NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Federal Security, Inc., and its alter egos or agents, James R. Skrzypek and Janice M. Skrzypek *and* Joseph Palm. Case 13–CA–038669

September 28, 2012

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN, AND BLOCK

On October 1, 2001, the National Labor Relations Board issued a Decision and Order in this proceeding finding that the Respondents violated Section 8(a)(1) of the Act by filing and maintaining a State-court lawsuit alleging that 17 former employees engaged in malicious prosecution and an abuse of process by filing an unfair labor practice charge and providing supporting evidence to the Board.[1] The Respondents subsequently filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement. On June 24, 2002, the Supreme Court issued its decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), addressing the Board's standard for determining whether completed lawsuits violate the Act. Thereafter, the Court of Appeals, in an unpublished decision, remanded the present case to the Board for further consideration.

On January 28, 2003, the Board invited the parties to file statements of position on the issues raised by the remand. The Respondents and the General Counsel filed statements of position.

We have considered the entire record, including the briefs, and the decisions of the Supreme Court and Board in *BE&K*.[2] For the reasons below, we have decided to affirm the Board's previous finding that the Respondents violated Section 8(a)(1) by filing and maintaining their lawsuit.[3]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Prior Unfair Labor Practice Case

Respondent Federal Security provided armed security guards at various public housing sites in Chicago. In *Federal Security, Inc.,* 318 NLRB 413 (1995) (*Federal Security I*), the Board found that Federal Security violated Section 8(a)(1) by discharging 19 of its guards for participating in a protected concerted walkout. In finding that the walkout was protected, the Board relied on the credibility-based findings of the administrative law judge that the walkout was motivated by the Company's failure to provide promised improvements in equipment and benefits and the perceived discharge[4] of supervisor Carlton Short, who had advocated for the employees in their efforts to improve working conditions.[5]

The Seventh Circuit denied enforcement of the Board's order.[6] The court found that the walkout was unprotected because it compromised the safety of residents of the public housing sites where guard stations were left unattended.[7] In doing so, the court did not address the Board's credibility-based findings regarding the reasons for the walkout. Nor did the court address whether, absent a threat to public safety, a walkout to protest the discharge of a supervisor who has acted as an advocate of employees in their efforts to improve working conditions is protected under the Act.[8]

B. The State-Court Lawsuit

On June 2, 2000, Respondents James and Janice Skrzypek, the president and vice president, respectively, of Respondent Federal Security, filed a complaint in the Circuit Court of Cook County, Illinois, against 17 of the employees who participated in the Board's proceedings in *Federal Security I*.[9] The State court complaint alleged that by filing the unfair labor practice charge and provid-

[1] 336 NLRB 703 (2001).

[2] *BE&K Construction Co.*, 351 NLRB 451 (2007).

[3] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We shall also modify the original Order and Notice to reflect our finding below that the Respondents' lawsuit violated the Act solely because it was preempted.

[4] At the time of the walkout, the employees believed that Short had been discharged. It was later revealed that he had only been suspended.

[5] The judge, affirmed by the Board, found that "insofar as the termination of Chief Short was a motivating factor in the employees' decision to strike it was because of the perceived effect it would have on their own working conditions." 318 NLRB at 420.

[6] *NLRB v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir. 1998).

[7] Id. at 756–757.

[8] The Board, with court approval, has long held that "concerted activity to protest the discharge of a supervisor . . . may be 'protected' provided the identity of the supervisor is directly related to terms and conditions of employment." *Southern Pride Catfish*, 331 NLRB 618, 620 (2000), citing *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990).

[9] The Skrzypeks identified themselves in the complaint as the sole former shareholders of and successors-in-interest to Federal Security, which was involuntarily dissolved by the State of Illinois in 1997. We agree with the judge for the reasons he states that the Board has jurisdiction over the Respondents. We also agree with the judge that the Charging Parties are statutory employees within the meaning of Sec. 2(3) of the Act. See, e.g., *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947), where the Board noted that the statutory definition of "employee" was broad enough to cover "former employees of a particular employer." These issues appear, in any event, to be beyond the scope of the remand order.

ing affidavits and testimony in the Board's proceedings the defendants engaged in malicious prosecution, a conspiracy to commit malicious prosecution, an abuse of process, and a conspiracy to commit an abuse of process. The alleged factual basis of the suit was described in paragraph 45 of the State court complaint as follows: in May 1999, former employee Michael Davenport told James Skrzypek that the employees who participated in the Board's proceedings in *Federal Security I* had "fabricated the facts, circumstances and the reasons for the walkout to the NLRB agents and attorneys . . . so that the NLRB would become involved," and "the only reason the guards left their posts was to show support for and loyalty to [Supervisor] Short after he was suspended." The complaint sought damages in excess of $140,000 in attorneys' fees and court costs incurred by Respondent Federal Security in defending against the unfair labor practice charge, attorneys' fees and court costs in bringing the State court suit, and punitive damages.

On October 12, 2000, the State court issued a default order against 11 defendants who did not answer the complaint.[10] On March 6, 2001, the court dismissed the abuse of process and related conspiracy claims upon motion of the nondefaulting defendants. The court, however, twice denied motions to dismiss the malicious prosecution claims. On April 1, 2002, at the Respondents' request, the court entered an order voluntarily dismissing the suit against the nondefaulting defendants. This order was without prejudice to the Respondents' right to refile their claims. The Respondents did not do so.

C. The Instant Case

1. Background

On January 29, 2001, the General Counsel issued the complaint in this case alleging that the Respondents violated Section 8(a)(1) by prosecuting and maintaining their State-court lawsuit. At the unfair labor practice hearing, Respondent James Skrzypek (Skrzypek) testified that he encountered former employee Davenport, by chance, at a drug store in May 1999. Davenport asked what Skrzypek's reaction was to losing in *Federal Security I.* Skrzypek informed Davenport that he had actually won the case on appeal in the Seventh Circuit, and he offered to send Davenport a copy of the court's decision. Skrzypek testified that Davenport responded, "You don't know what we did to you, do you?" Davenport then allegedly told Skrzypek that he had been "set up" and that "the reasons that [the employees] gave [for the walkout] were lies in order to get their jobs back." Skrzypek testified further that if Davenport had never told him that the employees had lied, he would not have filed the State-court lawsuit.[11]

Testifying as a witness for the General Counsel, Davenport corroborated aspects of Skrzypek's testimony, but denied telling Skrzypek that he or any other employees falsified their affidavits or testimony in *Federal Security I.* Davenport also testified that Skrzypek repeatedly asked him why the employees had brought the case before the Board, commented that he "hated" Joseph Palm, the charging party in *Federal Security I,* and said that if he ever met Palm again, there was "no telling what he would do to the man." Davenport testified further that the guards staged the walkout in order to protest working conditions, not solely to show support for and loyalty to Supervisor Short.

Charles Robinson, an alleged discriminatee in *Federal Security I*, also testified for the General Counsel. He denied that he provided, or was encouraged to provide, false testimony in the Board's proceedings in *Federal Security I*.

2. The Judge's Decision

On May 1, 2001, Administrative Law Judge Robert A. Giannasi issued his decision in this case. The judge found that the filing and maintenance of the Respondents' suit violated Section 8(a)(1) under two separate theories, both of which have their origins in the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*.[12]

In *Bill Johnson's*, the Supreme Court, while acknowledging that lawsuits may be powerful instruments of coercion or retaliation, nonetheless found that the First Amendment right of access to the courts and the states' compelling interest in maintaining domestic peace prohibit the Board from enjoining as an unfair labor practice a well-founded lawsuit, regardless of the plaintiff's motive for filing the action. The Court thus held that "retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit."[13] The Court emphasized at footnote 5, however, that its decision was not meant to apply to all lawsuits:

[10] The order was later vacated as to 2 of the 11 defaulting defendants.

[11] Skrzypek also testified that the lawsuit was based, in part, on unspecified information provided by former employee Nataline Jones (also referred to in the record as Nataline Cole) in a sworn statement obtained by the Skrzypeks' attorney before the State court lawsuit was initiated. Jones did not appear at the hearing, and the judge sustained Counsel for the General Counsel's hearsay-based objection to the introduction of her statement.

[12] 461 U.S. 731 (1983).

[13] Id. at 748–749.

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption . . . . Nor could it be successfully argued otherwise, for . . . this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).[14]

Applying *Bill Johnson's*, the judge found that the Respondents' suit violated Section 8(a)(1), both because it was preempted and because it was baseless and retaliatory. The judge found further support for these theories in two lines of Board cases addressing the lawfulness of State-court lawsuits targeting the use of Board processes.

