No. _____

In The

Supreme Court of the United States

ROBERT DOUGLAS KREB, JR.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT D. KREB, JR.
2100 SE 40th Avenue
Amarillo, TX 79118
(806) 471-3007
Pro Se

QUESTIONS PRESENTED

1. What is the appropriate standard of review when an agency administrative law judge abuses their discretion, is arbitrary and capricious or otherwise unreasonable in deference to application of an agency process statute and congressional acts, deviates from the clear intent of the statute to dismiss a relevant cause of action in violation of employee protection rights?

2. Was the appropriate standard of review reasonable when agency administrative law judge *in absentia* on motion *in limine* unreasonably weighed testimony as substantial evidence despite admitting spoliation of other evidence saddled petitioner with a much higher and arbitrary burden than the statute permits?

3. What is an appropriate standard of review when an agency administrative review board and the appellate court ignore *in absentia* of the administrative law judge and do not require court describe how evidence was fairly balanced as in other *de novo* appellate review?

4. What is an appropriate standard of review for agency solicitor briefs submitted to appellate courts knowing the factual contentions were void of evidentiary support or specific identification of evidence toward claims and defenses the solicitor cited to compel the court denial of a petition for review of administrative agency conduct?

5. What is an appropriate standard of review for petitioner to demonstrate a reasonable likelihood

QUESTIONS PRESENTED – Continued

blacklisting has for statutes do not require complainants to produce a proverbial "smoking gun" but merely inferred evidence of the results resembling an occurrence of blacklisting?

PARTIES TO THE PROCEEDING

Petitioner Robert Douglas Kreb, Jr., was a complainant in administrative law judge court proceedings and appellant in the administrative review board proceedings and in the court of appeals proceedings. Respondents Life Flight Network, LLC, Jackson Food Stores, Inc., Conyan Aviation, Inc. d/b/a Jackson Jet Center were respondents in the administrative court proceedings. The Secretary of the Department of Labor was appellee in the administrative review board proceeding and in the court of appeals proceedings.

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.

RELATED CASES – Continued

- *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.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Robert Douglas Kreb, Jr., petitions for a writ of certiorari to review the denial of petitions for review of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's Memorandum is Unpublished as Case No. 20-73497 (9th Cir. June 17, 2022) and reproduced at App. 1. The Ninth Circuit's denial of appellee's petition for rehearing is reproduced as App. 169. The Decision and Order of the Administrative Law Judge is reproduced at App. 4. The Administrative Review Board Decision Affirming the Administrative Law Judge Decision and Order is reproduced at App. 159.

JURISDICTION

The Court of Appeals entered unpublished memorandum on June 17, 2022. App. 1. The court denied timely petition for rehearing on October 12, 2022. App 169. This Court has jurisdiction under 28 U.S.C. § 1254(2).

REGULATIONS INVOLVED

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

29 CFR 1979.102 – Obligations and prohibited acts.

(b) It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has:

(1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;

29 CFR 1979.107 – Hearings

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of

Administrative Law Judges, codified at subpart A, of 29 CFR part 18.

(d) Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

29 CFR 1979.109 – Decisions and orders of the ALJ

The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1979.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an

> investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits.

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

> **29 CFR 18.401 – Definition of *relevant evidence.***
>
> *Relevant evidence* means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

> **29 CFR 18.402 – Relevant evidence generally admissible; irrelevant evidence *inadmissible.***
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority. Evidence which is not relevant is not admissible.

> **29 CFR 18.802 – Hearsay rule.**
>
> Hearsay is not admissible except as provided by these rules, or by rules or regulations of the

administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.

INTRODUCTION AND STATEMENT OF THE CASE

The issues presented in this case are genuine conflicts between administrative agency application of standards of review and appellate courts' regard for deference to agency administrative application of law regarding protections of employees making safety reports and voicing concern for employer violations of regulations.

Petitioner also presents troubling evidence of conduct by the administrative agency solicitor trampling upon rules of civil procedure, ethics and professional conduct to preserve agency decisions and mask questions of abuses of discretion and other potential unlawful conduct of the administrative agency infringing on employee rights and protection.

This peculiar case brings outstanding issues of bias and prejudice for mishandling motion *in limine* and failing to exclude irrelevant hearsay testimony and having no probative cited by the court in the decision as entirely from abuse of discretion regarding hearsay testimony as substantial evidence in application of the law. The decision was formed entirely from prejudice and bias against petitioner only after altering the law setting arbitrary and higher burdens of

proof than the law permits for the petitioner and then excused respondents from meeting their actually higher burden.

Appropriate appellate review of this crucial overreach escaped the Ninth Circuit. Denial of petitioner's review shows irreverence for the critical role the Court serves to assure proper administrative application of law that is kept within prescribed bounds of statutes.

These consequential oversights by the courts pose a potential jeopardy to others that may consider bringing such actions for the perilous decline in whistleblower protection through administrative review and upheld by the appellate are punctuated if not reversed and remanded for correct application of statutes and appropriate standards of review.

This case has far reaching implications and broad consequence in expansion of current regulatory oversight and compliance measures regarding Federal Aviation Administration ("FAA") safety programs and initiatives to enhance safety and regulatory compliance through engagement of frontline employees of ALL Domestic and Global Aviation Service Providers of the United Nations International Civil Aviation Organization Member States ("ICAO") under Annex 19.

The FAA issued Notice of Proposed Rulemaking ("NPRM") Docket No. FAA-2021-0419; Notice 23-05 on January 10, 2023. The NPRM plans expansion and updates to 14 CFR Part 5 [Aviation] Safety Management Systems ("SMS") that mandate all commercial operations incorporate 14 CFR Part 5 SMS to include and

compliance with risk analysis and mitigation practices petitioner such as were required by Life Flight Network, LLC ("LFN") Safety Management Systems ("LFNSMS") of Petitioner and also mandated by joint employer Jackson Food Stores, Inc., et al. ("Jacksons"). Previous FAA compliance requirements only targeted 14 CFR Part 121 Airlines and some CFR Part 135 Air Carrier Operations electing SMS voluntary deployment.[1] The NPRM is FAA's response to consistent patterns of lapses in safety and regulatory compliance leading to aviation accidents and incidents in the largesse of commercial air operators not currently required to comply with SMS regulations. Public outcry and pressure in 2020 following two Boeing 737MAX ("MAX") Next Generation Commercial Aircraft compelled congress quick action to target aviation manufacturers and aircraft parts production firms before the MAX NTSB Accident Investigations were completed. Congress learned of potential safety lapses between manufacturers and FAA oversight of design and production approvals might have been a factor and promptly acted to require Aircraft Type and Production Certificate Holders under 14 CFR Part 21 to implement and comply with 14 CFR Part 5 SMS under

[1] In 2010 Congress created "The Airline Safety and Federal Aviation Administration Extension Act of 2010" (Public Law 110-216 (Aug. 1, 2010) and accordingly in 2015, the FAA set forth "14 CFR Part 5 – Safety Management Systems" to be adopted by U.S. Commercial Air Carriers operating under CFR Part 121 and to improve public safety of commercial air travelers in response to the crash of Colgan Flight 3407 (Feb. 12, 2009).

