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Better to Analyze a Statute than to Psychoanalyze Congress? Eleventh Circuit Widens Circuit Split over Proper Causation Standard in False Claims Act Retaliation Cases

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I. INTRODUCTION

"You're fired!" Employees across America hear these words every day.[1] Usually, the federal government has no interest in whether or why an employee is fired. But when companies that do business with the federal government improperly fire employees for reporting fraud, the interests of the federal government and the general public are directly implicated.[2] The implications are clear: employees suffer the tribulations of wrongful

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[1] Job Openings and Labor Turnover Survey - August 2020, BUREAU OF LABOR STATISTICS, https://www.bls.gov/news.release/archives/jolts_10062020.pdf (cataloguing monthly data on job openings, hires, and separations in the United States).

[2] *See generally* S. Rep. 110-507 (2008) (providing historical background and reporting favorably from the Senate Judiciary Committee on The False Claims Act Correction Act of 2008, which sought to protect all Federal funds against fraud and enhance protections for whistleblowers who report it); False Claims Act FAQ, NATIONAL WHISTLEBLOWER CENTER (Nov. 13, 2020 6:25 PM), https://www.whistleblowers.org/faq/false-claims-act-qui-tam/ (offering short answers to common questions from potential whistleblowers regarding the False Claims Act, including information about protection for those who report fraud and face retaliation for doing so).

termination, the government feels the strain on its resources, and American taxpayers ultimately foot the bill.[3]

Healthcare providers and defense contractors are some of the federal government's largest business partners.[4] Because the federal government is a deep-pocketed and reliable payer, some providers seek to grow their business by billing the federal government as much and as often as possible. Sometimes, contractors and providers abuse their billing privileges and cross the line into fraud.[5] Well aware of this phenomenon, Congress has relied on the False Claims Act (FCA)[6] to combat fraud and recover ill-gotten gains.[7] To aid its effort in enforcing the FCA, Congress encourages employees to report fraud and allows them to share in any money that is successfully recovered.[8]

Congress recognizes that employees who report fraud to their employers will often face backlash.[9] To protect these employees, the FCA allows them to sue employers that retaliate against them for engaging in protected activity to uncover and report fraud.[10] Employees who sue their

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[3] S. Rep. 110-507, at 7–8 (2008). Notably, because fraud undermines public confidence in the government's ability to manage its affairs, the harm from fraud is not measured strictly in dollars and cents. Effective fraud enforcement tools provide the government an opportunity "to win back the hearts and minds of taxpayers who believe the Government does not care how taxpayer dollars are spent." *Id.* at 8.

[4] Heidi Peltier, *The Growth of the "Camo Economy" and the Commercialization of the Post-9/11 Wars*, 20 Years of War Costs of War Research Series (Jun. 30, 2020), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2020/Peltier%202020%20-%20Growth%20of%20Camo%20Economy%20-%20June%2030%202020%20-%20FINAL.pdf (noting that the Pentagon spent $370 billion on contracting in 2019 and demonstrating that military contracting is often more expensive than the government performing those services itself); Key Elements of the U.S. Tax System, TAX POLICY CENTER BRIEFING BOOK (May 2020), https://www.taxpolicycenter.org/briefing-book/how-much-does-federal-government-spend-health-care (indicating that the federal government spent almost $1.2 trillion on health care in 2019).

[5] S. Rep. 110-507, at 7–8 (2008) (noting that the federal government recovered roughly $8 billion from healthcare providers and over $1.6 billion from defense contractors between 1986 and 2008); Fraud Statistics – Overview, DEPARTMENT OF JUSTICE CIVIL DIVISION (Sept. 30, 2019), https://www.justice.gov/opa/press-release/file/1233201/download (calculating that the federal government recovered over $41 billion from healthcare providers and $6 billion from defense contractors between 1986 and 2019).

[6] 31 U.S.C. §§ 3729–3733.

[7] *See generally* S. Rep. 110-507 (2008).

[8] S. Rep. 110-507, at 5 (2008) (noting that, in most cases, whistleblowers who come forward and contribute to a successful fraud recovery stand to receive some portion of the money recovered).

[9] *Id.* (recognizing that whistleblowers take a risk when reporting fraud against the government).

[10] *Id.*

employers for retaliation can be reinstated and receive double back pay.[11] To prevail, employees must prove that an employer fired them "because of" their engagement in protected conduct.[12]

Whether an employee's complaints must be essential to or merely a consideration in an employer's decision to retaliate is frequently disputed in FCA retaliation cases. Courts are split on the issue.[13] In 2020, the United States Court of Appeals for the Eleventh Circuit decided *Nesbitt v. Candler Cnty.*, in which the court held that an employee must prove that her complaints were essential to her employer's retaliation decision.[14] In doing so, the court widened a circuit split on how to interpret the antiretaliation provision of the FCA.[15] As a result, the geographic location in which employees happen to work will often affect the protections afforded to them for reporting fraud against the federal government.[16]

II. FACTUAL BACKGROUND

Jamie Nesbitt began working for the Candler County ambulance service (the County) in 2006. He was an emergency medical technician (EMT). Several years into his tenure, Nesbitt's colleague, Donald Greer, was promoted from EMT to deputy director of the ambulance service. Following Greer's promotion, Nesbitt noticed problems and clashed with his supervisors.

As EMTs, Nesbitt and his coworkers had to complete "trip reports," which had to be filled out following each ambulance ride. The trip reports contained information about the condition of the patient and the medical

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[11] 31 U.S.C. § 3730(h)(2) provides that "[r]elief" shall include

> *reinstatement with the same seniority status* that [the] employee, contractor, or agent would have had but for the discrimination, *2 times the amount of back pay*, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(emphasis added).

[12] 31 U.S.C. § 3730(h)(1).

[13] *Nesbitt v. Candler Cnty.*, 945 F.3d 1355, 1360–61 (11th Cir. 2020) (discussing circuit split between the District of Columbia, Sixth, and Seventh Circuits, on the one hand, and the Third and Fifth Circuits, on the other).

[14] *Id.* at 1359.

[15] *Id.* at 1360–61.

