No. 10-_____

In The
Supreme Court of The United States

DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI, individually and representing a class of persons similarly situated,

Petitioners,

v.

US AIRLINE PILOTS ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

US Airways and America West merged in 2005. The airlines and their pilots agreed that a final and binding arbitration would determine how to equitably integrate the pilots' seniority lists. That arbitration was completed in May 2007. The airline has been willing to implement the arbitrated seniority list since December 2007. Nearly three years later, the pilots' union steadfastly refuses to do so. Petitioners, at a cost of $1.8 million in legal fees, obtained an order from the district court that the union must make all reasonable efforts to implement the arbitration award. In light of the federal policy favoring prompt resolution of divisive internal union disputes that affect collective bargaining, is Petitioners' claim to enforce compliance with the arbitration award ripe?

RULE 29.6 STATEMENT

No petitioners are corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Case No. 09-16564) (9th Cir. June 4, 2010) is reported at 606 F.3d 1174 (9th Cir. 2010). Appendix ("App.") A, 1a-33a. Petitioners' motion for rehearing *en banc* was denied by the court of appeals on July 8, 2010, in an unpublished order. The relevant U.S. District Court, District of Arizona, order is *Addington v. US Airline Pilots Ass'n*, which is unofficially reported at 2009 WL 2169164 (D. Ariz. July 17, 2009). App. B, 34a-105a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on June 4, 2010, and the order denying the motion for rehearing *en banc* was entered on July 8, 2010. This petition is timely under 28 U.S.C. § 2101(c) because it is being filed within 90 days of the entry of the order denying rehearing *en banc*. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is the McCaskill-Bond Amendment, 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007). App. C, 106a–108a.

STATEMENT OF THE CASE

In 2005, the airlines US Airways and America West entered into a merger agreement. App. B, 37a. More than three years have passed since the pilots from these airlines completed what they (and the airlines) agreed would be a final and binding arbitration to determine how to equitably integrate their two seniority lists. *Id.* Yet, the pilots' union, which was formed and dominated by the larger pilot group, steadfastly and emphatically refuses to implement the seniority list awarded by that arbitration.

Petitioners sought relief in the district court. At a cost of more than $1.8 million in legal fees, they obtained a jury verdict that the union, U.S. Airline Pilots Association ("USAPA"), is in breach of its duty of fair representation. The district court ordered USAPA to make all reasonable efforts to implement the arbitration award.

USAPA appealed and the Ninth Circuit dismissed the action for lack of ripeness. In doing so, it disregarded established rulings by this Court as well as federal policy strongly favoring prompt resolution of divisive internal union disputes that affect collective bargaining, a policy that Congress recognized in the specific context of airline mergers

when it passed the 2007 McCaskill-Bond Amendment.

The two pilot groups have diametrically opposite positions on seniority list integration. The West Pilots'[1] position is that pilots who were actively working at the time of the merger should be put ahead of pilots who were on furlough. App. B, 40a. In contrast, the East Pilots' position is that the seniority list should be ordered strictly by date-of-hire, even though that order would place more than a thousand East Pilots who were on furlough in 2005 (and who had not worked for years) ahead of West Pilots who were working. *Id.*

Following procedures that were subsequently codified into federal law by the McCaskill-Bond Amendment, the two pilot groups agreed to use binding arbitration to determine an equitable method of integrating their seniority lists. App. B, 41a. The result of that arbitration, referred to as the Nicolau Award, put 500 East Pilots at the top of the seniority list and placed all East Pilots who were on furlough in 2005 below West Pilots who were working. *Id.*

The East Pilots objected to the Nicolau Award and vigorously prevented its implementation. App. B, 42a. For example, they refused to participate in the collective bargaining of a new contract that would be used to implement an integrated seniority

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[1] The pilot groups from the pre-merger airlines are referred to as West Pilots (America West) and East Pilots (US Airways).

list. *Id.* They also withdrew support from the union that was then representing both pilot groups, causing it to be decertified. App. B, 43a. They formed a new union, USAPA, that they elected to represent the bargaining unit. App. B, 44a. USAPA promised that, if elected to represent the merged pilot groups, it would disregard the Nicolau Award and would present the date-of-hire seniority list favored by the East Pilots to the airline. *Id.* This is the same date-of-hire list that was rejected by the arbitration because it put more than a thousand East Pilots who had been on furlough in 2005 ahead of hundreds of West Pilots who had been working.

