18-1032

No.

IN THE

Supreme Court of the United States

ROBERT STEVEN MAWHINNEY,

PETITIONER,

v.

AMERICAN AIRLINES, INC.,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1 of the Federal Arbitration Act ("FAA") includes an exception which provides that: "... but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

Robert Steven Mawhinney ("RSMawhinney") and American Airlines, Inc., ("AA") entered into a Settlement Agreement and Release, on December 17, 2002 ("SAgreement"); where the primary intent was to re-hire RSMawhinney as an employee of AA, in exchange for the dismissal of a Lawsuit in the Superior Court, in San Diego, California, and the dismissal of a Case before the U.S. Department of Labor ("DOL"), under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21").

AA and the lower courts attempt to proclaim that a provision within the SAgreement triggers the arbitration of RSMawhinney's second AIR21 complaint; and that that was the primary intent of the SAgreement. AIR21 provides for the protection, and remedy, from discrimination of an air carrier employee in the performance of an employee's duties.

The questions presented are:

1. Did the Ninth Circuit err in determining that the "DOL's independent interest in Mawhinney's AIR21 discrimination and retaliation complaint ... ceased once its investigation concluded with a finding of no violation?"

2. Did the Ninth Circuit err in determining that a Statutory Federal Regulation (29 C.F.R. § 1979.111(e)), a rule that was not accepted, ordained, or published until March 21, 2003, (68 FR 14107), applies to the SAgreement which was conceived on December 17, 2002?

3. Did the Ninth Circuit, and District Court, err in determining that RSMawhinney's AIR21 discrimination complaint could lawfully be the subject of a pre-dispute arbitration provision, within the SAgreement, that did not include AIR21 within the provision?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit, whose judgments are sought to be reviewed, are Defendant (Robert Steven Mawhinney), and Plaintiff (American Airlines, Inc.); here, before the U.S. Supreme Court, Robert Steven Mawhinney is the Petitioner, and American Airlines, Inc., is the Respondent, as the caption contains the names of all the parties to the proceeding below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Robert Steven Mawhinney is an individual, with no corporate affiliation. It would be appropriate that American Airlines, Inc., submit its' own Corporate Disclosure Statement.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Steven Mawhinney ("RSMawhinney"), respectfully petitions for a writ of certiorari, to review the decisions of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") and of the United States District Court for the Southern District of California ("District Court"), with regard to RSMawhinney's United States Department of Labor ("DOL") – Occupational Safety and Health Administration ("OSHA") complaint; initiated under Section 519 of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR21").

The District Court inappropriately entertained a *motion* raised in a closed *case*; unrelated to the case-and-controversy of the original *case*. The District Court *denied* American Airlines, Inc., ("AA") *motion* on August 23, 2016, and, provided AA with an *advisory opinion* conveying legal advice. AA followed the legal advice of the *advisory opinion* and the District Court, later, *granted* AA's *motion* on October 27, 2016; just two (2) days before RSMawhinney's DOL AIR21 *case* was to begin.

On appeal, the Ninth Circuit avoided numerous arguments, refuted the District Court's *decision*, then, through creative reasoning, made a determination that conflicts with: U.S. Supreme Court decisions; a California Supreme Court decision; U. S. District Court decisions; DOL decisions; and, a U.S. Department of Transportation ("DOT") Inspector General determination.

As presented within this Petition, the DOL Administrative Review Board ("ARB") has stressed

the need for clear guidance from the courts to "resolve the tension between the Congressional mandate to protect whistleblowers and the mandate to protect arbitration clauses through the Federal Arbitration Act.

RSMawhinney respectfully requests that the U.S. Supreme Court grant the Petition on all three questions presented, or, in the alternative, summarily reverse the Ninth Circuit's and the District Court's *orders*, *decisions* and *judgment*.

OPINIONS BELOW

Ninth Circuit *Opinion*, Case No. 16-56638, "*American Airlines, Inc., v. Mawhinney,*" published September 26, 2018, reported as 904 F.3d 1114. (9th Cir. 2018). Appendix A, App. 1

Ninth Circuit *Order*, Case No. 16-56638, *denying* rehearing and rehearing *en banc*, issued November 5, 2018, unpublished. Appendix B, App. 24

District Court *Order*, Case No. 3:15-cv-259, *denying* AA's *motion*, on August 23, 2016, reported 2016 U.S. Dist. LEXIS 123386. Appendix C, App. 25

District Court *Order*, Case No. 3:16-cv-2270, *granting* AA's *motion* on October 27, 2016, is not reported. Appendix D, App. 33

DOL Administrative Review Board *Order*, Case No. 14-060, published. Appendix E, App. 48

DOL Secretary of Labor *amicus curiae brief*, is unpublished. Appendix F, App. 59

District Court *Order*, Case No. 3:09-cv-0652, *denying* Plaintiff's *motion*, is reported as 2011 U.S. Dist. LEXIS 4414. Appendix G, App. 72

JURISDICTION

The Ninth Circuit issued its *opinion* on September 26, 2018; then, *denied* RSMawhinney's timely petition for rehearing and rehearing *en banc* on November 5, 2018. The Ninth Circuit has decided important federal questions that conflict with:

relevant *decisions* of this Court;

a California Supreme Court *decision*;

decisions of the Ninth Circuit; and with,

decisions by other U.S. district courts.

The DOL ARB recognized RSMawhinney as a transportation worker in the field of interstate commerce, and, have raised the request for clarification in this regard with the statements:

> "... the Board also noted that transportation workers engaged in foreign or interstate commerce are exempted from the arbitration requirements of the FAA";[1] (*See* App. 54 n. 11)
>
> "... the Secretary's approval of a settlement agreement must explicitly state that a whistleblower is foreclosed from filing future whistleblower claims with OSHA before the Board can say that OALJ and ARB no longer have delegated authority to adjudicate a whistleblower claim;" (*See* App. 57 ¶ 1) and,

[1] Federal Arbitration Act, Section 1; 9 U.S.C. § 1

> "the Board needs to clarify whether the Act applies, in the first place, to whistleblower cases and resolve the tension between the Congressional mandate to protect whistleblowers and the mandate to protect arbitration clauses through the Federal Arbitration Act." (*See* App. 57 ¶ 2)

RSMawhinney timely files this petition; as this Court has jurisdiction under 28 U.S.C. § 1254, 28 U.S.C. § 1257(a), and, the U.S. Constitution.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article III:

§ 1 The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office, and,

§ 2 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a

State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make....

