DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202 (303) 606-2300	DATE FILED February 23, 2026 9:40 AM CASE NUMBER: 2024CV30459
Plaintiff: STATE OF COLORADO, ex rel. PHILIP J. WEISER, Attorney General v. Defendants: THE KROGER CO. and ALBERTSONS COMPANIES, INC.	▲ COURT USE ONLY ▲ Case Number: 2024CV30459 Division: 414
ORDER RE: DEFENDANTS' MOTION TO DISMISS COUNT II FOR LACK OF SUBJECT MATTER JURISDICTION	

THIS MATTER is before the Court on Defendants' Motion to Dismiss Count II for Lack of Subject Matter Jurisdiction filed on April 3, 2025 ("Motion"), Plaintiff's Opposition to Motion to Dismiss Count II filed on April 24, 2025 ("Response"), and Defendants' Reply in Support of Motion to Dismiss Count II for Lack of Subject Matter Jurisdiction filed on May 8, 2025 ("Reply"). THE COURT having considered the Motion, the responsive pleadings, attached exhibits, the Court's file, the applicable legal authority and being otherwise fully advised in the premises HEREBY FINDS, ORDERS and CONCLUDES as follows:

BACKGROUND

The facts relevant to the Motion are not disputed by the parties. On January 15, 2022, United Food and Commercial Workers UFCW Local 7 ("Union") went on a 10-day strike at King Soopers stores in Colorado owned by The Kroger Co. ("Kroger"). As part of its strike strategy, Union encouraged its Kroger employees to seek employment at Safeway stores owned by Albertsons Companies, Inc. ("ACI") and, if needed, transfer any medical prescriptions they had to those stores. During the same period of time, ACI was also negotiating with Union regarding a new collective bargaining agreement. On January 7, 2022, Kroger's VP for Labor & Associate Relations, Jon McPherson ("Mr. McPherson"), emailed his counterpart Daniel Dosenbach ("Mr. Dosenbach"), the Senior VP of Labor Relations at ACI, stating:

From: McPherson, Jon K [jon.mcpherson@kroger.com]
Sent: 1/7/2022 8:37:22 PM
To: Daniel Dosenbach [daniel.dosenbach@albertsons.com]
Subject: EXTERNAL EMAIL: Union Communications
Attachments: Handout with RMD Comments.pdf (01-07-2022).pdf

DATE FILED
November 8, 2024 7:47 PM

Dan:

Please see the attached UFCW Local 7 strike communication. Please see in this communication that the union is requesting prescription drug purchases be filled at Safeway pharmacies. We have also heard union representatives inform our associates that if there is a strike that they should go work at Safeway. Can you please inform me of Albertsons/Safeway intent as to how you plan to handle this to subjects? Thanks.

Jon K. McPherson
Vice President – Labor & Associate Relations
(513) 762-1214 (o)
(513) 401-1155 (c)

Tr. Ex. 124.

On January 9, 2022, Mr. Dosenbach emailed Mr. McPherson:

From: Daniel Dosenbach <Daniel.Dosenbach@albertsons.com >
Date: January 9, 2022 at 8:50:39 AM MST
To: "McPherson, Jon K" <jon.mcpherson@kroger.com >
Cc: Brent Bohn <Brent.Bohn@albertsons.com >
Subject: RE: EXTERNAL EMAIL: Union Communications

[EXTERNAL EMAIL]: Do not click links or open attachments unless you recognize the sender and know the content is safe.

Jon,

- We don't intend to hire any King Soupers employees and we have already advised the Safeway division of our position and the division agrees.
- With regards to Rx, we don't intend to solicit or publicly communicate that King Soupers employees should transfer their scripts to us. However, when a customer brings in a new or transferred script, we don't inquire as to why the customer is transferring or where they work, nor do we make it a practice to turn away customers.

Both Brent and I will be available to discuss the negotiations this week.

Dan

Tr. Ex. 462. Further, evidence presented at trial showed that other ACI employees subsequently referred to there being an "agreement" between the companies that ACI would not hire King Soopers employees during the strike (the "No-Poach Agreement") and would not solicit Kroger's pharmacy customers during that same time period (the "Non-Solicitation Agreement").[1] In Count

[1] Although the Court is entering this ruling after trial, it need not make a factual finding as to whether the No-Poach and Non-Solicitation agreements were actually agreements between Kroger and ACI for the purposes of this order, and the use of these terms is merely for convenience.

