No. 21-____

IN THE
Supreme Court of the United States

WILLIAM BEAUMONT HOSPITAL,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

31 U.S.C. § 3730(h)(1) protects an "employee" against retaliation for trying to stop a violation of the False Claims Act. The question presented is whether the term "employee" includes someone who is no longer an employee when the alleged retaliation takes place.

PARTIES TO THE PROCEEDING

William Beaumont Hospital, petitioner on review, was the defendant-appellee below.

David L. Felten, M.D., Ph.D., respondent on review, was the plaintiff-appellant below.

The United States of America was a plaintiff below.

RULE 29.6 DISCLOSURE STATEMENT

William Beaumont Hospital is not a subsidiary or affiliate of a publicly owned corporation.

RELATED PROCEEDINGS

Counsel is unaware of any related proceedings within the meaning of Sup. Ct. R. 14.1(b)(iii).

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William Beaumont Hospital (Beaumont) respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

INTRODUCTION

This case comes down to a simple question. Is someone who used to work for an employer still an "employee" after his employment has concluded? The question essentially answers itself. No, someone is not an employee once he no longer works for an employer. Yet the Sixth Circuit reached the opposite conclusion, over a strong dissent, holding that the anti-retaliation provision of the False Claims Act (FCA)—which protects "employee[s]"—extends to a person

who is no longer employed by the defendant when the allegedly retaliatory act occurs.

As the panel majority acknowledged, that decision "creates a circuit split." Pet. App. 14a. The Tenth Circuit and the substantial majority of district courts hold that because the FCA's anti-retaliation provision uses the term "employee," 31 U.S.C. § 3730(h)(1), its protections do not sweep in individuals who allege they were retaliated against *after* their employment ended. By contrast, a minority of courts, including the Sixth Circuit, hold that this provision reaches allegedly retaliatory acts that occur post-employment.

The Sixth Circuit reached its contrary decision by disregarding the text of the statute, jettisoning it in an attempt to find enough ambiguity to justify the court's purposivist result. But because the FCA does not define "employee," the court should have looked to its plain meaning—both in dictionaries and at common law. That's not where the Sixth Circuit began (or ended, for it never analyzed a single dictionary or agency-law treatise). Instead, it relied on *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), a case interpreting Congress's definition of "employee" in *Title VII*.

The majority also declined to apply basic canons of construction that show the FCA's provision is limited to post-employment retaliation claims. And the majority dismissed as irrelevant the fact that none of the FCA's other references to "employee" could logically mean a person who is no longer employed. Based on this atextual approach, the majority concluded that "employee" was temporally ambiguous and that the purpose of the FCA justified expanding the scope of the statute's anti-retaliation provision far beyond its plain meaning. It did so despite acknowledging that

this rule will lead to absurd results: under the Sixth Circuit's rule, someone who files a qui tam complaint *after* being fired, and *then* claims his former employer retaliated against him for filing that complaint can nevertheless seek reinstatement to his previous position—even though his termination was unrelated to any protected activity.

This Court's review is urgently needed. There is a one-to-one circuit split on this question. Although that type of conflict would often warrant more percolation, here it is not necessary or appropriate. The arguments have been developed in three separate court of appeals opinions and many district court decisions. And allowing the decision below to stand will have devastating consequences. By permitting relators to bring FCA retaliation claims decades after their employment has ended, the decision below will burden countless employers, large and small alike. It is particularly troubling for any employer with a connection to the Sixth Circuit, including the fifty-three Fortune 500 companies headquartered there, and for employers in the health care industry—the leading target of qui tam claims.

In the last two Terms alone, the Court has granted certiorari in at least six cases involving a one-to-one split and four cases involving an important question of statutory interpretation where there was no split at all. *Infra*, p. 34. This case is an ideal vehicle to resolve this important question of statutory interpretation before the flood of meritless retaliation claims begins. Because waiting for more decisions will serve little value and cause great harm, this Court should intervene now, as it has done in countless other cases

involving one-to-one splits. Certiorari should be granted.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 993 F.3d 428. Pet. App. 1a-27a. The Sixth Circuit's decision denying rehearing en banc is not reported. *Id.* at 47a-48a. The District Court's order granting Beaumont's motion to dismiss in relevant part is available at 2019 WL 2743699. Pet. App. 28a-37a. The District Court's order certifying this issue for interlocutory appeal is available at 2019 WL 3561917. Pet. App. 40a-46a. The Sixth Circuit's order granting the interlocutory appeal is not reported. *Id.* at 38a-39a.

JURISDICTION

The Sixth Circuit entered judgment on March 31, 2021. Pet. App. 1a. It denied rehearing en banc on June 2, 2021. *Id.* at 47a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h)(1), provides:

> 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 by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

STATEMENT

A. Statutory Background

The FCA imposes civil liability on any person who "knowingly" defrauds the Government by, among other things, "present[ing] * * * a false or fraudulent claim for payment or approval" "to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(a)(1)(A), (b)(2)(A)(i). To encourage enforcement of the Act, Congress authorized private citizens (known as relators) to file qui tam actions on behalf of the government. *Id.* § 3730(b). A relator may collect a sizable portion of any funds recovered through that lawsuit. *See id.* § 3730(d). Although the FCA allows the government to investigate and decide whether to intervene when a relator sues, the relator can still continue with the suit if the government does not intervene. *See id.* § 3730(b), (c)(3).

Congress added an anti-retaliation provision to the FCA in 1986. The original version applied only to "[a]ny *employee* who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an [FCA] action." False Claims Act Amendments of 1986, Pub. L. No. 99-562, § 4, 100 Stat. 3153, 3157-58 (emphasis added).

Congress has twice amended this provision. First, in 2009, Congress extended its protections to "[a]ny employee, *contractor, or agent*." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (emphasis added). Second, in 2010, Congress clarified that the FCA protects against retaliation for either a qui tam action or "other efforts

to stop 1 or more violations of" the Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(c)(1), 124 Stat. 1376, 2079 (2010) (codified at 31 U.S.C. § 3730(h)(1)). In other words, the anti-retaliation provision extends to whistleblowers whose actions *could* support an FCA claim, even where no claim is ever filed. *See, e.g.*, *United States ex rel. Reed* v. *KeyPoint Gov't Sols.*, 923 F.3d 729, 765 & n.18 (10th Cir. 2019) (collecting cases).

