NO. 13-35574

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA AIRLINES, INC.,
Plaintiff-Appellant,
v.
JUDY SCHURKE et al.,
Defendants-Appellees
And
ASSOCIATION OF FLIGHT ATTENDANTS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO,
Intervenor Defendant-Appellee.

On Appeal from the United States District Court
For the Western District of Washington
No. 2:11-cv-00616 JLR
The Honorable James L. Robart

PETITION FOR REHEARING EN BANC BY APPELLEE ASSOCIATION OF FLIGHT ATTENDANTS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO

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REQUEST FOR *EN BANC* REVIEW

The Association of Flight Attendants-Communication Workers of America ("AFA"), requests *en banc* review of the panel decision, *Alaska Airlines Inc. v. Schurke*, 846 F.3d 1081, 1083 (9th Cir. 2017), because the panel decision conflicts with decisions of the United States Supreme Court and with decisions of this Court, and consideration by the full court is therefore necessary to secure and maintain uniformity of the courts' decisions. Fed. R. App. P. 35(a). The AFA also seeks review of the panel decision because it raises a question of exceptional importance, because the panel decision conflicts with the authoritative decisions of the United States Supreme Court that have addressed the issue and substantially affects the application of federal labor law preemption of legislative acts of the states within the union. Fed. R. App. P. 35(b); Circuit Rule 35-1.

STATEMENT OF THE CASE

In 1988, the Washington Legislature enacted the Washington Family Care Act ("WFCA") as a minimum standard of employment in response to the changing nature of the workforce and the competing demands on families brought about by increasing numbers of working mothers, single-

parent households, and dual-career families.[1] In 2002, the Legislature amended the WFCA to require employers to allow employees to use their choice of "other paid time off," in addition to sick leave, to care for sick family members. 2002 Wash. Sess. Laws 1160 (ch. 243, § 1), codified at Wash. Rev. Code § 49.12.270. Thus, although the WFCA does not require employers to provide paid leave, where an employee is entitled to paid leave for an employee's own use under an employer policy or collective bargaining agreement, the WFCA mandates that the employee may use her choice of that leave to care for an eligible family member. *Honeycutt v. State, Dep't of Labor & Indus.*, 2017 WL 398687, at *1, *3 (Wash. Ct. App. Jan. 30, 2017).

It is undisputed that on December 31, 2010, pursuant to the CBA between AFA and Alaska Airlines, Inc. ("Alaska"), Laura Masserant, a flight attendant employed by Alaska and represented by AFA, received a vacation time allotment of 32 days which was banked for her use beginning on January 1, 2011. Excerpts of Record ("ER") 1129; Supplemental

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[1] *See* Notes of Legislative Findings Wash. Rev. Code § 49.12.270, which state: "In order to promote family stability, economic security, and the public interest, the legislature hereby establishes a ***minimum standard*** for family care. Nothing contained in this act shall prohibit any employer from establishing family care standards more generous than the minimum standards set forth in this act." [1988 c 236 § 1.] (emphasis added).

Excerpts of Record ("SER") 40, 376 (as of "January 1 of any given year," "[t]he entire bank of vacation becomes available to the flight attendant."); ER 614, 619; SER 46. It is undisputed that these 32 days were reflected in her leave bank as of January 1, 2011. SER 46.

In May 2011, Masserant requested use of two days of her remaining seven days' banked vacation leave to care for a sick child. SER 171 ("[C]an I use my vacation as stated in the Wa Family [Care] Act?"); SER 184; ER 615 ¶ 19; SER 58, 159. Alaska denied her the use of those two days of vacation leave because she had pre-scheduled those days for use in December 2011 pursuant to a bidding process under the CBA, and because Alaska interpreted the CBA and its past practice under the CBA to preclude use of pre-scheduled vacation days on days other than those pre-scheduled. SER 46, 376; ER 614 ¶ 24, 615, 619. This interpretation is not based on specific language in the CBA, but upon the absence of language allowing for the use of vacation days for WFCA purposes, and upon Alaska's interpretation of past practice. SER 7, 131; Dkt. # 8-1, Alaska Opening Brief at 14-15. The AFA does not dispute this practice. ER 39, n.3.

Because Masserant was not able to use vacation leave for the two-day absence, Alaska assessed disciplinary points under its attendance policy. ER 616.

On June 21, 2011, Masserant filed a complaint with the Washington State Department of Labor and Industries ("L&I"), because Alaska did not allow her to use her banked vacation leave to take care of a sick child. SER 79. L&I investigated and issued a Notice of Infraction because of Alaska's denial of the use of Masserant's banked vacation time for her absence due to her child's illness. ER 622, 947, 949-52; SER 200-201, 205-208, 312-13.

The parties stayed the administrative proceedings to allow this suit brought by Alaska to enjoin the administrative proceedings to reach conclusion before those proceedings resume. ER 628-629, 1041-105. The AFA intervened in this action in order to defend its members' right to seek enforcement of the WFCA using L&I procedures. ER 1040. The district court denied Alaska's motion for summary judgment and granted the motions of AFA and L&I, ER 1, 2, 35-54. Following Alaska's appeal, a panel of this Court issued a divided decision on January 25, 2017. *Alaska Airlines Inc. v. Schurke*, 846 F.3d 1081 (9th Cir. 2017). The majority opinion held that the minor dispute mechanisms of the Railway Labor Act preempted Masserant's WFCA complaint because she could have filed a grievance over the same events, and because the majority held that her WFCA claim was not "logically independent" from the CBA. *Schurke*, 846 F.3d at 1093.

The dissent held that Masserant's claim arose under state law and not the CBA, that the WFCA set a minimum labor standard that could not be waived by the CBA, and that Masserant's WFCA claim was not preempted because it arose under state law, not from the CBA, and was not substantially dependent on the CBA. *Schurke*, 846 F.3d at 1094-1099.