Federal Arbitration Act (9 U.S.C.):

§ 1 "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (emphasis added).

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") (Statute 49 U.S.C. § 42121):

(a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES – No air carrier or contractor or

subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) – (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

INTRODUCTION

RSMawhinney was an employee of AA as an Aircraft Maintenance Technician; with responsibility, to honor the policies of the Federal Aviation Regulations ("FAR"),[2] and policies of AA. RSMawhinney's employment was terminated on October 30, 2001, by AA in retaliation for exposing the removal and alteration of an AA aircraft's

[2] 14 C.F.R.

maintenance paperwork. On February 4, 2002, a DOL OSHA investigation determined:[3]

> "OSHA has reasonable cause to believe that the following violation of 49 U.S.C. § 42121(a)(1) has occurred: beginning on January 18, 2001 a series of suspensions, disciplinary letters issued, and medical examinations that you were required to undergo, culminated in a constructive discharge on October 30, 2001. These actions were taken by the Respondent in retaliation for the ASAP[4] report you filed on December 7, 2000."

RSMawhinney returned to employment with AA on January 6, 2003, after a Settlement Agreement and Release, dated December 17, 2002. ("SAgreement"). AA terminated RSMawhinney's employment again on September 23, 2011; and, RSMawhinney filed a second AIR21 complaint.[5] The DOL delayed investigating RSMawhinney's complaint due to AA's *ex parte* communication, proclaiming that arbitration was appropriate; AA's first attempt to compel RSMawhinney's AIR21 complaint to arbitration.

The DOL investigation ruled in favor of AA without providing RSMawhinney the opportunity to refute the evidence that AA had submitted.

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[3] DOL Case No. 2002-AIR-013, (OSHA Case No. 1083989).

[4] Aviation Safety Action Partnership ("ASAP")

[5] DOL OSHA Case No. 9-3290-12-001;
DOL OALJ Case No. 2012-AIR-017

RSMawhinney appealed the DOL decision to the DOL Office of Administrative Law Judge. ("OALJ"). The Administrative Law Judge ("ALJ"), assigned, *ordered* RSMawhinney's AIR21 complaint to arbitration; following a *motion* from AA. (AA's second attempt). RSMawhinney appealed to the ARB; and, the ARB reversed the DOL ALJ's *order*. (*See* App. 48)

The District Court *denied* AA's attempt to compel arbitration (AA's third attempt), on August 23, 2016; however, the District Court Judge provided AA with an *advisory opinion* within the *order*.[6] Following the *advisory opinion*, the District Court would later *order* RSMawhinney's AIR21 complaint to arbitration (AA's fourth attempt), on October 27, 2016;[7] only two (2) days before the scheduled DOL *case* was to begin. RSMawhinney timely appealed the District Court's *order* before the Ninth Circuit.

In 2002, when the SAgreement was created, RSMawhinney relied upon the laws of the United States that were in effect at that time; which included the U.S. Supreme Court ruling in *Circuit City v. Adams*, 532 U.S. 102, 121. The precedence:

> "As for the residual exclusion of 'any other class of workers engaged in foreign or interstate commerce,' Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. It would be

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[6] *See* App. 32

[7] *See* App. 33

> rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation. *See Pryner v. Tractor Supply Co., 109 F.3d at 358* (Posner, C. J.). Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees, *see* 49 Stat. 1189, *45 U.S.C. §§ 181-188.*"

During Ninth Circuit oral argument, Ninth Circuit panelist Judge N. Randy Smith declared:

> "the agreement is not right in the *order*;" and,
>
> "... I don't know how we would be able to do anything if the settlement agreement weren't perceived to be a part of the *order*."

Additionally, Ninth Circuit panelist Judge P. Kevin Castel declared the fact:

> "But those 2003 regulations were not adopted until after this settlement agreement was approved by the DOL."

The Ninth Circuit panel *opinion* declared:

> "DOL's order approving the 2002 Agreement does not expressly incorporate the terms the Agreement. DOL regulations currently treat '[a]ny settlement approved' as the 'final order of the Secretary.' 29 C.F.R. § 1979.111(e); *see also* 29 C.F.R. § 1979.113. Although the regulations came into effect in 2003, after the DOL approved the 2002 Agreement, DOL's 2016 order treated the 2002 settlement and

> the DOL order approving it as one, consistent with the later agency regulations. The parties do not dispute the point, and we have no reason to question DOL's 2016 interpretation of its own 2002 order. We therefore treat the 2002 DOL order as incorporating the settlement." (*See* App. 8 n. 1)

RSMawhinney disagrees with the Ninth Circuit panel's reasoning, and did dispute the incorporating of the SAgreement through the DOL's alleged authority to implement the arbitration of an AIR21 complaint. Section 1 of the Federal Arbitration Act reserves, by exception, "... but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce;" an exception that reserved for Congress itself, the control and flow of foreign and interstate commerce. The SAgreement does not include, within the arbitration clause, the arbitration of discrimination experienced by an employee (RSMawhinney) who provides information of FAR violations to an employer (AA), and/or to federal authorities (DOT). Additionally, at the time that the SAgreement was created, the U.S. case law precedence and DOL policy did not include the authorization of the DOL ALJ to include arbitration of AIR21 complaints; and, that fact was recognized and made note of, during oral argument, by Ninth Circuit panelist Judge P. Kevin Castel.

