No. 23-1859

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

LINDSEY GULDEN, *et al.*

Appellants,

v.

EXXON MOBIL CORPORATION,

Appellee.

On Appeal from the United States District Court for the District of New Jersey
Case No. 3-22-CV-07418

BRIEF OF U.S. CHAMBER OF COMMERCE, ASSOCIATION OF AMERICAN RAILROADS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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Dated: October 18, 2023

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber's members include a wide range of businesses that are subject to federal anti-discrimination laws, such as the Sarbanes-Oxley Act's (SOX) anti-discrimination provision, 18 U.S.C. § 1514A, that incorporate by reference the review and enforcement scheme laid out in 49 U.S.C. § 42121(b), which is part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and commuter

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

authorities. AAR's members account for the vast majority of the rail industry's line haul mileage, freight revenues, and employment. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts, and administrative agencies. AAR participates as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole. AAR's members have a strong interest in this case because they are subject to the anti-discrimination provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, which, like SOX, incorporates AIR-21's review and enforcement scheme in 49 U.S.C. § 42121(b).

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an *amicus curiae* in important administrative-

law cases. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142 (2012). And WLF's Legal Studies Division, its publishing arm, regularly produces and publishes timely papers on administrative-law questions. *See, e.g.*, Kevin S. O'Scannlain, Louisiana v. EPA*: A Chastened Agency Retreats on Environmental Justice, For Now*, WLF LEGAL BACKGROUNDER (July 14, 2023).

SUMMARY OF ARGUMENT

The plain text of SOX, by incorporating the procedures set forth in AIR-21, authorizes judicial enforcement only of final orders. As relevant here, AIR-21 gives federal courts jurisdiction to enforce orders issued "under" paragraph (3) of 49 U.S.C. § 42121(b). Only final orders are issued under paragraph (3); preliminary orders are issued under paragraph (2). Paragraph (2) incorporates by reference paragraph (3)'s language on available remedies. But because the authority to issue preliminary relief of any kind comes from paragraph (2), preliminary orders are issued "under" that provision, not paragraph (3).

Context and statutory history reinforce this conclusion. AIR-21's other jurisdiction-granting provisions use similar language and plainly apply only to final orders. Moreover, the lack of a direct reference to preliminary orders in AIR-21's judicial enforcement provision contrasts with the Surface Transportation Assistance

Act (STAA), on which AIR-21's remedial scheme is modeled, indicating that Congress consciously excluded such orders from the review provision.

The Department of Labor's (DOL) efforts to salvage Plaintiffs' theory of jurisdiction is policymaking masquerading as statutory interpretation. DOL advances a reading of the statute that is implausible. Its only justification is that judicial review must be available to make SOX's provision of preliminary reinstatement "effective." But that sort of reasoning improperly implies a cause of action where Congress did not create one—a practice that the Supreme Court rejected long ago. Its position also cannot be squared with DOL's historic interpretation of AIR-21, including its present regulations, and risks seriously destabilizing the well-established framework for direct review of its final orders.

Finally, even if policy considerations were relevant to the statutory interpretation issue, they counsel *against* finding jurisdiction here. Adhering to SOX's text as written promotes the longstanding judicial policy of adopting clear and administrable rules for defining subject-matter jurisdiction. Besides, preliminary reinstatement orders have meaningful effect even absent a judicial enforcement order, including by impacting an employee's duty to mitigate damages. And limiting review to final orders, particularly when considered alongside the other ways in which SOX makes it easier for whistleblowers to obtain relief, represents a

reasonable balance between protecting whistleblowers and conserving judicial resources.

ARGUMENT

I. UNDER THE PLAIN MEANING OF SOX, FEDERAL COURTS LACK JURISDICTION TO ENFORCE PRELIMINARY ORDERS.

This appeal should begin and end with SOX's text. SOX incorporates by reference the procedures set forth in Section 42121(b) of AIR-21, which authorizes the Secretary of Labor to issue two kinds of orders. Paragraph (2) authorizes "preliminary orders." Paragraph (3) authorizes "final orders." And the provision at issue here—paragraph (6)—authorizes suits to enforce "order[s] … issued under paragraph (3)." The meaning of this cross-reference is clear: district courts have jurisdiction to enforce *final* orders, not *preliminary* orders, as only the former are "issued under paragraph (3)." DOL's convoluted attempt to show otherwise multiplies the anomalies and conflicts within the statute and implementing regulations, and boils down to little more than a policy dispute with Congress.

