.

[27] *Id.* at 133.

[28] *Id.* at 134.

[29] *See* Consolidated Complaint, *supra* note 10, at 1. The complaint alleged that Glacier violated section 8 by unlawfully discharging drivers for the exercise of their section 7 rights and by filing a baseless and retaliatory lawsuit against the Union in state court. *Id.* at 3–5. After the U.S. Supreme Court granted certiorari to review the Washington Supreme Court's decision, Glacier moved the Board to "stay the case and hold it in abeyance pending" the Supreme Court's decision. Glacier's Motion to Postpone Hearing at 1, Glacier Nw., Inc., No. 19-CA-203068 (N.L.R.B. Jan. 5, 2023). An administrative law judge denied Glacier's request, concluding that the Supreme Court's assessment of "the adequacy of [Glacier]'s state-court complaint will have little bearing on whether that complaint must nonetheless fall when assessed in light of a fully developed evidentiary record" before the Board. Order Denying Respondent's Motion for Postponement of Hearing at 6, *Glacier*, No. 19-CA-203068 (Jan. 11, 2023).

[30] Order Denying Respondent's Motion for Postponement of Hearing, *supra* note 29, at 7.

[31] *See Glacier Northwest, Inc. d/b/a CalPortland*, NLRB, https://www.nlrb.gov/case/19-CA-203068 [https://perma.cc/26XF-9RCN].

[32] *Glacier*, 143 S. Ct. at 1410.

[33] *Id.* at 1414.

[34] Justice Barrett was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Kavanaugh.

[35] *Glacier*, 143 S. Ct. at 1413 (quoting Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 395 (1986)).

complaint, the Union could not make such a showing.[36]

To show that the work stoppage was protected under the Board's undisputed standard, the Union had to demonstrate that it had taken "'reasonable precautions' to protect [Glacier]'s property from foreseeable, aggravated, and imminent danger" caused by the strike.[37] But Glacier alleged that nine drivers "abandoned their fully loaded trucks without telling anyone," that the Union failed to "direct its drivers to follow Glacier's instructions to facilitate a safe transfer of equipment," and that "the Union executed the strike in a manner designed to compromise the safety of Glacier's trucks and destroy its concrete" — all notwithstanding the Union's knowledge of the potential consequences for Glacier's trucks and concrete arising from these decisions.[38] Thus, "accepting the complaint's allegations as true," the Union's conduct was not arguably protected by the Act.[39]

Justice Barrett distinguished the work stoppage alleged in Glacier's complaint from those simply involving the spoilage of perishable products, which the Board has routinely found protected.[40] "[B]y reporting for duty and pretending as if they would deliver the concrete, the drivers *prompted the creation* of the perishable product."[41] Justice Barrett also conceded that the strike was not unprotected by mere virtue of its timing, or because of the Union's failure to give Glacier notice of the strike, but stated that these were nonetheless "relevant considerations."[42] Finally, Justice Barrett declined to address "the significance, if any, of the Board's complaint with respect to *Garmon* preemption" given that the courts below had not yet had a chance to address it.[43]

Justice Alito, joined by Justices Thomas and Gorsuch, concurred in the judgment.[44] For Justice Alito, "[n]othing more [was] needed to resolve this case"[45] than to recognize that "*Garmon* preemption does not prevent States from imposing liability on employees who intentionally destroy their employer's property,"[46] as alleged in Glacier's complaint.[47] Justice Alito also questioned the theory that the Board's complaint should per se result in *Garmon* preemption,[48] writing that "[i]f the state

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[36] *See id.* at 1414.

[37] *Id.* at 1413 (quoting Bethany Med. Ctr., 328 N.L.R.B. 1094, 1094 (1999)).

[38] *Id.* at 1413–14.

[39] *See id.* at 1414.

[40] *Id.* at 1414–15.

[41] *Id.* at 1414. And, by waiting until the trucks were loaded with mixed concrete before striking, the drivers "not only destroyed the concrete but also put Glacier's trucks in harm's way." *Id.* at 1414–15.

[42] *Id.* at 1415 (citing Int'l Protective Servs., Inc., 339 N.L.R.B. 701, 702–03 (2003)).

[43] *Id.* n.3.

[44] *Id.* at 1418 (Alito, J., concurring in the judgment).

