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Protection to “Infinity and Beyond”: Why Former Employees Are Not Protected by the Anti-Retaliation Safeguard of the False Claims Act

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0. ABSTRACT

The False Claims Act (FCA) is a significant piece of federal legislation enacted to prevent individuals or companies from engaging in fraudulent activities to fleece government programs. Whistleblowers play a critical role in reporting these fraudulent actions. Unfortunately, whistleblowers often become targets of retaliatory actions either during or after their employment. The FCA's 1986 amendments provided protections to whistleblowers, who are identified as "employees." The Sixth and Tenth Circuits have disagreed on who is considered an "employee." The Sixth Circuit has agreed to extend whistleblower protection to former employees whereas the Tenth Circuit has refused to do so.

Part I of this note introduces the FCA, including the unique *qui tam* provision and relevant statistics of the Act. Part II explains the history and background of the Act and provides detailed reasonings why the circuit courts disagree as to the scope of the term "employee." Part III provides justifications why the Sixth Circuit's extension of protection to former employees is problematic. This includes expounding upon how the Sixth Circuit mistakenly determined the anti-retaliation provision was ambiguous, overly relied on overtly broader precedent and ignored legislative intent, and failed to use statutory canons to guide its analysis. Part IV addresses counter arguments to extending protection, including the reasons that it would reduce reporting fraud and how most whistleblower protection provisions in other federal statutes are frequently broadly examined by courts. Finally, Part V attempts to provide a new approach to interpreting the word "employee," including using the economic reality test, which would verify an "employee" as a person who is economically beholden to another.

I. INTRODUCTION

The False Claims Act¹ is a federal statute that assesses penalties to individuals for knowingly presenting or causing to be presented, fraudulent claims for payment from the federal government, or a federal government entity.² A unique feature of the FCA is that it allows both the United States Department of Justice (DOJ) and private parties to bring claims against violators of the Act.³ The latter are known as *qui tam* actions, and although unique to the FCA, they have been circulating as far back as 14th century England.⁴ *Qui tam* actions allow private parties, also known as "relators," to collect a portion of the judgment if the suit is successful.⁵ In some instances, relators may receive upwards of 30% of the judgment awarded to the government.⁶ Therefore, relators are incentivized not only by the moral good of reporting fraudulent activity, but also by the potential lucrative payouts they can obtain.⁷

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¹ This note will focus on the civil FCA, which is codified under 31 U.S.C. §§ 3729–3733. However, it is important to note that the FCA is separately codified under a federal criminal statute in 18 U.S.C. § 287.

² See 31 U.S.C. § 3729(a)(1)(A). There are a variety of other ways in which one can violate the FCA; however, this is the most common.

³ See *False Claims Act*, LEGAL INFO. INST. CORNELL L. SCH., https://www.law.cornell.edu/wex/false_claims_act (last visited Nov. 2025) [hereinafter *False Claims Act*].

⁴ See CHARLES DOYLE, CONG. RSCH. SERV., R40785, *QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 2* (updated 2021).

⁵ *False Claims Act*, *supra* note 3.

⁶ *False Claims Act*, *supra* note 3.

⁷ Press Release, U.S. Dep't of Just., *False Claims Act Settlements and Judgments Exceed \$2.68 Billion in Fiscal Year 2023* (Feb. 22, 2024), <https://www.justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed->

In fiscal year 2023, the total settlements and judgments were more than \$2.68 billion.⁸ Of this total, \$2.3 billion occurred via *qui tam* claims, which were fully pursued by either the federal government or relators.⁹ Claims under the *qui tam* provision have grown steadily since 1986, with 712 filings in fiscal year 2023.¹⁰ Moreover, the government and informants were party to 543 of these claims, which represents the most settlements/judgments in a one-year period.¹¹ Health care fraud remained the most prominent source of FCA claims, as Medicare and Medicaid remain the most frequently targeted government programs for fraudsters.¹² Indeed, one of the largest FCA settlements in this fiscal year involved The Cigna Group, which settled a claim for \$172 million, with the government alleging Cigna knowingly submitted inaccurate claims for the Medicare Advantage Plan.¹³ Ultimately, these statistics indicate the vital role the FCA plays in protecting government funded programs, and ultimately, tax payer dollars. To echo this sentiment, former Associate Attorney General Benjamin C. Mizer stated, “[t]he False Claims Act remains one of our most important tools for rooting out fraud, ensuring that public funds are spent properly, and safeguarding critical government programs.”¹⁴

II. THE CIRCUIT COURT SPLIT

A. History and Background

In 1863, President Lincoln signed the FCA into law.¹⁵ The legislation was primarily enacted to counteract fraudulent activity during the Civil War involving defense contractors who were providing low quality goods and services to soldiers.¹⁶ The FCA was amended various times,¹⁷ but no amendment had a greater effect on whistleblower protection than those made in 1986.¹⁸ These modifications included increasing damages from double to triple, and increasing penalties for violators from \$2,000 to between \$5,000 and \$10,000.¹⁹

268-billion-fiscal-year-2023 (In 2023, realtors received payments of over \$349 million in *qui tam* actions) [hereinafter DOJ Press Release 2023].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*; 2022 Government Fraud, Waste & Abuse Report: Emerging from the pandemic, THOMSON REUTERS INST., <https://www.thomsonreuters.com/en/reports/2022-government-fraud-waste-and-abuse-report-emerging-from-the-pandemic.html> (last visited Oct. 13, 2024).

¹³ DOJ Press Release 2023, *supra* note 7.

¹⁴ *Id.*

¹⁵ *The False Claims Act*, NAT'L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/protect-the-false-claims-act/> (last visited Jan. 19, 2025) [hereinafter NWC, *False Claims Act*].

¹⁶ *See* Nathan T. Tschepik, Comment, *The Executive Judgment Rule: A New Standard of Dismissal for Qui Tam Suits Under the False Claims Act*, 87 U. CHI. L. REV. 1051, 1058 (2020).

¹⁷ In addition to the 1986 Amendments, the FCA was amended in 2009 and 2010. In 2009, Congress passed the Fraud Enforcement and Recovery Act, which increased criminal enforcement of fraud, including for mortgage, securities, and commodities fraud. In 2010, Former President Barack Obama signed the Patient Protection and Affordable Care Act into law, which has also had substantial effects on the FCA. Since the ACA has created more stringent data requirements, *qui tam* lawsuits and whistleblower reports have increased.

¹⁸ NWC, *False Claims Act*, *supra* note 15.

¹⁹ U.S. Dep't of Just., *The False Claims Act: A Primer*, (2011), https://www.justice.gov/d9/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.

According to the National Whistleblower Center, a whistleblower is defined as an individual who “reports fraud, abuse, corruption, or dangers to public health and safety to someone who is in the position to rectify the wrongdoing.”²⁰ The DOJ’s Office of the Inspector General describes whistleblowers as performing a public service when they report wrongdoing.²¹ Oftentimes, the reporting person is a company insider, but this is not required for the person to be identified as a whistleblower.²² Unfortunately, whistleblowers are frequently subjected to retaliatory actions from employers,²³ including demotion, discipline, termination, salary reduction, or re-assignment of their positions or shifts.²⁴ Thus, several significant federal legislations have included whistleblower protection provisions.²⁵ In the FCA, the whistleblower protection is codified in 31 U.S.C. § 3730(h), which protects employees from retaliatory actions against the terms and conditions of their employment and provides for reinstatement and compensation. These include double the back pay with interest and compensation for special damages.²⁶ The Sixth and Tenth Circuit Courts have interpreted subsection (h) in vastly distinctive manners, with the Sixth Circuit extending protection to former employees while the Tenth Circuit has refused to extend such protection.

