United States Court of Appeals

for the

Third Circuit

Case No. 23-1859

LINDSEY GULDEN and DAMIAN BURCH,

Plaintiffs/Appellants,

– v. –

EXXON MOBIL CORPORATION,

Defendant/Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY, CASE NO. 3:22-CV-07418-MAS-TJB
HONORABLE MICHAEL A. SHIPP

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER

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FRAP 26.1(B) CORPORATE DISCLOSURE STATEMENT

National Whistleblower Center ("NWC") is a non-profit tax-exempt educational and charitable publicly supported non-partisan organization. The NWC has no shareholders, is not publicly owned and has no parent corporation.

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STATEMENT OF IDENTITY AND INTEREST IN THIS MATTER

Founded in 1988, National Whistleblower Center ("NWC") is a 501(c)3 non-profit, non-partisan, tax-exempt, charitable organization dedicated to the protection of whistleblowers – employees who lawfully report fraud or illegal conduct. *See* National Whistleblower Center, www.whistleblowers.org (last visited Aug. 6, 2023).[1]

NWC's staff and directors are dedicated whistleblower advocates who have engaged in advancing whistleblower rights and protections on several fronts and in several countries. As part of its core mission, NWC files *amicus curiae* briefs to highlight complex issues raised in whistleblower cases.

Since 1990, NWC has participated as *amicus curiae* before the U.S. Supreme Court, courts of appeal and administrative agencies in cases that directly impact the rights of whistleblowers, including *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1998); *Vermont Agency of Natural Resources v. United States. ex rel. Stevens*, 529 U.S. 765 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *Lane v. Franks*, 573 U.S.

[1] Statement pursuant to FRAP 29(a)(2): (i) No party's counsel authored the brief in whole or in part; (ii) No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) No person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief. Authority: Motion for Leave to Appear as *Amicus* is being filed simultaneously with the brief.

228 (2014); *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 575 U.S. 650 (2015); *Universal Health Svcs. v. United States ex rel. Escobar*, 579 U.S. 176 (2016); *Digital Reality Trust v. Somers*, 138 S. Ct. 767 (2018); *U.S. ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023).

Particularly, NWC has participated as an *amicus* in cases directly dealing with the Sarbanes-Oxley Act of 2002 ("SOX"). *See Lawson v. FMR LLC*, 571 U.S. 429 (2014); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Case Nos. 2007-SOX-039, 2007-SOX-042, 2011 DOL SOX LEXIS 39, 2011 WL 2165854 (2011) (*en banc*) (NWC participated in oral argument on the interpretation of SOX); *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013) (NWC argued the "reasonable standard" issue on behalf of the petitioner at oral argument); and *Genberg v. Porter*, 882 F.3d 1249 (10th Cir. 2018).

NWC has assisted Congress in drafting whistleblower protection legislation. *See* Whistleblower Protection Enhancement Act of 2012, S. Rep. No. 112-155, 112th Cong., 11 (testimony of NWC Ex. Dir.); Anti-Money Laundering Whistleblower Enhancement Act of 2022, S. 3316, 117 Cong. (2022) (citing to positions raised by the NWC). In 2001-02, NWC provided assistance to the Senate Judiciary Committee in drafting the Sarbanes-Oxley Act. *See* The Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. No 107-146, 107 Cong., 19 (2002).

The issue raised in this appeal is of exceptional interest to the National Whistleblower Center. Numerous whistleblower laws will be impacted by the precedent set in this decision. The Sarbanes-Oxley Act and other whistleblower laws that include similar preliminary reinstatement provisions, including the airline and railroad safety whistleblower laws, will be substantially and irrevocably weakened, unless the denial of jurisdiction by the district court is reversed.

The Third Circuit is a significant jurisdiction for corporate regulation and enforcement actions. The Third Circuit has regional jurisdiction over the state of Delaware. Delaware is the home of 1.9 million legal entities, and 62% of the Fortune 500 companies in the United States.[2] Over 50% of corporate employees will be directly impacted by this decision. Whether employees have meaningful access to an immediate remedy will radically impact their likelihood of reporting and determine the effectiveness of corporate oversight mechanisms which whistleblower protections are designed to enhance.