The relief for a successful retaliation claim "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." 31 U.S.C. § 3730(h)(2).

B. Procedural History

1. In 2010, while Dr. David Felten was employed by Beaumont, he filed a qui tam complaint against the hospital. Pet. App. 3a. At the time, he alleged that Beaumont had violated the FCA and had retaliated against him while he was employed for reporting those violations. *Id.* Except for the alleged retaliation claim and request for associated fees and costs, these claims have been resolved. *See id.*

In 2018, Felten filed an amended complaint alleging additional acts of retaliation, some of which occurred while he was employed and some of which post-dated his employment. *Id.* at 3a, 29a-30a. Specifically, he alleged that his termination resulted from false representations Beaumont made to him during his employment about an internal report on his position and concerning mandatory retirement. *Id.* at 3a. Felten also

alleged that, after his employment ended, he had been unable to find a comparable position in academic medicine. *Id.* at 3a-4a. "The only plausible explanation," Felten claimed, was that "Beaumont intentionally maligned Dr. Felten to" potential future employers "in retaliation for his reports of [Beaumont's] unlawful conduct." Am. Compl., D. Ct. Dkt. 97 at 16, ¶ 71; *see id.* at 18, ¶ 82. This petition involves only Felten's claim of post-employment retaliation in Beaumont's interactions with potential employers for Felten.

2. Beaumont moved to dismiss Felten's post-employment retaliation claim. Beaumont explained that the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h), applies only to "employee[s]." Because Felten was no longer an employee when this alleged retaliation occurred, his claim was not cognizable. *See* Pet. App. 35a.

The District Court agreed and dismissed Felten's post-employment retaliation claim. As the District Court explained, "[t]he overwhelming majority of courts that have considered the issue have found that § 3730(h)(1) does not apply to post-employment retaliation." *Id.* at 36a (internal quotation marks omitted). But because this was a "controlling question of law" and an immediate appeal would conserve resources, the District Court granted Felten's motion to certify this issue for interlocutory appeal. *Id.* at 44a.

3. A divided Sixth Circuit panel disagreed and held that "the FCA's anti-retaliation provision protects" against "post-termination retaliation." *Id.* at 3a; *see id.* at 38a-39a (Sixth Circuit order granting petition for interlocutory appeal).

The panel majority recognized that statutory interpretation "usually" starts with the "plain meaning" of

terms that are not specifically defined in a statute. Pet. App. 6a. Yet rather than start with the plain meaning of "employee," the panel looked to how this Court had interpreted the definition of "employee" that Congress had enacted for another statute, Title VII. Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). In *Robinson*, this Court held Title VII's definition temporally ambiguous based on its use of "employed"—a term missing from both the FCA and the common definition of "employee." 519 U.S. at 342. Without analyzing the text of the FCA, canvassing dictionary definitions, or discussing any common-law principles of agency, the majority concluded that Title VII's temporal ambiguity extended to the FCA too. Pet. App. 9a-10a.

The majority also found that Section 3730(h)(1) did not itself temporally limit the duration of the rights given to an "employee." That provision describes six retaliatory acts: discharge, demotion, suspension, threats, harassment, and discrimination "in the terms and conditions of employment." 31 U.S.C. § 3730(h)(1). The majority recognized that only someone currently employed could be discharged, demoted, or suspended. Pet. App. 7a. But it theorized that an employer could "discriminate[]" against someone "in the terms and conditions of employment" after their employment had ended. *Id.* at 7a-9a. It therefore found no reason to limit the remaining two acts—threats and harassment—to a current employment relationship. *Id.*

The majority did not analyze the multiple other times that the FCA uses the word "employee," nor did it dispute that reading "employee" in those provisions

to mean someone who is no longer employed would lead to absurd results. *Id.* at 10a n.2. Instead, it looked to the anti-retaliation provision's remedial language, which states that the relief available for a successful retaliation claim "shall include reinstatement," "back pay," and "compensation for any special damages sustained as a result of the discrimination." 31 U.S.C. § 3730(h)(2). The majority concluded that a person who was terminated and *afterward* retaliated against could "get the job back as a remedy," Pet. App. 12a, even though at the time of the retaliation in this scenario, the person had no job with the defendant to "get back." The majority argued that because "discrimination" could include post-employment conduct, special damages were also available for post-employment retaliation. *Id.* at 11a. And it concluded that the phrase "shall include" means this provision necessarily makes available some other, unspecified remedies for post-employment retaliation. *Id.* at 11a-12a.

Having found ambiguity, the majority turned to purposivism. *See id.* at 13a-14a. The majority determined that "the purpose of the [FCA's] anti-retaliation provision is to encourage the reporting of fraud" by protecting relators. *Id.* Because the majority believed that leaving post-employment retaliation outside the statute's scope would not further that purpose, it held that a person who is no longer employed at the time of the alleged retaliation still falls within the FCA's anti-retaliation provision. *Id.* at 14a. In so holding, the majority "acknowledge[d] that [its] decision creates a circuit split." *Id.*

Judge Griffin dissented. He explained that an "employee" is someone who "work[s] in the service of his * * * employer under a contract of hire or for pay."

Id. at 17a (Griffin, J., dissenting). That definition does not encompass a person who is no longer employed. *Id.* at 17a-18a. "[T]he specific context in which 'employee' is used," "other portions of the FCA," and "persuasive case law" all point to the same result. *Id.* at 18a-22a. Indeed, "[n]early every federal court that has considered whether the FCA's anti-retaliation provision is temporally limited to current employees * * * has reached the same conclusion." *Id.* at 21a-22a & n.2 (collecting cases).

