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The Role of Whisteblowers in the Recovery of Covid-19 Relief funds and the Need to Expand the FCA's Qui Tam Provision

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INTRODUCTION

The False Claims Act (hereinafter "FCA") has played and likely will continue to play a crucial role in the recovery of COVID-19 relief funds lost due to fraud.[1] Federal and state governments have funneled billions of dollars into COVID-19 relief through means such as the Paycheck Protection Program (hereinafter "PPP"),[2] waivers of Medicare and Medicaid regulations,[3] and "Government Procurement" of supplies.[4] As an unintended result, this massive government spending also multiplied the opportunity for fraudsters to exploit recovery efforts and thus, taxpayer dollars.[5] The FCA, and more specifically its *qui tam* provision,[6] has been one of the federal government's most successful tools in fighting back against the spike in fraudulent efforts.[7]

The *qui tam* provision of the FCA allows a "person," with knowledge of fraud,[8] to bring a civil action in a federal district court on behalf of themselves and the federal government.[9] This "person" is known more commonly as a "whistleblower" or "*qui tam* relator."[10] Private whistleblowers are met with significant financial incentives in exchange for their insider information about fraud that may otherwise be unknown to a

1. *See* Press Release, Chuck Grassley, Senators Introduce Bipartisan Legislation to Fight Government Waste, Fraud (July 26, 2021).

2. *See* Gavin A. Bell & W. Stacy Miller II, *Fraud in the Pandemic: How COVID-19 Affects Qui Tam Whistleblowers and the False Claims Act*, 43 CAMPBELL L. REV. 273, 298-300 (2021).

3. *See id.* at 300-02.

4. *See id.* at 302-04.

5. *See id.* at 306-07; *see also* Grassley, *supra* note 1.

6. *See Qui tam action,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.").

7. *See* Grassley, *supra* note 1; *see also* Bell & Miller, *supra* note 2, at 301.

8. *See* 31 U.S.C. § 3729(a)(1).

9. *See* 31 U.S.C. § 3730(b)(1); *see also* Bell & Miller, *supra* note 2, at 275-76.

10. *See* Bell & Miller, *supra* note 2, at 275-76.

government official.[11] This financial incentive typically will come in the form of a percentage of the government's total recovery from the action.[12] Use of these financial incentives—particularly since the FCA's 1986 and 2009-2010 amendments that have come as a result of Medicaid introduction and expansion, the Patient Protection and Affordable Care Act (hereinafter "ACA"), and other related governmental spending schemes—has proven to be incredibly successful in bringing fraud to the attention of the government.[13]

Once utilized as a tool during the Civil War to combat fraud amongst the Union Army's supplier chain,[14] the FCA has become essential to the recovery of fraudulently obtained and improperly distributed funds in the modern healthcare industry.[15] A fairly common example of fraud in the modern healthcare industry is "upcoding."[16] Many healthcare providers rely on standard billing codes such as the American Medical Association's Current Procedural Terminology (hereinafter "CPT") and the Centers for Medicare & Medicaid Services' (hereinafter "CMS") Healthcare Common Procedure Coding System (hereinafter "HCPCS").[17] Though useful for accurate and efficient billing, the HCPCS is easily manipulated by providers through upcoding—billing at a higher CPT code than the procedure actually requires—to furnish a higher rate of compensation.[18]

Another fraudulent practice that is prevalent within the modern healthcare industry is overutilization, which "occurs when a provider orders or performs medically unnecessary tests and services."[19] This practice transpires, at least in part, due to price limitations that the Medicare system puts on the services it pays out for.[20] Despite price limitations, there are no restrictions on the quantity of services, and hence, overutilization occurs.[21]

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11. *See* James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1270-75 (2013).

12. *See* Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 456 (1998).

13. *See* Helmer, *supra* note 11, at 1279, 1281-82.

14. *See* Rachel Goodson, *The Adequacy of Whistleblower Protection: Is the Cost to the Individual Whistleblower Too High?*, 12 HOUS. BUS. & TAX L.J. 161, 164-65 (2011).

15. *See* Meador & Warren, *supra* note 12, at 469-72.

16. *See id.* at 461-62; *see also, e.g.*, United States v. Krizek, 111 F. 3d 934, 936 (D.C. Cir. 1997).

17. *See* Ass'n of N.J. Chiropractors v. Aetna, Inc., No. 09-3761 (JAP), 2012 U.S. Dist. LEXIS 64413, at *6 (D.N.J., May 8, 2012).

18. *See id.* at *7.

19. Meador & Warren, *supra* note 12, at 470.

20. *See id.*

21. *See id.*

The reason that fraud is notably pervasive in the healthcare industry—and particularly within Medicare and Medicaid programs—is rooted in the nature of the programs, in that, "funds [are] paid directly to the provider of services rather than to the patient."[22] This "fee-for-service" (hereinafter "FFS") basis of reimbursement has left room for physicians and providers to allege higher costs on themselves for their services in order to achieve a higher rate of reimbursement from insurers.[23] FFS reimbursement fraud within the Medicare system alone accounts for the loss of billions of dollars annually due to improper payments.[24] Despite amendments to the Medicare and Medicaid programs and other statutory regulations have aimed to mitigate this loss,[25] the fraud still persists.[26]

Federal and state governments have taken a number of actions to prevent this fraud, such as the False Claims Act, which disincentivizes fraud by giving private whistleblowers a civil cause of action.[27] In addition, there are statutes, such as the Medicare & Medicaid Anti-Kickback Statute (hereinafter "Anti-Kickback statute"),[28] which impose criminal sanctions for those involved in improper healthcare activities.[29]

The purpose of the federal Anti-Kickback Statute is to effectively "limit the influence of financial incentives over health care decisions, demanding that such decisions be made solely on the basis of which products and services will best serve the interests of the patient, rather than the provider."[30] The Statute attacks, in particular, the practice of offering, paying, soliciting, or receiving compensation in exchange for patient

22. Karen M. Verdirame, *Ethical and Legal Remedies to Over-Utilization of Health Care Resources*, 25 CREIGHTON L. REV. 1537, 1542 (1992) (quoting Harvey E. Pies, *Control of Fraud and Abuse in Medicare and Medicaid*, 3 am. J.L. & MED. 323, at n. 1, 324 (1977)) (alteration in original).

23. *See* Theodore N. McDowell, Comment, *The Medicare-Medicaid Anti-Fraud and Abuse Amendment Amendments: Their Impact on the Present Health Care System,* 36 EMORY L.J. 691, 701 (1987); *see also* Meador & Warren, *supra* note 12, at 470.

24. *See* Joan H. Krause, *A Conceptual Model of Health Care Fraud Enforcement*, 12 J.L. & POL'Y 55, 59 (2003) ("The first audit of Medicare fee-for-service payments found that more than $23 billion had been paid out improperly in fiscal year 1996 alone."); *see also* Fact Sheet, *2020 Estimated Improper Payment Rates for Centers for Medicare & Medicaid Services (CMS) Programs*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Nov. 16, 2020), https://www.cms.gov/newsroom/fact-sheets/2020-estimated-improper-payment-rates-centers-medicare-medicaid-services-cms-programs#_ftn1 (reporting $28.91B in 2019 and $25.74B in 2020, in improper Medicare FFS payments).

25. *See generally* McDowell, *supra* note 23, at 702-03 (discussing prominent regulatory efforts).

26. *See* Fact Sheet, *supra* note 24.

27. *See* False Claims Act (FCA), 31 U.S.C. § 3730(b) (2018).

28. *See* 42 U.S.C. § 1320a-7(b) (2018).

29. *See* McDowell, *supra* note 23, at 691, 716.

30. Krause, *supra* note 24, at 68.

referrals,[31] the violation of which provides the Department of Justice (hereinafter "DOJ") with cause for successful FCA actions.[32]

Utilization of the FCA in tandem with the Anti-Kickback and other related statutes becomes prevalent during times of increased government spending[33] as protecting public resources becomes especially important.[34] The relationship between the two statutes may be attributed to the ACA, which "clarified that each violation of the [Anti-Kickback Statute] was also a violation of the [FCA]"[35] and that "no additional facts were required to prove a FCA violation."[36] This practice of piggybacking FCA claims onto Anti-Kickback Statute violations and convictions is likely to be continued, as government spending has reached record numbers in response to the COVID-19 pandemic in the United States.[37]

In an effort to protect its citizens, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (hereinafter "CARES Act"),[38] which approved the allocation of over $2 trillion towards pandemic relief efforts.[39] This was only the fourth time in U.S. history that the government has intervened in such a drastic way.[40] These allocations implemented by the CARES Act were dedicated to Small Business Administration loans,[41] Unemployment Insurance (hereinafter "UI") programs,[42] and

31. *See id.* at 69. As explained in Joan H. Krause's article:

> [T]he statute prohibits: (1) the knowing and willful; (2) offer or payment (or solicitation or receipt); (3) of any form of remuneration; (4) to induce someone to refer patients or to purchase, order, or recommend; (5) any item or service that may be paid for under a federal health care program.

Id.

32. *See Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016*, U.S. DEP'T OF JUST. (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.

33. *See* Bell & Miller, *supra* note 2, at 280.

34. *See id* at 289.

35. David Kirman & Alexander Wyman, *Anti-Kickback Statute Enforcement Trends*, 28 HEALTH L. 43, 43 (2015) (alteration in original).

36. *Id.* at 44.

37. *See* Todd Yoder, *The False Claims Act and Covid-19 Federal Spending*, JD SUPRA (May 4, 2021), https://www.jdsupra.com/legalnews/the-false-claims-act-and-covid-19-6595716/.

38. *See* Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), ch. 116, Pub. L. No. 116-136, 134 Stat. 821 (2020).

39. *See* Adhitya Mahesh, *No Good Deed Goes Unpunished: Potential Lender Liability for Paycheck Protection Program Lenders*, 25 N.C. BANK INST. 203, 205 (2021).

40. *See id.* at 210 (explaining that the only other times that the federal government has intervened during financial crises were "[t]he Panic of 1907, the Great Depression of the 1930s, and the Great Recession of 2008") (alteration in original).

41. *See* Coronavirus Aid, Relief, and Economic Security Act § 1102.

