

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GRAHAM COUNTY SOIL & WATER :

4 CONSERVATION DISTRICT, :

5 ET AL., :

6 Petitioners :

7 v. : No. 04-169

8 UNITED STATES, EX REL. :

9 KAREN T. WILSON. :

10 - - - - -X

11 Washington, D.C.

12 Wednesday, April 20, 2005

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:05 a.m.

16 APPEARANCES:

17 CHRISTOPHER G. BROWNING, JR., ESQ., Solicitor General,
18 Raleigh, North Carolina; on behalf of the
19 Petitioners.

20 MARK HURT, ESQ., Abingdon, Virginia; on behalf of the
21 Respondent.

22 DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the
23 Solicitor General, Department of Justice, Washington,
24 D.C.; on behalf of the United States, as amicus
25 curiae, supporting the Respondent.

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2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Graham County Soil & Water Conservation District
5 v. the United States.

6 Mr. Browning.

7 ORAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. BROWNING: Mr. Chief Justice, and may it
10 please the Court:

11 The issue in this case is whether Congress
12 expressly provided for a limitations period for
13 retaliatory discharge action under the Federal False
14 Claims Act.

15 The 6-year limitation period set out in section
16 3731(b) of the act is tied to a violation of section 3729,
17 that is, the submission of a fraudulent claim to the
18 Government. The triggering event to start the statute of
19 limitations running under section 3731(b) is a violation
20 of section 3729. Because a violation of section 3729 is
21 not an element of the cause of action for retaliatory
22 discharge, Congress did not intend to provide a
23 limitations period in section 3731(b) for a retaliatory
24 discharge action.

25 The Government in its amicus brief argues that

1 Congress must have intended a uniform limitation period so
2 that all three actions created by the False Claims Act
3 could be brought in the same proceeding. The -- the
4 Government's argument undermines the very purpose of the
5 Federal False Claims Act and the retaliatory discharge
6 provision.

7 The retaliatory discharge provision, section
8 3730(h) of the False Claims Act, not only protects people
9 who blow the whistle, the initial whistleblower, but it
10 expressly protects people who testify at trial. And we
11 have seen time and again in many of these cases the
12 Government will keep a case under seal for 5, 6, 7 years.
13 We've seen repeatedly situations, because of the
14 complexity of the underlying violation of the false claim,
15 that it might take a decade from when the complaint is
16 filed to when the case actually is put before a jury.

17 JUSTICE GINSBURG: Mr. Browning, this argument
18 that you're making, where you seem to be having great
19 solicitude for the -- for the whistleblowers, for the
20 people who might be retaliated against -- the respondent
21 and the Solicitor General answer your argument by saying
22 in all the years that 3730(h) retaliation claims have been
23 available, there has been no instance of qui tam plaintiff
24 barred because the retaliation occurred outside the 6-
25 year limitation. Yes, one could hypothesize these cases,

1 but are there any actual cases where the retaliation in
2 fact fell outside the 6-year, dated from the submission of
3 the false claim?

4 MR. BROWNING: Justice Ginsburg, I cannot cite
5 to a specific situation where that has occurred, and the
6 Government, you're right, makes very much of the argument
7 that this is simply hypothetical. But it is a very real
8 and concrete problem when you have cases that go to trial,
9 that it takes so long to go to trial, and those people who
10 are testifying at trial have no protection because it's
11 more than 6 years from the violation of section 3729. I
12 -- I would --

13 JUSTICE GINSBURG: Maybe they don't get
14 retaliated against if they testify at trial.

15 MR. BROWNING: Well --

16 JUSTICE GINSBURG: And if the question is
17 whether there is a problem out there in the real world on
18 -- for people whose interest is certainly not identical to
19 yours.

20 MR. BROWNING: Your Honor, I recognize that, but
21 you have to look at the statute as a whole to construe it
22 in its proper context. And there are many situations
23 where there -- a number of years pass from -- from when
24 the complaint is filed to when the testimony takes place
25 at trial. And -- and as the amicus brief of the National

1 Work Right Institute points out, an organization that's
2 designed to protect the human rights of employees, an
3 organization that's a spin-off of the American Civil
4 Liberties Union, that organization clearly views the
5 interpretation advocated by the respondents and adopted by
6 the Fourth Circuit as detrimental by employees.

7 JUSTICE BREYER: All right. All that's true,
8 but the question that I think Justice Ginsburg asked was
9 you have on your side the whole National Defense
10 Industrial Association. You have the Equal Employment
11 Advisory Council that represents dozens and dozens, I take
12 it, of businesses. We have your own client. We have you
13 in the firm. Everybody. I imagine you all racked your
14 brains to say has there ever been such an example, and I
15 take the answer is no, never. Not all of you could even
16 find one instance where this happened. Now, am I right?
17 Because that's what I think unless you provide the
18 example.

19 MR. BROWNING: I cannot cite a specific example.
20 Justice Breyer, I would direct your attention to the case
21 in the Eleventh Circuit, Childray v. UAPGA, in which 4-
22 and-a-half years had passed between when the initial
23 allegation of --

24 JUSTICE BREYER: Okay. So -- so what would be
25 so unreasonable about a Member of Congress concluding the

1 following? We want these things to end after 6 years, you
2 know? And there's never been an example of this horrible
3 that you think of, and so we are going to end them all
4 after 6 years from the time the thing took place, the
5 cheat took place. And that's it. And if there's some
6 other problem of the kind you're worried about that comes
7 up, we will worry about that later through amendment,
8 tolling, et cetera. Why is that an -- we don't want 30-
9 day statutes of limitations or 90-day statute of
10 limitations. We want 6 years. That helps most people.
11 And if there's an odd case that doesn't, we'll worry about
12 it. What's the answer to that?

13 MR. BROWNING: Well, Your Honor, if Congress had
14 said that, they certainly could have made that decision,
15 but it would run completely contrary to almost 200 years
16 of precedent from this Court that as a general rule, the
17 limitations period does not begin to run before your cause
18 of action even comes into existence.

