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 PETITION FOR REVIEW

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Introduction

The Court should deny Walmart's petition because the Court of Appeals decision correctly and thoughtfully applied federal law.

Argument

I. Review is not warranted because the unique facts here are unlikely to occur again and because the court of appeals correctly applied federal precedent in holding that federal law preempted Walmart's trespass suit.

A. This case does not raise an issue of substantial public interest.

The Court should deny Walmart's petition because the facts here are unique and unlikely to occur again and because the appeals court correctly applied established federal law governing National Labor Relations Act ("NLRA") preemption.

This case is unique because few companies file an unfair labor practice charge with the National Labor Relations Board ("NLRB") arguing that certain conduct violates the NLRA, then withdraw the charge, go forum shopping, and refile the case in court alleging that the same conduct constitutes trespass. In addition to Walmart's lawsuits, we know of only three cases where an employer filed both an NLRB charge and trespass lawsuit, and in all three the court held the state suit preempted, as the appeals court did here. *See Hillhaven Oakland Nursing and Rehab. Ctr. v. Health Care Workers Local 250,* 41 Cal. App. 4th 846 (1996); *Cross Country Inn, Inc. v. S. Cent. Dist. Council, United Bhd. of Carpenters & Joiners of Am.,* 50 Ohio App. 3d 8, 552 N.E.2d 232 (1989); *Florida Gulf Coast Bldg. Trades Council, AFL-CIO v. DeBartolo*, 392 So.

2d 916 (Fla. Dist. Ct. App. 1980). Instead, when unions conduct activities on company property, companies file trespass lawsuits only, as Sears did in the seminal NLRA-preemption case *Sears, Roebuck & Co. v. San Diego County Dist. Coun. of Carpenters*, 436 U.S. 180 (1978).[1]

The Court should also reject Walmart's attempt to gain review by exaggerating the appeals court's holding. The court held only that the NLRA preempts a trespass lawsuit when (1) the plaintiff concedes that the NLRA arguably prohibits conduct by filing a charge arguing that the conduct violates the NLRA; and (2) the plaintiff's charge and lawsuit are based on the same conduct. 354 P.3d 31, 34-37 (2015). The court did not hold that the NLRA preempts all trespass claims or claims that involve labor matters. Nor did it "carve out" a "labor exception" to trespass laws or "divest" "courts of the constitutional obligation . . . to protect property

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[1] *See, e.g., Freeman v. Retail Clerks Union Local No. 1207*, 58 Wn.2d 426, 363 P.2d 803 (1961); *Kadlec Hosp. v. Operating Engineers Union, Local 280*, No. 30587, 1976 WL 19360 (Wash. Super. Ct. March 11, 1976); *Musicians Union, Local No. 6 v. Superior Court of Alameda Cty.*, 69 Cal. 2d 695, 447 P.2d 313 (1968); *Ralphs Grocery Co. v. UFCW Local 8*, 55 Cal. 4th 1083, 290 P.3d 1116 (2012); *Laguna Vill., Inc. v. Laborers' Int'l Union of N. Am.*, 35 Cal. 3d 174, 672 P.2d 882 (1983); *United Farm Workers of Am. v. Superior Court*, 14 Cal. 3d 902, 537 P.2d 1237 (1975); *Safeway, Inc. v. Oregon Pub. Employees Union*, 152 Or. App. 349, 954 P.2d 196 (1998); *Duane Reade, Inc. v. Local 338, UFCW*, 777 N.Y.S.2d 231 (2003); *Riesbeck Food Markets, Inc. v. UFCW Local Union 23*, 185 W. Va. 12, 404 S.E.2d 404 (1991); *State ex rel. UMW, Local Union 1938 v. Waters*, 200 W. Va. 289, 489 S.E.2d 266 (1997); *Wiggins & Co., Inc. v. Retail Clerks Union Local No. 1557*, 595 S.W.2d 802 (Tenn. 1980); *Magic Laundry Servs., Inc. v. Workers United Serv. Employees Int'l Union*, 2013 WL 1409530 (C.D. Cal. 2013); *Point Ruston, LLC v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, 2010 WL 3584466 (W.D. Wash. 2010); *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766, 394 P.2d 921 (1964); *In re Zerbe*, 60 Cal. 2d 666, 388 P.2d 182 (1964); *Banales v. Mun. Court*, 132 Cal. App. 3d 67, 183 Cal. Rptr. 7 (1982); *In re Catalano*, 29 Cal. 3d 1, 623 P.2d 228 (1981); *People v. McKinney*, 135 Misc. 2d 259, 514 N.Y.S.2d 853 (N.Y.Crim.Ct. 1987).

rights."[2]

B. The appeals court correctly applied controlling Supreme Court and other federal precedent.

1. The appeals court correctly held that federal labor law preempts Walmart's suit because it presented to the state court the same controversy Walmart presented to the NLRB to adjudicate as an unfair labor practice.

As the appeals court held, under the Supremacy Clause, the NLRA preempts state claims based on conduct that the NLRA "arguably prohibits." 354 P.3d at 34-35, *citing* Art. VI, Cl. 2. *See also Sears*, 436 U.S. at 187 n. 11 (claims "must yield" when it "may fairly be assumed that the activities which a State purports to regulate are . . . an unfair labor practice under" -- or are "arguably prohibited" by -- the NLRA).

