No. 23-15631

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAHIG SALIBA,

Plaintiff-Appellant,

v.

ALLIED PILOTS ASSOCIATION,

Defendant-Appellee.

On Appeal From the United States District Court
For the District of Arizona
No. 2:22-CV-01025-DLR

ANSWERING BRIEF OF DEFENDANT-APPELLEE ALLIED PILOTS ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Allied Pilots Association is not a corporate entity and has no parent corporation or publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION....1

STATEMENT OF ISSUES....2

STATEMENT ON ORAL ARGUMENT....3

RULE 28-2.7 STATEMENT REFERENCING ADDENDUM....3

STATEMENT OF CASE....4

I. Appellant's factual allegations....4

II. The proceedings below....9

SUMMARY OF THE ARGUMENT....11

STANDARD OF REVIEW....12

ARGUMENT....13

I. Appellant's claim that the Union breached its duty of fair representation fails as a matter of law....13

II. Appellant's remaining claims fail as a matter of law....21

A. Appellant's claim under 14 C.F.R. § 91.11 fails because the FAA does not create a private right of action....22

B. Appellant's claim under 18 U.S.C. § 242 fails because that statute does not create a private civil right of action....23

C. Appellant's claim under 42 U.S.C. § 1983 fails because the Union is not a state actor....24

CONCLUSION....25

CERTIFICATE OF COMPLIANCE....26

CERTIFICATE OF SERVICE....27

TABLE OF AUTHORITIES

Page(s)

Cases

Addington v. US Airline Pilots Ass'n,
791 F.3d 967 (9th Cir. 2015) 21

Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.,
898 F.2d 1393 (9th Cir. 1990) 20

Aldabe v. Aldabe,
616 F.2d 1089 (9th Cir. 1980) 23

Allen v. Gold Country Casino,
464 F.3d 1044 (9th Cir. 2006) 23

ALPA v. O'Neill,
499 U.S. 65 (1991).....16

Ass'n of Flight Attendants v. Mesa Air Grp., Inc.,
567 F.3d 1043 (9th Cir. 2009) 20, 21

Beck v. United Food and Com. Workers Union,
506 F.3d 874 (9th Cir. 2007) 15

Belgau v. Inslee,
975 F.3d 940 (9th Cir. 2020) 24

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....13

Bowling Green v. Martin Land Dev. Co., Inc.,
561 F.3d 556 (6th Cir. 2009) 22

Brown v. Stored Value Cards, Inc.,
953 F.3d 567 (9th Cir. 2020) 12

Burkevich v. Air Line Pilots Ass'n,
894 F.2d 346 (9th Cir. 1990) 14

Conkle v. Jeong,
73 F.3d 909 (9th Cir. 1995) 14

Davis v. HSBC Bank Nev., N.A.,
691 F.3d 1152 (9th Cir. 2012) 4

Demetris v. TWU,
862 F.3d 799 (9th Cir. 2017) 10, 13, 14, 15

Dutrisac v. Caterpillar Tractor Co.,
749 F.2d 1270 (9th Cir. 1983) 14

Ford Motor Co. v. Huffman,
345 U.S. 330 (1953).....13, 14

G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.,
958 F.2d 896 (9th Cir. 1992) 17, 22

Galbraith v. Cnty. of Santa Clara,
307 F.3d 1119 (9th Cir. 2002) 22

Hallinan v. Fraternal Ord. of Police of Chi. Lodge No. 7,
570 F.3d 811 (7th Cir. 2009) 24