[16] S. Rep. 110-507, at 9 (2008) (pointing out that "conflicting interpretations from courts across the country . . . make the outcomes of FCA cases unclear–not based upon facts, but based upon where the case is filed–and significantly undermine the effectiveness of the FCA.").

necessity of the ambulance service. Based on the contents of the narrative section of each trip report, Medicare determines whether to reimburse ambulance providers for their services.[17]

As deputy director, Greer ordered Nesbitt and other EMTs under his direction to write in their trip report narratives that patients were non-ambulatory, regardless of whether or not the patients could walk. This practice would enable the County to bill Medicare for the trips. Nesbitt believed this practice was fraudulent, so he complained to Greer and other County officials.

Following the complaints, Greer reduced Nesbitt's work schedule. Normally, EMTs were scheduled to work two twenty-four-hour shifts per week. In addition, they would be on call for two more twenty-four-hour shifts. The on-call shifts allowed EMTs to work overtime and, thus, earn higher pay. Greer limited Nesbitt's on-call shifts to twelve hours instead of twenty-four, which reduced Nesbitt's income.

After the County reduced Nesbitt's hours and pay, Nesbitt took a second job, working as an EMT at a private ambulance company called Meddixx.[18] Although Greer approved Nesbitt's taking a second job, a County policy forbade employees to have side jobs without approval from the ambulance service director.[19] Nesbitt assumed that David Moore, the ambulance service director, knew and approved of his Meddixx job, but Moore claimed he knew nothing about it.

Greer and Moore recommended to the County Administrator, William Lindsey, that Nesbitt be fired.[20] They said that Nesbitt refused to follow orders and that he "violated the County's policy on side jobs."[21] The Board of Commissioners voted to fire Nesbitt.[22] Thereafter, Greer and Moore summoned Nesbitt to Greer's office, where they gave him a letter that provided two reasons for firing him.[23] First, he took an unauthorized side

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[17] *Nesbitt*, 945 F.3d at 1356.

[18] *Id.*

[19] *Id.* at 1356–57.

[20] *Id.* at 1357.

[21] *Id.*

[22] The County fired Nesbitt in 2014, after he raised his complaints. The five-member Board of Commissioners had the exclusive "authority to hire and fire County employees." *Nesbitt*, 945 F.3d at 1357. Under the County hierarchy, EMTs reported to the emergency medical services director, who reported to the County Administrator, who reported to the Board. Nesbitt v. Candler Cnty., No. 6:14-cv-094, 2018 WL 6356420, at * 1 (S.D. Ga. 2018). A department head or the County Administrator would usually recommend to an individual Board member that an employee ought to be fired. The Board member would then relay that recommendation to the full Board, which would then discuss and vote on it. *Nesbitt*, 2018 WL 6356420, at * 1.

[23] *Nesbitt*, 945 F.3d at 1357.

job with Meddixx, and second, Nesbitt refused to "fill out trip reports in 'the proper way.'"[24]

In August 2014, after the County fired him, Nesbitt sued under the FCA and the Georgia False Medicaid Claims Act, O.C.G.A. §§ 49-4-168–168.6,[25] alleging that the County fraudulently billed for ambulance services and fired him in retaliation for whistleblowing. In June 2016, the United States intervened. The parties reached a settlement in which Nesbitt and the government voluntarily dismissed the fraud claims. However, Nesbitt's retaliation claim proceeded.[26] The United States District Court for the Southern District of Georgia granted summary judgment for the County.[27] Although the district court acknowledged that Nesbitt had engaged in "protected conduct," it found that there was no genuine issue of material fact regarding whether the County fired Nesbitt for the reasons the County provided.[28] Nesbitt appealed to the United States Court of Appeals for the Eleventh Circuit.[29]

III. LEGAL BACKGROUND

A. False Claims Act

Congress enacted the FCA during the Civil War to combat fraud.[30] As the federal government sought out private contractors to aid the war effort, unscrupulous suppliers sold the government raggedy uniforms, infantry boots made of cardboard, rotted ship hulls freshly painted to disguise their age, and gunpowder barrels filled with sawdust.[31] Suppliers also sold the same mules "over and over again to Army quartermasters."[32] In response, Congress enacted and President Lincoln

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[24] *Id.*

[25] O.C.G.A. §§ 49-4-168–168.6 (2020).

[26] Under the FCA, whistleblowers typically pursue fraud claims jointly with the federal government. These fraud claims are separate from any retaliation claims. Thus, even if the fraud claims are released, whistleblowers can proceed independently with their retaliation claims. *See Nesbitt*, 945 F.3d at 1357.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 37 Cong. Ch. 67, March 2, 1863, 12 Stat. 696. For an interesting and extensive history of the FCA by an attorney intimately acquainted with its evolution over the last thirty-five years, *see* James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261 (2013).

[31] Helmer, *supra* note 30, at 1264–65.

[32] *Id.* at 1264.

signed the FCA[33] on March 2, 1863 to "prevent and punish Frauds upon the Government of the United States."[34] The FCA allowed anyone

> to bring an action on behalf of the United States against a government contractor who knowingly submitted false claims for payment to the Government. If the suit was successful, the offending contractor was required to pay double damages and a $2,000 per false claim penalty. The successful relator would receive 50% of the amount recovered.[35]

The idea was to make the United States whole and allow the relator[36] to share in the recovery.[37]

Although the FCA was successful for many years, Congress scaled back the provisions to allow private parties to sue on behalf of the United States during World War II, and its use declined sharply in the following four decades.[38] In the 1980s, due to President Reagan's defense build-up against the Soviet Union, military spending rose dramatically.[39] At the same time, alarming reports of government contractors perpetrating fraud against the United States surfaced.[40] Congress acted. It passed the False Claims Amendments Act of 1986,[41] which reinvigorated the private whistleblower provisions of the FCA.[42]

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[33] 31 U.S.C. §§ 3729–3733.

[34] 37 Cong. Ch. 67, March 2, 1863, 12 Stat. 696.

[35] Helmer, *supra* note 30, at 1266.