As the appeals court discussed, the U.S. Supreme Court in *Sears* held that the NLRA did not preempt Sears' trespass lawsuit because the matter that the NLRA arguably prohibited was not "identical" to the matter involved in the lawsuit. 354 P.3d at 36, *citing* 436 U.S. at 182-83. *Sears* involved a union that picketed on a company's property. 436 U.S. at 182. After the union refused a demand to leave, the company filed a trespass lawsuit. 436 U.S. at 182-83.

As the appeals court explained, the *Sears* Court concluded that the "controversies" could not be fairly called identical because the lawsuit "sought simply to remove the pickets from its property" alleging that "the

[2] Walmart's statement of the issues seriously misrepresents the Court of Appeals decision which, as explained below, did not limit trespass actions in any way, nor did the decision fail to apply federal law in holding that the "deeply rooted local interest" exception to NLRA preemption did not apply here.

location of the picketing was illegal but the picketing itself was unobjectionable." 345 P.3d at 36, *citing* 436 U.S. at 185 (emphasis added). As the appeals court explained, the *Sears* Court "concluded "that under section 8(b)(7)(C) of the NLRA, the 'arguably prohibited' conduct focused on the purpose of the union's activities, which was not identical to the state court lawsuit that focused on simple trespass," or the location of the conduct.[3] 354 P.3d at 36, *citing* 436 U.S. at 198. Because the focus of the arguable NLRA violation was different than the focus of the trespass claim, the *Sears* Court held that the NLRA did not preempt the claim.

In the NLRA-preemption context, courts do not apply the term "identical" in a "literal, mechanical fashion." *Local 926, Int'l Un. of Op. Engineers v. Jones*, 460 U.S. 669, 676 (1983). Rather, for purposes of NLRA preemption, controversies are similar enough to be identical when the NLRB and state claims are "the same in a fundamental respect" or not "completely unrelated."[4] 460 U.S. at 682-83. In *Jones* the NLRA preempted a lawsuit because the lawsuit and the plaintiff's NLRB charge were similarly based on the same conduct. 460 U.S. at 682. The charge argued that a union interfered with a company's NLRA right to choose its representative for bargaining when the union caused the company to terminate the plaintiff. *Id.* at 672. After the NLRB dismissed the charge,

[3] Walmart's NLRB charge alleged that Respondents' activities violated a different NLRA provision titled § 8(b)(1)(A), which concerns how and where the union conducted its activities. CP 242-243; 29 U.S.C. §158(b)(1)(A).

[4] In dissent, Justice Rehnquist acknowledged that the majority "defined" "identical" as "two items or concepts [that] are not ordinarily thought to be identical, and held that matters are "identical" if "they share a common element."" 460 U.S.at 688.

the plaintiff filed a lawsuit alleging that the union tortiously interfered with his employment contract by causing the company to terminate him. 460 U.S. at 673. The plaintiff argued that "the state cause of action and the unfair labor practice charge [were] not sufficiently alike" because, unlike the charge, the plaintiff did not have to prove coercion to state a tortious interference with contract claim. 460 U.S. at 681-82. Rejecting this argument, the Court emphasized that in the lawsuit the plaintiff "sought to prove a coerced discharge and breach of contract" and that the charge stated that the union "coerced [the company] in the selection of its . . . bargaining representative." *Id.*, at 672, 682 (emphasis added).

Based on this language, the Court held that the charge and lawsuit were sufficiently similar to be identical, even though the focus of the charge and lawsuit were different, the cases involved different rights of different parties, and the plaintiff later attempted to disavow the language he used in the charge. 460 U.S. at 680-84 (the focus of the charge was the company's right to select its bargaining agent, whereas the focus of the lawsuit was the plaintiff's right to his employment contract).

2. Walmart's charge and lawsuit are the same in several fundamental respects.

a. Same legal theory—trespass

As the appeals court found, Walmart argued in its NLRB charge that Respondents violated the NLRA by "'conducting a series of unauthorized and blatantly trespassory in-store mass demonstrations, invasive 'flash mobs,' and other confrontational group activities at

numerous facilities nationwide."'[5] 354 P.3d at 33 (quoting Walmart's NLRB charge and emphasis added); *see* CP 243. Walmart referred the NLRB to its "on-point decision . . . establish[ing] that . . . store invasions violate [NLRA] §8(b)(1)(A)": *Dist. 65 RWDSU*, 157 NLRB 615, 616 (1966), *enf'd*, 375 F.2d 745 (2d Cir. 1967). In *District 65*, the NLRB held that § 8(b)(1)(A) prohibited union representatives from "enter[ing] the premises of" various companies, "without permission, . . . refusing to leave when requested by the employers," the very definition of trespass.[6] 157 NLRB at 616. CP 243.

b. Same conduct, facts and allegations

The appeals court correctly found that Walmart's NLRB charge and lawsuit were the same because "[b]oth . . . challenge union activity in and near Walmart's stores. Unlike in *Sears*, "the [Respondents'] conduct is central to Walmart's trespass theory and claim that Walmart objected to the demonstrating and picketing itself, not just to the location of this conduct but the UFCW's conduct in trespassing by entering Walmart's stores without an intent to shop." 354 P.3d at 36. *compare Sears*, 436 U.S.

