No. 23-1859

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LINDSEY GULDEN ET AL.,
Plaintiffs – Appellants,

v.

EXXON MOBIL CORPORATION,
Defendant – Appellee.

On Appeal from the United States District Court
for the District of New Jersey
(No. 3:22-cv-07418-MAS-TJB, Honorable Michael A. Shipp)

ACTING SECRETARY OF LABOR'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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The Acting Secretary of Labor submits this brief as amicus curiae in support of Plaintiffs-Appellants Lindsey Gulden and Damian Burch. For the reasons set forth below, the district court erred in granting the motion filed by Defendant-Appellee Exxon Mobil Corporation ("Exxon") to dismiss Plaintiffs' complaint seeking enforcement of the order of preliminary reinstatement issued by the Secretary of Labor ("Secretary") under the whistleblower provision of the Sarbanes-Oxley Act ("Sarbanes-Oxley" or "the Act"), 18 U.S.C. 1514A.

ACTING SECRETARY'S INTEREST AND AUTHORITY

The Acting Secretary of Labor has a substantial interest in the interpretation of the whistleblower provision of Sarbanes-Oxley because the Secretary of Labor has the responsibility to investigate and adjudicate whistleblower complaints and to issue and enforce orders under the Act. *See* 18 U.S.C. 1514A(b) (incorporating 49 U.S.C. 42121(b)). Under the relevant statutory language, Congress expressly provided for the Secretary issue preliminary orders that require employers to reinstate complainants to their former positions pending final administrative adjudication of their whistleblower claims. *Id.* § 42121(b)(2)(A) & (b)(3)(B). The statute also mandates that a Respondent's objections "shall not operate to stay any reinstatement remedy contained in the preliminary order." *Id.* § 42121(b)(2)(A).

Although this case involves an effort by private complainants to enforce the Secretary's order, the district court's interpretation, if affirmed by this court, would leave no mechanism for the government itself, as well as private parties, to enforce these post-investigation preliminary reinstatement orders. Such an outcome would contradict Congress's express statutory mandate that such orders must be effective immediately and would significantly weaken Sarbanes-Oxley's whistleblower protections. Federal Rule of Appellate Procedure 29(a)(2) authorizes the filing of this brief.

ISSUE PRESENTED

Whether the whistleblower complaint procedures in Sarbanes-Oxley, 18 U.S.C. 1514A, provide for judicial enforcement of orders issued by the Secretary of Labor that require reinstatement of whistleblower complainants to their former positions pending final administrative adjudication of their whistleblower claims.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 2002, Congress enacted Sarbanes-Oxley "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Jaludi v. Citigroup*, 933 F.3d 246, 250 (3d Cir. 2019) (quoting *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 773 (2018)); Pub. L. No. 107–204, 116 Stat. 745. Section 806 of Sarbanes-Oxley provides whistleblower protection to employees of publicly traded companies and their contractors who report corporate fraud. *See* 18 U.S.C. 1514A(a). Employees who believe they have been subject to retaliation may file complaints with the Secretary, which the Secretary investigates and adjudicates under the procedures in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121(b). *See* 18 U.S.C. 1514A(b). When enacting Sarbanes-Oxley, Congress indicated that it intended to "track [AIR 21's]

protections as closely as possible." S. Rep. No. 146, 107th Cong., 2d Sess. 2 (2002); *see Lawson v. FMR LLC*, 571 U.S. 429, 437 (2014).

The Secretary delegated responsibility for receiving and investigating whistleblower complaints under Sarbanes-Oxley to the Occupational Safety and Health Administration ("OSHA"). *See* Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002). OSHA then enacted implementing regulations. *See* Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 69 Fed. Reg. 52104 (Aug. 24, 2004); 29 C.F.R. part 1980. Under these procedures, OSHA conducts an investigation and makes "findings" as to whether "reasonable cause" exists to believe a violation has occurred. *See* 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.104(e).

If, based on the information gathered, the Secretary has reasonable cause to believe a violation has occurred, the Secretary "shall" accompany the findings with a "preliminary order" providing the relief prescribed by the statute, including reinstatement of employees if their employment was terminated, as well as back pay and compensatory damages. 49 U.S.C. 42121(b)(2)(A), (3)(B). Either the employer or the complainant then has 30 days to object to the preliminary order and request a hearing before an administrative law judge. *Id.* § 42121(b)(2)(A).

AIR21, as incorporated into Sarbanes-Oxley, provides that objections "shall not operate to stay any reinstatement remedy contained in the preliminary order," 49 U.S.C. 42121(b)(2)(A), but does not provide the same for the other remedies in the statute (which by regulation are stayed by the filing of objections), *see* 29 C.F.R. 1980.106(b). Under the Secretary's regulations, therefore, the filing of objections does not automatically stay reinstatement. Rather, an employer that does not wish to reinstate the employee must file a motion with the ALJ for a stay of reinstatement. *See* 29 C.F.R. 1980.106(b).