Harris v. County of Orange,
682 F.3d 1126 (9th Cir. 2012) 6

Herring v. Delta Air Lines, Inc.,
894 F.2d 1020 (9th Cir. 1990) 14

Laughlin v. Riddle Aviation, Inc.,
205 F.2d 948 (5th Cir. 1953) 22, 23

Lee v. City of L.A.,
250 F.3d 668 (9th Cir. 2001) 6

Marquez v. Screen Actors Guild, Inc.,
525 U.S. 33 (1998).....13

In re Mexico City Aircrash of Oct. 31, 1979,
708 F.2d 400 (9th Cir. 1983) 23

Montgomery v. Am. Airlines, Inc.,
637 F.2d 607 (9th Cir. 1980) 22

Patterson v. Int'l Bhd. of Teamsters Loc. 959,
121 F.3d 1345 (9th Cir. 1997) 15

In re Seltzer,
104 F.3d 234 (9th Cir. 1996) 19

The Interface Grp., Inc. v. Mass. Port Auth.,
816 F.2d 9 (1st Cir. 1987).....22

Vaca v. Sipes,
386 U.S. 171 (1967).....13

Statutes

18 U.S.C. § 242.....2, 10, 11, 12, 21, 23

28 U.S.C. § 1291 1

42 U.S.C. § 1983 ..... 2, 10, 11, 12, 21, 23, 24

49 U.S.C. § 481 23

49 U.S.C. § 46101 22

49 U.S.C. § 46108 22

49 U.S.C. § 46110 22

U.S. Const. art. I, § 10, cl. 1 19

Regulations

14 C.F.R. § 61.53 .....8, 18

14 C.F.R. § 91.11 .....2, 9, 11, 12, 21, 22

Exec. Order No. 13998, 86 Fed. Reg. § 7205 (Jan. 26, 2021).....7, 24

Fed. R. Evid. 201 6

Security Directives

TSA SD 1542-21-01B.....7

TSA SD 1544-21-02B.....7

STATEMENT OF JURISDICTION

This Court has jurisdiction over Plaintiff-Appellant Bahig Saliba's appeal pursuant to 28 U.S.C. § 1291. The District Court granted Defendant-Appellee Allied Pilots Association's motion to dismiss on March 27, 2023. Plaintiff-Appellant timely filed a notice of appeal on April 26, 2023. The appeal is from a final judgment that disposes of all claims with respect to all parties.

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STATEMENT OF ISSUES

1. Whether the District Court's order dismissing Appellant's claim that the Allied Pilots Association breached its duty of fair representation when it made the reasoned decision in May 2020 not to oppose American Airlines' mask policy should be affirmed.
2. Whether the District Court's order dismissing Appellant's claim under 14 C.F.R. § 91.11, a regulation implementing the Federal Aviation Act ("FAA"), should be affirmed because the FAA does not create a private right of action for violations of this regulation.
3. Whether the District Court's order dismissing Appellant's claim under 18 U.S.C. § 242 should be affirmed because the provision does not create a private right of action.
4. Whether the District Court's order dismissing Appellant's claim under 42 U.S.C. § 1983 should be affirmed because the Allied Pilots Association did not act under the color of state law.

STATEMENT ON ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1), Allied Pilots Association states that oral argument is not necessary given that, as the District Court recognized in its succinct order, the issues in this case are controlled by the straightforward application of long-established legal principles.

RULE 28-2.7 STATEMENT REFERENCING ADDENDUM

The relevant statutes and rules appear in a separate Addendum ("A"), per Federal Rule of Appellate Procedure 28 2-7.

STATEMENT OF CASE

I. Appellant's factual allegations.

Plaintiff-Appellant Bahig Saliba ("Appellant") is a pilot employed by American Airlines ("the Airline"). Excerpt of Record ("ER-") 41 (Compl. 1:18-19). He is in a bargaining unit represented by the Allied Pilots Association ("the Union"). *Id.* (Compl. 1:19-22). Appellant's claims center on his opposition to a policy the Airline implemented in response to the COVID-19 pandemic that required each crew member to wear a facemask at all times while in common indoor areas but not on the flight deck of an aircraft (the "mask policy"). ER-12–13.[1]

In May 2020, as the early stages of the COVID-19 pandemic were unfolding, then-Union President Eric Ferguson and the Airline's Senior Vice President of Flight Operations published a joint letter to bargaining unit members

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[1] Appellant's Complaint referenced the Airlines' "mandatory mask policies," and alleged that "[the Union] adopted and agreed . . . to not challenge these policies." ER-52 (Compl. 12:22-26). The version of the Airline's mask policy at issue in this case, was therefore, incorporated into Appellants' Complaint by reference. *See* ER-12–13. "[C]ourts may take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading. A court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *See Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (cleaned up).

that encouraged pilots to "wear a face covering any time [they were] in view of . . . passengers, whether in the terminal or on the aircraft." ER-16.[2] The joint letter also encouraged pilots to "wear a face covering when a flight attendant enter[ed] the cockpit, if [they could] do so without degrading the safety of flight." *Id.* The joint letter articulated two primary reasons underlying the Airline's policy—which doubled as reasons why the Union did not object to the Airline's mask policy. First, at that time, "the vast majority [of customers] want[ed] to see . . . frontline employees wearing [face coverings]. . . . For . . . customers, wearing a face covering [wa]s a respectful gesture and a signal that they [did not] have to stay home to stay safe." *Id.* Second "[t]he consensus among epidemiologists [wa]s that wearing a face covering [could] significantly reduce[d] the spread of the disease by reducing the volume of contagion expelled by an infected individual, whether or not that person kn[ew] they [were] sick." *Id.*

About four months after the joint letter was published, the Federal Aviation Administration issued Safety Alert for Operators ("SAFO") 20009. *See* ER-51–52 (Compl. 11:23–12:11). SAFO 20009 directed crewmembers to wear masks when

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[2] Appellant's Complaint referenced the Union's "letter to the pilot group" and alleged that "Ferguson clamed to champion or spearhead the effort to create a uniform mask policy." ER-53 (Compl. 13:2-4). The joint letter was therefore, incorporated into Appellant's Complaint by reference. *See* ER-16.

around other people and when doing so would not interfere with safety concerns. Federal Aviation Administration, SAFO 20009 (2020).[3]

Consistent with SAFO 20009, the Airline's mask policy, as amended in November 2020, required that crewmembers, including pilots,

> wear a face mask at all times while in common indoor areas, including walk areas, breakrooms, hallways, restrooms, crew rooms, and office buildings—**regardless of whether 6 feet of social distance [could] be maintained.**
>
> * * *
>
> **Face mask use [was] optional on the flight deck. If any crewmember ma[d]e[] the personal choice to wear a face mask on the flight deck that choice [was to] be respected. That same crewmember [would] also respect the choice of others to not wear a face mask for safety reasons and/or based on safety objections.** [It was] expected the Captain's preference for jumpseat face mask usage [would] be accommodated/respected.

