No. 18-579

In the Supreme Court of the United States

ALASKA AIRLINES, INC.,

Petitioner,

v.

JUDY SCHURKE, in her official capacity as Director of the State of Washington Department of Labor and Industries; ELIZABETH SMITH, in her official capacity as Employment Standards Program Manager of the State of Washington Department of Labor and Industries,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents ground their opposition to certiorari on the premise that the Ninth Circuit majority opinion involves a routine application of the principle that federal law "does not preempt states from imposing different minimum labor standards." WA BIO 2. As respondents see it, Judge Ikuta and the four other judges who dissented from the Ninth Circuit's 6-5 en banc ruling were completely off base in concluding that the majority's decision imposes an "unprecedented constraint" that "is directly contrary to decades of the Supreme Court's preemption decisions and impairs or extinguishes RLA preemption." Pet. App. 39a (dissent). And the amici airlines, railroads, and businesses have no reason to believe that that the majority's decision will gut the RLA's mandatory arbitral mechanism, causing "immediate disruption" to affected industries and commerce. Amicus Br. for Association of American Railroads and Chamber of Commerce (AAR Br.) 4; *see* Br. for Airlines for America (A4A Br.) 2-4. In short, nothing to see here, say respondents.

But they are wrong. The Ninth Circuit's fractured en banc decision in this case establishes a blue print for circumventing the federal arbitral mechanism—just as the Ninth Circuit dissenters stressed. And once respondents' reinterpretation of the Ninth Circuit's decision is stripped of its sheep's clothing, it is clear that the Ninth Circuit's decision really *does* conflict with the decisions of this Court and other circuits and, if allowed to stand, really *would* have serious adverse consequences for airlines and railroads—not to mention all businesses subject to Section 301 of the LMRA. Indeed, respondents do not

even attempt to defend the Ninth Circuit's decision on its own terms. Taking the Ninth Circuit's decision on those terms, it is clear that certiorari is warranted.

A. Respondents Ground Their Effort To Avoid Certiorari On Recasting The Ninth Circuit's Decision

Recognizing that the Ninth Circuit's holding is indefensible on its own terms, respondents seek to recast it. That attempt fails for multiple reasons.

1. The majority opinion overhauls the RLA preemption analysis

Ultimately, the question in this case is whether a federal court can resolve a disputed threshold issue of state law when resolution of that issue is necessary to determine whether a state law claim will require interpretation of a collective bargaining agreement (CBA). Splitting 6-5, the Ninth Circuit held that it cannot. Instead, when a plaintiff *pleads* their claim in such a way that they "can prevail" without interpretation of a CBA, the dispute must be resolved in state court—rather than before an arbitral panel—even if the plaintiff's theory of state law is wrong, and the claim *in fact* will require interpretation of a CBA. Pet. App. 32a; *id.* at 71a-74a (dissent).

The facts of this case underscore the sweeping nature of the Ninth Circuit's rule. If petitioner's interpretation of the Washington Family Care Act (WFCA) is correct, then "resolution" of Masserant's claim necessarily *will* involve "interpretation" of a CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213-14, 220 (1985). That is because, under petitioner's reading of the statute, the WFCA permits a flight attendant to reschedule her accrued time off

for family medical leave purposes only if she "is entitled" to reschedule that time off *under the terms of her CBA*. Indeed, the WFCA is explicitly framed in terms of what an employee is "entitled to" "under the terms of a [CBA]" and provides that an employee taking leave "must comply with the terms of the [CBA]." Wash. Rev. Code § 49.12.270(1).

Respondents dispute that reading of the WFCA. In their view, the WFCA provides an "independent state [law] right" to reschedule accrued time off for family medical leave purposes—*irrespective* of the terms of the CBA. WA BIO 12. Ignoring the Act's explicit references to the "terms of a [CBA]," the State says that "entitled to" should be interpreted "to include vacation leave that has been earned and placed in an employee's leave bank, regardless of whether the vacation leave has been scheduled for a certain date." *Id.* at 13; *see* Pet. App. 50a-53a (dissent) (State's evolving interpretation).

