No. 21-443

IN THE
Supreme Court of the United States

WILLIAM BEAUMONT HOSPITAL,
Petitioner,

v.

DAVID L. FELTEN, M.D., PH.D., AND UNITED STATES OF AMERICA, EX REL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

None of the reasons Respondent offers for denying certiorari have merit. The pending bill in Congress is just that, a pending bill. In any event, it supports Petitioner by confirming that Congress knows how to make explicit when the term "employee" includes former employees. The split is clear and direct, as the Sixth Circuit expressly recognized (Pet. App. 14a); pointing to meaningless distinctions between the Sixth and Tenth Circuit decisions does not change that fact. The question presented is dispositive of Respondent's claim that Beaumont violated the FCA's anti-retaliation provision years after he no longer worked for the hospital. This issue is important to all

employers, but especially our nation's hospitals, which face a disproportionate amount of FCA litigation, including retaliation claims; that is why two national hospital associations and all four state hospital associations from the states within the Sixth Circuit filed an amicus brief stressing the need for this Court's review. And finally, the decision below is incorrect on the merits.

Respondent's merits argument—like the decision below—can be summed up in one word: *Robinson*. He says that because *Robinson* did not look to dictionaries or the common law to resolve the meaning of "employee" in Title VII, dictionaries and the common law should not inform the meaning of that term in the FCA's retaliation provision either. But there's a big difference: Title VII *defined* the term employee, but the FCA does not. Respondent says that because *Robinson* held the definition of employee in Title VII lacked a temporal modifier, Section 3730(h) must lack a temporal modifier too. But unlike Title VII, Section 3730(h) has strong textual cues about its temporal scope. Although other provisions of Title VII use "employee" to refer to both former and current employees, Respondent rightly concedes that no other provision in the FCA uses employee in this way. Respondent's arguments ultimately fail because *Robinson* was about *Title VII*; this case is about *the FCA*—a different statute with different language that was enacted at a different time. It is little wonder that focusing on the text of the wrong statute led to the wrong result.

With these false obstacles cleared, it is plain that this Court can and should step in to resolve the clear split. Allowing post-employment FCA retaliation claims will hurt employers, particularly in the health-

care industry, now and for years to come. And the Sixth Circuit reached the wrong result by elevating a supposed statutory purpose and a case about Title VII over the plain text of the FCA.

Certiorari should be granted.

ARGUMENT

I. THE SIXTH AND TENTH CIRCUITS ARE SPLIT ON THE MEANING OF "EMPLOYEE" IN THE FCA'S ANTI-RETALIATION PROVISION.

Respondent cannot dispute that courts are split over whether Section 3730(h) extends to retaliatory acts that occur after the relator's employment has ended. *See* Pet. 12-17. Nor does he try to distinguish this case from the many others in which this Court has granted certiorari to review one-to-one splits or splitless questions of statutory interpretation. *See id.* at 34 (collecting cases). And the factual differences between the Sixth and Tenth Circuit decisions that he latches onto have no bearing on the split.

In *Potts* v. *Center for Excellence in Higher Education, Inc.*, the Tenth Circuit unequivocally held that "employee" in Section 3730(h) "includes only persons who were current employees when their employers retaliated against them." 908 F.3d 610, 614 (10th Cir. 2018).[1] It "reach[ed] this conclusion by examining the wording of § 3730(h)(1)," *id.*, which undercuts

[1] The line that Respondent calls the Tenth Circuit's holding (*see* Opp. 9-10) is actually the appeals court's description of the district court proceedings. *Potts*, 908 F.3d at 612-613 ("After a hearing, the district court granted the motion, concluding that a former employee—one whose allegedly protected acts had occurred exclusively after employment ended—could not rely on the False Claims Act's anti-retaliation provision.").

Respondent's suggestion that the Tenth Circuit might change course in a later case presenting different facts. For cases proceeding in the Tenth Circuit, therefore, Section 3730(h) "unambiguously excludes relief for retaliatory acts occurring after the employee has left employment," regardless of "whether the whistleblowing occurs during employment, or as in Potts's case, after employment." *Id.* at 618 & n.8. None of the so-called "unusual" facts that Respondent recites (at 10) are mentioned anywhere in the court's statutory interpretation. *See Potts*, 908 F.3d at 613-618 .