Congress' Aircraft Certification Safety and Accountability Act ("ACSAA") in December 2020.[2]

FAA Expansion of CFR Part 5 SMS will substantially expand workforces' serving safety functions' requirement to comply with the same safety analysis and reporting of petitioner on July 9, 2014, Jacksons admitted was catalyst for his termination. This workforce' incorporation of CFR Part 5 SMS requires assurance of agency protections for employees reporting safety concerns under these new mandates or SMS quality and integrity is undermined.

The agency and appellate review in this case represent a disproportionate application of law that will have chilling effects on subjective reporting of safety concerns by employees and their required risk analysis as core components of CFR Part 5. LFN elected to comply with these higher "elective" standards before the FAA January 2015 mandate became effective. Jacksons was a signatory with LFNSMS safety reporting requirements and acknowledged before the ALJ,

[2] 14 CFR Part 5 was promulgated in January 2015 to require 14 CFR Part 121 operators to develop and implement SMS and set out the basic requirements for those systems to include risk and hazard identification, risk assessment of flight operations and mitigation procedures and best practices in order to reduce associated risk, hazards and threats to safety of operations. In December 2020, US Congress Aircraft Certification Safety and Accountability Act (Public Law 116-260, 134 Stat 2309 ("ACSAA") mandated regulatory requirements Part 5 SMS for 14 CFR Part 21 Type Certificate and Production Certificate Holders after two well publicized crashes of the Next Generation Boeing 737Max revealed serious safety issues in Boeing's design, certification and production process.

requiring petitioner conformance. But, Jacksons contested and disputed petitioner's required safety reporting of July 9, 2014 on the morning of July 10, 2014 and fired him hours later. The substantial evidence on the record outlines none of Jacksons Management team verified any of the elements of the safety reporting or concerns for violation of regulations before deciding to terminate petitioner July 10, 2014. The ALJ record is undisputed; an LFN email request "*to have a conference call [with Jacksons] about last night*." Jacksons reply stated with great animus for petitioner's safety reporting, "*I just want to clarify. . . . I STRONGLY recommend termination of [petitioner]*" *(emphasis added)* Jacksons Trial Exhibit JX21. Jacksons withheld evidence of their internal deliberations regarding petitioner and LFN email of July 10, 2014, could implicate a number of issues including the scheduling problems by Jacksons creating the issues or possibly debrief Jacksons initial cumulative instructions petitioner violate Flight Time Duty Period Limitations of 14 CFR 135.267. Jacksons overreaction, state of mind and animus toward petitioner are all clearly undeniable in the curt email reply to LFN and clearly formed nexus to petitioner's termination less than one hour later.

Congress and the FAA statutory intent to reduce accidents and incidents leading to loss of life and to protect workers who voice concerns of potential safety and regulatory noncompliance could be in doubt if the inconsistencies between rulings of the courts and consequential conduct of the administrative agency remain uncorrected. The FAA NPRM deliberately

restates requirements for reporting systems to assure employees that their reports are submitted without need to fear or have concerns of reprisal (FAA NPRM Docket No. FAA-2021-0419; Notice No. 23-05, Pg7, Par3, L9-13). If the FAA had perceived effectual application of the law by administrative and civil courts, this statement is irregular.

FAA safety enhancement initiatives and regulatory compliance cannot fully produce desired results to reduce aviation fatalities if administrative agency enforcing employee protections has such wide discretion and deference to distort a statute's application; arbitrary and improperly burden shifting of proof "tilt" scales weight of evidence away from employee protections and harm public confidence frontline safety workers job security for mandated safety reporting and concerns is never fully assured.

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 29 U.S.C. § 42121 ("AIR21"). AIR21 is central to petitioner's complaint and many state preemption programs for whistleblower protection of workers reporting on safety and concerns for regulatory noncompliance. Employees enjoy greater favor of state preemption programs and those courts strict interpretation of AIR21 to ensure employers meet appropriately higher burden in their defenses than employees' prima facie showing of retaliation to prevail than administrative agency governance of the statute and creates unequal protections under the federal law.

SMS has evolved since 2009 inceptions as a result of National Transportation Safety Board ("NTSB") recommendations the FAA require risk analysis and mitigation in air ambulance and air carrier operation preflight decision making. The NTSB recommendations to the FAA highlighted contributing factors common in the high accident fatality period of the time, were principally questionable decision making and a lack of risk aversion in preflight activities, in those accident investigations.

FAA periodic expansion and update of SMS has increased AIR21 complaint volume and is commensurate with Secretary of Labor policy revision to include directing reductions in burdens placed upon employee complaints, however the rate of merit determinations and agency awards for affected employees has remained relatively unchanged with fewer than 10 percent of all AIR21 cases deemed merited and ordering relief for complainants.

State preemption programs of AIR21 are disproportionately more favorable toward employees and may consequentially impact where complaints are made. Workers protected in state preemption programs will proactively participate in FAA expansion of CFR Part 5 while workers subject to more restrictive agency governance will realize less ambitious workers' regard for SMS, creating a greater jeopardy for public welfare than those with state programs.

Petitioner worked as a pilot for Joint Employers Jacksons and LFN as an Emergency Medical Services

("EMS") Air Ambulance Pilot from 2013 to 2014. The day before his termination, Jacksons congratulated petitioner on finally being transitioned from joint employment with LFN to sole employment with LFN as was planned since his December 2013 hire. Until the transfer occurred later that week, petitioner was still required to report to his many LFN and Jacksons managers and supervisors who normally relayed special flight assignment through LFN Dispatch who would then issue those special flight assignments and other flight requests to petitioner according to FAA Operations Specification, Company Manuals and required LFNSMS Program Protocols.

Petitioner was scheduled seven (7) 12-hour (twelve) duty periods of night shifts beginning July 8, 2014 at 8pm and concluding at 8am July 9, 2014. Scheduling errors by Jacksons management failed to staff the day shift duty period offsetting petitioner's duty from 8am to 8pm for the week of July 8, 2014.