42. *See id.* § 2102.

the compilation of medical product supplies,[43] among other things.[44] Of the many intended purposes of this massive government measure included the stabilization of the national economy, maintenance of employment, and the support of health care systems.[45]

As of March of 2021, the DOJ had commenced several civil actions in an attempt to recover over $569 million that was fraudulently obtained through the expanded PPP and UI programs, and the Economic Injury Disaster Loan program.[46] As the number of successful criminal charges brought under the Anti-Kickback Statute rises,[47] it is expected that the number of FCA cases brought by the DOJ will mirror that rise.[48]

The FCA has been particularly useful to the DOJ in securing settlements as a result of fraud allegations.[49] In one particular instance, the United States alleged that Seth A. Bernstein, owner of the jet charter company All in Jets, LLC (d.b.a "JetReady"), misappropriated the PPP loan that he took out on behalf of his business.[50] He was accused of diverting $98,929, of the nearly $1.2 million PPP loan, to pay for personal expenses unrelated to the business.[51] The DOJ was able to leverage these allegations and the threat of continued FCA litigation, and Bernstein ultimately agreed to pay $287,055 to settle out of court.[52] This recovery has been secured as a result of a *qui tam* action[53] brought by the whistleblower and former employee of JetReady, Victoria Hablitzel.[54] As a result of this settlement Hablitzel will receive $57,411 of the recovery.[55]

This Note argues the need to include former employees within the protection of the False Claims Act from retaliatory actions.[56] Part I provides the legal background for the issue and introduces the differing

43. *See id.* §§ 3101-03.

44. *See id.* §§ 1101-6002 (listing the areas the statute was designed to aid).

45. *See id.*

46. *See Justice Department Takes Action Against COVID-19 Fraud*, U.S. DEP'T OF JUST. (Mar. 26, 2021), https://www.justice.gov/opa/pr/justice-department-takes-action-against-covid-19-fraud.

47. *See id.*

48. *See* Grassley, *supra* note 1.

49. *See Owner of Jet Charter Company Settles False Claims Act Allegations Regarding Misappropriation of Paycheck Protection Program Loan*, U.S. DEP'T OF JUST. (Aug. 26, 2021), https://www.justice.gov/opa/pr/owner-jet-charter-company-settles-false-claims-act-allegations-regarding-misappropriation.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See* Complaint at 1, U.S. *ex rel.* Hablitzel v. All in Jets, LLC, No. 20-cv-6140 (S.D. Fla. July 13, 2020).

54. *See* U.S. DEP'T OF JUST., *supra* note 49.

55. *See id.*

56. *See infra* Part III.

approaches that the federal courts have taken when faced with plaintiffs who have sought relief from acts of retaliation that occurred after employment had already ended.[57] Part II presents the issue—which is that Congress has not been explicit in the language of the FCA as to an intent to include former employees within the scope of plaintiffs eligible for relief under Section 3730 of the statute, and explains the difficulties this may cause in the recovery of COVID-19 funds.[58] Finally, Part III examines alternate false claims statutes and proposes an expansive amendment to the FCA's anti-retaliation provision.[59]

I. THE EVOLUTION OF THE FALSE CLAIMS ACT AND JUDICIAL RESPONSE

This Part provides background on the employee whistleblower protections provided by the FCA.[60] Section A explores the history of those protections, including the causes and effects of the several amendments to the statute.[61] Section B further explores the ways in which federal courts have continued to limit those protections, including the denial of relief for former employees by the Tenth Circuit in *Potts v. Center for Excellence in Higher Educ., Inc.*[62] Section C examines the incorporation of former employees to the protections of the FCA as applied by the Sixth Circuit in *United States ex. rel Felten v. William Beaumont Hosp.*[63]

A. *The History of Whistleblower Protections Under the FCA*

Along with the Act's *qui tam* provision, granting persons with knowledge of fraud a private right of action to sue violators of Section 3729 of the FCA,[64] the Act also provides relief to those employees who were subjected to retaliation for commencing such an action.[65]

57. *See infra* Part I.
58. *See infra* Part II.
59. *See infra* Part III.
60. *See infra* Section I.
61. *See infra* Section I.A.
62. *See infra* Section I.B.
63. *See infra* Section I.C.
64. *See* 31 U.S.C. § 3730(b)(1).
65. 31 U.S.C. § 3730(h)(1) states:

> 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,

Considering the long history of false claims statutes and the FCA in the United States,[66] the concept of whistleblower protections is a fairly new one.[67] Prior to the addition of more recent protections, such as the 1986 Amendments to the FCA,[68] employees more often than not were forced to remain loyal and silent in fear of being fired and blacklisted from their industry.[69] As statutory protections have been incorporated and the public perception of whistleblowers has shifted, society has benefitted in several ways including the recovery of billions of dollars as a result of successful whistleblower claims.[70]

The 1986 Amendments[71] integrated two additional provisions into the existing FCA statute for the purpose of protecting whistleblowers.[72] These Amendments were enacted by Congress in an attempt to combat growing abuses of contractor payments[73] which were alleged to be the result of increased militarization under President Reagan.[74] The provisions that were added by the Amendment included the strengthening of the *qui tam* provision,[75] as well as the addition of anti-retaliation language.[76] These additions have largely been regarded as successful in incentivizing whistleblower action.[77]

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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.

Id. § 3730(h)(1).

66. *See generally* Meador & Warren, *supra* note 12 (discussing the history of various false claims statutes spanning from the Civil War error through more modern times).

67. *See* Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 53 (2011).

68. *See id.* at 56-57.

69. *See id.* at 51.

70. *See id.* at 53.

71. *See* 31 U.S.C. § 3730 (1986).

72. *See id.*; *see also* Hesch, *supra* note 67, at 55-56.

73. *See* Edward T. Ellis et. al., *False Claims Act Retaliation in 2021*, LITTLER (July 26, 2021), at 2, https://www.littler.com/files/false_claims_act_report_2021.pdf ([Abuses by contractors] "included contractor payments of $7,622 for a coffee pot, $435 for a hammer, and $640 for a toilet seat.") (citations omitted).

74. *See id.*

75. *See* 31 U.S.C. § 3730(b) (1986); *see* Hesch, *supra* note 67, at 56.

76. Hesch states:

> Any 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 action under this section ... shall be entitled to all relief necessary to make the employee whole.

Hesch, *supra* note 67, at 56; *see also* 31 U.S.C. § 3730(h) (1986).

77. Hesch, *supra* note 67, at 56; *see also* Ellis et al., *supra* note 73, at 2 ("The government's recovery was increased from two times to three times the loss resulting from the fraud.").

In an attempt to be more inclusive in the meaning of the term "employee" in the FCA statute, Congress again amended the FCA in 2009 by removing "specific limiting reference to 'the employer.'"[78] This amendment came in response to the narrow view of the term "employee" that many courts had adopted, and its purpose was to extend protections to a wider class of plaintiffs by including contractors and agents.[79] Congress included this amendment to its enactment of the Fraud Enforcement and Recovery Act of 2009,[80] with the goal of targeting "mortgage fraud, securities fraud, and other financial frauds" that came in the wake of the 2008 financial crisis.[81]

Congress, unsatisfied with the language provided by the 2009 amendment to the anti-retaliation provision and looking to increase protections further, amended the statute again in 2010.[82] This time, FCA amendment came with the enactment of the ACA[83] as well as the Dodd-Frank Wall Street Reform and Consumer Protection Act,[84] which was enacted for several purposes, one of which being to extend protections for whistleblowers in reporting their employers.[85] The amendment provided, in particular that "those [persons] 'associated' with those covered by the FCA ('employees, contractors, and agents') are also protected by the anti-retaliation provision of the FCA."[86]

In the years following the 2009 and 2010 amendments to the FCA, the DOJ was able to recover record amounts of fraudulently obtained funds through settlements and judgements.[87] In acknowledging this, the

78. Hesch, *supra* note 67, at 56.

79. *See id.* at 56-57; Ellis et al., *supra* note 73, at 3.

80. Pub. L. No. 111-21, 123 Stat. 1617 (2009).

81. Ellis et al., *supra* note 73, at 3.

82. *See id.*

83. *See id.* at 3-4 (stating that the ACA introduced several limitations, including: (1) the requirement that the relator be an original source and forbidding the government from opposing district court dismissal, and (2) the exclusion of state or local reports. The ACA expanded the "original source exception," though by reducing the requirement of "direct and independent" knowledge to only "independent knowledge.").

84. *See* Ellis et al., *supra* note 73, at 4; *see also* Dodd-Frank Act, Pub. L. 111-203, 124 Stat. 2079 (2010).

85. *See* Todd W. Shaw, *When Text and Policy Conflict: Internal Whistleblowing under the Shadow of Dodd-Frank*, 70 ADMIN. L. REV. 673, 679 (2018).

86. Ellis et al., *supra* note 73, at 4.

87. *See Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013*, U.S. DEP'T OF JUST. (Dec. 20, 2013), https://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013 (announcing four straight years of recoveries amounting to over two billion dollars per year between 2009 and 2013).

DOJ attributes this success to the growing number of whistleblowers and Congress's efforts in incentivizing them.[88]

B. *The Tenth Circuit Denies Relief to Former Employees Under the F.C.A.*

Congress's efforts in the expansion of the FCA's relief provision were not entirely successful, as courts hesitate to extend FCA protections to former employees whose discrimination has occurred post-employment.[89] In *Potts v. Center for Excellence in Higher Educ., Inc.*, the Tenth Circuit chose not to extend that definition and to limit relief only as it applies to those discriminatory acts that were made within the scope of employment.[90] This interpretation has not only been extended to the federal district courts within the Tenth Circuit,[91] but has also been adopted by several other federal courts.[92]

Debbi Potts brought a *qui tam* action against her former employer, CollegeAmerica Denver, Inc. (hereinafter "CollegeAmerica") whom she alleged engaged in active deception of "its accreditor to maintain accreditation."[93] Upon resigning from her position, Potts and CollegeAmerica entered into an agreement in which she obliged to refrain from "publicly or privately" disparaging the reputation or reporting the corporation to any governmental agency, in exchange for $7,000.[94] When Potts violated that agreement and her former employer sought the return of the $7,000, she commenced a *qui tam* action in the District Court for the District of Colorado.[95]

The Tenth Circuit affirmed the District Court's decision to dismiss Potts' claim alleging that her complaint to the Accrediting Commission of Career Schools and Colleges constituted "protected activity under the [FCA] because it revealed violations of accreditation standards, which would have disqualified [CollegeAmerica] from receiving federal student aid."[96] The District Court's reading provides that, to qualify as an

88. *See id.* (quoting Assistant Attorney General Delery: "We are also grateful to Congress and its continued support of strengthening the False Claims Act, including its *qui tam* provisions, giving the department the tools necessary to pursue false claims.").

89. *See* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F. 3d 610, 618 (10th Cir. 2018).

90. *Id.*

91. *See, e.g.,* Interstate Med. Licensure Compact Comm'n v. Bowling, 2021 U.S. Dist. LEXIS 133859, at *56 (D. Colo. June 23, 2021).

92. *See, e.g.*, Knight v. Standard Chartered Bank, 531 F. Supp. 3d 755, 769 (S.D.N.Y. 2021).

