ORIGINAL

22-1136

No. _____

In the Supreme Court of the United States

In re **ROBERT STEVEN MAWHINNEY**

On Petition for a Writ of Mandamus to:

U. S. Department of Labor; *et al.*

PETITION FOR A WRIT OF MANDAMUS

Robert Steven Mawhinney, Petitioner, In *Pro Se*
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QUESTION PRESENTED

"Does 49 U.S.C. § 42121 provide
the United States Department of Labor,
the United States Circuit Court of Appeals for the Ninth Circuit, or
the United States District Court for the Southern District of California
the means to invalidate the exemption incorporated in 9 U.S.C. § 1 ("... 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."), and,
to allow the deviation of the nondiscretionary duty commanded by 49 U.S.C. § 42121 ("... a hearing on the record ... shall be conducted expeditiously") with regard to the 49 U.S.C. § 42121 complaint filed by Robert Steven Mawhinney (an interstate commerce operation worker)?

PARTIES TO THE PROCEEDING

In addition to the parties set forth in the caption: American Airlines, Inc.; and, Transport Workers Union Local 591 ("*TWU*").

RELATED PROCEEDINGS

In DOL: "*Mawhinney v. Am. Airlines, Inc.*,"
ALJ Case 2002-AIR-013 Order, (Feb. 4, 2002);
ARB Case 2014-0060 Order, (Jan. 21, 2016);
ALJ Case 2012-AIR-017 Order, (Sept. 2, 2020);
ARB Case 2020-0067 Order, (Feb. 4, 2021);
"*Mawhinney v. TWU*,"
ARB Case 2012-0108 Order, (Sept. 18, 2014);
ALJ Case 2012-AIR-014 Order, (Dec. 27, 2018);
ARB Case 2019-0018 Order, (Dec. 9, 2020).
In District Court, Southern California:
"*Mawhinney v Am. Airlines, Inc.*"
Case 3:15-cv-00259 Order, (Aug. 23, 2016);
"*Am. Airlines, Inc. v. Mawhinney*,"
Case 3:16-cv-02270 Order, (Oct. 27, 2016);
Case 3:18-cv-00731 Order, (Apr. 29, 2019);
"*TWU v. Mawhinney*,"
Case 3:16-cv-02296 Order, (Oct. 27, 2016).
In Ninth Circuit:
"*Am. Airlines, Inc. v. Mawhinney*,"
Case 16-56638 Order, (Sept. 26, 2018);
Case 19-55566 Order, (June 5, 2020);
"*TWU v. Mawhinney*,"
Case 16-56643 Order, (Sept. 26, 2018);
"*Mawhinney v. Am. Airlines, Inc./TWU*,"
Case 21-70283/039 Order, (Nov. 22, 2022);
Case 21-70283/039 Order, (Feb. 22, 2023).
In U.S. Supreme Court:
"*Mawhinney v. Am. Airlines, Inc.*,"
Case 19-1032 Order, (Apr. 1, 2019).

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Constitution and Statutes

INTRODUCTION

Robert Steven Mawhinney, ("RSMawhinney") respectfully petitions for a writ of mandamus before the U.S. Supreme Court under the authority of 28 U.S.C. § 1361 to aid in the pursuit of, and the enforcement of, the nondiscretionary duties of: the U.S. Department of Labor ("DOL"); the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit"); and, the U.S. District Court for the Southern District of California ("District Court," "CASD").

The DOL Administrative Review Board ("ARB") *vacated* and *remanded* the Administrative Law Judge ("ALJ") orders that dismissed, and/or compelled the arbitration of RSMawhinney's cases: ARB 2014-0060; and, 2012-0108.

American Airlines, Inc. ("AAirlines") petitioned the District Court to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 case; the District Court *denied* AAirlines motion, but, advised AAirlines on steps necessary to proceed for future said action (CASD 3:15-cv-0259). Following the District Court's advice, AAirlines and the Transport Workers Union - Local 591 ("TWU") motioned the District Court to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 cases; the District Court *ordered* the arbitration of both cases (CASD 3:16-cv-2270, and 3:16-cv-2296).

RSMawhinney appealed the District Court *order*s; the Ninth Circuit held oral hearing. The Ninth Circuit *reversed* the District Court *order* regarding the TWU, and *affirmed* the *order* regarding AAirlines (904 F.3d 1114 (2018)).

RSMawhinney petitioned the U.S. Supreme Court regarding the Ninth Circuit *order* affirming the arbitration of RSMawhinney's 49 U.S.C. § 42121 complaint; the petition was *denied* the Court's discretion (Sup. Ct. 19-1032).

During the appeals process before the Ninth Circuit, an arbitration was initiated and concluded, by both AAirlines and the TWU; RSMawhinney did not engage, and notified all parties of the appeal(s) in progress. The District Court *confirmed* the arbitration award AAirlines petitioned; in spite of RSMawhinney's objections (CASD 3:18-cv-731). The Ninth Circuit *affirmed* the District Court order; in spite of RSMawhinney's objections (9th, 19-55566).

On return to the DOL, the ALJ dismissed RSMawhinney case 2012-AIR-017. RSMawhinney appealed before the ARB; the motion was *denied* (ARB 2020-0067).

The TWU motioned for dismissal before the ALJ; the motion was *granted* (ALJ 2012-AIR-014). RSMawhinney appealed before the ARB; the motion was *denied* (ARB 2019-0018).

RSMawhinney appealed both of the ARB *order*s before the Ninth Circuit; the appeals were *denied*, on Nov. 22, 2022 (9th Cir. 21-70283, and 21-70039). RSMawhinney petitioned the Ninth Circuit for rehearing, regarding both cases; the petition was *denied*, on February 22, 2023.
(9th 21-70283, and 21-70039).

All DOL administrative and federal court proceedings between RSMawhinney and AAirlines, and TWU, have been pursued and exhausted.

