Blacklisting Allowed? Whether the False Claims Act Protects Former Employees from Retaliation

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Employers commonly blacklist whistleblowers. Despite its frequency, blacklisting remains unaddressed in many federal whistleblower statutes. These statutes typically contain antiretaliation provisions protecting "employees," but since victims of blacklisting are former employees, protection under federal law is uncertain. In Robinson v. Shell Oil Co.*, the Supreme Court interpreted the term "employee" in the antiretaliation provision of Title VII of the Civil Rights Act to include former employees. Courts disagree, however, on* Robinson*'s relevance in interpreting the term "employee" in the antiretaliation provisions of other federal whistleblower statutes. A circuit split has emerged exemplifying this tension: the Sixth Circuit recently found that the term "employee" in the False Claims Act's antiretaliation provision includes former employees. The Tenth Circuit previously ruled otherwise. This Note offers the following contributions: (1) this circuit split reflects a broader disagreement on the role of* Robinson *in interpreting antiretaliation provisions, and (2) the* in pari materia *rule can resolve the split, as well as provide courts a clear path to applying* Robinson *to antiretaliation provisions in other federal statutes.*

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INTRODUCTION

In a room where people unanimously maintain a conspiracy of silence, one word of truth sounds like a pistol shot.

—Czesław Miłosz[1]

Whistleblowers Frances Haugen of Facebook and Sherron Watkins of Enron feared their reputations and future career prospects would suffer when they first came forward with evidence of misconduct by their employers. Haugen "knew that [Facebook] could do horrible things to [her] . . . [including] fund troll armies."[2] Watkins worried that being labeled a "whistleblower"[3] would make it more difficult for her to work in Corporate America again.[4] These fears were well-founded: an estimated two-thirds of whistleblowers face blacklisting when seeking new employment.[5] No matter their age, gender, educational attainment, or experience,[6] employees risk blacklisting after publicly accusing their employers of misconduct.

Blacklisting occurs when a former employer gives negative references to a whistleblower's prospective employers or spreads

1. Czesław Miłosz, *Nobel Lecture*, THE NOBEL PRIZE (Dec. 8, 1980), https://www.nobelprize.org/prizes/literature/1980/milosz/lecture [https://perma.cc/66N9-ZRYA].

2. Mark Scott, *Facebook Whistleblower: "They Could Do Horrible Things to Me,"* POLITICO (Nov. 9, 2021), https://www.politico.eu/article/facebook-whistleblower-frances-haugen-brussels-facebook/ [https://perma.cc/NQD9-2EXB] (Haugen said of Facebook, "I know that they could do horrible things to me. . . . They could, you know, tarnish my name. They could fund troll armies. They could sue me. There's lots of things they could do.").

3. A whistleblower is "one who reveals something covert or who informs against another," especially "an employee who brings wrongdoing by an employer or by other employees to the attention of a government or law enforcement agency." *Whistleblower*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/whistleblower [https://perma.cc/YK5L-GM5A].

4. Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 666 (2018) ("At a public event in 2014, when asked what her personal life has been like since blowing the whistle, Watkins acknowledged that her label of 'whistleblower' is synonymous in society with that of 'troublemaker,' making it difficult for her to ever work in 'Corporate America' again.").

5. Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information about Organization Corruption*, 26 WORK & OCCUPATIONS 107, 109, 120 (1999) (finding that in one survey of 761 U.S. whistleblowers, 64 percent reported being blacklisted and 69 percent reported being criticized or avoided by co-workers).

6. *Id.* at 122–23 (finding that Black whistleblowers experienced a higher rate of retaliation than whistleblowers of other races).

rumors about the whistleblower in the job market.[7] But the consequences do not stop there. Even after whistleblowers leave the employment of the accused, they face a number of other potential consequences, including breaks in work history, declines in earnings, stigmatization, and a need to explain to potential employers the circumstances of prior terminations and departures.[8] For those who have recently discovered misconduct by their employer, blacklisting and these other feared consequences serve as strong deterrents to coming forward.[9]

Despite its frequency and severity, blacklisting and other retaliatory acts against former employees generally receive no explicit mention in federal whistleblower statutes.[10] These statutes often contain antiretaliation provisions protecting "employees," but since victims of blacklisting are generally *former* employees, protection from this type of retaliation is uncertain.[11] The Supreme Court addressed this uncertainty in *Robinson v. Shell Oil Co.*, interpreting the term "employee" in the antiretaliation provision in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a), to cover former employees.[12] Some courts have relied on *Robinson* to interpret antiretaliation provisions in other statutes.[13] Other courts have not.[14]

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7. *See, e.g.*, Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997) (finding that a negative job reference given in retaliation for filing an EEOC complaint violated Title VII despite no effect on the prospective employer's hiring decision); Hillig v. Rumsfeld, 381 F.3d 1028, 1031–35 (10th Cir. 2004) (finding an employee's retaliation claim against employer for giving negative references to be actionable, even if an employee could not prove but-for causation).

8. *See* Eisenstadt & Pacella, *supra* note 4, at 668–69 (noting that these realities make whistleblowers less attractive to future employers and quoting one whistleblower who reported that "[p]rospective employers assumed [he] [was] not to be trusted. . . . It's like there is a bull's eye painted on you.").

9. *See id.* at 666–68 ("The fear of damaging future employment prospects is among the most significant disincentives for would-be whistleblowers, as prospective employers may avoid hiring known whistleblowers altogether due to the perception that they are disloyal." (internal quotations omitted)).

10. *See id.* at 675–91 (analyzing the Sarbanes-Oxley Act, Dodd-Frank Act, and False Claims Act antiretaliation provisions and describing their lack of explicit mention of blacklisting or former employees).

11. *See id.* ("[C]ase law interpreting [Sarbanes Oxley's antiretaliation provision] reveals a division among federal courts, many of which refuse to follow . . . regulatory guidelines.").

12. 519 U.S. 337 (1997). For a detailed summary of the case and the Court's reasoning, see *infra* text accompanying notes 62–75.

13. *See, e.g.*, Kshetrapal v. Dish Network, LLC, 90 F. Supp. 3d 108, 112–14 (S.D.N.Y. 2015) (finding that the Sarbanes-Oxley Act holds employers liable for post-employment retaliation); Smith v. BellSouth Telecomms, Inc., 273 F.3d 1303, 1307–13 (11th Cir. 2001)

A circuit split on the antiretaliation provision in the False Claims Act (FCA), 31 U.S.C. § 3730(h)(1), exemplifies this tension. The FCA is the federal government's primary means of policing against waste, fraud, and abuse by federal contractors.[15] Employees can file qui tam suits against their employers on behalf of the U.S. government.[16] To protect these whistleblowers, the FCA includes an antiretaliation provision, § 3730(h)(1), which holds employers liable for harassing, discharging, or discriminating against employees who file FCA lawsuits.[17] In 2022, the Sixth Circuit found that the term "employee" in § 3730(h)(1) includes former employees.[18] The Tenth Circuit in 2018, however, ruled otherwise.[19]

How other circuits and the Supreme Court answer this interpretative question has two practical implications. First, whether the FCA protects against blacklisting may affect the frequency with which employees of federal contractors report waste, fraud, and abuse in the future.[20] Defendants contend, however, that protecting former employees from retaliation exposes businesses to greater, even unbounded, liability.[21]

(finding as reasonable the Department of Labor's interpretation of the Family and Medical Leave Act as holding employers liable for post-employment retaliation).

14. *See, e.g.*, Dellinger v. Sci. Applications Int'l Corp., 649 F.3d 226, 231 (4th Cir. 2011) (finding that the antiretaliation provision of the Fair Labor Standards Act does not protect prospective employees against retaliation).

15. *See* Lasalle, *infra* note 27, at 497 (describing the overall role of the FCA).

16. 31 U.S.C. § 3730(c). For further explanation of qui tam suits, see United States v. Quest Diagnostics Inc., 734 F.3d 154, 158 n.2 (2d Cir. 2013) ("Qui tam is short for '*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,' which means 'who pursues this action on our Lord the King's behalf as well as his own.'" (quoting Rockwell Int'l. Corp. v. United States, 549 U.S. 457 (2007)).

17. § 3730(h)(1).

18. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431–35 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022). For a detailed summary of the case, the majority opinion, and the dissenting opinion, see *infra* text accompanying notes 84–109 and 131–134.

19. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 618 (10th Cir. 2018). For a detailed summary of the case and opinion, see *infra* text accompanying notes 110–130.

20. Eisenstadt & Pacella, *supra* note 4, at 667–68 (discussing the potential effects of blacklisting on reporting frequency).

21. An amicus brief filed by various hospital associations in response to the petition for a writ of certiorari in *Felten* outlines the reasons why covering former employers "exposes employers to virtually-unbounded retaliation liability." Brief for Am. Hosp. Ass'n et al. as Amici Curiae Supporting Petition for Writ of Certiorari at 4, William Beaumont Hosp. v. United States *ex rel.* Felten, No. 21-443 (Oct. 14, 2021), 2021 WL 4864667. These reasons include the availability of potentially high damages, the plaintiff-friendly causation standards applied in some circuits, the expansive terms defining "protected

Recent legislative developments have raised the stakes. The new Infrastructure Investment and Jobs Act, which doles out $1 trillion dollars to contractors, construction companies, and state governments across the country, increases the number of federal dollars vulnerable to fraud and abuse.[22] The Inflation Reduction Act, meanwhile, invests billions in onshore clean energy manufacturing, rural development and conservation, and renewable fuels.[23] Second, whether "employee" includes former employees in the FCA will likely influence how courts interpret antiretaliation provisions with similar language in other statutes across the federal code.[24]

This Note proposes a solution to reconcile the circuit split: courts should read the antiretaliation provisions of Title VII and the FCA *in pari materia*. To lay the groundwork, Part I describes the history of § 3730(h)(1), compares it with other antiretaliation provisions, and outlines the impact of *Robinson*, a seminal case on the interpretation of "employee" as used in federal whistleblower statutes. Part II describes the split between the Sixth and Tenth Circuits. Part III introduces and explains the *in pari materia* rule. Part IV then applies the *in pari materia* rule to resolve this split.

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activity" in the FCA, and the risk of a former employee bringing a retaliation suit decades after termination. *Id.* at 4–15.

22. Mary Clare Jalonick, *Roads, Transit, Internet: What's in the Infrastructure Bill*, ASSOCIATED PRESS (Nov. 6, 2021), https://apnews.com/article/joe-biden-technology-business-broadband-internet-congress-d89d6bb1b39cd9c67ae9fc91f5eb4c0d [https://perma.cc/FXQ2-NR6G]. The law's largest appropriations include $110 billion for roads and bridges, $65 billion to upgrade the electric grid, $66 billion for rail, $65 billion for broadband, $55 billion for water quality and wastewater infrastructure, and $39 billion for public transit. *Id.*

23. *See What's in the "Inflation Reduction Act" and What's Next for Its Consideration?*, BGR GRP. (Aug. 12, 2022), https://bgrdc.com/whats-in-the-inflation-reduction-act-and-whats-next-for-its-consideration/ [https://perma.cc/KQJ8-R22S] (including $1 billion in grants for energy efficient affordable housing, $2 billion in grants for auto manufacturers, $20 billion in loans for new clean vehicle manufacturing, $27 billion for green banks to provide incentives for clean energy technologies, $60 billion for environmental justice programs, $20 billion to support climate smart agriculture practices, $5 billion in grants to support forest resiliency programs, and $2.6 billion in grants for conservation and restoration of coastal habitats).

24. *See infra* Part I.C.

I. ANTIRETALIATION PROVISIONS AND THE FCA

Section 3730(h)(1) plays a particular role in the implementation of the FCA. But the provision is not an idiosyncratic component of the *United States Code*: dozens of statutes contain antiretaliation provisions. Part I.A describes the function of the FCA and the history of its antiretaliation provision. Part I.B identifies other antiretaliation provisions in the federal code and examines their variations from one another. Part I.C then discusses *Robinson*, a case interpreting Title VII's § 2000e-3(a), and its application by courts to antiretaliation provisions outside of Title VII.