A. SOX Confers Jurisdiction Only To Enforce Final Orders.

In matters of statutory interpretation, this Court's "job is to interpret the words consistent with their 'ordinary meaning.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018). No more, no less. Here, ordinary meaning points to only one conclusion—that courts lack jurisdiction to enforce preliminary reinstatement orders.

1. SOX allows employees of publicly traded companies to file a complaint with DOL when they believe they were discharged for engaging in protected activity. 18 U.S.C. § 1514A(b)(1). These administrative actions are "governed under the rules and procedures set forth in" 49 U.S.C. § 42121(b), which is part of AIR-21. 18 U.S.C. § 1514A(b)(1).

As relevant here, the scheme set forth in Section 42121(b) contemplates two types of orders. Paragraph (2) concerns "preliminary orders," as its title ("Investigation; Preliminary Order") suggests. It provides that if DOL concludes through an initial investigation that "there is a reasonable cause to believe that a violation" of SOX has occurred, it must issue a "preliminary order providing the relief prescribed by paragraph (3)(B)." 49 U.S.C. § 42121(b)(2)(A). One remedy authorized by paragraph (3)(B) is reinstatement. *Id.* § 42121(b)(3)(B)(ii). Paragraph (2) also provides that the parties may object to the preliminary order, in which case DOL must hold a hearing. But, in the meantime, "such objections shall not operate to stay any reinstatement remedy" in the preliminary order. *Id.* § 42121(b)(2)(A). On the other hand, if no one objects to the preliminary order, the order "shall be deemed a final order that is not subject to judicial review." *Id.*

Paragraph (3), as its title ("Final Order") also suggests, concerns "final orders." It provides that, where a party objects to a preliminary order and a hearing is held, DOL must issue a "final order providing the relief prescribed by this

paragraph or denying the complaint" within 120 days of the hearing. *Id.* § 42121(b)(3)(A). It also provides that, if a violation of SOX's whistleblower protection provision is found, DOL "shall order" reinstatement and compensatory damages. *Id.* § 42121(b)(3)(B).

Besides delineating preliminary and final orders, Section 42121(b) also provides three routes to federal court. Each is keyed to an "order … issued under paragraph (3)." Paragraph (4) authorizes direct review of "an order issued under paragraph (3)" in the Court of Appeals. *Id.* § 42121(b)(4)(A). Paragraph (5) authorizes DOL to bring an enforcement action in district court against any person who fails to comply with "an order issued under paragraph (3)." *Id.* § 42121(b)(5). And paragraph (6)—the provision at issue here—authorizes a plaintiff who obtained "an order … issued under paragraph (3)" to bring an action in district court to enforce "such order." *Id.* § 42121(b)(6).

2. Paragraph (6) authorizes enforcement only of final orders. An order is issued "under" paragraph (3) if it is issued "by reason of the authority of" that provision. *Ardestani v. INS*, 502 U.S. 129, 135 (1991). And by its terms, paragraph (3) authorizes only the "issuance of a final order." 49 U.S.C. § 42121(b)(3)(A). In contrast, preliminary orders, including preliminary orders of reinstatement, are issued by the authority of paragraph (2). If Congress had wanted to make

preliminary orders enforceable under paragraph (6), it would have referenced paragraphs (2) *and* (3).

To be sure, paragraph (2) requires preliminary orders to "provid[e] the relief prescribed by paragraph (3)(B)." *Id.* § 42121(b)(2)(A). But that hardly means preliminary orders are issued "under" paragraph (3). "Incorporation by reference is a form of legislative shorthand; the effect of an incorporation by reference is the same as if the referenced material were set out verbatim in the referencing statute." *Artistic Ent., Inc. v. City of Warner Robins*, 331 F.3d 1196, 1206 (11th Cir. 2003). So even though DOL must look to paragraph (3) to know what remedy to issue, the authority and duty to issue that remedy flows from paragraph (2), not (3). Indeed, if Apple offered a price-match guarantee—in effect, incorporating others' prices by reference—no one would say its iPhones were sold "under" a competitor's authority. So too here.