B. Sixth Circuit Extends Post-Employment Protections

In interpreting the FCA’s anti-retaliation safeguard, in 2021, the Sixth Circuit concluded that the provision extends to former employees who claim that their former employers have engaged in post-employment retaliation.²⁷ In the deciding case, *United States ex rel. Felten v. William Beaumont Hosp.*, David Felten was an employee of the William Beaumont Hospital (Beaumont).²⁸ He filed a *qui tam* claim, alleging that Beaumont was in violation of the FCA since the hospital was paying bribes to physicians and medical groups in exchange for referrals of Medicare, Medicaid, and TRICARE patients.²⁹ According to Felten, following his report, the hospital administrators threatened him and persistently claimed that they were in compliance.³⁰ Furthermore, Felten asserted that Beaumont created a fraudulent internal report stating that he

²⁰ *What is a Whistleblower?* NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/what-is-a-whistleblower/>. (last visited Jan. 19, 2025) [hereinafter NWC, *What is a Whistleblower?*].

²¹ DOJ Press Release 2023, *supra* note 7.

²² NWC, *What is a Whistleblower?*, *supra* note 20.

²³ Commonly, whistleblowers face demotion, termination, and blacklisting in the industry they work in. However, whistleblowing can take a severe mental and emotional strain on individuals. For example, John Barnett, who had worked for Boeing for over 30 years, was supplying evidence against the company’s poor performance standards. These subpar standards had led to several major tragedies and have generated a great deal of controversy around the company and their practice standards. On March 9, 2024, Barnett died from a self-inflicted gunshot wound. *See* Theo Leggett, *Boeing whistleblower John Barnett found dead in US*, BRIT. BROAD. CORP. (Mar. 11, 2024), <https://www.bbc.com/news/business-68534703>.

²⁴ Lisa Guerin, *Workplace Retaliation: What Are Your Rights?*, NOLO, <https://www.nolo.com/legal-encyclopedia/workplace-retaliation-employee-rights-30217.html>. (last updated Feb. 29, 2024).

²⁵ *See generally* 42 U.S.C. § 12203(a)-(b) of the Americans with Disabilities Act of 1990 (ADA), which includes a prohibition against retaliation and coercion against any person who has opposed an act or practice in violation of the Act; 29 U.S.C. § 1140 of the Employee Retirement Income Security Act of 1974 (ERISA), which makes it a violation to “discharge, fine, suspend, expel, discipline, or discriminate against” anyone exercising their rights under an employee benefit plan; 29 U.S.C. § 215(a)(3) of the FLSA, which makes it a violation to discharge or discriminate against an employee for filing a complaint or proceeding, or has testified to violations under the Act.

²⁶ 31 U.S.C. § 3730(h)(2).

²⁷ *United States of America ex rel. David Felten v. William Beaumont Hosp.*, 993 F.3d 428, 430 (6th Cir. 2021).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

ought to be replaced, and that his position was subject to a recently devised mandatory retirement policy.³¹ As a result, Felten believed Beaumont retaliated against him as a direct result of reporting the hospital for FCA violations.³²

According to the Court, the main “issue . . . is the temporal meaning of the word ‘employee’ and the prohibited employer conduct in the FCA’s anti-retaliation provision.”³³ The Sixth Circuit first examined whether the word “employee” had a plain and unambiguous meaning as it was utilized in the statute’s construction.³⁴ The Court determined that the law was ambiguous by relying on several statutory interpretation factors set forth by the United States Supreme Court in *Robinson v. Shell Oil Co.*³⁵ In *Robinson*, the Supreme Court concluded that “employee,” as it was used in the context of § 704(a) of Title VII of the Civil Rights Act of 1964, could be understood as relating to current or prior employees.³⁶ The Supreme Court relied on three factors. The first was determining whether the statute contained a temporal qualifier, or stated more simply, a time signal beside the word “employee.”³⁷ The second factor required scrutinizing the statutory definition of the word “employee” to locate a temporal qualifier.³⁸ Lastly, the Court inspected other portions of the legislation to decipher additional information as to the contextual uses of the word.³⁹ These factors were also examined by the Sixth Circuit in *Felten*.

On the first factor, the Sixth Circuit explained that § 3730(h)(1) did not contain a temporal qualifier beside the term “employee;” however, the statute’s reference to “[a]ny employee” could be read to include current and former employees.⁴⁰ Conversely, the defendant astutely argued that the phrase “any employee” is followed by six acts: discharged, demoted, suspended, threatened, harassed, or discriminated against.⁴¹ Under the well-known statutory interpretation canon known as *noscitur a sociis*,⁴² the defendant argued that the words discharged, demoted, or suspended refer to actions that can only be done to present employees.⁴³ Thus, they argued that these words constitute the temporal qualifier, which differentiated the case from *Robinson*.⁴⁴ Although the Court conceded that those three methods of retaliation can only be conducted against present employees, it reasoned that present and/or former employees can still be threatened, harassed, or

³¹ *Id.*

³² *Id.*

³³ United States of America ex rel. David Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (6th Cir. 2021).

³⁴ *Id.*

³⁵ *See id.*; *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341–42 (1997).

³⁶ 42 U.S.C. § 2000e-3(a) (The precise portion of the statute states that “[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.”).

³⁷ *Robinson*, 519 U.S. at 341.

³⁸ *Id.* at 342.

³⁹ *Id.*

⁴⁰ *See Ex rel. Felten*, 993 F.3d at 432.

⁴¹ *See id.*

⁴² This Latin phrase literally translates to “it is known by its associates.” This canon proposes deciphering the meaning of ambiguous words by inspecting the words surrounding it within the statute.

⁴³ *Ex rel. Felten*, 993 F.3d at 432.

⁴⁴ *Id.*

discriminated against.⁴⁵ Hence, the Court rejected the defendant’s *noscitur a sociis* argument and concluded that there was no temporal qualifier by the term “employee.”⁴⁶

The second factor that the Court considered pursuant to *Robinson* was the FCA’s definition of “employee.”⁴⁷ Unfortunately, the FCA is textually brief and includes no statutory definitions. However, in a prior Sixth Circuit case, *Vander Boegh*, the Court, relying on the dictionary definition of the term, held that under a plain reading of § 3730(h), employee status is not extended to an applicant.⁴⁸ *Vander Boegh* led the Sixth Circuit in *Felten* to believe that applicants are excluded since they never acquired employee status.⁴⁹

The third *Robinson* consideration that the Court examined was the usage of the term “employee[s]” in other portions of the FCA. The Court specifically pointed to three locations. The first is in the remedial provision of the Act, which enables former employees to pursue damages, including reinstatement for retaliatory acts.⁵⁰ The second location is the special damages provision, which provides relief for any discriminatory acts, which the Court interpreted to include post-employment retaliatory actions.⁵¹ Lastly, the Sixth Circuit in *Felten* denoted that the relief provision included the phrase “shall include,” which indicates that the remedies list is not comprehensive.⁵² Thus, the Court held that, in applying the *Robinson* considerations to the anti-retaliation safeguard of the FCA, there is support that the legislature intended for the Act to cover present and former employers.⁵³

Judge Richard Griffin wrote the dissenting opinion in the *Felten* case. He began his dissent by stating the issue: whether the FCA’s use of the word “employee” refers to a person who was formerly employed.⁵⁴ This issue was followed with an abrupt and sarcastic response in which he explained “[t]o ask the question is to answer it”⁵⁵, indicating his belief that the Court must look no further than the literal meaning of the word. Judge Griffin started the analysis by examining both the Circuit’s precedent and the plain meaning of the term as used in the FCA.⁵⁶ He also used *Vander Boegh* to exemplify how the Sixth Circuit has previously undertaken an examination of the true meaning of the word “employee” in the FCA.⁵⁷ He determined that, as defined in *Vander Boegh*, the more narrow question the Court should answer to determine whether a former employee falls within the “employee” definition is whether “a former employee work[s] in the service of his former employer under a contract of hire or for pay? The answer is ‘no,’ as otherwise he would not be a former employee.”⁵⁸

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 433.