A. THE FCA AND ITS ANTIRETALIATION PROVISION

The FCA is the federal government's primary means of detecting fraud in its programs.[25] Suits invoking the law have uncovered fraud in the healthcare, transportation, and national defense industries, among others.[26] Congress enacted the FCA during the Civil War as a response to rampant fraud by government contractors.[27] While the statute became weaker over the following century due to restrictions on private litigants,[28] Congress revamped the scheme in 1986 with amendments that eased substantive and procedural burdens on plaintiffs, increased

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25. *See* Press Release, U.S. Dep't of Just., Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 [https://perma.cc/75VU-R5WH] (noting that the FCA serves as "the government's primary civil tool to redress false claims for federal funds and property"); *see also* Scott Glass, Note, *Is the False Claims Act's First-to-File Rule Jurisdictional?*, 118 COLUM. L. REV. 2361, 2361 (2018).

26. *See id.* (describing FCA cases involving wartime contracts for food and trucks and kickback schemes by pharmaceutical companies); Ed Fishman et al., *DOJ Continues False Claims Act Enforcement in Transportation Industry*, JDSUPRA (Nov. 15, 2019), https://www.jdsupra.com/legalnews/doj-continues-false-claims-act-31980/ [https://perma.cc/ML3N-U9EC] (describing a recent trend of increased FCA settlements against transportation companies, including an $8.4 million dollar settlement with United Parcel Service (UPS) and the announcement of the DOJ's new Procurement Collusion Strike Force, signaling a renewed focus on fraud and antitrust crimes undertaken by government contractors).

27. *See* Frank Lasalle, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497, 497 (1995) (summarizing the history of the FCA).

28. S. REP. NO. 99-345, at 34 (1986).

penalties from double to treble damages, and increased the percentage of a judgment that a plaintiff can recover.[29] These changes sharpened the FCA's teeth and increased its effectiveness in policing government fraud, a result demonstrated by case filings.[30] While only twelve FCA suits were filed in 1987, 220 FCA suits were filed in 1994.[31] Between 1986 and 2020, the federal government recovered over sixty-four billion dollars under the Act.[32] Some commentators have voiced criticisms, arguing that these 1986 amendments impose excessive liability on recipients of federal funds.[33]

Scholars often attribute the FCA's efficacy to its unique complaint and reward system.[34] Employees of federal contractors (called "relators") may file a qui tam suit against their employers on behalf of the U.S. government.[35] Relators can receive fifteen to thirty percent of any damages recovered by the suit.[36] Because

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29. *See* Lasalle, *supra* note 27, at 500 nn.20–22.

30. *See id.* at 501, 501 n.29 (describing the increase in FCA suits since the amendments, as well as a statement by Sen. Charles Grassley).

31. *Id.* at 501.

32. *See* U.S. Dep't of Just., *supra* note 25.

33. *See, e.g.*, Lasalle, *supra* note 27, at 502–03 (arguing that the 1986 FCA amendments violate a defendant's Due Process rights given the punitive nature of penalties and low standard of proof). These amendments also coincide with a rise in the number of theories of liability for healthcare and hospital systems. *See* Joan H. Krause, *Promises to Keep: Health Care Providers and the Civil False Claims Act*, 23 CARDOZO L. REV. 1363, 1383 (2002) (concluding that federal law has been "stretched . . . to encompass activities that are increasingly removed from their factual and legal precursors," including "medical necessity fraud, fraud by billing consultants, violations of federal anti-referral statutes and quality-of-care requirements, and Cost Report fraud").

34. *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1246 n.2, 1247 n.3 (2012) (summarizing scholars praising the reward system and the results it has produced). Professor Engstrom further finds that specialized relator law firms and repeat relators enjoy higher rates of success in litigation and surface larger frauds compared to "one-shotters." *Id.* at 1249.

35. 31 U.S.C. § 3730(b) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.").

36. *See* § 3730(d)(1)–(2). If the United States intervenes, the relator's share can range from fifteen to twenty-five percent; if not, the range increases to twenty-five to thirty percent. *Id.* Professor Engstrom claims that this gradation incentivizes relators to continue their suit "where a politicized bureaucracy refuses to enforce." Engstrom, *supra* note 34, at 1273. *See also* U.S. *ex rel.* Simmons v. Samsung Electronics America, Inc., 116 F. Supp. 3d 575, 577–78 (D. Md. 2015) (noting that, while a relator receives the statutory minimum of fifteen percent by filing the suit, the court may raise that amount where, for example, the relator gathers additional documents and helps build a case against the defendant).

judgments can reach into the millions of dollars,[37] this bounty provides a substantial carrot to whistleblowers. Indeed, relators file the majority of FCA suits.[38]

In addition to offering rewards to whistleblowers, the FCA also supplies them with a shield: the antiretaliation provision.[39] In 1986, Congress added § 3730(h)(1), which allows relators to seek relief for being:

> discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.[40]

Prescribed relief for retaliation against relators includes reinstatement to the same level of seniority, doubled back pay with interest, and compensation for special damages resulting from discrimination, including attorneys' fees.[41]

Materials from § 3730(h)(1)'s legislative history indicate that Congress added the provision to incentivize employees who discover government fraud to come forward. A report from the Senate Judiciary Committee addressing § 3730(h)(1) (the "Senate Report") offers helpful commentary. Examining a Senate bill with materially identical language,[42] the Senate Report emphasizes that whistleblowers will seldom come forward without protection, strongly suggesting that the Committee adopted this provision with this purpose in mind.[43] The Senate

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37. *See, e.g.*, Press Release, U.S. Dep't of Just., Mail-Order Diabetic Testing Supplier and Parent Company Agree to Pay $160 Million to Resolve Alleged False Claims to Medicare (Aug. 2, 2021), https://www.justice.gov/opa/pr/mail-order-diabetic-testing-supplier-and-parent-company-agree-pay-160-million-resolve-alleged [https://perma.cc/GN7S-HTRV].

38. *See* CIV. DIV., U.S. DEP'T OF JUST., FRAUD STATISTICS - OVERVIEW 3 (Sept. 30, 2020), https://www.justice.gov/opa/press-release/file/1354316/download. The DOJ files the remaining minority of suits. *Id.*

39. An employee, however, need not file a qui tam suit in order to receive protection from retaliation. "Other efforts to stop 1 or more violations" of the FCA, § 3730(h)(1), can trigger coverage of the FCA's antiretaliation provision, such as sending a written complaint to an accreditor. *See, e.g.*, Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 612 (10th Cir. 2018).

40. § 3730(h)(1).

41. § 3730(h)(2).

42. *Compare* S. 1562, 99th Cong. § 3734 (1986), *with* § 3730(h)(1).

43. S. REP. NO. 99-345, at 34 (1986). The Senate Report states:

Report further cites several antiretaliation provisions in other federal statutes, such as the Clean Air Act, which guided the Committee in forming the FCA's protections.[44]

The Senate Report also directly addresses the subject of former employees, stating that "[a]s is the rule under Federal whistleblower statutes as well as discrimination laws, the definitions of 'employee' and 'employer' should be all-inclusive. Temporary, blacklisted or discharged workers should be considered 'employees' for purposes of this act."[45] The Senate Report's counterpart from the House Judiciary Committee lists but does not comment on a draft of § 3730(h)(1).[46] For the purposes of this Note, however, this legislative history is of questionable relevance, as scholars and courts have hotly debated the use of extratextual evidence in interpreting statutes.[47]

> The Committee recognizes that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation. With the provisions in section 3434, the Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence 'whistleblowers', as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.

Id.

44. *Id.* (citing also the Federal Surface Mining Act, Energy Reorganization Act, Safe Drinking Water Act, Solid Waste Disposal Act, Water Pollution Control Act, Comprehensive Environmental Response Compensation and Liability Act, and Toxic Substances Control Act). The Appendix *infra* includes the texts of these provisions.

45. *Id.*

46. H. REP. NO. 99-660 (1986).

47. Academics often divide interpretative philosophies into textualist and purposivist camps and contend that the former has propagated while the latter has diminished. *See* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 278–79 (2019) (framing statutory interpretation as a dichotomy of textualists and purposivists). *But see also* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1324 (2018) (noting that every surveyed judge except one said that they used legislative history); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 191 (2017) (anticipating the law "entering the post-'textualism vs purposivism' era").

B. ANTIRETALIATION PROVISIONS

The legislative history of § 3730(h)(1) illuminates the vast landscape of antiretaliation provisions across the federal code.[48] The Occupational Safety & Health Administration, for example, identifies twenty-five such provisions in statutes it enforces, including the Clean Air Act, Safe Drinking Water Act, Sarbanes-Oxley Act, and Consumer Financial Protection Act (also known as the Dodd-Frank Act).[49]

The enactment of these provisions reflects the public's changing view of whistleblowers in recent decades—from unsavory "snitches" to key players in the detection of fraud and misconduct.[50] The government depends on these insiders within the private sector to detect violations of the law that would otherwise be difficult to uncover by external audit or investigation.[51] Whistleblowers also provide "normative benefits," such as encouraging corporations to regulate themselves, more efficient government oversight of the private sector, and more functional internal compliance programs.[52] Many states have gone to even further lengths to protect whistleblowers through comprehensive legislation.[53]

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48. *See* S. REP. NO. 99-345, at 34; *see also* Courtney J. Anderson DaCosta, *Stitching Together the Patchwork:* Burlington Northern*'s Lessons for State Whistleblower Law*, 96 GEO. L.J. 951, 958 (2008) ("[A]t the federal level, while no comprehensive whistleblower statute exists, a subject-matter-specific cornucopia of whistleblower provisions attached to federal statutes—Sarbanes-Oxley, for example—protects employees who report certain types of illegal activity.").

49. OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER STATUTES SUMMARY CHART (June 7, 2021), https://www.whistleblowers.gov/sites/wb/files/2021-06/Whistleblower_Statutes_Summary_Chart_FINAL_6-7-21.pdf [https://perma.cc/X644-ZPKU] (not including the False Claims Act or Civil Rights Act).

50. *See* Eisenstadt & Pacella, *supra* note 4, at 671; *see also* Richard Moberly, *The Supreme Court's Anti-Retaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010) (identifying an Antiretaliation principle based on a series of Supreme Court decisions favoring the protection of whistleblowers).

51. *See* Eisenstadt & Pacella, *supra* note 4, at 671 n.22 (citing scholarly commentary on the benefits of whistleblowers as private enforcement mechanisms); S. REP. NO. 111-176, at 110 (2010) (describing legislators citing statistics regarding the effectiveness of whistleblowers while debating Dodd Frank, such as approximately fifty-four percent of uncovered fraud originating from whistleblower tips, compared to only four percent deriving from external audits or the SEC).

52. *See generally* Eisenstadt & Pacella, *supra* note 4, at 674.

53. *See* Anderson DaCosta, *supra* note 48, at 955–56 ("[S]ome twenty state legislatures have enacted comprehensive whistleblower statutes that protect both public and private employees against retaliation for reporting their employers' violations of any of a broad class of laws and public policies.").

Federal antiretaliation provisions follow a general format: first, they list prohibited acts of retaliation and second, they describe the kinds of whistleblowing that trigger the provisions' protections. Dodd-Frank's antiretaliation provision, for example, follows this format, reading similarly to the FCA.[54] Sarbanes-Oxley contains a similar provision.[55] Title VII follows the format but with notably different language:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[56]

Despite their antiretaliation provisions sharing structure and language, the overall statutory schemes of these whistleblower statutes differ in several respects. Some acts provide more incentives to report misconduct than others. For example, unlike Title VII, the FCA and other statutes create "bounty programs," which offer financial rewards to whistleblowers.[57] These other statutes seek to uncover entirely different conduct, ranging from illegal food manufacturing to violations of rules governing financial services.[58]

When interpreting these antiretaliation provisions, the Supreme Court has varied between expansive and narrow readings.[59] Expansive rulings include recognizing an implied

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54. 15 U.S.C. § 78u-6(h)(1)(A) (using "whistleblower" instead of employee).

55. 18 U.S.C. § 1514A ("No company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee. . . .").

