No. 04-169

In the

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the six year limitations period set out in 31 U.S.C. § 3731(b) should be applied to retaliatory discharge actions under the False Claims Act or whether courts should apply the most closely analogous state limitations period.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Graham County Soil & Water Conservation District, Cherokee County Soil & Water Conservation District, Gerald Phillips, Allen DeHart, Lloyd Millsaps, Bill Tipton, C.B. Newton and Eddie Wood.

The plaintiff below, United States of America ex rel. Karen T. Wilson, is the respondent here.

Raymond Williams, Dale Wiggins, Lynn Cody, and Graham County were defendant-appellees in the court of appeals but did not petition for certiorari.

Richard Greene, William Timpson, Keith Orr, Jerry Williams and Billy Brown were listed in the caption of the court of appeals as defendant-appellees, but did not participate in the court of appeals and did not petition for certiorari.

Graham County Board of County Commissioners, Cherokee County Board of County Commissioners, Cherie Greene, Ricky Stiles, Betty Jean Orr, Joyce Lane, Jimmy Orr, Eugene Morrow, Charles Lane, Charles Laney, George Postell, Lloyd Kissleburg, Ted Orr, Bernice Orr, John Doe, John Doe Corporations, and defendant, Government Entities 1-99, were defendants in the district court but did not participate in the court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Graham County Soil and Water Conservation District states that it is a public body corporate and politic created pursuant to N.C. Gen. Stat. § 139-5. Accordingly, it has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Cherokee County Soil and Water Conservation District also states that it is a public body corporate and politic created pursuant to N.C. Gen. Stat. § 139-5. Accordingly, it has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear on the following pages in the Appendix to the Petition for *Writ of Certiorari*:

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The opinion of the court of appeals (Pet. App. 1a-45a) is reported at *United States of America ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004). The order denying rehearing is unreported (Pet. App. 122a-123a). The district court's opinion granting Defendants' motion to dismiss is not reported (Pet. App. 46a-71a). The district court's denial of Plaintiff's motion for reconsideration and the district court's certification that the matter is ripe for review pursuant to 28 U.S.C. § 1292(b) is reported at 224 F. Supp. 2d 1042 (Pet. App. 72a-88a). The Memorandum and Recommendation of the United States Magistrate Judge is unreported (Pet. App. 89a-121a).

JURISDICTION

The court of appeals entered its judgment on April 29, 2004 (Pet. App. 1a-41a), and rehearing was denied on June 28, 2004 (Pet. App. 122a-123a). The petition for writ of certiorari was filed on July 28, 2004, and was granted on January 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the False Claims Act, 31 U.S.C. §§ 3729-33. The False Claims Act is set out in Pet. App. 124a-158a.

STATEMENT OF THE CASE

On March 7, 1997, Plaintiff Karen T. Wilson [hereinafter "Wilson"] resigned as a secretary at the Graham County Soil & Water Conservation District. (J.A. 30) Over three years and ten months later, Wilson filed the present action. (J.A. 3, 11) Wilson alleges that she was harassed by Petitioners for exposing various false claims for reimbursement made to certain federally-funded programs and that she was forced to resign on March 3, 1997, effective March 7, 1997. (J.A. 32-33) Specifically, she claims that Petitioners retaliated against her in violation of 31 U.S.C. § 3730(h) of the False Claims Act. (J.A. 32-33)

Petitioners moved to dismiss Wilson's retaliatory discharge claim in that it was barred by the applicable limitations period, namely the three-year limitations period North Carolina law imposes on wrongful discharge claims, *see* N.C. GEN. STAT. § 1-52 (2005). (J.A. 36-39; Pet. App. 3a) The district court agreed that Wilson's retaliatory discharge claim was time-barred and dismissed this claim. (Pet. App. 46a-71a) On April 29, 2004, a divided panel of the Fourth Circuit reversed the district court. (Pet. App 1a-45a) The majority concluded that claims under 31 U.S.C. § 3730(h) are governed by the limitations period set out in 31 U.S.C. § 3731(b)(1) (a six year period). The majority's opinion focuses upon the language of 31 U.S.C. § 3731(b), which provides:

> A civil action under section 3730 may not be brought –
>
> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b) (2000). The Fourth Circuit noted that section 3730, creates three separate causes of action. 367 F.3d at 248 (Pet. App. 5a). Section 3730(a) creates a cause of action that may be brought by the Attorney General when the Government has been damaged by a false claim. Section 3730(b) provides for the filing of a *qui tam* action by an individual. Section 3730(h) creates a cause of action for retaliatory discharge when an employee has been discriminated against for pursuing a false claim action. As the Fourth Circuit also noted, section 3729 "creates and defines the parameters of liability for presenting a false claim to the Government." 367 F.3d at 248 (Pet. App. 5a).