Petitioners initiated an action to stop USAPA from disregarding the Nicolau Award, arguing that this puts it in breach of its duty of fair representation. App. B, 48a. The district court found this action was ripe, in part, because USAPA unequivocally repudiated any duty to implement the Nicolau Award. App. B, 86a. It explained, for example, that USAPA's "constitution includes a commitment 'to maintain uniform principles of seniority based on date of hire" and that "USAPA officers have promised to 'overturn' the Nicolau Award, and USAPA considers itself constitutionally bound never to implement it." App. B, 47a.

The district court held a jury trial to decide USAPA's liability. App. B, 50a. After a 10-day trial, the jury found that USAPA was liable because its sole objective was to benefit East Pilots, rather than the bargaining union as a whole. *Id.* The district court therefore permanently enjoined and ordered USAPA to:

1. "make all reasonable efforts to negotiate and implement a single [CBA] . . . that will implement the Nicolau Award seniority proposal. . .";

2. "[m]ake all reasonable efforts to support and defend the . . . Nicolau Award in negotiations with US Airways"; and

3. "[n]ot negotiate for separate collective bargaining agreements for the separate pilot groups. . . ."

App. A, 8a-9a.

Petitioners incurred attorneys' fees and costs in excess of $1.8 million in the district court litigation, which entailed filing more than 600 documents and a ten-day jury trial. Petitioners also lost wages as a consequence of furloughs and missed promotions that would not have occurred "[u]nder a single CBA incorporating the Nicolau Award." App. A, 8a. Petitioners sought an award of their fees and costs pursuant to common benefit doctrine and claimed damages to remedy their lost wages. App. B, 49a-50a. The district court deferred addressing these claims during the pendency of USAPA's appeal to the Ninth Circuit.

The Ninth Circuit did not decide the substantive merits of USAPA's appeal. Instead, in a divided opinion, it found a lack of prudential ripeness and ordered the action dismissed. In so doing, it gave no weight to the "time, effort, and expense" incurred by the parties, the district court or the jury and did not recognize the strong federal policy favoring prompt adjudication of internal union disputes that

affect collective bargaining. App. A, 9a. Notwithstanding that it found a lack of ripeness, the Ninth Circuit cautioned USAPA that unless it "bargain[ed] in good faith pursuant to its DFR,[2] with the interests of all members—both East and West—in mind," there would be "an unquestionably ripe DFR suit, once a contract is ratified." App. A, 12a-13a.

In a well-reasoned dissenting opinion, Judge Bybee argued that the case was ripe:

> 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).

App. A, 24a.

As soon as the Ninth Circuit denied a petition for rehearing *en banc*, USAPA reaffirmed its unwavering commitment to disregard the Nicolau Award and announced its intention to impose a date-of-hire seniority list. A few days later, US Airways filed a declaratory action seeking clarification of its duties and liabilities in regard to this internal union seniority dispute. In that declaratory action, US Airways states three claims that primarily raise these two issues:

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[2] "DFR" stands for duty of fair representation.

1. If USAPA is in breach of its duty of fair representation, is US Airways liable to Petitioners if it acquiesces to USAPA's demand to disregard the Nicolau Award?

and

2. If USAPA is not in breach of the duty of fair representation, is US Airways liable to USAPA if it refuses to make every reasonable effort to reach agreement on USAPA's demand to disregard the Nicolau Award?

If the answer to both these questions is affirmative, then, unless US Airways knows whether USAPA is in breach of its duty of fair representation, it cannot know what it must do to avoid liability. Hence, the very question that the Ninth Circuit held was unripe when brought by Petitioners is raised by US Airways' declaratory action.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully submit that this Court should grant their petition for a writ of *certiorari* because the Ninth Circuit Court of Appeals wrongly decided an important federal question—the ripeness of an action to enforce compliance with a union seniority arbitration required to fully implement an airline merger. It did so in conflict with federal policy that strongly favors prompt resolution of divisive internal union disputes that affect collective bargaining. It did so in conflict also with *Reed v. United Transportation Union*, 488 U.S. 319 (1989); *Clayton v. Int'l Union, United*

Auto., Aerospace, & Agr. Implement Workers of America, 451 U.S. 679 (1981); and the 2007 McCaskill-Bond Amendment.

