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ARTICLE

Bankrupting Labor Power

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Abstract. Corporations use bankruptcy to undermine collective worker power. They can run to bankruptcy court, for example, to shed collective bargaining agreements or tort judgments for sexual harassment and race discrimination claims. But when unions and workers fight back through collective action, corporations respond by filing tort suits, chasing the unions into bankruptcy. If unions were treated like corporations, they would be able to discharge those tort claims. But that is not the case. Instead, corporations often ask courts to deny unions the same protection that they receive on the basis that unions filed for bankruptcy protection in "bad faith" in order to evade tort liability. When examined through a law and political economy lens, this uneven application of discharge raises questions about whether bankruptcy's promise of a "fresh start" exists for corporations but not for the unions that challenge corporate power.

This Article examines bankruptcy law's role in shaping collective power for labor unions and workers in three ways. First, it demonstrates that bankruptcy law's broad corporate discharge provision blunts the effectiveness of collective action tools. Second, it argues that if bankruptcy law provides no refuge for unions seeking relief from tort judgments arising out of their organizing and strike-related activity, then unions will limit their use of economic weapons during labor-management conflicts. Finally, the Article posits that the harmonization of bankruptcy and labor law regimes requires radical forgiveness of union tort liability when it is incurred through the socially beneficial exercise of collective worker power.

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Table of Contents

Introduction

Should unions have to pay for all the damage they cause even if it bankrupts them? Should bankruptcy law provide debt forgiveness to unions, which wield economic weapons to wage class struggle and, if so, on what terms? These are not theoretical questions but practical ones, implicating the future of labor movements and their ability to organize. For example, in 2011, the International Longshore and Warehouse Union (ILWU) engaged in a work slowdown at the Port of Portland.[1] A jury found the union liable for engaging in unlawful labor practices and awarded the port operator $94 million in damages.[2] In response, the ILWU filed for bankruptcy protection.[3] The employer did not relent. Instead, it argued that filing for bankruptcy was just a bad-faith attempt to evade responsibility and asked the court to dismiss the petition.[4] Even though the union claimed it had less than $12 million in assets, the parties eventually settled for $20.5 million.[5]

If bankruptcy courts begin to dismiss unions' bankruptcy petitions on the basis that they filed in bad faith to avoid responsibility for tortious conduct, then courts risk exacerbating the power asymmetry between unions and corporations. They do so by creating an imbalance between bankruptcy law's "fresh start" prerogative[6] and labor law's policy of encouraging workers to organize into unions and collectively bargain with their employers.[7] The tension between bankruptcy law and labor law derives from their design. Specifically, there is a mismatch between bankruptcy law's desire to reorganize a debtor quickly and labor law's tolerance of conflict (and the intentional torts that may arise therefrom) as a means of encouraging collective bargaining to settle disputes.

Labor law requires only that the parties bargain in good faith; it does not require that they reach an agreement. In bankruptcy, however, unions must demonstrate good cause for refusing an employer's proposal when the employer

1. Ronald D. White, *How a Fight over Two Jobs Pushed the Dockworker Union into Bankruptcy*, L.A. TIMES (Oct. 7, 2023, 3:00 AM PT), https://perma.cc/LDZ5-SZ7L.

2. *Id.* The district court reduced that amount to $19 million. ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union, 442 F. Supp. 3d 1329, 1366 (D. Or. 2020).

3. White, *supra* note 1.

4. *See* ICTSI Oregon, Inc.'s Response & Reservation of Rights re Debtor's First Day Motions at 2, *In re* Int'l Longshore & Warehouse Union, No. 23-30662 (Bankr. N.D. Cal. Feb. 22, 2024), ECF No. 28; *see also* White, *supra* note 1.

5. *ILWU and Portland Terminal Settle Long Dispute Which Bankrupted the Union*, MAR. EXEC. (Feb. 2, 2024, 5:01 PM), https://perma.cc/W798-LA45.

6. *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (quoting Grogan v. Garner, 498 U.S. 279, 286, 287 (1991))).

7. 29 U.S.C. § 151 (setting a congressional policy of encouraging the practice of collective bargaining).

seeks to reject a collective bargaining agreement (CBA).[8] In other words, unions are effectively required to accept an employer's proposal unless they can show a good reason for rejecting it. Because bankruptcy law is designed to restructure a debtor's obligations, it subordinates labor law's conflict-driven framework to the goal of successfully restructuring debt. As a result, when a union goes on strike or creates conflict and a tort claim arises out of that conflict, a bankruptcy court may shut its doors to that union entirely.

The labor movement's original sin is that it challenged corporate power using tactics at the penumbra of acceptable conduct. Labor power in the United States has been built on the back of strife. Conflict is a key part of labor law and has been a key part of organized labor's growth.[9] To achieve their ends, unions deploy "economic weapons" such as strikes and boycotts to inflict economic damage on employers. The law does not require unions to pay for economic damage caused by a strike or boycott.[10] But labor law does not leave corporations defenseless. They have their own economic weapons including the ability to replace striking workers with strikebreakers to continue production.[11] Corporations also file lawsuits against unions for a wide variety of claims, from common-law torts to statutory causes of action based on underlying torts or prohibited labor practices. Though these claims arise from different founts of law, this Article uses the term "torts" to refer to causes of action arising from conduct that falls outside the scope of any arbitration or dispute resolution procedure agreed to in a CBA.[12] These torts include claims

8. *See infra* Part II.A.

9. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 109, 127 (1991) (describing unions as engaging in semi-outlawry in response to judicial repression of labor organizing); Desirée LeClercq, *Labor Strife and Peace*, 15 U.C. IRVINE L. REV. 216, 221-25 (2024); Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth: A Union Side Apologia*, 15 EMP. RTS. & EMP. POL'Y J. 521, 526 (2011); Michael C. Duff, *The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility*, 117 W. VA. L. REV. 961, 978 (2015).

10. 29 U.S.C. § 163. "Economic weapons" is a term of art in labor law used to describe the market tools that labor unions and employers may employ to compel the other side to accept terms of a collective bargaining agreement. Federal labor law allows parties in a labor-management dispute to harm one another, at times indefinitely. At least one scholar has proposed a one-year limit on employers' ability to lock out employees after the start of a dispute. *See* Michael H. LeRoy, *Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA*, 74 WASH. U. L.Q. 981, 984-86, 1053 (1996).

11. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (permitting the hiring of strikebreakers).

12. An arbitrator may award damages or back pay to either party under a CBA, and an award in favor of an employer may cause a union financial distress. *See, e.g.*, W.R. Grace & Co. v. Loc. Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 764 (1983) (affirming enforcement of an arbitral award of backpay to a union); Suhauna Hussain, *After a Pandemic Strike, Nurses Union Must Pay Riverside*

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that intersect with speech and implicate the First Amendment, such as defamation,[13] racketeering,[14] and secondary boycotts—that is, boycotts against neutral parties with whom the employer has a business relationship.[15]

Once the parties' tussle changes arenas from an Article III trial court to an Article I bankruptcy court, a new set of rules that favor corporations over workers comes into play. As Melissa Jacoby observes, bankruptcy law protects "fake people" from the consequences of their torts but makes "real people" live with them.[16] For example, bankruptcy courts allow corporations to discharge their tort liabilities,[17] and the Bankruptcy Code ("the Code") allows corporations

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Hospital Millions in Damages, L.A. TIMES (June 13, 2024, 12:52 PM PT), https://perma.cc/E6DU-5R4F (reporting that an arbitrator ordered a nurses' union to pay $6.26 million in damages after finding that a ten-day pandemic strike violated the union's CBA with the employer). That situation exceeds the scope of this Article.

13. *See, e.g.*, Sutter Health v. UNITE HERE, 186 Cal. App. 4th 1193, 1198-99 (Ct. App. 2010) (reversing the trial court's award of $17 million to an employer who claimed that a union had issued a defamatory postcard).

14. *See, e.g.*, Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union, 585 F. Supp. 2d 789, 795-96 (E.D. Va. 2008) (denying summary judgment on claims that a union's corporate campaign to obtain voluntary recognition as a collective bargaining representative was extortionate and constituted an act of racketeering).

15. *Secondary Boycott*, LEGAL INFO. INST., https://perma.cc/W5Q6-S2AY (archived Mar. 3, 2026) ("Secondary boycotts refer to boycotting actions taken against an organization or company that does business with another organization with whom the primary dispute exists."). Federal law prohibits unions from engaging in secondary boycotts. *See* 29 U.S.C. §§ 158(b)(4), 187. Dockworker unions are especially at risk of engaging in secondary boycotts, as explained further below, because even though their disputes are typically with port operators, their actions affect neutral parties such as shoppers relying on goods to arrive from overseas destinations. *See, e.g.*, Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 214, 218 (1982) (holding that longshoremen's refusal to handle Russian cargo in protest of the Soviet invasion of Afghanistan was not protected political speech and constituted an illegal secondary boycott).

16. *See* Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEVS. J. 497, 501-03 (2023).

17. *See, e.g.*, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2078, 2080 (2024) (describing the bankruptcy court's confirmation of Purdue Pharma's reorganization plan discharging tort claims arising from deceptive marketing of opioid painkillers). Several scholars have criticized the breadth of the corporate discharge power and its effect on tort recovery. *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1157 (2022) (describing how the discharge power has been used in mass tort litigation to benefit not only corporate defendants but also "bankruptcy grifters" who are not themselves eligible for bankruptcy); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 368-70 (2022) (arguing that bankruptcy courts have outpaced multidistrict litigation panels in resolving mass tort cases like asbestos litigation, often without adequate procedural safeguards); Edward J. Janger, Essay, *Enterprise, Liability, and Insolvency: An Essay in Honor of Aaron Twerski*, 18 BROOK. J. CORP., FIN. & COM. L. 115, 127-29 (2023) [hereinafter Janger, *Enterprise, Liability, and Insolvency*] (describing how pre-bankruptcy shenanigans can turn bankruptcy courts into forums to discharge both intentional and unintentional tort claims); Adi Marcovich Gross, *Morally Bankrupt: Bankruptcy Law, Corporate Responsibility, and Sexual Misconduct*, 97 AM. BANKR. L.J. 480,

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to discharge their debts in almost all circumstances.[18] However, when unions commit torts against employers during a labor-management conflict, bankruptcy law may block those unions from discharging their tort liabilities.[19] This poses a significant problem for unions because it places two layers of deterrence against more aggressive organizing tactics. The first deterrent is tort liability. The second is the unions' inability to discharge claims in bankruptcy while corporations are not similarly constrained.

The central thesis of this Article is that bankruptcy law should enable union debtors, just like corporate debtors, to discharge tort liability when the union's tortious conduct arises in connection with a labor dispute.[20] Doing so would harmonize labor law's goal of encouraging workers to organize into unions with bankruptcy law's goal of giving debtors a fresh start. From a normative perspective, unions have a stronger claim to bankruptcy relief than corporations because Congress has recognized them as agents for reducing wage inequality.[21] Their role in reducing inequality also has the benefit of protecting democracy.[22]

500-05 (2023) (critiquing how corporations use bankruptcy strategically to minimize damage from sexual harassment claims even when they are solvent); *cf.* Nicole Langston, *Discharge Discrimination*, 111 CALIF. L. REV. 1131, 1139-44 (2023) (explaining how the discharge power undermines wage, hostile work environment, and sexual harassment claims against individual employers).

18. Corporations can discharge just about any workplace-based tort liability including sexual harassment, civil rights violations, and most wage and hour claims. *See* 11 U.S.C. § 1141(d)(1)(A); Gross, *supra* note 17, at 483; Langston, *supra* note 17, at 1139. The only liability that corporations cannot discharge is liability from claims made by the government for fraud against the government and tax evasion. 11 U.S.C. § 1141(d)(6)(B). Another part of the Code, Section 523(a)(6)-(7), bars individual debtors from discharging liability from willful and malicious injury and certain criminal penalties.

19. *See infra* Part I.C.

20. Under federal labor law, "[t]he term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c).

21. *Id.* § 151 (declaring a federal policy of promoting collective bargaining to remedy the wage depression and other commercial burdens caused by unequal bargaining power).

22. *See id.* Kate Andrias and Ben Sachs have written at length about the democratic values that a strong labor movement supports and what unions bring to debates about the future of constitutional law. *See, e.g.*, Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 990-91 (2024) ("First, labor seeks to protect as fundamental the rights to organize, bargain, and strike—and in so doing, it demands the extension of democratic values into the putatively private domain of the workplace."); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 77 (2016) ("Finally, effective and democratic worker organizations bring other important benefits over a purely regulatory approach: they have the potential to create workplace democracy and thus serve as an important training ground for political democracy."); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 573-77 (2021) (arguing that federal labor law reduces

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Currently, the few reported cases involving unions as debtors provide no clear doctrinal throughline for deciding whether a union has filed in bad faith, nor do they examine union bankruptcy petitions within a theoretical and doctrinal framework that focuses on unions' role in countering corporate power.[23]

The doctrinal point this Article makes about the dischargeability of union tort liability in labor-management relations has profound implications for the future of today's ossified labor law framework, insurgent worker movements, and the range of organizing strategies available to unions.[24] While unions represented 33.5% of the workforce in 1954, today only 10% of the workforce is represented by a union.[25] But according to a 2022 White House report on worker organizing, over 52% of nonunion workers (60 million) would vote for a union if they could.[26] To combat this decline, unions have explored various organizing strategies,[27] including corporate responsibility campaigns,[28]

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inequality and rebalances political power between elites and nonelites in a manner that is important for a functioning democracy); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 206-07 (2013) (arguing that federal labor law provides an important representational tool for alleviating the concerns of democratic theorists about the political effects of inequality).

23. *See infra* Parts I.B-.C. Courts have imposed stricter requirements on corporate debtors seeking to reject CBAs than on those seeking to reject regular contracts. They base that heightened scrutiny in the special nature of CBAs. *See infra* Part I.B.

24. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529-30 (2002) (describing how labor law has ossified due to the decline of organized labor, among other reasons); *see also* Cynthia Estlund, *The Ossification of American Labor Law and the Decline of Self-Governance in the Workplace*, 28 J. LAB. RSCH. 591, 592 (2007) (explaining that labor law is ossified because its development has been sealed off from democratic renewal and local innovation); Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 124 (2020) (arguing that the ILWU almost went bankrupt by favoring engaging in radical protests instead of channeling bargaining into legal processes).

25. BUREAU OF LAB. STATS., U.S. DEP'T LAB., USDL-25-0105, UNION MEMBERS SUMMARY (Feb. 18, 2026, 10:00 AM ET), https://perma.cc/7CTE-D9EU; PAUL D. ROMERO & JULIE M. WHITTAKER, CONG. RSCH. SERV., R47596, A BRIEF EXAMINATION OF UNION MEMBERSHIP DATA 1 (2023).

26. KAMALA D. HARRIS & MARTIN J. WALSH, WHITE HOUSE TASK FORCE ON WORKER ORGANIZING AND EMPOWERMENT 4, 10 (2022); Alvin Velazquez, *The Death of Labor Law and the Rebirth of the Labor Movement*, 67 B.C. L. REV. 183, 187 (2026).

27. For a review of the many techniques that unions have used to organize workers due to the failures of labor law, see Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 653-55, 657-58 (2016).

28. Ashley Laken & Brian Stolzenbach, *Employers Beware: Potential Rise in Union Corporate Campaigns*, SEYFARTH SHAW LLP (Feb. 1, 2018), https://perma.cc/7CBT-LRGT.

bottom-up civil disobedience,[29] standup strikes,[30] and insurgent tactics such as illegal strikes.[31] During the Red for Ed campaign, for instance, public school teachers refused to teach until they received pay raises even though state law forbade them from doing so.[32] Workers have gone on strike in settings from docks[33] to universities.[34] In one case, they even abandoned concrete delivery trucks in the middle of the workday while the mixers were running.[35] In most cases, their unions were sued.[36] In today's legal and regulatory climate, these campaign styles bring legal risks that could bankrupt labor organizations.[37]

This Article is the first to discuss the dischargeability of union tort liability in bankruptcy, to examine the application of the Code to a labor union *as a debtor*, and to consider the possibility of bankruptcy law as a mechanism to support the renewal of the labor movement. While scholars have mapped various routes for the movement's renewal, that literature does not look to bankruptcy as a tool for building worker power.[38] There is a similar union-sized

29. *See, e.g.*, Ken Matheny, *Catholic Social Teaching on Labor and Capital: Some Implications for Labor Law*, 24 ST. JOHN'S J. LEGAL COMMENT. 1, 44 (2009) ("With the traditional strike perversely transformed into a weapon for employers to break worker organizations, workers will be forced to win recognition of their organizations and promote the basic human right of collective bargaining by resorting to tactics that are either illegal or, at best, of questionable legality, much like the workers who waged sit-down strikes in the 1930s.").

30. Jonathan Rosenblum, *The UAW's "Stand Up Strike" Strategy Led to a Huge Win—and Not Just for Autoworkers*, NATION (Nov. 3, 2023), https://perma.cc/AQ8A-2NCT.

31. Eric Blanc, *The Red for Ed Movement, Two Years In*, NEW LAB. F. (Oct. 3, 2020), https://perma.cc/3EXQ-5UN2.

32. *Id.*

33. Jenn Brice, *The Dockworkers' Strike Ends for Now—But the Fight over Automating Jobs Continues, as It Has for Decades*, FORTUNE (Oct. 4, 2024, 7:00 AM ET), https://perma.cc/T9HC-TWQY; *see also* White, *supra* note 1 (reporting on work slowdowns at docks).

34. Ryan Quinn, *Rutgers Unions Sued over Strike; Case Seeks National Impact*, INSIDE HIGHER ED (Mar. 18, 2024), https://perma.cc/P2PG-WVEL (describing a student's lawsuit against the American Association of University Professors claiming $150 million in total damages for strike-related class disruptions).

35. *See* Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404, 1411-12 (2023) (recounting that the union told drivers to walk off mid-delivery, leaving perishable concrete to harden in the trucks).

