ORIGINAL

23-1362

No. 23-

IN THE

Supreme Court of the United States

ROBERT DOUGLAS KREB, JR.,

Petitioner,

v.

INTEGRA AVIATION, LLC, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it appropriate for courts to contend with this Court or Congress established law through *sua sponte* invocation of affirmative defenses and dismiss actions for want of subject matter jurisdiction from the Administrative Procedures Act despite this Court remand of subject matter jurisdiction exactly as Congress intended to abut agency conduct that violates Article III rights of Article II litigants pursing enforcement of this Court's established law, and as that conduct can originate from admitted or suspected Appointments Clause violations?

2. Is it appropriate for courts to dismiss *sua sponte* an aggrieved party's judicial review Congress intended and mandates for agency misconduct such as known or suspected Privacy Act violations explicit in 1996 Pilot Records Improvement Act and the Freedom of Information Act where courts have a prevalent history holding subject matter jurisdiction under state and federal causes of action?

3. Is it appropriate for courts to *sua sponte* dismiss Congress mandated judicial review and enforcement of agency orders that are explicit for whistleblowers' immediate reinstatement; that cannot be stayed for any reason; and that *sua sponte* dismissal has the deleterious effect of vacating the agency order without due process to the whistleblower and renders the law inconsequential from that judicial activism?

4. Is it appropriate for courts to uphold or affirm *sua sponte* dismissal despite exhaustive post judgment relief motions, the present and developing diversity claims and valid questions of law were not provided required notice of court intent and precluding without offering substantial reasoning, why any amended claim could not overcome or cure any alleged defect?

5. Is it appropriate for courts to untimely *sua sponte* dismiss matters without required hearings where the court is bound by law to disclose potential conflict with any party to the action that must be waived if the court has not volunteered recusal?

PARTIES TO THE PROCEEDING

Petitioner Robert Douglas Kreb, Jr. was a complainant in the U.S. District Court of Northern Texas Amarillo and appellant then petitioner for full panel review en banc in the Fifth Circuit Court of Appeal. Respondents Integra Aviation, LLC dba Apollo MedFlight; Apollo MedFlight, LLC; Flight Mechanix, LLC, Young Firm, P.C.; Panavia Air Taxi, LLC dba Haven Aero, LLC; Lee McCammon, Thomas L. Klassen; Joseph H. Belsha, III; Whitney Smith; Travis Lamance; Jeremi K. Young; and Julie A. Su, Acting Secretary of the United States Department of Labor were respondent appellees in the U.S. District Court and Fifth Circuit Court of Appeals.

RELATED CASES

- *Kreb v. Life Flight Network, et al.*, King County Superior Court of Washington State. Undocketed. Removed to Federal Court for Diversity Jurisdiction to the U.S. District Court for Western District of Washington State. Ordered June 6, 2016.

- *Kreb v. Life Flight Network, et al.*, No. C16-cv-00837JLR. U.S. District Court for Western District of Washington State. Change of venue to U.S. District Court for the Northern District of Idaho. Forum non conveniens September 14, 2016.

- *Kreb v. Life Flight Network, et al.*, No. 2:16-cv-00288, U.S. District Court for the Northern District of Idaho. Judgment entered June 22, 2021.

- *Kreb v. Life Flight Network, et al.*, ALJ Case No. 2016-AIR-0028, U.S. Department of Labor, Occupational Safety and Health Administration. Whistleblower Protection Program. Complaint dismissed August 6, 2018.

- *Kreb v. Life Flight Network, et al.*, ARB Case No. 2018-0065, U.S. Dept of Labor, Administrative Review Board. Petition for Review Denied September 28, 2020.

- *Kreb v. Life Flight Network, et al.*, No 20-73497, U.S. Court of Appeals for the Ninth Circuit. Petition for Review denied June 16, 2022.

- *Kreb v. Life Flight Network, et al.*, No. 20-73497, U.S. Court of Appeals for the Ninth Circuit, Petition for Panel Rehearing denied October 12, 2022.

- *Kreb v. Department of Labor*, No. 22-762, U.S. Supreme Court, Petition for writ of certiorari Denied April 17, 2023.

- *Kreb v. Apollo MedFlight, LLC*, Case No. 2022-AIR-00008, U.S. Department of Labor, Occupational Safety and Health Administration. Whistleblower Protection Program. Original Award and Orders for Reinstatement issued April 26, 2023. Administrative Law Judge hearing objection of Respondent vacated award and order for reinstatement dismissing complaint February 16, 2024.

- *Kreb v. Apollo MedFlight, LLC*, Case No. 2024-0027, U.S. Dept of Labor, Administrative Review Board Petition for Review Denied May 23, 2024.

- *Lindsey Gulden and Damian Burch v. Exxon Mobil Corp.*, U.S. Dept. of Labor, Occupational Safety and Health Administration Case No. 6-1730-21-120, Secretary Findings in favor of Complaints and Orders for Reinstatement on October 6, 2022.

- *Lindsey Gulden and Damian Burch v. Exxon Mobil Corp.*, U.S. Depart. of Labor, Administrative Law Judge Case No. 2023-SOX-00021 and 2023-SOX-00022. Matter pending.

- *Lindsey Gulden, et al., v. Exxon Mobil Corp.*, Case No. 7418-MAS-TJB (22-7418), US District Court, District of New Jersey, Memorandum Opinion and Granting Defendant Motion and Order to Dismiss Complaint to judicially enforce reinstatement orders, April 19, 2023.

- *Lindsey Gulden and Damian Burch v. Exxon Mobil Corp.*, Case No. 23-1859, U.S. Court of Appeals for Third Circuit, Oral Arguments held March 6, 2024, decision pending.

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PETITION FOR A WRIT OF CERTIORARI

Robert Douglas Kreb, Jr., petitions for a writ of certiorari to review United States Fifth Circuit Court of Appeals AFFIRMING the United States District Court's *sua sponte* dismissal of his case and DENYING Panel Rehearing *en banc*.

OPINIONS BELOW

The Fifth Circuit's Per Curiam Unpublished Decision as Case No. 23-10758 (5th Cir. December 29, 2023) and reproduced at App. 1a. The Fifth Circuit's denial of appellant's petition for rehearing *en banc* is reproduced as App. 33a. The *sua sponte* Order of the U.S. District Court of Northern Texas Denying TRO and Dismissing Case 2:23-CV-00088-Z is reproduced at App. 4a. The Order of the U.S. District Court of Northern Texas Denying Relief From Judgment and Leave of Court to file an Amended Complaint in Case 2:23-CV-00088-Z is reproduced at App. 13a. The Order of the U.S. District Court of Northern Texas Denying Motion for Reconsideration of Order Denying TRO and Dismissing Case 2:23-CV-00088-Z is reproduced at App. 10a.

JURISDICTION

The Court of Appeals issued an unpublished memorandum on December 29, 2023, App 53 Affirming the District Court *sua sponte* Dismissal for Subject Matter Jurisdiction. The Court then denied timely Petition for Rehearing *en banc* on January 29, 2024. App 76. This Court has jurisdiction under 12 U.S.C. § 1254.

REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves questions of interpretation of Statutory Application of law under:

49 U.S.C. § 42121(b)(6)—Enforcement of Order by Parties.—

(A) Commencement of action.—

A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties to enforce such order.

49 U.S.C. § 42121(b)(3) Final Order.—

(B) Remedy.—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

49 U.S.C. § 42121(b)(1) Filing and Notification.—

A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

49 U.S.C. § 42121(b)(2) Investigation; Preliminary Order.—

(A) In general.—

Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of

the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

5 U.S. Code § 701—Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) Statutes preclude judicial review; or

(2) Agency action is committed to agency discretion by law.