Respondent eventually falls back on his claim that further percolation is warranted. But he identifies no benefit to be gained by waiting. That is no surprise; there is none. This is a pure question of statutory interpretation, and the arguments on each side have been fully developed in the existing split.[2] Indeed, this Court grants certiorari in cases involving one-to-one splits and important questions of statutory interpretation even without a circuit split. Pet. 34. Just since Beaumont filed its petition, this Court granted

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[2] District court decisions have drawn the same line as the Tenth Circuit in various factual circumstances. *See Taul ex rel. United States* v. *Nagel Enters., Inc.*, No. 2:14-CV-0061-VEH, 2017 WL 4956422, at *2, *4 (N.D. Ala. Nov. 1, 2017) (allegations involved exclusively post-employment protected activity); *United States ex rel. Head* v. *Kane Co.*, 798 F. Supp. 2d 186, 191, 207-208 (D.D.C. 2011) (same); *Master* v. *LHC Grp. Inc.*, No. 07-1117, 2013 WL 786357, at *3, *7 (W.D. La. Mar. 1, 2013) (allegations involved protected activity during employment and post-employment retaliation); *Bechtel* v. *St. Joseph Med. Ctr., Inc.*, No. MJG-10-3381, 2012 WL 1476079, at *4, *9-10 (D. Md. Apr. 26, 2012) (same); *Poffinbarger* v. *Priority Health*, No. 1:11-cv-993, 2011 WL 6180464, at *1 (W.D. Mich. Dec. 13, 2011) (allegations of retaliation during and after termination of employment).

certiorari to resolve another one-to-one split, *see Marietta Mem'l Hosp. Emp. Health Benefit Plan* v. *DaVita, Inc.*, No. 20-1641, 142 S. Ct. 457 (Nov. 5, 2021), and granted multiple petitions presenting important questions of statutory interpretation absent any split, *see, e.g.*, *Viking River Cruises, Inc.* v. *Moriana*, No. 20-1573, 2021 WL 5911481 (U.S. Dec. 15, 2021); *West Virginia* v. *EPA*, No. 20-1530, 142 S. Ct. 420 (Oct. 29, 2021).

The development of the legal issues that this Court looks for in assessing whether to grant certiorari has already occurred. There is no need to wait for further percolation, particularly given the clean vehicle that this case presents. This Court should grant certiorari now to address this acknowledged split.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT QUESTION PRESENTED.

Perhaps recognizing the weakness of his merits position, Respondent throws out various theories as to why this case is not cert-worthy. None stick.

A. The Pending Senate Bill Does Not Warrant Denying Certiorari.

As Beaumont noted in the petition, a bill was introduced in the Senate that would extend the FCA's anti-retaliation provision to former employees. Pet. 29. Respondent tries to argue that this bill is a reason to deny certiorari, but the opposite is true. At least the bill's sponsors view the current statute as not covering former employees, contrary to the Sixth Circuit's decision.

Respondent's arguments about the bill are off-base. For starters, it is unclear why Respondent says (at 5) that the bill is "likely to pass," when neither house of

Congress has voted on it; in the past ten years, barely 4.5% of bills received a vote in either house, and only 2.3% have passed. *Statistics and Historical Comparison*, GovTrack, https://bit.ly/3snir6I (last visited Jan. 4, 2022). It is no surprise, then, that this Court has repeatedly granted certiorari despite the possibility that a bill would pass. *See, e.g.*, *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017); *United States* v. *Windsor*, 570 U.S. 744 (2013); *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428 (2011). Indeed, this Court has granted review even where the odds of the legislation passing were far higher. *See Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007) (granting certiorari even though bills had passed both houses, although no conference committee had been convened, *see* Reply Brief at 10 n.8, *Gonzales*, 549 U.S. 183 (No. 05-1629), 2006 WL 2581844).

If the Senate bill is not enacted, like 97.7% of proposed legislation, it will have no bearing on the scope of Section 3730(h). Respondent is wrong to suggest (at 8) that certiorari should be denied to give "the lower courts * * * the first opportunity to" guess at what Congress's failure to pass this amendment would mean for the scope of Section 3730(h). This Court has made clear that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a * * * statute." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-170 (2001) (internal quotation marks omitted); *see Murphy* v. *Smith*, 138 S. Ct. 784, 790 n.2 (2018).