I. THE NINTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THIS COURT'S RULINGS.

A. The Ninth Circuit disregarded a strong federal interest in prompt resolution of internal union disputes that affect collective bargaining.

Delaying adjudication of Petitioners' claim conflicts with a well-established federal interest in prompt resolution of internal union disputes that "directly relate in any way to collective bargaining or dispute settlement under a collective-bargaining agreement." *Reed*, 488 U.S. at 330; *see also United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 63 (1981) (same). In *Reed*, this Court explained this as an interest in avoiding unfavorable consequences that arise when such disputes are too long left unresolved:

> Internal union disputes, if allowed to fester, may erode the confidence of union members in their leaders and possibly cause a disaffection with the union, thus weakening the union and its ability to bargain for its members. Such prolonged disputes may also distract union officials from their sole purpose — representation of union members in their relations with their employer. These probable effects of protracted disputes may

> be destabilizing to labor-management relations.

488 U.S. at 330.

Petitioners' claim impacts the federal interest addressed in *Reed* because it concerns a divisive internal union dispute that affects collective bargaining. Seniority disputes are by nature divisive because one worker's gain is necessarily another's loss. This dispute is particularly divisive because it involves a dishonored agreement. After agreeing in 2005 that the Nicolau Arbitration would be "final and binding," the East Pilots, and later USAPA, rejected its outcome.[3] App. B, 55a. There is no question, therefore, that this dispute is highly divisive. Petitioners' claim also concerns a dispute that directly affects collective bargaining. Until there is a new collective bargaining agreement ("CBA"), the airline cannot fully merge its operations.[4] The dispute over enforcement of the Nicolau Award prevents reaching such agreement. Petitioners' claim, therefore, implicates the federal interest in prompt adjudication. That interest is

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[3] An example of the divisiveness of this dispute is described by the district court: "The Nicolau Award caused outrage among many East Pilots. The East Merger Representatives sought to have the award overturned and petitioned ALPA to revisit it. Emotions flared for weeks and months to follow while ALPA attempted to broker a compromise between the two pilot groups." App. B, 42a.

[4] The district court explained: "Because no new CBA is in place, the Airline carries on in a state of separate operations. Efforts toward a new CBA have been complicated by the process of deciding what seniority list the CBA will include." App. B, 39a.

offended by delaying adjudication of Petitioners' claim on the basis of prudential ripeness.

Delaying adjudication of Petitioners' claim also conflicts with the federal interest in prompt resolution of internal union disputes that "challenge the stable relationship between the employer and the union." 488 U.S. at 331 (alteration and quotation marks omitted). Federal courts apply a 6-month limitations to duty of fair representation disputes. *DelCostello v. Teamsters,* 462 U. S. 151, 172 (1983). In *Reed*, this Court explained that courts do so in furtherance of an interest in prompt resolution of such claims. 488 U.S. at 331. This interest is offended when, as happened here, resolution of such claims is delayed on prudential ripeness grounds.

A highly divisive internal union dispute that directly affects collective bargaining or challenges the stable relationship between the carrier and its union must not be left to fester for more than five years. That is far too long. *See Cummings v. John Morrell & Co.*, 36 F.3d 499, 507 (6th Cir. 1994) ("[F]ive or six years is simply too long a time to let a labor dispute fester."). Yet, that is what results from the Ninth Circuit's decision.

B. The federal interest in prompt resolution of internal union disputes that affect collective bargaining is particularly strong where the dispute concerns seniority integration after an airline merger.