Relying upon the language of these sections, the Fourth Circuit concluded that Congress intended to bar any retaliatory discharge claim that is not brought within six years from the date the false claim was submitted to the Government: "[T]he effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under § 3730(h), may be brought no more than six

years after the date on which the underlying violation was committed." 367 F.3d at 248 (Pet. App. 5a-6a). Recognizing that this issue has "divided both our sister circuits and courts within this circuit," the Fourth Circuit rejected the rationale of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.,* 162 F.3d 1027 (9th Cir. 1998). 367 F.3d at 249 (Pet. App. 8a). In *Lujan*, the Ninth Circuit concluded that 31 U.S.C. § 3731(b) does not provide a limitations period for retaliatory discharge claims, because the limitations period in section 3731(b) only addresses violations of section 3729, and section 3729 has no bearing upon retaliatory discharge actions. In its decision, the Fourth Circuit expressly rejected the Ninth Circuit's decision and instead adopted the rationale of the Seventh Circuit in *Neal v. Honeywell Inc.*, 33 F.3d 860 (7th Cir. 1994).

Judge Wilkinson dissented. He reasoned that the majority's opinion cannot be squared with the literal language of the False Claims Act and is not consistent with congressional intent. Moreover, he concluded that the majority's interpretation of the False Claims Act "is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts." 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 35a).

SUMMARY OF ARGUMENT

Congress has not expressly provided a limitations period for a retaliatory discharge action brought under section 3730(h) of the False Claims Act. Section 3731(b) of the False Claims Act establishes a limitations period for an action brought by the United States under section 3730(a) and for a *qui tam* action filed under section 3730(b). Congress, however, did not intend for this limitations period to govern retaliatory discharge actions filed under section 3730(h).

The language and structure of section 3731(b) make clear that Congress did not intend for a six year limitations period to be applied to retaliatory discharge actions. Section 3731(b) is directly tied to a "violation of 3729." Whether a violation of section 3729 has occurred, however, is irrelevant to an action for retaliatory discharge. Indeed, to establish a claim for a retaliatory discharge, a plaintiff need not show a violation of section 3729. Rather, a plaintiff must merely hold a good-faith belief that a violation of the False Claims Act has occurred. Because a cause of action for retaliatory discharge does not involve a "violation of section 3729," by its own terms, section 3731(b) does not apply to an action for retaliatory discharge.

The Fourth Circuit's decision hinges entirely upon its reading of the phrase "a civil action under section 3730" as that phrase is used in section 3731(b). Congress, however, has used this phrase to mean different things in different sections and subsections of the False Claims Act. In certain subsections, Congress has used this phrase to refer only to an action brought by the United States under section 3730(a). In other subsections, this phrase means both an action brought by the United States under section 3730(a) and a *qui tam* action filed under section 3730(b). In still other subsections, the phrase includes actions under section 3730(a) and (b), as well as retaliatory discharge actions under section 3730(h). Because Congress has ascribed different meanings to this phrase, the specific meaning that Congress intended in section 3731(b) can only be discerned by an examination of the context in which the phrase is used. When read in context, it is clear that Congress did not use this phrase in section 3731(b) to include an action for retaliatory discharge.

The legislative history of the 1986 amendments to the False Claims Act confirms that Congress did not intend for section 3731(b) to apply to an action for retaliatory discharge. The whistle-blower provision set out in section 3730(h) was

modeled after eight other federal statutes. Because these statutes provide for reinstatement and backpay, Congress provided a limitations period of 180 days or less in these eight statutes. Moreover, in each of these statutes, the limitations period accrues with the act of discharge or retaliation. By contrast, under the Fourth Circuit's decision, the limitations period for a retaliatory discharge action under section 3730(h) is six years, and the six year period begins to run not upon the act of discharge, but upon the date of the underlying violation of the False Claims Act. The Fourth Circuit's construction of the False Claims Act is therefore incongruent with every other whistle-blower statute enacted by Congress.

The statutory interpretation adopted by the Fourth Circuit produces a result that is not only odd, but absurd. Tying the commencement of the limitations period in a retaliatory discharge action to anything other than the act of discharge or retaliation imposes a tremendous burden on employers and employees. It would also produce a myriad of bizarre outcomes (*e.g.*, an employee being barred from bringing a retaliatory discharge action based upon the statute of limitations when the act of discharge or retaliation has not yet occurred).