[36] "Relator" is the term used to refer to private individuals who bring FCA suits on behalf of the government. These suits are usually captioned, "*United States ex rel.*" *See*, *e.g.*, United States ex rel. King v. Solvay Pharms., Inc., 871 F.3d 318, 333 (5th Cir. 2017); United States ex rel. Ziebell v. Fox Valley Workforce Dev. Bd., Inc., 806 F.3d 946, 953 (7th Cir. 2015). *Ex rel.* is the Latin short form of *ex relatione*, which means by or on the relation of. A "suit *ex rel.* is typically brought by the government upon the application of a private party (called a *relator*) who is interested in the matter." BLACK'S LAW DICTIONARY (11th ed. 2019).

[37] Helmer, *supra* note 30, at 1266.

[38] *Id.* at 1266–71 (2013). Congress eliminated the 50% bounty awarded to successful relators in response to pressure from Attorney General Francis Biddle to eliminate "parasitic lawsuits." In such lawsuits, citizens who knew about the FCA would hide out in federal courthouses waiting to observe criminal prosecutions against defense contractors. Once these opportunistic citizens discovered criminal prosecutions, they would file FCA whistleblower actions against the defense contractors and hope to collect a relator's share of any recovery. *Id.*

[39] *Id.* at 1271.

[40] *Id.* at 1271–72. For example, reports indicated that the Navy was being charged $400 for hammers, $7,000 for coffee pots, $660 for ashtrays, and $400 for socket wrenches. *Id.*

[41] Pub. L. No. 99-562, § 4, 100 Stat. 3153.

[42] Helmer, *supra* note 30, at 1273–74.

B. Antiretaliation Provision

When Congress reinvigorated the whistleblower provisions in the 1986 Amendments to the FCA, it also added an antiretaliation provision.[43] That provision, codified at 31 U.S.C. § 3730(h)(1), protects whistleblowers from retaliation by their employers:[44]

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment *because of* lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop [one] or more violations of this subchapter.[45]

The Senate Judiciary Committee reported that Congress was seeking "to halt companies and individuals from using the threat of economic retaliation to silence 'whistleblowers,' as well as to assure those who may be considering exposing fraud that they are legally protected from retaliatory acts."[46] The Committee was guided by whistleblower protection provisions in Federal safety and environmental statutes.[47]

The meaning of the words "because of" in the provision above are at the heart of the controversy in many FCA retaliation cases.[48] Without explaining why, courts either find the language ambiguous and examine the legislative history of the Act to resolve that ambiguity or find the language unambiguous and refuse to consider the legislative history to confirm the ordinary meaning.[49]

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[43] S. Rep. No. 99-345, at 34, reprinted in 1986 U.S.C.C.A.N. at 5299.

[44] Congress modified this provision in 2009 in the Fraud Enforcement and Recovery Act, Pub. L. No. 111-21 § 4, 123 Stat. 1617, 1621–25 (2009). The whistleblower protection provision was broadened to include protection for those reporting actions done by contractors and agents in furtherance of FCA Actions. In 2010, Congress added § 3730(h)(3) to clarify that the statute of limitations "for all retaliation cases would be three years after the date of the retaliation." Helmer, *supra* note 30, at 1279–80.

[45] 31 U.S.C. § 3730(h)(1) (emphasis added).

[46] S. Rep. No. 99-345, at 34, reprinted in 1986 U.S.C.C.A.N. at 5299.

[47] *Id*. The Committee cited examples including the Federal Surface Mining Act, the Energy Reorganization Act, Clean Air Act, Safe Drinking Water Act, Solid Waste Disposal Act, Water Pollution Control Act, Comprehensive Environmental Response, Compensation and Liability Act, and the Toxic Substances Control Act. *Id.*

[48] *See*, *e.g.*, *Nesbitt*, 945 F.3d at 1361–62; Yesudian v. Howard University, 153 F.3d 731, 736 (D.C. Cir. 1998).

[49] *See*, *e.g.*, *Nesbitt*, 945 F.3d at 1361–62; *Yesudian*, 153 F.3d at 736.

C. The Meaning of "Because Of"

Despite their differing interpretive approaches, courts uniformly agree that the language "because of" is a standard of causation.[50] They disagree, however, on whether the language requires the "motivating factor" standard or the "but-for" standard of causation.[51] The motivating factor standard is less stringent than the but-for standard.[52] In both cases, the employee made a whistleblowing claim and then was fired. Under the motivating factor standard, the employee only needs to show that the whistleblowing claim had a tendency to bring about or influence the employer's firing decision.[53] In contrast, under the but-for[54] standard, the employee must show that, absent the whistleblowing claim, she would not have been fired.[55]

The legislative history from the 1986 Amendments better supports the conclusion that "because of" requires the motivating factor standard of causation. Specifically, the Senate Judiciary Committee, in its report accompanying the adoption of the antiretaliation provision in 1986, wrote that "because of" means "the whistleblower must show the employer had

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[50] *See*, *e.g.*, *Nesbitt*, 945 F.3d at 1361–62; *Yesudian*, 153 F.3d at 736.

[51] *See*, *e.g.*, *Nesbitt*, 945 F.3d at 1361–62; *Yesudian*, 153 F.3d at 736.

[52] *See* Lauren Smith, *Motivating Factor versus But-for Causation in Claims Arising Under the Americans with Disabilities Act*, 48 U. TOL. L. REV. 643, 644–46 (2017) (pointing out that "[w]hen a specific factor is but one of multiple factors considered, it does not rise to the more stringent standard of but-for causation" and arguing that "precedent, the plain language of the ADA, and Congress's stated purposes in enacting the [ADA]" point to the conclusion that the motivating factor standard is appropriate). The motivating factor and but-for causation standards are borrowed from employment law. *Id.*

[53] Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 652–53 (2008) (contradistinguishing the two different causation standards as used in disparate treatment employment discrimination cases).

[54] A "but-for cause" is defined as "[t]he cause without which the event could not have occurred." It is also "termed *actual cause*; *cause in fact*; *factual cause*." BLACK'S LAW DICTIONARY (11th ed. 2019).

[55] Katz, *supra* note 53, at 653. Katz helpfully expands on the difference between the two standards:

> There are two different causal standards available under current disparate treatment law: necessity (often called "but for" causation) and minimal causation (often called "motivating factor" causation). A factor is necessary to (a "but for" cause of) an event where, absent that factor, the event would not have occurred when it did. A factor is minimally causal (a "motivating factor") where it has a tendency to bring about the event, but does not rise to the level of being necessary. By definition, necessity ("but for" causation) is more restrictive than minimal causation ("motivating factor"): a factor is minimally causal (a "motivating factor") if and only if it does not rise to the level of being necessary (a "but for" cause).