19 JUSTICE BREYER: Yes, that's true, it would be.
20 And the reason we're doing it is because there's a period
21 of time when somebody lies to the Government and we don't
22 want actions that are related to that. We'll have to go
23 into that proof to take place more than 6 years later.
24 Now, that would be the reason, and I agree it would be
25 contrary. But the difficulty for me is the language seems

1 to point to that reason.

2 MR. BROWNING: Well --

3 JUSTICE BREYER: And I can't find that reason
4 idiotic.

5 MR. BROWNING: Well, Your Honor, I -- I don't
6 think the language points to that because the language of
7 the limitations period, 3731(b), which is set out in the
8 appendix to the cert petition at page 135a -- the language
9 of the statute is a civil action under section 3730 may
10 not be brought more than 6 years after the date of the
11 violation of section 3729.

12 There are two material aspects of -- of the
13 statutory language: the violation of section 3729, which
14 is not an element of the cause of action --

15 JUSTICE STEVENS: Well, I -- I don't mean to
16 interrupt, but it is true that this is a civil action
17 that's brought under 3730(h), is it not?

18 MR. BROWNING: The -- the action is brought
19 under 3730(h), and Justice Stevens --

20 JUSTICE STEVENS: So it is literally within the
21 plain language of the statute.

22 MR. BROWNING: Well, it is and it isn't. It is
23 clearly in 3730(h), but when you look at the False Claims
24 Act, Congress has used the phrase, an action under 3730,
25 to mean different things in various portions throughout

1 the False Claims Act. Congress has used that phrase on
2 six different occasions, and I would particularly direct
3 the Court's attention to 3731(c). In -- in that
4 provision, Congress has provided that in an action brought
5 under section 3730, the United States must prove the
6 elements of the cause of action by a preponderance of the
7 evidence. The respondent and the Government say you must
8 have this literal reading of section -- the phrase, an
9 action under 3730, and it means all three causes of action
10 in 3731(b), but that -- but when you turn to 3731(c), that
11 virtually identical phrase appears and you have to read
12 that statutory provision in context, and read in
13 context --

14 JUSTICE GINSBURG: It seems -- it seems if you
15 read a provision like this, it says what the United States
16 would be required to prove. Implicit in -- in that is in
17 any action brought by the United States under 3730. I
18 think -- think (c) is clearly talking about cases in which
19 the United States is bringing the action.

20 MR. BROWNING: Exactly, Justice Ginsburg. You
21 have to read it in context, and I think when you read
22 3731(b) in context and that limitations period is tied to
23 a violation of section 3729, it is clear that Congress did
24 not intend the phrase, an action under 3730, to -- to
25 include a retaliatory discharge action in which a

1 violation of section --

2 JUSTICE GINSBURG: Well, I don't think that's at
3 all as clear as that (c) is directed to cases brought by
4 the United States for the reason that Justice Breyer just
5 explained. Congress might want to have one 6-year
6 limitation and say, well, maybe there would be this
7 hypothetical case that you're worried about, but for the
8 most part, 6 years will take care of everybody.

9 MR. BROWNING: And, Justice Ginsburg, my point
10 is just as section 3731(c) is not intended to cover all of
11 the causes of action under the False Claims Act, 3731(b)
12 is not intended to cover all of the actions under the
13 False Claims Act as well, that it's only intended to cover
14 the causes of action in which a violation of section 3729
15 is an element of the cause of action.

16 The -- the Government makes the argument that
17 you need a uniform limitations period so these actions can
18 be tried together, but the Government ignores the fact
19 that a qui tam action or an action brought by the
20 Government is a completely different cause of action than
21 an action for retaliatory discharge action. They involve
22 different substantive claims.

23 JUSTICE STEVENS: That's true, but is it also
24 not true that some of the people who get retaliated
25 against may be the same people who bring the qui tam

1 action?

2 MR. BROWNING: In some cases, that is -- is the
3 case, Justice --

4 JUSTICE STEVENS: So if they don't get the --
5 recover as being the victim of retaliation, they may still
6 get a very handsome reward for what happened to them.

7 MR. BROWNING: That is the case, but -- but I
8 also want to point out that in many cases, the person who
9 brings the qui tam action is a completely different
10 plaintiff than the person who brings the retaliatory
11 discharge action. The example of someone who is
12 retaliated against for testifying at trial -- in that
13 situation, it's clearly going to be a different plaintiff
14 than the plaintiff who brought the original qui tam
15 action.

16 It can also be a different defendant. Section
17 3730(h) is intended to preclude an industry from
18 blacklisting an employee. So if an employee brings a qui
19 tam action while at one employer and subsequently leaves
20 and go to -- goes to work for a second employer, when the
21 second employer recognizes or -- or learns that this
22 employee had previously been involved in an investigation
23 under the False Claims Act, that second employer is
24 precluded from retaliating against the -- the employee.
25 So --

1 JUSTICE SOUTER: In the real world, do we have
2 such cases?

3 MR. BROWNING: Yes, Your Honor. I cannot cite
4 to a specific case, but I'm aware that that is very much a
5 issue that practitioners face day in and day out.

6 JUSTICE SOUTER: Another real-world question.
7 Do we -- do we have any -- do you have any experience that
8 you can rely on either to show that in fact these
9 subsection (h) claims are brought customarily with the
10 main qui tam action or, conversely, that they are brought
11 separately? Do we know what's going on?

12 MR. BROWNING: Yes, Your Honor. It is a real
13 mix, that on many cases you will see a retaliatory
14 discharge action brought independently, and in other cases
15 you'll see the qui tam action and the retaliation action
16 brought simultaneously.

17 JUSTICE GINSBURG: In connection with what's
18 included and what isn't included, the -- in that same 3731
19 provision in (d), (d) is limited to (a) and (b) and so
20 excludes (h). And if Congress had meant that with respect
21 to the 6-year period, they could have said the same thing,
22 that it relates to (a) and (b) and not (h).

23 MR. BROWNING: Your Honor, I would recognize
24 that there is different language that Congress could have
25 -- have chosen to state this in a different way, but --

1 and you're right, that in section 3731(d), Congress did
2 specifically reference section 3730(a) and 3730(b), but
3 Congress did not use that precision in drafting throughout
4 the Federal False Claims Act. Just -- there are a number
5 of ambiguities that exist throughout the Federal False
6 Claims Act. Congress even referred to the General
7 Accounting Office as the Government Accounting Office.