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[5]*See also* Summary of Events that Walmart submitted to the NLRB: Nos. 48 ("demonstrators repeatedly refused to leave Walmart's premises upon request"); 51 ("the store manager approached the group and informed them of Walmart's no solicitation policy and asked them to leave. They refused to leave ...." CP 1375-1376.

[6]*See also Hillhaven*. 41 Cal. App. 4th 846. In *Hillhaven*, 30 "noisy" and "disruptive" union representatives "invaded" a nursing home "without permission and roamed the facility leafleting and talking to workers and residents until dispersed by the police, notwithstanding the facility administrator's repeated demands that they leave." 41 Cal. App. 4th at 850-51, 852. In response, the nursing home filed an NLRB charge arguing that this conduct violated § 8(b)(1)(A), and a trespass lawsuit. 41 Cal. App. 4th at 852. Holding that the NLRA preempted the lawsuit because the matters in the lawsuit were sufficiently similar to those of the employer's charge, the California appeals court observed that "although the issues presented to the Board and the superior court [were] not 'identical' . . . neither [were] they 'completely unrelated.'" 41 Cal. App. 4th at 859-60.

at 185 (Sears alleged only that "the location of the picketing was illegal but the [activity] itself was unobjectionable"). Here, Walmart specifically alleged that if Respondents "engaged in demonstrations, picketing, and other union-related activities, then [Respondents] would have exceeded Walmart's invitation and would have trespassed." 354 P.3d at 37.

The appeals court correctly compared the conduct Walmart sought to prohibit in its charge and lawsuit, and not just legal issues. NLRB and court cases may be the same in fundamental respects if they are based on the same conduct, even if the legal controversies are not identical. "It 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. and Motor Coach Emp. of America v. Lockridge*, 403 U.S. 274, 292 (1971). *See also Lumber Prod. Ind. Workers Local 1054 v. West Coast Ind. Relations Ass'n, Inc.*, 775 F.2d 1042, 1048 (9th Cir. 1985).

The court in *Lumber Production* explained that the "Supreme Court in *Jones* held that if the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by the NLRA, then the state claim is preempted." 775 F.2d at 1049. The court explained that

> [the fact] remains that the conduct which constitutes an essential element of the union's state law action is the very same conduct that the Board considered in rejecting the union's unfair labor practice claims.

Id. This makes sense because an NLRB case "and a state-law cause of action will, by definition, deal with different claims and if their lack of identity were conclusive, the state claims would never be preempted."

Penn. Nurses Ass'n v. Penn. State Educ. Ass'n, 90 F.3d 797, 805 (3d Cir. 1996).

Consistently, the court in *Parker v. Connors Steel Co.* held that even though the legal "dispute presented to the state court was not identical to the dispute that could have been presented to the Board," the plaintiffs' NLRB case and court case were "identical" for NLRA-preemption purposes because they were based on the same "facts and allegations." 855 F.2d 1510, 1518 (11th Cir. 1988), *citing Lockridge*, 403 U.S. at 292.

The allegations of Walmart's amended complaint involve the same conduct that Walmart argued violated the NLRA. Walmart alleges (at ¶¶ 44-45) that Respondents trespassed because they "did not have the authorization [or] invitation . . . to enter Walmart's property" "to engage in picketing, patrolling, parading, 'flash mobs,' demonstrations, handbilling, solicitation, customer disruptions, and manager confrontations." Specifically, Walmart alleged (CP 47-58) that Respondents trespassed by:

- conducting "flash mobs" (¶2);
- "chanting" (¶¶19, 20, 23, 26, 32), "singing" (¶25), "yelling" (¶26);
- "distribut[ing]" literature (¶¶16, 19-21, 24, 26, 33, 34, 36, 38);
- "videotap[ing]" (¶¶20, 25);
- "banging on pots, pans," "using bullhorns"(¶¶2, 20) and "loud speakers" (¶¶24, 26);
- "carr[ying] signs" (¶¶2, 19, 26);
- "march[ing]" (¶¶24, 32), "parad[ing]" (¶¶26, 50), "walk[ing] the perimeter of the store" (¶36);
- present[ing] a petition to a manager (¶¶20, 32);
- "confront[ing]" managers (¶¶16, 34);
- "picketing" (¶¶16, 27);
- "handing out balloons" (¶27);

- "mass demonstrations" (¶16), "rallies" (¶24).

In the Summary of Events Walmart submitted to the NLRB, Walmart argued that Respondents violated the NLRA when they:

- "play[ed] music" (No. 51);
- "chant[ed]" (Nos. 50, 51);
- became very "loud" (No. 48, 49)
- "pass[ed] out" literature; "leafleted" (Nos. 48, , 51);
- "[video]record[ed]" (No. 48);
- "bang[ed] pots and pans" (No. 50);
- "carr[ied] banners" and "signs" (Nos. 51);
- "paraded" (Nos. 49, 50, 51);
- "left a letter addressed to" a manager " (No. 48);
- "picketed" (Nos. 48, 49);
- used "balloons" (No. 51). [7]

CP 1375-1376. The Appendix contains a table comparing the conduct Walmart argued in its Summary of Events with the conduct alleged in its lawsuit. This table and the above lists of complaint and charge allegations show that Walmart could refile a charge over the same conduct that its lawsuit is based on.

c. The remedy for Walmart's charge is the same as the remedy Walmart seeks here.

