NO. 20-_____

In the Supreme Court of the United States

BARRY ROSEN,

Petitioner,

v.

UNITED STATES GOVERNMENT,
FEDERAL AVIATION ADMINISTRATION,
AND CITY OF SANTA MONICA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federally-certificated Pro Se pilot, and aircraft owner, domiciled at a federally-funded airport, was denied standing by both the District Court and Ninth Circuit to challenge government entity actions which both usurped the express intent of Congress and denied pilot his statutory rights, asks the Court to confirm standing and compel review process consistent with *NRDC v. FAA*, 564 F.3d 549, 555 (2nd Cir. 2009) as Ninth Circuit prematurely denied standing for want of redressable harm under *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th 2018), and improperly branding pilot a serial litigant; incident thereto, the Court is also asked to review certain due process hurdles Pro Se litigants face.

THE QUESTIONS PRESENTED ARE:

1. Whether a federally certificated Pilot, who has a special and substantial interest in a not only a public-use airport but the entire national airspace system, demonstrated injury-in-fact when his interests protected by underlying statutes, were violated by the government respondents, when they entered into a settlement agreement that allowed immediate shortening of the runway, in addition to allowing closure of the airport and did so without seeking statutorily required public input on local, state and federal levels.

2. Whether Congress statutorily imparted standing on entire aviation community (including Pilots), via an express right to use the airspace system and right of consultation on matters pertaining to the airports and the airspace system, under 49 U.S.C. § 40103, Airway and Airport Improvement Act 49 U.S.C. § 47101 *et seq.* and specifically 49 U.S.C. § 47103(b)(1).

3. Whether Petitioner's separation of powers Claims, which did not require standing (*see Leedom*) due to the (executive branch) FAA's separation of powers violation when it usurped the unambiguous statutory intent of Congress in releasing an airport from the obligation to by operated in perpetuity under the 1944 Surplus Property Act (Abolished by the Federal Property and Administrative Services Act (63 Stat. 738), June 30, 1949 and transferred to other agencies). *See also* 49 U.S.C. § 47151.

4. Whether a Circuit split exists on the issue of the Standing of a between the 2nd and 9th circuits with the 2nd circuit having determined that pilot users of an airport demonstrate the requisite substantial interest to challenge an FAA order (or in the case an action) *see NRDC, Inc. v. FAA*, 564 F.3d 549, 555 (2nd Cir. 2009).

5. Whether the District Court erred in failing to allow leave to amend to the Pro Se Petitioner, especially upon being the first pleading to be attacked regarding the sufficiency of [the Petitioner's] allegations.

6. Whether justice requires, a district court should 'freely give leave' to amend a complaint pursuant to FRCP 15(a) (*see Foman*).

7. Whether the District Court erred in dismissing the entire complaint and writ of mandate when the government Defendants' motions to dismiss never addressed the writ of mandate second claim for relief.

8. Whether Petitioner still had an intact right to amend under FRCP 15(a)(1)(b), after Petitioner had first amended prior to service under FRCP 4 and all subsequent amendment had been done with opposing party's written consent and the court's leave.

9. Whether a Pro Se complaints and other pleadings should be construed liberally in the interest of justice, in order to afford the benefit of any doubt.

10. Whether before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively.

11. Whether a Pro Se litigant should be afforded extra opportunity to amend before prior to applying a futility analysis (*i.e.* could not be saved by any further amendment).

12. Whether notice by a means other than those authorized by Rule 5(b) comport with the constitutional requisite for notice (*i.e.* service of process) (*see Mullane*)

13. Whether the overall implementation the CM/ECF filing system used by all Federal Courts violated fundamental rules of fairness protected by the U.S. Constitution due process clauses as embodied in relevant rules of the FRCP by allowing CM/ECF users to immediately file documents without service having been done on Non-CM/ECF users like pro per litigants/prisoners pursuant to FRCP 5.

14. Whether FRCP 5 needs to be modified to specify that non-CM/ECF users shall be served prior to filing on the CM/ECF system and instituting remedies and sanctions for such instances.

15. Whether the CM/ECF filing system needs to be modified to so that documents are only lodged and not filed when a non-CM/ECF user is involved in an action, allowing for a review of service by the clerk/court.

16. Whether the Clerk/District Court had a ministerial duty to reject filings done on the CM/ECF without proper service having been completed pursuant to FRCP 5 on all litigants and especially those who are Non-CM/ECF users and not subject to electronic service, like pro per litigants/prisoners.

17. Whether the District Court was divested of jurisdiction to consider government respondents subsequent papers, such as motions, appearances, etc., when such documents required to be served pursuant to FRCP 5, were filed via the CM/ECF system without any service of process on petitioner.

18. Whether filing documents on the CM/ECF system without required service pursuant to FRCP 5, could constitute failure to timely plead or otherwise defend in response as required by the time limits under FRCP 12(a)(1), resulting in a default under FRCP 55.

19. Whether government respondent City of Santa Monica, defaulted when it failed to timely plead or otherwise defend in response to the First Amended Complaint, as required by the time limits under FRCP 12(a)(1) and if the Clerk/District Court erred in not granting default.

20. Whether the Ninth Circuit violated Petitioner's due process rights when it lost Petitioner's opposition brief, and summarily granted extension of time to Respondent FAA, without considering the issues presented in that brief.

21. Whether under the AntiDeficiency Act (31 U.S.C. § 1341, *et seq*), during a government shutdown, the FAA would have been required to file its responsive pleading as ordered by the court prior to the shutdown

and if a violation occurred under 31 U.S.C. § 1342, 31 U.S.C. § 1350 when Department of Justice attorneys asked for an extension of time.

22. Whether the Ninth Circuit erred and violated Petitioner's due process rights in failing to consider Petitioner's motion for summary disposition, when it went completely unopposed by one respondent, and was largely unopposed by the other respondent.

23. Whether a respondent abrogated its rights to later file responsive pleading under the doctrine of waiver, when it fully (or partially) failed to oppose Petitioner's motion for summary disposition.

24. Whether the Ninth Circuit erred and violated Petitioner's due process rights, when it failed to review/ apply any standard of review.

25. Whether the Ninth Circuit erred and violated Petitioner's due process rights, in calling out Petitioner as a "serial litigant" as part of its reasons for affirming.

PARTIES TO THE PROCEEDINGS

Petitioner

- Barry Rosen

Respondents

- United States of America
- Federal Aviation Administration
- City of Santa Monica

CORPORATE DISCLOSURE STATEMENT

Accordingly, no entity warrants inclusion under Rule 29.6.

LIST OF PROCEEDINGS

Barry Rosen v. United States Government, Federal Aviation Administration, et al.

United States District Court for the Central District of California

17-cv-07727-PSG-JEM

Judge issues Order Granting Motions to Dismiss (July 5, 2018) (Dkt.113);

Barry Rosen v. United States Government, Federal Aviation Administration, and City of Santa Monica

United States Court of Appeals for the Ninth Circuit

18-56059

Unpublished Opinion (January 3, 2020) (9Dkt.63);

En Banc Petition for rehearing (February 14, 2020) (9Dkt.64);

Order Denying Petition for Rehearing (March 17, 2020) (9Dkt.65);

Mandate Issued (March 25, 2020) (9Dkt.66).

City of Santa Monica v. United States of America, Federal Aviation Administration, et al.