⁴⁸ *Id.*

⁴⁹ United States of America ex rel. David Felten v. William Beaumont Hosp., 993 F.3d 428, 433 (6th Cir. 2021).

⁵⁰ *Id.*; see also 31 U.S.C. § 3730(h)(2).

⁵¹ *Ex rel. Felten*, 993 F.3d at 434; see also 31 U.S.C. § 3730(h)(2).

⁵² *Ex rel. Felten*, 993 F.3d at 434; see also 31 U.S.C. § 3730(h)(2).

⁵³ *Ex rel. Felten*, 993 F.3d at 435.

⁵⁴ *Id.* at 436..

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 436-37.

⁵⁸ *Id.* at 437.

Judge Griffin also addressed the *noscitur a sociis* argument put forth by the defendant and disposed of by the majority. He explained that of the six actions (discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against), four could occur during employment.⁵⁹ However, to properly apply *noscitur a sociis*, the words in a list must have similar meanings.⁶⁰ Therefore, since most of these words are retaliatory actions that can only occur during employment, he concluded that it is likely that Congress intended for all the actions to be associated with retaliations during employment.⁶¹

To further solidify his position, Judge Griffin noted that the canon, *ejusdem generis*,⁶² also supported a narrow interpretation of the scope of the term “employee.”⁶³ As applied to the FCA, there is a catchall phrase at the end of the retaliatory acts list, which states, “in any other manner discriminated against in the terms and conditions of employment.”⁶⁴ Therefore, Judge Griffin concluded that “[e]jusdem generis limits the catchall phrase's scope to discriminations that are similar to discharges, demotions, suspensions, threats, and harassment. Further, these general discriminations are actionable only if they occur in the terms and conditions of employment.”⁶⁵ Thus, it is likely that Congress intended for threats and harassment to only apply during employment.⁶⁶

C. Tenth Circuit Rejects Extending Former Employees Protections

Contrary to the Sixth Circuit’s holding in *Felten*, in *Potts v. Ctr. for Excellence in Higher Educ., Inc.*,⁶⁷ the Tenth Circuit held that former employees are not protected from retaliatory acts by their former employers.⁶⁸ In *Potts*, Debbi Potts was a campus director for College America Denver, Inc. (CAD), which eventually became the Center for Excellence in Higher Education, Inc. (Center), until she resigned, claiming that CAD both actively violated accreditation standards and sought to deceive accreditors.⁶⁹ CAD seemingly recognized that there were some truth to Potts’ allegations, so they sought a written separation agreement between the parties.⁷⁰ As part of this agreement, CAD would compensate Potts \$7,000 and provide her with unemployment assistance in consideration for Potts’ agreement to: (1) abstain from contacting any government agency in order to file a complaint; (2) direct any complaint she had to CAD’s complaint department; and (3) not disparage CAD.⁷¹

Nevertheless, Potts violated the non-disparagement clause by making negative comments about CAD in an e-mail to a third-party, who was also a former employer of the company.⁷² CAD sued Potts, alleging breach of her non-disparagement clause, and as a remedy, CAD sought a return

⁵⁹ United States of America ex rel. David Felten v. William Beaumont Hosp., 993 F.3d 428, 437 (6th Cir. 2021).

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² This Latin phrase literally translates to “of the same kind.”

⁶³ *Ex rel. Felten*, 993 F.3d at 437-38.

⁶⁴ *Id.* at 437; *see also* 31 U.S.C. § 3730(h)(1).

⁶⁵ *Ex rel. Felten*, 993 F.3d at 437-38.

⁶⁶ *Id.* at 438.

⁶⁷ *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610 (10th Cir. 2018).

⁶⁸ *Id.* at 612.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Id.*

of the \$7,000.⁷³ Potts subsequently filed a complaint to CAD’s accreditor, claiming that CAD had engaged in deceptive practices to maintain accreditation.⁷⁴ Consequently, Potts countersued, alleging a violation of the anti-retaliation provision of the FCA.⁷⁵ In support of her allegations, Potts argued that her activity was protected under the FCA since “it revealed violations of accreditation standards, which would have disqualified [CAD] from receiving federal student financial aid.”⁷⁶ Moreover, she claimed CAD’s amendment to the complaint, where CAD claimed that she had further breached the separation agreement by contacting the accreditor to file a complaint, was an additional retaliatory act.⁷⁷

Once again, the Tenth Circuit considered whether the term “employees” under the anti-retaliation provision of the FCA included former employees.⁷⁸ In examining the plain meaning of the statute, the Court agreed with the defendant’s argument in *Felten* with respect to the listed retaliatory acts of “discharge, demotion, suspension, threats, harassment, or any other manner of discrimination in the terms and conditions of employment”⁷⁹; namely, that it was likely that the legislature intended for the anti-retaliation provision to solely encompass retaliatory acts by employers against current employees since “a former employer cannot discharge, suspend, or demote a former employee. Further, a former employer cannot discriminate against a former employee in the terms and conditions of employment.”⁸⁰

The Court also relied upon well-known statutory interpretation canons to examine the statute. The Court supported its finding on legislative intent with the associated-words canon elucidated by Former Associate Supreme Court Justice Antonin Scalia and Bryan Garner in *Reading Law: The Interpretation of Legal Texts*.⁸¹ This canon expounds on two specific notions relevant to the Court’s interpretation. The first notion is that when words are contextually associated, they should be given similar meanings.⁸² The second notion is words appearing in a list may have similar meanings.⁸³ Justice Scalia and Garner eloquently summarized this canon with the well-known proverb “birds of a feather flock together.”⁸⁴ In addition to the associated words canon, the court applied *ejusdem generis* similar to the dissent in *Felten*.⁸⁵ Here, the Court explained how the catch-all phrase of similar discriminations, which is included at the end of the list of retaliatory acts in the statute, must be similar to threats and harassment during employment.⁸⁶ The Court constructed this conclusion since they could not comprehend how “close cousins to

⁷³ Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 612 (10th Cir. 2018).

⁷⁴ See *id.* CAD added the filing of this complaint to their complaint to further indicate a breach of the agreement.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 614.

⁷⁹ Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 614 (10th Cir. 2018); see also *Ex rel. Felten*, 993 F.3d at 434.

⁸⁰ Potts, 908 F.3d at 614.

⁸¹ *Id.*; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 195 (West Group, 2012).

⁸² ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 195 (West Group, 2012).

⁸³ *Id.*

⁸⁴ See *id.*

⁸⁵ See Potts, 908 F.3d at 615; see also *Ex rel. Felten*, 993 F.3d at 437–38.

⁸⁶ Potts, 908 F.3d at 615.

threats and harassment would count only during employment . . . , but threats and harassment would continue to count years after employment ends.”⁸⁷

Following this application, the Court next turned to the series-qualifier canon⁸⁸ to scrutinize the phrase “in the terms and conditions of employment.”⁸⁹ Here, the Court needed to determine whether this phrase was used to refer to either the list of retaliatory acts or whether it modifies the phrase “in any other manner discriminated against.”⁹⁰ The Court affirmed that the phrases “in any other manner” (the prepositive) and “in the terms and conditions of employment” (the postpositive) were intended to reference back to the list of retaliatory acts.⁹¹ Thus, the Court concluded that the retaliatory acts string (discharged, demoted, suspended, threatened, harassed, or discriminated against) were parallel acts against current employees.⁹²

Lastly, the Court supported its conclusion by observing other relevant sections of the Act to further elucidate the legislature’s intention. It pointed to § 3730(h)(2), which identifies the relief for anyone that suffers a retaliatory act pursuant to § 3730(h)(1).⁹³ These remedies include reinstatement to the same employment status, double the back pay plus interest, and special damages in connection with the discrimination.⁹⁴ The Court concluded that these remedies are actions that only attach when an employment relationship exists.⁹⁵ Thus, the Court interpreted the remedies clause of the Act to determine that Congress likely intended for the FCA to cover only retaliatory acts during employment.