II of its Complaint, the State argued that Defendants had violated C.R.S. § 6-4-104 by entering into the No-Poach and Non-Solicitation Agreements.[2]

Section 6-4-104 reads:

> (1) Entering into or engaging in any of the following in restraint of trade or commerce is illegal:
>
> (a) A contract;
>
> (b) A combination in the form of a trust or other form of combination; or
>
> (c) A conspiracy.

Defendants have now filed the present Motion.[3] Defendants acknowledge that the Motion was filed after the trial in this matter was completed. However, questions regarding the Court's subject matter jurisdiction may be raised, and must be considered by the Court, at any time. *Town of Carbondale v. GSS Props., LLC*, 169 P.3d 675, 681 (Colo. 2007).

Defendants argue that Count II is preempted under the United States Supreme Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The Supreme Court has recognized two types of pre-emption:

> Although the [National Labor Relations Act ("NLRA")] itself contains no express pre-emption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as *Garmon* pre-emption, *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) (Golden State I). To this end, *Garmon* pre-emption forbids States to

[2] Count I of the Complaint alleged a violation of C.R.S. § 6-4-107(1). That section reads: "It is illegal for any person engaged in trade or commerce to acquire, directly or indirectly, the whole or any part of the stock, other share capital, or assets of another person engaged in trade or commerce if the effect of the acquisition may substantially lessen competition or tend to create a monopoly." On March 5, 2025, this Court entered an order dismissing Count I as moot.

[3] C.R.C.P. 12(b)(1) reads:

> (b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by separate motion filed on or before the date the answer or reply to a pleading under C.R.C.P. 12(a) is due:
>
> (1) lack of jurisdiction over the subject matter . . . .

> "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). The second, known as *Machinists* pre-emption, forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (quoting *NLRB v. Nash–Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971)). *Machinists* pre-emption is based on the premise that "'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" 427 U.S., at 140, n.4, 96 S.Ct. 2548 (quoting Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972)).

Chamber of Commerce v. Brown, 554 U.S. 60, 65 (2008). *Garmon* preemption is jurisdictional. *See International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 391 (1986). "If *Garmon* preemption applies, the correct result is that neither the federal court nor the state court has jurisdiction; the case must be adjudicated before the NLRB." *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1166 (10th Cir. 2004).

In *Garmon*, the Supreme Court specifically stated:

> When an activity is arguably subject to s 7 or s 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.
>
> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by s 7, or prohibited by s 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598, 609, 1 L.Ed.2d 601. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of

> the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* [*v. Anheuser-Busch, Inc.,* 348 U.S. 468 (1955)] and *Guss*. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

Garmon, 359 U.S. at 245-246. Defendants argue that the State "attempts to regulate, through the Colorado Antitrust Act, a purported agreement Defendants allegedly made to strengthen their positions during collective bargaining negotiations with a grocery worker's labor union." Mot., at 1.

ANALYSIS

State law claims like the antitrust claim presented here "rais[e] the specter that state law will say one thing about the conduct underlying the dispute while the NLRA says another." *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*, 598 U.S. 771, 776 (2023). To determine whether Count II seeks to regulate conduct arguably protected or prohibited by the NLRA, this Court must determine whether the controversy presented by the Count is identical to or different from a claim that could have been presented to the NLRB:

> As relevant here, when a state attempts to regulate activities protected by section 7 or acts which constitute an unfair labor practice under section 8, "due regard for the federal enactment requires that state jurisdiction must yield," *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124, 1127 (Colo. App. 1999), aff'd, 23 P.3d 1197 (Colo. 2001), and "defer to the exclusive primary competence of the [Board]," *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) (emphasis added); see also U.S. Const. art. VI, cl. 2 (Supremacy Clause). This type of preemption, known as *Garmon* preemption, forbids states from regulating activity that the NLRA "protects, prohibits, or arguably protects or prohibits." *Brown*, 554 U.S. at 65, 128 S.Ct. 2408 (citation omitted). To determine whether a state court claim seeks to regulate conduct arguably prohibited by the NLRA and subject to Garmon preemption, we ask "not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from" a claim that could have been presented to the Board. *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 197, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

Wal-Mart Stores, Inc. v United Food and Commercial Workers International Union, 2016 COA 72, ¶ 8, 382 P.3d 1249, 1253-1254.

