COMBATING FRAUD UNDER THE FALSE CLAIMS ACT: NOT PROTECTING AGAINST POST-EMPLOYMENT RETALIATION IS A SELF-DEFEATING POLICY DECISION

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I. INTRODUCTION: THE STRUGGLE AGAINST FRAUD

Every year, fraudulent activity against the United States government costs taxpayers billions of dollars.[1] The majority of these losses result from acts of fraud against federal health care programs like Medicare and Medicaid, and to a lesser extent, from matters involving contracts with the government for the purchase of goods and services.[2] However, the United States Department of Justice ("DOJ") fights back to regain lost taxpayer dollars by taking action under the False Claims Act ("FCA"), which imposes liability on such types of

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[1] *See* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., 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 [hereinafter 2021 Press Release] (stating that the Department of Justice obtained more than $2.2 billion in settlements and judgments in cases involving fraud and false claims in fiscal year 2020); *see also* George B. Breen et al., *DOJ False Claims Act Statistics 2020: Over 80% of All Recoveries Came from the Health Care Industry*, HEALTH L. ADVISOR (Jan. 21, 2021), https://www.healthlawadvisor.com/2021/01/21/doj-false-claims-act-statistics-2020-over-80-of-all-recoveries-came-from-the-health-care-industry (noting that more than $2.2 billion was recovered from both settlements and judgments for fraud in fiscal year 2020).

[2] *See* 2021 Press Release, *supra* note 1 ("Of the more than $2.2 billion in settlements and judgments recovered . . . over $1.8 billion relates to matters that involved the health care industry . . . ."); *see also* Breen et al., *supra* note 1 (noting that similar to prior years, the most significant recoveries came from the pharmaceutical industry).

government fraud.[3] Since 1986, actions taken by the DOJ resulted in the recovery of over $64 billion in settlements and judgments in cases involving fraud and false claims.[4] In fiscal year 2020 alone, the DOJ recovered over $2.2 billion, and saw even more success in the prior year when it recovered over $3 billion.[5] The DOJ does not achieve such victories and recover billions of dollars stolen from taxpayers all on its own—whistleblowers lead the charge and prove to be vital to the Department's success.[6]

Under the FCA, any private individual or whistleblower may sue other individuals and corporations for perpetrating fraud against the government.[7] The role these private suits played in combating fraud compounded with every passing year, and in fact, the number of cases filed in a single year peaked in 2020.[8] Often times, at the cost of great sacrifices, these suits are brought by brave employees against their employers on behalf of the government.[9] To encourage employees to actually utilize this statute, the FCA contains an anti-retaliation provision that provides relief to employees when their employers retaliate against them for exposing fraudulent activity.[10] Nonetheless, a pressing issue

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[3] *See* False Claims Act, 31 U.S.C. §§ 3729–33 (2021) (imposing liability on persons who defraud or conspire to defraud the United States Government); *see also The False Claims Act*, U.S. DEP'T OF JUST., https://www.justice.gov/civil/false-claims-act (Feb. 2, 2022) ("The Department of Justice obtained more than $5.6 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2021.").

[4] *See* 2021 Press Release, *supra* note 1 (stating that since 1986, recoveries under the False Claims Act have totaled to more than $64 billion); *see also* Breen et al., *supra* note 1 (noting that fiscal year 2020 reported the largest number of new claims under the False Claims Act initiated in a single year by the government since 1994).

[5] *See* Breen et al., *supra* note 1 ("More than $2.2 billion was recovered from both settlements and judgments in 2020, the lowest level since 2008 and almost $1 billion less than was recovered in 2019."); *see also* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 [hereinafter 2020 Press Release] ("The Department of Justice obtained more than $3 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2019 . . . .").

[6] *See* 2021 Press Release, *supra* note 1 ("Of the $2.2 billion in settlements and judgments reported by the government in fiscal year 2020, over $1.6 billion arose from lawsuits filed under the *qui tam* provisions of the False Claims Act."); *see also* Breen et al., *supra* note 1 (noting that total recoveries from suits from private individuals generated almost $1.7 billion).

[7] *See* 31 U.S.C. § 3730(b)(1) (allowing a person to bring a civil action for violation of the False Claims Act in the name of the United States Government); *see also* 2021 Press Release, *supra* note 1 (stating that whistleblowers with insider information are instrumental to identifying fraud).

[8] *See* 2021 Press Release, *supra* note 1 ("The number of lawsuits filed under the *qui tam* suits provisions of the Act has grown significantly since 1986, with 672 *qui tam* suits filed this past year — an average of nearly 13 new cases every week."); *see also* Breen et al., *supra* note 1 ("Significantly, 2020 saw the largest number of new FCA matters initiated in a single year.").

[9] *See* 2021 Press Release, *supra* note 1 (noting that individuals often make great sacrifices to expose and prosecute fraudulent schemes). *See generally* 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. United States, 142 S. Ct. 896 (2022) (explaining the events that led to the employee allegedly being retaliated against by his employer after the employee filed a qui tam suit.).

[10] *See* 31 U.S.C. § 3730(h)(1).

lies with whether the anti-retaliation provision's protections extend to *former* employees.[11] Since November 6, 2018, only the Tenth Circuit Court of Appeals addressed this issue in *Potts v. Ctr. for Excellence in Higher Educ., Inc*.[12] The Tenth Circuit held the FCA's anti-retaliation provision *only* extended protections to employees who were current employees at the time of retaliation.[13] However, on March 31, 2021, the Sixth Circuit Court of Appeals reached an opposite conclusion in *United States ex rel. Felten v. William Beaumont Hosp.* when it held that the term "employee" under the FCA provided anti-retaliation protections to victims of post-employment retaliation.[14]

This Comment addresses the Sixth Circuit's decision to interpret the term "employee" more broadly than the Tenth Circuit and the effect it has on FCA claims across the nation.[15] Part II provides background on the history of the

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> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done . . . in furtherance of an action under this section . . . .

Id. at § 3730(h)(2); *see also Felten*, 993 F.3d at 431 (interpreting the meaning of the word "employee" provided in the FCA's anti-retaliation provision).

[11] *See Felten*, 993 F.3d at 431 ("When this provision refers to an 'employee' and proscribes certain employer conduct, does it refer only to a current employment relationship, or does it also encompass one that has ended?"); *see also* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 614 (10th Cir. 2018) (deciding whether the FCA's anti-retaliation provision protects former employees).

[12] *See* Gregory Keating & Francesco A. DeLuca, *Post-Employment Actions May Trigger Liability for Retaliation Under the False Claims Act*, NAT'L L. REV. (Apr. 6, 2021), https://www.natlawreview.com/article/post-employment-actions-may-trigger-liability-retaliation-under-false-claims-act (stating that until April 1, 2021, only one federal court had addressed the issue of whether former employees were covered under the FCA's anti-retaliation provision); *see generally Potts*, 908 F.3d at 612 (deciding whether the FCA "applies when no retaliatory discrimination occurs until after employment ends.").

[13] *See Potts*, 908 F.3d at 614.

> We conclude that "employees" includes only persons who were current employees when their employers retaliated against them. If that condition is met, it doesn't matter whether the employee remains a current employee of the employer when suing. So the label "former employee" itself means nothing—what matters is the employee's employment status when the employer retaliates.

Id.; *see also* David R. Jimenez et al., *Tenth Circuit Rules that False Claims Act (FCA) Does Not Cover-Post Employment Retaliation*, NAT'L L. REV. (Nov. 14, 2018), https://www.natlawreview.com/article/tenth-circuit-rules-false-claims-act-fca-does-not-cover-post-employment-retaliation (detailing the 10th Circuit Court of Appeals' interpretation of the FCA to unambiguously exclude retaliatory protection from acts of retaliation committed after employment).

[14] *See Felten*, 993 F.3d at 430 ("[W]e hold that the FCA's anti-retaliation provision protects former employees alleging post-termination retaliation . . . ."). *But see Potts*, 908 F.3d at 617 ("[W]e cannot conclude that the False Claims Act language reaches that variety of 'former employee' who suffered retaliatory discrimination after . . . employment ended.").

