No. 92469-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WAL-MART STORES, INC.,

Plaintiff-Petitioner

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, ORGANIZATION UNITED FOR RESPECT AT WALMART and DOES 1-X,

Defendants-Respondents

RESPONDENTS' ANSWER TO MEMORANDUM OF AMICUS CURIAE WASHINGTON RETAIL ASSOCIATION

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TABLE OF CONTENTS

	Page
Argument	2
A. The appeals court narrowly held that the NLRA preempts Walmart's trespass suit because the NLRA arguably prohibited conduct at issue here.	2
B. This case is unique because companies rarely file cases with the NLRB over trespassory conduct, withdraw the case and then refile as state trespass lawsuits.	3
C. Walmart and other retailers are not without remedies; either the state trespass remedy is available, or the NLRB remedy is available, or both.	9

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge,
403 U.S. 274 (1971).....3

Constr. & Gen. Laborers' Union v. Curry,
371 U.S. 542 (1963).....5

Davis Supermarkets v. NLRB,
2 F.3d 1162 (D.C. Cir. 1993).....5

Garner v. Teamsters Local 776,
346 U.S. 485 (1953).....5

Int'l Longshoremen's Ass'n, AFL-CIO v. Davis,
476 U.S. 380 (1996).....3

Local 926, Int'l Un. of Op. Engineers v. Jones,
460 U.S. 669 (1983).....5, 7

Lumber Prod. Ind. Workers Local 1054 v. West Coast Ind. Relations Ass'n, Inc.,
775 F.2d 1042 (9th Cir. 1985).....5

Parker v. Connors Steel Co.,
855 F.2d 1510 (11th Cir. 1988).....5, 7

Penn. Nurses Ass'n v. Penn. State Educ. Ass'n,
90 F.3d 797 (3d Cir. 1996).....5

Plumbers v. Door Co.,
359 U.S. 354 (1959).....5

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959).....3, 5, 7, 8

Volentine v. Bechtel, Inc.,
27 F. Supp. 2d 728 (E.D. Tex. 1998).....5, 7

Weber v. Anheuser-Busch, Inc.,
348 U.S. 468 (1955).....5

State Cases

Beaman v. Yakima Valley Disposal, Inc.,
116 Wn.2d 697, 808 P. 2d 849 (1991).....5

Hillhaven Oakland Nursing and Rehab. Ctr. v. Health ..Care Workers Local 250,
41 Cal. App. 4th 846 (1996).....5, 6, 7, 8, 9

Hotel Employees & Rest. Employees, Local 8 v. Jensen,
51 Wn. App. 676, 754 P.2d 1277 (1988).....5

Kilb v. First Student Transp., LLC,
157 Wn. App. 280, 236 P.3d 968 (2010).....5

Federal Statutes

National Labor Relations Act.....*passim*

Other Authorities

1199 Nat'l Health & Human Service Employees Union,
339 NLRB 1059 (2003).....6

Dist. 65, RWDSU,
157 NLRB 615 (1966).....6

Donelson Packing Co.,
220 NLRB 1043 (1975).....4

GSM, Inc.
284 NLRB 174 (1987).....4

Int'l Un. of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 825,
302 NLRB 954 (1991).....9

Levitz Furniture Co.,
203 NLRB 580 (1973).....6

Teamsters Local 115,
275 NLRB 1547 (1985).....6

In its Amicus Curiae Memorandum, the Washington Retail Association mischaracterizes the narrow decision of the appeals court and ignores the aspects of Walmart's case that makes it unique.

The Association's Memorandum seeks to distract this Court from the appeals court's holding by dismantling contentions that the appeals court's decision does not embody any arguments that Respondents did not make. The appeals court did not hold that Respondents or anyone else are privileged to trespass on a retailer's property. Nor did the appeals court hold that the National Labor Relations Act ("NLRA") always preempts trespass claims when a union allegedly trespasses, or all lawsuits related to incidents over which companies also file cases with the National Labor Relations Board ("NLRB").