During petitioner's 14 CFR 135.267(d) FAA required rest period, Jacksons Chief Pilot and supervisor ("JCP") called to request petitioner append his 8pm scheduled duty period start time July 8, 2014. Petitioner informed JCP having not entered rest before 6am that day and could not begin his shift before 4pm and would do so accordingly. JCP stated appreciation for petitioner's flexibility and instructed he report to Lewiston LFN base at 4pm and consider Jacksons may adjust his other duty start times for that week.

Upon reporting for duty at 4pm on July 8, 2014, petitioner was advised another pilot was able to cover the remaining day shift so petitioner could start at 8pm. LFN later called petitioner around 6pm to preempt the 8pm start time as the other pilot left without authorization, returning to his Coeur d'Alene, Idaho home leaving the Lewiston LFN Base without a pilot on duty. Petitioner agreed to return and report for duty at 7pm on July 8, 2014. Petitioner received one flight assignment during this shift to Seattle for an atypical "milk run" LFN patient transport late in his 12-hour shift returning to Lewiston in the early morning hours of July 9, 2014.

Before petitioner's July 9, 2014 shift ended, JCP asked petitioner remain late past his 8am duty schedule to brief another LFN pilot in transit to cover the day shift and may need base familiarization briefings on operational support amenities and protocols required by LFNSMS. Petitioner contacted JCP at 9am to discuss reaching FAA duty limitations from beginning at 7pm on July 8, 2014 and not yet being contacted by the incoming relief pilot. JCP instructed petitioner to contact LFN Dispatch and advise the base would be out of service until a day shift pilot could report for duty. JCP directed petitioner enter a required rest period of 10-hours according to 14 CFR Part 135.267(d) and begin the July 9, 2014 night shift duty at 7pm and "be ready for anything."

Jacksons Director of Operations Administrative Manager ("JDO") sent petitioner an email with petitioner later that morning of July 9, 2014, regarding

fueling policy changes initiated by LFN related to petitioner's Seattle earlier that morning. JDO sent a subsequent email that afternoon containing unorthodox flight assignments and ambitious expectations that challenged LFNSMS, company directives, protocols and CFR 135.267.

Jacksons recent company directives mandated compliance with LFNSMS and attendance at annual LFNSMS Training from LFN Director of Safety ("LFNDS") June 24, 2014, during petitioner's preceding week-on shifts. LFNSMS required pilot preflight actions to include safety reports, risk analysis and mitigation of even remotely identified hazards to prevent accidents and potential violations of FAA regulations through use of a Flight Risk Assessment Tool ("FRAT") reporting. The FRAT elements all related to safety, regulations and common environmental, human and technical elements that statistically increased likelihood of contributing to an accident or incident in EMS Air Ambulance Operations (14 CFR 135.617; FAA AC 00-64 Air Medical Resource Management; FAA AC 135-15 Emergency Medical Service/Airplane).

JDO email assignment inclined Petitioner would not receive similar briefings of local pilots as JCP demanded of Petitioner just hours earlier believing the planned relief pilot had not previously received Lewiston LFN Familiarization training as required in LFNSMS to include such critical information as internal security codes to access facilities and location or manner of access for the aircraft ground support

provisions to refuel the aircraft and refill medical oxygen supplies for patient transports (14 CFR 135.329(e)(2)).

The unorthodoxy of JDO assignment was also rooted as Jacksons Vice President ("JVP") admonished and prohibited JDO from direct engagement with daily operational tasks due to the high stress of the type of operations and serious health challenges JDP suffered and returned only recently and restricted to limited duty responsibilities at Jacksons offices in Boise, Idaho.

The JDO instructions for petitioner's July 9, 2014 night shift compounded the JCP Duty period adjustment to start at 7pm instead of 8pm and then required a planned flight of 1 hour and 15 minutes to depart after accumulating thirteen (13) hours of duty time. This appeared to violate CFR 135.267(d) and Jacksons prior mandates regarding encroachment of flight and duty time limit regulations requiring dialogues with JCP before departure.

Petitioner promptly replied to JDO email assignment and asked to consider mitigation of many deficiencies petitioner considered relative to LFNSMS and CFR 135.267 limitations; as written conflicted with other safety and company directives and was highly irregular and extraordinary. Petitioner sought clarity and highest levels of care to verify completeness and accuracy of the assignment's compliance with LFNSMS and FAA regulations which barred acceptance of such an assignment without following LFNSMS mitigation requirements and mandated notification regarding CFR 135.267 potential noncompliance. Petitioner's

negligence to seek redress of JDO assigned discrepancies could be subject to FAA enforcement, civil penalties or certificate actions against petitioner, Jacksons and possibly LFN.

Petitioner reported for duty at 7pm on July 9, 2014 as JCP directed and called JDO and JCP regarding mitigation of assignment's deficiencies as none of Jacksons management team had responded to petitioner's reply or engaged in mitigation of any of his concerns. JDO was unavailable and JCP stated Jacksons management reviewed petitioner's email replied concerns but declined to mitigate any assignment elements from JDO email; directed petitioner to conduct JDO assignments as outlined and dismissed petitioner's concerns of potential violation of FAA Duty Limits in 14 CFR 135.267(d). Petitioner rebutted the assignment could not be completed legally after petitioner arrived for duty as instructed at 7pm and conduct 1 hours and 15 minutes of flight after 8am as JDO instructed and comply with CFR 135.267(a) & (c) duty period and flight time limitations during the shift.[3] JCP disputed petitioner's flight time calculation

[3] LFN maintained a preflight planning chart listing all of the minimum flight time planning required between all of LFN operating Locations and was part of the reference material in LFNSMS and other regulatory documents available to flight crews at all LFN Bases. This chart was crucial to LFN assuring high levels of safety and customer service to be used as an aid for pilots to quickly calculate whether patient transport flight requests could be accommodated late into their shifts or within cumulative flight time limitation totals without exceeding CFR 135.267 Flight Time and Duty Period Limitations or disrupting operations from inaccurate preflight planning. Petitioner

even though he later admitted in trial testimony along with JDO and JVP, all stated never having flown an airplane into Dallesport, Washington and never computed the flight time themselves for the assigned flight. (14 CFR 91.103)

LFN Dispatch informed petitioner upon reporting for duty at 7pm, his assigned aircraft was on an extended flight assignment with another LFN pilot and required petitioner to delay initiating JDO assignment until the aircraft returned to Lewiston. LFN Dispatch also briefed petitioner a mechanical issue was preventing real-time tracking of the aircraft and maintenance would confirm the aircraft could still be operated after returning to Lewiston. Petitioner chose to defer protesting Jacksons insistence for conducting the noncompliant flight assignment until petitioner could verify the aircraft inoperative equipment did not prohibit petitioner accepting the aircraft for the JDO assignments.