Airline-merger related seniority disputes are frequently quite contentious and often involve the courts. *See*, *e.g., Rakestraw v. United Airlines*, 981 F.2d 1524 (7th Cir. 1992); *Air Wisconsin Pilots Protection Com. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990); *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th 1989). Such judicial involvement is consistent with the federal interest in a stable national transportation system. *Burlington N. R.R. v. Bhd. of Maint. of Way Employees,* 481 U.S. 429, 450 (1987) (noting, "the major purpose of Congress in passing the RLA[5] [was] [t]o prevent, if possible, wasteful strikes and interruptions of interstate commerce") (alteration and quotation marks omitted). That interest, in turn, strengthens the interest in prompt resolution of disputes that interfere with airline mergers. This logically underlies the 2007 McCaskill-Bond Amendment,[6]

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[5] "RLA" refers to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq*.

[6] McCaskill-Bond provides that "sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger . . . shall apply to the integration of covered employees of the covered air carriers." 121 Stat. 2383, § 117. App. C, 106a. In the event two merging pilot groups cannot agree on how to integrate their seniority list, §§ 3 and 13 provide that an NMB arbitrator would decide

which mandates expedient, final and binding arbitration of seniority disputes arising from airline mergers.

Pursuant to McCaskill-Bond, workers involved in an airline-merger related seniority dispute can compel a "final and binding" arbitration of their dispute using procedures nearly identical to those used in the Nicolau Arbitration. App. D, 110a. Such arbitrations must be held "within 20 days after the controversy arises" and must be decided "within 90 days after the controversy arises." App. D, 109a-110a. This narrow time frame for arbitration reflects a strong federal interest in obtaining an expedient resolution of such disputes.

The federal interests underlying the McCaskill-Bond Amendment demonstrate a heightened federal interest in obtaining prompt resolution of seniority disputes arising from airline mergers. The Ninth Circuit's ruling that delays resolution of Petitioners' claim on prudential ripeness grounds conflicts with that interest.

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the issue and that "[t]he decision of the arbitrator shall be final and binding on the parties." *Alleghany-Mohawk Merger Case*, 59 C.A.B. 22, 45 (1972) (LPP § 13). App. D, 109a-110a. Although the Nicolau Arbitration was not conducted pursuant to McCaskill-Bond, it was conducted pursuant to the same *Alleghany-Mohawk* Labor Protective Provisions. There is no material basis, therefore, to distinguish the ripeness of a claim to enforce the Nicolau Arbitration, here, from the ripeness of claims to enforce a McCaskill-Bond arbitration.

C. The Ninth Circuit disregarded *Clayton's* admonition that delayed adjudication of an internal union dispute must not merely exhaust an aggrieved worker.

When Congress provides a right in the context of the Railway Labor Act, it implicitly provides a remedy to enforce that right. *See Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944) ("That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction."). A remedy, in turn, would be "sacrificed or obliterated" if federal doctrine worked to exhaust aggrieved workers' resources or resolve before they could obtain meaningful relief on a meritorious claim. Where the district court has jurisdiction to provide a remedy, therefore, it should not delay such remedy on prudential grounds if that would only impair workers' ultimate remedy.

Clayton addressed delay in the context of internal union disputes. 451 U.S. at 692. It balanced the hardships of delaying adjudication of such disputes against the general institutional advantages of nonjudicial resolution. *Id*. *Clayton* admonishes federal courts to not delay adjudication of such disputes unless "internal union procedures are capable of fully resolving meritorious claims short of the judicial forum." *Id*. Delay that can only exhaust an aggrieved workers' resources or resolve is unfair and inconsistent with federal policy.

"[W]here 'the member [may] become exhausted instead of the remedies,' it would be unfair to the employee to insist that internal union remedies be exhausted before going to court." *Frandsen v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 782 F.2d 674, 679 (7th Cir. 1986) (*quoting NLRB v. Marine Workers Local 22*, 391 U.S. 418, 425 (1968)). *See also Clayton* 451 U.S. at 693, n.22 ("Of course exhaustion might deplete the employee's energy and resources to the point where he chooses not to pursue his § 301 claim in court, but that result is surely inconsistent with federal policy.").