AIR21 established policies to protect individuals who bring forward *safety* concerns; and, explicitly describe the adjudicatory process and

resolution of discrimination in the work place. The DOL ARB declared:

> "... we hold that the Secretary's approval of the December 2002 settlement agreement does not mean that Complainant was precluded from pursuing a whistleblower claim with OSHA and DOL against American without clearer indication from the Secretary that the preclusion was intended;"(*See* App. 53 ¶ 2) ;
>
> "Also, like the majority, I think the Secretary's approval of a settlement agreement must explicitly state that a whistleblower is foreclosed from filing future whistleblower claims with OSHA before the Board can say that OALJ and ARB no longer have delegated authority to adjudicate a whistleblower claim." (*See* App. 57 ¶ 2)

RSMawhinney did <u>not</u> agree to arbitrate an AIR21 complaint in the SAgreement; and, AA knew that RSMawhinney held that position with the chronological series of events that transpired in 2011. AIR21 is a *statutory right*. RSMawhinney has <u>not</u> been provided the opportunity to judicially vindicate, and refute the claims AA submitted in response to, the DOL-OSHA investigation that was triggered by RSMawhinney's AIR21 complaint. ARB Judge Luis A. Corchado's largest concern:

> "Burying these safety disclosures in the world of arbitration would defeat this Congressional purpose for whistleblower laws."

STATEMENT OF THE CASE

The decisions below reflects the latest effort by the lower court(s) to: avoid the dictates of the FAA; misrepresent the duty and responsibility of the DOL; and, further, attempt to disassociate RSMawhinney's employment from the category of "... *a transportation worker in the field of interstate commerce...*," by refusing to acknowledge that the SAgreement was an employment contract.

The Ninth Circuit refuted the facts, relevant, within the *order* of the District Court; however, the Ninth Circuit *affirmed* the District Court's *decision* and *judgment*, through different means. The Ninth Circuit has disregarded the *opinions* and series of events recognized by: DOL Secretary of Labor; DOL ARB; and, DOL ALJ.

The Ninth Circuit, and District Court, incorrectly describe that the purpose of the SAgreement, between RSMawhinney and AA, was that of a sub-provision, within the SAgreement; a provision for private arbitration. In fact, the purpose of the SAgreement was the employment of RSMawhinney as an Aircraft Maintenance Technician for AA. The SAgreement included numerous terms, prior to employment, including:

- RSMawhinney would abandon a civil lawsuit against AA with regard to *public safety*, in the Superior Court of California, County of San Diego. (Case No. GIC782632);

- RSMawhinney would abandon an AIR21 lawsuit, where the DOL *order* determined that "... American Airlines, Respondent in this

matter, has violated 49 U.S.C., Section 42121(a)(1). (2002-AIR-013);" and, *inter alia*,

- "RSMawhinney shall enjoy and be entitled to all the normal rights and privileges of an AA employee, including those afforded under any Collective Bargaining Agreement."

The evidence before the Ninth Circuit, and the District Court included, *inter alia*:

- "Date of re-hire January 6, 2003;" and,

- "Expunge negative records."

The Ninth Circuit *Opinion* of this case was penned by Judge Marsha S. Berzon. Judge Berzon's *opinion* disregarded previous determinations made by the U.S. Supreme Court; where, the U.S. Supreme Court *reversed* the Ninth Circuit's *opinion*, with regard to contracts of employment in relation to the FAA (specifically, Section 1 (9 U.S.C. § 1)) . *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105. Judge Berzon also penned a Ninth Circuit o*pinion* which made reference to *Circuit City*, and noted: "... the FAA applies to all individual employment contracts except those involving transportation workers." *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 n. 1, (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109).

Judge Berzon disregarded the precedence established in *PowerAgent*, recognizing the U.S. Supreme Court's decision in *Circuit City*, and takes the unprecedented action of: providing false representations, contrary to the facts that are in evidence; providing false interpretation, contrary to

existing precedence and facts recorded and available to the Ninth Circuit; and, providing false representations of the actions that transpired before the DOL OALJ.

Judge Berzon falsely represents that:

(1) "In this case, however, there was no 'litigation' at DOL from which to infer a waiver;"

(2) "The Agreement between Mawhinney and the Airline does not extend to a proceeding of that kind, which concerns not a dispute between the parties to the Agreement, but a potential enforcement action by the government;"

(3) "The Airlines demand for arbitration, filed with the ALJ shortly after the bankruptcy stay was lifted, reflects a timely and diligent assertion of the right to arbitrate, and so precludes a finding of waiver;"

(4) "Mawhinney next argues that his AIR21 action cannot be arbitrated because AIR21 itself forbids it. In support of this proposition, Mawhinney points to no statutory language so stating, as there is none;"

(5) "DOL's independent interest in Mawhinney's AIR21 retaliation complaint ... ceased once its investigation concluded with a finding of no violation;"

(6) "... the AIR21 action at that point concerned only Mawhinney's purely private dispute with the Airline, not the government's independent interest in airline safety;"

(7) "Mawhinney did not refuse to arbitrate when he filed his AIR21 complaint;"

(8) "The Airline's action in district court was filed within four years of that date, and is therefore not time-barred;"

(9) "... it is doubtful the FAA's interstate exemption for contracts of employment in foreign or interstate commerce applies in this case;"

(10) "The Agreement was not a contract under which Mawhinney was hired. *See J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335-35 (1944) (observing that a contract of employment, at its most basic, is an 'act of hiring');"

(11) "Nor was it a contract setting the terms and conditions of employment;"

(12) "Instead, the Agreement was a contract settling a dispute between parties, albeit an employment-related one, by restoring the status quo ante and providing for the resolution of later disputes;"

(13) "... recourse to the FAA is not a condition of enforcing the arbitration agreement in this case;

(14) "As discussed, *see supra* note 1, the DOL's order provides an independent basis for enforcing arbitration;"

(15) "The order incorporates the terms of the Agreement, including the arbitration provision for future disputes, and is separately enforceable under 49 U.S.C. § 42121(b)(6)(A),

(*sic*), (with reference to the following note – "We do not address the district court's holding that airline mechanics, unlike 'seamen' or 'railroad employees,' are not 'engaged in foreign or interstate commerce.' *See* 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).")" ;

The Ninth Circuit provides an arbitrary decision, contrary to the facts in evidence and of the statutes and law argued. The Ninth Circuit incorrectly portrays that "The Agreement (SAgreement) was not the contract under which Mawhinney was hired." (emphasis added). Retired Judge Alice D. Sullivan stated the fact differently:

"Date of re-hire January 6, 2003."

The Ninth Circuit declares that:

"Instead, the Agreement was a contract settling a dispute between the parties, albeit an employment-related one, by restoring the status quo ante and providing for the resolution of later disputes. *Cf. Gilmer*, 500 U.S. at 25 n. 2 (concluding that the section 1 exemption does not extend to an agreement simply because it was reached in furtherance of or in relation to one's employment)."