---

demanded this evidence in requests for document production, in motions to compel production by the ALJ and *in limine*, to prohibit Jacksons contentions influencing the court via deposition and witness hearsay testimony disputing petitioner's claims referencing that chart in his July 9, 2014 safety reports and concerns that 8am flight between Dallesport, Washington LFN Base returning to Lewiston, Idaho LFN Base with the relief pilot driving to Dallesport from his home in Portland, Oregon would at a minimum deviate from company safety protocols and dictate to contact management for any assignments reasonably expected to exceed more than 13.5 hours of duty period. The ALJ permitted and improperly weighed Jacksons witness testimony disputing petitioner's claims and recollection of flight time details in a chart he referenced almost daily for LFN during his employment.

At 1015pm on July 9, 2014, LFN Dispatch advised petitioner his assigned aircraft return to Lewiston LFN base was imminent and assigned petitioner an additional series of non-revenue flight assignments that would preempt JDO assignments to Dallesport LFN Base. At 1030p, petitioner's aircraft returned to Lewiston LFN Base and petitioner confirmed the maintenance status of the aircraft to completed preflight preparations by 1045pm to include submission of LFNSMS Required Flight Risk Assessment Tool ("FRAT") for the compounded flight assignments as required by LFNSMS. This FRAT included all the associated risks petitioner anticipated to be reasonably and objectively applicable to JDO's emailed flight assignment as appended by LFN. Petitioner called the JCP at 1050pm to discuss the FRAT score as LFSMS required for mitigation of risks and hazards identified with JCP to attempt to lower overall risks of his flight assignments. JCP only then agreed on a mitigation plan petitioner requested that should any of the currently revised flight elements change any further or not comply with regulations or LFNSMS safety requirements; petitioner would suspend all further operations and secure a hotel room to enter a rest period and authorized petitioner to disregard the JDO 8am flight assignment on July 10, 2014 expected to violate CFR 135.267(d). Petitioner was satisfied this mitigation complied with FAA regulations and LFNSMS, for petitioner to accept and successfully conduct the bulk of the assignments from JDO and LFN Dispatch excluding the 8am repositioning flight.

By 1055pm LFN medical crew completed restocking aircraft patient medical supplies and petitioner began boarding with the helicopter pilot LFN Dispatch assigned as passenger destined for Aurora LFN Headquarters and Maintenance Facilities. LFN called to inform petitioner LFN Management vetoed Jacksons mitigation and cancelled petitioner's flight assignments before he could takeoff. LFN determined Jacksons mitigation was insufficient and ordered petitioner to remain at the Lewiston LFN base. LFN confirmed in pretrial actions, having cancelled petitioner's flight assignments. Petitioner texted JCP to inform him LFN had cancelled all of the flight assignments and instructed petitioner remain on shift at Lewiston LFN Base.

JDO disputed petitioner's safety reporting in a July 10, 2014, email prior to petitioner duty ending at 8am. JDO demonstrating clear disrepute for his errant presumption petitioner seized Pilot In Command ("PIC") authority refusing JDO flight assignments. JDO email protested petitioner's accounting of petitioner's FRAT elements for the July 9, 2014, assignments after feigning an apology for not engaging petitioner at 12am for his safety reporting but offers no reason for failing to engage petitioner's prompt response to the unorthodox email assignment petitioner notified JDO he had concerns. The record clearly shows Jacksons was not responsive to petitioner attempts to complete the flight assignments but under revision and in compliance with FAA regulations, LFNSMS and company directives and protocols.

Jacksons failed to cooperate in discovery demands of petitioner for all records, memos, emails and text message communications internally within Jacksons management, human resources ("JHR") and with LFN. The limited records petitioner did receive are clearly identifiable as provided by LFN such as Jacksons Exhibit JX21, an email thread between LFN and Jacksons where LFN management are the address header metadata. LFN's provisions implicate internal communications and email threads within Jacksons Management that were withheld from petitioner and contents therein are purely speculative. However, other evidence JHR produced demonstrate initial inclinations in response to learning of the flight cancellation, though still considered an adverse employment action for petitioner's safety reporting, JHR was first engaged by management to construct letter(s) of reprimand of petitioner, prior to escalating to termination after JVP 12pm email outburst of spiteful animus toward petitioner.[4]

---

[4] Jacksons Exhibit JX21 is time stamped at 1207pm Pacific Time. Boise, Idaho where Jackson's management headquartered is in Mountain Time zone. JVP would have sent his email animus regarding "STRONGLY recommend termination" of petitioner approximately 107pm Mountain Time Zone. This demonstrates deliberate shifting from a posture of reprimand for petitioner's safety reporting to the decision to terminate petitioner shortly after JVP opined in the email thread as petitioner was notified of his termination by JCP approximately 130pm Mountain Time. The nexus and contextual relationship of Jacksons discussion of petitioner's safety report to the adverse actions contemplated and then discharged are irrefutable.

LFN subsequently failed to act on July 8, 2014 declarations to complete petitioner's transition to Full LFN employment just that week as JDO congratulated petitioner in July 9, 2014 emails. LFN did not respond to petitioner attempts to contact management regarding the continued LFN employment promised July 8, 2014 and after Jacksons terminated petitioner.

Petitioner timely brought a complaint under the Occupational Safety and Health Administration's Whistleblower Protection Program ("OSHA" and "WPP" respectively) under 49 USC § 42121, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). Petitioner and OSHA Investigator assigned to petitioner WPP Complaint properly served prompt notice in 2014 and 2015 instructing Jacksons and LFN to protect and preserve all communications and documentation associated with petitioner's joint employment with LFN and Jacksons. After more than one year of fact finding and submission of evidence and engagement only by LFN in the OSHA Alternative Dispute Resolution ("ADR") process, the ADR Supervisor and Investigator originally assigned petitioner's complaint recommended a "Merit" determination to the OSHA District Office Manager in March 2016. In April 2016, another OSHA Investigator was re-assigned to petitioner's complaint, conducted no supplemental investigation or follow-up as required by OSHA WPP Investigator Manuals before overriding original investigator recommendations for merit determination and dismissed petitioner's complaint in July 2016. Petitioner obtained investigator notes and case

work product through a Freedom of Information Act request ("FOIA"). Those documents and investigator notes revealed a strong propensity of Jacksons management to supply untruthful statements and personal attacks on petitioner. The reassigned investigator never completed any follow-up interviews or disclosure of these statements by Jacksons to offer petitioner opportunity to rebut or impeach those statements as required by WPP Investigator manuals. Even so, the reassigned investigator reversed prior investigative team recommendations for merit determinations to recommend a non-merit determination and dismissed petitioner's complaint. Petitioner promptly objected according to the statute and the complaint was assigned to the Cherry Hill, New Jersey, Office of Administrative Law Judge ("ALJ") for a *de novo* review of petitioner's complaint and objections to the OSHA WPP Investigator determination.

