UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16564

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, individually and representing a class of persons similarly situated,

Plaintiffs-Appellees

v.

US AIRLINE PILOTS ASSOCIATION, an unincorporated association representing the pilots in the employment of US Airways Inc.,

Defendant-Appellant

PETITION FOR REHEARING EN BANC

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RULE 35(b)(1) STATEMENT

There are six reasons to find that the Opinion raises a question of exceptional importance that merits *en banc* rehearing. *First,* the Opinion decides a matter of first impression for all federal circuits—the issue of when it is ripe to decide a duty of fair representation claim (DFR claim) in the context of a union refusing to implement an arbitrated seniority integration method. *Slip Op.* at 8005. As a matter of first impression, this will bind future three-judge panels of this Circuit. *Hulteen v. AT & T Corp.*, 498 F.3d 1001, 1009 (9th Cir. 2007). In addition, if the Opinion gets the law wrong it will likely "provoke an avoidable circuit conflict that the Supreme Court would have to resolve." *Ricci v. DeStefano*, 530 F.3d 88, 93 (2d Cir. 2008) (Jacobs, Chief J, dissenting from denial of rehearing en banc).

Second, the issue addressed in the Opinion is likely to recur, given recent changes in federal law and trends favoring mergers in the airline industry. The dispute here concerns an arbitrated method of seniority integration in the context of an airline

merger. In the past, such arbitrations were mandated by the Civil Aviation Board. Later, they were left to internal union policies. With the passage of the McCaskill-Bond Bill, 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007), they are once again required by federal law. Similar disputes, therefore, are likely to occur with more frequency and are likely to find their way into the federal courts. It is important, then, that this case be properly decided.

Third, the Opinion could have consequences contrary to strong federal policies. McCaskill-Bond itself reflects a strong federal policy favoring peaceful, efficient integration of airline operations after an airline merger. The Opinion seemingly allows a union to wrongfully refuse to integrate operations even after a federally mandated arbitration. According to the Opinion, a DFR claim would not be ripe in such circumstances as long as the union never ratified a new CBA. *See Slip Op.* at 8008, n.1 (referring to "an unquestionably ripe DFR suit, once a contract is ratified"). A politically weak minority would have no remedy

against a union that, for bad faith motives, kept them in separate operation limbo. Surely that cannot be right.

Fourth, the Opinion addresses an issue that has particularly troubled this Court—the point at which uncertain future contingencies defeat ripeness. An *en banc* panel of this Court failed to reach a consensus on this issue in *Yahoo! v. La Ligue Contre Le Racisme*, 433 F.3d 1199 (9th Cir. 2006). Three judges on that panel found defects in ripeness on that basis. *Id.* at 1217. Three judges did not.

Regardless that there was no consensus, courts use *Yahoo!* to illustrate the outer limit of ripeness. The Second Circuit, for example, found a dispute was ripe because it was more ripe than the dispute in *Yahoo! Ehrenfeld v. Mahfouz*, 489 F.3d 542, 547 (2d Cir. 2007). The dispute was ripe, the court explained, because unlike *Yahoo!*, "[t]here has been no suggestion that the order will be changed or that" the party subject to the order "will be in compliance with the order." *Id.*

This Circuit also uses *Yahoo!* to define the outer limits of ripeness. *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009). The *Coleman* court found that a dispute was ripe because future contingencies were less speculative than they had been in *Yahoo!* *Id.* at 1005.

The Opinion explains, in effect, that this dispute with USAPA falls on the far side of *Yahoo!* because it "presents contingencies that could prevent effectuation of USAPA's proposal." *Id.* at 8006. This ignores the fact that *no* contingencies, would prevent USAPA's intractable opposition to implementing the Nicolau Award. *See Slip Op.* at 8019-20 (Judge Bybee noting USAPA is " 'constitutionally committed,' to voiding a binding arbitration award and adopting a 'date of hire' seniority principle that plainly favors one side of a merger"); *id.* at 8003 ("ALPA submitted the Nicolau Award to the airline, which accepted the award on December 20, 2007."). In essence, the Opinion says that a claim based on wrongful failure to act is never ripe, even where

the continuation of that failure to act is not at all speculative.[1] Delaying remedy here, therefore, does not eliminate relevant uncertainty.