Preliminary reinstatement is critical to the stability of whistleblowers who have the courage to report wrongdoing. This remedy allows both whistleblower and accused entity time to resolve any issues related to possible retaliation while simultaneously ensuring that that the suspected wrongdoing continues to be

[2] *See* Delaware Division of Corporations, Annual Report Statistics 2022, available at: https://corp.delaware.gov/stats/ (Aug. 16, 2023).

monitored. NWC has a vested interest in matters related to the interpretation of fundamental due process rights and remedies for whistleblowers and for this reason we submit this *amicus curiae* brief.

SUMMARY OF ISSUE

Whether the district court erred in finding it had no jurisdiction under SOX to consider enforcement of the preliminary order of reinstatement issued by the Department of Labor requiring Exxon to reinstate whistleblowers Gulden and Burch.

SUMMARY OF ARGUMENT

Effective statutory construction preserves rather than destroys Congressional intent. Congress designed SOX to protect whistleblowers. Preliminary reinstatement is an essential tool to prevent a chilling effect and protect both whistleblowers and the public. The language of AIR21 clearly indicates that objection to preliminary reinstatement does not constitute a stay. The finding that this court does not have subject matter jurisdiction is disastrous for corporate whistleblowers and corporate accountability efforts, and completely undermines the Secretary of Labor's authority rendering preliminary reinstatement moot and incentivizing defendants to disregard administrative orders. Reversal of the district court decision is necessary to maintain corporate integrity and prevent a chilling effect for whistleblowers nationwide.

ARGUMENT

I. Effective Statutory Construction Preserves rather than Destroys Congressional Intent.

When Congress passed the Sarbanes-Oxley Act, it intended to provide strong protections for employees of publicly traded companies. Congress provided these protections for employees under other whistleblower laws, and when enacting SOX it explicitly granted the United States Department of Labor ("DOL") the authority to order the preliminary reinstatement of a whistleblower. Congress established this authority to enable whistleblowers to come forward without fear of retaliatory discharge and empower the Secretary of Labor to take initial enforcement action with the benefit of continued monitoring by the whistleblower.

In its opinion, the district court ruled that it "does not have jurisdiction to enforce the Secretary's preliminary order of reinstatement because Sarbanes-Oxley does not grant such power by its plain language or overall construction." Civil Action No. 22-7418 (MAS)(TJB) at 3. NWC submits this brief asserting that this interpretation of the Sarbanes-Oxley Act fails to construe the language of the law in a manner consistent with its purpose, depriving the whistleblowers of a meaningful protection intended for them by Congress, and undermining the authority of the Secretary of Labor.

Courts are called to interpret the overall construction of a law in a manner consistent with Congressional intent. In *United States v. Menasche*, 348 U.S. 528

(1955), Justice Clark aptly stated that "The cardinal principal of statutory construction is to save and not destroy." at 538, citing to *Labor Board v. Jones & Laughlin Steel Corp*, 301 U.S. 1, 30. This principal was cited in a case discussing the naturalization of a U.S. citizen for whom the filing date overlapped with the enactment of a law that would exclude the person from eligibility. The Supreme Court grappled with the intent of the law, and the merits of excluding this person from the benefit of citizenship, a benefit Congress clearly intended to maintain for such an individual. The Court explored several avenues, and Justice Clark surmised that the correct path for evaluating the facts was by assuming the "duty 'to give effect, if possible to every clause and word of a statute,'" *Id*. at 538, citing to *Montclair v. Ramsdell*, 107 U.S. 147, 152.

The threat of failing to interpret laws in the appropriate context and a failure to "give effect to every clause and word" is a threat of "emasculat[ing] an entire section," *see id.* at 538-539. In *Menasche*, a failure to interpret the law with consideration to the intent Congress manifested in creating the law would have caused undue harm and restricted the rights of untold numbers of potential citizens. In this instance, the court is responsible for not only the livelihoods of individuals, but also the outcomes of a more permissive corporate accountability regime.

The structure, history and purpose of the Sarbanes-Oxley Act supports a less restrictive interpretation of the preliminary reinstatement remedy, 49 U.S.C. § 42121(b)(2), than granted by the district court.

Congress must be trusted. In *Montclair v. Ramsdell*, 107. U.S. 147, the Supreme Court determined that while interpreting statutory language, the court has a duty to do so "avoiding . . . any construction which implies that the legislature was ignorant of the meaning of the language it employed." at 151. And that, "the canons of statutory construction require us to presume that the legislature understood the full legal effect of such declaration." *Id.* at 152.