Here, Defendants argue that not only is the controversy presented by Count II identical to a claim that *could* have been presented to the NLRB, Union actually presented the claim to the NLRB by filing charges against Kroger and ACI arguing that the No-Poach and Non-Solicitation Agreements constituted unfair labor practices in violation of §§ 8(a)(1), (a)(3), and (a)(5) of the NLRA.[4] Section 8(a) of the NLRA concerns unfair labor practices by an employer and reads:

> (a) Unfair labor practices by employer
>
> It shall be an unfair labor practice for an employer--
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
> >
> > . . . .
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other

[4] The basis of the NLRB charge brought by Union against Kroger stated:

> In the last six months, Charging Party learned that the Employer(s) unlawfully agreed that its competitor grocer Safeway and/or Albertson's, (1) would not hire any striking King Soopers employees, and (2) would not solicit or publicly communicate to King Soopers pharmacy customers to transfer prescriptions to Safeway and/or Albertson's pharmacies. The Employer(s) made such agreement to aid King Soopers in negotiations with Charging Party. In doing so, the Employer(s) unlawfully interfered with its employees' rights guaranteed in Section 7, and discriminated against employees because of and in order to discourage protected concerted and union activity. The foregoing also constitutes a failure by King Soopers to bargain in good faith with Charging Party.

Mot., Ex. 2. Similarly, the basis of the NLRB charge brought by Union against ACI stated:

> In the last six months, Charging Party learned that the Employer(s) unlawfully agreed and committed that Safeway and/or Albertson's, (1) would not hire any employees on strike at its competitor grocery stores operated by King Soopers, and (2) would not solicit or publicly communicate to King Soopers pharmacy customers to transfer prescriptions to Safeway and/or Albertson's pharmacies. The Employer(s) made such agreement to aid King Soopers in negotiations with Charging Party, which in turn would improve Safeway and Albertson's (sic) positions in negotiations with Charging Party. In doing so, the Employer(s) unlawfully interfered with its current and prospective employees' rights guaranteed in Section 7, and discriminated against employees because of and in order to discourage protected concerted and union activity. The foregoing also constitutes a failure by Safeway and Albertsons to bargain in good faith with Charging Party.

Mot., Ex. 1.

> statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. §158(a). Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by § 7 of the NLRA. Section 7 reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. §157. Defendants therefore argue that the controversy presented to this court in Claim II is preempted under *Garmon* because it is identical to the claim presented to the NLRB.

1. State's Arguments

The State acknowledges that Union challenged the No-Poach and Non-Solicitation Agreements before the NLRB but raises three arguments in opposition to the Motion. It first argues that *Garmon* preemption does not apply under the Court's ruling in *Connell Const. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616 (1975). Second, it argues Defendants have failed to meet their burden to show that *Garmon* preemption applies as set forth in *Davis*, 476 U.S. at 395. Finally, it argues that Claim II falls under the two court-created exceptions to *Garmon* preemption. The Court will discuss these arguments in order.

a. *Connell Construction Co.* Argument

The State first argues that *Garmon* preemption does not apply based on its interpretation of the United States Supreme Court's ruling in *Connell*, and the interplay between that interpretation and the Court's previous ruling regarding Colorado's labor exemption, found at C.R.S. § 6-4-109(1).[5]

In *Connell*, Plumbers and Steamfitters Local Union No. 100 ("Local 100") was a local union that organized workers in the plumbing and mechanical trades in Dallas, Texas. Local 100 was a party to a multiemployer bargaining agreement with a group of about 75 mechanical contractors called the Mechanical Contractors Association of Dallas. Connell was a general building contractor in Dallas that did business with both union and nonunion subcontractors. Local 100 never sought to represent Connell's employees nor sought to bargain with Connell on their behalf. Local 100, however, asked Connell to agree to only subcontract mechanical work to firms that had a current contract with Local 100. When Connell refused to sign an agreement to that effect, Local 100 picketed one of Connell's construction sites, halting construction. Local 100 went on to use this tactic with other general contractors in Dallas.

Connell filed suit in state court, arguing that the picketing violated Texas antitrust law. Local 100 removed the case to federal court and Connell amended its complaint to claim the agreement also violated sections 1 and 2 of the Sherman Act. Connell sought a declaration that the agreement was invalid and an injunction against any further efforts to force it to sign such an agreement.