United States District Court for the Central District of California

2:13-cv-08046-JFW-VBK

Order Dismissing Case (February 13, 2014)

Settlement Agreement and Consent Decree approved by the Court (February 1, 2017)

National Business Aviation Association, et al. v. Michael P. Huerta, Acting Administrator and Federal Aviation Administration

United States Court of Appeals for the District of Columbia

17-1054

Per Curiam Judgment that the petition for review be denied. (June 12, 2018)

Per Curiam Order, En Banc, denying petition for re-hearing En Banc (August 6, 2018)

Kate Scott, James Babinski v. City of Santa Monica

United States District Court for the Central District of California

17-CV-07329-PSG-FFM (removed from Los Angeles Superior Court, Case No. BS169465)

Order on Motion to Dismiss Case (December 15, 2017)

National Business Aviation Association, et al. v. Daniel K. Ellwell, Acting Administrator and Federal Aviation Administration

United States District Court for the District of Columbia

18-CV-1719-RBW

Case filed (July 24, 2018)

Briefing Complete on FAA Rule 12 motion (October 30, 2018);

No other action taken since as of time of publication of this petition (August 14, 2020)

Mark Smith, Kim Davidson Aviation Inc, Bill's Air Center Inc, Justice Aviation, Inc, National Business Aviation Association, AOPA Inc. v. City of Santa Monica

FAA Part 16 Airport Proceedings Docket 16-16-2

Director's Determination finding City of Santa Monica violated federal Grant Assurance obligations under 49 U.S.C. § 47101, *et seq*. (November 8, 2019);

Currently on appeal to FAA Administrator (February 2, 2020)

National Business Aviation Association, v. City of Santa Monica

FAA Part 16 Airport Proceedings Docket 16-14-04.

The FAA issues a Final Agency Decision (FAD) holding that by accepting the additional funds in

2003, the grant assurance expiration date was extended until August 27, 2023 (August 15, 2016);

The City seeks review of the FAD in the U.S. Court of Appeals for the Ninth Circuit. (*City of Santa Monica v. FAA*), 16-72827 (9th Cir.), abrogated by Settlement Agreement and Consent Decree approved by the Central District Court in 2:13-cv-08046-JFW-VBK (February 1, 2017)

FAA Order on City of Santa Monica Re: Jet Discrimination Ordinance

FAA issues order to show cause regarding City ordinance banning C and D class aircraft (April 7, 2008)

United States Court of Appeals for the District of Columbia strikes down ordinance. Case number No. 09-1233 (January 21, 2011)

United States District Court for the Central District of California

5:08-CV-02814-JF

Montara Water & Sanitary District v. County of San Mateo

Judgment in favor of the United States. (Dkt.86) (February 26, 2009).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Barry Rosen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet.App.1a) is unpublished at *Rosen v. United States Government, Federal Aviation Administration, et al.*, 18-56059 (9th Cir. 2020). The relevant orders of the district court (Pet.App.6a) are also unpublished.

JURISDICTION

The Ninth Circuit issued its initial opinion on January 3, 2019. The Ninth Circuit denied Rosen's petition for rehearing on April 17, 2020. (Pet.App.22a) This Court has allowed 150 days pursuant to its Thursday, March 19, 2020 Order, which remains in effect. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND JUDICIAL RULES INVOLVED

A. Constitutional Provisions

U.S. Const. Art. III., § 2

[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . to Controversies to which the United States shall be a Party;.

U.S. Const. amend. V (Due Process Clause)

No person shall . . . be deprived of life, liberty, or property, without due process of law

U.S. Const. amend. XIV (Due Process Clause)

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

B. Statutory Provisions

FEDERAL STATUTES

Administrative Procedures Act (APA)

- 5 U.S.C. § 702
- 5 U.S.C. § 704

AntiDeficiency Act (ADA)

- 31 U.S.C. § 1341 *et seq.*
- 31 U.S.C. § 1342
- 31 U.S.C. § 1350

Federal Aviation Act

- 49 U.S.C. § 40101, *et seq.*
- 49 U.S.C. § 40103(a)(2)

Airway and Airport Improvement Act

- 49 U.S.C. § 47101 *et seq.*
- 49 U.S.C. § 47103(b)(1)
- 49 U.S.C. § 47107
- 49 U.S.C. § 47151
- 49 U.S.C. § 47152(8)

STATE STATUTES

California Statutes

- California Bus. & Prof. code § 6125
- California Bus. & Prof. code § 6126(a)
- California Bus. & Prof. code § 6127
- California Government code § 54956
- California Government code § 54960
- California Code of Civil Procedure § 1021.5 (codifies the private attorney general)
- California Environmental Quality Act (CEQA) Public Resources Code § 21000, *et seq*

  Public Resources Code § 21167
  Public Resources Code § 21066

Santa Monica Statutes

- Santa Monica City Charter § 613
- Santa Monica City Municipal Code § 10.04.020

C. Judicial Rules

FEDERAL JUDICIAL RULES

- Fed. R. Civ. P. 5
- Fed. R. Civ. P. 6(d)
- Fed. R. Civ. P. 12(a)
- Fed. R. Civ. P. 15(a)
- Fed. R. Civ. P. 55(a)
- Fed. R. App. P. 25
- Fed. R. App. P. 27
- Fed. R. App. P. 31
- Ninth Circuit Rule 31-2.2

CALIFORNIA JUDICIAL RULES

- Central District Local Rule 5-3.2.1
- Central District Local Rule 7-12
- Central District Local Rule 7-19.1
- Central District Local Rule 83-2.1.1.1
- Central District Local Rule 83-2.1.2.1
- Central District Local Rule 83-2.1.4.1
- California State Bar rule 5.5

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve multiple issues of exceptional national importance, that: (1) involve the rights of Pro Se litigants

disfavored by local courts; (2) have produced a conflict between the Ninth Circuit Court of Appeals and the Second Circuit Court of Appeals; and (3) have not yet been decided by the Supreme Court due to the very unique nature of the case.

A. Background

Santa Monica Airport ("SMO") is one of the oldest airports in the entire country, which even predates Lindbergh's famous transatlantic flight by nearly a decade. It is an important airport for a number of reasons, including being an entry point to the LA area, for Presidents since Ronald Reagan (and most recently Donald Trump). Due to its importance during WW2, SMO became the property of the Federal Government for the duration of the war. After the war, the much improved and expanded airport that we now know today, was conveyed to the City of Santa Monica (CSM) in 1948, according to a 1944 Surplus Property Act Instrument of Transfer Deed ("48 Instrument"). Pursuant to intent by Congress, language embodied in the 48 Instrument required that CSM continuously operate the so-called surplus property as an airport.[1] Since Congress clearly foresaw that issues may arise regarding future non-compliance, a remedy was specifically included within the 48 Instrument, providing for an exclusive right of reversion back to the federal government for failures to operate in perpetuity, et al. (*see Montara Water and Sanitary Dist. v. County of San Mateo*, 598 F.Supp.2d 1070, 1082, 1086-1087 (N.D. Cal. 2009)).

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[1] Statutory reversion language is still used today for surplus property deeds (*see* 40 U.S.C. § 50(h)(2))

In the early 1980's, CSM decreed that they no longer wished to operate the airport (in perpetuity) in clear defiance of their obligations under the 48 Instrument. Ultimately the Federal Aviation Administration (FAA) and CSM entered an agreement in 1984 ("84 Agreement") to purportedly "resolve all legal disputes." Amongst the terms of that agreement, certain so-called "excess" lands were to be released from aviation usage (in violation of 49 U.S.C. § 47151), provided that CSM met certain conditions regarding implementation of an overall airport plan. CSM also committed to operate the airport until July 1, 2015. The 84 Agreement deliberately lacked specificity beyond the expiration on July 1, 2015, because the terms of the 48 Instrument and 84 Agreement were to be interpreted consistently with each other, resulting in a reversion on July 2, 2015 to the U.S., when and if CSM failed to abide by operate SMO. In 2003, CSM took federal funds pursuant to grant assurances under 49 U.S.C. § 47101 *et seq.* in order to make improvements, resulting in, CSM's obligation to operate SMO being extended until 2023 (*see* 2016 FAD in FAA Part 16 Docket 16-14-04).