Even if the Senate bill overcomes the long odds to become law, it would only apply prospectively. *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*,

520 U.S. 939, 946 (1997) (declining to apply 1986 FCA amendment retroactively). It thus cannot apply to Respondent's claims, and any other claim for post-employment retaliation that occurred before the effective date of the enacted bill.

B. This Court Often Grants Certiorari In Interlocutory Appeals on Controlling Legal Questions.

Respondent is equally wrong to highlight the interlocutory nature of this case as bearing on its cert-worthiness. This Court often grants review in petitions arising from interlocutory appeals of controlling legal questions under Section 1292(b). *See, e.g.*, *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 485 (2015); *Cutter* v. *Wilkinson*, 544 U.S. 709, 717-719 (2005); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 374 (2004). It should do the same here.

None of the cases Respondent cites (at 12) dictate otherwise. No "procedural difficulties * * * arise from the interlocutory posture" of this appeal. *Cf. Wrotten* v. *New York*, 560 U.S. 959 (2010) (Sotomayor, J., respecting denial of certiorari) (unclear whether decision below was "final" and further factual development was necessary). The Sixth Circuit did not remand this case for further fact-finding on the question presented. *Cf. Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting denial of certiorari). Unlike with a preliminary injunction, the courts below have resolved the question at issue, rather than just opining on the likelihood that one party might prevail. *Cf. Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 791 (2020) (statement of Gorsuch, J.). And there are no complex remedial questions for the lower courts to resolve

before this Court weighs in. *Cf. Virginia Mil. Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari).

Neither of Respondent's two additional reasons (at 11-12) for denying review because of the interlocutory nature of the decision below are persuasive.

First, there is no need for this Court to address whether Section 3730(h) prohibits blacklisting. Because Respondent raised that argument "for the first time on appeal," the Sixth Circuit "remand[ed] for the district court to consider the issue in the first instance." Pet. App. 14a-15a. If this Court were to grant the petition and affirm, it could do the same. And if it granted the petition and reversed, there would be no need for the District Court to address that question on remand.

Second, granting certiorari and holding that Section 3730(h) does not reach post-employment retaliation would definitively resolve the question presented. That Respondent may pursue other claims of retaliation does not affect whether certiorari would resolve the issue here. And although affirming the decision below might mean Respondent could ultimately prevail, that is true in *any* case involving a threshold interpretive issue. That has not stopped this Court from granting review in such cases before. It should not stop it now.

C. The Question Presented Is Important.

Whether the FCA's anti-retaliation provision extends to post-employment retaliation is an important, recurring question. This Court should step in now, before the full panoply of "costly and distracting consequences" comes to pass. Amicus Br. of American Hospital Ass'n, et al. (AHA Amicus Br.) at 23.

Respondent attempts to discourage this Court from granting review because the number of possible post-employment retaliation cases is a "drop in the bucket" compared to the hundreds of thousands of civil cases filed each year. Opp. 15. Perhaps. But each drop can unleash a waterfall of consequences. *See* Pet. 30-33; AHA Amicus Br. 6-10.

In any event, it is unsurprising that Respondent could not locate many cases in the past year alleging post-employment retaliation. Before the Sixth Circuit's decision, courts nearly universally *rejected* the view that Section 3730(h) reached post-employment retaliation. Pet. 12-16 & n.2. The decision below changes that status quo. And although not every qui tam case will include post-employment retaliation claims, many will.

Respondent's handful of remaining arguments likewise fall flat.

Because a plaintiff can assert that her former employer retaliated against her *at any time* after her employment ended, the three-year limitations period on filing suit after the retaliation allegedly occurs is not a meaningful limit on post-employment retaliation claims. *Contra* Opp. 16. *See* Pet. 31 (explaining potential timelines). Respondent's own cases show as much. For example, in *Knight* v. *Standard Chartered Bank*, 531 F. Supp. 3d 755 (S.D.N.Y. 2021) (cited at Opp. 13), plaintiffs brought a post-employment retaliation claim seven years after filing a qui tam complaint. *Id.* at 761-762; *see* First Am. Compl. ¶ 92, *Knight*, 531 F. Supp. 3d 755 (No. 19-cv-11739 (PAE)), 2020 WL 5604196 (alleging post-employment retaliation because the defendant purportedly "made

disparaging statements" that prevented a potential new employer from "considering [one plaintiff] further").