The district court asserts that "AIR 21 uses imprecise language to describe the enforcement process of the Secretary's orders." Civil Action No. 22-7418 (MAS)(TJB) at 4. However, this brief will explain how the language of the AIR21 clearly states that preliminary orders are not to be stayed by objection and that Congress intended for these actions to be immediately enforceable, even if by district courts. The language is sufficiently precise, especially when taken in consideration to the structure, purpose, and history of SOX and preliminary reinstatement provisions to establish that district courts have jurisdiction to enforce these important orders.

The *cardinal principle* of saving and not destroying the intent behind statutes must be a priority in this instance. An overly narrow reading of the Sarbanes-Oxley

Act, and the preliminary reinstatement provisions it includes, would effectuate a chilling effect and emasculate the orders of the Secretary of Labor rendering preliminary reinstatement orders meaningless. Such a reading is clearly inconsistent with the intent and purpose of the statute and should therefore be reversed.

a. The Structure of the Preliminary Reinstatement Provisions in SOX Supports the Judicial Enforcement of Such Preliminary Orders.

The importance of providing whistleblowers with preliminary relief was first recognized by Congress when it enacted the Surface Transportation Assistance Act ("STAA"). Surface Transportation Assistance Act, 49 U.S.C. § 31105(b)(2)(A)-(B). In that law Congress was clear: "If the Secretary of Labor decides it is reasonable to believe a violation occurred, the Secretary of Labor shall include with the decision findings and a preliminary order for the relief . . . The filing of objections does not stay a reinstatement ordered in the preliminary order." 49 U.S.C. § 31105(b)(2)(A)-(B).

Congress incorporated a preliminary reinstatement requirement into a whistleblower protection law when it enacted Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(b)(2)(A)-(B). The U.S. Supreme Court, in its plurality decision in *Roadway Express v. Brock*, explained the operation of STAA's preliminary reinstatement requirement:

> Section 405 of the Surface Transportation Assistance Act . . . protects employees in the commercial motor

> transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance. The statute provides for an initial investigation of an employee's discharge by the Secretary of Labor and, upon a finding of reasonable cause to believe that the employee was discharged in violation of the Act, requires the Secretary to issue an order directing the employer to reinstate the employee. The employer may then request an evidentiary hearing and a final decision from the Secretary, but this request does not operate to stay the preliminary order of reinstatement.

Roadway Express v. Brock, 481 U.S. 252, 255 (1987).

Nearly twenty years later Congress incorporated language into the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(2)(A). By doing so, Congress recognized that preliminary reinstatement based on a DOL investigation is a core component to effectuating an effective whistleblower protection regime. Congress was clear: "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 [] relief . . . **The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.**" 49 U.S.C. § 42121(b)(2)(A).

In *Brock v. Roadway Express,* the Supreme Court explained the purpose behind the preliminary reinstatement requirement that runs through AIR21 and SOX, **serving the same purpose in each**.

b. The Purpose of the Preliminary Reinstatement Provision was to Encourage Reports.

Congress created the preliminary reinstatement remedy in the STAA to "encourage employee reporting of noncompliance". This was important in the context of the STAA because employees need "express protection against retaliation for reporting [] violations." The purpose of preliminary reinstatement is to encourage reports by preventing the chilling effect of retaliation, enabling enforcement bodies to benefit from whistleblower tips without unduly impacting the interest of employers. In *Roadway Express* the law is described as follows:

> Section 405 [of STAA] was enacted in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations. *See*, *e.g.*, 128 Cong. Rec. 32698 (1982) (remarks of Sen. Percy); *id.*, at 32509-32510 (remarks of Sen. Danforth). Section 405 protects employee "whistle-blowers" by forbidding discharge, discipline, or other forms of discrimination by the employer in response to an employee's complaining about or refusing to operate motor vehicles that do not meet the applicable safety standards. 49 U.S.C. App. 2305(a), (b).

> Congress also 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. Accordingly, 405 incorporates additional protections, authorizing temporary reinstatement based on a preliminary finding of reasonable cause to believe that the employee has suffered a retaliatory discharge. The statute reflects a careful balancing of the relative interests of the Government, employee, and employer.

Roadway Express, 481 U.S. at 258-59.