The Fourth Circuit erred in applying the general limitations period of section 3731(b) to a retaliatory discharge action under section 3730(h). Because Congress has not expressly provided for a limitations period for a retaliatory discharge action under section 3730(h), federal courts should apply the most closely analogous state statute of limitations.

ARGUMENT

In the absence of an express federal statute of limitations, federal courts should apply the statute of limitations for the most closely analogous state limitations period. *See Reed v. United Transp. Union,* 488 U.S. 319, 323-24 (1989).

In that Congress has failed to expressly set out a limitations period for a retaliatory discharge action under 31 U.S.C. § 3730(h), the Fourth Circuit erred by applying the six year limitations period of 31 U.S.C. § 3731(b) rather than turning to the most closely analogous limitations period under North Carolina law.

I. CONGRESS DID NOT EXPRESSLY PROVIDE A LIMITATIONS PERIOD FOR A RETALIATORY DISCHARGE ACTION BROUGHT UNDER 31 U.S.C. § 3730(h).

The starting point for interpreting the False Claims Act is the text of the statute. *See American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982). The sole limitations provision contained in the False Claims Act is as follows:

> A civil action under section 3730 may not be brought –
>
> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

A. By its very language, section 3731(b) applies only to violations of section 3729.

The language and structure of section 3731(b) demonstrate that Congress did not intend to apply a six year limitations period to a retaliatory discharge action brought under 31 U.S.C. § 3730(h). The retaliatory discharge provision of the False Claims Act, 31 U.S.C. § 3730(h), provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee 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 employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730(h) (2000). Section 3729 of the False Claims Act, 31 U.S.C. § 3729, sets out the conduct that constitutes the submission of a false claim to the Government. Section 3729

speaks only to the underlying False Claims Act violation and contains no reference to wrongful discharge or any act that would constitute a violation of 31 U.S.C. § 3730(h).

Section 3731(b) provides that a "civil action under section 3730" may be brought within six years of "the date on which the violation of 3729 is committed." This express reference to section 3729 establishes that section 3731(b) only provides the limitations period for an underlying violation of the False Claims Act, not a retaliatory discharge claim. As Judge Wilkinson explained in his dissent:

> The text of [31 U.S.C. § 3731(b)] could not be more plain. The six-year period is tied to a "violation of section 3729" and nothing else. Because an anti-retaliation claim does not involve a "violation of section 3729" but instead a violation of section 3730(h), by its own terms section 3731(b)(1) cannot apply. Section 3729 addresses only the submission of false claims to the federal government. Section 3729 does not address retaliatory actions by employers against whistle-blowing employees.

367 F.3d at 258 (Wilkinson, J., dissenting) (Pet. App. 31a).

The limitations period in section 3731(b) is tied solely to a "violation of section 3729." Section 3729, in turn, "strictly addresses false claims, not retaliation claims." *Lujan,* 162 F.3d at 1034. Thus, the language of the limitations period set out in section 3731(b) "clearly speaks only to the underlying False Claims Act violation." JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.11[A], at 4-204 (2d ed. Supp. 2000). As one commentator has noted:

> The statute of limitations provision in section 3731(b) clearly does not apply to section

> 3730(h) actions because it is expressly limited to violations of section 3729. As all courts have held, one need not allege a violation of section 3729 to have a cause of action under section 3730(h); one need only allege that one was retaliated against for investigating whether such an action could be filed. Therefore, because the federal cause of action does not supply a statute of limitations . . . , courts should apply the most closely analogous statute of limitations under state law.

ROBERT SALCIDO, FALSE CLAIMS ACT AND THE HEALTHCARE INDUSTRY: COUNSELING AND LITIGATION 278 (1999) (footnote omitted).

The structure of 31 U.S.C. § 3731(b) also shows that Congress did not contemplate that this provision would be used by courts to fill in a limitations period for a retaliatory discharge action. Under section 3731(b), Congress created a two-step process for determining whether an action based upon a violation of section 3729 has been timely asserted. First, section 3731(b)(1) provides that the action must be brought within six years of the date of the violation of section 3729. Second, section 3731(b)(2) extends the limitations period when the Government did not know nor reasonably should have known of the violation. Specifically, section 3731(b)(2) provides for a three year tolling of the limitations period from "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2).

