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Former Whistleblowers: Why the False Claims Act's Anti-Retaliation Provision Should Protect Former Employees

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FORMER WHISTLEBLOWERS: WHY THE FALSE CLAIMS ACT'S ANTI-RETALIATION PROVISION SHOULD PROTECT FORMER EMPLOYEES

Jim Stehlin *

ABSTRACT

Since the Civil War, the False Claims Act has served as a tool to combat fraud perpetrated against the government. Early fraud by government contractors during the Civil War was quaint: contractors selling the same horse twice or filling a Union Army contract for sugar with sand.¹ Today, the government recovers billions of dollars annually through actions under the FCA.²

Essential to the FCA's functioning are "relators," private citizens who serve as whistleblowers incentivized to report fraud by receipt of a percentage of whatever amount the government recovers in damages. The government relies on relators to blow the whistle on fraud—over two-thirds of FCA recoveries since 1986 come from cases brought by relators as whistleblowers.³ So important are these relators that in 1986 Congress amended the FCA and included an anti-retaliation provision to provide relief for employees who experience retaliation from their employers for reporting fraud.⁴

This Note discusses a recent circuit split over whether the anti-retaliation provision of the FCA protects former employees against post-termination retaliation by their employers, arguing that the anti-retaliation provision extends to retaliation against former employees. In arguing in favor of a more inclusive definition of "employee" in the FCA's anti-retaliation provision, this Note explores the history and purpose of the FCA, the legislative history of the FCA's anti-retaliation provision, and the arguments for and against the inclusion of former employees under the provision's protections. Finally, this Note calls for Supreme Court intervention or congressional action to clarify that the FCA's anti-retaliation provision protects former employees from post-termination retaliation.

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1. Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 *HAMLIN L. REV.* 373, 375-76 (2002).

2. See sources cited *infra* notes 52-54.

3. See sources cited *infra* note 55.

4. See sources cited *infra* notes 49-50.

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INTRODUCTION

Since Congress amended the False Claims Act (FCA) in 1986 to reform the FCA and introduce an anti-retaliation provision, the Department of Justice has recovered more than \$64 billion through lawsuits against entities accused of defrauding the federal government.⁵ One such recovery came in August 2018 when William Beaumont Hospital, a regional hospital system in Southeast Michigan, reached an \$84.5 million settlement with the Department of Justice.⁶ The settlement re-

5. See Press Release, U.S. Dep’t of Just., Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020> [https://perma.cc/KT28-LKUZ].

6. Press Release, U.S. Dep’t of Just., Detroit Area Hospital System to Pay \$84.5 Million to Settle False Claims Act Allegations Arising from Improper Payments to Referring Physicians (Aug.

solved allegations that Beaumont defrauded Medicare, Medicaid, and Tricare programs in violation of the Anti-Kickback Statute and the Stark Law by maintaining improper financial relationships with referring physicians between 2004 and 2012.⁷

Dr. David Felten was the first whistleblower to step forward in 2010 with his *qui tam* lawsuit against Beaumont as a relator under the FCA.⁸ A “world-renowned neuroscientist” in the field of psychoneuroimmunology and past recipient of the MacArthur “Genius” Grant, Dr. Felten worked as medical director of the William Beaumont Hospital Research Institute from 2005 to 2013.⁹ Prior to his termination in 2013, Beaumont deduced that Dr. Felten was a whistleblower and sought to fire him for being “the mole.”¹⁰ Dr. Felten alleges that in 2013 Beaumont terminated him by claiming that his position was “subject to mandatory retirement.”¹¹

Following the 2018 settlement, Dr. Felten ruminated on the effects of his whistleblowing eight years prior:

The effects on my career and family were devastating. In the midst of a highly successful career . . . I found myself blackballed at every turn when trying to find any position. The process of being forced out of Beaumont and unable to find a similar position despite my credentials was financially ruinous and put a huge stress on my family and my personal health.¹²

Dr. Felten is not alone in his experience. One study found that, like Dr. Felten, most surveyed whistleblowers experienced negative impacts on their career prospects, financial stability, family relations, or physical health after serving as a whistleblower.¹³ In the same study, 64% of

2, 2018), <https://www.justice.gov/opa/pr/detroit-area-hospital-system-pay-845-million-settle-false-claims-act-allegations-arising> [<https://perma.cc/RN4A-TJKC>].

7. *Id.*

8. JC Reindl, *Beaumont Whistleblower Speaks Out; Doctors' Names Revealed*, DETROIT FREE PRESS (Aug. 4, 2018) <https://www.freep.com/story/money/2018/08/03/beaumont-whistleblower-speaks-out-doctors-names-revealed/897733002/> [<https://perma.cc/86QC-DZBD>].

9. *Id.*

10. Brief of Plaintiff-Appellant at 4, United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428 (6th Cir. 2021) (No. 20-1002), *cert. denied sub nom.* William Beaumont Hosp. v. U.S. *ex rel.* Felten, 142 S. Ct. 896 (2022) (mem.).

11. *Id.*

12. Reindl, *supra* note 8.

13. See Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK & OCCUPATIONS 107, 120–211 (1999) (determining that “the most common fallout from their whistle-blowing involved: (a) severe depression or anxiety (84%), (b) feelings of isolation or powerlessness (84%), (c) distrust of

whistleblowers reported being blacklisted from obtaining another job in their field.¹⁴

After Beaumont reached its \$84.5 million settlement with the Department of Justice in 2018 Dr. Felten amended his complaint, adding more recent allegations that Beaumont had retaliated against him by blacklisting him within the medical industry.¹⁵ Specifically, Dr. Felten alleged that Beaumont violated section 3730(h) of the FCA, an anti-retaliation provision that entitles “[a]ny employee” to relief “if that employee . . . is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment” in retaliation for a lawful act under the FCA.¹⁶ However, the district court dismissed portions of the amended complaint because the alleged retaliation occurred following Dr. Felten’s termination from Beaumont.¹⁷ According to the district court, the FCA’s anti-retaliation provision does not cover retaliation against former employees.¹⁸ On appeal, the Sixth Circuit vacated the district court’s dismissal, holding that the FCA’s anti-retaliation provision “protects former employees alleging post-termination retaliation.”¹⁹ This decision created a circuit split with the Tenth Circuit regarding whether post-termination retaliation by employers against former employees is covered by the FCA’s anti-retaliation provision.²⁰

This Note argues that the Sixth Circuit’s more inclusive interpretation of the FCA’s anti-retaliation provision is correct—former employees should be protected from post-termination retaliation due to their lawful whistleblowing under the FCA. Part I of this Note discusses the history and purpose of the FCA and its amendments, including the 1986 Amendments that introduced the anti-retaliation provision. Part II discusses the recent circuit split over whether the FCA protects former employees alleging post-termination retaliation. Finally, Part III argues that the Sixth Circuit’s more inclusive interpretation of the FCA’s anti-

others (78%), (d) declining physical health (69%), (e) severe financial decline (66%), and (f) problems with family relations (53%).”).

14. *Id.* at 120.

15. Brief of Plaintiff-Appellant, *supra* note 10, at 3.

16. 31 U.S.C. § 3730(h)(1) (2013).

17. *United States v. William Beaumont Hosps.*, 2019 WL 2743699, at *4; *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428 (6th Cir. 2021), *cert. denied sub nom. William Beaumont Hosp. v. U.S. ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.) (“The overwhelming majority of courts that have considered the issue have found that § 3730(h)(1) does not apply to post-employment retaliation . . .” (quoting *Potts v. Ctr. for Excellence in Higher Educ.*, 244 F. Supp. 3d 1138, 1144 (D. Colo. 2017))).

18. *Id.*

19. *Felten*, 993 F.3d at 430, 435–436.

20. *Id.* at 435.

retaliation provision in *Felten* is correct, and the Supreme Court should adopt this interpretation to resolve the circuit split. Doing so would create consistency with judicial interpretations of similar anti-retaliation provisions, promote Congress' intent in enacting the anti-retaliation provision, and advance the Supreme Court's anti-retaliation principle. Given the Supreme Court's recent denial of certiorari in *Felten*, Part III also explores how Congress could amend section 3730(h) of the FCA to clarify that its anti-retaliation provision applies to post-termination retaliation against former employees.