ER-12–13. The Union decided not to challenge the Airline's mask policy.

The Airline's policy was similar to mask mandates instituted by public and private entities throughout society in 2020 and 2021, and it complied with federal mandates that subsequently were issued. *See* ER-50–51 (Compl. 10:8–11:19). In

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[3] This Court may take judicial notice of SAFO 20009 and other federal mandates cited in text because the Court "may take judicial notice of undisputed matters of public record," including "documents not attached to a complaint . . . if no party questions their authenticity and the complaint relies on those documents." *Harris v. County of Orange*, 682 F.3d 1126 (9th Cir. 2012) (citing *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001)); Fed. R. Evid. 201.

January 2021, Executive Order ("EO") 13998 was issued, and it required that masks be worn in airports and on commercial aircraft. Exec. Order No. 13998, 86 Fed. Reg. § 7205 (2021). Following EO 13998, the Transportation Security Administration ("TSA") issued Security Directives that required masks within security checkpoints, TSA SD 1542-21-01B,[4] and required that domestic aircraft operators "ensure that direct employees and authorized representatives wear a mask at all times while on an aircraft or in an airport location under the control of the aircraft operator," TSA SD 1544-21-02B.[5] The latter Security Directives contained an exemption for "[p]eople for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations." *Id.* at 4.

On December 6, 2021, Appellant arrived at the airport to report for flying duty, and he approached an airport security checkpoint without a mask. ER-57–58 (Compl. 17:16–18:2). A TSA officer instructed Appellant to wear a mask, and

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[4] TSA SD 1542-21-01B went into effect on September 14, 2021, and expired on January 18, 2022. *See also* TSA SD 1542-21-01A (effective May 12, 2021; expired September 13, 2021); TSA SD 1542-21-01 (effective February 1, 2021; expired May 11, 2021).

[5] TSA SD 1544-21-02B went into effect on September 14, 2021, and expired on January 18, 2022. *See also* TSA SD 1544-21-02A (effective May 12, 2021; expired September 13, 2021); TSA SD 1544-21-02 (effective February 1, 2021; expired May 11, 2021).

when Appellant refused, the officer contacted airport police who briefly detained Appellant. ER-58 (Compl. 18:2-14). Appellant continued to refuse to wear a mask. *Id.* (Compl. 18:13-14).

The Airline initiated disciplinary action against Appellant as a result of his conduct. ER-59 (Compl. 19:21). In discussions with the Union in preparation for a disciplinary hearing, Appellant demanded that the Union argue that the Airline's mask policy conflicted with Federal Aviation Regulation ("FAR") 61.53, 14 C.F.R. § 61.53, relating to a pilot's pre-flight medical certification. ER-67 (Compl. 27:8-12). The Union determined that this position was not legally sound and was inconsistent with the Union's decision not to object to the Airline's mask policy; therefore, the Union explained to Appellant, it could not make his preferred argument in his defense. ER-66 (Compl. 26:15-23).

A representative from the Union attended Appellant's disciplinary hearing on January 6, 2022. ER-61 (Compl. 21:5-7, 21:25-26). At the hearing, Appellant articulated his position that his personal decision not to wear a mask while at airport security did not violate the Airline's mask policy. ER-26–27, 29, 32, 35, 37–39 (Tr. 24:3–25:6, 27:4-24, 30:6-9, 40:3-7, 42:20–44:17).[6] According to

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[6] Appellant's Complaint referenced that "the [disciplinary] hearing . . . was recorded" and included allegations about what was stated at that hearing. ER-61 (Compl. 21:11). The certified transcript of the January 6, 2022 disciplinary hearing

Appellant, he was exempt from wearing a mask at any time while at work because it interfered with his ability to certify that he was medically fit for duty as required by FAR 61.53 and permitted by the workplace health and safety exemption to TSA SD 1544-21-02B. ER-20, 22–23, 27–28, 35–36 (Tr. 12:11-16, 20:18-23, 21:1-9, 25:24–26:1, 40:24–41:10).

After the disciplinary hearing, the Airline's management issued a written advisory to Appellant and inserted the advisory into his personnel file. ER-62 (Compl. 22:11-13). With the Union's assistance, Appellant filed a grievance challenging the written advisory. ER-63 (Compl. 23:1-4). The grievance process was ongoing when Appellant filed this lawsuit. *See* ER-69 (Compl. 29:5-7).

