No. 10-5602

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECRETARY OF LABOR, Hilda L. Solis,

Plaintiff - Appellee

v.

TENNESSEE COMMERCE BANCORP, INC.;
TENNESSEE COMMERCE BANK,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The government stands ready to present oral argument to the extent that the Court believes oral argument would be helpful to its consideration of this matter.

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No. 10-5602

SECRETARY OF LABOR, Hilda L. Solis,

Plaintiff - Appellee

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TENNESSEE COMMERCE BANCORP, INC.;
TENNESSEE COMMERCE BANK,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Secretary of Labor brought this action in district court under the whistleblower protection provisions of the Sarbanes-Oxley Act. *See* 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)). The agency sought to enforce a preliminary administrative order finding that defendants Tennessee Commerce Bancorp, Inc. and its wholly

owned subsidiary, Tennessee Commerce Bank, (collectively, "TNCC") had retaliated against a whistleblower, Tennessee Commerce Bank's former chief financial officer George Fort, and ordering defendants to reinstate Fort. RE.1 (Compl.); RE.1-1 (Secy's Findings & Prelim. Order).[1] The district court accordingly had subject matter jurisdiction under 28 U.S.C. § 1331.[2]

On May 19, 2010, the district court issued a preliminary injunction requiring the immediate reinstatement of Fort. RE.9; RE.10. Defendants timely filed a notice of appeal the same day. RE.11. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

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[1] Pursuant to 6th Cir. R. 28(a), citations to record materials include the Record Entry Number (RE) in the district court's electronic docket, followed by the relevant page number(s).

[2] As explained below, at 36–37, although defendants view the issue here to affect the subject matter jurisdiction of the district court, it is more properly regarded as a question about the scope of a cause of action. *See*, *e.g.*, *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998) (absence of a valid cause of action does not implicate subject matter jurisdiction).

STATEMENT OF THE ISSUE

The Sarbanes-Oxley Act requires the Secretary of Labor to investigate whistleblower complaints and, if she finds reasonable cause to believe that a violation has occurred, to issue findings and a preliminary order requiring the employer to, *inter alia*, reinstate the employee.

The questions presented are:

1. Whether, under the Sarbanes-Oxley Act, the Secretary may seek judicial enforcement of a preliminary reinstatement order if an employer refuses to follow it.

2. Whether a statutory timing provision providing that preliminary orders be issued within 60 days of receiving an employee's complaint removes the Secretary's power to act after 60 days.

3. Whether defendants demonstrated that the Secretary failed to meet the minimum requirements of due process described by the Supreme Court in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

STATEMENT OF THE CASE

In 2008, George Fort, the former chief financial officer of defendant Tennessee Commerce Bank, filed a complaint with the Secretary of Labor, alleging that the bank and its parent company, defendant Tennessee Commerce Bancorp, had fired him for engaging in protected whistleblower activity under the Sarbanes-Oxley Act. RE.1-1 (Secy's Findings & Prelim. Order) at 1.

The Secretary investigated Fort's complaint, and in March 2010, concluded that there was "reasonable cause to believe" that Fort's "protected activity was a contributing factor in the adverse actions taken against him." *Id.* at 7. The Secretary issued a preliminary order requiring defendants, *inter alia*, to reinstate Fort to his former position. *Id.* at 7–8. Defendants filed objections to the Secretary's preliminary order and requested a hearing before an ALJ, RE.6-4, but refused to reinstate Fort. RE.2-2 (May 12, 2010 letter).

The Secretary filed this suit to compel defendants' compliance with her reinstatement order. RE.1 (Compl.) at 1, 5–6. On May 19, 2010, the district court (Haynes, J.) issued a preliminary injunction ordering defendants to immediately reinstate Fort to his former

position. RE.10. Defendants appeal that order, which this Court stayed pending appeal. Order of May 25, 2010.

STATEMENT OF THE FACTS

I. Statutory & Regulatory Background

The Sarbanes-Oxley Act, Pub. L. 107-204, 116 Stat. 745 (2002), was enacted to restore confidence in financial markets after massive corporate fraud, most famously at Enron and WorldCom, imperiled the American economy. The Act comprises "a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies." *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 9 (1st Cir. 2006).

Section 806 of Sarbanes-Oxley, 18 U.S.C. § 1514A, extended whistleblower protections to corporate insiders who report securities violations and shareholder fraud. *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (Senator Leahy) ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies."). It is thus unlawful for a publicly traded company to take adverse action against an employee who has engaged in protected whistleblower activities. *See* 18 U.S.C.

§ 1514A(a). An employee or other covered person who believes that he or she has been the subject of retaliation for whistleblowing may file a complaint with the Secretary. *See* 18 U.S.C. § 1514A(b)(1)(A).

To govern proceedings before the Secretary, Congress incorporated the existing rules and procedures of the aviation safety whistleblower provisions in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21 Act"), 49 U.S.C. § 42121(b). *See* 18 U.S.C. § 1514A(b)(2)(A) and (b)(2)(C). Under these procedures, the Secretary, through the Occupational Safety and Health Administration, will notify the employer of the allegations contained in a complaint and the substance of the evidence supporting the complaint. 49 U.S.C. § 42121(b)(1); 29 C.F.R. § 1980.104(a). If the complaint makes out a prima facie case of retaliation and if the employer fails to show by clear and convincing evidence that it would have taken the same action regardless of the employee's protected activity, the Secretary will commence an investigation to determine whether reasonable cause exists to believe that a violation has occurred. 29 C.F.R. § 1980.104(b), (d). That investigation includes the opportunity for the employer to obtain "notice of the substance of the

relevant evidence supporting the complainant's allegations as developed during the course of the investigation," and "to meet with the investigators to present statements from witnesses in support of its position, and to present legal and factual arguments." 29 C.F.R. § 1980.104(c), (e).

If, on the basis of the information gathered, the Secretary has reasonable cause to believe that a violation has occurred, she will issue findings and a preliminary order providing the relief prescribed under the statute, including reinstatement of the employee. 49 U.S.C. § 42121(b)(2)(A), (3)(B); 18 U.S.C. § 1514A(c); and 29 C.F.R. § 1980.105(a). Either the employer or the complainant then has 30 days to file objections to the preliminary order and request a hearing before an administrative law judge. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.106(a). Parties may seek review of the ALJ's decision with the Department of Labor's Administrative Review Board. 29 C.F.R. § 1980.110. The Board's decision, in turn, can be challenged directly in the appropriate U.S. Court of Appeals. 49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1980.112.