I. THE DEVELOPMENT OF THE FALSE CLAIMS ACT AS A TOOL TO COMBAT FRAUD AGAINST THE GOVERNMENT HISTORY OF THE FALSE CLAIMS ACT (PRE-1986 AMENDMENTS)

Congress enacted the False Claims Act (FCA) in 1863.²¹ Initially known as the "Lincoln Law," the FCA's purpose was to combat simple fraud by government contractors who were supplying the Union Army during the Civil War.²² Examples of such fraud included government contractors selling the same horses to the federal government twice or shipping sand instead of gunpowder to the Union Army.²³ The 1863 Act also authorized private individuals (called "relators") to file *qui tam* lawsuits²⁴ "on behalf of the United States against persons submitting false claims to the government."²⁵

In the decades between the Civil War and World War II, *qui tam* lawsuits were uncommon.²⁶ Nevertheless, in 1943 Congress became concerned about potential for abusing them in the name of the FCA.²⁷ Congress's concern was partially in response to the Supreme Court's ruling in *United States ex rel. Marcus v. Hess* that an individual relator could bring a *qui tam* lawsuit under the FCA without "[having] any original information, [adding] anything by investigation of his own, or [showing that] his recovery is based on any fact not disclosed by the

21. False Claims Act, Pub. L. No. 37-67, 12 Stat. 696 (1863).

22. Brooker, *supra* note 1, at 375-76.

23. *Id.* at 376.

24. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932 (2009) ("The FCA establishes a scheme that permits either the Attorney General, § 3730(a), or a private party, § 3730(b), to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the 'relator.'").

25. Brooker, *supra* note 1 at 376.

26. *See id.* at 377.

27. *See id.* at 377-78.

Government itself.”²⁸ Following *Marcus*, Congress tightened the FCA’s *qui tam* provisions by barring lawsuits that were “based upon evidence or information in the possession of the United States . . . at the time such suit was brought.”²⁹ As a result, *qui tam* lawsuits declined after 1943.³⁰ Moreover, overzealous in its crusade against “parasitical suits” under the FCA, Congress failed to craft an exception for *qui tam* lawsuits in which the relator bringing suit was the original source of information for the government.³¹ As a result, by the 1980s judicial interpretation of the 1943 amendment produced the bizarre outcome whereby individuals who brought previously unknown information about fraud to the government were subsequently barred from bringing *qui tam* lawsuits as relators.³²

A. The False Claims Amendments Act of 1986 and Addition of § 3730(h)

In 1986, in response to judicial interpretations of the 1943 amendments and mounting concern about the government’s inability to effectively address fraud, Congress passed the False Claims Amendments Act of 1986.³³ In addition to reforming the problematic language of the 1943 amendment that hampered the ability of relators to bring certain *qui tam* lawsuits, the 1986 Amendments included specific procedures for filing *qui tam* lawsuits and increased the damages and civil penalties available to the government and relators, among other changes.³⁴

In addition, the 1986 Amendments introduced a provision to the FCA “to provide for ‘whistleblower’ protection.”³⁵ To combat fraud, Congress recognized that “few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employ-

28. *Id.* at 378; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 558 (1943) (Jackson, J., dissenting).

29. See Beverly Cohen, *Kaboom! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN ST. L. REV. 77, 83–84 (2011).

30. *Id.*

31. *Pettis ex rel. United States v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 671 (9th Cir. 1978) (“[T]he language of 31 U.S.C. s 232(C) affords no crevice of ambiguity within which to nestle the exception Pettis seeks. It presents a face, smooth, sharp, and unyielding.”).

32. See, e.g., *id.* (refusing request “to read into this provision an exception applicable to situations in which the person bringing suit is the source of the information possessed by the government prior to suit”); *United States ex rel. State of Wis. (Dep’t of Health & Soc. Servs.) v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984).

33. Brooker, *supra* note 1, at 379–80 (explaining that *U.S. ex rel. State of Wis. v. Dean* was a “well-publicized court case” that highlighted shortcomings in the FCA).

34. *Id.* at 381–82.

35. S. REP. NO. 99-345, at 34 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

ment, or any other form of retaliation.”³⁶ Through the anti-retaliation provision, Congress sought “to halt companies and individuals from using the threat of economic retaliation to silence ‘whistleblowers,’ as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.”³⁷

The 1986 Amendments attempted to accomplish Congress’ goal of protecting whistleblowers by enacting section 3730(h), which included the following:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination[.]

Although the term “employee” is not defined under section 3730(h) or any other subsection of the FCA, the Senate Report on the False Claims Amendments Act of 1986 supports a capacious definition of “employee.”³⁸ According to the Senate report, “[a]s is the rule under other Federal whistleblower statutes as well as discrimination laws, the definitions of ‘employee’ and ‘employer’ should be all-inclusive. Temporary, black-listed or discharged workers should be considered ‘employees’ for purposes of this act.”³⁹ Generally, blacklisting occurs when an employer “put[s] the name of (a person) on a list of those who are disfavored and are therefore to be avoided or punished.”⁴⁰ Black’s Law Dictionary illustrates this definition with “the firm blacklisted the former employee.”⁴¹ Because (1) Congress intended “employee” to be “all-inclusive,” and (2) the dictionary definition of “blacklist” specifically discusses blacklisting of former employees, it follows that Congress intended for section 3730(h)’s protections to extend to former employees.

36. *Id.* at 1, 34.

37. *Id.* at 34.

38. *See id.*

39. *Id.*

40. *Blacklist*, BLACK’S LAW DICTIONARY (11th ed. 2019).

41. *Id.*

The inclusion of “blacklisted” employees in the Senate’s Report on the False Claims Amendments Act of 1986 was not random—the amendments’ legislative history clearly demonstrates that Congress was aware of instances of employers blacklisting FCA whistleblowers.⁴² During a Senate subcommittee hearing on the proposed amendments, a whistleblower named Robert Wityczak spoke in support of the proposed amendments and about the retaliation he experienced after attempting to report his employer, a defense contractor, for fraudulently overcharging the federal government.⁴³ Wityczak explained that “[w]ithout this bill, these employees . . . will be forced to remain silent—at the peril of risking their jobs, being blackballed from the industry, and finding no means of supporting a family or making a living[. . .]”⁴⁴ John R. Phillips, Co-Director of the Center for Law in the Public Interest, submitted a prepared statement that discussed how “[a]fter filing a suit, [the person filing suit] might be immediately fired by his employer, threatened or harassed by supervisors or co-workers, and blackballed from the industry in which he works.”⁴⁵ He argued that the proposed amendments were “essential to alleviate the fears of a potential plaintiff or witness in a False Claims suit[.]”⁴⁶ In any case, the statements of Wityczak and Phillips show that Congress specifically included the term “blacklisted” in its 1986 report to indicate Congress’ awareness of instances of blacklisting as a particular type of retaliatory behavior against former employees.

Congress most recently amended the FCA in 2009 after “[t]he effectiveness of the FCA [was] undermined by judicial decisions limiting the scope of the law” unrelated to section 3730(h).⁴⁷ Nevertheless, in addition to clarifying language in response to “erroneous interpretations of the law,”⁴⁸ Congress simultaneously amended section 3730(h).⁴⁹ The amended section 3730(h) extended the protections of the FCA’s anti-retaliation provision to include contractors and agents in addition to employees,

42. See S. REP. NO. 99-345, at 34 (1986), as reprinted in 1986 U.S.C.A.N. 5266, 5299.

43. *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Admin. Prac. and Proc. of the S. Comm. on the Judiciary*, 99th Cong. 83–84 (1985) (statement of Robert Wityczak).

44. *Id.* at 84.

45. *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Admin. Prac. and Proc. of the S. Comm. on the Judiciary*, 99th Cong. 89, 94 (1985) (statement of John R. Phillips, Co-Director, The Center for Law in the Public Interest).