93. *Potts*, 908 F.3d at 612.

94. *Id.*

95. *See id.*

96. *Id.*

"employee" within the context of the statute, the person must first satisfy the condition that they were employed by the employer at the time the retaliatory acts occurred.[97] In coming to its conclusion, the Court examined the statutory language to interpret the meaning of "employee" in the context of the FCA.[98]

The Court first examined the "qualifying retaliatory acts" listed under Section 3730(h)(1): discharge, demotion, suspension, threats, harassment, or any other manner of discrimination.[99] In recognizing that four of the six listed retaliatory acts are acts that may only occur during employment,[100] the court rejected Potts' argument—that "employee" is ambiguous[101]—by employing an associated-words canon analysis.[102]

In applying the canon, and asserting that "words grouped in a list should be given related meaning,"[103] the Tenth Circuit concluded that a different "temporal qualifier" could not apply to "threatened" and "harassed" where Congress embedded those terms with four others terms that apply only to current employees within the scope of employment.[104] The Court also added that the catchall phrase—"or in any other manner discriminated against"—implies that the phrases are similar and should thus imply the same temporal qualifier.[105]

The Tenth Circuit further examined the phrase contained within the residual clause, "in the terms and conditions of employment."[106] While agreeing with Potts that the series-qualifier canon cannot be used to apply the context, "in the terms and conditions of employment," to any listed retaliatory action other than the last, the Court found this to bear no effect on the parallel nature of the list.[107]

97. *See id.* at 614.

98. *See id.* at 613-18.

99. *Id.* at 614.

100. *See id.* ("Obviously, a former employer cannot discharge, suspend, or demote a former employee. Nor can a former employer discriminate against a former employee in the terms and conditions of employment.").

101. *Id.* ("[U]nder § 3730(h)(1) the term 'employee' is ambiguous about whether it protects former employees who are threatened or harassed by their former employers ... even when the whistleblowing comes after employment.").

102. *See id.* at 614-15; *see also* WRITING CTR. AT GULC A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES 8 (Suraj Kumar & Taylor Beech, eds., 2017) (providing a detailed explanation as it pertains to the associated-words doctrine utilized by the Supreme Court).

103. Potts, 908 F.3d at 614 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 195 (2012)).

104. *Potts*, 908 F.3d at 614-15.

105. *Id.* at 615.

106. *Id.* at 615.

107. *Id.* at 615-16.

In her argument, Potts also set forth the position that the language of the anti-retaliation provision of the FCA is evidently similar to that of the Sarbanes-Oxley Act and Title VII.[108] She asserted that the Court should thus interpret the statute in the same way the Supreme Court did in the case of *Robinson v. Shell Oil, Co.*,[109] which extended the meaning of "employee," within the Title VII statute to include former employees.[110] In *Robinson*, the Supreme Court held that Section 704(a)[111] did not contain a temporal qualifier,[112] as well as that "other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.'"[113]

The Tenth Circuit, however, disagreed that this interpretation could be employed similarly to the anti-retaliation provision of the FCA.[114] The Court justified this disparity by concluding that the language of the FCA differed from that of Title VII, in that the FCA anti-retaliation statute contains a temporal qualifier, as explained above, where the Title VII provision does not.[115] The Tenth Circuit also concluded that Potts failed, in her argument, to provide a provision of the FCA in which the statute referred to 'employees' as meaning more than just 'current employees.'[116]

This Tenth Circuit interpretation of the FCA comes up short in providing whistleblower protections for retaliatory actions that occur post-employment.[117] While termination of employment is considered a "qualifying retaliatory act" according to the court,[118] other consequences such as ostracism, isolation, blacklisting, defamation, job stagnation, and personal consequences such as depression and family problems that may occur after termination, are left without recourse under the FCA.[119]

108. *See id.* at 616-17; Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514(a) (2010); Title VII of the Civil Rights Act of 1964 § 704(f), 42 U.S.C.S. § 2000e-3(a).

109. Potts, 908 F.3d at 616-17.

110. Robinson v. Shell Oil, Co., 519 U.S. 337, 346 (1997).

111. § 2000e ("The term 'employee' means an individual employed by an employer.").

112. *Robinson*, 519 U.S. at 337, 341.

113. *Id.* at 342.

114. *See Potts*, 908 F.3d at 617-18.

115. *See id.* at 618.

116. *See id.*

117. *See* Norman D. Bishara et al., *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 97-98 (2013).

118. *Potts*, 908 F.3d at 614.

119. *See* Bishara et al., *supra* note 117, at 97-98.

C. *The Sixth Circuit's Recent Incorporation of Whistleblower Protections for Former Employees*

The Sixth Circuit, in the case of *Felten v. William Beaumont Hospital*, came to an entirely different conclusion than that of the *Potts* Court.[120]

Dr. David Felten first filed his *qui tam* complaint in August of 2010, alleging that his employer violated the FCA, among other things,[121] in "paying kickbacks to various physicians and physicians' groups in exchange for referrals of Medicare, Medicaid, and TRICARE patients."[122] In Felten's original complaint he also alleged that Beaumont threatened and marginalized him.[123]

When Felten was fired after a fabricated "internal report suggested that he be replaced and that his position was subject to mandatory retirement," Felten amended his complaint to include a retaliation claim.[124] This claim set forth the allegation that Beaumont blacklisted him for reporting their conduct, and that consequently, after sending out roughly forty applications and despite his excellent reputation and prestigious contributions to psychoneuroimmunology,[125] he was unable to obtain a similar position in the field of academic medicine.[126]

Though the lower court initially dismissed Felten's complaint in part, with regards to his claims of post-termination retaliation, the Sixth Circuit granted permission to appeal in order to review the district court's application of Section 3730(h)(1).[127] After an analysis of the statutory language, the *Felten* majority concluded that relief should not be limited to current employees whose retaliation occurred during their employment.[128] In its analysis of the term "employee" within the FCA, the Sixth Circuit relied primarily on the Supreme Court's interpretation of Title VII's language in the case of *Robinson*.[129] In applying the *Robinson*

120. *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (2021).

121. Felten also alleged that his employer violated the Michigan Medicaid False Claims Act in paying kickbacks as well as the Mich. Comp. Laws § 400.610c in retaliating against him. *See Felten*, 993 F.3d at 430.

122. *Id.* at 430.

123. *See id.*

124. *Id.*

125. *See generally* Tim Newman, *Psychoneuroimmunology: Laugh and Be Well*, MEDICALNEWSTODAY (Feb. 3, 2016), https://www.medicalnewstoday.com/articles/305921 (providing insight to the field known as psychoneuroimmunology).

126. *See Felten*, 993 F.3d at 430.

127. *See id.* at 430-31.

128. *See id.* at 433-34.

129. *See id* at 432; *see also* McKnight v. General Motors Corp., 550 F.3d 519, 524-25 (6th Cir. 2008) (providing that *Robinson* created a "roadmap" for statutory interpretation in the context of postemployment actions).

reasoning to the FCA's anti-retaliation provision, the Sixth Circuit considered three factors: (1) whether temporal qualifiers exist within Section 3730(h) as to limit the meaning of "employee," (2) the statutory and dictionary meanings of the term "employee," and (3) the extent to which Section 3730(h)(2)'s statutory framework affects eligibility for relief.[130]

The Sixth Circuit, contrary to the Tenth Circuit, denied that Section 3730(h)(1)'s list of operative words classifies as a *noscitur a sociis* canon[131] capable of triggering a temporal qualifier.[132] Despite conceding that the terms "discharged, demoted, [and] suspended" can only refer to actions against current employees, the Court rejected Beaumont's argument that such a temporal limitation should also restrict the remaining terms—"threatened," "harassed," and "discriminated [against]," and rather concluded that the latter terms could also be applied to former employees.[133] In responding to Beaumont's secondary argument that the phrase, "in the terms and conditions of employment," acts as a catch-all applying to all actions as a temporal qualifier,[134] the Court looked to several "terms and conditions of employment" that may outlive employment—such as noncompete and confidentiality agreements,[135] non-solicitation provisions,[136] and severance pay[137]—to conclude that the phrase is not indicative of a temporal qualifier.[138]

The Court then went on to consider the definition of "employee."[139] In this case and in the context of Section 3730(h), this inquiry was limited to dictionary definitions for lack of a statutory definition.[140] In doing so, the Court looked to *Robinson* which, in a similar analysis, indicated that

130. *See Felten*, 993 F.3d at 432-35.

131. *See Noscitur a sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *noscitur a sociis* as a Latin term for "it is known by its associates"). This term is the concept that the intended meaning of an ambiguous word depends on the context in which it is used.

132. *See Felten*, 993 F.3d at 432-33.

133. *Id.* at 432.

134. Beaumont argues that a "canon ... [restricts] the meaning of all listed misconduct in § 3730(h)(1) to only activities that occurred while the plaintiff was employed." *Id.* at 432, (arguing that a "*ejusdem generis* canon [restricts] the meaning of all listed misconduct in §3730(h)(1) to only activities that occurred while the plaintiff was still employed.").

135. *See id.* at 433 (citing Lantech.com v. Yarbrough, 247 F. App'x 769, 771-72 (6th Cir. 2007)).

136. *See id.* (citing Hall v. Edgewood Partners Ins. Ctr., Inc., 878 F.3d 524, 528-29 (6th Cir. 2017)).

137. *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 433 (2021) (citing E.E.O.C. v. Cosmair, Inc., L'Oréal Hair Care Div., 821 F.2d 1085, 1088-98 (5th Cir. 1987)).

138. *See id.*

139. *See id.*

140. *See id.*

"the word 'employed' is not so limited in its possible meanings, and could just as easily be read to mean 'was employed.'"[141]

The final *Robinson* consideration that the Court addressed is statutory framework.[142] Here the court reviewed the damages section of the FCA, which reads:

> Relief under paragraph (1) 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 ... [143]

The Sixth Circuit concluded that the anti-retaliation provision does not limit relief to current employees, and rather deduced that several terms and phrases within the provision suggest applicability to former employees.[144] In coming to this conclusion, the Court first considered that the inclusion of "reinstatement" as a form of relief, being only available to employees who have been subjected to termination, would require plaintiff to be a former employee.[145] Also in support of this, the Court acknowledged that the provision includes "special damages" for acts of "discrimination" without indicating whether said discrimination need occur during employment.[146] Further, the Court reasoned that, "the use of 'shall include,' ... demonstrates that the list of remedies is not exhaustive ... [and the] expansive catch-all language further shows that remedies exist regardless of whether the plaintiff is still employed."[147]

Additionally, the Court considered the purpose of the anti-retaliation provision, which is to incentivize the reporting of fraud by providing protection for those who are assisting the government in combatting fraud, and found that failing to extend protection to former employees would frustrate that purpose, for it would leave employers with the opportunity to simply terminate a whistleblower's employment in order to further mistreat them without repercussion.[148] This also mirrors a consideration of

141. *Id.* (quoting Robinson v. Shell Oil, Co., 519 U.S. 337, 342 (1997)).