Crucially, an initial request for administrative review "shall not

operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. § 42121(b)(2)(A). Thus, as the Secretary's implementing regulations provide, "[t]he portion of the preliminary order requiring reinstatement will be effective immediately upon the [employer's] receipt of the findings and preliminary order, regardless of any objections to the order." 29 C.F.R. § 1980.106(b)(1). Moreover, if an aggrieved party chooses not to administratively challenge the Secretary's findings and preliminary order, that order "shall be deemed a final order that is not subject to judicial review." 49 U.S.C. § 42121(b)(2)(A).

The provision chiefly at issue in this case, 49 U.S.C. § 42121(b)(5), provides the Secretary with a cause of action to obtain district court enforcement of her orders. It states:

> Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

Ibid. The Secretary has consistently interpreted this provision to permit her to obtain civil enforcement of preliminary reinstatement

orders. *See* 67 Fed. Reg. 15,454 at 15,461 (Apr. 1, 2002) (interim final rules implementing the AIR21 whistleblower protectection provisions); 29 C.F.R. § 1979.113 (codified AIR21 judicial enforcement rule); 29 C.F.R. § 1980.113 (codified Sarbanes-Oxley judicial enforcement rule).

II. Factual Background[3]

George Fort was hired by TNCC in 2004, and was promoted to CFO in September 2005. RE.1-1 at 2. Three months after Fort's promotion, the bank became publicly traded on the NASDAQ stock exchange. *Ibid.* The bank thus became subject to the rules and regulations of the Securities and Exchange Commission (SEC). *Ibid.* Fort, as CFO, was the bank's official SEC compliance officer and accordingly was "responsible for identifying policies and procedures that would bring Tennessee Commerce Bank into compliance with SEC guidelines." *Ibid.*

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[3] The factual discussion is drawn from the Secretary's findings, which form the basis of her preliminary order. *See* RE.1-1. It is appropriate to focus on the Secretary's findings, given that the district court's task in this proceeding is "not to review the evidence but to simply ascertain whether the procedures followed by the Secretary in issuing the ALJ order satisfied due process." *See Martin v. Yellow Freight Sys., Inc.*, 793 F. Supp. 461 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1201 (2d Cir. 1993) (action to enforce an interim reinstatement order).

All early indications were that Fort was fulfilling those duties satisfactorily. In January 2006, bank CEO Arthur Helf wrote Fort a memo praising "the fine job [Fort] was doing by handling a myriad of details and procedures necessary to bring everything in line for the SEC, Tennessee Department of Financial Institutions (TDFI) and Federal Deposit Insurance Corporation (FDIC), as well as facilitating Tennessee Commerce Bank's year end closing." *Ibid.* In August 2006, Helf sent Fort another memo praising his performance, and increased his salary from $110,000 to $150,000. *Ibid.*

But starting in January 2007, Fort began identifying a series of "internal control issues" with respect to the bank's financial management.[4] *Id.* at 3. Fort recommended a number of specific measures to help resolve the issue, including "position descriptions" or "job descriptions" that would "clearly delineate authority and

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[4] Under SEC rules, publicly traded companies must maintain adequate "internal control over financial reporting." 17 C.F.R. § 240.13a-15(a). Such internal control requires processes designed by the company to "provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles," including procedures to maintain adequate financial records and ensure that transactions are made with proper authorization. *Id.* § 240.13a-15(f)

responsibility for all areas that impact the accuracy of the financial reports that I certify." *Id.* at 3, 4. Fort complained in particular that the bank's chief administrative officer, Lamar Cox, had responsibilities that should have been vested with the CFO. *Id.* at 3. Fort continued to raise these internal control issues with other senior management throughout the remainder of his tenure at the bank. *Id.* at 3–5.

Later that year, Fort also raised insider trading concerns related to a stock sale by CEO Helf. Those concerns related to the Board of Directors's decision on June 1, 2007, to give substantial raises to senior management at the bank—Helf, Cox, Fort, and bank president Mike Sapp—more than doubling each of their salaries. *Id.* at 2. Before those raises became public, Helf informed Fort that he wanted to exercise stock options worth over $1 million that week, and asked Fort whether he saw any problems with the sale. *Id.* at 2-3. Fort warned Helf that the transaction could violate restrictions on insider trading, because the pay increases were not yet public, and Helf knew that a number of board members were going to resign to protest the raises, potentially causing the bank's stock price to drop. *Id.* at 3. Helf dismissed Fort's concerns, telling Fort that the sale had been approved by outside

counsel.[5] *Ibid.* After the pay raises became public, three board members did indeed resign in protest.[6]

Fort continued to raise concerns about the firm's SEC compliance practices. In September 2007, Fort emailed bank CEO Helf and president Sapp, saying that based on his discussions with the bank's internal and external auditors the bank would not be able to pass SOX compliance. *Ibid.* Fort faulted the bank's file maintenance procedures, complaining that they were "completely out of my control." *Ibid.*

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[5] According to TNCC's public SEC filings, Helf exercised his stock options on June 13, 2007, obtaining 88,372 shares at $5 per share. *See* Tennessee Commerce Bancorp, Inc., Statement of Changes in Beneficial Ownership (Form 4) (Jun. 14, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1323033/000100579407000316/xslF345X02/primary_doc.xml. Helf had sold 50,000 of his shares for $27.07 a day earlier. Tennessee Commerce Bancorp, Inc., Statement of Changes in Beneficial Ownership (Form 4) (Jun. 15, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1323033/000100579407000318/xslF345X02/primary_doc.xml.

[6] TNCC announced the raises in a June 26, 2007, SEC filing. *See* Tennessee Commerce Bancorp, Inc., Current Report (Form 8-K) (Jun. 26, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1323033/000100579407000345/tcb8kjune262007.htm. The three board members resigned on July 18, 2007, citing "disagreement with recent decisions by the Company's Board of Directors with respect to matters of executive compensation." *See* Tennessee Commerce Bancorp, Inc., Press Release (Jul. 18, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1323033/000115752307006945/a5450175ex99_1.htm.