Potts advanced several arguments to support her conclusion that the FCA covers former employees. First, she used the whistleblower provision in the Sarbanes-Oxley Act (SOX),⁹⁶ which is codified under 18 U.S.C. § 1514A(a), to exemplify how this provision is structured and worded similarly to the FCA anti-retaliation provision.⁹⁷ However, the Court was not persuaded by this argument since the defendant cited two cases⁹⁸ that focused on issues related to noneconomic damages as opposed to whether the provision extends to post-employment retaliatory actions.⁹⁹ Next, Potts attempted to argue that the Department of Labor (DOL) interpreted SOX’s

⁸⁷ *Id.*

⁸⁸ The series qualifier canon explicates that when nouns or verbs appear in a list, “a prepositive or postpositive modifier normally applies to the entire series.” SCALIA & GARNER, *supra* note 81, at 147.

⁸⁹ *Potts*, 908 F.3d at 615.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ 31 U.S.C. § 3730(h)(2).

⁹⁴ *Potts*, 908 F.3d at 616.

⁹⁵ *Id.*

⁹⁶ The relevant language of the Act reads, “Whistleblower Protection for Employees of Publicly Traded Companies. No company . . . 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 [to assist in an investigation into an alleged violation of federal law relating to fraud against shareholders].” 18 U.S.C. § 1514A(a).

⁹⁷ *Potts*, 908 F.3d at 616.

⁹⁸ See *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 672 (4th Cir. 2015) (allowing noneconomic damages for violating the Sarbanes-Oxley Act’s whistleblower provision containing similar relief and language to the FCA); see also *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 265 (5th Cir. 2014) (same).

⁹⁹ *Potts*, 908 F.3d at 616.

whistleblower provision to cover former employees, and she cited a DOL regulation,¹⁰⁰ which defines an employee as someone who is currently working or has previously worked for a company.¹⁰¹ Nevertheless, the Court refused to interpret the same definition for the word “employee” since it was unclear on whether “this regulation means to protect former employees whose whistleblowing occurs solely after employment.”¹⁰² Therefore, the court rejected Potts’ attempts to connect the language of the FCA with that in SOX.

The last argument that Potts proffered is that the Tenth Circuit’s reading of the FCA would counteract the Supreme Court’s holding in *Robinson*.¹⁰³ In *Robinson*, after determining that the statute was ambiguous, the Supreme Court ultimately held that the word “employees,” as it appears in 42 U.S.C. § 2000e-3(a), extends to retaliatory acts against former employees.¹⁰⁴ The Supreme Court reasoned: (1) that there is no temporal qualifier in the statute; (2) that the definition of the word “employee” also lacks a temporal qualifier; and (3) that several other provisions in Title VII use the term “employee” more broadly, meaning that it expands beyond the traditional notion of only a “current employee.”¹⁰⁵ Thus, the Supreme Court held that the provision applied to former employees since that interpretation aligned with the broader legislative ideas in Title VII and the anti-retaliation restriction.¹⁰⁶ With respect to this argument, the Tenth Circuit in *Potts* explained how these circumstances differ from those present in *Robinson* since the FCA lists out retaliatory actions, which inherently act as a temporal qualifier because most of the acts must occur while employed.¹⁰⁷ Therefore, the Tenth Circuit affirmed the District Court’s ruling that the FCA’s anti-retaliation provision does not extend to former employees.

III. REASONS AGAINST EXTENDING PROTECTION TO FORMER EMPLOYEES

A. *The Sixth Circuit Erroneously Interprets 31 U.S.C. § 3730(h) as Ambiguous*

The Sixth Circuit in *Felten* mistakenly interprets 31 U.S.C. § 3730(h) as ambiguous, leading to its misguided reliance on the statutory interpretation set forth in *Robinson*.¹⁰⁸ In *Robinson*, prior to the Supreme Court commencing its analysis of Title VII, it highlights two important procedural steps in statutory interpretation.¹⁰⁹ First, when interpreting a statute, the court must decipher if the language in question maintains a “plain and unambiguous meaning with regard to the particular dispute in the case.”¹¹⁰ Secondly, the court determines ambiguity by the language, specific context, and the broader framework of the statute itself.¹¹¹ To reiterate, the Court in *Robinson* relied on three reasons why the word “employees” was ambiguous.¹¹² The

¹⁰⁰ 29 C.F.R. § 1980.101 (2025) states, “[e]mployee means an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person.”

¹⁰¹ *Potts*, 908 F.3d at 617.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see also *Robinson*, 519 U.S. at 346.

¹⁰⁵ *Potts*, 908 F.3d at 617–18; see also *Robinson*, 519 U.S. at 341–43.

¹⁰⁶ *Potts*, 908 F.3d at 618; see also *Robinson*, 519 U.S. at 345–46.

¹⁰⁷ *Potts*, 908 F.3d at 618.

¹⁰⁸ See *Ex rel. Felten*, 993 F.3d at 430; see also *Robinson*, 519 U.S. at 340–41.

¹⁰⁹ *Robinson*, 519 U.S. at 340–41.

¹¹⁰ *Id.* at 340.

¹¹¹ *Id.* at 341.

¹¹² *Id.* at 341–43.

Court determined that: (1) 42 U.S.C. § 2000e-3(a) did not have a temporal qualifier; (2) the definition of “employee,” as contained in the statute, did not have a temporal qualifier; and (3) “employee” was used more broadly in other sections of the statute.¹¹³ Subsequently, the Court could not rely on the plain meaning of the statute and determined that it needed to examine it from a broader context.

In *Felten*, however, the Court incorrectly determined that the term “employees” in the FCA was ambiguous, and that the plain reading of the statute could not be relied upon.¹¹⁴ Thus, they followed the Court’s reasoning in *Robinson* to decipher the true meaning.¹¹⁵ The *Felten* Court accurately explained that there is no temporal qualifier included in the FCA, and that there are no definitions within the Act to guide their interpretation.¹¹⁶ However, when the Court examined the usage of the word “employee” in 31 U.S.C. § 3730(h)(2) to determine its meaning in 31 U.S.C. § 3730(h)(1), it failed to recognize that the usage in subsection (2) maintains the same ambiguity it sought to resolve in subsection (1).¹¹⁷ Subsection (2) explains that relief “shall include reinstatement with the same seniority status that employee ... would have had but for the discrimination.”¹¹⁸ But the Court neglects to interpret subsections (1) and (2) concurrently, and instead chooses to use subsection (2) to interpret subsection (1).¹¹⁹ Subsection (1) identifies an “employee, contractor, or agent” as being entitled to relief for retaliatory acts against their terms and conditions of employment when they have filed a claim.¹²⁰ Subsection (2) provides the relief for the victims of subsection (1), so naturally, an employee that was discharged for filing a claim under subsection (1) would be considered a former employee seeking relief pursuant to subsection (2).¹²¹ Instead of reading the statute from subsection (1) to (2), the *Felten* Court attempts to use subsection (2) to interpret the meaning of subsection (1).¹²²

B. The Sixth Circuit Overly Relies on Robinson and Ignores Legislative Intent

The *Felten* Court’s reliance on *Robinson’s* interpretation of Title VII’s whistleblower protection is flawed. The Supreme Court has broadly interpreted the anti-retaliation safeguard in Title VII.¹²³ In addition, the language of the Act itself indicates an intent to protect others beyond simply employees.¹²⁴ Title VII covers “employees” and “applicants for employment,” whereas the FCA only covers “employees, contractors, and agents.”¹²⁵ Moreover, even the Sixth Circuit

¹¹³ *Id.*

¹¹⁴ *See Ex rel. Felten*, 993 F.3d at 431.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 432.