The Fourth Circuit's majority opinion recognized that section 3731(b)(2) is not applicable to a retaliatory discharge action. 367 F.3d at 248 n.1 (Pet. App. 6a). There is no "official of the United States charged with responsibility to act"

when an employee alleges retaliation under the False Claims Act. Thus, in applying section 3731(b) to a retaliatory discharge action, the Fourth Circuit effectively discarded section 3731(b)(2) - over half of the section upon which it relies.

Furthermore, the purpose of the limitations periods set out in section 3731(b)(1) and (b)(2) directly relates to the nature of fraudulent conduct, not to retaliation by an employer against a whistle-blowing employee. Congress established the six year limitation period of section 3731(b)(1) and the tolling provision of section 3731(b)(2) because fraud is difficult to uncover and trace. S. REP. NO. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280. In a retaliatory discharge action, however, the act of discharge or retaliation is open and obvious to all. Thus, neither the express language of section 3731 nor its underlying purpose suggests it should be applied to a retaliatory discharge action.

B. Because Congress has used the phrase an "action under section 3730" to mean different things under the False Claims Act, the phrase, as used in section 3731(b), should not be read to include a retaliatory discharge action.

The Fourth Circuit's opinion focuses upon the fact that section 3731(b) refers to a six year limitations period in connection with an "action under section 3730." The phrase an "action under section 3730" is used six times in the False Claims Act. 31 U.S.C. §§ 3731(a), (b) & (c), 3732(a) & (b), 3733(a)(1). In various portions of the False Claims Act, Congress appears to have used the phrase as shorthand for an action brought by the United States under section 3730(a). 31 U.S.C. §§ 3731(c), 3733(a)(1). In other places, Congress apparently intended the phrase to mean both an action brought

by the United States under section 3730(a) and a *qui tam* action under section 3730(b). *See* 31 U.S.C. § 3732(b). In other portions of the False Claims Act, Congress apparently intended the phrase to mean an action under section 3730(a), an action under 3730(b) and a retaliatory discharge action under section 3730(h). *See* 31 U.S.C. § 3731(a). In still other places, Congress' intent is far from clear. *Compare* 31 U.S.C. § 3732(a) (establishing a venue provision as to "any action under section 3730") *with* 31 U.S.C. § 3730(h) (addressing venue in retaliatory discharge actions). Accordingly, a complete reading of the False Claims Act reveals that the phrase an "action under section 3730" as used in 31 U.S.C. § 3731(b) is ambiguous.

Congress' use of the phrase "an action . . . under section 3730" in section 3731(c) is particularly instructive. Section 3731(c) provides:

> (c) In *any action brought under section 3730*, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

31 U.S.C. § 3731(c) (emphasis added). The only action that the federal government can bring under the False Claims Act is an action by the Attorney General under section 3730(a) to recover damages arising from a false claim. When section 3731(c) is read in light of sections 3730 and 3729, the effect of section 3731(c) is as follows:

> In an action brought under section [3730(a) by the United States,] the United States shall be required to prove all essential elements of the cause of action, including damages by a preponderance of the evidence.

Section 3731(c) illustrates that when Congress uses the phrase "an action under section 3730" in the False Claims Act, that phrase does not necessarily include an action for retaliatory discharge under section 3730(h).

Similarly, in section 3732(b), Congress used the phrase "an action brought under section 3730" as shorthand for an action brought by the United States under section 3730(a) and a *qui tam* action under section 3730(b). Section 3732(b) states:

> **(b) Claims under State law.**– The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as *an action brought under section 3730.*

31 U.S.C. § 3732(b) (2000) (second emphasis added). Here, the phrase "an action brought under section 3730" clearly does not encompass a retaliatory discharge action under 3730(h). An action for retaliatory discharge is by its very nature personal to the affected employee. Such discharge or retaliation simply cannot give rise to an action by the State "for recovery of funds paid by a State or local government."

Clearly, Congress could have avoided using the phrase "an action under section 3730" and instead used the phrase "an action under subsection (a) of section 3730" when it intended to refer solely to an action by the Government. Congress also could have used the phrase "an action under subsection (a) or (b) of section 3730" when it intended to refer to both an action by the Government and a *qui tam* action. In fact, Congress did exactly this in one subsection of the False Claims Act. 31 U.S.C. § 3731(d) (2000) (using the phrase "any action . . . under subsection (a) or (b) of section 3730"). Regrettably,

Congress did not consistently use such precise phraseology throughout the False Claims Act.