The Ninth Circuit held that it was powerless to decide which interpretation of state law was correct in determining whether the plaintiff's claim was preempted. Instead, whenever a plaintiff *pleads* their claim in such a way that the necessity of CBA interpretation itself turns on a threshold question of state law, the dispute is automatically committed to state court. *Id.* at 22a-23a. Under the majority's decision, the "plaintiff's pleading" is the beginning and the end of the preemption analysis, no matter how implausible the pleaded claim may be under state law. *Id.* at 22a; *see id.* at 33a (criticizing dissent

because it would have decided whether "Masserant's interpretation of state law is invalid").[1]

As the dissent explained, the majority's approach provides a roadmap for plaintiffs to "sidestep the RLA's mandatory arbitral mechanism" through "clever pleading" and "is contrary to Supreme Court precedent and common sense." *Id.* at 71a-72a.

2. Respondents' attempt to recast the majority opinion is implausible

Rather than defend that holding, the State and Union attempt to downplay and recast the majority's opinion, so that it is barely recognizable from the ruling that the Ninth Circuit actually issued.

First, the State argues (at 8-9) that the Ninth Circuit "found that [Masserant's state law] claim was based on a statutory right independent of the CBA." But the Ninth Circuit "found" no such thing; rather, that is the State's *own characterization* of the WFCA—a characterization petitioner vigorously disputes. In petitioner's view, the entitlement conferred by the WFCA is explicitly limited by "the terms of a [CBA]," which an employee "must comply with." Wash. Rev. Code § 49.12.270(1*); see* Pet. App. 49a-50a, 55a (dissent); *id.* at 96a-97a. The Ninth Circuit neither accepted nor rejected that position—instead, it held it was required to adopt Masserant's theory of state law *as pleaded*. Pet. App. 22a-24a. Indeed, the majority noted numerous times that it was *not* deciding any question of state law. *Id.* at 23a, 29a-31a, 33a-35a. The State's attempt to recast the

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[1] Even one member of the majority seemed to recognize that the State's interpretation of the WFCA is plainly incorrect. *See* CA9 Oral Argument at 32:48 (Judge Hurwitz).

Ninth Circuit's decision as in fact adopting its preferred statutory construction on the merits is simply baseless.

Second, the State claims that the majority did not "simply accept an assertion in a pleading," but rather actually "looked at 'the legal character of a *claim*,' as this Court has instructed." WA BIO 12 (quoting *Livadas v. Bradshaw,* 512 U.S. 107, 123 (1994)). But the majority made clear that, in its view, "the plaintiff's pleading" controls the preemption analysis. Pet. App. 22a; *see id.* at 24a ("Our only job is to decide whether, *as pleaded,* the claim" is independent of the CBA. (emphasis added)). That is the central holding of the case. The majority never examined the "legal character" of the claim by analyzing it under state law; instead, it held that the preemption analysis is confined to the claim *as pleaded* by the plaintiff. *Id.* at 29a (citation omitted); *see id.* at 71a-74a (dissent).

Third, the State denies (at 20) that the majority held that a court "lacked 'jurisdiction' or 'authority' to examine state law in its preemption analysis." But, as the dissent explained (Pet. App. 58a-59a), the majority explicitly framed—and justified—its rule in "jurisdiction[al]" terms. *See id.* at 24a n.17, 32a-33a. And the crux of the majority's analysis was its belief that it lacked the authority to decide whether the State's construction of state law was correct (or even plausible) in deciding whether the underlying grievance was subject to mandatory arbitration.[2]

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[2] The majority's position that it lacked the authority to construe state law is fundamentally at odds with the *Erie* doctrine. A4A Br. 12. The State suggests that the majority was simply referring to its lack of jurisdiction "to adjudicate the underlying claim." WA BIO 20. But the only question presented

Finally, respondents argue that the majority's entire preemption analysis boils down to the State and Union purportedly conceding that Masserant would lose under the terms of the CBA, and that as a result no CBA interpretation would be required. *See* WA BIO 13; Union BIO 3-4. This argument fails too. The majority never states that the State or Union conceded that issue. In a footnote (Pet. App. 32a n.22), it states that "the Union disavowed any interest in labor arbitration on Masserant's behalf over the possibility of a CBA-created right to reschedule accrued vacation leave," but that is a far cry from conceding that petitioner's interpretation of the CBA is correct. And, in fact, the Union has *contested* that interpretation in other proceedings. *See id.* at 31a.[3]