142. *Felten*, 993 F.3d at 433-35.

143. 31 U.S.C. § 3730(h)(2).

144. *See Felten*, 993 F.3d at 433-34.

145. *Id.* at 433 ("A plaintiff, by definition, must be a former employee; after all, only someone who has lost a job can be reinstated.").

146. *Id.* at 434.

147. *Id.*

148. *See id.* at 435 ("If 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.").

the *Robinson* court, which contemplated that barring former employees from retaliatory relief under Title VII, "would 'effectively vitiate much of the protection afforded by [the statute]' because it would deter reporting to the government and 'provide a perverse incentive for employers to fire employees who might bring Title VII claims.'"[149]

The *Felten* court also relied on a previous Sixth Circuit decision, *Vander Boegh v. EnergySolutions, Inc.*, which first suggested the viability of post-employment blacklisting claims.[150] The *Vander Boegh* Court, despite denying that a job applicant was within the purview of Section 3730(h), was receptive to recognizing former employees as part of the statute's protected class.[151] The Court suggested, "regarding the FCA's legislative history, the term 'blacklisted' is couched in the phrase '[t]emporary, blacklisted or discharged workers,' which merely suggests that 'employee' extends to former employees, as well as present employees."[152]

While the Sixth Circuit was the first of the federal circuit courts to apply the *Robinson* reasoning to the FCA to provide to relief for former employees whose retaliation occurred post-termination, the Western District of Wisconsin did previously apply this reasoning over a decade earlier in 2008.[153] This Court, in the case of *Haka v. Lincoln Co.*, similarly acknowledged that applying a temporal limitation and failing to protect former employees would limit the statute's effectiveness and frustrate the purpose of the FCA.[154]

II. INCONSISTENCY IN THE APPLICATION OF F.C.A. PROTECTIONS FOR FORMER EMPLOYEES

This part examines the criticisms that have come as a result of the Sixth Circuit decision in *Felten* and discusses the effect of the remaining gap in FCA protections for former employees, as well as the effect that the gap may have on the recovery of COVID-19 funds.[155]

149. *Id.* (quoting Robinson v. Shell Oil, Co., 519 U.S. 337, 345-46 1997)).
150. *See* Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1063 (6th Cir. 2014).
151. *See id.* at 1064.
152. *Id.* at 1063 (alteration in original).
153. See Haka v. Lincoln Co., 533 F.Supp.2d 895, 917 (W.D. Wis. 2008).
154. *Id.*
155. *See infra* Part II.

A. *Circuit Judge Griffin's Dissent and Beaumont's Petition for a Writ of Certiorari*

Though the *Felten* decision has provided protections against post-termination retaliation for former employees within the Sixth Circuit's jurisdiction, this decision has not come without criticism.[156] One prevalent criticism was published by Circuit Judge Griffin in his dissenting opinion.[157] Judge Griffin condemned the majority for "rush[ing] to find ambiguity," in the meaning of "employee" within the text of the FCA rather than "applying tried-and-true tools of statutory interpretation."[158]

Judge Griffin's opinion was comparable with that of the majority in *Potts*, in that he suggests that the "associated-words" *noscitur a sociis*, and the *ejusdem generis* canons create a temporal limitation incompatible with the inclusion of "former employees" to the statute's application.[159] Judge Griffin also analyzed other uses of the word "employee" in other provisions of the FCA,[160] and determined that other uses of the word in the statute would not be compatible with inclusion of former employees.[161]

Of the more persuasive of Judge Griffin's sentiments, is his position that the language of the FCA should only be examined as to the "plain meaning" of the text.[162] He relied on an earlier decision of the Sixth Circuit[163] which previously defined the term "employee" in accordance with Black's Law Dictionary, as meaning "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."[164]

This position was also set forth by William Beaumont Hospital in its Petition for a Writ of Certiorari (hereinafter "Petition"), which was

156. *See* Felten v. William Beaumont Hosp., 993 F.3d 428, 436-41 (2021) (Griffin, C.J., dissenting).

157. *See id.*

158. *Id.* at 436.

159. *Id.* at 437-38.

160. Circuit Judge Griffin uses this form of analysis, which has previously been used by the U.S. Supreme Court. *See id.* at 438 ("A standard principle of statutory construction provides that identical words... within the same statute should normally be given the same meaning.") (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007)).

161. *See id.* at 437-38 (dissent).

162. *Id.* at 436 ("If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.") (quoting Roberts v. Hamer, 655 F.3d 578, 583 (6th Cir. 2011)).

163. *See* Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1060 (6th Cir. 2014).

164. *Id.* at 1060 (quoting BLACK'S LAW DICTIONARY 639 (10th ed. 2014)).

submitted to the Supreme Court on September 21, 2021.[165] The Hospital starts off its Petition with a pointed question and direct answer: "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."[166] The Hospital urged the Supreme Court to resolve this "one-to-one" circuit split in its favor, alleging that the current Sixth Circuit rule "conflicts with the text of the FCA."[167]

In its Brief in Opposition (hereinafter "Brief") filed on December 17, 2021,[168] the United States and Felten urged the Supreme Court not to grant the writ of certiorari and defended the decision of the Sixth Circuit.[169] The Brief cautioned the Court that this issue is slated to be considered by the Senate, circumstances of which have previously given the Court cause to dismiss a writ of certiorari,[170] and encouraged the Court to allow Congress the opportunity to resolve the issue and make legislative changes.[171] Also insisted on in the Brief, is for the Court to adhere to its own policy to "wait 'until more than two courts of appeals have considered a question.'"[172] The Respondents further alleged that the facts of the instant case are too dissimilar from the unusual fact pattern of the *Potts* case, such that the "split ... is not square."[173]

In addition to the argument of prematurity, the Brief set forth two ways that certiorari would be interlocutory: (1) the Sixth Circuit did not yet consider "whether blacklisting is included as a form of prohibited retaliatory action," and (2) granting certiorari would not be dispositive of the matter, as "Dr. Felten may still prevail on state law grounds."[174] The Respondents urged the Court to follow common practice and deny the

165. *See* Petition for Writ of Certiorari, *Felten*, 993 F.3d 428 (No. 21-433).

166. *Id.*

167. *Id.* at 17-19.

168. Brief in Opposition, *Felten*, 993 F.3d 428 (2021) (No. 21-443).

169. *See id.* at 1. The Brief in Opposition was separated into five parts. Parts I-IV set forth several policy and procedural causes for the Court to deny the Hospital's Writ of Certiorari, and Part V is dedicated to the defense of the Sixth Circuit decision. *See id.* at i.

170. *See id.* at 7-8 (citing as an example the case of *Morris v. Weinberger*, 410 U.S. 422 (1973) (per curiam)).

171. *See id.* at 8.

172. *Id.* (quoting STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 4-16 (11th ed. 2019)).

173. *Id.* Brief in Opposition, *Felten*, 993 F.3d 428 (2021) (No. 21-443), at 9. The Brief goes on to compare the facts of the Tenth and Sixth Circuit cases and further argues that "*Potts* is a good illustration of the adage that bad facts can make bad law," to suggest that under different circumstances the Tenth Circuit may have decided differently. *Id.* at 9-10.

174. *Id.* at 11.

review of interlocutory orders,[175] whilst also arguing that the question presented in the Petition is "[n]ot [i]mportant [e]nough" to require Supreme Court intervention.[176]

Though strongly pressing the Court to reject the Hospital's writ, the Respondents also defended the Sixth Circuit's decision at length.[177] Expanding upon the arguments made before the Sixth Circuit, Respondents argued that a rule contrary to that of the Sixth Circuit would allow "employers to harass and discriminate against former employees," and "would undermine access to the FCA's fraud-fighting provisions."[178] This proposition was supported by reference to the intent of Congress in enacting the 1986 amendment to the FCA: "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.'"[179]

These arguments will go unheard by the Supreme Court, however, as the Court has denied resolving the circuit court split at this time.[180] The denial has no effect on the determination of the Sixth Circuit's decision, and former employees facing retaliation within the Sixth Circuit's jurisdiction may still be provided remedy under the FCA, but the fate of those outside of its jurisdiction remains unknown.

Although the Respondents set forth in their Brief that Congressional intent is clear—that current and former employees alike should be protected by the FCA's anti-retaliation provision—the decision in *Potts* exists as evidence to the contrary.[181] Without guidance from the Supreme Court and without an expression of clear legislative intent presented within the statute, federal courts outside of the Tenth and Sixth Circuits

175. *See id* at 11-12.

176. *Id.* at 13-17. Respondents allege that the "split is so shallow that the question presented will not frequently be relevant, let alone dispositive ... [being] dispositive only when post-employment retaliation was the sole act of retaliation that occurred and no other legal issue bars the claim..." *Id.* at 13.

177. *See id.* at 17-30. The Respondents' defense of the Sixth Circuit decision is broken up into three different parts: the first section is dedicated to expounding the temporal ambiguity of the term, "employee." *Id.* at 18-23. The second compares the instant issue with that considered by the Court in *Robinson* with respect to the application of ambiguous language. *Id.* The final section minimizes the Petitioner's criticisms of the Sixth Circuit decision and extinguish Petitioner's efforts to further distinguish the instant case from *Robinson*. *Id.* at 27-30.

178. Brief in Opposition, *Felten*, 993 F.3d 428 (2021) (No. 21-443), at 26.

179. *Id.* at 25 (citing S. Rep. No. 99-345, at 34 (1986)).

