No. 21-443

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

BRIEF IN OPPOSITION

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INTRODUCTION

The False Claims Act (FCA) broadly prohibits any person from defrauding the government. *See* 31 U.S.C. § 3729(a). The statute also empowers any person who learns of such a fraud to bring a *qui tam* action to redress it, and rewards those whistleblowers with a share of the recovery in a successful case. *See id*. § 3730(b), (d).

Congress recognized that one major impediment to the FCA's effectiveness is "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." S. Rep. No. 99-345, at 34 (1986) (emphasis added). To encourage private parties to stop fraud on the government, the FCA includes an antiretaliation provision that protects "[a]ny employee, contractor, or agent" from retaliation that occurs "because of lawful acts done … in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h)(1). In enacting this provision, Congress wanted "the definitions of 'employee' and 'employer'" to "be all-inclusive," and specifically to reach "[t]emporary, blacklisted or discharged workers." S. Rep. No. 99-345, at 34.

In the interlocutory appeal below, the Sixth Circuit held that the FCA's antiretaliation provision protects both current and former employees from retaliation. Petitioner William Beaumont Hospital—which defrauded the government, and also retaliated for years against people who tried to stop that fraud—seeks certiorari to reverse that decision. This Court should deny the petition.

STATEMENT OF THE CASE

1. Respondent Dr. David Felten, M.D., Ph.D, filed a *qui tam* complaint in 2010 alleging that his employer at the time—petitioner—was violating the FCA and the Michigan Medicaid False Claims Act. App.3a. Specifically, petitioner had been unlawfully paying kickbacks to physicians and physicians' groups in exchange for Medicare, Medicaid, and TRICARE patient referrals, and then billing the government for those patients' care. *Id.* Petitioner also retaliated against Dr. Felten by threatening and marginalizing him. *Id.*

The U.S. Department of Justice and Michigan Attorney General intervened in the suit and settled the fraud case with petitioner. As a result, petitioner agreed to pay $84.5 million to the government. *See* Press Release, U.S. Dep't of Justice, Detroit Area Hospital System to Pay $84.5 Million to Settle False Claims Act Allegations Arising From Improper Payments to Referring Physicians (Aug. 2, 2018), https://www.justice.gov/opa/pr/detroit-area-hospital-system-pay-845-million-settle-false-claims-act-allegations-arising. As the government's press release explained, "[h]ealth care providers that offer or accept financial incentives in exchange for patient referrals undermine both the financial integrity of federal health care programs and the public's trust in medical institutions," and the government was resolved "to protect both patients and taxpayers by holding those who engage in fraudulent kickback schemes accountable." *Id*. (quotation marks omitted).

Although the fraud case was resolved, Dr. Felten's claims for retaliation, attorneys' fees, and costs remained pending. App.3a. Dr. Felten later amended his complaint to add new allegations of retaliation that

took place not only after he had filed the initial complaint, but also after petitioner terminated him. *Id*. Petitioner terminated Dr. Felten after concocting a bogus internal report conveniently suggesting that his particular position be subject to mandatory retirement. *Id*. Thereafter, petitioner intentionally undermined Dr. Felten's employment applications to nearly 40 institutions—such that Dr. Felten, who has been described as one of the "most influential neurologist[s] still living"[1]—was unable to secure comparable employment. *Id.* at 4a.

2. The district court granted petitioner's motion to dismiss the allegations of retaliatory conduct that occurred after Dr. Felten's termination. According to the district court, the FCA's antiretaliation provision only applies to retaliatory acts that occur during the course of a plaintiff's employment. App.4a. Dr. Felten's claims based on retaliation that occurred while he was employed, on the other hand, were not dismissed. On Dr. Felten's motion, the district court certified for interlocutory review the question whether the FCA's antiretaliation provision applies to post-employment retaliatory acts, and the Sixth Circuit granted Dr. Felten's petition for interlocutory appeal. *Id.*

3. The Sixth Circuit ruled in Dr. Felten's favor. The majority opinion, authored by Judge John K. Bush and joined by Judge David McKeague, "start[ed] with the statutory text," first determining "'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

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[1] First Amended Complaint, R.97, Page ID #1262.

of the statute as a whole.'" App.5a (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997)). Acknowledging that courts "interpret a statute according to its plain meaning, without inquiry into its purpose," the court followed "*Robinson*['s] … guidelines for determining when a statute's meaning is not plain in the context of protections for employees and what to do in the face of ambiguity." *Id.* at 6a.

Robinson "held that the term 'employees'" in the antiretaliation provision of Title VII of the Civil Rights Act of 1964 "is ambiguous and could be read to refer to both current and former employees." App.6a. Following that decision, the panel majority found temporal ambiguity in the FCA's antiretaliation provision for the same reasons. *Id.* at 6a-13a. First, there is no temporal qualifier in the provision to indicate whether the FCA's antiretaliation provision covered "only current employees or both current and former employees." *Id.* at 7a. Second, just as in *Robinson*, "the statutory and dictionary definition of 'employee' … also shows that the FCA could cover former employees." *Id.* at 9a. Third, "other aspects of the statutory framework"—such as the remedial provision—"also support a reading that the FCA covers former employees," just "as in *Robinson*." *Id.* at 10a. Having found the term ambiguous, the panel majority went on to resolve the ambiguity in exactly the same manner as this Court in *Robinson*. And for the same reasons, as further outlined below, the lower court concluded that "[a]ny employee" covers current *and* former employees. *Id.* at 13a-14a.