8 JUSTICE SCALIA: They could have done the same
9 in 3731(c) also. Instead of just saying any action
10 brought under section 3730, they could have said any
11 action brought under -- which one? (a) of -- of -- which
12 is the one that allows the Government suit?

13 MR. BROWNING: 3730(a), Justice Scalia.

14 JUSTICE SCALIA: (a). They could have said (a),
15 and they didn't. They said all of 3730.

16 MR. BROWNING: Yes. So -- so all you can really
17 take from the statute is that the phrase --

18 JUSTICE SCALIA: Sloppy --

19 MR. BROWNING: Yes.

20 JUSTICE SCALIA: -- is what you can take.

21 MR. BROWNING: Yes, Your Honor. That you have
22 to look at the context. You have to look at the meaning,
23 and when you're dealing with a statute that is drafted in
24 a way that's sloppy, you have to look at what Congress
25 really intended, and when Congress --

1 JUSTICE STEVENS: May I ask -- may I ask you a
2 question about the alternative? If we don't follow this
3 statute, you -- you refer to State law for the correct
4 cause -- statute of limitations I guess.

5 MR. BROWNING: Yes, Your Honor.

6 JUSTICE STEVENS: And I imagine because there
7 are different forms of retaliation -- sometimes it's a
8 discharge, sometimes it might be slander by defaming the
9 person for his next employer, it might be a tort, they
10 beat him up or something, there could be a lot of
11 different kinds of retaliation -- each of which would give
12 rise to a different statute of limitations under State
13 law. Does that seem reasonable?

14 MR. BROWNING: Well, Your Honor, this Court has
15 faced that situation with 1983 in a variety of contexts,
16 and there are a number of --

17 JUSTICE STEVENS: We had to make up a rule to
18 fill a gap.

19 MR. BROWNING: And -- and in North Carolina it's
20 easy. It is basically a 3-year statute of limitations for
21 everything. And for a retaliatory discharge action, you
22 look at the -- in North Carolina, you look at the
23 limitations period for --

24 JUSTICE STEVENS: But what about Wisconsin,
25 Michigan, Illinois, and -- and Florida? Maybe they all

1 have different statutes and they have different kinds of
2 causes of action that may be relevant in the retaliation
3 case.

4 MR. BROWNING: Your Honor, that is certainly an
5 issue. With respect to the parties in this case, that is
6 a matter that is clear and simple because North Carolina
7 you look to a retaliatory discharge action --

8 JUSTICE STEVENS: No, but in our construction of
9 the statute, we have to think about its application
10 throughout the United States, not just in North -- North
11 Carolina.

12 MR. BROWNING: Yes, and a rule that would apply
13 the residual limitation period for personal injury would
14 certainly be appropriate for a situation like this.

15 JUSTICE SCALIA: Is it -- is it a necessary
16 element of a successful action for retaliatory discharge
17 that -- that the action under the False Claims Act have
18 succeeded?

19 MR. BROWNING: No, Your Honor. The courts have
20 repeatedly held that for a retaliatory discharge action,
21 it is not necessary to have a violation of section 3729.

22 JUSTICE SCALIA: What does the Government
23 contend is to be done under (b) (1) when no violation of
24 section 3729 is committed?

25 MR. BROWNING: Well, the way I read the

1 Government's brief is they want to modify the language of
2 section 3731(b) by inserting the phrase alleged before the
3 phrase, violation of section 3729.

4 JUSTICE BREYER: But don't we have to do that
5 anyway when -- when in fact a person brings an ordinary
6 claim? I mean, Joe Smith brings a claim that XYZ company
7 cheated the Government. Now, that doesn't mean it was
8 committed. It just means he says it was committed. After
9 all, he might lose.

10 MR. BROWNING: But -- but, Justice Breyer, when
11 the jury renders its verdict, if there is a violation of
12 section 3729 that's proven to exist, but that -- that
13 proven violation is beyond the 6-year period, the
14 defendant would be entitled to judgment based upon the
15 affirmative action --

16 JUSTICE BREYER: You mean if in fact the
17 plaintiff loses because the jury finds for the defendant
18 in the qui tam action, then it should have been dismissed
19 on statute of limitations grounds.

20 MR. BROWNING: No, Your Honor. What I'm
21 saying --

22 JUSTICE BREYER: No, of course not because --
23 because the word is committed there refers to the claim of
24 a plaintiff. Doesn't it?

25 MR. BROWNING: What I'm -- what I'm saying is

1 you have to look at the facts that are ultimately proven
2 at trial, and if the fact of the violation is more than 6
3 years from the filing of the cause of action, clearly
4 that's going to be barred by the limitations period. The
5 word alleged does not appear in the statute, and the
6 Government tries to -- they essentially confuse the issue
7 by saying, well, you -- you could never -- a defendant
8 could never prevail on a motion to dismiss because you
9 have to look at the allegations for a motion to dismiss.
10 But that's the very nature --

11 JUSTICE STEVENS: Well, it seems to me that if
12 -- if there's no violation, then there's no triggering
13 event to start the statute of limitations running.

14 MR. BROWNING: Yes, Your Honor. That -- that's
15 the real problem, that even under the Government's
16 reading, that there is not a triggering event. So when
17 you look at 3731(b) as a whole, when you try to discern
18 congressional intent, Congress intended a -- the
19 triggering event to be a violation of section 3729 which
20 doesn't apply to a retaliatory discharge action.

21 Your Honor, the -- the statute here is worded in
22 such a way that throughout the Federal False Claims Act,
23 there are a variety of ambiguities, but when you look at
24 the statute as a whole, when you look at the stated
25 purpose that Congress had of protecting people who testify

1 at trial, there is only one way to read the statute in a
2 way that's harmonious, and that's to read it so that
3 3731(b) only applies to section 3730(a) and 3730(b) --

4 JUSTICE GINSBURG: Mr. Browning, is it proper to
5 consider in the calculus that if you use 6 years from the
6 date the -- that the false claim was made or was alleged
7 to be made, then you don't have to get into the question
8 which State's statute of limitations, the choice of law
9 question, and then when you identify that State, which
10 limitation period within that State? I mean, those are
11 two inquiries which can sometimes be rather complicated.
12 They are obviated entirely if we take the 6 years from the
13 Federal statute.