Moreover, the cross-reference to subparagraph (3)(B) deals only with the remedy contained in the "preliminary order," which paragraph (2) has already authorized. That is, that cross-reference takes for granted the existence of a preliminary order and simply defines part of its contents with reference to a list elsewhere in the statute. But that does not affect the reach of paragraph (6), which turns on the authority under which the "order" is "issued"—that is, the authority that requires the order to exist in the first place. For preliminary orders, that is paragraph

(2). *See* 49 U.S.C. § 42121(b)(2)(A) (DOL "shall accompany [its] findings with a preliminary order").

DOL cites two cases in support of its contrary interpretation of "under," DOL Br. 11–12, but both affirmatively undermine its case. In *Ardestani*, the petitioner raised an argument like the one DOL raises here. She claimed deportation proceedings arose "under" the Administrative Procedure Act (APA) because regulations "conform[ed] deportation hearings … to the procedures required for formal adjudication under the APA." 502 U.S. at 134. But the Court held that was "immaterial." *Id.* Even if the procedural standards were essentially identical, deportation proceedings are not directly "'subject to' or 'governed by'" the APA, so they do not arise "under" it. *Id.* at 135. So too here. Although the remedies authorized by § 42121(b)(2) and (3) are identical, paragraph (3) does not reference, much less *authorize*, a preliminary order or remedy. Both of those come from paragraph (2), which merely incorporates by reference language from paragraph (3) to define the remedies DOL must include in issuing an order "under" paragraph (2).

In *Blackman v. District of Columbia*, the court held that a § 1983 claim arose "under" the Individuals with Disabilities in Education Act when the claim was brought to enforce a right guaranteed by that Act. 456 F.3d 167, 177 (D.C. Cir. 2006). But that was because § 1983 "is not the source of substantive rights but rather 'a method for vindicating federal rights elsewhere conferred.'" *Id.* Here, by

contrast, the source of an employee's substantive right to a preliminary remedy is paragraph (2). By its terms, paragraph (3) establishes a remedy only after a final adjudication; paragraph (2) is thus the sole source of the right to a preliminary order.

3. Neighboring provisions within Section 42121(b) reinforce that only final orders constitute orders "issued under paragraph (3)."

First, paragraph (2) itself refers to preliminary relief as "[r]elief … ordered *under subparagraph (A)*"—that is, under paragraph (*2*)(A). *See* 49 U.S.C. § 42121(b)(2)(B)(iv) (emphasis added). Preliminary orders are thus explicitly identified as issued "under" paragraph (2), not paragraph (3).

Second, paragraph (4), which authorizes direct review of "order[s] issued under paragraph (3)" in the Court of Appeals, is also clearly limited to final orders. By its terms, it envisions that the party seeking review will file its petition "not later than 60 days after the date of the issuance of [DOL's] final order." *Id.* § 42121(b)(4)(A). It also provides that "[r]eview shall conform to chapter 7 of title 5," *id.*—*i.e.*, the APA—which authorizes review only of "final agency action," 5 U.S.C. § 704. Further, case law uniformly recognizes that paragraph (4) covers only a "final order." *E.g.*, *Garvey v. DOL*, 56 F.4th 110, 118 (D.C. Cir. 2022); *Carnero v. Bos. Sci. Corp.*, 433 F.3d 1, 17 (1st Cir. 2006); *Stone v. Duke Energy Corp.*, 432 F.3d 320, 322 (4th Cir. 2005). As have DOL's own regulations for over twenty years. 29 C.F.R. § 1980.112(a); 67 Fed. Reg. 15,454, 15,461 (Apr. 1, 2002). DOL

has also taken that interpretation for granted in litigation in countless cases in the Courts of Appeals.[2]

Third, paragraph (5), which authorizes DOL to bring m an action to enforce "an order issued under paragraph (3)," provides for venue in "the district in which the violation was found to occur." § 42121(b)(5). But DOL "determines that a violation … has occurred" only in the final order. 49 U.S.C. § 42121(b)(3)(B). A preliminary order, by contrast, requires mere "reasonable cause to believe" a violation occurred. *Id.* § 42121(b)(2)(A).