The judicial enforcement provision directly at issue in this case, 49 U.S.C. 42121(b)(6), provides complainants with a cause of action to obtain district court enforcement of the Secretary's orders. It states, in relevant part:

> A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order.

Id. § 42121(b)(6)(A). A separate provision at § 42121(b)(5) contemplates a similar cause of action for the Secretary to bring suit to enforce an order issued under paragraph (3).

Since enactment, the Department has interpreted the enforcement provisions in paragraphs (5) and (6) to permit federal court enforcement of reinstatement relief in preliminary orders, as it has explained in its regulations implementing AIR21 and Sarbanes-Oxley. *See* Procedures for the Handling of Discrimination

Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Interim final rule, 67 Fed. Reg. 15454, 15461 (Apr. 1, 2002); 69 Fed. Reg. at 52111 (2004) (Sarbanes-Oxley); Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 80 Fed. Reg. 11865, 11874 (Mar. 5, 2015).

The AIR21 whistleblower protection procedures, incorporated into Sarbanes-Oxley, were modeled on those in the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. 31105(b)(2), which provides protection for whistleblowers in the trucking industry. *See* H.R. Rep. No. 167, 106th Cong., 1st Sess. 85 (1999). STAA, like AIR21, specifically provides for preliminary reinstatement and clarifies that the filing of administrative objections does not stay this remedy. 49 U.S.C. 31105(b)(2)(B).

Several years before the passage of AIR21, the Supreme Court examined STAA and explained the legislative intent behind Congress's inclusion of preliminary reinstatement:

> Congress . . . recognized that the employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review.

Brock v. Roadway Express, Inc., 481 U.S. 252, 258–59 (1987). In *Roadway Express*, the Court concluded that, as long as certain procedures were observed,

due process is sufficiently protected without a full-fledged evidentiary hearing before an employee is temporarily reinstated. *Id.* at 263–64.

OSHA designed its regulations under AIR21 and Sarbanes-Oxley to be in accordance with the requirements in *Roadway Express*. *See* 67 Fed. Reg. at 15455 (AIR21); 69 Fed. Reg. at 52107 (Sarbanes-Oxley).

B. Procedural Background

Plaintiffs Lindsey Gulden and Damian Burch filed a whistleblower complaint with OSHA under Sarbanes-Oxley after their employment was terminated by Exxon. *See* Compl., *Gulden v. Exxon Mobil Corp.*, No. 22-7418-MAS-TJB (D.N.J.), App000017, ¶ 1. After an investigation, OSHA issued a preliminary order that included a requirement that Exxon immediately reinstate the plaintiffs. *Id.* ¶ 2; Preliminary Order at 8, App000037. Exxon objected and requested a hearing with the Department's Office of Administrative Law Judges (OALJ), but did not file a motion to stay reinstatement and did not offer to reinstate the Plaintiffs. App000017–18, Compl. ¶¶ 3–4. The Plaintiffs then filed their complaint with the district court seeking enforcement of the reinstatement relief while the underlying dispute proceeds through the agency process.

After briefing on Exxon's motion to dismiss under Fed. R. Civ. P. 12(b)(1), the district court concluded it did not have jurisdiction to enforce the reinstatement. The court concluded that the language of paragraphs (5) and (6)—which "give

district courts the power to enforce orders 'issued under paragraph (3),'" Op. 4, App000004—authorize district courts to enforce DOL's "final orders" (*ibid.*) but "do not confer jurisdiction to enforce preliminary orders," *id.*, App000005.

The district court observed that § 42121(b) "contemplates two types of orders, preliminary and final"; that paragraph (2) discusses preliminary orders while "Paragraph (3) discusses final orders"; and that Congress provided for enforcement only of orders issued under paragraph (3). App000003–05. The court also supported its conclusion with reference to other provisions of the statute. In particular, it noted that the appellate review provision in paragraph (4) also refers to orders "issued under paragraph (3)," App000005 (quoting 49 U.S.C. 42121(b)(4)(A)), and that this suggested the correct interpretation of the "issued under paragraph (3)" language throughout the statute is that it refers only to "final orders," App000006 & n.5. With regard to the legislative history, the district court found it to support the conclusion that Congress "chose not to include" the enforcement power. App000006.