Id. at 652–53 (footnotes omitted).

knowledge the employee engaged in protected activity" and that "the retaliation was motivated, *at least in part*, by the employee's engaging in protected activity."[56] Some courts have quoted this language when analyzing the antiretaliation provision.[57] By contrast, other courts have refused to consider this language and reached a different interpretation, based on the ordinary meaning of the statute's text.[58] These courts refer to their interpretation as the "but-for" standard of causation.[59] Depending on a court's view, the outcome of a case may turn on the standard of causation that applies to retaliation claims.[60] The United States Circuit Courts of Appeals are split on whether to apply the motivating factor standard or the but-for standard in FCA retaliation cases.[61] The following sections explore these two standards and why courts differ on the correct standard.

1. The Case for Using the Motivating Factor Standard

The United States Court of Appeals for the District of Columbia (D.C.) Circuit, the Sixth Circuit, and the Seventh Circuit use the motivating factor standard. In 1998, in *United States ex rel. Yesudian v. Howard University*, the D.C. Circuit reversed a district court's grant of judgment as a matter of law on the plaintiff's retaliation claim under the FCA.[62] In that case, Dr. Daniel Yesudian worked in the University's purchasing department, where he discovered and repeatedly complained to high-level university officials that the department's director committed several financial improprieties. The director allegedly falsified employees' time reports, provided vendors confidential information to give them an advantage when bidding for projects, accepted bribes, approved fraudulent payments, and took university property home.[63]

Before analyzing the antiretaliation provision specifically, the court in *Yesudian* provided a brief history of the FCA and emphasized the law's purpose.[64] The court noted that Congress originally passed the FCA "to

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[56] S. Rep. No. 99–345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300 (emphasis added).

[57] *See*, *e.g.*, *Yesudian*, 153 F.3d at 731–49.

[58] *See Nesbitt,* 945 F.3d at 1359; DiFiore v. CSL Behring, LLC, 879 F.3d 71, 76–78 (3d Cir. 2018); *King*, 871 F.3d at 333.

[59] *Nesbitt*, 945 F.3d at 1357.

[60] *Id.*

[61] *See Nesbitt*, 945 F.3d at 1360; *DiFiore,* 879 F.3d at 76-78; *King*, 871 F.3d at 333; Singletary v. Howard Univ., 939 F.3d 287, 293 (D.C. Cir. 2019); *Ziebell*, 806 F.3d at 953; McKenzie v. Bellsouth Telecomms., Inc., 219 F.3d 508, 518 (6th Cir. 2000).

[62] 153 F.3d 731, 734 (D.C. Cir. 1998). The court also affirmed the district court's denial of judgment as a matter of law on the plaintiff's breach of contract claim. *Id.*

[63] *Id.* at 734.

[64] *Id.* at 735–36.

combat widespread fraud in defense contracts during the Civil War."[65] Regarding the 1986 amendment, the court pointed out the purpose of and quoted the antiretaliation provision.[66] Quoting the Senate report and citing cases from the Sixth and Ninth Circuits, the D.C. Circuit noted that, to establish the "because of" element, an employee must show that the employer knew the employee was engaged in protected activity and "the retaliation was motivated, at least in part, by the employee's engaging in [that] protected activity."[67] Thus, after considering the legislative history and the statute's purpose, the D.C. Circuit adopted the motivating factor standard of causation.[68] The D.C. Circuit followed its decision[69] to adopt the motivating factor standard once in *United States ex rel. Schweizer v. Oce N.V.*[70] and again in *Singletary v. Howard University*.[71]

Similarly, a few years after *Yesudian*, the Sixth Circuit adopted the motivating factor standard in *McKenzie v. Bellsouth Telecommunications., Inc.*[72] In *McKenzie*, the court heard an appeal from a district court's grant of summary judgment for the defendant in an FCA retaliation action.[73] McKenzie's claim required proof that her employer

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[65] *Id.* at 736 (citing S. Rep. No. 99-345, at 8, reprinted in 1986 U.S.C.C.A.N. at 5266, 5273).

[66] *Id.*

[67] *Id.* (alteration in original) (quoting S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300).

[68] The *Nesbitt* court claimed, incorrectly, that the *Yesudian* court ignored the ordinary meaning of "because of" and relied solely on the Senate report. *Nesbitt*, 945 F.3d 1360. That claim overlooks the fact that the *Yesudian* court also looked to the statute's purpose.

[69] Like other circuits, a three-judge panel of the D.C. Circuit is constrained to follow its circuit precedent. Florida Bankers Ass'n v. U.S. Dept. of the Treasury, 799 F.3d 1065, 1073 (D.C. Cir. 2015) (Henderson, J., dissenting) (citing LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (stating that one three-judge panel lacks the "authority to overrule another three-judge panel of the court."); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 795 (2012) (explaining that, in all but the Seventh Circuit, "a subsequent panel is bound by the holding of a previously published decision in that circuit.").

[70] 677 F.3d 1228 (D.C. Cir. 2012).

[71] 939 F.3d 287 (D.C. Cir. 2019). In *Singletary*, the court, as it did in *Yesudian*, mentioned the historical purpose of the FCA to combat fraud by Civil War contractors. *Id.* at 292–93. It noted that the FCA protects whistleblowers to enhance enforcement of the law and stated that, to make out a claim for retaliation, plaintiffs must show that their employer was motivated, at least in part, by the plaintiff's protected activity. *Id.* at 293. The court reaffirmed the motivating factor standard in spite of what other circuits had done in the interim. *DiFiore*, 879 F.3d at 76–78 (adopting but-for standard of causation in FCA retaliation cases); *King*, 871 F.3d at 333 (same).

[72] 219 F.3d 508, 518 (6th Cir. 2000).