Congress' lack of precision in drafting is particularly acute in section 3730. For example, in two places, section 3730 refers to the "Government Accounting Office" when Congress apparently intended to refer to the General Accounting Office. 31 U.S.C. § 3730(d)(1), (e)(4)(A) (2000). Moreover, in the *qui tam* provisions of section 3730, Congress jumps from using the phrase an action "under this section" to an action "under this subsection" when only the latter phrase is appropriate. 31 U.S.C. § 3730(b)(3), (b)(5) (2000). The errors that plague Congress' word choice in section 3730 caused one court to note that this portion of the False Claims Act "does not reflect careful drafting or a precise use of language." *United States ex rel. Mistick PBT v. Housing Auth.,* 186 F.3d 376, 387 (3d Cir. 1999). Congress' use of the phrase "an action under 3730" to mean different things in different sections and subsections of the False Claims Act underscores this lack of precision and clarity in drafting.

Because the phrase "an action under section 3730" means different things throughout the False Claims Act, the phrase cannot be uniformly read to include all three causes of action created by section 3730. Given Congress' disparate use of the phrase throughout the False Claims Act, the phrase, if read in isolation, is ambiguous. Rather, the phrase can only be given meaning if read in context. For "it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Reno v. Koray,* 515 U.S. 50, 56 (1995) (quoting *Deal v. United States,* 508 U.S. 129, 132 (1993)); *see also Koons Buick Pontiac GMC, Inc. v. Nigh,* 125 S. Ct. 460, 466-67 (2004) (noting that statutory language must be read in context rather than viewed in isolation). When read in context, it is clear that Congress only intended the six year limitations period

of section 3731(b) to apply to violations of section 3729, not to relatiatory discharge actions.

C. The Fourth Circuit's decision misconstrues congressional intent.

As set out in the legislative history of the 1986 amendments to the False Claims Act, the Act's whistle-blower provisions were modeled after eight other statutes that had been previously enacted by Congress:

> [T]he 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.
>
> In forming these protections, the Committee was guided by the whistle-blower protection provisions found in Federal safety and environmental statutes including the Federal Surface Mining Act, 30 U.S.C. 1293, Energy Reorganization Act, 42 U.S.C. 5851, Clean Air Act, 42 U.S.C. 7622, Safe Drinking Water Act 42 U.S.C. 300j-9, Solid Waste Disposal Act, 42. U.S.C. 6971, Water Pollution Control Act, 33 U.S.C. 1367, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, and Toxic Substances Control Act, 15 U.S.C. 2622.

S. REP. NO. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299. Like 31 U.S.C. § 3730(h), each of these eight whistle-blower statutes provides that an employee who has suffered retaliation may be reinstated to his or her

position and recover back pay. These statutes further provide that an employee loses his or her right to pursue a whistle-blower claim unless it is asserted within a relatively short time period from the discharge. The longest filing period that any of these eight statutes allows is 180 days from the discharge or retaliation. The vast majority of these statutes provide that a claim must be asserted within 30 days of discharge.

In contrast to these eight statutes, the Fourth Circuit concluded that the time period for filing a retaliation claim under the False Claims Act is six years and that this period runs from the date of the underlying False Claims Act violation rather than the date of the retaliatory act. Other whistle-blower statutes enacted by Congress do not have limitations period even remotely approaching six years.[1]

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[1] *See* Federal Deposit Ins. Act, 12 U.S.C. § 1831j (2000) (two year limitations period); Fed. Credit Union Act, 12 U.S.C. § 1790b(b)(2000) (two years); Fed. Home Loan Bank Act, 12 U.S.C. § 1441a(q)(2) (2000)(two years); Nat'l Labor Relations Act, 29 U.S.C. §§ 158, 160 (2000)(six months); Surface Transp. Assistance Act, 49 U.S.C. § 31105 (2000)(180 days); Migrant and Seasonal Agric. Workers Protection Act, 29 U.S.C. § 1855 (2000)(180 days); Energy Reorganization Act, 42 U.S.C. § 5851 (2000)(180 days); TSCA (asbestos), 15 U.S.C. § 2651 (2000)(90 days); Sarbanes-Oxley, 18 U.S.C. § 1514A (Supp. II 2002)(90 days); Aviation Inv. and Reform Act, 49 U.S.C. § 42121 (2000)(90 days); Fed. Mine Safety and Health Act, 30 U.S.C. § 815 (2000)(60 days); Safe Containers for Int'l Cargo Act, 46 U.S.C. app. § 1506 (2000) (60 days); TSCA, 15 U.S.C. § 2622 (2000)(30 days); Fed. Surface Mining Act, 30 U.S.C. § 1293 (2000)(30 days); Water Pollution Control Act, 33 U.S.C. § 1367 (2000)(30 days); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (2000)(30 days); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000)(30 days); Clean Air Act, 42 U.S.C. § 7622 (2000)(30 days); CERCLA, 42 U.S.C. § 9610 (2000)(30 days). On other occasions, Congress has declined to specifically adopt a limitations period. *See* ERISA, 29 U.S.C. § 1140 (2000); Coast Guard Authorization Act, 46 U.S.C. § 2114 (2000).