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ARGUMENT

THE BEST READING OF THE SARBANES-OXLEY AND AIR21 STATUTES PROVIDES AUTHORITY FOR JUDICIAL ENFORCEMENT OF REINSTATEMENT RELIEF IN A PRELIMINARY ORDER ISSUED BY THE SECRETARY OF LABOR

The district court erred in concluding it did not have subject-matter jurisdiction to enforce the Secretary of Labor's post-investigation preliminary reinstatement order. Applying traditional methods of statutory interpretation, the best reading of the language of Sarbanes-Oxley and AIR21 at 49 U.S.C. 42121(b)(5) and (b)(6)(A) is that these paragraphs provide the requisite causes of action. There is no dispute that these provisions authorize causes of action for enforcement of certain orders by the Secretary, referring to those orders issued "under paragraph (3)" of the statute. When this language is examined in full context, including in light of the express statutory command in 49 U.S.C. 42121(b)(2) that any "objections shall not operate to stay any reinstatement remedy contained in the preliminary order," the most reasonable conclusion is that Congress intended to authorize judicial enforcement of post-investigation preliminary reinstatement orders as well as final orders.

To decide otherwise, the district court discounted the fundamental canon of statutory construction that requires courts to avoid interpreting one part of a statute in a manner that renders another part inoperative or insignificant. The court's

conclusion that there is no judicial enforcement for preliminary reinstatement orders has allowed Exxon to entirely ignore the Secretary's order in this case. This outcome has rendered insignificant and self-defeating the express statutory mandate that such relief must not be stayed by objections.

A. Providing a Cause of Action for Enforcement of Post-Investigation Preliminary Reinstatement Orders Is Necessary to Give Effect to Congress's Instruction That Reinstatement Shall Not Be Stayed.

The "starting point of all statutory construction is the text of the statute[.]" *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 611 (3d Cir. 2015). After beginning with the relevant text, courts take account of "the specific context in which that language is used, and the broader context of the statute as a whole." *Disabled in Action of Penn. v. Se. Penn. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (citations omitted). In considering possible interpretations, courts should construe a statute "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Geisinger Cmty. Med. Ctr. v. Sec'y U.S. Dep't of Health & Hum. Servs.,* 794 F.3d 383, 392 (3d Cir. 2015) (quoting *Corley v. United States*, 556 U.S. 303 (2009)).

1. As the district court acknowledged, the statute "uses imprecise language to describe the enforcement process for the Secretary's orders." App000004. Paragraph (6) does not expressly refer to final orders or preliminary orders. Rather, it provides for a cause of action to enforce "an order" under paragraph (3), a

construction which could encompass a post-investigation preliminary order as well as a final one, depending on the meaning of the phrase "under paragraph (3)."

Post-investigation reinstatement orders are properly viewed as orders issued "under" paragraph (3) within the meaning of AIR21's enforcement provisions. "Under" is a word that "has many dictionary definitions and must draw its meaning from its context." *Ardestani v. I.N.S.*, 502 U.S. 129, 135–36 (1991); *see also Kucana v. Holder*, 558 U.S. 233, 245 (2010) ("The word 'under' is chameleon[.]"). Among others, these definitions include "required by[,] in accordance with[, or] bound by." *D.C. Hosp. Ass'n. v. District of Columbia*, 224 F.3d 776, 779 (D.C. Cir. 2000) (citing Webster's Third New International Dictionary 2487 (1981)). In *Ardestani*, the Court interpreted the term as best meaning "subject to" or "governed by" in the context of the statute at issue in that case. 502 U.S. at 135.

Post-investigation reinstatement orders under the AIR21 procedure are issued "in accordance with" both paragraphs (2) and (3). While paragraph (2) defines the circumstances under which a post-investigation preliminary order is issued, that paragraph also requires the order to provide the relief "prescribed by paragraph (3)(B)." 49 U.S.C. 42121(b)(2)(A). The relief provided when a post-investigation reinstatement order is issued, because it is "prescribed by" paragraph (3), is necessarily issued "in accordance with" paragraph (3) and therefore "under" paragraph (3) as well.

A post-investigation reinstatement order is also issued "subject to" paragraph (3). The decision in *Blackman v. District of Columbia*, 456 F.3d 167 (D.C. Cir. 2006), provides a helpful illustration of this meaning of "under." *Blackman* involved a limitation in appropriations statutes for attorney fees in suits brought "'under the Individuals with Disabilities Education Act' (IDEA)[.]" *Id.* at 170 (quoting 20 U.S.C. 1400 *et seq.*). The court found this limitation applied also to actions under 42 U.S.C. 1983 to enforce rights created by the IDEA. Such a § 1983 action "is 'governed by' and 'subject to' the IDEA because, in the absence of the IDEA, the appellees would have no federal right to vindicate." 456 F.3d at 177. Similarly, in AIR21, the provision in paragraph (2) for preliminary orders incorporates paragraph (3) to provide the right to reinstatement relief, and therefore such a preliminary order is issued under, *i.e.* subject to, paragraph (3) in addition to paragraph (2).