Judge Richard Griffin dissented, arguing that "employee" in the FCA's antiretaliation provision is not ambiguous and plainly applies only to current employees. *See* App.16a-26a.

Importantly, the Sixth Circuit decided only that the phrase "[a]ny employee" includes former employees. It did not also address whether blacklisting constitutes prohibited discrimination. Instead, in Part III of its opinion, the Sixth Circuit noted that the district court had not reached this question, and the court of appeals left the issue for the district court to address in the first instance on remand. App.15a.

THE PETITION SHOULD BE DENIED

This Court should deny certiorari for five independently sufficient reasons. In summary:

1. Congress is considering an amendment, which has already been voted out of committee and is likely to pass, that will codify the decision below. If the amendment passes, it will resolve the question presented. Even if the amendment fails, Congress's action will inform the debate over the question presented, perhaps prompting the lower courts to move into alignment on their own, or at least providing useful information for this Court if it takes up the question in a later case. In all scenarios, the better course is for this Court to deny certiorari and wait until the legislative dust settles.

2. The circuit split does not warrant this Court's review. The split is as shallow as can be: 1-1, newly created by the decision below, and not square in any event because the facts of this case are very different from the facts of the assertedly conflicting Tenth Circuit decision. It remains entirely possible that the lower courts will reach a consensus on their own, and so this issue is an ideal candidate for further percolation.

3. The decision below is interlocutory, and the question presented is not case-dispositive. The district court partially dismissed respondent's federal retaliation claim, but it allowed the remainder of the case (including a federal retaliation claim based on pre-termination misconduct, as well as a state retaliation claim) to proceed, and then certified its order for interlocutory appeal. But there are still unresolved issues about whether the statute applies to the alleged blacklisting in this case. App.15a. And beyond those, respondent has other retaliation claims. Thus, even if petitioner prevails before this Court, the case against it will not end; it will only be narrower (and it may not even be that if the lower courts construe the Michigan False Claims Act to cover post-employment retaliation). This Court should at least await a final judgment before entering the fray.

4. The issue is not important enough to warrant this Court's review. Cases alleging retaliation under the FCA are uncommon to begin with. This specific issue matters at all only in the subset of those cases alleging post-employment retaliation; it will be case-dispositive only when post-employment retaliation was the sole alleged misconduct; and it will be relevant to employers' primary conduct only if no other law (*e.g.*, a state false claims act) prohibits identical conduct. Contrary to petitioner's speculation, such cases are quite rare, and are not unduly burdensome to the industry.

5. Finally, the decision below is correct. Petitioner spends an inordinate amount of space on the merits, perhaps to distract from the lack of certworthiness. But that discussion is unpersuasive. This Court held unanimously in *Robinson v. Shell Oil Co.*, 519 U.S. 337

(1997), that the word "employees" in Title VII's antiretaliation provision includes current and former employees. There is no reason to give the word a narrower meaning in the context of the FCA's antiretaliation provision. Put simply, employers do not need the unfettered right to blacklist former employees who try to protect the government from fraud—and when Congress sought to encourage whistleblowers to come forward, it did not foolishly decide to permit such blacklisting.

I. The Court Should Deny The Petition Because Congress Is Currently Considering The Question Presented.

This Court should deny the petition because Congress is considering amending the FCA's antiretaliation provision to clarify that it applies to any "current or former employee."

Specifically, on July 22, 2021, Senator Charles Grassley (R-IA)—for himself and on behalf of a bipartisan group of co-sponsoring Senators Patrick Leahy (D-VT), John Kennedy (R-LA), Richard Durbin (D-IL), and Roger Wicker (R-MS)—introduced the False Claims Amendments Act of 2021, which was referred to the Committee on the Judiciary. S. 2428 – False Claims Amendments Act of 2021 (last visited Dec. 14, 2021), https://www.congress.gov/bill/117th-congress/senate-bill/2428/text?r=52&s=1. On November 16, 2021, the bill was reported out of committee by Senator Durbin. *Id.* It is now slated for consideration by the full Senate. *Id.* The bill would amend the FCA's antiretaliation provision in only one way: "Section 3730(h)(1) of title 31, United States Code, is amended by inserting 'current or former' after 'Any.'" *Id.*

That amendment would conclusively answer the question presented, which "is whether the term 'employee' includes someone who is no longer an employee when the alleged retaliation takes place." Pet.i. Under the amended language, the answer is a clear "yes." If the Court grants certiorari before, it will likely have to dismiss the writ as improvidently granted when the amendment passes. *See, e.g.*, *Morris v. Weinberger*, 410 U.S. 422, 422 (1973) (per curiam) (dismissing writ under these circumstances).