II. The proceedings below.

Appellant sued the Union alleging that the Union violated its statutory duty of fair representation under the Railway Labor Act ("RLA") by (1) choosing not to oppose the Airline's mask policy, (2) refusing to advance Plaintiff's preferred arguments against the mask policy in his disciplinary and grievance proceedings, and (3) otherwise mishandling his grievance. ER-69–73 (Compl. 29–33). Appellant also asserted a claim that the Union violated 4 C.F.R. § 91.11, a Federal

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was therefore incorporated into Appellant's Complaint by reference. *See* ER-19–40.

Aviation Act ("FAA") regulation that prohibits interference with an airplane crew member's performance of their duties. ER-78 (Compl. 38:7). Finally, Appellant asserted civil rights claims under 18 U.S.C. § 242 and 42 U.S.C. § 1983. *Id.* (Compl. 38:5, 15-16).

The District Court dismissed Appellant's suit under Federal Rule of Civil Procedure 12(b)(6) in its entirety for failure to state a claim to relief. ER-5–10. As to Appellant's duty of fair representation claim, the court recognized that a union's exercise of judgment is reviewed under a "highly deferential" standard, given that "unions must balance the interests of individuals and of the group as a whole," and "pursuing every individual's goals would make it impossible to effectively pursue the broader goals of the entire group." ER-8 (citing *Demetris v. TWU*, 862 F.3d 799, 804-05 (9th Cir. 2017)). Applying this standard, the court held it was "implausible" that the Union "acted arbitrarily, discriminatorily, or in bad faith when it refused to oppose[ ] [the Airline's] mask policy or to advance [Appellant's] idiosyncratic view of FAA regulations." ER-8–9. The court observed that:

> [The Airline's] mask policy was generally consistent with those adopted by the federal government, as well as many state and local governments. It also was based on a scientific consensus that wearing masks helps reduce the transmission of COVID-19. [Appellant] might disagree with the science, but his disagreement does not make [the Union's] endorsement of [the Airline's] mask policy arbitrary, discriminatory, or in bad faith.

ER-9. As to Appellant's contentions regarding the Union's refusal to advance his preferred arguments about FAR 61.53, the court found that Appellant and the Union "merely had a disagreement over the proper reading of the relevant FAA regulations," and further noted that nothing in the language of the regulation "even arguably" supported Appellant's position. ER-9.

The court dismissed Appellant's remaining claims for other reasons. The court found Appellant's claims under 18 U.S.C. § 242 and 14 C.F.R. § 91.11 failed as a matter of law because those provisions do not provide a private right of action. ER-8. The court dismissed Appellant's claim under 42 U.S.C. § 1983 because the Union is a private actor, not a state actor, and, on the facts alleged, did not participate in conduct that could be deemed state action. *Id.* Appellant sought reconsideration, which the court denied, ER-3–4; and Appellant timely appealed, ER-81–82.

SUMMARY OF THE ARGUMENT

The District Court correctly determined that Appellant's Complaint failed to state any claim for relief, and nothing that Appellant says on appeal disturbs that determination. The District Court's Order should be affirmed in all respects.

First, with respect to the Appellant's duty of fair representation claim, as the District Court recognized, unions are afforded a great deal of latitude with respect to exercises of judgment as how to best carry out the representation of a bargaining

unit with disparate interests. The Union's decision not to challenge the mask policy was a reasoned judgment based on available evidence that sought to promote the aggregate health and welfare of bargaining unit employees. Although Appellant may disagree with the Union's reasoning, the Union's decision not challenge the Airline's mask policy was quintessentially the type of exercise of judgment for which Unions receive deference and cannot support a duty of fair representation claim.

Second, as a matter of law, Appellant cannot challenge the Union's decision as a violation of either 14 C.F.R. § 91.11 or 42 U.S.C. § 242 because neither of these provisions gives Appellant a private civil right of action to sue the Union.

Finally, Appellant cannot challenge the Union's conduct under 42 U.S.C. § 1983 because the Union did not act under the color of state law within the meaning of that statute. The Union is a private actor, and it made a decision to not object to the policy decision of another private actor—the Airline—to implement a mask policy. The Union's conduct is therefore not cognizable as state action.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's order dismissing a complaint for failure to state a claim. *See, e.g.*, *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 572 (9th Cir. 2020). When reviewing a dismissal under Fed. R. Civ. P. 12(b)(6), the Court accepts factual allegations in the complaint as true and

construes the pleadings in the light most favorable to the non-moving party. *Id.* This Court will dismiss a complaint if the plaintiff has failed to "plead facts to state a claim for relief that is 'plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Appellant's claim that the Union breached its duty of fair representation fails as a matter of law.

A. As the exclusive representative of the bargaining unit of pilots at the Airline, the Union has a legal obligation under the Railway Labor Act to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Demetris*, 862 F.3d at 804 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). Thus, a union breaches its duty of fair representation only "when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 805 (quoting *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998)).