The Supreme Court in *Roadway Express* explicitly describes the purpose of preliminary reinstatement, stating that the laws "would lack practical effectiveness if the employee could not be reinstated pending complete review." *Roadway Express*, 481 U.S. at 258. And that, "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.**" *Id.* at 259 (emphasis added).

The chilling effect of retaliatory discharge is so compelling that effective whistleblower protections, and accountability mechanisms, required the inclusion of immediate remedies like preliminary reinstatement. The purpose of preliminary

reinstatement is to encourage reporting by providing an immediate remedy. By declining to enforce the preliminary reinstatement order, the district court alienates whistleblowers and undermines the purpose of these provisions.

c. The History of Preliminary Reinstatement Supports its Judicial Enforcement.

Preliminary reinstatement provisions have real life impacts. In 2000, shortly after two Alaska airliners crashed, Congress passed Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. Prior to its passage there were no whistleblower protections for airline employees. The need to effectively protect employees who wanted to raise safety concerns was obvious: information surfaced shortly after the two accidents that there was a whistleblower who had raised concerns directly related to one of the fatal crashes.

In 1997, John Liotine, a lead mechanic at Alaska Airline's Oakland facility, reported the need to replace the jackscrew on a passenger plane. *See* Steve Miletich, *No criminal charges against Alaska; airline settles with whistle-blower*, SEATTLE TIMES (Dec. 20, 2020), https://archive.seattletimes.com/archive/?date=20011220&slug=alaska20/, and s*ee* Christine Clarridge, *10th Anniversary of Alaska Flight 261*, SEATTLE TIMES (Jan. 28, 2010), https://www.seattletimes.com/seattle-news/10th-anniversary-of-alaska-flight-261. Liotine ordered the screw replaced, but instead of replacing this critical component the plane was put back into service without Liotine's work order completed. *Id.* In

1998, Liotine made efforts to communicate his concerns to federal authorities and in 1999 he was placed on paid leave with Alaska Airlines alleging he had become "disruptive to operations". *Id.* Investigators believed that the jackscrew identified by Mr. Liotine, and Alaska Airlines' failure to repair it, was the cause of the tragic crash of Flight 261 on December 31, 2000. *Id.*

In the House Report recommending enactment of an airline whistleblower law, the House Committee on Infrastructure and Transportation explained that laws existed protecting some "private sector employees who make disclosures concerning health and safety matters," but noted that "there are no laws specifically designed to protect airline employee whistleblowers." Aviation Investment and Reform Act for the 21st Century, H. Rep. 106-167, 106 Cong., 85, https://www.govinfo.gov/content/pkg/CRPT-106hrpt167/pdf/CRPT-106hrpt167-pt1.pdf. The only law cited to by Congress as an example of the legal protections that would be needed for airline workers was STAA, "[f]or example, section 2305 of the Surface Transportation Assistance Act of 1978, 49 U.S.C. 2305, prohibits retaliation for filing a complaint or instituting any proceeding relating to violations of motor vehicle safety rules or refusing to operate an unsafe vehicle." Aviation Investment and Reform Act for the 21st Century, H. Rep. 106-167, 106 Cong., 85.

The House Report directly mirrors the procedure's preliminary reinstatement provisions contained in STAA:

> Paragraph (2) directs the Labor Department . . . to launch an investigation to determine whether there is reason to believe the complaint has merit and to notify the parties of its findings. If Labor concludes that there is reason to believe a violation has occurred, it shall issue a preliminary order providing a remedy. Within 30 days of being notified of Labor's findings, either side may file objections and request a hearing but this *shall not stay* a reinstatement remedy in the preliminary order.

Aviation Investment and Reform Act for the 21st Century, H. Rep. 106-167, 106 Cong., 120 (emphasis added).

This preliminary reinstatement requirement was thereafter incorporated into AIR21. There is no doubt that Congress intended for preliminary reinstatement orders to be immediately enforceable to protect the interests of both whistleblowers and the public. The history of these provisions makes clear that they aim to ensure protections that are consistent with the public interest in health and safety. A few years later, Congress would determine that these provisions would also be necessary to protect whistleblowers who attempt to shield the public from the harms of corporate wrongdoing and fraud.

II. Congress included Preliminary Reinstatement in SOX Enforcement Mechanisms to Protect both Whistleblowers and the Public.