ARGUMENT

A. The Majority Opinion Is Irreconcilably Contrary To Longstanding Controlling Precedent That Recognizes State Authority To Enact Employment Standards Applicable To Conditions Also Governed By CBAs.

The majority opinion's analysis is irreconcilable with United States Supreme Court precedent and this Court's decisions regarding federal labor law preemption. The analysis utilized ignores the Supreme Court's teaching that "[p]re-emption of employment standards 'within the traditional police power of the State' 'should not be lightly inferred.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 114 S. Ct. 2239, 2243, 129 L. Ed. 2d 203 (1994) (quoting *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21, 107 S. Ct. 2211, 2222, 96 L. Ed. 2d 1 (1987)). Significantly, the minor-dispute provisions of the RLA pertain only to disputes invoking contract-based rights so that the system boards of adjustment jurisdiction does not extend to enforcement of state statutes. *Id.* at 254. Federal labor law preemption thus

extends only to preclude state adjudication contractual disputes, not all disputes concerning working conditions in unionized workplaces.

Instead of recognizing the boundaries of labor preemption, the majority opinion described as “broad” the preemptive effect of the RLA, which it stated was “to provide for settlement of ‘all’ disputes about ‘pay, rules or working conditions,’ and ‘all’ disputes growing out of interpretation or application of agreements about ‘pay, rules, or working conditions.’” *Schurke*, 846 F.3d at 1087 (quoting 21 45 U.S.C. § 151a(4)–(5)).

The majority acknowledged “an exception to this broad preemption, though, for independent state rights…such as when the state right does not concern ‘pay, rules or working conditions.’” *Id.* However, the majority relied on dictum taken out of context to state that because the CBA contained a provision that could have been the premise for a contract grievance on the same facts as Masserant’s WFCA claim, the claim was preempted. The majority noted that Masserant could have brought “a grievance under the collective bargaining agreement,” 846 F.3d at 1086, and because of that, the majority stated that the outcome of the preemption question was governed by a dictum in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985), 846 F.3d at 1087 (“The

question in this case is the one answered by this dictum, though it is merely dictum"). The *Lueck* dictum, the majority stated,

> speaks directly to the case before us. *Lueck* says that "[c]laims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court" were they not deemed preempted.[] …. The question in this case is the one answered by this dictum, though it is merely dictum, because Masserant's claim is precisely that her vacation leave ought to be deemed available in May rather than December, because of state law affecting use of leave.

Id. (*quoting Lueck*, 417 U.S. at 219-220, 105 S. Ct. 1914-1915) (footnotes omitted). This discussion in *Lueck* concerned a tort claim that was entirely derivative of a CBA provision, not, as here, a legislatively enacted state minimum standard of employment. *Id.*

More importantly here, this conclusion is irreconcilable with *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 408, 410, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988), and its progeny, which all hold that the mere existence of a right under the CBA on the same set of facts does not extinguish the state law cause of action, or "that such parallelism renders the state-law analysis dependent upon the contractual analysis." Indeed, the Court observed that states had long regulated the workplace and that the RLA did not preempt state statutes regulating the same factual context because "pre-emption merely ensures that federal law will be the basis for

interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Hawaiian Airlines, Inc.*, 512 U.S. at 256–57 (citing *Terminal Railroad Assn. of St. Louis v. Trainmen*, 318 U.S. 1, 6-7, 63 S. Ct. 420, 423, 87 L. Ed. 571 (1943) (Although the Court assumed that a railroad adjustment board would have jurisdiction under the RLA over the same factual dispute, the state law was enforceable nonetheless.) This longstanding principle was most recently reiterated by this Court in *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1033 (9th Cir. 2016) ("a court must focus its inquiry on "the *legal* character of a claim, as 'independent' of rights under the collective-bargaining agreement [ ] and not whether a grievance arising from 'precisely the same set of facts' could be pursued.") (quoting *Livadas*, 512 U.S. at 123, 114 S. Ct. 2068 (emphasis added) (internal citation omitted)).

The dissent here correctly followed this precedent, in stating that to "determine whether a particular right inheres in state law," courts "consider 'the *legal* character of [the] claim, as independent of rights under the collective-bargaining agreement [and] not whether a grievance arising from precisely the same set of facts could be pursued.'" *Schurke*, 846 F.3d at 1096 (Christen, J., dissenting) (quoting *Burnside v. Kiewit Pac. Corp.*, 491 F.3d

1053, 1060 (9th Cir. 2007) (quoting *Livadas,* 512 U.S. at 123, 114 S. Ct. 2068 (emphasis added) (internal citations omitted) (quoting *Lueck,* 471 U.S. at 213, 105 S. Ct. 1904, and *Lingle,* 486 U.S. at 410, 108 S. Ct. 1877, respectively)).

B. The Majority's Analysis Is Irreconcilably Inconsistent With Longstanding Supreme Court Precedent And With This Court's Preemption Jurisprudence Concerning The Origin Of The Right At Issue, And Whether The Right May Be Adjudicated Without Interfering With Federal Jurisprudence Concerning CBAs.

After a discussion of the historical development of federal labor law preemption, the majority applied a "three-step decision tree" to the question of whether independent state right "exception to preemption" applied:

> [The] court must consider: (1) whether the CBA contains provisions that govern the actions giving rise to a state claim, and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and (3) whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract. A state law will be preempted only if the answer to the first question is "yes," and the answer to either the second or third is "no."