2. Reading "under" in AIR21's enforcement provisions as "in accordance with" or "subject to" is consistent with the rest of statutory language and the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Mejia-Castanon v. Att'y Gen. of the U.S.*, 931 F.3d 224, 233–34 (3d Cir. 2019) (quoting *King v. Burwell*, 576 U.S. 473, 492 (2015)). Most relevant to this analysis is the statute's other express reference to preliminary reinstatement orders.

Paragraph (2) of § 42121(b) permits a party aggrieved by the Secretary's preliminary order to seek administrative review by filing objections and requesting a hearing. 49 U.S.C. 42121(b)(2)(A). But crucially, it also provides that "[t]he filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order." *Ibid*. Congress thereby directed that, although the other non-reinstatement remedies that a preliminary order may include can be given effect only after the agency's adjudicatory process ends, the remedy of reinstatement must be given immediate effect during the agency proceedings. The Secretary's regulations draw on the statutory priority that Congress assigned to reinstatement, providing that a party's timely request for a hearing will automatically stay "all provisions of the preliminary order . . . , except for the portion requiring reinstatement[.]" 29 C.F.R. 1980.106(b).

The only way the statutory mandate regarding reinstatement can be given appropriate significance is for paragraphs (5) and (6) to be read to allow judicial enforcement of post-investigation reinstatement relief contained in preliminary orders; there is no other effective means to compel immediate compliance. A contrary conclusion on the availability of judicial enforcement would mean that despite the statute's express denial of an automatic stay, an employer could simply ignore the order, as Exxon has done here, and avoid any adverse consequences beyond after-the-fact remedies such as back-pay and compensatory damages that

would be available regardless. This construction of Sarbanes-Oxley would "effectively nullify the language . . . that objections to a preliminary order cannot stay enforcement of the preliminary order." *Solis v. Tenn. Comm. Bancorp, Inc.*, 713 F. Supp. 2d 701, 713 (M.D. Tenn. 2010) (concluding that the statute authorizes enforcement).

Under the district court's interpretation that it lacks jurisdiction, the statute's focus on ensuring immediate reinstatement relief would "shrink to insignificance." *Lawson*, 571 U.S. at 441, 452 (rejecting, for similar reasons, an interpretation of Sarbanes-Oxley that would have left employees of contractors to public companies without a remedy). If Congress did not intend to allow post-investigation reinstatement relief in preliminary orders to be enforceable in some way, the mandate that such relief shall not be stayed would be self-defeating. *See Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) ("We should not lightly conclude that Congress enacted a self-defeating statute.").

3. The district court's limited consideration of this fundamental problem with its interpretation is entirely unsatisfying. The court addressed the issue with a recitation that "courts do not automatically assume that judicial power is necessary to enforce statutory rights," quoting Judge Jacob's opinion in the fragmented decision in *Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469, 473 (2d Cir.

2006).[1] App000006. For this principle, Judge Jacobs quoted the reasoning of *Chicago & Nw. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 578 (1971). *United Transportation Union,* however, only reinforces the conclusion that Congress must have intended for AIR21 and Sarbanes-Oxley preliminary reinstatement orders to be enforceable in court.

In *United Transportation Union*, the Supreme Court was presented with the question of whether the federal courts had jurisdiction to enjoin a threatened strike because the union had failed to bargain in good faith, in violation of an express requirement of the Railway Labor Act. The Court found it had authority to enjoin the strike despite ambiguity in the statutory provisions, explaining:

> [W]here the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

402 U.S. at 578. Analyzing each factor in turn, the Court found that judicial enforcement was appropriate. *Id.* at 578–81.

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[1] In *Bechtel*, the panel declined to enforce a preliminary reinstatement order, but only Judge Jacobs found no jurisdiction. 448 F.3d at 473. Judge Leval concurred on due process grounds, finding OSHA's actions there had been insufficient to comply with the requirements in *Roadway Express*. *Id.* at 476. But Judge Leval declined to answer the "very difficult question" of enforceability. *Id.* Judge Straub dissented, concluding that Congress intended to authorize judicial enforcement of preliminary reinstatement orders. *Id.* at 483.