The structure, purpose and history of preliminary reinstatement as an immediate remedy for whistleblowers is consistent with a reading of the Sarbanes-Oxley Act which would allow district court jurisdiction to enforce preliminary reinstatement orders.

The intent behind SOX was explained in a 2002 Senate Report discussing the need for corporate regulation and corporate whistleblower protections: "In the wake of the continuing Enron Corporation ("Enron") debacle, the trust of the United States' investors and pensioners in the nation's stock market has been seriously eroded. This is bad for our markets, bad for our economy, and bad for the future growth of investment in American companies. This bill would play a crucial role in restoring trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146, p. 2 (2002).

Congress chose to model the SOX procedures on the AIR21 procedures, including the preliminary reinstatement rule that originated with STAA, for reasons outlined in *Lawson v. FMR LLC*, 571 U.S. 429:

> The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act) aims to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." S. Rep. No. 107–146, p. 2 (2002) (hereinafter S. Rep.). Of particular concern to Congress was abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a "corporate code of silence"; that code, Congress found, "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." *Id.,* at 4–5 (internal quotation marks omitted). When employees of Enron and its accounting firm, Arthur Andersen, attempted to report corporate misconduct, Congress learned, they faced retaliation, including discharge. . . Congress identified the lack of whistleblower protection as "a significant deficiency" in the law, for in complex securities fraud

> investigations, employees "are [often] the only firsthand witnesses to the fraud." *Id.,* at 10. Section 806 of Sarbanes-Oxley addresses this concern.

Lawson v. FMR LLC, 571 U.S. 429, 434-35 (2014).

The rationale for including a preliminary reinstatement provision in SOX mirrors that for STAA and AIR21 and is consistent in the purpose and intent of those laws. Preliminary reinstatement is designed to defeat a "code of silence," enforced by the threat of **discharge, prolonged unemployment, and resulting severe economic hardship** that employees faced, even **if they are eventually able to prevail in an employment discrimination proceeding.**

The preliminary reinstatement requirement is the *only* provision in the law that directly addresses the chilling effect triggered by firing a whistleblower and the subsequent hardships faced by employees who were lawfully reporting violations. The preliminary reinstatement provisions incorporated into SOX directly incorporated all the duet process requirements afforded to employers under STAA and AIR21. Without these protections, corporate whistleblowers are left vulnerable to retaliatory discharge and significant financial hardship.

Congress recognized that preliminary reinstatement was critical for protecting the public from financial frauds by ensuring corporate employees would not be subjected to the "code of silence". Thus, Congress decided to incorporate the same

preliminary reinstatement provision into the whistleblower protection provisions in SOX, 18 U.S.C. § 1514A(b)(2)(A).

As the U.S. Supreme Court explained in *Lawson v. FMR LLC*, "Congress modeled §1514A on the anti-retaliation provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. §42121. *See* S. Rep., at 30 (corporate whistleblower protections "track [AIR 21's] protections as closely as possible." 571 U.S. 429, 437 (2014). Section 1514A directly incorporates by cross-reference AIR 21's administrative enforcement procedures. 18 U.S.C. § 1514A(b)(2)."

By incorporating this critical provision into a law designed to bolster corporate accountability, Congress sends a clear message that market crashes should be taken as seriously as plane crashes.

III. The Language of AIR21 Clearly Indicates that Objection to Preliminary Reinstatement does not Constitute a Stay.

Congress intentionally crafted the process for preliminary reinstatement in the airline whistleblower law, AIR 21 and then incorporated these protections into in the SOX. The procedure is clearly laid out as follows: (1) An employee files a whistleblower retaliation complaint. (2) The Department of Labor is required to conduct a comprehensive and detailed investigation. (3) If that investigation results in a finding of probable or reasonable cause to conclude that the employer violated the law, the DOL must issue an order granting relief to the employee, which could

include such things as reinstatement, back pay, compensatory damages, attorney's fees and other equitable relief. (4) If the employer appeals this order, all of the relief ordered for the employee is stayed pending appeal, *except* the preliminary order of reinstatement. (5) Under the statute, if the DOL

follows the investigatory procedures set forth in its regulations, and the due process requirements mandated by the Supreme Court, this limited relief *cannot be stayed*, and must be immediately granted. *See* Aviation Investment and Reform Act for the 21st Century, H. Rep. 106-167, 106 Cong., 120.