5 U.S. Code § 702—Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money

damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S. Code § 703—Form and Venue of Proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action, . . . Except to the extent that prior adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S. Code § 704—Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate

remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the agency final action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S. Code § 705—Relief Pending Review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve the status or rights pending conclusion of the review proceedings.

5 U.S. Code § 706—Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 U.S.C. § 44703(j) Limitations on Liability; Preemption of State Law.—

(1) **Limitation on Liability.**—No action or proceeding may be brought by or on behalf of an individual who has applied for or is seeking a position with an air carrier as a pilot and who has signed a release from liability, as provided for under subsection (h)(2) or (i)(3), against—

(A) the air carrier requesting the records of that individual under subsection (h)(1) or accessing the records of that individual under subsection (i)(1);

(B) a person who has complied with such request;

(C) a person who has entered information contained in the individual's records; or

(D) An agent or employee of a person described in subparagraph (A) or (B);

in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise, or under any Federal or State law with respect to the furnishing or use of such records in accordance with subsection (h) or (i).

(2) **Preemption.**—No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (h) or (i).

(3) Provision of Knowingly False Information.— Paragraphs (1) and (2) shall not apply with respect to a person who furnishes information in response to a request made under subsection (h)(1) or who furnished information to the database established under subsection (i)(2), that—

(A) The person knows is false; and

(B) was maintained in violation of a criminal statute of the United States.

(4) Prohibition on Actions and Proceedings Against Air Carriers.—

(A) Hiring decisions.—

An air carrier may refuse to hire an individual as a pilot if the individual did not provide written consent for the air carrier to receive records under subsection (h)(2)(A) or (i)(3)(A) or did not execute the release from liability requested under subsection (h)(2)(B) or (i)(3)(B).

(B) Actions and proceedings.—

No action or proceeding may be brought against an air carrier by or on behalf of an individual who has applied for or is seeking a position as a pilot with the air carrier if the air carrier refused to hire the individual after the individual did not provide written consent for the air carrier to receive records under subsection (h)(2)(A) or (i)(3)(A) or did not execute a release from liability requested under subsection (h)(2)(B) or (i)(3)(B).

49 U.S.C. § 44703(h) Records of Employment of Pilot Applicants.—

(2) Written Consent; Release From Liability.— An air carrier making a request for records under paragraph (1)—

(A) Shall be required to obtain written consent to the release of those records from the individual that is the subject of the records requested; and

(B) May, notwithstanding any other provision of law or agreement to the contrary, require the individual who is the subject of the records to request to execute a release from liability for any claim arising from the furnishing of such records to or the use of such records by such air carrier (other than a claim arising from furnishing information known to be false and maintained in violation of a criminal statute).

(5) Receipt of Consent; Provision of Information.—A person shall not furnish a record in response to a request made under paragraph (1) without first obtaining a copy of the written consent of the individual who is the subject of the records requested; except that, for purposes of paragraph (15), the Administrator may allow an individual designated by the Administrator to accept and maintain written consent on behalf of the Administrator for records requested under paragraph (1)(A). A person who receives a request for records under this subsection shall furnish a copy of all such requested records maintained by the person not later than 30 days after receiving the request.

(6) Right to Receive Notice and Copy of Any Record Furnished.—A person who receives a request for records under paragraph (1) shall provide to the individual who is the subject of the records—

(A) on or before the 20th day following the date of receipt of the request, written notice of the request and of the individual's right to receive a copy of such records; and

(B) in accordance with paragraph (10), a copy of such records, if requested by the individual.

(9) Right to Correct Inaccuracies.—An air carrier that maintains or requests and receives the records of an individual under paragraph (1) shall provide the individual with a reasonable opportunity to submit written comments to correct any inaccuracies contained in the records before making a final hiring decision with respect to the individual.

(10) Right of Pilot to Review Certain Records.—Notwithstanding any other provision of law or agreement, an air carrier shall, upon written request from a pilot who is or has been employed by such carrier, make available, within a reasonable time, but not later than 30 days after the date of the request, to the pilot for review, any and all employment records referred to in paragraph (1)(B)(i) or (ii) pertaining to the employment of the pilot.

(11) Privacy Protections.—An air carrier that receives the records of an individual under paragraph (1) may use records only to assess the qualifications of

the individual in deciding whether or not to hire the individual as a pilot. The air carrier shall take such actions as may be necessary to protect the privacy of the pilot and the confidentiality of the records, including ensuring that information contained in the records is not divulged to any individual that is not directly involved in the hiring decision.

5 U.S.C. § 552a—Records maintained on individuals

(a) **Definitions.**—For the purposes of this section—

(7) The term "routine use" means, with respect to the disclosure of such record for a purpose which is compatible with the purpose for which it was collected;

5 U.S.C. § 552a(g)(1) Civil Remedies.—Whenever any agency

(A) Makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) Refuses to comply with an individual request under subsection (d)(1) of this section;

(C) Fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such

record, and consequently a determination is made which is adverse to the individual; or

(D) Fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) Actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) The costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on

which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

This case also involves questions of how appropriate findings and conclusions of law were drawn from:

Federal Rules of Civil Procedure Rule 12(b)

(b) How to Present Defenses. Every defense to a claim for relief in any proceeding must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject matter jurisdiction;

(2) lack of personal jurisdiction;

Federal Rules of Civil Procedure Rule 12(h)

(h) Waiving and Preserving Certain Defenses

(3) Lack of Subject-Matter Jurisdiction. Of the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

INTRODUCTION AND STATEMENT OF THE CASE

A Judicial Fiat appears to contend directly with law established by this Court and Congress that would *set stare decisis* other courts will be compelled to deliberate without proper redress the law is and operates exactly as congress intended and contention of courts in this regard rises to a judicial activism now burdening this Court.

This contentious judicial activism has trampled upon due process afforded Petitioner by violating rules of civil procedure so fundamental and unmistakable in their construct to inhibit such unconscionable actions by courts. Yet, the courts were unyielding and unrelenting in their contention to distort jurisprudence to embody that contention against established law that persisted through exhaustive and appreciably crafted motions of every meaningful procedural rule provided before finding an appellate unwilling to appreciate Petitioner, his pleadings or the various relevant causes of action and questions posed in his original complaint. Petitioner seeks this Court's mindful consideration of district and appellate conduct sufficiently detrimental to public interests to warrant reversal and remand of the judicial review of underlying overreach of agency application of law and misconduct so egregious it is of the type and fear Congress contemplated could require the judicial review exclusively provided under agency statute and the Administrative Procedures Act and is well overdue for the Department of Labor as is evidenced herein not for the purpose of litigating before this Court but to support the original complaint dismissal reversal and remand so the appropriately provided judicial review may be perfected as Congress intended by the courts.

ONE LAW BUT SEPARATE INDUSTRIES AND OUTCOMES

Sarbanes-Oxley ("SOX") Financial and air carrier safety whistleblower protection programs ("AIR21") rely on one set of Congressional statute for review of retaliation complaints. However, financial agency whistleblowers stand astronomical and unconscionably higher chances of prevailing on retaliation complaints for blowing the whistle on financial improprieties of employers than aviation safety reporting as SOX law enjoys "kick-out" provisions if the Department of Labor Occupational Safety and Health Administration Whistleblower Protection Program ("DOL/OSHA/WPP") does not timely issue any merit determination of a SOX retaliation complaints, the case may be removed to U.S. District Court for Article III adjudication of the statute. AIR21 complainants are wholly subject to the DOL under Article II review of complaints. The DOL is implicitly compelled to "fast-track" SOX complaints from political pressure and obtains more frequent favorable merit determinations than the rare case an AIR21 case is issued a merit determination and award to air safety whistleblowers *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129 (D.P.R. 2014).