In support of his finding that the lawsuit was preempted, the judge relied on *Manno Electric, Inc.*[15] In *Manno Electric,* the Board considered an employer's State-court lawsuit alleging, in part, that employees made false statements to the Board with a malicious intent to injure the employer. The Board found that the employer's initiation and maintenance of the suit violated Section 8(a)(1), affirming without comment the following analysis of the administrative law judge:

> Under the teachings of *Bill Johnson's*, supra, the first consideration must be whether the Respondent['s] suit is a suit "claimed to be beyond the jurisdiction of the state courts because of federal-law preemption or a suit that has an objective which is illegal under the federal law."
>
> . . . .
>
> The obvious effect of paragraph 2 [of the State court petition] was to both punish the defendants and to frighten employees from appealing to the Board. Plaintiff's state court suit was a prohibited act aimed at discouraging employees' protected activities and was incompatible with the objectives of the Act and had for its purpose an illegal objective. By filing and continuing the state court lawsuit as to paragraph 2, the Plaintiff interfered with, restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act and [was] in violation of Section 8(a)(1) of the Act. The state court suit comes under the exception of *Bill Johnson's*, supra. It was preempted by Federal law.[16]

Applying these principles to the Respondents' lawsuit, the judge found that the lawsuit was preempted and hence violated the Act because it interfered with employee access to Board processes—a protected right.[17]

In support of his finding that the lawsuit was baseless, the judge relied on *LP Enterprises,*[18] wherein the Board explained that the filing of an unfair labor practice charge is protected under the Act unless the charge is filed in bad faith.[19] The Board held, therefore, that in State-court lawsuits targeted at the filing of unfair labor practice charges, Federal law superimposes the requirement of bad faith, which the Board defined in terms of malice, i.e., "knowledge that the charge allegations were false or [filed] with reckless disregard of the truth."[20] Applying that standard, the judge found that the Respondents' suit was baseless because the charge allegations and supporting affidavits in *Federal Security I* could not be deemed malicious.[21] The judge observed that the Respondents' lawsuit alleged that the charge allegations and affidavits were false in one particular respect, the reasons for the walkout. The judge emphasized, however, that the testimony of the employees concerning the reasons for the walkout was credited by the administrative law judge after a full trial at which their testimony was tested by cross-examination and the opportunity to submit counter evidence. The judge also emphasized that, although the Seventh Circuit denied enforcement of the Board's order, the court did not disturb the Board's credibility-based finding that the walkout was related to working conditions. The judge therefore found that the charge, supporting affidavits, and testimony could not be deemed malicious or submitted in bad faith.[22]

[14] Id. at 737 fn. 5.

[15] 321 NLRB 278 (1996), enfd. 127 F.3d 34 (5th Cir. 1997).

[16] 321 NLRB at 297–298 (internal citations omitted). Concurring in the result, Member Cohen found it unnecessary to pass on whether the suit had an illegal objective because he agreed that the suit was preempted, inasmuch as it related to the protected activity of employee access to Board processes. He acknowledged that the suit alleged that the defendants' use of Board processes was malicious and that malicious use of Board processes may be unprotected. He observed, however, that the employer did not offer any evidence to support the allegation of malice. Id. at 278 fn. 5.

[17] See para. 1(a) of the judge's recommended Order (ordering the Respondents to cease and desist from "[f]iling, maintaining and prosecuting lawsuits with causes of action that are preempted by the Act and include conduct protected by the Act."). 336 NLRB at 709.

[18] 314 NLRB 580 (1994).

[19] Id. at 580.

[20] Id., citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 64–65 (1966).

[21] 336 NLRB at 708.

[22] Id. The judge also found that the evidence submitted by the Respondents fell far short of establishing that the charge, supporting affi-

The judge next examined the Respondents' motive for filing the lawsuit. He observed that it is not necessary to establish retaliatory motive in order to find that a preempted lawsuit violates the Act, but such a showing is required under the theory set forth in *LP Enterprises*. The judge found "overwhelming" evidence of retaliatory motive based on the lawsuit's lack of merit, the Respondents' request for attorney's fees double what Respondent Federal Security had actually expended, the request for punitive damages, and the Respondents' lingering animus toward Palm, the charging party in *Federal Security I*.[23] The judge therefore concluded that the Respondents violated Section 8(a)(1) of the Act by filing and maintaining their State-court lawsuit.

3. The Board's Decision

The Board adopted the judge's conclusion that the Respondents violated the Act by filing and maintaining their lawsuit. The Board held that the lawsuit "violated Section 8(a)(1) from the time it was filed, both because it was preempted as directed against activity that was 'actually' or 'clearly' protected by Section 7, and because it was baseless and retaliatory."[24]

4. The Remand

As explained above, while the Board's Order was pending before the United States Court of Appeals for the District of Columbia Circuit, the Supreme Court issued its decision in *BE&K*, supra. Thereafter, the Court of Appeals remanded this case to the Board in light of the Court's decision and to further address the preemption issue.

In *BE&K*, the Court considered whether the Board "may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless[.]"[25] The Court found that some unsuccessful lawsuits involve genuine grievances because genuineness does not turn on whether the grievance succeeds. The Court also found that unsuccessful but reasonably based suits advance some First Amendment interests because they allow the public airing of disputed facts, raise matters of public concern, promote the evolution of the law, and add legitimacy to the court system as an alternative to force.[26] In light of this analysis, the Court held that the Board's extant standard, under which it could penalize "all reasonably based but unsuccessful suits filed with a retaliatory purpose," was invalid.[27] In doing so, however, the Court did not determine the scope of Petition Clause protection to be afforded unsuccessful but reasonably based lawsuits.[28]

On remand, the Board addressed the question left unresolved by the Court concerning the scope of Petition Clause protection to be afforded unsuccessful but reasonably based suits. The Board held that, "just as with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice," regardless of the motive for filing it.[29]

Although the Court and Board in *BE&K* addressed the appropriate standard for analyzing whether a reasonably based but unsuccessful lawsuit violates the Act in light of the First Amendment Petition Clause, they did not address the present issue of preempted lawsuits.

II. POSITIONS OF THE PARTIES

A. The Respondents

The Respondents contend that the Supreme Court's decision in *BE&K* compels dismissal of the complaint. The Respondents observe that the Court held that petitioning "is genuine both objectively and subjectively" "as long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal."[30] The Respondents argue that Skrzypek's testimony at the hearing establishes that he reasonably believed the defendants' conduct was illegal, and the lawsuit was therefore objectively and subjectively genuine within the meaning of the Court's opinion in *BE&K*.

The Respondents argue, moreover, that the Board cannot find that their lawsuit was baseless in light of the State court's denial of two motions to dismiss the malicious prosecution and related conspiracy claims. The Respondents contend that the State court's determination

davits, and testimony were submitted in bad faith. The judge explained that Skrzypek's testimony concerning his meeting with Davenport was hearsay, and Davenport could not know what was or was not true in the affidavits and testimony in *Federal Security I* other than his own, nor could he know what motivated Palm to file the charge, given his limited connection to the earlier unfair labor practice case. Moreover, there was no evidence that the charge was filed for any purpose other than to obtain reinstatement and backpay for alleged unlawful terminations, which are traditional remedies for such conduct. The judge found further that Davenport's alleged statement that Skrzypek was "set up" was too ambiguous to establish bad faith or malice. Id. at 708.

[23] Id. at 708–709.

[24] Id. at 703 fn. 3. The Board ordered the Respondents to withdraw the suit, to take affirmative action to have the default orders in the proceeding vacated, and to reimburse the defendants for all legal and other expenses incurred in defending the suit.

[25] 536 U.S. at 524.

[26] Id. at 532.

[27] Id. at 536.

[28] Id. at 536-537.

[29] 351 NLRB 451, 457 (2007). To determine whether a lawsuit is reasonably based, the Board adopted the following standard: a lawsuit lacks a reasonable basis "if 'no reasonable litigant could realistically expect success on the merits.'" Id. at 457 (quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries,* 508 U.S. 49, 60 (1993)).

[30] 536 U.S. at 534 (emphasis in original).

that these claims were well pled under State law is binding on the Board or at least entitled to substantial deference. The Respondents also contend that the General Counsel has failed to establish that their suit was retaliatory.

Finally, the Respondents maintain that their lawsuit was not preempted. In this regard, the Respondents contend that the conduct at which the suit was directed--the filing of false charges and providing false testimony--is not clearly or even arguably protected under the Act, and therefore the conduct is not within the Board's exclusive jurisdiction, citing *San Diego Building Trades Council v. Garmon*,[31] (holding that "[w]hen it is clear or may fairly be assumed" that the activities that a State purports to regulate are protected by Section 7 or prohibited by Section 8, or even "arguably subject" to those sections, the State and Federal courts are ousted of jurisdiction). The Respondents also contend that even assuming the targeted conduct was "arguably" protected, the suit fell within the exceptions to federal preemption carved out by the Court in *Garmon* for conduct that is "a merely peripheral concern" of the Act or that touches interests "deeply rooted in local feeling and responsibility."[32] The Respondents assert, additionally, that they had no acceptable means of presenting their claims to the Board for adjudication, and they argue that this weighs heavily against preemption, citing, inter alia, *Sears, Roebuck & Co. v. Carpenters*,[33] and *Linn*[34] ("The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for preemption.").

B. The General Counsel

The General Counsel maintains that the Board correctly found in its prior decision that the Respondents violated Section 8(a)(1) by filing and maintaining their suit, and that the Supreme Court's decision in *BE&K* does not require a different result.

The General Counsel maintains that the Respondents' claims were baseless and retaliatory, essentially for the reasons stated by the judge. The General Counsel further maintains that the Board's jurisdiction preempted that of the State court under the principles set forth in *Garmon*, supra, inasmuch as it is "clear" that the conduct targeted by the Respondents' suit was protected under the Act. The General Counsel submits that *BE&K* did not affect the Board's authority under footnote 5 of *Bill Johnson's* to find unlawful a preempted suit, without determining whether the suit is baseless or retaliatory.