Again, RSMawhinney was terminated from employment, the first time, on October 30, 2001; and, was re-employed, by contract (SAgreement), on January 6, 2003, after conditions were met.

SUMMARY OF ARGUMENT

I. FAA § 1 EXEMPTION, RSMAWHINNEY

The Ninth Circuit *opinion* incorrectly states:

> "Mawhinney does not dispute that, absent some provision of law providing otherwise, his AIR21 retaliation action falls within the scope of the Agreement's arbitration clause."

During oral argument RSMawhinney was asked, by Judge Berzon, "What statute exempts this statute from the FAA-Federal Arbitration Act?"

RSMawhinney's response was "The statute is 9 U.S.C. code Section 1."

It is a false representation, by Judge Berzon, to proclaim that RSMawhinney does not dispute that, absent some provision of law providing otherwise, his AIR21 retaliation action falls within the scope of the Agreement's arbitration clause. RSMawhinney provided the Ninth Circuit oral and written argument that the exemption within 9 U.S.C. § 1 applies. (*See also* App. 48-58; Appendix E)

The SAgreement was signed on December 17, 2002. The most recent U.S. Supreme Court ruling at that time, relevant to the circumstances, was *Circuit City v. Adams*, 532 U.S. 105 (March 21, 2001). Within *Circuit City*, it was determined:

> "Section 1 exempts from the FAA only contracts of employment of transportation workers." *Id.*, at 119.

Further, *Circuit City* determination included:

> "As for the residual exclusion of 'any other class of workers engaged in foreign or interstate commerce,' Congress' demonstrated

> concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation. *See Pryner v. Tractor Supply Co.*, 109 *F.3d at 358* (Posner, C.J.). Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees, *see* Stat. 1189, *45 U.S.C. §§ 181-188.*" *Id.*, at 121.

The Ninth Circuit misrepresents and disregarded the basis of how this case came before the Ninth Circuit. AA made four attempts to compel the arbitration of RSMawhinney's AIR21 complaint. The first attempt, by AA, was before the DOL investigation of RSMawhinney's AIR21 Complaint. RSMawhinney was notified of AA's *ex parte* action before the DOL investigation on January 9, 2012. ("During our conversation I also told you that I would contact American Airlines attorney to inquire about the arbitration ... as well as to request that they provide a response to your OSHA complaint.").[8] RSMawhinney notified the DOL-Secretary of Labor (Ms. Hilda Solis) that the AIR21 investigation had been wrongfully delayed. RSMawhinney was

[8] DOL Investigator email to RSMawhinney; January 9, 2012

subsequently provided a response from the DOL: "... OSHA's investigation of your case has resumed...."[9]

Additionally, the DOT Office of Inspector General correspondence included:

> "We have carefully reviewed this complaint ... and have concluded that the appropriate venue for your whistleblower complaint is with the U.S. Department of Labor and for the aviation safety complaint is the Federal Aviation Administration."[10]

The DOT is aware of AA and the Federal Aviation Administration under-performance as described in a published report (Report No. AV-2010-042 "FAA's Oversight of AA Maintenance Programs");[11] within the report, includes "Retribution was taken against personnel who have reported maintenance problems."

The second attempt by AA, to compel arbitration of RSMawhinney's AIR21 complaint, was incorrectly submitted before the DOL ALJ on April 8, 2014, and incorrectly determined by the DOL ALJ on May14, 2014. The DOL ARB *reversed* the ALJ's *Order* on January 21, 2016. (*See* App. 48-58)

On April 28, 2016, AA made the third attempt, to compel arbitration of RSMawhinney's AIR21 complaint, before the District Court; exceeding the statute of limitations of 29 C.F.R. § 1979.113. On

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[9] DOL Letter to RSMawhinney; April 11, 2012

[10] DOT IG email to RSMawhinney; April 11, 2012

[11] DOT IG Report No. AV-2010-042; February 16, 2010

August 23, 2016, the District Court ***DENIED*** AA's request. Within the District Court's *order*, the District Court determined that "... either party may seek an order compelling arbitration of the issue by filing a petition to compel arbitration pursuant to *9 U.S.C. § 4.*" (*See* App. 31) In addition, the District Court wrongfully provided an *advisory opinion*, directed specifically to AA. The District Court was confronted with RSMawhinney's objection that the District Court could not entertain AA's motion; as the original *case-and-controversy* before the District Court was different, and under appeal before the Ninth Circuit. District Court Judge Michael M. Anello violated RSMawhinney's *constitutional rights* by instructing AA with an *advisory opinion* ("... to the extent that American wishes to file a petition to compel arbitration pursuant to 9 U.S.C. 4, it must file its petition as a new case, not as an alternative request in a motion to enforce judgment."). (*See* App. 32)

Judge Anello violated the U.S. Constitution – Article III, as well as, his own canon oath, ethics and understanding of an *advisory opinion* as confirmed in a previous *case* before Judge Anello:

> "The Court's jurisdiction is strictly limited to the case and controversy before it, as defined in the operative pleading. *See Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("the court's role is 'neither to issue advisory opinions nor declare rights in hypothetical cases.'");" and,
>
> "The Court declines to amend its Order to provide guidance on claims not alleged in the

FAC, as it would amount to nothing more than an improper advisory opinion."[12]

RSMawhinney provided the Ninth Circuit with argument that the District Court provided AA with an *advisory opinion*; and, opened the door for AA to initiate AA's fourth attempt to request that RSMawhinney's AIR21 complaint be compelled to arbitration. The Ninth Circuits *opinion* ignores RSMawhinney's allegation that the District Court provided an *advisory opinion* to AA; and, resorts to *misrepresenting the facts*, that were in evidence.

RSMawhinney provided the Ninth Circuit with argument:

> "a district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions." *Van Dusen v. U.S. District Court, for Dist. of Arizona*, 654 F.3d 838, 844 (9th Cir. 2011); and,
>
> "Defendants and district courts have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of whether the parties can invoke the authority of the FAA, this puts the cart before the horse, Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot through the insertion of a delegation clause confer authority on a district court that Congress chose to withhold." *Id.* at 844.