By November 2007, senior management at the bank began to express private concerns about Fort's activities. In a memo to file, Helf noted that he had met with outside counsel to discuss his dissatisfaction with Fort's behavior and his concerns with Fort's SEC expertise. *Id.* at 4. He also noted that Fort had alleged that he, Helf, had violated SEC regulations by making trades when Fort was out of the office. *Ibid.* At the end of the memo Helf stated, "George has a serious problem." *Ibid.*

Soon afterwards, the bank's internal auditors identified suspicious activities in employee accounts, and informed Fort of their findings. *Ibid.* Following these findings, Fort told Helf and Sapp in January 2008 that he would not be able sign the bank's annual SEC filing.[7] *Ibid.* Fort identified a range of concerns relating to "internal controls, employee accounts, insider trading, wire transfers, check

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[7] Under SEC rules mandated by the Sarbanes-Oxley Act, 15 U.S.C. § 7241, a company's principal executive and financial officers must certify, among other things, that the information in financial reports is accurate and complete, that the company's internal controls are adequate, and that they have informed the company's auditors and independent audit committee of any "significant deficiencies in the design or operation" of those internal controls. *See generally* 68 Fed. Reg. 36,636 (Jun. 18, 2003).

kiting and the fabrication of Asset Liability Committee ... minutes." *Ibid.*; *see also id.* at 5 (describing letter from Fort's personal counsel to bank reiterating that Fort could not certify the SEC filings because of improper activities and material weaknesses in internal control structure).

Fort eventually concluded that despite his best efforts, the bank had failed to ensure SEC compliance by having in place adequate internal controls. Fort accordingly announced to Helf and Sapp that he would be raising his concerns with the bank's independent audit committee. *Id.* at 4. According to Fort, Helf responded, "[I]t would not be a good idea for you to go [to] the audit committee." *Ibid.* Fort insisted on following the company's whistleblower policy, and shared his concerns with the bank's external auditors and the audit committee. *Id.* at 4-5. After the audit committee meeting, Fort informed the bank's counsel that he would be meeting with the bank's regulators, the FDIC and the TDFI. *Id.* at 5. Before Fort met with the regulators, the bank's chief administrative officer, Lamar Cox, sent two emails to the bank's internal auditors about Fort. In one, Cox said that he was "in a 'get even' mode and I am enjoying every minute of it." *Id.* at 6.

On March 6, 2008, Fort and his personal counsel met with the FDIC to discuss the issues he had identified with the bank's internal controls. *Id.* at 5. The next day, March 7, TNCC placed Fort on administrative leave. *Ibid.* Fort filed a whistleblower retaliation complaint against TNCC with the Secretary of Labor on April 4, 2008. *Id.* at 1. On May 5, 2008, TNCC fired Fort. *Id.* at 5.

On April 17, 2008, the bank's auditors confirmed Fort's concerns, identifying two material weaknesses in the bank's internal controls. *Id* at 5, 6–7.

III. Proceedings Below

1. After Fort filed his whistleblower complaint, the Secretary (through OSHA) conducted a detailed investigation of Fort's allegations. During that investigation, the Secretary gave TNCC her initial findings, and the bank met with investigators and "submitted additional arguments and documentation." RE. 1-1 at 7.

On March 17, 2010, the Secretary issued her findings and preliminary order. She concluded, based on the factual findings above, that Fort had engaged in a range of protected activity, that the "temporal proximity of the adverse actions to [Fort's] protected activity,

culminating in his meeting with the FDIC on March 6, 2008 creates a strong inference of retaliation," and that there was "evidence of animus and intent to retaliate against [Fort]." *Id*. at 6.

The Secretary rejected the bank's competing version of events. The bank claimed that Fort was placed on leave by a vote of the board of directors on March 7. But the Secretary found evidence that the vote was a mere formality: the bank had submitted a Form 8-K announcing Fort's leave to the SEC's EDGAR system five hours before the board meeting even started. *Ibid.* The bank also claimed that the board of directors decided to fire Fort on April 22, 2008. *Ibid.* But again, there was evidence that the decision was a foregone conclusion. Nearly a month earlier, Chief Administrative Office Lamar Cox told the bank's internal auditor that the bank wanted "to take our time to search for the right CFO this time!!" *Ibid.*

The bank also claimed that it placed Fort on administrative leave to allow him to focus his full attention on investigating the bank's internal controls. *Id.* at 5. That contention, however, was belied by the fact that Fort "could not access Tennessee Commerce Bank's computer system or information necessary for him to assist the independent

auditor's ... investigation" and had been "instructed to have no contact with any Tennessee Commerce Bank employee without going through Mr. Helf, Mr. Sapp or Mr. Cox, as the acting CFO." *Ibid.*

The Secretary found no evidence to support TNCC's defense that it would have fired Fort regardless of his protected activity because Fort was negligent in his duties. *Id.* at 6. The bank's external auditors denied the bank's claim that they had said Fort"grossly neglected his duties as SOX compliance officer and that [he] displayed poor management and communications skills." *Ibid.* And the bank's assertion that Fort "could not have believed that the complained-of conduct violated securities laws" was contravened by the fact that the bank's auditors had actually found suspicious activity in employee accounts and shortcomings in the bank's internal controls. *Id.* at 6-7.

The Secretary accordingly issued a preliminary order requiring TNCC to, *inter alia*, "immediately reinstate [Fort] to his former position" and pay compensatory damages. *Id.* at 7. TNCC filed objections to the order and requested a hearing before an ALJ. RE.6-4. That filing automatically stayed all provisions of the preliminary order, except the portion requiring preliminary reinstatement. *See* 29 C.F.R.

§ 1980.106(b)(1). Although the Secretary's rules provide—in accord with the provisions of the AIR21 Act—that the reinstatement order "will be effective immediately upon the [employer's] receipt of the findings and preliminary order, regardless of any objections to the order," *ibid.*, TNCC refused to reinstate Fort.

2. The Secretary filed suit against TNCC under the AIR21 Act's civil enforcement provision, 49 U.S.C. § 42121(b)(5), as incorporated into the Sarbanes-Oxley Act. Defendants moved to dismiss the suit, arguing that the § 42121(b)(5) did not give the district court subject matter jurisdiction to enforce the Secretary's preliminary reinstatement order, and that the Secretary's investigation had not met minimum constitutional due process requirements. *See* RE.6 (Def's Mem. in Support of Mot. to Dismiss). The Secretary moved for a temporary restraining order and a preliminary injunction enforcing the order. *See* RE.3 (Sec'ys Mem. in Support of Mot. for TRO & PI).