Here, in the context of AIR21 and Sarbanes-Oxley, each of these factors points toward a cause of action: Congress expressly emphasized the "importance of the duty in the scheme of the Act" by highlighting preliminary reinstatement above all other forms of relief and mandating that it would not be stayed by administrative objections. *See* 49 U.S.C. 42121(b)(2)(A). Courts have the "capacity" to enforce preliminary reinstatement orders, because they do so under other whistleblower statutes. *See, e.g.*, *Roadway Express*, 481 U.S. at 263–64 (setting forth requirements for preliminary reinstatement orders under STAA). Finally, enforcement is needed to give immediate effect to the post-investigation reinstatement relief contained in a preliminary order.

The question then is whether there is any possible reason that Congress would expressly provide for the Secretary to issue post-investigation reinstatement relief in a preliminary order—and expressly provide that it cannot be stayed by administrative objections—but deny immediate enforcement. The district court's only effort to answer this question is a one-sentence explanation that Sarbanes-Oxley provides for an "expeditious review process" and contains a "kick-out" provision (not in the AIR21 procedure) that allows a complainant to seek "de novo review" in district court if the Secretary has not issued a final order within 180 days of the filing of the complaint. *See* App000007 & n.6; 18 U.S.C. 1514A(b)(1)(B). But there are several problems with this argument.

First, the expeditious review in 49 U.S.C. 42121(b)(2)(A) is best read as supporting rather than undermining the conclusion that post-investigation reinstatement orders are enforceable. Hearings regarding objections to preliminary orders are be conducted "expeditiously" and a final order issued "[n]ot later than 120 days after the date of conclusion of a hearing." 49 U.S.C. 42121(b)(2)(A), (3)(A). These requirements have been understood as intended "in large part to minimize the burdens on the employer of preliminary reinstatement before the merits are fully determined," *Bechtel*, 448 F.3d at 485 (Straub, J.), again indicating Congress's intention that preliminary reinstatement orders will in fact be effective during that time. *See also Roadway Express*, 481 U.S. at 259 (suggesting the expeditious hearing is intended to account for *the employer's* interest in light of preliminary reinstatement).

Second, the 180-day "kick-out" provision present in Sarbanes-Oxley but not AIR21, does not mitigate an employer's refusal to reinstate a complainant because it would not provide the same relief as immediate reinstatement. *See Bechtel*, 448 F.3d at 487 (Straub, J.). A complainant seeking to use the "kick-out" provision would have to wait 180 days before filing a complaint in district court, and then could have to litigate the case all the way through discovery before possible reinstatement only after summary judgment or trial. As the Supreme Court explained in *Roadway Express*, delay for additional procedures before preliminary

reinstatement "would further undermine the ability of employees to obtain a means of livelihood, and unfairly tip the statute's balance of interests against them." 481 U.S. at 267. Moreover, there is an additional purpose to immediately reinstating an employee: to incentivize protected disclosures by "provid[ing] concrete evidence to other employees, through the return of the discharged employee to the jobsite, that the legal protections of the whistleblower statutes are real and effective." *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2005 WL 767133, at *2 (ARB Mar. 31, 2005). Allowing an employee to start anew in district court at a later date does not provide these benefits.[2]

The district court's reliance on the expeditious review and kick-out ultimately fails to explain why Congress would have identified the post-investigation reinstatement remedy in the first place—and expressly attempted to ensure its viability and effectiveness during the course of the review process—if Congress did not in fact intend for it to be enforceable and therefore effective at

[2] Similarly, this court should not interpret the statute as requiring the complainant to seek a separate order in DOL's administrative process to effectuate post-investigation reinstatement, as the complainant has now done in this matter. *See* Appellant's Br. 2–3 & n.1, ECF No. 14. The statute states plainly that objections to a preliminary reinstatement order do not operate to stay the reinstatement relief. Thus, where the Secretary has issued reinstatement relief in a preliminary order, and the employer has not timely sought to stay the reinstatement under the regulatory-stay provision at 29 C.F.R. 1980.106(b), the reinstatement relief should be enforceable in district court without the delay of any further administrative litigation by the complainant.

that time. *See United States v. Occidental Chem. Corp.*, 200 F.3d 143, 149 n.6 (3d Cir. 1999) ("[W]e feel confident that Congress did not intend to authorize administrative orders against a person . . . and, at the same time, deny . . . the authority to enforce those orders in court.").

B. Reading 49 U.S.C. 42121(b)(6) to Permit Enforcement of Reinstatement Relief in Preliminary Orders is Also Most Consistent with the Purpose and Legislative History of AIR21 and Sarbanes-Oxley.

The language of § 42121(b), including the express language directed at the immediate effectiveness of post-investigation reinstatement relief, demonstrates that the district court's judgment should be reversed. But Congress's intent to permit judicial enforcement of reinstatement in preliminary orders is also supported by an examination of its legislative history.