The dissenter also chastised the majority's use of "unauthorized, unnecessary purposivism." *Id.* at 26a. "After the majority finds ambiguity, it determines which result the FCA should achieve." *Id.* But "[t]hat task should be left to Congress." *Id.* Because "Congress unambiguously" instructed "that the anti-retaliation provision applies only to 'employees,' " the dissenter would have "affirm[ed] the district court" and held that Section 3730(h)(1) does not reach post-employment conduct. *Id.*

4. The Sixth Circuit denied Beaumont's petition for rehearing en banc. *Id.* at 47a-48a. This petition follows.

REASONS TO GRANT THE PETITION

"This case asks if the word 'employee,' " in the FCA "refers to someone who is not an employee. To ask the question is to answer it." Pet. App. 16a (Griffin, J., dissenting). Yet in the decision below, the Sixth Circuit held that a "former employee"—that is, a person who is no longer employed when they experience alleged retaliation—can sue under the FCA's anti-

retaliation provision.[1] That decision split from nearly every federal court to consider this question, including a unanimous Tenth Circuit panel.

The Sixth Circuit's rule conflicts with the text of the FCA. Rather than interpreting the text of *that* statute, the majority relied on the definition of "employee" in another statute, disregarded obvious temporal clues, and adopted an interpretation that even it admitted would lead to absurd results. After finding ambiguity based on its atextual approach, the majority turned to "unauthorized, unnecessary purposivism" and purported to "divine[ ] congressional intent from its own perception of which reading would best serve the FCA's 'broader context and purpose.'" *Id.* at 16a, 26a.

This Court's review is urgently warranted. This question recurs often, as retaliation claims are part and parcel of FCA cases. Parties need clarity now on whether post-employment retaliation claims can proceed, before the inevitable flood of meritless suits begins. And although this is only a one-to-one split, further percolation is unnecessary, as the arguments on both sides have already been fully developed in the Tenth and Sixth Circuit decisions. Because waiting for more decisions will serve little value and cause great harm, this Court should intervene now, as it has done in countless other cases involving one-to-one splits. The petition should be granted.

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[1] Unless otherwise noted, as used in this petition and the decisions below, the terms "former employee" and "former employer" refer to the employment relationship at the time of the alleged retaliation, not at the time of filing suit.

I. COURTS ARE SPLIT ON WHETHER THE FCA PROHIBITS POST-EMPLOYMENT RETALIATION.

As the Sixth Circuit "acknowledge[d]," its decision "create[d] a circuit split" on whether the FCA's anti-retaliation provision extends to retaliatory acts that occur *after* a relator's employment has ended. Pet. App. 14a. Many federal courts have considered this question. A minority, including the Sixth Circuit, hold that Section 3730(h)(1) permits a claim for post-employment retaliation. In contrast, the majority—including the Tenth Circuit—hold that Section 3730(h)(1) protects only against retaliation that occurred during the relator's employment.

1. In the decision below, the Sixth Circuit held that a "former employee"—meaning someone no longer employed when they are allegedly retaliated against—may sue for post-employment retaliation under Section 3130(h)(1). Rather than start with the plain meaning of the FCA's anti-retaliation provision, the majority looked to *Robinson*, a case interpreting the definition of "employee" in Title VII's anti-retaliation provision. Even though Title VII contains an express definition of the word "employee"—a definition noticeably absent from the FCA and different from the common meaning of that term—the majority believed that because *Robinson* found the definition of "employee" in Title VII temporally ambiguous, the same must also be true of the term "employee" in the FCA. Pet. App. 6a.

The majority also disregarded obvious temporal clues in Section 3730(h)(1) itself, as well as the FCA writ large. The majority recognized that three of the listed retaliatory acts—discharge, demotion, and suspension—"refer to harm against only current

employees." Pet. App. 7a. Yet it found that the phrase "discriminated against in the terms and conditions of employment" could refer to discrimination occurring after the individual's employment is over. *Id.* at 7a-9a. Relying on that premise, the majority determined that there was no reason to limit the remaining two retaliatory acts—threats and harassment—to the employment context either. *Id.* The majority next concluded that Section 3730(h)'s remedial provision would allow a person who has been terminated and is then retaliated against to get their "job back as a remedy for" that post-termination retaliation. Pet. App. 12a. And the majority dismissed as irrelevant the fact that none of the FCA's other uses of "employee" could reasonably refer to someone who is no longer employed at the time of the relevant conduct. *See id.* at 10a n.2.

Having "rushe[d] to find ambiguity" based on its atextual approach, the majority turned to purposivism. *Id.* at 16a (Griffin, J., dissenting). The majority elected to "construe § 3730(h)(1) to effectuate" what it saw as "the statute's broader context and purpose." *Id.* at 14a (majority opinion). It accordingly held that Section 3730(h)(1) extends to post-employment retaliation. *Id.*

A handful of district courts have reached the same conclusion using a similar interpretive method. Rather than conducting an independent textual analysis, they too relied on *Robinson* to conclude that Section 3730(h)(1) reaches post-employment retaliation claims. *See Haka* v. *Lincoln County*, 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008); *Ortino* v. *Sch. Bd. of Collier Cnty.*, No. 2:14-cv-693-FtM-29CM, 2015 WL 1579460, at *3-4 (M.D. Fla. Apr. 9, 2015).

2. In contrast, most federal courts, including the Tenth Circuit, hold that Section 3730(h)(1) does not reach retaliation claims based on post-employment conduct.

In *Potts* v. *Center for Excellence in Higher Education, Inc.*, the Tenth Circuit held that the FCA does not recognize retaliation claims for post-employment conduct. 908 F.3d 610 (10th Cir. 2018). The Tenth Circuit "beg[an] with the language of the statute itself." *Id.* at 613. Four of Section 3730(h)(1)'s six qualifying retaliatory acts "*must* occur during employment"; "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." *Id.* at 614. Although the court "acknowledged the truism" that a "former employer" can harass or threaten a "former employee," it explained that the associated-words canon (*noscitur a sociis*) cautioned against giving the terms threatened and harassed "a different temporal range" than "their four neighbors." *Id.* at 614-615; *see, e.g.*, *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("*noscitur a sociis* * * * dictates that words grouped in a list should be given related meaning" (internal quotation marks omitted)).