Respondent's assertion (at 16) that an employer can simply "stop[] retaliating" ignores that a motivated individual can still *claim* retaliation. And although Respondent brushes it aside, the concern about using opportunistic whistleblower litigation to force a settlement has long been documented. *See, e.g.*, James Fisher et al., *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 19 Dick. J. Int'l L. 117, 134 (2000). That risk is particularly acute where, as here, "[t]he availability of these high-paying damages provides a lucrative incentive for FCA-retaliation suits," AHA Amicus Br. 8, the litigation is not subject to any government oversight, *id.* at 8-9, the relevant standards are often very "plaintiff-friendly," *id.* at 9, and the plaintiff may allege retaliation in response to decades-old "protected activity," *see* Pet. 31-32.

Finally, Respondent claims that the fact that the health care industry spends billions dealing with existing FCA cases is no reason to grant certiorari here. Not so. Hospitals already face disproportionate burdens from FCA-related litigation and "[a]dopting the Sixth Circuit's rule would make this untenable situation even worse." AHA Amicus Br. 4. This Court should step in here and now to prevent that result.

III. THE DECISION BELOW IS WRONG.

Respondent's defense of the decision below rests entirely on *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), which interpreted a provision in Title VII. Had he or the panel looked to the plain text of the FCA, it would have been clear that "employee" in

Section 3730(h) excludes someone no longer employed when allegedly retaliated against.

First, *Robinson* did not need to consult dictionary definitions or the common-law meaning of "employee" because Title VII specifically defined the term to mean "an individual employed by an employer," without a temporal limitation. 519 U.S. at 342 (quoting 42 U.S.C. § 2000e(f)). Some other state and federal laws similarly choose to define "employee" more broadly than the term's plain meaning. *See* Opp. 27-28. But the fact that certain statutes deviate from the dictionary definition and common-law meaning of "employee" cannot alter the meaning of that term in the FCA where the term is *not* defined.

Second, *Robinson* did not say that "employee" is *always* temporally ambiguous; it concluded that it was temporally ambiguous in Title VII because *that statute* lacked a "temporal qualifier." 519 U.S. at 341. Section 3730(h) does contain such a limit: it covers only retaliation that can occur during employment. Pet. 19-20. Respondent responds by once again directing this Court to Title VII, citing "on-the-job" language that *Robinson* never mentioned, and the Senate bill, which may or may not be enacted. *See* Opp. 20.

Third, and relatedly, *Robinson* explained that other uses of "employee" in Title VII did not help discern the meaning in the provision at issue because they did not have a consistent meaning; the term sometimes referred to current employees and sometimes was used more broadly. 519 U.S. at 343-344. But Respondent admits that, unlike Title VII, every other use of "employee" in the FCA refers to current employees. Opp. 21-22; *see* Pet. 20-22. That is strong evidence that Congress intended it to have that same meaning in

Section 3730(h). *See, e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990).

Fourth, Respondent concedes that the Sixth Circuit's conclusion that "reinstatement can be a remedy * * * for post-termination retaliation," Pet. App. 12a, "simply isn't correct," Opp. 23. Petitioner agrees. But that is precisely how the Sixth Circuit interpreted the statute: "Under § 3730(h)(1), a person out of a job can get the job back as a remedy for the proscribed conduct, regardless of when the wrongful act occurred." Pet. App. 12a. All the more reason certiorari is appropriate.

Finally, Respondent argues that it was appropriate for the panel to resort to purposivism because that's "what this Court did in *Robinson*." Opp. 24-25. But even *Robinson* looked to purpose only after exhausting all available interpretive tools and concluding Title VII's anti-retaliation provision was genuinely ambiguous. 519 U.S. at 345-346. Here, applying interpretive tools shows that Section 3730(h) includes only current employees—which means it was improper for the Sixth Circuit to find ambiguity here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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