In this lawsuit, Walmart seeks an order enjoining Respondents from holding events at its stores. Walmart's NLRB case sought an order prohibiting Respondents from holding events at the same stores. The NLRB has broad remedial power to prohibit trespass. Congress "empowered" the NLRB "to prevent any person from engaging in any

[7] Contrary to its assertion (at 4-5), Walmart did not limit its charge to specific events, but instead argued that Respondents violated the NLRA by "conducting a series of . . . demonstrations . . . at numerous facilities nationwide (including, but not limited to, the facilities listed in the [Summary of Events])." CP 243. Walmart did not include in its Summary of Events several events alleged in its complaint (at ¶¶31-39) because they occurred after Walmart filed its charge on March 1, 2013.

unfair labor practice"; this power is not "affected by any other means of . . . prevention that has been . . . established by . . . law."[8] 29 U.S.C. § 160(a).

The NLRB has the power to order Respondents to cease holding events at Walmart stores, regardless of the NLRA's focus on worker rights.[9] In the NLRB decision Walmart cited in its charge, for example, the NLRB ordered the union to "cease and desist from entering the premises" of the companies. *Dist. 65*, 157 NLRB at 626. CP 243. In *Bartenders Local 2*, the NLRB remedied the same NLRA violation Walmart argued here by ordering the union to "cease and desist from" "entering [company] premises . . . and disrupting the business operations of [the company]." 240 NLRB 757, 762 (1979). *See also Det. Typo. Union v. Det. Newspaper Ag.*, 283 F.3d 779, 783 (6th Cir. 2002) (enjoined "blocking or otherwise coercively interfering with ingress or egress" to company property "by any means including . . . physical confrontation or intimidation, unlawful group trespass, mass picketing").[10]

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[8] The NLRA does not require the NLRB to petition federal courts for cease-and-desist orders after finding NLRA violations. However, the NLRB may petition courts for temporary injunctions before finding violations. 29 U.S.C. §160(j).

[9] Although the section of the NLRA that Walmart argued Respondents violated technically concerns worker rights, Walmart obviously filed the charge to prohibit Respondents from holding events at its stores. Contrary to Walmart's assertion (at 15), even if the NLRB limited its order to events held in the presence of workers, the NLRB's order would be no narrower than the court's because all of Respondents' events occurred when Walmart's stores were open and associates were working.

[10] Walmart misconstrues (at 15 n.12) federal law by asserting that *Retail Store Employees Local 1001* held that trespass does not violate § 8(b)(1)(A). 203 NLRB 580 (1973). Instead, the NLRB held only that one union representative entering a breakroom on one occasion did not violate the NLRA. 203 NLRB at 581. Moreover, 30 years later, the NLRB in *1199, National Health & Human Services Employees Union* rejected the suggestion that because the union representatives' actions may "have amounted to actionable trespass under state law," the employer "should have looked to a state court lawsuit or to the police for assistance, rather than to the Board." 339 NLRB 1059, 1063

3. By filing its NLRB charge, Walmart conceded that the NLRA arguably prohibits respondents' conduct.

The appeals court correctly found that "[b]y initially pursuing relief with the" NLRB, Walmart conceded that the NLRA arguably prohibited Respondents' conduct.[11] 354 P.3d at 36. Arguably prohibited preemption "has the greatest validity when a party . . . sought redress for [the party's] claims from the NLRB and [then] restructured [the claims] as state law claims." *Parker*, 855 F.2d at 1517. *See also Volentine v. Bechtel, Inc.*, 27 F. Supp. 2d 728, 734 (E.D. Tex. 1998), *aff'd,* 209 F.3d 719 (5th Cir. 2000).

In *Parker*, workers filed an NLRB charge alleging that their company bargained in bad faith when the company closed after they agreed to concessions. 855 F.2d at 1514-15. After the NLRB dismissed the charge, the workers sued the company for fraudulently misrepresenting that it would remain open if they agreed to concessions. 855 F.2d at 1515.

(dissent), 1062 (2003). The majority held that that the union representatives violated the NLRA by entering areas of an employer's facility to which the employer did "not agree to give . . . access." 339 NLRB at 1059.

Walmart's reliance (at 15 n.12) on Justice Burger's concurrence in the *per curiam* decision of *Taggart v. Weinacker's, Inc.* is misplaced. 397 U.S. 223, 227 (1970). In *Taggart* the Court dismissed a writ of certiorari on procedural grounds. While Justice Burger would have held that the NLRA did not preempt the trespass claim, two other justices would have held that the NLRA would preempt the trespass claim. 397 U.S. at 226-31.