Since the inception of the duty of fair representation, courts have also recognized that unions often face challenges in representing bargaining units whose members have disparate, and often competing, interests. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). As a result, a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the

unit it represents." *Id.*; *see also, e.g.*, *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990) ("[The union] must be able to focus on the needs of its whole membership without undue fear of law suits from individual members."). Under this "highly deferential standard," "a union's conduct generally is not arbitrary when the union exercises its judgment," and it "can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Demetris*, 862 F.3d at 805 (cleaned up). This deference also applies to decisions by unions as to what arguments to pursue with respect to individual grievance matters. *See, e.g.*, *Conkle v. Jeong*, 73 F.3d 909, 915–16 (9th Cir. 1995) ("A union representative is entitled to decline to put forward an interpretation of the collective bargaining agreement which he and his union reasonably [believe is] incorrect."); *Burkevich v. Air Line Pilots Ass'n*, 894 F.2d 346, 351 (9th Cir. 1990); *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir. 1983) ("Because the union must balance many collective and individual interests when it decides whether and to what extent to pursue a particular grievance, courts should accord substantial deference to the union's decisions.").

B. Appellant's claims on appeal center on his belief that the Union violated its duty of fair representation when it did not object to the Airline's mask policy, either at the time it was implemented or in connection with Appellant's

disciplinary proceedings for his violation of the mask policy. Opening Br. 1-3, 6-7, 17-21, 34-35; ER-41, 69–72 (Compl. 1, 29–32).[7]

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[7] Although Appellant has made conclusory assertions in his Complaint and Opening Brief that the Union's conduct was also "discriminatory" or "bad faith," *see* Opening Br. 34; ER-69–71 (Compl. 29–31), there are no allegations in the Complaint that could even be arguably construed to state a claim under those prongs of the duty of fair representation standard. To state a claim for discriminatory conduct by a union, an aggrieved member must plead facts plausibly asserting "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Demetris,* 862 F.3d at 806. To state a claim for bad faith conduct by a union, an aggrieved member must "plead facts that, if true, show substantial evidence of fraud, deceitful action, or dishonest conduct." *Id.* at 808 (internal quotation marks omitted). There are no such allegations in the Complaint.

Further, Appellant does not appear to raise on appeal his claim that the Union's other conduct with respect to processing Appellant's grievance constituted a breach of its duty of fair representation. *See* ER-77 (Compl. 37). Instead, he asserts that the Union's position on the Airline's mask policy "undermined [the Union's] ability to comply with the grievance process" by asserting Appellant's preferred arguments and that the grievance process is "inapplicable." Opening Br. 32, 35. In any event, the allegations in the Complaint regarding the handling of Appellant's grievance do not state a claim for relief because he has not alleged any "egregious" conduct or "substantial[]" harm with respect to the handling of his grievance, which was still pending at the time he filed his Complaint. *See Beck v. United Food and Com. Workers Union*, 506 F.3d 874, 881 (9th Cir. 2007) (holding that union breached the duty of fair representation because it "substantially injured" the member by failing to file a grievance); *Patterson v. Int'l Bhd. of Teamsters Loc. 959,* 121 F.3d 1345, 1349-50 (9th Cir. 1997) (holding that the union did not breach the duty of fair representation because the union did not show "egregious or reckless disregard for the rights of its members" but exercised reasonable judgment when handling the member's grievance (internal quotation marks omitted)).

The facts alleged in the Complaint defeat Appellant's claim. The joint letter published by the Union and Airline in May 2020 demonstrates that the Union's decision not to object to the Airline's mask policy was a reasoned act of judgment by the Union that is entitled to deference. *Supra* at 4–5. Indeed, the joint letter stated that the mask policy reflected the consensus among epidemiologists that masks could significantly reduce the spread of COVID-19. *Supra* at 5. The mask policy in place at the time of Appellant's discipline also complied with federal guidance and directives. *Supra* at 5–7. Notably, the Airline's mask policy permitted pilots to remove their masks while on the flight deck and, especially, while piloting the plane. *Supra* at 6.

In the Union's reasoned judgment, the Airline's mask policy promoted the aggregate welfare of bargaining unit members. Appellant may well disagree with that judgment, but the facts alleged in his Complaint do not plausibly establish that the Union's decision was "so far outside the wide range of reasonableness that it [was] wholly irrational" when the Union decided not to challenge the mask policy. ER-70 (Compl. 30:7-9) (quoting *ALPA v. O'Neill*, 499 U.S. 65,67 (1991)). The District Court's judgment can and should be affirmed on this basis.

C. Appellant makes several arguments in an attempt to portray the Union's position with respect to the Airline's mask policy as somehow inconsistent with the law or his legal rights, and thus, presumably, irrational. As the District

Court recognized, a mere disagreement between the Union and Appellant as to the proper interpretation of the legal authorities he cites would not suffice to demonstrate a breach of the duty of fair representation, as the Union would be entitled to advance its preferred interpretation so long as it was reasonable. ER-9. But, in any event, Appellant's various arguments fail even on their own terms.