This disparity is clearly contrasted by DOL's treatment of aviation safety whistleblower Boeing Engineer John Barnett and Boeing Auditors ("Audit IT SOX") Nicholas P. Tides and Matthew C. Neumann whom were able to remove their cases for Article III judicial review of Boeing's whistleblower retaliation *Tides, et al., v The Boeing Co.*, 644 F.3d 809 (9th Cir. 2011). Mr. Barnett was restricted to Article II administrative agency review that found no merit and dismissed Mr. Barnett's complaint

just as hundreds of AIR21 complaints brought since AIR21 was enacted less than twenty complaints have ever received any merit determination by DOL investigators.

Similarly, Exxon Mobil Corporation retaliated against two scientists who reported Exxon financial disclosures violated SOX. The DOL enjoined the two separate complaints and quickly issued merit determinations in their whistleblower complaints and issued immediate reinstatement orders of the scientists *Lindsey Gulden and Damian Birch v. Exxon Mobil Corp.*, US Department of Labor, Administrative Law Judge Case Nos. 2023-SOX-00021 and 2023-SOX-00022. Exxon refused to comply with agency orders to reinstate the complainants and objected to Secretary Findings to be heard under de novo review by DOL ALJ. Complainant's motioned the ALJ to enforce the orders for reinstatement but the motion was denied under clear interpretation of the statute enforcement and judicial review was exclusive statutory jurisdiction of US District Court. Complainants promptly sought that enforcement in US District Court which dismissed their complaint for want of subject matter jurisdiction under the Administrative Procedures Act ("APA") interpreting judicial review was improper prior to an agency decision becoming "final." Complainants sought appellate review in Third District Court of Appeals where the DOL Solicitor joined in *amicus curiae* offer the agency interpretation for US District Court jurisdiction of judicial review exclusively provided under the statute in briefs and oral argument held March 5, 2024 and the matter remains pending.

Petitioner also received a very rare merit determination in his AIR21 complaint and orders for immediate

reinstatement that by law cannot be stayed for any reason. Respondent also refused to offer an unconditional offer of reinstatement of Petitioner to his former position with pay, seniority, benefits and responsibilities he held before the adverse employment action(s). Petitioner brought his complaint and sought statutory judicial review for the agency order and district court relief and remedy for respondent willful noncompliance and stay of agency proceedings, preserving the status quo and barring further agency action to cause further potential irreparable harm to Petitioner and as described herein, supporting the petition for this Court to reverse the equitable harm of the courts as the Third District Court of Appeals is presently contemplating while the Fifth District Court of Appeals withheld any similar regard of Petitioner's exhaustive appellate petitions.

Gulden, et al and Petitioner are the first known rare instance of merit determination and orders for immediate reinstatement have been defiantly and unlawfully rejected by respondents. Congress clearly intended Article III due process be secured by courts for such potential and exceptional intervention and support Article II agency rightfully deficient powers for enforcement and where necessary including injunctive remedy. Relenting Article III Courts are severe impediments to prompt and equitable justice Congress tenders agencies for required enforcement powers agency orders.

RAMPANT AGENCY MISCONDUCT UNDER ARTICLE III

Agency misconduct is prolific in both Petitioner's 2014 and 2021 complaints. A former Regional Administrator assigned to investigate Petitioner's 2014 complaint was

removed for refusing to revise her recommendations for merit determination, awarded monetary damages and reinstatement. The Investigator was replaced by another staff member that immediately issued a "Closing Conference Letter" indicating intention to issue a non-merit determination and dismiss the AIR21 complaint and without following agency rules or correcting defects his replacement of the former investigator created by ignoring substantial evidence amassed in the former investigator's merit recommendations.

The DOL repeatedly excused respondent's violations of the Privacy Act by releasing Pilot Records Improvement Act confidential pilot records to the DOL which then admitted unlawfully disseminating those privacy protected confidential pilot records among the DOL investigation team in Petitioner's 2021 AIR21 complaint. This investigation team was repeatedly noticed by the primary investigator to include DOL Solicitor(s) and clearly violates Agency Procedural Rules for handling AIR21 complaints. The respondents violated the Pilot Records Improvement Act of 1996 ("PRIA") in an attempt to slander and defame petitioner with both their defenses of the retaliation to OSHA Investigators and also harm Petitioner financially and by reputation in blacklisting him and using allegations of improprieties in his PRIA records to that end. That defamation and slander in defense of the AIR21 complaint compelled OSHA investigators repeated assertions the PRIA violations were warranted and issued a "Closing Conference Letter" in June 2022 advised their intent to dismiss the complaint.

Petitioner issued strong written protest of Closing Conference Letter analysis and lack of acknowledgement

the substantial evidence provided by Petitioner. Thereafter, respondent submitted conclusive admission to possessing knowledge of Petitioner's 2014 AIR21 case and using that knowledge and information to retaliate against Petitioner in 2021 and in violation of AIR21. Respondent's admissions were cited in investigator's merit determination, award for damages and orders for reinstatement. Petitioner's admissions as outlined herein demonstrate Petitioner's 2021 case is now indelibly intertwined with his 2014 complaint's dismissal in 2018 where the findings and interpretation of the statute between the complaints arise from the exact same regulatory violation reported in 14 CFR 135.267 Flight Time Limitations and Rest Period Requirements for air carrier flight crew. The decisions and orders between the two separate cases induce a confounding paradox induced from misconduct and violations of Article III due process requirement that are ripe for and statutory mandate judicial review of the courts.

"Interference" by the courts as Congress intended would prevent Respondent Objection to the Secretary findings being improperly assigned the same ALJ whose 2017 presiding over hearing of Petitioner's objections to the dismissal of his 2014 complaint, conducted the hearing and issued decision and orders maligning the statute and also violated the appointments clause according to this Court's *Lucia* decision and APA/ALJ rules.

Petitioner promptly submitted written protest of the ALJ assignment to the Chief Administrative Law Judge, Office of Inspector General and upon motion for disqualification before the assigned ALJ which brazenly stated in denying Petitioner's motion the agency efforts to

preempt this Court June 2018 *Lucia* decision, the agency did not appropriately correct the appointments clause violations before the ALJ presided over Petitioner's July 2017 AIR21 hearing and in August 2018, issued a decision and order dismissing Petitioner's 2014 complaint.

The Chief ALJ implicitly acknowledged agency misconduct in ceasing further assignment of the ALJ to cases brought in other districts the law required rotation of assignments to judges of those districts and not exclusively assigning over 120 cases and only AIR21 cases in less than 10 years to only one ALJ in the Cherry Hill, NJ ALJ district and irrespective of what ALJ district AIR21 complaints were brought. There is strong evidence this ALJ personally retaliated against Petitioner in his 2021 AIR21 complaint and violated Petitioner's Article II administrative rights and rules for handling AIR21 complaints as well as substantially depriving Petitioner Article III due process rights to include extreme, improper and inappropriate dismissal of his 2021 AIR21 complaint and vacating the monetary awards and orders for reinstatement the ALJ was continually briefed respondents were in willful and defiantly noncompliant. The ALJ demonstrated his substantial bias against Petitioner at the onset of respondent's objection when known statements and representations known to be false and without any substantive evidence to support counsel's attempts to cure fatal defects in their objection were excused by the ALJ which ignored and failed to weigh all of the substantial regulatory compliance documents and official public filings and certifications to the Texas Secretary of State clearly refuted counsel false statements and misrepresentations to allow the ALJ objection to continue when it was shown to be unlawful.