46. *Id.* (emphasis omitted).

47. S. REP. NO. 111-10, at 10 (2009), as reprinted in 2009 U.S.C.A.N. 430, 437.

48. *Id.*

49. Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, sec. 4, § 3730(h), 123 Stat. 1617, 1624–25 (2009).

again indicating Congress' intent for expansive protections for whistleblowers under the FCA.⁵⁰

Today, the FCA is “considered [the] single most important tool for combating fraud against the government.”⁵¹ More than 150 years after the FCA's modest enactment in 1863, the Department of Justice secured over \$2.2 billion from settlements and cases originating under the FCA in fiscal year 2020 alone.⁵² Of the \$2.2 billion recovered under the FCA, over \$1.8 billion involved the healthcare industry, “including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians.”⁵³ In total, the Department of Justice has recovered more than \$64 billion since Congress amended the FCA in 1986.⁵⁴ Cases brought by individual relators through *qui tam* lawsuits (with or without intervention by the federal government) are responsible for \$46 billion (over two-thirds) of that total.⁵⁵

Protecting whistleblowers like Dr. Felten from retaliation is essential to the FCA's ability to function properly as a tool to combat fraud. In enacting the 1986 Amendments, Congress recognized that “few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation.”⁵⁶ Despite these protections, retaliation against whistleblowers remains a problem.⁵⁷ It is imperative to resolve the circuit split over section 3730(h)'s anti-retaliation provision so that former employees are protected from post-termination retaliation due to their whistleblowing.

50. *Id.* at 1624–25.

51. Press Release, U.S. Dep't of Just., Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986 (Jan. 31, 2012), <https://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986> [https://perma.cc/XHD4-V9JY].

52. Press Release, U.S. Dep't of Just., Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020> [https://perma.cc/VD2S-M52K].

53. *Id.*

54. *Id.*

55. Press Release, U.S. Dep't of Just., *Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference* (Feb. 17, 2021), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar> [https://perma.cc/4V9M-2AX4].

56. S. REP. NO. 99-345, at 27 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

57. See GLOBAL BUS. ETHICS SURV., THE STATE OF ETHICS & COMPLIANCE IN THE WORKPLACE (Mar. 2021) <https://www.ethics.org/wp-content/uploads/2021-ECI-GBES-State-Ethics-Compliance-in-Workplace.pdf> [https://perma.cc/SWU3-AE3B] (finding that “the rate of retaliation against employees for reporting wrongdoing in the U.S. was 79 percent in 2020,” and this rate has been increasing since 2007).

II. THE CIRCUIT SPLIT IN *POTTS* AND *FELTEN*

Part II analyzes the circuit split between the Tenth and Sixth Circuit Courts of Appeals' definition of the term "employee" as used in section 3730(h) of the FCA. To provide context for the current split, Part II.A discusses precedential treatment of the term "employee" in comparable federal statutes, culminating in the Supreme Court's 1997 decision in *Robinson v. Shell Oil Co.* Parts II.B and II.C detail the circuit split between the Tenth Circuit in *Potts v. Center for Excellence in Higher Education, Inc.* and the Sixth Circuit in *United States ex rel. Felten v. William Beaumont Hospital*. These Parts explain each Court's approach to statutory interpretation and the *Robinson* considerations when determining whether "employee" in section 3730(h) of the FCA includes former employees.

A. Defining "Employee" in Comparable Federal Statutes and the Impact of *Robinson*

Prior to *Robinson* in 1997, there was a growing consensus among the federal circuit courts that the term "employees" in the anti-retaliation provisions of federal statutes included former employees.⁵⁸ As early as the 1970s, these courts began to broadly define the scope of "employees" as used in the anti-retaliation provisions of federal statutes—such as the Fair Labor Standards Act (FLSA),⁵⁹ Title VII of the Civil Rights Act,⁶⁰ and the Age Discrimination in Employment Act—to include former employees.⁶¹ In *Dunlop v. Carriage Carpet Co.*, the Sixth Circuit held that a former employee, voluntarily separated from his employer, was protected by the anti-retaliation provision of the FLSA.⁶² The FLSA anti-retaliation provision in question protected "any employee"—defined within the FLSA as "any individual employed by an employer"—who

58. See *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 140–41 (6th Cir. 1977); *Rutherford v. Am. Bank of Commerce*, 565 F.2d 1162, 1166 (10th Cir. 1977); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1054–55 (2d Cir. 1978) (per curiam); U.S. Equal Emp. Opportunity Comm'n v. *Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir. 1987); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 330 (D.C. Cir. 1991); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509–10 (11th Cir. 1988). *But see* *Reed v. Shepard*, 939 F.2d 484, 492–93 (7th Cir. 1991); *Polsby v. Chase*, 970 F.2d 1360, 1365 (4th Cir. 1992), as amended (Aug. 12, 1992), *cert. granted, judgment vacated sub nom.* *Polsby v. Shalala*, 507 U.S. 1048, 113 S. Ct. 1940, 123 L. Ed. 2d 646 (1993).

59. See *Dunlop*, 548 F.2d at 140–41.

60. See *Rutherford*, 565 F.2d at 1166; *Pantchenko*, 581 F.2d at 1054–55 (2d Cir. 1978) (per curiam).

61. See *Cosmair, Inc.*, 821 F.2d at 1088; *Passer*, 935 F.2d at 330.

62. *Dunlop*, 548 F.2d 139.

filed a complaint for discharge or discrimination.⁶³ Based on “the broad purposes and clear policies of the [FLSA],” the Sixth Circuit rejected a narrow reading of the term “employee” in favor of a broad reading that protected former employees from discrimination by their former employers.⁶⁴

Shortly after the Sixth Circuit’s decision in *Dunlop*, the Tenth Circuit applied parallel reasoning in *Rutherford v. American Bank of Commerce* to determine that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 protected former employees from post-termination discrimination by former employers.⁶⁵ Like the FLSA, Title VII defined “employee” as “an individual employed by an employer.”⁶⁶ The Tenth Circuit concluded that “former employees, no less than present employees, needed protection from discrimination by [resentful] employers[.]”⁶⁷ Following the Tenth Circuit’s decision in *Dunlop*, the Second, Third, and Eleventh Circuits also adopted the reasoning in *Rutherford* as applied to the anti-retaliation provision of Title VII.⁶⁸ Meanwhile, the Seventh⁶⁹ and Fourth⁷⁰ Circuits took an opposing view, interpreting the definition of “employees” more narrowly and holding that “Title VII provides no cause of action against a former employer by an ex-employee for acts of retaliation after the employment had ended.”⁷¹

As for the anti-retaliation provision of the Age Discrimination in Employment Act of 1967 (ADEA), the Fifth Circuit applied a similarly broad interpretation of “employees” in *EEOC v. Cosmair, Inc., L’Oreal Hair Care Division*.⁷² Citing *Dunlop* and *Rutherford*, the Fifth Circuit held that under this broad interpretation of “employees,” former employees are employees “as long as the alleged discrimination is related to or

63. *Id.* at 142.

64. *Id.*

65. *Rutherford*, 565 F.2d at 1166.

66. *Id.* at 1163.

67. *Id.* at 1166.

68. See *Pantchenko v. C. B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994) (“[P]ost-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued.”); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509–10 (11th Cir. 1988) (“[A] strict and narrow interpretation of the word ‘employee’ to exclude former employees would undercut the obvious remedial purposes of Title VII.”).

69. See *Reed v. Shepard*, 939 F.2d 484, 492–93 (7th Cir. 1991).

70. See *Polsby v. Chase*, 970 F.2d 1360, 1365 (4th Cir. 1992), as amended (Aug. 12, 1992), *cert. granted, judgment vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048 (1993).