The court of appeals held only that where a company files a case with the NLRB arguing that the NLRA prohibits certain conduct and then files a state case alleging that the *same conduct* is a trespass, the NLRA preempts the trespass claim (unless the conduct involves violence or property damage) and Walmart conceded this by filing the NLRB case.

Thus, limited to these unique facts the appeals court's decision will not apply across the spectrum of trespass cases to allow all demonstrators to trespass or to prevent retailers from obtaining a remedy short of self-help.

Argument

A. The appeals court narrowly held that the NLRA preempts Walmart's trespass suit because the NLRA arguably prohibited conduct at issue here.

The Association ignores the key observation of the appeals court that the conduct of the Respondents' demonstrations is central to both Walmart's state case and to Walmart's NLRB case. As the appeals court held, unlike the company in *Sears Roebuck & Co. v. San Diego County Dist. Coun. of Carpenters*, Walmart did not plead a simple trespass claim objecting only to the "location" of the demonstrations; Walmart objects to conduct of the demonstrations. 190 Wn. App. 14, 354 P.3d 31 at 36, *citing* 436 U.S. 180, 185 (1978).

Because it would be unhelpful to its assertion, the Association never addresses the distinction that the appeals court drew, that unlike *Sears*, Walmart's NLRB and trespass cases are based on the *same conduct*: Respondents' demonstrations. Walmart argued that Respondents' conduct violated the NLRA, and alleges that by engaging in that conduct, Respondents exceeded their invitation and committed trespass. Consistent with *Sears*, the appeals court correctly found that Walmart's NLRB case and lawsuit were the same because they are both based on Respondents' conduct, explaining that unlike "in *Sears*, the [respondents'] conduct is central to Walmart's trespass theory and claim." "Walmart objected," the

court continued, "to the demonstrat[ions themselves], not just to the location of th[e demonstrations]." Sears argued only that "the location of the picketing was illegal but the *picketing itself* was unobjectionable.'"[1] *Id.* (emphasis added).

Lastly, as the appeals court recognized, the significance of the NLRB case Walmart filed is that by filing that case, Walmart effectively conceded that the NLRA arguably prohibits Respondents' conduct. *Id.* at 36.

B. This case is unique because companies rarely file cases with the NLRB over trespassory conduct, withdraw the case and then refile as state trespass lawsuits.

When companies desire to remove unions from their property, companies almost always file trespass lawsuits objecting to the location of the union's activity, and not lawsuits and NLRB cases, like Walmart did.[2]

Leveraging its erroneous reading of the breadth of the appeals court decision, the Association next argues that pandemonium will break loose in retail stores across Washington State, because the court of appeals has said the NLRA preempts all state trespass actions targeted at labor

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[1]To determine whether the NLRB cases and lawsuits are the same in a fundamental respect, courts focus on conduct. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 292 (1971) ("Pre-emption . . . is designed to shield the system from conflicting regulation of conduct"); *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 394-95 (1996) (as "the *Garmon* line of cases directs, the pre-emption inquiry is whether the conduct at issue was arguably . . . prohibited by the NLRA").

[2]See cases cited in footnote 1 of Respondent's Answer to Petition for Review.

demonstrations and companies will therefore have no remedy for trespassory demonstrations. *See* Mem. at 6-10. However, as described above, the appeals court held nothing of the sort. 345 P.3d at 36.

Nor did the Association correctly claim that companies "often" file NLRB cases when unions are allegedly trespassing and also "simultaneously seek relief in state court." The two cases the Association cited are distinguishable.

The injunction in *GSM, Inc.* enjoined "acts of violence." 284 NLRB 174, 176 (1987) (the case "contained allegations of rock and bottle throwing, blocking the entrances to the plant, shouting and kicking, or hitting of cars.") Similarly, *Donelson Packing Co.* involved "union misconduct and suspected union violence which gave rise to the injunction suit" and an NLRB case "related" to the union's "misconduct," including a car that "swerved" towards people and two picketers who "carr[ied] a rifle or shotgun." 220 NLRB 1043, 1049, 1050, 1062 (1975).