56. 42 U.S.C. § 2000e-3(a). Part IV.A *infra* offers an in-depth comparison of this language with that of § 3730(h)(1). The Appendix *infra* compares it with other antiretaliation provisions.

57. *See, e.g.*, *Office of the Whistleblower*, SEC (last visited Nov. 9, 2021), https://www.sec.gov/whistleblower [https://perma.cc/U9GJ-DX3Q] (noting that the SEC "is authorized by Congress to provide monetary awards to eligible individuals who come forward.").

58. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 49, at 9.

59. NANCY M. MODESITT ET AL., WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 1-13 to -17 (3d ed. 2015) (collecting cases and describing the Court's response as mixed). *But see* Moberly, *supra* note 50, at 388–89 (2010) (identifying, after examining five cases decided by the Court between 2005 and 2010, an Antiretaliation Principle

cause of action against retaliation without an express statutory provision and widening the definition of acts by an employer constituting retaliation.[60] Narrow rulings include requiring but-for causation for Title VII retaliation and denying First Amendment protection for official speech by government employees.[61] *Robinson* belongs to the former category and remains the Supreme Court's only decision to address whether the term "employee" in an antiretaliation provision includes former employees.

C. *ROBINSON* AND ITS DISPUTED REACH

Robinson v. Shell Oil Co.[62] is the guiding precedent on blacklisting and retaliation against former employees.[63] Charles Robinson filed a complaint with the Equal Employment Opportunity Commission (EEOC) against Shell, alleging that Shell terminated him from his position as a Territory Sales Representative due to his race.[64] After Robinson applied for a job with another employer, he alleged that Shell gave him a negative reference in violation of § 704(a) of Title VII, as amended, 42

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adopted by the Court, defined as favoring protection of employees from retaliation in order to further enforcement of civil and criminal laws).

60. *See*, respectively, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 180 (2005) (finding that Title IX of the Education Amendments of 1972 included an implied cause of action against retaliation without express provision since reporting of incidents "would be discouraged if retaliation against those who report went unpunished"); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60 (2006) (rejecting the Sixth Circuit's more restrictive standard for Title VII retaliation that required an "adverse employment action" or severe harassment and instead recognizing retaliation that "would have been material to a reasonable employee" and likely would have "dissuaded a reasonable worker from making or supporting a charge of discrimination").

61. *See*, respectively, Garcetti v. Ceballos, 547 U.S. 410, 421 (1996) (ruling that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline"); Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (finding that a Title VII retaliation plaintiff must prove that "his or her protected activity was a but-for cause of the alleged adverse action by the employer").

62. 519 U.S. 337 (1997).

63. This Note does not address the issue of whether the FCA protects applicants from retaliation. Courts that have addressed that question have refused to extend protection to applicants. *See, e.g.*, Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056 (6th Cir. 2014); *see also* Eisenstadt & Pacella, *supra* note 4, at 687–88 (noting that cases like *Vander Boegh* demonstrate courts' focus on plain meaning and legislative history, not public policy implications, when interpreting the FCA).

64. *Robinson*, 519 U.S. at 339; Brief for Petitioner at 2, Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (No. 95-1376), 1996 WL 341308.

U.S.C. § 2000e-3(a).[65] These facts raised the issue of whether the term "employee" in § 2000e-3(a) encompasses former employees.

Writing for a unanimous Court, Justice Thomas first looked to identify the term's plain meaning from the statute.[66] Though "at first blush" the term "employee" seemed limited to an existing employment relationship, this impression did not withstand scrutiny under three textual features (referred to in this Note as the "*Robinson* three-factor test").[67] First, § 2000e-3(a) contained no temporal qualifier to the term "employee," unlike other statutes which specified "former."[68] Second, Title VII's definition of "employee" lacked any temporal qualifier.[69] Third, other provisions of Title VII used "employee" to include more than current employees.[70] On this last point, the Court acknowledged that other sections of Title VII did limit "employee" to current employees but only saw this as evidence of each section adopting its own meaning within its own context.[71]

The Court dismissed other points raised by the respondents, such as the meaningfulness of the term "individual" and the *expressio unius* presumption that, in including job applicants but not former employees, Congress meant to exclude the latter.[72] Finding the term "employee" ambiguous, the Court resolved the ambiguity with two devices.[73] First, the Court explained that other sections of the statute "plainly contemplate" that remedies be made available to former employees since discharged employees may file actions under § 2000e-3(a).[74] Second, the Court concluded that excluding former employees from the protections of § 2000e-3(a) would deter victims of discrimination

65. *Robinson*, 519 U.S. at 339.
66. *Id.* at 340.
67. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).
68. *Id.* at 341–42.
69. *Id.* at 342 (citing 42 U.S.C. § 2000e(f)).
70. *Id.* (noting that both §§ 706(g)(1) and 717(b) use the phrase "reinstatement or hiring of employees," which plainly refers to former employees since only they may be reinstated).
71. *Id.* at 343 (citing, for example, § 703(h), which allows different standards of compensation for "employees who work in different locations").
72. Robinson v. Shell Oil Co., 519 U.S. 337, 344–45 (1997).
73. *Id.* at 345.
74. *Id.* The author does not find persuasive the Court's argument regarding discharged employees. *Robinson* and the FCA circuit split concern acts of retaliation against former employees occurring *after* their employment has ended. Employees are not former employees until after they have been terminated. Furthermore, the employee's status when they file suit has little importance because acts of retaliation, not the filing, trigger statutory protection.

from complaining to the EEOC, which would undermine the provision's very purpose.[75]

Since the decision, federal courts across the country have used *Robinson* to interpret a variety of statutes. Some courts have relied on *Robinson*'s three-factor test to extend the protections of the Family Medical Leave Act (FMLA) to former employees.[76] Other courts have applied *Robinson* to the antiretaliation provision in Sarbanes-Oxley.[77] Some courts have treated *Robinson* as laying down a presumption that courts should in general broadly construe antiretaliation provisions.[78] Other courts have even applied a "*Robinson* presumption" to terms other than "employee," such as "individual."[79] The remainder of this Note explores the theoretical justification for extending *Robinson* beyond Title VII and, in particular, to interpret the term "employee" in § 3730(h)(1).

II. THE SPLIT

The question of *Robinson*'s applicability to the FCA's antiretaliation provision, § 3730(h)(1), has generated a circuit split. On one side, the Sixth Circuit has applied the Court's framework in *Robinson* to § 3730(h)(1), contending it covers former employees.[80] On the other side, the Tenth Circuit has declined to apply *Robinson*, interpreting § 3730(h)(1) to not cover

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75. *Id.* at 345–46.

76. *See, e.g.*, Smith v. BellSouth Telecomm., Inc., 273 F.3d 1303, 1307–10 (11th Cir. 2001); *see also* Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1 (1st Cir. 1998) (finding the FMLA coverage of former employees ambiguous based in part on application of the *Robinson* factors).

77. *See, e.g.*, Kshetrapal v. Dish Network, LLC, 90 F. Supp. 3d 108, 112–14 (S.D.N.Y. 2015).

78. *See, e.g.*, Kreinik v. Showbran Photo, Inc., No. 02CIV.1172(RMB)(DF), 2003 WL 22339268, at *5 (S.D.N.Y. Oct. 14, 2003) (reading Section 510 of the Employee Retirement Income Security Act to protect plaintiffs from post-employment retaliation and noting that *Robinson* "articulated a broad rationale behind anti-retaliation provisions in federal labor statutes, stating that the primary purpose of such provisions is to maintain 'unfettered access to statutory remedial mechanisms'" (quoting *Robinson*, 519 U.S. at 346)); *see also* Moberly, *supra* note 50, at 386 (recognizing an Antiretaliation Principle adopted by the Court in *Robinson* and implemented in other retaliation-related decisions).

79. *See, e.g.*, Smith v. SEIU United Healthcare Workers W., No. C 05-2877 VRW, 2006 WL 2038209, at *4 (N.D. Cal. July 19, 2006) ("Because the [Americans with Disabilities Act and FMLA] [do] not define 'individual,' following the Supreme Court's lead, the court takes it as 'a broader term than employee [that] would facially seem to cover a former employee.'" (quoting *Robinson*, 519 U.S. at 345)).

80. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431–32 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022).

former employees.[81] Of district courts that have addressed the issue, only two agree with the Sixth Circuit's holding.[82] Most side with the Tenth Circuit.[83]

Part II.A describes the Sixth Circuit majority opinion. Part II.B describes the Tenth Circuit opinion and the Sixth Circuit dissent. Part II.C identifies the disagreement among the opinions regarding the role of *Robinson* in interpreting § 3730(h)(1). Part II.D discusses the practical implications of resolving the split.

A. FORMER EMPLOYEES INCLUDED: THE SIXTH CIRCUIT MAJORITY

United States ex rel. Felten v. William Beaumont Hosp. involved a former employee alleging that their former employer blacklisted them in retaliation for filing suit under the FCA.[84] David Felten, a well-credentialed neurologist and researcher,[85] filed a qui tam complaint on August 30, 2010 alleging that his then-employer, William Beaumont Hospital ("Beaumont"), had violated the FCA and state law by paying kickbacks to physicians in exchange for referrals of Medicare, Medicaid, and TRICARE patients.[86] Felten eventually amended the complaint by adding

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

82. The dissent in *Felten* collected two district court opinions including former employees within the reach of the FCA's antiretaliation provision. 993 F.3d at 438 n.2 (Griffin, J., dissenting) (Ortino v. Sch. Bd. of Collier Cty., 2015 WL 1579460, at *3–4 (M.D. Fla. April 9, 2015); Haka v. Lincoln Cty., 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008)).

83. The dissent in *Felten* collected ten district court opinions denying former employees relief. 993 F.3d at 438 n.2 (Griffin, J., dissenting) (United States *ex rel.* Head v. Kane Co., 798 F. Supp. 2d 186, 208 (D.D.C. 2011); United States *ex rel.* Complin v. North Carolina Baptist Hosp., 2019 WL 430925, at *10 (M.D.N.C. Feb. 4, 2019); Elkharwily v. Mayo Holding Co., 84 F. Supp. 3d 917, 927 n.7 (D. Minn. 2015), *aff'd on other grounds*, 823 F.3d 462 (8th Cir. 2016); United States *ex rel.* Tran v. Computer Scis. Corp., 53 F. Supp. 3d 104, 138 (D.D.C. 2014); Weslowski v. Zugibe, 14 F. Supp. 3d 295, 306 (S.D.N.Y. 2014); Master v. LHC Group Inc., No. 07-1117, 2013 WL 786357, at *6 (W.D. La. March 1, 2013); Bechtel v. Joseph Med. Ctr., No. MJG-10-3381, 2012 WL 1476079, at *9–10 (D. Md. Apr. 26, 2012); Poffinbarger v. Priority Health, No. 1:11-CV-993, 2011 WL 6180464, at *1 (W.D. Mich. Dec. 13, 2011); United States *ex rel.* Davis v. Lockheed Martin Corp., 2010 WL 4607411, *8 (N.D. Tex. 2010); United States *ex rel.* Wright v. Cleo Wallace Ctrs., 132 F. Supp. 2d 913, 928 (D. Colo. 2000)).

84. *Felten*, 993 F.3d at 430.

85. *See David L. Felten*, UNIV. OF MED. AND HEALTH SCIS., https://www.umhs-sk.org/david-l-felten [https://perma.cc/3QBR-VLD5].

86. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 430 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022). *See generally* TRICARE 101, TRICARE, https://www.tricare.mil/Plans/New [https://perma.cc/AH7L-QD4Y] ("TRICARE

claims of post-employment retaliation.[87] In these claims, Felten alleged that Beaumont had terminated him in response to the FCA suit and that, since his termination, he had been unable to procure similar employment in academic medicine at nearly forty other institutions.[88] He attributed this employment drought to Beaumont "intentionally maligning" him.[89] The district court dismissed Felten's blacklisting claims.[90]

Reviewing *de novo*, the Sixth Circuit framed the issue as whether the term "employee" in § 3730(h)(1) prohibited an employer from retaliating against a former employee.[91] To interpret this language, the panel first looked for an unambiguous plain meaning of "employee" and, in its absence, sought meaning from the broader context of the statute and its purpose.[92] To determine whether plain meaning existed, the Sixth Circuit used the *Robinson* factors as a roadmap, asking (1) whether there is a lack of temporal qualifier in Title VII, (2) whether there is a lack of temporal qualifier in Title VII's definition of "employee," and (3) whether the use of "employee" in other provisions of the statute refer to future or former employees.[93] The majority then applied these factors to § 3730(h)(1). The opinion makes no effort to compare § 3730(h)(1) and 42 U.S.C. § 2000e-3.