III. DISCUSSION

As explained below, we find that the Act preempted the Respondents' lawsuit from the date it was filed.[35] We further find that the Supreme Court's decision in *BE&K* did not invalidate the Board's standard for imposing liability on preempted lawsuits. Applying that standard here, we find that the Respondents violated Section 8(a)(1) of the Act by filing and maintaining their State-court lawsuit. Because we decide the case on preemption grounds, we need not consider whether the Board correctly determined in its prior decision that the lawsuit was baseless and retaliatory.[36]

A. The Preemption Doctrine

Our review of the preemption doctrine starts with the Constitution's Supremacy Clause. The Supremacy Clause provides in relevant part:

[31] 359 U.S. 236, 244, 245 (1959).

[32] Id. at 243–244.

[33] 436 U.S. 180 (1978).

[34] Supra, 383 U.S. at 64.

[35] The Respondents, joined by the dissent, argue that the judge improperly found that the lawsuit was preempted because that theory of violation was not alleged or litigated by the General Counsel. We disagree. It is settled that the General Counsel is not required to describe in the complaint the legal theory relied on. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994); *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990) (enforcing Board decision finding an unfair labor practice under a different legal theory than the one articulated in the complaint). See also *Massey Energy / Mammoth Coal*, 358 NLRB No. 159, slip op. at 10 (2012) ("the Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, . . . where the unlawful *conduct* was alleged in the complaint" (emphasis in original)), and cases cited therein. Sec. 102.15 of the Board's Rules and Regulations requires only that the complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." The complaint met these requirements. It advised the Respondents that the alleged violation consisted of the filing and maintenance of the State court lawsuit. The complaint thus gave the Respondents fair notice of the acts claimed to constitute the unfair labor practice. Moreover, the Respondents have not shown any prejudice as a result of the General Counsel's failure to allege the preemption theory. The baseless and retaliatory theory and the preemption theory rely on the same set of facts and the Respondents have not proffered any evidence that they would have introduced had the preemption theory been alleged or even asserted that they would have introduced additional evidence. "When an employer is not prejudiced by the Board's reliance on a theory not specifically addressed in the complaint or at the hearing, the employer's due process rights are not violated." *Davis Supermarkets,* 2 F.3d at 1169, citing *Pergament,* 920 F.2d at 137.

[36] Accordingly, we need not address *Summitville Tiles,* 300 NLRB 64 (1990), and other Board cases on which our dissenting colleague relies in support of his argument that the Respondents' lawsuit was reasonably based.

> [T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[37]

Thus, under the Constitution, Federal law is the "supreme Law of the Land," and State laws that interfere with, or are contrary to, Federal law, are preempted.

In *Metropolitan Life Ins. Co. v. Massachusetts*,[38] the Supreme Court summarized the task courts and Federal agencies face when confronted with the issue of preemption:

> In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.[39]

While the Act "neither contains explicit pre-emptive language nor otherwise indicates a congressional intent to usurp the entire field of labor-management relations," the Supreme Court has nevertheless found that State law is displaced to the extent it actually conflicts with the Act. *Brown v. Hotel & Restaurant Employees Local 54*.[40] "Such actual conflict between state and federal law exists when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[41]

Guided by these considerations, the Supreme Court in *Garmon*, supra, adopted a rule broadly preempting the states' role in regulating labor activity subject to the Act. The Court held that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield."[42] The Court explained that "[t]o leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."[43]

The Court additionally held that a presumption of preemption applies even when the activity that the State seeks to regulate is only "arguably" protected by Section 7 of the Act or prohibited by Section 8 of the Act.[44] This "prophylactic rule"[45] "avoids the potential for jurisdictional conflict between State courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB."[46] "The governing consideration," the Court explained, "is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."[47]

The Court in *Garmon* recognized, however, that not every State cause of action involving arguably protected or prohibited activity is preempted, and specifically recognized two exceptions: activity that is "a merely peripheral concern" of the Act and activity that touches interests "deeply rooted in local feeling and responsibility."[48] In *Sears*, supra, the Court also recognized an exception where the injured party has no means of bringing the dispute before the Board.[49]

As the Court has repeatedly emphasized, however, the rule that State law is preempted when "it is clear or may fairly be assumed" that conduct is protected by the Act admits of no exception.[50] "If the state law regulates conduct that is actually protected by federal law . . . preemption follows . . . as a matter of substantive right . . . . [and] the relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail."[51]

---

[37] U.S. Constitution, Art. VI, Clause 2.
[38] 471 U.S. 724 (1985).
[39] Id. at 738 (internal quotation marks omitted).
[40] 468 U.S. 491, 501 (1984).
[41] Id. (internal quotation marks and citations omitted).
[42] 359 U.S. at 244.
[43] Id.
[44] Id. at 245. A showing of "arguable" protection or prohibition requires the party claiming preemption to present sufficient evidence to show that the Board could decide the issue in its favor. *International Longshoremen's Assn.. v. Davis*, 476 U.S. 380, 395 (1986). However, the failure of the Board to decide whether activity is protected or prohibited under the Act does not in itself permit the states to regulate conduct they would otherwise be precluded from regulating. *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Garmon*, supra, 359 U.S. at 245 (explaining that the failure of the Board to determine whether disputed conduct is within the compass of Sec. 7 or Sec. 8 does not give the states the power to Act).
[45] *Sears*, supra, 436 U.S. at 187.
[46] *Brown*, supra, 468 U.S. at 502.
[47] *Garmon*, supra, 359 U.S. at 246.
[48] Id. at 243–244. See also the Board's discussion of the preemption doctrine in *Webco Industries* ., 337 NLRB 361, 362 (2001).
[49] 436 U.S. at 202-203.
[50] *Garmon*, supra, 359 U.S. at 244.
51 *Brown*, supra, 468 U.S. at 503. See also *Sears*, supra, 436 U.S. at 199 & fn. 30 ("there is a constitutional objection to state-court interference with conduct actually protected by the Act"; "[i]t is clear that a state court may not exercise jurisdiction over protected conduct.").

1. The Activity Targeted by the Respondents' Lawsuit was "Clearly" or "Actually" Protected by Section 7 of the Act

In light of the above, the threshold question in any preemption analysis involving the Act is whether "it is clear or may fairly be assumed" that the activity which a State purports to regulate is protected or prohibited by the Act.[52] If that question is answered in the affirmative, the inquiry is at an end and "state jurisdiction must yield."[53]

"The National Labor Relations Act, as amended, was enacted by Congress in order to prescribe the legitimate rights of employees and employers in their relations affecting commerce, and to provide an orderly and peaceful procedure for the prevention of interference by either with the legitimate rights of the other."[54] To enforce the provisions of the Act, Congress created the National Labor Relations Board and gave the Board responsibility for preventing unfair labor practices affecting commerce.[55] The Board, however, cannot initiate its own processes. Enforcement of the Act is dependent upon the initiative of individual persons, who must invoke its processes by filing an unfair labor practice charge.[56]

Congress has in unmistakable terms recognized that the ability of an employee to file a charge or provide information to the Board without fear of coercion is crucial to the functioning of the Act as a whole. To ensure that access to the Board's processes is unimpeded, Congress enacted Section 8(a)(4), which provides that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act."[57]

It is well settled, moreover, that an employer that retaliates against an employee because he has filed charges under the Act violates not only Section 8(a)(4) but also Section 8(a)(1). Under Section 8(a)(1), it is an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7."[58] Section 7 guarantees employees the right "to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[59] This guarantee includes the right to invoke the administrative processes of the Board and to provide evidence. See, e.g., *2 Sisters Food Group, Inc.*;[60] *Mesker Door, Inc.*[61](explaining that "filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7"); *U-Haul Co. of California*;[62] *Network Dynamics Cabling, Inc.*[63]

The Board and the courts have scrupulously protected access to Board processes. In *Nash v. Florida Industrial Commission*,[64] the Court explained:

> The [NLRA] is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such it is of course the law of the land which no state law can modify or repeal. Implementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board.[65]

Likewise, in *NLRB v. Marine & Shipbuilding Workers Local 22,*[66] the Court observed:

> A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy. The Board cannot initiate its own proceedings; implementation of the Act is dependent upon the initiative of individual persons. The policy of keeping people completely free from coercion against making complaints to the Board is therefore important in the functioning of the Act as an organic whole. . . . A healthy interplay of the forces governed and protected by the Act means that there

[52] *Garmon*, supra, 359 U.S. at 244.
[53] Id.
[54] *Power Systems, Inc.*, 239 NLRB 445, 447 (1978), enf. denied on other grounds 601 F.2d 936 (7th Cir. 1979).
[55] Id.
[56] Id. Sec. 10(b) of the Act states, in pertinent part: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board ... shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect." Sec. 10(b) thus requires that a charge be filed before the Board issues a complaint.
[57] 29 U.S.C. § 158(a)(4). Congress placed no limits on the protection afforded by Sec. 8(a)(4). The legislative history confirms that this was not an oversight. See, e.g., 79 Cong. Rec. at 7676 (statement of Sen. Hastings)(proposing that language be added to 8(a)(4) limiting its scope to employees who file charges in good faith, thereby excluding "an employee [who] might file charges maliciously"). The proposal was discussed, see id., (statements of Sens. Hastings and Wagner), and the decision was made not to add the proposed limitation, see id., (statement of Sen. Wagner) ("I am satisfied with the provision as it stands").
[58] 29 U.S.C. § 158(a)(1).
[59] 29 U.S.C. § 157.
[60] 357 NLRB No. 168, slip op. at 2 (2011).
[61] 357 NLRB No. 59, slip op. at 6 (2011).
[62] 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).
[63] 351 NLRB 1423, 1427 (2007).
[64] 389 U.S. 235 (1967).
[65] Id. at 238 (footnote omitted).
[66] 391 U.S. 418 (1968).