Schurke, 846 F.3d at 1090 (quoting *Miller v. AT & T Network Sys.*, 850 F.2d 543, 548 (9th Cir. 1988) (footnote omitted). This test, although similar, was not identical to the test applied in this Court's other labor law preemption decisions, and the majority deviated from those decisions in irreconcilable ways in applying its test.

The test used in other decisions in this Circuit is the *Burnside* test, in which the Court first inquires whether the asserted cause of action involves a right conferred on the employee by virtue of state law or by the terms of a CBA. *Schurke*, 846 F.3d at 1095 (Christen, J., dissenting), *citing Burnside*, 491 F.3d at 1059. "'If the right exists solely as a result of the CBA, then the claim is preempted, [ ] our analysis ends there,' and the claim must be resolved under the RLA's mandatory arbitral mechanisms." *Id.* "Even if the asserted right does exist independently of the CBA, at step two the court must 'consider whether it is nevertheless "substantially dependent on analysis of a collective-bargaining agreement."'" *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)). Claims that are substantially dependent on an analysis of a CBA are also preempted. *Schurke*, 846 F.3d 1081, 1095 (Christen, J., dissenting) (citing *Burnside*, 491 F.3d at 1060).

1. The majority's analysis of whether the right to use the already banked leave was independent of the CBA erroneously reasoned that any reference to a right in a CBA in enforcing the state right resulted in preemption. This analysis is irreconcilable with precedent and this Court's other decisions.

The majority recognized that as an undisputed fact Masserant's leave bank included seven days at the time she sought to use two of those days under the WFCA. The majority recognized that there was no dispute that the

practice under the CBA was to forbid use of pre-scheduled vacation for WFCA purposes. The majority knew that Masserant's claim was "that under the Washington statute, she was entitled to use her pre-scheduled vacation leave in May rather than in December, because of her child's illness." *Id.* The majority opinion further acknowledged that as a matter of state law, use of WFCA cannot be constrained by "any [policy or contractual] terms relating to the choice of leave." 846 F.3d at 1083.

Although the majority acknowledged the State created a distinct right to use banked paid leave for care for a sick family member, it held that because the existence of banked leave was derived from a CBA, the independent state right was preempted. The majority opinion found the "most important fact about this case is the circularity between the Washington statute and the collective bargaining agreement" because the "entitlement to leave (as opposed to what the leave may be used for) [is] dependent on the collective bargaining agreement." 846 F.3d at 1085–86.

In determining whether the right Massarant was asserting in the state forum was independent of the CBA, the majority applied several doctrinal rules that are irreconcilable with Supreme Court precedent and this Court's other decisions.

First, the majority misapplied *Burnside*:

> Under the three part test, "if the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there." [] Since the statute creates no right to any kind of paid leave, and conditions its expansion of rights upon an employee entitlement under the collective bargaining agreement, "the analysis ends there." The right to leave in this case is "substantially dependent on analysis of a collective-bargaining agreement." []Therefore it is preempted.

846 F.3d at 1092 (quoting *Burnside*, 491 F.3d at 1059) (footnotes omitted). The majority flipped the "solely" test and erroneously reasoned as if the test were that the right she asserted had to arise solely out of the statute (rather than solely out of the CBA), without any reference at all to the CBA:

> She has to show an entitlement to leave under the collective bargaining agreement to use her leave to care for her sick child, according to the statute. Thus whatever right Masserant has cannot, by the terms of the statute, arise "solely" out of the statute.

846 F.3d at 1093. The majority concluded that "[p]reemption applies because the right to take paid leave arises solely from the collective bargaining agreement. This statute only applies if the employee has a right conferred by the collective bargaining agreement, so the state right is intertwined with, and not independent of the collective bargaining agreement. 846 F.3d at 1093.

This holding that the mere reference to a precursor fact that resulted from application of the CBA rules results in preemption is not reconcilable with this Court's very recent decision in *Kobold*, 832 F.3d at 1040–41 (finding no preemption of state law where claims alleged disbursement of

deductions for medical insurance required by CBA were made late in violation of state law, and no preemption of violation of state-imposed fiduciary obligations regarding the deductions that were authorized by the CBA). Nor is the majority's reasoning reconcilable with *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1109 (9th Cir. 2000), in which this Court held that although the CBA there defined discharge in a certain way, and although the plaintiff had to show discharge as a precursor to his state-law claim that his employer failed to pay his wages within 24 hours of being discharged, his state-law claim was not preempted.

2. The majority's analysis irreconcilably deviates from established precedent on whether the right is substantially dependent on the CBA.

The majority failed to acknowledge this Court's previous decisions holding that reference to a CBA term that did not require analysis of a disputed interpretation was not sufficient to require preemption. In *Kobold*, 832 F.3d at 1033, this Court explained:

> The second *Burnside* factor—whether a plaintiff's state law right is "substantially dependent on analysis of [the CBA]," *Burnside*, 491 F.3d at 1059—turns on "whether the claim can be resolved by 'look[ing] to' versus interpreting the CBA. If the latter, the claim is preempted; if the former, it is not." *Id.* at 1060 (quoting *Livadas*, 512 U.S. at 125, 114 S.Ct. 2068) (alteration in original). This court has previously "stressed that, in the context of § 301 complete preemption, the term 'interpret' is defined narrowly—it means something more than 'consider,' 'refer to,' or 'apply.' " *Balcorta v.*

> *Twentieth Century–Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000).