14 MR. BROWNING: Justice Ginsburg, you're
15 absolutely right, that if the respondents' and the Fourth
16 Circuit's reading of the statute is correct, that Congress
17 did intend this bizarre result to take place for all three
18 causes of action, then you don't have to look to a State
19 law cause of action to fill the gap.

20 But there are many circumstances where this
21 Court has recognized that you do -- when Congress has not
22 expressly provided a limitations period, the most
23 appropriate vehicle is to look to the most closely
24 analogous State law cause of action. As a matter of fact,
25 one of the comparable situations here is ERISA.

1 JUSTICE SCALIA: We've done it for several
2 hundred years, haven't we --

3 MR. BROWNING: Yes.

4 JUSTICE SCALIA: -- for all Federal causes of
5 action? We've -- we've looked to State --

6 JUSTICE GINSBURG: When there is no statute of
7 limitations.

8 MR. BROWNING: When -- when --

9 JUSTICE GINSBURG: The question is Federal
10 statute. Is there one? And my question is deciding is
11 there one -- this is not something drawn from thin air.
12 There is a 6-year period right in the statute.

13 MR. BROWNING: There -- there is a 6-year period
14 and if that is applied by this Court to a retaliatory
15 discharge action, there will still be difficulties because
16 you will have situations where there is no violation of
17 section 3729. So when do you start the limitations period
18 running?

19 The respondent would argue in their brief that
20 you start it running from when they believed that the
21 violation took place. So your -- the respondent is
22 arguing you're looking to the mental impression of the
23 litigant that would be the triggering device for the
24 limitations period.

25 Your Honor, if there are no further questions,

1 I'd reserve the remainder of my time for rebuttal.

2 CHIEF JUSTICE REHNQUIST: Very well, Mr.
3 Browning.

4 Mr. Hurt, we'll hear -- we'll hear from you.

5 ORAL ARGUMENT OF MARK HURT

6 ON BEHALF OF THE RESPONDENT

7 MR. HURT: Mr. Chief Justice, and may it please
8 the Court:

9 The text of this statute could not be more clear
10 on this issue. A retaliation claim is a civil action
11 under section 3730, and a civil action under 3730 is
12 subject to a 6-year limitations period.

13 Petitioners argue, in effect, that the Court
14 should disregard the plain language here and claim that
15 Congress really meant that only two of the three causes of
16 action under section 3730, should be subject to the 6-
17 year limitations period, those brought under sections (a)
18 and (b), and that Congress told us this indirectly by
19 changing the limitations trigger -- this simply makes no
20 sense for two reasons.

21 First, there is no reason why Congress would
22 have limited the scope of the limitations period in such a
23 cryptic manner. In paragraph (d) as Justice --

24 JUSTICE SCALIA: Sloppiness. Sloppiness. How
25 about that as a reason, sloppiness that appears throughout

1 the rest of this -- of this piece of legislation?

2 MR. HURT: Well, I -- I would propose that if
3 Congress really wanted this trigger, wanted that uniform
4 limitations period, they really couldn't have done this
5 particular provision, (b)(1), in a more clear way.

6 JUSTICE SCALIA: Do you -- do you know of -- of
7 any other situation in which a -- a time limit is imposed
8 that has nothing whatever to do with the -- with the act
9 that the individual is complaining about, nothing whatever
10 to do with the act --

11 JUSTICE KENNEDY: And -- and where the time
12 limit begins to run even before the act occurs?

13 JUSTICE SCALIA: Before the act occurs.

14 MR. HURT: The answer is no, but --

15 JUSTICE SCALIA: And the time limit could have
16 expired before the act occurs. Right? So you get free
17 retaliation after 6 years. Is that right?

18 MR. HURT: Sometimes equitable doctrines might
19 apply, but the --

20 JUSTICE SCALIA: No, wait. What kind of an
21 equitable doctrine?

22 MR. HURT: For instance, if the employer
23 deliberately waited to retaliate until the 6 years has
24 past, that could be an instance.

25 But the important thing is the retaliation

1 provision in the False Claims Act is unique because it's
2 designed to be a companion or an add-on action to the qui
3 tam action. That's -- if you look at the reported cases,
4 the vast majority of those cases show the two actions
5 brought together.

6 JUSTICE SCALIA: I thought that one of the major
7 things they were concerned about was retaliation against
8 witnesses in the qui tam action, and that will always
9 occur after. I mean, the -- the suit for retaliation will
10 then always occur after the qui tam action.

11 MR. HURT: I believe the core concern is to
12 incentivize the whistleblower. But take that particular
13 situation, the witness, and that concern. There are other
14 laws and other causes of actions that will protect the
15 witness in that situation. For instance, section 1985.
16 This Court in Hadel v. Harrison ruled that a witness who
17 is retaliated against at a Federal trial does have a
18 section 1985 action.

19 Here, Congress was focusing on the
20 whistleblower, encouraging him to bring this qui tam
21 action. In fact, he's only protected for activities that
22 are -- the -- the statute says, in furtherance of an
23 action under this section. That is pointing to the qui
24 tam action.

25 And there's all kinds of problems that arise if

1 these two actions are not brought together if the
2 retaliation action must be brought first.

3 First, if you accept the petitioner's view,
4 you're going to have situations where as little as 180
5 days -- they have 180 days like in Florida to bring this
6 retaliation action. Once that's gone, the -- the
7 whistleblower has possibly 6 years to bring this qui tam
8 action, but no incentive from the retaliation action,
9 which was one of the --

10 JUSTICE GINSBURG: Mr. Hurt, can you -- can you
11 go back a few steps? Because there was a difference
12 between an answer that you gave and one that Mr. Browning
13 gave. He said it's a mixed bag, the litigation of whether
14 it's brought in one action and the whistleblower is making
15 both claims or whether the retaliation claim is saved out
16 and brought in a separate action. You said the vast
17 majority of the cases involve the whistleblower asserting
18 both claims in a single action. Which characterization is
19 right? Mixed bag or vast majority?