71. *Id.*

72. *U.S. Equal Emp. Opportunity Comm’n v. Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir. 1987).

arises out of the employment relationship.”⁷³ The District of Columbia Circuit adopted the same approach under the ADEA in *Passer v. American Chemical Society*.⁷⁴

Finally, in a unanimous decision in *Robinson v. Shell Oil Co.*, the Supreme Court affirmatively answered the question of whether the term “employees” in Title VII’s anti-retaliation provision included former employees.⁷⁵ In *Robinson*, petitioner Charles Robinson was fired by respondent Shell Oil Company.⁷⁶ After being fired, Robinson filed a Title VII employment discrimination charge with the Equal Employment Opportunity Commission (EEOC).⁷⁷ Robinson alleged that while his charge with the EEOC was pending, Shell provided a negative professional reference for Robinson to a potential new employer in retaliation for filing the charge against Shell.⁷⁸ The Fourth Circuit affirmed the district court’s dismissal of Robinson’s claims on the grounds that the term “employees” in the anti-retaliation provision of Title VII refers only to current employees, leaving former employees like Robinson without a claim.⁷⁹

In reversing the Fourth Circuit, the Supreme Court determined first that the meaning of the term “employees,” as used in the statute, was ambiguous by considering three parameters: first, “the language itself”; second, “the specific context in which that language is used”; and third, “the broader context of the statute as a whole.”⁸⁰ Using this approach, the Supreme Court found that the term “employees” in the statute does not include a temporal qualifier to clarify whether the provision applies to only current employees.⁸¹ Additionally, the definition of “employee” in Title VII’s definitions section similarly lacks a temporal qualifier.⁸² Finally, different sections of Title VII use the term “employees” in contexts that clearly refer to either current employees only or

73. *Id.* at 1088–89 (citing *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (per curiam); *Rutherford v. Am. Bank of Com.*, 565 F.2d 1162, 1165–66 (10th Cir. 1977); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977); *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972)).

74. *Passer v. Am. Chem. Soc.*, 935 F.2d 322, 330 (D.C. Cir. 1991).

75. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 337 (1997).

76. *Id.* at 339.

77. *Id.*

78. *Id.*

79. *Id.* at 337 (stating that “§ 704(a) of Title VII... makes it unlawful ‘for an employer to discriminate against any of his employees or applicants for employment’ who have availed themselves of Title VII’s protections.”).

80. *Id.* at 341 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

81. *Id.*

82. *Id.* at 341–42 (reciting the definition of “employee” as “an individual employed by an employer” (quoting 42 U.S.C. § 2000e(f))).

both current employees and former employees. Therefore, “the term standing alone is necessarily ambiguous[.]”⁸³

After determining that the term “employees” was ambiguous as to whether it includes former employees, the Supreme Court resolved the ambiguity by holding that “employees” in Title VII’s anti-retaliation provision does include former employees.⁸⁴ The Court determined that including former employees as “employees” within the provision is more consistent with “[t]he broader context provided by other sections of the statute” which “plainly contemplate that former employees will make use of the remedial mechanisms of Title VII.”⁸⁵ Furthermore, excluding former employees from the protections of the provision “would effectively vitiate much of [its] protection[.]”⁸⁶ This vitiating would disincentivize employees from filing charges with the EEOC for fear of post-termination retaliations (for which they no longer would have recourse as “former employees”).⁸⁷ A narrow reading of the term employees also would allow employers to fire employees to eliminate employees’ ability to bring Title VII claims.⁸⁸ The Supreme Court reasoned that “[t]hose arguments carry persuasive force given their coherence and their consistency with a primary purpose of [anti-retaliation] provisions: Maintaining unfettered access to statutory remedial mechanisms.”⁸⁹ The Supreme Court’s decision in *Robinson* affirmed its approach to resolving ambiguities in anti-retaliation provisions inclusively by referencing the broader context of the statute.

B. *The § 3730(h) Split: Potts*

In *Potts v. Center for Excellence in Higher Education, Inc.*, the Tenth Circuit held that section 3730(h) of the FCA not does cover post-termination retaliation by an employer against a former employee.⁹⁰ The Center for Excellence in Higher Education sued Debbi Potts in state court and alleged breach of a \$7,000 post-resignation written agreement that restricted, among other things, Ms. Potts’ ability to contact governmental or regulatory agencies to file a complaint about the Cen-

83. *Id.* at 344.

84. *Id.* at 345.

85. *Id.*

86. *Id.*

87. *Id.* at 346.

88. *See id.*

89. *Id.* (first citing *NLRB v. Scrivener*, 405 U.S. 117, 121–22 (1972); and then citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292–93 (1960)).

90. *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610, 612 (10th Cir. 2018).

ter's business practices.⁹¹ The Center alleged that Ms. Potts violated the agreement by sending an email disparaging the Center to one of its former employees.⁹² When the Center later learned that Ms. Potts "sent a written complaint to the Center's accreditor, the Accrediting Commission of Career Schools and Colleges (ACCSC), concerning the Center's alleged deceptions in maintaining its accreditation," the Center amended its breach of contract claim to include Ms. Potts' complaint to the ACCSC as also violating the agreement.⁹³ In response, Ms. Potts filed a lawsuit in federal district court. She claimed that the Center harassed her with the lawsuit in violation of section 3730(h) of the FCA "because [her complaint] revealed violations of accreditation standards, which would have disqualified the Center from receiving federal student financial aid."⁹⁴

In determining whether Ms. Potts' claim against the Center was covered by section 3730(h) of the Federal Claims Act, the Tenth Circuit followed the Supreme Court's *Robinson* reasoning by deciding whether the meaning of the term "employee" in the text of section 3730(h) is ambiguous.⁹⁵ In doing so, the court applied the *Robinson* considerations: first, "the language itself," second, "the specific context in which that language is used," and third, "the broader context of the statute as a whole."⁹⁶ However, unlike the Supreme Court in *Robinson*, the court found that the meaning of "employee" in the text of section 3730(h) is unambiguous and "includes only persons who were current employees when their employers retaliated against them."⁹⁷ Additionally, the court implicitly rebuked the numerous pre-*Robinson* courts that had interpreted the term "employees" to include former employees in comparable anti-retaliation provisions.⁹⁸

Despite concluding that the meaning of "employee" is unambiguous, the court took its analysis further by looking to the context of section 3730(h) to determine that the anti-retaliation did not cover retaliation against former employees.⁹⁹ The court used *noscitur a sociis*,¹⁰⁰ the "associ-

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 613 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *Ceco Concrete Constr., LLC v. Centennial State Carpenters Pension Tr.*, 821 F.3d 1250, 1258 (10th Cir. 2016))).

96. *Id.*

97. *Potts*, 908 F.3d at 614.

98. *See, e.g.*, *Rutherford v. Am. Bank of Com.*, 565 F.2d 1162, 1165 (10th Cir. 1977) (interpreting the FLSA as "[a] statute which is remedial in nature should be liberally construed.").

99. *See Potts*, 908 F.3d at 614.

ated word” canon of statutory construction, to analyze how the forms of retaliation included in the provision were temporally limited to current employees and supported the determination that the anti-retaliation provision does not include retaliation against former employees:

We agree that the associated-words canon applies here. . . . In view of [the *noscitur a sociis* canon of construction], and with Congress having snugly embedded “threatened” and “harassed” within the other four retaliatory acts needing to occur during employment [discharge, demotion, suspension, or discrimination], we cannot apply a different temporal range for those two terms than applies for their four neighbors.¹⁰¹

Additionally, the court concluded that the residual clause “or in any other manner discriminated against” did not undermine this interpretation¹⁰²—rather, the court interpreted the residual clause to include only “similar discriminations” as the specific forms of discrimination listed.¹⁰³

Turning to section 3730(h)(2), the court further reasoned that the remedies listed in the text “all relate to an employment relationship,” which shows that the provision does not include relief for retaliation against former employees.¹⁰⁴ Although Potts argued that section 3730(h)(2) simply states that relief “shall include” the listed remedies (indicating that the list is not restrictive), the court concluded that it did not “reach relief beyond employment-related relief.”¹⁰⁵

The court then dismissed Potts’ argument that because the Department of Labor (DOL) promulgated a regulation that interpreted parallel language in the Sarbanes-Oxley Act’s anti-retaliation provision¹⁰⁶ as applying to retaliation against former employees, then by extension section 3730(h) must apply to retaliation against former employees, too.¹⁰⁷ The DOL regulation interpreting the Sarbanes-Oxley Act provision states that “[e]mployee means an individual *presently or formerly working* for a covered person, an individual applying to work for a cov-

100. BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *Noscitur a sociis* as “A canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it.”).