However, the majority rejected the "looking to" versus "interpreting" standard and instead adopted a completely new standard of "logical independence":

> The argument for Masserant seems to be that no "analysis" of the collective bargaining agreement is needed because it is plain and undisputed that she is not entitled to paid leave under it. That argument is mistaken for two reasons. First, it ignores the purpose of the distinction between "analysis" and mere "looking at." The purpose is to distinguish independent state rights from rights intertwined with the collective bargaining agreement. The purpose is not to distinguish hard from easy analysis. "Analysis," in the context of determining whether the state right is independent of the collective bargaining agreement, refers to whether the state claim cannot logically be determined independently of the provisions of the collective bargaining agreement. **If the right is not logically independent, it's not "independent," whether the analysis is intellectually challenging or not.**

846 F.3d at 1093.

Therefore, despite the majority's recognition that there was no dispute under the CBA that Masserant was in May 2011 "entitled to seven days of vacation leave," 846 F.3d at 1083, the mere fact that the CBA was the source of that entitlement required preemption because the CBA-driven entitlement was a precursor to the state-law right to use vacation at a different time than it was pre-scheduled for care for a sick child.

> The statute expressly limits the right it establishes to employees "entitled" to leave "under the terms of a collective bargaining

> agreement or employer policy." The employee "must comply" with those terms "except for any terms relating to the choice of leave." **This dependence of the state claim on the terms of the collective bargaining agreement means that the collective bargaining agreement has to be analyzed to see whether the employee is entitled to paid leave as in *Firestone*.** If the flight attendant is entitled to leave under the collective bargaining agreement, she can use it to care for her son when he is ill. If not, not. The statute directs us to the collective bargaining agreement to determine whether the employee is entitled to any leave.

846 F.3d at 1092 (emphasis added).

The conclusion that Masserant's entitlement to paid leave in May, rather than in December, could only be determined by analysis of the CBA is nonsensical on this record. As the majority acknowledged, it was undisputed that the practice under the CBA prohibited Masserant from using her paid vacation leave in May. It was furthermore undisputed that in May 2011 Masserant was "entitled" to seven days of paid leave, albeit that leave had been prescheduled. Neither of those undisputed facts, whether the result of the operation of the CBA or not, required "analysis" of the CBA.

The majority's reasoning cannot be squared with that of *Livadas*, 512 U.S. at 125, 114 S. Ct. 2068, (state-law right to prompt payment of wages not preempted because the right at issue arose out of state law and because "[b]eyond the simple need to refer to bargained-for wage rates in computing the penalty, the collective-bargaining agreement [wa]s irrelevant to the dispute") or this Court's recent decisions in *Matson v. United Parcel Serv.*,

Inc., 840 F.3d 1126, 1133 (9th Cir. 2016) and *Kobold*, 832 F.3d at 1033. As the *Matson* court explained:

> "there is no basis for scuttling the state law cause of action if any necessary CBA interpretation can in some fashion be conducted via the appropriate grievance/arbitration forum." *Kobold*, 832 F.3d at 1033. As we explained in *Kobold*, "[t]o allow such scuttling disadvantages employees covered by CBAs, as they lose state law protections because of an embedded CBA issue possibly peripheral to their core cause of action. The interest in sending substantial CBA issues through grievance/arbitration does not justify creating this disadvantage unless the interest cannot be otherwise accommodated." *Id.*

Matson, 840 F.3d at 1133. Here, of course, there is not even the need for reliance on an arbitral interpretation, because the key fact was undisputed under the CBA: at the time she sought to use two days of paid vacation, Masserant had already become entitled to vacation leave, and had seven days of paid vacation remaining in her bank. In fact, without a dispute over that matter, there would be no jurisdiction for the Board of Adjustment.

3. The majority opinion is not reconcilable with precedent that holds that state-law minimum standards may not be waived by collective bargaining.

States have historically set minimum labor standards and have protected those standards from waiver by contract in order to advance public policy. Therefore, the RLA does not "pre-empt [these] nonnegotiable rights conferred on individual employees as a matter of state law." *Livadas,* 512 U.S. at 123. *See also Lingle* 486 U.S. at 412; *Lueck*, 471 U.S. at 213 (no

RLA preemption where a statute "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract"). Here, the right asserted by Masserant is a minimum standard enacted by the Washington State Legislature, and it does not yield to renegotiation by the parties to a CBA. Notes of Legislative Findings Wash. Rev. Code § 49.12.270. Therefore, although it is undisputed that Alaska's practice under the CBA is to deny the use of pre-scheduled paid vacation leave for leave to take care of a sick child, that is not a material fact and cannot be the basis of preemption. And, even if this fact were material, which it is not, there was no analysis or interpretation of the CBA required, because there was no dispute between the parties about the practice.

CONCLUSION

Because of the foregoing delineated departures from established precedent, and to ensure uniformity in application of federal labor preemption jurisprudence to state legislation, this court should grant *en banc* review.

RESPECTFULLY SUBMITTED this 22nd day of February, 2017.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, in the matter of *Alaska Airlines v. Judy Schurke, et al.* Ninth Circuit Cause Number 13-35574, I hereby affirm that there are no known related cases pending before this Court.

DATED this 22nd day of February, 2017.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the word limit of Fed. R. App. P. 32(c)(2) and Circuit Rule 40-1, because, excluding the parts of the document exempted by Fed R. App. P. 32(f), this document contains 4082 words, which is no more than 4,200 words.

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DATED this 22nd day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2017, I caused to be electronically filed the foregoing AFA's Petition for Rehearing En Banc with the Ninth Circuit Court of Appeals using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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for the Western District of Washington
The Honorable James L. Robart
Case No. 2:11-cv-00616 JLR

ALASKA AIRLINES, INC.'S RESPONSE TO PETITIONS FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiff-appellant Alaska Airlines, Inc. hereby certifies that it is wholly owned by Alaska Air Group, Inc., and that no public company owns more than 10% of the stock of Alaska Airlines, Inc.