Even if the amendment ultimately fails, Congress's actions will be important to interpreting the statute as it is currently written—and the lower courts should have the first opportunity to see whether the legislative action changes their views and brings them into alignment. At a minimum, Congress's actions will provide useful information to this Court about what the statutory text means—and so it makes sense to wait until that information is available before this Court acts.

Because the fate of the pending amendment will be dispositive or at least important to the resolution of the question presented, this Court should deny certiorari and wait for Congress to act.

II. The Asserted Circuit Split Does Not Warrant This Court's Review.

The circuit split does not warrant this Court's review because it is neither well-developed nor square. Petitioner identifies examples where this Court has granted certiorari to resolve a one-to-one split, but this Court's normal "'policy'" is to wait "'until more than two courts of appeals have considered a question.'" Stephen M. Shapiro et al., *Supreme Court Practice*

4-16 (11th ed. 2019) (quoting William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983)).

The split also is not square. Although there is some tension between the legal rules adopted by the Sixth Circuit below and the Tenth Circuit's decision in *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610 (10th Cir. 2018), the facts of the two cases are different—and *Potts* is a good illustration of the adage that bad facts can make bad law.

The plaintiff in *Potts* was not a *qui tam* relator at all. Rather, she resigned her employment with the defendant because she believed the defendant's business practices "violate[d] Title IV of the Higher Education Act of 1965." *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 244 F. Supp. 3d (D. Colo. 2017). After leaving the company, she expressly agreed (in exchange for a payment) not to contact any government agency about the company or to disparage the company. *Id*. She nevertheless then complained to the company's accrediting agency that the company had provided false information to the agency. *Id*. The company sued Potts in state court, claiming that she had violated her agreement, and she sued in federal court under the FCA's antiretaliation provision, asserting that the state-court lawsuit was a form of harassment and seeking to enjoin it. *Id*. Thus, the facts of the case were unusual because both the allegedly protected acts and also the alleged retaliation occurred after her employment—and also because the plaintiff had expressly agreed not to engage in the activity she described as protected by the FCA and was attempting to enjoin a lawsuit against her (relief the FCA does not clearly authorize, *see id*. at 1142-43). In that posture, the Tenth

Circuit held 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." *Potts*, 908 F.3d at 612-13 (emphasis added).

Respondent's claims are different. He is a relator who filed a *qui tam* suit, falling squarely within the ambit of the FCA. That protected activity and at least some of the alleged retaliation also occurred while he was still employed by the defendant. After he engaged in whistleblowing activities, petitioner responded by stripping him of his department budget, threatening him, and eventually discharging him under the pretense that his job was subject to mandatory retirement. Once respondent was terminated, petitioner then proceeded to blacklist him.

Given the factual differences, it is quite possible that, with the benefit of the Sixth Circuit's reasoning, the Tenth Circuit would decide a case like this one the same way the Sixth Circuit did (either in a panel decision or *en banc*). Intervention by this Court now—to address a question decided by only two circuits, where one emphasized the unusual nature of entirely post-employment protected conduct—would be premature. The better course would be to allow the issue to percolate.

III. The Interlocutory Posture Of This Case, And The Non-Dispositive Nature Of The Question, Press Against Certiorari.

Certiorari should also be denied because the decision below is interlocutory, and the question presented is not case-dispositive.

The order below is interlocutory in two ways. First, in Part III of its opinion, the Sixth Circuit noted that "the district court . . . did not address whether blacklisting is included as a form of prohibited retaliatory action." App.15a. The Sixth Circuit accordingly also did "not address the issue; instead, [the court] remand[ed] for the district court to consider the issue in the first instance." *Id*. This means that an essential legal component of the federal post-employment retaliation claim still has not been addressed by the lower courts at all, and this Court would be the first one to address it.

Second, if the Court were to grant certiorari, no matter how the Court ruled, the case would not be over. Even if the Court rules in petitioner's favor, respondent's federal claims for pre-termination retaliation will remain pending. Moreover, although the Sixth Circuit did not expressly discuss the district court's holding with respect to whether the Michigan Medicaid False Claims Act's antiretaliation provision covers former employees, the court of appeals vacated the district court's order using analysis that applies equally to the state statute. Petitioner has not asked this Court to construe the state law; accordingly, Dr. Felten may still prevail on state law grounds even if petitioner succeeds here. *See Supreme Court Practice* 4-18 (certiorari may be denied even as to an important and unsettled issue when the petitioner "would be liable under either federal law or state law"). And even if the Court rules in respondent's favor, petitioner might prevail on other legal grounds, or on the facts.