36. *See, e.g.*, *id.* at 1415-16 (concluding that the right to strike does not insulate unions from actions for damages when workers walk off the job without taking reasonable efforts to secure employer property); Quinn, *supra* note 34; White, *supra* note 1.

37. *See* White, *supra* note 1 (reporting that litigation costs from a labor dispute drove a dockworker union into bankruptcy); *Glacier Nw.*, 143 S. Ct. at 1413 (reaffirming that the NLRA does not immunize unions from all tort liability).

38. *See, e.g.*, Andrias & Sachs, *supra* note 22, at 560 (highlighting the need for organizations combatting wealth inequality to be financially self-sufficient); Cesar F. Rosado Marzán, *Can Wage Boards Revive U.S. Labor?: Marshaling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV. 127, 141 (2020) (noting how Fast Food Justice, an alternative labor group, has had

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hole in the bankruptcy literature. Most of the literature about unions in bankruptcy examines them from the perspective of what Andrew B. Dawson calls "concession bargaining agents."[39] This literature focuses on minimizing impairments to unions' CBAs and understanding how the Code has failed to protect those agreements.[40] Some scholars have explored how labor unions may take, or have taken, advantage of labor or bankruptcy law to organize a worker-led resistance to concessions that a corporation or government seeks to impose on them.[41] For example, I have written about how retirees and unions in Puerto Rico's bankruptcy court exploited a section of the Code to organize successful protests against pension cuts.[42] However, those contributions examine the union's participation in a bankruptcy as a creditor, not a debtor.

This Article makes an unapologetically progressive contribution to bankruptcy scholarship by tying the future of the labor movement to a

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difficulties becoming financially sustainable). *But see* Fisk & Reddy, *supra* note 24, at 107-08, 115-16 (discussing a union that was almost bankrupted by a judgment for engaging in an illegal strike and took extraordinary steps to avoid paying it).

39. Andrew B. Dawson, *Labor Activism in Bankruptcy*, 89 AM. BANKR. L.J. 97, 98 (2015).

40. *See id.*; *see also, e.g.*, Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 AM. BANKR. L.J. 103, 104 (2010) (finding that courts rejected CBAs in every single corporate reorganization from 2001 to 2007); Olivia Hunter, Note, *A Bankrupt Bargain*, 2022 COLUM. BUS. L. REV. 447, 450 (arguing that Section 1113 allows companies to default on their statutory bargaining obligations); Steven Kropp, *Collective Bargaining in Bankruptcy: Toward an Analytical Framework for Section 1113*, 66 TEMP. L. REV. 697, 701, 749 (1993) (arguing that bankruptcy judges are unfamiliar with collective bargaining norms, misapply Section 1113, and "are pre-occupied with the focus on successful reorganization of the debtor at the expense of other values"); HAMIISI JUNIOR NSUBUGA, EMPLOYEE RIGHTS IN CORPORATE INSOLVENCY: A UK AND US PERSPECTIVE 54-55 (2020) (noting criticism of Section 1113 but arguing that proposals to amend it would not fundamentally improve industrial relations between management and labor); Anne J. McClain, Note, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L.J. 191, 191 (1991) ("But Section 1113, envisioned as a pro-labor response to [*NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984)], has failed to provide armor for collective bargaining agreements and has actually placed laborers in a worse position than before its enactment." (footnote omitted)). *But see* Carlos J. Cuevas, *Necessary Modifications and Section 1113 of the Bankruptcy Code: A Search for the Substantive Standard for Modification of a Collective Bargaining Agreement in a Corporate Reorganization*, 64 AM. BANKR. L.J. 133, 193 (1990) ("The onerous and burdensome test elevates the status of labor above other parties to the corporate reorganization.").

41. *See, e.g.*, Michael C. Duff, *Labor Injunctions in Bankruptcy: The Norris-LaGuardia Firewall*, 2009 MICH. ST. L. REV. 669, 716 (concluding that "federal courts are simply not authorized to issue injunctions in labor disputes other than in [certain] very narrow exceptions" and that bankruptcy injunctions do not "fall within those exceptions"); Jared A. Ellias & George Triantis, *Government Activism in Bankruptcy*, 37 EMORY BANKR. DEVS. J. 509, 525-28 (2021) (describing how the Obama Administration sought to aid a political ally, the United Auto Workers, by using the federal government to protect union members' jobs and retiree benefits).

42. Alvin Velazquez, *Lucha Si, Entrega No: How an "Awkward Power Sharing Arrangement" Enabled Retirees to Upend a Plan of Adjustment*, 97 AM. BANKR. L.J. 836, 880-903 (2023).

progressive application of the Code.[43] It also advances the literature on the renewal of labor law discussed above by incorporating, for the first time, bankruptcy law into theories of how to build power for the labor movement. Additionally, this Article joins nascent bankruptcy literature that criticizes bankruptcy's discharge doctrine for protecting the interests of corporations over tort victims.[44] That nascent body of scholarship offers important insights into whether liability for incidental harms arising out of the exercise of collective worker power should be dischargeable.[45] While unions—like corporations—are artificial creatures of law, their behavior is radically different

43. In a way, this Article also builds on the legacies of progressive scholars such as Vern Countryman and Elizabeth Warren. I conceive of its contribution as what David Skeel describes as progressive: "Scholars who identify themselves as 'progressive' frequently advocate the use of social data to motivate legislative reform, identify with the socially disadvantaged rather than the elite, and can be found at the liberal end of the political spectrum on most issues." David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1077-78 (2000).

44. *See* Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 940 (2017) (examining how the Code does not allow the discharge of penal debt); *see also* Gross, *supra* note 17, at 499-505 (criticizing how corporations use bankruptcy to reduce their exposure to sexual misconduct claims); Jacoby, *supra* note 16, at 501-03 (criticizing how bankruptcy resists treating corporations as actors "capable of independent wrongdoing"); MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 51-53 (2024) (criticizing how the dischargeability of fines in bankruptcy impacts subordinated communities); *cf.* Langston, *supra* note 17, at 1139-44 (examining how individual employer-debtors discharge civil rights and wage theft awards at the expense of employees). Because a debtor cannot discharge penal debt, those who engage in civil disobedience, or the conscientious refusal to follow the law, receive the same treatment as those who refuse to follow the law for other motives. This discrepancy adds further costs to social dissent. But it is beyond the scope of this Article to examine how the Code deals with individuals who have engaged in civil disobedience.

45. *See, e.g.*, Christopher D. Hampson, *Defamation, Bankruptcy & the First Amendment*, 5 J. FREE SPEECH L. 513, 547-53 (2024) (questioning whether bankruptcy's fresh start policy provides a sufficiently robust tool for deciding the dischargeability of defamation claims); *see also* Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U. L. REV. 1, 6 (arguing that the NLRA protects new forms of worker organizing from state defamation claims). Several scholars have separately argued that certain forms of union collective action warrant First Amendment protection. *See, e.g.*, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2063 (2018) (setting out a progressive vision of the First Amendment that protects labor protest despite recent Supreme Court free speech precedent weakening labor unions); Charlotte Garden, *Speech Inequality After* Janus v. AFSCME, 95 IND. L.J. 269, 270, 286-89 (2020) (arguing that the Court has accorded union political speech much less deference than corporate political speech and has failed to grapple with the distinct societal value of collective speech through a union). This body of scholarship likewise bears on whether liability for the incidental harms of collective union expression should be dischargeable. *See* 11 U.S.C. § 523(a)(6) (prohibiting an individual debtor from discharging liability "for willful and malicious injury"); *infra* Part I.C (explaining that Section 523(a)(6)'s normative framework informs the good-faith analysis that may preclude union tortfeasors from obtaining discharge).

because they operate through the concerted activity of numerous workers who constitute their membership and take collective action.[46]

This Article proceeds as follows. Part I provides a historical overview of the role that strife has played in labor law's rise and outlines bankruptcy law's tort forgiveness regime. Part II conducts a close examination of how bankruptcy treats a union, first reviewing unions as creditors in Part II.A and then as debtors in Parts II.B and II.C. Part III discusses the legal doctrine surrounding four labor-related tort claims that employers have brought against unions to squelch nascent organizing campaigns or to use as leverage in bargaining disputes. Part IV ties the analysis together by harmonizing bankruptcy law with the policies that motivated Congress to enact the National Labor Relations Act (NLRA). In doing so, this Article argues that courts should both refrain from dismissing union bankruptcy petitions under Chapter 11 and discharge unions' tort liabilities arising from labor disputes—providing a doctrinal pathway for unions to use bankruptcy as a tool for building power at a moment when legislative relief from either the NLRA or the Code is unlikely to come.

I. Labor's Strife and Bankruptcy's Tort Forgiveness

The history of labor law centers on unions using conflict as a tool to obtain better wages and working conditions for their members. When unions create strife, employers often respond by filing tort claims against unions to quell conflict. When employers succeed on those claims, unions lack the same access to bankruptcy's tort forgiveness regime that corporations enjoy. The following Subparts begin to construct the intellectual edifice for concluding that most torts for which labor unions are held liable have a nexus with speech, and therefore the First Amendment, and merit discharge when they arise out of a labor dispute.

A. Labor's Original Sin

This Subpart makes the descriptive claim that labor law is designed to allow unions to engage in controlled conflict as a tool for challenging corporate power and obtaining increased benefits for their members. However, each time unions develop a powerful tactic to challenge corporate power, Congress or courts counter with new doctrines to contain the unions' new tools. There is good reason for this dynamic. The labor movement's original sin is that it challenged corporate power using tactics that lie at the penumbra of acceptable conduct. As Catherine Fisk and Diana Reddy observe, "Labor as the basis of an oppositional movement represents a crucial liability of capitalism."[47] Each iteration of labor conflict has defined the zone of permissible conduct with greater clarity. As Brishen Rogers

46. *See* 29 U.S.C. § 152(b)(5) (defining labor organizations); *id.* § 157 (protecting employees when they are engaged in concerted activity for mutual aid or protection).

47. Fisk & Reddy, *supra* note 24, at 149.

states, "[I]t is an article of faith among union organizers that workers are far more likely to organize when they are angry, and less so when they are fearful."[48]

To reconcile bankruptcy law with federal labor law, bankruptcy must allow for industrial tumult by forgiving labor's torts. Scholars who, like me, practiced labor law for a significant period before transitioning to academia, have observed just how central conflict is to American labor law. For example, Michael Duff, who formerly belonged to the Teamsters Union, observes that "tumult is what compels employers to engage in any honest bargaining over terms and conditions of employment" and that "[t]he potential for the creation of tumult is the sine qua non of a bona fide labor law."[49] Similarly, Desirée LeClercq's work in *Labor Strife and Peace* maps out how strife defines labor law's past and future.[50] LeClercq, who served as counsel to the Chair of the National Labor Relations Board (NLRB),[51] observes that "courts and NLRBs have lost sight of the NLRA's original intention to protect workplace strife" and criticizes both for "replac[ing] presumptions of behavior and intent favoring workplace protest with presumptions favoring industrial peace."[52] This critique holds true not only when courts apply the NLRA but also when labor disputes spill over into bankruptcy courts.

Consider labor law in its most primitive state. Labor activism in the United States was born of conflict. The Lowell Women's strike was but one example: In 1834, 800 textile workers went on strike in response to a 15% cut in their wages.[53] The textile mill owners were caught completely by surprise; they had expected total docility from the all-female workforce and ultimately made concessions.[54] No legal framework for managing an industrial labor dispute existed at the time, and the Massachusetts legislature feared that intervention would put the state's mills at a competitive disadvantage.[55] The owners were thus able to carry on without political interference.

It took the development of railroads for unions to adopt new techniques, such as the interstate strike and the boycott, to push labor law forward.[56] As union organizers learned, a work stoppage in one city could stop commerce in

48. Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 357 (2012).

49. Duff, *supra* note 9, at 526.

50. LeClercq, *supra* note 9, at 223-25.

51. *Desirée LeClercq*, U. GA. SCH. L., https://perma.cc/RX88-RQ63 (archived Apr. 26, 2026).

52. LeClercq, *supra* note 9, at 239-40.

53. PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 28-29 (2010).

54. *See id.* at 30-31.

55. *Id.* at 59-60 (noting that the "Lowell Miracle" had produced strikes and a petition for a ten-hour workday that "met limited success"—but no permanent union).

56. *See* JEREMY BRECHER, STRIKE! 14-15 (2020) (calling the labor uprising and railroad strikes taking place after 1879 the "Great Upheaval").

another.[57] The most famous of these rail strikes was the Pullman strike just outside of Chicago. To employers, the American Railway Union's strike was "a far more reprehensible act than a run-of-the-mill trade union strike . . . [b]ecause it engaged diverse groups of train workers across occupational boundaries" and "had more the feel of a full-fledged rebellion."[58] That strike was so devastating that it pushed the United States to "the edge of anarchy" and led President Grover Cleveland to use the Army to protect U.S. mail, threaten strikers, and ultimately break the strike.[59] The leader of that strike, Eugene Debs, went to jail for violating an injunction and contempt of court.[60]

Labor's punishment for its transgressions during the Pullman strike was the nationwide inauguration of an era of "government by injunction"—a time in which both the U.S. government and American corporations sought injunctive relief to put down strikes and in which courts were giddy to grant such relief.[61] After the Pullman strike, corporations turned to the argument that labor unions were illegal conspiracies and antitrust violations.[62] The cat-and-mouse game of a successful labor action being converted into an unlawful tort through later court or congressional action continued for years. For example, Congress passed the Clayton Act in 1914, declaring that labor was not a commodity of commerce.[63] Therefore, labor unions were presumptively immune from prosecution for violating antitrust laws.[64] In response, courts began to find other reasons to enjoin peaceful labor protests and boycotts, usually on the basis of injury to intangible property or disturbances of local peace, because they mobilized broad swaths of working-class people across locations and employers.[65] Congress eventually responded by stripping federal courts' jurisdiction to enjoin peaceful labor protests when it passed the Norris-

57. *Id.* at 102.

58. *Id.* at 200-01.

59. JACK KELLY, THE EDGE OF ANARCHY: THE RAILROAD BARONS, THE GILDED AGE, AND THE GREATEST LABOR UPRISING IN AMERICA 213, 220, 225 (2018) (describing President Cleveland's proclamation urging people to stay at home because troops would not discriminate between strikers and those who mingled with them).

60. *In re* Debs, 158 U.S. 564, 599-600 (1895) (denying a writ of habeas corpus for strike-related conduct).

61. FORBATH, *supra* note 9, at 63 (noting that the "historical seedbed" of the "exuberant growth of labor injunctions" could be found in the coordinated use of the strike across entire working-class communities).

62. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274, 307-09 (1908) (reversing dismissal and permitting a union to be held liable for forming a combination in violation of the Sherman Antitrust Act).

63. Ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17).

64. *See id.*

65. FORBATH, *supra* note 9, at 83, 85.

LaGuardia Act in 1932.[66] That Act has become "America's forgotten labor law," partially because Congress passed the NLRA just three years later.[67]

When the NLRA passed, proponents called it the "Magna Carta" of labor.[68] Congress enacted it after several other statutes failed to pacify the open conflict between capital and labor,[69] seeking instead to ensure industrial peace through collective bargaining.[70] The stakes for democracy at the time were quite high. As then-president of the United Mine Workers John Lewis put it, American labor stood "between the rapacity of the robber barons of industry of America and the lustful rage of the communists, who would lay waste to our traditions and our institutions with fire and sword."[71] The NLRA facilitated labor peace by creating the NLRB, an independent board empowered to investigate and prevent unfair labor practices, including by seeking injunctions.[72] Its goal was to promote economic growth by minimizing labor conflict's effect on commerce.[73] This stated goal allowed the Supreme Court to find that the Commerce Clause authorized Congress to enact the NLRA.[74] Labor was able to organize millions of workers and represent about 30% of all workers within ten years or so of the NLRA's passage.[75] As unions represented and collectively

66. *See* ch. 90, § 1, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 101).

67. David Boehm & Lynn Ta, *The Promise of America's Forgotten Labor Law*, LPE PROJECT (Sept. 26, 2024), https://perma.cc/PB3W-C8SH; *see* ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

68. Steve Early, *90 Years After Its Passage, the National Labor Relations Act Is Under Siege*, IN THESE TIMES (July 2, 2025), https://perma.cc/245K-NURG; *Object: FDR Signs Labor's Magna Charta*, NAT'L MUSEUM OF AM. HIST., https://perma.cc/NZL8-EDGV (archived Mar. 24, 2026).

69. IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941, at 298-317 (Haymarket Books 2010) (1969) (describing a multitude of strikes in cities across the United States and frustration with the NLRB in place at the time).

70. *See* 29 U.S.C. § 151.

71. DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 299 (1999). Recall that at the time President Franklin D. Roosevelt was trying to protect American democracy from fascist-like pressures from the political left in the form of Huey Long's "Share the Wealth" campaign. *Id.* at 237, 241-43. On the right, financiers backed a scheme to install General Smedley Butler as President in what has been called the "Business Plot." Gillian Brockell, *Wealthy Bankers and Businessmen Plotted to Overthrow FDR. A Retired General Foiled It.*, WASH. POST (Jan. 13, 2021), https://perma.cc/5CTD-2TJ3.

72. 29 U.S.C. §§ 160(a), (j).

73. *Id.* § 151.

74. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-32, 41 (1937).