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I. INTRODUCTION

On January 25, 2017, a Ninth Circuit panel issued a majority decision, holding that a flight attendant's claim under the Washington Family Care Act (WFCA), RCW 49.12.265 *et seq.*, to leave to care for an ill family member derived from a collective bargaining agreement (CBA), was a "minor dispute" under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, and was resolvable only by arbitration. *Alaska Airlines Inc. v. Schurke*, 846 F.3d 1081 (9th Cir. 2017). No basis for rehearing the decision exists.

The majority's reasoning is consistent with longstanding precedent from the Ninth Circuit and the United States Supreme Court. The WFCA is an "opt-in" statute, meaning the rights extended to employees apply only if the employer, through a CBA, grants employees the right to take paid leave for themselves. Other state labor standards are "opt-out" statutes or contain no statutory expression of waiver at all. Because the rights at issue in this case arise solely out of the parties' CBA, the majority decision does not alter controlling jurisprudence regarding federal preemption of state legislative acts. Instead, the majority applied well-settled principles of federal preemption to the precise facts before it. The majority decision is not controversial in the least. Petitioners State of Washington and the Association of Flight Attendants-Communication Workers of America (AFA) have failed to establish any basis for rehearing the decision.

II. STATEMENT OF THE CASE

Alaska Airlines employs over 3,000 flight attendants nationwide. Excerpts of Record (ER) 611 ¶ 4. Alaska understands that employees have family obligations and that unexpected illness happens. ER 925. At the same time, employee attendance plays a critical role in ensuring passenger safety, Federal Aviation Administration (FAA) compliance, and timely flight departures. ER 611 ¶ 4. Indeed, without the requisite number of flight attendants, a plane cannot take off, causing significant disruptions throughout the system. *Id.* Flight attendant absences thus impact Alaska in ways unique to the airline industry.

Through extensive collective bargaining with AFA, Alaska carefully balanced family needs with safety obligations and negotiated comprehensive scheduling, leave, and attendance provisions. ER 604 ¶ 3; ER 612-13 ¶ 10; ER 674-75, 677; ER 1070 ¶ 8. The CBA (which governs all flight attendants, regardless of the state in which he or she resides) also contains complex sick leave accrual provisions and vacation bidding and scheduling procedures that govern when "[f]light attendants will be entitled to and will receive vacations with pay." ER 1129 § 14.A; *see also* ER 926; ER 934-36. Under the parties' longstanding interpretation of the CBA, a flight attendant is not "entitled" to use his or her awarded vacation at a non-scheduled time for himself or herself, other than in a

few situations not applicable here. ER 1129-34 §§ 14, 15; ER 936, 929; ER 525-26, 586.

In the fall of 2010, Masserant bid for her 2011 vacation schedule. ER 614 ¶ 16. Based on her seniority, she received 32 vacation days: four days in January, seven in February, seven in April, seven in November, and seven in December. *Id.*; ER 619. Masserant took her four days of scheduled vacation in January and "cashed out" her February, April, and November vacation time, leaving only the seven days scheduled for December. ER 615 ¶ 18.

In May 2011, Masserant requested the use of two of her remaining seven days of vacation to care for her sick child. Alaska declined her request because she was not entitled to use her pre-bid December vacation time for her own use in May. ER 615 ¶ 19; ER 619; ER 1129 § 14.A; ER 929, 935. Masserant filed a Personal Leave Complaint with the Department of Labor and Industries (L&I) in June 2011, alleging that Alaska violated the WFCA. ER 792-806; ER 1140, 1142 §§ 19.B & 20.C; ER 612 ¶ 8. On May 31, 2012, L&I issued a Notice of Infraction regarding Masserant's claim, finding Alaska violated the WFCA because L&I "determined that Ms. Masserant was entitled to seven days of vacation" in December. ER 622.

The administrative proceedings have been stayed pending the outcome in this suit brought by Alaska, with AFA as intervenor. On January 25, 2017, this

Court issued a panel decision, holding that because the WFCA creates a duty "conditioned and dependent" on a CBA, Masserant's claim arose from the Alaska CBA. Therefore, Masserant had to resort to the grievance and arbitration procedures mandated by the RLA. *Schurke*, 846 F.3d at 1993-94.

III. ANALYSIS

A. Standard for Granting Petition for Rehearing En Banc

A petition for rehearing en banc may be granted to secure or maintain uniformity of the court's decisions or because the proceeding involves a question of exceptional importance. FRAP 35(a). Petitioners satisfy neither standard.

B. RLA Preemption Principles

Congress enacted the RLA "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines Inc. v. Norris*, 512 U.S. 246, 252 (1994); *see also* 45 U.S.C. § 151a. To realize this goal, Congress mandated that management and labor rely solely and exclusively on System Boards of Adjustment (SBAs) to arbitrate "minor" disputes, *i.e.*, those that involve "duties and rights created or defined by the CBA," *Norris,* 512 U.S. at 258, and "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Id.* at 253 (citing *Trainmen v. Chicago R&I Ry. Co.*, 353 U.S. 30, 33 (1957)); *see also Bhd. of Loc. Eng'g v. Louisville & N. R.R.*, 373 U.S. 33, 38 (1963) ("[T]his statutory grievance procedure is a mandatory, exclusive, and comprehensive system."). If,

therefore, a flight attendant's dispute is "minor," she must submit it to binding arbitration, even if it touches on matters of state law.

Without federal preemption, different state courts could give the same terms in a multi-state CBA different meanings, disrupting labor negotiations, prolonging disputes, and substantially impeding interstate commerce. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985) (citing *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962)). Congress intended to avoid these outcomes by enacting the RLA. Indeed, "keep[ing] these so-called 'minor' disputes … out of the courts" is considered "essential" to effectuating Congress's intent. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978).