Finally, even if "under" could compass DOL's unbounded interpretation, that would mean preliminary orders arise under *both* paragraphs (2) and (3), with final orders arising under paragraph (3) alone. It is implausible that Congress would select such a clumsy and counterintuitive way to reference both types of orders, when the same could be achieved much more naturally by referencing orders issued "under paragraphs (2) and (3)." Thus, even spotting DOL its definition of "under," the fact that Congress referred only to paragraph (3) is still sufficient reason not to apply that definition here. To put it a different way, if DOL's view were right *and* Congress had intended to limit appellate review to final orders, it would have had to

[2] *See, e.g.*, DOL Br., *Neely v. DOL*, 2023 WL 2563129, at *2 (9th Cir. filed Mar. 9, 2023) ("§ 42121(b)(4)(A) []provid[es] that review of the Secretary's final order may be obtained in the court of appeals"); DOL Br., *Ronnie v. DOL*, 2022 WL 17819794, at *2–3 (11th Cir. filed Dec. 14, 2022) (same); DOL Br., *Kossen v. Asia Pac. Airlines*, 2022 WL 9482309, at *3 (9th Cir. filed Oct. 7, 2022) (same).

cross-reference paragraph (3) and then expressly exclude preliminary orders, an approach no one could seriously expect Congress to take given the clarity of meaning in cross-referencing paragraph (3) alone.

4. AIR-21's history provides further support for the more natural reading of the statute. Much of AIR-21's procedural framework tracks that of an earlier statute, the STAA, Pub. L. No. 97-424, 96 Stat. 2097 (1983). *Compare* 49 U.S.C. § 42121(b) (AIR-21), *with id.* § 31105(b)–(d) (STAA). Like AIR-21, the STAA allows covered employees discharged for whistleblowing activities to file an administrative complaint with DOL, which is then empowered to grant preliminary and final relief. *Id.* § 31105(b). Preliminary relief includes reinstatement, which, as under AIR-21, is not stayed by an employer's objection. *Id.* § 31105(b)(2)(B).

When it comes to judicial review, however, the STAA and AIR-21 differ in two critical respects. *First*, the STAA authorizes DOL to bring civil enforcement actions for *any* "order issued under subsection (b) of this section." *Id.* § 31105(e). Unlike paragraph (3) in AIR-21, subsection (b) in the STAA includes *both* the provision authorizing preliminary relief, *id.* § 31105(b)(2), *and* the provision authorizing final relief, *id.* § 31105(b)(3). It thus directly and unambiguously grants district courts jurisdiction over actions to enforce preliminary orders.

Second, under the STAA, *only* DOL may bring a civil enforcement action. *See id.* § 31105(e). AIR-21, in contrast, separately authorizes DOL *and* private

individuals to bring enforcement actions in federal district court. *Id.* § 42121(b)(5)–(6).

AIR-21's inclusion of a private enforcement action shows that Congress did not intend to uncritically copy and paste the STAA's remedial scheme when it enacted AIR-21. The only reasonable conclusion is that Congress intended to make AIR-21's remedial scheme—in that respect—more generous than the STAA's, while also ruling out judicial enforcement of preliminary orders. *See infra* at 27–28. It would upset that quintessentially legislative judgment to accept the liberalized aspects of AIR-21 (*i.e.*, the private right to enforce) while attempting to "fix" the more restricted provisions (*i.e.*, limiting enforcement to final orders) through a strained interpretation, especially when the text is clear.

Thus, while all agree that Congress "borrowed significantly from STAA" in passing AIR-21, DOL Br. 20–22, on the precise issue here, Congress chose *not* to borrow uncritically from that earlier statute. That decision speaks volumes and reinforces the straightforward textual conclusion that § 42121(b)(6) does not extend to preliminary orders.

5. Finally, the weight of judicial authority supports this reading. Two courts squarely held that district courts lack jurisdiction to enforce preliminary orders under AIR-21. *See Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006); *Solis v. Union Pac. R.R. Co.*, 2013 WL 440707 (D. Idaho Jan. 11, 2013).

Another court ordered dismissal of such an enforcement action, albeit based on separate rationales advanced by the two judges composing the majority (one found no jurisdiction; the other a due process violation). *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006). And the only decision finding jurisdiction was stayed pending appeal because of the substantial likelihood that it would be reversed, before it ultimately was dismissed as moot. *Solis v. Tenn. Comm. Bancorp, Inc.*, 713 F. Supp. 2d 701, 714–15 (M.D. Tenn. 2010), *stayed pending appeal*, 2010 WL 11187001 (6th Cir. May 25, 2010).