[73] *Id.* at 510.

retaliated against her because of actions she took while pursuing an FCA claim.[74] To determine the meaning of "because of," the court relied on the legislative history in the Senate Judiciary Committee report: "the employee must show that 'the retaliation was motivated at least in part by the employee's engaging in protected activity.'"[75] After quoting the Senate report, the court reasoned that McKenzie failed to show that Bellsouth was aware of her protected activity and held that Bellsouth's decision to fire her could not have been motivated by her protected activity.[76] The only source of meaning the court considered in determining the meaning of "because of" was the Senate committee report, which showed the legislature's specific intent regarding the meaning of "because of."[77] The Sixth Circuit has not considered this issue since *McKenzie*.

Unlike the D.C. Circuit and the Sixth Circuit, the Seventh Circuit has never evaluated the correctness of the motivating factor standard, even while using it. In *Brandon v. Anesthesia & Pain Management Associates, Ltd.*,[78] the Seventh Circuit heard an appeal for retaliatory discharge under Illinois law.[79] In addition to the retaliatory discharge claim, the court addressed in dicta whether the plaintiff could bring an FCA retaliation claim as an alternative remedy.[80] The court specified the elements the plaintiff had to prove for an FCA retaliation claim, and it cited *Yesudian* to support its conclusion that the discharge must have been "motivated, at least in part, by the protected conduct."[81] Thus, the Seventh Circuit followed the D.C. Circuit and adopted the motivating factor standard. In later cases, the Seventh Circuit relied on *Brandon* to apply the motivating factor standard in both *Fanslow v. Chicago*

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[74] *Id.* at 518.

[75] *Id.* (quoting S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300).

[76] *Id.*

[77] *Id.* The court did not use the plain meaning canon. *See* LINDA D. JELLUM, *THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES*, 126 (2d ed., Carolina Academic Press 2021) (explaining that under the plain meaning canon courts presume that words bear their ordinary meaning, which is what most people would think the words mean). Nor did the court address ambiguity, which "refers to words and phrases that have more than one ordinary meaning." *Id.* at Chp. 7. The fact that courts disagree on the meaning of "because of" strongly suggests that the phrase is ambiguous. When ambiguity is present, "judges will turn to sources of meaning other than the text, such as the other intrinsic sources, extrinsic sources, and policy-based sources." *Id.* at 269.

[78] 277 F.3d 936 (7th Cir. 2002).

[79] *Id.* at 938.

[80] *Id.* at 943–44.

[81] *Id.* at 944 (quoting *Yesudian*, 153 F.3d at 736).

Manufacturing Center, Inc.[82] and *United States ex rel. Ziebell v. Fox Valley Workforce Dev. Bd., Inc.*[83]

2. The Case for Using the But-for Standard

In contrast, the Fifth and Third Circuits have rejected the motivating factor standard and adopted the but-for standard.[84] These circuits made this choice as a response to two Supreme Court cases that addressed the meaning of "because of" outside the FCA context—*Gross v. FBL Financial Services, Inc.*[85] and *University of Texas Southwestern Medical Center v. Nassar*.[86]

In *Gross*, the Supreme Court analyzed the words "because of" in the Age Discrimination in Employment Act,[87] which provides: "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age[.]"[88] In analyzing this language, the Court said it would begin with the text and assume that the ordinary meaning of that text expressed the legislature's purpose.[89] To start, the Court cited the dictionary and said that "because of" means "by reason of: on account of."[90] The Court then concluded that "by reason of" requires showing but-for causation.[91] The Court cited three cases in support of its

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[82] 384 F.3d 469 (7th Cir. 2004).

[83] 806 F.3d 946, 953 (7th Cir. 2015). The Seventh Circuit has never explicitly transitioned away from using the motivating factor standard, but the future looks less certain based on a couple of cases decided in the last five years. In *United States ex rel. Marshall v. Woodward, Inc.*, the court applied the but-for standard, but only because the parties agreed that it was the correct standard under the FCA and Illinois law for the plaintiff's state-law claim. 812 F.3d 556, 564 (7th Cir. 2015). A few years after *Marshall*, the court decided *Heath v. Indianapolis Fire Department*, 889 F.3d 872 (7th Cir. 2018), in which it mentioned in dicta that reconsidering the Circuit's holding in *Fanslow* to use the motivating factor standard might be warranted in a future case. *Heath*, 889 F.3d at 874. The court cited a decision from the Fifth Circuit, *King*, and a decision from the Supreme Court, *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), as reasons for reconsidering the applicable causation standard. *Heath*, 889 F.3d at 874.

[84] *DiFiore*, 879 F.3d at 76–78; *King*, 871 F.3d at 333.

[85] 557 U.S. 167 (2009). Justice Thomas wrote the opinion of the court for a 5-4 majority.

[86] 570 U.S. 338 (2013). The language at issue in *Nassar* was "because" rather than "because of," but the Supreme Court concluded that the difference was not meaningful. *Id.* at 352.

[87] 29 U.S.C. §§ 621–634.

[88] 29 U.S.C. §§ 623(a)(1) (emphasis added).

[89] *Gross*, 557 U.S. at 175.

[90] *Id.* at 176 (citing Webster's Third New International Dictionary 194 (1966)).

[91] *Id.*

conclusion.[92] Thus, to prove a retaliation claim under the ADEA, a plaintiff must show that "age was the but-for cause of the employer's adverse decision."[93]

Four years after *Gross*, the Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar*. In *Nassar* the Court addressed the standard of causation for Title VII retaliation claims.[94] The Court started by saying that Congress legislated against the background of common law tort principles, which provide that, for an act to be considered the cause of an outcome, the outcome must not have occurred without—that is, but for—that act.[95] Next, the court pointed out that Title VII prohibits two categories of employer conduct, each involving distinct causation standards.[96] The first category involves discrimination by an employer based on an employee's race, color, religion, sex, or national origin.[97] The Court noted that in Congress's 1991 amendments to Title VII, Congress explicitly included a provision with a lower causation standard.[98]

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[92] *Id.* (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (ruling that age must be a but-for cause in ADEA disparate-treatment claims); Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 652–55 (2008) (stating that "by reason of" requires showing but-for causation); Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 63–64 (2007) (observing that "based on" indicates a but-for causal relationship in common talk).