Applying the first *Robinson* factor, the Sixth Circuit found § 3730(h)(1) included no temporal qualifier.[94] The court noted that some terms, namely "discharged," "demoted," and "suspended," only apply to current employees, but surmised that other terms in the list: "threatened," "harassed," and "discriminated," may very well apply to former employees.[95]

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is a uniformed services health care program for active duty service members . . ., active duty family members . . ., National Guard and Reserve members and their family members, retirees and retiree family members, survivors, and certain former spouses worldwide.").

87. *Felten*, 993 F.3d at 430.

88. *Id.*

89. *Id.*

90. *Id.* ("The district court interpreted the qualifier 'in the terms and conditions of employment' in § 3730(h)(1) to mean that the provision's coverage encompasses only conduct occurring during the course of a plaintiff's employment.").

91. *Id.* at 431.

92. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022).

93. *Id.* at 431–32.

94. *Id.* at 432.

95. *Id.*

Furthermore, since half of the terms lack this temporal connotation, *noscitur a sociis*[96] added little.[97] The majority also took pains to explain that the phrase "in the terms and conditions of employment," is not a temporal qualifier because "terms and conditions" can often continue post-employment, such as through noncompete agreements.[98] Furthermore, while "in the terms and conditions of employment" at least modifies "discriminated against," it is unclear whether it modifies "threatened" and "harassed."[99] The court then applied the second *Robinson* factor, finding that the definition of "employee" lacked a temporal qualifier.[100] In the absence of a statutory definition, the majority examined dictionary definitions, which did not contain temporal elements.[101] In applying the third *Robinson* factor, the majority noted several provisions in the FCA implying that the term "employee" encompasses former employees.[102] These included reinstatement and "special damages" as types of relief.[103] Although some provisions of the FCA can be otherwise read to only refer to current employees, the majority concluded that a mix of uses indicated textual ambiguity.[104]

In the face of this ambiguity as to the meaning of "employee," the court considered the "broader context" and "primary purpose" of § 3730(h)(1), as the *Robinson* Court did.[105] In *Robinson*, the Supreme Court found excluding former employees from Title VII's protections 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."[106] Similarly, in *Felten*, the Sixth Circuit found that the FCA is designed to

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96. *See* WILLIAM ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1151 (6th ed. 2019) (defining *noscitur a sociis* as to "interpret a general term to be similar to more specific terms in a series").

97. *Felten*, 993 F.3d at 432.

98. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 432–33 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022).

99. *Id.*

100. *Id.* at 433.

101. *Id.*

102. *Id.*

103. *Felten*, 993 F.3d at 433–34.

104. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 433 n.2 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022).

105. *Id.* at 435.

106. Robinson v. Shell Oil Co., 519 U.S. 337, 345–46 (1997).

discourage fraud and that the FCA's antiretaliation provision aims to encourage reporting of fraud by protecting those who assist the federal government.[107] Should blacklisting be allowed, the panel concluded that "potential whistleblowers could be dissuaded" from reporting.[108] As a result, the Sixth Circuit held that § 3730(h)(1) covers retaliation against former employees. The court ended its analysis by remanding to the district court the question of whether § 3730(h)(1) includes blacklisting as a form of prohibited retaliation.[109]

B. FORMER EMPLOYEES EXCLUDED: THE TENTH CIRCUIT MAJORITY AND SIXTH CIRCUIT DISSENT

Potts v. Ctr. for Excellence in Higher Educ., Inc. presented facts similar to those of *Felten*, but the Tenth Circuit reached a different conclusion.[110] Debbi Potts worked as the campus director of CollegeAmerica Denver, Inc. ("CollegeAmerica"), which later became the Center for Excellence in Higher Education, Inc. (the "Center").[111] Potts resigned due to her belief that CollegeAmerica had violated its accreditation standards and "actively deceiv[ed]" its accreditor.[112] After her resignation, the Center learned Potts had disparaged it in an email to another former employee. The Center responded with a suit in state court alleging breach of contract (with a resignation agreement).[113] Potts countersued, alleging that the Center's claim regarding her complaint to the Center's accreditor fell under § 3730(h)(1).[114] Because accreditation is necessary to receive federal financial aid, Potts sought the protections of the FCA.[115] The district court

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107. *Felten*, 993 F.3d at 435.
108. *Id.*
109. *Id.*
110. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 618 (10th Cir. 2018).
111. *Id.* at 612.
112. *Id.*
113. *Id.* (quoting appellant's app. at 50) ("Potts also violated the contract by filing a complaint with the ACCSC.").
114. *Id.* As the case name suggests, this complaint was not a qui tam suit filed on behalf of the United States.
115. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 612 (10th Cir. 2018). *See generally Accreditation in the United States*, U.S. DEP'T OF EDUC., https://www2.ed.gov/admins/finaid/accred/accreditation.html [https://perma.cc/X6E2-TLDF] ("In order for students to receive federal student aid . . . the institution must be accredited by a 'nationally recognized' accrediting agency. . . .").

dismissed Potts' complaint, finding § 3730(h)(1) did not cover acts against former employees.[116]

The Tenth Circuit agreed, interpreting § 3730(h)(1) to apply only to current employees.[117] The panel looked first at the qualifying retaliatory acts in the statute and noted four—"discharged, demoted, suspended . . . [and] in any other manner discriminated against in the terms and conditions of employment"—must occur during, never after, employment.[118] To the remaining terms "harassed" and "threatened," the panel applied *noscitur a sociis*.[119] It supplemented the analysis with *ejusdem generis*[120] applied to the statutory phrase "in any other manner discriminated against in the terms and conditions of employment," which it read accordingly as "similar discriminations."[121] The panel noted, however, that the phrase "in the terms and conditions of employment" modifies only "discriminated against," not the other five qualifying retaliatory acts.[122] The panel also pointed out that all forms of relief listed in § 3730(h)(2) related to the employment relationship.[123]

The panel concluded by addressing Potts' arguments that relied on analogous statutes. First, Potts argued that the Department of Labor has interpreted a similar provision in the Sarbanes-Oxley Act as covering former employees.[124] Other circuits have noted the similarity in these provisions, albeit regarding issues unrelated to coverage of former employees.[125] The panel, however, refused to read the relevant U.S. Department of Labor regulation to include acts following

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116. *Potts*, 908 F.3d at 612–13.
117. *Id.* at 618.
118. *Id.* at 614; 31 U.S.C. § 3730(h)(1).
119. *Potts*, 908 F.3d at 614.
120. A cousin of *noscitur*, it means to interpret a general term using the specific terms accompanying it. *See* ESKRIDGE, *supra* note 96, at 1152.
121. *Potts*, 908 F.3d. at 615 ("We can't see why close cousins to threats and harassment would count only during employment (i.e., when in the terms and conditions of employment), but threats and harassment would continue to count years after employment ends.").
122. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 616 (10th Cir. 2018).
123. *Id.*
124. *Id.*
125. *Id.* (citing Jones v. Southpeak Interactive Corp. of Del., 777 F.3d 658, 672 (4th Cir. 2015); Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 265 (5th Cir. 2014)).

employment; it held that only former employees discriminated against while still employed were covered under the regulation.[126]

Finally, the court addressed the *Robinson* factors.[127] First, it concluded that the FCA *does* contain temporal limitations, while Title VII does not.[128] Second, it found no provision of the FCA where "employees" includes former employees.[129] The court reasoned that "Potts understate[d] the statutory differences [between 42 U.S.C. § 2000e-3 and § 3730(h)(1)]. In effect, Potts asserts that the Court would have decided *Robinson* the same even with § 3730(h)(1)–(2)'s language—we disagree."[130]

Dissenting in *Felten*, Judge Griffin leaned further into *Robinson*'s inapplicability and used many of the same tools of statutory interpretation employed by the Tenth Circuit panel in *Potts*.[131] Judge Griffin saw "nothing in *Robinson* that exempts the word 'employee' from its plain meaning or the tools of statutory interpretation."[132] He did not interpret *Robinson*'s reasoning to "invent[ ] new theories of interpretation" for retaliation cases and reiterated that the Sixth Circuit has never recognized such an interpretation of *Robinson*'s methodology.[133] Following their condemnation of the majority's use of *Robinson*, Judge Griffin argued that, even if applied, the *Robinson* factors led to a result contrary to the one reached by the Sixth Circuit majority.[134]

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126. *Id.* at 617.

127. *See supra* Part I.C.

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

129. *Id.* The second *Robinson* factor is unaddressed because the FCA does not provide a definition of employee.

130. *Id.* at 618 n.7.

131. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 436–38 (6th Cir. 2021) (Griffin, J., dissenting), *cert. denied sub nom.* 142 S. Ct. 896 (2022) (employing plain meaning, *ejusdem generis*, *noscitur a sociis*, other provisions of the FCA, and the holdings of other courts).

132. *Id.* at 439.

133. *Id.* The majority differs from this stance on Sixth Circuit precedent, finding that previous cases have staked out the interstatutory applicability of *Robinson*. *Id.* at 431 ("[W]e are bound to follow *Robinson*." (citing McKnight v. General Motors Corp., 550 F.3d 519, 524 (6th Cir. 2008) (finding that *Robinson* "laid out a roadmap for statutory interpretation"))). The dissent interprets *McKnight* to the contrary, noting that the Sixth Circuit was only recognizing that *Robinson* laid out "run-of-the-mill" principles of statutory interpretation. *Felten*, 993 F.3d at 439 (Griffin, J., dissenting).

134. *Id.* at 439–40.

C. PRACTICAL IMPLICATIONS OF RESOLVING THE SPLIT

The resolution of the split concerning the meaning of "employee" in § 3730(h)(1) carries several practical implications. First, bringing former employees under the protection of the FCA creates a starburst of potential effects. Covering former employees may increase employers' compliance, but also their legal costs.[135] Indeed, former employees may file retaliation claims decades after their original qui tam suit,[136] and the triggering events for the antiretaliation provision, such as filing a qui tam suit, are expansive.[137] But greater protections for former employees may increase the likelihood that whistleblowers will come forward, which could deter improper conduct and increase the compensation paid by violators to the U.S. government.[138] This is especially important in cases of retaliation because plaintiffs already face an uphill battle to prove their claims of backlash.[139] Should former employees be excluded from the protections of the FCA and other statutes, these potential effects reverse, most notably decreased burdens on employers. Hospital and healthcare systems for example—already stretched in their resources, especially since the COVID-19 pandemic—would have greater flexibility to spend their limited resources on services, competitive pay, and a whole host of other expenses.[140] Furthermore, an extension or cabining of *Robinson* affects the

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135. *See generally* Brief for Am. Hosp. Ass'n et al., *supra* note 21, at 4–15.

136. While retaliation claims have a three-year statute of limitations that begins with the act of retaliation, 31 U.S.C. § 3730(h)(3), no statutory limitation attaches the retaliation claim with any previous qui tam suit or protected activity under the FCA.

137. The FCA's antiretaliation provision becomes active when an actor engages in one of two categories of "protected activity": (1) "lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section, or (2) "other effects to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h)(1). The second prong is particularly broad, encompassing preventive acts such as internal reporting of suspected FCA violations, *see* Jones-McNamara v. Holzer Health Sys., 630 F. App'x 394, 399 (6th Cir. 2015), and even the refusal to falsify documents. *See* United States *ex rel.* Chorches for Bankr. Est. of Fabula v. Am. Med. Response, Inc., 865 F.3d 71, 96–97 (2d Cir. 2017) (finding that refusal to falsify a Patient Care Report constituted a protected activity).

138. *See* S. REP. NO. 99-345, at 34 (1986).