B. DOL's Contrary View Is Untenable.

DOL purports to offer a rigorous textualist defense of the contrary position. It is a façade. DOL's north star is its policy view that preliminary reinstatement orders should have a judicial enforcement mechanism. But to reach that result, DOL must break some glass. It reinterprets clear, easily administrable provisions to be opaque and inconsistent. It makes a hash of its own regulations, positing an interpretation that would render them invalid. It expresses agnosticism about how basic features of the administrative scheme it has overseen for two decades are supposed to work. And it struggles at each turn to explain away a host of inconsistencies and anomalies that cascade from its interpretation. This Court should see DOL's effort for what it is—an improper attempt to bend the text to serve a policy pursuit that is better addressed to Congress.

1. DOL's argument for jurisdiction here works from the premise that this Court must strain to find jurisdiction to enforce preliminary reinstatement orders so that they "will in fact be effective." DOL Br. 17. But this sort of reasoning has long been discredited as inconsistent with the judicial role.

During the "*ancien regime*" of the "mid-20th century," courts "assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Ziglar v. Abbasi*, 582 U.S. 120, 131–32 (2017). Now, however, courts must "assume that Congress will be explicit if it intends to create a private cause of action." *Id.* at 133. Courts may not themselves "create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* The creation of a right or duty without a corresponding cause of action to back it up is not an absurd result to be avoided by an implausible saving construction; it is a congressional prerogative.

In fact, the practice of implying causes of action was "abandoned" nearly five decades ago with the Supreme Court's decision in *Cort v. Ash*, 422 U.S. 55 (1975). *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Yet DOL (at 14–15) encourages this Court to determine "the propriety of judicial enforcement" by reference to "factors" composing the precise framework that the Supreme Court repudiated long ago. *Compare Chicago & Nw. Ry. Co. v. United Transp. Union*, 402 U.S. 570 (1971), *with Ziglar*, 582 U.S. at 133. It is telling that the government

believed it had better odds upending five decades of law than defending its approach under current standards. But this Court should not be fooled into applying bad law.

Had Congress wished to provide a cause of action to enforce preliminary remedies, it was easy enough to do so "explicit[ly]." *Ziglar*, 582 U.S. at 133. It could have referenced orders issued under paragraph (2), like its approach in the STAA. That should be dispositive. It is not reasonable to suppose Congress intended to create a private right of action to enforce *preliminary* orders solely by referencing the paragraph for *final* orders.

2. DOL contends it is significant that, at the time of SOX's enactment, its AIR-21 regulations permitted judicial actions to enforce preliminary orders. This too is deeply flawed conceptually.

To start, DOL's regulations in 2002 were internally inconsistent—as they still are today. Both then and now, DOL's regulations provide that judicial enforcement is available under § 42121(b)(5) and (6) for preliminary orders, but direct judicial review under paragraph § 42121(b)(4) is available only for "a final order." 29 C.F.R. §§ 1979.112 & .113; 67 Fed. Reg. at 15,461. Yet the scope of all three statutory provisions is the same; all address orders "issued under paragraph (3)." 49 U.S.C. § 42121(b)(4)(A), (5), (6)(A). Thus, as a matter of text, the regulations are inconsistent. Indeed, the regulations interpret the class of orders broadly when it

expands DOL's enforcement power, but narrowly when it entails judicial oversight of its decision making.

In any case, DOL's understanding of the scope of *federal court jurisdiction* has no interpretive significance. Agencies may have privileged insight into the meaning of statutes they administer. But "[f]ederal agencies do not administer and have no relevant expertise in enforcing the boundaries of the courts' jurisdiction." *Allegheny Def. Project v. FERC*, 964 F.3d 1, 11 (D.C. Cir. 2020) (en banc); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990) (rejecting as irrelevant DOL's "position" on whether a private cause of action was available, because DOL cannot "regulate the scope of the judicial power vested by [a] statute"). Since these regulations had no *legal effect* on federal courts' jurisdiction, they cannot have formed part of the *legal backdrop* against which Congress enacted SOX.

Even setting these (fundamental) problems aside, the 2002 regulations would still be irrelevant. The regulations could not have altered the meaning of AIR-21, which was fixed at the time of its enactment in 2000. *BP PLC v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021). And SOX, passed in 2002, did not purport to amend AIR-21. It simply made AIR-21's existing procedures applicable to a new statutory scheme. *See* 18 U.S.C. § 1514A(b)(1). To suggest that the 2002 regulations must inform the interpretation of SOX would mean the same

provisions of AIR-21 could mean one thing for claims arising under AIR-21 directly and another for claims arising under SOX. That is untenable.