75. *See* ROMERO & WHITAKER, *supra* note 25, at 4.

bargained for a larger portion of the workforce than ever before, the wealth inequality gap significantly narrowed.[76]

The signing of labor's Magna Carta did not end the dialectic between labor's actions at the penumbras of the law and the narrowing of permissible actions. Instead, Congress and the NLRB repeatedly outlawed effective labor tactics, including actions taken in solidarity with other workers. For example, in 1947, Congress banned secondary boycotts.[77] The Board has also recognized intermittent strikes—plans to strike, return to work, and then strike again—as unprotected since the 1950s.[78] In 1959, Congress took yet another restrictive step when it passed the Landrum-Griffin amendments to the NLRA, which outlawed the use of hot cargo agreements[79]—contractual provisions in which an employer agrees to refuse to engage in business dealings with another employer with whom the union has a dispute.[80] Landrum-Griffin also banned most forms of recognitional picketing—that is, when a union seeking the right to represent the workers of a particular employer pickets that employer.[81] Commentators have raised questions about whether these amendments to the NLRA violate the First Amendment, but to date the Court has rebuffed any legal challenges seeking to invalidate these restrictions.[82]

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76. *See* Emmanuel Saez & Gabriel Zucman, Wealth Inequality in the United States Since 1913, at 3 (2014), https://perma.cc/S6YG-MW7X; ARLOC SHERMAN, DANILO TRISI & JOSEPHINE CURETON, CTR. FOR BUDGET & POL'Y PRIORITIES, A GUIDE TO STATISTICS ON HISTORICAL TRENDS IN INCOME INEQUALITY 1 (2024); Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325, 1380 (2021) (concluding that "[a] combination of low-skill composition, compression, and a large union income premium made mid-century unions a powerful force for equalizing the income distribution.").

77. *See infra* Part III.C.

78. Farley Candy Co., 300 NLRB 849, 849 (1990) (referring to an "intermittent strike" as "a plan to strike, return to work, and strike again"); Pac. Telephone & Telegraph Co., 107 NLRB 1547, 1548-50 (1954) (finding, consistent with the Supreme Court, that strikes are unprotected when the union's strategy is to engage in "hit and run" work stoppages deliberately calculated to harass the company).

79. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, sec. 704(b), § 8(e), 73 Stat. 519, 543-44 (codified at 29 U.S.C. § 158(e)).

80. *Hot Cargo Clause*, LEGAL INFO. INST., https://perma.cc/GMS3-YPYY (archived Mar. 3, 2026).

81. Labor-Management Reporting and Disclosure Act sec. 704(c), § 8(b), 73 Stat. at 544 (codified at 29 U.S.C. § 158(b)(7)). Recognitional picketing becomes illegal if the union is picketing when one union already represents the workers; when a union board election has been held in the prior twelve months; or when there is no incumbent union, but the union seeking to represent the employees continues the picket for more than thirty days without filing a petition with the NLRB to hold an election. 29 U.S.C. § 158(b)(7).

82. *See, e.g.*, Lee Modjeska, *Recognition Picketing Under the NLRA*, 35 U. FLA. L. REV. 633, 653-54 (1983) (critiquing the ambiguity of the language barring recognitional picketing); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 U. MICH. L. REV. 169, 201-02, 225-26 (2015) (noting that the ban on recognitional picketing is intricate and opaque, and

footnote continued on next page

The revision of labor's Magna Carta did not stop there. When labor attempted to go outside of the NLRA to organize in the early 2000s, courts were willing to find that corporate social responsibility campaigns were a form of racketeering.[83] The Supreme Court's recent decision in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*[84] is simply another form of retreat from the commitments made in labor's Magna Carta. That decision represents continued punishment for labor's original sin of challenging capital using tactics that were at the penumbras of accepted labor law. The next Subpart provides additional context by explaining bankruptcy law's mechanisms for reaching its policy goals, including how corporations shed tort claims, before turning in Part II to a deeper examination of how bankruptcy courts apply the Code to unions differently than corporations.

B. Labor's Route to Bankruptcy's Forgiveness

A central axiom of consumer bankruptcy law is that it exists to give "the honest but unfortunate debtor" relief from financial claims against it, but the same could be said for organizational debtors such as corporations and unions.[85] Unions are not corporations; they are tax-exempt unincorporated associations.[86] Under federal law, unions have constitutions and bylaws that govern their actions and must provide their members with rights to participate in their governance.[87] Unions are primarily funded with dues paid by their members. Dues are typically determined by a direct vote of the membership or their duly elected representatives.[88] Even though unions are unincorporated associations, federal law bars creditors that receive money judgments against unions from seeking satisfaction of those tort judgments directly from union members.[89] For the purposes of determining bankruptcy eligibility, unions are treated like individual people and corporations.[90] As a result, a union can file for

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that the bans on recognitional picketing and secondary boycotts raise problematic First Amendment questions).

83. *See infra* Part III.B.

84. 143 S. Ct. 1404 (2023).

85. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 287 (1991)).

86. 26 U.S.C. § 501(c)(5) (exempting labor organizations from taxation); *see, e.g.*, United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145, 153 (1965) (noting that labor unions are unincorporated associations and leaving Congress to determine whether they should be treated as corporations for the purpose of determining diversity jurisdiction).

87. 29 U.S.C. § 411(a)(1), (b).

88. *Id.* § 411(a)(3).

89. *Id.* § 185(b).

90. *See* 11 U.S.C. § 109(a)-(b).

bankruptcy under Chapter 7 of the Code.[91] A trustee will then collect a union's assets and distribute them to creditors according to the priority scheme contained in the Code, after which the union would cease to exist.[92] In contrast, Chapter 11 of the Code allows unions to restructure their debts and continue operating.[93] The focus of this Article is on unions in Chapter 11 bankruptcies, since liquidating under Chapter 7 would render them unavailable to serve the beneficial goals that Congress sets out for them in the NLRA.

Understanding the payment priority scheme in bankruptcy is key to understanding the difficult position that unions find themselves in when they face bankruptcy, both as creditors and debtors. To begin, the payment priority under which creditors receive repayment under both Chapters 7 and 11 is the same.[94] Secured creditors—those whose claims are secured by a property lien[95]—may seek to foreclose on their collateral. But unions in bankruptcy rarely have to worry about secured claims; instead, they must worry about unsecured claims and where their members, or their employers, fall within that regime.

The Code outlines a priority scheme for *unsecured* creditors to recover from a debtor. Unsecured creditors are those with claims that are not backed by collateral that a creditor could sell off to satisfy a judgment.[96] The Code sets out ten priority claims that must be paid before the debtor's shareholders can receive payment.[97] This scheme is called the "absolute priority rule."[98] For example, the Code provides that workers who are owed wages within 180 days of a bankruptcy filing get *fourth* priority, but only up to $10,000.[99] The Code allows workers to get *fifth*-priority payment up to $10,000 for employee benefit plans, such as health insurance and pensions.[100] That means that a debtor must pay wages before health care contributions. If all funds have been used to pay the

91. *See id.*

92. *See id.* §§ 721, 725.

93. *See id.* § 1123(a)(5). One federal court found that unions could file as corporations under the Bankruptcy Act, which predated the 1978 enactment of Chapter 11. Highway & City Freight Drivers, Loc. Union No. 600 v. Gordon Transps., Inc., 576 F.2d 1285, 1291 (8th Cir. 1978); *see also id.* at 1287-91 (interpreting the Act in light of its 1926 and 1938 amendments). No other case in which the union was a debtor had explored this issue in any depth. *See id.* at 1291 (citing "[t]he few cases" that "passed on this question").

94. Chapter 5 of the Code applies to bankruptcies taking place under Chapter 7 and Chapter 11. *See* 11 U.S.C. § 103(a).

95. 11 U.S.C. § 506(a)(1).

96. *See id.* § 507.

97. *Id.*

98. *Id.* § 1129(b)(2); Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 444, 447-48 (1999) (describing Section 1129(b)(2) of the Code as the "absolute priority rule"); *see* 11 U.S.C. § 507.

99. 11 U.S.C. § 507(a)(4).

100. *Id.* § 507(a)(5).

first-, second-, third-, and fourth-priority creditors, though, the fifth-priority creditors (owed money for a pension plan) and lower-level claims are dischargeable[101] pursuant to the absolute priority rule.[102] Bankruptcy law treats employees' sexual harassment and civil rights claims as general unsecured claims that have no priority and are therefore only entitled to a pro rata share of the unsecured creditors pool.[103] Parties whose executory contracts have been rejected under Section 365 can typically seek rejection damages (which are unsecured) once a court has allowed debtors to reject an agreement.[104] That is not the case with unions. If a union's CBA has been rejected, it is not entitled to any damages because the breach of its contract is court-authorized.[105]

Because of the absolute priority rule, the priority of employee tort claims, and the refusal to allow unions to seek rejection damages, a court will most likely discharge claims for pension plan payments, sexual harassment and civil rights damages, and CBA breaches. For corporations filing under Chapter 11, all debts are dischargeable except for two types of claims held by the federal government that are inapplicable here.[106] In comparison, there are over twenty exceptions to discharge for individuals.[107] The next Subpart explains how courts have applied some of those exceptions to cases involving unions.

C. Blocking Labor's Path to Discharge

Courts often conflate the exceptions for discharge—which apply only to individual debtors under Chapters 7 and 13—with the exceptions that should apply to unions filing for bankruptcy under Chapter 11. This doctrinal problem arises because bankruptcy courts import the normative values underlying Section 523(a)(6)'s discharge exception into their determination of whether a

101. A bankruptcy discharge is a release of the debtor from personal liability for those claims within the scope of the discharge. The U.S. bankruptcy courts define a discharge as a permanent order barring creditors from taking any further action seeking repayment. *Discharge in Bankruptcy—Bankruptcy Basics*, U.S. CTS., https://perma.cc/ZLA5-4KEF (archived Mar. 3, 2026).

102. 11 U.S.C. § 1129(b)(2)(B).

103. *See id.* § 507 (failing to enumerate priority for sexual harassment or civil rights claims connected with the employment relationship); Langston, *supra* note 17, at 1139-40; Gross, *supra* note 17, at 484.

104. 11 U.S.C. § 365(a) (allowing for the rejection of an executory contract); *In re* Old Carco LLC, 424 B.R. 633, 639 (Bankr. S.D.N.Y. 2010) (noting that "[t]he purpose of treating a rejection as a pre-petition breach is to allow the non-debtor party to have a claim against the debtor").

105. *See* 11 U.S.C. § 1113 (allowing for the rejection of CBAs); Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 483 F.3d 160, 169-72 (2d Cir. 2007) (stating that rejection of a CBA does not result in a breach because it is a court-authorized "abrogation").

106. 11 U.S.C. § 1141(d)(1).

107. *See id.* § 523(a).

party filed a petition for bankruptcy protection or a plan of adjustment in good faith, and those values clash with the strife that unions are designed to cause. The Code excepts from discharge claims "for willful and malicious injury by the debtor to another entity or to the property of another entity."[108] The Supreme Court held in *Kawaauhau v. Geiger* that Section 523(a)(6) applies to deliberate or intentional, not merely reckless, infliction of injury against a creditor.[109] The Court did not define or further explain what it means to deliberately cause injury, as the facts in that case did not require it to reach that question. Several courts applying *Kawaauhau* have held that a debtor's conduct must be substantially likely to cause injury for the discharge exception to apply, but courts disagree on whether injury must be determined subjectively or objectively.[110]

Unions that seek bankruptcy relief because of a tort judgment are thus in danger of having their claims declared nondischargeable because they engaged in an intentional tort—if not directly through Section 523(a)(6), then as part of the court's good-faith analysis. The tension arises out of the fact that unions are in a two-party relationship with their employers, and Congress has given them license to cause economic harm against that employer in the context of a labor dispute.[111] A bankruptcy court could thus hold that every tort a union commits to cause economic harm produces a nondischargeable debt.

Even though there are no cases in which a court has applied *Kawaauhau* to a union as a debtor, there have been several instances in which unions or their pension funds have, with mixed results, litigated as creditors. For example, in one case, the union sued an employer over a breach of a CBA and consent judgment in which the employer agreed to use union labor exclusively.[112] The employer attempted to discharge the union's damages claims arising from violation of the consent judgment.[113] On appeal, the Fifth Circuit held that the union's claim was not for tortious conduct within the meaning of Section 523(a)(6) because the employer's conduct did not injure the union, and there was no evidence that the employer intended to injure the union.[114] Instead, the court treated the breach of the CBA as an ordinary, dischargeable breach of contract claim.[115] However, the fact that the employer continued the prohibited conduct in violation of the

108. *Id.* § 523(a)(6).

109. 523 U.S. 57, 63-64 (1998).

110. Scott F. Norberg, *Contract Claims and the "Willful and Malicious Injury" Exception to the Discharge in Bankruptcy*, 88 AM. BANKR. L.J. 175, 182-84 (2014).

111. *See supra* Part I.A.

112. Williams v. Int'l Bhd. of Elec. Workers Loc. 520 (*In re* Williams), 337 F.3d 504, 506-08 (5th Cir. 2003).

113. *Id.*

114. *Id.* at 509-11.

115. *Id.* at 511.

consent judgment rendered the claim nondischargeable.[116] In another instance, a union's pension fund tried to collect on an employer's failure to make a legally required contribution, but the court allowed the debtor to discharge those claims because the failure to pay was done without intent to injure.[117] In yet another case, a union brought an action against a union member, seeking a declaration that its claim against the member for crossing a picket line during a strike was nondischargeable under Section 523(a)(6).[118] This was an act of "scabbing." Scabs are workers who leave a union, cross a picket line, or continue to work for an employer during a strike, "thus weakening the striking workers' bargaining power."[119] Scabbing during a strike is a nearly unpardonable offense in the eyes of labor activists.[120] The union fined the union member-debtor for violating the union's constitution.[121] The court denied the union's request for relief and sanctioned the union (instead of its counsel) for bringing the case in violation of

116. *Id.* at 513. *But see* NLRB v. Gordon (*In re* Gordon), 303 B.R. 645, 648, 659 (Bankr. D. Colo. 2003) (denying a motion for summary judgment by the NLRB seeking an exception to discharge under Section 523(a)(6) because the Board failed to demonstrate evidence of the employer's intent to injure its employees).

117. Cent. Laborers' Pension Fund v. VanHuss (*In re* VanHuss), 633 B.R. 830, 843 (Bankr. C.D. Ill. 2021) (explaining that creditors failed to allege specific facts supporting a finding of an intent to injure as there was no "animosity by the Debtor toward the Plaintiffs" and further observing that "[n]ot all nonpayments, however, are intended to inflict injury or occur without just cause or in conscious disregard of one's duties"). *But see* Anderson v. Michaelson, No. 98-C-2927, 1999 WL 59985, at *8-9 (N.D. Ill. Feb. 3, 1999) (upholding the trial judge's determination that a scheme to avoid paying into the union's pension fund caused willful and malicious injury and produced a nondischargeable debt).

118. Commc'ns Workers of Am., Loc. No. 11500 v. Akridge (*In re* Akridge), 71 B.R. 151, 152-53 (Bankr. S.D. Cal. 1987), *aff'd*, 89 B.R. 66 (B.A.P. 9th Cir. 1988).

119. Caroline Bologna, *Where Did the Term 'Scab' Come from?*, HUFFPOST (Aug. 25, 2023, 5:45 AM EDT), https://perma.cc/KRZ3-2YG5.

120. Jack London's famous poem *Ode to a Scab* summarizes the hard feelings that scabbing creates among trade unionists:

> After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a SCAB. A SCAB is a two-legged animal with a corkscrew soul, a water-logged brain, and a combination backbone made of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> ....
>
> . . . Judas Iscariot sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The modern strike-breaker sells his birthright, his country, his wife, his children, and his fellow-men for an unfulfilled promise from his employer, trust or corporation.

JACK LONDON, ODE TO A SCAB (1915), *quoted in* Dunn v. Air Line Pilots Ass'n, 193 F.3d 1185, 1201 n.1, 1202 (11th Cir. 1999) (Tjoflat, J., concurring in part and dissenting in part) (noting that the poem appeared on the cover of a scab list naming over 2,000 pilots who continued to work during a strike on Eastern Airlines); *see also* Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 286 (1974) (characterizing the poem as "a familiar piece of trade union literature" that "has been published countless times in union publications").

121. *In re Akridge*, 71 B.R. at 152-53.

Federal Rule of Bankruptcy Procedure 9011.[122] The NLRB has fared no better in its dischargeability battles. It has never convinced a court that an employer's NLRA violation committed with anti-union animus is an intentional tort that gives rise to a nondischargeable debt.[123]

Taken together, these cases demonstrate that bankruptcy courts have not developed a clear doctrinal rationale based in labor law policy for applying Section 523(a)(6) of the Code and have instead adjudicated in an ad hoc manner. They do not provide a framework for evaluating whether a union, as a debtor managing tort liability, has willfully committed an intentional tort that renders the resulting claim nondischargeable. This doctrinal inconsistency becomes a problem when examining the conduct of a union as a debtor in bankruptcy under the good-faith standards set out in Sections 1112(b) and 1129(a)(3) of the Code. There is a danger that courts will import Section 523(a)(6) doctrine into their interpretation of those sections when the union is the tortfeasor.[124]

Applying Section 523(a)(6) to determine whether unions can discharge their tort liabilities would produce inconsistent results. This ad hoc treatment would contrast starkly with the much more consistent treatment that corporations enjoy when seeking to discharge even the most egregious intentional tort claims.[125] Several bankruptcy scholars have highlighted this disparity and argue that corporations aggressively use bankruptcy to silence the voices of tort victims, including employees. For example, Pamela Foohey and Christopher Odinet highlight corporations' (both nonprofit and for-profit) use of bankruptcy to cabin people's voices and cut short public scrutiny of alleged wrongdoing.[126] Similarly, Section 523(a)(6) chills protest. In one case, for example, the employer restaurant retaliated against restaurant workers for protesting their employment conditions.[127] Yet the court held that the workers' wage claims were dischargeable because they failed to prove that their employer acted with actual malice.[128]

Foohey and Odinet's general observations concerning mass torts apply to many workplace tort claims as well. The broad discharge provision for corporations and bias inherent in the Code have undermined suits brought by workers seeking to vindicate statutory rights, such as claims of racial

122. *Id.* at 155 ("The Union sought a test case to harass the Debtor and must be held responsible for this violation of Bankruptcy Rule 9011.").