[15] *See Felten*, 993 F.3d at 430 (holding that the anti-retaliation provision of the FCA may be invoked by a former employee for retaliation perpetrated post-termination). *But see Potts*, 908 F.3d at 612 (concluding that the anti-retaliation provision does not apply in circumstances where retaliation is

FCA, its anti-retaliation provision, and the legislative intent supporting the provision.[16] Part II also explains how individuals who learn of fraudulent conduct can bring claims under the FCA, as well as the types of protections the FCA provides to whistleblowers.[17] Further, Part II explains how the Tenth and Sixth Circuits reached opposite conclusions on whether the term "employee" under the FCA was broad enough to provide protections to *former* employees.[18] Next, Part III addresses the United States Supreme Court's analysis when it interpreted the term "employee" in the anti-retaliation provision of Title VII, which was the basis upon which the Sixth Circuit interpreted the term "employee" in its own analysis.[19] Part III also explores how a narrow interpretation of the term "employee" undermines the purpose of the FCA when *former* employees are excluded from receiving the same protections.[20] Finally, Part III illustrates how

absent during employment and retaliatory discrimination occurs only after employment ends).

[16] *See infra* Part II (providing background on the FCA's history). One of the concerns was the lack of reporting by employees for fear of retaliation from their employers:

> The Committee recognizes 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 . . . . [T]he Committee seeks 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.

S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299; *see generally* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (codified as amended at 31 U.S.C. § 3729 *et seq.*) (enacting "An Act to prevent and punish Frauds upon the Government of the United States," the earlier version of the FCA).

[17] *See infra* Section II.D (discussing how the FCA is utilized today); *see also* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 ("[T]he Committee believes protection should extend not only to actual qui tam litigants, but those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action."). *See generally* 31 U.S.C. § 3730 (explaining the process for civil actions brought by private parties, or *qui tam* actions, and the types of relief provided to whistleblowers).

[18] *See infra* Section II.D (discussing the holdings of the Tenth and Sixth Circuit Court of Appeals). *Compare Felten*, 993 F.3d at 431 (finding that the FCA's anti-retaliation provision's statutory language is ambiguous), *with Potts*, 908 F.3d at 618 (finding that the FCA's anti-retaliation provision's statutory language is unambiguous).

[19] *See infra* Section III.A (discussing how the Supreme Court handled a similar application of the term "employee"); *see also* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (discussing whether "employee" under Title VII of the Civil Rights Act of 1964 is ambiguous as to whether the term includes former employees). *See generally* 42 U.S.C. § 2000e-3(a).

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by . . . [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

Id.

[20] *See infra* Section III.B (discussing how a narrow interpretation of the term "employee" frustrates the purpose of the FCA); *cf.* Vessell v. DPS Assocs. of Charleston, Inc., 148 F.3d 407, 412 (4th Cir. 1998) ("If an independent contractor were to learn of, and expose, the fraud of a principal contractor, the independent contractor should not lose its contract by virtue of having exposed wrongdoing any more than an employee should."). *Compare* Neal v. Honeywell, Inc., 826 F. Supp 266, 270–71

a narrow interpretation of the term "employee" perpetuates and exacerbates the gross injustices that result from employer retaliation.[21]

Part IV proposes a legislative and judicial solution to the circuit split.[22] Congress should revisit the FCA, and make a statutory amendment that clarifies the definition of the term "employee" to include protections for *former* employees.[23] Alternatively, if Congress is unable to reach a consensus to amend the FCA, the United States Supreme Court should grant certiorari on appeal and apply the same reasoning used when it held that an "employee" in Title VII's anti-retaliation provision includes *former* employees—thus, the Supreme Court should similarly hold that the FCA's anti-retaliation provision extends protection to *former* employees.[24]

II. BACKGROUND: A HISTORY OF THE FALSE CLAIMS ACT AND ITS ANTI-RETALIATION PROVISION

A. 1863: LINCOLN'S FALSE CLAIMS ACT

During the American Civil War, rampant fraud by Union defense contractors became a serious issue because they supplied many of the goods and

(N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994) (stating that whistleblower statutes are broadly construed because they are remedial in nature), *with* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 ("As 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 the purposes of this act.").

[21] *See infra* Section III.C (illustrating a hypothetical situation applying the narrower understanding of the term "employee"); *see also* S. REP. NO. 99-345, at 5, *as reprinted in* 1986 U.S.C.C.A.N. at 5270.

> I told my supervisors I would no longer mischarge on my time cards. They reacted angrily, calling me antimanagement, anti-Rockwell, and a pain in the [neck]. Gradually, I was squeezed out of the work I was doing. I was stripped of my confidential security, my access to documents was limited, I was excluded from meetings and was put to work doing menial tasks outside my job description, such as sweeping, making coffee, and cleaning a 50 gallon coffee pot.

Id. *See generally Vessell*, 148 F.3d at 412–13 (stating that although an independent contractor should not be retaliated against for exposing fraud, the FCA does not protect independent contractors).

[22] *See infra* Part IV (proposing an amendment or a Supreme Court interpretation similar to that of the holding in *Robinson* which includes protections for post-employment whistleblower retaliation); *see also Felten*, 993 F.3d at 435 (justifying the decision to include former employees under the protection of the FCA's anti-retaliation provision based on the analysis applied in *Robinson*).

[23] *See infra* Section IV.A (proposing an amendment to the FCA that inserts language to include protections for post-employment whistleblower retaliation); *see also* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 ("As is the rule under other Federal whistleblower statutes as well as discrimination laws, the definitions of 'employee' . . . should be all-inclusive.").

[24] *See infra* Section IV.B (proposing that the Supreme Court resolve the circuit split at issue by applying *Robinson*); *see also Robinson*, 519 U.S. at 340, 344–45 (granting certiorari to resolve a circuit split and holding that the term "employees" in Title VII, which is more consistent with the primary purpose of Title VII, includes former employees under its anti-retaliation provision).

services for the war effort.[25] In response to this issue, on March 2, 1863, President Lincoln signed the False Claims Act ("FCA") into law as a measure to protect the government in its Civil War defense contracts.[26] At the time of its passing, the FCA allowed any private individual (the "relator") to bring suit on behalf of the government in a *qui tam* action.[27] The FCA imposed civil—and criminal—liability on anyone who was found to knowingly submit a false claim to the government.[28] The penalties for defrauding the government were quite harsh and allowed the government to recover from the defendant: (1) a two-thousand dollar fine; (2) double the amount of damages sustained by the government as a result of the fraud; (3) the cost of litigation; and (4) either the defendant's sentencing between one and five years, or an additional fine between one and five-thousand dollars.[29] To incentivize individuals to bring *qui tam* actions, the FCA entitled a relator to receive one-half of the total awarded judgment in the event that a *qui tam* action successfully found a defendant to be guilty of fraud.[30]

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[25] *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) ("The War Department found itself at the hands of unscrupulous and corrupt government contractors. The abuses and damage done to the federal treasury and war effort was, for defense contractors, an opportunity for windfall profit."); *see also* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 547 (1943) ("[O]ne of the chief purposes of the [FCA], which was itself first passed in war time, was to stimulate action to protect the government against war frauds.").

[26] *See* Act of Mar. 2, 1863, ch. 67, §§ 1–3, 12 Stat. 696, 696–98 (1863) (codified as amended at 31 U.S.C. § 3729 *et seq.*) (imposing liability on fraud against the government); *see also* S. REP. NO. 99-345, at 8, *as reprinted in* 1986 U.S.C.C.A.N. at 5273 ("The [FCA] was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts.").

[27] *Compare* Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696, 698 (1863) (codified as amended at 31 U.S.C. § 3729 *et seq.*) ("Such suit may be brought and carried on by any person, as well for himself as for the United States . . . ."), *with Newsham*, 722 F. Supp. at 609 ("The Act authorized suits to recover the forfeitures and damages to 'be brought and carried on by any person, as well for himself as for the United States . . . .'"), *and* Marvin v. Trout, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government."). *See generally Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) (explaining that *qui tam* derived from the Latin phrase "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*[,]" which translates to "who as well for the king as for himself sues in this matter.").

[28] *See* Act of Mar. 2, 1863, ch. 67, §§ 1–2, 12 Stat. 696, 697–98 (1863) (imposing liability for fraud against the government, such as false vouchers, false oaths, forging signatures, uttering forged papers, conspiring to defraud, stealing or embezzling, concealing property, etc.); *see also* S. REP. NO. 99-345, at 8, *as reprinted in* 1986 U.S.C.C.A.N. at 5273 ("Originally the act provided for both civil and criminal penalties assessed against one who was found to knowingly have submitted a false claim to the Government.").