101. *Potts*, 908 F.3d at 614–15.

102. *Id.*

103. *Id.* at 615.

104. *Id.* at 616.

105. *Id.*

106. *Id.* at 616; 18 U.S.C. § 1514A.

107. *Potts*, 908 F.3d at 617 (citing 29 C.F.R. § 1980.101 (2003)).

ered person, or an individual whose employment could be affected by a covered person.”¹⁰⁸ However, the court concluded that “this regulation may simply recognize what we have already conceded here—that a former employee could sue for retaliatory discrimination occurring during employment,” which would conform with the court’s holding that section 3730(h) does not apply to *post-termination* retaliation against former employees.¹⁰⁹

Finally, the court dismissed Potts’ argument that a narrow interpretation of the term “employee” in section 3730(h) would run counter to the Supreme Court’s decision in *Robinson*.¹¹⁰ The court stated that the Supreme Court in *Robinson* found the term “employee” in Title VII’s anti-retaliation provision to be ambiguous on three grounds: first, there was no temporal qualifier for the term in the anti-retaliation provision; second, Title VII’s definition of “employee” also lacked a temporal qualifier; and third, various provisions of Title VII use the term “employee” to refer to either current or former employees.¹¹¹ The court reasoned that the *Robinson* considerations did not support a broader interpretation of the term “employee” in the FCA because “the False Claims Act, by its list of retaliatory acts, temporally limits relief to employees who are subjected to retaliatory acts while they are current employees.”¹¹² Additionally, Potts failed to identify any use of the term “employee” in the FCA that refers to employees “whose protected activity exclusively post-dates the employment relationship.”¹¹³ As a result, the court concluded that its holding that “employee” was unambiguous did not run afoul of the Supreme Court’s *Robinson* analysis.

C. The § 3730(h) Split: Felten

In contrast to the Tenth Circuit in *Potts*, the Sixth Circuit in *Felten v. William Beaumont Hospital* held that the term “employee” in section 3730(h) of the FCA includes former employees alleging post-termination retaliation.¹¹⁴ As discussed in this Note’s Introduction, Dr. David Felten alleged that after his termination, his former employer Beaumont Hos-

108. 29 C.F.R. § 1980.101 (2003) (emphasis added).

109. *Potts*, 908 F.3d at 617.

110. *Id.* at 617–18.

111. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

112. *Id.* at 618.

113. *Id.*

114. *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 434–35 (6th Cir. 2021), *cert. denied sub nom. William Beaumont Hosp. v. U.S. ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.).

pital violated the anti-retaliation provision of the FCA by blacklisting him for filing a *qui tam* lawsuit.¹¹⁵ The first key distinction between the Sixth Circuit's analysis in *Felten* and the Tenth Circuit's analysis in *Potts* is that the Sixth Circuit's concluded that the term "employee" in section 3730(h) is ambiguous. Second, unlike the Tenth Circuit, the Sixth Circuit proceeded to resolve this ambiguity by looking to the broader context of the statute and the primary purpose of the anti-retaliation provision.¹¹⁶ The Sixth Circuit concluded that "employee" in section 3730(h) of the FCA includes former employees alleging post-termination retaliation.¹¹⁷

The court in *Felten* began its analysis by rejecting Beaumont's argument that the FCA's anti-retaliation provision "unambiguously excludes" any claim of post-termination retaliation, as the Tenth Circuit held. Instead, the court turned to *Robinson*, which "provide[d] guidelines for determining when a statute's meaning is not plain in the context of protections for employees and what to do in the face of ambiguity[.]"¹¹⁸ The court determined that *Robinson*'s considerations apply "with equal force" to section 3730(h).¹¹⁹ The court then applied the *Robinson* considerations: first, "the language itself," second, "the specific context in which that language is used," and third, "the broader context of the statute as a whole."¹²⁰

Applying the first *Robinson* consideration in reaching its conclusion that the meaning of "employee" in section 3730(h) is ambiguous, the court determined that the term "employee" in the FCA's anti-retaliation provision, like "employees" in Title VII, does not have a temporal qualifier.¹²¹ The court rejected the argument that the *noscitur a sociis* canon of construction indicated unambiguity; rather, because three of the six retaliation forms included in the statute (threats, harassment, and discrimination) are not limited to former employees, this "[reduces] the value of the *noscitur a sociis* canon in this case."¹²² The court focused on the three non-temporally limited retaliation forms (threats, harassment, and discrimination) to infer that "Congress may have included [these forms] in the statute to expand the temporal scope of the anti-

115. *Id.* at 430.

116. *Id.* at 435.

117. *Id.* at 431–32.

118. *Id.* at 431.

119. *Id.* at 432.

120. *Id.*; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

121. *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 432 (6th Cir. 2021), *cert. denied sub nom. William Beaumont Hosp. v. U.S. ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.).

122. *Id.*

retaliation provision[.]”¹²³ The court also concluded that the phrase “in the terms and conditions of employment” did not temporally limit the types of retaliation in section 3730(h) because there are terms and conditions of employment that apply to former employees.¹²⁴

Applying the second *Robinson* consideration, the court looked to the statutory and dictionary definitions of employee.¹²⁵ The FCA does not define “employee,” so the court turned to the dictionary and concluded that “employee” could include former employees.¹²⁶ The court also referred to a previous Sixth Circuit holding in *Vander Boegh v. EnergySolutions, Inc.* that a job applicant is not an “employee” under section 3730(h).¹²⁷ In *Vander Boegh*, the Sixth Circuit contrasted job applicants from former employees under section 3730(h) because “[T]o be either a current or former employee, an employment relationship must have formed. A job applicant has never performed work as an employee for the employer; both current and former employees, by definition, have.”¹²⁸ The Sixth Circuit in *Felten* concluded that the *Vander Boegh* court’s reasoning combined with the plain meaning of “employee” did not confine section 3730(h) to current employees.¹²⁹

Turning to the third *Robinson* consideration, the court looked to the broader context of the statute and concluded that aspects of the FCA’s statutory framework support an interpretation of the term “employee” that includes former employees.¹³⁰ For example, section 3730(h)(2) includes forms of relief such as reinstatement (which can only apply to former employees).¹³¹ Beyond the specific forms of relief in section 3730(h)(2), “the catch-all wording of the relief provision [that relief ‘shall include ...’] can support application of the FCA to former employees ... [and] demonstrates that the list of remedies is [illustrative instead

123. *Id.*

124. *Id.* at 432–33.

125. *Id.* at 433.

126. *Id.* (“The argument that the term ‘employed’ . . . is commonly used to mean ‘[p]erforming work under an employer-employee relationship,’ BLACK’S LAW DICTIONARY 525 (6th ed. 1990), begs the question by implicitly reading the word ‘employed’ to mean ‘is employed.’ But the word ‘employed’ is not so limited in its possible meanings, and could just as easily be read to mean ‘was employed.’” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997))).

127. *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1060 (6th Cir. 2014).

128. *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 433 (6th Cir. 2021), *cert. denied sub nom. William Beaumont Hosp. v. U.S. ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.) (quoting *Vander Boegh* 772 F.3d at 1060).