The Fourth Circuit's interpretation of 31 U.S.C. § 3730(h) also constitutes a significant departure from every other whistle-blower statute enacted by Congress in that it ties the commencement of the limitations period to the underlying statutory violation rather than the date of the discharge. Had Congress truly intended to make such a radical departure from other whistle-blower statutes, this intent would have undoubtedly been discussed at length during congressional debate. No such debate occurred. In fact, as set out below, *infra* pp. 19-21, the discussion of the 1986 amendments during congressional debate reflects that Congress did not intend the six year limitations period to apply to retaliatory discharge claims under 31 U.S.C. § 3730(h).

Sound public policy reasons exist for Congress' decision to enact relatively short limitations periods with respect to whistle-blower statutes. When a statute provides for reinstatement, the longer an employee delays in asserting his or her rights, the more difficult it is for the employer to reinsert the employee into the same position. Moreover, when Congress provides for recovery of back pay, a lengthy limitations period may result in economic waste in that it encourages an employee to sit on his or her claim in order to recover the greatest possible damages. *See, e.g.*, *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998) (Congress intended short limitations period when "damages such as backpay may be mounting"); *see also Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (limitations periods "protect employers from the burden of defending claims arising from employment decisions that are long past"). As Judge Posner has noted: "The statute of limitations is short in . . . most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991).

Although the Fourth Circuit purports to base its decision on the legislative history of the 1986 amendments to the False Claims Act, the Fourth Circuit's interpretation of this legislative history is flawed. In its opinion, the Fourth Circuit notes that the original drafts of the House and Senate bills to amend the False Claims Act set out the retaliatory discharge provisions as a separate section of the statute (to be codified at 31 U.S.C. § 3734). *See* 367 F.3d at 252 (Pet. App. 15a-16a). Thereafter, Congress condensed the act by simply placing this proposed new section as a subsection within 31 U.S.C. § 3730. The majority opinion concludes that this renumbering of the statute evidences Congress' intent that a six year statute of limitations be applied to retaliatory discharges:

> Had § 3730(h) been enacted as a separate section as originally contemplated by the legislative history to the 1986 amendments, a claim of retaliation under the FCA would not constitute "[a] civil action under § 3730," and thus Congress's intent to have courts apply the most analogous state statute of limitations would be clear. Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply.

367 F.3d at 252 (citations omitted) (Pet. App. 16a). The Fourth Circuit, however, disregards the specific wording of section 3731(b) that was changed by the 1986 amendments.

Prior to 1986, section 3731(b) read: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982). When Congress created an action for retaliatory discharge, the language of section 3731(b) was amended so as

to tie this six year period to a "violation of section 3729." 31 U.S.C. § 3731(b)(1) (2000). If Congress had intended a retaliatory discharge action to be governed by a six year limitations period, there would have been no reason for Congress to have deleted the words "from the date the violation is committed" and substituted in its place the words "after the date on which the violation of section 3729 is committed." As the Ninth Circuit concluded in *Lujan*:

> If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 language of section 3731(b) intact when it enacted the 1986 amendments to the [False Claims Act]. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729. Section 3729 specifically and strictly addresses false claims, not retaliation claims.

162 F.3d at 1034-35. Similarly, had Congress intended for the six year limitations period to apply to violations of section 3730(h), it would have amended section 3731(b) to say that the limitations period commenced with the "violation of section 3729 or 3730."

Both before and after the renumbering of the statute, Congress clearly understood and believed that this six year limitations provision would only be applied to violations of the False Claims Act brought on behalf of the Government (as opposed to retaliatory discharge claims brought by an employee for the sole benefit of the employee).