[29] *See* Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 696, 698 (1863) (listing the forfeiture and damages that a person found to have defrauded the government would have to pay); *see also* S. REP. NO. 99-345, at 8, *as reprinted in* 1986 U.S.C.C.A.N. at 5273 ("The civil penalty provided for payment of double the amount of damages suffered by the United States as a result of the false claim, plus a $2,000 forfeiture for each claim submitted.").

[30] *See* Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. 696, 698 (1863) (explaining that the person that brings the *qui tam* suit to its final judgment is entitled to receive half of the amount of forfeiture and damages); *see also* S. REP. NO. 99-345, at 10, *as reprinted in* 1986 U.S.C.C.A.N. at 5275 ("The

B. 1943: CONGRESS RENDERS THE *QUI TAM* PROVISION USELESS

After cracking down on fraud during the Civil War, the FCA once again stood on the forefront against fraud during the Second World War.[31] During this period, the United States significantly increased government spending, and naturally, contractors found many opportunities to defraud the government.[32] However, this increased government spending not only presented an opportunity for fraudulent contractors, but also an opportunity for private plaintiffs to turn a profit under the FCA.[33]

The FCA did not impose any limitations on how or when private individuals could file a *qui tam* suit at the time of its signing.[34] Eventually, opportunists took notice and schemed to take advantage of the FCA.[35] As a result, opportunists launched a slew of *qui tam* suits based on allegations made in *already settled and adjudicated* criminal indictments by the government.[36] Contrary to the wishes of the United States Department of Justice, one of these opportunists had their *qui tam* suit heard before the United States Supreme Court in *United States ex rel. Marcus v Hess*.[37] In *Marcus*, the respondents, electrical

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original statute also provided that the private relator who prosecuted the case to final judgment would be entitled to one half of the damages and forfeitures recovered and collected. If successful, the relator would also be entitled to an award of his costs.").

[31] *See* S. REP. NO. 110-507, at 2 (2008) ("In the early 1940s, a number of qui tam cases were filed in response to the increased Government procurement during World War II."); *see also* S. REP. NO. 99-345, at 10, *as reprinted in* 1986 U.S.C.C.A.N. at 5275 (noting that several *qui tam* suits were filed regarding defense procurement contract during World War II).

[32] *See* S. REP. NO. 110-507, at 2 (noting the increase in government spending during the Second World War); *see, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 539–40 (1943) (explaining how respondents were indicted for defrauding the government).

[33] *See* CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 7 (2021) ("[I]nformers' suits have become mere parasitical actions, occasionally brought only after law-enforcement offices have investigated and prosecuted persons guilty of a violation of law and solely because of the hope of a large reward.") (quoting Attorney General Biddle); *see also* S. REP. NO. 110-507, at 2 (explaining that the Court in *Marcus* "found that such suits could proceed and accomplish the goals of the [FCA] recovering more money than is allowed under criminal penalties.").

[34] *See* S. REP. NO. 110-507, at 2 ("[U]nder the 1863 [FCA], nothing precluded qui tam actions from being pursued by a relator regardless of the source of the relator's information."); *see also* S. REP. NO. 99-345, at 10, *as reprinted in* 1986 U.S.C.C.A.N. at 5275 (noting that some suits were filed by private individuals based on allegations addressed in previous criminal indictments).

[35] *See* S. REP. NO. 99-345, at 10–12, *as reprinted in* 1986 U.S.C.C.A.N. at 5275–77 (noting that government officials called for a statutory amendment that protects honest informers after the United States Supreme Court's decision in *Marcus*). *See generally Marcus*, 317 U.S. at 545 (noting that petitioner filed suit based on information that was neither original nor already disclosed by the government).

[36] *See Marcus*, 317 U.S. at 545 (noting that respondent had already been fined $54,000 before petitioner filed a *qui tam* suit); *see also* S. REP. NO. 110-507, at 2 (citing to the court in *Marcus* that dealt with a *qui tam* suit and addressed the issue of "whether qui tam relators were filing FCA cases based solely upon information obtained in the criminal indictments brought by the Government.").

[37] *See Marcus*, 317 U.S. at 545 (deciding whether to affirm $315,000 judgment against Respondent, despite petitioner contributing nothing to obtaining the information that supported the allegation); *see also* 89 CONG. REC. 7603 (1943) (statement of Sen. Langer) ("[I]n the Marcus against Hess case in Pennsylvania[,] the Attorney General's office of the United States moved heaven and earth to

contractors, *already* pled *nolo contendere* for defrauding the government during a Public Works Administration project and paid the resulting fine of $54,000 before the *qui tam* suit's initiation.[38] In its opinion, the United States Supreme Court explained that the FCA allowed private individuals to file *qui tam* actions without restrictions on where information of fraud was acquired—even when the information's source is a public record stating the allegation was previously adjudicated.[39] Remarkably, the Court upheld a $315,000 judgment against the respondents—in addition to the prior $54,000 fine.[40]

In response to the decision, in 1943, Congress amended the FCA to bar individuals from filing a *qui tam* suit relying on information that the government already obtained, known as the "government knowledge bar."[41] The 1943 amendments also authorized the government to take full control of filed suits and reduced the maximum judgment award the relator could recover from fifty percent, down to twenty five percent or less.[42] The amendments not only reduced any monetary incentives for filing *qui tam* suits but also barred an individual from filing suit even if the government took no action nor investigated

prevent the plaintiff from getting a judgment.").

[38] *See Marcus*, 317 U.S. at 539, 545 ("Previous to the filing of this action these respondents were indicted for defrauding the government and on a plea of nolo contendere were fined $54,000."). *See generally* S. REP. NO. 99-345, at 10, *as reprinted in* 1986 U.S.C.C.A.N. at 5275 (noting that under the original FCA, once a private individual filed a *qui tam* suit, the Government could not take over the suit).

[39] *See Marcus*, 317 U.S. at 546 (rejecting the respondent's and the government's contention that petitioner should not be allowed to file a qui tam suit because petitioner received the information, which served as the basis for the suit, not by his own investigation, but from the previous indictment); *see also* S. REP. NO. 99-345, at 11, *as reprinted in* 1986 U.S.C.C.A.N. at 5276 ("The Court rejected the Government's contentions and ruled that the statute, as then written, did not require the relator to bring original information to the suit or that the Attorney General should have exclusive control over the Government's civil fraud litigation.").

[40] *See Marcus*, 317 U.S. at 545, 552 (upholding the $315,000 judgment against the respondent). Senator Clark, in response to the *Marcus* case, stated the following:

> [T]he Department of Justice sought unsuccessfully in the Marcus case to inject itself into private litigation on appeal, and the result was that the Department of Justice was rebuked by the Supreme Court, that the Government collected some fifty-odd thousand dollars in fines on pleas of nolo contendere, and that the private litigation recovered for the Government [was] something more than three times that amount.

89 CONG. REC. 7611 (1943) (statement of Sen. Clark).

[41] *See* 31 U.S.C. § 3730(b)(4) (1982), *amended by* 31 U.S.C. § 3730(e)(4)(A) (1986) (providing after the 1986 amendments that "[u]nless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought."); *see also* S. REP. NO. 99-345, at 12, *as reprinted in* 1986 U.S.C.C.A.N. at 5277 ("The Senate specifically provided that jurisdiction would be barred on qui tam suits based on information in the possession of the Government unless the relator was the original source of that information.").

[42] *See* DOYLE, *supra* note 33, at 8 (noting the that the FCA allowed the government to intervene in any case filed under the Act); *see also* S. REP. NO. 110-507, at 3 ("[T]he 1943 amendments limited the relator's portion of proceeds to 'fair and reasonable compensation' not to exceed 10 percent of the proceeds if the Government prosecuted the suit. In the event the Government did not intervene, a relator could receive up to, but not to exceed, 25 percent of the recovery.)

allegations of fraud.[43] As a result of these changes, the number of *qui tam* filings dwindled significantly, with only six to ten cases filed per year between 1943 and 1986.[44]

C. 1986: CONGRESS RESURRECTS THE FALSE CLAIMS ACT

By the 1980s, the federal budget grew to exceed an unprecedented $567 billion, Congress could no longer ignore the ineffectiveness of the FCA considering the widespread evidence of fraudulent activity.[45] In 1978, a report by the General Accounting Office (now the U.S. Government Accountability Office) concluded that the number, variety, and value of federal programs created virtually limitless opportunities to defraud the government.[46] Exploitation occurred all across the United States Government, stealing millions of dollars through grants, contracts, and federal assistance through false claims for benefits and services, delivering of substandard goods, and bribery of public officials.[47]

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[43] *See* S. REP. NO. 110-507, at 3 (noting the jurisdictional limitation for *qui tam* litigants filing under the FCA). There are also cases where a *qui tam* litigant can be excluded from the litigation by the court:

> Once a qui tam litigant has been found an improper relator due to this jurisdictional bar, he is no longer a part of the litigation and is precluded not only from receiving a portion of the proceeds, but also forfeits any rights to challenge the Government's "reasonable diligence" or object to settlements and dismissals.