The Congressional record for AIR21 specifically states that "If Labor concludes that there is a reason to believe a violation had occurred, it shall issue preliminary order providing a remedy. Within 30 days of being notified of Labor's findings, either side may file objections and request a hearing, but this *shall not stay* a reinstatement remedy in the preliminary order." *Id.* (emphasis added). The law provides defendants with recourse but does not create any opportunity to effectuate a stay of a preliminary reinstatement order without the approval of the Secretary.

By denying jurisdiction to enforce this provision, the district court effectively granted Exxon a stay of the Secretary's order without involving the DOL – undermining the enforcement powers of the Department of Labor, and the Congressional intent behind this immediate remedy.

IV. Reversal of the District Court Decision is Necessary to Maintain Corporate Integrity and Prevent a Chilling Effect for Whistleblowers Nationwide.

The decision to reverse the district court opinion in *Burch and Damian v. Exxon* will impact over 50% of corporate employees nationwide.

Judge Straub of the district court dissented, "concluding that jurisdiction is appropriate because the language and history of Sarbanes-Oxley indicate Congress's intent to allow judicial enforcement of preliminary reinstatement orders." Civil Action No. 22-7418 (MAS)(TJB) at 5. This dissent is consistent with NWC's understanding of the Sarbanes-Oxley Act, and the interests of whistleblowers who stand to benefit from the protection afforded them by preliminary reinstatement orders.

The laws underlying preliminary reinstatement orders reflect a "careful balancing of the relative interests of the Government, employee, and employer." *Roadway Express*, 481 U.S. at 259. They are the only procedure available under law that effectively "recognized that the employee's protection against having to choose between" reporting illegal activity and "losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." *Id.* at 258-59. Moreover, they are the only procedures under law that address the reality that "the longer a discharged employee remains unemployed, the more devastating are the consequences to his personal financial condition and prospects for

reemployment, and that "ensuring the eventual recovery of backpay may not alone provide sufficient protection to encourage reports" of violations of law. *Id.* at 259.

The district court opinion woefully underestimates the impact of retaliatory discharge and the efficacy of the DOL when it stated that "the expeditious nature of the review process counsels against judicial enforcement of preliminary reinstatement orders". Civil Action No. 22-7418 (MAS)(TJB) at 7. Preliminary reinstatement is intended to be an immediate remedy which cannot be stayed by objection.

Immediate reinstatement is critical to maintaining the standing of the employee who has the courage to report wrongdoing. If Congress intended for whistleblowers to sustain the harms of retaliatory discharge in favor of the "expeditious nature of the review process", it would not have provided an immediate remedy such as preliminary reinstatement.

For decades, and in three separate law-making processes, Congress has asserted the importance of protecting whistleblowers in various sectors. These protections have consistently included preliminary reinstatement provisions. Each law, from STAA to AIR21 to SOX, was established to address a crisis and empower employees to help prevent future harm. Congress intended preliminary reinstatement orders to act as a counterbalance to the chilling effect retaliatory discharge was shown to have on potential whistleblowers. The non-enforcement of these orders

effectively destroys them both in function and purpose. To construe the law in such a deleterious manner would be inconsistent with the cardinal rule of statutory interpretation. Failing to allow district courts to enforce preliminary reinstatement orders may embolden employers to both retaliate against their whistleblower employees, and disregard orders from the Secretary of Labor – critically undermining the sole purpose of the Sarbanes-Oxley Act whistleblower protections.

Congress clearly intended these orders to be immediate and enforceable, and such an intent enables courts to enforce these preliminary reinstatement orders.

CONCLUSION

For the reasons stated herein, and in the brief filed by the whistleblowers in this proceeding, the decision below should be reversed. This court must give full effect to the plain meaning of SOX and ensure that preliminary reinstatement orders, lawfully ordered by the Department of Labor, are judicially enforced.

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Siri Nelson, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: August 16, 2023

By: /s/ Siri Nelson
Siri Nelson

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5). This brief contains 4,642 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: August 16, 2023

By: /s/ Siri Nelson
Siri Nelson

CERTIFICATE OF FILING AND SERVICE

I certify that on this 16th day of August 2023, the foregoing *Amicus* Brief was filed through CM/ECF system and served on all parties or their counsel of record through the CM/ECF system.

Dated: August 16, 2023

By: /s/ Siri Nelson
Siri Nelson