20 MR. HURT: Well, the SG's office informed us
21 that they did a search of the reported cases. In the
22 majority of those cases, the -- the claims were brought
23 together. The SG, I think, can give you the details on
24 that.

25 JUSTICE GINSBURG: All right.

1 JUSTICE SCALIA: You're now saying majority, not
2 vast majority.

3 MR. HURT: Okay. I think it --

4 JUSTICE SCALIA: Well, wait for the SG.

5 (Laughter.)

6 MR. HURT: But they point out -- they realized,
7 I think, petitioners, that this is a problem that -- that
8 this is a unique act, and they -- and they point out --
9 they make the claim that the Major Fraud Act somehow
10 renders this not unique. That's a criminal statute and it
11 doesn't have a qui tam action.

12 Every retaliation claim is going to be based in
13 part on an alleged violation of section 3729.

14 JUSTICE SCALIA: So you're reading alleged into
15 -- into (b) (1). Right? Sure, it will always be based on
16 an alleged violation. So it doesn't have to be a
17 violation.

18 MR. HURT: Well, no. I think that ignores how
19 statute of limitations are actually construed by courts.
20 You can write a statute basically two ways. You can put
21 the violation as the trigger or you can put the act,
22 alleged to be a violation. Courts apply those
23 identically.

24 And for instance, if you have a summary judgment
25 motion by a qui tam -- qui tam defendant, which we always

1 agree that this statute (b)(1) applies, all the defendant
2 has to do is point out the act alleged to be a false claim
3 falls outside of the 6-year period, and he wins. He
4 doesn't have -- no one has to show whether the actual
5 claim itself was false or not. So I think, you know, as
6 Justice Breyer points out, this is the way you universally
7 construe statute of limitations.

8 Having the same trigger for all three 3730
9 actions means the limitations period starts for all three
10 at the same time. This makes it easier for the
11 whistleblower to bring both their qui tam and retaliation
12 actions together. If she's forced to bring the
13 retaliation action first, then if she misses that, then
14 she's got no incentive to then go on and bring the qui tam
15 action from the -- the incentive from this whistleblower
16 action, which is the key purpose of it.

17 Also, if she has to bring the -- the retaliation
18 action first before the qui tam action, then what will
19 happen, if she's not ready to bring the qui tam action --
20 these can be very complicated allegations, complicated
21 defense contract -- then what will happen is she will most
22 likely have to split her claim. And that exposes the
23 whistleblower to all kinds of -- of pitfalls. For
24 instance --

25 JUSTICE GINSBURG: Mr. Hurt, what -- what about

1 the argument that unlike most retaliation situations, here
2 if you take that 6-year period, which is much longer than
3 the general run of retaliation statutes take it, then you
4 would have a qui tam plaintiff who waits while the back
5 pay is mounting, and so you can have an exorbitant
6 application both with respect to the amount of back pay
7 and the claim for reinstatement. 5 years down the road --
8 I haven't worked with this company now -- I'm going to
9 insist they take me back, be reinstated. That -- that
10 concern, that on your reading there is the potential for
11 much larger damages and much more disruptive reinstatement
12 than is usually the case.

13 MR. HURT: I think that that type of situation
14 is just so highly unlikely. It doesn't really comport
15 with the realities of what whistleblowers are thinking
16 about. For instance, in this case, Ms. Wilson didn't come
17 forward until she saw no one else would come forward and
18 remedy what she saw as theft from the U.S. Government.

19 JUSTICE SOUTER: No, but isn't -- isn't Justice
20 Ginsburg's question raised by your very argument, that you
21 don't want whistleblowers having to bring their
22 whistleblower actions before they are ready to bring their
23 main actions? And if it's going to take -- you've just
24 said how difficult it may be to prepare one of these qui
25 tam cases. If in fact you're right and it may take a

1 couple of years from the time the employer gets wind that
2 something is going on and fires or does whatever, then in
3 exactly that situation, the -- the whistleblower damages
4 are going to be mounting during that period of 1 or 2 or
5 whatever years it may be before the qui tam action starts.
6 So on your hypothesis, it seems to me, you're going to get
7 just the situation that Justice Ginsburg raised.

8 MR. HURT: I think that -- I think there's a
9 split in the lower courts about how the mitigation will
10 apply.

11 JUSTICE SOUTER: Well, let's -- let's first see
12 about your argument. Isn't that what your argument
13 implies?

14 MR. HURT: I think that -- that that is a
15 possible case, but I think that that's -- the priorities
16 for the Government and -- and Congress in drafting this
17 law was to get money back for the Government. That's
18 their number one concern here and to incentivize that
19 whistleblower. If it so happens that the whistleblower
20 takes much -- takes a long time to prepare his qui tam and
21 brings his -- his retaliation action at the same time and
22 ends up getting some more damages, I -- I think that ranks
23 low on the list of Congress' priorities in drafting this
24 retaliation provision. It's the -- getting the
25 Government's money back, giving the whistleblower

1 protection and an incentive to bring that qui tam claim is
2 really Congress' core concern here.

3 And I think these other issues about damages
4 mounting can be readily addressed with the mitigation
5 defense and -- and dealing with that that will take care
6 of double damages so -- so if the whistleblower is just
7 sitting around waiting for that, then the mitigation
8 defense would take care of that.

9 Also, I think the petitioner raised the idea
10 that this is some kind of -- the -- the retaliator can
11 bring some kind of nebulous fraud allegation if it doesn't
12 -- isn't really tied to a specific false claim. I think
13 that the courts are not interpreting it that way because
14 this is a False Claims Act retaliation claim, not just a
15 generalized fraud claim. So in a typical case, there will
16 be a claim that -- that the whistleblower will -- will be
17 able to point to and say I think that this claim is false.
18 I have a good faith belief that it is false, and then it
19 -- and that's what the trigger would be based on.

20 I mean, in summary, if there's no further
21 questions, I'd like to just summarize.

22 I think this Court should uphold the plain
23 language of the statute. While the limitations trigger is
24 unusual, it is the one that Congress set forth in the
25 statute. It makes sense. It reflects the unique

1 considerations of encouraging -- the goal of encouraging a
2 whistleblower to bring his qui tam claim with his
3 retaliation claim.