GSM and *Donelson Packing* are thus distinguishable because both the NLRB and courts had concurrent jurisdiction over violence, violent threats and property damage under the local interest exception to NLRA preemption.[3] (*See* Resp. Ans. to Pet. for Rev. at 13-20 (discussing local

[3]The only occasions when courts and the NLRB have concurrent jurisdiction is when cases involve violence or property damage, threats of violence, malicious libel or intentional infliction of emotional distress involving outrageous conduct. *Sears*, 436 U.S.

interest exception)). *See Hillhaven Oakland Nursing and Rehab. Ctr. v. Health Care Workers Local 250*, 41 Cal. App. 4th 846, 859-60 (1996) (even though the NLRA preempted the plaintiff's peaceful trespass lawsuit, the court retained jurisdiction to "intervene in the event that conduct involving actual violence, serious threats of violence, or obstruction of access, should occur in the future").

Thus, even if in some future case the NLRB and state cases are based on the same conduct, the NLRA would not preempt any state restrictions on conduct that involves any of the parade of horribles the Association raises such as violence, violent threats, property damage or mass blocking.[4]

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at 195. Every other case finding that the NLRA preempts lawsuits holds that the NLRB's jurisdiction is exclusive. *See, for example, Beaman v. Yakima Valley Disposal, Inc.*, 116 Wn.2d 697, 808 P. 2d 849 (1991); *Kilb v. First Student Transp., LLC*, 157 Wn. App. 280, 236 P.3d 968 (2010) (holding that former supervisor's wrongful discharge claim was preempted); *Hotel Employees & Rest. Employees, Local 8 v. Jensen*, 51 Wn. App. 676, 754 P.2d 1277 (1988); *Local 926, Int'l Un. of Op. Engineers v. Jones*, 460 U.S. 669, 676 (1983); *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *Plumbers v. Door Co.*, 359 U.S. 354 (1959); *Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542 (1963); *Lumber Prod. Ind. Workers Local 1054 v. West Coast Ind. Relations Ass'n, Inc.*, 775 F.2d 1042, 1048 (9th Cir. 1985); *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1178-79 (D.C. Cir. 1993); *Penn. Nurses Ass'n v. Penn. State Educ. Ass'n*, 90 F.3d 797, 805 (3d Cir. 1996); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1518 (11th Cir. 1988); *also Volentine v. Bechtel, Inc.*, 27 F. Supp. 2d 728, 734 (E.D. Tex. 1998), *aff'd*, 209 F.3d 719 (5th Cir. 2000); *Hillhaven*, 41 Cal. App. 4th 846 (1996).

[4]The appeals court correctly held that the local interest exception does not apply because Walmart's "[d]eclarations ... detailing the UFCW's conduct inside and near Walmart's stores did not ... document actual violence, threats of violence, or property damage." 354 F.3d at 37. Indeed, over the thousands of demonstrations Respondents have held at Walmart stores since 2010, there has not been one incident of violence or violent threat, and no participant has been charged with any crime. If there had, Walmart would have

The Association also incorrectly claims (at 8) that companies file "numerous" NLRB cases "involving trespassing union agents," citing two.[5] A search of more than 700 NLRB cases involving potential "trespass" revealed only five that a company filed against a union (case or docket numbers using the letters "CB"): the two the Association cited, and three cases Walmart cited (distinguished in Respondents' opposition to the petition for review).[6] The Association misleadingly asserts (at 5 & n.4) that here were "139 ULPs filed by Washington companies alone," relying on the designation as "CB" cases on the NLRB's website. There is, however, no indication that companies filed those ULPs or that those cases involved trespass.