Fifth, the Opinion cannot be readily reconciled with related Ninth Circuit case law. As shown above, it fails to recognize that wrongful union inaction can give rise to a ripe DFR claim. That is inconsistent with this Court's application of ripeness in the context of wrongful agency inaction. *See*, *e.g.*, *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1175, n.4 (9th Cir. 2009). The dispute in *Rosemere* was ripe based on the likelihood that the agency would continue wrongful inaction. *Id.* USAPA's wrongful refusal to implement the Nicolau Award is no more contingent than was the agency's wrongful refusal to enforce regulations in *Rosemere*.

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[1] Although it is true that "Plaintiffs abandoned their claim that USAPA is intentionally delaying negotiation of a CBA," *Slip Op.* at 8008, n.1, they never abandoned the claim that USAPA is wrongfully refusing to negotiate a Nicolau CBA. There is no doubt either that this is true or that it will continue to be true unless the courts intervene.

Sixth, the ripeness issue here is evenly split with two judges on each side. In his vigorous, well reasoned dissent, *Slip Op.* at 8015-8023, Judge Bybee explains that he "agree[s] with the district court [because], given the 'precise legal question' raised by the West Pilots [Plaintiffs], this case is 'fit for decision.' " *Id.* at 8021. Given the balance of opinion on both sides and the quality of the opinions written by the district court and Judge Bybee, this matter surely merits further consideration.

In sum, there are six reasons to grant *en banc* review. The Opinion addresses a matter of first impression. It addresses issues that are likely to recur. It can lead to results that would be contrary to strong federal policy. Ripeness issues have particularly troubled this Court. The Opinion cannot be readily reconciled with related existing Ninth Circuit law. And, the judges who have given the matter careful consideration are split equally on the issue of ripeness. The members of this Court, therefore, should vote to grant this *Petition for Rehearing En Banc*.

PETITION

I. BACKGROUND

US Airways and America West merged in 2005. The two pilot groups, referred to as the West Pilots and East Pilots, agreed to integrate their respective seniority lists to compete the integration of airline operations. Nearly five years later, they have not done so.

The pilots agreed to use binding arbitration conducted by George Nicolau to determine a method of seniority integration. That result of that arbitration is referred to as the Nicolau Award. After the arbitration was completed, the East Pilots objected to the Nicolau Award and prevented its implementation. Judge Bybee explains what occurred:

> [T]he Air Line Pilots Association ("ALPA") was decertified and a new union, the U.S. Airline Pilots Association ("USAPA"), certified precisely to frustrate implementation of the Nicolau [Award] and to negotiate a CBA with U.S. Airways that favors the East Pilots. As the district court found, "USAPA's sole objective in adopting and presenting its seniority proposal to the Airline was to benefit East Pilots at the expense of West

> Pilots, rather than to benefit the bargaining union as a whole." Thus, "the terms of USAPA's seniority proposal are substantially less favorable to West Pilots than the Nicolau Award" made through binding arbitration, an award that "USAPA concedes that it will never bargain for." * * * Although a CBA would supply tangible evidence of a violation of the DFR, in this case, there is sufficient evidence to consider the West Pilots' complaint without the CBA. The issues are concrete and were well developed in district court proceedings that included a jury trial (for damages) and a bench trial (for equitable relief).

Slip Op. at 8015-16 (Bybee, CJ, dissenting).