The District Court held that the subcontracting agreement was exempt from federal antitrust laws because it was authorized by the construction industry proviso to s 8(e) of the

[5] Under C.R.S. § 6-4-109(1), "[t]he labor of an individual is not a commodity, a service, or an article of trade or commerce." Defendants had moved for dismissal of Count II on the ground that the alleged No-Poach and Non-Solicitation Agreements were agreements regarding the labor of an individual and therefore not agreements that restrained "trade or commerce" in some way.

National Labor Relations Act. 29 U.S.C. s 158(e).[6] The District Court also held that federal labor legislation pre-empted the Texas antitrust law.

The Court of Appeals affirmed, holding that Local 100's goal of organizing nonunion subcontractors was a legitimate union interest and that its efforts toward that goal were therefore exempt from federal antitrust laws. It also held that state law was pre-empted under *Garmon*.

The Supreme Court held that the union's agreement with Connell was subject to the *federal* antitrust laws, but the same could not be said for the *state* antitrust laws. The Court held that Congress and the Supreme Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemption from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. The Court further noted that "[s]tate antitrust laws generally have not been subjected to this process of accommodation. If they take account of labor goals at all, they *may* represent a totally different balance between labor and antitrust policies." *Connell*, 421 U.S. at 636 (emphasis added). The Court noted in a footnote regarding this observation:

> Texas law is a good example. Vernon's Texas Rev. Civ. Stat. Ann., Arts. 5152 and 5153 (1971), declare that it is lawful for workers to associate in unions and to induce other persons to accept or reject employment. Article 5154, however, referring to the preceding articles, provides: 'Nothing herein shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies.' The Texas antitrust statutes prohibit, among other specified agreements, trusts, and monopolies, any combination of two or more persons to restrict 'the free pursuit of a lawful business.' Tex. Bus. & Comm. Code ss 15.02—15.04 (1968) V.T.C.A.

Id. at 636 n.18. The Court continued by recognizing that:

> Permitting state antitrust law to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.

[6] Section 8(e), 29 U.S.C. §158(e) to which § 8(b)(4)(A) refers, generally makes it unlawful for a labor organization to enter into hot-cargo agreements and other agreements which require an employer to cease doing business with any other person. The section, however, contains the following proviso:

> Provided, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, ...

> Because employee organization is central to federal labor policy and regulation of organizational procedures is comprehensive, federal law does not admit the use of state antitrust law to regulate union activity that is closely related to organizational goals.

Id. at 636-637. Finally, the Court acknowledged:

> Of course, other agreements between unions and nonlabor parties may yet be subject to state antitrust laws. *See Teamsters v. Oliver, supra*, 358 U.S., at 295—297, 79 S.Ct., at 304—305. The governing factor is the risk of conflict with the NLRA or with federal labor policy.

Id. at 637.

As best the Court can tell, the State reads *Connell* as amending or undercutting *Garmon's* directive that "[w]hen an activity is arguably subject to s 7 or s 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. The State appears to argue that, before following this directive when considering whether application of a state antitrust statute is to be preempted, a court must first examine the state's antitrust laws in general to determine whether it believes those laws strike a good balance between labor and antitrust policies, including whether the state has a statutory labor exemption. The State then argues that since Colorado does have a labor exemption, and since the Colorado Supreme Court has held that there is a "similarity in text and purpose between the federal and Colorado antitrust statutes," and has "decline[d] to depart from the basic analytical framework developed by federal courts with respect to the labor exemption in antitrust prosecutions," *People v. North Ave. Furniture and Appliance, Inc.*, 645 P.2d 1291, 1299 (Colo. 1982), then there is no risk of conflict with the NLRA or federal labor policy in Colorado.

The State then turns to this Court's previous ruling regarding the Colorado labor exemption and argues that since this Court held that the labor exemption was not grounds for dismissal when taking as true the allegations presented in the complaint, and since the Colorado Supreme Court has held that the Colorado and federal antitrust statutes are similar in text and purpose, and since Colorado courts are supposed to apply the basic analytical framework developed by the federal courts with respect to the federal labor exemption when considering application of the Colorado labor exemption, then there is no need for *Garmon* preemption because there should not be any space between the federal and state treatment of the controversy.