"It is often most efficient" for this Court "to await a final judgment … rather than reviewing issues on a piecemeal basis." *Supreme Court Practice* 4-19. Thus,

the Court normally does not review interlocutory orders. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 791 (2020) (Gorsuch, J., concurring in denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. (2017) (Roberts, C.J., concurring in denial of certiorari); *Wrotten v. New York*, 130 S. Ct. 2520, 2521 (2010) (statement of Sotomayor, J., respecting the denial of the petition for a writ of certiorari); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). This practice is well-founded and long-lasting. *See, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application ...."); *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372 (1893) ("[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters," so "this [C]ourt should not issue a writ of certiorari to review ... an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

There is no reason to depart from that practice here. Petitioner could, of course, seek this Court's review of the question presented once the courts below have definitively resolved the merits. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). This has the additional benefit of giving time to see whether the question will be resolved by Congress or by the lower courts, obviating any need for this Court to step in.

IV. The Question Presented Is Not Important Enough To Justify This Court's Review.

Part of the reason the split is so shallow is that the question presented will not frequently be relevant, let alone dispositive. The question will matter at all only in the subset of cases alleging post-employment retaliation; it will be dispositive only when post-employment retaliation was the sole act of retaliation that occurred and no other legal issue bars the claim; and it will be relevant to an employer's primary conduct only if no other law (*e.g.*, a state false claims act) prohibits post-employment retaliation.

Although we are not aware of any official statistics counting such cases (or even FCA retaliation cases generally), the available evidence suggests they are rare. For example, a Westlaw search of all state and federal cases from the last 12 months citing the FCA's antiretaliation provision, 31 U.S.C. § 3730(h)(1), produced 48 hits, only 8 of which are reported decisions. *See* Westlaw, Search Results for "3730(h)(1)", https://www.westlaw.com/SharedLink/84c67f7881534 6288211c601bef5104a?VR=3.0&RS=cblt1.0 (last run Dec. 14, 2021). Of those, only two involved alleged post-employment retaliation—*Knight v. Standard Chartered Bank*, 531 F. Supp. 3d 755 (S.D.N.Y. 2021), which was dismissed for lack of personal jurisdiction, and this case. Thus, this case is the only case in the last year in which the question presented was decided on the merits—and, as explained above, the question may not even be dispositive here.

Although a one-year sample may not be a perfect yardstick to judge the frequency with which the issue arises, it is far more illuminating than the irrelevant numbers petitioner advances. For example, petitioner

observes that 600 *qui tam* cases are filed annually. Pet.30. But those are fraud cases, not retaliation cases; they have nothing to do with the importance of the question presented because *qui tam* fraud cases can be brought by anybody (including employees, former employees, competitors, and totally unrelated parties), and most fraud cases do not include any retaliation allegations.[2]

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[2] Petitioner's *amicus*, the American Hospital Association (AHA), likewise focuses on *qui tam* fraud cases, arguing that there are a lot of them, and that many cases in which the government does not intervene end without a recovery. But that has nothing to do with the question presented, which is not about fraud cases.

Dr. Felten's case is also a stark counterexample to the AHA's point: the government intervened in his case, petitioner paid an $84.5 million settlement, and the case put a stop to a pernicious kickback scheme that was undermining the quality of patient care. Against that backdrop, the AHA's complaint that health care entities are spending too much to settle these cases rings hollow.

AHA's point is also generally overblown. Most of the dismissed cases they describe are ones in which the relator voluntarily dismisses the action as soon as the government declines to intervene. That does not necessarily mean the cases are meritless; it only means that the relator and his counsel determined not to proceed (which could be for any number of reasons, including concerns about the costs and risks of litigation, the defendant's ability to pay, or other factors external to the merits). Whatever the reason for the dismissal, such cases do not cost defendants very much because the complaints are never served on the defendant and no active litigation occurs.

In addition to these practical realities, defendants have access to the full range of ordinary civil defenses in FCA fraud cases, as well as some special ones. Specifically, the government can move to dismiss such cases (as defendants frequently ask it

Even if the 600 number were an accurate representation of the potential retaliation claims by former employees (which it is nowhere even vaguely close to being), it would still pale in comparison to the number of retaliation claims that were being brought when *Robinson* was decided; the U.S. Equal Employment Opportunity Commission (EEOC) reported that in Fiscal Year 1997, for example, 18,198 such charges were filed. *See* EEOC, Retaliation-Based Charges (Charges filed with EEOC) FY1997 – FY2020, https://www.eeoc.gov/statistics/retaliation-based-charges-charges-filed-eeoc-fy-1997-fy-2020 (last visited Dec. 14, 2021).

More broadly, 600 civil cases a year is a drop in the bucket of our justice system—less than a quarter of one percent of all cases filed. *See* Jacklyn DeMar, *There Are Nearly 300,000 Civil Cases in the US Each Year, How Many Are False Claims Act Cases?*, Taxpayers Against Fraud Education Fund (Sept. 29, 2021), https://www.taf.org/post/fraud-by-the-numbers-september-29-3. Indeed, an American in 2020 was more likely to be attacked by a skunk, drafted by a major league baseball team, accepted to Harvard University, or vote for Kanye West's presidential campaign than become an FCA whistleblower. *See* Raymond Sarola, *Whistlebowers: About as Rare as Lightning Injuries*, Taxpayers Against Fraud Education Fund (Sept. 30,

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to do). *See* 31 U.S.C. § 3730(c)(2)(A). And in certain cases, defendants can seek their attorney's fees and costs. *See id.* § 3730(d)(4). Those provisions provide a bulwark against clearly meritless cases—but they are seldom invoked, which again shows that AHA's argument is hyperbolic.