[45] *Id.*

[46] *Id.*

[47] *See id.*

[48] *See infra* notes 56–58 and accompanying text.

courts on remand dismiss this case on that ground, the decision . . . would be a good candidate for a quick return trip" to the Supreme Court.[49]

Justice Thomas also filed a separate concurrence, joined by Justice Gorsuch.[50] His opinion "emphasize[d] the oddity of *Garmon*'s broad pre-emption regime"[51] and suggested that in an appropriate case, *Garmon* should be reconsidered — noting "that any proper pre-emption inquiry must focus on the NLRA's text and ask whether federal law and state law 'are in logical contradiction.'"[52]

Justice Jackson dissented.[53] She began with a reminder that "[t]he right to strike is fundamental to American labor law" and "enshrined" in the NLRA.[54] And, to define the contours of such a right, Congress specifically entrusted the Board as "an agency with specialized expertise" to "develop and enforce national labor law in a uniform manner, through case-by-case adjudication."[55] Following from this premise, Justice Jackson noted that the Board's complaint "represents the General Counsel's conclusion — reached after an extensive independent investigation . . . — that the Union's claim that its strike was protected 'appears to have merit.'"[56] "A court presented with a General Counsel complaint should therefore find *Garmon* inherently satisfied,"[57] and "all courts — including this one — should stand down."[58]

Justice Jackson also questioned the majority's application of Board precedents to the alleged facts.[59] For drivers at a concrete company responsible for delivering concrete, "it is unremarkable" — and definitely not a sign of "aggravated or even untoward" conduct — "that [they] struck at a time when there was concrete in the trucks."[60] In contending otherwise, "Glacier seeks . . . to shift the duty of protecting an employer's property from damage or loss incident to a strike onto the striking workers."[61] But, Justice Jackson proclaimed, "[w]orkers are not indentured servants, bound to continue laboring until any planned work

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49 *Glacier*, 143 S. Ct. at 1418 n.1 (Alito, J., concurring in the judgment).

50 *Id.* at 1416 (Thomas, J., concurring in the judgment).

51 *Id.*

52 *Id.* at 1417 (quoting Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1681 (2019) (Thomas, J., concurring)).

53 *Id.* at 1418 (Jackson, J., dissenting).

54 *Id.*

55 *Id.* at 1419; *see also id.* at 1420–21.

56 *Id.* at 1423 (quoting 29 C.F.R. § 101.8 (1987)).

57 *Id.* Justice Jackson also believed that the majority erred by declining to address this argument, concluding that to the extent the Court is concerned with being "a court of review, not of first view," *id.* at 1415 n.3 (majority opinion) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)), that "same observation . . . should have likewise led it to decline to intrude into this labor dispute while it is pending before the Board," *id.* at 1424 (Jackson, J., dissenting).

58 *Id.* at 1424 (Jackson, J., dissenting).

59 *Id.* at 1427.

60 *Id.* at 1432.

61 *Id.* at 1432–33.

stoppage would be as painless as possible for their master. They are employees whose collective and peaceful decision to withhold their labor is protected by the NLRA even if economic injury results."[62]

*Glacier* narrowly held that "[t]he state court . . . erred in dismissing Glacier's tort claims as preempted" based on the particular facts alleged in Glacier's complaint.[63] Yet, by framing *Garmon* as unusual without investigating its origins, *Glacier* leaves *Garmon* on shaky ground.[64] In fact, *Garmon* is no more than an ordinary application of two doctrines: primary jurisdiction and preemption. By combining them into one formulation, *Garmon* may be unusual in form — but is not in substance.

The primary jurisdiction doctrine emanates from the Court's 1907 decision in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co*.[65] The Interstate Commerce Act of 1887[66] (ICA) required common carriers to establish "just and reasonable" rates and to file them with the Interstate Commerce Commission.[67] If the Commission determined that a carrier's rates were unreasonable, it could supplant them with its own maximum rates.[68] A shipper filed a common law suit for damages against a carrier, alleging that the carrier "coercively collected . . . freight charges in excess of a reasonable" rate from the shipper.[69] But because the Commission had not determined that the rate in question was unreasonable, *Abilene* held that courts must abstain from the suit.[70]

To be sure, the ICA did not abrogate the common law remedy — but in deciding whether to grant that remedy, the court needed to first know whether the rate was reasonable.[71] And the ICA "endowed" the Commission alone "with plenary administrative power" to investigate carriers and determine the reasonableness of their rates.[72] Otherwise, "a uniform standard of rates . . . would be impossible."[73] And as later cases noted, affording an agency primary jurisdiction capitalizes on the agency's "expert and specialized knowledge."[74]

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[62] *Id.* at 1433.