AVIATION SAFETY AND REPORTING SINCE 1996

A Pilot reputation for adhering to regulations and safety protocols holds equitable market value to them personally and air carrier employers.[1] Aviation Whistleblower Statutes in 49 U.S.C. § 42121 are intended by Congress that neither pilot reputations or safety protocols be subject to certain unlawful compromise by outside or internal interests to introduce greater exposure to persons and property than aviation operations already profoundly and fundamentally impose. Although Congress intent in the language concisely expresses how the law should be applied, courts would seem intent to persistently mask their imperfect application of the law behind claims of ambiguity in the language with deference to agency interpretation of the law under *Chevron* and the APA. Courts seem content declining to rarely if ever "disturb" or intervene in agency outcomes or ALJ interpretation of agency process and handling of statutory stare decisis. This cannot be farther from Congress intent and lacks appreciation of jeopardy Article II tribunals posed to constitutional protections Article III affords. Petitioner posited substantial evidence of misconduct of DOL Solicitor and ALJ discretion abuses with clear evidence the ALJ's engaged in judicial activism before the 9th Circuit Court of Appeals and this Court which were not

1. John J. Nance et al., The Pilot Records Improvement Act of 1996: Unintended Consequences, 66 J. AIR L.& COM. 1225 (2001) https://scholar.smu.edu/jalc/vol66/iss3/6 . A broad perspective of the aviation industry jeopardy to pilots adhering to regulatory requirements of reporting safety related issues to air carrier management who now have power to adversely affect a pilot's market value under protection of relevant pilot records disclosure law.

inclined to engage the AIR21 Whistleblower statutes' thorough judicial review and appellate power provisions to remand that 2017 Agency action for proper lawful review. Petitioner was denied certiorari from this Court's preceding term on April 17, 2023 and fully exhausted and made his 2014 AIR21 complaint dismissal "final." This was a civil cause of action under federal statute for judicial review of the agency misconduct which included appointments clause violations if remedied by judicial review *Lucia* required, would reasonably correct many adverse agency actions against Petitioner by remanding the statutory judicial review afforded him.

Congress intent in AIR21 law unmistakably targets aviation safety promotion by protecting frontline air carrier operations staff making reports of suspected violations having occurred or potential to occur. The law's lack of meaningful historical results impacting accident statistics over a decade of enactment Congress seized upon National Transportation Safety Board Recommendations in 2009 to develop and deploy Aviation Safety Management Systems by U.S. Air Carriers and Commercial Operators where safety reporting and risk analysis for safety and regulatory compliance of flight operations to mandate routine employment of safety communication homogeny to air carriers' daily flight operations.

Petitioner was fully complying with his joint employers's Safety Management System requirements as originated from the 2009 Congressional mandate as Air Ambulance Operators were compelled. Unfortunately, petitioner's employers found that mandated safety reporting particularly inconvenient under extraordinary circumstances and highly abnormal operational challenges

to Petitioner's overnight duty shift July 9, 2014. Petitioner's joint employers were attempting to stretch one aircraft and pilot across three Pacific Northwest States and five different air ambulance bases that were deprived of appropriate staffing or an airworthy aircraft when he received three separate assignments from different managers of the differing companies that conflicted or cumulatively performed as assigned would violate 14 CFR 135.267. Petitioner's required safety reports caused one manager to overrule the others and in cancelling the assignments caused strife between the joint employers that contributed to at least one employer retaliating against Petitioner and terminating his employment within hours of completing his overnight Air Ambulance Pilot Duty period and in violation of law.

REASONS FOR GRANTING THE PETITION

It could not be understated the Fifth Circuit is now "split" on *sua sponte* dismissal having affirmed the district court in this petition and there is no overwhelming support for any one of the restrictive means *sua sponte* dismissal is averred to be appropriate. Legal journal publications would incline some discomfort for such application of the law to justify a very limited ability of jurists to remain neutral while disposing of a matter *sua sponte* inherently implicates an adversarial induction of the court into the litigation. It is inconceivable Petitioner did not successfully poll a sufficient number of the Fifth Circuit from his en banc petition for rehearing where *sua sponte* dismissals have been routinely reviewed for fairness and appropriate application of procedure to preserve the integrity of the district court impartiality. The extensive arguments required on appeal of the district court *sua sponte*

dismissal and preserve all of Petitioner's claims on appeal according to local rules necessitated Petitioner avoid redundant statements of obvious defects of the lower court dismissal. Petitioner raised more than sufficient argument and conclusions for the Fifth Circuit appeal and petition for rehearing *en banc* support reversal of the dismissal or restore more than majority of Petitioner's claims despite the maligning of his claims with bias and unfavorable light for *pro se* litigants bringing time sensitive claims, seeking injunctive relief and judicial review and enforcement Congress mandates. The dismissal appears hastily drawn and incorporating denial of a motion for injunctive relief and mandamus Petitioner filed just two (2) days prior. 49 U.S.C. § 42121(c). The dismissal was wrought with significant fatal errors conflating Fed. R. Civ. Proc. 12(b)(1), 12(b)(2), 12(b)(6) and 12(h)(3) to pose arguments that were not lawfully congruent with citations of "personal jurisdiction" which can only be raised upon motion or in an affirmative defenses of parties named to the action. This erroneous ruling escaped the Fifth Circuit as it related to Petitioner's assertions the district court failed to follow court rules and procedure for *sua sponte* dismissal which already subjects scrutiny on integrity of courts' perception of impartiality and fairness fully adjudicating complaints of litigants, particularly, *pro se* complainants' pursuit of good faith claims for appropriate judicial review and adequate remedy.

This Court should question and establish proper application of law in judicial review and eliminate judicial "crutches" to defer administrative deference to application of law so workers making routine and mandated safety reports may now do so without fear of reprisal or that compromises air safety or security protocols.

I. The *sua sponte* dismissal deprives, withholds or otherwise annuls judicial review and enforcement of Whistleblower Law and orders for reinstatement as Congress mandates.

Hundreds of Air Carrier Whistleblower Complaints have been filed and investigated by OSHA since Congress enacted AIR21. However, poorly trained investigators have been far too, unfamiliar, unable or defiant to comprehend highly regulated aviation industry safety practices and rules that are ubiquitous compared to other industries OSHA is responsible to oversee worker and job site safety. Congress charges Federal Aviation Administration ("FAA") with oversight of whistleblower program efficacy however they do not offer or publish statistical data on volume and type of whistleblower reports or outcomes of internal FAA Employee protections or those of air carriers' employees. Only a small and limited number of favorable awards for AIR21complaints of air carrier employees can be identified through complainant or respondent objections to OSHA findings tracked by the DOL OALJ and Administrative Review Board ("ARB"). OSHA Press Releases are an unreliable source for this data as the DOL does not appear to follow their own rules or the law as Petitioner's favorable findings by the Secretary and Order for reinstatement were not published in a DOL Press Release as was required, to bring attention and notice that WPP AIR21 investigations yield results and promotes the reporting program to other air carrier employees and encouraged they make their own safety reports without fear of adverse employment action Petitioner suffered.