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[12] *See* App. 76 ¶ 3 – App. 77 ¶ 2.

The Ninth Circuit's *opinion* in this case (Case No. 16-56638) is contrary to the U.S. Supreme Court's precedent *opinion* in *Circuit City*; and, the Ninth Circuit's *opinion* in *Van Dusen*.

Additionally, RSMawhinney argued the California Supreme Court *opinion*:

> "As noted, the AIR21 statutory scheme gave ... the right to a formal de novo hearing of record before an ALJ, and further gave him the right to appeal the Secretary's order to the appropriate United States Court of Appeals in accordance with the Administrative Procedures Act ... The statute further expressly reflects Congress's intent that '[a]n order of the Secretary of Labor with respect to which review could have been obtained ...' shall not be subject to judicial review in any criminal or other civil proceedings.' " *Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 876.

Within the Ninth Circuit *opinion* it is recognized:

> "An administrative AIR21 action did remain, as Mawhinney elected to pursue his complaint against the Airline in a hearing before an ALJ, as he was entitled to do;"[13] and,
>
> that of the *Murray* case. (*i.e.* "The AIR21 statutory scheme afforded ... an absolute right to a full de novo trail-like hearing before an ALJ, a hearing we find would fully comport with the requirements set forth in *Pacific Lumber* for establishing that the

[13] *See* App. 13 ¶ 2

administrative proceedings were 'undertaken in a judicial capacity.' (*Pacific Lumber, supra,* 37 Cal. 4th at p. 944.)[*5]") *Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 878 (2010).

II. THE U.S. DEPARTMENT OF LABOR'S DUTY AND RESPONSIBILITIES DID NOT "...ceased once its investigation concluded with a finding of no violation."

The Ninth Circuit's *opinion* included the statement:

> "DOL's independent interest in Mawhinney's AIR21 retaliation complaint – grounded in its responsibility for assuring the safety of air travel, see H.R. Rep. No. 106-167, pt. 1 at 100 (1999) – ceased once its investigation concluded with a finding of no violation."

The Ninth Circuit's *opinion* goes beyond misinterpretation; it sets an incorrect precedence

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[*5] (*5, footnote 5, in *Murray*, includes: "The Ninth Circuit's order observes, 'An AIR21 complainant may contest the Secretary's investigative findings by filing 'objections to [those] findings' and 'request[ing] a hearing on the record' within 30 days of receiving them. *See § 42121(b)(2)(A); 29 C.F.R. § 1979.106(a).* If the Secretary's findings are timely challenged, AIR21 provides for a *de novo*, on-the-record hearing before an Administrative Law Judge. *See 29 C.F.R. § 1979.107(a)-(b); id.* at *§ 1979.109(a)* (written findings and conclusions); *29 C.F.R. § 18.13* (discovery procedures); *id.* at *§ 18.24* (subpoena power); *id.* at *§ 18.34* (right to personal appearance and representation by counsel); *id.* at *§ 18.38* (prohibition on ex parte communications); *id.* at *§ 18.52* (decision based on record of hearings).' (*Murray v. Alaska, supra, 522. F.3d at p. 923, fn. 4.*)").

that will adversely affect AIR21 complainants from this day forward.

The DOL ARB have raised issue, and seek resolution, with:

> "Burying these safety disclosures in the world of arbitration would defeat this Congressional purpose for whistleblower laws;" and,
>
> "The Board needs to clarify whether the Act (FAA) applies, in the first place, to whistleblowers cases and resolve the tension between the Congressional mandate to protect whistleblowers and the mandate to protect arbitration clauses through the Federal Arbitration Act. If the Federal Arbitration Acts applies to the Board, then the Board must ensure it complies with the mandatory language of that arbitration act and, in my view, more thoroughly analyze the applicability of the arbitration act's exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C.A. § 1." (emphasis added). (*See* App. 57)

The Ninth Circuit denied the DOL's request for clarification and deference of opinion, recognizing RSMawhinney was eligible for the implementation and remedies of AIR21.

> (*i.e.* "Initially we hold that the Secretary's approval of the December 2002 settlement agreement does not mean that Complainant was precluded from pursuing a whistleblower claim with OSHA and DOL against American

without clearer indication from the Secretary that this preclusion was intended."), (See App. 53 ¶ 2)

DOL ARB Judge Luis A. Corchado's concurring *opinion* included:

> "Also, like the majority, I think the Secretary's approval of a settlement agreement must explicitly state that a whistleblower is foreclosed from filing future whistleblower claims with OSHA before the Board can say that OALJ and ARB no longer have delegated authority to adjudicate a whistleblower claim." (*See* App. 57 ¶ 2)

The DOL raised the exemption included in 9 U.S.C. § 1, as the ARB noted:

> "... the Board also noted that transportation workers engaged in foreign or interstate commerce are exempted from the arbitration requirements of the FAA." (*See* App. 54 n. 11)

The DOL investigators determined that RSMawhinney had established a *prima facie* complaint; necessary to trigger an investigation. The Ninth Circuit *opinion* incorrectly holds:

> "But as DOL emphasized in its letter to Mawhinney regarding his post-investigation 'appeal' right, the AIR21 action at that point concerned only Mawhinney's purely private dispute with the Airline, not the government's independent interest in advancing the public interest in airline safety."

The Ninth Circuits holding would conflict with what the DOL investigator provided to RSMawhinney:

> "As we discussed today, your ALJ process (the next step) is a de novo review, which means that the ALJ can choose to ignore the OSHA findings."[14]

Additionally, the DOL provided to RSMawhinney:

> "... I have stressed to you that OSHA does not enforce the safety and security aspects of AIR21. That is the jurisdiction of the FAA (Federal Aviation Administration), and you need to contact the FAA or other agencies with proper jurisdiction on your own if you have any ongoing air safety or security concerns."[15]

The DOL's understanding of AIR21 was correct. The Ninth Circuit's interpretation and statement was incorrect. The DOL's role in AIR21 is the "Protection of employees providing air safety information."[16]

The Ninth Circuit resorts to the *misrepresentation of facts*, in attempt to distract from the issues raised, and to substantiate the *opinion* the Ninth Circuit rendered.