139. *See* Mark J. Oberti, *New Wave of Employment Retaliation and Whistleblowing*, 38 T. MARSHALL L. REV. 43, 48–49 (2012) (explaining that recent cases, even those "seemingly 'no brainer' termination decisions," have become close calls during motions for summary judgment and dismissal due to difficulties in proving causation from circumstantial evidence).

140. *See* Brief for Am. Hosp. Ass'n et al., *supra* note 21, at 20–22 (commenting on the financial strain COVID-19 has imposed on U.S. hospitals).

interpretation of antiretaliation provisions in other whistleblower statutes, amplifying these (and other) potential effects across the federal code.[141]

Second, a circuit split carries a special importance in federal law.[142] Inconsistent application of the law among federal courts incentivizes parties to engage in forum shopping, a phenomenon generally disfavored in the American legal zeitgeist.[143] While courts generally accept the reality of forum shopping between different states,[144] the same cannot be said of forum shopping between different federal circuits, which all interpret the same federal code. The fact that some courts would allow recourse for post-employment retaliation while others would not, combined with the expansive relief afforded by the FCA,[145] creates inequitable administration of law and justice based simply upon venue.[146] The optimal solution is one that resolves the circuit split and gives courts of first impression clear guidance on how to interpret § 3730(h)(1).

D. IMPORTANCE OF *ROBINSON* IN RESOLVING THE SPLIT

Beyond disagreeing about terms in § 3730(h)(1)'s text, the Sixth and Tenth Circuits diverge on methodology, namely the applicability of *Robinson* and Title VII. The Sixth Circuit majority identifies *Robinson*'s three-factor framework as an interpretative guide but makes no effort to compare the antiretaliation provisions of Title VII and the FCA.[147] The Tenth Circuit, in contrast, engaged in a cursory comparison (confined to a footnote) of the antiretaliation provisions and implied

141. *See supra* Introduction; Part I.C.

142. *See* Glass, *supra* note 25, at 2384. In writing this paragraph, the author referred to Glass's helpful commentary on circuit splits in his Note.

143. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (identifying the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws").

144. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) ("[L]ack of uniformity between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.").

145. *See* 31 U.S.C. § 3730(h)(2) (listing remedies including reinstatement, double back pay and interest, "special damages," litigation costs, and reasonable attorney's fees).

146. *See* 28 U.S.C. § 1391(b) (Generally, a civil action may be brought in "a judicial district in which any defendant resides" or "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.").

147. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431–32 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022).

significant differences between the two provisions; the panel, did not comment further.[148] The Sixth Circuit dissent adopted a slightly different posture, arguing that the court should interpret the FCA's antiretaliation provision independently of both *Robinson* and Title VII.[149]

Despite their snubbing by the Sixth Circuit dissent and the Tenth Circuit, *Robinson* and Title VII seem critical in interpreting the FCA's antiretaliation provision. *Robinson* is the only Supreme Court case to address whether the term "employee" in an antiretaliation provision includes former employees. The boilerplate nature of antiretaliation provisions suggests that courts cannot leave their analyses by concluding that, upon cursory review, the two provisions are different birds of a feather or must be interpreted entirely independent of one another. All three opinions, however, leave several questions unanswered. Are the antiretaliation provisions of Title VII and the FCA similar enough for *Robinson* to be relevant in interpreting the FCA? How should a court determine that similarity? And if *Robinson* is relevant to interpreting the FCA, how should a court weigh that evidence among the other available tools of statutory interpretation? Proper application of the *in pari materia* rule provides answers to these questions and a resolution to the circuit split.[150]

III. *IN PARI MATERIA*

The use of Title VII to interpret the FCA directly implicates the *in pari materia* rule. Part III.A introduces and describes the *in pari materia* rule. Part III.B describes why courts should heavily weigh *in pari materia* in their analyses of antiretaliation provisions.

A. TEST OF THE *IN PARI MATERIA* RULE

The *in pari materia* rule embodies the common-sense notion that if two statutes address the same thing and the textual differences between them are minor, a court should interpret

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148. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 618 n.7 (10th Cir. 2018).

149. *Felten*, 993 F.3d at 439–40 (Griffin, J., dissenting).

150. *See infra* Part III.A.

them the same way.[151] For example, say a court is determining whether the term "vehicles" in Statute A includes bicycles. In a previous case, the court interpreted "vehicle" to include bicycles but in Statute B, a different statute. To determine whether "vehicle" includes bicycles in Statute A, courts employ a test with two requirements: (1) the statutes must pertain to the same subject[152] and (2) Statute A's term must be otherwise ambiguous.[153] The terms read together can be words, phrases, or clauses.[154]

Courts and academics have articulated various justifications for the rule. One focuses on Congress' intentions. The canon assumes Congress intends for a word or phrase to be interpreted the same way when the word or phrase is used in the same context but in different statutory provisions.[155] When drafting and passing a new bill, at least some members of Congress and their staffs are aware of the language used by existing statutes that address the same subject.[156] Another justification, that laws should be harmonized, is more pragmatic.[157] The passage of a new federal law adds to a continuum of other federal laws that,

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151. *See* ESKRIDGE, *supra* note 96, at 1158 (explaining that reading two statutes *in pari materia* means that a court presumptively interprets them in the same way because they are similar provisions in compatible statutory schemes).

152. *See* United States v. Freeman, 44 U.S. 556, 564 (1845) (explaining that if "statutes relate to the same thing, they . . . are to be to be taken together, as if they were one law").

153. *See In re* Adoption of Doe, 326 P.3d 347, 350 (Idaho 2014) (noting that, when a statute is unambiguous, *in pari materia* does not apply because the legislature has clearly expressed its intent). The author sees no reason why a court cannot apply these criteria in reverse order.

154. *See* Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303 (2006) (recognizing the canon's validity but refusing to apply it to the word "located" in two banking statutes); Erlenbaugh v. United States, 409 U.S. 239, 243–45 (1972) (refusing to apply the canon but noting that, under different circumstances, it might be sensible to read an entire exception into one statute that clearly applied to a similar statute).

155. *See Erlenbaugh*, 409 U.S. at 243 ("[A] legislative body generally uses a particular word with a consistent meaning in a given context."). For the contrary view, see an artful aphorism from Justice Holmes on the fluid nature of words. Towne v. Eisner, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

156. *See Erlenbaugh*, 409 U.S. at 244.

157. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252 (2012) ("It rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so.").

taken together, are supposed to make sense.[158] One scholar has articulated this notion as "the jurisprudential notion that all law is part of one coherent whole, that all statutes and the common law work together."[159] These justifications, of course, have undergone extensive discussion in legal scholarship, the volume of which cannot be fully enumerated here.[160] Notably, however, legislative coherence runs afoul with practical considerations. It is unrealistic to assume Congress always considers the language of its existing statutes when passing new statutes, and even if true, courts cannot always assume that Congress would intend statutes written on the same subject to be interpreted in the same way.[161] For this reason, some commentators have explained that the same-subject test ameliorates these practical considerations.[162] Despite these limitations, the Roberts Court

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158. *See* HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 214–15 (1967) (describing Justice Frankfurter's view that a piece of legislation is merely a fragment of a "historic process," meaning that interpreters "must consult not only what went before but what came after—the statute must be read as part of a continuum").

159. Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 196 (2020).

160. *See, e.g.*, *id.* at 197–98 (noting that, *inter alia*, the increased complexity of the law makes harmonization more difficult and, as the subcategories of regulation become further divided, it may not be necessary for a given body of law to cohere as it divides into separate subject matters); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 951–52 (1988) (defending formalism, which "postulates that law is intelligible as an internally coherent phenomenon"). *But see, e.g.*, John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 738–39 (2014) (arguing, *inter alia*, that the coherence ideal is inconsistent with legislative compromise and that a court's efforts to cohere the federal code "undervalue Congress' intent to impliedly repeal legislative" and "displace[ ] . . . federal common law").

161. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 207–19 (2000) (contending that multiple practical realities render mere fiction a single Congress, including shifting political personnel, limitations in the expertise of specific committees, and altering political coalitions, favoring a more context-specific framework of statutory interpretation).

162. It is unrealistic to assume that Congress would survey all law when considering language for a bill, but it is reasonable that Congress would consult the language of related laws. Within this sphere of relation, they likely want a "coherent theme, 'a uniform and consistent design.'" Michael Sinclair, *"Only A Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L. SCH. L. REV. 919, 974 (2006). *But see also* Haywood v. State, 344 S.W.3d 454, 465 (Tex. App. 2011) (noting that in determining whether to read two statutes *in pari materia*, "courts should consider whether (1) the two statutes are contained in the same legislative act; (2) the same elements of proof are required by the two statutes; (3) they involve different penalties; and (4) they obviously were designed to serve the same purpose and objective").

commonly invokes other statutes to answer questions of statutory interpretation.[163]

Regardless of the theoretical debate, lower courts frequently deploy *in pari materia*.[164] The following two sections define "same subject" inquiry, the rule's first prong. Part III.A.1 describes how courts determine the "subject" of a statute. Part III.A.2 describes how courts determine whether two subjects are the "same."

1. *The Definition of "Subject"*

As a general matter, courts determine the "subject" of a statute by looking at its purpose.[165] To determine purpose, courts look to the text, neighboring provisions, and legislative history.[166]

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163. *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 96 (2021) (finding that 27.1 percent of Roberts Court majority or plurality opinions on statutory questions invoked whole code comparisons). For trends and further analysis on same-subject relatedness and non-relatedness in statutory comparisons by the Roberts Court, see *id.* at 104–09. It is possible that interstatutory evidence will become less popular with the Court's recent conservative shift, but anecdotal examples indicate otherwise. *See, e.g.*, United States v. Taylor, 142 S. Ct. 2015, 2023 (2022) (describing the use of the word "threat" across several federal statutes to determine its meaning).

164. *See, e.g.*, United States v. Howard, 968 F.3d 717 (7th Cir. 2020) (relying in part on *in pari materia* to interpret a federal child pornography statute); California v. Trump, 963 F.3d 926, 947 n.15 (9th Cir.), *cert. granted sub nom.* Trump v. Sierra Club, 141 S. Ct. 618 (2020) (relying on *in pari materia* to interpret a military statute in a case involving construction of a southern border wall); USA Gymnastics v. Liberty Ins. Underwriters, Inc., 27 F.4th 499, 515 (7th Cir. 2022) (relying in part on *in pari materia* to interpret Rule 9033(d) of the Federal Rules of Bankruptcy Procedure); Frame v. City of Arlington, 657 F.3d 215, 223 (5th Cir. 2011) ("The ADA and the Rehabilitation Act generally are interpreted *in pari materia*.").

165. *See* Nashville, C. & St. L. R. v. Ry. Emps.' Dep't, of AFL, 93 F.2d 340, 343 (6th Cir. 1937) ("[W]e know of no rule of statutory construction which requires two acts relating to separate and distinct subjects to be read *in pari materia*, even though they affect the same general class of persons."); *see also* Desai, *supra* note 159, at 251 (explaining that, as a general matter, the purpose of a law is the particular "mischief" it seeks to address, whereas the intention of a law focuses on Congress' aims or, more practically, the aims of certain members, committees, or drafters). *But see id.* at 216–19 (noting an alternative approach to *in pari materia* based on intent). Further complicating the matter is whether a different audience must be conjured to determine the objective meaning of different statutes. For instance, a bankruptcy statute may have a different audience determining its subject than an employment statute, as the audiences for those statutes are presumptively different. *Id.*

166. *See* Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 694 (2012) (identifying the above sources of legislative history and advocating for legislative leadership to more clearly identify which types of legislative history courts should take into account in interpreting statutes). Furthermore, some notable members of Congress, often conservative-leaning, have advocated for the use of legislative history in statutory interpretation. *Id.* at 670–71 (noting that Senator Charles Grassley, ranking member of

Paradoxically, though same-subject relatedness is a purpose-driven inquiry, the *in pari materia* rule is a textual tool.[167] A court uses the text of one statutory provision to inform the interpretation of another statutory provision.[168] If text plays a role in determining the subject of a statute, however, a court can only engage in a soft look at the text in divining purpose. This is an analytical necessity. If a court used all of its tools of statutory interpretation to determine the meaning of a text (e.g., plain meaning, *ejusdem generis*), the second step of *in pari materia* (whether a statute is otherwise unambiguous) would become subsumed into the first step (same-subject relatedness). A full analysis of the text, moreover, must occur separately from same-subject relatedness otherwise *in pari materia* becomes a conclusory label rather than a meaningful presumption.[169] Though some textualist-inclined jurists may turn away from any interpretative approach which attempts to determine the purpose of a statute, others would not be so rigid.[170]

While the Supreme Court has never articulated specific criteria for same-subject relatedness, its opinions applying the *in pari material* rule have used a combination of text and apparent purpose.[171] For example, in *Burlington N. & Santa Fe Ry. Co. v. White*, the Court addressed the question of whether Title VII's antiretaliation provision is limited to employment-related activities.[172] Burlington and the U.S. Solicitor General argued that the antidiscrimination provision of Title VII, which contains

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the Judiciary Committee, and Senator Orrin Hatch, once-chair of the same committee, have strongly supported the use of legislative history in adding context to statutory text).