The district court denied defendant's motion to dismiss, and issued the requested preliminary injunction. RE.9 (Mem.). The district court held that it could properly hear the case under the AIR21 Act's civil enforcement provision, reasoning that "[d]espite the statute's

ambiguity, an examination of all of its provisions demonstrates that Congress intended to provide an enforcement mechanism in Section 42121(b)(5) for both final orders and preliminary orders." RE.9 (Mem.) at 14-15. The court cited in particular "the language of 49 U.S.C. § 42121(b)(2)(A) that objections to a preliminary order cannot stay enforcement of the preliminary order." *Id.* at 16. This mandate, the court found, "would be rendered nugatory under the Defendants' argument that courts lack the authority to enforce preliminary orders of reinstatement." *Ibid.* The court accordingly adopted the Secretary's interpretation as "most commensurate with the overall statutory structure and stated goals of the statute." *Id.* at 15.

The district court also rejected TNCC's due process arguments. It concluded that the Secretary "provided ample notice of the specific factual allegations at issue, her investigator's report and shared the Department's initial findings with the Defendants who presented evidence and extensive arguments to the Secretary's representatives." *Id.* at 21. The district court also determined that the Secretary had made an adequate showing to support the issuance of a preliminary injunction. *Id.* at 21–23. This appeal followed.

SUMMARY OF ARGUMENT

I. The Sarbanes-Oxley Act, incorporating a provision of the AIR21 Act, requires the Secretary of Labor to investigate whistleblower complaints and, if she finds reasonable cause to believe that a violation has occurred, to issue findings and a preliminary order requiring the employer to reinstate the employee.

Congress has clearly indicated that preliminary reinstatement orders are not to be stayed during the administrative review process, so that those orders are immediately effective. But the Secretary only has one possible way to enforce such orders: filing a civil action in district court. If the Secretary is denied that remedy, an employer could effectively stay the order and avoid any adverse consequences simply by ignoring it, as defendants have done here. Even more troubling, the bank's preferred reading of the statute—which would permit judicial enforcement only of final orders issued at the conclusion of an administrative appeals process—would allow an employer to avoid complying with *any* order of the Secretary simply by declining to appeal it administratively, and then ignoring the order once it is "deemed" final.

Unsurprisingly, the statute does not require these results. To the contrary, a review of the statutory text, taking into account all of its provisions, compels the conclusion that the Secretary may file a suit to enforce preliminary reinstatement orders issued under the Sarbanes-Oxley Act. That conclusion is buttressed by the background against which Congress was legislating when it passed the Sarbanes-Oxley Act. Before Congress enacted Sarbanes-Oxley, which incorporated the judicial enforcement provision of the AIR21 Act, the Department of Labor had interpreted that provision to permit judicial enforcement of preliminary reinstatement orders. Accordingly, under *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978), Congress is presumed to have been aware of the Department's interpretation of § 42121(b)(5), and to have adopted that interpretation when it incorporated that provision by reference. That conclusion is further supported by the legislative history of the AIR21 Act and the Sarbanes-Oxley Act.

II. TNCC's argument (Appellant's Br. at 36–39) that the preliminary order here is not valid because it was issued after the expiration of a statutory 60-day time frame is at odds with Supreme Court precedent. The Supreme Court has held that "if a statute does

not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). The statute here specifies no such consequence, and this argument should accordingly be rejected.

III. TNCC's due process claims are similarly unavailing. As the district court recognized, the Secretary gave the bank ample notice of the employee's allegations and the substance of the relevant supporting evidence, and multiple opportunities to submit written responses, to present rebuttal witnesses, and to meet with the OSHA investigators and other Labor Department officials. Thus, the Secretary's investigation readily met the due process requirements described in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

STANDARD OF REVIEW

The propriety of a preliminary injunction is generally reviewed for abuse of discretion. *Samuel v. Herrick Memorial Hospital*, 201 F.3d 830, 833–34 (6th Cir. 2000). Appellants, however, have not challenged the district court's ultimate decision to issue a preliminary injunction, and have instead focused on threshold legal issues. These issues are

reviewed *de novo*. *See United States v. Parrett*, 530 F.3d 422, 429 (6th Cir. 2008) ("We review questions of statutory interpretation de novo."); *United States v. Moncivais*, 492 F.3d 652, 658 (6th Cir. 2007) (due process claims reviewed *de novo*).

ARGUMENT

I. The Sarbanes-Oxley & AIR21 Acts Provide A Cause Of Action For District Court Enforcement Of Preliminary Reinstatement Orders.

Statutory interpretation begins with a review of the relevant text, viewing the statute "as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *See Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992).

The key provisions here, paragraph (5) of § 42121(b), which is incorporated by the Sarbanes-Oxley Act, states:

> Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order.

The question here is whether this provision permits the Secretary of

Labor to bring a civil action in district court to enforce preliminary reinstatement orders, *i.e.* whether such an order is "an order issued under paragraph (3)" within the meaning of paragraph (5).

Three other provisions of § 42121(b) are relevant here. Paragraph (2), which defines the circumstances in which a preliminary reinstatement order is issued, provides:

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

49 U.S.C. § 42121(b)(2)(A). Paragraph (3)(A) requires the Secretary to issue a "final order" after completion of the agency appeal process. *Id.* § 42121(b)(3)(A). And paragraph (3)(B)—which is cross-referenced in paragraph (2)—describes what remedies will be included as part of preliminary and final orders. *Id.* § 42121(b)(3)(B).

1. Paragraph (5)'s reference to orders "issued under paragraph (3)" is ambiguous when read in isolation. As the district court concluded, preliminary orders can reasonably be described as "issued under paragraph (3)" on a straightforward reading of the statutory text. *See* RE.9 (Mem.) at 14. "Under"—the key term in this phrase—is most pertinently defined as "in accordance with (some regulative power or principle)." The Oxford Compact English Dictionary 950 (2nd ed. 1998).[8] Preliminary orders are plainly issued "in accordance with" both paragraph (2) and paragraph (3): while paragraph (2) defines the circumstances under which a preliminary order is issued, that paragraph requires the preliminary order to "provid[e] the relief prescribed by paragraph (3)(B)." 49 U.S.C. § 42121(b)(2)(A).