The problem with this argument is that is not how *Garmon* preemption is applied. *Garmon* preemption is based on the *risk* of disparate treatment between the states and the federal government and, "when properly invoked," *Garmon* "tells us not just what law applies (federal law, not state law) but who applies it (the National Labor Relations Board, not the state court of federal district courts)." *Glacier*, 598 U.S. at 777 (internal quotation marks and further citation

omitted). There is not an initial step where a court decides for itself whether a particular state's antitrust system is similar enough in form and application to the federal antitrust system that there is no need to apply the mandated *Garmon* tests to determine whether the activity at issue is arguably subject to section 7 or section 8 of the NLRA.

b. Argument That Defendants Failed To Meet Their Burden

The State next argues that Defendants have failed to meet their burden to show that *Garmon* preemption applies. The State argues that meeting this burden "requires more than a conclusory assertion that the NLRA arguably protects or prohibits conduct." *See, e.g., Glacier Northwest, Inc.*, 598 U.S. at 776 (internal quotation marks omitted). A party asserting *Garmon* preemption "is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor." *Davis*, 476 U.S. at 395. To do so, the party must: (1) "advance an interpretation of the Act that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or the [NLRB]," then (2) "put forth enough evidence to enable the court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation." *See id*. (internal quotation marks omitted). The Court disagrees that Defendants' argument amounts to a conclusory assertion.

Here, Defendants point to the charges filed by Union and argue that "[t]he existence of the alleged unlawful agreement between Defendants is the central feature of both Plaintiff's Count II and the NLRB Charges." Mot., at 9. They first urge the Court to rule that the two-part *Davis* standard does not apply in *Garmon* cases addressing "arguably prohibited" conduct, because applying it in such cases would require a defendant advancing a *Garmon*-preemption argument to present evidence that could serve as proof in any potential NLRB case against itself. Rep. at 7-8. Nevertheless, Defendants go on to point to *Allina Health Systems*, 343 N.L.R.B. 498 (2004) as a case that is analogous to this one. *Id*. at 9.

In *Alina Health Systems*, several hospitals negotiating with the same nurses' union formed an advisory committee, closely coordinated their bargaining strategy, and agreed they would refuse to employ any striking nurses if the union went on strike against one or more of the hospitals. All the hospitals except one eventually reached agreements with the union. The union eventually struck the remaining hospital, and the other hospitals refused to employ any of the striking nurses pursuant to the previous agreement, even though many nurses worked part-time shifts at those other hospitals in addition to their regular shifts at the struck hospital.

The NLRB held that the refusal to hire the striking nurses was an unfair labor practice because the hospitals that refused to hire had already reached agreements with the union and were not members of a multiemployer bargaining group with the hospital that was struck. The NLRB held that those hospitals, "having concluded their own negotiations, have no legitimate justification for disrupting the peaceful relations thereby established with the Union by using the refusal-to-hire weapon to coerce the Union and its employee supporters in negotiations with another employer." *Alina Health Systems*, 343 N.L.R.B. at 501.

As to Plaintiff's first argument, the Court does not need to decide whether the *Davis* test does not apply to cases addressing "arguably prohibited" conduct, since even if it does apply the Defendants have met their burden. The Defendants are simply required to show that the NLRA *arguably* protects or prohibits the conduct at issue. While there are differences between the *Alina Health Systems* case and this one, the Court believes that the controversy presented to the NLRB is practically identical to that presented in Count II and the *Alina Health Systems* case is sufficiently similar to the case at hand to show that the *Davis* test is met and the No-Poach and Non-Solicitation Agreements are arguably prohibited by section 8 of the NLRA. Reading the *Davis* test to require too large a quantum of proof before application of *Garmon* preemption would undercut that very preemption and the NLRB's primary jurisdiction to determine such matters.

The Court does not agree that Defendants have to present cases where state antitrust claims brought by an attorney general were preempted to meet their burden. The courts have certainly applied *Garmon* preemption to preempt state antitrust claims. S*ee, e.g., Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 193-194 (1978) (holding that "a State's antitrust law may not be invoked to enjoin collective activity which is also arguably prohibited by the federal Act" and that "the pertinent inquiry is whether the two potentially conflicting statutes were brought to bear on precisely the same conduct" (interior quotation marks omitted)). The State does not make an argument as to *why* a state antitrust case brought by an attorney general deserves special treatment under *Garmon* or why such a case would be less likely to undermine the NLRB's primary jurisdiction.