167. *See* Desai, *supra* note 159, at 209–16 (explaining in detail how *in pari materia* supports the principal arguments for the use of textualism, namely upholding the text as enacted, reducing decision costs, limiting judicial discretion, and notice to those affected by a law).

168. *See* ESKRIDGE, *supra* note 96, at 1158.

169. *See* Desai, *supra* note 159, at 209–12 (explaining that arguing that only the text is enacted law does not help to determine whether two statutes concern the same subject).

170. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266–71 (2020) (noting that cases such as *Bostock v. Clayton County* have revealed a division between flexible and formalistic textualism); *see also* Gluck & Posner, *supra* note 47, at 1322 (finding that in a survey of forty-two federal appellate judges, "not one judge was willing to describe him or herself as a textualist without qualification," including remarks like "some word that is on the continuum between textualist and contextualist").

171. *See* Krishnakumar, *supra* note 163, at 107.

172. 548 U.S. 53, 61 (2006). The case concerned a Title VII complaint alleging both gender discrimination and retaliation, where one Sheila White alleged, among other things, that Burlington's roadmaster had "placed her under surveillance and was monitoring her daily activities." *Id.* at 53–54.

a clause limiting discrimination to employment-related activities,[173] should be read *in pari materia* with the antiretaliation provision with respect to this employment limitation.[174] The Court approached this argument by examining Title VII's text and apparent purpose. The Court identified significant textual differences between Title VII's antiretaliation and antidiscrimination provisions.[175] The antidiscrimination provision includes other language such as "to fail or refuse to hire or to discharge" and "which would deprive or tend to deprive any individual of employment opportunities."[176] According to the Court, these textual differences signified an intention for different legal outcomes.[177] The Court then explained the different, apparent purposes of the antiretaliation and antidiscrimination provisions.[178] According to the Court, whereas the antidiscrimination provision addressed discrimination in the workplace based on an individual's race, ethnicity, religion, or gender, the antiretaliation provision aimed to prevent employers from interfering with employees' efforts to seek remedies under Title VII.[179] The Court reasoned that to achieve this objective of the antidiscrimination provision, Congress needed only to address employment-related discrimination.[180] To achieve the antiretaliation provision's objective, however, such a limitation made little sense.[181]

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173. § 2000e-2(a)(1) (affecting the employee's "compensation, terms, conditions, or privileges of employment").
174. *Burlington*, 548 U.S. at 61.
175. *Id.* at 61–62.
176. *Id.* (quoting § 2000e-2(a)).
177. *Id.* (applying a version of the meaningful variation canon).
178. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).
179. *Id.*
180. *Id.*
181. *Id.* In a concurring opinion, Justice Alito disagreed, arguing that Title VII's antidiscrimination and antiretaliation provisions should be read together. *Id.* at 74 (Alito, J., concurring). He argued that the antiretaliation provision also serves to "prevent harm to individuals," not just to deter employers from interfering with reporting. *Id.* at 77. Among other things, "the majority's interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination." *Id.* at 78.

2. *The Definition of "Same"*

"Sameness" is not a literal term.[182] Two examples from the Court's jurisprudence demonstrate that sameness is a high but surmountable bar. In *United States v. Granderson*, the Court refused to read *in pari materia* a supervised release revocation statute and a probation revocation statute.[183] The majority reasoned that supervised release and probation are different subjects: unlike probation, supervised release "is not a punishment in lieu of incarceration" and generally applies to more serious offenders than probation.[184] Since supervised release then follows longer sentences, it makes sense that terms of supervised release are generally shorter than probation.[185] Notably, the Court's analysis focuses not on the basic difference between probation and supervised release, but on how those subjects make the *objects* of these statutes dissimilar.[186]

The Court followed a similar approach in *Wachovia Bank v. Schmidt*.[187] There, the Court found that a statute governing venue and a statute governing subject-matter jurisdiction, while both addressing banking, were not "concepts of the same order" given their different waiver rules and roles in litigation.[188] This result stands in contrast with, for instance, the same subjects of the Americans with Disabilities Act and the Rehabilitation Act.[189]

B. WEIGHT OF *IN PARI MATERIA*

Where a court determines that the antiretaliation provisions of the FCA and Title VII are of the same subject and that the FCA's text is otherwise ambiguous, this Note argues *in pari materia* should play a dispositive role in its judgment. Though theory dictates that *in pari materia* play a dispositive role in

182. *See* ESKRIDGE, *supra* note 96, at 1158 (using the phrase "similar statutory provisions . . . in comparable statutory schemes").
183. 511 U.S. 39, 50–51 (1994).
184. *Id.*
185. *Id.* at 50.
186. *Id.* at 51.
187. 546 U.S. 303 (2006).
188. *Id.* at 315–16.
189. See Kemp v. Holder, 610 F.3d 231, 234 (5th Cir. 2010) ("Both of these statutes prohibit employment discrimination against qualified individuals with disabilities, but the statutes govern different entities. . . ."); Frame v. City of Arlington, 657 F.3d 215, 223 (5th Cir. 2011) ("The ADA and the Rehabilitation Act generally are interpreted *in pari materia*.").

determining the meaning of an ambiguous statute, its role can be less significant in practice because a court may apply several other tools of statutory interpretation.[190] One could also argue that *in pari materia* has fallen from grace like some other canons, disfavored or relegated to mere tiebreaking.[191]

The boilerplate nature of antiretaliation provisions, however, compel giving the *in pari materia* rule substantial weight. One need only skim and compare the antiretaliation provisions throughout the federal code to note their similar use of particular terms and phrases.[192] The Senate Report further supports this conclusion with its long list of provisions that inspired the FCA provision's drafting.[193] Furthermore, the narrowness of the same-subject inquiry increases the relevance of language from different statutes. Same-subject relatedness sets a high bar for applying *in pari materia*,[194] and should two statutes pass that bar, a presumption is appropriate.

Indeed, some courts would shy away from heavily weighing *in pari materia* or interstatutory evidence more generally. Their reasons likely fall into one of several objections. First, *in pari materia* ignores the gulf in time between the passage of the FCA and Title VII. Congress passed the words and phrases of the FCA's antiretaliation provision and its remedies simultaneously; a different Congress passed Title VII approximately two decades before the passage of § 3730(h)(1).[195] Second, *in pari materia*

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190. *See, e.g.*, Firstar Bank, N.A. v. Faul, 253 F.3d 982, 990 (7th Cir. 2001) (applying *in pari materia* and three other similar canons of statutory consistency).

191. *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (applying the rule of lenity only in the face of "grievous" ambiguity); *see also Firstar Bank*, 253 F.3d at 990 (explaining that the *in pari material* canon should be read together with other canons of statutory interpretation "such that the ambiguities in one may be resolved by reference to the other"). The difference between a tiebreaker and a presumption in statutory interpretation can be significant. If a court applies *in pari materia* as a presumption as the first step of a statutory analysis, the presumption becomes a hurdle that must be overcome by a certain level of ambiguity. If the court applies a tiebreaker as the last step in a statutory analysis, the court has already applied all of the other relevant tools of statutory interpretation. Naturally, by the end of that analysis, a court is more likely to have arrived at a firm interpretation by the time it reaches the tiebreaker. Of course, there is no reason, in theory, why the timing of applying a tool determines whether a statute is more or less ambiguous.

192. *See infra* Appendix.

193. *See* S. REP. NO. 99-345, at 34 (1986).

194. *See supra* Part III.A.2.

195. For the curious reader, forty-three members of the 88th Congress, which passed Title VII, were members of the 100th Congress, which passed the 1986 amendments to the FCA. *Biographical Directory of the United States Congress*, https://bioguide.congress.gov/search (on file with the Columbia Journal of Law & Social Problems) (In the left-hand

relies on unrealistic assumptions about the legislative process of drafting and editing statutes. Third, unlike more popular canons such as constitutional avoidance, *noscitur a sociis*, or *ejusdem generis*, the Supreme Court lacks an extensive case law sketching out the boundaries of *in pari materia*'s usage.[196] This lack of case law may even signal the Court's disfavoring posture. Fourth, placing high weight on *in pari materia* increases the decision costs for courts by requiring them to search throughout the federal code for obscure provisions when faced with an issue of statutory interpretation.

These objections, however, prompt compelling responses. A gap in years implies either Congress' lack of awareness of an older statute's language or a change in meaning with time. Excerpts from the legislative history and the obvious similarities in the provisions, however, clearly indicate Congress' awareness of previous retaliation provisions.[197] Even if a court ignores this evidence, it can still apply *in pari materia* but slightly discount its weight according to the year gap.[198] Objections based on unrealistic assumptions about the legislative process would undermine much of Supreme Court jurisprudence.[199] For those concerned about the lack of clear doctrine from the Supreme Court, enough cases deal with *in pari materia* for a court to apply it on this question of statutory interpretation.[200] Finally, it is debatable whether *in pari materia* increases decision costs: on the one hand, while courts must sift through more cases, this body of case law gives them more guidance on which to rely. But even if *in pari materia* produces a net increase in decision costs, the burden of that total increase is likely low. The narrow bounds of the same-subject inquiry limit the pool of statutes requiring comparison,[201] and resources are available to track analogous provisions throughout the federal code.[202] Moreover, the parties

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directory, click "88 (1963–1965)"; click "Download" in the top right-hand corner and select "CSV" as Download Type; in the downloaded Excel spreadsheet, select the column titled "congresses" and mash Ctrl+F; type "100" and click "Find All.").

196. *See* Krishnakumar, *supra* note 163, at 107.

197. S. REP. NO. 99-345, at 34 (1986).

198. *See* Haywood v. State, 344 S.W.3d 454, 465 (Tex. App. 2011) (listing whether two provisions were contained in the same legislative act as a factor in whether two statutes have a similar object or purpose).

199. *See* Krishnakumar, *supra* note 163, at 96.

200. *See supra* Part III.A.

201. *See supra* Part III.A.2.

202. *See, e.g.*, *supra* note 49 (listing antiretaliation provisions across federal law).

in a given litigation shoulder some of these costs through their own research and by submitted briefings.

IV. THE FCA SHOULD PROTECT FORMER EMPLOYEES

The *in pari materia* rule offers a path to resolve the circuit split. Part III.A applies the first step of *in pari materia* and explains how the antiretaliation provisions of the FCA and Title VII concern the same subject. Part III.B follows with the second step of *in pari materia* and concludes that the FCA's antiretaliation provision is ultimately ambiguous. It also briefly discusses whether blacklisting falls within any of § 3730(h)(1)'s categories of retaliation. Part III.C discusses how the *in pari materia* rule addresses several concerns of the Sixth Circuit dissent and Tenth Circuit. Part III.D argues that, even if *in pari materia* does not apply, FCA's antiretaliation provision should still cover former employees based on *Robinson*'s three-factor test, i.e., "soft" *in pari materia*.

A. THE ANTIRETALIATION PROVISIONS OF TITLE VII AND THE FCA CONCERN THE SAME SUBJECT

It is clear that the antiretaliation provisions of Title VII and the FCA concern the same subject: holding employers liable for retaliation against whistleblowers reporting violations of their respective statutes. Several pieces of evidence support this conclusion.