That conclusion was "buttress[ed]" by the catchall phrase—"other manner discriminated against in the terms and conditions of employment." *Potts*, 908 F.3d. at 615; 31 U.S.C. § 3730(h)(1). *Ejusdem generis* instructs that a catchall phrase is limited to the same context as the specific examples it follows. *Potts*, 908 F.3d. at 615; *see, e.g.*, *Cir. City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). Applying that canon, the court held that "[d]iscriminatory acts similar to

threats and harassment are actionable only if those acts occur in the terms and conditions of employment." *Potts*, 908 F.3d at 615. And there was no reason why "close cousins to threats and harassment would count only during employment (i.e., when in the terms and conditions of employment), but threats and harassment would continue to count years after employment ends." *Id.*

Finally, the Tenth Circuit rejected the argument that an unrelated statute (the Sarbanes-Oxley Act) and a case interpreting a second, unrelated statute (*Robinson*) required a different result. The Tenth Circuit explained that interpretations of other statutes were not dispositive. *Id.* at 616-618. As for *Robinson*, unlike Title VII, the "list of retaliatory acts" in Section 3730(h)(1) "temporally limits relief to employees who are subjected to retaliatory acts while they are current employees." *Id.* at 618. Because the Tenth Circuit concluded that Section 3730(h)(1) "unambiguously excludes relief for retaliatory acts occurring after the employee has left employment," it had "no occasion to" consider whether it *should* nevertheless extend to post-employment retaliation. *Id.* at 618 & n.9. Those "policy arguments are for Congress." *Id.* at 618 n.9.

The vast majority of federal courts agree with the Tenth Circuit.[2] Like the Tenth Circuit, these courts

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[2] *Knight* v. *Standard Chartered Bank*, No. 19 Civ. 11739 (PAE), 2021 WL 1226870, at *8 (S.D.N.Y. Mar. 31, 2021); *United States ex rel. Complin* v. *North Carolina Baptist Hosp.*, No. 1:09CV420, 2019 WL 430925, at *10 (M.D.N.C. Feb. 4, 2019), *aff'd on other grounds,* 818 F. App'x 179 (4th Cir. 2020) (per curiam); *Taul ex rel. United States* v. *Nagel Enters., Inc.*, No. 2:14-CV-0061-VEH, 2017 WL 4956422, at *4 (N.D. Ala. Nov. 1, 2017); *Elkharwily* v. *Mayo Holding Co.*, 84 F. Supp. 3d 917, 927 n.7 (D. Minn.

rely on "[t]he plain language of" Section 3730(h)(1). *United States ex rel. Head* v. *Kane Co.*, 798 F. Supp. 2d 186, 208 (D.D.C. 2011). And, like the Tenth Circuit, they reject analogies to other statutes—including Title VII—that "do not contain language limiting their scope to the employment context." *Id.* at 208 n.32.

3. This Court should grant certiorari to resolve this acknowledged split. If Felten had filed his complaint in the Tenth Circuit, his post-employment retaliation claim would not have been allowed to proceed. This inconsistent approach will foster forum-shopping by plaintiffs, uncertainty for courts grappling with Section 3730(h)(1)'s limitations, and unfairness for defendants depending on the jurisdiction in which they are sued. *See* 31 U.S.C. § 3732(a) (creating jurisdiction for "[a]ny action under section 3730" where the "defendant can be found, resides, transacts business, or" where a violation of 31 U.S.C. § 3729 occurred). This Court should grant review to ensure that, no matter where an FCA retaliation suit is filed, it is subject to a single, national standard. *See, e.g.*, *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S.

2015), *aff'd on other grounds*, 823 F.3d 462 (8th Cir. 2016) (per curiam); *Master* v. *LHC Grp. Inc.*, No. 07-1117, 2013 WL 786357, at *6-7 (W.D. La. Mar. 1, 2013); *Bechtel* v. *St. Joseph Med. Ctr., Inc.*, No. MJG-10-3381, 2012 WL 1476079, at *9-10 (D. Md. Apr. 26, 2012); *United States ex rel. Head* v. *Kane Co.*, 798 F. Supp. 2d 186, 207-208 (D.D.C. 2011); *Poffinbarger* v. *Priority Health*, No. 1:11-cv-993, 2011 WL 6180464, at *1 (W.D. Mich. Dec. 13, 2011); *see Lehoux* v. *Pratt & Whitney*, No. Civ. 05-210-P-S, 2006 WL 346399, at *2 (D. Me. Feb. 8, 2006) (interpreting pre–2009 version of § 3730(h) to require dismissal for post-employment retaliatory conduct), *report and recommendation adopted*, No. Civ. 05-210-P-S, 2006 WL 616057 (D. Me. Mar. 9, 2006); *United States ex rel. Wright* v. *Cleo Wallace Ctrs.*, 132 F. Supp. 2d 913, 928 (D. Colo. 2000) (same).

662, 665 (2008) (resolving a conflict between the Sixth and D.C. Circuits over what a qui tam plaintiff must show about the relationship between making a false statement and the payment or approval of a false claim).

II. THE SIXTH CIRCUIT'S DECISION IS WRONG.

As this Court "always say[s]," "[s]tatutory interpretation * * * begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). And "if the text is unambiguous," the "inquiry * * * ends there as well." *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004). That describes this case. The text of Section 3730(h)(1), the FCA as a whole, and common-law agency principles show that an individual may not bring a retaliation claim based on post-employment conduct. The Sixth Circuit's contrary decision ignores these principles, turns clarity into ambiguity, and rests on the panel's judgment about the FCA's "proper" purpose.

A. The Text Of The Anti-Retaliation Provision And The FCA As A Whole Show That Section 3730(h)(1) Does Not Reach Post-Employment Retaliation.