> should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. . . . [W]e agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative . . . . [67]

See also *United Credit Bureau of America, Inc. v. NLRB*[68] (holding that the Board's exclusive jurisdiction over labor matters preempts State court jurisdiction of an employer's common law civil action against an employee for filing allegedly fraudulent unfair labor practice charges against the employer); *Power Systems*[69] (penalizing employee for filing a charge with the Board and thus depriving him of, and discouraging employees from seeking, access to the Board's process is unlawful object of employer's lawsuit).

Allowing states to exercise jurisdiction over such disputes would thwart the congressional objective of ensuring that "all persons with information about [unfair labor] practices [] be completely free from coercion against reporting them to the Board." *Nash,* supra, 389 U.S. at 238. Plaintiffs who prevail on claims of malicious prosecution in Illinois are entitled to recover attorneys' fees and costs. Successful plaintiffs may also be entitled to punitive damages, which may well dwarf the fees and costs.[70] Consequently, absent preemption of such lawsuits, an employee's resort to the Board's processes to protect himself and others from perceived violations of the Act or assistance in the Board's investigation of alleged unfair labor practices could give rise to substantial financial liability. The financial burden is not rendered irrelevant by the fact that it would only be imposed on an employee who, in the State's view, submitted charges or evidence in bad faith. For, even if an employee acted in good faith, he would still bear the costs of defending himself in court as well as the risk of a mistaken adverse finding by the court.[71] Thus, a civil suit that is factually predicated on the filing of charges or the submission of evidence under the Act, even if it ultimately proves unsuccessful, may impose a costly and prohibitive burden on the invocation of and participation in the Board's processes. "It appears obvious to us that this financial burden . . . will impede resort to the Act and thwart congressional reliance on individual action."[72] And it is not only the State court defendants who suffer. The public interest in the enforcement of the Act is also impaired since the consequence of such a suit is not only to silence the State court defendants but to chill others who might speak out as well. See *NLRB v. Scrivener*[73] ("This complete freedom [to provide information to the Board concerning unfair labor practices] is necessary ... 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" [quoting *John Hancock Mutual Life Insurance Co. v. NLRB*[74]].

These considerations compel a conclusion that the Respondents' lawsuit was preempted. To allow the states to adjudicate civil actions for money damages that are factually predicated on the filing of charges or providing other assistance to the Board could stand as "an obstacle to the accomplishment and execution of the full purposes" of the Act, because such suits have a direct tendency to frustrate the intent of Congress to leave people free to file unfair labor practice charges or submit evidence to the Board without fear of retaliation or coercion. *Brown*;[75] *Marine and Shipbuilding Workers Local 22*.[76] As the Court stated in *Garmon*, "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."[77]

Seeking to avoid this conclusion, the Respondents argue that the conduct that was the subject of their lawsuit—falsifying unfair labor practice charges and supporting evidence—is not protected by the Act. As described in their State court complaint, the Respondents assert that the employees who participated in the Board's proceedings in *Federal Security I* "fabricated the facts, circumstances and the reasons for the walkout" so that the Board would become involved and "the only reason the guards left their posts was to show support for and loyalty to [Supervisor] Short after he was suspended." However, when the Respondents' filed their lawsuit, those issues had already been decided by the Board in *Federal Security I*. Following an investigation during which Federal Security was given an opportunity to submit evidence, the General Counsel issued a complaint, indicating that he found the charge allegations to be well grounded in fact and law. After a formal hearing at which Federal Security had an opportunity to cross-examine witnesses and submit additional evidence, the judge in *Federal Security I* credited the witnesses' testi-

[67] Id. at 424 (internal quotation marks, footnotes, and citations omitted).
[68] 643 F.2d 1017 (4th Cir. 1981), cert. denied 454 U.S. 994 (1981).
[69] 239 NLRB at 449.
[70] *William J. Templeman Co. v. Liberty Mutual. Insurance Co.*, 316 Ill.App.3d 379, 384 (2000).
[71] *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 72 (2008).
[72] *Nash*, supra, 389 U.S. at 239.
[73] 405 U.S. 117, 122 (1972).
[74] 191 F.2d 483, 485 (D.C. Cir. 1951).
[75] 468 U.S. 501.
[76] 391 U.S. at 424.
[77] 359 U.S. at 244.

mony that the walkout was related to working conditions. Specifically, the judge found: "According to the credible and consistent testimony of Palm and Short, they discussed what they considered Skryzpek's reneging on promises to provide bulletproof vests, insurance, unlimited overtime, and paid vacations . . . and decided to demand that Skryzpek meet with them about these matters or they would walk off the job."[78] The judge also found that "Palm and Robinson, who organized the walkout, credibly testified that the reasons for it were to protest . . . the failure of Skryzpek to provide benefits that he had promised to the sweep team members."[79] Finally, the judge found that "the evidence establishes that insofar as the termination of Chief Short was a motivating factor in the employees' decision to strike it was because of the perceived effect it would have on their own working conditions."[80] The judge therefore found that this aspect of the walkout was also protected.[81] The Board adopted the judge's findings in toto. Although the Seventh Circuit denied enforcement of the Board's order, it did so on the basis that the guards exposed residents at the public housing sites they guarded to heightened danger by abandoning their posts. The court did not disturb the Board's credibility findings or its finding that the walkout was related to working conditions and not solely to protest the perceived discharge of supervisor Short.[82]

The State court could not find that the defendants named in the Respondents' suit engaged in malicious prosecution without first finding that the charge allegations, affidavits, and/or testimony that they submitted to the Board in *Federal Security I* were knowingly false and therefore unprotected.[83] The Board had already held, however, that the charge allegations and supporting evidence were truthful and that the walkout was related to working conditions.

The Respondents' lawsuit thus sought to regulate activity that was "clear[ly] or may fairly be assumed" to be protected by Section 7 in light of the Board's decision in *Federal Security I*.[84] Allowing the State to impose sanctions on employees who exercise their right to file charges and submit evidence under the Act even where the Federal agency in charge of administering the Act has determined that the charges and evidence were truthful would be fundamentally inconsistent with the comprehensive Federal regulatory scheme. See *Garmon*[85] ("If the Board decides . . . that conduct is protected by Section 7 . . ., then the matter is at an end, and the States are ousted of all jurisdiction.").

2. Even Assuming that the Targeted Conduct Was Only "Arguably" Protected, the Respondents' Lawsuit was Preempted

The Respondents contend that the conduct that the State court would be called upon to regulate was only "arguably" protected. They contend, further, that their suit fell within the exceptions to federal preemption carved out by the Court in *Garmon*, supra, for State regulation of "arguably" protected conduct that is "a merely peripheral concern" of the Act or that touches interests "deeply rooted in local feeling and responsibility."[86] They would find support for the application of these ex-

[78] 318 NLRB at 417.

[79] Id. at 418.

[80] Id. at 420.

[81] Id.

[82] *NLRB v. Federal Security*, supra, 154 F.3d 751.

[83] To prevail on a claim of malicious prosecution in Illinois, a plaintiff must show: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) that the proceeding terminated in favor of the plaintiff; (3) absence of probable cause for such proceeding; (4) the presence of malice on the part of the defendant; and (5) damages resulting to the plaintiff. *Sutton v. Hofeld*, 118 Ill.App.3d 65, 67–68 (1983).

[84] 359 U.S. at 244. In reaching this conclusion, we do not rely on the judge's discussion of the collateral estoppel effect of the Board's decision in *Federal Security I*. Rather, we find that, under well-established preemption principles, where the Board has found that charge allegations and testimony are truthful, and its credibility findings have not been overturned or vacated by a Federal court with the exclusive authority to review Board orders pursuant to Sec. 10(e) and (f) of the Act, a State court cannot determine that the charge allegations and testimony were false or submitted in bad faith and penalize employees on that basis. The potential for conflict and prohibition of protected conduct is simply too great, in our view, to permit states to overturn or disregard the Board's credibility determinations and factual findings in malicious prosecution actions.

We reject, as inapposite, the Respondents' argument that when a fraud has been committed in an earlier proceeding, the decision in that proceeding is not preclusive or binding on other tribunals. The Respondents' argument and the cases they cite do not address the question presented here of whether a State court has authority to decide that allegations and testimony that a Federal agency in fulfilling its statutory mandate has found to be truthful are, in fact, false and to penalize employees on that basis. Even putting aside their failure to address the core issue of preemption, moreover, the cases relied upon by the Respondents do not support their argument. The Respondents cite a dissenting opinion in *Gordon v. United Airlines, Inc.,* 246 F.3d 878, 894 (7th Cir. 2001) which was not adopted by the majority and which does not, in any event, even allude to the proposition for which it is cited. The Respondents' reliance on *U.S. v. Parker*, 447 F.2d 826 (7th Cir. 1971), likewise fails. There, a United States court of appeals reversed a district court decision finding that a witness committed perjury in an earlier trial before the same judge. See 18 U.S.C. § 1621 (criminalizing perjury). Like the dissent in *Gordon*, *Parker* does not address the circumstances in which a *State* court can penalize, as false, testimony that a Federal agency credited in its proceeding to enforce Federal law. Compare *In re Loney*, 134 U.S. 372, 375–376 (1890) (States may not punish perjury in Federal courts).