Of the portion of AIR21 complaints that are accounted for in the OAL and ARB reporting, a disproportionate number of all cases result in affirming favorable findings or reverse unfavorable findings of the Secretary Investigators, ALJ or ARB at its highest known report from independent audit and analysis of legal professionals, 7% of "all" complaints result in a favorable outcome for AIR21 air carrier whistleblowers. On the contrary, this number appears to be representative of data available only on the number of cases published by the ALJ and ARB and not the unknown total of complaints of which outcomes are not known or otherwise disclosed by the FAA or DOL and OSHA. If considering all complaints filed by air carrier employees may be disposed without any determination, this number of favorable outcomes is significantly reduced and effectively render the WPP useless and ineffective to a point employers have become emboldened as Petitioner and in *Gulden v. Exxon*, the employers defiantly refuse compliance with orders for reinstatement in Secretary Findings that cannot be stayed for any reason as respondents receive significant and sufficient due process rights from the DOL and ahead of those findings and orders. In the very low number of outcomes of whistleblower complaints under AIR21 where employers are ordered to reinstate a complainant, Petitioner, *Gulden and Burch v. Exxon Mobil Corp.* are believed to be the first opportunity to test Congress intent and question the law requiring judicial review of the secretary order and judicial enforcement of the courts where sanction and other remedy are available to obtain the agency compliance ordered under the statute. In addition, the ALJ Assigned in *Gulden*, in Denying the Complainant Motion to Enforce the Reinstatement order, instructs "the Agency has no independent executable

enforcement authority" and further asserts "Whether OSHA's Order is enforceable is a question properly before the Article 3 Courts" August 28, 2023, Order Denying Motion to Enforce Reinstatement, Hon. Patrick M. Rosenow, District Chief ALJ, *Gulden, et al., v. Exxon Mobil Corp.*, OALJ Case No(s). 2023-SOX-00021 and 2023-SOX-00022.

The *sua sponte* dismissal of Petitioner's complaint not only deprives any opportunity to develop his case and litigate both the agency ALJ assertion and Congress intent in the law, but vacates the agency orders without due process rights of Petitioner as respondent received by an October 19, 2022 due process letter advising of the pending merit determination and orders to immediately reinstate the complainant not being stayed by any objection filed with the OALJ. Reversal and/or Remand of the district court order for his entire complaint shall serve to restore Petitioner's due process rights Congress affords under the statute and enable judicial review of other important questions of law pertinent to air carrier safety and whistleblower laws.

II. The *sua sponte* dismissal deprives or withholds Congress provision for judicial review of agency conduct as incorporated in Chapter 7 of Title 5 indicted in AIR21.

49 U.S.C. § 42121(b)(4)(A) is not ambiguous in its' outline for judicial review conforming to Chapter 7 of Title 5 of the United States Code where 5 U.S.C. § 702 outlines Petitioner's right of review of aggrieving agency action; § 703 provides Form and Venue for district court judicial review congress intends in the statute; § 704

prescribes the district court subject matter jurisdiction of agency action where no other adequate remedy are subject to judicial review; § 705 provides relief in administrative proceedings pending judicial review; and finally, § 706 lays out scope of review to include arbitrary and capricious conduct in agency actions or by administrative law judges *Marsh v. Oregon Nat. Res. Council,* 52 F.3d 1485, 1492 (9th Cir. 1995). While the ARB and Ninth Circuit declined to acknowledge this challenge and other elements raised by Petitioner in specific regard to his 2014 AIR21 action, the courts deferred only to agency discretion in their findings against Petitioner. The conduct of the agency in executing that presumed discretion was not contemplated as reviewable under AIR21. Petitioner asserts in his complaint following the final determination of the Agency action by this Court denial of his petition on April 17, 2023, that agency conduct should unquestionably be reviewable under Chapter 7 as the law clearly frames Congress intent and conduct of the agency in now both Petitioner's AIR21 cases warrant a judicial review and enjoining the agency from further misconduct and irreparable harms.

Substantive abuse and unlawful agency actions such as willfully disregarding Petitioner's repeated requests to comply with Privacy Act Protections asserting the DOL maintained inaccurate records, unlawfully possessed and dissemination his Confidential Pilot Records respondent unlawfully released without Petitioner's consent and release of liability according to 49 USC § 44703(h)(2) & (2)(A), 49 USC § 44703(h)(9) & (11), 5 USC § 552a(g)(1)(B) & (D). Courts consistently rule the law contains no prerequisite for exhaustion of Administrative remedies before pursuing civil actions for damages and the agency need only refuse individuals' request to take some

corrective action regarding the privacy act protected records *Graham v. Hawk*, 857 F. Supp.38, 40 (W.D. Tenn. 1994); *Phillips v. Widnall*, No. 96-2099, 1997 WL 176394, at *2-3 (10th Cir. Apr. 14, 1997); *Hubbard v. EPA*, 809 F.2d 1, 7 (D.C. Cir. 1986); *Nagel v. HEW*, 725 F.2d 1438, 1441 & n.2 (D.C. Cir. 1984). Furthermore, the deference of the district court for the Administrative Procedures Act is improper. The APA holds no jurisdiction to enjoin an agency from disclosing confidential records covered under the Privacy Act and Congress is presumed to intend district courts to use inherent equitable powers that are not explicitly precluded and permits causes of action under 5 USC 552a(g)(1) *Doe v. Veneman*, 230 D.Supp. 2d 739, 752 (W.D. Tex. 2002); *Recticel Foam Corp. v. DOJ*, No. 98-2523, slip op. at 9 (D.D.C. Jan 31, 2002), *Doe v. Herman*, No. 97-0043, 1998 WL 34194937, at *4-7 (W.D. Va. Mar. 18, 1998); *Haase v. Sessions*, 893 F.2d 370, 347 n.6 (D.C. Cir. 1990).

The district court's sua sponte dismissal conflated with personal jurisdiction analysis is devoid of thoughtful consideration of other opinions' reasoning to support Petitioner pursuing remedy under federal torts for privacy violations derived from willful and intentional record disclosures unlawful under the Privacy Act permits injunctive relief and monetary remedy Congress exlicitly bars in only those lawsuits brought by military personnel against military departments *O'Donnell v. United States*, 891 F.2d 1079, 1084-85 (3d Cir. 1989); *Beaven v. DOJ*, No. 03-84, 2007 WL 1032301, at *21-25 (E.D. Ky. Mar. 30, 2007); *Feres v. United States*, 340 U.S. 135, 146 (1950); *Cummings v. Navy*, 279 F.3d 1051, 1053-58 (D.C. Cir. 2002)

Finally, courts have held damages are proper against any agency maintaining confidential records protected under the act violates standards of fairness regardless of the agency disposition to any adverse determination when the inaccurate confidential record is sourced for adverse determinations and a civil action remedy operate independently of agency imposition for record keeping in subsection (e)(5) *Dickson v. OPM*, 828 F.2d 32, 36-40 D.C. Cir. 1987); *Blazy v. Tenet*, 979 F. Supp. 10, 19 (D.D.C. 1997). This Court has posited in *Cooper*, 132 S. Ct. 1441 (2012) the context of the Privacy Act as intended to protect defamation and privacy torts and implicates this Court would agree, reversing the *sua sponte* dismissal and remanding for full adjudication of the facts of the case is in the best interests of the public. Such action would uphold Congress intent that such egregious actions of willful and intentional violation of Petitioner's privacy rights in disclosure, maintenance and further dissemination of information and records containing confidential pilot information required by PRIA greatly undermines the integrity of PRIA and civil remedies in monetary and injunctive relief are the best deterrent for past, present and future violations of the act.

III. The *sua sponte* dismissal deprives or withholds any opportunity to test or question Congress' intent to implicate persons or air carriers violating Pilot Records Improvement Act of 1996 disclosure restrictions and "routine use" provisions are subject to civil liability in district courts.