III. THE NINTH CIRCUIT *misrepresented the facts* in evidence.

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[14] DOL Investigator email to RSMawhinney; May 25, 2012

[15] DOL Investigator email to RSMawhinney; April 3, 2012

[16] DOL - Secretary's *Order*; 65 FR 50017; August 16, 2000

RSMawhinney's previous compilation of the Ninth Circuit's *misrepresentation of facts* include:[17]

(1) "In this case, however, there was no 'litigation' at DOL from which to infer a waiver."

This Ninth Circuit statement is incorrect; and is contradictory to the facts in evidence. The District Court declared:

> "Defendant (RSMawhinney) is currently litigating employment-related claims before the ALJ, and a two-week hearing before the ALJ is scheduled to begin on October 31, 2016." (emphasis added). (*See* App. 37 ¶ 2)
>
> Additionally, the DOL ALJ declared:
>
> "... each Respondent has filed a motion for summary decision in these administrative proceedings."[18]

Further, AA subpoenaed RSMawhinney for deposition, with regard to DOL Case No. 2012-AIR-017, and the DOL ALJ declared:

> "The hearing has been scheduled, with the parties' agreement, for October 31 since February of this year."[19]

AA took RSMawhinney's deposition on September 14, and 15, of 2016. Judge Berzon's

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[17] *See* App. 1-23; Appendix A, 904 F.3d 1114 (9th Cir. 2018)

[18] DOL ALJ *Order*; October 14, 2016.

[19] DOL ALJ *Order*; September 12, 2016.

misrepresentation of facts is contrary to the facts in evidence, and, of the meaning of litigation[20] ;

(2) "The Agreement between Mawhinney and the Airline does not extend to a proceeding of that kind, which concerns not a dispute between the parties to the Agreement, but a potential enforcement action by the government."

The Ninth Circuit is incorrect; and, contrary to the proceedings in progress before the DOL. The Secretary of Labor's *amicus curiae brief* holds:

> "... until the issue of whether Complainant's AIR21 claims are subject to mandatory arbitration has been definitively determined, this Court should not dismiss the ALJ Actions." (*See* App. 68 ¶ 1)

RSMawhinney's DOL Case No. 2012-AIR-017 is *stayed*,[21] at this time;

(3) "The Airlines demand for arbitration, filed with the ALJ shortly after the bankruptcy stay was lifted, reflects a timely and diligent assertion of the right to arbitrate, and so precludes a finding of waiver."

This Ninth Circuit representation statement is incorrect and disregards the DOL ARB's declaration:

> "... the parties simultaneously participated in the arbitration process and the AIR21

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[20] "Litigation" – "the process of carrying on a lawsuit";
"a lawsuit itself."
Black's Law Dictionary, 10th Edition

[21] DOL ALJ *Order*, January 19, 2017

whistleblower claim without raising an objection." (*See* App. ¶ 2);

(4) "Mawhinney next argues that his AIR21 action cannot be arbitrated because AIR21 itself forbids it. In support of this proposition, Mawhinney points to no statutory language so stating, as there is none."

The Ninth Circuit is incorrect, and misrepresents the proceedings before the Ninth Circuit. As described previously, and on the record in evidence, RSMawhinney provided response to the Ninth Circuit, that 9 U.S.C. § 1 includes the exemption:

> "...but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce";

(5) "DOL's independent interest in Mawhinney's AIR21 retaliation complaint ... ceased once its investigation concluded with a finding of no violation."

This Ninth Circuit declaration is incorrect. RSMawhinney has previously provided statements and support to the argument that the Ninth Circuit *misrepresents the facts* that have transpired, and are currently transpiring, before the DOL. The DOL ALJ has placed RSMawhinney's AIR21 Action on *stay*; due to the *amicus curiae brief* of the DOL Secretary of Labor ("The proceedings before the Office of Administrative Law Judges are stayed until the Ninth Circuit appeals are resolved and there is a

final arbitration decision addressing Complainant's AIR21 claims.").[22] (*See* App. 71 ¶ 1);

(6) "... the AIR21 action at that point concerned only Mawhinney's purely private dispute with the Airline, not the government's independent interest in airline safety."

The Ninth Circuit misrepresents the role of the DOL; confusing anyone reviewing the Ninth Circuit's *opinion* with the responsibilities of the DOL, and setting precedence that will incorrectly determine justice from this day forward.

RSMawhinney was provided the role of the DOL, ("Protection of employees providing air safety information"); and, of the Federal Aviation Administration, ("Please understand that the FAA (Federal Aviation Administration) investigation can only address air carrier safety issues; OSHA will investigate the discrimination issues.").[23] (emphasis added).

Additionally, the Federal Aviation Administration provided the result of their investigation:

"We established a violation of an order, regulation, or standard relating to air carrier safety may have occurred"[24] ;

(7) "Mawhinney did not refuse to arbitrate when he filed his AIR21 complaint."

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[22] DOL ALJ *Order*; January 23, 2017.

[23] DOL-FAA email to RSMawhinney; October 20, 2011.

[24] DOT-FAA Letter to RSMawhinney; May 14, 2013.

The Ninth Circuit *misrepresents the facts* in evidence; and, denies RSMawhinney's truthful account of the proceedings that transpired before the DOL. RSMawhinney provided the Ninth Circuit with evidence that the DOL investigation was stalled by AA; through AA's *ex parte* notice to the DOL of AA's alleged right to arbitrate RSMawhinney's AIR21 complaint. AA refused to cooperate with the DOL investigation until the Secretary of Labor, and the Inspector General of the DOT, held that RSMawhinney's AIR21 complaint was appropriate before the DOL and DOT. The DOL, and DOT, investigations resumed after the DOL Secretary of Labor, and DOT Inspector General, understood RSMawhinney's refusal to arbitrate the AIR21 complaint;

(8) "The Airline's action in district court was filed within four years of that date, and is therefore not time-barred."