During ALJ pre-trial discovery, LFN sought mediation and subsequent settlement with petitioner. The ALJ approved LFN's settlement terms with petitioner and dismissed LFN from the case.

Jacksons did not cooperate with petitioner's discovery requests and other pretrial activities forcing petitioner to pursue sanctions and a motion to compel production of documents and evidence relied upon in petitioner's complaint for introduction as trial evidence. At opening of trial July 2017, petitioner filed Motion *in limine* to prohibit Jacksons prejudicing the court with hearsay testimony, irrelevant or other evidence holding no probative value that could prejudice

the court due to their witness prior conduct before WPP Investigators and in pretrial depositions.

Petitioner's motion *in limine* did not attempt to resolve a factual dispute or weigh evidence. Petitioner FOIA of OSHA WPP Investigation files revealed Jacksons manufactured and untruthful statements swayed investigators non-merit determination after April 2016. In light of probative and relevant evidence withholding by Jacksons, petitioner sought to preclude Jacksons continuation of distortion and manufacture of facts through hearsay trial testimony after spoliation of documentation evidence petitioner sought in discovery. Petitioner's desired to inhibit potential testimony believed could distract the court from the real issues in the case *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 690 (9th Cir. 2001) or create an unfair prejudice against petitioner. The ALJ silence on the motion *in limine* would seem to disagree with *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988) where appellate affirmed exclusion of even probative evidence to be proper under Fed. R. Evid. 403 for the probative value had been substantially outweighed by the potential danger of prejudicial harm to the appellant. The ALJ took petitioner's motion under advisement stating a desire to hear and weigh that evidence as trial progressed in light of the destroyed evidence Jacksons withheld.

The ALJ decision affirmed by ARB and the Ninth Circuit reflect disproportionate regards for petitioner's unanswered motion *in limine* as potential abuse of discretion by the ALJ decision not describing

appropriately applied balancing test(s) to determine if unsupported hearsay testimony held probative value that outweighed dangers of potential prejudicial harm to petitioner after ALJ arbitrarily and capriciously excused Jacksons spoliation of evidence petitioner knew to exist and sought in discovery to substantially support various claims. The ALJ inexplicably admits an abuse of discretion in his decision citing discretion of the court to be swayed by clearly prejudice inducing hearsay testimony from Jacksons and is improper, then disregarded in ARB affirmation and appellate denial of the petition for review.

Petitioner asks this Court to consider the abuses of discretion, misapplication of rules of evidence to meet substantial evidence requirements of the statute and absent *de novo* review of these deficiencies unjustly harms petitioner and other potential claimants of wrongdoing under the statute.

The ALJ stated petitioner met prima facie burdens at trial closing but was unclear the protected activity actually involved a specific violation of a FAA regulation. The ALJ ordered petitioner submit written closing arguments to describe actual regulation violation involved in the protected activity to prevail in the AIR21 case. Petitioner complied with this artificial inducement of AIR21 by detailing the framework 14 CFR 135.267 related to the JDO assignment for 8am July 10, 2014 after accumulating thirteen (13) hours of duty with fourteen (14) hours' limitation. Petitioner again restated this fundamental request by the ALJ in reply brief to Jacksons closing arguments.

On August 6, 2018, ALJ issued a Decision and Order dismissing petitioner's complaint. The ALJ acknowledged the surety of whistleblower protections as argued, however, decided petitioner's marked professional experience barred his protection from reporting potential violations of regulations because he held power and authority to cease activities that would exceed Flight Time and Duty Period Limitations of 14 CFR 135.267. The ALJ further described Jacksons assignment of the excessive duty was not relevant to a whistleblower complaint under AIR21. The ALJ disregarded petitioner testimony and the record reflecting Jacksons inducements of similar subjective events and circumstance beyond petitioner's control on June 24, 2014 caused another violation of 14 CFR 135.267 just fifteen (15) days earlier. The ALJ absolved Jacksons from any wrongdoing for the multiple flight assignment clearly violated CFR 135.267 and was contrary to LFNSMS and other directives of Jacksons as was established in the record.

By the standards of review applied in the ALJ decision affirmed by ARB, Licensed Auditors and Accountants of the investment and securities industry are in great peril as the Sarbanes-Oxley Act of 2002 ("SOX") are required to seek their protections for reporting violations of corporate accounting law under provisions of AIR21. Just as Congress reacted to 737MAX issues of subdued potential whistleblowers contributed to significant losses of life, Congress enacted SOX in 2002 on the heels of Enron, WorldCom and Tyco violations of finance and securities law to

protect highly skilled and seasoned professionals who may report violations of securities law are then adversely affected by employers for those reports. The ALJ asks this Court to recognize and defer to agency discretion in determining that such professionals in a position to control whether a violation of security law occurs, their reports to officials regarding the company directive to those professionals to violate the law, are not engaging in protected activity under statute. This absurdity is just how the ALJ decided in petitioner's case regarding the directed assignments from multiple managers not first collaborating with each other compounding expectations of petitioner that would necessarily cause violation of the CFR 13.267(d) regulation and orders and standards discharged by company directive for petitioner to communicate with management if even a small chance existed of violating the exact regulation petitioner raised.

The ALJ decision also included unreasonable deference to the statute broad inclusion of potential deviations petitioner included other concerns raised July 9, 2014, notwithstanding inducements of 14 CFR 135.267 violations. LFNSMS and directives prescribed in many communications by Jacksons are in the tribunal record. The substantial evidence of records before the tribunal demonstrate beyond question for meeting the burden of the statute broadly encompassing framework appropriately qualified as "any order, regulation, or standard of the [FAA] . . . or any other provision of Federal law relating to aviation safety . . . " (49 USC § 42121(a)(1)). Though not raised to great extent for

appellate review of the decision for the limited and rightly restrict space and time to draw distinction of errors by lower courts, statutory requirement for *de novo* review on appeal should direct appellate to fully embrace the whole of the record and impact how petitioner relief is sought.