2021), https://www.taf.org/post/fraud-by-the-numbers-september-30.

Petitioner argues that under the Sixth Circuit's rule, retaliation suits could be filed years after the relator's employment ends. Pet.31. But the retaliation provision has a three-year limitations period from the date the alleged retaliation occurred. 31 U.S.C. § 3730(h)(3). If the employer stops retaliating against the former employee, then it need not worry about stale claims.

Petitioner also speculates that opportunistic employees will sue belatedly, hoping to coax out settlements. Pet.32. But its sole authority for this proposition is a law-student note about ERISA claims, which itself cites no empirical data or evidence. The fact that petitioner has to grasp at straws like this shows how speculative its concerns truly are.

Finally, petitioner argues that the health care industry will be particularly affected because many FCA *qui tam* suits relate to health care. It argues that health care companies spend "billions each year" dealing with this litigation. Pet.32. But that figure includes the amount of money defendants spend resolving fraud allegations, *i.e.*, settling *qui tam* cases. Accordingly, the "billions" number isn't really so much about defense costs or undue burden on industry as it is about the magnitude of fraud these defendants commit on the government. It does not show that the question presented is unusually important, likely to arise with any frequency, or actually threatening to the industry.

In any event, if petitioner wants to make policy arguments, it can make them to Congress—which is

likely to reject them, as the legislature is poised to codify the decision below. That is because a bipartisan group of knowledgeable legislators that has been working in this area for decades understands that the sky will not fall if the Sixth Circuit's decision stands. Petitioner's effort to argue otherwise falls flat.

V. The Sixth Circuit's Decision Is Correct.

The merits are a secondary consideration at the certiorari stage because this Court is not principally engaged in error-correction (and especially not when Congress has the ability to act). The merits-based argument for certiorari is especially weak here because the decision below is correct.

Petitioner frames the question as "whether the term 'employee' includes someone who is no longer an employee when the alleged retaliation takes place." Pet. i. Of course, the actual question is whether the statutory phrase "[a]ny employee" includes former employees, which is exactly what this Court unanimously held when analyzing an indistinguishable phrase ("any of [an employer's] employees") in the parallel antiretaliation provision of Title VII. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997).

Here, the Sixth Circuit employed the analysis this Court set forth in *Robinson*. Here, as in *Robinson*, the court reasoned that the term is temporally ambiguous and, looking to other textual clues that are also present here, concluded that the provision applies to current and former employees. Having faithfully adhered to this Court's decision in *Robinson*, the panel majority got to the right answer.

A. "Any employee" is temporally ambiguous.

The FCA protects "[a]ny employee" from retaliatory acts for engaging in whistleblowing activities. 31 U.S.C. § 3730(h)(1). Title VII protects "any of [an employer's] employees" from retaliatory acts for opposing employment practices made unlawful by Title VII. 42 U.S.C. § 2000e-3(a). This Court held in *Robinson* that "any … employees" in Title VII is temporally ambiguous. "Any employee" as used in the FCA is ambiguous for the same reasons.

Petitioner implicitly acknowledges this, in arguing that Congress "recently introduced an amendment" that would "*clarif[y]* … that 'employee' means 'current or former employee.'" Pet.29 (emphasis added). Nevertheless, petitioner makes three arguments to dispute this ambiguity, each of which this Court unanimously rejected in *Robinson*. The arguments should be rejected here as well.

First, petitioner points to dictionary definitions and this Court's decision in *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997). Because dictionaries use the present tense to define "employee," and *Walters* held that the unmodified use of "employees" in a different Title VII provision (not its antiretaliation provision) only means current employees, petitioner argues that "employee" in the FCA's antiretaliation provision must only reach current employees too. Pet.17-18. But in *Robinson*, this Court found that these sources did not answer the question as to the use of "employees" in Title VII's antiretaliation provision specifically. *See* 519 U.S. at 341-42.

"At first blush," this Court reasoned, "the term 'employees' … would seem to refer to those having an

existing employment relationship with the employer in question." 519 U.S. at 341. "This initial impression, however, does not withstand scrutiny in the context" of the statute. *See id.* There was "no temporal qualifier in the statute such as would make plain that" Title VII's antiretaliation provision "protects only persons still employed at the time of the retaliation." *Id.* Not once did Congress insert the words "former" or "current" as a modifier to "employees," in any of the Title VII provisions in which it is used, "even where the specific context otherwise makes clear an intent to cover current or former employees." *Id.* at 341 & n.2 (citing *Walters*, 519 U.S. at 207-208). The same is true of the FCA.