The Ninth Circuit misrepresents the point in time that AA made the claim of the alleged right to arbitrate RSMawhinney's AIR21 complaint; and, when RSMawhinney refused to arbitrate the AIR21 complaint. The Ninth Circuit did point out that the District Court's "... determination was incorrect," regarding when AA alleged the right to arbitrate RSMawhinney's AIR21 complaint. (*See* App. 15 n. 4) The Ninth Circuit denied RSMawhinney's truthful representation of the DOL, and DOT, proceedings; and, incorrectly determined when AA exceeded the *statute of limitations,*[25] and, when AA *waived* AA's alleged right to arbitrate RSMawhinney's AIR21 complaint;

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[25] C.C.C. P. § 337

(9) "... it is doubtful the FAA's interstate exemption for contracts of employment in foreign or interstate commerce applies in this case."

The Ninth Circuits declaration portrays uncertainty with the use of the word "doubtful". The Ninth Circuit, and the District Court, disassociate RSMawhinney's employment in the field of interstate commerce; and, ignore relevant case precedence *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187 (9th Cir. 2011), and, *Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 878 (2010). RSMawhinney was re-hired on January 6, 2003; and, the SAgreement's primary purpose was the employment of RSMawhinney with AA which included the terms and conditions prior to RSMawhinney's return to employment;

(10) "The Agreement was not a contract under which Mawhinney was hired. *See J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335-35 (1944) (observing that a contract of employment, at its most basic, is an 'act of hiring')."

The Ninth Circuit, and District Court, ignore the facts in evidence; where, the Award of the Arbitrator included the fact that RSMawhinney was "... re-hired, on January 6, 2003...." Additionally, the Award of the Arbitrator listed the terms included within the SAgreement.

The Ninth Circuit's *opinion misrepresents the fact*, and contradicts its' holding, with the statement

that RSMawhinney's SAgreement and return to employment was "... albeit an employment-related one, by restoring the status quo ante...."

The Ninth Circuit inaccurately described case precedent determinations, raised by the Ninth Circuit, to support the Ninth Circuit's *opinion*. The Ninth Circuit's representation that:

> *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944) supports the Ninth Circuit's *opinion* ("The Agreement was not a contract under which Mawhinney was hired"); and,
>
> *Am. Postal Workers Union of L.A. v. U.S. Postal Serv.*, 861 F.2d 211, supports the Ninth Circuit's *opinion* ("Nor was it a contract setting the terms and conditions of employment").

RSMawhinney proclaims that these cases that the Ninth Circuit did raise to support their *decision*, when reviewed, speak otherwise; and, RSMawhinney raised the facts of these cases, and the determinations held within, that disproved the Ninth Circuits interpretations. RSMawhinney made the proclamations on October 5, 2018, (within the Petition for Rehearing or Rehearing *en banc)*; and, that these cases, raised by the Ninth Circuit, in fact, supported RSMawhinney's position.

RSMawhinney provided argument before the Ninth Circuit that these *case(s)* that the Ninth Circuit referenced, as precedence, were incorrect interpretations; and, that the cases actually

supported RSMawhinney's position. RSMawhinney proclaimed, with regard to *J.I. Case*:

> "The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates." *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 336.

Additionally, RSMawhinney proclaimed, with regard to *Am. Postal Workers Union*:

> "It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement." *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 338;

(11) "Nor was it a contract setting the terms and conditions of employment."

RSMawhinney proclaimed that the SAgreement included terms and conditions: *i.e.*

> "After execution of this Agreement and after the Parties receive Dismissals with Prejudice of both the Lawsuit and the Administrative Proceeding, and after expiration of all time periods set forth in Paragraph 8 hereof, and further provided the Plaintiff has not exercised any right of revocation of this Agreement, American shall, no sooner than January 6, 2003, reinstate Claimant to his

previous position of Aircraft Maintenance Technician at its operation in San Diego, California, subject to a favorable result as to legally required fingerprinting and background checks;"

"Except as specifically set forth in Subparagraph 5(B)(iv) of this Agreement, and upon his reinstatement to employment at American Airlines, Plaintiff shall enjoy and be entitled to all the normal rights and privileges of an American Airlines employee, including those afforded to him under any Collective Bargaining Agreement which may govern his employment."[26] ;

(12) "Instead, the Agreement was a contract settling a dispute between parties, albeit an employment-related one, by restoring the status quo ante and providing for the resolution of later disputes."

The Ninth Circuit disregards *Circuit City*, and *PowerAgent* precedence; and, the exception within 9 U.S.C. § 1. The Ninth Circuit does point out the fact that the SAgreement was "... albeit an employment-one...." Within the evidence before the courts, the Award of the Arbitrator included many observations, including:

"Date of re-hire January 6, 2003;" and,

"This arbitration is in addition to whatever rights he has to file a grievance as a union member or any other rights as a citizen";

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[26] SAgreement, excerpt (verbatim).

(13) "... recourse to the FAA is not a condition of enforcing the arbitration agreement in this case."

The Ninth Circuit has targeted, and alienated, RSMawhinney from the rights of a transportation employee in the field of interstate air commerce; with regard to 9 U.S.C. § 1. The District Court provided an *advisory opinion*, specifically, to AA:

> "... to the extent American wishes to file a petition to compel arbitration pursuant to *9 U.S.C. 4*, it must file its petition as a new case...." (*See* App. 32 ¶ 1)

AA, the AAA Arbitrator, the DOL ARB, and the DOT Inspector General have all held that RSMawhinney's employment with AA was as a transportation worker (Aircraft Maintenance Technician) in AA's interstate air commerce operation. The AAA Arbitrator, DOL ARB, and DOT Inspector General all held that RSMawhinney's appropriate recourse was within DOL jurisdiction;

(14) "As discussed, *see supra* note 1, the DOL's order provides an independent basis for enforcing arbitration."[27]

The Ninth Circuit incorrectly deduced that the SAgreement was incorporated into the DOL's *order*. During the July 11, 2018, oral argument hearing Judge Smith and Judge Castel point-out:

> "the agreement is not right in the *order*;"

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[27] The referenced note "note 1" states: "DOL's order approving the 2002 Agreement does not expressly incorporate the terms the Agreement."

> "... I don't know how we would be able to do anything if the settlement agreement weren't perceived to be a part of the *order*;" and,
>
> "But those 2003 regulations were not adopted until after this settlement agreement was approved by the DOL."