49 U.S.C. § 42121 is a "'... carefully-tailored administrative scheme ...' for adjudicating retaliation claims," as held by the Ninth Circuit.

RSMawhinney has been negatively affected by the timing of progress, clarification, and honor of law. RSMawhinney's petition before the U.S. Supreme Court, in January of 2019, was in the printing stage when the U.S. Supreme Court decision *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019) ("*New Prime*") was published. The *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022) ("*Saxon*") case, was available and argued, before the Ninth Circuits' final judgement.

RSMawhinney petitions the U.S. Supreme Court: for the Court's aid in established law; for the correction of the DOL's overreach, invalidating the exemption within 9 U.S.C. § 1 (which would affect more individuals than RSMawhinney alone); to rectify the inconsistencies that will continue to exist, between the circuit courts; to eliminate the uncertainty of judgment that exists with the Ninth Circuit; and, to enforce the nondiscretionary duties 49 U.S.C. § 42121 command.

OPINOINS BELOW

Actions in the DOL:
"Mawhinney v. American Airlines, Inc., / TWU"
ARB Case 2012-0108 Order, n/rptd.[1] (App. P, 115);
ARB Case 2014-0060 Order, n/rptd. (App. O, 105);
ALJ Case 2012-AIR-14 Order, n/rptd. (App. F, 16);
ALJ Case 2012-AIR-17 Order, n/rptd. (App. D, 6);
ARB Case 2019-0018 Order, n/rptd. (App. E, 13);
ARB Case 2020-0067 Order, n/rptd. (App. C, 4).

Actions in the District Court:
"Mawhinney v. American Airlines, Inc.,"
Case 3:15-cv-0259 Order, n/rptd. (App. L, 70);
"American Airlines, Inc. v. Mawhinney,"
Case 3:16-cv-02270 Order, n/rptd. (App. M, 77);
Case 3:18-cv-0731 Order, n/rptd. (App. I, 39);
"TWU v. Mawhinney,"
Case 3:16-cv-02296 Order; n/rptd. (App. N, 91).

Actions in the Ninth Circuit:
"American Airlines, Inc. v. Mawhinney,"
Case 16-56638/643 Opinion, is reported,
904 F.3d 1114, (App. J, 46);
Case 16-56638 Order, n/rptd. (App. K, 69);
Case 19-55566 Order, is reported,
807 Fed. Appx. 720, (App. G, 37);
Case 19-55566 Order, n/rptd. (App. H, 38);
"Mawhinney v. American Airlines, Inc., / TWU"
Case 21-70283/-70039 Order, n/rptd. (App. A, 1);
Case 21-70283/-70039 Order, n/rptd. (App. B, 3).

Action in the U.S. Supreme Court:
"Mawhinney v. American Airlines, Inc.,"
Case 19-1032 Order, n/rptd. (April 1, 2019).

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[1] "n/rptd." = not reported

JURISDICTION

The Ninth Circuit *order*s that are published: 904 F.3d 1114 (9th Cir. 2018) (App. J, 46); and, 807 Fed. Appx. 720 (9th Cir. 2020) (App. G, 37). The orders of the federal courts and DOL that followed are not reported: Ninth, rehearing denied16-56638 (App. K, 69); DOL-ALJ final Order (App. F, 16); District Court Order (App. I, 39); Ninth, rehearing denied (App. H, 38); DOL-ALJ final Order (App. D, 6); DOL-ARB final Order (App. E, 13); and, DOL-ARB final Order (App. C, 4). The Ninth Circuit memorandum, of November 22, 2022, is not reported, (App. A, 1). The Ninth Circuit denial of rehearing, of February 22, 2023, is not reported. (App. B, 3). This petition is due no more than 90 days after the date of February 22, 2023.

All administrative and federal proceedings have exhausted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1361. All parties have been notified, Court rule 29(5)(c).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 554 (*infra*, Appendix).

9 U.S.C. § 1 (*infra*, Appendix).

28 U.S.C. § 1361 (*infra*, Appendix).

49 U.S.C. § 42121[2] (*infra*, Appendix).

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[2] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR21").

Article III, U.S. Constitution
(*infra*, Appendix).

STATEMENT

RSMawhinney was terminated from employment with AAirlines as an Aircraft Maintenance Technician ("AMT") - Crew Chief.[3] RSMawhinney entered a complaint with the DOL. 49 U.S.C. § 42121 policy requires that the DOL notify the Federal Aviation Administration of RSMawhinney's complaint.

1. 49 U.S.C. § 42121 Federal Aviation Administration proceedings.

"Who enforces the AIR21 law?

The FAA Administrator and the Secretary of Labor (DOL) have joint and independent responsibilities for the enforcement of the Whistleblower Protection Program.

The FAA is responsible for investigating and enforcing the air carrier safety aspects of a complaint.

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[3] This was the second termination of RSMawhinney's employment with AAirlines. The first termination of RSMawhinney's employment was investigated by DOL, and it was determined "Based on the foregoing, it is determined that American Airlines, Respondent in this matter, has violated 49 U.S.C., Section 42121 (a)(1)." (App. Q, 133 ¶ 3). A settlement agreement followed. ("SAgreement"). (App. R, 135). The DOL dismissed RSMawhinney's DOL case 2002-AIR-013.

> The DOL is responsible for investigating and enforcing the discrimination aspects of a complaint."[4]

The Federal Aviation Administration performed two investigations and determined: "We established a violation of an order, regulation, or standard relating to air carrier safety may have occurred." (DOT-FAA case: WB 12106). A Federal Aviation Administration investigator raised the fact that AAirlines own internal investigation admitted that AAirlines personnel did not follow Federal Aviation Administration approved procedures.