1. The legislative history of Sarbanes-Oxley makes clear that ensuring the effectiveness of the whistleblower provision was a central purpose of the Act. As the Supreme Court has recognized, in enacting Sarbanes-Oxley, Congress was particularly concerned about the "corporate code of silence" that "discourage[d] employees from reporting fraudulent behavior." *Lawson*, 571 U.S. at 434–35 (citing the Senate Judiciary Committee's report on the Act, S. Rep. No. 146, 107th Cong., 2d Sess. 2 (2002) ("Senate Report")). The Senate Report "identified the lack of whistleblower protection as 'a significant deficiency'" in existing law and it

listed whistleblower protection as one of three main purposes of the Act. *Id.*; Senate Report at 2, 10.

When Sarbanes-Oxley and AIR21 were enacted, post-investigation reinstatement relief in a preliminary order was a particularly well-understood policy option. Preliminary reinstatement orders under the STAA had been the subject of the Supreme Court litigation in *Roadway Express*, 481 U.S. 252. The STAA statute included language nearly identical to the key provision in AIR21, clarifying that "[t]he filing of objections does not stay a reinstatement ordered in the preliminary order." 49 U.S.C. 31105(b)(2)(B). In *Roadway Express*, the Court had validated the concept of preliminary reinstatement, explaining that Congress had "recognized that the employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated *pending complete review*." 481 U.S. at 258–59 (emphasis added).

When Congress passed AIR21, it borrowed significantly from STAA, though it re-organized the numbering of the enforcement paragraphs. AIR21 included the same specific reference to the effectiveness of reinstatement in preliminary orders, and the House Report on passage of AIR21 specifically cited STAA, above all other whistleblower statutes, as an example of existing laws that

prohibited retaliation in a way that did not yet exist for airline whistleblowers. *See* H.R. Rep. No. 167, 106th Cong., 1st Sess. 85 (1999).

This legislative background rebuts Exxon's general policy arguments against preliminary reinstatement. Exxon Opp. Br. 12, App000109. In the district court, Exxon relied on Judge Jacobs's assertion in *Bechtel* that the "reasonable cause to believe" standard for findings leading to preliminary orders was too "tentative and inchoate [to be a] basis for present enforcement." 448 F.3d at 474. Exxon also noted Judge Jacobs's argument that the exercise of jurisdiction by a federal court at the preliminary stage "could cause a rapid sequence of reinstatement and discharge, and a generally ridiculous state of affairs." *Id.* These policy arguments are unpersuasive in light of the *Roadway Express* decision. The Supreme Court recognized the legitimate policy justifications for post-investigation reinstatement relief in a preliminary order and found the "reasonable cause" standard to be a sufficient basis for its validity. *See Roadway Express*, 481 U.S. at 255.

2. The legislative history certainly provides no reason to believe that Congress disagreed with *Roadway Express* or sought to depart from it. The district court's conclusion that Congress "chose not to include" judicial enforcement of post-investigation reinstatement seems to have been based on a misconception of STAA as including "explicit language" allowing judicial enforcement. *See* App000006. The STAA statute, however, like AIR21 and Sarbanes-Oxley, only

contains a reference to judicial authority to enforce "an order," with a cross-reference to a separate subsection. 49 U.S.C. 31105(e). The difference between STAA and AIR21 that forms the basis for Exxon's argument is only that the cross-reference in STAA is to a larger subsection that includes reference to both preliminary and final orders. STAA does not contain "explicit language" beyond the cross reference.

More significant, there is no indication that at the time Sarbanes-Oxley was enacted anyone had interpreted the AIR21 procedure as departing from STAA or otherwise limiting judicial enforcement. To the contrary, on April 1, 2002, before Congress enacted Sarbanes-Oxley, the Department issued its interim final regulations implementing the AIR21 whistleblower provisions. 67 Fed. Reg. 15454. In those regulations, the Department interpreted the judicial enforcement provisions in AIR21—like STAA—to permit actions to enforce post-investigation reinstatement relief in preliminary orders, and it explained that the procedure was in accordance with the due process requirements of *Roadway Express*. *See* 67 Fed. Reg. at 15455, 15461.

In its May 6, 2002 report, a month after the issuance of the Department's AIR21 regulations, the Senate Judiciary Committee specifically stated that Sarbanes-Oxley would allow employees "to file a complaint with the Department of Labor, to be governed by the same procedures . . . now applicable in the

whistleblower law in the aviation industry." Senate Report at 13. It was against this background that Congress subsequently enacted Sarbanes-Oxley. *See Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978)) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").[3]

The Supreme Court noted this very point in *Lawson*, where it interpreted coverage aspects of the Sarbanes-Oxley whistleblower provisions. In finding that the provisions protected the employees of contractors to public companies, the Court recognized that at the time of the Act's passage, DOL had already implemented the AIR21 regulations, which covered such contractor employees. 571 U.S. at 457–58. Given its knowledge of the administrative interpretation, "Congress had a miles-wide opening to nip [DOL's] regulation in the bud if it had wished to do so. It did not." *Lawson*, 571 U.S. at 456 (citation omitted).