The District Court provided AA with an *advisory opinion*, creating an inappropriate opportunity for AA, to resubmit AA's *motions*:

> "... to the extent that American wishes to file a petition to compel arbitration pursuant to 9 U.S.C. 4, it must file its petition as a new case, not as an alternative request in a motion to enforce judgment." (*See* App. 32 ¶ 1)

The Ninth Circuit ignores RSMawhinney's representation that the DOL ALJ did not have the authority to, nor did the ALJ specifically incorporate AIR21 into the Agreement. *See Circuit City*, 532 U.S. 105, 112 (2001). The DOL ARB correctly interpret that the SAgreement did not include the arbitration of AIR21's discrimination and subsequent retaliation issues. (*See* App. 53 ¶ 2) Additionally, the SAgreement was not silent on AIR21's reach; as AA did suggest before the District Court. Within the SAgreement includes:

> "The Parties recognize for purposes of entering into this Agreement and settling all claims between them, that Mawhinney's claim in the Lawsuit for Wrongful Termination in Violation of Public Policy is preempted by 49 U.S.C. § 42121....";

(15) "The order incorporates the terms of the Agreement, including the arbitration provision for future disputes, and is separately enforceable under 49 U.S.C. § 42121(b)(6)(A), (*sic*), (with reference to the following note – "We do not address the district court's holding that airline mechanics, unlike 'seamen' or 'railroad employees,' are not 'engaged in foreign or interstate commerce.' See 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).")" ;

The Ninth Circuit ignores and disregards the District Courts attempt to disassociate RSMawhinney from employment as a transportation worker in the field of interstate air commerce. RSMawhinney raised the issue of the District Court's violation of RSMawhinney's *constitutional rights*, by providing AA with an *advisory opinion*. The District Court Case, No. 3:15-cv-259-MMA, was a case-and-controversy separate from the case-and-controversy of RSMawhinney's AIR21 complaint; Case No. 3:15-cv-259-MMA was closed on December 9, 2015, with Doc. No. 32. On April 28, 2016, the District Court entertained AA's belated attempt to combine RSMawhinney's AIR21 complaint, which was before the DOL OALJ (Case No. 2012-AIR-017); and, it was then, that the District Court provided AA with the *advisory opinion*, after admitting to the fact that the case-and-controversy was different. The *advisory opinion* that the District Court provided to AA, inappropriately provided AA the opportunity to initiate AA's fourth attempt to arbitrate

RSMawhinney's AIR21 complaint.[28] The District Court referenced another district court's *opinion*:

> "Aircraft maintenance crew members, or workers engaged in aviation-related services, do not fall within this exemption. *See Jimenez v. Menzies Aviation Inc.*, 2015 WL 4914727, at *5 n.4 (N.D. Cal. Aug. 17, 2015)."[29]

The District Court incorrectly relies on a lower court's *opinion* that was never challenged, or appealed; and, is contrary to the policies and proceedings before the DOL, regarding AIR21.

In addition, the District Court *misrepresented the fact*:

> "Because Defendant offers no evidence that the 2002 Agreement is a contract of employment, or that he engaged in interstate commerce necessary to qualify for the exemption, Defendant fails to demonstrate he is exempt from the FAA." (*See* App. 43 ¶ 1)

RSMawhinney did provide the evidence that the District Court falsely proclaims was not offered. RSMawhinney provided the evidence that was submitted by AA to the DOL, during the AIR21 investigation, which included:

> "As important as planes are to what American does, however, nothing is more important to its mission of safe travel than the people who

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[28] *See* App. 33 ¶ 1

[29] *See* App. 43 ¶ 1

> make what it does possible. Planes do not fly themselves, nor do they fix themselves. People do. And so maintaining a work environment in which people can do their jobs, and do them well, is itself important to American's mission of providing safe travel."[30]

AA submitted this evidence before the DOL and before the District Court, on April 28, 2016.[31] AA purposely excluded this evidence on AA's fourth attempt to compel RSMawhinney's AIR21 complaint to arbitration on September 22, 2016.[32] However, RSMawhinney did enter the evidence before the District Court, in Case No. 3:16-cv-2270.

CONCLUSION

The Ninth Circuit's *opinion* incorrectly *affirms* the District Court's *decision* and *judgment*; first, refuting the basis and determination employed by the District Court, then, incorrectly, and through the *misrepresentation of fact*, made an arbitrary *decision*. Additionally, the District Court's employment of an *advisory opinion*, on August 23, 2016, is inconsistent with the District Court's previous position and *order* on January 18, 2011. (*See* App. 76 ¶ 3 – App. 77 ¶ 2)

The Ninth Circuit misrepresents when time began, regarding AA's alleged right to arbitration;

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[30] Doc. No. 16-2, p. 56 ¶ 2; D.C. Case No. 3:16-cv-2270-MMA

[31] Doc. No. 38-3, p. 1; Case No. 3:15-cv-259-MMA "AA's May 11, 2012 Position Statement in Response to Mawhinney's DOL-OSHA Complaint"

[32] Doc. No. 5-2, p. 4; Case No. 3:16-cv-2270-MMA (missing - "AA's May 11, 2012 Position Statement in Response to Mawhinney's DOL-OSHA Complaint")

and, subsequently, incorrectly determined whether AA waived its' rights, with regard to the *statute of limitations*.

The Ninth Circuits actions compromise the integrity of the justice system; through the Ninth Circuit's employment of the *misrepresentation of facts* of the evidence entered before the Ninth Circuit, and before the District Court.

RSMawhinney's AIR21 *case* has not been determined to date; and, the DOL ARB Judges have revealed the difficulties they have encountered. The Ninth Circuit avoids providing conclusion to the questions raised by the DOL ARB Judges. The District Court, and Ninth Circuit, strategically disassociate RSMawhinney as a transportation worker in the field of interstate commerce.

RSMawhinney's arguments and evidence were not considered and honored by the District Court and Ninth Circuit. The Ninth Circuits has denied RSMawhinney with equal opportunity and level, valid, *justice*. RSMawhinney prays that the U.S. Supreme Court recognizes the injustice that has been served by the lower court's, and, upholds the intent of AIR21, in the interest of AIR21, *public-safety* and National Security.

Respectfully,

Robert Steven Mawhinney,
Petitioner