On December 12, 1985, the Senate Judiciary Committee reported favorably on the proposed amendments to the False

Claims Act (Senate Report No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266). As of that date, the retaliatory discharge provisions were to be set out as a separate section (31 U.S.C. § 3734) and had not yet been moved into 31 U.S.C. § 3730. In addition to adding whistle-blower protection to the False Claims Act, the proposed amendments enlarged the limitations period with respect to claims brought on behalf of the Government. In its discussion of this change, the Senate Report makes clear that the six year statute of limitations (as amended by the proposed legislation) only relates to False Claims Act violations brought for the benefit of the Government:

> Seventh, the subcommittee added a modification of the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when **the Government** learned of a violation, whichever is later. The subcommittee agreed that because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure **the Government's** rights are not lost through a wrongdoer's successful deception.

S. REP. NO. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280 (emphases added). As reflected by this Senate Report, the proposed amendments (as they existed as of December 12, 1985) were not intended to create a six year limitations period for retaliatory discharge claims. Rather, the six year limitations period and the new tolling provision were limited to claims brought on behalf of **the Government** to "ensure **the Government's rights** are not lost."

In September 1986, Congress altered the bill as it had been reported by the Senate and House Judiciary Committees. As part of those changes, the retaliatory discharge provision (proposed as a new section 31 U.S.C. § 3734) was moved into 31 U.S.C. § 3730. 132 CONG. REC. 22,332 & 28,576 (1986). Following the renumbering of the statute, however, Congress continued to view the six year limitations period as being applicable only to False Claims Act violations brought on behalf of the Government. On September 9, 1986, Congressman Fish, one of the principal sponsors of the original House proposal, described the revised bill during floor debate as follows:

> Section 5 amends the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted, the current standard, or within 3 years after **the Government** learns of the violations, whichever is later.

132 CONG. REC. 22,337 (1986) (emphases added).

Thus, even after the consolidation of the whistle-blower provisions into section 3730, Congress believed that the six year limitations period was only applicable to claims brought on behalf of the Government. The six year limitations period was not intended to apply to employees making a retaliation claim for their own personal benefit. Rather than supporting the position taken by the Fourth Circuit, the legislative history of the 1986 amendments to the False Claims Act demonstrates that Congress did not intend to apply a six year statute of limitations to retaliatory discharge claims.

D. The Fourth Circuit's decision is illogical and creates an unmanageable scheme for determining when the limitations period commences.

Under the Fourth Circuit's decision, the limitations period for a retaliatory discharge claim under the False Claims Act begins to run from the date of "the violation of section 3729." Thus, the Fourth Circuit ties the limitations period not to the act of retaliation, but to the date of the underlying False Claims Act violation. In doing so, the Fourth Circuit produces a result that is illogical and contrary to every other whistle-blower statute enacted by Congress. *See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 69 (1994) (Congress, in passing laws, should not be presumed to have intended "results that were not merely odd, but positively absurd"); *see also Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs,* 519 U.S. 248 (1997) (courts should avoid statutory construction that is "absurd or glaringly unjust").

First, the Fourth Circuit's interpretation of the False Claims Act leads to the absurd result that the retaliatory discharge claim of some whistle-blowers will be time-barred even before the act of discharge. Under the Fourth Circuit's decision, the limitations period begins running six years from the time the employer submits a false claim to the Government. If an employee discovers a false claim years after the claim was submitted and proceeds to blow the whistle, section 3730(h) will not protect the employee from retaliation. "[T]he idea that a statute of limitations could expire even before the cause of action comes into being is not one that we should jump to conclude that Congress intended to embrace." 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 31a). As courts and commentators have noted, it would be a "bizarre result" if an

employee who brings a false claim action immediately prior to the expiration of the six year period could be fired shortly thereafter and yet the employee's retaliatory discharge claim would be time-barred. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.11[A], at 4-205 to -206 (2d ed. Supp. 2005-1).

Second, the Fourth Circuit's decision creates "an unprecedented oddity" in that while some employees will see their retaliation claims time-barred even before the act of discharge, for other employees, their claims will never be time-barred. *Graham County Soil & Water*, 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 35a). A retaliatory discharge claim may occur even when there has been no violation of section 3729. S. REP. NO. 99-345, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300 (although underlying violation of False Claims Act need not be shown to establish a retaliatory discharge action, "the actions of the employee must result from a 'good faith' belief that the violations exist").[2] Thus, under the rationale adopted by the Fourth Circuit, when an employee incorrectly (but in good faith) blows the whistle on his or her employer, any retaliatory discharge claim brought by that employee will never be time-barred. For such employees, the stop watch upon the

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[2] As the Seventh Circuit recently noted in *Fanslow v. Chicago Manufacturing Center, Inc.,* 384 F.3d 469 (7th Cir. 2004), whether an employee is engaged in protected activity under the False Claims Act entails both an objective and subjective component. Not only must the employee have a good faith belief that the employer is committing fraud against the government, the employee must show that a reasonable employee in the same or similar circumstances would hold the same belief. *Id.* at 479-80. Accordingly, while an actual substantive violation of section 3729 is not necessary to bring a retaliatory discharge action, there must be an objective and subjective potential that such a claim exists.

limitations period is never started because there has been no "violation of Section 3729."