S. REP. NO. 99-345, at 12, *as reprinted in* 1986 U.S.C.C.A.N. at 5277.

[44] *See* S. REP. NO. 110-507, at 3 (noting the reduction in FCA filings between 1943 and 1986); *see also* Elleta Sangery Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 318 (1992) ("Before the FCA was revised [in 1986], relator suits under the statute averaged six per year.").

[45] *See* S. REP. NO. 110-507, at 3 (noting Congress's awareness of evidence of fraud against the government); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GGD-78-62, FEDERAL AGENCIES CAN, AND SHOULD, DO MORE TO COMBAT FRAUD IN GOVERNMENT PROGRAMS 7 (1978) [hereinafter Federal Agencies] ("The U.S. Chamber of Commerce in 1974 estimated that total losses from white-collar crime in both the public and private sectors exceeded $40 billion annually.").

[46] *Compare* FEDERAL AGENCIES, *supra* note 45, at ii ("Opportunities for defrauding the Government are virtually limitless because of the number, variety, and value of Federal programs. These programs, amounting to billions of dollars, involve numerous recipients, providers of goods and services, and public employees at all levels of government. The involvement of so much money, and so many people and institutions makes the Federal programs vulnerable to fraud."), *with* U.S. GOV'T ACCOUNTABILITY OFF., GAO–21–309, DOD FRAUD RISK MANAGEMENT, ACTIONS NEEDED TO ENHANCE DEPARTMENT-WIDE APPROACH, FOCUSING ON PROCUREMENT FRAUD RISKS 7-8 (2021) [hereinafter Fraud Risks] ("According to the [Department of Defense] there are many contracting fraud schemes [the Department] may face . . . The extent of fraud associated with [the Department's] contracting has not been determined. One of the many challenges is that because of fraud's deceptive nature, programs can incur financial losses related to fraud that are never identified and such losses are difficult to reliably estimate.).

[47] *Compare* FEDERAL AGENCIES, *supra* note 45, at 7–8, 11 (listing the many ways fraud against the government is committed), *with* FRAUD RISKS, *supra* note 46, at 2, 7 (showing the following examples of procurement fraud schemes the Department of Defense currently faces: counterfeit parts; billing for work not performed; fraudulent bid submission with falsified prices to manipulate the selection of bids; and disguising conflicts of interest).

In 1986, Congress responded to the growing threat of fraud against the government by once again introducing amendments to the FCA.[48] In a report on the 1986 amendments, the Senate Judiciary Committee ("the Committee") claimed the only way to combat "sophisticated and widespread fraud" is through the "coordinated effort of both the Government and the citizenry . . ."[49] To encourage individuals to come forward with information pertaining to fraudulent activities, the proposed amendments increased incentives for relators to file *qui tam* suits and directly addressed the flaws of the 1943 Amendments by permitting fraud allegations relying on publicly disclosed information *if* the relator is the "original source of the information."[50] Finally, to encourage employees to expose fraud being committed by their employers, the 1986 Amendments introduced a whistleblower provision to protect employees from retaliation by their employers, and provided relief such as reinstatement, backpay with interest, and compensation for other damages resulting from an employer's retaliatory actions.[51]

D. 2021: AN INCOMPLETE FALSE CLAIMS ACT

In the years following the 1986 amendments, the FCA only underwent a few other developments.[52] Today, the FCA is a highly successful tool for rooting out fraud such as making false claims, falsifying of records or statements, and conspiring to violate the FCA.[53] The FCA's success is a direct result of the 1986 amendments that strengthened the *qui tam* provisions to enlist the aid of private individuals in combatting fraud, while also limiting the opportunity for

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[48] *See* S. REP. NO. 99-345, at 1, *as reprinted in* 1986 U.S.C.C.A.N. at 5266 (detailing that the growing pervasiveness of fraud against the government necessitates a public and private coordinated effort); *see also* S. REP. NO. 110-507, at 3 (identifying widespread fraud in the early 1980s).

[49] *See* S. REP. NO. 110-507, at 4 ("The House and Senate bills amending the FCA in 1985 shared the similar goal of returning the qui tam provisions to the FCA in order to empower private citizens to work with the Government in rooting out fraud."); *see also* S. REP. NO. 99-345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. at 5267 (arguing that decreasing instances of fraud requires public and private coordination).

[50] *See* S. REP. NO. 99-345, at 9, 30, *as reprinted in* 1986 U.S.C.C.A.N. at 5277, 5302 (explaining that the amendment would increase financial incentives for *qui tam* suits and change the previous jurisdictional element); *see also* S. REP. NO. 110-507, at 5 (noting that the 1986 Amendments specifically removed the 1943 "government knowledge bar" with the new "public disclosure bar").

[51] *See* S. REP. NO. 99-345, at 34–35, *as reprinted in* 1986 U.S.C.C.A.N. at 5299–300 ("With the [whistleblower provision] . . . the Committee seeks 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."). *See generally* 31 U.S.C. § 3730(h)(1)–(2) (providing relief for whistleblower employees if retaliated against).

[52] *See* DOYLE, *supra* note 33, at 9–10 (clarifying the public disclosure bar, as well as the amendments from the Dodd-Frank Wall Street Reform and Consumer Protection Act, adding a three-year statute of limitation for FCA claims); *see also* U.S. DEP'T OF JUST., *supra* note 3 (noting that the FCA has been amended several times).

[53] *See* 2021 Press Release, *supra* note 1 (noting that since 1986, recoveries under the False Claims Act have totaled to more than $64 billion); *see generally* 31 U.S.C. § 3729(a)(1)(A)–(G) (imposing liability for false claims, false records or statements, conspiracy, conversion, false receipts, unlawful purchase of government property, and reverse false claims).

parasitic suits that led to the FCA's dismantling in 1943.[54] Since the 1986 amendments, private-public efforts recovered over $64 billion in settlements and judgments, and relators stand to potentially recover up to thirty percent of the rewards following a successful suit.[55]

To take part in the billions of dollars in yearly recoveries, private individuals must disclose all their acquired information supporting allegations of fraud to the government prior to filing a *qui tam* suit.[56] Following the disclosure, the government then takes sixty or more days to investigate the allegations and decides whether to intervene and take control over the suit, whether to move to dismiss or settle the case, or whether to allow the relator to proceed with the *qui tam* suit.[57]

Thanks to the 1986 amendments, employees who discover fraudulent activity by their employers may now take part in the billions of dollars in yearly recoveries free from fear of retaliation.[58] The anti-retaliation provision encourages employees to meet the FCA's longstanding goal of rooting out fraud

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[54] *See* S. REP. NO. 99-345, at 37, *as reprinted in* 1986 U.S.C.C.A.N. at 5302 (explaining that the 1986 amendments would increase financial incentives for, and modify the bar on, filing *qui tam* suits); *see also* 2021 Press Release, *supra* note 1 (noting that recoveries from *qui tam* suits accounted for more than half of the $2.2 billion in recoveries reported in fiscal year 2020).

[55] *See* 2021 Press Release, *supra* note 1 (totaling all recoveries under the False Claims Act since 1986 to exceed $64 billion). There are, however, situations when the Government will not participate in a lawsuit under the law:

> If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

31 U.S.C. § 3730(d)(2).

[56] *See* 31 U.S.C. § 3730(b)(2) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government[.]"); *see also* 31 U.S.C. § 3730(e)(4)(A)–(B) (requiring a private individual seeking *qui tam* action to be an "original source" of allegation information, and defining an "original source" as an individual who voluntarily discloses the information supporting to the government prior to public disclosure).

[57] The statute states as follows:

> The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

31 U.S.C. § 3730(b)(2); *see also* 31 U.S.C. § 3730(b)(4)(A)–(B) (listing the actions the government may take after investigating disclosed allegations of fraud).