123. NLRB v. Calvert, 570 B.R. 77, 83-85 (S.D. Ind. 2017), *aff'd*, 913 F.3d 697 (7th Cir. 2019).

124. *See infra* Parts II.B-.C.

125. Corporations can discharge all debts except certain claims owed to governmental units. *See* 11 U.S.C. § 1141(d)(6); *see also supra* note 18 (comparing the discharge exclusions for individual and corporate debtors).

126. Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1296 (2023).

127. *See* Wu v. Lin (*In re* Lin), 576 B.R. 32, 57-58 (Bankr. E.D.N.Y. 2017).

128. *Id.* at 58, 66.

discrimination and claims brought under the NLRA.[129] As Nicole Langston notes, "Despite the EEOC laws, a debtor who has discriminated against an employee can have those monetary damages forgiven in bankruptcy since no Code provisions specifically prohibit the discharge of employment protection claims."[130] To prevent that debt from being discharged, a claimant would have to demonstrate that an individual, noncorporate employer is attempting to discharge liability for an intentional tort, or otherwise argue that the corporation filed for bankruptcy protection in bad faith for the purpose of discharging debt for an intentional tort.[131] Langston's work demonstrates that civil rights claimants have had little success meeting this standard: Individual employers have discharged claims for failure to meet minimum wage laws and rebuffed attempts by victims of racial discrimination to have their claims barred from discharge under the willful and malicious standard.[132] Corporations have also been able to use bankruptcy to silence survivors of sexual harassment. Adi Marcovich Gross outlines how corporations use bankruptcy to avoid liability for sexual misconduct by restricting victims' access to court, capping compensation, and protecting third parties who might bear responsibility.[133] Much like the discharge power inherent in bankruptcy, these tools silence victims of sexual and racially motivated misconduct, including employees. At first blush, a union's CBA may give the appearance that it has the strength to

129. *See, e.g.*, NLRB v. Calvert, 570 B.R. 77, 85 (S.D. Ind. 2017), *aff'd*, 913 F.3d 697 (7th Cir. 2019) (finding an employer's NLRA violation and anti-union animus insufficient to establish an intentional tort producing a nondischargeable debt under Section 523(a)(6)); NLRB v. Gordon (*In re* Gordon), 303 B.R. 645, 658-59 (Bankr. D. Colo. 2003) (holding that an NLRA violation alone does not establish nondischargeable intentional tort liability). *But see* NLRB v. Fogerty (*In re* Fogerty), 204 B.R. 956, 962 (Bankr. N.D. Ill. 1996) (adopting the NLRB's finding that a violation was willful and the resulting debt therefore nondischargeable under § 523(a)(6)). For cases in which race discrimination claims were discharged, see, for example, Jaurdon v. Cricket Commc'ns, Inc., 412 F.3d 1156, 1157-59 (10th Cir. 2005); *In re* Tribune Media Co., 902 F.3d 384, 389, 391-92, 404 (3d Cir. 2018); and Smith v. Delta Airlines, Inc., No. 07CV843, 2010 WL 2976075, at *2 (D. Utah July 28, 2010). *See also* Zachery v. Whalen, No. 93-CV-36, 1994 WL 411526, at *8 (N.D.N.Y. July 26, 1994) (finding that race discrimination claims were not contemplated as intentional tort claims subject to Section 523(a)(6)'s bar on dischargeability); Morelli v. Serv. Am. Dining Servs., No. 96-CV-1979, 1998 WL 166878, at *2-3 (N.D.N.Y. Apr. 3, 1998) (same).

130. Langston, *supra* note 17, at 1139.

131. *Id.* at 1140-41; *see also* 11 U.S.C. §§ 523(a)(6), 1112(b). Corporations that have used the "Texas Two-Step"—a divisive-merger maneuver under Texas law that isolates tort liabilities in a successor that then files for Chapter 11—have successfully defeated motions to dismiss for filing in bad faith under Section 1112(b)(2) in many, but not all, instances. Katherine H. O'Neill, *Dirty Dancing: Is the Texas Two-Step a Bad Faith Filing?*, 91 FORDHAM L. REV. 2471, 2488-89 (2023).

132. Langston, *supra* note 17, at 1140-43.

133. Gross, *supra* note 17, at 499-508.

give voice to these and other claims, but bankruptcy courts have devised several ways to quiet a union's voice, as described in the next Part.

II. Displaying a Union's Good Faith in Bankruptcy

This Part provides an in-depth examination of how bankruptcy courts use the concept of "good faith" to quell a union's voice both as creditor and, potentially, as debtor. Courts use good faith as an important gatekeeping tool throughout the entire bankruptcy process. Three Code provisions touching on faith (good or bad) are relevant for this discussion: Sections 1113(b)(2), 1112(b), and 1129(a)(3).[134] Even though each of these provisions requires a bankruptcy judge to evaluate a party's good faith throughout different phases of a Chapter 11 process, observations made by one bankruptcy court in 1999 provide a useful frame for thinking about the inconsistent results that seem to arise when applying the good-faith standards to any part of the Code. The court stated:

> We have always been reluctant to seize upon "good faith" as an easy way out of confirming a difficult or questionable plan. We believe that a finding of lack of good faith in proposing a plan ought to be extraordinary and should not substitute for careful analysis of other elements necessary for confirmation. However, we also believe that a court of equity must use all of its senses to determine whether a proposed course is fair and equitable. . . . Sometimes a bankruptcy judge's nose tells him/her that something doesn't smell right and further inquiry is warranted. (Others may call this "common sense.") . . . . Sometimes, a bankruptcy judge's stomach may turn, when he/she is preparing to sign a particular judgment or order. This queasiness is reflective of the judge's sense that for some, perhaps inarticulable, reason, it just isn't right to grant the relief requested.[135]

That queasiness could lead judges to conclude that unions are not acting in good faith when they create strife, when in fact they are behaving exactly as Congress intended. The next Subparts discuss the Code provisions containing good faith as a standard that may impact a union in bankruptcy, especially when conduct that may constitute good faith under the NLRA clashes with what bankruptcy courts consider behaving in good faith.

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134. There are several other Code provisions requiring that courts evaluate the good faith of a debtor—typically an individual debtor—including through "means testing." *See, e.g.*, 11 U.S.C. § 707(b) (requiring a court to determine whether a petitioner seeking relief for discharge under Chapter 7 is abusing the Code and should instead be required to repay its debts pursuant to a payment plan); *id.* § 1129(a)(3) (requiring a debtor to file a plan in good faith).

135. *In re* Dow Corning Corp., 244 B.R. 673, 676 (Bankr. E.D. Mich. 1999) (quoting *In re* Timko, No. 87-09318 (Bankr. E.D. Mich. July 22, 1988) (unpublished)) (citation omitted), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002), *abrogated on other grounds by* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024).

A. Bargaining in Good Faith Under Section 1113

At first glance, it may appear that courts treat unions like corporations, but in fact, courts treat unions' claims on behalf of workers like any other unsecured claim. When dealing with claims arising out of a union's CBA, as compared to other nonpriority unsecured claims, bankruptcy silences workers' collective voice with a gentler, more nuanced touch. CBAs act as the written expression of a union's power over an employer. Traditionally, bankruptcy courts deferred to a business's judgment when reviewing whether to allow a debtor to reject a CBA under Section 365.[136] However, the Supreme Court in *NLRB v. Bildisco & Bildisco* found it necessary to review the rejection of a CBA under a stricter standard.[137] The Court held that a debtor could set aside a CBA "if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."[138] Labor leaders decried the decision, and Congress immediately amended the Code to add Section 1113 to make it more difficult for courts to reject CBAs.[139]

Even though Congress took action to prevent courts from easily rejecting CBAs in bankruptcy, corporations continue to easily discharge any damages arising out of breach of a CBA. In fact, since at least the late 1980s, many scholars have agreed that Section 1113 of the Code has failed in its mission to make rejection of CBAs difficult.[140] Despite its great promise, Section 1113 has become an albatross for unions. For example, in the 1980s, even though Continental Airlines was financially solvent, it filed for bankruptcy to shed its CBAs with its pilots and flight attendants.[141] In that case and others like it, the fact that corporations deemed cutting CBAs "necessary" had become the motivating force

136. 465 U.S. 513, 523 (1984).

137. *Id.* at 524. The Court's decision also received scholarly attention. *See, e.g.*, Mark S. Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANKR. L.J. 1, 29 (1984) (arguing for an application of *Bildisco* that favors the rejection of CBAs). *But see* Douglas Bordewieck & Vern Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293, 298 (1983) (arguing that CBAs deserve robust protection).

138. *Bildisco*, 465 U.S. at 525-26.

139. Donald H.J. Hermann & David M. Neff, *Rush to Judgment: Congressional Response to Judicial Recognition of Rejection of Collective Bargaining Agreements Under Chapter 11 of the Bankruptcy Code*, 27 ARIZ. L. REV. 617, 630-34 (1985).

140. *See* sources cited *supra* note 40.

141. *See* Anne M. Burr, *The Unproposed Solution to Chapter 11 Reform: Assessing Management Responsibility for Business Failures*, 25 CAL. W. INT'L L.J. 113, 114-15 (1994); Charles B. Craver, *The Impact of Financial Crises upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 471 (1988) (detailing how Continental lowered the wages of pilots by one-third and flight attendants by over one-half).

behind rejecting CBAs in Chapter 11.[142] In fact, Andrew Dawson found after conducting a comprehensive study of corporate motions to set aside a CBA that the employer won in every motion to reject a CBA from 2001 to 2007.[143] Section 1113, combined with the broad discharge power allowed to corporations, has simply served as another tool to dissipate union and worker power.[144]

One reason that bankruptcy courts could so easily grant employer motions to set aside CBAs under Section 1113 of the Code was that courts refused to harmonize the NLRA's definition of bargaining in good faith with Section 1113's directive to "confer in good faith." Congress incorporated the NLRA's requirement that parties negotiate in good faith.[145] Congress also required that courts refrain from rejecting a CBA unless they find that (1) the debtor made a proposal "which provides for those necessary modifications" to the CBA to continue to let the business continue operating;[146] (2) the union "refused to accept such proposal without *good cause*";[147] and (3) "the balance of the equities clearly favors rejection of such agreement."[148] The problem is that the NLRA allows the parties to negotiate in good faith but does not require that unions accept management's proposed concessions or face the consequences outside of bankruptcy proceedings.[149]

This interpretation of Section 1113 has developed in a way that undermines unions' power by making it easy for corporations to reject a CBA. Unions have tried to make the argument, to deaf ears, that companies seeking Chapter 11 protection for the purpose of avoiding their obligations under CBAs do so in bad faith.[150] Unions tried that maneuver for good reason—they wanted to avoid

142. *See* Christopher D. Cameron, *How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 845-46, 911-12, 915 (1994) (demonstrating that the more days the parties spend in bargaining, the more likely it is that a debtor will file a successful motion to reject under Section 1113).

143. Dawson, *supra* note 40, at 104.

144. There is a bipartisan congressional effort to reform the Code to protect employees, retirees, and unions in their role as creditors. The Protecting Employees and Retirees in Business Bankruptcies Act of 2025 proposed several amendments to Section 1113 to make it more difficult for business debtors to set aside CBAs. *See* S. 1381, 119th Cong. § 201 (2025).

145. *Compare* 29 U.S.C. § 158(d) (requiring parties to meet and confer in good faith), *with* 11 U.S.C. § 1113(b)(2) (same).

146. 11 U.S.C. § 1113(b)(1)(A); *id.* § 1113(c)(1) (requiring that the court find subsection (b)(1) satisfied).

147. *Id.* § 1113(c)(2) (emphasis added).

148. *Id.* § 1113(c)(3).

149. *See* H. K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970) (holding that the Board could not require that the parties arrive at an agreement or compel acceptance of an offer made during collective bargaining).

150. *See infra* notes 179-80 and accompanying text (discussing the *In re Continental Airlines Corp.*, 38 B.R. 67, 69, 71 (Bankr. S.D. Tex. 1984), decision on good faith).

having their CBAs rejected under Section 1113 under standards that favor employers. Anne McClain notes, "Courts have liberally construed Section 1113 in favor of debtors: allowing union and nonunion employees to be treated differently, de-emphasizing the requirement of debtor good faith in negotiations, and presuming a union's rejection to be without good cause."[151] One court observed "that the curse of Babel struck when the courts came to consider the test for allowing rejection of collective bargaining agreements."[152] Even though the court made that observation before Congress enacted Section 1113, it applies with equal force to Section 1113. As one bankruptcy court noted, Section 1113 "is not a masterpiece of draftsmanship."[153] To make sense of it, the court enumerated nine requirements for the rejection of a CBA under Section 1113, including:

> 1. The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.
>
> . . . .
>
> 3. The proposed modifications must be necessary to permit the reorganization of the debtor.
>
> 4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.
>
> . . . .
>
> 7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
>
> 8. The Union must have refused to accept the proposal without good cause.
>
> 9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.[154]

A circuit split emerged between the Second and Third Circuits in applying this standard—specifically, in defining a "necessary" modification to a CBA. The Third Circuit developed a strict standard in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*.[155] There, the court held that a necessary change to a CBA is one that is essential to the restructuring of the debtor, and showing that rejection would lower labor costs is not good enough to demonstrate necessity.[156] That view has become the minority. Instead, the Second Circuit's decision in *Truck Drivers Local 807 v. Carey Transportation, Inc.* now takes

151. McClain, *supra* note 40, at 205.

152. *In re* Rath Packing Co., 36 B.R. 979, 988 (Bankr. N.D. Iowa 1984) (citations omitted).

153. *In re* Am. Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

154. *Id.*

155. 791 F.2d 1074, 1088-89 (3d Cir. 1986).

156. *Id.*

preeminence.[157] In that case, the court held that the necessity element requires only that debtors prove they made a proposal in good faith and that it contains "necessary, *but not absolutely minimal*, changes" that will ensure that the debtor successfully emerges from bankruptcy.[158] When unions have objected or refused to enter into an agreement, courts have readily accused them of "stonewalling" and found that they have done so without good cause and are not bargaining in "good faith."[159]

The treatment of the term "good faith" by bankruptcy courts demonstrates that judges seem to issue decisions that protect bankruptcy law's prerogatives over those of labor law. However, when unions are the debtors, the sensible approach, one would think, is to marry the two approaches so that unions can discharge debt as easily as corporations—especially when the tort that unions engage in is in pursuit of the goals that Congress set out for them under the NLRA. Academic literature on Section 1113 has wrestled with achieving the right balance between the goals of the NLRA and the goals of the Code.[160] However, the court decisions that tend to favor the Code's preference for giving the reorganized debtor a chance to succeed lead to an important insight. To paraphrase Gali Racabi, for unions, balancing labor law with the Code has been an exercise "for suckers."[161] In his view, Section 7 of the NLRA, which allows workers to engage in concerted activity for mutual aid and protection, is a statutory command in appearance only.[162] Racabi's observation is apt in the bankruptcy context. Bankruptcy judges have had no problem balancing bankruptcy law against labor law, and siding with the bankruptcy law prerogative of giving the debtor a fresh start at the expense of preserving hard-

157. 816 F.2d 82 (2d Cir. 1987); *see, e.g.*, *In re* Mile Hi Metal Sys., Inc., 899 F.2d 887, 892 (10th Cir. 1990) ("[T]he majority of cases decided since *Wheeling-Pittsburgh* have declined to interpret section 1113(b)(1)(A) as requiring that a proposal be absolutely necessary." (footnote omitted)); *see also* Dawson, *supra* note 40, at 109 ("Even though the Second Circuit's interpretation has been more widely accepted among the other circuits, commentators continue to debate which court has the better interpretation, as discussed below. Each side advances both policy and statutory arguments in favor of its position." (footnote omitted)).

158. Truck Drivers Loc. 807 v. Carey Transp., Inc., 816 F.2d at 90 (emphasis added).

159. *See* Kropp, *supra* note 40, at 734 (citing *In re* Sierra Steel Corp., 88 B.R. 337, 340-41 (Bankr. D. Colo. 1988)).

160. *Id.* at 699-701; *see also* Peter B. Brandow, *Rejection of Collective Bargaining Agreements in Bankruptcy: Finding a Balance in 11 U.S.C. § 1113*, 56 FORDHAM L. REV. 1233, 1255-56 (1988); Cuevas, *supra* note 40, at 197-99; Steven Kropp, *A Case of Misplaced Priorities: A Proposed Solution to Resolve the Apparent Conflict Between Sections 507 and 1113 of the Bankruptcy Code*, 18 CARDOZO L. REV. 1459, 1462-63 (1997) (arguing for a broad reading of Section 1113 and for allowing priority status for rejection damages); Hunter, *supra* note 40, at 450-51 (explaining that Section 1113 balanced many competing interests between labor and bankruptcy law but often functions as a union-busting device to disastrous effect).

161. *See* Gali Racabi, *Balancing Is for Suckers*, 109 CORN. L. REV. 63, 111 (2024).