Petitioner timely appealed the ALJ decision to Department of Labor, Administrative Review Board ("ARB") for arbitrary, capricious and unreasonable application of the statute to include mishandling petitioner's motion *in limine* to allowing prejudice of the tribunal and bias in the decision.

ARB affirmed the decision contrary to *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010 (ARB Dec. 30, 2004) having not outlined *de novo* review requirements or otherwise account for ALJ split from another simultaneously tried case *Bell v. Bald Mtn.* (incl. herein) according to statute.

Petitioner brought timely petitions for review and for panel rehearing before the Court of Appeals for the Ninth Circuit. The court denied the first petition merely restating questionable process and findings of the ALJ and ARB holding no regard for petitioner calling into question the agency deviation from normal practice of review or court's own disparate review of other actions.

Petitioner sought to become a professional aviator after death of a dear family member in Christmas 1982 when a United States Air Force ("USAF") Boeing B-52 Bomber crashed in California. Petitioner's cousin

whom he had spent the weekend in Sacramento prior to the crash was assigned as Navigator Instructor to that flight. Petitioner later learned from colleagues and professional comradery at industry symposiums and safety training meetings the great extent of systemic failures and error chains that contributed to the great loss of life in that crash.

From the early beginnings of his professional career in 1993, SMS was only dawning from its metamorphosis from health care surgical program roots and into military aviation ranks before civilian aviation identified those industrial successes and began to developed safety platforms for civilian aviation. Petitioner sought to find value from near and actual losses of friends and colleagues throughout his aviation career and drew from those loses, a strong desire to understand and learn how just a minimal set of errors and chains of events progressively developed until multi-million dollar aircraft with the best equipment and highly trained crews perish mere moments after takeoff as petitioner's cousin perished in 1982.

LFNSMS promoted robust safety standards petitioner was required to conform. LFNSMS relied on identification of hazards, threats and error chains that National Transport Safety Board Accident Investigations report are common contributing factors in aviation accidents. In 2009 after tremendous loss of life and aircraft in EMS Air Ambulance Operations, the NTSB recommended the FAA improve oversight over EMS Air Ambulance operators under 14 CFR Part 135. LFNDS stated, "*EMS pilot is one of the most dangerous*

civilian jobs." (CX 98,144:10-147:2 18:8-21:2; 25:4-12 (Miles Deposition).

SMS holds prolific core values for system analysis, situational awareness, risk assessment and hazard identification in preflight planning and decision making requiring "2-tier operational control" protocols where management material participation with pilots effectively identifies hazards, assesses and mitigates risks to lower acceptable levels jointly decline higher risk assignments. These core SMS values and protocols are included in LFNSMS as petitioner employed July 9, 2014. Jacksons fired petitioner for his mandated reverence of LFNSMS and for reporting Jacksons lost situational awareness prescribing two different assignments in violation of regulations.

Despite ALJ prejudice and bias in the decision, the record alleged in support against petitioner does not cite any abuse of any other safety report or that petitioner ever refused or declined a flight. Petitioner demonstrated liberal flexibility to schedule needs and accommodation for Jacksons gross scheduling error while other pilots left their post without authorization or communication. Petitioner fully endorsed his schedule adjustments to LFN and Jacksons benefit even under circumstance similar to exceptional assignments and best laid plans of June 24, 2014, violation of CFR 135.267. Petitioner sought Jacksons engagement according to LFNSMS preventing prior deviations and reduce risks of repeating previous errors.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit denial split from other rulings recognizing exceptional importance of applying proper standard of appellate review for agency overreach or improper deference to application of statute and bias. There remains significant question of the agency deference applied in this case as petitioner offered several opportunities for realignment of agency decision and conformance to statute intentions from FAA and Congressional directives.

This Court should grant review to cure disparity between agency and appellate review within circuit courts for other rulings reliance on relevant facts and substantial evidence probative to complaints.

This Court should consider if agency administration and appellate review appropriately bound the agency to deference limitations in application of statutes to assure constitutional protections are unfettered by breaches of agency boundaries of law not limited to FAA SMS as corporate finance whistleblowers subject to the same agency deficiencies of review under SOX.

I. The ALJ decision demonstrates an overt disregard for any limits of deference in application of administrative law.

The ALJ decision departed from clear guidance of statutes while simultaneously deciding another nearly identical case heard in parallel to petitioner. That

closely situated case conducted hearings prior to petitioner but published findings after petitioners. The decisions of two closely situated held nearly identical format and reasoning, however, contradictory decisions.[5]

---

[5] *McMullen v. Figeac Aero N. Amer.*, ARB No. 2017-0018, ALJ No. 2015-AIR-27 (ARB Mar. 30, 2020) is a perplexing contrast in how evidence was weighed and applied under the substantial evidence standard of review according to the statute. Figeac was heard by the exact same tribunal as petitioner just prior to petitioner's July 2017 hearings yet, the ALJ delayed issuance of a decision and order almost 2 months following petitioner in October 2018. The ALJ outlines McMullen's case as plagued with disciplinary issues over a sustained period of time that intensified prior to safety reporting by McMullen as having witnessed a potential violation of Figeac Aero in instructions to a coworker and not a violation he was tasked to materially participate. The ALJ produced a nearly verbatim decision and order as for petitioner's August 2018, including the courts discretion to weigh testimony absent substantial evidence supporting that testimony. Curiously, the ALJ outlined also in the decision and order in Figeac Aero as the employer having established fairly clearly and convincingly the disciplinary issues with McMullen were escalating toward a likely discharge at the time of the third party safety reporting that could be construe ad an opportunistic convenience for McMullen to escape or defer the imminent adverse action he had to be aware was developing. The ALJ abused his discretion and acted arbitrary and capricious in his own decision and order of both McMullen and petitioner if the decisions are viewed side by side as the ALJ also took both matters "side-by-side." The ALJ gave McMullen great deference and benefit of the doubt in application of the statute for his third party reporting of safety concerns while holding petitioner to an exceptionally high burden of deference to the same statute as McMullen but for reporting safety concerns and potential of direct violations of regulations petitioner had received from his employer who held no disciplinary course or pending adverse action to reference for the ALJ to outline as in Figeac Aero which settled with McMullen in

The two complaints coincidentally adjudicated, while closely situated, held distinctly differing substantial application cited in their cases, received disproportionately different prevailing decisions hinged entirely on discretion to weigh testimony over the record of documented evidence. The ALJ disregarded substantial documented evidence of Figeac to favor McMullen supported mostly from testimony. The ALJ found one of only three Jacksons witness testimony most credible, disregarded admitted spoliation of evidence and substantial evidence documentation of petitioner to favor Jacksons. Both cases demonstrate prejudice and bias in addition to unreasonable deference and abuses of discretion for agency application of the statute.