Federal courts apply a multi-part test to determine whether a dispute is "minor" and preempted by the RLA's mandatory arbitration machinery:

> [The] court must consider: (1) whether the CBA contains provisions that govern the actions giving rise to state claim, and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and (3) whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract.

Miller v. AT&T Network Sys., 850 F.2d 543, 548 (9th Cir. 1988).[1] If the answer to the first question is "yes," and the answer to either the second or third question is "no," a state law claim is preempted. *Schurke*, 846 F.3d at 1090. And because a

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[1] This Court may consider Labor Management Relations Act (LMRA) cases in determining whether RLA preemption applies. *Norris*, 512 U.S. at 263 (citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 411-12 (1988)).

"yes" to the first question and a "no" to either of the other two questions compels preemption, courts often do not address all three. *Id.*

This test, however, "establishes only a 'hazy' and indeterminate line between independent state rights and state rights inextricably intertwined with the collective bargaining agreement." *Schurke*, 846 F.3d at 1091. Because this test resists easy, mechanical application, the Supreme Court and this Court have articulated additional guideposts to aid in the determination of whether a state claim is preempted by the RLA. First, courts must consider "whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA." *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). "If the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there." *Id.* (citations omitted). This is referred to as the first *Burnside* factor.

Next, even if "the right exists independently of the CBA, [the court] must still consider whether it is nevertheless 'substantially dependent on analysis of a collective-bargaining agreement.'" *Id.* (quoting *Caterpillar Inc. v. Williams,* 482 U.S. 386, 394 (1987)); *see also Norris*, 512 U.S. at 256, 260. "If such dependence exists, then the claim is preempted." *Burnside*, 491 F.3d at 1059-60. This is referred to as the second *Burnside* factor.

On the initial question, courts "consider the legal character of a claim, as independent of rights under the collective-bargaining agreement." *Burnside*, 491 F.3d at 1060 (citing *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994)). Where a dispute involves rights that are "founded directly on rights created by [a CBA]," the dispute is not "independent" from the CBA and the claim is preempted, without reaching the second question. *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1033 (9th Cir. 2016) (citations omitted). In *Lueck*, for instance, the United States Supreme Court held that a state tort action for the bad-faith handling of an insurance claim was preempted because the insurance benefit "derived" from the CBA and would not exist but for the CBA. *Id.* at 217; *see also Burnside*, 491 F.3d at 1065 ("the only reason the plaintiff [in *Lueck*] had an insurance claim at all was because the CBA created an obligation on the part of the employer to provide the insurance benefit in question.").

On the second question, whether a state law right is "substantially dependent" on terms of a CBA, courts must determine "whether the claim can be resolved by 'look[ing] to' versus interpreting the CBA." *Kobold*, 832 F.3d at 1033; *see also Balcorta v. Twentieth Century-Fox Film. Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000). When a state claim is "inextricably intertwined" with the terms of a CBA, the claim is preempted. *Lueck*, 471 U.S. at 213. But if the court need only "look to" a CBA term whose definition or application is not disputed, no

preemption will be found under the RLA. *Id.* Preemption, however, might still exist on other grounds, such as under other RLA-related preemption theories, the Dormant Commerce Clause, or the Airline Deregulation Act, 49 U.S.C. § 1371 *et seq*.

C. The Majority Opinion Is In Lock-Step With Longstanding Precedent Under the RLA

The majority in *Schurke* did not depart from these well-settled principles of federal labor law.

Employers are not required to give workers paid holiday, vacation, sick or bereavement leave under current Washington law. But, the WFCA grants a conditional right to take paid time off for family leave if the employee is already entitled under an applicable CBA to take paid leave for himself or herself:

> (1) If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for: (a) A child of the employee with a health condition that requires treatment or supervision; or (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition. An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.

RCW 49.12.270(1).

This statute is plain and unambiguous. It neither requires employers to

provide paid sick leave or other paid time off nor creates an employee right to paid sick leave or other paid time off. The WFCA merely allows an employee whose employer provides sick leave or other paid time off to choose which type of paid leave to use for family care from among the types of paid leave the employee already "is entitled" to use for himself or herself under the terms of a collective bargaining agreement. RCW 49.12.270(1). If the CBA does not provide for sick leave or other paid time off at all, the WFCA offers no remedy for the employee. And if the CBA provides for sick leave or other paid time off but the employee is not "entitled" under the CBA to use that leave on a particular day, the WFCA does not apply to that employee.

It cannot reasonably be disputed that the underlying right and entitlement to the paid time off that Masserant requested exists only as a result of the Alaska CBA, not an independent state right. As the majority aptly observed:

> The most important fact about this case is the circularity between the Washington statute and the collective bargaining agreement. The statute makes the employee's entitlement to leave (as opposed to what the leave may be used for) dependent on the collective bargaining agreement. And the collective bargaining agreement expands use of leave to whatever the state statute says.... But entitlement to leave, under the statute, is to be defined by the collective bargaining agreement or employer practice. This dependence of the Washington statute on the collective bargaining agreement is established by its command that leave "shall be governed" by the collective bargaining agreement or employer policy.

Schurke, 846 F.3d at 1085-86. The Alaska CBA must be given preemptive effect

under the first *Burnside* factor, ending the analysis.

D. Petitioners Misstate the Law and Mischaracterize Precedent

Petitioners contend the majority misapplied several doctrinal rules to find preemption. Petitioners are mistaken. The outcomes in the various cases cited do not arise from separate preemption tests; they arise from an application of the same test to different statutory regimes, none of which are analogous to the WFCA.