First, Appellant devotes much of his brief to articulating his argument regarding FAR 61.53, which is one of several regulations promulgated by the Federal Aviation Administration that prescribe standards to promote air safety. *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 898-99 (9th Cir. 1992). FAR 61.53(a) states that:

> no person who holds a medical certificate issued under part 67 of this chapter may act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person:
>
> (1) Knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation; or
>
> (2) Is taking medication or receiving other treatment for a medical condition that results in the person being unable to meet the requirements for the medical certificate necessary for the pilot operation.

14 C.F.R. § 61.53. As written, this regulation prohibits a pilot from operating an aircraft if that person knows that he or she is medically unfit to do so. Appellant contends, however, that FAR 61.53 bestows upon a pilot not only the authority to

determine whether he or she is medically fit to operate an aircraft—but also the authority to determine what generally applicable rules, whether imposed by an employer or a public authority, the pilot may choose to follow in the event the pilot believes the rules may impact his or her fitness to fly. *See* ER-49 (Compl. 9:12-14) ("The plaintiff is the sole proprietor, interest holder, and beneficiary of his . . . medical certificate, and he is the only authority in decision making in matters related to its validity and his health.")

As the District Court recognized, there is nothing in the language of the regulation that "even arguably" supports that interpretation of FAR 61.53. ER-9 ("Nothing in this section even arguably gives Saliba the unilateral authority to decide whether to comply with a mask mandate policy, especially when that policy did not require him to wear a mask while actually piloting the airplane from the flight deck."). Appellant cites no legal or other authorities in support of his interpretation. Further, it would be unworkable in practice for pilots to have authority to determine on an individual basis what employer rules they are bound to follow based on personal beliefs about their health needs, however well-intentioned those beliefs may be.[8] At a minimum, it was not irrational for APA not

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[8] There were, of course, avenues available to Appellant if he believed compliance with the Airline's mask policy would interfere with his medical fitness: he could have sought a reasonable accommodation under the Americans with

to advance Appellant's unsupported interpretation of FAR 61.53 in his disciplinary proceeding, or to not object to the Airline's mask policy in light of Appellant's interpretation.

Second, Appellant appears to assert that the Airline's mask policy interfered with his right to contract with the "people"—who he identifies as passengers who expect that their pilot is medically fit to safely complete each flight—in violation of the Contracts Clause of the Federal Constitution. Opening Br. 5–6, 8–9, 32–34; *see id.* at 8 ("[Medical certificates are] a contractual agreement between the pilot and The People that neither [the Union] nor [the Airline] can be a party to."). This argument is entirely misplaced.

At the threshold, the Contracts Clause has no application here. The Contracts Clause prohibits state and local governments from "impairing the [o]bligation[s] of [c]ontracts" through changes in the law. U.S. Const. art. I, § 10, cl. 1; *see generally In re Seltzer*, 104 F.3d 234, 235 (9th Cir. 1996) (describing elements of Contracts Clause claim). There is no change in the law by a local government at issue here. Nor under any analysis does Appellant have a contractual relationship with the passengers of the aircraft he is employed by the Airline to fly—and Appellant cites

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Disabilities Act or similar statute. *See* TSA SD 1544-21-02B. And Appellant was not required by the mask policy to certify himself as medically fit to fly if he was, in fact, not fit to do so.

nothing to support the notion that he does. Rather, Appellant has a private employment relationship with the Airline under which he is expected to abide by certain policies and work rules, which are negotiated or otherwise agreed to between the Airline and the Union. The Union's conduct in no way interfered with any freestanding legal rights regarding contracts possessed by the Appellant.

Finally, Appellant appears to assert that the Union was required to treat the Airline's imposition of a mask policy as a "major dispute" under the RLA. *See* Opening Br. 17–18; *id.* at 2 (describing the Union's decision not to challenge the mask policy as one that "invade[d] public policy" and "induced activities that . . . negatively impact[ed] a pilot's . . . medical certification."). Under the RLA, disputes that arise between an employer and bargaining unit are classified as either "major" or "minor" disputes. *Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1395–96 (9th Cir. 1990). A dispute is major when a union challenges an airline's attempts to unilaterally "impose new obligations or create new rights." *Ass'n of Flight Attendants v. Mesa Air Grp., Inc.*, 567 F.3d 1043, 1047 (9th Cir. 2009). In the case of a major dispute, a union may seek an injunction enjoining such a unilateral change by the employer in order to "freeze the status quo." *Id.* at 1047. A minor dispute, on the other hand, relates to a union's challenge to a carrier's enforcement or interpretation of existing contractual obligations or rights and must be resolved through binding arbitration. *Id.* at 1045.