3. Finally, DOL's unnatural reading of § 42121(b)(6) makes a complete hash of the direct-review provision—§ 42121(b)(4)(A). DOL proposes two options, but commits to neither. While this alone should cause concern, neither option withstands scrutiny.

DOL's first option is to read paragraph (4) as authorizing judicial review of preliminary orders. DOL Br. 24–26. But this is a nonstarter as a matter of interpretation and wildly impractical. On interpretation, DOL's reading contradicts (1) the language of the provision (which expressly contemplates that a petition for review will be filed "after" a "final order" has been issued), (2) uniform judicial precedent, (3) DOL's own regulations, and (4) its consistent, yearslong litigation position. *Supra* at 10–11.

Despite these contrary indicators, DOL suggests that the direct-review provision may apply to preliminary orders because it contemplates not just "violations" of employee rights but "alleged[]" violations. 49 U.S.C. § 42121(b)(4)(A). But the reference to "alleged" violations does nothing for its case. Paragraph (4) applies not just when an *employer* appeals from a finding of a violation, but also when an *employee* appeals from a finding of no violation. *E.g.*, *Villanueva v. DOL*, 743 F.3d 103, 105 (5th Cir. 2014). In the latter case, there is a

final order, but only an alleged violation, which is why paragraph (4) contemplates both actual and alleged violations.

DOL also claims its regulations do "not expressly prohibit judicial review of a preliminary reinstatement order." DOL Br. 25 n.4. This is disingenuous. The judicial-review regulations expressly contemplate that judicial review is limited to final orders. *See* 29 C.F.R. § 1980.112(c) (providing that "the record of *proceedings before the ALJ*"—which produce final orders and occur only after objections to a preliminary order are filed—"will be transmitted" to the reviewing court when "a timely petition for review is filed" (emphasis added)). It also defies common sense. Just like a sign saying, "Children taller than four feet may ride the Ferris wheel," excludes shorter children, DOL's regulation saying a person "may file a petition for review" "[w]ithin 60 days after issuance of a final order" plainly excludes filing a petition without or before a final order.

Further, DOL's proposed reading would transform direct review of AIR-21 decisions into an unwieldy system of multiple appeals as a matter of course. Throughout our Nation's history, federal courts have had a "long-standing statutory policy against piecemeal appeals," including in review of administrative decisions. *Parr v. United States*, 351 U.S. 513, 519 (1956). Although interlocutory appeals are allowed in limited circumstances, DOL's proposed approach would allow dissatisfied parties to seek direct review of *any* DOL preliminary order under AIR-

21, not just preliminary *reinstatement* orders. No remedial scheme for employee grievances works this way.

DOL tries to resist this unworkable conclusion, but in vain. It claims direct review would extend to "*reinstatement* relief, and not of any other elements of a preliminary order," because those other forms of relief can be stayed pending a final decision. DOL Br. 26 n.5. But the other elements of preliminary relief are just as much "relief prescribed by paragraph (3)(B)" as reinstatement is, 49 U.S.C. § 42121(b)(2)(A), so under DOL's theory they would be just as much "an order issued under paragraph (3)" as a preliminary order of reinstatement. *Id.* § 42121(b)(4)(A). For purposes of judicial review, a stay is irrelevant. It is common for agency or lower court decisions to be stayed pending review by the Court of Appeals. *See* Fed. R. App. P. 8, 18.

DOL's first option is thus textually indefensible, inconsistent with its own regulations, contrary to settled practice, and absurd in its results.

DOL's second proposed approach—that an "order" "issued under paragraph (3)" means final orders for direct-review purposes under paragraph (4) but final *or* preliminary orders for enforcement purposes under paragraphs (5) and (6)—fares no better. DOL Br. 26–27 DOL defends interpreting identical language in neighboring provisions differently by invoking the need to guarantee the "effectiveness of preliminary reinstatement relief." *Id.* at 27. But this reasoning again relies on the

discredited view that judicial remedies can be expanded whenever courts deem it necessary to make a statutory right "effective." *Supra* at 15–16. In addition, federal court jurisdiction cannot turn on such ethereal considerations. Courts have a duty to "read[] jurisdictional laws … to establish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 380 (2016). If three neighboring provisions use the same language to define federal courts' jurisdiction over a class of administrative orders, that identical language must be given the same meaning.