2. **49 U.S.C. § 42121 DOL proceedings.**

The DOL investigator made the request, of RSMawhinney, to provide the findings of the previous (2002) DOL investigation. (App. Q, 123). In January, of 2012, RSMawhinney made attempts to communicate with the OSHA department to understand the reason for the delay in DOL's investigation. The DOL investigator expressed that AAirlines was claiming that the case was being arbitrated. RSMawhinney notified the DOL investigator that that was not true; and, made the request for the 49 U.S.C. § 42121 complaint to continue. (This was AAirlines first attempt to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 complaint). RSMawhinney's further attempts to communicate with the DOL department went unanswered.

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[4] https://www.faa.gov/about/initiatives/whistleblower/qanda#examples

RSMawhinney notified the DOL Secretary of Labor of the unanswered attempts to communicate. The Secretary of Labor's response, from the DOL Director of the Office of the Whistleblower Protection Program ("OWPP"), included:

> "... We understand that OSHA's investigation of your complaint was delayed due to voluntary arbitration of your claim with your former employer .... investigation of your case has resumed." (App. S, 147).

AAirlines submitted a response to DOL's investigation, to include:

> "... As important as planes are to what American does, however, nothing is more important to its mission of safe travel than the people who make what it does possible ... In airplane maintenance, the Crew Chief position is critical and acts as a hub of activity ... That person is a central nexus through which mechanics, operations, and management all connect ...." (App. T, 149).

DOL separated RSMawhinney's complaint, against AAirlines and the TWU, and filed separate findings; denying, and dismissing the complaints.

The DOL's letters of findings included:

> "Respondents and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ) ... The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the

> parties are allowed an opportunity to present their evidence for the record ... The rules and procedures for handling of AIR21 cases can be found in Title 29, code of Federal Regulations Part 1979 and may be obtained at www.whistleblowers.gov."

49 U.S.C. § 42121(b)(2)(A) provides:

> "... either the person alleged to have committed the violation or the complainant, may file objections to the findings ... and request a hearing on the record;" and, "Such hearings shall be conducted expeditiously."

RSMawhinney filed objections to both of the DOL's findings to the DOL Office of ALJ's; case assignments were issued and an ALJ was assigned.

The ALJ consolidated, then separated, and dismissed DOL case 2012-AIR-014.

AAirlines submitted a "Proposed hearing date and schedule." (App. U, 151). Later, AAirlines motioned the ALJ to compel the arbitration of DOL case 2012-AIR-017. The ALJ ordered the arbitration of DOL case 2012-AIR-017, and dismissed the case. (This was AAirlines second attempt to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 complaint).

RSMawhinney appealed both of the ALJ's orders before the ARB. The ARB *vacated* and *remanded* both: ARB 2012-0108 (App. P, 115); and, ARB 2014-0060 (App. O, 105).

The ARB order, case 2014-0060, included:

"Given the 2002 settlement agreement's language, the ALJ found that 'the only issue meriting discussion is whether [Mawhinney's] complaint under AIR21 may lawfully be the subject of a pre-dispute arbitration agreement;'"

"He also found that the agreement to arbitrate is a 'condition of employment' that allows for the arbitration under related Title VII cases;"

"In adjudicating an AIR21 whistleblower complaint, the ALJ and Board have only the authority expressly or implicitly provided by law;"

"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;"

"The FAA arbitration exclusion for 'transportation workers' might similarly apply to Mawhinney who was employed by American Airlines as an Aircraft Maintenance Technician;"

"In *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, 015, 016; ALJ No. 209-AIR-017, 016, 015 (Sept. 16, 2011), the Board held that the contractual arbitration proceeding and the retaliation proceeding then pending before the Secretary can both proceed, as the causes of action are different and wholly independent;"

"To be clear, like the majority, I found no provision in the whistleblower statutes or regulations that expressly authorizes the OALJ or the Board to grant a 'motion to compel' to enforce an arbitration clause in a settlement agreement;"

"Congress wanted to ensure the public learned about safety concerns in industries where many people can die or be seriously injured if a plane or train or 80,000 pound semi-trailer crashes, a nuclear plant threatens to melt down, or the drinking water of a town has toxic poisons;"

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

"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 the delegated authority to adjudicate a whistleblower claim;"

"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;" and,

" If the Federal Arbitration Act 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.'" (App. O, 105-114).

On remand, the ALJ consolidated the cases and set a hearing date.

Within the DOL Secretary's *amicus curiae* brief:[5]

> "As an initial matter, we note that the Arbitrator's Award does not explicitly address Complainant's AIR21 claims. Instead, the arbitrator addressed a state law retaliation claim under California's FEHA;"
>
> "The standard for causation in an FEHA retaliation claim is different from the standard of causation in an AIR21 retaliation claim. As the arbitrator explained, to establish a claim of retaliation under FEHA, Complainant needed to prove his protected activity was a 'substantial motivating reason' for the adverse employment action ... In contrast, to establish a claim of retaliation under AIR21, an employee must prove his protected activity was a '*contributing factor* in the unfavorable personnel action." 49 U.S.C. § 42121(b)(2)(B) (emphasis added);" and,
>
> "This court also should not rule on the pending motions for summary decision. Those motions involve Complainant's AIR21 retaliation claims against Respondents ... At this stage, this Court should not adjudicate Complainant's AIR21

[5] R.148; DOL certified list of records, Ninth circuit 21-70283

claims, which includes ruling on the motions for summary decision."

3. **AAirlines/TWU District Court action.**

AAirlines filed action in the District Court; to compel the arbitration of DOL case 2012-AIR-017. (This was AAirlines third attempt to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 complaint). The District Court *denied* AAirlines action; however, the District Court advised AAirlines of the steps required to pursue future said action.

(App. L, 70).

AAirlines followed the District Court's *advisory opinion* and took action before the District Court to compel the arbitration of DOL case 2012-AIR-017. (AAirlines forth attempt to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 complaint).

The TWU followed AAirlines lead by taking the same action, to compel the arbitration of DOL case 2012-AIR-014, before the District Court.

The District Court compelled the arbitration of both DOL cases based on 9 U.S.C. § 4, and, the maxim "Courts are also directed to resolve any 'ambiguities as to the scope of the arbitration clause itself ... in favor of arbitration.'"