[93] *Gross*, 557 U.S. at 176 (internal quotation marks omitted). Notably, *Gross* was a 5-4 decision. Justice Stevens wrote a dissent, in which he raised two significant points. First, he said "[t]he most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee." Second, Justice Stevens noted that the but-for causation standard adopted in *Gross* was advanced in dissent by Justice Kennedy in Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989), which interpreted identical language in Title VII of the Civil Rights Act of 1964. Stevens emphasized that, after the Supreme Court rejected the but-for standard in *Price Waterhouse*, Congress amended Title VII in 1991 and also rejected the but-for standard. *Gross*, 557 U.S. at 180–81 (Steven, J., dissenting). Justice Breyer also wrote a dissent, in which he argued that a but-for causation standard makes sense in tort cases involving the movement of physical forces, but the standard does not make sense in the hazier realm of assessing an employer's motive. Justice Breyer further stated that, because an employer inevitably knows more about its motives than the employee, "[a]ll that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision." *Gross*, 557 U.S. at 190–91 (Breyer, J., dissenting).

[94] *Nassar*, 570 U.S. at 346.

[95] *Id.* at 346–47.

[96] *Id.* at 347.

[97] *Id.*

[98] *Id.* at 348–49. The new provision, codified at 42 U.S.C. § 2000e-2(m), provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, even though other factors also motivated the practice." *Nassar*, 570 U.S. at 348–49 (alteration in original) (emphasis added) (quoting 42 U.S.C. § 2000e-2(m)).

The second category involves employer-based retaliation for protected conduct by employees; it contains two criteria, as laid out in 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any [employee] . . . *because* he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.[99]

After discussing its holding in *Gross*, the Court held that the word "because" in the antiretaliation provision of Title VII has the same meaning as "because of" in the ADEA.[100] The Court extensively analyzed counterarguments to adopting the but-for causation standard, but ultimately rejected that standard based on the clarity of the text and the section's fit within the act as a whole.[101]

Because of these decisions, the Fifth Circuit used the Supreme Court's reasoning in *Gross* and *Nassar* to apply the but-for standard in *United States ex rel. King v. Solvay Pharms., Inc.*[102] In *King*, the court reviewed a district judge's grant of summary judgment against a relator's retaliation claim.[103] The court interpreted the words "because of" in the antiretaliation provision of the FCA.[104] Without much analysis, the court concluded that the but-for causation standard applied.[105] To support its conclusion, the court merely cited *Gross* and *Nassar* and included parenthetical notes in the citation for each case.[106]

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[99] 42 U.S.C. § 2000e-3(a) (citations omitted).

[100] *Nassar*, 570 U.S. at 352.

[101] *Id.* at 352–60. Like *Gross*, *Nassar* was a 5-4 decision. Justice Ginsburg wrote the dissent, in which she argued that status-based discrimination based on immutable characteristics and employer retaliation for complaining of such discrimination are inextricably linked. Because of that link, she wrote, adopting a lesser causation standard for status-based discrimination and a heightened but-for causation standard for retaliation makes little sense. *Nassar*, 570 U.S. at 363–64 (Ginsburg, J., dissenting).

[102] 871 F.3d 318 (5th Cir. 2017).

[103] *Id.* at 323. The case also involved other FCA claims and a partial grant of court costs to the defendant. *Id.*

[104] *Id.* at 333.

[105] *Id.*

[106] *Id.* In the citation for *Gross*, the Fifth Circuit merely quoted the Supreme Court's holding: "the language 'because of' requires a 'but-for' cause of the employer's adverse decision under ADEA retaliation claims." *Id.* (quoting *Gross*, 557 U.S. at 176). In addressing *Nassar*, the court provided a quote in which the Supreme Court stated that there was no meaningful difference between the text at issue in *Gross* and in *Nassar*, and as such the obvious conclusion was that plaintiffs pursing retaliation claims under Title VII must prove

The Third Circuit also followed *Gross* and *Nassar* when it adopted the but-for standard. In *DiFiore v. CSL Behring, LLC*,[107] the plaintiff brought a claim against her former employer for retaliation in violation of the FCA.[108] After losing on summary judgment, the plaintiff appealed, arguing that the district court's instruction to the jury regarding use of the but-for causation standard was erroneous.[109] On appeal, the Third Circuit stated that the district court's jury instruction to apply the but-for causation standard was a correct application of Supreme Court case law.[110] The court then cited *Gross* and *Nassar* and explained why it believed the reasoning in those decisions applied to FCA retaliation claims.[111] It said that the Supreme Court looked to the ordinary meaning of the words "because of" to determine that the but-for causation standard applied.[112] Because the language in the FCA retaliation provision ("because of") is almost identical to the language the Supreme Court interpreted in *Gross* and *Nassar*, the Third Circuit concluded that FCA retaliation claims require proof of but-for causation.[113]

IV. COURT'S RATIONALE

The Eleventh Circuit followed the Third and Fifth Circuits in adopting the but-for standard in *Nesbitt v. Candler County*.[114] The only issue on appeal in *Nesbitt* was whether the but-for standard or the motivating factor standard applied.[115] The court adopted the but-for standard, and in doing so foreclosed any possibility of Nesbitt surviving summary judgment.[116]

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an employer's desire to retaliate was the "but-for cause of the challenged employment action." *King*, 871 F.3d at 333 (quoting *Nassar*, 570 U.S. at 352).

[107] 879 F.3d 71, 76-78 (3d Cir. 2018).

[108] *Id.* at 73. The plaintiff also asserted a claim of "wrongful discharge under a theory of constructive discharge in violation of Pennsylvania state law." *Id.*

[109] *Id.*

[110] *Id.* at 76.

[111] *Id.* at 76–77. The court also disposed of the plaintiff's argument that the Third Circuit was bound by its prior decision in Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 186 (3d Cir. 2001). In *Hutchins*, the court recited in dicta that the elements of an FCA retaliation claim require using the but-for causation standard. *Id.*

[112] *DiFiore*, 879 F.3d at 76.

[113] *Id.* at 78.

[114] *Nesbitt*, 945 F.3d at 1359.

[115] *Id.* at 1357.