Third, the Fourth Circuit's decision divorces the accrual of the limitations period from the elements of the cause of action. For well over a century, this Court has recognized that statutes of limitations begin to run when the last act that gives rise to the cause of action is complete. In *Clark v. Iowa City,* 87 U.S. (20 Wall.) 583, 589 (1875), this Court noted that "[a]ll statutes of limitation begin to run when the right of action is complete." In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.,* 522 U.S. 192 (1997), this Court reaffirmed the well-established rule "that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Id.* at 201 (quoting *Rawlings v. Ray,* 312 U.S. 96, 98 (1941)). As Judge Wilkinson stated in his dissent:

> The matter seems almost second-nature. Statutes of limitations for personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin to run on the date of the discharge. In an action challenging a wrongful act, the limitations period generally begins on the date of the act.

367 F3d. at 260 (Wilkinson, J., dissenting) (Pet. App. 31a).

Here, the Fourth Circuit has tied the limitations period to an event unrelated to the elements of the plaintiff's cause of action. By doing so, the Fourth Circuit ignores the well-established principle that a limitations period should not commence until the cause of action is complete and denies employees adequate notice of when they can bring a retaliation claim. Employees may not know, and may not be able to discover, when the violation of section 3729 occurred. Under every whistle-blower statute in this country, the limitations

period begins to run upon the act of the discharge or retaliation. The reason is simple – employees know immediately when they have been fired. The injury resulting from the retaliatory act is open and obvious.

The Fourth Circuit decision imposes upon the False Claims Act a framework for determining whether a retaliatory discharge claim is time-barred that is both illogical and inconsistent with congressional intent. Given the language of section 3731, the legislative history of the 1986 amendments and the bizarre outcomes that flow from tying the limitations period to anything other than the date of the retaliatory act, it is clear that Congress did not intend for a six year period set out in 31 U.S.C. § 3731(b) to apply to retaliatory discharge claims.

II. BECAUSE CONGRESS DID NOT PROVIDE FOR A LIMITATIONS PERIOD FOR AN ACTION UNDER 31 U.S.C. § 3730(h), FEDERAL COURTS SHOULD USE THE MOST CLOSELY ANALOGOUS STATE LIMITATIONS PERIOD.

When Congress has failed to supply an express statute of limitations for a federal cause of action, this Court has "generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law." *DelCostello v. Teamsters*, 462 U.S. 151, 158 (1983).[3] This Court has only deviated from this well-established general rule "when a rule from elsewhere in federal

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[3] In 1990, Congress enacted 28 U.S.C. § 1658. This statute provides that all civil actions created by Congress after December 1, 1990 shall be governed by a four year limitations period unless a more specific statute provides for a different period. *See Jones v. R. R. Donnelley & Sons Co.,* 124 S. Ct. 1836 (2004). Because a civil action for retaliatory discharge under the False Claims Act was created in 1986, 28 U.S.C. § 1658 is not applicable to a cause of action under 31 U.S.C. § 3730(h).

law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Id.* at 172. This exception to the general rule, however, is "narrow" and "closely circumscribed." *Reed,* 488 U.S. at 324. In *DelCostello*, this Court made clear that "in labor law or elsewhere," courts should rarely turn to a federal limitations period by analogy, and "resort to state law remains the norm for borrowing of limitations periods." 462 U.S. at 171.

Here, this Court should not deviate from this well-established rule. In *Reed*, this Court applied the most analogous state limitations period to a claim by a local union officer that the union had retaliated against the plaintiff in violation of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2). As in *Reed,* applying state limitations periods would not "frustrate or significantly interfere with federal policies." 488 U.S. at 327.

Congress has failed to provide an express limitations period for a cause of action for retaliatory discharge under 31 U.S.C. § 3730(h). Accordingly, federal courts should use the most closely analogous state limitations period. Under North Carolina law, a cause of action for retaliatory discharge must be brought within three years of the retaliatory act. N.C. GEN. STAT. § 1-52.

CONCLUSION

The judgment of the court of appeals should be reversed.

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