In anticipation of the expiration of the 84 Agreement, CSM filed a "quiet title" lawsuit against the FAA in October 2013 (13-cv-08046-JFW-VBK) seeking to undermine obligations under the 48 Instrument. CSM's action was quickly Dismissed by the DC under an FAA motion. CSM then appealed to the Ninth Circuit, which reversed in July 2016. Around that same time, CSM began the process removing so-called "excess" lands from aviation usage under terms of the expired 84 Agreement, which in turn, caused injuries-in-fact to Rosen.

Before further action was undertaken in CSM's lawsuit, just days into the new presidential administration, the two governmental entities entered into a secretive backroom deal to settle. CSM then hastily ratified the settlement during a closed session meeting of the City Council, without proper notice to the general public (California Govt code 54956, SM Municipal Code 1.04.020, Santa Monica City Charter § 613) and without any notice whatsoever of pending action on the settlement, as demonstrated in CSM's own RFJN (Exhibits 16-17). Similarly, it is undisputed that the FAA, failed to consult the aviation community pursuant to their statutory obligations under 49 U.S.C. § 47103(b)(1). The entire aviation community and citizens of Santa Monica were stunned by the announcement of the settlement, made during a press conference held shortly after secret ratification by the Council. The DC Judge overseeing the case, then refused to allow for any intervenors, including a group of 8,700 Citizens, prior to rubber-stamping the settlement.

Pilots enjoy a special interest relationship with their "home" airports and indeed the entire national airspace system (NAS). As a result, Pilots have a prudential concrete interest regarding the NAS. Rosen, a federally certificated commercial pilot and aircraft owner whose plane is domiciled at SMO, filed the action at issue Pro Se, seeking first and foremost to strike down the improper settlement, in order to restore the status quo by returning SMO to the original terms of the 48 Instrument under provisions of the Administrative Procedures Act (APA) (5 U.S.C. § 702), California Environmental Quality Act (CEQA) (Public Resources Code § 21167) *et al.* In addition, via Writ of Mandate,

Rosen was seeking enforcement of congressional mandated grant assurance obligations codified in 49 U.S.C. § 47101, *et seq.*, which have resulted in injury-in-fact suffered from revenue diversion, the runway shortening, and numerous other, violative or discriminatory actions by CSM.

B. District Court Due Process Issues

As a member of the aviation community and airport user, Rosen deserved to have his case adjudicated on the merits, but instead was faced with a plethora of procedural road blocks meant to deprive him of his fundamental rights under the rules of fairness, which amongst other things included being deprived of due notice (service) of opponents' documents/motions; deprived of right to amend as a Matter of Course under FRCP 15(a)(1)(B) and deprived of default when Respondents failed to timely file a responsive pleading pursuant to FRCP 12(a)(1)(A)(i) or a DC order.

From the very outset, the DC systematically allowed Respondents to file subsequent documents via the CM/ECF system without demonstrating prerequisite FRCP 5(b) compliant service and in most cases, with any service whatsoever. These actions violated Local Rules (specifically L.R. 5-3.2.1), which require service in accordance with FRCP 5 upon litigants who are not CM/ECF users such as a Pro Se or Prisoner. Such documents included appearances of Counsel, Ex Parte ("EP") motions and/or Opposition and most importantly, the FRCP 12 Motions to Dismiss ("MTD's).

As is fully chronologically outlined above in Rosen's Ninth Circuit Briefs, CSM began electronically filing its earliest papers on 10/25/17 (Dkt.8-11) without

demonstrating pre-requisite FRCP 5(b) compliant service, claiming delivery to/by United Parcel Service. Rosen only learned of the filings when the DC order (denying TRO) later arrived in the U.S. Mail. Next, appearance by Attorney Brian Hazen, was filed (Dkt.16) without any service whatsoever. The following day, after the case was transferred to Judge Gutierrez, CSM filed an EP application to extend time (Dkt.19) yet again without demonstrating pre-requisite FRCP 5(b) compliant service (claiming service by being left with the CSM's Counsel mail-room). Said filing was done without compliance under L.R. 7-19.1 and violated the standing order ("DCSO") (requiring a fax). Nonetheless, the DC granted CSM's EP (Dkt.20) exactly as proposed, extending time to respond specifically to the initial (Verified) Petition/Complaint. It is unlikely the DC even saw Rosen's opposition (docketed on CM/ECF System docket until 5 days later).

Because Respondents had not been served with the initial complaint pursuant to FRCP 4, on 11/15/17 Rosen filed a (Verified) First Amended Petition/ Complaint (FAC), without invoking the one-time amendment pursuant to FRCP 15(a)(1)(A), mooting the DC order (Dkt.20). Pursuant FRCP 12(a)(1)(A) requirement, CSM was required to respond within 21 days after service of the FAC. As CSM failed to timely respond to the FAC by 12/8/17, they were in default and Rosen properly and timely filed a Request for Entry of Default pursuant to FRCP 55(a) (Dkt.32-33), which was improperly rejected by the Clerk (Dkt.34-35) citing the now mooted order (Dkt.20) as the reason for rejection. Because of that refusal to grant default, the action proceeded forward, with CSM continuing to blatantly disregard service obligations

under the FRCP's, with an appearance by attorney Ivan Campbell, electronically filed without any service whatsoever (Dkt.53)

Similarly, the FAA was also responsible for numerous similar rules violations. The first of which resulted in Rosen being sandbagged by an EP motion to extend time (Dkt.38), which was handily granted by the DC (Dkt.39) the very next day after filing, without Rosen ever having seen the motion (service done under FRCP 5(b)(2)(C)-6(d) requiring 3 extra days), and without any compliance with the DCSO. Thus, Rosen was fully denied his right to oppose. Weeks later, FAA counsel, filed another EP seeking to extend time to meet and confer under L.R. 7-3 (Dkt.46), without required notice under L.R. 7-19.1; without service and without a proposed order under L.R. 5-4.4.1/7-19 (as duly noted in deficiency notice) (Dkt.47). The DC handily "stamped" off on the order (Dkt.49) "so ordered" without actually entering any actual discernable order and likely without having seen Rosen's opposition, which not only points out the rules violations, but that FAA Counsel had engaged in perjury.

Thereafter, the Parties agreed to two (2) separate stipulations to amend, (both granted by the DC), resulting in the operative Third Amended Complaint ("TAC") being filed, requiring (by DC order) responsive pleadings by 4/23/18. On 4/23/18, both Respondents separately electronically filed their FRCP 12 MTD's (Dkt.57-63) without any service pursuant to FRCP 5 and L.R. 5-3.2.1. Most notably, CSM's defective certificate of service, claims an intent to serve, and the FAA's makes no claim of service whatsoever on Rosen. Under FRCP 5, L.R. 5-3.2.1 and L.R. 7-12, the

DC had a ministerial obligation to reject the filings for both lack of service and violation of an order setting a deadline, but the DC refused to exercise its discretion consistent with the dictates of the rules. As a result, Rosen filed a request for entry of default (rejected by DC for lack of service, even though exempt under FRCP 5(a)(2) (Dkt.66)) and then a (second) request (Dkt.67-68) (with FRCP 5 service) (rejected by the clerk (Dkt.69)). As a result of those rejections, Rosen filed an EP motion seeking to strike (Dkt.77-78), whereupon the DC again refused to exercise discretion consistent with the dictates of the rules, by denying the motion for failure to meet and confer pursuant to L.R. 7-19.1 (Dkt.79), demonstrating a double standard.