[116] *Id.* at 1359. At oral argument, Nesbitt's lawyer conceded, perhaps unwisely, that Nesbitt would lose the case if the court adopted the but-for standard instead of the motivating factor standard. The court accepted the concession and agreed that Nesbitt would lose under the but-for standard. *Id.* at 1357–58. This concession was especially concerning considering that but-for causation arguably does not impose a significantly

In its opinion, the court conspicuously framed the issue in the case as a "choice" it had to make between the two different standards.[117] Taking a textualist approach, the court said, it "must begin, and often should end as well, with the language of the statute itself."[118] The court believed that the language at issue was unambiguous because the Supreme Court had already interpreted this language, albeit in other, unrelated statutes, as explained above.[119] Given the "because of" language, the court surmised that the Supreme Court's interpretations in *Gross* and *Nassar* did the necessary work to interpret that phrase.[120] The Eleventh Circuit concluded that it was constrained to follow the interpretation of "because of" in those two cases because the language in the FCA was "identical or materially identical."[121]

Oddly, however, the court pivoted and claimed that Congress had already made the choice of which causation standard to apply by choosing the words "because of."[122] Without citing any authority, the court said that, in using these unambiguous words in the antiretaliation provision, Congress had been clear about its intent.[123]

In its review of *Gross*, the court quoted the relevant provision of the ADEA that contains the phrase "because of" and stated that the Supreme Court ruled that age must be a but-for cause of an employer's adverse decision.[124] The court noted the Supreme Court's observation that the ordinary meaning of "because of" is "by reason of: on account of."[125] The court then repeated the Supreme Court's holding that age must have a determinative influence on an employer's decision.[126]

Next, the court discussed *Nassar* and the Supreme Court's interpretation of the word "because" in the antiretaliation provision of

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higher burden than motivating factor causation. *See*, *e.g.*, Kawn v. Andalex Group LLC, 737 F.3d 834, 845 (2d Cir. 2013) (reasoning that temporal proximity between an employee's complaints and an employer's retaliation, when combined with other evidence such as inconsistent employer explanations, may be sufficient to defeat summary judgment).

[117] *Nesbitt*, 945 F.3d at 1358.

[118] *Id.* (quoting United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc)).

[119] *Nesbitt*, 945 F.3d at 1358–59.

[120] *Id.* at 1358.

[121] *Id.* at 1359.

[122] *Id.* at 1358.

[123] *Id.*

[124] *Id.* at 1359.

[125] *Id.*

[126] *Id.*

Title VII.[127] The court noted two premises from which the Supreme Court reasoned. First, Congress incorporated familiar tort principles into federal tort statutes—i.e., causation means but-for causation.[128] Second, *Gross* provided insight into the correct way to interpret the word "because" by looking to its ordinary meaning.[129] The court emphasized that the Supreme Court "focused on the statute's text."[130] It then noted that the Supreme Court rejected counterarguments based on prior precedent, Congress's 1991 Amendments to Title VII, and the Equal Employment Opportunity Commission's interpretation of the statute.[131]

Based on its reading of *Gross* and *Nassar*, the Eleventh Circuit expressed its conviction that "the but-for causation standard applies to claims under the antiretaliation provision of the False Claims Act just as it does to the antiretaliation provision of Title VII and the antidiscrimination provision of the ADEA."[132] The court said the key language is "identical or materially identical in all three statutes."[133] Given the identical nature of the language in the statutes, the court stated it was duty-bound as an inferior court to follow the Supreme Court's decisions.[134] The court pointed out that other circuits took the same approach of following *Gross* and *Nassar*, which led it to conclude that the but-for standard of causation applied.[135]

The Eleventh Circuit recognized that the Sixth, Seventh, and D.C. Circuits used the motivating factor standard, but it criticized them for doing so.[136] First, it criticized the Sixth Circuit for not considering the ordinary meaning of the language "because of" in the statute when it decided *McKenzie*.[137] The court noted that the Sixth Circuit considered

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[127] *Id.* Interestingly, the Supreme Court recently addressed using the but-for causation standard for Title VII claims in its landmark decision in Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020). The Court cited *Gross* and *Nassar* and reasoned thus:

> Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened 'but-for' the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

Id. at 1739 (internal citations omitted).

[128] *Nesbitt*, 945 F.3d at 1359.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 1360 (citing U.S. CONST. ART. III, § 1).

[135] *Id.*

[136] *Id.*

[137] *Id.*

only a Senate report to interpret the language and also pointed out that the Sixth Circuit has not revisited the question since *Gross* and *Nassar* were decided.[138]

Next, the court attacked the D.C. Circuit for failing to focus on the ordinary meaning of the words "because of" and instead adopting the motivating factor standard in *Yesudian* based on the same Senate report the Sixth Circuit used.[139] The court derided the D.C. Circuit for failing to reconsider the rule it adopted in *Yesudian* after the Supreme Court's decisions in *Gross* and *Nassar*.[140] The D.C. Circuit followed its circuit precedent once after *Gross* when it decided *Schweizer* and once again after *Gross* and *Nassar* when it decided *Singletary*.[141]

Finally,[142] the court turned to the Seventh Circuit, criticizing it for adopting the motivating factor standard based on the D.C. Circuit's decision in *Yesudian* and without conducting its own analysis.[143] Although some of the Seventh Circuit's subsequent decisions suggested it may reconsider the proper causation standard for FCA retaliation claims, particularly given *Gross* and *Nassar*, the court begrudgingly concluded that the motivating factor standard remains in force in the Seventh Circuit.[144]

The court concluded its opinion by summarizing the basis of the circuit split on the issue of which causation standard to apply.[145] It said the circuits which disagreed with the but-for causation standard did so based on an erroneous focus on legislative history or following law from another circuit that relied on legislative history.[146] In response to the plaintiff's invitation to rely on legislative history, the court drew a line in the sand: "we should not, cannot, and do not use legislative history to get around the plain meaning of a statute's text."[147] The court said the statutory text

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[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] The court also added in a footnote that it could not determine whether the Eighth Circuit applies the motivating factor standard, but noted that if it did, the Eighth Circuit was also incorrect. *Nesbitt*, 945 F.3d at 1361, n.2.

[143] *Nesbitt*, 945 F.3d at 1360–61.

[144] *Id.* at 1361.