TNCC suggests that Congress could have made even clearer that preliminary reinstatement orders are judicially enforceable by expressly referencing both paragraph (2) and paragraph (3) in

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[8] *See also* Random House College Dictionary 1430 (rev. ed. 1975) ("in accordance with: *under the provisions of the law*"). *See also United States v. One TRW, Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 427 (6th Cir. 2006) ("Where ... no statutory definitions exist, courts may refer to dictionary definitions for guidance in discerning the plain meaning of a statute's language.").

paragraph (5). And as TNCC points out, Congress has been clearer in other statutes. *See* Appellants' Br. at 22–23 (citing the Federal Rail Safety Act, 49 U.S.C. § 20109(d)(2)(A), and the Surface Transportation Assistance Act, 49 U.S.C. § 31105(e)). But Congress could have also removed all doubt in § 42121(b) by modifying paragraph (5) to refer only to "final orders" or to "orders issued under paragraph 3(A)." In short, the scope of the phrase "issued under paragraph (3)" is ambiguous when read in isolation.

2. The ambiguity in paragraph (5), however, is readily resolved by examining the rest of § 42121(b). When read as a whole, that provision clearly permits the Secretary to seek judicial enforcement of preliminary reinstatement orders.

Paragraph (2) permits a party aggrieved by the Secretary's preliminary order to seek administrative review by filing objections and requesting an ALJ 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.* Thus, as the Secretary's regulations indicate, Congress intended that "[t]he portion of the preliminary order requiring reinstatement

will be effective immediately ... regardless of any objections to the order." 29 C.F.R. § 1980.106(b)(1).

The only way this mandate can be effective, however, is for paragraph (5) to be read to allow judicial enforcement of preliminary reinstatement orders; the Secretary possesses no other means of compelling compliance. A contrary conclusion would mean that despite the statute's clear denial of a stay, an employer could effectively stay the order by ignoring it, as TNCC had done here, and avoid any adverse consequences. It is axiomatic that courts should "mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *See Lake Cumberland Trust*, 954 F.2d at 1222. As the district court recognized, TNCC's reading of the statute would "effectively eliminate the reinstatement remedy of the preliminary order that Congress deemed necessary to protect a whistleblower employee from a demonstrated violation" of Sarbanes-Oxley. RE.9 (Mem.) at 16. This Court should avoid a reading of paragraph (5) that would leave the Secretary without any remedy to vindicate Congress's intent.

Paragraph (2) also provides that if the employer does not

administratively challenge the preliminary order, it "shall be deemed a final order that is not subject to judicial review." 49 U.S.C. § 42121(b)(2)(A). Such orders—which are "deemed" final because they were not administratively challenged—must be judicially enforceable. A contrary conclusion would lead to an absurd result: an employer could avoid having to comply with any order simply by declining to appeal it administratively, and then ignoring the order once it is "deemed" final. Congress surely did not intend to enact a loophole that would swallow the statute entirely.

TNCC's reading of the statute, however, would produce exactly that result. TNCC argues that the paragraph (5)'s reference to orders "issued under (b)(3)" only encompasses"final orders" issued under (b)(3)(A), *i.e.*, orders issued the end of the administrative appeals process. *See* Appellant's Br. at 16–18. But if that argument were correct, then orders that are "deemed" final by operation of paragraph (2) would not be judicially enforceable, because such orders would have no connection to paragraph (3)(A). The only reading of paragraph (5) that makes sense of the "deemed final" provision is one that permits judicial enforcement of preliminary orders, even though they are

authorized by paragraph (2). *See United States v. Ninety Three Firearms*, 330 F.3d 414, 423 (6th Cir. 2003) ("[W]here a statutory provision is ambiguous, our 'perception that a particular result would be unreasonable' must play an important role in our interpretation process." (quoting *Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987))).

3. The language of § 42121(b), taken as a whole, demonstrates that the district court's judgment should be affirmed. But Congress's intent to permit judicial enforcement of preliminary orders is confirmed by the fact that the Secretary had issued a definitive interpretation of the AIR21 Act's whistleblower provisions before Congress passed the Sarbanes-Oxley Act.

As explained above, the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, incorporates the whistleblower complaint procedures of the AIR21 Act, 49 U.S.C. § 42121(b). Congress enacted the AIR21 Act in 2000. *See* Pub. L. 106-181, 114 Stat. 145 (2000). On April 1, 2002—before Congress enacted Sarbanes-Oxley—the Department of Labor issued "interim final" regulations implementing the AIR21 whistleblower provisions. 67 Fed. Reg. 15,454 (Apr. 1, 2002). Significantly, in those

regulations the Department interpreted the judicial enforcement provision in the AIR21 Act—paragraph (5) of § 42121—to permit the Secretary to file a civil action to enforce preliminary and final orders. *See* 67 Fed. Reg. at 15,461. (That provision was unchanged by the final rule. *See* 68 Fed. Reg. 14,099 (Mar. 21, 2003); 29 C.F.R. § 1979.113.)

It was against this background that Congress enacted the Sarbanes-Oxley Act—which expressly incorporated § 42121(b)—in July 2002. As the Supreme Court has explained, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). And where, as 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." *Id.* at 581. Thus, when Congress enacted the Sarbanes-Oxley Act, it was presumed to have been aware of the Department's interpretation of paragraph (5), and to have adopted that interpretation when it incorporated that provision by reference.

This presumption has particular force here, because Congress

purposefully chose to incorporate the AIR21 Act into the statute, rather than creating new whistleblower complaint procedures from scratch. *See* S. Rep. No. 107-146, at 13 (2002) (noting that SOX adopts "the same procedures and burdens of proof now applicable in the whistleblower law in the aviation industry"); *id.* at 26 (additional views) ("We believe that protections for corporate whistleblowers should track those already existing for airline employees."); *compare Lorillard*, 434 U.S. at 581–82 (presumption "particularly appropriate" where Congress exhibited "selectivity ... in incorporating provisions"). Moreover, at the time Congress passed the Sarbanes-Oxley Act, the agency's interpretation of paragraph (5) was likely the only definitive interpretation that had been issued. *Compare INS v. Phinpathya*, 464 U.S. 183, 200 (1984) (Congress presumed to have adopted the reading of "the only Court of Appeals that had occasion to interpret" the language at issue).

The fact that the Department of Labor's rules were "interim" makes no difference to this analysis. The D.C. Circuit addressed similarly "interim final" rules in *Career College Ass'n v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996). In *Riley*, the Higher Education Act required the

Department of Education to issue rules "in final form" by a certain date. *Id.* at 1267. By that date, however, the Department had issued an "interim final rule," which contemplated the receipt of comments and possible amendment of the rules. *Ibid.* In challenging those regulations, plaintiffs argued that the regulations could not have been "in final form" because they were expressly described as "interim" and could possibly be amended. *Id.* at 1268. The D.C. Circuit rejected the argument, concluding that "[t]he key word in the title 'Interim Final Rule,' unless the title is to be read as an oxymoron, is not interim, but *final*." *Ibid.* The court thus reasoned, "'[i]nterim' refers only to the Rule's intended duration—not its tentative nature." *Ibid.* The Department of Labor's "interim final" rule was effective immediately, *see* 67 Fed. Reg. at 15,454, and under *Riley,* provided the agency's definitive interpretation of the statute.