162. *Id.* at 66.

fought CBAs.[163] In a way, bankruptcy courts have read the fresh start policy into the Code as a kind of tiebreaker when the Code clashes with labor law—and labor law almost always loses. If that is the case, Racabi may be right. Balancing in this case may be for suckers, and labor law's priorities lose out.[164]

This Article takes a different approach, one that does not require any balancing. When unions are the debtors, judges should not feel any tension between bankruptcy law's fresh start principle and the NLRA's policy of encouraging collective bargaining. Since unions promote important public interest goals (albeit through strife), bankruptcy courts should evaluate their filings under a framework that recognizes the public values unions serve. By adopting such a framework, this Article accepts Jay Lawrence Westbrook's invitation to think about bankruptcy law in the public interest—in this case, society's interest in combating wealth inequality and its deleterious effects through the mechanism of collective bargaining.[165]

This Subpart has demonstrated that corporations are granted wide latitude in discharging their obligations under CBAs, and that courts do not question their good faith in doing so. However, courts do question the good faith of the union that refuses to arrive at an agreement with a corporate employer, even though outside of bankruptcy a union is not required to arrive at such an agreement. The next Subpart of this Article outlines the law on dismissing bad-faith petitions before turning to the argument that ensuring that unions can discharge debts arising out of a labor dispute has a public purpose that aligns with Congress's approach to labor policy.[166]

B. Good-Faith Filing of a Bankruptcy Petition Under Section 1112(b)

A union must meet the criteria set out in Section 1112(b) of the Code to enter bankruptcy. In making this determination, courts scrutinize unions' pre-petition conduct. Section 1112(b) enables judges to review petitioners' "good faith" in seeking bankruptcy relief.[167] This part of the Code does not use the words "good faith." Instead, it sets out two criteria for dismissal to protect the integrity of the bankruptcy process. The first allows a court to dismiss a Chapter 11 petition for cause unless it finds that the appointment of a trustee to oversee the affairs of the debtor would be in the best interest of creditors and the bankruptcy estate.[168] In that case, it can appoint a trustee instead of allowing the

163. *See* sources cited *supra* note 40; *supra* notes 141-44 and accompanying text.

164. *See* Racabi, *supra* note 161, at 66.

165. Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, 4 PENN. ST. J.L. & INT'L AFFS. 445, 450 (2015).

166. *See infra* Part III.

167. *See, e.g.*, 11 U.S.C. § 362(a) (providing for an immediate stay of all litigation against a debtor from the moment that it files for bankruptcy protection).

168. *Id.* § 1112(b)(1).

debtor to run the affairs of the union.[169] Courts are unlikely to do so because federal law only allows the imposition of a trustee in very limited circumstances.[170] The second criterion follows the logic of the first. It allows a court to dismiss a Chapter 11 petition unless unusual circumstances show that dismissal would disserve creditors and the estate; the court can confirm a plan of adjustment quickly; and the debtor can mitigate any harm arising from the conduct cited as cause.[171] In applying this statute, courts have read the "for cause" language in Section 1112(b)(1) to imply a good-faith requirement for the entirety of Section 1112(b).[172] They have developed a two-step analysis for determining whether a debtor has filed in good faith.[173] First, they "determine whether cause exists to dismiss the Chapter 11 filing."[174] Second, they "determine whether dismissal is in the best interest of creditors and the estate."[175]

Courts are reluctant to dismiss cases for lack of good faith, even in scenarios where the debtor engaged in pre-petition planning to set itself up to discharge tort debt.[176] As Lawrence Ponoroff and F. Stephen Knippenberg observe, "[T]he judicial attitude that has emerged is that so long as valid reasons for filing exist, it is irrelevant that the petition may actually be motivated by other circumstances and events."[177] This lenient standard has incentivized companies to engage in strategic bankruptcy filings and raises questions about whether unions facing crippling tort judgments can do the same.[178]

Unions attempting to save their CBAs from abrogation under Section 1113 of the Code have attempted, to no avail, to challenge employers' Chapter 11

169. *Id.*

170. *See* 29 U.S.C. § 462 (allowing a parent union to appoint a trustee over a local union's affairs in limited instances).

171. 11 U.S.C. § 1112(b)(2).

172. Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 924-25 (1991).

173. Nicholas Wogan, Circumstances Under Which a Court Will Dismiss a Chapter 11 Filing Made in Bad Faith pt. I.B (2022) (unpublished research memorandum) (on file with the St. John's Bankruptcy Research Library).

174. *Id.*

175. *Id.*

176. *See, e.g.*, *In re* Dow Corning Corp., 244 B.R. 673, 676-77 (Bankr. E.D. Mich. 1999), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002), *abrogated on other grounds by* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024); *see also* Janger, *Enterprise, Liability, and Insolvency*, *supra* note 17, at 133-34 (describing courts' findings that mass-tort defendants filed for bankruptcy in good faith as required by Section 1112(b) of the Code).

177. Ponoroff & Knippenberg, *supra* note 172, at 942.

178. Michael J. Venditto, *The Implied Requirement of "Good Faith" Filing: Where Are the Limits of Bad Faith?*, 1993 DET. C.L. REV. 1591, 1606-10; *see also* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 44-45 (2023) (describing how courts' lenient application of the good-faith standard has allowed debtors to employ the "Texas Two-Step" to survive dismissal petitions).

filings for lack of good faith. For example, in *In re Continental Airlines*, union plaintiffs claimed that the airline filed for bankruptcy in bad faith for the sole purpose of rejecting their CBAs.[179] The court understood that the corporation filed in part to set aside the CBAs—but it denied the union's motion because the corporation had additional motivations.[180] In *Stoner v. LTV Corp.*, the employer filed for Chapter 11 bankruptcy with an acknowledged purpose of restructuring its employee benefit plans and immediately terminated benefits for 78,000 retirees.[181] Congress reacted swiftly by enacting what eventually became Section 1114 of the Code.[182] Unions have found more success, however, in small commercial cases. For instance, where employers have used Chapter 11 filings to avoid priority claims for union benefit fund contributions, unions have been able to demonstrate bad faith in violation of Section 1112(b).[183]

Unfortunately, the cases evaluating whether unions filed for Chapter 11 bankruptcy in good faith under Section 1112(b) do not provide much guidance for constructing a theory of bankruptcy law that balances unions' role as collective bargaining agents with bankruptcy's fresh-start goal. The one case arising out of a union's filing due to an adverse judgment involved an internal union dispute.[184] There, a former local union president brought a successful Labor-Management Reporting and Disclosure Act claim for damages against the

179. *In re* Cont'l Airlines Corp., 38 B.R. 67, 69, 71 (Bankr. S.D. Tex. 1984).

180. *Id.* at 71 ("This court would reject any argument that a financially troubled company, which is losing money and is insolvent (or nearly so), is unable to pay its debts as they mature, has no credit and no free assets, and is about to run out of cash; nevertheless, [the company] cannot file a Chapter 11 proceeding if rejection of its collective bargaining agreements is a planned element in the reorganization of its business."); *see also In re* Rath Packing Co., 36 B.R. 979, 996 (Bankr. N.D. Iowa 1984) (finding, prior to the enactment of Section 1113, that a debtor's Chapter 11 petition to set aside a CBA did not constitute bad faith or "union busting"); Anne M. Burr, *supra* note 141, at 131 n.170 (observing that the Code "does not contain an express good faith filing requirement" but that courts have read one in as implied). The *In re Continental Airlines Corp.* decision does not specifically cite Section 1112, but the framing and analysis mirror the analysis that a court would undertake in reviewing a motion to dismiss under Section 1112. *See* 38 B.R. at 71-72.

181. Stoner v. LTV Corp. (*In re* Chateaugay Corp.), 140 B.R. 64, 67 (S.D.N.Y. 1992), *vacated on other grounds*, 153 B.R. 409 (S.D.N.Y. 1993).

182. Janet A. Flaccus, *Have Eight Circuits Shorted? Good Faith and Chapter 11 Bankruptcy Petitions*, 67 AM. BANKR. L.J. 401, 436-37 (1993) (noting that Congress reacted quickly to LTV's actions and arguing that the good-faith test is a poor tool for keeping certain cases out of Chapter 11). Section 1114 requires debtors to continue making retiree benefit payments after filing for Chapter 11 bankruptcy, 11 U.S.C. § 1114(e)(1), and provides for repayment if an insolvent company cuts off benefits in the 180-day period prior to filing, *id.* § 1114(*l*).

183. *See In re* Mech. Maint., Inc., 128 B.R. 382, 385, 390 (E.D. Pa. 1991); Bricklayers & Trowel Trades Int'l Pension Fund v. Wasco, Inc., 551 B.R. 319, 326, 337 (M.D. Tenn. 2015) (reversing the trial court's confirmation of a plan of adjustment because an employer acted in bad faith by trying to avoid payment to a pension fund as required under the Employee Retirement Income Security Act).

184. *In re* Loc. Union 722 Int'l Bhd. of Teamsters, 414 B.R. 443, 446 (Bankr. N.D. Ill. 2009).

union, which filed for bankruptcy to avoid paying the judgment.[185] The court dismissed the filing for bad faith because the union had gerrymandered the damages claim into a separate class.[186] Additionally, the court dismissed the filing on the basis that the union's petition for bankruptcy was simply an attempt to manage a two-party dispute.[187] The court found that the filing was made in bad faith and also pointless because there was no confirmable plan that the debtor could file.[188] Bankruptcy courts typically dismiss or abstain from hearing bankruptcy petitions under Section 305(a)(1) or Section 1112(b) when the dispute is between two parties.[189] Bankruptcy courts do so because their tools are intended to solve collective action problems that arise when multiple tort-judgment creditors attempt to collect against the same debtor at the same time.[190] Article III courts, they reason, are the better forum for two-party disputes.[191] Bankruptcy judges are especially skeptical when creditors seek to push a debtor into bankruptcy and a bit more solicitous when debtors on the wrong end of a tort lawsuit are in need of the tools that bankruptcy offers.[192]

Scholars have recognized the problems that exist with the bad-faith elements of Section 1112(b), but their proposed remedies fall short when applied to unions and their conduct. For example, Michael Venditto suggests that a finding of bad faith is warranted only when a court finds that:

> 1) the debtor's filing is primarily motivated by a desire to obtain some strategic advantage offered by bankruptcy's equitable powers; 2) the debtor's ability to effectuate a plan is largely dependent upon securing that strategic advantage in order to adversely affect the contractual or property rights of a third party; and, 3) the resolution of existing financial problems in, or through, chapter 11 would make the debtor a financially viable entity.[193]

But Venditto's test, and the two-party dispute doctrine more generally, break down when applied to labor disputes. Most of a union's activity takes place within the union-management dyad, such that the union would not qualify for

185. *Id.* at 446-47.

186. *Id.* at 453.

187. *Id.* at 448-49.

188. *Id.* at 453.

189. *See* 11 U.S.C. §§ 305(a)(1), 1112(b); Christopher D. Hampson, *Bankruptcy Abstention*, 106 B.U. L. REV. (forthcoming 2026) (manuscript at 26-27) (finding that bankruptcy courts will abstain from exercising jurisdiction when a creditor seeks to enforce a judgment against a debtor because bankruptcy courts do not like being used as debt collection agencies in two-party disputes); *In re* Obstetric & Gynecologic Assocs. of Iowa City & Coralville, P.C., 651 B.R. 1, 11 (Bankr. S.D. Iowa 2023) (dismissing a bankruptcy petition on bad-faith grounds, as the matter was essentially a two-party dispute).

190. Hampson, *supra* note 189, at 26-27.

191. *See id.* at 27.

192. *See id.*

193. Venditto, *supra* note 178, at 1613-14.

bankruptcy protection under either framework. The NLRA requires unions to bargain enterprise-by-enterprise as a default rule[194]—thus mandating that unions bargain within the employer-employee dyad. That means that every union bankruptcy filing is at risk of being dismissed as a two-party dispute under Section 305 or Section 1112(b).[195]

By its very design, labor law allows for unions to engage in strikes to gain strategic advantage over an employer—but those strikes can also harm third parties. For example, when dockworkers go on strike, packages of goods do not get delivered. Under Venditto's proposal, if a union goes bankrupt while on strike, it would never be able to file in good faith. Similarly, under the two-party dispute doctrine, a bankruptcy court would either dismiss a union's petition for not having been filed in good faith or abstain from exercising jurisdiction over the petition. Either way, a union suffering from a crippling unsecured tort judgment claim would be unable to access bankruptcy law's tort-forgiveness regime.[196] To remedy this problem, this Article suggests that courts construct a new theory of bankruptcy law. Courts evaluating a motion to dismiss a bankruptcy petition under Section 1112(b) of the Code should harmonize workers' right to organize under the NLRA and bankruptcy law's fresh start and creditors' rights regimes. But first, the next Subpart examines one court case involving a Teamsters local that did apply the good-faith standard correctly, albeit under Section 1129(a)(3) of the Code.

194. 29 U.S.C. § 158(d). The NLRA does not bar other arrangements. Unions may engage in bargaining with multiple employers at the same time. For example, Local 1 of the Service Employees International Union has a CBA with the Apartment and Building Managers of Chicago, an association of employers. Agreement Between Service Employees International Union, Local 1 Residential Division and the Apartment Building Owners and Managers' Association of Illinois: Covering Janitors in Walk-Up Apartment Buildings; Effective December 1, 2021-November 30, 2024 pmbl., § 201(e)-(f) (Dec. 1, 2021), https://perma.cc/P2U5-UEQX. Employers, too, may seek to bargain on a different basis, since the NLRA only requires that a single employer bargain with a single certified bargaining representative. *See* 29 U.S.C. § 158(d), 159(b).

195. Kate Andrias describes the NLRA as being committed to an employer-employee dyad and calls for a system that instead "locates decisions about basic standards of employment at the sectoral level and positions unions as social actors empowered to advance the interests of workers generally." Andrias, *The New Labor Law*, *supra* note 22, at 58. Bankruptcy courts could use that dyad as a doctrinal justification for dismissing a union's bankruptcy petition in response to a tort judgment as nothing more than a two-party dispute under Sections 305 and 1112. *See* 11 U.S.C. §§ 305(a)(1) (authorizing dismissal when interests of creditors and the debtor are better served outside bankruptcy); *id.* § 1112(b) (authorizing dismissal or conversion for cause).

196. At least one scholar has criticized Section 1112(b) as a poor tool for protecting the interests of unsecured creditors. Carlos Cuevas argues that "the bad faith criteria are not a useful mechanism for protecting unsecured creditors and enforcing fiduciary duties." Carlos J. Cuevas, *The Myth of Fiduciary Duties in Corporate Reorganization Cases*, 73 NOTRE DAME L. REV. 385, 401 (1998).

C. Filing a Plan of Adjustment in Good Faith Under Section 1129(a)(3)

At the final step of a traditional Chapter 11 bankruptcy, a union files a plan of adjustment as set out in Section 1129 of the Code. A plan of adjustment can really be called a plan of *debt* adjustment. A Chapter 11 plan operates like "a contract—a legally binding document that dictates . . . . how creditors are repaid and how the company will proceed financially."[197] A union's proposed plan must meet a series of requirements.[198] In particular, the Section 1129(a)(3) requirement that a debtor present a plan in "good faith" parallels the Section 1112(b) requirement discussed above. If a union tortfeasor is prevented from proposing a plan to discharge those debts, then the organizing tactics available to it are limited by the risk that a debt is nondischargeable.

While unions rarely seek bankruptcy,[199] at least one union has defeated an employer's good-faith challenge and convinced a court to confirm its plan of adjustment. In *In re General Teamsters Union Local 890*, Teamsters Local 890 declared bankruptcy after employers sued the union following a strike that turned violent.[200] Twelve years of litigation ensued.[201] In affirming the bankruptcy and district courts, the Ninth Circuit described the legal standard for "[a] plan proposed in good faith" as "one that satisfies the purposes of the [B]ankruptcy [C]ode," namely, "facilitating the successful rehabilitation of the debtor, and maximizing the value of the bankruptcy estate."[202] The bankruptcy court distinguished "good faith" analysis under Section 1112(b) and Section 1129(a)(3): While Section 1129(a)(3) considers good faith in evaluating a plan under the totality of the circumstances, Section 1112(b) considers good faith in evaluating pre-petition conduct.[203] The court remained silent as to whether the violence during the union's pre-petition strike excepted the union's tort debt from discharge under Section 523(a)(6). Instead, it focused on the Teamsters' post-petition conduct in granting the union a discharge.

The Teamsters Local 890 bankruptcy saga shows that courts are able and willing to discharge the debt of union tortfeasors even when the underlying strike turns violent. But the court did not discuss exceptions to discharge under

197. Michele Schechter, *The Nuts and Bolts of a Chapter 11 Plan*, DAILYDAC (Feb. 17, 2025), https://perma.cc/RE8E-D2P3.

198. 11 U.S.C. § 1129(a)(1)-(16).

199. A search of all federal cases with keywords related to bankruptcy and labor yields only a handful of results in Westlaw. *See* WESTLAW, "chapter 11" /100 "labor union" /100 tort, 3 results (Apr. 3, 2026) (on file with the *Stanford Law Review*) (filtered by "Cases," "All Federal"); WESTLAW, "chapter 11" /100 "labor union" /100 strike, 8 results (Apr. 3, 2026) (on file with the *Stanford Law Review*) (filtered by "Cases," "All Federal").

200. *See* 225 B.R. 719, 722 (Bankr. N.D. Cal. 1998), *aff'd*, 265 F.3d 869, 877 (9th Cir. 2001).

201. *See In re Gen. Teamsters*, 265 F.3d at 872.

202. *Id.* at 877 (citation omitted).

203. *In re Gen. Teamsters*, 225 B.R. at 729; *see supra* Part II.B.

Section 523 or how to balance the NLRA's policy goals against bankruptcy's policy goals in the context of labor organizing.

To be sure, the Teamsters Local 890 case reflects courts' willingness to give relief to the open and honest debtor while accommodating the constraints that internal governance norms and federal law place on unions.[204] The harder question is whether Section 1129(a)(3) would bar a union tortfeasor from getting a plan of adjustment confirmed—especially if a court looks at pre-bankruptcy conduct in determining good faith. The nature of labor law is such that if bankruptcy courts evaluate the "good faith" of a union debtor based on pre-petition conduct, then unions may not get a fair shake.[205] The bankruptcy court hearing Local 890's petition focused on post-petition conduct. It might have reached a different conclusion had it considered the violence that occurred during the strike pre-petition.[206] Section 1112(b) already serves as a tool for an employer to seek dismissal of a union petition based on conduct leading up to the filing.[207] A second bite at that apple is not needed to accommodate the Code's purposes.

Even though the Local 890 decision protected the union, it did not provide a doctrinal roadmap for evaluating a union's pre-petition torts in determining good faith. The next Part discusses the types of torts that could lead an employer to sue a union and possibly precipitate a bankruptcy judgment. Part IV then develops the roadmap that the court in the Local 890 case failed to provide.