While neither of DOL's options works, it is telling that the government felt compelled to offer them, with all the baggage they entail, including chunky footnotes (DOL Br. at 25–26 nn. 4–5) struggling to harmonize Option 1 with its own regulations. That interpreting a few simple words—"order … under paragraph (3)"—should entail such a journey, even if one could survive it, is reason enough to reject the methodology, especially when a natural, straightforward reading is available.

II. POLICY CONSIDERATIONS DO NOT JUSTIFY DEPARTING FROM SOX'S PLAIN MEANING.

Appeals to policy pervade the arguments of both Plaintiffs and DOL. But it would be a serious error to reverse the district court on that basis. For now, "[i]t suffices that the natural reading of the text" led to the judgment below. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000).

"Achieving a better policy outcome … is a task for Congress, not the courts." *Id.* at 13–14.

But even if policy considerations were relevant here, they favor adhering to SOX's and AIR-21's text. In their attempts to remedy perceived unfairness toward employees receiving preliminary reinstatement orders, Plaintiffs and DOL risk making it impossible to administer the AIR-21 review scheme, contrary to well-established judicial policy. Further, preliminary reinstatement orders pack a meaningful punch even without a judicial cause of action to enforce them. And Congress's decision not to provide a cause of action reflects a considered judgment about how to balance the costs and benefits of federal court litigation.

A. As demonstrated above, Plaintiffs and DOL can reach their preferred outcome only by reading AIR-21's jurisdictional provisions in a convoluted and counterintuitive manner. But this is precisely what longstanding judicial policy cautions against.

"[A]dministrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). A "vague boundary … is to be avoided in the area of subject-matter jurisdiction wherever possible." *Id.* Simple jurisdictional rules "promote greater predictability," keep parties from wasting their time and resources on matters beside the "merits of their claims," and conserve "[j]udicial resources." *Id.*

Limiting review and enforcement to final orders is straightforward and administrable. It gives all three jurisdiction-granting provisions the same scope. It allows parties to determine whether an order is reviewable or enforceable by looking solely at the four corners of § 42121(b)(3), the only provision the review provisions explicitly name. And it accords with the established practice for orders subject to judicial review.

Plaintiffs' and DOL's approach, by contrast, is opaque and unpredictable. It relies on subjective assessments about the "effectiveness" of the statute's remedies. It leaves open the possibility that the various jurisdiction-conferring provisions cover different orders despite using the same language. And it risks destabilizing the uniformly accepted existing method of conducting direct appeals, either replacing it with a novel system of universal interlocutory review or saving it only by adopting implausible distinctions between the direct-review provision and the enforcement provisions.

In short, the Hippocratic injunction to "first, do no harm" could be applied with special force here. Even assuming (which *Amici* do not accept) that it was an oversight not to provide a judicial enforcement mechanism for preliminary reinstatements, what is needed is a surgical fix only a legislative body can provide. If courts attempt the operation themselves through the manipulation of jurisdictional

rules, they will create confusion, undermine the good working order of AIR-21's remedial scheme, and exceed the well-established limits on their authority.

B. Even without a cause of action for immediate judicial enforcement, preliminary reinstatement is not a toothless remedy in the event an employer does not abide by DOL's order. The order continues to confer a real, and ultimately judicially enforceable, benefit to the discharged employee because of the duty to mitigate damages. Ordinarily, a wrongfully discharged employee has a duty "to make a reasonable effort to mitigate damages" by seeking out alternate employment. *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 89 (3d Cir. 2009). SOX and AIR-21 follow this general rule. *See In re Clemmons*, 2013 WL 6354832, at *5 n.31 (ARB Nov. 25, 2013). A reinstatement order, however, entitles the employee to return to work at his former employer. If an employer declines to return the discharged employee to work when she is willing to do so, a fact-finder could excuse the employee's failure to obtain other employment. *See Restatement (2d) of the Law—Torts*, § 918, cmt. f (1965) ("It may be shown … in mitigation of damages that [a discharged employee] had an opportunity of earning something in like employment, during the period and that he unreasonably failed to take advantage of it."); *Restatement (2d) of the Law—Agency*, § 455, cmt. d (1958) ("Whether or not [a discharged employee] is reasonable in not accepting or seeking a particular employment is a question for the triers of fact.").

Further, the mere existence of a reinstatement order can provide concrete benefits to employees. *Cf. NLRB v. Constellium Rolled Prod. Ravenswood, LLC*, 43 F.4th 395, 405 (4th Cir. 2022) ("the lack of a future judicial sanction does not eliminate the obligations under the Board's order"). Some employers may comply with preliminary reinstatement orders even without the specter of enforcement. A company known for disregarding DOL's orders, for instance, may suffer reputational harms or may struggle to hire and retain high-quality employees. Others may want to stem their monetary exposure or benefit from services they may end up paying for through a backpay award.