First, the apparent purposes of the provisions are the same. From the statute's text, the Court in *Robinson* identified the purpose of Title VII's antiretaliation provision as preventing the threat of retaliation from deterring victims of discrimination from complaining to the EEOC.[203] Section 3730(h)(1) addresses the same subject. The FCA provides for the reporting of fraud by government contractors, and the antiretaliation provision by its very terms holds employers liable for retaliating against FCA relators.[204] Like Title VII's provision, this liability reduces the threat of retaliation and adds an additional incentive for relators to file qui tam complaints.[205] The similarity of these subjects

203. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).
204. 31 U.S.C. § 3730(h)(1).
205. S. REP. NO. 99-345, at 34 (1986).

differs from supervised release and probation in *Granderson*,[206] or of venue and subject-matter jurisdiction in *Wachovia Bank*.[207] Those distinctions mattered because they meant each provision functioned differently. In this case, there is no apparent reason why the difference between reporting employment discrimination and reporting misspent government funds would mean that employees, former or not, would be any less or more protected from retaliation.

Second, a soft look at the text of each antiretaliation provision suggests they have the same purpose. Section 704(a) of Title VII undoubtedly uses language different from § 3730(h)(1), but several core elements of the statutes match. Both statutes proscribe "discriminat[ion]" against an employee by an employer under certain circumstances.[208] The structures of the statutes also match: each first identifies the proscribed conduct and then lists the triggering activity that brings an employee under its protection.[209] Two differences, however, are noteworthy. First, the FCA lists more specific categories of proscribed conduct, while Title VII lists more specific triggering activities.[210] This differing terminology, however, does not appear to signal fundamentally different purposes for each provision; instead, it signals slight differences in the triggering events or proscribed conduct. Second, § 3730(h)(1) uses the phrase "in the terms and conditions of employment" as a qualifier to "discriminated against."[211] Its presence in § 3730(h)(1), however, does not impact same-subject relatedness since it only modifies "discriminated against" and not the other categories of proscribed conduct.[212] Part IV.B *infra* fully explores the impact of this phrase and how it affects the ambiguity of § 3730(h)(1) as a whole.

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206. United States v. Granderson, 511 U.S. 39, 50–51 (1994).

207. Wachovia Bank v. Schmidt, 546 U.S. 303, 315–16 (2006).

208. § 3730(h)(1); § 2000e-3(a).

209. *Compare* § 3730(h)(1) (beginning with "discharged, demoted . . ." and moving to "because of lawful acts done by the employee . . . in furtherance of action under this section"), *with* § 2000e-3(a) (beginning with "to discriminate against any of his employees" and moving to "because he has made a charge, testified, assisted, or participated . . .").

210. § 3730(h)(1) ("discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment"); § 2000e-3(a) ("opposed any practice made an unlawful employment practice by this subchapter . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

211. § 3730(h)(1).

212. *Id.*

Third, extratextual evidence strongly suggests both provisions have the same purpose. The Senate Report specifically points out that the antiretaliation provision ought to protect relators from blacklisting.[213] But beyond this, the Senate Report clearly envisions harmonizing the FCA antiretaliation provision with a long list of preexisting provisions in federal law.[214] Some may argue, however, that since this list of provisions does not include Title VII, it lacks any persuasive weight in this *in pari materia* analysis. This argument fails, however, upon closer inspection of these provisions in other acts. The provisions' texts resemble the antiretaliation provision of Title VII in several respects.[215] They use the phrase "discriminated against" and usually some collection of "assisted," "testified," and "participated."[216] Several arguments counsel against placing weight on a single Senate report, including, *inter alia*, that the text did not undergo Bicameralism and Presentment and that reports of this kind are especially susceptible to the influence of lobbyists and committee staff.[217] It bears mentioning, however, that the Senate Report serves only as corroborating information for this Note's argument.

Opponents of applying *in pari materia* may argue in response that "preventing retaliation" is too broad to meet the "same subject" standard. These opponents may argue that the provisions do not address the same subjects because one protects victims of Title VII discrimination while the other protects employees of government contractors who report fraud. This argument, however, is not compelling for two reasons. First,

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213. S. REP. NO. 99-345, at 34 (1986).

214. *Id.*

215. *See infra* Appendix.

216. *Id.* The bolded, underlined portions are those approximately matching language between the statute and Title VII.

217. *See* U.S. CONST. art. I, § 7; Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) ("The only thing we know for certain both Houses of Congress (and the President, if he signed the legislation) agreed upon is the text."); Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (acknowledging that the references to court cases in congressional committee reports "were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform Members . . . but rather to influence judicial construction"). *But see, e.g.*, James Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1219–24 (2010) (arguing that the Constitution's Journal Clause and Rules Clause invite courts to invoke legislative history when appropriate).

though the Court has applied the same subject requirement as a narrow standard, the provisions need not be identical in all their purposes. After all, that would mean *in pari materia* only applies when two statutes are virtually identical, which is not how courts have implemented the canon.[218] Second, the more important inquiry is whether the two statutes' purposes differ in a way material to *former employees*. FCA and Title VII complaints, to be sure, differ in several respects, most notably the differences between government fraud and employment discrimination. These differences, however, give no apparent cause to protect former employees against retaliation any more or less in either case.

B. THE TEXT OF § 3730(H)(1) IS OTHERWISE AMBIGUOUS, MEANING *IN PARI MATERIA* APPLIES

The *in pari materia* rule is only a presumption, so the second step in applying the rule is to determine whether the text unambiguously excludes former employees, thereby precluding the *in pari materia* presumption. Within the FCA, the two primary sources determinative of the meaning of "employee" in its antiretaliation provision are the terms of the provision itself and the FCA's other provisions.

In isolation, the term "employee" is ambiguous. To determine the meaning of a word in a statute, courts generally look to plain (or ordinary) meaning.[219] The Court has already noted that, without a temporal qualifier, the term "employee" is ambiguous since Congress uses the term more narrowly or more broadly in different statutes.[220] Even as a matter of ordinary meaning, however, "employee" can include former employees depending on

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218. *See, e.g.*, Thielebeule v. M/S Nordsee Pilot, 452 F.2d 1230, 1231–32 (2d Cir. 1971) (finding that a federal statute exempting seamen from the duty to prepay costs is the same subject matter of a statute providing for exceptions from taxes and collections owed to U.S. marshals); Estate of Sanford v. Comm'r of Internal Revenue, 308 U.S. 39, 44 (1939) (concluding that a statute addressing a gift tax and a statute addressing an estate concern the same subject matter and should be construed together under *in pari materia*).

219. *See, e.g.*, King v. Burwell, 576 U.S. 473, 474 (2015) ("If the statutory language is plain, the Court must enforce it according to its terms."); *see also* Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting) (quipping that the test for ordinary meaning should be "whether you could use the word in that sense at a cocktail party without having people look at you funny"). For a discussion on the nuances and variances of applying plain and ordinary meaning, see William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 544–46 (2017).

220. Robinson v. Shell Oil Co., 519 U.S. 337, 341–43 (1997); *see also supra* Part I.C.

context. The Supreme Court, for example, often labels as "employees" those who have lost their jobs and are seeking unemployment assistance.[221]

The core passage of the FCA's antiretaliation provision begins with "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment."[222] At least three of these six terms (discharged, demoted, and suspended) imply employment at the time of retaliation. This suggests at most, however, that the statute contemplates more situations where retaliation occurs during a current employment relationship, which perhaps matches reality.[223] The Tenth Circuit also applied the *noscitur a sociis* canon to limit the meanings of "harassing" and "threatened" to a current employment relationship.[224] The application of this canon is unpersuasive because four out of six terms suggesting one interpretation should not presumptively limit the scope of the remaining two.[225]

The next textual issue is the scope and applicability of the phrase "terms and conditions of employment."[226] Both the Sixth Circuit dissent and the Tenth Circuit panel claim that the phrase limits discrimination to the current employment relationship *and* that it applies to the five other terms on the list. A court should regard this argument with particular significance given that the antiretaliation provision of Title VII, the entire basis for applying *in pari materia*, does not use this phrase.[227] In contrast, the

221. *See, e.g.*, Nash v. Florida Industrial Comm'n, 389 U.S. 235, 239 (1967) ("Florida has applied its Unemployment Compensation Law so that an employee who believes he has wrongly been discharged has two choices. . . ."); California Dep't of Human Resources v. Java, 402 U.S. 121, 134 (1971) (noting that an interview to determine unemployment compensation "is an occasion when the claims of both the employer and the employee can be heard").

222. 31 U.S.C. § 3730(h)(1).

223. Brief of Respondent in Opposition to Petition for Certiorari at *13, William Beaumont Hosp. v. United States *ex rel.* Felten, No. 21-443 (Dec. 17, 2021), 2021 WL 6102284 (noting that, in the twelve months prior to filing the brief, the FCA's antiretaliation provision was cited forty-eight times and that only two involved post-employment retaliation).

224. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 614 (10th Cir. 2018).

225. *See* Graham Cnty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 559 U.S. 280, 288 (2010) (refusing to apply *noscitur a sociis* to a list of three items because the association between the terms was "not so tight or so self-evident" to justify denying any term "its independent and ordinary significance" (internal quotations omitted)).

226. § 3730(h)(1).

227. *See infra* Appendix. This argument could also be addressed as part of the "same subject" question discussed in Part III.A.1. The Court sometimes uses a textual analysis

FCA's antiretaliation provision and most of those listed in its legislative history use the phrase or a comparable analog.[228]

The counterarguments to these positions, however, are equally or more persuasive. First, terms and conditions of employment can regulate conduct *after* employment. Non-compete clauses, for example, can remain operative after the termination of the employment relationship. Second, even if terms and conditions of employment do not extend beyond the employment relationship, the clause only modifies "in any other manner discriminated against" rather than the other five prohibited activities; the phrase "discharged . . . in the terms and conditions of employment," for example, does not make grammatical sense. This interpretation comports with the inspiring provisions from other statutes listed in § 3730(h)(1)'s legislative history, which tend to treat "discriminated against" and some version of "terms and conditions of employment" as a paired unit.[229] Threatened, harassed, and discharged remain unmodified and able to cover post-employment retaliation.

The FCA's other uses of "employee," though relevant methodologically,[230] do not add clarity in this case. The Sixth Circuit dissent emphasizes that the FCA's grant of immunity to senior executive branch officials excludes former employees since including former employees would grant lifetime immunity to thousands of officials.[231] Since the FCA depends on another statute to define this particular type of employee, however, Congress most likely did not intend for that definition to apply to all other types of employees. Taken together, these words and

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as part of its "same subject" inquiry. *See* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006).

228. *See infra* Appendix. The italicized, bolded phrases highlight this analogous language.

229. *Id.* For example, the antiretaliation provision of the Toxic Substances Control Act reads: "No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment." 15 U.S.C. § 2622(a).

230. *See* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . .").

231. *See generally* 31 U.S.C. § 3730(e)(2)(A)–(B) ("No court shall have jurisdiction over an action brought [by a private person] against . . . a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought." Senior executive branch official is further defined as "any employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978.").

phrases do not add up to an unambiguous reading of the term "employee" in the FCA's antiretaliation provision. Following *in pari materia*, a court should read "employee" to cover former employees, contractors, and agents.

The last issue is whether blacklisting falls under any of the prohibited retaliatory acts listed in the FCA's antiretaliation provision.[232] The two most likely terms to encompass blacklisting are "harassed" and "discriminated against in the terms and conditions of employment."[233] Merriam-Webster defines blacklisting as "to put on a blacklist," where blacklist is defined as "a list of persons who are disapproved of or are to be punished or boycotted."[234] Merriam-Webster defines harass as "to annoy persistently" or "to create an unpleasant or hostile situation for [sic] especially by uninvited and unwelcome verbal or physical conduct."[235] Although these definitions overlap in some ways, proving annoyance, a hostile situation, or repeated conduct may be difficult in some cases of blacklisting in practice. "Discriminating against in the terms and conditions of employment" may be suitable in some situations, but again, it would depend on the particular terms of the plaintiff's employment and whether those terms still apply post-employment. For garden-variety negative references, harassment may be the stronger claim, since difficulty obtaining employment may create an unpleasant situation.[236]

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232. This issue receives little discussion in the Sixth Circuit opinion (and no discussion in the Tenth Circuit opinion). Since it is not the subject of the circuit split, this Note includes only a short discussion.