1. Section 3730(h)(1) provides that an "employee, contractor, or agent" is entitled to relief if they have been "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment." An "employee" is "[a] person who *works* for another in return for financial or other compensation." *Employee*, Am. Heritage Dictionary (2d College ed. 1985) (emphasis added); *accord Employee*, Black's Law Dictionary (5th ed. 1979) ("A person in the service of another under any contract of hire * * * where the

employer has the power or right to control and direct the employee in the material details of how the work is to be performed. * * * One who works for an employer * * * ."); *see Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (where the statute does not define a term, this Court asks "what that term's ordinary, contemporary, common meaning was when Congress enacted [it]" (internal quotation marks omitted)). These definitions are written in present tense; a person who is no longer employed does not work in the service of their "former employer," and a "former employer" does not have the right to control the details of the "former employee's" work performance. *See Walters* v. *Metro. Educ. Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (explaining that the phrase "has an employee" refers to only current employees and noting that dictionaries define "have" as "to possess") (internal quotation marks, brackets, and citations omitted)).

Congress likewise wrote the words immediately surrounding "employee" in the present tense. Section 3730(h)(1) protects three types of individuals against retaliation: an employee, an agent, and a contractor. "Agent" and "contractor" are also temporally limited to individuals currently serving in those roles. An "agent" is "[o]ne that *acts* as the representative of another." *Agent*, Webster's II New College Dictionary (3d ed. 2005) (emphasis added); *accord Agent*, Black's Law Dictionary (9th ed. 2009) ("[o]ne who is authorized to act for or in place of another; a representative"). A "contractor" is "[a] person who agrees to furnish materials or perform services at a specified price." *Contractor*, Webster's II, *supra*; *accord Contractor*, Black's Law Dictionary (9th ed. 2009) ("one who contracts to do work or provide supplies for

another"). Neither of these definitions encompasses a person who was *previously* authorized to act on another's behalf, or who was *previously* furnishing materials or performing services for another. There is no reason to interpret "employee" any differently. *See, e.g.*, *Dole*, 494 U.S. at 36 ("words grouped in a list should be given related meaning" (internal quotation marks omitted)).

2. The rest of Section 3730(h)(1) points to the same result: "employee" does not include someone no longer employed when they experience retaliation.

The FCA prohibits six types of retaliation: an employee may not be "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" in retaliation for protected activity. 31 U.S.C. § 3730(h)(1). Four of these six actions "can be committed only during employment." Pet. App. 18a (Griffin, J., dissenting). An employer may not fire, demote, or suspend someone who no longer works for them. Nor can an employer discriminate against someone "in the terms and conditions of employment" after their employment has ended. *Id.*; *see Potts*, 908 F.3d at 615.

The associated-words canon provides that "threaten[]" and "harass[]" are also temporally limited. When several words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (discussing *noscitur a sociis*). This canon therefore "limit[s] a general term to a subset of all the things or actions that it covers." *Id.* at 196. That is precisely how it operates here. The statute could be

read to cover a "former employer" who threatens or harasses an individual after their employment has ended. Or, consistent with the remaining terms in the list, the statute could be read to cover only the subset of threats and harassment that occur during the employment relationship. *Noscitur a sociis* instructs that the answer is the latter.

The majority reached a different conclusion by badly contorting the phrase "terms and conditions of employment." The majority determined that "discriminated against in the terms and conditions of employment" was not limited to discrimination that occurred while an individual was employed because certain "terms and conditions of employment * * * can persist after an employee's termination." Pet. App. 8a. That is irrelevant. The terms and conditions of employment are set during the employment relationship. Although such provisions may *persist* post-employment, an employer cannot discriminate with respect to already-set terms and conditions because it may not unilaterally alter them once employment has ended. *See Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 62 (2006) (explaining that this type of language is limited in scope "to actions that affect employment or alter the conditions of the workplace."); *see also Faragher* v. *City of Boca Raton*, 524 U.S. 775, 803 (1998) ("[w]hen a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him").

3. Other portions of the FCA confirm that "employee" in Section 3730(h)(1) does not refer to someone who is no longer employed when the retaliation

occurs. "[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted). That rule holds true here. The FCA uses "employee" eight times outside of Section 3730(h). Not one of these references could reasonably include "former employees."

Take a provision at the heart of the FCA: the prohibition on knowingly presenting a false claim "to an officer, employee, or agent of the United States." 31 U.S.C. § 3729 (b)(2)(A)(i). Does this encompass presenting a false claim to a *former* federal employee who has since struck out on their own? Of course not. The FCA may be broad, but it is not limitless. *See* Pet. App. 21a (Griffin, J., dissenting); *see also* 31 U.S.C. § 3729(a)(1)(F) (prohibiting knowingly obtaining "public property from an officer or employee of the Government * * * who lawfully may not sell or pledge property"); *id.* § 3733(*l*)(1) (defining "false claims law" to include any statute that prohibits presenting a false claim to a federal "employee").

Reading the Act's other uses of "employee" to include "former employees" would lead to similarly absurd results. Such an interpretation would "make[ ] it *more* difficult to enforce the FCA" by granting "lifetime immunity" to "thousands of executive branch officials * * * from certain *qui tam* suits on their first day of work," even if they later assumed a different position. Pet. App. 21a (Griffin, J., dissenting) (discussing 31 U.S.C. § 3730(e)(2), which shields from liability certain "employee[s]" of the executive branch). And it would permit a former federal employee to demand access to certain confidential documents produced in

connection with a false claims investigation. *See* 31 U.S.C. § 3733(i)(2)(B)-(C) (discussing the preparation of such documents when required by an "employee of the Department of Justice"), (*l*)(3) (defining a "false claims law investigator" as an "employee of the United States"). Because "a word is presumed to have the same meaning in all subsections of the same statute," that "employee" cannot plausibly mean "former employee" in those provisions is strong evidence against reading it to mean "former employee" in Section 3730(h)(1). *Morrison–Knudsen Constr. Co.* v. *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 461 U.S. 624, 633 (1983).

The majority did not dispute any of this evidence. Instead, it relied exclusively on Section 3730(h)(2). That provision states: "Relief" for a successful FCA retaliation claim "shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination," back pay, "and compensation for any special damages sustained as a result of the discrimination." 31 U.S.C. § 3730(h)(2). The majority read the availability of "reinstatement" to confirm its view that the anti-retaliation provision extends to "former employee[s]" because "only someone who has lost a job can be reinstated." Pet. App. 11a.