[11]The appeals court also correctly observed that here, "unlike in *Sears*, where federal preemption would have denied the employer any relief because the union had not filed NLRB charges, Walmart has legal recourse; it already filed NLRB charges and may still refile charges." 354 P.3d at 36, *citing Sears*, 436 U.S. at 206-07 (if the NLRA preempted Sear's lawsuit, the result would have "den[ied Sears] access to any forum in which to litigate either the trespass issue or the [NLRA] issue"). Walmart does not contest that it could refile its NLRB charge.
The appeals court incorrectly stated that Walmart filed the charge relevant here in November 2012, instead of on March 1, 2013. 354 P.3d at 33.

The court held that the NLRA preempted the state court claim because by "initially pursuing relief with the NLRB the employees . . . implicitly recognized the Board's jurisdiction over their claims."[12] 855 F.2d at 1517.

This presumption is consistent with the holdings of almost all courts considering whether the NLRA preempted lawsuits when the plaintiff also filed an NLRB charge over the same conduct.[13]

a. Statements Walmart made during oral argument corroborate that the appeals court correctly interpreted Walmart's NLRB charge as a concession.

During oral argument in the trespass case Walmart filed against respondents in Arkansas, Walmart conceded that its court and NLRB case are the same. When it discussed "Wal-Mart's withdrawal of all of the ULP charges that relate to state trespass actions," Walmart admitted that it withdrew its "charges with respect to these in-store invasions or property

[12]The Court should disregard Walmart's attempt (at 16) to confuse the relevance of its charge. The appeals court never suggested that filing a charge is a prerequisite for arguably prohibited preemption. Rather, by filing and arguing the charge as it did, Walmart conceded that the NLRA arguably prohibits Respondents' conduct.

[13]While Walmart correctly states (at 13 n.11) that trial courts in its other lawsuits against Respondents have decided the preemption issue, the only appeals court that has decided the issue is Division Two. That decision is consistent with the vast majority of cases which have held that the NLRA preempted lawsuits when plaintiffs also filed unfair labor practice charges. *See, e.g., Lumber Prod. Indus. Workers Local No. 1054 v. W. Coast Indus. Relations Ass'n, Inc.,* 775 F.2d 1042 (9th Cir. 1985); *Platt v. Jack Cooper Transp., Co., Inc.,* 959 F.2d 91 (8th Cir. 1992); *DeSantiago v. Laborers Intern Union of N. Am., Local No. 1140,* 914 F.2d 125 (8th Cir. 1990); *Lewis v. Whirlpool Corp.,* 630 F.3d 484 (6th Cir. 2011); *Mobile Mech. Contractors Ass'n, Inc. v. Carlough,* 664 F.2d 481 (5th Cir. 1981); *Carrick v. AT & T Inc.,* 610 Fed. Appx. 421 (5th Cir. 2015); *In re Sewell,* 690 F.2d 403 (4th Cir. 1982); *Richardson v. Kruchko & Fries,* 966 F.2d 153 (4th Cir. 1992); *Local 807, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Brink's, Inc.,* 744 F.2d 283 (2d Cir. 1984); *Chaulk Servs., Inc. v. Massachusetts Comm'n Against Discrimination,* 70 F.3d 1361 (1st Cir. 1995); *Rodriguez v. Yellow Cab Coop., Inc.,* 206 Cal. App. 3d 668, 253 Cal. Rptr. 779 (1988); *Int'l Assn. of Heat etc. Workers v. Superior Court,* 132 Cal. App. 3d 1, 182 Cal. Rptr. 732 (1982); *Hotel Employees & Rest. Employees, Local 8 v. Jensen,* 51 Wn. App. 676, 754 P.2d 1277 (1988).

intrusions because it chose . . . state court actions for trespass rather than the NLRB process."[14]

4. The appeals court correctly applied federal law in holding that peaceful trespass does not fit within the local interest exception to NLRA preemption.

a. *Belknap* is not a local interest exception case; there the Court found no preemption because the conduct at issue was not identical.

Walmart incorrectly argues (at 9-10) that the U.S. Supreme Court decided that preemption did not apply in *Belknap, Inc. v. Hale* based on the local interest exception. 463 U.S. 491, 510 (1983). Rather than applying the exception, the Court held that the NLRA did not preempt the misrepresentation and breach of contract claims because "the state-court and Board controversies could not fairly be called identical." 463 U.S. at 510. The Court explained that in *Sears* "we held that a state trespass"

> action was . . . not pre-empted since the action concerned only the location of the picketing while the arguable unfair labor practice would focus on the object of the picketing. In that case, we emphasized that a critical inquiry in applying the *Garmon* rules . . . is whether the controversy presented to the state court is identical with that which could be presented to the Board. [In *Sears*] the state-court and Board controversies could not fairly be called identical.

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[14] See transcript at 707:5-8, 708:3-9 submitted May 27, 2014, and judicially noticed June 20, 2014, by order of the Court of Appeals. Walmart's actions confirm its intent to withdraw its "trespass" case from the NLRB and refile the same "action[] for trespass" in court. If Walmart actually believed that its NLRB charge protected only workers' NLRA rights, it would not have withdrawn the charge but instead would have allowed the NLRB case to proceed independently of the trespass lawsuits.