[63] *Id.* at 1414 (majority opinion).

[64] *See* Benjamin Sachs, Glacier *and Justice Thomas' Preemption Breadcrumbs*, ONLABOR (June 2, 2023), https://onlabor.org/glacier-and-justice-thomas-labor-preemption-breadcrumbs [https://perma.cc/2YT4-3VGL].

[65] 204 U.S. 426 (1907).

[66] Ch. 104, 24 Stat. 379 (1887) (repealed 1994).

[67] *Abilene*, 204 U.S. at 437–38.

[68] An Act to Regulate Commerce, ch. 3591, § 4, 34 Stat. 584, 589 (1906).

[69] *See Abilene*, 204 U.S. at 430, 432 (quoting Abilene Cotton Oil Co. v. Texas & Pac. Ry. Co., 85 S.W. 1052, 1053 (Tex. Civ. App. 1905)).

[70] *Id.* at 448.

[71] *See id.* at 446–47.

[72] *See id.* at 438.

[73] *Id.* at 440. "[T]he established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." *Id.* at 441.

[74] United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956). Courts have no reason to "refer[]"

Thus, in enacting the ICA, Congress created a logical order of decisionmaking authority over disputes arising under the Act: The agency first decides the disputed question. Then, courts step in. Courts can therefore entertain a suit only if there is no disputed ICA issue — either because the agency has already decided the rate's reasonableness, or because it could not even arguably find that the rate was reasonable.[75]

The same is true under the NLRA. The Court first applied the principles of primary jurisdiction to federal labor law in *Garner v. Teamsters Local Union No. 776*.[76] *Garner* invoked *Abilene*,[77] analogizing the NLRA's enforcement of legal rights through the administrative process to that of the ICA,[78] and held that Congress "confide[d] primary interpretation and application of [the NLRA's] rules to a . . . specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order."[79] Reasoning from these textually entrenched procedures,[80] *Garner* concluded: "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules."[81] Subsequently, in *Weber v. Anheuser-Busch, Inc.*,[82] the Court held that where conduct "may be *reasonably deemed* to come within the protection afforded by" the NLRA, "the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."[83]

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the resolution of issues that have only one arguable resolution to the primary jurisdiction of agencies, just as courts need not send to a jury questions that no reasonable juror could decide otherwise. *See* FED. R. CIV. P. 56(a); Union Pac. R.R. Co. v. Bay Area Shippers Consolidating Ass'n, 594 F.2d 1291, 1293 (9th Cir. 1979) (upholding district court's original determination of an issue susceptible to only one reasonable interpretation).

75 *See* Winters, *supra* note 3, at 542. The Supreme Court didn't use the "arguable" language in the rate-setting cases. But it noted that courts should defer claims that "require[] the resolution of issues . . . placed within the special competence of an administrative body." *W. Pac. R.R.*, 352 U.S. at 64. If a court finds that there is no way that the agency could even arguably find that the rate was reasonable, there is, by definition, no issue to resolve.

76 346 U.S. 485 (1953).

77 *Id.* at 497 n.21 (citing *Abilene*, 204 U.S. at 443–44).

78 *Id.* at 496–97.

79 *Id.* at 490.

80 Even if one were to conclude that *Garner* used a since-discredited purposivist framework to apply primary jurisdiction to the NLRA, statutory stare decisis counsels against reversal. "Congress [is] undoubtedly aware" of the Court's precedents upholding the primary jurisdiction of the Board. *Cf.* Allen v. Milligan, 143 S. Ct. 1487, 1515 (2023). "It can change that if it likes. But until and unless it does, statutory stare decisis counsels [the Court] staying the course." *Cf. id.*

81 *Garner*, 346 U.S. at 490. Those "specially designed procedures" include that, upon review of a Board's decision in a court of appeals, "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). They also provide that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *Id.*

82 348 U.S. 468 (1955).

83 *Id.* at 481 (emphasis added).