4. The above discussion confirms the Secretary's reading of § 42121(b). But the legislative history of the AIR21 Act and the Sarbanes-Oxley Act, which illuminate the purposes of whistleblower protection and preliminary reinstatement provisions, provide additional support.

The legislative history of the AIR21 Act makes clear that Congress regarded preliminary reinstatement to be a crucial part of an effective whistleblower protection scheme. The AIR21 whistleblower protection provisions were modeled on those contained in the Surface Transportation Assistance Act, 49 U.S.C. § 31105(b)(2) (1999).[9] *See* H.R. Rep. 106-167(I) (1999), 1999 WL 355951, *85. Years before Congress passed the AIR21 Act, the Supreme Court examined the legislative intent behind the preliminary reinstatement provision in the Surface Transportation Assistance Act:

> 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. The longer a discharged employee remains unemployed, the more devastating are the consequences to his personal financial condition and prospects for reemployment. Ensuring the eventual recovery of backpay may not alone provide sufficient protection to encourage reports of safety violations.

Brock v. Roadway Express, Inc., 481 U.S. 252, 258–59 (1987).

This decision, and the possibility of requiring preliminary

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[9] These provisions were later amended by § 1536 of Pub. L. 110-53, 121 Stat. 266, 464–67 (2007), though not in a manner that is material to this case. *See* 49 U.S.C. § 31105(b)(2)(A).

reinstatement, were highlighted in the hearings that led to the passage of whistleblower protection provisions of the AIR21 Act. During hearings for a set of predecessor airline whistleblower protection bills, the sponsor of one of those bills introduced a report by the Administrative Conference of the United States. *See Hearings on Aviation Whistleblower Protection Before The Subcomm. on Aviation, Comm. on Public Works and Transportation*, H. Rep. Doc. No. 100-54, at 5 (Apr. 27, 1988) (testimony of Rep. Kleczka).[10] That report highlighted the preliminary reinstatement provision of the Surface Transportation Assistance Act, and the Supreme Court's decision upholding that provision. *See id.* at 108, 123, 140. Indeed, two of the three bills introduced during the 1988 hearings contained some form of immediate preliminary reinstatement. *Id.* at 31 (H.R. 4023, 100th Cong. (1988)); *id.* at 44 (H.R. 4113, 100th Cong. (1988)).

Given that the AIR21 Act provides that preliminary reinstatement orders were to be effective immediately, Congress plainly had this background in mind. *See* 49 U.S.C. § 42121(b)(2)(A).

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[10] These hearings were specifically referenced in the committee report for the AIR21 Act. *See* H.Rep. No. 106-167(I), at 85 (1999).

Thus, as Judge Straub recognized in the Second Circuit's decision in *Bechtel,* the preliminary reinstatement provision in the AIR21 Act "reflect[s] Congress's sense that timely reinstatement is essential to prevent the chilling effects of employer retaliation." *Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469, 485 (2d Cir. 2006) (Straub, J., dissenting).

By the time Congress enacted the Sarbanes-Oxley Act, it had already recognized the importance of preliminary reinstatement. The legislative history of Sarbanes-Oxley Act further demonstrates Congress's desire to put into place effective whistleblower protections to prevent massive and complex corporate fraud. The Senate committee report for that portion of the Sarbanes-Oxley Act encompassing the whistleblower protection provision (§ 806), 18 U.S.C. § 1514A, emphasized the importance of whistleblowers to the Act's enforcement scheme: "[O]ften, in complex fraud prosecutions, ... insiders are the only firsthand witnesses to the fraud. They are the only people who can testify to 'who knew what, and when,' crucial questions not only in the Enron matter but in all complex securities fraud legislation." S. Rep. No. 107-146, at 10 (2002). This legislative history indicates that

Congress intended to create a procedure that was protective of such whistleblowers.

Although, as *amicus* notes (AABD Br. at 14–16), during the legislative drafting process Congress made changes to the bill in an effort to limit frivolous claims against employers, Congress expressed no intent to restrict the powers of the Secretary where there was "reasonable cause to believe" a company had retaliated against a company. And, in any event, the key point here is that TNCC's reading of § 42121(b)(5) would, as explained above, create substantial loopholes in Sarbanes-Oxley's whistleblower protection scheme. The weight of legislative history counsels against such a result.

5. TNCC's arguments are unavailing. First, the bank erroneously describes paragraph (5) of § 42121(b) as a "jurisdictional statute," and thus mistakenly argues that "any uncertainty or ambiguity must be resolved *against* a finding of federal jurisdiction." Appellants' Br. at 31. In fact, 28 U.S.C. § 1331 ("arising under" jurisdiction) vested the district court with jurisdiction over this suit.[11]

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[11] The fact that the second sentence of paragraph (5) uses the word "jurisdiction" makes no difference. 49 U.S.C. § 42121(b)(5) ("In

(continued...)

As this Court has explained, "[a] claim arises under federal law when 'the plaintiff's statement of his own cause of action shows that it is based upon [federal] laws or [the federal] Constitution.'" *Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 548 (6th Cir. 2006) (quoting *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). The court stated that there are only two narrow exceptions to that rule. "A plaintiff's claim that federal law entitles him to relief is insufficient to create subject-matter jurisdiction where (1) 'the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction' or (2) the 'claim is wholly insubstantial and frivolous.'" *Id.* at 548-49 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)).

The Secretary's claim is based on § 806 of the Sarbanes-Oxley Act, and neither of the narrow exceptions applies, so there is no

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[11](...continued)
actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages."). The Supreme Court addressed similar language in *Steel Co.*, and concluded that it did not limit the subject matter jurisdiction of the district court, but "merely specif[ied] the remedial powers of the court . . . to enforce the violated requirement." 523 U.S. at 90.

question that 28 U.S.C. § 1331 vested the district court with subject matter jurisdiction. The actual issue here is an ordinary question of statutory interpretation: whether 49 U.S.C. § 42121(b), as incorporated by the Sarbanes-Oxley Act, authorizes a cause of action to enforce preliminary reinstatement orders. *See Steel Co.*, 523 U.S. at 89 (absence of a valid cause of action does not implicate subject matter jurisdiction).