II. RIPENESS DOCTRINE

A. General Principles

Ripeness doctrine "prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). As Judge Bybee notes, "[r]ipeness is case-specific and does not lend itself to broad, bright-line rules based on the type of claim asserted." *Slip Op.* at 8016. Consequently, it is "important" to ripeness analysis to "specify the precise legal

question to be answered." *Yahoo!*, 433 F.3d 1199, 1212 (9th Cir. 2006). "Depending on the legal question, the case may be ripe or unripe. If we ask the wrong legal question, we risk getting the wrong answer to the ripeness question." *Id.*

Getting the legal question right is critical to the proper application of ripeness doctrine. That question may be different for seemingly similar cases. The legal question and the ripeness answer could be different, for example, for two claims that both challenge an imminent arbitration. If one claim is based on a right to not undergo arbitration, the claim is ripe when the arbitration is imminent. If the other claim is based on a right to have a fair result from arbitration, the claim is not ripe until the arbitration is finished. The difference comes from how the claim defines the injury. When arbitration is imminent, it is reasonably certain that arbitration will occur. It is not certain that the result will be unfair.

In *Thomas*, a pre-arbitration challenge to mandatory arbitration was ripe because the plaintiffs alleged that they were

"aggrieved by the *threat* of an unconstitutional arbitration procedure." *Id.* 473 U.S. 568, 579 (1985) (emphasis added). The injury would be the arbitration itself, not the result of the arbitration. That threat of an impending arbitration was enough to establish ripeness because: "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough. *Nothing would be gained by postponing a decision*, and the public interest would be well served by a prompt resolution. . . ." *Id.* at 581-82 (quotation marks and citations omitted) (emphasis added).

Thomas shows that ripeness depends on the context. Had those plaintiffs pled that they would be injured by the result of the arbitration, their claim would not have been ripe. Because they claimed an injury from having to begin the arbitration, "[n]othing would be gained by postponing a decision" until the arbitration is completed. *Id.* at 582.

B. DFR Principles

"[A] union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998). "The duty . . . is the quid pro quo for the union's right to exclusive representation; it protects employees in the minority from arbitrary discrimination by the majority union." *Laborers & Hod Carriers, Loc. No. 341 v. N.L.R.B.*, 564 F.2d 834, 839-40 (9th Cir. 1977).

Due to uniqueness of labor law, the majority focused on DFR cases for guidance. They relied, however, on DFR cases that do not address ripeness. This invited precisely the error that *Yahoo!* cautions against.

For example, the majority cited three Ninth Circuit DFR cases—*Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321 (9th Cir. 1980), *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213 (9th Cir. 1989), and *Hendricks v. Air Line Pilots Ass'n*, 696 F.2d 673 (9th Cir. 1983). *See Slip Op.* at 8009. None of these cases address

ripeness. These cases are merely examples of ripe DFR claims. An example of a ripe DFR claim does not establish what is *not* a ripe claim.

The majority also relies on *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). Although *O'Neill* did not address ripeness, it is an example of a claim that was no more ripe than the instant matter. The *O'Neill* claim was ripe when there was only a bankruptcy court "Order and Award" determining seniority integration—no CBA had been negotiated. *See Air Line Pilots Ass'n v. O'Neill*, 886 F. 2d 1438, 1441 (5th Cir. 1989), reversed on unrelated grounds 499 U.S. 65 (1991).[2] *O'Neill* did not establish, as the majority states, that "a claim can only be brought once negotiations are complete and a 'final product' has been reached."

[2] *O'Neill* is distinguishable the extent that ALPA intended to implement the bankruptcy court's Order and Award while USAPA does *not* intend to implement the Nicolau Award. In both cases, injury was contingent on the union following through on its stated intention to abide by a seniority integration scheme ordered by an independent neutral—in *O'Neill the* bankruptcy court, here the Nicolau arbitration. Surely, then, if *O'Neill* was ripe, this case is ripe as well.

Slip Op. at 8010. Nothing of the sort. Rather, this language in *O'Neill* addresses evidence doctrine. *O'Neill* explained that "the final product of the bargaining process may constitute evidence of a [DFR] breach." 499 U.S. at 78. The phrase "may constitute evidence" does not mean "is the only claim that can be brought."