(App. M, 77) / (App. N, 91).

4. **RSMawhinney appeal, Ninth circuit.**

The Ninth Circuit received submissions from the parties and held an oral hearing ("Oral Hearing").[6]

The Ninth Circuit *reversed* the District Court order regarding DOL case 2012-AIR-014, raising issue with the reasoning of the District Court, and, for relying on the maxim:

> "Instead, the district court cited the maxim that 'doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).*" (App. J, 62-68).

The Ninth Circuit *affirmed* the District Court order regarding DOL case 2012-AIR-017. The Ninth Circuit negated the District Court's reasoning and *sua sponte* declared a "governmental order" regarding the DOL's dismissal of RSMawhinney's previous DOL case 2002-AIR-013. (App. J, 62 ¶ 2).

The Ninth Circuit creates conflict with the District Court's determination that the SAgreement was "... not an employment contract," stating:

> "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." (App. J, 62 ¶ 1).

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[6] https://www.ca9.uscourts.gov/media/video/?20180711/16-56638/

The SAgreement included:

"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 Aviation 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;" and,

"Similarly, and except as specifically set forth in Subparagraph 5(B)(iv) of this Agreement, Plaintiff shall be subject to and governed by all American Airlines obligations, rules, policies and procedures applicable generally to American Airlines employees, including those contained in or promulgated pursuant to any Collective Bargaining Agreement which may govern his employment." (App. R, 135-146).

The Ninth Circuit's determination was in conflict with the ARB's observation, where the: "... ALJ found that the agreement was a 'condition of employment' ...." (App. O, 108 ¶ 1).

The Ninth Circuit recognized:

> "The Agreement defines the 'Parties' as Mawhinney and the Airline, defines the 'Parties Bound' as Mawhinney and the Airline, and is signed only by Mawhinney, Mawhinney's attorney, and a representative of the Airline." (App. J, 64, fn. 9).

The Ninth Circuit recognized the fact that 49 U.S.C. § 42121 policies were not adopted until after the SAgreement was produced, as described:

> "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 these regulations came into effect in 2003, after the DOL order approving the 2002 Agreement, DOL's 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." (App. J, 54, fn. 1).

The Ninth Circuit made the determination that the District Courts' determination regarding waiver was incorrect:

> "The district court concluded that Mawhinney did not refuse arbitration until September 2016, after the Airline initiated an arbitration in which Mawhinney refused to participate. That determination was incorrect. California law does not require that an arbitration be initiated before the limitations period starts running; only a refusal to arbitrate is required."
> (App. J, 61, fn. 4).

RSMawhinney refused to arbitrate RSMawhinney's 49 U.S.C. § 42121 complaint in January of 2012; as is evident, in the letter from the DOL Director of the OWPP. (App. S, 147).

The Ninth Circuit proclaimed that:

> "DOL's independent interest in Mawhinney's AIR21 retaliation complaint – grounded in its responsibility for assuring the safety of air travel ... ceased once its investigation concluded with a finding of no violation." (App. J, 58 ¶ 4).

The Ninth Circuit proclaimed that:

> "The proceeding before the ALJ was therefore squarely controlled by the arbitration provision in the Agreement." (App. J, 59 ¶ 1).

RSMawhinney has argued otherwise; raising the exemption within 9 U.S.C. § 1, and, 49 U.S.C. § 42121 administrative proceedings.

5. **DOL case 2012-AIR-014 following the federal courts' proceedings.**

The DOL case 2012-AIR-014 order (App. F, 16) overlooked and/or dismissed the evidence AAirlines provided that raised the contract between AAirlines and the TWU; that "... provides for the performance of safety-sensitive functions." The ALJ's decision was based on dicta found in the Ninth Circuit's *opinion*, which included:

> "It may well be that the Union is no more a 'contractor' under AIR21 than it is an 'agent' under the Agreement ... There is little reason to believe the Union meets that definition – that is, that the Union, which is a representative for the workers in collective bargaining and in the grievance process, 'performs safety-sensitive functions' for the Airline." (App. J, 66, fn. 10).

The ARB *affirmed* the ALJ's case 2012-AIR-014 order (App. F, 16); in spite of RSMawhinney's arguments and objections. (App. E, 13).

The Ninth Circuit *affirmed* the ARB's case 2019-0018 order: in spite of RSMawhinney's arguments and objections (App. A, 1). The Ninth Circuit *denied* RSMawhinney petition for a rehearing. (App. B, 3).

6. DOL case 2012-AIR-017 following the federal court proceedings.

The DOL case 2012-AIR-017 order (App. D, 6) was based on: the Ninth Circuit's *opinion* (App. J, 46); and, the District Court *granting* AAirlines petition to confirm an arbitration award (App. I, 39) (an arbitration that transpired without RSMawhinney's participation, during RSMawhinney's appeal before

the Ninth Circuit, and in disregard of RSMawhinney's effort to notify all parties of the Ninth Circuit appeal in progress).

The Ninth Circuit *affirmed* the District Court decision (App. I, 39); in spite of RSMawhinney's arguments and objections (App. G, 37), and *denied* RSMawhinney a rehearing. (App. H, 38).

The ARB *affirmed* the ALJ's case 2012-AIR-017 order (App. D, 6); in spite of RSMawhinney's arguments and objections. (App. C, 4).

The Ninth Circuit *affirmed* the ARB's 2012-AIR-017 order (App. C, 4): in spite of RSMawhinney's arguments and objections, (App. A, 1); and, *denied* RSMawhinney a rehearing. (App. B, 3).

REASON FOR GRANTING THE EXTRAORDINARY WRIT

The District Court and the Ninth Circuit erred in taking extraordinary actions to: invalidate the exemption within 9 U.S.C. § 1; invalidate and misrepresent the important purpose and intent of federal statute 49 U.S.C. § 42121; and, exceeded jurisdiction in overlooking the nondiscretionary duties of the DOL, and, of the nondiscretionary duties of the federal courts themselves.