Whether an abuse of discretion or inadvertent and disproportionate application of deference between the two parallel cases, the deference is clearly unevenly applied in a manner set forth below and shows unbinding applications of deference in administrative agency standards of review.

---

the course of seeking appellate review by the ARB which may have had a compelling argument to reverse the ALJ decision and award for McMullen prevailed while petitioner in contrast did not.

A. The statute applied by the ALJ standard of review permits only two (2) possible outcomes under 29 CFR 1979.109(a).

No prior decision splits from the statute requiring issuance of only one of two possible outcomes after trying of facts under substantial evidence considerations. The courts discretion is limited only to: 1) finding complaint is merited by prima facie showing of nexus that protected activity contributed to the discrimination but for protected activity; or 2) respondents demonstrate clear and convincing evidence adverse actions would have occurred absent protected activity.

The tribunal stated for the record at trial closing, petitioner had proven the nexus of protected activity. However, petitioner was saddled with exceptional burdens to show protected activity related to FAA regulations. This application of law required much higher burdens statutes permitted as actual violations only of regulation is not the threshold for protected activity. Even so, petitioner met this higher burden and demonstrated CFR 135.267 infractions as result of multiple supervisors' controlling interests over issuing petitioner's assignments on July 9, 2014. *Bondourant v. Southwest Airlines, Inc*., ARB No. 14-049 previously held by the agency required no such burden, much less arbitrary inflated thresholds.

The ALJ decision remarks petitioner met his arbitrary burden, however retracted the prevailing argument outlining petitioner controlled whether or not regulations would actually be violated and therefore

could not actually engaged in protected activity, again in deference to *Bondourant* upholding at ARB.

The ALJ position and ARB affirmation are counter-intuitive to *Johnson v. The Wellpoint Companies, Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-38 (ARB Feb. 25, 2013); *Zinn v. American Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-25 (ARB Mar. 28, 2012); and *Barrett v. e-Smart Technologies, Inc.*, ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013) all correlate employees need not report actual violations nor must violations occur; and even employees mistaken regarding potential violations are protected.

The ALJ disregarded statute relevance to petitioner's other mandated safety reporting of July 9, 2014 FRAT and emails. The ALJ deference to limit application of the statute to only actual violation of a regulation disregarded FRAT consideration by company directive and LFNSMS compliance directly derives from FAA "order, regulation, or standard of the [FAA] . . . or any other provision of Federal law relating to aviation safety . . . " (AIR21). The statute broad language form many protected activities petitioner engaged in the mandated FRAT. ALJ and ARB disregard this application was improper and unreasonable deference to agency application of statute and beyond abuse of discretion.

The ALJ saddled petitioner with no other known arbitrary burden outside of showing safety reporting related to FAA regulations ad held no argument

defining protected activity. Substantial evidence of documents on record demonstrates Jacksons believed petitioner engaged in protected activity by his safety reports and concerns. The ALJ patently reneged on stated tests for petitioner in an abuse of discretion and the appellate inappropriately affirmed petitioner did not want to fly when *de novo* review demonstrates petitioner exhaustively sought to conduct assignments safely and legally compliant before LFN cancelled the flights for recognition of assignment's deficiencies.

The ALJ departed from administrative agency reasonableness standards requiring both subjective and objective consideration to abuse its discretion to decide the reasonableness of petitioner's concerns and safety reporting *Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995) " . . . *courts should not defer to an agency without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision* . . . " The ALJ did not outline an analysis in the decision how he arrived at any of petitioner's safety reporting to be unreasonable and dismissing the action and the appellate review is silent on petitioner's possible inarticulate implications of such err.

In *Harp v. Charter Commc'ns,* 558 F.3d 722 (7th Cir. 2009) the appellate review examined with great scrutiny "reasonable belief" under both subjective and objective standards. Merely stating petitioner was unreasonable without demonstrating any examination or application of both standards regarding "reasonableness" of petitioner's reports are sorely lacking by the

ALJ and appellate review in departure from *Harp*. Moreover, it is impossible to theorize any other pilot could be similarly situated on July 9, 2014, to petitioner's expansive career and recent experience such as June 24, 2014, duty period violations when he was faced with the unorthodox assignment containing a litany of defects and violations.

The ALJ decision infers the court review granted substantial deviation outside of deference and allowed bias or prejudice emulate from the decision unchecked. The appellate review is void of reason or clarity for decisions' grandiose for nonexistent and unconscionable burden of proof post trial without Jacksons having argued any such position as the ALJ enforced; dismissing Jacksons much higher burden shifting requirement to demonstrate clear and convincing evidence the adverse action against petitioner would have still occurred absent the protected activity. This directly contradicts the parallel and inverse *Figeac* decision among others.

B. The ALJ, ARB and Ninth Circuit are absent or silent on a proper standard of review for Motion *in limine* after Jacksons admitted to spoliation of evidence.

Petitioner exhausted all cordiality for Jacksons cooperation in discover and production of documents known to exist and implied in email communications produced by LFN after Jacksons and LFN were noticed in November 2014 for preservation and protection of case evidence. OSHA WPP Investigator assigned to

petitioner's complaint advised Jacksons federal law required preservation of evidence related to petitioner's complaint in March 2015. Jacksons frustrated petitioner's every attempt to obtain documentation evidence in discovery petitioner knew Jacksons possessed. Some evidence was included in FAA record keeping requirements for retention up to five (5) years. ALJ denied motions to compel and sanctions against Jacksons. Petitioner was forced to file Motion *in limine* to prohibit Jacksons from entering hearsay testimony as probative evidence to prejudice the court after discovering untruthful statements to WPP investigators and in depositions of Jacksons witnesses. The ALJ excused Jacksons admitted negligence failing to preserve even electronic backups of documents lost during company computer server maintenance. The ALJ further excused Jacksons from preservation of physical documents and papers due to the age of the case and passed time being an unreasonable amount of time to preserve evidence. The ALJ took the motion under advisement intending to hear testimony and weigh it appropriately during July 2017 hearings. The ALJ decision split from others; how credibility and determination of witness' testimony weight was the courts discretion. The ALJ acknowledged the absence of substantial supporting evidence of testimony left the ALJ to their discretion to weigh that hearsay testimony under substantial evidence requirements of the statute (29 C.F.R. § 1979.110(b)). The ALJ failed to cite any deliberative process or other thoughtful analysis used to balance the evidence versus prejudice.