We know of only two cases where a company filed an NLRB case and a trespass lawsuit that sought to enjoin peaceful conduct: *Walmart* and *Hillhaven*, 41 Cal. App. 4th 846 (1996). However, the Association asserts (at 8, n. 8) that *Hillhaven* is unlike this case and "is truly a one-of-a-kind case." In this, the Association is right and it is wrong. It is wrong because

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highlighted the incident, rather than solely speculating the possibility of violence in the future.

[5]*Teamsters Local 115* involved violence and some unidentified state court case. 275 NLRB 1547, 1549-50 (1985) ("Company officials were slapped, punched, kicked, spat upon, pelted with rocks" and "[e]mployees were repeatedly shoved, punched, threatened"). The company in *Metro. Reg'l Council of Carpenters* could not file a trespass lawsuit because it was a contractor and not the landowner. 2011 WL 1924130.

[6]*Dist. 65, RWDSU*, 157 NLRB 615 (1966); *Levitz Furniture Co.*, 203 NLRB 580 (1973); *1199 Nat'l Health & Human Service Employees Union*, 339 NLRB 1059 (2003).

Hillhaven is very much like Walmart's case. It is right because *Hillhaven* is a unique case, which has only this case as a companion.

As here, the activity involved numerous people – in *Hillhaven* 30 – who "invaded" an employer's premises "without permission and roamed the [premises] leafleting and talking to workers and residents until dispersed by the police, notwithstanding . . . repeated demands that they leave." 41 Cal. App. 4th at 850-51, 852. In response, the employer – like Walmart – filed an NLRB case arguing that this conduct violated § 8(b)(1)(A). *Id.* at 852. The employer – like Walmart – also filed a trespass lawsuit. *Id.* Like the appeals court here, the California appeals court held in *Hillhaven* that the NLRA preempted the lawsuit because the conduct in the lawsuit was sufficiently similar to that of the NLRB case, observing that "although the issues presented to the Board and the superior court [were] not 'identical' . . . neither [were] they 'completely unrelated.'"[7] *Id.* at 859-60.

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[7]Respondents do not contest that subject matter jurisdiction does not depend on a party's consent, as the Association asserts. However, a party by filing a claim with a tribunal has acknowledged its jurisdiction. Moreover, because the test for NLRA preemption is whether the NLRA arguably prohibits conduct at issue in a lawsuit, it does not make any difference if a company settles its NLRB case – like the *Hillhaven* employer – or withdraws its case – like Walmart. For example, in *Jones*, the U.S. Supreme Court rejected the argument that the NLRB's dismissal of the plaintiff's NLRB case "cleared the way for a state cause of action." 460 U.S. at 680. The Court explained that not only did the plaintiff fail to appeal the dismissal, "the *Garmon* pre-emption doctrine [applies to] matters arguably within the reach" of the NLRA. *Jones*, 460 U.S. at 680 (emphasis added). *See also Parker v. Connors Steel Co.*, 855 F.2d 1510, 1517 (11th Cir. 1988) (dismissed charge); *Volentine*, 27 F.Supp.2d at 736 (when NLRB dismissed plaintiff's

The Association fails to distinguish *Hillhaven* on the ground that there the parties' contract contained a provision giving the union access to the property. That fact was irrelevant to the holding under *Garmon* that the NLRA preempted the employer's trespass claim, because the employer's NLRB case and lawsuit were the same in a fundamental respect, since conduct at issue in the employer's NLRB and trespass cases was not "completely unrelated," 41 Cal.App.4th at 859-60, and because the local interest exception did not apply.[8] *Id.*, at 858. Thus, even though the superior court's injunction conflicted with a collective bargaining agreement, under another type of NLRA preemption ("§301 preemption"), that does not affect the court's holding that *Garmon/Sears* "arguably prohibited" preemption also applied. *Id.*, at 861, *citing* 29 U.S.C. § 185.