C. The District Court's Other Contextual Arguments Are Not Persuasive Reasons to Discount Congress's Intent that Post-

[3] The Secretary is not seeking deference to the regulations. *See Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 403–04 (3d Cir. 2021) (concluding no deference is due to agency interpretations of the scope of federal court jurisdiction). But this is irrelevant to the *Lorillard* principle. The argument is "not that the President's 'interpretation' . . . is due deference, . . . but rather that the Executive Branch's interpretation of the law through its implementation colors the background against which Congress was legislating." *United States v. Wilson*, 290 F.3d 347, 356–57 (D.C. Cir. 2002).

Investigation Reinstatement Relief in Preliminary Orders Must Be Immediately Effective

While effectively writing the core "shall not operate to stay" language out of the statute, the district court also placed undue significance on other statutory provisions.

1. First, contrary to the district court's conclusion, AIR21's direct appellate-review provision 49 U.S.C. 42121(b)(4)(A), which also refers to "an order issued under paragraph (3)," does not undermine the conclusion that preliminary reinstatement orders are enforceable. The district court assumed that if paragraphs (5) and (6) provide a cause of action to enforce preliminary reinstatement orders as orders "issued under paragraph (3)," paragraph 4(A) would also have to authorize direct review of such orders. This, the court reasoned in turn, would be inconsistent with the "strong presumption that 'judicial review will be available only when agency action becomes final.'" Op. 5–6 (citations omitted).

However, there are two ways to read paragraph (4) that do not require the court to contradict Congress's mandate that post-investigation reinstatement relief in preliminary orders must be immediately effective. This court need not decide between the two readings because both readings are reasonable and this case does not involve appellate review of such an order.

On one hand, paragraph (4) can be read to allow direct appeal of the reinstatement relief in preliminary orders. Paragraph (4) states that judicial review

lies in the "circuit in which the violation, with respect to which the order was issued, *allegedly* occurred[.]" 49 U.S.C. 42121(b)(4)(A) (emphasis added). Referencing the violation as "alleged" is consistent with possible review of a preliminary order. Paragraph (4) also requires only that the petition for review must be filed "no later" than 60 days after the final order, which does not preclude filing any time *before* the final order (e.g., after the preliminary order). Thus, a court could reasonably interpret the term "under paragraph (3)" to allow enforcement and review of reinstatement relief in preliminary orders in a similar manner in paragraphs (4), (5), and (6). While the implementing regulations do not currently interpret paragraph (4) in this manner, the statutory and regulatory language also do not preclude such an interpretation.[4]

The district court referenced the presumption that direct review is only available for "final orders," but this presumption is less powerful here. Under the peculiar statutory scheme, the post-investigation reinstatement relief in a preliminary order is unstayed and is therefore, for practical purposes, the "final"

[4] The Department's AIR21 and Sarbanes-Oxley regulations provide that judicial review in circuit court is available after the issuance of a "final order" of an ALJ or the ARB. *See* 29 C.F.R. 1980.112. They also provide that a respondent must file administrative objections to a preliminary order in order to seek judicial review. *Id.* § 1980.106. Although the Secretary has previously interpreted paragraph (4) as limited to direct review of "final" orders, the regulations do not expressly prohibit judicial review of a preliminary reinstatement order, as long as objections have been filed and review therefore has not been waived.

order of the Secretary for the time period during which agency review on the merits is pending. *Cf. CalPortland Co., Inc. v. Fed. Mine Safety & Health Rev. Comm'n on Behalf of Pappas*, 839 F.3d 1153, 1159–61 (D.C. Cir. 2016) (holding temporary reinstatement orders under the Mine Act are reviewable because, among other factors, they "conclusively and finally" determine an issue). It therefore is reasonable to interpret paragraph (4) to allow direct review of the reinstatement relief in a preliminary order in the same way that such relief should be enforced under paragraphs (5) and (6).[5]

On the other hand, it is also reasonable to interpret "under paragraph (3)" to provide a different scope of authority in paragraph (4) than it does in the enforcement paragraphs. The presumption that identical words used in different parts of the statute are intended to have the same meaning may be "overcome when

[5] It would only be reasonable to allow direct review of the *reinstatement* relief, and not of any other elements of a preliminary order. Only reinstatement (among all other remedies) must remain unstayed during the course of the administrative proceeding and thus would justify immediate and direct review. Additionally, the review of reinstatement in preliminary orders would be a limited one because those orders are issued only on the basis of the agency's finding of "reasonable cause to believe that a violation of [the whistleblower-protection provision] has occurred." 49 U.S.C. 42121(b)(2)(A). A reviewing court would therefore be limited to deciding whether the agency committed a dispositive violation of the law; whether the agency acted arbitrarily or capriciously in finding what amounts to probable cause that a violation occurred; or whether it abused its discretion in formulating a remedy. *See id.* § 42121(b)(4)(A) ("Review shall conform to chapter 7 of title 5, United States Code.").