49 U.S.C. § 42121(c) includes: "MANDAMUS – Any nondiscretionary duty imposed by this section shall be enforced in a mandamus proceeding brought under section 1361 of title 28, United States Code."

A. The DOL failed to uphold U.S. Supreme Court opinion and precedence.

1. DOL disregards 9 U.S.C. § 1 exemption.

The DOL case 2012-AIR-017 ALJ order, raised:

> "... the only issue meriting discussion is whether his complaint under AIR21 may lawfully be the subject of a pre-dispute arbitration agreement." (App. O, 107 ¶ 1).

The SAgreement included:

> "If any court of competent jurisdiction declares that any part of this Dispute Resolution Mechanism subparagraph is illegal, invalid, or unenforceable, such declaration will not affect the legality, validity, or enforceability of the remaining parts of this Agreement, and illegal, invalid, or unenforceable parts will no longer be part of this Agreement." (App. R, 139).

The ARB case 2014-0060 order, noted:

> "... the Board also noted that transportation workers engaged in foreign or interstate commerce are exempted from the arbitration requirement of the FAA." (App. O, 108, fn.11).

2. DOL disregards U.S. Supreme Court precedence.

The final ALJ case 2012-AIR-017 order stated:

> "The issue is whether, as a matter of law, the arbitral and federal-court decisions preclude Mr. Mawhinney from pursuing his AIR21 claim in

> the Department of Labor. I find and conclude that they do." (App. D, 8 ¶ 2).

The ARB case 2020-0067 order rubber-stamped the final ALJ order without providing any further reasoning: "... we conclude that the ALJ decision is in accordance with the law and is well-reasoned." (App. C, 5 ¶ 3).

The U.S. Supreme Court case *New Prime* was decided on Jan. 15, 2019; before the final ALJ 2012-AIR-017 order (App. D, 6), on Sept. 3, 2020. No consideration or review of RSMawhinney's arguments regarding *New Prime* is evident, in the final ALJ case 2012-AIR-017 order. Further, the final ALJ case 2012-AIR-017 order ignored RSMawhinney's *due process* rights, with:

> "It appears that Mr. Mawhinney's similar motion in the second arbitration is still pending before the Ninth Circuit. Given the basis for the panel's affirmance of the district court's judgment, I deem it unnecessary to wait for the Court to address Complainant's motion, or for the results of any further appeal." (App. D, 8, fn. 3).

The U.S. Supreme Court *affirmed* the First Circuit Court of Appeals judgment *Oliveira v. New Prime, Inc.* 857 F.3d 7, with *New Prime*.

The Seventh Circuit Court of Appeals judgment *Saxon v. Southwest Airlines Co.*, 993 F.3d 492, followed the precedence in *New Prime*; and was later *affirmed* by the U.S. Supreme Court, *Saxon*.

The ARB's case 2020-0067 order (App. C, 4) confirms that a conflict still exists (between this

decision, and the position held by the U.S. Supreme Court and circuit courts) in the implementation of the exemption within 9 U.S.C. § 1. The ALJ and the ARB disregarded and denied RSMawhinney's arguments; and, promote the conflict in law.

The *Saxon* case provides further understanding and guidance to the precedence set by *Circuit City*[7] and *New Prime*. The ALJ and the ARB orders did not follow and honor the U.S. Supreme Court's precedence, reasoning, and law.

The ARB case 2020-0067 order (App. C, 4) denied RSMawhinney of *due process* under 5 U.S.C. § 554 – Adjudication; ("APA").[8]

The U.S. Supreme Court holds the position:

> "... the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' *Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)*. In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' *Bowman Transportation, Inc. v. Arkansas- Best Freight Systems, Inc., supra at 285*; *Citizens to Preserve Overton Park v. Volpe, supra, at 416*. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important

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[7] *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001).
[8] Administrative Procedure Act

aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)*." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43.

The U.S. Supreme Court holds the position:

"In *Circuit City* ... the Court applied two well-settled canons of statutory interpretation to hold that *§1* exempted only 'transportation workers,' rather than all employees." *Saxon*, at 1785.

3. The DOL disregards 49 U.S.C. § 42121's "carefully-tailored administrative scheme."

The Ninth Circuit recognized that the DOL was not a party to the SAgreement. The Ninth Circuit recognized that the DOL policies were not in effect during the production of the SAgreement. RSMawhinney has been disadvantaged with the fact that the standards now applied were not in effect at the time the SAgreement was produced.

The U.S. Supreme Court holds the position:

"'When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.

If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.' *Id., at 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483*." (with footnote 14, "Applying this rule to the question in the case, we concluded that *§ 102 of the Civil Rights Act of 1991* should not apply to cases arising before its enactment. *511 U.S., at 293, 128 L. Ed. 2d 229, 114 S. Ct. 1483*."). ("*Id.*"; referring to *Landgraf v. USI Film Products*, 511 U.S. 244).
Republic of Austria v. Altmann,
541 U.S. 677, 693.

The Ninth Circuit recognized:

"... AIR21 reflects 'a carefully-tailored administrative scheme' for adjudicating retaliation claims, with federal district court actions available only for 'suits brought to enforce the [DOL]'s final orders;'"
(App. J, 59 ¶ 2), and,

"An administrative 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. *See Murray v. Alaska*

Airlines, Inc., 50 Cal. 4th 860, 868, 114 Cal. Rptr. 3d 241, 237 P.3d 565 (2010) (observing that the procedure available following DOL's unfavorable investigation was 'a full de novo trial-like hearing before an ALJ')." (App. J, 59).

The U.S. Supreme Court holds the position:

"The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of 'a clear nondiscretionary duty.' *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)." *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121.

The DOL has the nondiscretionary duty to expeditiously conduct a hearing-on-the-record. 49 U.S.C. § 42121(b)(2)(A).