180. *See* William Beaumont Hospital v. United States, 993 F.3d 428 (6th Cir. 2021), *cert.* denied, 142 S.Ct. 896 (2022) (No. 21-433) (mem.). The petition for writ of certiorari was denied by the Supreme Court on January 24, 2022, without opinion. *Id.*

181. *See generally* Potts v. Ctr. for Excellence in Higher Educ., 908 F. 3d 610 (10th Cir. 2018) (finding that no remedy for former employees facing post-employment retaliation exists in the language of the FCA).

are left with the discretion to determine the fate of *qui tam* suits filed by former employees within their jurisdiction.[182]

B. *The Effect that Failing to Protect Former Employees May Have on the Efficacy of the FCA in the Wake of the COVID-19 Pandemic*

Despite the *Felten* court's decision to expand the FCA's reach, the Sixth Circuit remains the only Circuit to grant such protections for former employees.[183] Indeed, this reality is something that both William Beaumont Hospital and Circuit Judge Griffin pointed out in their arguments against the majority's decision.[184]

Outside of the *Potts* and *Felten* decisions, and outside the realm of statutory interpretation, "temporal qualifiers" and canons of construction, lay the real-world effects and repercussions of failing to provide protection to former employees.[185] For example, without liability for such actions, "employers can simply threaten, harass, and discriminate against employees without repercussions as long as they fire them first."[186] This creates a greater problem for whistleblowers outside of the Sixth Circuit, because although the act of termination is covered by Section 3730(h), any further discrimination by their now-former employer is not.[187] One major example of such discrimination, as seen in the *Felten* case,[188] is blacklisting.[189]

i. A Flawed System of Ostracization

Blacklisting is the act of putting someone or something on a "blacklist"—a list of "persons who are disapproved of or are to be punished or

182. *See supra* Part II.A.

183. *See* Petition for Writ of Certiorari, *supra* note 165, at 17-19 ("That decision split from nearly every federal court to consider this question, including a unanimous Tenth Circuit panel.").

184. *See id.* at 16-17. William Beaumont Hospital points this out in in their Petition for Writ of Certiorari and Circuit Judge Griffin points this out in dissenting with the majority in *Felten*. *Id.*

185. *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (2021).

186. *Id.*

187. *See id.*

188. *See id.*

189. *See generally* Frank Houghton & Sharon Houghton, *"Blacklists" and "Whitelists": a Salutary Warning Concerning the Prevalence of Racist Language in Discussions of Predatory Publishing,* 106 (4) J. MED. LIBR. ASSOC. 527 (2018) (examining the racially bigoted origins of the terms "blacklist" and "blacklisting"). It is important to acknowledge that language such as "blacklisting," "black market," and "black sheep," are reflective of "racist culture, but also serve[] to reinforce, legitimize, and perpetuate it," in implying negative connotations such as "disreputable," "shamed," or "outcast." *Id.* at 528.

boycotted."[190] This practice occurs in large part because, "[a]lthough [the whistleblower] has done the right thing, he is considered to be a disloyal employee and a potential liability for future employers."[191] The concept of blacklisting is hardly a new one,[192] and the tactic is prevalent in many industries and establishments including in foreign politics,[193] "Hollywood,"[194] and education.[195] The practice is also no stranger to the healthcare system.

The healthcare industry has been known to ostracize its doctors and nurses, often making it difficult or impossible for those health professionals to find work in the field of medicine.[196] For example, in the business of "travel nurses,"—a growing group of professionals in high demand during the COVID-19 pandemic due to staff shortages[197]—ostracization comes in the form of the DNR (Do Not Return), DNS (Do Not Send), and the DNU (Do Not Use).[198] This process can be effectuated privately within particular nursing agencies,[199] but also exists publicly by means of

190. *Definition of "Blacklist,"* MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/blacklist (last visited Jan. 21, 2022).

191. FREDERICK D. LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES, AND PROTECTION STRATEGIES 58 (John Wiley & Sons, Inc. 2012) (internal citations omitted).

192. *See Definition of "Blacklist," supra* note 190 (listing the first known use of "blacklist" to be in 1624); *see also* Houghton & Houghton, *supra* note 189, at 528 ("It is notable that the first recorded use of the term occurs at the time of mass enslavement and forced deportation of Africans to work in European-held colonies in the Americas.").

193. *See generally* Matthew J. Peed, *Blacklisting as Foreign Policy: The Politics and Law of Listing Terror States*, 54 DUKE L.J. 1321, 1324-29 (2005) (discussing Congress' use of the "terrorism list" as a means of protecting the country from acts of terrorism).

194. *See generally* Elizabeth Pontikes et al., *Stained Red: A Study of Stigma by Association to Blacklisted Artists During the "Red Scare" in Hollywood, 1945 to 1960*, 75 (3) AM. SOCIO. REV. 456, 461-62 (2010) (examining "blacklisting" of actors and actresses from the U.S. film industry as a result of "widespread fears of communist penetration in the film industry.").

195. *See e.g.,* Hank Stephenson, *An Arizona School District Kept a Secret Blacklist for Decades. A Reporter Found It.,* COLUM. JOURNALISM REV (Jan. 23, 2018), https://www.cjr.org/united_states_project/tucson-daily-star-jackalope.php.

196. *See* Lawrence R. Huntoon, *Sham Peer Review: The Destruction of Medical Careers*, 24 J. AM. PHYSICIANS & SURGEONS 99, 99 (2019).

197. *See* Kat Eschner, *As COVID Surges, 'Travel Nurses' are in More Demand Than Ever, and Can Make $5,000 Per Week,* FORTUNE (Dec. 21, 2021), https://fortune.com/2021/12/21/travel-nursing-jobs-careers-salary-covid-omicron-surge/ ("By the time ... the COVID-19 pandemic was in full swing, ... the floor was primarily staffed by travel nurses – especially during the evening and overnight shifts.").

198. *See Blacklisting: The Dirty Side of Travel Nursing*, HEALIO NEWS (June 14, 2016), https://www.healio.com/news/nephrology/20180227/blacklisting-the-dirty-side-of-travel-nursing.

199. *See id.* (discussing alternative protocols that can be used when disciplining nurses, in lieu of blacklisting).

government-created blacklists such as the National Practitioner Data Bank (NPDB).[200]

The NPDB, which may be used to blacklist any licensed healthcare professional in the United States,[201] exists as a resource for the "public to engage in self-protection by preventing 'predators' from traveling to new locations to prey on a new group of unsuspecting victims."[202] Though seemingly well-intentioned, the "peer-review" system utilized is flawed in that it does not allow practitioners due process to contest reports made against them,[203] and "afford[s] few limitations on the discretion of the decision-makers, leading to a high risk of arbitrary and capricious decision-making and error."[204]

While often times effective at weeding out the "bad eggs" of the healthcare system,[205] this system of blacklisting gives hospital administrators unfettered discretion to remove practitioners whenever, subject to few limitations, "in their sole judgement the good of the hospital or the patients therein may demand it."[206] This places whistleblowers within the healthcare system in a vulnerable position, effectively silencing practitioners from reporting issues in fear of ostracization from their profession.[207]

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200. *See* Katharine A. Van Tassel, *Blacklisted: The Constitutionality of the Federal System for Publishing Reports of "Bad" Doctors in the National Practitioner Data Bank*, 33 CARDOZO L. REV. 2031, 2032 (2012).

201. *See id.* at 2032-33 ("...the NPDB expanded its scope to take on blacklisting of *all* licensed healthcare practitioners in the United States, including dentists, nurses, physicians' assistants, and social workers, extending its reach to over six million people.").

202. *Id.* at 2033 (comparing the NPDB to the other public blacklists such as sexual predator blacklisting programs).

203. *See id.* at 2041 (noting that "physicians who are blacklisted, in the vast majority of cases, do not have access to the judicial system at all" to remedy their loss of employment, wages, etc.). Legislation has also been passed-such as the Healthcare Quality Improvement Act (HCQIA) of 1986–for the purpose of preventing practitioners "from challenging the results of peer review in court and winning damages." *Id.* at 2047-48; *see also* 42 U.S.C. §§ 11101-11152 (2006).

204. Van Tassel, *supra* note 200, at 2076.

205. Though the efficacy of the system is also questionable as it often times as "bad physicians" are often "significant income providers to the hospital and thus enjoy the protection of a hospital more concerned with revenues than patient well-being." Gil Mileikowsky & Bartholomew Lee, *How to Protect Physician Whistleblower – Patient Advocates – From Retaliation to Benefit Patients: A Legal Analysis Regarding Summary Suspension, Retaliation, Peer Review and Remedies*, 16 US-CHINA L. REV. 21, 26 (2019).

206. Van Tassel, *supra* note 200, at 2076-77 (quoting N. Broward Hosp. Dist. v. Mizell, 148 So. 2d 1, 2-5 (Fla. 1962)).

207. *See* Van Tassel, *supra* note 200, at 2089-91. This phenomenon, albeit an unintended consequence of legislation such as the HCQIA, is not uncommon. *See id.* at 2090 ("In one survey of 448 emergency rooms physicians across the United States, twenty-three percent reported that they had lost a job, or had been threatened with termination, when they had raised quality of care concerns.").

Referring back to the example of travel nurses, such workers may be at a heightened and unique risk for blacklisting.[208] Travel nurses are often blacklisted—even for minor reasons—instead of being terminated, simply so the hospital or clinic can avoid paying a cancellation fee for ending the contract early.[209] Whatever the reason may be for wanting to break the nursing contract early, an employer would not usually be able to do so without paying a fee to the staffing agency.[210] To avoid this, the employer can instead blacklist the nurse to "justify" the termination and get out of the contract.[211]

As being blacklisted can be devastating for a nurse's career, and even a minor patient complaint could set off a career-ending series of events, such vulnerability could greatly disincentivize such healthcare professionals from reporting those who are able to destroy their career.[212] This may have a devastating impact on government recovery efforts as nurses are in a unique position, as "liaisons between documentation and [health]care . . . and between physicians and coders," to identify and report fraud in an industry responsible for hundreds of millions of dollars in false billings.[213]

ii. Failure to Protect Whistleblowers Disincentivizes the Reporting of Fraud

In order to encourage whistleblowers to come forward with their concerns, their rights and protections must be adequate.[214] For example, Section 11(c) of the Occupational Safety and Health Act (Hereinafter "OSHA")—enacted[215] for the purpose of protecting whistleblowers who have reported their employers for workplace safety violations under

208. *See Blacklisting*, *supra* note 198.

209. *See id.*

210. *See id.*

211. *See id.*

212. *See infra* Part II.B.i and Part II.C.

213. Everett-Thomas Ruth et al., *Nurses are Vital to Improving to Clinical Integrity and Documentation in Hospitals*, 1 J. NURSING & HEALTHCARE MGMT. 1, 2 (2018) (acknowledging that nurses are among those healthcare professionals responsible for fraudulent billing, and false claims, etc.); *see e.g.,* Heather Landi, *Feds Charge 138 Medical Professionals with $1.4B in Healthcare Fraud, Including Telehealth Schemes*, FIERCE HEALTHCARE (Sept. 20, 2021, 11:17 AM), https://www.fiercehealthcare.com/tech/feds-charge-138-medical-professionals-including-doctors-1-4b-telehealth-fraud-case.

214. *See* Mileikowsky & Lee, *supra* note 205, at 27 (discussing fear of retaliation among physicians); *see also* Emily A. Spieler, *Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act*, 32 A.B.A. J. LAB. & EMP. L. 1, 3 (2017) ("Individual workers are unlikely to raise concerns unless they can realistically expect that their employers will not retaliate or that whistleblower protections will be effectively enforced.").