¹¹⁷ *See* 31 U.S.C. § 3730(h)(1)–(2).

¹¹⁸ 31 U.S.C. § 3730(h)(2).

¹¹⁹ *See* 31 U.S.C. § 3730(h)(1)–(2); *see also Ex rel. Felten*, 993 F.3d at 433-34.

¹²⁰ 31 U.S.C. § 3730(h)(1).

¹²¹ *See* 31 U.S.C. § 3730(h)(1)–(2).

¹²² *See* 993 F.3d at 433-34.

¹²³ *See generally* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (expanding acts that are included under “adverse action”); *see also CBOCS West Inc. v. Humphries*, 553 U.S. 442 (2008) (expanding protection to employees that complained about the employer interfering with another employee’s contractual rights); *see also* *Thompson v. N. Am. Stainless LP*, 562 U.S. 170 (2011) (expanding retaliation protection to third-party employees).

¹²⁴ 42 U.S.C. § 2000e–3(a).

¹²⁵ *See id.*; *see also* 31 U.S.C. § 3730(h)(1).

has held that the FCA was not intended to expand protection to applicants for employment.¹²⁶ According to former California Representative Howard L. Berman, who was the House sponsor for the 1986 FCA amendments, Congress sought to "cover . . . retaliation against contractors and agents . . . who have been denied relief . . . because they are not . . . 'employees'" and to "protect persons who seek to stop violations regardless of whether the person is a salaried employee, . . . independent contractor, or an employee hired in an agency relationship."¹²⁷ Berman's quote indicates a clear intention to expand protection to parties being compensated by the violators. Those falling outside the scope of employment, which includes employment applicants and former employees, are noticeably absent from his response.

C. *Canons of Statutory Interpretation*

The canons of statutory interpretation serve a crucial role for judges. Statutory canons provide judges with a valuable resource to guide them since there are canons related to text, structure, history, evolution of practice, and norms.¹²⁸ Several speakers at the 2021 Appellate Judges Education Institute Summit developed guidance in connection with these canons.¹²⁹ Firstly, the speakers cautioned that they do not develop a sole interpretation of any statute.¹³⁰ If statutes are interpreted rigidly with canons, then the law will not evolve over time. Secondly, statutory interpretation necessitates more detailed consideration than simply applying the canons to the relevant statute.¹³¹ Although canons should be considered cautiously, they provide a critically important guide for judges that cannot be underemphasized.

In *Potts*, the Court agreed with the District Court's application of *noscitur a sociis* to interpret the anti-retaliation clause of the FCA.¹³² The *noscitur a sociis* canon explains that ambiguous words can be interpreted by the words that appear near them in a statute.¹³³ There are various advantages to judges using this canon.¹³⁴ The legislative drafters need not consider all possible circumstances and unexpected situations when creating a bill.¹³⁵ Judges are often left to fill in any gaps, and hence, common law is created. Thus, *noscitur a sociis* provides them with a useful tool. Secondly, judges can interpret unclear or ambiguous words by searching for associated words.¹³⁶ Frequently, drafters place words with similar meanings beside or near each other to cover multiple facets. To use a simple example, a rule stating, "[t]he employee must attend meetings, conferences and other related events" can be interpreted by the canon by observing the

¹²⁶ See *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1064 (6th Cir. 2014) (determining that the FCA's legislative history and case precedent limit the interpretation of "employees" to parties maintaining an employment-like relationship).

¹²⁷ See 155 CONG. REC. E1295 (daily ed., June 3, 2009) (statement by Rep. Howard L. Berman).

¹²⁸ Matthew Foerster, *Canons of Construction: What is Their Role, if Any, in Modern Jurisprudence?*, AM. BAR ASS'N (Aug. 4, 2022), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2022/winter/canons-of-construction/.

¹²⁹ See *id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Potts*, 908 F.3d at 614.

¹³³ *Principle of Noscitur a Sociis*, PROCEJURELAW (June 14, 2020), <https://procejurelaw.wordpress.com/2020/06/14/principle-of-noscitur-a-sociis/>.

¹³⁴ See *id.*

¹³⁵ *Id.*

¹³⁶ See *id.*

context of meetings and conferences and can restrict the application of “other related events” to those events that are similar to meetings and conferences.¹³⁷

When applied to the FCA, *noscitur a sociis* can be used to interpret the anti-retaliation provision protecting against an employee who has been “discharged, demoted, suspended, threatened, harassed, . . . in the terms and conditions of employment.”¹³⁸ Discharge, demotion, and suspension can only occur when an individual is employed. However, threats and harassment can both occur inside or outside employment. In applying the canon, the drafters likely contemplated that threats and harassment must occur within the employment context since the surrounding words (discharge, demotion, and suspension) can only occur within the employment context.¹³⁹

The Tenth Circuit in *Potts* reinforced its reasoning against extending anti-retaliation protection to former employees by using the statutory interpretation canon *ejusdem generis*.¹⁴⁰ *Ejusdem generis* explains that when a statute includes a list of items, and then includes a general phrase at the end of that list such as “any other,” then the drafters likely expected the catchall phrase to include “any other” items that are similar to the items that were previously listed.¹⁴¹ The difference between *noscitur a sociis* and *ejusdem generis* is subtle. *Noscitur a sociis* focuses on interpreting the ambiguous words in a list by observing the words that it appears next to or that it is associated with. Similarly, *ejusdem generis* focuses on catchall words or general words appearing at the end of a list and limits the application of the general phrase to the scope of the preceding words. Stated succinctly, *noscitur a sociis* clarifies the meaning of words through context, while *ejusdem generis* limits the scope of the meaning of terms. A simplified example of *ejusdem generis* is a statute stating, “[n]o vehicles, including cars, trucks and other vehicles, are allowed in this area.”¹⁴² In applying the canon, “other vehicles” would be limited to vehicles that are like cars and trucks.¹⁴³

The *Potts* Court used *ejusdem generis* to exemplify how the catchall phrase on the end of 31 U.S.C. § 3730(h)(1), which states “in any other manner discriminated against in the terms and conditions of employment”, is meant to refer to discriminatory acts that are like discharge, demotion, suspension, threats and harassment.¹⁴⁴ Moreover, the Court explained that examining the statute’s logical construction, the only plausible conclusion would be that threats, harassment or other discriminatory acts must occur within the conditions of employment.¹⁴⁵ Thus, in correctly applying this statutory interpretation canon, one would conclude that all the items in the list and the general phrase must occur during the employment term.

¹³⁷ Aishwarya Agrawal, *Difference Between ejusdem generis and noscitur a sociis*, L.BHOOMI (Sept. 26, 2023), https://lawbhoomi.com/difference-between-ejusdem-generis-and-noscitur-a-sociis/#6_Examples.

¹³⁸ 31 U.S.C. § 3730(h)(1).

¹³⁹ See *Potts*, 908 F.3d at 614; see also *Ex rel. Felten*, 993 F.3d at 437.

¹⁴⁰ *Potts*, 908 F.3d at 615.

¹⁴¹ John M. Fitzgerald, *Ejusdem Generis and Statutory Construction*, APP. LAWYERS ASSOC. OF ILL. (Apr. 15, 2021, 05:33 PM), <https://aplawyers.org/blog/10317283>.

¹⁴² Agrawal, *supra* note 137.

¹⁴³ *Id.*

¹⁴⁴ *Potts*, 908 F.3d at 615.