III. Tale of Four Labor Torts

The strife-ridden environment of an organizing campaign can become a petri dish for tortious conduct. It is common for employers to fire employees during a union organizing campaign because the benefits of squelching a union organizing drive outweigh the costs of NLRA remedies, especially in low-wage

204. *See* 29 U.S.C. § 185(b) (shielding union members from personal liability for union debts).

205. This is especially true if a court is somehow hostile to a union's right to protest or strike during a bankruptcy proceeding. Some commentators have argued that the Norris-LaGuardia Act bars even bankruptcy courts from enjoining peaceful protests. *See, e.g.*, Duff, *supra* note 41, at 669-70 ("[F]ederal courts have lacked, and continue to lack, authority to enjoin private sector employees from peacefully striking, picketing, or leafleting in connection with labor disputes, including those arising in bankruptcy."). *But see* Craver, *supra* note 141, at 505 ("It is unlikely that Congress intended to permit operation of the Norris-LaGuardia Act to negate the functioning of section 362(a)."). The reality is that a court may seek to enjoin a labor protest if strike misconduct occurs post-petition and may use it as evidence that a union is not presenting a plan of adjustment in good faith—even if a court limits its gaze to post-petition conduct in applying Section 1129(a)(3).

206. *Cf. In re Gen. Teamsters*, 225 B.R. at 728-34 (analyzing post-petition conduct to find good faith under Section 1129(a)(3)).

207. *See supra* Part II.B.

industries.[208] That is because a fired worker cannot sue their employer for damages; the fired worker can only seek back pay.[209] The NLRA preempts other claims, providing the sole remedy for a worker who was fired for engaging in union activity.[210] Even once a union is organized, challenges remain.

The NLRA requires that the parties bargain in good faith but does not require them to arrive at an agreement.[211] When bargaining fails, unions turn to other tools, such as the strike, to force employers to reach an agreement. In response, employers can seek significant tort damages to quell union organizing. They can bring claims for defamation, secondary boycotts, strike misconduct-related torts, and violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act.[212] These claims may disincentivize unions from creating the conditions for labor strife that are part and parcel of union organizing campaigns. In a way, tort lawsuits act as a fail-safe for employers when the tools available to legally resist a union organizing drive prove ineffective. The following Subparts tell a tale of how employers use those tort claims to undermine worker power.

A. Defamation

The tale of defamation begins in common law. The common-law tort of defamation includes two expressions of the tort: libel (falsehood reduced to writing) and slander (spoken falsehoods).[213] At common law, a defamatory statement had to be "a false statement purporting to be fact," made to a third

208. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983) (estimating that one in twenty union-supporting workers will be fired in violation of their right to organize); CELINE MCNICHOLAS ET AL., ECON. POL'Y INST., UNLAWFUL: U.S. EMPLOYERS ARE CHARGED WITH VIOLATING FEDERAL LAW IN 41.5% OF ALL UNION ELECTION CAMPAIGNS 1 (2019) (finding that one out of every five union campaigns involves a charge of an employer terminating a worker illegally for engaging in union activity); *see also* Matthew T. Bodie, *Labor Relations at the Woke Corporation*, 79 N.Y.U. ANN. SURV. AM. L. 171, 187 (2023) (recounting a "firing spree" of unionizing workers by Starbucks).

209. *See* 29 U.S.C. § 160(c); Radio Officers' Union of the Com. Telegraphers Union v. NLRB, 347 U.S. 17, 54-55 (1954) ("It is clear that petitioner committed an unfair labor practice and the policy of the Act is to make whole employees thus discriminated against."); NLRB v. Starbucks Corp., 125 F.4th 78, 96-97 (3d Cir. 2024).

210. *See* 29 U.S.C. § 160(a). Federal law governs labor-related activity and determines what is protected or prohibited. *See* S.D. Bldg. Trades Council v. Garmon, 359 U.S. 236, 245-46 (1959).

211. *See supra* Part II.A.

212. *See infra* Parts III.A-.D.

213. James Maxwell Koffler, *The Pre-*Sullivan *Common Law Web of Protection Against Political Defamation Suits*, 47 HOFSTRA L. REV. 153, 162-63 (2018).

party, negligently, and causing damages.[214] Four categories of defamation per se all had these features at common law and included claims that someone engaged in immoral or criminal conduct or said something harmful about a person's business or trade.[215] The effect of a defamation per se claim is that the plaintiff does not have to prove damages.[216]

The law of defamation takes a curious turn in the context of modern labor disputes due to their heated and confrontational nature. For example, when unions go on strike, it is common for union members to stand beside a "Scabby the Rat" inflatable to shame companies that are using nonunion labor during a strike.[217]

Figure 1

Scabby the Rat Participates at a Union Protest[218]

214. *Defamation*, LEGAL INFO. INST., https://perma.cc/Q4SW-FMM8 (archived Mar. 3, 2026); Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1495 (2014) (summarizing the elements of a defamation claim at common law and explaining when damages are presumed).

215. Koffler, *supra* note 213, at 163-67, 226 (providing an overview of the elements of various common-law defamation torts).

216. *Defamation Per Se*, PRACTICAL LAW GLOSSARY (Thomson Reuters 2026).

217. Bologna, *supra* note 119. The Seventh Circuit has also weighed in on whether a town ordinance improperly infringed on a union's First Amendment right to deploy "Scabby" and included several photos of different inflatable rats used to portray the character. *See* Constr. & Gen. Laborers' Loc. Union No. 330 v. Town of Grand Chute, 834 F.3d 745, 746-47, 752-53, 756-57 (7th Cir. 2016).

218. Joseph Barillari, *Giant Inflatable Rat on Massachusetts Ave. in Cambridge, MA.* (photograph 2010), https://perma.cc/44TD-72U5.

Not surprisingly, the term "scab" has been the subject of defamation litigation and demonstrates the unique balance that the Supreme Court has developed for labor speech during labor disputes. In *Linn v. United Plant Guard Workers, Local 114*, the Court held that even though the NLRA does not preempt state defamation claims, a plaintiff cannot bring a viable defamation claim arising out of a "labor dispute" unless the statements are made with malice *and* actually cause damage.[219] The Court in *Linn* announced that the First Amendment protects even the most repulsive speech as long as it is not inaccurate.[220] Several years later, in the events leading to *Old Dominion Branch No. 496 v. Austin*, a postal workers union published a list of scabs.[221] One of the employees who was listed as a scab sued, claiming that the union acted with actual malice toward him.[222] The Court clarified that malice did not mean that the words were spoken with ill will or emotion; rather, they had to be spoken with a reckless disregard of the truth.[223] Since the plaintiff was indeed a scab, he could not sustain a cause of action in defamation.[224]

Employers have also brought defamation actions against unions with mixed results.[225] Losing a defamation suit can shut down a union's organizing campaigns. For example, when a janitorial company sued a Service Employees International Union local for defamation, the local filed for bankruptcy after the court entered a judgment.[226]

The First Amendment plays a major part in regulating the behavior of labor unions outside of bankruptcy and should receive special attention during bankruptcy proceedings. As noted above, Section 523(a)(6) of the Code arguably bars the discharge of defamation liability because defamation is an intentional tort. As Christopher Hampson observes, "[t]he phrase 'willful and malicious' [in Section 523(a)(6) of the Code] presents thorny statutory interpretation questions, with no obvious tiebreaker."[227] In the labor context, however, there is a tiebreaker: the Supreme Court's decision in *Linn* and the NLRA's defamation defense. As Kati Griffith argues, the NLRA's defamation defense doctrine provides union corporate campaigns with important protections not otherwise

219. 383 U.S. 53, 63-65 (1966).

220. *Id.* at 63.

221. 418 U.S. 264, 267 (1974).

222. *Id.* at 267-68, 281.

223. *Id.* at 281.

224. *Id.* at 282-83.

225. Griffith, *supra* note 45, at 33-35.

226. Tom Corrigan, *Facing Judgment, Texas Union Fights to Stay in Bankruptcy*, WALL ST. J. (Jan. 3, 2017, 4:40 PM ET), https://perma.cc/6AHF-SS74.

227. Hampson, *supra* note 45, at 533.

available under state defamation laws.[228] The NLRA's defamation defense doctrine preempts state-based defamation law.[229] Federal labor law on defamation thus serves as a stronger tiebreaker for determining the scope of Section 523(a)(6) than state defamation law. Bankruptcy courts can and should lean on federal labor policy to recognize that defamation claims arising out of labor disputes are exempt from Section 523(a)(6)'s ban on discharging a debtor's intentional tort liability.

Defamation is not the only tort claim an employer can bring to halt a union campaign. Employers have also brought racketeering suits against unions, as explained in the next Subpart.

B. Racketeering

The tale of racketeering as a union tort has its origins in Congress's attempt to control mob activity. Congress passed RICO in 1970 to combat organized crime and illegal mob activity.[230] RICO punishes organizations that engage in two or more acts of racketeering[231]—acts "in which the organization extorts others, or otherwise creates problems, for the purpose of solving those problems for a fee or other benefit."[232] Under RICO, twenty-seven federal crimes and eight state crimes are considered "racketeering activity."[233] Canonically, RICO was meant to deal with mob protection rackets, in which mobs engage in theft or extortion of a legitimate business unless they receive "protection money." Mobs

228. Griffith, *supra* note 45, at 5, 34. There has been significant academic debate about whether labor law should tolerate inflammatory speech and whether courts should apply a new defamation standard in labor disputes. *Compare* John Bruce Lewis, Bruce L. Ottley & Gregory V. Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 854 (1989) ("Examination of the common law, constitutional law, and federal labor law principles governing defamation claims arising out of the workplace reveals numerous areas of inconsistency and unpredictability which encourage litigation. These suits are time consuming and expensive, fail to protect adequately the reputation of employees, hinder the communication of information concerning employees, and discourage the free and uninhibited discussion of issues pertinent to employees, employers, and unions."), *with* Griffith, *supra* note 45, at 40-41 (cautioning that "encouraging courts to engage in [a sliding continuum] type of NLRA preemption analysis could unintentionally lead to the deterioration of the NLRA defamation defense").

229. Griffith, *supra* note 45, at 7.

230. Benjamin Levin, Note, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 615 (2012).

231. 18 U.S.C. §§ 1961(5), 1962.

232. *Racketeering*, LEGAL DICTIONARY (Feb. 18, 2016), https://perma.cc/MAC8-HXHJ.

233. 18 U.S.C. § 1961(1). *See generally id.* § 1962 (prohibiting racketeering activity in connection with an enterprise affecting interstate commerce).

thereby simultaneously create a problem and provide the solution.[234] Federal prosecutors used RICO to prosecute not only members of the mob, but also unions with connections to the mob.[235] RICO is primarily a criminal statute; however, it also provides a private right of action for victims of racketeering activity.[236] Victims of racketeering activity can seek treble damages.[237]

Unions lost faith in the NLRA and turned to comprehensive campaigns to shore up their declining membership,[238] thus bringing the tale of racketeering into play. Charlotte Garden defines such campaigns as "prolonged organizing efforts designed to pressure employers into agreeing to union demands. . . . Comprehensive campaigns simultaneously target multiple employer pressure points—employees, customers, shareholders, directors, regulators, and the public at large—by 'appeal[ing] directly to the public by way of rallies, pickets, speeches, and leafleting in public streets and parks . . . .'"[239] Garden further observes that comprehensive campaigns differ from traditional union campaigns by (1) moving labor disputes out of the workplace into the community, (2) rallying a base beyond labor's core constituent membership, and (3) moving away from traditional rhetoric and toward raising civil rights and environmental concerns, among other things.[240] They also include litigation, political appeals, and requests for agencies to investigate an employer's violations of law.[241]

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234. Randy D. Gordon, *Of Gangs and Gaggles: Can a Corporation Be Part of an Association-in-Fact RICO Enterprise? Linguistic, Historical, and Rhetorical Perspectives*, 16 U. PA. J. BUS. L. 973, 975-76 (2014) (noting that Congress passed RICO to combat organized criminal organizations, which "extract money from legitimate business through protection rackets or loansharking"); *see also* Jason J. Jokerst, *How the RICO Act Dismantled the American Mafia: A Legal Turning Point in Organized Crime*, MEDIUM (June 15, 2025), https://perma.cc/C5W8-KNQ9.

235. James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and Unions*, *in* 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 229, 239-46 (Michael Tonry ed., 2003) (discussing a string of prosecutions of leaders of other unions for violating RICO in the 1980s).

236. 18 U.S.C. § 1964(c).

237. *Id.*

238. As one article critical of unions engaging in corporate campaigning notes:

> [C]orporate campaigns are intended by unions to take their disputes with employers outside the traditional labor law model for one simple reason: from the unions' perspective, the model embodied by labor law is inadequate for the unions' purposes. Accordingly, it is valid and worthwhile to analyze the lawfulness of corporate campaign tactics under non-labor laws and particularly under RICO.

Herbert R. Northrup & Charles H. Steen, *Union "Corporate Campaigns" as Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771, 796 (1999).

239. Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2621-22 (2011) (alteration in original) (quoting Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1605 (2002)).

240. *Id.* at 2622.

241. *Id.*

Employers responded to unions' comprehensive campaigns in the early 2000s with RICO claims meant to silence unions' organizing activity. These suits "cut to the heart of union activity rather than to the alleged corruption of unions by bad actors."[242] When employers brought RICO claims against unions for engaging in core union activity, they alleged that unions were engaged in extortion.[243] Of course, they did not claim that violence took place. Rather, employers claimed that unions were engaging in campaign activities to extort from them the ability to represent their employees in collective bargaining and to collect dues dollars from members who do not want union representation.[244] Some of these suits were dismissed; others were settled before going to trial.[245] RICO allegations created a serious cloud over union activities that at least partially arose out of speech on matters of public concern and were arguably protected by the First Amendment or other conduct that the NLRA allows.[246] As James Brudney observed, however, the reality is that "federal labor law legitimates and indeed protects what might in ordinary meaning terms be thought of as extortionate activity."[247]

Under Section 523(a)(6) or Section 1112(b), a court could conclude that RICO liability for engaging in speech is not dischargeable because it arises from an intentional tort, such that granting a discharge could encourage unions to engage in racketeering.[248] But that result would fail to harmonize labor law's

242. Benjamin Levin, *Criminal Labor Law*, 37 BERKELEY J. EMP. & LAB. L. 43, 67 (2016). Bankruptcy law does not allow for the discharge of liability for willful and malicious acts. 11 U.S.C. § 523(a)(6).

243. Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1639 (2016) (criticizing RICO decisions as having a *Lochner*-esque quality because they incorporate a mindset that views unions as a part of a criminal conspiracy).

244. *See, e.g.*, Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union, 585 F. Supp. 2d 789, 795 (E.D. Va. 2008); Prime Healthcare Servs., Inc. v. Servs. Emps. Int'l Union, 147 F. Supp. 3d 1094, 1105-06 (S.D. Cal. 2015) (assessing employers' RICO lawsuits in response to a union's campaign to organize workers into a union).

245. The court in *Smithfield Foods* refused to grant the defendant union's motion for summary judgment. *See* 585 F. Supp. 2d at 815. The parties settled that dispute on the eve of trial. *See* Press Release, Bredhoff & Kaiser, Smithfield RICO Litigation Settled on Eve of Trial (Oct. 27, 2008), https://perma.cc/7TZF-8AU5; *see also* Josh Eidelson, *That's RICO,* AM. PROSPECT (Sept. 30, 2011), https://perma.cc/E77K-5W7X (noting multiple union RICO-claim settlements). In contrast, the court in *Prime Healthcare* granted the union's motion to dismiss. 147 F. Supp. 3d at 1116.

246. Garden, *supra* note 45, at 270, 286-89; *see also* Levin, *supra* note 230, at 624-29 (explaining how RICO lawsuits shape public perception and reinforce old tropes concerning unions).

247. *See* James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 774 (2010).

248. *See supra* Part II.C (discussing how courts could import Section 523(a)(6)'s bar on discharging intentional tort claims into the good-faith analysis for union debtors); *supra* notes 242-46 (discussing employer RICO claims alleging that union organizing and boycott activity constituted extortion).

policy of encouraging collective bargaining with bankruptcy's promise of giving debtors a fresh start and could possibly chill speech that a union might otherwise engage in to hold a corporation accountable. Before getting to bankruptcy law and its accommodation with the NLRA's values, it is time to tell another labor tort tale—this time of two boycotts: primary and secondary boycotts.

C. Secondary Boycotts

Unions have long used boycotts as a tool of protest. A boycott is a refusal to trade, usually as a way of forcing a change in behavior, and is protected by the First Amendment.[249] In the context of a labor dispute, a boycott or picket line directed at the employer with whom the union has the dispute is a "primary boycott." A picketing campaign or refusal to deal targeting an establishment that does business with the primary employer but has no direct labor dispute with the union is a "secondary boycott."[250] Secondary boycotts proved to be extremely effective tools for organized labor because neutral employers, seeking to preserve their own businesses, would urge the primary employer to settle the dispute.[251] As a result of their disruption of commerce, Congress enacted a ban on secondary boycotts as part of the Taft-Hartley Amendments in 1947.[252]

Scholars have critiqued Congress's ban on secondary boycotts in labor disputes as a content- or viewpoint-based restraint on speech. For example, Cynthia Estlund comments, "For now it is enough to recognize that unions are

249. *Boycott*, MERRIAM-WEBSTER, https://perma.cc/56C8-JP65 (last updated Mar. 1, 2026); *see* Courtlyn G. Roser-Jones, *The Roberts Court and the Unraveling of Labor Law*, 108 MINN. L. REV. 1407, 1433 & n.100 (2024).

250. *Secondary Boycott*, LEGAL INFO. INST., https://perma.cc/PX7J-UNA8 (archived Mar. 3, 2026).