215. 29 U.S.C. §660(c).

OSHA—has been criticized for its weaknesses.[216] The weaknesses of the statute have had a substantial and influential effect causing "[l]aborside members of the Whistleblower Protection Advisory Committee [to] strongly suggest[ed] that many people do not raise safety concerns because of fears of retaliation and . . . not [to] bring their retaliation concerns to OSHA . . ."[217] This is concerning, as unreported safety concerns or injuries may lead to increased injuries, adverse effects on productivity, and in extreme cases even serious environmental disasters.[218]

One agency that recently spoke up about their concerns for its whistleblowers is the Federal Aviation Administration (hereinafter "FAA").[219] The FAA expressed these concerns following the publication of an open letter, signed by 21 current and former employees of Blue Origin,[220] voiced allegations of gender bias and sexual harassment,[221] toxic work environment,[222] censorship,[223] and concerns for the safety of employees and passengers.[224]

Those who signed the letter expressed concern over a gap in whistleblower protections for employees of private companies such as Blue Origin.[225] Unlike employees of public agencies, such as the National Aeronautics and Space Administration, employees of private companies are not safeguarded by whistleblower statutes unless their employers have

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216. *See* Spieler, *supra* note 214, at 18-20 (discussing four weaknesses of § 11(c): (1) failure to provide a right to bring a civil action after exhausting administrative requirements, (2) short statute of limitations; (3) limitations on the right to reinstatement during the pendency of the action, and (4) high burden of proof).

217. *Id.* at 21.

218. *See id.* at 2-3.

219. *See* Ana Popovich, *FAA Concerned about Lack of Whistleblower Protections in Blue Origin Safety Investigation,* WHISTLEBLOWER NETWORK NEWS (Dec. 14, 2021), https://whistleblowersblog.org/government-whistleblowers/faa-concerned-about-lack-of-whistleblower-protections-in-blue-origin-safety-investigation.

220. Blue Origin, a privately funded aerospace manufacturer, is a limited liability company founded by Jeff Bezos in 2000 and headquartered in Kent, Washington. *See id.*

221. *See* Popovich, *supra* note 219.

222. *See id.* Claims of toxic work environment were substantiated with references to "[m]emos from senior leadership reveal[ing] a desire to push employees to their limits, stating that the company needs to 'get more out of our employees' and that the employees should consider it a 'privilege to be a part of history.'" *Id.*; *see also* Alexandra Abrams, *Bezos Wants to Create a Better Future in Space. His Company Blue Origin Is Stuck in a Toxic Past*, LIONESS (Sept. 30, 2021, 3:00 PM), https://www.lioness.co/post/bezos-wants-to-create-a-better-future-in-space-his-company-blue-origin-is-stuck-in-a-toxic-past (letter).

223. *See* Popovich, *supra* note 219 (referring to added difficulties for employees wishing to voice concerns and ask questions at company town halls).

224. *See id.* Those current and former employees of Blue Origin who signed the letter claimed to "have seen a pattern of decision-making that often prioritizes execution speed and cost reduction over the appropriate resourcing to ensure quality." *Id.*

225. *See Id.*

contracted with the federal government.[226] The state of whistleblower protections in this industry are such that twenty of the twenty-one employees who signed the letter wished to stay anonymous for fear of retaliation.[227]

According to a study conducted by the Government Accountability Project, when whistleblowers were asked why they waited to make a report to the government about wrongdoing, thirty-five percent of respondents reported it was because they "feared reprisal."[228]

Despite numerous federal and state statutes across various areas of the law designed to protect whistleblowers from retaliation, fear of retaliation is not unjustified.[229] Another study reported that:

> . . . approximately two thirds of the whistleblowers in their study had experienced the following forms of retaliations: 69% lost their job or were forced to retire; 64% received negative employment performance evaluations; 68% had work more closely monitored by supervisors; 69% were criticized or avoided by coworkers; and 64% were blacklisted from getting another job in their field.[230]

Though most statutory schemes that rely on whistleblowers as private enforcers of their regulations do provide those whistleblowers with a remedy for retaliation,[231] those protections are not without loopholes.[232]

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226. *See* David Aron, *"Internal" Business Practices?: The Limits of Whistleblower Protections for Employees who Oppose or Expose Fraud in the Private Sector*, 25 A.B.A. J. LAB. & EMP. L. 277, 296 (2010).

227. *See* Popovich, *supra* note 219.

228. *See Why Whistleblowers Wait: Recommendations to Improve the Dodd Frank Law's SEC Whistleblower Awards Program*, GOV'T ACCOUNTABILITY PROGRAM 9-10 (Feb. 18, 2016), https://whistleblower.org/wp-content/uploads/2018/12/GAP_Report_Why_Whistleblowers_Wait.pdf.

229. *See* Ruth Ann Strickland, Whistleblowers, MIDDLE TENN. ST. U. (2009), https://www.mtsu.edu/first-amendment/article/1029/whistleblowers (acknowledging the existence of federal laws and state statutes, as of 2009, that protect whistleblowers).

230. Tanya M. Marcum & Jacob Young, *Blowing the Whistle in the Digital Age: Are you Really Anonymous? The Perils and Pitfalls of Anonymity in Whistleblowing Law*, 17 DEPAUL BUS. & COMM. L.J. 1, 3 (2019).

231. *See e.g.*, *Occupational Safety and Health Administration Directorate of Whistleblower Protection Programs (DWPP) Whistleblower Statutes Summary Chart*, U.S. DEPT. OF LAB., https://www.whistleblowers.gov/sites/wb/files/2021-06/Whistleblower_Statutes_Summary_Chart_FINAL_6-7-21.pdf (last updated June 7, 2021) (outlining whistleblower statutes applicable to OSHA, remedies available, etc.).

232. *See infra* Part II.C.

C. *Understanding the Potential Effect of the* Potts *Decision on Whistleblowers Reporting Fraud Under the FCA*

The federal government relies on tools—such as the anti-retaliation provision of the FCA—to help mitigate whistleblowers' fears of retaliation.[233] Section 3730(h), similar to the anti-retaliation provisions over other statutory schemes, prohibits the firing, threatening, suspending, harassing, and other discrimination of whistleblowers who have alerted the federal government to the fraud of their employers.[234] Despite the availability of monetary compensation for successfully litigated or settled fraud allegations, the remedy may be limited in effectively incentivizing whistleblowers only where the "costs" of blowing the whistle outweigh the possible benefits of doing so.[235]

Though the act of whistleblowing is said to be heavily influenced by an individual's sense of morality,[236] whistleblowers are faced with a dilemma in that they must weigh their moral and ethical concerns with the personal consequences that they may be subject to as a result.[237] Moreover, whistleblowers may be more compelled to report wrongdoing where they are personally victimized by said wrongdoing.[238] Consequently, where the effects of the wrongdoing are indirect—such as in circumstances of fraudulent misrepresentations to the federal government—individuals are statistically far less likely to report it.[239] This is where incentives and heightened protections may nab a crucial role in encouraging individuals to come forward with knowledge of misconduct.[240]

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233. *See* Mileikowsky & Lee, *supra* note 205, at 29-30; *see also* John T. Boese, *Fundamentals of the Civil False Claims Act and Qui Tam Enforcement*, 11th NAT'L INST. ON THE CIV. FALSE CLAIMS ACT AND QUI TAM ENF'T A-1 (Jan. 2016), http://www.fcba.org/wp-content/uploads/2016/01/11-2016-Fundamentals.pdf.

234. *See* 31 U.S.C. § 3730(h)(1); *see also* Hesch, *supra* note 67, at 56-62.

235. *See* Robert Howse & Ronald J. Daniels, *Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy*, U. PA. SCHOLARLY COMMONS 525, 527-32 (1995), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1003&context=law_series.

236. *See* James A. Dungan et al., *The Power of Moral Concerns in Predicting Whistleblowing Decisions*, 85 J. EXPERIMENTAL SOC. PSYCH. 1, 2 (2019).

237. *See id.* at 10; *see also* P.G. Cassematis & R. Wortley, *Prediction of Whistleblowing or Non-reporting Observation: The Role of Personal and Situational Factors*, 117 J. BUS. ETHICS 615 (2012) (evaluating the cost-benefit analysis of whistleblowers).

238. *See* Cassematis & Wortley, *supra* note 237, at 628 ("... perceived victimisation was the most influential predictor. Categorisation as a whistleblower was slightly over three times more likely when the participant believed they were personally victimized victimised.").

239. *See id.*

240. *See* Howse & Daniels, *supra* note 235, at 534-36.

Congress and the DOJ have relied heavily on the FCA's retaliation remedies and monetary rewards to incentivize whistleblowers[241] in an attempt to sway individuals who may have otherwise been hesitant to blow the whistle on their employers.[242] As the FCA has been determined to be the federal government's most functional tool in the recovery of misappropriated funds during the COVID-19 pandemic,[243] the success of the *qui tam* provision in said recovery will ultimately depend on the willingness of workers to bring such fraud to light.[244]

In large part, as much of the CARES Act relief has been allocated to the healthcare industry,[245] healthcare professionals such as doctors and nurses may be expected to uncover fraud occurring in hospitals and clinics.[246] Understanding this, and knowing that healthcare practitioners are particularly vulnerable to being blacklisted from their professions,[247] the federal government is left with this enduring issue: will those individuals be deterred from whistleblowing where there is such a significant gap in protections against retaliation?

While increasingly complicated in the context of the COVID-19 pandemic and heightened government spending, this issue is not so delimited.[248] The gap in whistleblower protections—recognized and resolved only by the Sixth Circuit in *Felten*, and failing the plaintiff in the Tenth Circuit *Potts* case—leaves whistleblowers susceptible to blacklisting without recourse.[249] This issue, exposed by the case of *Vander Boegh v. EnergySolutions, Inc.*,[250] has the capacity to diminish the FCA's "incentive to report illegal or unethical activity [that] is heavily outweighed by the threat of . . . blacklisting," if there is no legislative recourse.[251]

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241. *See* Helmer, *supra* note 11, at 1272-77 (discussing the efforts of the DOJ and Congress in expanding the FCA protections and incentives for the purpose of multiplying recoveries).

242. *See id.* at 1281-82.

243. *See* Grassley, *supra* note 1 (Senator Grassley's press release); *see also* Bell & Miller, *supra* note 2, at 298-300.

244. *See generally* Cassematis & Wortley, *supra* note 237, at 616 (discussing the cost-benefit analysis and factors effecting an individual's decision to blow the whistle on their employer).