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case it "d[id] *not* state that the conduct [was not] *arguably* prohibited by the NLRA"). Thus, even the "failure of the NLRB to assume jurisdiction d[oes] not leave the states free to regulate activities that they would otherwise be precluded from regulating." *Garmon*, 359 U.S. at 246.

[8]The Association's cite (Mem. at 7-8) to *Hillhaven* for the proposition that the local interest exception applies "even though the same conduct might constitute a violation of the NLRA" is unremarkable. First, the local interest exception applies only when the conduct is similar. If the conduct were not similar, arguably prohibited preemption could not apply. Second, although the *Hillhaven* court found that the employer's NLRB and trespass case were based on the same conduct, the court nevertheless held that the "actions of [the union] d[id] not approach the types of conduct found to warrant application of the local interest exception." 41 Cal.App.4th at 858. This is because the court recognized that the "local interest exception [is] founded upon the 'compelling state . . . interest in the maintenance of domestic peace' and applied to 'conduct marked by violence and imminent threats to the public order.'" 41 Cal.App.4th at 854, *quoting Garmon*, 359 U.S. at 247. And, the court found that the employer's evidence "d[id] not . . . support the allegations of actual violence or threats of violence." 41 Cal.App.4th at 858.

The Association is correct that *Hillhaven* is a one-of-a-kind, or, really, a one of two-of-a-kind, case when Walmart's case is included. This demonstrates why Walmart's case is also unique and unlikely to arise again in the future. That is, as in past labor disputes, companies are unlikely to file an NLRB case arguing that conduct violates the NLRA and also file a lawsuit alleging that that same conduct also constitutes trespass. Rather, companies will do what the companies did in the cases cited in footnote 2 above and file lawsuits.

C. Walmart and other retailers are not without remedies; either the state trespass remedy is available, or the NLRB remedy is available, or both.

The Association's claim that the NLRB never provides remedies for "trespass" is wrong. Despite the Association's assertion, the NLRB has ordered unions to cease and desist "trespassing." *Int'l Un. of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 825*, 302 NLRB 954, (1991) ("ORDER" The union "shall 1. Cease and desist from . . . (f) Trespassing onto [the company's] facility").

Moreover, the Association does not contest that the NLRB has the authority to order Respondents to cease holding demonstrations at Walmart stores. *See* Mem. at 5 and 8. Walmart did the same here. As the appeals court found, Walmart's NLRB case sought an order directing Respondents "to stop the 'planning, orchestrating, and conducting a series

of unauthorized and blatantly trespassory in-store mass demonstrations, invasive "flash mobs," and other confrontational group activities at numerous facilities nationwide.'"[9] 190 Wn. App. at 24. Thus, Walmart does have a remedy alternative to a trespass injunction: "[u]nlike in *Sears*, Walmart is not without a legal remedy and could ... file another NLRB charge."[10] 190 Wn.App. at 27.

RESPECTFULLY SUBMITTED this 8th day of March, 2016.

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[9] Putting aside whether Walmart genuinely sought to protect its workers' rights by filing its NLRB case, although the NLRA section that Walmart argued Respondents violated technically concerns worker rights, the remedy would have protected Walmart's property rights: an order prohibiting Respondents from holding any demonstrations at its stores.

[10] So Walmart is not in the position of the company in *Sears* who would have been "den[ied] access to any forum in which to litigate either the trespass issue or the [NLRA] issue" if the U.S. Supreme Court held that the NLRA preempted the trespass issue. 436 U.S. at 206-07.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2016, I caused the foregoing Respondents' Answer to Memorandum of Amicus Curiae Washington Retail Association to be filed with the Washington State Supreme Court by emailing to: Supreme@courts.wa.gov, and copies of the same to be emailed and deposited in the U.S. mail addressed to:

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Good afternoon. Attached for filing with the Washington State Supreme Court is Respondents' Answer to Memorandum of Amicus Curiae Washington Retail Association in Wal-Mart v. United Food and Commercial Workers International Union et al., Case No. 92469-4.

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