1. The Majority Decision Is Consistent with *Burnside*

Petitioners claim incorrectly that the majority misapplied *Burnside*. Dkt. 51-1 at 14; Dkt. 50 at 14, 18, 20-21. *Burnside* involved an "opt-out" state right, meaning the right existed by statutory mandate until it was waived by collective bargaining. Because "a right that inheres unless it is waived exists independently of the document that would include the waiver," 491 F.3d at 1063-64, "opt-out" state rights cannot be preempted on the first step in the RLA preemption analysis (though they can still be preempted under the second step). By contrast, the WFCA is an "opt-in" statute. "Under the opt-in approach, the state-law rights can be more readily viewed as existing only if the CBA says so and as therefore dependent on the CBAs." 491 F.3d at 1064 n.11. "[I]f a right exists only because of the CBA and, as a result of the dependence can be waived or altered by agreement of the parties, then there is preemption" under the first step in the analysis. *Id.* at 1066 (citations omitted). This is precisely the case here. The

WFCA lets parties to a CBA "opt in" to its coverage, because employees may use sick leave or other paid time off for family leave purposes only if a specific contractual condition precedent exists—*i.e.*, if the particular employee is already entitled under the CBA to take paid time off from work. *Id.*; RCW 49.12.270(1), .265(5). Nothing in *Schurke* is inconsistent with *Burnside*.

2. The Majority Decision Is Consistent with *Kobold*

Petitioners next contend that because it is undisputed that the Alaska CBA prohibited Masserant from using her paid vacation leave in May, no interpretation of the CBA is required and Masserant's claim cannot be preempted under *Kobold*. Dkt. 51-1 at 16-19; Dkt. 50 at 17-21. But as *Kobold* itself demonstrates, preemption cannot be reduced to this single issue.[2]

Kobold, a consolidated appeal, involved five distinct preemption arguments, two of which were decided under the first *Burnside* factor. *Id.* at 1041 (authority to deduct funds from paychecks and apply those funds towards health insurance premiums were "purely contractual entitlements" without which the employee

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[2] Before addressing *Kobold*, it is necessary to point out a logical flaw in Petitioners' argument. The WFCA allows an employee to take paid family leave only if the employee is "entitled" to take leave for herself under circumstances that "comply with the terms of the collective bargaining agreement." RCW 49.12.270. *See also* RCW 49.70.265(5) (defining "sick leave or other paid leave" as "time allowed under the terms of … [a] collective bargaining agreement … as applicable to an employee"). If, as Petitioners concede, Masserant was not "entitled" under the CBA to take her paid vacation leave for herself in May, *see* Dkt. 51-1 at 18, she was not entitled to take paid family leave either. Nothing in the WFCA requires otherwise.

would have no basis upon which to bring a claim); *id.* at 1047 ("non-defamation claims are preempted … because they involve rights arising under her CBA."). This Court decided the three remaining claims under the second *Burnside* factor and determined that one of them was preempted. *Id.* at 1035 ("the right to receive premium pay for extra shifts worked … is substantially dependent on an analysis of the terms of the … CBA."), *id.* at 1039-41 (rejecting preemption where enforcement of statutory duties independent of the CBA did not substantially depend on an interpretation of the CBA).

Kobold applied the same multi-step analysis that the majority applied in *Schurke*. *Kobold* also demonstrates that when preemption is justified under the first *Burnside* factor, courts need not proceed to the second factor, regardless of whether "interpretation" or "analysis" of the CBA is required. For these reasons, Petitioners assert incorrectly that unless interpretation of a CBA is necessary, no preemption can be found.

Even if this Court were to analyze the second *Burnside* factor (which it need not do because this case is resolved under the first *Burnside* factor), the Court "must … determine whether the factual predicate triggering application of the relevant [state] labor law requires interpretation of the CBA. If so, the claim is preempted by the RLA." *Adames v. Exec. Airlines, Inc.*, 258 F.3d 7, 13 (1st Cir.

2001) (emphasis added) (*cited with approval in Firestone v. S. Cal. Gas. Co.,* 281 F.3d 801, 802 (9th Cir. 2000)).

Here, the Alaska CBA sets forth detailed procedures for rescheduling vacation time after the initial bid process. *See* ER 1109-16 §§ 10 (scheduling provisions); ER 1123-26 § 12 (sequence exchange provisions, permitting trading vacation days according to certain terms); ER 1130-34 § 15 (leaves of absence provisions, permitting using vacation days according to certain terms). Courts have repeatedly held that where, as here, the state labor law turns on rights provided for under a CBA, and the contract contains complex provisions governing the right at issue, the claim is preempted. *See, e.g.*, *Emswiler v. CSX Transp. Inc.*, 691 F.3d 782, 792-93 (6th Cir. 2012) (preempting disability discrimination claim); *Cavallaro v. UMass Mem. Healthcare, Inc.*, 678 F.3d 1, 7-8 (1st Cir. 2012) (preempting a claim for failure to keep accurate wage records); *Firestone v. Southern California Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000) (preempting an overtime claim); *McKinley v. Southwest Airlines Co.*, 2017 WL 676597, at * 5-6 (9th Cir. 2017) (same), *aff'd in* 2017 WL 676597 (Feb. 1, 2017); *Blackwell v. Skywest Airlines, Inc.*, 2008 WL 5103195, at *12 (S.D. Cal. Dec. 3, 2008) (preempting overtime, meal period, and rest period claims). Because Masserant's claim cannot be resolved simply by referring to the number of unused vacation days, the claim's resolution requires examining, interpreting, and applying CBA

terms (including its seniority, vacation, sick leave, absence, and attendance provisions). Only the SBA has authority to carry out these functions to resolve the parties' dispute.

3. The Majority Decision Is Consistent with *Livadas* and *Balcorta*

Petitioners wrongly contend that the majority in *Schurke* conflicts with *Livadas* and *Balcorta*. Dkt. 51-1 at 16; Dkt. 50 at 15-17. All three decisions applied the same test. The different outcomes resulted from differences in the state laws at issue, not from an expansion of the principles of RLA preemption.