4 19 years of experience have shown that the plain
5 language works in the typical cases that arise, and that
6 none of the reasons given by the petitioners come close to
7 providing a justification for this Court to discard the
8 plain language of the statute. None of the reasons --
9 this statute does not rise to the level of absurdity that
10 would justify this Court disregarding the plain language.

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hurt.

13 Mr. Driemeier, we'll hear from you.

14 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

15 ON BEHALF OF THE UNITED STATES,

16 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

17 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice, and
18 may it please the Court:

19 Section 3731(b) provides the statute of
20 limitations for, quote, a civil action under section 3730.
21 There is no question that Ms. Wilson's claim of
22 retaliation is a claim under section 3730. Petitioner
23 asks the Court to construe section 3731(b) to include an
24 implicit limitation to claims under subsections (a) or
25 (b) --

1 JUSTICE SCALIA: What he's saying is it should
2 be read to include only those causes of action under 3730
3 that the rest of (b) makes sense as applied to, just as in
4 (c) the phrase, brought under section 3730, should be
5 interpreted to -- to include only those causes of action
6 that the rest of that provision applies to, namely, those
7 -- those actions under 3730 that involve the United
8 States. I mean, that's -- that's a perfectly
9 reasonable --

10 MR. HALLWARD-DRIEMEIER: Section 3731(c) does
11 not require, in its application, the Court to construe a
12 civil action under section 3730 to mean anything other
13 than what its words import because it only relates to the
14 United States' burden of proof.

15 The petitioner suggested that it implicitly was
16 limited to an action under 3730(a). Well, that's
17 certainly not true because if -- if an action is brought
18 under 3730(b) and the United States intervenes, section
19 3731(c) establishes the standard of proof. If Congress
20 were to amend section 3730(h) to allow the United States
21 to bring a claim on behalf of the employee who was
22 retaliated against, section 3731(c) would, by its terms,
23 establish the burden of proof that the United States would
24 have to meet. So there is no inconsistency there.

25 JUSTICE SCALIA: You think -- do you think

1 Congress is more likely to amend 3731(b) to say clearly
2 and non-sloppily what it means if we find for the
3 Government here or if we find for the -- I mean, for --
4 for the side that the Government supports or if we find
5 for the other side?

6 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I
7 think that 3731(b) is capable of application exactly as
8 written, and in fact, as we say in our brief, that that is
9 the statute of limitations which most serves the purposes
10 of the statute unlike the alternative the petitioner --

11 JUSTICE SCALIA: What -- what about this as a
12 general -- as a general principle of construction? A
13 court should not, unless there is no reasonable
14 alternative, construe a statute of limitations provision
15 in such fashion that the statute can expire before the
16 cause of action arises?

17 MR. HALLWARD-DRIEMEIER: Well --

18 JUSTICE SCALIA: Is that a reasonable
19 proposition?

20 MR. HALLWARD-DRIEMEIER: No, sir.

21 JUSTICE SCALIA: No?

22 MR. HALLWARD-DRIEMEIER: There are any --

23 JUSTICE SCALIA: It seems to me reasonable to
24 me.

25 MR. HALLWARD-DRIEMEIER: Many States have

1 adopted statutes of repose, and they apply to a cause of
2 action that under State law accrues for purposes of
3 statute of limitations upon the discovery of the injury.
4 But a statute of repose can come in and instead tied to
5 the act, say, for instance, in which the date that a
6 product was first sold into the market. And so the cause
7 of action, for purposes of statute of limitations, will
8 not arise in many instances until after the statute of
9 limitations has run because of a statute of repose. So
10 that it's certainly not unheard of in the law.

11 JUSTICE GINSBURG: And that was the point that
12 the Seventh Circuit made clear in -- in its --

13 MR. HALLWARD-DRIEMEIER: That's right, Justice
14 Ginsburg.

15 JUSTICE GINSBURG: -- statute of repose.

16 JUSTICE BREYER: What about an action of
17 ejectment, an action of ejectment that arises only after
18 the adverse possession statute of limitations have run?

19 MR. HALLWARD-DRIEMEIER: That's right. There --

20 JUSTICE BREYER: I'm not sure it is right.

21 MR. HALLWARD-DRIEMEIER: -- there other examples
22 of -- of cases in which the time in which a claim can be
23 brought may have expired before the cause of action
24 accrues.

25 JUSTICE SCALIA: But we don't run forward to

1 create situations like that, do we?

2 MR. HALLWARD-DRIEMEIER: Well --

3 JUSTICE SCALIA: My -- my point isn't that it
4 couldn't exist. I just said you should not interpret a
5 statute of limitations if it is reasonably possible to
6 avoid it in that fashion.

7 MR. HALLWARD-DRIEMEIER: Well, in the Bay Area
8 Laundry case and in the Reiter case, the Court has
9 acknowledged that there is a general rule that statutes of
10 limitations start to run when the cause of action accrues.
11 But in each of those case -- cases, the Court was very
12 clear that that was the rule that applied in the absence
13 of contrary indication by Congress. And here we have a
14 very explicit contrary indication by Congress, that the
15 statute of limitations for any civil action under section
16 3730 runs from the date on which the violation of section
17 3729 was committed.

18 In other words, Congress has opted here to
19 establish a single uniform statute of limitations for all
20 claims that might arise under the False Claims Act. And
21 as I said before, that serves the purposes of the False
22 Claims Act better, far better certainly, than petitioner's
23 alternative.

24 As we have pointed out, many State statutes of
25 limitations, assuming that one can determine which one

1 applies of the many that might be offered, are much
2 shorter than the statute provided for bringing the qui tam
3 action. As a practical matter, then an employee might be
4 forced to split their claims. If they split their claims,
5 any number of adverse consequences follow.

6 First, they could find themselves barred from
7 bringing a subsequent qui tam action on behalf of the
8 United States by the public disclosure bar of the False
9 Claims Act. The Eleventh Circuit has a rule that says
10 that the two claims are one for purposes of res judicata.
11 So in the Eleventh Circuit, apparently they could be
12 barred by res judicata from bringing a qui tam action.

