JONES DAY

51 LOUISIANA AVE. NW • WASHINGTON, DC 20001

TELEPHONE: +1.202.879.3939 • FACSIMILE: +1.202.626.1700

DIRECT NUMBER: (202) 879-3636
DMORRELL@JONESDAY.COM

March 26, 2024

United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *Gulden v. Exxon Mobil Corp.*, No. 23-1859

To the Honorable Court:

Amici curiae U.S. Chamber of Commerce, Association of American Railroads, National Association of Manufacturers, and Washington Legal Foundation submit this letter in response to the Court's March 11, 2024, order. *Amici* agree with ExxonMobil that Sarbanes-Oxley is best read not to incorporate by reference the remedial authority conferred by AIR21 in 49 U.S.C. § 42121(b)(1)(B). Even if it were so incorporated, the Secretary's power to order "affirmative action" under § 42121(b)(1)(B)(i) encompasses only remedial actions, not punitive actions like sanctions. Besides, as explained below, preliminary reinstatement orders under SOX have concrete legal effect regardless of whether the Secretary has authority to issue sanctions.

1. The remedy of "affirmative action" in employment law long predates AIR21. It first appeared in the National Labor Relations Act of 1935, which authorizes the National Labor Relations Board to order an employer "to take such affirmative action … as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c). Soon after the NLRA's enactment, the Supreme Court clarified that this "power … is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 235 (1938). It does not authorize sanctions "even though the

Board be of the opinion that the policies of the Act might be effectuated by such an order." *Id.*; *accord E. Brunswick Eur. Wax Ctr., LLC v. NLRB*, 23 F.4th 238, 249–50 (3d Cir. 2022).

Congress carried over this understanding of affirmative action into antidiscrimination statutes that incorporate the term. Because the NLRA's "remedial section" was "the model" for Title VII's, courts look to the NLRA when construing the meaning of "affirmative action" in that statute. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976). Thus, "affirmative action" under Title VII does not include punitive damages. *Richerson v. Jones*, 551 F.2d 918, 927 (3d Cir. 1977). Instead, Congress amended the statute in 1991 to separately authorize that remedy. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 533–34 (1999). Further, affirmative action in Title VII continued to be recognized as a form of "equitable relief," *id.* at 533, and the "power to award 'equitable relief' … historically excludes punitive sanctions," *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).

The same understanding applies to the specific phrase "affirmative action to abate the violation." *See* 49 U.S.C. § 42121(b)(3)(B)(i). The phrase first appeared as a remedy in the Federal Coal Mine Health and Safety Act of 1969. *See* Pub. L. No. 91-973, § 110(b)(2), 83 Stat. 742, 759. In a *separate section*, the Act also authorized "civil penalt[ies]." *Id.* § 109(a)(1), at 756–57. And in construing the affirmative-action provision in administrative adjudications, the Federal Mine Safety and Health Review Commission has "follow[ed] cases under the NLRA," a practice upheld on judicial review. *Brock ex rel. Parker v. Metric Constructors, Inc.*, 766 F.2d 469, 473 (11th Cir. 1985).

When Congress enacted AIR21, it must be presumed to have adopted the "well-established legal meaning[]" of "affirmative action" in the employment context. *United States v. Hansen*, 599 U.S. 762, 774 (2023). The remedy thus covers equitable actions not already enumerated to "restore the economic status quo that would have obtained but for the company's wrongful act." *Franks*, 424 U.S. at 769. So, for instance, an employer could be ordered to expunge negative references to

the employee's protected conduct in her personnel file to prevent the conduct from harming the employee in future performance reviews or professional references. *E.g.*, *Bechtel v. Competitive Techs., Inc.*, 2005 WL 4888999, at *2 (DOL ALJ Mar. 29, 2005). It does not, however, encompass punitive sanctions. *Consol. Edison*, 305 U.S. at 235.

Indeed, AIR21's affirmative-action provision more clearly excludes punitive sanctions than the NLRA's. Punitive sanctions may be useful to "effectuate the purposes" of the NLRA, but are not permitted under the statute. 29 U.S.C. § 160(c). Yet AIR21 permits affirmative action only "to abate the violation," a narrower standard than that described in the NRLA. 49 U.S.C. § 42121(b)(3)(B)(i). And punitive sanctions, by definition, have aims beyond abatement: they impose additional liability to exact retribution for blameworthy conduct and to deter future violations. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) (distinguishing "abat[ing] current violations and deter[ring] future ones").

2. None of this means, however, that employers could disregard a preliminary reinstatement order without consequence. Although AIR21 does not authorize punitive sanctions, an employer's compliance or noncompliance with a preliminary stay order could affect the compensatory damages an employee is owed if the employee ultimately prevails. For example, a wrongfully discharged employee ordinarily 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). Employees who disregard this duty may have their damages award "reduced." *Id.* at 88. The Administrative Review Board has "consistently" recognized that this principle applies to SOX actions. *Kalkunte v. DVI Fin. Servs., Inc.*, 2005 WL 4889006, at *53 (DOL ALJ July 18, 2005).

A reinstatement order, however, entitles the employee to return to work *with her former employer specifically*. Given this entitlement, if the employee is willing to return but the employer refuses to employ her, a fact-finder could consider this fact and conclude that, under the

circumstances, the employee has not failed to mitigate damages by failing to look elsewhere. *See Donlin*, 581 F.3d at 89 (failure to mitigate arises from "*unjustified* refusals to find or accept other employment" (emphasis added)); *see also* Amicus Br. of U.S. Chamber of Commerce *et al.*, ECF No. 38, at 24 (discussing mitigation further).

In addition, if the Secretary ultimately finds that the employer violated SOX, the Secretary can order the employer to pay the discharged employee's "reasonably incurred" "attorneys' … fees." 49 U.S.C.§ 42121(b)(3)(B). Those would naturally include any additional attorneys' fees the employee reasonably incurred as a result of the employer's noncompliance with a preliminary reinstatement order.

* * *

In sum, AIR21's affirmative-action provision does not authorize punitive sanctions. But such sanctions are not necessary to give preliminary reinstatement orders under SOX meaningful legal effect.

Respectfully submitted,

/s/ David M. Morrell

David M. Morrell
(D.C. Bar No. 1013411)
Counsel of Record
Jacqueline M. Holmes
Ryan M. Proctor
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3636
dmorrell@jonesday.com

Cory L. Andrews
John M. Masslon II
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Jennifer B. Dickey
Kevin R. Palmer
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Kathryn D. Kirmayer
Charlie Kazemzadeh
Association of American Railroads
425 Third St., SW, Ste. 1000
Washington, DC 20024
(202) 639-2506

Erica Klenicki
Michael A. Tilghman II
NAM Legal Center
733 Tenth St., NW, Ste. 700
Washington, DC 20001
(202) 637-3000

cc: Counsel of Record via CM/ECF