The ARB and Ninth Circuit split from other decisions and *de novo* review of motion *in limine*; where prior rulings questioned quaint rulings to deny or grant such motions as failing to describe how deliberate balancing measures taken weighed implications of rulings with or without the subjective evidence according to substantial evidence standards to prevail in the motion. The appellate review sought no such answer to petitioner's pleadings.

The appellate review declined to acknowledge discrepancies of spoiled evidence weight by the ALJ as it related to the hearsay testimony and prejudice of the court's creation. This enabled the ARB and Ninth Circuit to evade discussions of appropriate standards of appellate review given other cases and whether ALJ withholding ruling on motion *in limine* inappropriately expanded deference and discretion to substantially weigh hearsay evidence to dismiss petitioner's complaint. This uncorrected "pocket veto" of a relevant motion condoned by the Ninth Circuit implicitly expands an already excessive deference for application of the administrative statute and condones an agency's subversive judicial activism.

II. Agency solicitors have ethical and professional duties of care to assure proper balance of zeal for clients to adherence to oaths as officers of courts to follow procedural rules.

The Department of Labor commission protects workers from subjective employment standards,

unsafe conditions and houses OSHA and WPP complaints. Congress designates the DOL Secretary to become the adversary if either party objects to administrative review findings in petition to the appellate court. This statute structure implies congress believed disaffected workers would not be the disproportionate number of adversaries appearing before appellate courts they are; arguing against the agency protecting them from employer abuses. The statute structure oversight of the ALJ by licensed attorneys suggests congress intimated licensed attorneys would not jeopardize bar standings and other credentials to produce untruthful briefs and certify false statements the ALJ acted appropriately and according to precedent deference of application of the administrative statute.

Rule 11 of Civil Procedure precludes attorneys from signed statements and certifications of factual contentions that do not have evidentiary support or specifically identify evidence toward claims and defenses they represent. Petitioner's briefs before the appellate were answered by agency solicitors which signed statements and certifications of factual contentions in the answers to petitioner that did not have evidentiary support or specifically identified evidence toward defenses they represented. Solicitor bar credentials created a bias and prejudice in petitioner's appellate review resulting in decisions denying petitioners appropriately sought appellate review *de novo*. The solicitor failed to become familiar with the whole of the case record and signed and certified statements before the Ninth Circuit which were untrue and lacked

sufficient evidence or identified the evidence supporting defenses of the DOL. The denial of the petition clearly demonstrates the bias and prejudice of the Court for their decision restated the untrue and unsupported signed statements of the Solicitor and demonstrates the appellate failed to review the case *de novo*, for they would have discovered the solicitor's indiscretion at either of petitioner's responsive pleadings.

The DOL Solicitor did not answer petitioner's challenges to factual contentions not factually supported by the record. Petitioner opposed the solicitor substitution of counsel before the Ninth Circuit for fear new counsel would not be sufficiently aware of the facts of the case to appropriately answer petitioner. The appellate did not rule on petitioner's opposition before substitute counsel for the solicitor recited the same erroneous ARB contentions to certify their briefings without evidentiary support or specific identification of evidence toward the DOL defenses.

In matters before other courts, the remedy for violation of Rule 11 could be sanctions and other appropriate relief from applicable rules. In this matter before this Court, the solicitor violations of rules may not have been properly articulated in proper form or manner, however were outlined before the Ninth Circuit, well known for admonishment of counsel deliberate or involuntary mistakes and previously reversed or remanded such serious errors prejudicing a court's decisions. In denying petitioner's review, the Ninth Circuit candidly restated errant factual contentions of the

Solicitor as petitioner strenuously objected. Left uncorrected by this Court, adversarial postures Solicitors pose against disaffected workers and a Ninth Circuit silent on transgressions of the solicitor to obtain favorable rulings would seem at odds with Congress intent in assigning the appellate charge over the review process and the constitutional rights of American workers subject to the same safety reporting petitioner was mandated July 9, 2014.

III. ARB and Ninth Circuit decisions are devoid of *de novo* considerations in their appellate review.

Decisions to deny petitioner's review of agency dismissal are absent of citations noting *de novo* consideration for lower court rulings and simply restated erroneous findings and left significant questions of law unanswered; whether the ALJ applied statutes appropriately and whether appellate properly reviewed that application within permissible deference to the agency. Of all the agency shortcomings petitioner cited for appropriate review, the appellate is the only opportunity for disaffected claims to be afforded highly trained legal review of administrative agency conduct in exceptionally important causes; protection of workers making safety reports and concerns for regulatory compliance.

In *Funke v. FedEx Corp.,* ARB No. 09-004 (July 8, 2011) the complainant followed mandated training making reports protected under SOX but the ALJ

dismissed after very restrictive application of the statute to who and how reports are raised to be protected activity. The ARB reversed and expanded the protected activity to include third party reporting as protected. The lack of de novo review of petitioner shows a split from *Funke* to ensure ALJ is not overstepping discretion in application of statutes.

Just as petitioner decision making and safety reporting on July 9, 2014 was the last opportunity to address linear progression of deficiencies exponentially increasing chances of an accident, petitioner asks this Court to consider the Swiss cheese model of aviation safety where stages of safety controls designed to ensure error chains do not develop or find their way through larger holes of deficiency that become aligned to develop "error chains" where human disinterest or indifference or distraction are greatest threats to SMS efficiency. The levels of controls applied in aviation safety could be correlated with legal review of this case beginning with WPP investigators. Defects of agency statute application by investigators or deference combined with deficient or inconsistent applications of legal review are a dangerous error chain that could erode public confidence that worker protections are assured by the courts when the agency review before them gets it wrong.

This Court should question the proper application of procedural rules at each stage of review as well as administrative deference to application of law so

workers making safety reports may do so without fear of reprisal.

CONCLUSION

The Supreme Court should therefore grant this petition for writ of certiorari to bring clarity to constraints of administrative agency deference and subsequent standards of appellate review are applied appropriately to these matters of exceptional importance for safety initiatives of the FAA and Congress to protect workers engaged in mandated safety reporting and for potential regulatory violations.

Respectfully submitted,

ROBERT D. KREB, JR.
2100 SE 40th Avenue
Amarillo, TX 79118
(806) 471-3007
Pro Se