Because the MTD's fully lacked service, Rosen's sought leave of the DC to amend because the right to amend under 15(a)(2) was never triggered. The district court denied Rosen's motion, without taking notice of the substantial changes in the proposed Fourth Amended Complaint. The DC ultimately issued an order on the MTD's (without the benefit of a hearing), completely dismissing Rosen's entire action, holding that Rosen lacked standing on several grounds and denied leave to amend, on the very first time that sufficiency of the pleadings were ever challenged. Thereafter, CSM electronically lodged a proposed judgment, again without any service pursuant to FRCP 5/L.R. 5-3.2.1 (Dkt.114), which the DC then handily signed off on (Dkt.115) as its last act prior to Rosen filing for appeal. On 8/6/18, Rosen timely filed an appeal with the Ninth Circuit.

1. Improper CM/ECF Filings by a Non-Bar Member

Rosen has learned that FAA counsel Gary D. Feldon, was fully ineligible to practice pursuant to L.R. 83-2.1.1.1, L.R. 83-2.1.2.1, California Business and Professions Code §§ 6125, 6126(a), 6127 and California Bar Rule 5.5, as he is not a member of the California Bar. Feldon, made his first appearance as a U.S. Attorney in the *Santa Monica v. FAA* action, which underlies this action. It is notable that Feldon somehow appeared by electronically filing a notice of appearance, without being a DC bar member and without first having sought leave under L.R. 83-2.1.4.1 or being admitted *pro hac vice*. Feldon then somehow appeared in 8:14-cv-00534-CJC-JPR on 6/1/17, and finally, in Rosen's action (Dkt.38) on 12/20/17, all without having sought any leave of the DC. It is notable that even had Feldon sought leave under L.R. 83-2.1.4.1, he still would have been ineligible to practice without admission to the California Bar.

C. Ninth Circuit Due Process Issues

The Ninth Circuit ("NC") was not immune from due process issues. After Rosen filed his opening brief (9Dkt.12), the date to file responsive pleadings was 1/14/19 pursuant to FRAP 31. On 1/3/19, during a government shutdown that started on 1/21/18, the FAA filed a motion to extend time until 03/15/2019. Rosen timely opposed that motion 1/10/19 (9Dkt.24) citing numerous important legal issues arising under the AntiDeficiency Act ("ADA") 31 U.S.C. § 1341 *et seq.*, that precluded all work required to even seek an extension (31 U.S.C. §§ 1342, 1350). The NC has never addressed those issues, due to Rosen opposition being misplaced by the Clerk (discussion in 9Dkt.20-21).

The FAA was summarily given a one-month extension by the Clerk. CSM was never actually granted any extension. The docket itself, demonstrates the missing brief was docketed on 3/6/19, but was never considered.

On 1/29/19, the FAA filed a second motion to extend. Again, Rosen timely opposed the motion (9Dkt. 20/21), which also put the issue of the lost opposition brief specifically in front of the NC. The Clerk summarily granted an extension (after briefs had already been filed by Respondents), even though CSM had no proper or pending request.

Because many issues were undisputed, Rosen filed a Motion for Summary Disposition on 2/22/2019 (9Dkt.22) under Circuit Rule 3-6. On the 3/4/19 deadline under FRAP 27(3)(A), the Motion went fully unopposed by CSM, with the FAA failing to address the vast majority of issues (9Dkt.23). Rosen filed a reply brief fully completing motion briefing on 3/4/19 (9Dkt.23) precluding further briefing under the doctrine of waiver, yet the NC never took up Rosen's motion, even though it was almost completely unopposed.

Rosen's Pro Se representation status was replaced by Attorney Gustavo Lamanna as of the reply brief (9Dkt.36). On 1/3/20, the three-judge panel issued an unpublished opinion, not only affirming the DC ruling, but also improperly called out Rosen as a "serial litigant" seeming to imply that Rosen was somehow vexatious, which he is not. The fact that the panel affirmed based on such an abbreviated and haphazard opinion seems to indicate a clear bias against (formally Pro Se) litigant.

Rosen requested an En Banc hearing on 1/14/20 and on 3/17/20. The NC panel issued an Order Denying Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

Although it is easier to define injury in some cases than in others, the occasional difficulty of the enterprise is hardly reason to abandon it altogether (John G. Roberts, Jr., Article III Limits on Statutory Standing, 42 Duke L.J. 1219 (1993), yet here, both the DC and NC seem to have done exactly that in completely failing to recognize that not only does Rosen have a particularized concrete interest, but also that an actual invasion of legal rights resulting in injury-in-fact, along with *ultra vires* claims.

I. PRO SE PILOT HAS STANDING

It doesn't take a rocket scientist to recognize that, a federally certificated pilot pursuant 14 C.F.R. Part 61, Subpart F, and aircraft owner, has a special, substantial and cognizable prudential interest in not only his domicile "home" airport, but the entire national airspace system. Moreover, Congress, as set forth in the Federal Aviation Act, 49 U.S.C. § 40101, *et seq.* and Airway and Airport Improvement Act ("AAIA"), 49 U.S.C. § 47101 *et seq.* has statutorily conferred rights, including that "a citizen of the United States has a public right of transit through the navigable airspace (49 U.S.C. § 40103(a)(2))," as well as a right of consultation for such users (aviation community) (49 U.S.C. § 47103(b)(1)) as part of the implementation section

of National Policy related to Airports/Airways codified under the AAIA.

In their haste to ink the settlement during the void in the first days of the Trump Administration, both actors, failed to study what ramifications would occur in the NAS and to the aviation community, including Rosen. These include increased burdens on nearby airports, taxing the entire NAS—for instance after SMO closes, loss of the VOR NAVAID will necessitate serious changes in the airspace system resulting in major revisions of routings, including arrivals/ departures at LAX. and routes that allow VFR traffic to traverse LAX airspace—the net result is that the NAS will be severely impacted, along with its users.

A. Statutory Claims

The FAA/CSM settlement gives rise to numerous statutory claims that were fully ignored by the both the DC and NC. One of Rosen's key claims arises from statutory rights under Federal, State and local statutes that require governmental transparency via citizen review and/or commentary of pending or proposed actions. Pursuant to implementation provisions of AAIA National Policy, under 49 U.S.C. § 47103(b)(1) a right of consultation on airport/airspace affairs is afforded to the aviation community, which clearly includes Rosen. Here, it is undisputed that the FAA never publicly disclosed the settlement to anyone, let alone the aviation community. It is notable that the parties rushed to complete settlement just days into the incoming Trump administration, before the new administration or incoming Secretary Elaine Chao, had an opportunity to review. Under 49 U.S.C. §§ 47151-47152, review by the Secretary of Transportation and Admin-

istrator of General Services were specifically and unambiguously required.[2]

The settlement also abrogated obligations under the National Environmental Policy Act (NEPA) and Airport Noise Capacity Act (ANCA) for both the FAA and CSM. It further abrogated the rights of the aviation community (including Rosen) to seek 14 C.F.R. Part 16 (aka Part 16 complaint) redress for violations of statutory and regulatory obligations by CSM, such as Grant assurances (49 U.S.C. § 47107), et al. As a result, Rosen has statutory standing under the Administrative Procedures Act (APA), 5 U.S.C. § 702, 5 U.S.C. § 704, to challenge not only the agency decision to enter into the settlement, but the abrogation of NEPA, ANCA, along complete failure of the FAA to consult with the aviation community.