Petitioner notes that Title VII includes a definition for the term employee and the FCA does not. But it is confusing why petitioner believes the FCA's lack of any definition for employee somehow makes the word less ambiguous. *See* Pet.8. In fact, petitioner misleads by suggesting that because Title VII's definition used the word "employed," and "'[e]mployed' could mean either '*is* employed' or '*was* employed,' *Robinson*'s analysis does not apply." *See* Pet.28. *Robinson*'s point was that *neither* the term "employees" in Title VII's antiretaliation provision nor the term "employed" in Title VII's definition of "employees" had temporal modifiers, so both were temporally ambiguous. 519 U.S. at 342 ("Title VII's definition of 'employee' likewise lacks any temporal qualifier and is consistent with either current or past employment."). "The argument that the term 'employed,' as used in [the definition], is commonly used to mean 'performing work under an employer-employee relationship,' begs the question by implicitly reading the word 'employed'

to mean '*is* employed.'" *Id.* (quoting *Black's Law Dictionary* 525 (6th ed. 1990)). "But the word 'employed' is not so limited in its possible meanings, and could just as easily be read to mean '*was* employed.'" *Id.*

In other words, Title VII's definition of "employees" did not get the petitioner in *Robinson* any further than the antiretaliation provision itself. If anything, this is an *a fortiori* case because the text itself provides even less information—the FCA's temporally ambiguous use of "employee" is the only thing to look to.

Second, petitioner highlights that some of the retaliatory acts listed in the FCA's antiretaliation provision can only apply to current employees. Pet.19. This is, of course, also true of Title VII's antiretaliation provision. For example, Title VII proscribes discriminating against "any … employees" in "on-the-job training programs." 42 U.S.C. § 2000e-3 (emphasis added). Obviously, only current employees can be retaliated against when it comes to on-the-job training.

More importantly, perhaps, the amendment currently pending in the Senate is good evidence that petitioner simply misunderstands the import of the exemplars of retaliation. As noted *supra* p.7, Congress is poised to amend the FCA's antiretaliation provision by inserting "current or former" before the word "employee," with no other change. This disproves petitioner's insistence that *all* of the exemplars are only reasonably read to apply to current employees alone—because if petitioner were correct, then the amendment would accomplish nothing. The canons cited by petitioner do little work in the face of the pending amendment. The panel majority correctly understood that at least some of the exemplar retaliatory acts apply to former employees.

The same goes for petitioner's argument that "Congress likewise wrote the words immediately surrounding 'employee' in the present tense." Pet.18. Those terms—"contractor" and "agent"—are only "present tense" in the same sense as "employee" is. Thus, the terms "contractor" and "agent" are temporally ambiguous for the same reason: They, too, do not have any temporal modifier. And it is irrelevant that dictionaries may use the present tense to define those terms, for the same reason it is irrelevant to the definition of employee. *See Robinson*, 519 U.S. at 342. If Congress passes the amendment, then it will clarify that former contractors and former agents are protected as well.

Third, petitioner argues that eight other provisions of the FCA use the term "employee" in a way that cannot "reasonably include 'former employees,'" and thus the FCA's antiretaliation provision must also apply only to current employees. Pet.20-21.

This same argument was raised and rejected in *Robinson*, which also recognized other "[s]ections of Title VII where, in context, use of the term 'employee' refers unambiguously to a current employee, for example, those sections addressing salary or promotions." 519 U.S. at 343 (citing 42 U.S.C. § 2000e-2(h); 42 U.S.C. § 2000e-16(b)). "But those examples at most demonstrate that the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts." *Id.*

The same point is even more obviously true here. The FCA's antiretaliation provision is the only part of the statute that protects employees; the other provisions that discuss "employees" do so to describe who is

immune from liability, 31 U.S.C. § 3730(e)(2)(B) (describing who counts as a "senior executive branch official" against whom certain FCA actions cannot be brought), who is authorized to view materials obtained pursuant to a civil investigative demand, *id*. § 3733(i)(2)(B), (C) (explaining that a custodian of materials handed over may cause materials to be created and shared with "officer[s] or employee[s] of the Department of Justice"), and what counts as a "false claims law," *id*. § 3733(l)(1)(B) (providing that a "false claims law" includes laws other than the FCA that provide civil remedies with respect to false claims, bribery, and corruption of "any officer or employee of the United States"). There is no logical reason for those sections to inform the meaning of the phrase "[a]ny employee" in the antiretaliation provision.

It therefore does not matter that applying *other* provisions of the FCA to former employees would "lead to … absurd results." *See* Pet.21-22. As *Robinson* makes explicit, the use of "employee" in those sections may apply only to current employees, and this does not require the same of the FCA's antiretaliation provision. *Contra* Pet.21 (quoting *Sullivan v. Stroop*, 496 U.S. 478 (1990)). It surely would have been absurd in *Robinson* to hold that all uses of the term "employee" in Title VII had to apply to former employees across the board. And the defendant in *Robinson* similarly argued that applying Title VII's antiretaliation provision would lead to "absurd results." *Cf.* Brief for Respondent 37-41, *Robinson v. Shell Oil Co.* (U.S. 1996), *available at* 1996 WL 419672. This Court rejected these concerns, finding ambiguity in the word "employees" as used in Title VII's antiretaliation provision even

though "employees" as used elsewhere in Title VII could only mean those currently employed.