¹⁴⁵ *Id.*

D. Agreement Amongst Most Courts

Lastly, although only the Sixth and Tenth Circuit Courts of Appeal have considered whether the FCA's anti-retaliation section extends to former employees, an overwhelming majority of the district courts that have considered the question have agreed with the interpretation and reasoning set forth by the Tenth Circuit in *Potts*.¹⁴⁶ Thus, the district courts have generally interpreted the statute in the same manner and have concluded that the language of the anti-retaliation safeguard of the FCA does not extend to former employees.

IV. COUNTERARGUMENTS SUPPORTING EXTENDING PROTECTION

A. Discouraging Whistleblower Reporting

The main argument for extending whistleblower protection to former employees is that excluding former employees will discourage whistleblowers from reporting fraud.¹⁴⁷ In fact, a study of about 1,600 people across 30 organizations found that 93% of them believed that their organization was at risk of suffering an accident since employees were not willing or empowered to speak up.¹⁴⁸ Whistleblower legislation encourages both current employees and former employees to report fraud.

However, despite excluding former employees from anti-retaliation protection as whistleblowers, there has not been a reduction in fraud reporting. Overall, the United States has trended towards an increase in whistleblowing. The settlements and judgments recovered in 2024 under the FCA were \$2.9 billion, which was up from \$2.68 billion in 2023 and \$2.2 billion in 2022.¹⁴⁹ In addition to the judgments and settlements increasing year-over-year, the number of *qui tam* lawsuits has followed the same trend.¹⁵⁰ During the 2024 fiscal year, whistleblowers filed 979 *qui tam* lawsuits, which far exceeds the 713 filed during the 2023 fiscal year.¹⁵¹ There may be a variety of reasons for this, but perhaps one might be the structure of the Act itself. Relators are likely incentivized to report fraud since they have the chance to collect the settlements. The average amount of *qui tam* lawsuit settlements varies, but in 2022, the average settlement was

¹⁴⁶ *Ex rel. Felten*, 993 F.3d at 438 (Griffin, J., dissenting); *but see* *Ortino v. Sch. Bd. of Collier Cty*, 2015 U.S. Dist. LEXIS 46463, 2015 WL 1579460, at *3-4 (M.D. Fla. April 9, 2015); *see also* *Haka v. Lincoln Cty.*, 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008).

¹⁴⁷ See Emily A. Spieler, *Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act*, 32 A.B.A. J. LAB. & EMP. L. 1, 5 (2016) ("Individual workers are unlikely to raise concerns unless they can realistically expect that their employers will not retaliate or that whistleblower protections will be effectively enforced.")

¹⁴⁸ Amanda Nieweler, *What Do Your Employees Fear Most About Blowing the Whistle*, WHISTLEBLOWER SEC. (last updated July 20, 2020), <https://blog.whistleblowersecurity.com/blog/what-your-employees-fear-most-about-blowing-the-whistle>.

¹⁴⁹ Press Release, U.S. Dep't of Just., *False Claims Act Settlements and Judgments Exceed \$2.9B in Fiscal Year 2024*, (Jan. 15, 2025), <https://www.justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024>; DOJ Press Release 2023, *supra* note 7.

¹⁵⁰ Barak Cohen, *False Claims Act Qui Tam Lawsuits Increased to 979 in FY 2024—the Highest Ever*, PERKINS COIE (Jan. 22, 2025), <https://perkinscoie.com/insights/update/false-claims-act-qui-tam-lawsuits-increased-979-fy-2024-highest-ever>.

¹⁵¹ *Id.*

almost \$750,000.¹⁵² Relators can collect upwards of 30% of the settlement/judgment amount.¹⁵³ Thus, the FCA’s judgments, settlements, and *qui tam* actions continue to increase year-over-year even though most jurisdictions refuse to extend protection to former employees. Consequently, it seems inconceivable that refusing to extend retaliation protection to former employees who blow the whistle will reduce the reporting of FCA violations.

B. Courts Typically Broadly Interpret Anti-Retaliation Protections

A second argument supporting post-employment protection for whistleblowers is that courts routinely interpret anti-retaliation provisions broadly by viewing the statute or provision’s purpose.¹⁵⁴ Over time, the Supreme Court has acknowledged that employees must be shielded from retaliatory actions to enforce civil and criminal laws.¹⁵⁵ This concept has come to be known as the “Antiretaliation Principle,” which asserts benefits for both employees and society.¹⁵⁶ Courts are placed into the predicament of interpreting provisions based on the statute’s broader purpose because of a lack of clarity from Congress. In fact, “legislative silence often require[s] the Supreme Court to explicate th[e] purpose by utilizing the Antiretaliation Principle to justify a broad reading of a statutory antiretaliation provision.”¹⁵⁷

For example, SOX, which was created in light of the Enron scandal,¹⁵⁸ imposed greater levels of financial disclosure and corporate responsibility, and it also contained an anti-retaliation provision.¹⁵⁹ The SOX anti-retaliation section is similar to the one present in the FCA since under SOX, no company that falls within the Act “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.”¹⁶⁰ The Supreme Court has broadly interpreted SOX’s whistleblower provision. To illustrate, the Supreme Court recently held in *Murray v. UBS Sec., LLC* that to prove a whistleblower claim, the whistleblower need only show that the employer’s action is a contributing factor to the retaliation; thus, making the employee’s retaliatory intent moot.¹⁶¹ This lowers the standard of proof for an employee in a retaliation claim, displaying an intentionality of the Court to provide greater deference to those bringing anti-retaliation claims under SOX.

¹⁵² Eric Kingsley, *Whistleblower Lawsuit Settlements: Rewards, Risks, And Impact*, KINGSLEY SZAMET (Aug. 18, 2024), <https://www.kingsleykingsley.com/whistleblower-lawsuit-settlements#:~:text=FAQs%20about%20Whistleblower%20Lawsuit%20Settlement,-What%20is%20the&>.

¹⁵³ False Claims Act, *supra* note 3.

¹⁵⁴ Katelyn Deibler, *The Blacklist: Post-Employment Retaliation Under the False Claims Act*, 49 OH. N.U.L. REV. 21, 48 (2023).

¹⁵⁵ Richard Moberly, *The Supreme Court's Anti-Retaliation Principle*, 61 CASE W. RES. L. REV. 375, 380 (2010).

¹⁵⁶ *Id.* at 380-81.

¹⁵⁷ *Id.* at 382.

¹⁵⁸ Enron was a natural gas company who began facing increased competition in the industry. As a result, management team members began using creative accounting practices to hide their losses from shareholders. Subsequently, many of the executives were indicted for their actions and new regulations and legislation were developed to increase the veracity of financial reporting. See Peter Bondarenko, *Downfall and bankruptcy – in Enron Scandal*, ENCYCLOPEDIA BRITANNICA (last updated Aug. 19, 2025), <https://www.britannica.com/event/Enron-scandal/Downfall-and-bankruptcy>.

¹⁵⁹ Jim Stehlin, *Former Whistleblowers: Why the False Claims Act's Anti-Retaliation Provision Should Protect Former Employees*, 56 U. MICH. J. OF L. & REFORM 543, 569 (2023).

¹⁶⁰ See *id.*; 18 U.S.C. § 1514A.

¹⁶¹ See 601 U.S. 23, 40-41 (2025).