More broadly, it stretches credulity to think that Judge Berzon's 30-page opinion—which drew a stinging 20-page dissent from Judge Ikuta—turned on a case-specific concession. Moreover, the majority doubled down on its insistence that substantive review of state law is inappropriate by stating that "[t]he dissent's approach would be just as objectionable" whichever way "its state law analysis [had] come out," because "[e]ither way, th[e] court would be deciding a state law issue not properly before it." *Id.* at 34a n.25. It is, of course, a familiar

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by this case is whether resolution of that claim is *preempted* because it will require interpretation of the CBA. The majority's view that "courts may not consider state law" in the preemption inquiry is "entirely meritless." Pet. App. 71a (dissent).

[3] At oral argument, the State admitted that it had no authority to concede this issue on Masserant's behalf. CA9 Oral Argument at 33:32. And when pushed, the Union refused to concede that Masserant was *not* entitled to use her scheduled leave here under the terms of the CBA. *Id.* at 1:03:45.

refrain from a party opposing certiorari that the decision below adopts no broad rule or turns on some case-specific waiver or concession. But that assertion is utterly unpersuasive for the decision here.

And there is another problem: the State and Union simply lack authority to concede the issue on Masserant's behalf in this case even if they had *tried* to do so. *Id.* at 56a (dissent). As Judge Ikuta explained, Masserant (who is not a party to this case) herself "did *not* concede that she had no . . . right [to reschedule time off] under the CBA." *Id.* (emphasis added). To the contrary, she has argued that she was entitled to reschedule her leave under the CBA. ER956 (letter from Masserant to State, stating that petitioner's position on leave "violates the [CBA]"). If told that her construction of the WFCA was meritless, Masserant would surely argue in state court that she is entitled to reschedule her leave under the CBA, and a state court would then have to interpret the CBA—which is precisely why her claim is preempted.

In short, respondents' attempt to explain the Ninth Circuit's en banc decision away based on some case-specific concession about the CBA is just as baseless as their attempts to run away from the meat of the Ninth Circuit's preemption analysis.

B. Respondents Offer Essentially No Defense For Why The Ninth Circuit's Actual Decision Does Not Warrant Review

Taking the Ninth Circuit's decision on its own terms, it is clear that certiorari is warranted.

1. The conflict is real

The Ninth Circuit's holding breaks from the established RLA preemption analysis in virtually

every other circuit. Pet. 15-21. The State's *entire* basis for denying that circuit conflict is that the Ninth Circuit's holding rested on the ground that "there was no relevant dispute about the CBA's meaning." WA BIO 25; *see id.* at 21 ("In each case cited by Alaska Airlines, the state-law claim was preempted because resolution of the dispute required CBA interpretation, *which is not the case here*." (emphasis added)). But as discussed, the State's premise is wrong.

Once that premise is correct, the State has *no answer* to the circuit conflict. For example, as the State acknowledges (at 22), "the plaintiffs" in the Seventh Circuit case, *Tifft*, "alleged that the defendant's conduct violated state law without reference to any CBA." To decide the federal preemption issue, the Seventh Circuit thus undertook an independent examination of Illinois law and "disagree[d]" with plaintiff's interpretation. *Tifft v. Commonwealth Edison Co.*, 366 F.3d 513, 517 (7th Cir. 2004). Yet, despite the identical circumstances—a plaintiff who alleged that she "can prevail" without regard to a CBA "if state law means what [*she* says] it means," Pet. App. 32a—the Ninth Circuit *refused* to undertake any independent review of Washington law and, instead, categorically held that it was bound by "the plaintiff's pleading." *Id.* at 22a.