In the settlement, CSM was improperly granted to the right to immediately shorten the runway. In its rush to do so, CSM violated the California Environmental Quality Act (CEQA) codified in Public Resources Code § 21000, *et seq*. As Rosen is a person as defined under California Public Resources Code § 21066, he had the right to challenge the decisions of a public agency under with § 21167(a) within 180 days from the date (5/24/17) of the CSM's decision to carry out or approve the runway shortening project. Reviewing courts routinely find adequate standing

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[2] *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 (1984), prescribes a two-step test for judicial review of agency interpretations of federal statutes. *Bostock v. Clayton County Georgia*, 139 S.Ct. 1599 (2019), When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork.

on the basis of court filings that merely assert that the plaintiff has an interest as a citizen in having the laws executed and the lead agency's statutory duties enforced (*Rialto Citizens for Responsible Government v. City of Rialto*, (2012) 208 Cal.App.4th 899, 915). Because of the CEQA, claims, Rosen also properly asserted private-attorney-general doctrine claims, which contrary to the both the DC and NC findings, is codified in California Code of Civil Procedure § 1021 (*Ketchum v. Moses*, (2001) 24 Cal.4th 1122, 1132; *City of Sacramento v. Drew*, (1989) 207 Cal.App.3d 1287, 1297, fn. 3.). Because the Federal Government was a party, the DC had supplemental jurisdiction over those state claims under 28 U.S.C. § 1367. Both the DC and NC all but ignored those state claims. Rosen has now suffered multiple injuries-in-fact, including being financially harmed and his life put in danger, resulting from the runway shortening.

Similarly, State/local statutes set obligations for open-meetings to ensure public transparency, along with statutory remedies for violations thereof. It is abundantly clear is that CSM intended to deliberately flout their statutory obligations when it rushed to ratify the settlement in violation of its open-meeting obligations under Santa Monica City Charter § 613, California Govt code § 54956 and SM Municipal Code 1.04.020. It is undisputed that the meeting agenda noticed a special meeting of City Council at a location other than City Council Chambers of the City Hall, without proper designation by ordinance or resolution under § 613. Conversely, the official (ratified) minutes show that the weekend meeting was held in City Council Chambers and not the previously noticed location and was done in closed session. It is also

undisputed that the meeting agenda also demonstrates no disclosure whatsoever of a proposed settlement to the public at large. All of which was likely willfully designed to deprive the public (and Rosen) of notice and access to the meeting. Pursuant to California Govt code § 54960, Rosen as an interested person, has statutory standing to seek redress. (*See Trancas Property Owners Association v. City of Malibu*, 138 Cal.App.4th 172, 186 (2006))

B. Mandate Claims

Rosen's remaining claims principally deal with mandate issues arising from various statutory provisions. Under 49 U.S.C. § 47107, the FAA has a congressional mandate to enforce federal Grant assurance obligations ("FGAO"), along with ensuring and airport will be available for "public use on reasonable conditions and without unjust discrimination." CSM and FAA's actions in entering into the settlement agreement have abrogated those FGAO's. By the failure of the FAA to comply with its statutory enforcement mandate, CSM has been allowed to engage in actions including "revenue diversion" which have allowed for unjust discrimination against aviation and have caused injury-in-fact to Rosen. It is notable that Rosen's "revenue diversion" claims are well founded as demonstrated in *Mark Smith, et al. v. City of Santa Monica*, FAA Part 16 Docket 16-16-2 (*see* 9Dkt.59).

Finally, the release of so-called excess lands under 84 Agreement was wholly improper under 49 U.S.C. § 47151 and when CSM started removing those lands (also subject to FGAO's) after the 84 Agreement had already expired in 2015, Rosen suffered injury-in-fact resulting from the loss of aircraft parking, hangers,

etc. Rosen is aware that CSM was precluded from removing those lands in the first instance, due to non-compliance with the terms of the 84 Agreement, let alone after the expiration said agreement. Rosen therefore had multiple causes of action that could be asserted on the subject, which were sufficiently pled in the TAC. In other words, the Pro Se litigant was directly impacted by the continued and ongoing actions of CSM under the expired 84 Agreement that persist to this day—illustrating standing.

C. *Ultra Vires* Claims

In entering into a settlement agreement, a separation of powers issue arose when an Executive branch agency (FAA) acted contrary to and usurped national policy as set forth by the Congressional branch powers originally under the *1944 Surplus Property Act ("SPA") (Abolished by the Federal Property and Administrative Services Act (63 Stat. 738), June 30, 1949 and transferred to other agencies* (*see also* 49 U.S.C. § 47151-47152))*, as well the* AAIA.

As discussed at length in *Montara*, Congress unambiguously intended that airports given to a state political subdivision (such as CSM) pursuant to an SPA conveyance deed (aka Instrument of transfer) shall be operated in perpetuity, with remedy for violation of this requirement (or any other provision), being a reversion to the [United States] (*see* 49 U.S.C. § 47152(8)). Thus, when CSM decreed that it no longer wanted to operate the airport, it triggered that reversionary interest by the federal government. In a situation hostile to federal rights of reversion, the Court must eschew state law in favor of federal law.—noting that "the applicable deed terms, and the well-

established canon that federal land grants are to be construed in favor of the [federal] government, with any doubts resolved in the [federal] government's favor" (*Montara Water Sanitary v. County of San Mateo*, 598 F.Supp.2d 1070, 1080-81 (N.D. Cal. 2009)). Claims as to surplus property disposals or change in arrangements are preempted by the intent of Congress, statutory regulations, and the deed of transfer, precluding the FAA from ever fully releasing SMO from 48 Instrument obligations, (without an act of Congress). The net result being that CSM's "quiet title" lawsuit was precluded in the first instance and therefore should never have resulted in a settlement. Letting the DC dismissal and NC affirmance stand would not only eviscerate Montara but violate National Policy and federal preemption.

Most courts will not "blindly" lend their imprimatur to stipulated consent decrees (*e.g.*, imposing future nonmonetary obligations) because enforcement may affect the rights of third parties or otherwise be unjust. The court will want to know the background of any consent decree and insist on "deciding" whether the order is one, which the court would approve. (*See United States v. International Brotherhood of Teamsters*, 970 F.2d 1132, 1137 (2nd Cir. 1992); *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2nd Cir. 1992)). The criteria applied in deciding whether to approve and enter a proposed consent decree, are whether it is "fair, adequate, and reasonable, as well as consistent with the public interest." (*United States v. Lexington-Fayette Urban County Gov't*, 591 F.3d 484, 489 (6th Cir. 2010)). Here, it is undisputed that the DC Judge erred and abused his discretion by blindly rubber-

stamped the settlement without any inquiry what so ever, while also ignoring the public interest, when he slammed the door on any outside commentary or challenges by groups representing more than 8,700 Santa Monica residents who moved to intervene (*see* Dkt.53*, City of Santa Monica v. United States*, No. 13-cv-08046 (C.D. Cal. Jan. 31, 2017)). Had the DC judge done so, he might have learned that the (Executive Branch) FAA clearly overstepped its authority when it usurped Congress, giving rise to *ultra vires* claims. Courts can prohibit action by an agency (including action not deemed final) that is in excess of the agency's jurisdiction or its delegated powers under *Leedom v. Kyne*, 358 U.S. 184 (1958), and its progeny. Nowhere in the development of this case has the FAA even addressed such *ultra vires* claims, which do not require Article III standing. In the light of *Leedom* and *Montara*, Rosen's action seeking judicial review of the settlement was not only appropriate, but well-warranted. As a result of the violation of separation of powers, non-statutory equitable review is now appropriate and warranted and the Court should grant certiorari.