[85] 359 U.S. at 245.

[86] 359 U.S. at 243–244.

ceptions in the Supreme Court's decisions in *Linn*, supra, and *Farmer*, supra.

We reject the Respondents' argument that the conduct targeted by their lawsuit was only "arguably" protected for the reasons set forth above. Moreover, if the conduct were only "arguably" protected, none of the recognized exceptions to the *Garmon* preemption doctrine apply.

We cannot construe the Respondents' lawsuit as "a merely peripheral concern" of the Act, because it targets activities that are "at the heart of Board processes."[87] Nor can we conclude that the lawsuit falls within the local interest exception. The Supreme Court has ordinarily applied this exception in cases where the disputed conduct concerned activity historically recognized to be the subject of local regulation, such as trespass, intentional infliction of emotional distress, malicious libel, violence, threats of violence, and destruction of property.[88] The Respondents cite no authority establishing that the State has an historic interest in regulating access to Board processes that is "so deeply rooted in local feeling and responsibility" as to justify an exception to *Garmon* preemption principles. To the contrary, access to Board processes is a particular concern of the Board.

Even were we to conclude, moreover, that the Respondents' lawsuit implicates a significant State interest, the Court has cautioned that the determination of whether State regulation should be permitted in such circumstances involves "a sensitive balancing" of factors, including, among other things, the harm to the Federal regulatory scheme, the importance of the asserted cause of action to the State in protecting the health and well-being of its citizens, and the risk that the State will sanction conduct that the Act protects.[89] Those factors weigh much more heavily in favor of preemption here than they did in *Linn* or *Farmer.*

In *Linn*, the Supreme Court held that the Act does not completely preempt civil actions for malicious libel published during a labor dispute if the defamatory statements are circulated with malice and cause damage. The Court found that State regulation of such conduct only peripherally concerned the Act, while the State, on the other hand, had "an overriding . . . interest" in protecting residents from malicious libel that was "deeply rooted in local feeling and responsibility."[90] The Court also found that there was little risk that permitting the State to proceed would interfere with the effective administration of national labor policy, because an unfair labor practice proceeding before the Board would focus on whether the statements were misleading or coercive, not on whether they were defamatory, while the State court would be unconcerned with whether they were coercive or misleading in the labor context.[91] The Court found that these factors justified an exception to the *Garmon* preemption rule.[92] Similarly, in *Farmer*, supra, the Court held that the Act did not preempt a union member's State court action against his union for intentional infliction of emotional distress because the Act does not protect such "outrageous" conduct, while the State has a substantial interest in regulating such conduct, and the State's interest "does not threaten undue interference with the federal regulatory scheme."[93]

We find the facts in *Linn* and *Farmer* to be readily distinguishable from those in the present case. The defamatory statements in *Linn* and the outrageous conduct in *Farmer* did not occur in a Board proceeding. In contrast, the conduct at issue in the Respondents' lawsuit occurred entirely within the context of the Board's administrative investigation of charge allegations and unfair labor practice hearing. Indeed, the gravamen of the lawsuit was the invocation of the Board's processes. Thus, while the State actions in *Linn* and *Farmer* were "a merely peripheral concern" of the Act, the subject matter of the Respondents' lawsuit is of central importance to the Act.

In *Linn* and *Farmer,* moreover, the Court presumed that the challenged conduct was not protected by the Act. The Court also found that, if a charge had been filed alleging that the challenged conduct was prohibited, the respective controversies presented to the State and the Board would not have been the same. The Court there-

[87] *John Hancock Mutual Life Insurance*, supra, 191 F.2d at 485.

[88] See, e. g., *Sears*, supra, 436 U.S. at 190–198 (trespass); *Farmer*, supra, 430 U.S. 290 (intentional infliction of emotional distress); *Linn*, 383 U.S. 53 (malicious libel); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence).

[89] *Operating Engineers Local 926 v. Jones*, 460 U.S. 669, 676 (1983) (determination involves "a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens."); *Sears*, 436 U.S. at 188–189 (determination turns on "the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of permitting State court jurisdiction); *Farmer*, 430 U.S. at 297 (determination requires examination of "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme.").

[90] 383 U.S. at 61–62.

[91] Id. at 63–64. The Court also weighed the fact that the Board could award no damages or provide any other relief to the defamed individual. Id. at 63.

[92] The Court, however, limited the scope of the exception by holding that states would be permitted to exercise jurisdiction over such claims only if the plaintiff pleaded and could prove that the defamatory statements were published with knowledge or reckless disregard of their falsity, adopting the standard in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

[93] 430 U.S. at 302.

fore found that there was little risk that permitting the State to proceed would interfere with the regulatory jurisdiction of the Board. In contrast, in this case, the Federal and State claims are the same in fundamental respects. The State court would have to determine the credibility of the charge allegations and testimony in *Federal Security I*, the reasons for the walkout, and whether there was probable cause for the charge under Federal labor law. However, when the Respondents filed their lawsuit, those issues had already been decided adversely to the Respondents in *Federal Security I*. "The risk of interference with the Board's jurisdiction is thus obvious and substantial."[94]

Furthermore, balancing the State interest in adjudicating malicious prosecution and abuse of process claims against the interference with the Federal regulatory scheme and the risk that State courts will prohibit conduct protected by the Act, we cannot conclude that Congress intended to permit State courts to adjudicate the conduct alleged in the Respondents' lawsuit. In making this determination, we have considered the State's interest in protecting its citizens from vexatious litigation. However, that interest is very narrow when the challenged conduct involves petitioning an agency of the Federal Government to enforce the public rights guaranteed by the Act. Further, when the State's interest is measured against the Federal objective of ensuring unfettered access to the Board's processes—an objective that will unquestionably be frustrated by permitting employers to bring civil actions against employees for filing charges or submitting evidence under the Act—we are persuaded that the State's interest must yield. In essence, this is the same judgment that the Court made in *Nash,* where it struck down a Florida law denying unemployment compensation to employees who filed unfair labor practice charges, finding that the law would have "a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board."[95] In reaching this conclusion, the Court "follow[ed] the unbroken rule that has come down through the years . . . that a state law cannot stand that either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created."[96]

The Respondents also assert that they had no acceptable means of presenting their claims to the Board for adjudication, and they argue that this weighs heavily against preemption, citing, inter alia, *Sears*, supra. In *Sears*, the Court sustained State regulation of peaceful trespassory picketing even though it was "arguable" that the picketing was either protected or prohibited under the Act. The Court divided its analysis into the "arguably prohibited" and the "arguably protected" prongs of the *Garmon* test. We focus on the Court's application of the "arguably protected" prong, since there is no argument that the Act prohibits the conduct at issue in the Respondents' lawsuit.

The Court began by acknowledging that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board."[97] The Court went on to explain that this rationale "does not provide a *sufficient* justification for pre-empting state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so."[98]

The Court was careful to point out, however, that the fact that the aggrieved party lacks an opportunity to have the Board consider whether challenged conduct is protected does not "necessarily foreclose the possibility that pre-emption may be appropriate."[99] Where there is a strong argument that Section 7 does protect the activity, the Court cautioned, the risk of interference with federally protected conduct may require that the State yield its jurisdiction even if the controversy is not one that the aggrieved party could bring before the Board. "Thus, the acceptability of 'arguable protection' as a justification for pre-emption" where the aggrieved party has no opportunity to invoke the Board's jurisdiction, the Court explained, is "at least in part, a function of the strength of

[94] *Jones*, supra, 460 U.S. at 683.

[95] 389 U.S. at 239.

[96] Id. at 240 (internal quotation marks and citations omitted). See also *Linn*, 430 U.S. at 305 ("At the same time, we reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme.")

[97] 436 U.S. at 202.

[98] Id. at 202–203 (emphasis in the original) (footnotes omitted).

[99] Id. at 203. See also *Garmon,* supra, 359 U.S. at 245–246, where the Court explained that the Board's failure to define activity as protected or prohibited "with unclouded legal significance" is not sufficient by itself to preclude preemption:

> [T]he failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

the argument that Section 7 does in fact protect the disputed conduct."[100]

Applying these principles to the union's conduct in *Sears*, the Court found that the employer had no acceptable method of invoking, or inducing the union to invoke, the jurisdiction of the Board.[101] The Court also found that the argument that Section 7 protected the disputed conduct was weak because "experience under the Act" teaches that trespassory picketing by nonemployee organizers is "far more likely to be unprotected than protected" and is only "rare[ly]" protected.[102] The Court therefore concluded that "permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct which the Board . . . would find protected."[103]

In sharp contrast, in the instant case, the Board has already decided the core issues in the Respondents' lawsuit, namely, whether there was probable cause for the charge in *Federal Security I* and the veracity of the charge allegations and evidence indicating that the walkout was related to working conditions. It cannot be said, therefore, that the Respondents had "no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board" to obtain a ruling on those questions.[104] Moreover, experience teaches that, unlike trespassory picketing, filing charges and providing evidence under the Act is far more likely to be protected than unprotected. These distinctions are fundamental, and they illuminate the problem of the present case. The assertion of state jurisdiction in a case that is premised on the filing of charges or providing evidence to the Board would "create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct," because participation in the Board's processes is rarely unprotected and, in all such cases, the Board's jurisdiction will have already been invoked.[105] In these circumstances, we think it is "reasonable to infer that Congress preferred the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction."[106]