[58] *See* S. REP. NO. 99-345, at 34–35, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 (recognizing that few employees will expose fraud if they fear that disclosing fraud will lead to retaliation and stating that the whistleblower provision makes whole anyone who is retaliated against by their employer for their involvement with a false claim disclosure). *See generally* 31 U.S.C. § 3730(h)(1) (providing relief for whistleblower employees if retaliated against).

against the government by affording them relief from retaliation such as reinstatement, backpay with interest, and compensation for other damages.[59]

Much of the FCA's success is owed to its anti-retaliation provision.[60] Therefore, it stands to reason that the FCA should provide protection for all types of employees because all types of employees may possess intimate knowledge of fraud perpetration.[61] However, the FCA does not expressly define "employee" or state whether *former* employees—who are among such individuals that may possess first-hand knowledge of fraud—fall within the scope of the FCA's protection.[62] This issue—central to this Comment—is currently the subject of conflicting rulings between the Tenth and Sixth Circuit Court of Appeals, and highlights the weaknesses of the FCA.[63]

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[59] In order to promote the reporting of fraud and protect whistle-blowers, the government provides relief:

> Relief . . . shall include reinstatement with the same seniority status that employee, contractor, or agent 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, including litigation costs and reasonable attorneys' fees.

31 U.S.C. § 3730(h)(2). This relief is reflected in other sources, such as the Senate Report from 1986:

> Section 3734 provides "make whole" relief including "reinstatement with full seniority rights, backpay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys[']] fees." In addition, the court could award double back pay, special damages or punitive damages if appropriate under the circumstances.

S. REP. NO. 99-345, at 34–35, *as reprinted in* 1986 U.S.C.C.A.N. at 5300.

[60] *See* 2021 Press Release, *supra* note 1 (highlighting that *qui tam* suits filed by whistleblowers accounted for more than $1.6 billion in recoveries in fiscal year 2020). *See generally* 31 U.S.C. § 3730(h) (defining what type of individual is protected from retaliatory actions and explaining the types of relief granted following retaliatory).

[61] *See* S. REP. NO. 99-345, at 34–35, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 ("As is the rule under other Federal whistleblower statutes as well as discrimination laws, the definitions of 'employee' and 'employer' *should* be all-inclusive.") (emphasis added); *see also* H.R. REP. NO. 99-660, at 23 (1986) ("Often, the employee within the company may be the only person who can bring the information forward.").

[62] *See* 31 U.S.C. § 3730(h)(1) (qualifying employees, contractors, and agents under for protection from retaliatory actions, but not defining "employee."); *see also* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (6th Cir. 2021) (noting that the FCA does not explicitly say whether "employee" only means "current employee.").

[63] *Compare Felten*, 993 F.3d at 430 ("[W]e hold that the FCA's anti-retaliation provision protects former employees alleging post-termination retaliation . . ."), *with* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 614 (10th Cir. 2018) ("We conclude that 'employees' only persons who were current employees when their employers retaliated against them. If that condition is met, it doesn't matter whether the employee remains a current employee of the employer when suing. So the label 'former employee' itself means nothing—what matters is the employee's employment status when the employer retaliates.").

i. *Potts* Determined "Employees" Excludes Former Employees

In 2018, the Tenth Circuit Court of Appeals became the first circuit court to ask whether the term "employee" (in the anti-retaliation provision of the FCA) included *former* employees in *Potts v. Ctr. for Excellence in Higher Educ, Inc*.[64] Here, Potts was the camp director of CollegeAmerica Denver, Inc. ("CollegeAmerica")—later known as the Center for Excellence in Higher Education, Inc. ("the Center")—before resigning because she believed CollegeAmerica's business practices were unethical, alleging that CollegeAmerica actively deceived its accreditor to maintain its accreditation.[65] Following Potts' resignation, Potts and CollegeAmerica entered into a written agreement in which CollegeAmerica would pay Potts $7,000 in exchange for Potts refraining from filing any complaint against CollegeAmerica and refraining from maliciously disparaging CollegeAmerica's reputation.[66]

The Center (formerly CollegeAmerica) filed suit against Potts seeking the $7,000 it paid her after discovering she violated the written agreement by disparaging the Center's reputation in an e-mail to another former employee.[67] In response, Potts filed a complaint with the Center's accreditor, the Accrediting Commission of Career Schools and Colleges (ACCSC), exposing the Center's business practice of actively deceiving the ACCSC to maintain accreditation.[68] The Center then amended its complaint against Potts to include Potts' violation of the written agreement by filing a complaint with the ACCSC.[69] Finally, Potts sued the Center for violation of the FCA's anti-retaliation provision on the basis that the Center retaliated against her when it amended its complaint against her for complaining to the ACCSC.[70]

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[64] *See Potts*, 908 F.3d at 612 (considering whether the anti-retaliation provision of the FCA applies to retaliation against *former* employees); *see also* Jimenez et al., *supra* note 13 (examining the Tenth Circuit's recent holding on the scope of the FCA's retaliation provision).

[65] *See Potts*, 908 F.3d at 612 (describing Potts' reasons for resignation); *see also* Jimenez et al., *supra* note 13 ("Debbi Potts, a campus director at an educational organization, resigned her employment in July 2012.").

[66] *See Potts*, 908 F.3d at 612 (detailing the agreement between Potts and CollegeAmerica); *see also* Jimenez et al., *supra* note 13 ("In September 2012, Potts and the organization entered into an agreement whereby Potts promised not to disparage the organization or 'contact[] any governmental or regulatory agency with the purpose of filing any complaint or grievance.'").

[67] *See Potts*, 908 F.3d at 612 (reviewing Potts' alleged breach of contract and the Center's subsequent suit); *see also* Jimenez et al., *supra* note 13 ("The organization sued Potts for breach of contract, citing Potts's complaint to the accreditor.").

[68] *See Potts*, 908 F.3d at 612 (recounting how Potts sent a written complaint to the Center's accreditor, the Accrediting Commission of Career Schools and Colleges); *see also* Jimenez et al., *supra* note 13 ("Potts sent a complaint to the organization's accreditor regarding 'alleged deceptions in maintaining its accreditation.' (After entering into the agreement, Potts also sent a disparaging email.)").

[69] *See Potts*, 908 F.3d at 612 (describing how the Plaintiff amended its complaint to add a single sentence in support of its breach of contract claim); *see also* Jimenez et al., *supra* note 13 ("The organization sued Potts for breach of contract, citing Potts's complaint to the accreditor.").

[70] *See Potts*, 908 F.3d at 612 ("Potts alleged that her complaint to the Center's accreditor was protected activity under the [FCA] because it revealed violations of accreditation standards, which

To examine whether the term "employee" also included *former* employees under the FCA, the Tenth Circuit analyzed the FCA's language on what qualifies as a retaliatory act—discharge, demotion, suspension, threats, harassment, or other forms of discrimination.[71] The Tenth Circuit ultimately found that "employee" unambiguously excludes *former* employees.[72] The Tenth Circuit explained that most of the six statutorily recognized retaliatory acts can *only* occur during employment—*former* employees cannot be discharged, suspended, demoted, threatened or harassed in the terms and conditions of employment.[73] Additionally, the Tenth Circuit reasoned that the relief provided under the FCA cannot be construed to also provide for relief to *former* employees.[74]

ii. *Felten* Splits From *Potts*

About three years later, the Sixth Circuit Court of Appeals addressed the same issue in *United States ex rel. Felten v. William Beaumont Hosp*.[75] Here, Felten initiated an FCA *qui tam* action against his former employer, William Beaumont Hospital ("Beaumont"), alleging that Beaumont paid kickbacks to medical professionals in exchange for Medicare, Medicaid, and TRICARE

would have disqualified the Center from receiving federal student financial aid."); *see also* Jimenez et al., *supra* note 13 (noting Potts' reactive lawsuit).

[71] *See Potts*, 908 F.3d at 614 (listing the qualifying retaliatory acts under the FCA); *see also* 31 U.S.C. § 3730(h)(2) (providing relief to whistle-blowers in order to promote the reporting of fraud and provide protection against retaliation).

[72] *See Potts*, 908 F.3d at 617 (concluding that the FCA excludes relief for retaliatory acts against *former* employees); *see also* Jimenez et al., *supra* note 13 (noting the Tenth Circuit's holding that FCA relief is limited to current employees).

[73] The Tenth Circuit made this distinction clear:

> Of these six categories of retaliatory acts, four, by their nature or wording, must occur during employment (as must the protected activity). Obviously, a former employer cannot discharge, suspend, or demote a former employee. Nor can a former employer discriminate against a former employee in the terms and conditions of employment.