The same goes for the Fourth Circuit's decision in *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 101 (4th Cir. 2014), and the First Circuit's decision in *Rueli v. Baystate Health, Inc.,* 835 F.3d 53, 58 (1st Cir. 2016). Those courts likewise adopted an approach that requires a federal court to resolve *contested threshold* questions of state law between the parties, if doing so is necessary to determine whether "'resolution' of [a plaintiff's] claim 'arguably hinges

upon an interpretation of the collective bargaining agreement.'" *Rueli,* 835 F.3d at 58 (citation omitted). Once again, respondents point (at 25) to only a *single* supposed distinction: that—in their view—the interpretation of the CBA here purportedly was not disputed. And, once again, they are incorrect.

The State's attempt to distinguish away *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990), and *Lueck*, 471 U.S. at 219-20, fails for the same reason. Respondents assert that this Court only assessed in those cases "whether the plaintiffs' state-law claims were sufficiently 'independent of the collective-bargaining agreement' to avoid preemption." WA BIO 18 (citation omitted). But in both cases, understanding whether or not a state law claim was "independent" of a CBA required this Court to interpret the boundaries of state law—and the Court did so. The State charges that doing so involved a purely "federal question." *Id.* But that is precisely the point. Here, the Ninth Circuit *refused* to interpret state law, even though—as in *Rawson* and *Lueck*—doing so was an essential predicate to answering the purely federal question in this case.

2. The importance of the question presented is undenied

Respondents do not deny the critical importance of the RLA's mandatory arbitral mechanism for resolving minor disputes "growing out of . . . the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. § 153(i)— just like the routine grievance out of which this case grew. *See* Pet. App. 42a-43a, 49a & n.7 (dissent). Nor do they dispute the far-reaching consequences of CBAs having "different and

potentially inconsistent interpretations in different jurisdictions." *Livadas*, 512 U.S. at 122. Instead, they revert to their mantra that no divergent interpretation is possible here. WA BIO 30.

But as discussed, a divergent CBA interpretation is in fact likely *in this very case*. If this case returns to state court, Masserant can—and likely will—assert that the CBA should be construed to "entitle" her to reschedule her vacation. In order to resolve the state law claim before it, the state court will necessarily have to interpret the terms of the CBA—and that interpretation may well diverge from settled arbitral interpretation. *See* Pet. App. 55a-56a (dissent). And, if Masserant's claims are not preempted, then employees in California, Oregon, and elsewhere can plead minor disputes *out of* federal arbitration, too.

As this Court has explained, even "[t]he *possibility* that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (emphasis added). That "possibility" undeniably now exists across the Ninth Circuit—which alone warrants this Court's review.

The frequency with which *Schurke* has been cited in both federal and state court in just the past few months underscores the general importance of the case as well. The case has already been cited 17 times in federal court, and petitioner alone has been subject to two state court actions in which *Schurke* was invoked to retain jurisdiction over a claim that may involve interpretation of a CBA. *See* Order, *Engelien v. Alaska Airlines, Inc.*, No. 18-2-27481-8 SEA (Wash.

Super. Ct. Mar. 7, 2019); Minute Order, *Gunther v. Alaska Air Group Inc.*, No. 37-2017-00037849-CU-OE-NC (Cal. Super. Ct. Feb. 25, 2019).

3. This case is an excellent vehicle

The State half-heartedly suggests (at 33-34) that this case represents a "poor vehicle" because the employer initiated this action in federal court. But it fails to explain why that distinction matters; like any case involving RLA preemption, the underlying claim involves "an employee suing their . . . employer." *Id.* at 34. The fact that the preemption issue arises in a declaratory judgment action is entirely immaterial to the Ninth Circuit's decision and in no way limits its precedential effects—as is underscored by the federal and state courts applying *Schurke* in its wake. *Supra* at 10. Furthermore, as the Ninth Circuit found, respondents waived any "procedural objection" to the court's review. Pet. App. 24a n.17. This case, in short, is an excellent vehicle. Pet. 31.

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The Ninth Circuit's en banc decision in this case creates a road map for circumventing labor arbitration in the thousands of grievances filed each year in countless industries subject to collective bargaining under the RLA and Section 301 of the LMRA. Respondents deny the far-reaching implications of this case—and the circuit conflict it creates—only by reading the opinion in a manner that *neither* the majority nor dissent would recognize. The disruptive consequences of the Ninth Circuit's holding are plain to see and cannot be left to stand. This Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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