We emphasize that our holding does not leave respondents in Board proceedings entirely without recourse against false charges or testimony. If a respondent discovers that an employee has submitted false evidence or testimony in a Board proceeding, the respondent may bring that to the Board's attention. If the Board finds that an employee engaged in deliberate and malicious misconduct that abused and undermined the integrity of the Board's processes, the Board will withhold reinstatement and/or backpay for any unfair labor practice found. See, e.g., *Precoat Metals*[107] (employee denied reinstatement and backpay where, in prehearing affidavit and at hearing, employee lied about core issue and invented conversations that likely contributed to the General Counsel's decision to pursue the complaint and prolonged the Board proceeding). If the alleged falsehood comes to light after the unfair labor practice hearing has ended, the respondent can petition the Board to reopen the hearing. See, e.g., *Toll Mfg. Co.*[108] (Board reopened unfair labor practice hearing and modified remedy to deny backpay where it was determined that the discriminatee had repeatedly lied under oath about a central issue). Finally, even where, as here, the respondent has prevailed at the appellate court level and the Board no longer has jurisdiction of the case, the respondent may request the Board to refer alleged false charges or testimony to the Justice Department for criminal investigation.[109]

Although these options do not offer the substantial monetary damages available under State tort law, that is not a sufficient reason by itself to warrant holding preemption inapplicable. As the Court explained in *Jones,* "such a claim was squarely rejected in *Garmon*."[110] The *Garmon*[111] Court stated:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. . . . Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

It is important to keep in mind that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief."[112] "The obligation to pay compensation can be, indeed is designed to be, a potent

[100] 436 U.S. at 203.
[101] Id. at 202.
[102] Id. at 205.
[103] Id.
[104] Id. at 202.
[105] Id. at 203.
[106] Id.
[107] 341 NLRB 1137 (2004).
[108] 341 NLRB 832 (2004).
[109] See, e.g., 18 U.S.C. § 1621 (criminalizing perjury); see also *U.S. v. Kupau*, 781 F.2d 740 (9th Cir. 1986), cert. denied 479 U.S. 823 (1986) (affirming perjury conviction based in part on submission of false affidavits to the district court in a matter brought by the Board's General Counsel under the authority of Sec. 10(l) of the Act).
[110] 460 U.S. at 684.
[111] 359 U.S. at 246–247.
[112] *Garmon,* supra, 359 U.S. at 247.

method of governing conduct and controlling policy."[113] And in the regulation of the kind of conduct at issue in this case, it is the Federal regulatory scheme of the Act, not the regime of the State tort law, that controls.

B. The Respondents Violated Section 8(a)(1) by Filing and Maintaining Their Lawsuit

As explained above, the Board's standard for imposing liability for the filing and maintenance of a preempted lawsuit derives from language in footnote 5 of *Bill Johnson's,* where the Court emphasized that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption."[114] The Board has interpreted this language to mean that preempted lawsuits are outside the scope of First Amendment protection. Thus, the Board has consistently held, with court approval, that a preempted lawsuit can be condemned as an unfair labor practice, without regard to its objective merits or the motive with which it was filed, if it is unlawful under traditional 8(a)(1) principles.[115]

The Respondents contend that the Supreme Court's decision in *BE&K* invalidated the Board's standard for imposing liability on preempted lawsuits. They point out that the Court held that petitioning "is genuine both objectively and subjectively" "as long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal."[116] The Respondents submit that Skrzypek's testimony at the hearing establishes that he reasonably believed the defendants' conduct was illegal and that the lawsuit was therefore genuine within the meaning of the Court's opinion in *BE&K*. The Respondents assert that the lawsuit is thus insulated from legal sanction under the First Amendment Petitioning Clause.

That argument has been squarely rejected by the D.C. Circuit and the Board. In *J. A. Croson Co.*,[117] the Board explained,

> It is clear . . . that the *Bill Johnson's* exception for preempted lawsuits remains intact after *BE&K*. In *Can-Am Plumbing*, [supra] the D.C. Circuit stated, "*BE&K* did not affect the footnote 5 exemption in *Bill Johnson's*," and "the jurisdictional question of preemption is, as *Bill Johnson's* acknowledged in footnote 5 (and *BE&K* did not disturb), a different matter" than the question of whether a lawsuit can be held unlawful as retaliatory. *Can-Am Plumbing*, supra, 321 F.3d at 151. Thus, *BE&K* does not shield preempted state lawsuits. Rather, footnote 5 of *Bill Johnson's* "places preempted lawsuits outside of the First Amendment analysis." Id.[118]

Accordingly, the Board may continue to hold that a preempted lawsuit is an unfair labor practice without regard to whether it is objectively baseless if it is unlawful under traditional NLRA principles. See, e.g., *Can-Am Plumbing;*[119] *Associated Builders & Contractors*.[120] In this case, the Respondents filed a lawsuit alleging that 17 former employees engaged in abuse of process and malicious prosecution by filing an unfair labor practice charge and providing evidence to the Board. At its core, the Respondents' lawsuit sought to punish and deter resort to the Board's processes--a right protected by Section 7 of the Act. We therefore find that the Respondents violated Section 8(a)(1) of the Act by filing and maintaining their lawsuit.[121] See, e.g., *Webco Industries*[122] ("[I]f a suit is preempted, it violates Section 8(a)(1) if it

---

[113] Id.

[114] 461 U.S. at 737 fn. 5.

[115] See, e.g., *Can-Am Plumbing, Inc.,* 335 NLRB 1217 (2001), enf. denied on other grounds and remanded 321 F.3d 145 (D.C. Cir. 2003), reaffd. 350 NLRB 947 (2007), enfd. 340 Fed.Appx. 354 (9th Cir. 2009); *Associated Builders & Contractors,* 331 NLRB 132, 132 fn. 1 (2000). Accord: *Emery Worldwide v. NLRB,* 966 F.2d 1003, 1006 fn. 4 (5th Cir. 1992); *Teamsters Local 776 v. NLRB,* 973 F.2d 230, 235–236 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[116] 536 U.S. at 534 (emphasis in original).

[117] 359 NLRB No. 2, slip op. at 8 (2012).

[118] As we stated in *Croson*, supra, 359 NLRB No. 2, slip op. at 8, in light of *Can-Am Plumbing* and the absence of any indication that the Supreme Court limited the scope of footnote 5 of *Bill Johnson's*, we decline to join our dissenting colleague in expanding the reach of *BE&K* to preempted lawsuits. The dissent asserts that the language in *Can-Am Plumbing* is "of doubtful precedential value," because the D.C. Circuit remanded the case to the Board on other grounds. However, the dissent ignores the fact that the court expressly rejected what "Can-Am principally contend[ed]," i.e., that *BE&K* "extend[ed] the analytical framework of *Bill Johnson's* . . . to preempted lawsuits." 321 F.3d at 147, 148, 150–151. The court concluded, as a matter of law, that footnote 5 of *Bill Johnson's*, which "*BE&K* did not disturb" (id. at 151), "places preempted lawsuits outside of the First Amendment analysis." Id. The court further held that the First Amendment concerns expressed in *BE&K* were "not relevant" because the State-court lawsuit was wholly preempted by Federal law. Id. See also *Small v. Plasterers Local 200*, 611 F.3d 483, 492 (9th Cir. 2010), quoting *Can-Am Plumbing*, 321 F.3d at 151 (expressing agreement with the position of the D.C. Circuit and the Board that "'*BE&K* did not affect the footnote 5 exemption in *Bill Johnson's*.'").

[119] 335 NLRB at 1217.

[120] 331 NLRB at 132 fn. 1.

[121] We overrule *LP Enterprises*, supra, 314 NLRB 580, and similar cases, i.e., *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 (1990), enfd. 934 F.2d 1288 (1991), cert denied 502 U.S. 1091 (1992); *Power Systems*, supra, 239 NLRB 445; *Clyde Taylor Co.*, 127 NLRB 103, 108 (1960), to the extent they hold that an employer or a union does not violate the Act by filing or maintaining a State lawsuit that is factually predicated on, and seeks to punish or deter, the filing of charges or other participation in the Board's processes if the lawsuit is reasonably based.

[122] Supra, 337 NLRB at 363.

tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.").[123]

ORDER

The National Labor Relations Board orders that the Respondents, Federal Security, Inc., and its alter egos or agents, James R. Skrzypek and Janice M. Skrzypek, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing, maintaining and prosecuting lawsuits with causes of action that are preempted by the Act and include conduct protected by the Act.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act or persons filing charges or cooperating with the Board.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 7 days after service of this Decision and Order by the Region, if they have not already done so, withdraw and, if necessary, otherwise seek to dismiss the lawsuit docketed in the Circuit Court of Cook County, Illinois, as No. 00-L-06317, *James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer et al.,* including any amendments or refilings, and take affirmative action to have the default orders in the proceeding vacated.

(b) Reimburse the defendants in that lawsuit for all legal and other expenses incurred in defending the lawsuit, to date and in the future, plus interest as described in the remedy section of this decision.