The U.S. Supreme Court holds the position:

"Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement. Compare *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S. Ct. 956, 149 L. Ed. 2d 62 (1998)* (recognizing that 'shall' is 'mandatory' and 'normally creates an obligation impervious to judicial discretion'), with *United States v. Rodgers, 461 U.S. 677, 706, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983)* (explaining that '[t]he word 'may,' when used in a statute usually implies some degree of discretion')." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016).

B. **The Ninth Circuit invalidated an important federal statute on its face.**

1. **The Ninth Circuit misrepresents the facts.**

(a) "In particular, the ARB concluded that a 'contractor' is potentially any party to a contract, and so a union may be a 'contractor' by virtue of being a party to a collective bargaining agreement with an employer." (App. J, 53 ¶ 2).

The Ninth Circuit misrepresents the ARB's conclusion (App. P, 115); and, taints further DOL case 2012-AIR-014 proceedings.

(b) "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." (App. J, 56 ¶ 4).

The Ninth Circuit misrepresents the facts, as RSMawhinney entered written and oral argument; and, is evident with the Ninth Circuit's admissions that followed.

(c) "As the Airline could not have compelled arbitration of DOL's independent investigation, the Airline cannot be faulted for failing to have sought to do so." (App. J, 58 ¶ 2).

The Ninth Circuit misrepresents the facts. AAirlines did attempt to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 complaint; as recognized by the DOL (App. S, 148). AAirlines did not timely follow 49 U.S.C. § 42121 policies and procedures, as it is evident from the ARB's case 2014-0060 order (App. O, 105) and the District

Court's order (App. L, 70); exceeding the *statute of limitations*, of four years.

(d) "In support of this proposition, Mawhinney points to no statutory language so stating, as there is none." (App. J, 58 ¶ 3).

The Ninth Circuit misrepresents the facts. RSMawhinney provided written argument, and directly answered (during the Oral Hearing): "9 U.S.C. § 1."[9]

The Ninth Circuit's determination that the DOL's "... interest ... responsibility for ... safety of air travel ...." is misplaced. The DOL, District Court and Ninth Circuit jurisdiction "... is responsible for investigating and enforcing the discrimination aspects of a complaint."

2. **Ninth Circuit disregards 9 U.S.C. § 1.**

The Ninth Circuit is well aware of relevant U.S. Supreme Court precedence:

> "The Supreme Court overruled our prior precedent that the FAA does not apply to any employment contracts and held, in a case involving an individual employment contract, that the FAA applies to all individual employment contracts except those involving transportation workers. *Circuit City v. Adams, 532 U.S. 105, 109, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001)*." *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 fn. 1. ("*PowerAgent*").

[9] Oral Hearing [Time Stamp = 13:44]

The Ninth Circuit Judge that penned the *PowerAgent* opinion was adamant that RSMawhinney was not referred to as a "transportation worker," during the Oral Hearing:

> "It's not a transportation exception as written, it's an exception for employees engaged in interstate commerce."[10]

The Ninth Circuit would make the determination:

> "Mawhinney did not refuse to arbitrate when he filed his AIR21 complaint. He refused to arbitrate in early 2014 ...." (App. J, 60 ¶ 4).

The Ninth Circuit's determination is incorrect. AAirlines first attempt to arbitrate RSMawhinney's complaint was before April, of 2012; and, the DOL was aware on April 11, 2012, of RSMawhinney's refusal to arbitrate RSMawhinney's complaint. (App. S, 147).

The Ninth Circuit Judge who penned the *opinion* "*American Airlines, Inc. v. Mawhinney*, 904 F.3d 1114" expressed (during the Oral Hearing):

> "Well, I understand the people that are loading the airplane are perhaps not engaged in interstate commerce, but people who are actually making it flyable, I don't know, but what does it matter?"[11]

This Ninth Circuit Judges' preconceived conviction, evident in this prior statement, is in

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[10] Oral Hearing [Time Stamp = 25:17]

[11] Oral Hearing [Time Stamp = 25:32]

direct conflict with the position held by U.S. Supreme Court in *Saxon*:

> "Here, *§1's* plain text suffices to show that airplane cargo loaders are exempt from the FAA's scope, and we have no warrant to elevate vague invocations of statutory purpose over the words Congress chose." *Saxon*, at 1792-93.

The U.S. Supreme Court has repeatedly addressed the issue of the arbitration of an interstate commerce workers legal action. 9 U.S.C. § 1 was enacted in 1925, wherein, it is stated: "... 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."

The Ninth Circuit's decision of Nov. 22, 2022, allows the conflict between the courts to continue:

> "Mawhinney's challenge to the propriety of the decision to compel arbitration of his AIR21 claim against the Airline likewise fails because this court has already affirmed the order compelling arbitration of this claim. *See Am. Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir. 2018)." (App. A, 2, ¶ 1).

The *Saxon* case was granted a *writ of certiorari* to resolve decision conflicts between the Seventh Circuit and the Fifth Circuit. The *Saxon* decision concludes:

> "To be sure, we have relied on statutory purpose to inform our interpretation of the FAA when

that 'purpose is readily apparent from the FAA's text;'" and,

"But we are not 'free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal.'" *Saxon*, at 1792.

The Ninth Circuit does not honor the exemption within 9 U.S.C. § 1; and, denies RSMawhinney's arguments, and U.S. Supreme Court precedence.[12]

C. District Court invalidated an important federal statute on its face.

1. District Court provided AAirlines with an advisory opinion.

AAirlines filed action in the District Court to compel the arbitration of DOL case 2012-AIR-017. RSMawhinney filed objections, with arguments. The District Court *denied* AAirlines motion to compel the arbitration of DOL case 2012-AIR-017; however, the District Court inappropriately advised AAirlines, specifically, to promote the future pursuit of AAirlines intent, in conflict with the justiciability imposed within Article III. The District Court included:

"Accordingly, 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, not as an alternative request in a motion to enforce judgment." (App. L, 76 ¶ 1).