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was created in 2010 as a response to the 2008 financial crisis.¹⁶² In addition to expanding financial reporting mechanisms and developing new government agencies to administer the legislation, Dodd-Frank enlarged the SOX whistleblower program.¹⁶³ The expanded program allowed informers to receive 10-30% of litigated settlements and broadened protection for covered employees with the inclusion of subsidiaries and affiliates.¹⁶⁴ More importantly, it defined “whistleblower” more generally to include “any individual” reporting fraud under the Act.¹⁶⁵ Again, the broadened protection of covered employees and expanded definition of whistleblower indicates Congressional intent to widen the boundary of coverage. Accordingly, courts have responded by interpreting the statute to protect post-employment retaliation. For example, in *Mimedx Group, Inc. v. Fox*, the District Court for the Northern District of Illinois held that the term “employee,” as used in Dodd-Frank, does not contain a temporal qualifier limiting its application to current employees; thus, the Court stated that “[r]eading the term ‘employer’ to encompass a former employer’s actions against ex-employees makes sense in light of the purpose of the Dodd–Frank whistleblower provision.”¹⁶⁶ Hence, courts expanding protection to post-employment reprisals under Dodd-Frank follows from the statute’s broad construction and coverage.

Title VII is perhaps the most well-known workplace federal discrimination law.¹⁶⁷ It prohibits any discrimination in the workplace based upon race, religion, national origin, color, and sex, which includes gender, gender identity, pregnancy, and sexual orientation.¹⁶⁸ Furthermore, the statute includes an anti-retaliation provision, which was extensively examined in *Robinson*.¹⁶⁹ On its face, the statute covers certain individuals including applicants, but the Supreme Court has also interpreted the provision broadly. For example, in *Burlington N. & Santa Fe Ry. v. White*,¹⁷⁰ the Supreme Court needed to resolve a circuit court split regarding the “discriminate against” provision in Title VII.¹⁷¹ This provision prevents an employer’s actions that “discriminate against” employees or job applicants if they have resisted an employee procedure or the employer has committed an act related to an investigation or hearing regarding employer practices.¹⁷² The circuit courts disagreed with whether the action needed to be employment or workplace related, and what degree of harm constituted retaliation.¹⁷³ The Sixth Circuit and several other courts held that these actions must generate an adverse effect in the employee’s terms, conditions, or benefits of employment,¹⁷⁴ whereas the Fifth and Eighth Circuits confined this interpretation to acts such as hiring, granting leave, discharge, and promotion.¹⁷⁵ Ultimately, the Supreme Court resolved the

¹⁶² Deibler, *supra* note 154, at 39.

¹⁶³ Adam Hayes, *Dodd-Frank Act: What It Does, Major Components, and Criticisms*, INVESTOPEDIA (last updated Feb. 1, 2025), <https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp>.

¹⁶⁴ *Id.*

¹⁶⁵ See 15 U.S.C. § 78u-6(a)(6).

¹⁶⁶ *MiMedx Grp., Inc. v. Fox*, No. 16 CV 11715, 2018 WL 558500, at *8 (N.D. IL. Jan. 24, 2018).

¹⁶⁷ See *What you need to know about Title VII of the Civil Rights Act*, THOMSON REUTERS (Aug. 6, 2024), <https://legal.thomsonreuters.com/en/insights/articles/what-is-title-vii-civil-rights-act>.

¹⁶⁸ *Id.*

¹⁶⁹ 42 U.S.C. § 2000e-(3)(a); *Robinson*, 519 U.S. at 341-42.

¹⁷⁰ 548 U.S. at 59-62.

¹⁷¹ *Id.* at 59-60.

¹⁷² *Id.* at 60.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 60.

split by holding that the anti-retaliation provision applies to employer's actions that do not relate to the terms and conditions of employment for the employer, which typifies the Court's inclination for broad interpretation.¹⁷⁶

However, using the whistleblower provisions of SOX, Dodd-Frank, and Title VII to interpret the FCA's anti-retaliation safeguard is erroneous since those statutes contain language indicating an intent to expand the bounds of protection for retaliation unlike the verbiage included in the FCA. Section 1514A of SOX protects "any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized *statistical rating organization*." Most of those mentioned in the statute could be employees, with the one large exception of nationally recognized statistical rating organizations. These organizations rate the credit of many financial institutions under the umbrella of the Securities and Exchange Commission (SEC), and they are critical for ensuring that a company's credit rating is accurately reported for investors.¹⁷⁷

In Dodd-Frank, the whistleblower provision states that an employer cannot "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment."¹⁷⁸ "Whistleblower" was then defined in the Act as a person who offers evidence concerning a violation of securities laws to the SEC.¹⁷⁹ This creates the bounds of protection for those who supply information relating to the violation of securities law, not just employees. Thus, Congress' intent was to utilize broad language to expand protection for whistleblowers who suffer retaliatory actions pursuant to Dodd-Frank.¹⁸⁰

Courts tend to broadly interpret the anti-retaliation safeguards of these acts because there is clear evidence that Congress intended for them to be interpreted broadly. To simplify, in addition to protecting employees, SOX covers credit reporting agencies, Dodd-Frank covers whistleblowers, which they have broadly defined as anyone reporting a violation under the Act, and Title VII covers applicants for employment. Conversely, the FCA only covers employees, contractors, and agents. The best evidence for Congress' intent with the FCA is that, originally, 31 U.S.C. § 3730(h) only included "employees," but was then subsequently amended to include contractors or agents.¹⁸¹ Thus, legislators rejected the inclusion of "former employees" and remained within the bounds of the employment relationship for coverage.

Yet, Congress has recognized that courts have disagreed over 31 U.S.C. § 3730(h)'s coverage, and therefore, Senator Chuck Grassley had proposed a bipartisan bill entitled "False

¹⁷⁶ See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

¹⁷⁷ Will Kenton, *Nationally Recognized Statistical Ratings Organization (NRSRO) Definition*, INVESTOPEDIA (last updated Apr. 27, 2025), <https://www.investopedia.com/terms/n/nationally-recognized-statistical-ratings-organization.asp>.

¹⁷⁸ 17 C.F.R. § 165.20(a) (2023).

¹⁷⁹ H.R. Res 4173, 111th Cong. § 922(a)(6) (2010).

¹⁸⁰ Jasmine Gandhi, *Protect Our Friends: The Extraterritorial Application of the Anti-Retaliation Provision of the SEC's Whistleblower Program*, 9 GEO. MASON J. INT'L COM. L. 100, 115-16 (2017).

¹⁸¹ Brett Barnett, *Fifth Circuit Provides Guidance on Who Has Standing to Pursue an FCA Retaliation Claim*, THE FCA INSIDER (Mar. 30, 2016), <https://www.thefcainsider.com/2016/03/fifth-circuit-provides-guidance-on-who-has-standing-to-pursue-an-fca-retaliation-claim/>.

Claims Amendments Act of 2021.”¹⁸² The proposed amendment would have modified the anti-retaliation provision to include “current or former” after “[a]ny.”¹⁸³ Additionally, the amendment would have applied to any case filed on or after the date of the amendment.¹⁸⁴ However, after the bill passed the Senate Judiciary’s vote, it ultimately stalled.¹⁸⁵ Subsequently, Senator Grassley once again attempted to update the anti-retaliation stipulation with the False Claims Amendments Act of 2023.¹⁸⁶ Nevertheless, there has been no movement on that bill either.¹⁸⁷ Although it is likely that the initial version of 31 U.S.C. § 3730(h) was only meant to include current employee’s, it appears that some members of Congress now believe that the FCA should extend protection to former employees. Moreover, these legislators comprehend the confusion that has been generated by the holdings in the *Felten* and *Potts* Courts. Nevertheless, the most pertinent point is that as currently constructed, the anti-retaliation safeguard of the FCA was drafted more narrowly than other whistleblower provisions; thus, courts should interpret it more narrowly.