Even petitioner's hypothetical example of how it would be absurd to apply the antiretaliation provision to former employees does not pass muster. According to petitioner, the upshot of including former employees in the antiretaliation provision's protection is that "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." Pet.23.

This simply isn't correct. Section 3730(h)(2) provides that relief "shall include reinstatement with the same seniority status that employee, contractor, or agent would have had *but for* the" retaliation. 31 U.S.C. § 3730(h)(2) (emphasis added). If a termination "was unrelated to the filing of the FCA claim," Pet.23, the termination wasn't "but for" the filing of the claim, so reinstatement would not be available. 31 U.S.C. § 3730(h)(2). And it is difficult to see how an FCA complaint filed *after* the termination could plausibly claim that a previous termination occurred "because of" the complaint, as required to establish liability in the first place. *Id*. § 3730(h)(1).

B. This ambiguous language covers current *and* former employees, just as in *Robinson*.

Because "employee" is temporally ambiguous, the Sixth Circuit was "left to resolve that ambiguity." *Cf. Robinson*, 519 U.S. at 345. And here, as in *Robinson*, the "broader context provided by other sections of the

statute provides considerable assistance in this regard." *See id.* Petitioner's two arguments to the contrary have already been considered and rejected by this Court.

First, petitioner argues that the panel majority "misunderstands the issue" by reasoning that the FCA's remedial provision includes relief that can only be given to a former employee, such as reinstatement for a discriminatory discharge. Pet.22. "The question," petitioner insists, "is not whether a 'former employee' can seek relief for retaliation … that occurred *while* they were employed." *Id.* Rather, petitioner argues, the "question is whether that person can seek relief for retaliation that occurred *after* they were no longer employed." *Id.*

But the reasoning criticized by petitioner is the exact reasoning in *Robinson*. As the Court explained, Title VII "expressly includes discriminatory 'discharge' as one of the unlawful employment practices against which Title VII is directed." *Robinson*, 519 U.S. at 345. And because a claim for retaliatory discharge "would necessarily be brought by a former employee," this Court reasoned that "it is far more consistent to include former employees within the scope of 'employees' protected by" Title VII's antiretaliation provision. *Id.* If petitioner is correct, this Court's reasoning is logically flawed, because an employee's discharge can only occur "*while* they were employed." *See* Pet.22. But this Court relied on this logic to hold that relief could be sought "for retaliation that occurred *after* they were no longer employed." *Contra id.*

Second, petitioner faults the panel majority for ending its analysis by looking to the purpose of antiretaliation provisions. Pet.28-29. Once again, that is

exactly what this Court did in *Robinson*. In considering the petitioner's and EEOC's arguments in *Robinson* that excluding former employees "would effectively vitiate much of the protection afforded by" Title VII's antiretaliation provision, "undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from" bringing a complaint, and "provide a perverse incentive for employers to fire employees who might bring Title VII claims," 519 U.S. at 345-46, the Court said this: "Those arguments carry persuasive force given their coherence and their consistency with a *primary purpose of antiretaliation provisions*: Maintaining unfettered access to statutory remedial mechanisms," *id.* at 348 (emphasis added). This Court "agree[d] with these contentions and f[ound] that they support the inclusive interpretation of 'employees'" in Title VII's antiretaliation provision "that is already suggested by the broader context of" the Act. *Id*. at 346.

The same is plainly true of the FCA. As explained in the introduction, Congress's overarching goal in the FCA is stopping fraud on the government. The antiretaliation provision serves that goal by protecting whistleblowers from retaliation that might deter them from coming forward and sharing their valuable information. In enacting this provision, Congress stated that it wanted "the definitions of 'employee' and 'employer'" to "be all-inclusive," and specifically to reach "[t]emporary, blacklisted or discharged workers." S. Rep. No. 99-345, at 34 (1986).

That makes perfect sense. The FCA allows any "person" to bring a fraud action, 31 U.S.C. § 3730(a)(1), and was designed "to encourage any individual

knowing of Government fraud to bring that information forward," S. Rep. No. 99-345, at 1. That naturally includes former as well as current employees—and there are good reasons to think that former employees will often have information that could help the government. For example, many individuals who learn of fraud at their employer will leave their jobs—either because the employer will discriminate against them, or because their conscience will not allow them to work for an employer that knowingly defrauds the government. Others may realize that their employers were engaged in fraud on the government only after they leave their jobs. In all those situations, Congress wanted those individuals to come forward, without fear of retaliation by the defendant.

The form of retaliation at issue here, blacklisting, was also known to Congress. *See* S. Rep. No. 99-345, at 34. Rational whistleblowers will understand that they not only risk losing their current jobs, but also being unable to find work in their industry if their employer tries to sabotage their careers. Naturally, that risk will deter many from coming forward—and so Congress wanted to ameliorate it to keep the flow of information moving.