Thus, with or without a cause of action for enforcement, preliminary reinstatement orders do meaningful work. To the extent Plaintiffs and DOL want them to do more, that is an issue for Congress, not the courts.

C. Finally, SOX's provisions on preliminary reinstatement represent a reasonable balance of competing interests, particularly when the statutory scheme is considered as a whole. SOX and AIR-21 of course have as a central purpose the protection of whistleblowers. An important way the statutes effect that purpose is by providing for preliminary reinstatement without a stay pending a final decision. But "[n]o legislation pursues its purposes at all costs." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). And it was reasonable for Congress to balance

competing interests by providing for reinstatement without making it immediately judicially enforceable.

Congress intended for SOX adjudications to proceed quickly. AIR-21 requires DOL to issue a final decision within 120 days of holding a hearing. 49 U.S.C § 42121(b)(3)(A). If DOL dithers, SOX gives complainants the power to take matters into their own hands by suing in district court. 18 U.S.C. § 1514A(b)(1)(B) (authorizing suit if the agency fails to issue a final decision within 180 days from the complaint). The timelines also limit the window during which a court could provide meaningful relief in a preliminary enforcement action, because preliminary enforcement suits generally become "moot" once the "obligation to reinstate … flows from [DOL]'s final order and not the preliminary order." *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 258 (1987). Congress could thus have reasonably determined that, although there is value in a preliminary reinstatement order, the costs inherent in enforcing them judicially—both to the parties and to the federal courts—are not worth the benefits.

Congress made preliminary orders judicially enforceable in the STAA, but that does not make its balance of interests in SOX and AIR-21 unreasonable. To begin with, Congress is allowed to balance the relevant interests differently for different industries, and to adopt different views on the appropriate balance at different times. After all, it enacted AIR-21 almost twenty years after the STAA and

for a different industry. Furthermore, just as a court can decide it is not worth the disruption to overrule a precedent it believes is wrong, so too Congress could decide that the STAA may not strike the right balance any longer—and so adopt a different balance for AIR-21 and SOX—but without also fiddling with the STAA.

Besides, when Congress adapted the STAA scheme for AIR-21, it did not simply *eliminate* judicial enforcement for preliminary orders. It also *added* a private enforcement cause of action, which the STAA lacks. *Supra* at 12–13. Thus, considering its actions as a whole, Congress did not lower its commitment to protecting whistleblowers. Instead, it made the remedial scheme more generous in one respect and less generous in another. Given the necessarily ephemeral nature of preliminary relief—including preliminary relief obtained through court action—Congress could reasonably have decided that a scheme with private enforcement actions that are limited to final orders more vigorously protects whistleblowers overall while also making better use of the legal system's scarce resources.[3]

The upshot is that DOL cannot fairly pit the text against policy in urging its preferred outcome here. The statute is "ambiguous" and its cross-references "imprecise" (DOL Br. at 29) only if one takes it on faith that Congress could not

[3] Other statutes incorporating AIR-21 make different tradeoffs. The Federal Rail Safety Act (FRSA), for instance, generally follows the AIR-21 procedural framework. 49 U.S.C. § 20109(d)(1), (d)(2)(A). But, unlike SOX, the FRSA permits only DOL to bring an enforcement action and authorizes punitive damage awards. *Id.* § 20109(d)(2)(A)(iii), (e)(3).

have intended what it wrote. But that article of faith is wrong. As noted, Congress altered the STAA scheme in multiple ways when enacting AIR-21 and SOX. In making some provisions more favorable to whistleblowers and some less so, Congress made precisely the kinds of difficult policy tradeoffs that are its unique duty to make. There is no reason to believe it acted carelessly or unreasonably in doing so. And there is no need and indeed no warrant to buy the unnatural and convoluted interpretation Plaintiffs and DOL propose.

CONCLUSION

For the foregoing reasons, the district court's judgment dismissing the case for lack of jurisdiction should be affirmed.

Respectfully submitted,

Dated: October 18, 2023

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CERTIFICATION RELATING TO BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 28.3(d), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,439 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted using the word-count function on Microsoft Word Version 2302 software.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

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