245. *See generally* Bell & Miller, *supra* note 2 (discussing several programs developed and funded by the federal government in response to the COVID-19 pandemic including the Paycheck Protection Program and the Medicare and Medicaid programs).

246. *See id.* at 306 (explaining that the government relies on those seeking payment to uncover fraud and the importance of whistleblowers efforts to limit fraud against healthcare programs).

247. *See supra* Part II.B.i.

248. *See generally* Bell & Miller, *supra* note 2, at 274-75 ("In the midst of... the Covid-19 pandemic... Congress and the American people depend on whistleblowers to tell us about wrongdoing... as the government gets bigger, the potential for fraud and abuse gets bigger.").

249. *See* Brief in Opposition, *supra* note 168, at 7.

250. Vander Boegh v. EnergySolutions, Inc. 772 F.3d 1056, 1063 (6th Cir. 2014).

251. Liane Rousseau, Comment, *Whistle While You Work: The Gap in Whistleblower Protection Exposed by the Sixth Circuit*, 76 OHIO STATE L.J. FURTHERMORE 147, 152 (2015).

III. TIME FOR ANOTHER AMENDMENT TO THE FALSE CLAIMS ACT

Even though inter-circuit splits may be considered an important part in the process of legal development,[252] without resolution said splits may have harmful effects.[253] Consequences may include:

> [H]arming the principle of equal treatment under the law. . . On civil issues, they can make it difficult for business to operate in multiple jurisdictions, or to make contracts that are enforceable nationwide; on criminal issues, circuit splits can make it hard for the government to treat all violators equally. Splits also invite circuit shopping and additional litigation, and possibly cast doubt on the legitimacy of the legal system itself.[254]

In the absence of Supreme Court guidance, the resolution of this issue—the mending of the gap in protections for whistleblowers from post-employment retaliation—will require legislative action. Such legislation should take the form of an amendment to the existing False Claims Act.

A. *Pending Legislation*

Of the arguments made in the *Felten* Opposition Brief, was the contention that the petition for writ of certiorari should be denied because of legislation pending in Congress to amend the FCA.[255] This legislation was introduced on July 22, 2021 by Senator Charles Grassley (R-IA),[256]

252. *See* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 450 (2019).

253. *See id.* at 450-51.

254. *Id.* at 451 (internal references omitted); *see also* Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 990 (2020) ("Circuit splits undermine the uniformity, consistency, and predictability of federal law.").

255. *See* Brief in Opposition, *supra* note 168, at 7.

256. Also introduced by Senator Grassley in 2021 was the Administrative False Claims Act, "which updates the law governing smaller, and potentially more frequent, instances of fraud committed against the government." Grassley, *supra* note 1.

with bipartisan support,[257] and was named the False Claims Amendments Act of 2021 (hereinafter "the Amendments").[258]

Senator Grassley has been a leading advocate for strengthening the FCA since 1986.[259] Not only was he a leading advocate for the 1986 amendments, but he was also an original co-sponsor to the Fraud Enforcement and Recovery Act of 2009, which provided additional improvements to the Act.[260] Of the Senator's motivations for the Amendments, he asserts, "this bill isn't about fighting an abstract thing called fraud. It is about making sure that the taxpayer is getting what he pays for. Every dollar that is stolen . . . should have been spent on another good or service."[261]

After a vote by the Senate Judiciary Committee, the bill was placed on the Senate Legislative Calendar on November 16, 2021.[262] Among several proposed revisions to the Act,[263] the Amendments will, if adopted,

257. Co-sponsors of the Act include Senators Patrick Leahy (D-VT), John Kennedy (R-LA), Richard Durbin (D-IL), and Roger Wicker (R-MS). *See id.*; False Claims Amendments Act of 2021, S. 2428, 117th Cong. (2021). *But see* Mary Jane Wilmoth, *Why Did Seven Senators Oppose the False Claims Amendments Act of 2021?*, THE XII NAT'L L. REV., (Nov. 3, 2021), https://www.natlawreview.com/article/why-did-seven-senators-oppose-false-claims-amendments-act-2021 (describing the reasons for which several Senators—all of which are of the Republican party—have opposed the Amendments). The bill is also endorsed by Taxpayers Against Fraud, the National Whistleblower Center, the Project on Government Oversight, and the Government Accountability Project. *See* Grassley, *supra* note 1 (Senator Grassley's press release). Though there are a number of opponents to the Amendments, most criticisms have been raised in response to other provisions of the bill, and not the provision that would provide former employees with a right of action. *See* Brett Johnson & Vinnie Lichvar, *The False Claims Amendment Act of 2021—A New Paradigm in Contracting with the Government?*, CORP. COMPLIANCE INSIGHTS (Aug. 31, 2021), https://www.corporatecomplianceinsights.com/false-claims-amendment-act-2021-government-contracting/.

258. False Claims Amendments Act of 2021, S. 2428, 117th Cong. (2021).

259. *See* Press Release, Dep't of Just., Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986, (Jan. 31, 2012), https://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986.

260. *See id.; see also* Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong. (2009) (enacted).

261. Press release, Chuck Grassley, Senator, Grassley Statement at An Executive Business (Oct. 28, 2021), https://www.grassley.senate.gov/news/remarks/grassley-statement-at-an-executive-business-meeting.

262. *See* S. 2428.

263. An earlier version of the amendment would have: (1) revised the FCA's evidentiary standards to allow "the government or [a] relator to establish materiality by a preponderance of the evidence . . . [and] defendant may rebut an argument of materiality by clear and convincing evidence," (2) required, where the government elects not to intervene in an FCA action, the court to "order the requesting party, upon a motion by the government, to pay the government's attorney's fees and other expenses for responding to the party's discovery requests," (3) placed the burden on the government to demonstrate reasons for dismissing an action over the objections of the relator, and allowing the relator the "opportunity to show that the reasons are fraudulent, arbitrary and capricious, or contrary to law," and (4) require the Government Accountability Office to report on the FCA's effectiveness. S. 2428.

"extend relief from retaliatory actions to former employees."[264] The bill proposes that the improved Section 3730(h)(1) would read as such:

> Any current or former 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, or agent under this section or other efforts to stop 1 or more violations of this subchapter.[265]

This language would, in essence, render moot the issue in controversy between the Tenth and Sixth Circuits.[266]

With the passage of the Amendments, no longer could arguments be made that former employees were not meant to be included within the "plain meaning" of the statute's anti-retaliation provision.[267] Furthermore, this provision may help to alleviate reliance on the analysis of canons of construction in order to postulate or speculate the legislative intent,[268] as this will be expressly stated in the provision.

While it is arguable that this provision of the Amendments should be enacted by Congress to mend the existing gap in protections, and may be effective in ensuring that whistleblowers are protected from post-employment retaliation by way of a right of action, the following section of this Note will examine two state false claims statutes with alternative language. The section will further examine these statutes corresponding anti-retaliation provisions, and compare the scope of their safeguards with that of the federal FCA.[269]

B. *State Statute Comparison*

Section 1909 of the Social Security Act[270] requires "that the Inspector General of the Department of Health and Human Services, in consultation with the Attorney General," evaluate the effectiveness of state false

264. *Id.*

265. *Id.* ("Section 3730(h)(1) of Title 31, United States Code, is amended by inserting 'current or former' after 'Any'."); *see also* 31 U.S.C. § 3730(h)(1) (providing the language of the currently enacted version of the anti-retaliation provision of the FCA).

266. *See* discussion *supra* Part I.B – C.

267. *See supra* p. 585; *see also supra* notes 148-49.

268. *See supra* Parts II.C (discussing the use of canons of construction in the *Potts* decision and Judge Griffin's dissenting opinion in *Felten*).

269. *See infra* Section III.B.

270. 42 U.S.C. § 1396h.

claims provisions.[271] Upon a state's request, the Office of Inspector General ("OIG") is to determine whether the state's False Claims Act meets certain requirements, as provided by Section 1909, fulfillment of which will qualify that state for specific financial incentives.[272] Of the twenty-nine states[273] that have requested this review of the OIG, only twenty-two have been approved for the incentive.[274]

One of the requirements provided by Section 1909 requires the state law to "contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as those described [in the federal statute]."[275] All twenty-two states, as per the conditions for the incentive, have satisfied this requirement.[276] Some states have accomplished this by enacting statutes nearly identical to the current federal FCA,[277] and others have passed statutes that are modeled off of the federal FCA,[278] but may be more effective in "rewarding and facilitating" whistleblowers.[279]

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271. *See id.* § 1396h(b).

272. *See id.* § 1396h(a) ("[I]f a State has in effect a law relating to false or fraudulent claims that meets the requirements . . . the Federal medical assistance percentage with respect to any amounts recovered under a State action . . . shall be decreased by 10 percentage points.").

273. This number reflects the number of states who have adopted a false claims act containing a *qui tam* provision. *See State False Claims Acts*, GREENE LLP, https://www.falseclaimsattorneys.com/state-false-claims-acts.html (last visited Feb. 26, 2022).

274. *See State False Claims Act Reviews*, U.S. DEP'T OF HEALTH & HUM. SERVICES OFF. OF INSPECTOR GEN., https://oig.hhs.gov/fraud/state-false-claims-act-reviews/ (last visited Feb. 26, 2022). Of the remaining states which have not requested review, many have not done so simply because their state has not adopted a version of a false claims act or a *qui tam* provision. *See also* GREENE LLP, *supra* note 273 (listing the States without a false claims act or a *qui tam* provision and noting that several have passed "generic Medicaid anti-fraud statutes," and many are considering the enactment of a state false claims act).

275. § 1396h(b)(2) (alteration in original).

276. *See State False Claims Act Reviews*, *supra* note 274.

277. *See* Pamela Bucy et al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 CARDOZO L. REV. 1523 app. A at 1552-61, (2010); *see, e.g.*, California False Claims Act, CAL. GOV'T CODE §§ 12650-12653 (West 2018). The anti-retaliation provision of the California FCA is nearly identical to the federal FCA. *Compare id.* § 12653(a), *with* 31 U.S.C. § 3730(h)(1).

278. *See* Bucy et al., *supra* note 277, app. A at 1552-61 (noting that the NY false claims statute is "[g]enerally modeled on [the] federal False Claims Act.") (alteration in original).