'there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'" *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 204 (3d Cir. 2010) (citations omitted). Paragraph (4) alone, unlike paragraphs (5) and (6), makes explicit reference to "final" orders. It explains that "[t]he petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor." 49 U.S.C. 42121(b)(4)(A). This reference to "the final order" can be read to suggest that the drafters of paragraph (4) contemplated that direct review would be invoked only after the final order was issued. As paragraphs (5) and (6) contain no similar reference, it is reasonable to read "under paragraph (3)" differently in the enforcement context—where allowing enforcement of preliminary reinstatement orders is the only way to give sufficient meaning to Congress's explicit language regarding the immediate effectiveness of preliminary reinstatement relief. Such a reading is also consistent with the Department's regulations. *See supra* note 4.

Given the two reasonable ways that this court can interpret paragraph (4) in relation to paragraphs (5) and (6), there is no reason to interpret these provisions in a way that makes the "shall not operate to stay" reinstatement relief provision in paragraph (2)(A) self-defeating.

2. Finally, the district court suggested that Congress did not intend reinstatement relief in preliminary orders to be enforceable because paragraph (5) allows enforcement of orders in the district "in which the violation was found to occur[.]" 49 U.S.C. 42121(b)(5). According to the court, this is significant because a violation "has not been 'found to occur' until the Secretary issues a final order[.]" App000006. This wording, however, is not a persuasive basis to interpret the statute in a manner that eviscerates that the statutory command that reinstatement relief in preliminary orders is not stayed.

To begin with, the reference to "violation" in paragraph (5) can be understood to refer to the violation of the Secretary's order, not the statute itself. The sentence that refers to the "violation" states that "[w]henever any person has *failed to comply with an order* . . . ," the Secretary may bring an enforcement action in "the district in which the violation was found to occur[.]" The violation of the order—whether preliminary reinstatement or final—creates the complainant's need to file the enforcement action. In addition, the STAA statute contains similar language. STAA states that a civil action can be brought to enforce the order (interpreted as including preliminary reinstatement orders) in the district court "in which the violation occurred." 49 U.S.C. 31105(e). Given that this language does not limit enforcement of reinstatement relief in preliminary orders under STAA,

the language in paragraph (5) of AIR21 does not suggest AIR21 and Sarbanes-Oxley should be so limited either.

In sum, it is undisputed that the judicial enforcement and review provisions in paragraphs (4), (5), and (6) of AIR21 are less than clear. In concluding that judicial enforcement should be authorized, Judge Straub in *Bechtel* acknowledged that the statute appeared to be "internally inconsistent." 448 F.3d at 484–85 & n.2. Under such circumstances, the court's challenge is to identify a reading of the statute that harmonizes the inconsistencies to the greatest extent and attempts to give effect to key elements of the statute. Reading the statute to allow enforcement of post-investigation reinstatement in preliminary orders is a permissible construction of the ambiguous and imprecise cross-references. This is also the best reading, as it is the only one that gives effect to Congress's inclusion of the specific statutory provision to ensure the immediate effectiveness of post-investigation reinstatement relief.

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CONCLUSION

For the foregoing reasons, the Acting Secretary of Labor respectfully urges this Court to reverse the district court's decision.

Respectfully,

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COMBINED CERTIFICATIONS

1. Type-Volume, Typeface, and Type Styles Requirements. This brief complies with the type-volume requirements of Fed. R. App. P. 29(a)(5) & 32(a)(7)(B) because this brief contains 6,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word for Office 365, Times New Roman 14-point font.

2. Virus Check. I hereby certify that a virus detection program, Microsoft Windows Defender Antivirus, last updated on August 16, 2023, and that no virus was detected.

3. Bar Membership. As an attorney representing an agency of the United States, I am not required to be a member of the bar of this Court. *See* 3d Cir. L.A.R. 28.3, Committee Comments.

Dated: August 16, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Acting Secretary of Labor's Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 16, 2023. Service of the foregoing will be accomplished by the CM/ECF system for all participants in the case.

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