251. *See* Jack McCarthy, Note, *Winning Is Secondary: Secondary Boycotts in the United States and Denmark*, 41 ARIZ. J. INT'L & COMP. L. 108, 109-11, 113-15 (2024) (describing the effectiveness of the secondary boycott against McDonald's in Denmark, where the union pressured neutral third-party employers, and noting that the Taft-Hartley Amendments to the NLRA stripped American unions of this powerful tool).

252. Labor-Management Relations Act, ch. 120, sec. 101, § 8(b)(4), 61 Stat. 136, 141 (1947); *see* Nancy M. Rappa, *Clarifying the Work Preservation/Work Acquisition Dichotomy Under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act:* National Labor Relations Board v. International Longshoremen's Association, 35 CATH. U. L. REV. 1061, 1062 & nn.4-5 (1986) (explaining that Congress amended the NLRA to prohibit certain union unfair labor practices—such as secondary boycotts—in light of their tendency to disrupt commerce); DRAY, *supra* note 53, at 496-99 (noting that the Taft-Hartley Amendments gave employers the ability to "sue unions over secondary boycotts"); *see also* Dan Ganin, Note, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539, 1547 (2008) (observing that although the term "secondary boycott" does not appear in the text of the Act, one of its sponsors expressed a desire to protect "wholly unconcerned" parties from being embroiled in labor disputes).

subject to restrictions on expression that would be unconstitutional if applied to other voluntary associations."[253] Courtlyn Roser-Jones illustrates the disparity:

> [T]wo different people holding identical picket signs outside a bicycle store will have their message evaluated using different standards. The first picketer, a union-affiliate who holds a sign asking customers not to shop there because the store sells products through Amazon, which they believe has exploitive working conditions, will be violating the NLRA's restrictions against secondary picketing and boycotting activity.[254]

A human rights activist engaging in that same conduct has nothing to fear from the ban on secondary boycotts.[255] To date, the Supreme Court has rejected all First Amendment challenges to the congressional ban on secondary boycotts.[256]

Dockworker unions are at a heightened risk of violating the prohibition against secondary boycotts due to the damage that their work stoppages can inflict on the U.S. economy. In one famous case, *International Longshoremen's Association v. Allied International, Inc.*, the Supreme Court found that a show of patriotism by the dockworkers violated the prohibition on secondary boycotts.[257] There, dockworkers had refused to load goods headed to the Soviet Union as a protest of the USSR's invasion of Afghanistan.[258] The boycott hurt the shipping company with whom the union did not have a dispute.[259] The Court held that the political message behind the workers' conduct did not convert their secondary boycott into a boycott protected by the First Amendment.[260]

That dynamic played out again in *NAACP v. Claiborne Hardware Co.*[261] There, the Court held that the First Amendment prohibits states from regulating nonviolent boycotts.[262] Interestingly, the facts of that case mirror a secondary boycott. There, Black citizens of Claiborne County met with county

253. Estlund, *supra* note 82, at 202. *But see* Alex MacDonald, *Secondary Picketing, Trade Restraints, and the First Amendment: A Historical and Practical Case for Legal Stability*, 40 HOFSTRA LAB. & EMP. L.J. 1, 1-2 (2022) (arguing that First Amendment challenges to the ban on secondary boycotts "ignore[] the historical and practical bases for limiting secondary picketing").

254. Roser-Jones, *supra* note 249, at 1465-66 (footnotes omitted).

255. *Id.*

256. Estlund, *supra* note 82, at 227; *see also* Megan Stater Shaw, Note, *"Connote No Evil": Judicial Treatment of the Secondary Boycott Before Taft-Hartley*, 96 N.Y.U. L. REV. 334, 339 (2021) (arguing that prohibitions against secondary boycotts have existed since before Taft-Hartley).

257. 456 U.S. 212, 226-27 (1982).

258. *Id.* at 214-15.

259. *Id.* at 215-16.

260. *Id.* at 226-27.

261. 458 U.S. 886 (1982).

262. *Id.* at 932.

officials and made a set of demands for racial integration.[263] After officials refused their demands, the NAACP called for a boycott of white businesses and kept a sort of scab list naming any Black person who patronized them.[264] The Court held that the NAACP's conduct was protected by the First Amendment.[265]

From the perspective of bankruptcy law, the Court's decision leaves the law of secondary boycotts in a strange doctrinal place.[266] Labor unions may engage in primary boycotts, but the NLRA bars them from engaging in secondary boycotts.[267] Since civil rights groups such as the NAACP are *not* labor organizations, they may engage in both primary and secondary boycotts.[268] They absolutely can target a business with the aim of bringing economic harm and forcing a government to change.[269] Even though the Court has demonstrated some sympathy for unions complaining that the ban on secondary boycotts restricts their free speech rights,[270] to this day courts continue to hold that the restriction is constitutional.[271] If unions could discharge secondary boycott claims in bankruptcy, then the law may incentivize them to engage in conduct that is closer to the line between an exercise of their

263. *Id.* at 889.

264. *Id.* at 903-04.

265. *Id.* at 925-26.

266. Josh Halpern & Lavi M. Ben Dor, *Boycotts: A First Amendment History*, 47 HARV. J.L. & PUB. POL'Y 95, 101-02, 111 (2024) (approving of the Court's decision in *Claiborne* as reaching the correct balance between speech and conduct but leaving unanswered the question of the ban on secondary boycotts); *see also supra* note 256 and accompanying text (noting that all First Amendment challenges to the ban on secondary boycotts for unions have failed).

267. *See* 29 U.S.C. §§ 157, 158(b)(4).

268. *See id.* § 152(b)(5) (defining labor organizations as organizations that exist, in whole or in part, to deal with employers over terms and conditions of employment); *NAACP*, 458 U.S. at 907-15.

269. The Montgomery Bus Boycott is a textbook example. Civil rights activists boycotted the Montgomery City Lines in response to its requirement that Black passengers sit in the back of the bus. David J. Garrow, *In Honor of Fred Gray: The Meaning of Montgomery*, 67 CASE W. RSRV. L. REV. 1045, 1046 (2017). The boycott and accompanying lawsuit challenging segregation led to the eventual desegregation of the bus system in Montgomery, Alabama. *See* Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956); *see also* Garrow, *supra*, at 1047-48 (recounting how the Montgomery Bus Boycott shifted the strategy for civil rights change from a lawyer-centric approach).

270. *See, e.g.*, DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 588 (1988) (holding that urging a secondary boycott by distributing handbills at a shopping mall did not constitute coercion against stores inside the mall within the meaning of a challenged statute, thereby avoiding the plaintiff's accompanying First Amendment challenge).

271. *See, e.g.*, NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 941 F.3d 902, 907 (9th Cir. 2019) (holding a restriction on secondary boycotts constitutional and rejecting a First Amendment challenge), *cert. denied*, 141 S. Ct. 2671 (2021).

First Amendment rights and an intentional tort whose debt cannot be discharged.

D. Strike Misconduct

The tale of strike misconduct law now runs through the Supreme Court's recent decision in *Glacier Northwest*, a case that arose from a Teamsters' strike against a concrete delivery company.[272] After the Teamsters had already mixed concrete in trucks that morning, the workers walked off, leaving wet concrete still mixing in the trucks.[273] The problem was that wet concrete can last only a few hours before it spoils.[274] Naturally, the employer was not happy that the wet concrete spoiled and brought claims for property damage against the Teamsters.[275] The Court decided 8-1 that the NLRA's preemption doctrine does not bar state torts arising out of this type of strike misconduct.[276] Nor does it protect the Teamsters from being sued for causing damage to employer property.[277] The Court said that the strike put the employer's vehicles and concrete in "foreseeable and imminent" danger of being damaged and found that the union had not taken reasonable precautions to protect employer property.[278]

Glacier Northwest raises questions about whether the Court will further erode the power of the strike through tort law. In its decision, the Court explained that "[t]he Board has long taken the position—which both the Union and Glacier accept—that the NLRA does not shield strikers who fail to take 'reasonable precautions' to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work."[279] Some commentators let out a sigh of relief because the Court's decision could have

272. Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404, 1410 (2023).

273. *Id.* at 1410, 1412.

274. *Id.* at 1411-12.

275. *Id.* at 1412. No trucks were significantly harmed during the strike. The harm alleged was to concrete that went unused after being prepared. *Id.*

276. *Id.* at 1412-14.

277. *Id.* at 1415.

278. *Id.* at 1413. Former NLRB Chair Mark Pearce questioned whether employers would have any obligation to take "reasonable precautions" to protect workers from losing their homes, health, or tuition for children when they hire scabs during a strike, lamenting that the Court made no comment about this. Mark Gaston Pearce, Speech, *One Step Up and Another Step Down: Modern Labor Action and the Judicial Response*, 63 U. LOUISVILLE L. REV. 213, 223 (2025).

279. *Glacier Nw.*, 143 S. Ct. at 1413.

been worse[280]—it could have done away with preemption or done away with the right to strike altogether. However, the decision is another step in the direction of stifling labor power.[281] As Veena Dubal points out, "[s]ome of the most powerful on-the-job tools that workers can use to exert coordinated power in an oppressive workplace—including intermittent strikes, partial strikes, and slowdown strikes—have all been deemed unlawful. Further, federal law bans secondary boycotts, making solidarity actions illegal."[282] Historians have characterized the period before the passage of the NLRA as the period of governance by injunction due to the prolific use of the injunction to stymie labor activity.[283] Now employers can undermine labor power by suing unions for defamation[284] and undermining the right to strike.

After *Glacier Northwest*, it remains uncertain whether damages arising out of strike misconduct should be dischargeable or justify dismissal of a union's bankruptcy petition under Sections 1112(b) or 1129(a)(3). Roser-Jones comments that "*Glacier Northwest, Inc.* creates an overlapping jurisdiction," such that "with an artfully crafted complaint, employers can sustain a lawsuit in state court concurrently with the Board's proceedings."[285] That observation is especially meaningful in light of bankruptcy law's hostility to discharging intentional tort claims, as an artfully pleaded complaint can allege an intentional tort that is unprotected by labor law and produces a nondischargeable debt.[286] If all strikes that cause economic damage to an employer become intentional torts with nondischargeable judgments, then the future of the labor movement is indeed bleak. For example, under *Glacier Northwest*, universities can possibly bring claims of intentional interference with business relationships against graduate student unions for striking during the semester, and those unions would not be able to discharge their claims. Instead of strikes creating economic losses that are

280. *See, e.g.*, Andrew Strom, Glacier Northwest *Could Have Been Worse, but It's Still Bad*, ONLABOR (June 6, 2023), https://perma.cc/BC7H-JGXR. *But see* Alexander S. Whistler, Note, *Labor Law's Preemption Problem:* Glacier Northwest *and What the Fate of* Garmon *Means for American Workers*, 75 U.C. L.J. 853, 877-78 (2024) (arguing that *Glacier Northwest* may present an opportunity to narrow preemption and allow for "pro-worker experimentation at the state level [that] would permit unions and workers to push the envelope more forcefully in certain parts of the country, and would hopefully facilitate the labor movement's resurgence after decades of obsolescence").

281. *See* Veena Dubal, *Chipping Away at the Right to Strike*, DISSENT, Fall 2023, at 113, 114.

282. *Id.* at 113.

283. FORBATH, *supra* note 9, at 61-62 (counting over 4,000 injunctions issued against labor activity between 1880 and 1930); Roser-Jones, *supra* note 249, at 1487 (stating that the goal of the Court is to unravel labor law as Congress designed it).

284. *See supra* Part III.A.

285. Roser-Jones, *supra* note 249, at 1483.

286. *See* 11 U.S.C. § 523(a)(6).

damnum absque injuria,[287] bankruptcy and tort law would do what labor law has not—outlaw strikes. The next Part develops a third way that respects bankruptcy law's policy of granting debtors a fresh start and labor law's promotion of collective bargaining.

IV. Forgiving Labor of Its Torts

A. Why Forgive Union Torts?

Because unions have an important social and democracy-preserving function that corporations simply do not possess, bankruptcy law should provide a route for the forgiveness of labor's tort liability, as it does for corporations. Corporate law scholars have engaged in a never-ending debate focused on to whom a corporation's board of directors owes its duties. Must the board focus only on maximizing shareholder profits, or may it consider the interests of broader stakeholders, such as its workforce and community?[288] This debate considers whether corporate governance promotes democratic norms among shareholders.[289] While sparse, some recent literature explicitly explores the role of the corporation as a democracy-preserving institution by virtue of its profit-generating function.[290] That said, Christina Parajon Skinner makes a recent and timely intervention in this space by warning that unelected executives should refrain from playing lead roles in shaping public policy under the guise of promoting other social values about which society disagrees.[291] In Skinner's view, doing so only consolidates political and economic power in corporate hands.[292]

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287. Such losses are those for which the law provides no means of recovery. *Damnum Absque Injuria*, MERRIAM-WEBSTER, https://perma.cc/P6Z7-ZAFG (archived Mar. 3, 2026).

288. Christina Parajon Skinner, *Capitalism Stakeholderism*, 47 SEATTLE U. L. REV. 643, 645-54 (2024).

289. *See, e.g.*, Lisa M. Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1, 2-4 (2008) (summarizing relevant literature and opining that increased shareholder democracy can have salutary benefits for share value and corporate governance); Kate Jackson, Corporate Populism: Musk's Challenge to the Rule of Law and Equity 63-64 (July 31, 2025) (unpublished manuscript), https://perma.cc/NRV7-V4C5 (observing that theories of populism and fascism can explain recent corporate governance trends of democratic backsliding at several major companies).

290. *But see* TOM C.W. LIN, THE CAPITALIST AND THE ACTIVIST: CORPORATE SOCIAL ACTIVISM AND THE NEW BUSINESS OF CHANGE 72-82 (2022) (exploring the Muslim travel ban, the Charlottesville riots, and the January 6 attack on the U.S. Capitol as case studies in which corporations restrained the President).

291. Skinner, *supra* note 288, at 670.

292. *Id.* at 670-71.

In contrast, when unions engage in strife to combat corporate power, they fulfill multiple democracy-preserving functions. First, because there is an inverse relationship between strong unions and wage inequality,[293] unions may bolster democracy. Studies have shown a strong correlation between high income inequality and unstable democracies.[294] The fall in union membership since 1947, but especially over the last thirty years, correlates strongly with the rise of inequality in the United States.[295] Declining union membership may be linked to some of the breakdowns in American democracy; though the current literature has established that relationship in other countries, further work is needed to conclusively establish it in the United States.[296]

Second, unions amplify the political voice of their membership and facilitate the passage of laws that make it easier to vote.[297] Even though unions are frequently criticized for engaging in political campaigns and subverting the voices of dissenting members,[298] they tend to employ democratic processes outlined in their constitutions and bylaws for arriving at endorsement decisions.[299] Unions have a special role in civil society and serve different democracy-saving functions that other associations or businesses cannot.[300] As

293. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV. 513, 528 (2011) (finding that a fall in union representation accounts for about one-third of the rise in within-group wage inequality in the United States).

294. Eli G. Rau & Susan Stokes, *Income Inequality and the Erosion of Democracy in the Twenty-First Century*, 122 PROCS. NAT'L. ACAD. SCI. U.S.A. e2422543121, at 5-6 (2025) (concluding that wealth inequality undermines democracies, including well-established democracies such as the United States); CELINE MCNICHOLAS, MARGARET POYDOCK, HEIDI SHIERHOLZ & HILARY WETHING, ECON. POL'Y INST., UNIONS AREN'T JUST GOOD FOR WORKERS—THEY ALSO BENEFIT COMMUNITIES AND DEMOCRACY 26 (2025), https://perma.cc/W62J-DWER.

295. Christopher Kollmeyer, *Trade Union Decline, Deindustrialization, and Rising Income Inequality in the United States, 1947 to 2015*, RSCH. SOC. STRATIFICATION & MOBILITY, Oct. 2018, at 1, 3.

296. *See, e.g.*, Assaf S. Bondy, *Workers for Democracy? Trade Unions and the Struggle Against Democratic Backsliding*, 33 DEMOCRATIZATION 344, 357-60 (2026) (examining how union strength in Poland and Israel correlated with democratic backsliding and suggesting that studies be conducted on the United States).

297. McNicholas et al., *supra* note 294, at 26; *see also* Thomas A. Kochan & William T. Kimball, *Unions, Worker Voice, and Management Practices: Implications for a High-Productivity, High-Wage Economy*, RUSSELL SAGE FOUND. J. SOC. SCIS., December 2019, at 88, 93-94, 98-101 (noting that a decrease in union representation signaled a breakdown in the social contract between workers and society and the weakening of the worker voice).

298. *See, e.g.*, David R. Osborne, Opinion, *Unions Should Be About Employees, Not About Politics*, HILL (Oct. 23, 2024, 12:00 PM ET), https://perma.cc/97L3-85JA.

299. *See* Don McIntosh, *How Unions Decide Which Campaigns to Endorse*, NW. LAB. PRESS (Oct. 18, 2024), https://perma.cc/6BB8-A6PP (detailing the procedures that unions use to solicit membership input on political endorsements).

300. Garden, *supra* note 239, at 2652 (arguing that it is implausible that the average cooking club will oppose the state).

Garden helpfully lists, they check the power of the state,[301] promote social interdependence,[302] reinforce social identity by providing a place to come together,[303] and serve as schools for democracy.[304] Despite their flaws, unions still serve as a bulwark of democracy and are worth preserving.[305]

To that end, bankruptcy courts should honor unions' democracy-saving functions by reading a presumption in favor of discharging labor's tort debts into Sections 523(a)(6), 1112(b), and 1129(a)(3) of the Code.[306] Corporations have so far escaped challenges to their good faith by both unions and other tort claimants. As a result, they have benefitted from Chapter 11's broad discharge provision. This unfairly ties unions' hands when fighting corporate power. If unions are to battle corporate power on equal terms,[307] they must be given the same broad power as corporations to engage in "tactical restructurings."[308]

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301. *Id.* at 2653.