A contrary rule allowing employers to harass and discriminate against former employees, by contrast, would undermine access to the FCA's fraud-fighting provisions. As the court below observed, "[i]f employers can simply threaten, harass, and discriminate against employees without repercussion as long as they fire them first, potential whistleblowers could be dissuaded from reporting fraud against the government." App.14a.

C. Petitioner's other arguments are meritless in the face of *Robinson*.

Petitioner makes two other arguments that are in the teeth of *Robinson*.

First, petitioner points to the common law of agency to argue that "employee" must mean current employees only. Pet.24-25. Whatever the common law of agency might say, this Court did not look to that doctrine in resolving the meaning of "employees" in Title VII. And anyway, there is much more direct authority as to the meaning of "employee" as used in the common law. For example, in the District of Columbia, a former employee receiving disability payments is an "employee" for purposes of the jurisdiction's common-law prohibition on employees sitting on criminal juries. *See United States v. Griffith*, 2 F.2d (D.C. Cir. 1924).

State law also holds that the term "employee" can include former as well as current employees. Thus, in New Jersey, a dismissed striker is still an "employee" for purposes of a state law prohibiting injunctions against picketing based on a dispute "between employer and employee." *McPherson Hotel Co. v. Smith*, 12 A.2d (Ct. Ch. NJ 1940); *see also United Firefighters of L.A. v. City of L.A.*, 231 Cal. App. 3d 1576, 1583-84 (Cal. Ct. App. 1991) (terminated California firefighter was an employee protected under a collective bargaining agreement authorizing "employees" to file grievances). And other federal statutes also use the unqualified term "employee" to cover both current and former employees. *See, e.g.*, *Allied Chem. & Alkali Workers of Am., Loc. Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Div.*, 404 U.S. 157, 169 (1971) (citing *Blassie v. Kroger Co.*, 345 F.2d 58, 70 (8th Cir. 1965) (retired

workers are "employees" for the purpose of section 302(c)(5) of the Labor Management Relations Act)); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 545 n.29 (1940) (citing *Nashville, C. & St. L. Ry. v. Ry. Employees' Dept.*, 93 F.2d 340 (6th Cir. 1937) (furloughed workers are "employees" within the meaning of the Railway Labor Act)).

To be sure, such "examples of [other] cases using the term 'employee' to refer to a former employee are largely irrelevant," given the other textual and contextual clues that show "employee" as used in the FCA's antiretaliation provision includes former employees, "except to the extent they tend to rebut a claim that the term 'employee' has some intrinsically plain meaning." *Robinson*, 519 U.S. at 344 n.4. We simply include these counterexamples to disprove petitioner's contention that the common law requires the result petitioner wants.

Second, petitioner criticizes the decision below for starting with this Court's decision in *Robinson* instead of interpreting the FCA's antiretaliation provision without regard to that decision. Pet.25-26. But *Robinson* is a plainly analogous decision: it interprets indistinguishable language in a statutory provision that has the same function as the one at issue here. Ignoring it would have been a clear error.

In any event, petitioner's description of the decision below is also wrong. Petitioner argues that the Sixth Circuit failed to "start with the text." Pet.26 (quotation marks omitted). Actually, the decision "start[ed] with the statutory text," App.5a, and ultimately concluded that "the statutory text is in fact "ambiguous" for the same reasons this Court said so in *Robinson*. *See* App.6a.

Petitioner also faults the Sixth Circuit for failing to "cite a single dictionary definition" or "the Restatement of Agency or any evidence about the common-law relationship between a master and servant." Pet.25-26. First, the court *did* refer to "dictionary definitions" of "employee." App.9a. And second, why would the court look to the common-law relationship between a master and servant instead of following directly an applicable "roadmap for statutory interpretation" that was "laid out" in *Robinson* to interpret the word "employee"? App.6a (quotation marks omitted). Surely, that authority is more relevant than the case petitioner cites, which is "about the meaning of 'automatic telephone dialing system' in the Telephone Consumer Protection Act." Pet.26 (citing *Facebook, Inc. v. Duguid*, 141 S. Ct. (2021)).

In a final attempt to distinguish *Robinson*, petitioner highlights that Title VII uses the term "individual" in its definition of employees, which "is a broader term than 'employee,'" and which the FCA does not include. Pet.28 (quoting *Robinson*, 519 U.S. at 345). But *Robinson* reasoned that use of "individual" in Title VII's definition "provide[d] no meaningful assistance in resolving th[e] case," because the term "would also encompass a present employee as well as other persons who have never had an employment relationship with the employer at issue." 519 U.S. at 345. Thus, the term "provide[d] no insight into whether the term 'employees' is limited only to current employees." *Id.* The absence of "individual" from the FCA's antiretaliation provision cannot provide "insight into whether the term 'employee[]'" in the Act "is limited only to current employees" if its inclusion in Title VII did not. But to the extent this matters, the text of the FCA authorizes

any "person" to bring a fraud action, and Congress expressly stated that it wanted "any individual" with knowledge to come forward.

In sum, the decision below is correct—and so error-correction is not a reason to grant certiorari, either (not that it ever was).

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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