That misunderstands the issue. The question is not whether a "former employee" can seek relief for retaliation—like a retaliatory discharge—that occurred *while* they were employed. Of course they can. The question is whether that person can seek relief for retaliation that occurred *after* they were no longer employed. As Judge Griffin explained in dissent, "[t]he relevant consideration is not the employment status

of the plaintiff at the time of suit, but rather the employment status of the plaintiff *at the time of retaliation*." *Id.* at 25a (Griffin, J., dissenting) (emphasis added); *accord Potts*, 908 F.3d at 614 ("[W]hat matters is the employee's employment status when the employer retaliates."). Under the Sixth Circuit's reading, someone who was fired for poor performance, then filed a qui tam complaint, and *then* claimed their employer retaliated by providing poor references could seek reinstatement to their previous position—even though their termination was unrelated to the filing of the FCA claim. *See* Pet. App. 12a ("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*. * * * [Reinstatement] could be a remedy for post-termination retaliation as well." (emphasis added)).

The majority also concluded that the special-damages provision can provide relief for post-employment retaliation because it authorizes "compensation for any special damages sustained as a result of * * * discrimination." *Id.* at 11a (quoting 31 U.S.C. § 3730(h)(2)). But as explained, Section 3730(h)(1)'s reference to "discrimination" is limited to discrimination that occurs while an individual is employed. *Supra*, pp. 19-20. That leaves only the phrase "shall include." *See* Pet. App. 11a-12a. But the mere fact that special damages are available hardly suggests that Congress intended a former employer to face liability under Section 3730(h)(1) for post-employment actions taken against a former employee.

In sum, nothing in the plain meaning of "employee," the text of Section 3730(h), or the FCA as a whole

suggests that Congress provided a cause of action for post-employment retaliation.

B. Common-Law Agency Principles Confirm That "Employee" Does Not Include Someone Who Is No Longer Employed.

The plain meaning of "employee" and how the FCA uses it match the common-law understanding of that term. When Congress uses a common-law term without defining it, this Court presumes "that, absent other indication, Congress intends to incorporate the well-settled meaning of" that term at common law. *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016) (internal quotation marks omitted) (applying this presumption to the FCA); *see Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989). Thus, "when Congress has used the term 'employee' without defining it," this Court has "concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Reid*, 490 U.S. at 739-740 (collecting cases). To overcome that presumption, Congress must "clearly indicate[] otherwise." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 325 (1992).

Because retaliation statutes often use terms like "employee" without defining them, courts frequently look to the common law of agency in analyzing retaliation claims. For example, before Congress amended Section 3730(h)(1) to include "contractors," courts relied on common-law principles to decide whether an independent contractor qualified as an "employee" for purposes of FCA retaliation claims. *E.g.*, *Vessell* v. *DPS Assocs. of Charleston, Inc.*, 148 F.3d 407, 411-412 (4th Cir. 1998); *see Schmidt* v. *Ottawa Med. Ctr., P.C.*,

322 F.3d 461, 463-466 (7th Cir. 2003) (same, to determine whether "an individual shareholder-claimant" qualifies as an employee eligible to bring an ADEA retaliation claim). They likewise look to the common law to determine when an employer can be held liable for its employee's retaliatory acts. *E.g.*, *Faragher*, 524 U.S. at 802; *Reed* v. *A.W. Lawrence & Co.*, 95 F.3d 1170, 1180 (2d Cir. 1996).

These principles point to the same result as the plain language of Section 3730(h)(1) and the rest of the FCA. A "servant" is someone "employed by a master to perform service in his affairs who[ ] * * * is subject to the right to control by the master." Restatement (Second) of Agency § 2(2) (1958); *see id.* § 2 cmt. d (explaining that statutes commonly use "employee" "to indicate the type of person herein described as servant"). But a "former employee" no longer performs services for her "former employer." And a "former employer" cannot control the actions of a "former employee" after she has been terminated. The common law accordingly leads to the same result as the text of Section 3730(h)(1): "employee" does not include someone no longer employed. Because nothing in the text of Section 3730(h)(1) itself or the rest of the FCA suggests otherwise, the Sixth Circuit was wrong to hold that employee means something other than the usual common-law concept. *See supra*, pp. 17-24.

C. The Sixth Circuit's Approach To Statutory Interpretation Conflicts With Precedents Of This Court And Other Circuits.

The decision below conflicts with this Court's precedent. The panel did not cite a single dictionary defining employee, agent, or contractor. Nor did it cite the Restatement of Agency or any evidence about the

common-law relationship between a master and servant. Instead, it cited *Robinson*'s discussion of Title VII and concluded that because Congress defined "employee" in *that statute* in an ambiguous way, employee must also be ambiguous in the anti-retaliation provision of the FCA. Pet. App. 9a-10a; *see* 42 U.S.C. § 2000e(f); *Robinson*, 519 U.S. at 342.

That was error. As this Court has said time and again, statutory interpretation begins with the plain text. *E.g.*, *BP P.L.C.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021); *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1169 (2021). Inherent in the command to "start with the text" is that the court must begin with the text of *the statute to be interpreted*. Indeed, even *Robinson* explained that the "first step in interpreting a statute is to determine whether *the language at issue* has a plain and unambiguous meaning with regard to *the particular dispute in the case*." 519 U.S. at 340 (emphases added). Thus, in *BP P.L.C.*, a case about 28 U.S.C. § 1447(d), this Court began with "the ordinary meaning of [28 U.S.C. § 1447(d)'s] terms at the time of their adoption." 141 S. Ct. at 1537. In *Duguid*, a case about the meaning of "automatic telephone dialing system" in the Telephone Consumer Protection Act, this Court began "with the text" of that provision. 141 S. Ct. at 1167, 1169. The Court did not begin with a case discussing other issues associated with 28 U.S.C. § 1447(d) or another statute that used the term "automatic telephone dialing system." And when the statute in question involves a term with a "settled meaning under * * * the common law" of agency, this Court looks to agency-law principles, too. *See, e.g.*, *Reid*, 490 U.S. at 739 (internal quotation marks omitted); *Escobar*, 136 S. Ct. at 1999.