Rosen also challenges the legitimacy of the settlement itself because it is unenforceable as attorneys cannot contractually bind their parties; in other words, the DOJ and FAA signatories, both attorneys, lacked authority to bind the FAA under both State and Federal precedent. *Davidson v. Sup. Ct. (City of Mendota)*, (1999) 70 Cal.App.4th 514, 528; *Malave v. Carney Hosp.*, 170 F.3d 217 (1st Cir. 1999), 221-222 citing *Millner v. Norfolk & W. Ry. Co.*, 643 F.2d 1005, 1009-1010 (4th Cir 1981). Even more notably, the DOJ attorney was ineligible to practice in the Central Dis-

trict of California under local rules, let alone file the settlement before the district court.

As a matter of National Policy, this Court should now grant Certiorari set the correct precedent for all airports under surplus conveyance deeds and strike down the settlement. If left unchecked, the bad precedent set by the FAA could have a chilling effect on the entire NAS, as dozens of localities could now seek to shed their airports.

D. Standing Circuit Split with Second Circuit

This case presents a clear circuit split on the issue regarding the standing of a federally certificated pilot to sue over airport/airspace related issues. In *NRDC v. F.A.A.*, 564 F.3d 549, 555 (2nd Cir. 2009), the Second Circuit easily found "affidavits submitted by various members of petitioners' organizations, including private pilots who use the existing Panama City Airport that . . . suffice to demonstrate the requisite substantial interest in the challenged order. The NC holding that Rosen had no standing whatsoever, contradicts the Second circuit precedent—creating a circuit split on point. This split cannot be resolved without this Court's intervention. The Court should grant certiorari.

II. PLEADING STANDARDS

A. *Lujan* not Applicable and Misapplied

In the light of the *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), itself, it is extremely problematic that all of Rosen's asserted, federal, state and local claims contained in the TAC, would be summarily tossed out for lack of standing, when Lujan specifically makes it clear that "[t]he person who has been accorded

a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." (*Lujan*, 504 U.S. 572 at Footnote 7) Here, it is undisputed that Rosen has been accorded a procedural right by Congress to protect his concrete interests under 49 U.S.C. § 47103(b)(1)

Even if Lujan were applicable, this Court itself differentiated standards that apply at various stages of litigation. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, on a motion to dismiss, we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim," National Wildlife Federation, *supra*, 497 U.S. at 889 quoting *Lujan*, 504 U.S. at 561. Thus, when pleadings are challenged on a motion to dismiss under FRCP 12(b), the factual allegations in the complaint are construed in a Plaintiff's favor (*see also Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004), "When considering a facial attack, the Court takes the allegations in the plaintiff's complaint as true"). Here Rosen alleges not just general but specific allegations that an invasion of legal rights under Federal, State and Local statutes has occurred, along with the fact that the Airport settlement negatively affects the quality of his experiences using the facility due to those invasions. Thus, because the pleadings here detail specific sets of facts that are injurious and stem from defendants' actions, the Lujan standard is reached.

Even if the DC had the right to consider Respondents FRCP 12 MTD's, (which it did not due to lack of service), what becomes abundantly clear is the fact

that both Respondents sought to apply a fully erroneous standard of review at pleading stage. The DC clearly erred in applying such a higher standard of review at pleading stage. The DC erred in both allowing and considering voluminous requests for judicial notice ("RFJN"), which were clearly outside of the four-corners of the complaint, and in order to undermine the complaint. In setting such a high bar at pleading stage and by taking judicial notice voluminous RFJN en masse, a standard has been created wherein, it would likely be impossible for almost any aggrieved plaintiff to demonstrate a sufficiently "plausible" claim for relief. (*see Khoja v. Orexigen Therapeutics*, 899 F.3d 988 (9th Cir. 2018)). Moreover, such an erroneous FRCP 12 MTD standard directly constitutes a conflict with decisions of this court, and other Circuits (*see Utah v. Evans*, 536 U.S. 452, 464 (2002)." The plaintiff or Petitioner must show that a favorable decision would result in a "significant increase in the likelihood that [it] would obtain relief."; *Teton Historic Aviation Found. v. U.S. Dep't of Defense*, 785 F.3d 719, 726 (D.C. Cir. 2015). It "need not show to a certainty that a favorable decision will redress its injury."). Here, it is undisputed that reversal of the settlement and a grant of writ of mandate on the federal grant assurance obligations (49 U.S.C. § 47101 *et seq*), *et al*, will in fact redress the majority of the key injuries. Other injuries including the runway shortening can be redressed under Public Resources Code § 21167 (*California Environmental Quality Act (CEQA)*), *et seq. et al*.

B. Pro Se Not Freely Granted Leave to Amend

The NC and Supreme Court are bound by precedent providing Pro Se litigants a right to amend under FRCP 15 (*see Foman v. Davis*, 371 U.S. 178, 182 (1962), *Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015)), yet Rosen was never afforded that right and such right was clearly overlooked by the NC Panel. Circuit precedent also clearly favors that leave should be freely granted to amend a complaint, *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 871 (9th Cir. 2016) (quoting FRCP 15(a)(2); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) and also stresses and requires a policy favoring amendment be applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990), *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). *Adam v. State of Hawaii*, 99-15988 (9th Cir. 2000), yet, the NC Panel has summarily denied Rosen the opportunity to cure by amending, upon the first attack on the sufficiency of Rosen's pleadings. *See United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1183 (9th Cir. 2016) (reversing denial of leave to amend even though the plaintiff had previously amended his pleading three times). Circuit precedent also provides that Pro Se litigant must be provided with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

Rosen deserved to have his case adjudicated on the merits, but instead has faced procedural roadblocks

meant to deprive him due process resulting from lack of notice of opponents' motions and deprived him of the opportunity to cure by amending his complaint upon the first attack of the sufficiency of his pleadings. *See United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1183 (9th Cir. 2016) (reversing denial of leave to amend even though the plaintiff had previously amended his pleading three times). The Court should grant certiorari upholding Rosen's right to amend.

C. FRCP Right to amend

The record here clearly demonstrates that the first and only FRCP 4 service was of the FAC done on Respondents on November 17, 2017 (Dkt.36). As a result, even if CSM's EP application to extend (Dkt.19) had been served under FRCP 5 (which is was not), the motion was *moot ab initio* as no jeopardy ever attached under FRCP 4/FRCP 12 as the initial complaint had not been served. Because of the fact that both Respondents were never served with the initial complaint pursuant to FRCP 4, Rosen could have availed himself of the opportunity to amend as many times as he desired without such amendments invoking the one-time amendment right under FRCP 15(a)(1)(A). The following two (2) amended pleadings were done by stipulation between the parties and approved by the district court pursuant to FRCP 15(a)(2), which also left Rosen with the right to amend pursuant to FRCP 15(a)(1)(B) in response to a Rule 12 Motion.

Because of the lack of service of both Respondent's FRCP 12 motions, Rosen wasn't afforded the opportunity to amend under FRCP 15(a)(1)(B), as the language in FRCP 15(a)(1)(B) itself, plainly demon-

strates that amendment right is triggered by service of a motion under Rule 12(b), (e), or (f). Therefore, because of the complete lack of service, Rosen had no choice but to seek leave to amend pursuant to FRCP 15(a)(2) in order to file a fourth amended complaint.