129. *Id.*

130. *Id.*

131. *Id.*

of exhaustive].”¹³² Additionally, the court determined that nothing in section 3730(h) limits the provision’s remedies to a former employee who was employed when the retaliatory conduct occurred.¹³³

After applying the three *Robinson* considerations to determine that the term “employee” in section 3730(h) is ambiguous, the court again turned to *Robinson* to guide its holding that the anti-retaliation provision of the FCA protects former employees who experience retaliation from a former employer.¹³⁴ Like in *Robinson*, the court looked to the broader context of the FCA and the primary purpose of section 3730(h).¹³⁵ It reasoned that a narrow interpretation of “employee” would vitiate much of the protection of the FCA’s anti-retaliation provision similarly to how a narrow interpretation would have vitiated Title VII’s protections in *Robinson*. Including only current employees under section 3730(h) would undermine the provision’s purpose of encouraging whistleblowers to report fraud and then protecting those same whistleblowers.¹³⁶ A narrow reading of the term “employee” would dissuade whistleblowers from reporting fraud because employers could threaten, harass, or discriminate against them if they were fired or otherwise not current employees.¹³⁷ Acknowledging the creation of a circuit split with the Tenth Circuit, the Sixth Circuit stated that its analysis was better aligned with *Robinson*’s precedent and held that the FCA’s anti-retaliation extends to employees who allege post-termination retaliation.¹³⁸

III. POST-FELTEN: RESOLVING THE CIRCUIT SPLIT THROUGH JUDICIAL OR CONGRESSIONAL INTERVENTION

The circuit split between the Tenth Circuit’s holding in *Potts* and the Sixth Circuit’s holding in *Felten* creates uncertainty for potential FCA whistleblowers (including current and former employees) as to their protection from retaliation under the FCA. Part III argues that this cir-

132. *Id.* at 434 (citing *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) (“It is true that use of the word ‘include’ can signal that the list that follows is meant to be illustrative rather than exhaustive.”)).

133. *Id.*

134. *Id.* at 435.

135. *Id.*

136. *Id.* (quoting *Neal v. Honeywell Inc.*, 33 F.3d 860, 861 (7th Cir. 1994), *abrogated on other grounds by* *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005)).

137. *Id.*

138. *Id.* The court left for the district court the question of whether blacklisting specifically is included as a form of retaliatory action under the FCA.

cuit split is ripe for intervention by the Supreme Court to determine that the FCA's anti-retaliation provision includes post-termination retaliation against former employees. However, given the Supreme Court's recent denial of certiorari in *Felten*, this Part will also discuss the need for Congressional action to address this problem.¹³⁹

A. *The Supreme Court should resolve the circuit split by holding that former employees are included under § 3730(h)'s protections against retaliation.*

The Supreme Court should affirm *Felten's* more inclusive interpretation of section 3730(h) that the anti-retaliation provision “protects former employees alleging post-termination retaliation[.]”¹⁴⁰ There are legal and policy justifications for Supreme Court intervention to resolve this nascent circuit split: first, the narrower interpretation of “employee” in section 3730(h) results from a flawed application of *noscitur a sociis* and the Supreme Court's *Robinson* precedent; second, the emergence of this circuit split could create confusion as to who is protected under section 3730(h) at the expense of both potential whistleblowers and the efficacy of the FCA; third, affirming the Sixth Circuit's interpretation of section 3730(h) aligns with the Supreme Court's Anti-Retaliation Principle.¹⁴¹

The Sixth Circuit's more inclusive interpretation of “employee” in section 3730(h) is the proper application of *Robinson* and better aligns with the purpose of the FCA and its anti-retaliation provision. In reaching the opposite conclusion, the Tenth Circuit relied heavily on the canon of *noscitur a sociis* (associated word canon) to determine that section 3730(h) does not protect former employees from post-termination retaliation.¹⁴² Citing the Supreme Court's use of *noscitur a sociis* in *Dole v. United Steelworkers of America*, the Tenth Circuit incorrectly reasoned that, because four of the six retaliation forms listed in section 3730(h) can only apply to current employees (discharge, demotion, suspension, or discrimination), the other two forms of retaliation (threats or harassment) must also be temporally limited to current employees.¹⁴³

139. See *William Beaumont Hosp. v. United States ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.).

140. *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 430 (6th Cir. 2021), cert. denied sub nom. *William Beaumont Hosp. v. U.S. ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.).

141. See generally Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010) (arguing that the Supreme Court has broadly interpreted many antiretaliation statutes).

142. See *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610, 615 (10th Cir. 2018) (“On just that basis [of *noscitur a sociis*], we would affirm [the narrower interpretation].”).

143. *Id.* at 614.

The Tenth Circuit failed to consider that the *noscitur a sociis* is used to avoid giving *unintended* breadth to statutes, not to undercut Congress' purpose by narrowing a statute's meaning.¹⁴⁴ For example, the court failed to acknowledge that in *Dole*, the Supreme Court, after applying the canon, also looked to determine whether "[t]he same conclusion is produced by a consideration of the object and structure of the [Act at issue] as a whole," rather than relying on *noscitur a sociis* in isolation from Congress' purpose and intent in enacting the statute.¹⁴⁵ In another case, while using the *noscitur a sociis* canon of construction, the Supreme Court stated that "[t]he maxim *noscitur a sociis* . . . while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of *unintended* breadth to the Acts of Congress."¹⁴⁶

Noscitur a sociis aims to avoid giving unintended breadth to acts of Congress (in this instance, section 3730(h) of the FCA). A reexamination of Congress' purpose in enacting the provision with the 1986 Amendments demonstrates that the Sixth Circuit's more inclusive interpretation aligns with congressional intent, while the Tenth Circuit's narrower interpretation does not. In determining congressional intent, Committee Reports are the "authoritative source."¹⁴⁷ Quoting the Senate Report on the 1986 Amendments, the Supreme Court has reiterated that "[t]he basic purpose of the 1986 amendments was to make the FCA a 'more useful tool against fraud in modern times.'"¹⁴⁸ The same Senate Report on the 1986 Amendments states that, like other whistleblower statutes and discrimination laws, "the definitions of 'employee' and 'employer' should be all-inclusive." According to the Senate Report, "employees" should also include temporary, blacklisted, or discharged workers.¹⁴⁹ Given that discharged workers are necessarily former employees and that blacklisting is an action often taken against former employees,¹⁵⁰ the legislative history of section 3730(h) strongly supports the more inclusive interpretation of "employee" within the anti-

144. See *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

145. *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990).

146. *Jarecki*, 367 U.S. at 307 (1961) (emphasis added) (citing *Neal v. Clark*, 95 U.S. 704, 708–09).

147. *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'").

148. *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. REP. NO. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.).

149. S. REP. NO. 99-345, at 34 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

150. See *Blacklist*, BLACK'S LAW DICTIONARY (11th ed. 2019).

retaliation provision. This interpretation is buttressed by Congress' express intent for the term "employee" to be "all-inclusive."¹⁵¹ The Tenth Circuit's narrower interpretation, based on its rigid application of *noscitur a sociis*, failed to consider whether "[t]he same conclusion [about a statute's meaning] is produced by a consideration of the object and structure of the [Act at issue] as a whole."¹⁵² Here, consideration of the object of the FCA as a whole (as a tool to combat fraud) favors a more inclusive interpretation of section 3730(h).

Looking beyond the flaws in the Tenth Circuit's use of the canons of statutory construction, a more faithful application of the *Robinson* considerations also would have resulted in a conclusion that the meaning of "employee" in section 3730(h) includes former employees. In *Robinson*, after determining that the meaning of "employees" was ambiguous, the Supreme Court looked to the "broader context of [the statute] and the primary purpose of [the provision at issue]."¹⁵³ In *Potts*, the Tenth Circuit stopped short of applying this analysis because it concluded that the term "employee" was unambiguous.¹⁵⁴ However, the Tenth Circuit resolved the ambiguity surrounding the meaning of "employee" by improperly applying canons of statutory construction to resolve the statute's ambiguity. Indeed, had the court correctly acknowledged that "employee" had an ambiguous meaning, it then should have considered the broader context of the statute and the purpose of section 3730(h) like the Supreme Court did in *Robinson* in analyzing Title VII's anti-retaliation provision.

As previously discussed in this Part, an analysis of the broader context of the FCA and the purpose of section 3730(h) as an anti-retaliation provision strongly favors the conclusion that the ambiguity in the meaning of "employee" should be resolved by including post-termination retaliation against former employees. The *Robinson* court stated that "a primary purpose of [anti-retaliation] provisions [is to maintain] unfettered access to statutory remedial mechanisms," and this supports resolving ambiguity as to the meaning of "employee" in section 3730(h) to allow former employees access to the provision's remedial mechanism.¹⁵⁵ As the Sixth Circuit correctly stated, the FCA's primary purpose is to deter fraud against the government, and the

151. S. REP. NO. 99-345, at 34 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

152. *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990).

153. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

154. *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610, 618 n.9 (10th Cir. 2018) (stating "[w]e have no occasion to reach the policy arguments Potts makes in favor of protecting whistleblowers. Because § 3730(h)(1) unambiguously provides no remedy for a former employee's post-employment whistleblowing, these policy arguments are for Congress.").

155. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, (1997).

FCA's anti-retaliation provision advances that purpose by protecting whistleblowers who assist the government in combating that fraud.¹⁵⁶ Because of *Potts*, however, former employees might not receive protection from, or recourse against, post-termination retaliation. This incorrect interpretation of section 3730(h) would lead to the absurd outcome whereby an employer could retaliate against (through harassment, threats, or other forms of discrimination such as blacklisting) an employee who brought an FCA *qui tam* lawsuit to assist the government in combatting fraud as long as the employee was a former employee rather than a current employee. This undesirable outcome highlights the practical concerns raised by the Supreme Court's *Robinson* analysis of Title VII's anti-retaliation provision.¹⁵⁷ The narrower interpretation of "employee" restricts access to section 3730(h)'s remedial mechanisms for any former employee alleging post-termination retaliation.

In addition to the FCA's overall purpose of combating and deterring fraud, as discussed in Part I and this Part, the legislative history of the section 3730(h) supports an interpretation of the provision that includes former employees alleging post-termination retaliation.¹⁵⁸ This legislative history, combined with a complete application of the three-part *Robinson* analysis, leads to the conclusion that the purpose and intent of the FCA generally, and section 3730(h) specifically, support resolving the ambiguity in section 3730(h) in favor of a more inclusive definition of "employee."

Beyond the issues with the narrow interpretation of "employee" in section 3730(h), a second justification for Supreme Court intervention is the risk that this circuit split, if unresolved, will undermine the efficacy of the FCA. Confusion as to who is protected under section 3730(h) might discourage potential whistleblowers and impede the FCA as a tool to combat fraud. The Supreme Court's intervention would resolve this problem. Outside of the Tenth and Sixth Circuits, numerous district courts have addressed this issue with varying results.¹⁵⁹ However,

156. *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 435 (6th Cir. 2021), *cert. denied sub nom. William Beaumont Hosp. v. U.S. ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.) (quoting *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994); *Neal v. Honeywell Inc.*, 33 F.3d 860, 861 (7th Cir. 1994), *abrogated on other grounds by Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 162 L.Ed.2d 390 (2005)).

157. *Id.*

158. See S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299 (stating that "[a]s is the rule under other Federal whistleblower statutes as well as discrimination laws, the definitions of 'employee' and 'employer' should be all-inclusive. Temporary, blacklisted or discharged workers should be considered 'employees' for purposes of this act.>").

159. See, e.g., *United States ex rel. Head v. Kane Co.*, 798 F.Supp.2d 186, 208 (D.D.C. 2011); *Fitzsimmons v. Cardiology Assocs. of Fredericksburg, Ltd.*, Civil Action No. 3:15CV72, 2015 WL 4937461, at *7 (E.D. Va. Aug. 18, 2015); *United States ex rel. Complin v. N. Carolina Baptist Hosp.*,

because the Supreme Court denied writ of certiorari in *Felten* in January 2022, the Supreme Court will not have the opportunity to address this issue until another petition puts the meaning of “employee” in section 3730(h) at issue.¹⁶⁰ Given the Supreme Court’s decision to deny certiorari, this nascent circuit split could deepen and cause confusion among federal courts. For example, since the emergence of the circuit split with *Felten* in 2021, at least two district courts have adopted the Sixth Circuit’s more inclusive interpretation of section 3730(h), indicating the necessity of Supreme Court intervention to resolve the circuit split before it deepens and hinders the FCA’s functionality.¹⁶¹

Given the recent increases in government spending to address the effects of the COVID-19 pandemic, it is more important than ever to clarify that protections for whistleblowers under the FCA include former employees.¹⁶² Less than two weeks after the Supreme Court denied the opportunity to resolve the circuit split presented by *Felten*, the DOJ announced that in fiscal year 2021, the federal government recovered more than \$5.6 billion through the FCA.¹⁶³ Senator Chuck Grassley, who co-authored the 1986 and 2009 FCA amendments, stated that, “[t]he massive increases in government spending to address the COVID-19 crisis have created new opportunities for fraudsters As history has shown all of us, fraudsters thrive during times of crises and large-scale government spending.”¹⁶⁴ Senator Grassley advised the DOJ, Congress, and whistleblowers to “remain very vigilant” of fraud during the COVID-19 crisis.¹⁶⁵ Acting Assistant Attorney General Brian Boynton echoed Senator Grassley’s sentiment in a February 2021 speech in which

No. 1:09CV420, 2019 WL 430925 (M.D.N.C. Feb. 4, 2019), *aff’d*, 818 F. App’x 179 (4th Cir. 2020) (determining that section 3730(h) does not protect against post-termination retaliation against former employees). *But see, e.g.*, *Haka v. Lincoln Cty.*, 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008) (holding that “the logic of [Robinson] applies to plaintiff’s claim [that 3730(h) includes former employees].”); *Ortino v. Sch. Bd. of Collier Cty.*, No. 2:14-CV-693-FTM-29CM, 2015 WL 1579460 (M.D. Fla. Apr. 9, 2015).

160. *William Beaumont Hosp. v. U.S. ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.).

161. *See Kamran v. Ali*, No. 120CV1494RDAMSN, 2021 WL 4453598, at *8 (E.D. Va. Sept. 29, 2021); *Smith v. Athena Constr. Grp., Inc.*, No. 18-CV-2080 (APM), 2022 WL 888188, at *18 (D.D.C. Mar. 25, 2022).

162. *See* Press Release, U.S. Dep’t of Just., Justice Department’s False Claims Act Settlements and Judgments Exceed \$5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year> [<https://perma.cc/3JVR-QEAR>] (including a \$2.8 billion recovery from Purdue); Courtney Bubl , *Senator: Pandemic Makes Anti-Fraud Law More Important Than Ever*, GOV’T EXEC. (Feb. 17, 2021) <https://www.govexec.com/management/2021/02/grassley-says-pandemic-makes-anti-fraud-law-more-important-ever/172114/> [<https://perma.cc/2HNL-AHYJ>].

163. Press Release, U.S. Dep’t of Just., *supra* note 162.

164. Bubl , *supra* note 162.

165. *Id.*

he mentioned pandemic-related fraud as a top priority for DOJ enforcement.¹⁶⁶ Noting that while the pandemic inevitably has produced novel opportunities for fraud against the government, such fraud “will in many cases resemble misconduct that the False Claims Act has long been used to address.”¹⁶⁷

In enacting the 1986 FCA amendments, Congress was concerned that “few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation.”¹⁶⁸ This concern will be realized if courts narrow the reach of the essential protections offered by section 3730(h). Therefore, it is imperative that the Supreme Court take advantage of the next opportunity to properly interpret section 3730(h). Otherwise, the erroneous narrowing of the term “employee” section 3730(h) might dissuade whistleblowers from assisting the government in combating fraud due to confusion about the scope of the protections against retaliation.