(c) Mail to all defendants in the State-court lawsuit, at their last known home addresses, and at Respondents' expense, on a form provided by the Region and signed by the Skrzypeks, a copy of the attached notice marked "Appendix."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification by the Skrzypeks, on a form provided by the Region, attesting to the steps the Respondents have taken to comply with this Order.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

In this case, as in *J.A. Croson*, 359 NLRB No. 2, issued this same day, my colleagues hold that an employer violated Section 8(a)(1) of the Act by filing and maintaining a State-court lawsuit, which they find to be preempted. I dissented in *Croson*[1] on alternative grounds that the lawsuit there was not preempted, but even it if was, a violation should not be found pursuant to the rationale of the Supreme Court's and Board's decisions in *BE&K*.[2] In this case, my colleagues devote the bulk of their opinion to a defense of the judge's finding that the Respondents' lawsuit—a tort action for malicious prosecution against former employees who the Respondents reasonably believed had filed knowingly false Board charges supported by knowingly false affidavits and testimony—was preempted. I question whether the lawsuit was preempted and whether that issue is even before the Board. I also dispute the breadth of the majority's preemption rationale. Instead, I believe the determinative issue before the Board on exceptions to the judge's decision is whether the judge correctly found that the State-court action was baseless and retaliatory. Again relying

[123] The Respondents contend that the Board has no authority to order the Respondents to have the default orders issued by the State court vacated. The Respondents' argument is premised on the *Rooker-Feldman* doctrine. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482–486 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–416 (1923). Briefly stated, that doctrine bars a losing party in State court "from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005–1006 (1994). As the Supreme Court explained in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.,* 544 U.S. 280, 284 (2005), the *Rooker-Feldman* doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by State-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." A Board order requiring the Respondents to seek vacatur of the State court default order would not implicate the "narrow ground occupied by *Rooker-Feldman*," id., because, among other things, the Board proceedings in this case were commenced before the default order was rendered. (The charge that resulted in the issuance of the complaint in this case was filed on June 30, 2000. The State court issued the default order on October 12, 2000.) In addition, the doctrine applies only if the injury alleged by the Federal plaintiff was caused by the State court judgment itself. Here, the source of the injury is not the default order, but the filing and maintenance of the lawsuit. Furthermore, because the State-court lawsuit was preempted, the State court lacked subject matter jurisdiction and the default orders were therefore void *ab initio*.

[1] NLRB No. 2 slip op. at 1.

[2] *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *BE&K Construction Co.*, 351 NLRB 451 (2007).

on the *BE&K* precedent, I would reverse the judge's finding that the State-court action was baseless.[3] Consequently, as in *Croson*, I find that the Respondents' lawsuit, even if preempted was lawful.[4]

The majority believes otherwise. In their view, a preempted lawsuit can be condemned as an unfair labor practice if it interferes with rights protected by Section 7 of the Act—a condition that is invariably satisfied where preemption applies. In truth, then, the majority holds that a preempted lawsuit is unlawful simply because it is preempted. This holding impermissibly threatens the right, protected by the First Amendment and reiterated by the Supreme Court in *BE&K*, to petition the Government for redress of grievances. It does so by penalizing the entire class of preempted lawsuits regardless of whether some lawsuits within that class—including the Respondents'—constitute genuine petitioning. Because the majority's decision is at odds with the constitutional principles embodied in *BE&K*, I dissent.

Background

Over two decades ago, the Respondents' security guard employees engaged in a walkout, for which several of them were discharged. The Board found the discharges unlawful.[5] However, the Seventh Circuit Court of Appeals determined that the walkout was unprotected and denied enforcement.[6] Nearly 2 years later, one of the Respondents' former employees, Michael Davenport, bumped into Company President James Skrzypek at a drug store and admitted to him that the employees had "set him up" in the Board proceeding. According to Skrzypek, Davenport said that the employees had lied in their affidavits and testimony, fraudulently asserting untruths in order to bring their walkout within the scope of Section 7 protection so that they could get their jobs back. Armed with this information, the Respondents filed the State tort action at issue here, seeking damages for malicious prosecution and related misconduct. In the course of the State proceeding, the court issued default judgment orders against 11 of the 17 named defendants, and twice denied motions to dismiss the malicious prosecution claims. In June 2002, the Respondents had their suit voluntarily dismissed against the remaining defendants without prejudice.

Discussion

The majority's preemption rationale sweeps too broadly.

My colleagues find that the Respondents' lawsuit was preempted from the time it was filed because the Board had already determined, in *Federal Security I*, that the charges in the underlying case were meritorious.[7] They find that, by calling on the State court to make fact findings contrary to those of the Board's, the Respondents' lawsuit "sought to regulate activity that was 'clear[ly] or may fairly be assumed' to be protected by Section 7 of the Act" and was therefore preempted.[8]

As stated above, I question whether the instant lawsuit was preempted, but I need not go down that path because I find that the Respondents did not violate the Act by filing and maintaining their State action, even assuming it was preempted. That being said, however, I disagree with my colleagues' rationale for finding that the issue is before us, despite the acknowledged fact that the preemption theory was neither alleged nor litigated by the General Counsel. For the reasons set forth in my partial dissent in *Massey Energy / Mammoth Coal*, 358 NLRB No. 159, slip op. at 14-18 (2012), my colleagues' insistence on reaching unalleged and unlitigated questions is contrary to the Administrative Procedure Act and fundamental principles of due process.

Further, one aspect of the majority's preemption analysis must be noted and questioned. As I read it, the crux of the majority's preemption rationale is that it is within the Board's exclusive jurisdiction to determine whether charges, affidavits, and testimony in a Board proceeding are false and malicious. My colleagues appear to suggest that *all* charge filing is immunized from State tort actions—even where the charges are knowingly, maliciously false. They cite legislative history to that effect, stating that "Congress placed no limits on the protection afforded by Sec. 8(a)(4)," and noting that a proposal to limit that provision's scope to charges filed in good faith was not adopted. And they say, sweepingly and categorically, that "[t]o allow the states to adjudicate

[3] A lawsuit lacks a reasonable basis only if no reasonable litigant could realistically expect success on the merits. *BE&*K, 351 NLRB at 457. The State court twice denied motions to dismiss the Respondents' malicious prosecution claims. That alone suffices to show that the Respondents' lawsuit was reasonably based. See *Ray Angelini, Inc.*, 351 NLRB 206, 208–209 (2007).

[4] There was no contention in *Croson* that the lawsuit was either baseless or retaliatory.

[5] *Federal Security, Inc.,* 318 NLRB 413 (1995) (*Federal Security I*).

[6] *NLRB v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir. 1998).

[7] In so finding, the majority ignores the fact that *Federal Security I* predated by 4 years the fateful drug store encounter between Skrzypek and Davenport. In light of that fact, the majority gives the merit determinations in *Federal Security I* far more weight than they are, in reason, entitled to. It is this circumstance that invites me to question whether the lawsuit was preempted. When the Board upheld the charges in *Federal Security I*, the Respondents were still in the dark. By the time they were enlightened, the Board had lost jurisdiction of the case; and even assuming it could have reacquired jurisdiction, it lacks remedial authority to make the Respondents' whole.

[8] Quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

civil actions for money damages that are factually predicated on the filing of charges or providing other assistance to the Board could stand as 'an obstacle to the accomplishment and execution of the full purposes' of the Act.'"

To clarify this issue, I point out that extant Board precedent holds that the Act does *not* protect knowingly false charges and testimony.[9] Thus, where a party was indeed the target of a malicious Board prosecution, or a judge's credibility findings indicate knowingly false testimony, a State tort action seeking damages for such unprotected conduct is beyond the Board's statutory reach. The State action could not be preempted because it would not actually or even arguably conflict with the Act under *Garmon*, supra. It follows that charges and testimony alleged to be maliciously false are at best only arguably protected until a State court plaintiff's evidence can be assessed on the merits.[10]

The Respondents' lawsuit cannot be stripped of First Amendment protection solely because it was preempted

The Respondents did not violate the Act. They filed a reasonably based lawsuit seeking damages for allegedly fraudulent and abusive Board litigation. Their error, if any, was that they failed to discern the proper venue in which to air their grievance. For that, the majority finds that they violated Federal law. My colleagues acknowledge that the Respondents would not have violated the Act had they brought their evidence to the Board rather than to the State court. They ignore the fact that the Board lost jurisdiction of the case once the record was filed in the Seventh Circuit, and never thereafter reacquired jurisdiction because the appellate court denied enforcement without remanding to the Board.[11] More importantly, their finding of an unfair labor practice based solely on preemption grounds cannot be reconciled with the First Amendment.

The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." The right to petition is implicit in "[t]he very idea of government, republican in form."[12] It is "among the most precious of the liberties safeguarded by the Bill of Rights."[13] In keeping with these principles, the Supreme Court in *BE&K Construction* invalidated the Board's standard under which it imposed unfair labor practice liability on "all reasonably based but unsuccessful suits filed with a retaliatory purpose."[14] Because the class of "reasonably based but unsuccessful" lawsuits includes suits that involve genuine grievances, the Court concluded that the Board's standard was overbroad and impermissibly burdened the First Amendment right to petition. The Court observed that reasonably based lawsuits that prove unsuccessful nevertheless advance important public interests because, inter alia, they allow the public airing of disputed facts, raise matters of public concern, and promote the evolution of the law.[15] Plainly, the same First Amendment interests protected by the Supreme Court's holding in *BE&K* exist regardless of whether a reasonably based State-court lawsuit is unsuccessful under State law because of a failure of proof *or* because it is preempted by Federal labor law. Nothing in the *BE&K* Court's decision or the Board's decision on remand singles out preempted lawsuits as lacking First Amendment protection.