Clayton explained that, unless delay in favor of internal union procedures can be justified, it merely undermines the policy favoring prompt adjudication:

> As we recently stated, one of the important federal policies underlying § 301, is the " 'relatively rapid disposition of labor disputes.' " This policy is undermined by an exhaustion requirement unless the internal procedures are capable of either reactivating the employee's grievance or of redressing it.

Id. at 693 (citations omitted).

Given that USAPA is constitutionally committed to a date-of-hire seniority list, delay of adjudication by the district court cannot possibly lead to extra-judicial resolution in Petitioners' favor. No matter how meritorious their claim might be, Petitioners will never obtain relief from USAPA. Nothing positive can be gained, therefore,

by delaying adjudication of Petitioners' claim—as directed by the Ninth Circuit—until after "negotiations are complete." App. A, 17a. This delay can do nothing other than exhaust Petitioners' resources and resolve. The dismissal ordered by the Ninth Circuit, therefore, is contrary to federal policy recognized by this Court. Indeed, it sets a bad precedent that will likely encourage similar mischief in future airline mergers.

II. THE NINTH CIRCUIT MISAPPLIED PRUDENTIAL RIPENESS.

A. The duty of fair representation applies at all stages of union representation.

"The duty of fair representation 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. NLRB*, 564 F.2d 834, 839-40 (9th Cir. 1977). "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft." *Steele*, 323 U.S. at 204. As well as in enforcing contract terms, "[a] union must discharge its duty . . . in bargaining with the employer." *Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry*, 494 U.S. 558, 563 (1990). It logically follows, therefore, that a union can breach the duty of fair representation at all stages of representation, including while it is bargaining with the employer over contract terms.

B. This matter is ripe because the hardships of postponing adjudication are great and there are no corresponding benefits.

Ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993). Prudential ripeness "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Prudential ripeness is lacking where a "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).

A court determining prudential ripeness weighs the hardships of postponing adjudication only where there are "institutional interests that militate in favor of deferral of review." *Consol. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 824 F.2d 1071, 1088-89 (D.C. Cir. 1987) (Edwards, C.J., concurring). If there is no benefit to delaying review, if no institutional interest militates in favor of deferral of review, there is no reason to weigh hardship. There is no such benefit where, as here, there is no internal union procedure to fairly resolve a dispute over seniority.

Prudential ripeness must not be used to deny a person any forum to resolve an important federal

question. Federal courts, for example, apply the closely related abstention doctrines only where an alternative forum exists that can resolve the dispute. *See*, *e.g.*, *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976) (recognizing considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation"). Where an alternative forum could provide comprehensive relief, this Court often requires exhaustion of that forum as a prerequisite to ripeness. *E.g.*, *Panetti v. Quarterman,* 551 U.S. 930 (2007) (state habeas); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (state takings).

The question of prudential ripeness, therefore, largely hinges on whether an alternative forum could provide a comprehensive disposition of the legal questions at issue. The answer to the ripeness inquiry, therefore, may depend on how the question at issue is framed. Hence, a court addressing ripeness must focus on "the precise legal question to be answered." *Yahoo! v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1212 (9th Cir. 2006), relying on *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952).

The precise legal question to be answered here is whether USAPA is breaching its duty of fair representation by refusing to support the Nicolau Award and by adopting and promoting the East Pilots' date-of-hire seniority scheme. Under the Railway Labor Act, only the district court can resolve this issue. *Czosek v. O'Mara*, 397 U.S. 25,

27-28 (1970) ("[A] suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts."). In other words, there is no alternative forum that might resolve Petitioners' claim if it were dismissed for lack of ripeness. No institutional interest, therefore, militates in favor of postponing adjudication.

Not only does no institutional interest militate in favor of postponing adjudication, but substantial hardships strongly militate against such delay. The Ninth Circuit correctly noted that "considerable time, effort, and expense have been devoted to the merits of Plaintiffs' [duty of fair representation] claim before both this Court and the district court." App. A, 9a. Wasting that time, effort and expense is surely a burdensome hardship. This must be considered and given substantial weight. On balance, therefore, this action is ripe.

CONCLUSION

This petition for a writ of *certiorari* should be granted so that the Court can address the ripeness of claims to enforce arbitrated integrations of seniority lists.

Respectfully submitted,

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