13 The disclosures in the course of the wrongful
14 termination of retaliation claim action would, of course,
15 alert the defendant to the scope and extent of any
16 Government investigation.

17 JUSTICE SOUTER: Well, he's already alerted to
18 the extent that he's taking retaliatory action as true.
19 He may not whole -- know the -- the whole extent of -- of
20 what the employee knows, but he's already been tipped off.

21 MR. HALLWARD-DRIEMEIER: Well, as a practical
22 matter, oftentimes the employer fires the employee as soon
23 as the employer has a sense that the employee is on to
24 something. He doesn't have a full knowledge of what the
25 employee knows and certainly doesn't know that the

1 employee might have told the Government and that the
2 Government is investigating. And that's the purpose of
3 the under seal requirement of the False Claims Act, to
4 allow the Government to conduct a full investigation of
5 the claim, talk to other employees about what was going
6 on. Sometimes the employee really has identified fraud,
7 but may only have identified a portion of the larger
8 scheme of fraud that's going on. And the Government gets
9 to investigate that while the claim is under seal.

10 But in the course of discovery in any wrongful
11 termination suit or retaliation suit, all of that
12 information would become available to the employer. And
13 so the sealed provisions of the FCA would be defeated in
14 large extent.

15 There's also the fact of just the litigation
16 efficiencies of litigating the two claims together.

17 JUSTICE SCALIA: Can I ask you --

18 MR. HALLWARD-DRIEMEIER: -- will be the same.

19 JUSTICE SCALIA: Can I ask you another textual
20 question? You -- you want us to say that (b) (1) must
21 apply to all civil actions under section 3730. Must
22 (b) (2) apply to all civil actions under 3730 as well?

23 MR. HALLWARD-DRIEMEIER: The -- the most close
24 reading of the text would be that any civil action under
25 3730 can be brought within 3 years of when the official of

1 the United States -- now, we differ from the Ninth Circuit
2 on this. We believe that is only a Government official,
3 in particular a Department of Justice official -- knows of
4 the facts relevant to bringing a cause of action that the
5 United States could bring, i.e., the cause of action under
6 3730(a). But we think that 3 years from that date in the
7 action under 3730 could be brought, including the qui tam
8 action or including a retaliation action.

9 But that reading is not essential to the
10 position that we advocate here.

11 JUSTICE SCALIA: So that -- that could exclude
12 even a retaliation action by an individual who -- who
13 doesn't -- who doesn't know when the -- when the
14 individual -- the official of the United States found out
15 about those facts. That -- that doesn't seem to me very
16 reasonable.

17 MR. HALLWARD-DRIEMEIER: Well, of course --

18 JUSTICE SCALIA: That provision is very -- very
19 reasonable as applied to qui tam actions. It doesn't seem
20 to me to make any sense as applied to a retaliation
21 action.

22 MR. HALLWARD-DRIEMEIER: Well, Your Honor, it --
23 it does make sense applying it to a retaliation action
24 because it could be, for instance, the employee who was
25 the individual who informed the Government official

1 charged with responsibility to act of the facts that would
2 warrant the United States in filing an action under
3 3730(a).

4 JUSTICE SCALIA: It might be, but maybe the
5 United States found out before -- before that individual
6 came forward. Maybe there was an official in the United
7 States.

8 MR. HALLWARD-DRIEMEIER: That's -- that's
9 possible.

10 JUSTICE SCALIA: And so he's -- you know, he's
11 -- he's out of -- out of time before he even knows about
12 it.

13 MR. HALLWARD-DRIEMEIER: Well, there may be
14 events that --

15 JUSTICE SCALIA: Strange.

16 MR. HALLWARD-DRIEMEIER: There may be instances
17 where the employee would not know that they could take
18 advantage of that provision.

19 But in the Bay Area Laundry case, the Court
20 considered and rejected a virtually identical argument.
21 That case -- the statute of limitations also was stated in
22 the alternative, and the second one was 3 years after the
23 information necessary to the claim had arrived. And the
24 party who was opposed to the position the Court ultimately
25 adopted said that the Court's interpretation of the first

1 of the two alternatives would render the second
2 superfluous. And the Court said, it may be superfluous to
3 this category of claims, but it's not superfluous to other
4 categories of claims, and so that does not prevent us from
5 construing the first provision in the way that we are.

6 So likewise, even if the Court were to conclude
7 that 3731(b) (2) is unavailable to a retaliation claim or
8 unavailable to a qui tam claim, as some courts of appeals
9 have held, it would not mean that 3731(b) (1) is
10 unavailable, just as holding that 3731(b) (2) is
11 unavailable to a qui tam relator would not mean that
12 3731(b) (1) is unavailable to a qui tam relator.

13 A couple of Justices, Justice Souter --

14 JUSTICE SCALIA: No, but it -- but it would mean
15 that just as 3731(b) (2) can be selectively applied to some
16 categories and not to others, so also, by parity of
17 reasoning, (b) (1) can selectively be applied to some
18 categories of violation and not to others.

19 MR. HALLWARD-DRIEMEIER: Well, again, we believe
20 that the best, most faithful reading of the text is that
21 (b) (2) is available to all causes of action under 3730.

22 The -- Justice Souter asked a question about
23 statistics and the frequency with which the claims are
24 litigated together. In a review of court of appeals
25 decisions, there were 51 court of appeals decisions

1 actually involving a 3730(h) claim. Of those, in 32 the
2 qui tam -- a qui tam claim and a retaliation claim were
3 paired. They were litigated together. In only 5 were
4 both a qui tam action and retaliation claim brought, but
5 brought in separate litigation. So 32 to 5 is the
6 relevant comparison there.

7 JUSTICE SCALIA: What about the rest?

8 MR. HALLWARD-DRIEMEIER: In -- in --

9 JUSTICE SCALIA: That's --

10 MR. HALLWARD-DRIEMEIER: -- 14 claims an
11 individual brought a retaliation claim but never brought a
12 qui tam suit. It may be that the Government had sought this --

13 JUSTICE SCALIA: Well, I would count that as
14 being brought separate. I think you should add that with
15 the other 5.