III. APPLICATION

To evaluate ripeness, the Court must start with the "precise legal question" presented by the claim. *See Yahoo!*, 433 F.3d at 1212. As the district court explained, the precise legal question presented by the West Pilots' claim "is whether USAPA—or any union—violates its duty of fair representation by adopting and promoting a certain integrated seniority list for no reason other than to favor one group of employees at the expense of another." Doc. # 593 at 16:23 to 16:26.[3]

[3] Judge Bybee frames the question so: "We are asked whether our Article III jurisdiction extends to a DFR claim based on a union 'constitutionally committed,' Maj. Op. at 8001, to voiding a binding arbitration award and adopting a 'date of hire' seniority principle that plainly favors one side of a merger." *Slip Op.* at 8019-20 (Bybee, CJ, dissenting).

The Opinion gives short shrift to the precise question raised in the claim. Rather, it sees ripeness as a categorical rather than a specific question. *See Slip Op.* at 8009 (noting that "our DFR decisions . . . have found DFR violations based on contract negotiations only after a contract has been agreed upon."). The Ninth Circuit, however, does not use categorical rules to determine ripeness. Rather, it uses a two-part, claim specific, test that evaluates: "(1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if [it] decline[s] to consider the issues." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 2006).

The first part of the ripeness test considers whether material factual elements of the claim are still contingent and uncertain. The second part of the test comes into play where the first part is weak. This Court explains how the two parts are balanced: "Lack of ripeness will prevent review if the systemic interest in postponing adjudication due to a lack of fitness outweighs the hardship on the parties created by the postponement." *Chavez v.*

Director, OWCP, 961 F.2d 1409, 1414 (9th Cir. 1992). In other words, the Court weighs the hardship of further delay only where it finds that delay would significantly improve fitness for decision. As shown below, both parts of the ripeness test are satisfied here.

A. Fitness for Decision

The issues raised by the West Pilots' DFR claim are fit for decision. The claim raises two issues, breach and injury. Breach was proven when the jury found that "USAPA adopted and presented its seniority proposal without any legitimate union objective, solely to benefit East Pilots at the expense of West Pilots." Doc. # 593 at 36:23 to 36:25. The issue of injury is fit for decision because, in this instance, "threatened injury . . . is *certainly* impending." *United States v. Streich*, 560 F.3d 926, 931 (9th Cir. 2009). For those pilots who have been furloughed, injury has already occurred.

The majority seems to read *Streich* to require "certain" injury. A series of cases, however, make clear that there need

only be a "realistic danger" of injury. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("[W]e consider whether the plaintiffs face a realistic danger of sustaining a direct injury."). This Court has colorfully made this point by stating that it "does not require Damocles' sword to fall before [it] recognize[s] the realistic danger of sustaining a direct injury." *Chang v. United States*, 327 F.3d 911, 921 (9th Cir. 2003).

There surely is a "realistic danger" here. Some West Pilots already have lost employment and other benefits while USAPA refuses to bargain toward implementing the Nicolau Award. These pilots and others will continue to suffer such injuries unless the courts intervene. As the district court explained:

> Plaintiffs' case does not rest upon contingent future events . . . [because] USAPA concedes that it will never bargain for implementation of the Nicolau Award. It is constitutionally hostile to doing so. * * * *The outcome of negotiations is irrelevant. Without an injunction, USAPA's seniority position inevitably impairs the collective bargaining process.*

> For this same reason, denying judicial review would work a substantial hardship . . . .

Id. at 36:28 to 37:11 (emphasis added, citation omitted).

The failure to integrate pilot operations has already injured all those interested in seeing US Airways complete its 2005 merger. Ripeness doctrine does not require that anyone suffer additional "injury to obtain preventive relief." *Streich*, 560 F.3d at 931. With all respect, therefore, the majority is wrong to hold that the pilots must wait until "the airline responds to [USAPA's seniority] proposal, the parties complete negotiations, and the membership ratifies the CBA." *Slip Op.* at 8007.