Finally, the Supreme Court should affirm the Sixth Circuit’s interpretation of “employee” within section 3730(h) to further what Professor Richard Moberly has referred to as the Court’s Anti-Retaliation Principle.¹⁶⁹ Examining a series of Supreme Court cases from 1960-2010, Moberly concluded that the Court “consistently has permitted a wide range of plaintiffs to bring retaliation lawsuits because of the devastating ‘chilling’ effect retaliation can have on future employer misconduct reports.”¹⁷⁰ In particular, Moberly regards *Robinson* as emblematic of the Court’s liberal approach to interpreting anti-retaliation provisions.¹⁷¹ Moberly proceeds to explain that while “[many] retaliation statutes contain vague language about their scope of protection... the Court has broadly interpreted these statutes to allow a wide range of individuals to bring retaliation claims.”¹⁷² Although recent cases such as *University of Texas Southwestern Medical Center v. Nassar* have undermined the Court’s Anti-Retaliation Principle by requiring heightened causation standards in retaliation claims,¹⁷³ it remains true that the Court favors

166. Brian M. Boynton, Acting Assistant Attorney General, U.S. Dep’t of Just., Remarks at the Federal Bar Association Qui Tam Conference (Feb. 17, 2021), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar> [<https://perma.cc/TGH2-ZALA>].

167. *Id.*

168. S. REP. No. 99-345, at 27 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

169. See Moberly, *supra* note 141.

170. *Id.* at 437.

171. *Id.*

172. *Id.*

173. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 361 (2013).

“[m]aintaining unfettered access to statutory remedial mechanisms” in terms of who is able to bring claims under anti-retaliation provisions.¹⁷⁴

By holding that section 3730(h) applies to post-termination retaliation against former employees, the Supreme Court could advance this Anti-Retaliation Principle not only for FCA whistleblowers but also for whistleblowers under the Sarbanes-Oxley Act. The Sarbanes-Oxley Act of 2002 (SOX), enacted in response to the Enron scandal and similar corporate misconduct, is an effort to “[demand] corporate responsibility, public disclosure, and improved auditing and financial reporting methods.”¹⁷⁵ SOX contains a similar anti-retaliation provision as the FCA to protect employees of publicly traded companies who divulge information about potential securities fraud or violations of the Securities and Exchange Commission’s rules or regulations.¹⁷⁶ Specifically, under section 1514A of SOX, no company meeting the Act’s specifications “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee [under the Act.]”¹⁷⁷ Because the language of section 1514A of SOX is nearly identical to section 3730(h) of the FCA, the Supreme Court ruling that the more inclusive interpretation of section 3730(h) is the correct interpretation would bode well for former employees alleging post-termination retaliation for their whistleblowing under the parallel provision in section 1514A of SOX.¹⁷⁸

B. *Congress should amend § 3730(h) of the False Claims Act to ensure former employees are protected from post-termination retaliation.*

In January 2022, the Supreme Court denied writ of certiorari in *Felten*.¹⁷⁹ Because the Supreme Court declined an opportunity to set

174. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

175. John F. Fatino, *The Sarbanes-Oxley Act of 2002 and the New Prohibition on Employer Retaliation Against Whistleblowers: For Whom the Bell Tolls or Tooting One's Own Horn?*, 51 S.D. L. REV. 450, 450 (2006).

176. *Id.* at 451 n.5.

177. 18 U.S.C.A. § 1514A (West).

178. *See, e.g.*, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006) (citing *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)) (“[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read ‘as if they were one law.’”). Already one district court has ruled that a former employee’s post-termination deposition testimony was protected by section 1514A of SOX, but the Supreme Court could settle this issue and advance the Anti-Retaliation Principle for whistleblowers both under the FCA and SOX. *See Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108, 114 (S.D.N.Y. 2015).

179. *William Beaumont Hosp. v. United States ex rel. Felten*, 142 S. Ct. 896 (2022) (mem.).

precedent in interpreting section 3730(h) of the FCA, Congress should amend the FCA to resolve the ambiguities at issue in *Potts* and *Felten*. In July 2021, a bipartisan group of U.S. Senators, led by Senator Grassley (co-author of the 1986 and 2009 FCA amendments), introduced the False Claims Amendments Act of 2021.¹⁸⁰ The Act, among other changes, would amend section 3730(h)(1) by “inserting ‘current or former’ after ‘Any.’”¹⁸¹ If enacted, section 3730(h) would provide relief from retaliatory actions for “[a]ny *current or former* employee[.]” The Act reported out of the Senate Committee on the Judiciary in November 2021 but has not yet received a vote.¹⁸² Despite the Act’s bipartisan origins, it faces significant opposition from the healthcare industry which opposes, among other provisions, the expansion of section 3730(h)(1)’s protections.¹⁸³ Additionally, seven Republican Senators on the Senate Judiciary Committee voted against advancing the Act out of committee,¹⁸⁴ indicating that the Act will not pass without overcoming an organized opposition.

The Act would help to resolve the circuit split in favor of section 3730(h)’s proper interpretation by amending the statute to explicitly include former employees. However, there is an additional amendment to section 3730(h)(1) that would be useful in enacting Congress’ intent with the 1986 and 2009 amendments while preventing courts from misinterpreting the newly amended statute: Congress should add “blacklisted” to the list of retaliatory actions under section 3730(h)(1). This would entitle any *current or former* employee to relief if that employee is discharged, demoted, suspended, threatened, harassed, *blacklisted*, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts under the FCA. There are three justifications for this reform. First, the 1986 amendments were concerned about providing relief for blacklisted employees,¹⁸⁵ and the Act’s current sponsors are concerned with retaliation against former employees.¹⁸⁶ This

180. False Claims Amendments Act of 2021, S. 2428, 117th Cong. (2021).

181. *Id.* § 4.

182. *Id.*

183. AHA, *Others, Express Opposition to the False Claims Amendments Act, S. 2428*, AM. HOSP. ASS’N (Oct. 27, 2021), <https://www.aha.org/lettercomment/2021-10-27-aha-others-express-opposition-false-claims-amendments-act-s-2428> [perma.cc/TJ98-VJDJ] (“[T]here is no temporal or other limit on the bill’s backward-looking anti-retaliation provision for former employees. An employer may validly terminate an employee, including a qui tam relator, for performance issues that are unrelated to their status as an FCA plaintiff, and the employer can lawfully communicate these valid reasons to another prospective employer.”).

184. Mary Jane Wilmoth, *Why Did Seven Senators Oppose the False Claims Amendments Act of 2021?*, THE NAT’L L. REV. (Nov. 3, 2021), <https://www.natlawreview.com/article/why-did-seven-senators-oppose-false-claims-amendments-act-2021> [perma.cc/Q9BZ-5TZT].

185. S. REP. NO. 99-345, at 34 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

186. See S. 2428, § 4.

amendment would codify that concern. Second, adding blacklisting to the list of retaliatory actions would make it clear to courts that section 3730(h) protects not only former employees generally but specifically former employees who experience post-termination retaliation. Given the Tenth Circuit's focus on the supposed temporal limitations of the existing list of retaliation actions in section 3730(h), this amendment would provide additional clarification that the proscribed retaliatory actions are not temporally limited to current employees. Third, the Sixth Circuit in *Felten* did not address the issue of whether blacklisting is a form of retaliatory action proscribed by section 3730(h), instead remanding for the district court to consider the issue.¹⁸⁷ Amending section 3730(h) to add backlisting to the list of retaliatory actions would clarify Congress' intent to prohibit blacklisting former employees under the FCA.

CONCLUSION

The False Claims Act cannot function properly as a tool to combat fraud without the efforts of individual relators who blow the whistle, often against their own employers. Such actions by employees are not only encouraged by the FCA, but they are also vitally important to the federal government's ability to identify fraud and recover billions of dollars from *qui tam* lawsuits. However, the prevalence of retaliation against whistleblowers in the workplace demonstrates the need for robust protections from retaliation for employees who lawfully report fraud by their employers to the federal government. While section 3730(h) serves this purpose, judicial constraint of the scope of the provision threatens to undermine the FCA's ability to combat fraud. Sutherland *qui tam* Supreme Court precedent, the FCA's purpose and legislative history (section 3730(h) specifically), and public policy concerns all support an interpretation of section 3730(h) that protects former employees from post-termination retaliation. The Supreme Court or Congress must act to protect whistleblowers like Dr. Felten, without whom the FCA could not continue to function as the government's most effective tool to combat fraud.

187. *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 435 (6th Cir. 2021), *cert. denied sub nom. William Beaumont Hosp. v. United States*, 142 S. Ct. 896 (2022) (mem.).