Here, there was no dispute—either major or minor—between the Airline and the Union. As discussed above, the Union made the reasoned decision not to challenge the Airline's mask policy as it determined it to be in the general interest of bargaining unit members. A union is not obligated to challenge every change in work rules an employer implements, let alone to seek a federal court injunction with respect to each such change. "A union must act in the general interest of its membership, and it may have to compromise on positions that will inevitably favor a majority of its members at the expense of other of its members." *Addington v. US Airline Pilots Ass'n*, 791 F.3d 967, 983 (9th Cir. 2015). To hold otherwise would bring labor relations between unions and employers to a halt, as a union would have no discretion to work with an employer on employer-initiated policies that the union deems beneficial to its members.

II. Appellant's remaining claims fail as a matter of law.

Appellant challenges the District Court's dismissal of his claims under 14 C.F.R. § 91.11, 18 U.S.C. § 242, and 42 U.S.C. § 1983. For the reasons discussed below, the District Court properly dismissed each of those claims.

A. Appellant's claim under 14 C.F.R. § 91.11 fails because the FAA does not create a private right of action.

As the District Court found, Appellant's claim that APA violated 14 C.F.R. § 91.11, a regulation promulgated under the FAA, fails because there is no private right of action to enforce the FAA. The Secretary of Transportation has the authority to enforce the FAA and its regulations. 49 U.S.C. § 46101, *see also* 49 U.S.C. §§ 46108, 46110. It is well-settled that there is no express or implied private right of action under the FAA, especially when, as here, the claims arise from the regulations and not the statute itself. *G.S. Rasmussen & Assocs., Inc., v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 902–03 (9th Cir. 1992); *Montgomery v. Am. Airlines, Inc.*, 637 F.2d 607, 610 (9th Cir. 1980); *see also Bowling Green v. Martin Land Dev. Co., Inc.*, 561 F.3d 556, 561 (6th Cir. 2009); *The Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 15 (1st Cir. 1987).

Appellant points to an inapposite Fifth Circuit case, *Laughlin v. Riddle Aviation, Inc.*, 205 F.2d 948 (5th Cir. 1953), apparently in connection with an invitation to this Court to change the law of this Circuit. *See* Opening Br. 22, 24–25. Except in limited circumstances, a three-judge panel of this Court may not overrule a decision of a prior panel on a controlling question of law. *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002) (noting exception when there is an intervening Supreme Court precedent "closely on point"). In any event, the court in *Laughlin* considered whether a private right of action existed under a

different, and now defunct, statute—the Civil Aeronautics Act of 1938, 49 U.S.C. § 481, *see* 205 F.2d at 949, and this Court has previously suggested that it would not extend the reasoning in *Laughlin* to the FAA. *See In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 408 n.12 (9th Cir. 1983).

B. Appellant's claim under 18 U.S.C. § 242 fails because that statute does not create a private civil right of action.

Section 242 criminalizes certain deprivations of constitutional rights, privileges, or immunities caused by a person acting "under the color of any" state law. 18 U.S.C. § 242. As the District Court found, ER-8, the provision does not create a private civil right of action. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006); *see also Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The District Court's order dismissing Appellant's claim under § 242 must therefore be affirmed.[9]

[9] Appellant appears to assert that the District Court erred in dismissing his claim under 18 U.S.C. § 242 because, he argues, the Union's non-objection to the Airline's mask policy amounted to state action. Opening Br. 20–21, 38. This argument misunderstands the rationale of District Court's order dismissing Appellant's claim under § 242, which was that statute does not contain a private right of action. ER-8. In any event, Appellant's state action argument fails for the reasons described in text with respect to Appellant's § 1983 claim.

C. Appellant's claim under 42 U.S.C. § 1983 fails because the Union is not a state actor.

To prove a claim under § 1983, a plaintiff must allege that "the challenged conduct that caused the alleged constitutional deprivation [is] fairly attributable to the state." *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020) (internal quotation marks omitted). As the District Court recognized, "[u]nions are not state actors; they are private actors." ER-8 (quoting *Hallinan v. Fraternal Ord. of Police of Chi. Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009)). Although in certain circumstances the conduct of a private party may be deemed state action, *see Belgau*, 975 F.3d at 946-49, no such circumstance is present here. Appellant asserts that the Union "became a state actor in the implementation of EO 13998." Opening Br. 20. However, on the facts alleged, the Union did not take any steps to implement EO 13998. Rather, the Airline—a private employer—enacted a mask policy that complied with EO 13998 and other federal guidance, and the Union—another private party—made a reasoned decision not to challenge the Airline's mask policy. The mere fact that the mask policy was consistent with federal mandates regarding masks, including EO 13998 and subsequent TSA Security Directives does not transform the Union's private conduct into state action under any applicable test. *See Belgau*, 975 F.3d at 947 (A private union does not act under the color of state law unless it has acted "in concert with the state in effecting a particular deprivation of [a] constitutional right.").