As asserted further herein under challenges to *Chevron* and statutory *stare decisis* in section (V.), Congress does not explicitly bar civil damages and

other remedy against individual persons whom are alleged to have violated the law. It is not unreasonable that Congress identified the serious nature of keeping confidential and private personal information air carriers are required to process and store, in sufficient safe keeping and not disseminated or only released for good reason under "routine use" and only then with the consent and authorization of the pilot to whom the records are related. Congress language tactfully inclines "persons" as defined in the law are liable for abuse, mishandling or unlawful release of those confidential records if doing so, not in accordance with the law or without the expressed consent of the Pilot those records are regarding to be released and circumvents his right to receive copies of all the records being released even without his consent. It is only logical and acceptable to test in a review of the court regarding the conduct of the persons and air carriers involved for willful and intentional violation of the law under laws of torts such as slander, defamation or interference with a business expectancy such as other clients respondents and their employees were aware and had authorized Petitioner to engage and supplemental in subordinate to his duties and responsibilities assigned by the respondent air carrier employer. The *sua sponte* dismissal for assertion of personal jurisdiction as cited by the court as Rule 12(b)(2) should have been raised by defendants as an affirmative defense or in an answer or appearance and not raised by the court in a *sua sponte* judgment and dismissal without proper handling of notification and opportunity of Petitioner to cure any alleged defect or amend the complaint.

Having deprived the Petitioner of an important test or question of law implicitly establishes courts are not

concerned to uphold Congress clear intent that employees of air carriers accessing or disseminating private information in pilot confidential records are not exempt from liability induced by persons and air carriers who do so while not in accordance with the law for a routine use or having failed to obtain the Pilot's expressed written consent for the release and dissemination of records 49 U.S.C. §44703(j)(1)(B) & 49 U.S.C. § 44703(j)(1)(C)&(D).

IV. The *sua sponte* dismissal implicates the district court in gross mis-application of law found in Fed. R. Civ. Proc. Rule 12(B) and 12(h).

The district court judgment and order in *sua sponte* dismissal appears to make profound, improper and unreasonable construct of multiple rules to support the court determination alone and without evidence being submitted from litigant's defenses as required under Rule 12(b) and Rule 12(h). The court transposed affirmative defenses away from a litigant and assumed the responsibility of the court to employ such "gate-keeping" functions is inappropriate and courts are restricted from such drastic and extreme measures as dismissal "the severe sanction of dismissal should be imposed 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.' " *Id.* at 682 (quoting *Durham v. Florida East Coast Railway Co.*, 385 F.2d 366, 368 (5th Cir.1967)). This is constitutionally a reversible error for many defects of the court application of the rule as Petitioner challenged in appellate and reply briefs.

Appellate courts appear evenly split in their review with little or no majority of support for or against *sua sponte* dismissals and more critical of process courts

employ to arrive at the *sua sponte* dismissal "[t]he trial judge should have given notice of his intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court. . . ." *California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 281 (9th Cir.1974). *Accord, Lewis v. State of New York,* 547 F.2d 4, 6 (2d Cir. 1976); *Literature, Inc. v. Quinn,* 482 F.2d 372, 374 (1st Cir.1973). Judicial Review articles have reasoned that employing affirmative defenses and inserting the court into an adversarial position in litigation to be improper without a litigant having answered a responsive pleading and/or motion to raise such defenses.[2] The district court ordered dismissal of Petitioner only after defendants named in the summons failed to timely appear and/or answer Petitioner's complaint. The district court seemed to implicate a lack of merit in the complaint and joined the same order denying Petitioner's motion filed two days earlier seeking emergency injunctive relief and without scheduling any hearing on the motion. Even so, in such case as meritless or frivolous and inarticulate complaints, they must first be accepted if all factual allegations in a complaint as true and take[n] . . . in the light most favorable to a pro se plaintiff *Phillips v. County of Allegheny,* 515 F.3d 224, 229 (3d Cir. 2008); *Erickson v. Pardus,* 551 U.S. 89, 93 (2007) and "must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus,* 551 U.S. at 94 and the court must grant plaintiff leave to amend a complaint unless amendment would be

2. 36 Quinnipiac L. Rev. 25 (2017-2018) *Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals.*

inequitable or futile *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 114 (3d Cir. 2002). The district court framing of "futility" in refusing to grant leave to Petitioner to amend the complaint and cure alleged deficiencies encapsulates terse judicial activism as to parse language of the Fifth Circuit analysis in its' section 2. Applicable Law regarding the court denial of a THIRD amended complaint and motion in opposition raising the Rule 12(b)(6) affirmative defenses in *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014). In the fuller context of the Fifth Circuit analysis of "2. Applicable Law", the appellate argued "the district court must possess a "substantial reason" to deny leave to amend and "failure to provide an adequate explanation to support denial of leave to amend justifies reversal." *Mayeaux v. La. Health Serv. And Indent. Co.*, 376 F.3d 420, 426 (5th Cir. 2004) "unless the denial is "readily apparent," and "if the record reflects ample and obvious grounds for denying leave to amend." In this same context of analysis the district court justifies his discretion to *sua sponte* dismiss Petitioner's complaint but fails to offer any explanation of the futility outside of the pretext in the judgment for subject matter jurisdiction this petition and preceding prayers soundly rebutted. In *Marucci* the district court had some reasoning and some record against the two (2) prior motions and still granted leave to amend the complaint before denying the third motion as futile given the previous amendments failed to establish a record or cured defaults of the prior two motions. The district court in Petitioner's dismissal held no such reasoning or any record including any appearance or legitimate Rule 12 motion of a party defense to deny Petitioner leave and motion to amend the allegedly defective complaint. The Fifth Circuit established the record, reasoning and

explanation as proffered were sufficient to defeat an abuse of discretion challenge on the appeal *Anokwuru v. City of Houston, et al.*, No. 20-20295 (5th Cir. March 16, 2021)

Petitioner has fallen victim to substantial self serving and craftily cited opinions to augment absence of proper motion or appearance as "substantial reason" from a vacant record justifying *sua sponte* dismissal and constitutional challenge that denial of a Rule 15(a) motion poses this case. The court alone determined without motion or affirmative defenses as Rule 12(b) requires, denying leave for Petitioner to amend his complaint was improper and an abuse of discretion for lack of sufficient reasoning from an empty record where no hearing or motion other than Petitioner's were before the court and is reversible by law the Fifth Circuit failed to identify and correct under their own precedence. This Court review for reverse and remand is obliged to uphold and recoup Article III constitutional protections of due process.

This haste to dismiss Petitioner's complaint and inhibit the injunctive relief motion likely contributed to the court conflating rules and improperly dismissing Petitioner's complaint under *Greenlaw*, 128 S. Ct. at 2564; *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) ("Under [our adversary] system, courts are generally limited to addressing the claims and arguments advanced by the parties."); *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.") *Jefferson Fourteenth Associates v. Wometco De Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983)

V. The *sua sponte* dismissal deprives any opportunity for ripe challenges to *Chevron* and statutory *stare decisis* where agencies dispute Congress intent in Whistleblower Protection Law and violated the Appointments Clause allowing misconduct and adjudications to oppose Congress reading of the law.

The DOL OSHA is responsible for more than a dozen different Congressional Acts appropriating duties to investigate complaints arising from U.S. workers. The DOL has as many diverse sets of rules for handling those complaints with wide ranges of jurisdictional limitations and remedies that are exclusive to those jurisdictions. AIR21 is one of the most restrictive in terms of limitations for when complaints must be brought, what actions and subjects are covered under the act and what very limited remedies are available to complainants should investigators find a complaint meritorious. The only benefit of the highly restrictive procedures for handling AIR21 complaints under 29 CFR 1979 is a simple and clear, interpretable intention of Congress in the law. Safety reports made following adverse employment action and safety reports of willful or intentional violation of regulations or safety protocols are the only unprotected activities under the law.