My colleagues find that the instant lawsuit receives no First Amendment protection solely because it was preempted by the Act. Citing their decision in *J. A. Croson Co.*, 359 NLRB No. 2, slip op. at ___, which in turn cites the D.C. Circuit's decision in *Can-Am Plumbing*,[16] they take the position that footnote 5 of the Supreme Court's decision in *Bill Johnson's*[17] places preempted lawsuits "outside of the First Amendment analysis," and that the Court's subsequent decision in *BE&K Construction* "did not affect" footnote 5. Thus they condemn the entire class of preempted lawsuits as falling outside of the Petition Clause, despite that many such suits present genuine grievances and are brought with a reasonable belief that the courts in which they are filed properly have jurisdiction. This sweeping standard is as overbroad and flawed as the one the Court rejected in *BE&K*. Contrary to the

[9] E.g., *Summitville Tiles*, 300 NLRB 64, 65 fn. 5 (1990) (filing an unfair labor practice charge is protected unless undertaken in bad faith).

[10] *Loehmann's Plaza*, 305 NLRB 663, 671 (1991) (holding that where arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter, and only upon the Board's involvement is a lawsuit directed at arguably protected activity preempted by Federal labor law).

[11] Even if the Board had retained jurisdiction, the best the Respondents could have obtained from the Board (as the majority acknowledges) would have been relief from the obligation to reinstate the lying employees with backpay, and possibly a referral to the Justice Department for criminal investigation. They could not have been made whole for their injuries.

[12] *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

[13] *Mine Workers District. 12 v. Illinois State Bar Assn.*, 389 U.S. 217, 222 (1967); see also *McDonald v. Smith*, 472 U.S. 479, 486 (1985) (Brennan, J., concurring) ("[E]xcept in the most extreme circumstances," the right to petition the government "cannot be punished . . . without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.") (internal quotation omitted).

[14] 536 U.S. at 536.

[15] Id. at 532.

[16] *Can-Am Plumbing v. NLRB*, 321 F.3d 145 (D.C. Cir. 2003).

[17] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983).

majority, footnote 5 of *Bill Johnson's* does not support their holding. In *Bill Johnson's,* the Supreme Court held that the First Amendment right to petition the courts prohibited the Board from enjoining an ongoing, well-founded lawsuit, regardless of the plaintiff's motives for filing it. Footnote 5, inter alia, clarified that that prohibition did not affect the Board's well-established authority under *NLRB v. Nash-Finch Co*.[18] to seek a Federal court injunction against an ongoing State action that it deemed preempted, despite the Petition Clause interests involved.[19] It did not place preempted lawsuits outside of the First Amendment or address the standard for imposing unfair labor practice liability.[20]

Further, the majority injects unpredictability into First Amendment law by failing to protect preempted lawsuits in which a respondent had a reasonable belief that the State court had jurisdiction. Given the broad spectrum of possibilities implicated when a party considers legitimate petitioning activity, there is a substantial risk that the threat of liability under the Act for maintaining such lawsuits will unreasonably deter parties' exercise of their constitutional right to do so. The Supreme Court has recognized that preemption law lacks clarity, calling the "statutory implications concerning what has been taken from the States and what has been left to them [to be] of a Delphic nature." *Garmon*, supra at 241 (citation omitted). As the Seventh Circuit opined in the context of construing the fraud exception in antitrust litigation, the potential for chilling petitioning activity is "particularly great when it is unclear whether the law actually forbids the contemplated activity."[21] To paraphrase the court's admonition about the Sherman Act in that case, "it is critical that we do not transform the [NLRA] into a means by which to chill vital conduct protected under the First Amendment." Regrettably, uncertainty over whether the Board will conclude that a particular lawsuit is or is not preempted will do exactly that.

Accordingly, if a lawsuit is found preempted, but the respondent had a reasonable belief that the State court had jurisdiction, the standard the Board established on remand in *BE&K* applies. Thus, "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit."[22] Applied here, the Respondents had reason to believe that the State court had jurisdiction, provided they established that the Board charges were maliciously false.[23] Had the Respondents done so, their lawsuit would necessarily escape preemption because the filing of maliciously false charges is not protected by Section 7 and therefore falls outside of the Board's reach. Moreover, and contrary to the majority, the Respondents would not have reasonably believed that a motion for reconsideration in the Board proceeding was an option. The Board lost jurisdiction once it filed the record in *Federal Security I* with the Seventh Circuit in connection with its application for enforcement, see Section 10(e) of the Act, and it did not thereafter reacquire jurisdiction because the Seventh Circuit denied enforcement without remanding the case to the Board.

Thus, the Respondents reasonably believed that the State court had jurisdiction, and the sole remaining question is whether their lawsuit was reasonably based. It was. As noted above, the court's repeated denials of motions to dismiss the Respondents' malicious prosecution claims demonstrate that the lawsuit was reasonably based as a matter of State law. Further, "'if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot . . . be concluded that the suit [lacks a reasonable basis].'"[24] A factual dispute exists over what Davenport said to Skrzypek at the drug

[18] 404 U.S. 138, 144 (1971).

[19] Here, the district court denied the General Counsel's motion for a temporary injunction under the "baseless and retaliatory" theory on which this case was actually litigated.

[20] As for *Can-Am Plumbing*, the D.C. Circuit's pronouncement on footnote 5 is of doubtful precedential value because the court ultimately granted the petition for review and remanded the case to the Board on other grounds. See 321 F.3d at 151–153. Also in that case, the respondent did not dispute the General Counsel's assertion on brief that footnote 5 "stated" that preempted lawsuits "may be found unlawful irrespective of motivation." Thus the court may have merely accepted that characterization of footnote 5 absent any counterargument from the respondent. Further, the Board on remand did not pass on the D.C. Circuit's statement, but the Board has found that lawsuits brought with an illegal object lack Petition Clause protection. See 350 NLRB 947, 947 fn. 10 (2007). Such cases are qualitatively different from preempted lawsuits, which, unlike illegal objective cases, may be reasonable and filed in good faith. *Small v. Plasterers' and Cement Masons' Local 200*, 611 F.3d. 483, 492 (9th Cir. 2010), also cited by my colleagues, involved a case brought with an illegal objective. The court stated that the preemption issue was not before it. Id. at fn. 4.

[21] See the discussion in *Mercatus Group, LLC v. Lake Forest Hospital*, 641 F.3d 834, 847–848 (7th Cir. 2011).

[22] 351 NLRB at 456.

[23] See *LP Enterprises*, 314 NLRB 580, 580 (1994) (holding that "for the filing of a charge to lose the protection of the Act and be subject to a malicious prosecution action, the Federal standard requires a showing that the party filing the charge acted maliciously, i.e., it filed an unfair labor practice charge with knowledge that the charge allegations were false or with reckless disregard of the truth" (citing by analogy *Linn v. Plant Guard Workers*, 383 U.S. 53, 64–65 (1966)). The majority overrules *LP Enterprises* today, but it was extant law when the Respondents filed and maintained their lawsuit. See also *Summitville Tiles*, supra, 300 NLRB at 65 fn. 5 (filing an unfair labor practice charge is protected unless undertaken in bad faith).

[24] *Ray Angelini*, supra, 351 NLRB at 208–209 (quoting *Bill Johnson's*, supra, 461 U.S. at 745).

store. According to Skrzypek, Davenport told him that he (Skrzypek) was "set up to take a fall," that the employees' lawyer "falsified the affidavits" in *Federal Security I*, and that the employees "lie[d] in order to get their jobs back." Davenport denied telling Skrzypek that the employees falsified the charge, affidavits, and testimony. This key issue of disputed material fact turns on witness credibility and was never resolved against the Respondents. Had Skrzypek been credited, it would have helped establish many of the elements in the Respondents' State-court action. In sum, the Respondents reasonably believed that the State court had jurisdiction, and the lawsuit was reasonably based. Accordingly, the instant unfair labor practice complaint should be dismissed regardless of whether the lawsuit was preempted.

In sum, the rationale and evidentiary test of the Supreme Court and Board *BE&K* cases should apply to a determination of whether any particular preempted lawsuit violates the Act. By declining to uncouple the preemption and unfair labor practice inquiries, and thereby holding that the entire class of preempted lawsuits are unlawful even if reasonably based, my colleagues unnecessarily raise constitutional questions. Not only is their action contrary to general Board practice,[25] it also flies in the face of admonitions twice voiced by the Supreme Court to the Board on the specific subject of whether lawsuits violate the Act. Should this case or another based on the majority's broad proscription of preempted lawsuits wend its way to the Supreme Court for review, I doubt that the third time will prove to be the charm for advocates of the Board's position.

For these reasons, I respectfully dissent.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to sign, mail and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT file, maintain, or prosecute lawsuits which are preempted by the Act and which interfere with activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 7 days from the date of the Board's Order, withdraw and, if necessary, otherwise seek to dismiss our lawsuit docketed in the Circuit Court of Cook County, Illinois, as No. 00-L-06317, *James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer et al.,* including any amendments or refilings, and take affirmative action to have the default orders in the proceeding vacated.

WE WILL reimburse the defendants in the above lawsuit for all legal and other expenses incurred in defending the lawsuit, to date and in the future, plus interest.

FEDERAL SECURITY, INC., AND ITS ALTER EGOS OR AGENTS, JAMES R. SKRZYPEK AND JANICE M. SKRZYPEK

[25] See *Ampersand Publishing, LLC.,* 357 NLRB No. 51 (2011) (noting duty to construe the Act, when possible, to avoid raising "serious questions" of constitutionality, citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575 (1988)).