16 MR. HALLWARD-DRIEMEIER: Well, Your Honor, in --
17 in fact, if we -- if we look more closely at those 14
18 cases, 5 of them were dismissed because the plaintiff was
19 not even involved in protected conduct under the statute.
20 So the closer you get to the core of what Congress had in
21 mind, when it enacted the statute, of -- of pulling out
22 employees who have the information that only they have
23 that the Government needs in order to recover fraud, the
24 closer you get to that core, the more likely it is that
25 the claims that are going to be litigated together. And

1 that's the way the Court ought to apply the statute. It's
2 the way Congress wrote the statute, to serve those
3 purposes.

4 The -- I -- I think that the alternative of
5 applying State statutes of limitations raises -- North
6 Carolina does not dispute that, for example, in Florida
7 the -- the analogous statute of limitations under Florida
8 law -- it's the Florida State False Claims Act which has a
9 retaliation provision -- would be 180 days. 180 days is
10 far too short to put together the complicated qui tam
11 complaint that is called for under the False Claims Act.

12 CHIEF JUSTICE REHNQUIST: Well, apparently
13 Florida didn't think so.

14 MR. HALLWARD-DRIEMEIER: Excuse me, sir?

15 CHIEF JUSTICE REHNQUIST: Apparently Florida
16 didn't think it was too short.

17 MR. HALLWARD-DRIEMEIER: Well, Florida may have
18 made an alternative policy decision in terms of wanting
19 the claims to be litigated together or apart. The
20 Congress has established a single uniform statute of
21 limitations which allows the claims to be litigated
22 together, and as I've said, that is in fact the practice
23 that when someone is going to bring a qui tam action, they
24 almost invariably -- there -- there are 5 exceptions --
25 bring the cases together.

1 If there are no further questions, thank you
2 very much.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Driemeier.

5 Mr. Browning, you have 8 minutes remaining.

6 REBUTTAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.

7 ON BEHALF OF THE PETITIONER

8 MR. BROWNING: Thank you.

9 The Government argues that there will be
10 problems that will arise from splitting the qui tam action
11 and the retaliatory discharge action. And one of the
12 examples that the Government use -- uses is the public
13 disclosure doctrine which is set out in section
14 3730(e)(4)(A) of the False Claims Act. The public
15 disclosure doctrine, however, is a red herring here
16 because the public disclosure doctrine is designed to keep
17 -- to avoid parasitic lawsuits where information is in the
18 -- the public domain, somebody taking that information,
19 and then filing a -- a qui tam lawsuit.

20 The -- the public disclosure doctrine,
21 3730(e)(4)(A), also provides that when someone is the
22 original source of the information, even if the basis for
23 the lawsuit has been made public through a congressional
24 hearing or elsewhere, that person can still bring an
25 action if they're an original source. So it's a complete

1 red herring here.

2 The other red herring that was put forth is a
3 statement that there's a rule in the Eleventh Circuit
4 relating to claims splitting. And forgive me, I cannot
5 recall the name of the case that the Government is
6 referring to, but it is a decision by James C. Hill. And
7 that specific case involved a situation where the qui tam
8 action was brought, a settlement was reached, and then
9 well after the fact, the plaintiff said, oh, and I have
10 this retaliation claim. It makes perfect sense in that
11 situation to -- to apply principles of res judicata.

12 What the Government is ignoring is there are no
13 reported decisions anywhere where a retaliatory discharge
14 action was brought and then res judicata was used to bar
15 the qui tam action filed at a later date. And there's a
16 perfectly logical reason for that because they are
17 different causes of action, and they involve different
18 parties. A retaliation claim is personal to the individual.
19 A qui tam action is an action brought on behalf of the
20 Government.

21 One final point that I'd like to make is the
22 respondent takes the position that the False Claims Act is
23 unique. Well, it's not unique. It's not unique in that
24 when you look at the Major Fraud Act, there is a
25 retaliatory discharge provision that is virtually

1 identical to the False Claims Act, and in the Major Frauds
2 Act -- with respect to the Major Fraud Act, Congress made
3 a -- a conscious decision not to include an express
4 limitations period.

5 It's not -- the False Claim Act is also not
6 unique when you compare it to ERISA. ERISA --

7 JUSTICE GINSBURG: Just go back to what you
8 said. In -- in the Major -- whatever it is -- is there
9 any limitation at all, or just the limitation on the qui
10 tam and as here, as you contend is so here?

11 MR. BROWNING: The Major Fraud Act is a criminal
12 provision that provides a retaliatory discharge provision
13 for anyone who assists the Government in bringing the
14 criminal prosecution. There -- there -- in the Major
15 Fraud Act, there is a specific limitations period of 7
16 years in which the prosecution has to be brought by the
17 United States.

18 JUSTICE GINSBURG: Oh, that's -- that's a
19 criminal proceeding.

20 MR. BROWNING: But -- but there is -- it -- but
21 the criminal statute provides for a civil remedy for a
22 retaliatory discharge, and with respect to that
23 retaliatory discharge provision in the Major Fraud Act,
24 there is no limitations provision.

25 One other point that I want to make is that the

1 False Claims Act is not -- not unique when you compare it
2 to ERISA. ERISA is a statute that has essentially a
3 retaliatory discharge provision as well in section 510 of
4 ERISA, 29 U.S.C. 1140. And courts -- the Federal courts
5 have consistently held that there is no express
6 limitations period for section 510, so we have to look to
7 the limitations period under the most closely analogous
8 State law cause of action.

9 On the other hand, ERISA has numerous
10 provisions, numerous other aspects of the statute, that do
11 have a limitations period. The limitations period for an
12 action for breach of fiduciary duty is a 6-year period
13 with a 3-year tolling provision. So ERISA is a prime
14 example of a statute where Congress has made a decision
15 that when you have a retaliatory discharge provision, not
16 to apply the statute of limitations period, that you look
17 to State law, even though that Federal statute in other
18 aspects has other limitations provisions.

19 If there are no further questions, we would rely
20 upon our briefs.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Browning.

23 The case is submitted.

24 (Whereupon, at 11:58 a.m., the case in the
25 above-entitled matter was submitted.)