The U.S. Supreme Court has addressed and explained the policies embodied in Article III:

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[12] *i.e.*, *Circuit City*; *New Prime*; and, *Saxon*.

> "And it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' C. Wright, Federal Courts 34 (1963). Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." (with Footnote 14: "The rule against advisory opinions was established as early as 1793, see 3 H. Johnston, Correspondence and Public Papers of John Jay 486-489 (1891), and the rule has been adhered to without deviation, See *United States v. Fruehauf, 365 U.S. 146, 157 (1961)*, and cases cited therein.")
>
> *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

AAirlines pursued the motion to compel the arbitration of DOL case 2012-AIR-017 in the District Court, based on the *advisory opinion* provided by the District Court, more than four years after the DOL recognized AAirlines first attempt to compel the arbitration of RSMawhinney's 49 U.S.C. § 42121 complaint (and, RSMawhinney's refusal to arbitrate the complaint). AAirlines communicated to the TWU, of the invitation extended by the District Court; to encourage the TWU to take action, and move, to compel the arbitration of DOL case 2012-AIR-014.

2. **District Court disassociated the 9 U.S.C. § 1 exemption.**

The District Court delegated the legal standards applied:

> "'[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement.' 9 U.S.C. § 4;"
>
> "Courts are also directed to resolve any 'ambiguities as to the scope of the arbitration clause itself ... in favor of arbitration.' *Volt Info. Scis., Inc. v. Bd. Of Trs. Of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476-77 (1989);" and,
>
> "Agreements to arbitrate are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2." (App. M, 81-83).

The District Court case 3:16-cv-2270 order determined:

> "Here the 2002 Agreement is not a 'contract of employment,' but rather a settlement agreement designed to resolve legal disputes between the parties. Defendant does not argue that the 2002 Agreement is a contract of employment. Additionally, the Supreme Court has interpreted this exemption narrowly, finding that the exemption is limited to those engaged in the movement of goods in interstate commerce. *See*

> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). 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)." (App. M, 86 ¶ 2).

The District Court is disingenuous to raise precedence that refers to the SAgreement as an "arbitration agreement," but not refer to it as an "employment agreement." The SAgreement included RSMawhinney's employment with AAirlines. Further, the District Court disingenuously proclaims that RSMawhinney "... does not argue that the 2002 Agreement is a contract of employment."

The District Court's case 3:16-cv-2270 order (App. M, 77) addresses the issue repeatedly; because the issue was raised. The District Court is incorrect regarding 9 U.S.C. § 1's exemption; relying on another district courts' unfounded determination that "Aircraft Maintenance crew members, or workers engaged in aviation-related services, do not fall within this exemption." A conflict in the understanding, application, and honoring of the exemption within 9 U.S.C. § 1 is revealed. The U.S. Supreme Court has provided clarity with *New Prime* and *Saxon*.

The U.S. Supreme Court has reiterated:

> "Thus, any class of workers directly involved in transporting goods across state or international borders falls within *§1's* exemption."
> *Saxon*, at 1789.

AAirlines transports passengers and goods. AAirlines admits that RSMawhinney is engaged in AAirlines interstate commerce operation; and, further states that the Crew Chief position "... is critical and acts as a hub of activity." (App. T, 149).

RSMawhinney did raise argument; and, further believes that the District Court misrepresents the intent and purpose of the SAgreement. The SAgreement includes the action of employing RSMawhinney as an AMT, and, describes RSMawhinney's rights and privileges as an AAirlines employee. The Ninth Circuit would later admit that the SAgreement was "... albeit an employment-related one...." (App. J, 62 ¶ 1).

The District Court misrepresents the facts, relying on, and capitalizing on, the title of the SAgreement. Legal precedence proclaims:

> "Neither its label nor its form determines what the agreement is. That determination results from an examination of the entire instrument and the ascertainment of its intent and the rights created by it." *John Deere Co. v. Wonderland Realty Corp.*, 38 Mich. App. 88, 91.

The District Court deviated from assigned discretionary duties; and, disingenuously followed another district court's unfounded, unsupported and unverified precedence. The District Court's reasoning and determination is in conflict with U.S. Supreme Court precedence and law, as held in *Circuit City*, *New Prime*, and *Saxon*. The U.S. Supreme Court has provided clarity and precedence, but the District Court has not followed or honored U.S. Supreme Court reasoning and precedence; and,

pushed the arbitration of both DOL cases.
(App. M, 77; and, App. N, 91).

3. **District Court disregards U.S. Supreme Court precedence.**

The District Court, following the Ninth Circuit *opinion* (App. J, 91), erred in not considering the U.S. Supreme Court case *New Prime* before making a declaration:

> "This argument reflects a fundamental misunderstanding of the relationship between trial and appellate courts. As a lower trial court, this Court defers to the Ninth Circuit and the U.S. Supreme Court, and is bound by those courts' decisions." (App. I, 43 ¶ 2).

The District Court, Ninth Circuit, and DOL denied RSMawhinney *due process* by not considering and honoring U.S. Supreme Court decisions and precedence; and, denied RSMawhinney the exemption within 9 U.S.C. § 1, as an interstate commerce worker.

D. **DOL ALJ denies the facts.**

The ARB case 2014-0060 held:

> "... the Board vacated the ALJ's finding that the TWU is not a "company," and thus it cannot by definition be a contractor or subcontractor subject to liability under the Act. The Board held that the common legal definition of 'contractor' manifestly includes labor unions, and that the proper inquiry is whether the Collective Bargaining Agreement (CBA), or any other

> contract, between the TWU and American, which was in effect during Mawhinney's employment with American, provides for the performance of safety-sensitive functions by the TWU or its members. Therefore, the Board remanded this issue to the ALJ to determine initially whether the CBA or any other contract between the TWU and AA provides for the performance of safety-sensitive functions." (App. O, 107 fn. 4).