When the Supreme Court decided *Garmon*, it again emphasized the usual primary jurisdiction rationales — uniformity of federal law[84] and agency expertise[85] — and quoted at length from both *Garner*[86] and *Weber*.[87] It then clarified the relationship between courts and the NLRB arising from those decisions: because it is the Board, not the courts, that Congress has designated as the "primary tribunal[] to adjudicate" whether certain activity is protected or prohibited by section 7 or 8 of the NLRA,[88] state courts lack jurisdiction over activity that is even "*arguably* within the compass of" those provisions.[89]

Despite *Garmon*'s genesis in the doctrine of primary jurisdiction, the relationship between the two has become an enigma. In his concurrence in *Glacier*, Justice Thomas quoted from a footnote in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[90] to emphasize *Garmon*'s unusualness.[91] The *Sears* Court wrote that "[w]hile the considerations underlying *Garmon* are similar to those underlying the primary-jurisdiction doctrine," *Garmon* is different insofar as it "completely pre-empts state court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited."[92] In other words, unlike with the rate-setting cases, "jurisdiction does not return to the referring court after the issue has been litigated" by the agency.[93]

But the *Sears* footnote misleads. Consider how *Garmon* works. First, when a court is presented with a disputed question of whether conduct is covered by the NLRA, the court must yield primary jurisdiction over the dispute to the Board, just as in the rate-setting cases.[94] This flows from the text of the statute, which only provides for the initial

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[84] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241 (1959) ("The extent to which the variegated laws of the several States are displaced by a single, uniform, national rule has been a matter of frequent and recurring concern."); *id.* at 242–43 (quoting *Garner*, 346 U.S. at 490–91).

[85] *Id.* at 242 ("[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency . . . equipped with its specialized knowledge and cumulative expertise . . . .").

[86] *Id.* at 242–43 (quoting *Garner*, 346 U.S. at 490–91).

[87] *Id.* at 240 (quoting *Weber*, 348 U.S. at 480–81).

[88] *Id.* at 244.

[89] *Id.* at 246 (emphasis added).

[90] 436 U.S. 180 (1978).

[91] *Glacier*, 143 S. Ct. at 1417 (Thomas, J., concurring in the judgment) (quoting, inter alia, *Garmon*, 359 U.S. at 240–42, 244–45).

[92] *Sears*, 436 U.S. at 199 n.29.

[93] Winters, *supra* note 3, at 564.

[94] An exception to this is where one of the parties "has no acceptable method of invoking, or inducing the [other party] to invoke, the jurisdiction of the Board." *Sears*, 436 U.S. at 202; *see also id.* at 202–03. The Board does not currently provide a mechanism for determining whether given activity is protected or not outside of a ULP charge. *See id.* at 203 n.34 (quoting Int'l Longshoremen's Ass'n, Loc. 1416 v. Ariadne Shipping Co., 397 U.S. 195, 201–02 (1970) (White, J., concurring)). However, the Board could consider promulgating, by notice and comment, a procedure for issuing declaratory judgments on such matters, similar to those it currently uses to issue advisory and declaratory judgments regarding the Board's jurisdiction under 29 C.F.R. §§ 102.98 and 102.105.

adjudication of ULP disputes by the Board[95] — not by any court — and from Congress's intent to create a uniform national labor policy.[96]

After the court has yielded its jurisdiction, two things can happen. If the Board determines that the disputed activity is *not* covered by the Act, there is no preemption and state courts are free to resume jurisdiction — once again, just like any other application of primary jurisdiction doctrine.[97] If the Board determines that the activity *is* protected or prohibited, that determination becomes an authoritative interpretation of federal law, and state courts are ousted of jurisdiction under ordinary principles of conflict preemption: if the NLRA protects a certain right, it would create a "logical contradiction" for state law to attach liability to the exercise of said right.[98]

Whichever way the Board decides, the NLRA provides that "[a]ny person aggrieved by a final order of the Board" can petition a court of appeals for review of the Board's determination.[99] Thus, courts *initially* lack jurisdiction over conduct within the "penumbra[]" of the Board's "carefully insulated common law of labor relations," as Justice Thomas described it.[100] But once the Board makes its "preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed,"[101] just as in other primary jurisdiction cases,[102] courts are revested with jurisdiction to review the Board's decision — maintaining their "*ultimate* interpretative authority 'to say what the law is.'"[103] The only difference is that the NLRA textually commits exclusive review of Board decisions to the federal court of appeals[104] — not to the state or federal court that initially heard the case.

Thus, what is unusual about *Garmon* is not that it treats NLRA preemption differently, but that it takes both primary jurisdiction and preemption, as dictated by the text of the NLRA and the Supremacy Clause of the United States, and combines them into one formulation.