302. *Id.* at 2653-56.

303. *Id.* at 2656-57.

304. *Id.* at 2657-58.

305. As Fishkin and Forbath observe:

> [T]he evisceration of American labor has left us without a critical political bulwark against oligarchy. In the decades after the New Deal, it was unions that did much of the political work of pressing for state and national policies that broadly distributed the rewards of our national economic life. Like the then-new mass parties created by the Jacksonian Revolution, the then-new mass unions created by the New Deal had many flaws, but they had the organized political clout to prod Congress and state lawmakers to attend to the economic needs and aspirations of poor and working-class Americans. They served the nation for a long season as a critical safeguard against the threat of oligarchy posed by the political power of concentrated wealth.

Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 690 (2014). To be sure, corporations have a democracy-saving function as well. *See, e.g.*, Rebecca Henderson, *The Business Case for Saving Democracy*, HARV. BUS. REV. (Mar. 10, 2020), https://perma.cc/BTL2-NJ35. But the literature connecting corporations to democracy preservation is much less robust than the literature framing unions as bulwarks of democracy. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) ("Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.").

306. Admittedly, it would be better for Congress to enact labor reform to address the problems with the NLRA. However, in the absence of congressional action, bankruptcy courts could take certain steps to ensure that unions survive tort judgments.

307. Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting) ("One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.").

308. Diane Lourdes Dick, *Tactical Restructurings*, 93 FORDHAM L. REV. 1, 6-7 (2024) (defining a tactical restructuring as one in which a corporate debtor engages in pre-bankruptcy planning to achieve certain significant outcomes in a future bankruptcy).

B. The Relationship Between Forgiveness and a Coin Flip

Labor law's relationship with the First Amendment is a complicated one. Conservative groups have successfully used the First Amendment to bankrupt unions and kneecap their ability to charge agency fees—fees collected from workers who opt out of union membership to fund collective bargaining services.[309] In recent years, employers and conservative political activist groups have also used the First Amendment to weaken the ability of unions to collect dues from public sector employees, such as in *Janus v. AFSCME*.[310] In that case, the Supreme Court held that governments that withheld agency fee payments from workers who object to union membership violated those workers' First Amendment rights.[311] To arrive at that conclusion, the Court had to reverse its decision in *Abood v. Detroit Board of Education*,[312] where it had held that teachers could not be required to support ideological causes they opposed, but did have to support the costs of administering a CBA that benefited them.[313] Conservative commentators hailed the decision as a major win against forced unionism, but also noted that the decision would weaken unions by hitting them where it hurts—their wallets.[314]

Kate Andrias has a different take. Andrias used the metaphor of the Roman deity Janus, the god of beginnings and endings, to set out a new First Amendment jurisprudential vision.[315] Andrias advocates recognition of the minimum speech harm that comes to workers paying agency fees and the social and democratic functions of labor unions.[316] Diana Reddy and Catherine Fisk also write about how unions should reframe their work as having incremental

309. *See* Alexander T. MacDonald, *Are Agency Fees Unconstitutional in the Private Sector?*, FEDERALIST SOC'Y (Feb. 24, 2023), https://perma.cc/T5VA-JYBP.

310. Janus v. Am. Fed. St. Cnty. & Mun. Emps., Council 31 (*Janus v. AFSCME*), 585 U.S. 878 (2018).

311. *Id.* at 884-86.

312. 431 U.S. 209, 235-36 (1977).

313. *Janus*, 585 U.S. at 886.

314. *See, e.g.*, Jarrett Skorup, Janus *Had a Large Impact on Union Membership, Five Years Later*, MACKINAC CTR. FOR PUB. POL'Y (Nov. 20, 2023), https://perma.cc/3ET9-ZUZH (arguing that *Janus* had a significant effect on union membership and income); *Right to Work Expansion Hitting Union Coffers*, NAT'L RIGHT TO WORK COMM. (Oct. 23, 2023), https://perma.cc/Y563-RWSN.

315. Kate Andrias, Janus*'s Two Faces*, 2018 SUP. CT. REV. 21, 21-22.

316. *Id.* at 56-57. Not every scholar holds out hope that the Court will adopt a pro-democratic view of the First Amendment, especially as applied to labor law. *See, e.g.*, Charlotte Garden, *Is There an Anti-Democracy Principle in the Post-*Janus v. AFSCME *First Amendment?*, 2020 U. CHI. LEGAL F. 77, 78 ("[T]here is a central irony at the crux of these cases: plaintiffs often couch their arguments in terms of rights to speech and association, but success could imply that workers have a constitutional right not to more democratic participation in their workplaces, but instead to have their wages and working conditions determined unilaterally by their employers.").

normative value for democracy over facilitating labor peace.[317] Andrias's hopeful vision of a two-faced Roman deity Janus informs a clear vision of First Amendment doctrine as applied to funding disputes outside of bankruptcy.

In bankruptcy, there is another two-faced character that provides a better metaphor for thinking about the dischargeability of labor's tort debts and the First Amendment: Batman's enemy Two-Face, who relies on chance to make major decisions by flipping a coin.[318] Bankruptcy law's scattered jurisprudence on whether a defamation claim is nondischargeable as an intentional tort under Section 523(a)(6) seems similarly chance-based. And the development of First Amendment defenses to labor torts is even more unpredictable.

The case law around organized protests may as well have been decided by Two-Face's coin flip. There is not always a doctrinal principle to separate which cases receive heightened protection and which cases do not. What matters, it seems, is only the economic power of the entity being harmed by speech. For example, in the defamation context, the Court has essentially developed a labor privilege for speech that recognizes the heightened emotional state that labor disputes may bring about.[319] However, in recent times, the First Amendment "seems less friend than foe of egalitarian values," especially as applied to protests.[320]

Two-Face may as well use his coin to decide RICO cases. While some courts have rejected employer RICO claims arising out of campaign-related conduct at the motion-to-dismiss phase, several others have allowed such claims to move forward and put unions in the position of having to expend significant resources in defending these claims.[321] Unfortunately, these cases lack a discernible throughline. For example, where unions face RICO charges for engaging in corporate social responsibility campaigns, courts have variously granted dismissal and refused to grant summary judgment to unions.[322]

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317. Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1455-56, 1459 (2023) (arguing that unions must frame their arguments beyond economic rationality to normative rights and noting that unions, rather than public law, have been tasked with advocating for fundamental economic rights); *see also* Fisk, *supra* note 45, at 2092 (noting that unions are bulwarks against the erosion of constitutional democracy).

318. *Two-Face*, D.C. COMICS, https://perma.cc/M7NA-CPLA (archived Mar. 3, 2026).

319. *See* Linn v. United Plant Guard Workers of Am., Loc. 114, 383 U.S. 53, 55, 58 (1966) (recognizing that labor policy requires the protection of the First Amendment in labor disputes given that both labor unions and management speak bluntly and embellish their statements); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 286 (1974) (relying on *Linn* for the proposition that exaggerated speech is common in labor disputes and protected by federal labor law).

320. Fisk, *supra* note 45, at 2059.

321. *See* Eidelson, *supra* note 245 (noting that unions often settle RICO cases that survive motions to dismiss).

322. *See* cases cited *supra* note 244.

The same critique applies to secondary boycotts. The Court permits civil rights organizations to engage in such conduct but sanctions unions for engaging in the same conduct.[323] Two-Face can forget his coin, at least in the case of First Amendment challenges to the secondary boycott provision in Taft-Hartley. Despite scholarly criticism, the courts have had no problem finding that Congress could prohibit secondary boycotts and recognitional picketing.[324] Charlotte Garden observes a trend that could apply outside of the political spending context to labor speech and tort law. In Garden's view, "[c]omparing *Davis*, *Citizens United*, and *Arizona Free Enterprise Club* with *Janus* shows how the Court's treatment of unions has continued to diverge from its treatment of other speakers."[325]

C. Moving Toward Forgiveness for Labor's Torts

This final Subpart argues that labor unions' slightly stronger normative claim to the discharge of tort liability, relative to that of corporations, should act as a tiebreaker when the values of bankruptcy doctrine and labor policy clash. Reddy observes that "[f]or labor unions, the law of apolitical economy has inhibited development of a fundamental rights claim for unions, equivalent in normative valence to the rights claims advanced by later movements."[326] By viewing unions as just another economic actor or creditor, bankruptcy law makes the same mistake. However, unions' social democratic function positions union debtors differently than corporate debtors. When courts consider discharge of tort liability, unions merit special consideration as compared to corporations. The corporation is often theorized as a nexus of contracts or private interests, with the primary role of generating profits for its owners.[327] While corporate law theory has become much more open to conceiving of corporations' goals as moving beyond shareholder wealth maximization, corporate governance theory has rarely considered the protection of democratic

323. Roser-Jones, *supra* note 249, at 1465-67 (describing how labor law's push to minimize economic damage has led to the Court's incoherent jurisprudence on secondary boycotts).

324. *See* Estlund, *supra* note 82, at 201-02 (noting that the Court upheld the ban on secondary boycotts as applied to labor but not other groups and collecting scholarly critique of the distinction); Int'l Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705 (1951) ("The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise."); *see also supra* Part III.C.

325. Garden, *supra* note 45, at 296.

326. Reddy, *supra* note 317, at 1455.

327. *See* GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 53-57, 59 (2020).

norms writ large.[328] The key theoretical insight that allows for moving labor torts toward debt forgiveness, then, lies in recognizing the democracy-saving characteristics of labor unions, rather than only considering them as private economic agents. The idea that bankruptcy law should accommodate other areas of law is not a new one. As Feibelman observes, "[b]ankruptcy is a regulatory tool created by the state to advance some unique and independent goals, but also to function in concert with a host of other legal and regulatory regimes."[329] While Congress intervened directly in shaping bankruptcy law when it enacted Section 1113 in response to the Court's decision in *Bildisco,* further doctrinal work remains for courts to properly accommodate labor law within the bankruptcy framework.

For example, labor unions currently have no doctrinal lever for discharging their intentional tort debts. Under bankruptcy law's approach to intentional torts, the fact that a union means to inflict economic harm on an employer during a labor dispute is enough to either render any resulting tort debt nondischargeable under Section 523(a)(6) or to establish that a union's petition or plan of adjustment was filed in bad faith. If a union's intent to cause economic harm means that the resulting tort liability is not dischargeable, then bankruptcy law (1) undermines its own promise of a fresh start to the union debtor and (2) disincentivizes unions from doing what they were created to do—to use strife to organize workers and collectively bargain. As Gross and Langston demonstrate, bankruptcy courts have tied themselves in doctrinal knots to ensure that employers can discharge tort liabilities from sexual harassment and discrimination claims.[330] Bankruptcy courts have done so by narrowly defining intentional torts for corporations to encourage the dischargeability of the claims.[331] This doctrinal turn has occurred even though the underlying claims that corporations are discharging—namely, those based on civil rights violations—are neither socially beneficial nor tied to the pursuit of corporate profitability.[332]

328. There is precious little scholarship arguing that corporations, like unions, are bulwarks of democracy. *Cf., e.g.*, Jackson, *supra* note 289, at 58-65 (describing how corporate governance can both model and undermine democratic norms).

329. Adam Feibelman, *Bankruptcy and the State*, 38 EMORY BANKR. DEV. J. 1, 8 (2022).

330. *See* Gross, *supra* note 17, at 483; Langston, *supra* note 17, at 1141-43 (describing cases in which an employer was able to discharge a debt "stemming from someone's civil rights violation").

331. *See* Gross, *supra* note 17, at 483 ("Unlike individual debtors, who are not permitted to discharge liability for sexual misconduct due to the 'willful and malicious' exception to discharge, corporations can take full advantage of the bankruptcy process to dispose of sexual misconduct claims.").

332. *Id.* (explaining that Section 523(a)(6) does not impair corporations from discharging sexual harassment claims); *cf.* Langston, *supra* note 17, at 1136-37 (showing that individual employers discharge liability for negligent and reckless civil rights violations despite facing stricter discharge exclusions than corporations).

Because of the mismatch between the language of Sections 523(a)(6), 1112(b), and 1129(a)(3), a court seeking a reason to approve a union's petition for protection and grant a discharge must find or construct a rule that mirrors the speech privilege given to labor speech under *Linn* and its progeny.[333] Consider, for example, a union that files for bankruptcy protection after an employer secures a judgment for strike misconduct. Inevitably, the employer will ask the bankruptcy court to (1) abstain from exercising jurisdiction because the matter is fundamentally a two-party dispute or (2) dismiss the petition because it was filed in bad faith to avoid paying a nondischargeable debt for an intentional tort.

In that situation, the bankruptcy court should harmonize bankruptcy law with labor law by exercising jurisdiction over the petition and concluding that the petition was filed in good faith. The court should hold that debts from torts committed by a union during a labor dispute are dischargeable. To do so, a court should first examine whether the tort arose out of a labor dispute, borrowing the definition of a labor dispute contained in the Norris-LaGuardia Act.[334] Then, the court should examine whether the goals of that labor dispute were in furtherance of collective bargaining or the creation of a labor union. Finally, the court should examine whether the damages were economic in nature and of the kind that would arise when unions use the economic weapons available to them, including, but not limited to, the strike and the boycott.[335] If these conditions are met, then the court should find that the union is filing in good faith and rebuff claims of strategic conduct that an employer may level. A rule like this would encourage unions to take risks in organizing but would not allow discharge of RICO claims based on fraud that are not tied to the goals of a bargaining statute.[336]

Admittedly, defamation claims add a wrinkle to this proposal. This Article argues that unions possess a stronger normative claim to the discharge of tort liability because they represent "real people" rather than "fake people." But bankruptcy law provides no basis for distinguishing between the two when determining the dischargeability of speech-related tort claims. While the normative justification falls short in the defamation context, Christopher

333. *See supra* Part III.A.

334. 29 U.S.C. § 113(c).

335. *See* Garden, *supra* note 239, at 2621-22 (describing comprehensive campaigns as prolonged efforts aimed at pressuring "employers into agreeing to union demands" targeting "multiple employer pressure points" by appealing directly to the public using a variety of tools).

336. *See, e.g.*, Daniel Wiessner, *9th Circ. Sends RICO Claims Against Longshore Union to Arbitration*, REUTERS, https://perma.cc/9X2E-VBYD (last updated June 30, 2021). A recent case involving the Longshoremen raised allegations that union members were violating RICO by defrauding their employer. *See id.* The rule that this Article constructs does not envision the discharge of a RICO claim in that situation because it does not appear that the actions were part of a labor dispute.

Hampson offers an important doctrinal avenue for protecting labor speech.[337] Hampson observes that defamation claims may be nondischargeable as "willful and malicious" under Section 523 of the Code.[338] In his view, however, defamation claims should be dischargeable when "creditors cannot find any additional facts to prove a higher standard of fault," such that "a debtor can be liable for defamation even without the requisite intent to make the debt nondischargeable in bankruptcy."[339] Hampson's view is based on case law holding that courts must refuse to discharge intentional tort claims when there is an intent to cause injury.[340] Interestingly, businesses can obtain an immediate discharge of intentional tort debt under Chapter 11; if bankruptcy courts grant union debtors this same broad Chapter 11 discharge, then defamation claims pose no issue.[341] But it remains unclear whether courts will extend this treatment to unions.

The problem for the labor movement is that unions, by their very design, cause economic injury to employers when securing CBAs. For labor law and bankruptcy law to be balanced, the correct answer is to discharge a defamation tort claim if it arises in the context of a labor dispute. Otherwise, "[l]aw [may] tend[] not only to thwart and suppress but also to channel movement activity in ways that weaken threats to the hegemony of the wealthy under capitalism."[342]

Conclusion

Just as bankruptcy forgives corporations' torts, so too should bankruptcy forgive labor unions' torts. This argument may seem to suggest that this Article is normatively grounded in ensuring that unions can fight corporations on even terms. That misses the point. The central argument of this Article is normatively rooted in preserving unions so that they can engage in democracy-preserving work by lowering wealth inequality and giving workers a voice in the workplace.

Bankruptcy law provides significant forgiveness of a corporation's torts even when those torts serve no countervailing interest or social benefit. It is for this reason that Gross is correct in calling the forgiveness of sexual harassment

337. Hampson, *supra* note 45, at 513.

338. *Id.*

339. *Id.* at 537.

340. *Id.* at 534.

341. *Id.* at 538; *see also* 11 U.S.C. § 1141(d). No reported cases involving the bankruptcy of a labor organization discussed the applicability of the Chapter 11 discharge injunction to intentional tort debts.

342. Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685, 688 (2021) (emphasis omitted).

claims through the bankruptcy process "morally bankrupt."[343] However, when unions seek to discharge tort debts in pursuit of the beneficial ends of collective bargaining and building countervailing power in service of preserving democracy, employers argue that such petitions are made in bad faith or that the intentional nature of the unions' torts renders their claims nondischargeable. Bankruptcy law misunderstands the purpose of labor law and its design. The NLRA is a dualistic regime that sees only employer and employee.[344] Anyone else is a neutral party. Understood that way, it is easy to see how bankruptcy law and labor law are incongruent because bankruptcy law sees labor's torts as intentional torts done with the intent of causing an employer economic harm. In the eyes of bankruptcy law, the intentional torts that labor engages in constitute unforgivable sins. However, there is another way to understand labor law and bankruptcy law. The point of labor law is to cause and resolve labor conflict. Labor's original sin is to challenge an employer's hegemony through the instigation of labor disputes. If unions are to succeed in that job, as they were designed to do so that society can reap the benefits of their actions, then the proper way to resolve their tort claims in bankruptcy is by granting them access to a fresh start on the same conditions as corporations.

343. Gross, *supra* note 17, at 485-86 (describing how bankruptcy is "morally bankrupt" in its handling of sexual harassment claims and suggesting changes to reduce corporate and managerial wrongdoing).

344. Andrias, *The New Labor Law*, *supra* note 22, at 9-10 (calling for a new labor law that rejects the employer-employee dyad).