Judge Bybee, therefore, was entirely correctly when he explained:

> Certainly this case might be "riper" were plaintiffs to wait for these future events, but when USAPA took the reins as the West Pilots' union and refused to pursue the Nicolau Award, USAPA's promise moved from abstract disagreement to adjudicable legal controversy. The future events cited by the majority are not likely to occur anytime soon, and plaintiffs will be harmed all the while.

Id. at 8022-23.

Under these circumstances, "[n]othing would be gained by postponing a decision." *Thomas,* 473 U.S. at 582. There is more than enough basis, therefore, to find breach and injury. In other words, the material issues are fit for decision. Hence, the first part of the Ninth Circuit's ripeness test—fitness for decision—is satisfied.

B. Hardship From Delay

The second part of the Ninth Circuit ripeness test—hardship from delay—is considered only where there is concern that delaying the litigation by dismissing without prejudice would substantially improve fitness for decision. *Chavez*, 961 F.2d at 1414.[4] As shown above, there is no such concern here. Yet, if

[4] "The 'hardship' prong of the *Abbott Laboratories* test is not an independent requirement divorced from the consideration of the institutional interests of the court and agency. Thus, where there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong." *Teva Pharmaceuticals USA, Inc. v. Sebelius*, 595 F. 3d 1303, 1310 (D.C. Cir. 2010).

there were such concern, consideration of hardship from delay would tip the balance in favor of ripeness.

On one hand, if this Court dismisses this case for lack of ripeness the East Pilots will believe that they can avoid further litigation and avoid implementation of the Nicolau Award as long as they *never* ratify a new CBA. The district court explained why this is so. Doc. # 593 at 29:6 to 29:19.

The district court found that USAPA "misled the majority about its power to improve their seniority prospects at the expense of the West Pilots." *Id.* at 29:6 to 29:7. USAPA misled the majority to have "a mistaken understanding of the law and mismanaged [their] expectations." *Id.* at 29:8 to 29:9. After having misled its membership in such ways, "USAPA claims that the East Pilots hold such strong objections to the Nicolau Award that they always will vote as a bloc against any new CBA with it, enjoying the self-denial of a single CBA with improved wages and working conditions into perpetuity." Doc. # 593 at 29:16 to 29:19. If USAPA's claim is true, then the East Pilots would not ratify a

CBA—even if it does not use the Nicolau Award—if USAPA tells them (as it likely will) that will allow them to avoid judicial intervention.

On the other hand, if this Court affirms on the merits the East Pilots will see that they were misled by USAPA and will be more amenable to ratifying a CBA—even a Nicolau CBA. The district court indicated as much by finding that if USAPA's "membership were correctly advised on the limits of fair representation that constrain the agreement—and all the collective bargaining of every union—then they would perceive no incentive to hold out for an improper bargaining objective." *Id.* at 29:10 to 29:12.

In short, Plaintiffs would have less hardship after a decision affirming on the merits than they would have after a decision dismissing for lack of ripeness. Hardship from delay, therefore, weighs in favor of ripeness. Given that the issues are also fit for decision, the Court should find this is a ripe dispute.

IV. CONCLUSION

Under well established ripeness doctrine, the West Pilots "are entitled to have their claims heard" now. *Slip Op.* at 8023. Everyone with an interest in this merger—the Airline, pilots and other workers—needs a final decision on whether USAPA may disregard the Nicolau Award. The Court, therefore, should grant this petition for rehearing *en banc*.

RESPECTFULLY SUBMITTED this 10th day of June, 2010.

POLSINELLI SHUGHART, P.C.

By: *s/ Andrew S. Jacob*
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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket No. 06-16417

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Andrew S. Jacob

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/s/ *Andrew S. Jacob*

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