RSMawhinney entered evidence before the ALJ that substantiated the fact that the TWU did provide for the performance of safety-sensitive functions; Aviation Safety Action Partnership ("ASAP"). The ALJ falsely claims that there is no evidence of an ASAP contract:

> "While it appears that TWU participated in ASAP, there is no evidence of a contract related to ASAP which obligates TWU to perform safety-sensitive functions for American Airlines." (App. F, 34 ¶ 4).

The ALJ is disingenuous to claim that the ASAP contract was not before him. The ASAP contract was provided to all parties by AAirlines on October 3, 2016; but the DOL have strategically excluded evidence from the records. (*i.e.* Record 149, Exhibits A-K, are missing; 21-70039 certified list of records; as well as all of the OSHA records).

A U.S. Department of Transportation report recognized ASAP; and, that the Federal Aviation Administration was under-utilizing ASAP.[13]

E. The Question Presented Warrants This Court's Review.

The U.S. Supreme Court has repeatedly addressed the exemption within 9 U.S.C. § 1; reversing and correcting the Ninth Circuits' incorrect decisions, and, upholding correct decisions executed by other U.S. Circuit Court of Appeals.

Review is warranted here because the exemption within 9 U.S.C. § 1 is paramount to the *rights* of RSMawhinney (and other similar interstate commerce workers); in regard to transparent legal proceedings commanded by 9 U.S.C. § 1, and, by 49 U.S.C. § 42121. Review is especially warranted here because the DOL, Ninth Circuit, and District Court reasoning and decisions refuse to incorporate the exemption within 9 U.S.C. § 1; and, disregard the intent and purpose of Congress, with regard to 9 U.S.C. § 1, and, 49 U.S.C. § 42121.

The U.S. Supreme Court upheld the First Circuit's position, with:

> "When Congress enacted the Arbitration Act in 1925, the term 'contracts of employment' referred to agreements to perform work."
> *New Prime*, at 543-44.

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[13] https://www.oig.dot.gov/sites/default/files/WEB%20FILE_FAA%20Oversight%20of%20AA.pdf

The Ninth Circuit has taken the action of misrepresenting: RSMawhinney's arguments regarding the arbitration of DOL case 2012-AIR-017; RSMawhinney's understanding of the administrative process provided by AIR21; the DOL's "... statutorily and regulatorily defined role and remedies;" and, of the DOL's alleged interest and responsibility in RSMawhinney's AIR21 cases.

The District Court and the Ninth Circuit violate RSMawhinney's *due process rights* through the act of invalidating the exemption within 9 U.S.C. § 1; by not following and honoring U.S. Supreme Court decisions and precedence (*i.e.*, *Circuit City*, *New Prime*, and *Saxon*).

49 U.S.C. § 42121 does not provide the DOL, District Court, or the Ninth Circuit the authority to invalidate 9 U.S.C. § 1. 49 U.S.C. § 1 does not authorize an ALJ to impair RSMawhinney's *rights* as a worker in AAirlines interstate commerce operation. The dismissal of RSMawhinney's DOL case 2002-AIR-013 did not provide the means for an ALJ to deviate from the "'carefully-tailored administrative scheme ...' for adjudicating retaliation claims;" that was never intended, or expressed, by Congress. The ARB held:

> "... 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 ...."(App. O, 109 ¶ 2).

This petition is appropriate for U.S. Supreme Court supervisory power to substantiate and reinforce the effectiveness of 49 U.S.C. § 42121:

> "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of the courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312.

RSMawhinney provided all forums with argument and the exemption in 9 U.S.C. § 1. The U.S. Supreme Court holds the position:

> "While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the CWA), 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63.

RSMawhinney believes that AAirlines has employed a *continued violation* against RSMawhinney. The FBI closed the (FAA) investigation of RSMawhinney's DOL complaint (2002-AIR-013) on September 12, 2001 (the day after the events of September 11, 2001). The DOL's investigation of RSMawhinney's DOL case 2002-AIR-013 determined AAirlines "... violated 49 U.S.C., Section 42121(a)(1)," with:

> "Based on the foregoing, it is determined that American Airlines, Respondent in this matter, has violated 49 U.S.C., Section 42121(a)(1);"
>
> and,
>
> "The inference above is further buttressed by a signed statement taken from a witness, who will

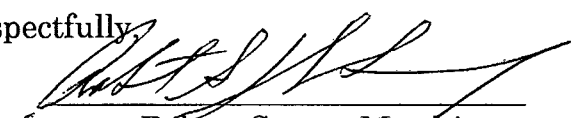
testify, if called, that Mr. Harmon told Mr. Mawhinney, in the October 29, 2001, meeting, that 'the allegations he had made placed undue burden on himself and the station during the investigations by the various Federal agencies...'" (App. Q, 129-133).

CONCLUSION

RSMawhinney has been denied an impartial hearing-on-the-record under the jurisdiction of 49 U.S.C § 42121. U.S. Supreme Court supervisory power is necessary to: establish the intent of Congress; validate the purpose of 49 U.S.C. § 42121; and, enforce the nondiscretionary duties commanded.

RSMawhinney prays for the vacate of judgement regarding: DOL-ARB case 2020-0067/2012-AIR-017 (App. C, 4), and, DOL-ARB case 2019-0018/2012-AIR-014 (App. E, 13); the Ninth Circuit case 16-56638 *opinion* (App. J, 46); the Ninth Circuit orders in case 16-56638 (App. K, 69), 19-55566 (App. G, 37), 21-70283 (App. A, 1), and, 21-70039 (App. A, 1); and, the District Court orders in case 3:16-cv-2270 (App. M, 77), and, 3:18-cv-0731 (App. I, 39). In addition, RSMawhinney prays for the remand of DOL case 2012-AIR-017, and, 2012-AIR-014.

Respectfully,



Robert Steven Mawhinney,
Petitioner, In *pro se*

DATED: May 11, 2023