That Walmart withdrew the NLRB charge at the same time it filed its lawsuits reveals that Walmart considered the cases to be the same. After filing the trespass cases, Walmart no longer needed to maintain the NLRB case.

Walmart's actions also show that it did not (Pet. at 5) "decide[] to stop spending time and money pursuing the in-store, associate coercion allegations because the NLRB did nothing to address the merits of those allegations despite months of waiting."

This is also the case here [in *Belknap*].[15]

463 U.S. at 510 (emphasis added).

The *Belknap* Court explained that the "focus" of the NLRB case would be "whether the rights of strikers were being infringed. [This] would [not] have anything in common with the question whether Belknap made misrepresentations to [striker] replacements . . . . The Board would be concerned with the impact on strikers not with whether the employer deceived replacements." 463 U.S. at 510. Similarly, the NLRB case and breach of contract claim involved "'discrete' concerns."[16] *Id.* at 512.

Here, the appeals court followed this precedent and correctly found

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[15] Walmart wrongly characterizes (at 10) *Sears* as a "'deeply-rooted' case." As the *Belknap* Court explained, the NLRA did not preempt the trespass lawsuit in *Sears* because the NLRB and lawsuit "controversies" could not be fairly called identical. 463 U.S. at 510. If *Sears* held that the NLRA did not preempt peaceful trespass based on the local interest exception, *Sears* would have been a much shorter and simpler opinion.

[16] Walmart also overreaches in contending that the appeal court's decision contradicts *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015), and *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994). In those cases, this Court held that the NLRA did not preempt minimum labor standards legislation under *Garmon/Sears* principles because the legislation neither attempted to regulate worker NLRA rights to organize unions or bargain collectively, nor attempted to provide remedies for violations of NLRA rights.

In *Filo*, after rejecting Filo Foods' argument that a minimum standards ordinance was preempted under various federal laws and principles, this Court rejected the argument that the NLRA preempted the ordinance's anti-retaliation provision under *Sears*. This Court explained that the anti-retaliation provision only prohibited retaliation against workers who exercise rights under the ordinance and did not attempt to provide a remedy for retaliation against workers who exercise NLRA rights.

Similarly in *Hume*, this Court rejected a company's challenge of the anti-retaliation provision of a state wage claim statute because that provision "focus[ed] on whether the employees were discharged in retaliation for their overtime claims," not for engaging in activity protected by the NLRA, including filing grievances under collective bargaining agreements. 124 Wn.2d at 665. Neither did the "statute . . . attempt to regulate employee grievance procedures under contracts companies and unions enter into under the NLRA. *Id.* at 664.

(354 P.3d at 37) that the local interest exception did not apply because of Walmart's allegations:

> Declarations filed by Walmart detailing the UFCW's conduct . . . did not allege or document actual violence, threats of violence, or property damage . . . . The superior court correctly found that Walmart's allegations did not "rise[ ] to the level" of a "deeply rooted" local interest because the UFCW's activities were not violent, intentional torts, or threaten violence.[17]

b. Peaceful trespass does not fall within the local interest exception.

Applying U.S. Supreme Court decisions beginning with *San Diego Building Trades Council v. Garmon*, the appeals court held that the local interest exception does not apply here. 354 P.3d at 37, *citing* 359 U.S. 236 (1959). The NLRA preempts lawsuits "arising out of peaceful union activity." *Garmon*, 359 U.S. at 246. Thus, the Court in *Garmon* limited the local interest exception to "torts" that involve "conduct marked by violence and imminent threats to the public order." 359 U.S. at 247-48 & n.6. The *Sears* Court defined the exception as applying to cases involving:

- violence and property damage, *citing Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); and *UAW v. Russell*, 356 U.S. 634 (1958);
- threats of violence, *citing United Const. Workers v. Laburnum Const. Corp.* 347 U.S. 656 (1954);
- malicious libel, *citing Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53 (1966); and
- intentional infliction of emotional distress involving outrageous conduct, *citing Farmer v. United Bhd. of Carpenters*, 430 U.S. 290

[17] Thus, the appeals court applied the principles of the federal cases, and neither assumed the role of "arbiter of what is a deeply rooted local interest for NLRA preemption purposes," nor held that "Washington courts are [not] bound by the U.S. Supreme Court's decisions on what labor-related conduct is 'deeply rooted' in local interest." Pet. at 1.

(1976).

436 U.S. at 195. When listing torts that fit the local interest exception, the Court notably did not include peaceful trespass, despite trespass being the only issue in *Sears*. 436 U.S. at 195.

Review of cases in which the United States Supreme Court has found the local interest exception applicable demonstrates that it does not apply to the peaceful activities here:

Violence: The "violence" in *Youngdahl* consisted of nails "strewn over the company's parking lot" and "on the driveways of 12" non-striking workers, two slashed tires of a car owned by the daughter of a non-striker, "enormous amount of abusive language hurled . . . at the company employees," and the threat that a striker would "wipe the sidewalk" with a manager. 355 U.S. at 132-34.