And the stakes of preserving the Board's primary jurisdiction are high. Without *Garmon*, Washington courts on remand could attach

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95 *See* 29 U.S.C. § 160.

96 *See Glacier*, 143 S. Ct. at 1419 (Jackson, J., dissenting) (acknowledging "Congress's judgment that an agency with specialized expertise should develop and enforce national labor law in a uniform manner, through case-by-case adjudication").

97 *See id.* at 1422. This is also true where the Board invokes section 14(c) of the NLRA, declining to exercise jurisdiction over the dispute. *See* 29 U.S.C. § 164(c).

98 *Glacier*, 143 S. Ct. at 1417 (Thomas, J., concurring in the judgment) (quoting Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1681 (2019) (Thomas, J., concurring)).

99 29 U.S.C. § 160(f).

100 *Glacier*, 143 S. Ct. at 1417 (Thomas, J., concurring in the judgment).

101 Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 498 (1958).

102 United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

103 Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (emphasis added) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

104 *See* 29 U.S.C. § 160(e)–(f). In fact, the same was true for the Federal Maritime Board in *Far East Conference v. United States*, 342 U.S. 570 (1952), which the Supreme Court held has primary jurisdiction over the lawfulness of certain rate systems, *id.* at 576–77.

liability to the Union's work stoppage before the Board finds that the strike was protected. If the Board's judgment is enforced by a court of appeals, what are courts to do? They will either have to develop complex doctrines about the retroactive invalidation of state court remedies, or else allow state courts to completely nullify the protections afforded by federal labor law.[105] Neither consequence flows from Congress.

Finally, in addition to justifying *Garmon*'s preservation, understanding the doctrine's roots in primary jurisdiction helps answer what comes next. As *Glacier* made clear, when a state court is adjudicating a state tort law claim in the absence of a General Counsel complaint, it cannot dismiss the claim under *Garmon* unless the party asserting preemption has "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on [its] interpretation."[106] But where the General Counsel has found that the employer disciplined workers for protected conduct — with the benefit of a board investigation, rather than just the facts alleged by one party's state court complaint[107] — there can be no doubt that the union's conduct is at least arguably protected.[108] If Washington courts properly defer the matter to the Board on this basis, Justices Alito, Thomas, and Gorsuch might be looking for a fourth vote for *Glacier*'s "quick return trip" to the Supreme Court.[109] If they find that vote, the Court should affirm. In so doing, the Court would be wise to clarify how *Garmon* is not so strange after all, fitting neatly into the doctrine of primary jurisdiction.[110]

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[105] *Cf.* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("[I]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." (quoting United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809))).

[106] *Glacier*, 143 S. Ct. at 1426 (Jackson, J., dissenting) (quoting Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 395 (1986)).

[107] *See* Counsel for the General Counsel's Supplemental Brief to the Administrative Law Judge at 3, Glacier Nw., Inc., No. 19-CA-203068 (N.L.R.B. June 30, 2023) (noting that "the Court's decision" in *Glacier* "was singularly premised on the limited facts alleged in [Glacier]'s state lawsuit"). For example, Glacier alleged in its state law complaint that striking drivers put its trucks in harm's way. *See supra* notes 19–20 and accompanying text. But the General Counsel found otherwise and noted many ways in which drivers affirmatively minimized any risk of harm to the trucks. GC Brief, *supra* note 11, at 67–71.

[108] *See Glacier*, 143 S. Ct. at 1423 (Jackson, J., dissenting).

[109] *Id.* at 1418 n.1 (Alito, J., concurring in the judgment).

[110] *Glacier* does not foreclose the primary jurisdiction reading of *Garmon*. On a state court motion to dismiss, before there is additional evidence inferred from the General Counsel's issuance of a complaint, considerations of comity and respect for state courts might counsel allowing those courts to proceed if the conduct, as alleged, is not even arguably protected. Allowing such claims to proceed may also discourage the other party from filing frivolous charges before the Board to delay the lawsuit. Either way, *Glacier* does not undermine the Board's primary jurisdiction. It does not allow a court to decide, in the first instance, a dispute within the Board's primary jurisdiction. All *Glacier* does is allow such disputes to get past the pleading stage in cases where it is not initially clear whether there is, under the yet-undiscovered facts, a dispute over the NLRA's coverage.