CONCLUSION

For the reasons set forth above, this Court should affirm in its entirety the judgment entered in favor of the Union.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing brief of Appellee Allied Pilots Association complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is in Times New Roman 14-point typeface. With the exception of those portions excluded by Fed. R. App. P. 32(f), the brief contains 5, 520 words.

Dated: August 25, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2023, I electronically filed the foregoing brief of Defendant-Appellee Allied Pilots Association with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: August 25, 2023

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No. 23-15631

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAHIG SALIBA,

Plaintiff-Appellant,

v.

ALLIED PILOTS ASSOCIATION,

Defendant-Appellee.

On Appeal From the United States District Court
For the District of Arizona
No. 2:22-CV-01025-DLR

STATUTORY ADDENDUM

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TABLE OF CONTENTS

18 U.S.C. § 242 ..... A.3
28 U.S.C. § 1291 ..... A.3
42 U.S.C. § 1983 ..... A.3
49 U.S.C. § 46101 ..... A.4
49 U.S.C. § 46108 ..... A.5
49 U.S.C. § 46110 ..... A.5
14 C.F.R. § 61.53 ..... A.7
14 C.F.R. § 91.11 ..... A.7
Exec. Order No. 13998, 86 Fed. Reg. 7205 (Jan. 26, 2021) (excerpt) A.7
TSA SD 1544-21-02B (excerpt) A.8

Statutes

18 U.S.C. § 242

Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

28 U.S.C. § 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

49 U.S.C. § 46101 (excerpt)

Complaints and investigations

(a) General.--(1) A person may file a complaint in writing with the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) about a person violating this part or a requirement prescribed under this part. Except as provided in subsection (b) of this section, the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall investigate the complaint if a reasonable ground appears to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration for the investigation.

(2) On the initiative of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate, the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration may conduct an investigation, if a reasonable ground appears to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration for the investigation, about--

(A) a person violating this part or a requirement prescribed under this part; or

(B) any question that may arise under this part.

(3) The Secretary of Transportation, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration may

dismiss a complaint without a hearing when the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration is of the opinion that the complaint does not state facts that warrant an investigation or action.

(4) After notice and an opportunity for a hearing and subject to section 40105(b) of this title, the Secretary of Transportation, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall issue an order to compel compliance with this part if the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration finds in an investigation under this subsection that a person is violating this part.

49 U.S.C. § 46108

Enforcement of certificate requirements by interested persons

An interested person may bring a civil action in a district court of the United States against a person to enforce section 41101(a)(1) of this title. The action may be brought in the judicial district in which the defendant does business or the violation occurred.

49 U.S.C. § 46110

Judicial Review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate. The Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings. After reasonable notice to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration only if the objection was made in the proceeding conducted by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

Regulations

14 C.F.R. § 61.53

Prohibition on operations during medical deficiency.

(a) Operations that require a medical certificate. Except as provided for in paragraph (b) of this section, no person who holds a medical certificate issued under part 67 of this chapter may act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person:

(1) Knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation; or

(2) Is taking medication or receiving other treatment for a medical condition that results in the person being unable to meet the requirements for the medical certificate necessary for the pilot operation.

(b) Operations that do not require a medical certificate. For operations provided for in § 61.23(b) of this part, a person shall not act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person knows or has reason to know of any medical condition that would make the person unable to operate the aircraft in a safe manner.

(c) Operations requiring a medical certificate or a U.S. driver's license. For operations provided for in § 61.23(c), a person must meet the provisions of—

(1) Paragraph (a) of this section if that person holds a medical certificate issued under part 67 of this chapter and does not hold a U.S. driver's license.

(2) Paragraph (b) of this section if that person holds a U.S. driver's license.

14 C.F.R. § 91.11

Prohibition on interference with crewmembers.

No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated.

Exec. Order No. 13998, 86 Fed. Reg. 7205 (Jan. 26, 2021) (excerpt)

(a) Mask Requirement. The Secretary of Labor, the Secretary of Health and Human Services (HHS), the Secretary of Transportation (including through the

Administrator of the Federal Aviation Administration (FAA)), the Secretary of Homeland Security (including through the Administrator of the Transportation Security Administration (TSA) and the Commandant of the United States Coast Guard), and the heads of any other executive departments and agencies (agencies) that have relevant regulatory authority (heads of agencies) shall immediately take action, to the extent appropriate and consistent with applicable law, to require masks to be worn in compliance with CDC guidelines in or on:

(i) airports;

(ii) commercial aircraft;

(iii) trains;

(iv) public maritime vessels, including ferries;

(v) intercity bus services; and

(vi) all forms of public transportation as defined in section 5302 of title 49, United States Code.

Security Directives

TSA SD 1544-21-02B (excerpt)

C. The aircraft operator must ensure that direct employees and authorized representatives wear a mask at all times while on an aircraft or in an airport location under the control of the aircraft operator, except as described in Sections D., E., and F

F. This SD exempts the following categories of persons from wearing masks:

1. Children under the age of 2.

2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).

3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.