Despite this violence, the U.S. Supreme Court vacated the injunction, holding that the state court could enjoin picketers "from threatening violence . . . or provoking violence . . . and . . . from obstructing . . . the free use of the streets adjacent to [the company's] place of business, and . . . free ingress and egress to and from that property." 355 U.S at 139. However, the state "court entered the pre-empted domain of the [NLRB] insofar as it enjoined peaceful picketing." 355 U.S. at 139. Thus, the Court vacated the injunction "to the extent the injunction prohibit[ed] all other picketing and patrolling of [the company's] premises and in particular prohibit[ed] peaceful picketing." 355 U.S. at 139-40

(emphasis added).

The violence in *Russell* involved picketers who "by force of numbers, threats of bodily harm . . . and damage to . . . property, prevented a [worker] from reaching the plant gates." 356 U.S. at 636. The Supreme Court held that the lawsuit was not preempted because it involved "injuries caused by mass picketing and threats of violence." *Garmon*, 359 U.S. at 248 n.6, *summarizing Russell*, 356 U.S. at 646. The *Russell* Court "continually stresse[d] the violent nature of the conduct." 359 U.S. at 248 n.6 (emphasis added), *citing* 356 U.S. at 646. The *Russell* Court "limit[ed] its decision" to "the 'kind of tortious conduct' there involved." *Garmon*, 359 U.S. at 248 n.6, *summarizing Russell*, 356 U.S. at 646.

Threats of violence: In *Laburnum*, the "threats of violence" were similarly extreme "to such a degree that [the company] was compelled to abandon . . . its [construction] projects in the area." 347 U.S. at 658.

Mental distress: In *Farmer*, the U.S. Supreme Court explained that it "was careful . . . to limit the scope of [the local interest] exception." 430 U.S. at 299. Thus, the NLRA does preempt claims of intentional infliction of mental distress if the claim was "based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts." 430 U.S. at 306. The NLRA did not preempt the mental distress claim in *Farmer* because the "outrageous conduct" there involved the union "subject[ing the plaintiff] to a campaign of personal abuse and harassment," and because the state has an "interest in protecting

the health and well-being of its citizens." 430 U.S. at 292, 300, 303-04.

Malicious libel: The U.S. Supreme Court likewise limited the scope of the local interest exception in defamation lawsuits because labor "campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Linn*, 383 U.S. at 58. Thus, the NLRA preempted defamation claims that did not require the plaintiff to prove actual malice and punitive damage awards without proof of actual injury. 383 U.S. at 65, 58. Thus, the local interest exception applies only to "libel issued with knowledge of [the libel's] falsity, or with reckless disregard of whether it was true of false," and libel that causes actual injury. *Id.* at 61.

The "exception to the pre-emption rule [covers] cases involving violent tortious activity" because nothing "in the federal labor statutes protects or immunizes from state action violence or threats of violence in a labor dispute."[18] *Farmer*, 430 U.S. at 299 (emphasis added). Enforcement of "laws prohibiting violence, defamation, the intentional infliction of emotional distress or obstruction of access to property is not pre-empted by the NLRA" because "none of those violations of state law involves protected conduct." *Sears*, 436 U.S. at 204.

Neither the U.S. Supreme Court nor any other court has ever held

[18] The NLRA did not preempt torts of "false arrest, false imprisonment, and malicious prosecution" in *Radcliffe* because they were "similar to torts of threatened violence, traditionally held not to be preempted" because such threats "touch[] interests so deeply rooted in local feeling and responsibility." 254 F.3d at 784-85.

that non-violent trespass, without more, fits this exception.[19] Indeed, the *Sears* court observed that some "violations of state trespass law may be actually protected by" the NLRA. 436 U.S. at 204, *citing NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In contrast, courts have held that the NLRA can preempt peaceful trespass cases.[20]

c. Speculation that peaceful conduct may become violent does not bring the conduct within the local interest exception.

Courts apply the local interest exception to cases involving violence, threats of violence, property damage, etc. Theoretical threats do not meet the local interest exception. Indeed, courts hold that the NLRA

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[19] The cases Walmart cites to the contrary are *dictum*. Several cases did not involve trespass: *Platt v. Jack Cooper Transport*, 959 F.2d 91 (8th Cir. 1992) (whistleblower statutes); *Henry v. Laborers' Local 1191*, 848 N.W.2d 130, 141 (Mich. 2014) (same); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) (fraud and breach of contract).

The courts in other cases decided the NLRA-preemption issue on grounds other than the local interest exception: *Brown Jug*, 688 P.2d 937 (claim not preempted because "union d[id] not submit the question to the NLRB" by filing a charge); *Retail Property Trust v. United Bhd. of Carpenters*, 768 F.3d 938, 951-52 (9th Cir. 2014) (did not involve *Sears* preemption). The *Retail Property Trust* court incorrectly assumed that the NLRA did not preempt the trespass lawsuit in *Sears* because of the local interest exception, citing page 180 of *Sears*. Page 180, however, is the syllabus, not the Court's opinion. 768 F.3d at 960, *citing* 436 U.S. at 180. Elsewhere in its opinion, however, the court correctly stated that the NLRA did not preempt the *Sears* lawsuit because "the controversy which Sears might have presented to the [NLRB was] not the same as the controversy presented to the state court." 768 F.3d at 953, *citing* 436 U.S. at 198. *Retail Property Trust* recognized that "local interests included 'violence and imminent threats to public order,' because 'the compelling state interest . . . in the maintenance of domestic peace," including "threats of violence, violence, libel, and intentional infliction of mental distress." *Id.* at 952, 953. Thus, Walmart incorrectly claims (at 7) that "enforcement of state trespass laws is a matter 'deeply rooted' in local interest not subject to NLRA preemption."