Second, TNCC argues that the Secretary's reading of paragraph (5) is contradicted by her reading of paragraph (4) of § 42121(b), which states: "Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals." 49 U.S.C. § 42121(b)(4)(A). As the bank notes, the Secretary reads paragraph (4) to permit direct review in the Court of Appeals only after the Secretary has issued a final order; a person aggrieved by a preliminary order may not seek direct appellate review. Appellants' Br. at 27–28. The bank suggests that Secretary is improperly reading the same phrase—"an order issued under paragraph (3)"—to refer to both final and preliminary orders for purposes of enforcement under paragraph (5), but only to final orders

for the purposes of paragraph (4). *See* Appellants' Br. at 27-28.

But there is nothing improper about the Secretary's interpretation. The phrase "an order issued under paragraph (3)" is ambiguous, and must be read in light of the statute as a whole. As explained, reading § 42121(b) as a whole leads to the conclusion that paragraph (5) permits judicial enforcement of preliminary orders. *See supra* at 26–29. By contrast, there is no indication anywhere in the statute that Congress intended to authorize immediate appellate review of preliminary reinstatement orders. To the contrary, the next sentence in paragraph (4) makes explicit reference to "final" orders, suggesting that Congress intended the direct review provision to have limited scope. 49 U.S.C. § 42121(b)(4)(A) ("The 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."). Moreover, interpreting the language in paragraph (4) to encompass only final orders does not result in any hardship for parties wishing to challenge preliminary orders: the statute clearly sets out an administrative review scheme for such orders. *Id.* § 42121(b)(2)(A); 29 C.F.R. § 1980.110

Third, plaintiffs rely heavily on Judge Jacobs' opinion in *Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469, (2d Cir. 2006). But Judge Jacobs' opinion has no precedential force, even in the Second Circuit, because no other judge joined his decision. Judge Leval concurred in the judgment, expressly declining to reach the question of judicial enforceability and instead concluding that the reinstatement order violated the company's due process rights, *id.* at 476–83, and Judge Straub dissented in full, *id.* at 483–90.

Moreover, Judge Jacobs' statutory interpretation was flawed, for the reasons described above. *See supra* at 25–32. He did not properly consider the meaning of the word "under" in § 42121(b)(5), instead assuming, erroneously, that preliminary orders are only issued "under" paragraph (2). *Id.* at 472–73. He failed to apply the well-established canon that statutes should be read to give meaning to all of their terms, and failed to give effect to Congress's clear intent that preliminary orders are to have immediate effect. *Id.* at 473–74. And he did not take into account that Congress was presumed to have adopted the Department of Labor's preexisting interpretation of § 42121(b)(5) when it incorporated that provision into the Sarbanes-Oxley Act. *See*

Lorillard, 434 U.S. at 580–81.

Instead of relying on these canons of statutory construction, Judge Jacobs, like TNCC here, cited three policy considerations to "buttress[]" his conclusion. *Bechtel*, 448 F.3d at 474; Appellants' Br. at 33–36. First, he reasoned that the fact a complainant may bring suit in district court and abandon his or her administrative claim if the Secretary fails to issue an order in 180 days "reduces any need for a judicial order." *Bechtel*, 448 F.3d at 474. Second, he noted that a preliminary order is based on "reasonable cause" and concluded that this was "a tentative and inchoate basis for present enforcement." *Ibid.* And, finally, he noted that immediate enforcement of orders as a whistleblower complaint proceeds through successive levels of administrative review "could cause a rapid sequence of reinstatement and discharge, and a generally ridiculous state of affairs." *Ibid.*

But neither of the other two judges on the *Bechtel* panel agreed with those considerations. As Judge Leval correctly noted:

> [E]ven if Judge Jacobs is correct that there are good reasons why a preliminary order should not be enforced, these considerations do not explain why Congress would provide that a preliminary order is not stayed if, despite the statute's denial of a stay, the employer without adverse consequences may effectively stay the order simply by

declining to obey it.

Bechtel, 448 F.3d at 478 (Leval, J., concurring in the judgment); *see also id.* at 487 (Straub, J., dissenting) ("Congress has made clear that it wants employees reinstated *while*, not after, the administrative process goes forward."). Judge Leval also agreed with Judge Straub's assessment that Judge Jacobs's arguments were "overstated." *Id.* at 478; *see also id.* at 487 (Straub, J., dissenting).

Thus, while both TNCC and *amicus* highlight Judge Jacobs's argument that immediate enforcement of preliminary orders is inappropriate because it might result in a "rapid sequence of reinstatement and discharge," the two other judges on the panel rejected that argument. As Judge Straub noted, there was "no dispute ... that Congress provided for immediate reinstatement regardless of whether the employee ultimately prevailed." *Id.* at 487 n.4. And, as Judge Straub concluded, "the scenario Judge Jacobs presents is hardly more 'ridiculous' than a statutorily mandated preliminary order that is utterly unenforceable." *Ibid.*

For the reasons explained above, the statutory text, taking into account all of its provisions, and buttressed by the regulatory

background against which Congress was legislating when it passed the Sarbanes-Oxley Act, compels the conclusion that the Secretary may file a suit to enforce preliminary reinstatement orders.

II. The Failure To Meet A Statutory Timing Provision Does Not Deprive The Preliminary Order Of Legal Force.

TNCC argues that the preliminary order here is not valid because it was issued more than 60 days after the Secretary received George Fort's complaint. Appellants' Br. at 36–39. The argument is based on the observation that § 42121(b)(2)(A) states that "[n]ot later than 60 days after the date of receipt of a complaint filed ... the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings."

Assuming *arguendo* that this provision contemplates the issuance of a preliminary order within 60 days, rather than simply the commencement of an investigation, TNCC's argument is at odds with Supreme Court precedent. The Court has "expressed reluctance 'to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when

important public rights are at stake.'" *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)). This is particularly so where the agency's responsibility, as here, is "substantial," and the "ability to complete it within [the deadline] is subject to factors beyond [the agency's] control." *Brock v. Pierce County,* 476 U.S. at 260–61. The Supreme Court has accordingly held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). The statute here specifies no such consequence, and TNCC's argument should accordingly be rejected.