Potts, 908 F.3d at 614. By comparison, the Sixth Circuit made the following distinction:

> [T]he first three operative words on that list—"discharged, demoted, suspended"—refer to harm against only current employees. A person cannot be discharged, demoted, or suspended unless he or she first has a job to lose. However, current employment is not necessary for a person to be "threatened," "harassed," or "discriminated" against—the last three types of misconduct specified on the list.

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

[74] *See Potts*, 908 F.3d at 616 (stating that the FCA lists remedies that all relate to a current employment relationship). *But see Felten*, 993 F.3d at 433 ("The FCA's remedial provision allows former employees to seek relief for post-termination retaliation. For example, a former employee can obtain 'reinstatement' as one type of relief under the statute.").

[75] *See Felten*, 993 F.3d at 430 (considering whether the FCA's anti-retaliation provision protects *former* employees); *see also* Keating & DeLuca, *supra* note 12 (noting the Sixth Circuit's addressing of this issue).

referrals, and that Beaumont retaliated against Felten by intentionally maligning him—causing Felten to be unable to find similar employment elsewhere.[76]

To determine whether the term "employee" included *former* employees under the FCA, the Sixth Circuit closely followed the United States' Supreme Court's analysis in *Robinson v. Shell Oil Co.* by asking whether "employee" is statutorily plain or ambiguous language.[77] The Sixth Circuit ultimately rejected the Tenth Circuit's reasoning, finding the term "employee" is ambiguous and could refer to both current and former employees.[78] The Sixth Circuit reasoned that because a temporal qualifier did not accompany "employee," and that "threatened," "harassed," or "discriminated" under the list of retaliatory acts also did not have any temporal qualifiers, Congress intentionally included such language to expand the scope of the FCA's protection.[79] The Sixth Circuit also explained that the dictionary definition of "employee" itself is consistent with either current or past employment.[80] Finally, it reasoned the FCA's remedial provisions for retaliation apply to former employees—former employees can be granted reinstatement as a type of relief under the FCA, and the provision for special damages is a catch-all phrase that supports the application of the FCA to former employees.[81]

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[76] *See Felten*, 993 F.3d at 430 (noting Felten's complaint and allegations of retaliation against Beaumont); *see also* Keating & DeLuca, *supra* note 12 ("In 2010, David Felten filed an action on behalf of the United States and the State of Michigan against his employer, William Beaumont Hospital, alleging that it had violated the FCA and a comparable Michigan law by paying physicians for referrals of Medicare, Medicaid, and TRICARE patients.").

[77] *See Felten*, 993 F.3d at 431 ("We first 'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case,' relying on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'") (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340–41 (1997)); *see also* Keating & DeLuca, *supra* note 12 (noting that the Sixth Circuit analyzed whether "employee" was statutorily plain or ambiguous language).

[78] *Compare Felten*, 993 F.3d at 435 (holding that the FCA may be invoked by *former* employees for retaliation by former employers), *with Potts*, 908 F.3d at 617 (holding that the FCA excludes relief for retaliatory acts against *former* employees).

[79] *See Felten*, 993 F.3d at 432 (noting the lack of temporal qualifiers broadens scope of the anti-retaliation provision). As described in the National Law Review, the Supreme Court noted some reasons to justify the extension of protections to former employees:

> The statute refers to "[a]ny employee[s]," not just "current employees." Additionally, the "in the terms and conditions of employment" qualifier that the lower court relied on does not imply a temporal limitation, since "many terms and conditions of employment . . . can persist after an employee's termination," such as restrictive covenants and severance pay.

Keating & DeLuca, supra note 12.

[80] *See Felten*, 993 F.3d at 433 (noting that the statutory and dictionary definition of "employee" shows that the FCA covers former employees); *see also* Keating & DeLuca, *supra* note 12 ("The FCA does not define 'employee,' and dictionaries do not limit the definition of 'employee' to 'current employee.'").

[81] *See Felten*, 993 F.3d at 433–34 (noting that the FCA remedial provisions entitles former employees to relief for post-employment retaliation); *see also* Keating & DeLuca, *supra* note 12 ("The remedial scheme of the FCA is expansive and ostensibly provides former employees with relief in

III. DISCUSSION: THE PROPER SCOPE OF PROTECTION OF THE FALSE CLAIMS ACT

A. THE SUPREME COURT PROVIDES GUIDANCE ON "EMPLOYEE"

The opposing decisions from the Tenth and Sixth Circuits demonstrate a clear rift in the understanding and application of United States Supreme Court precedent to today's challenges.[82]

Although the question of whether the FCA's anti-retaliation provision protects *former* employees is an issue of first impression for federal circuit courts, it is not an issue completely devoid of guidance.[83] In fact, in *Robinson*, the Supreme Court resolved challenges in Title VII of the Civil Rights Act of 1964 that share striking similarities to the challenges of the FCA's anti-retaliation provision today.[84]

It makes perfect sense why the Sixth Circuit chose to follow *Robinson* so closely—the central issue in *Robinson* was nearly identical—whether the anti-retaliation provision in the Civil Rights Act of 1964, which prohibits an employer from retaliating against an employee alleging employer discrimination based on race, color, religion, sex, or national origin, protects *former* employees.[85] Resolving *Robinson's* central issue likewise rested on analyzing the term "employee" and determining whether its meaning was plain or ambiguous.[86] Just as in Title VII of the Civil Rights Act of 1964, "employee" under the FCA lacks any express modifiers indicating exclusivity to current employment.[87] Additionally, the statutorily recognized retaliatory acts in both the Civil Rights

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the form of reinstatement, 'special damages,' and potentially other remedies.").

[82] *Compare Felten*, 993 F.3d at 435 (holding that the FCA may be invoked by *former* employees for retaliation by former employers), *with Potts*, 908 F.3d at 617 (holding that the FCA excludes relief for retaliatory acts against *former* employees).

[83] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 339 (1997) ("We are asked to decide in this case whether the term 'employees,' as used in § 704(a), includes former employees, such that petitioner may bring suit against his former employer for post-employment actions allegedly taken in retaliation for petitioner's having filed a charge with the Equal Employment Opportunity Commission (EEOC)."); *see, e.g.*, *Felten*, 993 F.3d at 430 (considering whether the FCA's anti-retaliation provision protects former employees).

[84] *Compare Robinson*, 519 U.S. at 339 ("The United States Court of Appeals for the Fourth Circuit, sitting en banc, held that the term "employees" in § 704(a) referred only to current employees and therefore petitioner's claim was not cognizable under Title VII."), *with Felten*, 993 F.3d at 435 (concluding that the FCA may be invoked by former employees for retaliation by former employers), *and Potts*, 908 F.3d at 617 (concluding that the FCA excludes relief for retaliatory acts against former employees).

[85] *Compare Robinson*, 519 U.S. at 339 (asking whether former employees are protected under the Civil Rights Act's anti-retaliation provision in Title VII), *with Felten*, 993 F.3d at 430 (asking whether the former employees are protected under the FCA's anti-retaliation provision).

[86] *Compare Robinson*, 519 U.S. at 340 (asking whether the term "employee" in Title VII has a plain and unambiguous meaning), *with Felten*, 993 F.3d at 431 (asking whether the term "employee" under the FCA has a plain and unambiguous meaning).

[87] *Compare Robinson*, 519 U.S. at 341 (Title VII's "definition of 'employee' likewise lacks any temporal qualifier and is consistent with either current or past employment."), *with Felten*, 993 F.3d at 432 (finding that "employee" under the FCA lacks a temporal qualifier).

Act of 1964 and the FCA are not all limited to a current employer-employee relationship and can occur after employment.[88] These similarities demonstrate a strong analogous relationship between Title VII of the Civil Rights Act of 1964 and the anti-retaliation provision of the FCA, which mandates application of the Supreme Court's analysis and must ultimately lead to a similar interpretation of "employee."[89]

B. BROADER PROTECTION EQUALS GREATER SUCCESS

In 1986, the Senate Judiciary Committee proposed amendments to the FCA to fulfill one primary objective—"to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[90] The Committee proposed these amendments after recognizing that the growing pervasiveness of fraud could not be surmounted by the U.S. Department of Justice alone and thus required a revitalization of the FCA's *qui tam* provision.[91] To accomplish this objective, the Committee recommended, and Congress ultimately approved of the FCA's anti-retaliation provision.[92] As a result of these amendments, the DOJ has recovered billions of stolen taxpayer dollars, and yearly reports on FCA recoveries laud the efforts of whistleblowers as instrumental to the FCA's success.[93]

Evidently, the Committee was correct to believe that the anti-retaliation provision would breathe life into the FCA's *qui tam* provision—it gave employees the confidence to report fraudulent activity by their employers because they were afforded protection from retaliatory acts.[94] Further, the Committee has

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[88] *Compare Robinson*, 519 U.S. at 342–43 (finding that discharge necessarily includes former employees), *with Felten*, 993 F.3d at 432 ("[C]urrent employment is not necessary for a person to be 'threatened,' 'harassed,' or 'discriminated' against . . . .").