[20] *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1178-79 (D.C. Cir. 1993); *Cranshaw Constr'n v. Ironworkers, Local 7*, 891 F. Supp. 666, 674-75 (D. Mass. 1995) (NLRA preempted trespass claim involving "nonviolent interference with the company's operations," but did not preempt trespass claim involving vandalism or property destruction); *Hillhaven*, 41 Cal. App. 4th at 859-60; *Riesbeck Food Mkts. v. UFCW Local 23*, 404 S.E.2d 404 (W. Va. 1991); *Cross Country Inn v. S. Cent. Dist. Counc. United Bhd. Carpenters & Joiners of Am.*, 552 N.E.2d 232 (Oh. App. 1989); *Wiggins & Co. v. Ret. Clerks Union Local 1557*, 595 S.W.2d 802 (Tenn. 1980); *Shirley v. Ret. St. Employees Un.*, 592 P.2d 433 (Kan. 1979).

preempts peaceful trespass even when it occurs in the midst of actual violence. *Youngdahl*, 355 U.S. at 139 (trial court "entered the pre-empted domain of the [NLRB] insofar as it enjoined peaceful picketing"); *Cranshaw*, 891 F. Supp. at 674-75 (NLRA preempted trespass claim involving "nonviolent interference with the company's operations," but not claim involving vandalism or property destruction); *Hillhaven*, 41 Cal. App. 4th at 861 (court retained jurisdiction to intervene if "conduct involving actual violence, serious threats of violence, or obstruction of access, should occur in the future").

Walmart cites no cases holding that a potential threat of violence brings peaceful trespass within the local interest exception. Furthermore, Respondents' events do not pose a threat of violence. Not only did Walmart fail to "document actual violence, threats of violence, or property damage" here, 354 P.3d at 37, Walmart failed to do so in the eight trespass cases Walmart has litigated against respondents.

Conclusion

The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 6th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2016, I caused the foregoing Respondents' Answer to Petition for Review to be deposited in the U.S. mail, first class, addressed to:

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Appendix

Location Date	Walmart's NLRB Charge	Complaint
Renton 10/10/12	Approximately "20-25 demonstrators congregated outside the [Renton] store, passing out OURWalmart fliers." Summary of Events, No. 48, at 14 (CP 1375).	A "group of 20-25 demonstrators . . . gathered outside the front entrance with signs and began handbilling." Comp. ¶19 (CP 51).
Auburn 11/3/12	A "group of 15 OURWalmart supporters invaded the store, paraded around banging pots and pans, and chanting . . . . The police arrived and the demonstrators started to leave the store. As they left, they chanted things such as 'Who's Walmart, Our Walmart' and 'Who has the power, We Do.'" Summary of Events, No. 50, at 14 (CP 1375)	A "group of 10 or so OURWalmart demonstrators met inside the Walmart store in Auburn, formed a circle, and banged loudly on pots, pans and other cookware as they chanted. When the police arrived, the group began to leave the store, chanting, 'Who's Walmart, OURWalmart' and 'Who has the power? We do." Comp. ¶23 (CP 52).

Location Date	Walmart's NLRB Charge	Complaint
Federal Way 11/15/12	"60 to 90 demonstrators paraded in front of the store . . . . The store manager approached the group and informed them of Walmart's no solicitation policy and asked them to leave. They refused to leave and told the store manager to call the police." "The police arrived and asked the group to leave. The group then moved off Walmart property but once the police left, the group returned to the store[.]" "The group pressed against the doors attempting to enter the store and this blocked customers and associates from entering or exiting the store. Summary of Events, No. 51 at 15 (CP 1376).	"[A]pproximately 30 demonstrators gathered at the front of the Walmart store . . . . The store manager explained Walmart's no solicitation policy and asked the group to leave. The group refused to leave, and told the store manager that he had to call the police. The crowd grew to about 60-90 demonstrators[.]" "The police arrived, and asked the group to leave Walmart's property. The group gathered at their original location on the street . . . . After the police left, the group marched back to the front of the store." "The demonstrators surrounded and pressed on the front doors . . . Customers had difficulty leaving the store." Comp. ¶24 (CP 52).
Renton 11/23/12	A "group of 100 to 200 demonstrators . . . paraded and picketed in the parking lot and in front of the entrances[.]" "Customers pulled into the parking lot and then drove away after seeing the large group. Members of the group were seen . . . blocking customers from parking. The group also blocked the flow of vehicular traffic in the parking lot." Summary of Events, No. 49, at 14 (CP 1375).	A "group of 100 to 200 UFCW and OURWalmart members trespassed and paraded on Walmart's parking lot for over two hours[.]" The "crowds made it difficult for customers to enter the parking lot and find a parking space." Comp. ¶26 (CP 53).