As Rosen first amended prior to FRCP 4 service and because all subsequent amendments occurred pursuant to stipulation/Court order, along with the fact that service of the FRCP 12 MTD's was never done pursuant to FRCP 5, the net result here is that Rosen still has what is best known in golf terms as a "mulligan," *i.e.* the right to amend under FRCP 15(a)(1)(B). (*see Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). The Court should grant certiorari.

D. Pro Se Pleading Standards circuit split with Sixth Circuit

The NC decision did not address the fact that 'Pro Se complaints are to be construed liberally and may only be dismissed if it appears beyond doubt that the such a plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *cf. Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014). This case presents a clear circuit split on the issue regarding Pro Se pleadings. As the Sixth Circuit has held that Pro se pleadings are held to less-stringent standards, and these were good enough. *Alspaugh v. McConnell*, 643 F.3d 162 (6th Cir. 2011). The split cannot be resolved without this Court's intervention. The Court should grant certiorari.

III. DUE PROCESS VIOLATION ISSUES

The heart of this case is the repeated violations of the Rosen's due process rights under the Fifth and Fourteenth Amendments due to a litany of procedural violations (as outlined above in proceedings/related cases) and especially the failure to properly service FRCP 12 motions. These extend from the very beginning of the action in the DC to the NC rulings.

Due process requires that the procedures by which rules are applied must be evenhanded, so that individuals are not subjected to an arbitrary exercise of judicial power. Throughout history, judicial institutions have required that all parties receive proper notice starting with an action's commencement (*see* FRCP 4) and continuing throughout subsequent filings (*see* FRCP 5). This fundamental requisite of notice is based on a paramount concern over fairness and due process. Regardless of whether a party is well respected attorney, a pro se litigant, or even a prisoner suing to enforce their rights, notice must comport with constitutional due process. This Court's formative decision in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950) provides the contemporary framework for this constitutional requisite. (*See Dusenbery v. United States*, 534 U.S. 161, 168 (2002) (noting that Supreme Court regularly has turned to *Mullane* when confronted with issues over adequacy of notice).

While the issue regarding FRCP 5 service is brand new to this Court, only 2 other decisions on the subject exist, having extracted the same applicable standard from the Supreme Court's watershed decision in *Mullane*, namely, that notice (*i.e.* service of process) is fundamental and must comport with constitutional due process. The NC in *Magnuson v. Video Yesteryear*,

85 F.3d 1424, 13 1430-1431 (9th Cir. 1996) and the Middle District of North Carolina, in *Salley v. Board of Governors, Univ. of N.C.*, 136 F.R.D. 417, 419 (M.D.N.C. 1991) have found that "actual notice by a means other than that authorized by FRCP 5(b) does not constitute valid service and is not an exception to the rule."

The undisputed record here clearly demonstrates Rosen was *never* served (*i.e.* given notice) pursuant to the requirements under FRCP 5, with either of Respondents FRCP 12 MTD's prior to the filing of those motions with the DC via the CM/ECF system. The record also demonstrates that Rosen was also never served pursuant to FRCP 5, with any of Respondents documents prior to the filing of the FRCP 12 MTD's. The procedural due process litmus test under *Mullane*, *et al.*, suggests that due process requires proper notice and where there is a lack of service, imposes a limit on the jurisdiction of the Courts. Thus, lack of service by Respondents, deprived the DC of jurisdiction to consider the FRCP 12 MTD's in the first instance and also deprived this Court from also considering the issue of standing as well. The DC erred in failing to consider that it had no jurisdiction to enable it to hear or rule on the matter of Rosen's Motion to Dismiss. Basic fairness and binding legal precedent require the DC to take steps to ensure that all parties are notified of motions and that responding parties have enough time to prepare a timely response. As a result of those errors, professional attorneys were allowed to run roughshod over a Pro Se litigants right to due process under both the Fifth and Fourteenth Amendments. The NC also clearly overlooked this issue.

The underlying reason for the abuses by Respondents involves a question of exceptional importance on a national level. It is simply far too easy for a CM/ECF registered user to violate the due process rights of a non-user such as a Pro Se/Prisoner, under the current system due to the ability simply file documents regardless of having preformed service pursuant to FRCP 5. It is further clear that there is simply no DC oversight to ensure that FRCP 5 compliant service has been done on all parties prior to electronic filing. The FRCP 12 MTD filings by Respondents exemplify this problem, as there was no assertion whatsoever that Rosen had been served prior to Respondents electronically filing their motions and indeed, it is undisputed that Rosen was never actually served. Had the clerks at the DC simply performed their ministerial duties and exercised some human oversight, this matter would likely have quickly ended with the clerk rejecting the FRCP 12 MTD's for lack of service, leading to entry of default for untimely filing pursuant to an order.

The parties most at risk of being affected by this issue and having their due process rights violated, include anyone who opts out of service pursuant to FRCP 5(b)(2)(E) and/or Pro Se litigants. Prisoners acting Pro Se are especially even more at risk. Because of the ongoing lack of service/notice issues, and grant of dismissal by the DC. Rosen was deprived of his due process rights under both the Fifth and Fourteenth amendments. The Court should now grant Certiorari.

A. City Default Ab Initio

Before even considering the service issues *supra*, CSM failed to timely respond or otherwise defend in response to the First Amended Complaint as required by the time limits under FRCP 12(a)(1) and was therefore subject to default pursuant to FRCP 55. It is also well settled that when a Defendant fails to timely respond after service of a Summons/Complaint, that the Court is divested of jurisdiction over Defendant, and entry of default by the clerk is the appropriate remedy. Here, when asked by Rosen, the Clerk failed/refused to perform their ministerial duty to enter default after a properly filed default request by Rosen. As a result of the earlier default by CSM, the DC abused its discretion when it later considered the CSM's FRCP 12 motion, resulting in yet another due process violation. Entry of default is now appropriate based on precedent binding upon this Court. It is clear that the three-judge Panel also overlooked this point.

The FRCP's exist to ensure conformity as to how litigation is to be handled from start to finish and to ensure that Judges cannot subject litigants to an arbitrary exercise of judicial power, as has clearly happened here. Thus, this is an issue of exceptional importance for this Court. Moreover, Rosen notes that DC Judge has demonstrated that, when he has disdain for a particular case, he is prone to such an arbitrary exercise of judicial power as has happened in this matter (*see* unpublished decision in *Stephen Yagman v. Gina Haspel*, 18-55784, (May 2019)).

B. Default by Failure to Serve

Another question of exceptional importance for this Court that was overlooked by the three-judge

Panel, is whether Respondents actually defaulted when they fully failed to serve Rosen with their respective FRCP 12 MTD's. As Respondents were precluded from filing their motions via the CM/ECF system pursuant to both the FRCP's and local rule 5-3.1.2 for lack of service, the net result should be that they both failed to timely plead or otherwise defend in response to the TAC as required by the time limits under FRCP 12(a)(1), and the DC scheduling order. It is well settled that when a Defendant fails to timely plead or otherwise defend, entry of default is appropriate as the Court was divested of jurisdiction over Defendant.