V. A PROPOSED NEW APPROACH

A. *The Economic Reality Test*

If a court does not have a statutory definition of a word, it attempts to interpret the context of the word as it is used in the legislation; and ultimately, courts may turn to decipher congressional intent from reviewing the passage of the act or provision. At present, the FCA does not include a definition of the term, and the Sixth and Tenth Circuits have taken different routes to interpreting congressional intent in connection with 31 U.S.C. § 3730(h). Moreover, the word “employee” has proven to be an elusive term when interpreting statutes.¹⁸⁸ Although it would be a novel application of the test, courts could use the economic reality test to provide some guidance when a statute uses the term “employee,” and the statute provides no definition as to its true meaning. This test uses multiple factors, none of which are alone dispositive, to decide whether an employment relationship exists between the parties.¹⁸⁹ The goal of the test is to determine whether a worker financially depends on another for employment or whether this individual employs himself or herself.¹⁹⁰

The Supreme Court first applied the economic reality test in *United States v. Silk*.¹⁹¹ In *Silk*, the Supreme Court considered whether workers are independent contractors or employees under the Social Security Act (SSA).¹⁹² Albert Silk sued the United States after it levied and

¹⁸² S. 2428, 117th Cong. (2021).

¹⁸³ S. 2428, 117th Cong. § 4 (2021).

¹⁸⁴ S. 2428, 117th Cong. § 6 (2021).

¹⁸⁵ See S. 2428, 117th Cong. (2021).

¹⁸⁶ See S. 659, 118th Cong. (1st Sess. 2023).

¹⁸⁷ S. 2428, 117th Cong. (2021).

¹⁸⁸ See generally *Robinson*, 519 U.S. at 346; see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992) (holding that Congress’ use of “employee” with no definition indicates an intention to describe a master-servant relationship under common law).

¹⁸⁹ *Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB. (last revised Mar. 2024), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>.

¹⁹⁰ *Id.*

¹⁹¹ See 331 U.S. 704, 713 (1947).

¹⁹² *Id.* at 705.

collected taxes against his business, the Albert Silk Coal Company.¹⁹³ The company sold retail coal, and Silk would compensate coal unloaders based on a price per ton rate.¹⁹⁴ The coal unloaders would come to Silk's yard at their own behest and utilized their own tools.¹⁹⁵ Additionally, Silk contracted with individuals who had trucks to deliver coal.¹⁹⁶ When coal orders came in, the truckers would use a self-managed call list to decide who would make the delivery.¹⁹⁷ The truckers were responsible for the operational expenses, supplied the equipment, and were free to accept or decline deliveries.¹⁹⁸ The United States levied and collected a tax against Silk, claiming that from 1936 to 1939, the coal unloaders and truckers were employees, and thus, were subject to the SSA tax.¹⁹⁹

Ultimately, the Supreme Court held that the workers were independent contractors except for the unloaders.²⁰⁰ The Court was left to grapple with the broad language of the SSA since Congress did not define "employee", and "employment" was simply defined as: "any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, ... by an employee for the person employing him".²⁰¹ Thus, the Supreme Court ruled that to determine whether the workers were truly employees, the economic reality of the parties' relationship and the degree of control exercised by one party over the other were important factors to consider.²⁰² Here, the unloaders were employees since Silk could exercise control over their jobs.²⁰³ Conversely, the drivers were considered independent contractors since they maintained their own trucks and hired their own staff of workers, indicating not only their freedom from Silk's control, but that they also incurred self-risk, exercised control over workers, and aimed for a profit.²⁰⁴

Contemporary courts consider a variety of factors under the economic reality test; however, the DOL has recently developed guidelines for applying the test.²⁰⁵ The six factors that should be considered to decipher if an individual is an employee or independent contractor under the Fair Labor Standards Act (FLSA) are: (1) the chance for profit or loss based on managerial skills; (2) investments by worker and employee; (3) permanency of the parties' relationship; (4) nature and degree of control; (5) necessity of the work to the employer's business; and (6) the skill and initiative.²⁰⁶

The economic reality test could help judges determine whether an individual is an employee under the FCA. The disagreement between the Sixth and Tenth Circuits is whether former employees can be covered under the FCA's anti-retaliation provision. This provision only

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 706.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *United States v. Silk*, 331 U.S. 704, 706-07 (1947).

¹⁹⁸ *Id.* at 707.

¹⁹⁹ *See id.*

²⁰⁰ *Id.* at 718-19.

²⁰¹ *See id.* at 712 n.6.

²⁰² *See id.* at 713.

²⁰³ *United States v. Silk*, 331 U.S. 704, 718 (1947).

²⁰⁴ *Id.* at 718-19.

²⁰⁵ U.S. DEP'T OF LAB., *supra* note 189.

²⁰⁶ *Id.*

applies to employees, contractors, or agents. Nevertheless, in applying the economic reality test set forth in the DOL's guidelines, a former employer has no opportunity for profit or loss based on managerial skills. A former employer will also not invest resources in a former employee. Additionally, there is no longer a permanency of a former employee's relationship with their former employer since their ties have been severed. The former employee is also no longer under any control by the former employer. Next, a former employee is not doing any work for a former employer; thus, there is no need to determine the skill or initiative of a task. Hence, a former employee could never be financially beholden to a former employer under the economic reality test. However, in applying the economic reality test to the FCA, an individual that is financially beholden to an employer will be allowed to bring an anti-retaliation lawsuit.

VI. CONCLUSION

The Sixth and Tenth Circuits have come to opposite conclusions regarding the anti-retaliation provision in the FCA. The Sixth Circuit has held that the statute, which covers employees, contractors, and agents, includes retaliatory acts against former employees, whereas the Tenth Circuit has declined to extend protection to past employees. This provision should not extend to previous employees since, as currently constructed, the statute is not ambiguous. The Sixth Circuit erroneously relies on *Robinson's* interpretation of the broader anti-retaliation provision in Title VII and ignores the legislative intent while passing the 1986 amendments to the FCA. Further, *noscitur a sociis* and *ejusdem generis* can be used to interpret the statute as only extending protection to current employees. Additionally, the vast majority of district courts agree²⁰⁷ that as drafted, the Act does not extend to former employees. The two counter arguments in favor of extending protection are that a lack of protection for former employees will reduce whistleblower reporting and that courts typically broadly interpret whistleblower protection clauses in statutes. However, the statistics show that whistleblowers reporting fraud has steadily increased over time, particularly in recent years. Moreover, the anti-retaliation stipulation of SOX, Dodd-Frank, and Title VII cannot be used to decipher the intent of the FCA drafters since the legislations of those laws intended to go beyond the scope of the employment relationship, whereas the FCA has shown an intent to remain within the bounds of that relationship. Lastly, the economic reality test has been proposed as a possible solution to interpret who should be covered in a statute that does not expand on the definition of employee. This test requires determining whether an individual is financially beholden to an employer to decipher if they are in fact an employee. As applied to the FCA, a former employee would not be included since they cannot be financially subjected to a former employer.

The future of the anti-retaliation safeguard of the FCA is uncertain. The Supreme Court or Congress must intervene to resolve the circuit split. However, in the meantime, companies must maintain effective compliance programs and aid human resource departments in understanding the FCA, and its implications for their business.²⁰⁸ Companies must create an effective plan through compliance programs since they aid in reducing risk.²⁰⁹ Next, employers should educate personnel

²⁰⁷ These district courts sit in jurisdictions in which the circuit court has not considered the question of whether the FCA anti-retaliation protection extends to former employees.

²⁰⁸ Edward T. Ellis, et al., *False Claims Act Retaliation in 2021*, LITTLER (2021), https://www.littler.com/sites/default/files/false_claims_act_report_2021.pdf?mubo6pcmd7q.

²⁰⁹ *Id.*

to understand the FCA and issues that may arise under the law.²¹⁰ Lastly, companies must develop better strategies for surveillance of fraud so that they can spot any potential issues and correct them before whistleblowers find them.²¹¹

²¹⁰ *Id.*

²¹¹ *Id.*