[89] *See Felten*, 993 F.3d at 432 ("Robinson's reasoning applies with equal force to the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h)(1)."). *But see Potts*, 908 F.3d at 617 (finding that the FCA expressly sets a temporal limitation, whereas the Title VII of the Civil Rights Act of 1964 does not).

[90] *See* S. REP. NO. 99-345, at 1 (1986), *as reprinted in* 1986 U.S.C.C.A.N. at 5266 ("The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."); *see also* S. REP. NO. 110-507, at 8 (2008) ("The original FCA was written to assist the Government in combating fraud against the U.S. Treasury by incentivizing private individuals to act as private attorneys general.").

[91] *See* S. REP. NO. 99-345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. at 5266–67 (noting the need for a private-public effort to combat fraud); *see also* S. REP. NO. 110-507, at 4 ("The House and Senate bills amending the FCA . . . shared the similar goal of returning the *qui tam* provisions to the FCA in order to empower private citizens to work with the Government in rooting out fraud.").

[92] *See* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 (recommending protecting whistleblowers from retaliatory acts). *See generally* 31 U.S.C. § 3730(h)(1) (providing relief to employees from employer retaliation).

[93] *See* 2021 Press Release*, supra* note 1 (noting that the FCA has recovered over $64 billion since 1986, and that *qui tam* actions acquired over half of the recoveries in fiscal year 2020); *cf.* 2020 Press Release*, supra* note 5 (noting that the FCA recovered over $3 billion in fiscal year 2019).

[94] *See* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 (recommending the anti-retaliation provision to encourage exposing fraud); *see also* 2021 Press Release, *supra* note 1 ("'Whistleblowers with insider information are critical to identifying and pursuing new and

already answered whether affording *former* employees the same protections under the FCA would likewise contribute to the FCA's overarching purpose—in its report, the Committee emphasized that the definition of "employee" should be "all-inclusive" because few individuals will report fraud if doing so exposes them to retaliation.[95] Therefore, not only will interpreting the FCA to include protections for *former* employees strengthen the usefulness of the FCA as a tool against fraud, but denying such protection to *former* employees actively undermines the FCA's purpose.[96]

C. JUSTICE REQUIRES BROADER PROTECTIONS

Imagine that there is a person who is an employee at a company who discovers their employer regularly perpetrates fraud against the government in one way or another.[97] The employee knows that what their employer is doing is morally and legally wrong, but the employee is stuck between deciding to do the right thing by reporting their employer's fraud while risking their own financial stability and wellbeing, or turning a blind eye which will allow their employer to contribute to the decimation of the integrity and public confidence of our country's federal programs.[98]

In the scenario provided, the employee consults an attorney and learns of the FCA's anti-retaliation provision, and after discussing the matter with their attorney, they confidently decide to bring their employer to justice, and they succeed in doing so.[99] A few years later after FCA action, the employee decides

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evolving fraud schemes that might otherwise remain undetected . . . .'") (quoting Acting Assistant Attorney General Jeffrey Bossert Clark, Jan. 14, 2021).

[95] *See* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 ("As is the rule under other Federal whistleblower statutes as well as discrimination laws, the definitions of 'employee' and 'employer' should be all-inclusive."); *see also* S. REP. NO. 110-507, at 4 ("[T]he 1986 qui tam amendments to the Act that strengthened whistleblower provisions have allowed us to recover losses to the Federal [government] that we might not have otherwise been able to identify.") (alteration in original) (quoting Deputy Assistant Attorney General Michael Hertz, Feb. 27, 2008).

[96] *See supra* Section II.D (noting the FCA's success as a result of the 1986 amendments); *see also* S. REP. NO. 110-507, at 6 (noting that prior to the 1986 amendments, the FCA only recovered $54 million); *cf.* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) ("The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII[.]").

[97] This is a hypothetical scenario designed to illustrate how even an FCA-protected current employee can later be retaliated against as an unprotected former employee under an understanding of *Potts'* interpretation of the FCA. *Compare* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 617 (10th Cir. 2018) (excluding FCA protection to retaliatory acts against former employees), *with* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (6th Cir. 2021) (including FCA protection to retaliatory acts against former employees).

[98] *Compare* S. REP. NO. 99-345, at 5, *as reprinted in* 1986 U.S.C.C.A.N. at 5270 (illustrating a worker's difficult decision to step forward to expose fraud and be subjected to retaliation), *with* H.R. REP. NO. 99-660, at 23 (1986) (noting that a person may be unwilling to expose fraud if they stand to lose their job).

[99] *Cf.* S. REP. NO. 99-345, at 5, *as reprinted in* 1986 U.S.C.C.A.N. at 5270 (noting that employees are generally supportive of exposing fraud if protected from retaliation). *See generally* 31 U.S.C. § 3730(h)(1) (protecting employees from retaliatory acts by their employers for exposing fraud).

to leave the company and seek employment elsewhere in the same industry and discovers that their now *former* employer has been contacting potential employers, warning them of the employee's propensity for justice and advising the potential employers not to hire them.[100] Under the *Potts* interpretation of the FCA's anti-retaliation provision, the employee cannot rely on any protections.[101]

The consequence of a uniform *Potts* interpretation of the FCA essentially renders the anti-retaliation provision useless because an employer is no longer responsible for retaliatory actions after the employee is no longer employed by them.[102] Under that interpretation, what incentive would any employee have for reporting their employers for committing fraud?[103] Undoubtedly, the interpretation in *Potts* runs contrary to the longstanding purpose of the FCA and the 1986 amendments including the anti-retaliation provision.[104]

IV. SOLUTION: DUAL ALTERNATIVES FOR BROADER PROTECTIONS

A. A CONGRESSIONAL AMENDMENT TO INCLUDE FORMER EMPLOYEES

The best solution to resolve the shortcomings of the FCA's anti-retaliation provision—and the circuit split at issue—is a congressional amendment expressly including *former* employees under the FCA's protection.[105] This is the ideal solution because Congress is in the best position to pass an amendment in line with the spirit and intent of the 1986 amendments.[106]

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[100] *Compare Felten*, 993 F.3d at 430 (explaining that a former employee had been blacklisted and unable to find comparable employment), *with* S. REP. NO. 99-345, at 35, *as reprinted in* 1986 U.S.C.C.A.N. at 5300 (noting that blacklisted workers should be considered employees).

[101] *See Potts*, 908 F.3d at 617 (concluding that the FCA excludes relief for retaliatory acts against former employees). *But see Felten*, 993 F.3d at 435 (concluding that the FCA includes relief for retaliatory occurring post-employment).

[102] *See Felten*, 993 F.3d at 435 (determining that including protection to *former* employees better effectuates the FCA's broader context and purpose); *cf.* S. REP. NO. 110-507, at 28 (2008) (noting that the Senate Judiciary Committee believes that differing judicial interpretations frustrate the goal of protecting individuals from retaliation).

[103] *See* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 (recognizing that few individuals will expose fraud if doing so leads to retaliatory by their employers); *see also Felten*, 993 F.3d at 435 (stating that protections to former employees better fits the FCA's broader context and purpose).

[104] *See* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 (noting that FCA protection should be construed broadly); *see also* H.R. REP. NO. 99-660, at 23 (noting that the only person who can bring information of fraud is often an employee).

[105] *See supra* Part III (discussing the issues with excluding *former* employees from whistleblower protection); *see also* False Claims Amendments Act of 2021, S. 2428, 117th Cong. (2021) (introducing amendment to the FCA that includes protections for former employees).

[106] *See supra* Section III.B (discussing how broader whistleblower protection leads greater FCA recoveries). *See generally* S. REP. NO. 99-345, at 34, *as reprinted in* 1986 U.S.C.C.A.N. at 5299 (noting the 1986 Senate Judiciary Committee's belief that FCA protection should be construed broadly).