[145] *Id.*

[146] *Id.*

[147] *Id.* The court ended its opinion with a rhetorical flourish by paraphrasing one of Justice Jackson's many colorful statements: "it is better to analyze a statute than it is to psychoanalyze Congress; resorting to legislative history is less interpreting statutory language than recreating it." *Id.* at 1362. Although this statement exerts considerable force, an important distinction exists between resorting to legislative history and reviewing it while sleuthing around to uncover subtle but meaningful statutory ambiguity.

in the antiretaliation provision was clear, and it followed the Supreme Court's decisions interpreting the same clear language in other statutes.[148]

V. IMPLICATIONS

The FCA is the primary tool by which the federal government combats fraud perpetrated by defense contractors and healthcare providers.[149] Private whistleblowers play a substantial role in exposing and reducing fraud.[150] If whistleblowers do not receive protection and compensation for retaliation when they report fraud, they will be less likely to come forward.[151] When less fraud is reported, less money is recovered. Ultimately, taxpayers bear the costs when the federal government pays for deficient or nonexistent services.[152]

The Eleventh Circuit's decision in *Nesbitt*, like the Fifth Circuit's decision in *King* and the Third Circuit's decision in *DiFiore*, hurts employees. Employees who are fired for trying to expose fraud in these three circuits[153] now have to show that their employer would not have fired them had they not tried to expose that fraud.[154] By contrast, in the D.C. Circuit, the Sixth Circuit, and the Seventh Circuit, employees need only show that their employers considered the employees' protected conduct when firing them, even if that conduct was not a reason the

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[148] *Id*. Although language is sometimes clear, courts seem to overstate lingual clarity. They would do well to remember one of Justice Holmes' many wise admonitions: "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." RICHARD A. POSNER, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 287 (1992) (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).

[149] United States ex rel. Roby v. Boeing Co., 302 F.3d 637, 641 (6th Cir. 2002) (discussing history and provisions of the FCA).

[150] S. Rep. No. 110-507, at 6–7 (2008).

[151] *See Id.* at 5.

[152] The False Claims Act, TAXPAYERS AGAINST FRAUD, https://www.taf.org/false-claims-act (last visited on Oct. 23, 2020) (noting that the FCA is "the single most important tool U.S. taxpayers have to recover the billions of dollars stolen through fraud by U.S. government contractors every year.").

[153] There are nine States in these three circuits: Alabama, Georgia, and Florida, in the Eleventh Circuit; Delaware, New Jersey, and Pennsylvania, in the Third Circuit; and Louisiana, Mississippi, and Texas in the Fifth Circuit. About U.S. Federal Courts, FEDERAL BAR ASSOCIATION, https://www.fedbar.org/for-the-public/about-u-s-federal-courts/ (last visited on Nov. 13, 2020) (providing map with geographic boundaries and State composition of each circuit).

[154] *Nesbitt*, 945 F.3d at 1359.

employee was fired.[155] It is easier for an employee to prove that an employer considered the whistleblowing activity when deciding to fire someone than it is to show that a particular factor determinatively influenced the employer's decision. As Justice Breyer reasoned in his dissent in *Gross*, employees are at a disadvantage in determining and proving an employer's motives for firing them, because there is an inherent information asymmetry between employers and employees.[156] It is easy for employers to contrive reasons for firing employees. Thus, employees who are fired after stepping forward to expose fraud are less likely to be made whole.

Further, employees in different parts of the country have to meet different standards. The Fifth, Third, and now Eleventh Circuits[157] have ruled that "because of" requires using the but-for causation standard, while the Sixth, Seventh, and D.C. Circuits have ruled that the motivating factor causation standard applies. Because the result of FCA whistleblower retaliation cases often turns on which standard applies,[158] the Supreme Court ought to decide this issue for the whole country to ensure uniformity around the United States.

Indeed, the Supreme Court may well address this issue. A circuit split always increases the probability that the Supreme Court will grant certiorari to decide an issue and resolve the division.[159] Furthermore, because the issue in *Nesbitt* was a pure question of law, the case is a good vehicle for the Supreme Court to resolve the circuit split on how to interpret the phrase "because of" in the antiretaliation provision of the FCA.

Moreover, because the Eleventh, Fifth, and Third Circuits relied on *Gross* and *Nassar* when they decided which standard applied, the Supreme Court may be even more likely to resolve the issue. In *Gross*, the Supreme Court decided that the phrase "because of" requires applying the but-for causation standard to ADEA discrimination

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[155] *Singletary,* 939 F.3d at 293; *Ziebell*, 806 F.3d at 953; *McKenzie*, 219 F.3d at 518.

[156] *Gross*, 557 U.S. at 190–91 (Breyer, J., dissenting).

[157] Since submitting this article to the editors in November 2020, the First Circuit has joined the Fifth, Third, and D.C. Circuits in adopting the but-for causation standard. *See* Lestage v. Coloplast Corp., 982 F.3d 37, 40–41 (1st Cir. 2020) (addressing the proper causation standard under the FCA in an issue of first impression in the First Circuit and holding that the but-for causation standard applies).

[158] *Nesbitt*, 945 F.3d at 1357.

[159] H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT, Harvard University Press 246, 251 (1991) (concluding that the existence of a circuit split is the most important factor the Supreme Court considers when deciding whether to review a case).

claims.[160] Four years later in *Nassar*, the Supreme Court decided it was necessary to interpret almost identical language–"because"–in the retaliation provision of Title VII.[161] That the Supreme Court decided the meaning of such similar language in two different statutes within a few years suggests it may be more inclined to resolve the circuit split over what standard to apply in FCA retaliation cases.

Alternatively, Congress could clarify which standard it prefers. The legislative history is strong evidence that Congress intended the motivating factor standard, and this standard furthers the FCA's purpose of combating fraud and encouraging whistleblowing. It is eminently possible that the Eleventh, Fifth, and Third Circuits adopted the wrong standard. Until Congress or the Supreme Court acts, however, future whistleblowers are less likely to report fraud, taxpayers will recover less money, and the harm will be disproportionately distributed throughout the United States. Neither Congress nor the Supreme Court should stand for it.

Douglas E. Comin

[160] *Gross*, 557 U.S. at 176.

[161] *Nassar*, 570 U.S. at 360.