233. § 3730(h)(1).

234. *Blacklist*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/blacklist [https://perma.cc/LGC3-LVF9].

235. *Harass*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/harass [https://perma.cc/PFU8-RKTZ].

236. One could also argue that blacklisting former employees constitutes, at least in some cases, a "threat" to *current* employees. An employer may intend retaliation against a former employee as a signal to current employees that whistleblowing will result in reduced employment opportunities. It is unclear, however, whether § 3730(h)(1) would hold employers liable when the employee engaging in the protected activity and the employee receiving retaliation are different people.

C. THE *IN PARI MATERIA* RULE ADDRESSES METHODOLOGICAL CONCERNS OF THE SIXTH CIRCUIT DISSENT AND THE TENTH CIRCUIT

As Part II *supra* articulates, two types of wedges drive the Sixth Circuit majority and Tenth Circuit panel apart: methodological disputes and textual disputes. While the introduction of *in pari materia* does not address the textual positions adopted by the Tenth Circuit and the Sixth Circuit dissent, it does address the methodological gulf between the two sides of the split.

The Tenth Circuit and the Sixth Circuit dissent raise several methodological issues. First, Judge Griffin's dissent criticizes the majority for engaging in "unauthorized, unnecessary" purposivism instead of determining meaning through the language of the statute.[237] Second, the Sixth Circuit dissent correctly points out that the majority has assigned unexplained meaning to the *Robinson* factors.[238] The Court in *Robinson* gave no indication as to whether its three-factor framework laid out the rules of interpretation for antiretaliation provisions or the term "employee" in federal statutes.[239] The Tenth Circuit also refuses to extend *Robinson*'s holding due to the apparent differences between § 3730(h)(1) and § 2000e-3(a).

The *in pari materia* rule addresses these objections relating to purposivism and *Robinson*'s applicability. *In pari materia* addresses warnings against purposivism because using the text of one statute to interpret another is ultimately a textual tool.[240] Though *in pari materia* involves a purpose-based inquiry to determine same-subject-relatedness, it differs from purposivism in two ways. First, *in pari materia* requires another statutory text, whereas purposivism can draw on purely extratextual materials to derive meaning.[241] Second, unlike pure purposivism, the high bar required to meet same-subject-relatedness limits the

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237. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 440 (6th Cir. 2021) (Griffin, J., dissenting), *cert. denied sub nom.* 142 S. Ct. 896 (2022).
238. *Id.*
239. *Felten*, 993 F.3d at 431.
240. *See supra* Part III.A.1.
241. *Id.*

scope of purpose-based evidence. This limited use of purpose-based evidence comports with moderate versions of textualism.[242]

D. "SOFT" *IN PARI MATERIA*

Even if declining to apply *in pari materia*, a court can still reach the same interpretation—that former employees are covered by § 3730(h)(1)—by applying *Robinson*'s interpretative framework. The Sixth Circuit adopts this approach.[243] The Court's three-factor framework in *Robinson* serves as an interpretative guide to determining whether "employee" in § 3730(h)(1) includes a temporal limitation. According to the Sixth Circuit dissent, the Court in *Robinson* did not create a three-factor test for interpreting antiretaliation provisions, and the court should instead rely on normal rules of statutory interpretation.[244]

The use of *Robinson*'s three-factor test, however, has theoretical support. Though this approach neither resembles a presumption nor a tiebreaker, one could describe it as a "soft" form of the *in pari materia* rule. Instead of reading two similar statutes together, the Sixth Circuit opted to *interpret* two similar statutes together. This approach is sensible for two reasons. First, the *Robinson* factors encapsulate the ways in which a statute will indicate temporal limitations *as a general matter*. Justice Thomas' opinion merely looks at a statute for temporal qualifiers in all the locations they may reside, a definition provided by the statute, or any other provision in the statute that uses the term "employee."[245] Second, it provides a more efficient

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242. *See* William N. Eskridge, Jr., *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990) (noting that textualism is best understood as statutory interpretation beginning and usually ending with the apparent meaning of the statutory language). Professor Eskridge further notes that two common varieties of textualism are, first, no inquiry into what the legislature meant, and second, statutory language is the best, but not the only, guide to legislative intent or purpose. *Id.* at 340–41. *See also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78–80 (2006) (explaining that textualists never find meaning exclusively within the enacted text and routinely consult unenacted sources of context beyond the plain meaning of the statute).

243. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (6th Cir. 2021), *cert. denied sub nom.* 142 S. Ct. 896 (2022) (explaining that *Robinson* provides "guidelines" on "what to do in the face of ambiguity" when interpreting the term "employee" in antiretaliation provisions).

244. *Felten*, 993 F.3d at 439 (Griffin, J., dissenting).

245. Robinson v. Shell Oil Co., 519 U.S. 337, 341–43 (1997).

method of statutory interpretation for lower courts. Antiretaliation provisions exist throughout the federal code and often differ from one another.[246] Instead of analyzing the term "employee" in each statute independently by deploying all available tools of statutory interpretation, courts can apply *Robinson*'s three factors with greater ease and consistency. Indeed, the individualized methodology endorsed by the Sixth Circuit dissent risks judicial disagreement and increased litigation over what are, more or less, variations on a boilerplate template.

CONCLUSION

In pari materia offers an elegant solution to reconcile a recent circuit split. In recognizing that the antiretaliation provisions of Title VII and the FCA concern the same subject, courts must read them together and apply *in pari materia*. This Note has argued that, after applying this presumption, the antiretaliation provision of the FCA holds employers liable for retaliating against former employees.[247] This successful application blazes a trail for the remaining circuits and the Supreme Court to use *Robinson* as a tool to interpret the FCA, as well as antiretaliation provisions throughout the federal code.

The impact of this finding reaches many statutes and whistleblowers. If the antiretaliation provisions of Title VII and the FCA are read *in pari materia*, dozens of other ambiguous retaliation provisions in dozens of other statutes can be (and have been) similarly interpreted.[248] Reports of retaliation against whistleblowers have increased in recent years.[249] The number of statutes allowing whistleblowers to come forward has also risen over the past few decades.[250] In addition, the passage of

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246. *See infra* Appendix; OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 49.

247. *See supra* Part III.

248. *See supra* Parts I.B & II.D. This Note, however, cannot advocate for including former employees under the protection of multiple whistleblower statutes because *in pari materia* remains only a rebuttable presumption. A court would need to examine each statute separately to determine whether that statute reaches a certain threshold of ambiguity.

249. *See* Rothschild & Miethe, *supra* note 5, at 108.

250. *See* MODESITT ET AL., *supra* note 59, at 1-3 (explaining that federal protections for whistleblowers have greatly multiplied since the 1970s); *see also id.* at 1-12 (noting a correlation between the rise of deregulation in the 1980s and the proliferation of

Congress' infrastructure and inflation reduction bills means federal contractors will receive an influx of federal funds in the next year.[251] Given indications of widespread blacklisting,[252] the coverage of § 3730(h)(1) and other antiretaliation provisions will continue to be critical for years to come.

APPENDIX

The following tables compare the language of Title VII's antiretaliation provision with the language of other laws that inspired the FCA's antiretaliation provision, as indicated in the FCA's legislative history.[253] The bolded, underlined phrases are key similarities; the bolded, italicized phrases are key differences.

Clean Air Act, 42 U.S.C. § 7622(a)

Text of Inspiring Provision	**Text of Title VII Antiretaliation Provision**
(a) Discharge or discrimination prohibited. No employer may discharge any employee or **<u>otherwise discriminate against any employee</u>** with respect to his ***compensation, terms, conditions, or privileges of employment*** because the employee (or any person acting pursuant to a request of the employee)— (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or a proceeding for the administration or enforcement of any requirement imposed under this Act or under any applicable	It shall be an unlawful employment practice for an employer to **<u>discriminate against any of his employees</u>** or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, **<u>testified, assisted, or participated in any manner</u>** in an investigation, proceeding, or hearing under this subchapter

whistleblower protection statutes, a trend in part explained by the increased popularity of the belief that private citizens are better equipped than government to solve social ills).

251. *See* Jalonick, *supra* note 22.
252. *See* Rothschild & Miethe, *supra* note 5, at 120.
253. S. REP. NO. 99-345, at 34 (1986).

implementation plan, (2) **<u>testified</u>** or is about to testify in any such proceeding, or (3) **<u>assisted or participated or is about to assist or participate in any manner</u>** in such a proceeding or in any other action to carry out the purposes of this Act.	

Federal Surface Mining Act, 30 U.S.C. § 1293(a)

Text of Inspiring Provision	**Text of Title VII Antiretaliation Provision**
(a) Retaliatory practices prohibited[.] No person shall discharge, **<u>or in any other way discriminate against</u>**, or cause to be fired or **<u>discriminated against, any employee</u>** or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.	It shall be an unlawful employment practice for an employer **<u>to discriminate against any of his employees</u>** or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter

Energy Reorganization Act, 42 U.S.C. § 5851

Text of Inspiring Provision	**Text of Title VII Antiretaliation Provision**
(1) No employer may discharge any employee or otherwise **<u>discriminate against any employee</u>** with respect to his ***compensation, terms, conditions, or privileges of***	It shall be an unlawful employment practice for an employer to **<u>discriminate against any of his employees</u>** or applicants for employment . . . because he has opposed any

employment because the employee (or any person acting pursuant to a request of the employee) . . . (F) **assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding** or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.	practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, **assisted, or participated in any manner in an investigation, proceeding**, or hearing under this subchapter

Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(1)

Text of Inspiring Provision	**Text of Title VII Antiretaliation Provision**
(1) No employer may discharge any employee or **otherwise discriminate against any employee** with respect to his ***compensation, terms, conditions, or privileges of employment*** because the employee (or any person acting pursuant to a request of the employee) has— (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State, (B) **testified** or is about to testify in any such proceeding, or (C) **assisted or participated or is about to assist or participate in any manner** in such a proceeding or in any other action	It shall be an unlawful employment practice for an employer to **discriminate against any of his employees** or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, **testified, assisted, or participated in any manner** in an investigation, proceeding, or hearing under this subchapter

to carry out the purposes of this subchapter.	

Water Pollution Control Act, 49 U.S.C. § 20109(e)

Text of Inspiring Provision	Text of Title VII Antiretaliation Provision
(a) In general.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not ***discharge, demote, suspend, reprimand***, or **<u>in any other way discriminate against an employee</u>** if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done . . . (3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding . . .	It shall be an unlawful employment practice for an employer to **<u>discriminate against any of his employees</u>** or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter

Comprehensive Environmental Response Compensation and Liability Act, 49 U.S.C. § 31105(a)

Text of Inspiring Provision	Text of Title VII Antiretaliation Provision
(a) Prohibitions.—(1) A person may not discharge an employee, or discipline or **<u>discriminate against an employee</u>** regarding ***pay, terms, or privileges of employment***, because— (A)(i) the employee, or another person at the employee's request,	It shall be an unlawful employment practice for an employer to **<u>discriminate against any of his employees</u>** or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has

has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or **has testified** or will testify in such a proceeding . . .	made a charge, **testified**, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter

Toxic Substances Control Act, 15 U.S.C. § 2622(a)

Text of Inspiring Provision	Text of Title VII Antiretaliation Provision
(a) In general[.] No employer may discharge any employee or otherwise **discriminate against any employee** with respect to the employee's ***compensation, terms, conditions, or privileges of employment*** because the employee (or any person acting pursuant to a request of the employee) has— (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; (2) **testified or is about to testify in any such proceeding; or** (3) **assisted or participated or is about to assist or participate in any manner in such a proceeding** or in any other action to carry out the purposes of this chapter.	It shall be an unlawful employment practice for an employer to **discriminate against any of his employees** or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, **testified, assisted, or participated in any manner in an investigation, proceeding**, or hearing under this subchapter