In response to sensational scandal in the financial industry, Congress acted to curb risky and even fraudulent activity of financial institutions by protecting financial workers from retaliation for reporting these risky activities that could adversely affect investor holdings of public corporations under the Sarbanes-Oxley legislation of 2002(SOX). Congress had greatly exhausted legislative energies in AIR21 and hastily drew

SOX legislation to calm public markets and investor fears of failures in Corporate Financial Responsibility. However, Congress failed to create independent rules for handling SOX complaints, underwriting compliance and enforcement with AIR21 air carrier safety complaint procedures for financial worker retaliation complaints. Highly complex financial disclosures clearly contrast simple derivatives of aviation safety reporting but disproportionately earn merit determinations in a substantial majority of retaliation complaints and inversely to the number of merit determinations in AIR21 retaliation complaint that are approximately 7% of all DOL complaints disclosed by the DOL have issued a favorable outcome for AIR21 whistleblowers. Moreover, courts routinely claim imperfections and ambiguity in Congress's hastily drawn SOX law implicate fewer favorable SOX complaint outcomes unfairly ensnare already low improbability any aviation safety complainant will prevailing despite clear statutory language dictating that only two complaint distinctions that should not prevail under AIR21 while also outlining broadest scopes of potential activities should be protected without any certain exclusion. Nonetheless, air carrier safety complaints administratively investigated and adjudicated then reviewed by appellate courts have a prolific history of statutory *stare decisis* and *Chevron* deference Congress could not have intended. Statutory *stare decisis* from poor jurisprudence of courts against Congress's intent to "disturb" agency ruling and their "area of expertise" is precisely Congress's warranted for the due process afforded all parties under Article III in administrative actions and is now upon this Court to establish the law as Congress intended AIR12.

Congress and the FAA thrust AIR21 upon OSHA without regard to limited "expertise" DOL investigators

could have with diverse complexities of evolving aviation safety directives and flight operations since AIR21 inception. AIR21 and Pilot Records Improvement Act of 1996 have undergone significant changes in the law since Petitioner brought his firstAIR21 complaint in October 2014 with much of the superseded guidance and prior statutory versions of law obsolete and difficult to source without substantial reach of investigative resources to demonstrate a poor "expertise" of the DOL in its' history of handling AIR21 actions. The much more complex SOX protection of Financial and Investment Industry whistleblower disproportionately obtains favorable outcomes that are near reciprocal of AIR21 complaints. Both Sox and AIR21 together are disproportionately awarded favorable outcomes compared to other industries such as those covered under Seaman's Protection Act (SPA, 46 U.S.C. § 2114) or Surface Transportation Assistance Act of 1982 (STAA, 49 U.S.C. § 31105) with well seasoned law seldom engaged or revised compared to SOX and AIR21 industries. DOL is an expert applying those long established laws according to original intent but lulls mystique upon financial or aviation safety industries' whistleblower complaints that subdues genuine and equal application for simplest and clearest reading of the law from agency personnel experience that is generally administrative and clerical. Petitioner's investigators largely come from regimented military administrative experiences and the ALJ formerly adjudicated Social Security Administration Claims. This agency "expertise" likely induced subjective and critical analysis of AIR21 law related to protected activities rather than evaluating the protected activities as claimed under the statute as Congress clearly intended. *Chevron* deference to "agency" expertise in this regard is clearly faulty and the district court *sua sponte* dismissal thwarted

a rare opportunity for judicial review to answer significant questions of public importance.

The DOL lack of expertise and familiarity with FAA safety initiatives' and correlating law allowed material participation by DOL in violations of Complainant's privacy rights by abuse, unlawful dissemination and disclosure of Confidential Pilot Records covered under the Privacy Act of 1974 framed within Pilot Records and Improvement Act of 1996 (PRIA) (49 USCA § 44703(h)(5)). Petitioner repeatedly verbose pleadings advising of the DOL investigation team and inappropriate inclusion of the Solicitor, their possession and dissemination of Petitioner's Pilot records without consent or release of liability as respondent violated extended to but should not continue by the DOL. OSHA investigators sustained their endorsement respondent abuses and unlawful handling of PRIA records was reasonable and may justify adverse employment action even in response to Petitioner making safety reports and of potential violations of regulations to the FAA and incorporated this position in June 2022 via "Closing Conference Letter" informing Petitioner of proposed findings of a non-merit determination to dismiss his 2021 AIR21 complaint. OSHA willful and deliberate misconduct regarding Petitioner's Confidential Pilot Records violated PRIA Privacy law. Petitioner justly pursued review and remedy outside the administrative action's purview and agency's area of expertise or judicial enforcement as state and federal causes of action demonstrate civil remedy may be sought for PRIA violations and damages awarded to parties adversely affected by the violation *FAA v. Cooper,* 566 U.S. 284, 132 S. Ct. 1441 (2012) and *Nelson v. Tradewind Aviation, LLC,* Appellate Court of Connecticut Nos. 34624, 34838.

The district court *sua sponte* dismissal deprives Petitioner of his right to have the matter heard and challenge *Chevron* and *stare decisis* for courts to "interfere" and disrupt an absent FAA which is charged with enforcement or upholding law preventing employers from adversely affecting reputations of Pilots through PRIA or opportunities for gainful and fruitful pilot employment with high quality air carrier operations and private operations now required to conduct PRIA records review of prospective pilot hires.

Respondent also entered false statements and information to OSHA regarding and including Petitioner's Confidential Pilot Records, intending to slander or defame Petitioner in tortuous interference with a business expectancy to misrepresent PRIA Pilot Records in their possession and assert unknown and undisclosed deficiency to deceive OSHA investigators for adverse decisions in his AIR21 complaint (49 U.S.C. § 44703(j)(3)(A)&(B)) and never described the alleged defects they claimed justified the unlawful access and dissemination of his confidential pilot records and termination. OSHA investigators failed to follow PRIA law as Petitioner requested and cited requirement of an opportunity to correct any described deficiency (49 U.S.C. § 44703(h)(9)&(10)) or obtain copies of all records provided without Petitioner's consent.

DOL misconduct extended beyond these highlighted breaches of Petitioner's privacy with refusal of pertinent agency review detailed in official written requests of the Administrator, Regional Administrator, Office of Inspector General and as provided under law, statute and the agency rules to include Petitioner Freedom of Information Request (FOIA) filed June 6, 2023 and persists

even after the ALJ unlawfully dismissed petitioner's 2021 complaint erasing a monetary award and reinstatement. The agency has indicated refusing to provide any or very specific information requested and not exempted under the FOIA Act of 1966 to include communications between the Office of the Solicitor and Investigative staff that are believed to contain inappropriate discussions regarding Petitioner's 2014 and 2021 AIR21 cases as they were under appellate and judicial review before respondent filed their objection to agency findings in favor of Petitioner.