This solution is a very real possibility because Senator Chuck Grassley of Iowa—who spearheaded the 1986 amendments—along with a bipartisan group of U.S. Senators, are sponsoring the False Claims Amendments Act of 2021 to address the FCA's shortcomings.[107] Along with other changes, this Amendment specifically addresses post-employment whistleblower retaliation by proposing inserting the words "current or former" after "[a]ny" in the anti-retaliation provision.[108] Additionally, the sheer fact that a framer of the 1986 amendments is introducing an amendment to expressly include *former* dispels any doubt as to whether the 1986 Senate Judiciary Committee intended for the inclusion of *former* employees in the FCA's anti-retaliation provision, and may be considered by the United States Supreme Court should a congressional amendment fail to become law.[109]

B. A SUPREME COURT SOLUTION

As previously discussed, the similarities between protecting *former* employees under the FCA and protecting *former* employees under Title VII of the Civil Right Acts of 1964 in *Robinson* warrant an interpretation of the FCA that leads to an outcome similar to *Robinson*.[110] Therefore, as an alternative to a congressional amendment, the United States Supreme Court should grant certiorari on appeal to resolve the differing opinions between the Tenth and Sixth Circuit Court of Appeals.[111] To resolve the split, the Court should apply the

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[107] *See* S. 2428, 117th Cong. (introducing amendments to the FCA and noting Sen. Chuck Grassley sponsorship); *see also* S. REP. NO. 99-345, at 13, *as reprinted in* 1986 U.S.C.C.A.N. at 5278 ("The False Claims Reform Act, S. 1562, . . . was introduced on August 1, 1985, by Senators Charles E. Grassley (R, Ia.), Dennis DeConcini (D, Az.), and Carl Levin (D, Mich.) . . . .").

[108] *Compare* S. 2428 ("[Amendment to the Anti-Retaliation Provision] Section 3730(h)(1) of title 31, United States Code, is amended by inserting 'current or former' after 'Any.'"), *with* 31 U.S.C. § 3730(h)(1) ("*Any employee*, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done . . . in furtherance of an action under this section . . . .") (emphasis added).

[109] *See Senators Introduce Bipartisan Legislation to Fight Government Waste, Fraud*, CHUCK GRASSLEY (July 26, 2021), https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud ("The *False Claims Act* has clearly been the best tool to fight fraud against the government and recover lost taxpayer dollars. Tens of billions of dollars have been returned to the federal treasury since my updates of 35 years ago.") (emphasis in original) (quoting Senator Chuck Grassley of Iowa); *see also* S. 2428 (proposing a bipartisan FCA amendment including former employees under the FCA's protection).

[110] *See supra* Section III.A (discussing the similarities between judicial interpretation of the FCA and Title VII of the Civil Rights Act of 1964); *see also supra* Part II.D.i–ii (discussing the circuit split between the Tenth and Sixth Circuit Court of Appeals).

[111] *See supra* Section IV.A (proposing a congressional amendment to include *former* employees under FCA protection); *see also supra* Sections II.D.i–ii (discussing the differing opinions between the Tenth and Sixth Circuit Court of Appeals). *See generally* 31 U.S.C. § 3730(h)(1) (providing retaliatory protections to employees).

analysis of *Robinson* and ultimately hold that an "employee" in the FCA's anti-retaliation provision includes protection for *former* employees.[112]

Fortunately, on September 22, 2021, the employer in *Felten*—Beaumont—filed a petition of writ of certiorari for the Court to review.[113] If Congress does not pass the False Claims Amendments Act of 2021, the Court will likely grant Beaumont's petition to create a uniform interpretation of the FCA's anti-retaliation provision.[114] In light of the newly proposed amendments, the comparable circumstances in *Robinson*, and the fact that *Robinson's* author—Justice Thomas—still occupies a seat on the Court, taxpayers and whistleblowers everywhere should look forward to the realization of broader protections of the FCA.[115]

V. CONCLUSION

"The need for a robust FCA cannot be understated."[116] In the year prior to the 1986 Amendments, the Department of Justice recovered only $54 million using the FCA.[117] Such an abysmal recovery—when compared to the

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[112] *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (6th Cir. 2021) (acknowledging that the decision to hold that the False Claims Act protected against post-employment retaliation creates a circuit split); *see also* Robinson v. Shell Oil Co., 519 U.S. 337, 340, 344 (1997) (resolving a circuit split by holding that the term "employees" in Title VII, it being more consistent with the primary purpose of Title VII, includes former employees under its anti-retaliation provision).

[113] The plaintiff, Dr. David Felten, sought *certiorari* in the Supreme Court in 2021:

> On Wednesday a petition for writ of certiorari was filed for the Supreme Court of the United States. The petition was filed by William Beaumont Hospital against the United States ex rel Dr. David Felten. Dr. Felten brought his case after his former employer allegedly maligned him to prospective employers after he left the hospital.

Erin Page, *SCOTUS Petition Filed Concerning Applicability of Whistleblower Act for Actions After Termination*, LAW ST. (Sept. 23, 2021), https://lawstreetmedia.com/news/health/scotus-petition-filed-concerning-applicability-of-whistleblower-act-for-actions-after-termination; *see generally supra* Section III.D.ii (discussing the decision of the Sixth Circuit Court of Appeals).

[114] *See* Page, *supra* note 113 (noting the petition for writ of certiorari filed with the Supreme Court). *See generally* S. 2428 (proposing an amendment to the FCA including former employees under the FCA's protection).

[115] *See* S. 2428 (proposing amending the FCA include former employees under the FCA's protection); *see also supra* Section III.A (discussing the similarities between the issue in *Robinson* and in the Tenth and Sixth Circuit Court of Appeals). *See generally Robinson*, 519 U.S. at 339 (noting that Justice Thomas delivered the opinion of the Court).

[116] S. REP. NO. 110-507, at 8 (2008) (noting the importance of the FCA); *see* S. Rep. No. 99-345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. at 5267–68 (noting that fraud against the government permeates generally all government programs, and that fraud erodes public confidence in government programs).

[117] *Compare* S. REP. NO. 99-345, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. at 5268 ("Fraud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence. GAO concluded in its 1981 study that most fraud goes undetected due to the failure of Governmental agencies to effectively ensure accountability on the part of program recipients and Government contractors."), *with* S. REP. NO. 110-507, at 6 (noting that the Department of Justice recovered only $54 million dollars in 1984).

widespread fraud perpetrated against the government—necessitated a complete revitalization of the FCA.[118] As a result, the FCA is an effective tool in putting an end to fraud against the government and now recovers billions of dollars every year because of the anti-retaliation provision that protects employees from retaliation.[119] However, the differing interpretations between the Tenth and Sixth Circuit Court of Appeals threaten to prevent whistleblowers from coming forward to expose fraud—undermining the public policy justification necessary to further the purpose of the FCA.[120]

To maintain a uniform interpretation of the FCA that is in line with the intent of the 1986 amendments, Congress should pass an amendment that expressly include anti-retaliatory protections for *former* employees, or alternatively, the United States Supreme Court should follow its own precedent and hold that the anti-retaliation provision of the FCA protects *former* employees.[121]

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[118] *See* S. REP. NO. 99-345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. at 5268 ("The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget. Taking into account the spending level in 1985 of nearly $1 trillion, fraud against the Government could be costing taxpayers anywhere from $10 to $100 billion annually."); *see also* H.R. REP. NO. 99-660, at 18 (1986) ("It is unknown just how much public money is lost to fraud. Estimates by the General Accounting Office, Department of Justice, and the Inspectors General, who have studied the issue, range from hundreds of millions of dollars to more than $50 billion per year.").

[119] *See* 2021 Press Release, *supra* note 1 (noting $64 billion in recoveries since the 1986 amendments); *see also* S. REP. NO. 110-507, at 6 ("After the 1986 Amendments, recoveries have increased incrementally each year [.]").

[120] *See supra* Section III.C (discussing how a narrow interpretation of the FCA's antiretaliation provision undermines the purpose of the FCA); *see also* S. REP. NO. 110-507, at 6 ("With such a great potential for fraud against the Government, it is important that the Committee revisit the FCA and correct erroneous court interpretations that have limited the scope and application of the FCA in contravention of Congress's intent in passing the 1986 Amendments.").

[121] *See supra* Section IV.A (proposing a congressional amendment to include protection for former employees); *see also supra* Section IV.B (proposing a Supreme Court solution applying the application and similar holding of *Robinson*).