279. *See e.g.*, New York False Claims Act, NY STATE FIN. §§ 187-194 (2018); *see generally* 42 U.S.C. § 1396h(b)(2) (explaining that States that have false claims acts "that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims" as the federal FCA qualify for a financial incentive).

i. New York's False Claims Act

The anti-retaliation provision of the New York False Claims Act,[280] similar to the Amendments proposed by Senator Grassley, provides a remedy for post-employment retaliation by expressly indicating the words, "current or former," before its list of relators eligible for remedies.[281] Aside from this similarity, there are also several key differences between the New York statute's anti-retaliation provision and the federal statute that would exist upon adoption of the Amendments.[282]

For one, the New York provision expressly provides a remedy for retaliation in both private and public employment.[283] The federal FCA is currently silent as to this distinction, and the issue, whether a public employee may commence an FCA lawsuit and retaliation claim, has primarily been left up to the courts to decide.[284] While courts have addressed this issue and have not outright barred claims brought by government employees simply because they work for the government,[285] such actions may be complicated where government employees face unique difficulty in establishing themselves as an "original source," as required by the FCA.[286]

The New York False Claims Act also provides, unlike the federal FCA, a remedy for job applicants who have been discriminated against by prospective employers.[287] Though this Note has focused primarily on

280. The provision reads:

> Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of this article, shall be entitled to all relief necessary to make the employee, contract or agent whole...

NY STATE FIN. § 191(1). The provision also provides, unlike the federal FCA, for the hiring of job applicants not hired due to their report of fraud. *See id.* § 191(1)(b).

281. *Id.* § 191(1).

282. *Compare id.* § 191(1), *with* 31 U.S.C. § 3730(h).

283. *See id.* NY STATE FIN. § 191(1).

284. *See, e.g.*, Little & Arnold v. Shell Exploration & Prod., 290 F.3d 282, 294 (5th Cir. 2012) (holding that employees of the federal government have standing to commence a FCA *qui tam* action, but also noting potential issues that may arise with regards to the "original source" requirement).

285. *See id.* at 288-89.

286. *See id.* at 294. For more information about the "original source" requirement, *see also* Joel D. Hesch, *Restating the Original Source Exception to the False Claims Act's Public Disclosure Bar in Light of the 2010 Amendments*, 51 U. RICH. L. REV. 991 (2017).

287. *See* NY STATE FIN. § 191(1). The respective remedy for this retaliation/discrimination includes, the "hiring, contracting or reinstatement to the position such person would have had but for the discrimination or to an equivalent position." *Id.* § 191(1)(b).

advocating for the expansion of whistleblower protections to include a remedy for post-employment retaliation, former employees often become job applicants who may then suffer the same consequences of their whistleblowing.[288] Similar to the fear of employees and former employees being blacklisted from their work industry,[289] is the fear of job applicants that "prospective employers may avoid hiring known whistleblowers ... due to the perception that they are 'disloyal.'"[290]

The New York False Claims Act expands the class of individuals protected. New York is currently the only state whose "false claims statute provides explicit retaliation protections for job applicants."[291] Despite criticisms,[292] similar amendment to the federal FCA by the United States Congress should be considered as a means to further the efficacy of the *qui tam* provision.[293] Supporters of the expansion have recognized and advocated that such legislative action is necessary to effectively incentivize whistleblowers and continue to advocate for such action.[294]

ii. Colorado's False Claims Act

The Colorado Medicaid False Claims Act[295] was determined to meet the requirements of Section 1909 and was approved by the OIG in December of 2016.[296] Though satisfactory in accordance with Section 1909, the statute's reach is limited to the report of fraudulent Medicaid claims and the healthcare industry.[297]

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288. *See* Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 666-67 (2018).

289. *See supra* Part II.B.i.

290. Eisenstadt & Pacella, *supra* note 288, at 666.

291. *Id.* at 697.

292. *See, e.g.*, Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1263-74 (2008) (noting that while intervention may effectively incentivize whistleblowers to come forward with their reports of fraud, the "consequences of this are two-fold: first, too many non-meritorious qui tam suits are litigated, and second, relators are able to exert undue influence over the direction of FCA enforcement and the expansion of FCA liability.").

293. *See* Rousseau, *supra* note 251, at 152.

294. *See id.* ("In absence of legislative action extending whistleblower protection beyond its current scope, the incentive to report illegal or unethical activity is heavily outweighed by the threat of job retaliation or blacklisting."). Also noted, is that "[s]ocietal interests in reporting illegal or unethical activity... far outweigh any complications that would result from expanding the definition of 'employee' [to include job applicants]."). *Id.*

295. Colorado Medicaid False Claims Act, COLO. REV. STAT. §§ 25.5-4-304 – 25.5-4-310 (2013).

296. *See State False Claims Act Reviews, supra* note 274.

297. *See* REV. STAT § 25.5-4-305.

To address this inadequacy, in January of 2022 the Colorado legislative session introduced a more comprehensive bill titled the Colorado False Claims Act ("CFCA").[298] The bill was signed into law on June 7, 2022.[299] The statute has a *qui tam* provision similar to that of the federal FCA,[300] and does not limit claims of fraud to just those within the healthcare industry or Medicaid.[301] In addition, the CFCA's anti-retaliation provision has unique differences from that of the federal FCA and other state statutes which provide that:

> An employee, contractor, or agent is entitled to all relief necessary to make that individual whole if the individual is discharged, demoted, suspended, threatened, harassed, intimidated, sued, defamed, blacklisted, or in any other manner retaliated against or discriminated against in the terms and conditions of the individual's employment, contract, business or profession by the defendant or by any other person because of lawful acts done by the individual or associated others in furtherance of an action brought in pursuant to this section or in furtherance of an effort to stop any violation, or what the individual reasonably believes to be a violation of [the Colorado False Claims Act].[302]

Of the main differences between this provision of the CFCA and that of the proposed federal Amendments, the CFCA has bolstered its list of discriminatory conduct to provide specific reference to misconduct such as intimidation, defamation, and blacklisting.[303] This augmented list, accompanied by reference to "discrimina[tion] . . . in the terms and conditions of the individual's . . . business or profession," makes clear the intent to include former employees—and potentially even job applicants[304]—among the protected class.[305] This inclusive list naturally counteracts any

298. Colorado False Claims Act, H.B. 22-1119, 73d Gen. Assemb. (Colo. 2022) (as introduced to Colo.'s H. Comm. on the Judiciary, January 21, 2022).

299. *See* Mary Jane Wilmoth, *Governor Polis Signs Colorado False Claims Act into Law*, NAT'L L. REV. (June 9, 2022), https://www.natlawreview.com/article/governor-polis-signs-colorado-false-claims-act-law.

300. *See id. Compare* Colo. H.B. 22-1119 § 24-31-1203(4), *with* 31 U.S.C. § 3730(b), (c). *Compare* Colo. H.B. 22-1119 § 24-31-1204(4), *with* § 3730(b)-(c).

301. *See* Colo. H.B. 22-1119 § 24-31-1203.

302. *Id.* § 24-31-1204(9)(b).

303. *See id.*

304. Though the CFCA's anti-retaliation provision does not explicitly refer to former employees or job applicants, the provision may potentially be construed to apply to job applicants because the discrimination is not limited to misconduct that occurred "in the terms and conditions of employment." *See generally* Eisenstadt & Pacella, *supra* note 288, at 687-91 (discussing the Vander Boegh case and the limits of the current FCA where only those within an employee-employer relationship are protected by the anti-retaliation provision).

305. *See id.*

arguments—like those made by the *Potts* court—that an "associated-words" / *noscitur a sociis* analysis would reject such claims.[306]

The anti-retaliation provision presented by the CFCA is unlike that of any other state.[307] Though the provision is unique and has not yet been reviewed by the Colorado courts, the provision illustrates what all-inclusive whistleblower protection may look like at the federal level.[308]

C. *Re-envisioning the False Claims Act*

Though the False Claims Amendments Act of 2021 has been calendared for Senate review, enactment of which would place "former employees" among those eligible for relief from retaliation, a more comprehensive amendment to the anti-retaliation provision may better protect the whistleblowers that the federal government so greatly relies on.[309] Though the general framework of the existing federal FCA statute and the various state false claims statutes have proven successful for many whistleblowers who suffered retaliation,[310] there are several improvements which can and should be made.[311]

Congress should not only adopt the changes of the above-mentioned Amendments,[312] but should also further expand the class of protected whistleblowers to include job applicants, as well as the listed discriminatory misconduct.[313] The proposed amendments to the anti-retaliation provision are as follows:

(h) *Relief from Retaliatory Actions*. Any current or former employee, contractor, or agent shall be entitled to all relief necessary to make that individual whole if the individual is discharged, demoted, suspended, threatened, harassed, intimidated, sued, defamed, blacklisted, or in any other manner retaliated against or discriminated against in the terms and conditions of the individual's employment, contract, business or profession by the employer, or a prospective employer, because of lawful acts

306. *See* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F. 3d 610, 614-15 (10th Cir. 2018).

307. No other state false claims act contains an anti-retaliation provision that appears in this way. For the list of OIG-approved statutes containing links and citations to each statute, *see* State False Claims Act Reviews, *supra* note 274.

308. *See* Rousseau, *supra* note 251, at 152.

309. *See supra* Parts II.B-C.

310. *See supra* notes 59-88, and accompanying text.

311. *See supra* Parts III.A-B.

312. *See supra* Part III.A.

313. *See supra* Parts III.B.i-ii.

done by the individual under this section or other efforts to stop one or more violations of this subchapter.

This provision would greatly expand the claims for which relief may be granted by the federal courts, and most importantly would provide adequate protections and incentives for whistleblowers with knowledge of fraud.[314] Absent a clear and unambiguous enumeration of all protected persons and every discriminatory act to which the statute should apply, the courts, like the *Potts* court, can decide for themselves who and what the legislature intended to protect.[315] By combining the language of the proposed federal Amendment with that of New York's state False Claims Act and the CFCA, the gap in whistleblower protections from post-employment retaliation under the FCA will be effectively mended.[316]

CONCLUSION

Congress should enact this Note's proposed federal FCA amendment to create a more effective statute and to mend the existing gap in whistleblower protections.[317] The current anti-retaliation provision leaves whistleblowers susceptible to post-employment retaliation by leaving "employers with the opportunity to simply terminate a whistleblower's employment in order to further" blacklist and defame that individual.[318]

The proposition in this Note would not only provide a remedy for those whistleblowers, but may also further incentivize whistleblowers to come forward with knowledge of fraud.[319] The False Claims Act has played a vital role in the recovery of funds as government spending has increased in the past,[320] and as it is now playing a vital role in the recovery of COVID-19 relief funds,[321] it is important for Congress to adequately incentivize these whistleblowers by enacting the provision proposed by this Note.[322]

314. *See supra* Part I.B.
315. *See supra* Part I.B.
316. *See supra* Part III.A.
317. *See supra* Part III.A.
318. *See supra* Part I.C.
319. *See supra* pp. 26-28.
320. *See supra* pp. 1-5.
321. *See* Grassley, *supra* note 1.
322. *See supra* Part I.A.

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