That the FCA uses the term "employee" does not justify disregarding these maxims. Other courts analyzing the scope of an anti-retaliation provision that applies to "employees" have had no trouble following these usual rules, *Robinson* notwithstanding. *See, e.g.*, *Potts*, 908 F.3d at 614 ("examining the wording of § 3730(h)(1)" to "conclude that 'employees' includes only persons who were current employees when their employers retaliated against them"); *Villarreal* v. *R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 963, 967 (11th Cir. 2016) (en banc) (holding that the plain text of the Age Discrimination in Employment Act does not provide a disparate-impact cause of action for prospective employees, and noting the "different" "statutory context" from Title VII); *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1111-12 (9th Cir. 2000) (concluding that the Americans with Disabilities Act is not ambiguous because, "unlike the section of Title VII at issue in *Robinson*, [it] has a 'temporal qualifier' "). And, where appropriate, they have looked to the common law, too. *See, e.g.*, *United States* v. *Youssef*, 547 F.3d 1090, 1093-94 (9th Cir. 2008) (per curiam) (looking first to the plain text of the statute, then analyzing the "established meaning at common law," and explaining that this approach tracks *Robinson*'s command to start with the text); *Scrimgeour* v. *Internal Revenue*, 149 F.3d 318, 327 (4th Cir. 1998) (similar).

Had the panel majority done the same and followed this Court's rules of interpretation, it would have been plain that "employee" in Section 3730(h)(1) excludes a person who is no longer employed when they were allegedly retaliated against. *Supra*, pp. 17-25. Instead, the majority looked to *Robinson*'s discussion of the definition of "employee" in *Title VII*. Congress

codified Title VII's anti-retaliation provision in 1964. Civil Rights Act of 1964, Pub. L. No. 88-352, § 704(a), 78 Stat. 241, 257 (codified at 42 U.S.C. § 2000e-3(a)). At the same time, Congress defined "employee" for purposes of that statute as "an individual employed by an employer." *Id.* § 701(f), 78 Stat. at 255 (codified at 42 U.S.C. § 2000e(f)). "Employed" could mean either "*is* employed" or "*was* employed." *Robinson*, 519 U.S. at 342. But the *FCA*'s anti-retaliation provision, added twenty-two years later, does not use the term "employed." Rather, it refers to an "employee," which means someone who *works* for an employer, not someone who *worked* for another. *Supra*, pp. 17-18. And unlike the FCA, which limits its anti-retaliation provision to "employee[s]," Title VII's protections extend to "individual[s]," which "is a broader term than 'employee' and would facially seem to cover a former employee" alleging post-employment retaliation. *Robinson*, 519 U.S. at 345. It is little wonder that, by relying so heavily on *Robinson*, the majority reached the wrong result.

D. Rather Than Exhaust All Available Interpretive Tools, The Sixth Circuit Resorted To Purposivism.

Rather than apply the full panoply of "tried-and-true" interpretive tools, the Sixth Circuit "rushe[d] to find ambiguity" and "then divine[ ] congressional intent from its own perception of which reading would best serve the FCA's broader context and purpose." Pet. App. 16a (Griffin, J., dissenting) (internal quotation marks omitted). Relying on a series of errors, the panel majority held that "employee" in the FCA's anti-retaliation provision is ambiguous. It therefore resorted to "unauthorized, unnecessary purposivism,"

id. at 26a (Griffin, J., dissenting), to conclude that "the anti-retaliation provision of the FCA may be invoked * * * for post-termination retaliation," *id.* at 14a (majority opinion).

That was wrong. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain,* 503 U.S. 249, 253-254 (1992). If Congress intended for the FCA's anti-retaliation provision to reach post-employment conduct, it could easily have said so. Congress amended the statute in 2009 to expand its reach from just "employee[s]" to an "employee, agent, or contractor." Fraud Enforcement and Recovery Act of 2009 § 4(d), 123 Stat. at 1624-25. It could have instead eliminated these distinctions and provided that Section 3730(h)(1) applies to "any individual" who experiences retaliation for filing an FCA claim. *Cf.* 18 U.S.C. § 1031(h) (creating cause of action for "[a]ny individual" who experiences retaliation for lawful actions in furtherance of a major-fraud prosecution); *see Robinson*, 519 U.S. at 345 (" 'individual' is a broader term than 'employee' "). Or it could have clarified then that "employee" means "current or former employee." *Cf.* 49 U.S.C. § 60129(a)(1) (prohibiting retaliatory discrimination against "any current or former employee"); 29 U.S.C. § 1002(7) (defining a "participant" for purposes of the Employee Retirement Income Security Program as "any employee or former employee"). In fact, Congress recently introduced an amendment that would do just that. False Claims Amendments Act of 2021, S. 2428, 117th Cong. § 4 (introduced July 22, 2021). But in the current version of Section 3730(h)(1), it did not do either. This Court should grant certiorari to correct the Sixth Circuit's contrary interpretation.

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS IMMEDIATE REVIEW.

The Sixth Circuit's flawed interpretation of Section 3730(h)(1) requires immediate review. The decision below threatens to impose intolerable burdens on countless employers, large and small alike, especially those in the health care industry. And although employers nationwide will feel the effects of this ruling, because the majority created a circuit split, those burdens will fall disproportionately on employers in the Sixth Circuit. This case is an ideal vehicle to resolve this pressing issue now; there is no need to wait for further percolation in the lower courts.

1. If allowed to stand, the Sixth Circuit's opinion will create an unbounded anti-retaliation provision that immensely burdens countless employers.