Beyond stated objections to appointments clause violations of the ALJ under *Lucia*, Petitioner outlined agency violations of the Administrative Procedures Act and 29 CFR 18, particularly, rules requiring rotation of ALJ case assignments among districts' judges where complaints are brought. Since 2014, the Chief ALJ had improperly assigned more than 120 AIR21 cases to only one ALJ from Cherry Hill, NJ ALJ District. Both Petitioner's 2014 case from Washington State and 2021 from Texas were assigned this same Cherry Hill, NJ ALJ despite Petitioner protesting the appointments clause violation beginning with his 2014 case. The Cherry Hill, NJ ALJ is on record in Petitioner's 2017 ALJ Hearing declaring his role in the DOL was an ALJ "Circuit Rider" assigned only AIR21 and operating between all the ALJ districts to hear AIR21 cases despite no rule or congressional appropriation for the DOL to create such a biased position being shown in any published rule or procedure and contrary to law and Congress legislation for Administrative Law Judges. This deprives all the districts from a proper rotation of cases and routine familiarity of AIR21 that has likely induced significant error in handling AIR21 cases the law requiring rotation

of assignments among the judges within districts where complaint were brought is inclined to inhibit. The DOL Chief ALJ implicitly acknowledged DOL misconduct after Petitioner objected to the Chief ALJ, Office of Inspector General and Regional Administrator, the Cherry Hill, NJ ALJ was not assigned another AIR21 case for the remainder of the 2023 term or well into 2024 when the ALJ first AIR21 assignment is believed to be a complaint brought in the Cherry Hill, New Jersey ALJ district.

Denial of requested emergency injunctive relief and *Sua sponte* dismissal of Petitioners' lengthy claims against the DOL permitted substantial further misconduct and retaliation against Petitioner in his AIR21 case in violation of DOL ALJ rules under 29 CFR 18 and an unlawful dismissal of Petitioner's AIR21 Complaint that vacated favorable findings of the Secretary and order for reinstatement of his employment as Petitioner repeatedly advised the ALJ and sought a stay while seeking judicial review and enforcement of agency reinstatement orders. Dismissal of Petitioner's claims regarding the ALJ misconduct assignments reinforces a defective establishment of statutory *stare decisis* and deference for *Chevron* by depriving Petitioner of an opportunity to review conduct of the assigned ALJ in more than one-hundred-twenty (120) cases where the final outcome was only favorable to complainants in less than ten (10) total cases the ALJ presided and decisions and orders of the ALJ appear to violate substantial evidence standards of review under Congress intent under the statute as well as potential misconduct in application of rules of the tribunal and Federal Rules of Civil Procedure under Chapter 7 of Title 5.

Congress only permits two fundamental conditions where a whistleblower complaint should hold no merit as the activity is not protected under AIR21: 1) Reporting of Safety information only after the adverse action has commenced, or 2) safety reports related to willful or inadvertent violation of rules or regulation and induced by the reporting employee without an air carrier's knowledge. Tribunals have far too often injected adversarial adjudication of merit determinations to disregard or disqualify whistleblower protected activities from coverage under the act. The Cherry Hill, NJ ALJ assigned to more than 120 AIR21 cases has far history of overreach and subjective application and broad expansion of the simple exclusions of protected activity to void AIR21 claims as was demonstrated in Petitioner's 2017 ALJ hearing. Congress broad language and intent in the law paints a very broad range of all encompassing activities where a nexus can and should be formed with adverse employment action to make the law as effective as possible to promote safety reporting by frontline operations staff through appropriate remedy for complainant to compel air carrier compliance with safety and security protocols installed by the FAA and inhibit harassment of safety reporters.

ALJ misconduct and unlawful assignment in Petitioner's 2017 hearing refused to weigh substantial evidence favorable to Petitioner, that his safety reporting of July 9, 2014 was mandatory by law and the operator expressed written safety directives to clarify three (3) separate and conflicting duty and flight assignments from multiple supervisors between his joint employers, performing all of the conflicting assignments without raising questions in the mandated safety reporting,

Petitioner would violate FAA Flight time and Rest Requirements in 14 CFR § 135.267. The ALJ decision absurdly stated his mandated report of concerns for the compounded assignments exceeding the Rest Requirements were inconsequential and not protected under AIR21 for Petitioner could control at any time whether he would actually violate the regulation. The ALJ implicated Petitioner should have completed all assignments and not engaged or contend with the joint employers' conflicting assignments and recent reiteration of protocols requiring reports of erroneous assignments jeopardizing safety or regulatory compliance. The ALJ patently failed to weigh substantial evidence Petitioner presented for a preceding duty period had violated the same regulation when Petitioner was placed in similar circumstances and events beyond his control caused a violation of rest period requirements in 14 CFR 135.267. Management criticized Petitioner and issued companywide clarification requiring prompt reporting of just such concerns in the future. The ALJ refused to allow evidence of poor safety culture's causation of an aircraft accident soon after Petitioner's termination when similar operations tempo and persistent staffing issues plaguing Petitioner July 9, 2014, contributed to damage that could have been more substantial and injurious to aircraft occupants. The ALJ also weighed unsupported testimony of respondent witnesses against Petitioner's substantial physical evidence and communications regarding poor safety culture contended between joint employers despite an unheard motion *in limine* the ALJ refused to rule or answer Petitioner's requests to limit unsupported testimony.

VI. The *sua sponte* dismissal deprives opportunity for ripe challenge whether Congress intended whistleblower protection law to permit setoffs in backpay awards in clear absence of punitive damages as a remedy.

AIR21 has no compelling feature for DOL to adequately serve FAA and Whistleblower protections intended to enhance aviation safety and security protocols. AIR21 contains no "kick-out" provision or allows preemption by state law that is meaningful or dissuades misconduct or violations of air carriers Act and no punitive remedy is available to wrongfully terminated whistleblowers while many other OSHA investigated actions provide substantial remedy to discourage violation of retaliation and discrimination prevention programs. While investigators contemplated dismissal of Petitioner's AIR21 complaint, their correspondence demanded Petitioner payroll and income records including premature withdrawal from retirement activities needed to support Petitioner's loss of income from respondent retaliation and blacklisting.

AIR21 language does not cite sett-offs for monetary awards and does not narrow consideration of "Front Pay" or "Back Pay" where "return of complainants to their former position and pay is not possible." The district court *sua sponte* dismissal deprives courts of a rare opportunity to argue growing judicial distaste of courts application sett-off doctrine in discrimination complaints where no punitive damage remedy is available and other awards are highly restrictive or capped with no trebling of actual damages for willful misconduct or intent to violate or not comply with law. Petitioner is particularly aggrieved where

limited mitigation of further damage for respondents' willful actions to blacklist Petitioner with operators known to Respondent who required notice and approval to avoid conflicts during Petitioner's employment. Respondent continued to willfully and knowingly violate privacy act law with regard to Petitioner PRIA Pilot Records to publicly blacklist Petitioner with other air carriers and FAA operators to an unknown degree of mishandling of PRIA records prevented Petitioner from finding gainful employment for the required records requests to work under FAA oversight allow the respondent to perpetuate blacklisting as far as the required FAA PRIA Records Checks may reach to prevent his gainful employment as a commercial pilot.

CONCLUSION

The Supreme Court should grant this petition for writ of certiorari so pertinent and important questions of law and judicial review of agency orders, of agency conduct and Congress intent to secure Article III due process rights' in Article II administrative agency actions are finally fully answered by this Court establishing improper application of unlegislated acts through statutory *stare decisis* shall be reversed; that an accord of appropriate judicial review shall be always be conducted as established by this Court and Congress original intent for Pilot Privacy and Whistleblower Protection being restored as an effective law of the land to regain frontline air carrier operations staff and pilot confidence in safety and security of flight operations within mandated safety systems of air carriers they are employed so persons and and property engaged in air commerce or inadvertently exposed as a patient under the care of emergency air ambulance

operators may quietly enjoy the highest performing duties of care Congress intended for aviation safety and security programs.

Respectfully submitted,

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