C. 9th Circuit Due Process Issues

It would be hard to believe that similar due process violations would occur in the NC given the extent of the due process issues presented in the DC, yet they did occur. As outlined above, Rosen timely filed an opposition to the FAA's motion to extend by manually filing it with the Clerk. In that opposition, important legal issues were presented regarding the government's ability to ask for an extension during a government shutdown under the AntiDeficiency Act (ADA) (31 U.S.C. § 1341, *et seq*. Specifically, whether the ADA restricts Department of Justice attorneys from working to even ask for an extension, even on a voluntary basis (*see* 31 U.S.C. § 1342) and/or if they were required to file a responsive pleading pursuant the Federal Rules, as the obligation to do so existed prior to the shutdown and therefor was not new obligations of funds in advance of appropriations or beyond appropriated levels. Moreover, whether working to ask for an extension, constituted a "Criminal penalty" under 31 U.S.C. § 1350. Unfortunately, these important

issues were never addressed by the motions panel because Rosen's opposition filing was lost by the Clerk, who also summarily granted the FAA a one-month extension, while denying CSM's extension request.

The issue of the lost brief came to light when the FAA sought another extension of time, just a couple weeks later, yet neither the Clerk or motions panel ever took up the issue of either the lost brief or the important legal issues therein, thereby again denying Rosen of his constitutional due process rights. Not only was Rosen's opposition not considered, but the Clerk eventually granted the extension after Respondents responsive briefs were filed, even though CSM, had no pending request for such an extension.

Prior to filing of any responsive briefs by Respondents, Rosen brought motion for Summary Disposition. While the FAA did file an opposition that only addressed a very few points, the motion was wholly unopposed by CSM. As a result, under the doctrine of waiver, the motion for Summary Disposition should have been granted, but was actually never even considered by either the motions or the three-judge panels. Again, in violation of Rosen's due process rights. Moreover, because of its failure to oppose Rosen's motion, CSM should have been fully precluded from responsive brief for waiver. Similarly, the FAA should have been partially precluded from any discussion of issues/points in their responsive brief, that were previously not addressed (*i.e.* were waived) by their failure to address them in their motion opposition brief.

As a further demonstration of the lack of due process, the unpublished three-judge panel opinion seems to lack any standard of review whatsoever and

is wrought with errors further demonstrating that no cognizant review was done. Such errors include the fact that the Panel clearly overlooked Paragraph 19 of the TAC, which makes specific allegations that CSM's actions pursuant to the 84 Agreement have continued well past the 2015 expiration and in fact continue to this very day. As previously discussed, such includes continuing to remove lands from aviation usage, along with continuing to engage in the ticketing noise violations from departures and arrivals. These ongoing activities are current and result in injury-in-fact to Rosen resulting from aircraft parking and hanger availability, and an increased danger to airport users caused by a shorter runway that increases the need to cancel approaches and fly to another far-off airport. Thus *Caldwell v. Caldwell*, 545 F.3d 1126, 1130 (9th Cir. 2008), is not applicable due to Rosen's claims not being generalized grievances but in fact being specifically pled. Furthermore, the panel's view on intervenor standards is appalling under the circumstances. The record is quite clear that the DC judge would not allow for any intervention by anyone including a group of approximately 8,700 of Santa Monica residents before he rubber-stamped the settlement. Because the DC summarily preclude intervention by anyone, Rosen now has the right to be an intervenor via the only means available, by filing his own action. (*See*, *e.g.*, *Conservation Nw v. Sherman*, 715 F.3d at 1185-87; *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165-66 (9th Cir. 2012).

D. Ninth Circuit Bias

The second sentence of the NC judgment brands Rosen 'a Pro Se and a serial litigant'. This prejudice

was left unchecked En Banc and demonstrates a drastic departure from accepted and usual course of judicial proceedings. The mere suggestion of Rosen as a somehow vexatious litigant or Pro Se crackpot or both violates judicial neutrality and detachment. Rosen is entitled to a neutral and detached judge in the first instance. *Ward v. Village of Monroeville*, *Ohio*, 409 U.S. 57, 62 (1972). The En Banc panel had the opportunity to correct and address this, but it was left unchecked. The suggestion in the second sentence of the judgment lacks the neutrality and detachment required, and when combined with the foregoing, further reinforces and justifies granting certiorari because this is a significant issues of public policy: Pro Se litigants, where or not they are serial litigants, should not be treated differently than other serial litigants or prejudiced for not having counsel. Aside from being a pilot, Rosen is a photographer and holder of copyrights, as well as protective of his rights and does in fact engage in a great deal of litigation predominantly as a photographer/copyright owner, whose works have been heavily infringed. His litigation record demonstrates that he is in fact a very successful litigant, who has won in every copyright action that has thus far been brought to trial, including not only bench trials, but at jury trial. Thus, the fact that both the DC and Panel were so easily dismissive of Rosen's' claims simply because of the mere implication of being "a serial litigant" is concerning and has serious precedential ramifications for other serial litigants such as Disney, Sony, Sierra Club, the NRDC, and Center for Biological Diversity, in the future. These types of unfounded allegations have no place our judicial review policy. Had a litigant facing Disney, Sony, the Sierra Club, NRDC, or the Center

for Biological Diversity asserted their 'serial litigant' status, it would be disregarded. Here the NC demonstrated they are not neutral and detached, warranting a grant of certiorari, particularly when combined with the foregoing.

IV. STEPS TO RECTIFY CM/ECF AND FRCP 5 ISSUES

A significant problem exists with the overall implementation of the CM/ECF system and FRCP 5 that now needs to addressed, as it used nationally by all DC's and because it is prejudicial to non-CM/ECF users such as Pro Se/Prisoner litigants. Pre electronic filing system, DC clerks would routinely review documents for proper service under FRCP 4 and FRCP 5. If an issue existed, then the clerk had but two options, rejecting or lodging it for determination by a Judge. The CM/ECF now allows users to directly electronically file, while simultaneously performing service on all other CM/ECF users. However, the system fails spectacularly when a Pro Se/Prisoner litigant (*i.e.* Non-ECF user) is involved, as it allows for filing of documents without any FRCP 5 prerequisite service of process (*i.e.* notice) whatsoever. DC Clerks then routinely fail to even review to ensure that proper service of process has been done, even though most DC local rules or orders also require service prior to filing, consistent with FRCP 5. Rosen has encountered such issues in the Southern District of California as well. Disturbingly, complaints regarding such issues seemingly fall on deaf ears, as is the case here. As a result of this unchecked process, Rosen is aware that Non-CM/ECF users are being harmed.

The fact that an ineligible Attorney somehow remained unchecked and appeared in 3 separate cases

in the DC from 2016 through 2018, not only underscores the fact that nobody is looking, but also calls into question, the validity of all of his work product (including the CSM/FAA settlement at issue here), giving rise to potential further claims of invalidity of the settlement by Rosen.

Rosen respectfully requests that this Court now take steps that will rectify the lack of service due process situation by reversing the NC's decision through (1) A strong decision giving guidance to all district courts regarding FRCP 5 complaint service on Pro Se litigants (or those that have opted out). (2) Revise and Standardize FRCP's establishing firm rules on clerks to police filings when electronically filed, where a non-CM/ECF user is a litigant/Party to an action. (3) Set out new sanctions on Attorney's for failures to comply (4) Changes to the CM/ECF system itself, so that an electronic filing entry is "lodged" and not automatically "filed" (as is currently the case) in order to ensure screening for service by a "gatekeeper" or filing clerk.

The different treatment of Mr. Rosen, the Pro Se pilot, against the non-admitted DOJ counsel, further illustrates shortcomings in the CM/ECF system and would be ripe for the Court to grant certiorari to resolve important federal constitutional questions regarding electronic filing across the country.

CONCLUSION

For the foregoing reasons, Rosen's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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