Nor does the Court agree that Defendants must present cases "involve[ing] an agreement among employers to allocate the markets for labor and customers" to meet their burden. Resp., at 14. There is a long history of court's struggling with the proper application of antitrust and labor laws concerning union/employer activities since many aspects of employer and union action can be anti-competitive. The Court does not see why the fact that this case involves No-Poach and Non-Solicitation agreements create a special case that would impact the analysis.

The Court notes that Defendants filed a Notice of Rulings in Related Proceedings on Jul 31, 2025, to notify the Court that the NLRB dismissed the charges before it against Kroger and ACI on the grounds that "there is insufficient evidence to establish a violation of the [National Labor Relations] Act." Not., Exs. A, B. Defendants argue that this ruling shows that "the NLRB exercised its jurisdiction and issued merits decisions dismissing the charges." Not., at 1. They argue: "Count II of Plaintiff's Complaint asks the Court not only to exercise jurisdiction over the same alleged collective-bargaining conduct already under the NLRB's jurisdiction, but also to declare that alleged labor conduct illegal under state law despite the NLRB's conclusion that it is not illegal under federal labor law." *Id*. at 1-2.

The State's response to the notice takes issue with Defendants' assertion that the NLRB's decision found the alleged No-Poach and Non-Solicitation Agreements "not illegal" under federal labor law, arguing that "a vague one-sentence conclusion about the quantum of the union's

evidence says nothing about whether the conduct in question is protected or prohibited by the NLRA, nor does it suggest any conflict between the NLRA and the Colorado Antitrust Act." Resp. to Not., at 1.

The Court does not need to be able to tell for certain whether the NLRB dismissed the charges because it thought that the No-Poach and Non-Solicitation Agreements were "not illegal" under federal labor law to determine *Garmon* preemption applies. In *Garmon*, the Supreme Court noted that "if the Board decides, subject to appropriate federal judicial review, that conduct is protected by s 7, or prohibited by s 8, then the matter is at an end, and the States are ousted of all jurisdiction." *Garmon*, 359 U.S. at 245. But it also recognized that "the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance," and that "the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act." *Id*. at 245-246. The Court ruled that "[i]n the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." *Id.* at 246. The dismissal of the charges here on the ground that there was insufficient evidence to establish a violation of the Act is just such an instance.

c. Argument That Case Falls Within Exceptions To *Garmon* Preemption

Finally, the State argues that the Court should rule that Count II falls under two court-created exceptions to *Garmon* preemption. These exceptions apply when the alleged conduct (1) is "merely a peripheral concern" of federal labor law, or (2) "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Supreme Court] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 243-244.

In support of its argument, the State cites to a number of tort cases to argue that a court must consider whether "the focus of the state claim differs from the NLRA charge." Resp., at 14. The State argues that if the focus is different, "the state claim may proceed notwithstanding any overlapping conduct arguably prohibited by the NLRA." *Id*. The State asserts that, here, the focus of Claim II differs from that of the NLRA charge because the focus of Claim II is "the harm to competition caused by Defendants' conduct," and the focus of the NLRA charge is "whether Defendants' conduct harmed the collective bargaining process." *Id*. at 17.

If accepted, this argument would never allow *Garmon* preemption to be applied to state antitrust cases, which would always concern harm to competition. However, antitrust cases are often used as an example of the types of cases to which *Garmon* preemption would most likely apply. *See, e.g., Sears*, 436 U.S. at 193-194. This is because Antitrust cases were often used by the courts in the early days of labor organizing to strike down union activities on the basis that

they improperly restrained trade and commerce. *See, e.g.,* Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252 (1955).

As for the State's argument that state regulation of antitrust matters falls under the exception for regulation of interests deeply rooted in local feeling and responsibility, this cannot be the case. Again, such an exception would swallow the rule. Colorado's general interest in regulating antitrust matters is no greater than the interest any other state would have. Further, the state has not argued that there is any more at stake in this particular case than the general interest in preserving competition in the state. Finally, courts have often applied *Garmon* preemption to state antitrust law, and the State cites to no case where this exemption has been used in regard to antitrust matters. The Court holds that this exemption also does not apply in this case.

CONCLUSION

Therefore, for the foregoing reasons and authorities, the COURT HEREBY GRANTS the Motion, and DISMISSES Count II for lack of subject matter jurisdiction.

SO ORDERED.

DATED: February 23, 2026 BY THE COURT:

ANDREW J. LUXEN
District Court Judge