The Supreme Court has repeatedly rejected arguments that the failure to comply with statutory timing provisions warrants invalidation of government action. *See Barnhart*, 537 U.S. at 158; *James Daniel Good Real Property*, 510 U.S. at 63; *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990); *Brock v. Pierce County*, 476 U.S. at 265. Indeed, in *Barnhart* the Court noted that since *Brock v Pierce County*, it had never "construed a provision that the Government

'shall' act within a specified time, without more, as a jurisdictional limit precluding action later." 537 U.S. at 158.

TNCC's assertion that these precedents do not apply because the statute here requires the supposedly serious remedy of reinstatement, rather than the mere payment of money, is unavailing. Appellants' Br. at 37. This distinction has never been the law. Indeed, *Montalvo-Murillo* involved the government's failure to comply with the prompt hearing provision of the Bail Reform Act. 495 U.S. at 716. But despite the seriousness of the result—the continued pretrial detention of a criminal suspect—the Court concluded that the failure to meet the timing provision did not "defeat the Government's authority to seek detention of the person charged." *Id.* at 717.

III. The Secretary's Investigation Fulfilled The Requirements Of Due Process.

1. TNCC's due process claims are similarly unavailing. In the context of orders requiring immediate reinstatement of whistleblower employees, the Supreme Court has stated that

> minimum due process for the employer ... requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal

> witnesses. The presentation of the employer's witnesses need not be formal, and cross-examination of the employee's witnesses need not be afforded at this stage of the proceedings.

Brock v. Roadway Express, Inc., 481 U.S. 252, 264 (1987). Due process in this context requires only that such "prereinstatement procedures establish a reliable 'initial check against mistaken decisions'" and that "complete and expeditious review is available." *Id.* at 263 (quoting *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 545 (1985)).

As the district court recognized, and as the preliminary order makes clear, the Secretary gave the bank ample notice of the employee's allegations and the substance of the relevant supporting evidence, and multiple opportunities to submit written responses, to present rebuttal witnesses, and to meet with the OSHA investigators and other Labor Department officials. *See* RE.9 (Mem.) at 21; RE.1-1 (Secy's Findings & Prelim. Order) at 7.

TNCC's contentions lack merit. The bank identifies only one supposed flaw: that it "was not provided copies of statements by Fort or statements from any other witnesses supporting his allegations." Appellants' Br. at 41. The bank contends that this failure warrants dismissal of the suit, because Judge Leval in *Bechtel* based his

conclusion that the agency had failed to meet due process requirements in part on its failure to provide witness statements. *See Bechtel*, 448 F.3d at 481 (Leval, J., concurring). But Judge Leval found that witness statements were required because the Secretary had failed to provide any other notice of supporting evidence. *Ibid.* *Roadway Express* does not require copies of witness statements, only "notice of the substance of the relevant supporting evidence." *Roadway Express*, 481 U.S. at 264. Here, unlike in *Bechtel*, the Secretary provided TNCC with its initial findings, which put the bank on notice of the substance of evidence against it. RE.1-1 at 7.

TNCC's allegation that it did not receive "a summary of the testimony of auditors regarding Fort's performance" fares no better. Appellant's Br. at 41. The bank put its own auditors's views at issue: it attempted to justify its actions by claiming that the bank's external auditors had been critical of Fort. *See* RE.9 (Mem.) at 6. The Secretary simply pointed out that the auditors had denied that assertion; there was no more "substance" than that to reveal. *Ibid.* And the bank asserts in its brief that they did not actually argue that the auditors had told them about Fort's performance. Appellants' Br. at 41 n.14. If

that is true, then the auditor's views about Fort's performance were not relevant at all, since the Secretary had only relied on them to rebut the bank's defense.

Moreover, as noted above, due process in this context only requires that "prereinstatement procedures establish a reliable 'initial check against mistaken decisions.'" *Roadway Express*. 481 U.S. at 263 (quoting *Loudermill*, 470 U.S. at 538–539). The factual discussion above (*supra* 9–15)makes clear that the process provided a "reliable initial check" that Secretary had "reasonable cause to believe" that TNCC retaliated against George Fort.

2. The bank's remaining due process argument similarly lacks merit. The bank notes that immediate enforcement of the preliminary reinstatement order will cause it some irreparable harm—the wages paid to Fort—even if the bank eventually prevails on appeal. Appellant's Br. 42–44. The bank argues that it should have been "given the opportunity to confront Fort" and "receive[] an adjudication from [a] tribunal" before having to make "immediate and unrecoverable payments" to Fort. *Id.* at 43.

A similar argument was considered and rejected by the Supreme

Court in *Roadway Express*. The district court in that case had invalidated a preliminary reinstatement order issued under the Surface Transportation Assistance Act, holding that "the employer must be given, 'at a minimum, an opportunity to present his side and a chance to confront and cross examine witnesses.'" *Roadway Express*, 481 U.S. at 262. In the Supreme Court, the employer claimed that this process was necessary in light of the harm caused by reinstatement, including "consequences to efficiency, discipline in the workplace, and the morale of the employer and fellow employees." *See* Br. of Respondent, *Brock v. Roadway Express, Inc.* (1987) (No. 85-1530), 1986 WL 728040, at *10.

The Supreme Court nevertheless concluded that, in the context of preliminary reinstatement orders, "as a general rule the employer's interest is adequately protected without the right of confrontation and cross-examination." *Id.* at 266. The Court reasoned that "[t]o allow the employer and employee an opportunity to test the credibility of opposing witnesses during the investigation would not increase the reliability of the preliminary decision sufficiently to justify the additional delay." *Ibid.* Thus, as explained above, due process only requires that the Secretary "[p]rovid[e] the employer the relevant

supporting evidence and a chance to meet informally with the investigator, to submit statements from witnesses and to argue its position orally" before ordering preliminary reinstatement. *Ibid.* The Secretary met those due process requirements here, for the reasons explained above.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Century Schoolbook font, 14 point type. Based on a word count under Corel Word Perfect X4, this brief contains 9,582 words, excluding the statement regarding oral argument, table of contents, table of authorities, and certificates of counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following counsel:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The appellee hereby designates the following items in the record:

1.	RE.1	Complaint
2.	RE.1-1	Secretary's Findings and Preliminary Order
3.	RE.2-2	Letter from AUSA Wildasin to Waverly Crenshaw
4.	RE.3	Secretary's Memorandum in Support of Motion for Temporary Restraining Order & Preliminary Injunction
5.	RE.6	Defendants' Memorandum in Support of Motion to Dismiss
6.	RE.6-4	Objections to Preliminary Order
7.	RE.9	District Court's Memorandum
8.	RE.10	Order
9.	RE.11	Notice of Appeal

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