Livadas involved a provision in the California Labor Code that required employers to pay all wages due an employee immediately upon discharge. 512 U.S at 110, n.3. In *Livadas*, the CBA contained no provisions detailing when an employer would pay an employee upon separation, and the employer did not suggest that the employee's statutory rights were bargained away at the negotiating table. *Id.* at 125. If either had been present, the Court might have found RLA preemption. But on those facts, the Court concluded that the claim was rooted in state law and no interpretation of CBA terms was necessary. Accordingly, the claim could not be preempted under either *Burnside* factor. *Id.* at 124-125.

This Court applied identical logic in *Balcorta*, which involved a similar state law and a similar CBA. *See* 208 F. 3d at 1104, 1111.

The *Schurke* majority is easily squared with *Livadas* and *Balcorta*. The WFCA creates no obligation to provide paid family leave at all, unless the applicable CBA provides for sick leave or other paid time off. The right to paid leave therefore arises solely as a result of a CBA and is preempted under the first *Burnside* factor. (The derivative right to choose which type of leave to credit to care for ill family members necessarily arises from the CBA as well.) Conversely, employer obligations under California Labor Code exist without a CBA. The rights at issue in *Livadas* and *Balcorta* therefore cannot be preempted under the first *Burnside* factor.

E. Whether the "Choice of Law" Provision Is a Non-Negotiable Minimum Labor Standard Is Irrelevant

Petitioners contend that the "choice of law" element in the WFCA creates a nonnegotiable minimum labor standard that is immune from preemption under the RLA. Dkt. 51-1 at 4, 19-20; Dkt. 50 10-13. But the "choice of law" provision is irrelevant. The dispute in this case has nothing to do with whether Alaska limited Masserant's choice of paid leave for use as family leave in violation of the WFCA. Instead, the dispute is whether Masserant was "entitled," under the terms of the Alaska CBA, to use her pre-scheduled December vacation for herself in May such that she was allowed to use her leave to care for a sick child in May.

And this right—whether Masserant was "entitled" to paid leave in May—is negotiable. By operation of the WFCA, "entitlement" to leave is conditioned on a

negotiable CBA and on how the CBA provisions governing paid leave and vacation scheduling are interpreted.

Petitioners are also wrong that nonnegotiable state rights are shielded from RLA preemption as a matter of law. Even nonnegotiable state rights can be preempted as minor disputes if a resolution of the dispute requires interpretation of a collective bargaining agreement. *See Lingle*, 486 U.S. at 407 n. 7 (observing that nonnegotiable state rights turning on the interpretation of a CBA are subject to federal preemption); *see also Burnside*, 491 F.3d at 1066 ("the fact of nonnegotiability is not a talisman for determining preemption"). The Supreme Court subsequently reaffirmed this principle and adopted the "*Lingle* standard" in RLA cases. *Norris*, 512 U.S. at 263 & n.9; *see also Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1081-82 (9th Cir. 2005) (quoting *Lingle*, 486 U.S. at 407 n.7). *See also Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 501 (7th Cir. 1996); *Dep't of Fair Employment & Hous. v. Verizon Cal., Inc.*, 108 Cal. App. 4th 160, 171, 133 Cal. Rptr. 2d 258 (2003); *Cornn v. United Parcel Serv., Inc.*, 2004 WL 2271585, at *1 (N.D. Cal. Oct. 5, 2004). Thus, even if the WFCA creates nonnegotiable remedies for employees entitled to sick leave or other paid time off, this feature would not shield Masserant's claim from the preemptive effect of the RLA. As explained above, the WFCA expressly predicates an employee's choice to take paid family leave on whether the employee is "entitled" to take paid leave "under

the terms of a collective bargaining agreement." RCW 49.12.270(1). The application of the WFCA to Masserant's particular circumstances necessarily turns on interpreting the Alaska CBA, and her claim would still be preempted.

F. The Majority Decision Does Not Involve a Matter of Exceptional Public Importance

The only "exceptional" aspect to this case is that the WFCA allows parties to a CBA to "opt in" to its coverage. *See Schurke*, 846 F.3d at 1085-86. Because the WFCA is fundamentally different from the state protections at issue in *Burnside*, *Kobold*, *Livadas*, and *Balcorta*, the preemptive scope of the majority decision is not far reaching, contrary to Petitioners' claims. The majority decision does not expand RLA preemption beyond Congressional intent or this Court's existing jurisprudence, nor does it prevent Washington employees from receiving important state protections simply because those protections are not conferred by the parties' CBA. The legislature left the benefits in the WFCA subject to the parties' negotiation. If AFA wants to bargain for additional rights, it is free to do so.

IV. CONCLUSION

Alaska respectfully requests the petitions for rehearing en banc be denied.

RESPECTFULLY SUBMITTED this 4th day of April, 2017.

Davis Wright Tremaine LLP
Attorneys for Alaska Airlines, Inc.

By */s/ Mark A. Hutcheson*
Mark A. Hutcheson, WSBA 1552
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am aware of no related cases currently pending in this Court.

RESPECTFULLY SUBMITTED this 4th day of April, 2017.

Davis Wright Tremaine LLP
Attorneys for Alaska Airlines, Inc.

By */s/ Mark A. Hutcheson*
Mark A. Hutcheson, WSBA 1552

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 4, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Davis Wright Tremaine LLP
Attorneys for Alaska Airlines, Inc.

By *_/s/ Mark A. Hutcheson_*
Mark A. Hutcheson, WSBA 1552

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 13-35574

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4197 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Mark A. Hutcheson

Date: April 4, 2017

("s/" plus typed name is acceptable for electronically-filed documents)