More than 600 qui tam suits have been filed each year since 2011, compared to just 30 back in 1987. Civil Div., U.S. Dep't of Justice, *Fraud Statistics – Overview, October 1, 1986 – September 30, 2020*, https://bit.ly/2VLY9ph (last visited Sept. 20, 2021) ("*Fraud Statistics*"). Because these suits are filed under seal, defendants may not know about them or see the complaint allegations for many years; Felten's complaint, for example, was under seal for eight years. *See* Pet. App. 30a, 35a. The costs to defendants of litigating these claims are significant, particularly because realtors need not have "direct or firsthand knowledge of the information underlying their allegations." *See, e.g.*, Todd J. Canni, *Who's Making False Claims, the Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 2, 11 & n.66 (2007) (noting that FCA

lawsuits can "linger" for years, that "it is not uncommon for courts to grant plaintiffs leave to amend their complaints multiple times before ultimately dismissing the case," and that defending against a relator's "speculative allegations" is very costly).

On top of the cost of a qui tam suit, employers must now worry about fighting meritless, unending claims alleging retaliation against former employees. Relators have three years from "the date when the retaliation occurred" to bring a claim. 31 U.S.C. § 3730(h)(3). But there is no time limit on when a post-employment retaliation claim can arise. A relator terminated today could file a qui tam action in 2031. *See Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 139 S. Ct. 1507 (2019). Eight years later, he could amend his complaint to add a retaliation claim based on conduct that occurred in 2037. *See supra*, p. 6 (explaining that Felten filed a post-employment retaliation claim eight years after his qui tam complaint). And if he continued to have trouble landing a job, the relator could bring suit again in, say, 2046—twenty-five years after his employment ended—alleging that his employer continued to retaliate by making it more difficult for him to obtain employment. *See Potts*, 908 F.3d at 615 n.2 ("a former employee could wait years upon years before whistleblowing and then sue if the employer allegedly retaliated").

The majority's rule will significantly burden businesses. In addition to the obvious financial and reputational costs, discovery in decades-old cases is notoriously difficult. "[T]he search for truth" in these cases can "be seriously impaired by the loss of evidence, whether by death or disappearance of

witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). This "may encourage an opportunistic employee to bring an [anti-retaliation] action in the hopes that the employer will settle rather than expend the time and money necessary to defend the suit." Eli Rosenberg, Comment, *Silence Is Golden: Excluding Internal Complaints from ERISA Section 510*, 59 U. Kan. L. Rev. 1155, 1159 (2011).

The risks of retaliation claims years and years into the future are especially pronounced under the FCA because they can be brought as stand-alone claims, even if the plaintiff never files a qui tam suit. A plaintiff need only allege that the defendant retaliated against him for engaging in protected activity. *See* 31 U.S.C. § 3730(h)(1). By statute, protected activity reaches broadly: It encompasses any conduct that *could* lead to an investigation or the filing of a qui tam action, even if the employer committed no FCA violation. *See, e.g.*, *KeyPoint Gov't Sols.*, 923 F.3d at 765 & n.18 (collecting cases). Thus, even where an employee never filed a qui tam complaint, he can still force his "former employer" to undergo discovery of decades-old information in his quest to establish protected activity, not to mention discovery associated with the retaliation claim itself.

2. These burdens are particularly concerning for entities in the health care industry. The vast majority of qui tam actions involve allegations of health care fraud. *See Fraud Statistics*, *supra*, at 5-6. As a result, "[p]harmaceutical, medical devices, and health care companies" still "spend billions each year" dealing with this litigation. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*,

3 Fin. Fraud L. Rep. 801, 801 (2011); *see Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (recognizing that relators "are motivated primarily by prospects of monetary reward rather than the public good"). Former employees may well target health care companies with post-retaliation claims too, knowing those entities may settle rather than risk the financial and reputational costs of a prolonged legal battle about dated allegations.

The Sixth Circuit's rule authorizing post-employment retaliation claims has particularly broad impact because of the FCA's venue provision. A relator may sue anywhere a defendant "can be found, resides, transacts business, or in which any act proscribed by [31 U.S.C. §] 3729 occurred." 31 U.S.C. § 3732(a). Fifty-three Fortune 500 companies are headquartered in the Sixth Circuit, many of which submit claims to the United States. That number does not include the countless employers of all sizes around the country that "transact[] business" in Kentucky, Michigan, Ohio, and Tennessee. Defendants should not be subjected to potentially never-ending claims of FCA retaliation simply because they do business in Kentucky or Michigan, rather than Colorado or Wyoming. And employers with offices in multiple states should not be left guessing which of two potential rules will apply to them.

3. This case is an ideal vehicle to resolve this discrete and important question of statutory interpretation. As a result of the posture of this case, whether Section 3730(h)(1) extends to post-employment conduct is presented cleanly and squarely. If the answer is yes, Felten's post-employment retaliation claim can proceed

to discovery and ultimately trial. If the answer is no, it must be dismissed.

There is no need to wait for further percolation. The arguments for both sides have been developed in three separate courts of appeals opinions and many district court decisions. The pressing need for consistency and clarity also outweighs any benefit from further percolation. This issue already came up frequently when courts nearly universally held that Section 3730(h)(1) *did not* reach claims of post-employment retaliation. *See supra*, pp. 12-16 & n. 2. Now that the Sixth Circuit has opened the floodgates, such claims will only increase.

This Court often grants certiorari under similar circumstances where there is only a one-to-one split, including in four cases last Term and two this Term. *See Yellen* v. *Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434 (2021); *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063 (2021); *Edwards* v. *Vanney*, 141 S. Ct. 1547 (2021); *Fed. Republic of Germany* v. *Philipp*, 141 S. Ct. 703 (2021); *see also Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 141 S. Ct. 1734 (2021); *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, No. 20-219, 2021 WL 2742781, at *1 (U.S. July 2, 2021). Indeed, it granted certiorari four times last Term to resolve an important question of statutory interpretation even when there was no split at all. *See HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021); *United States* v. *Cooley*, 141 S. Ct. 1638 (2021); *Shinn* v. *Kayer*, 141 S. Ct. 517 (2020) (per curiam); *Tanzin* v. *Tanvir*, 141 S. Ct. 486 (2020).

This Court should do the same here and seize this opportunity to resolve this important question of

federal law before this circuit split fosters further confusion, unpredictability, and unfairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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