No. 09-834

In the Supreme Court of the United States

KEVIN KASTEN, PETITIONER

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Fair Labor Standards Act of 1938, 29 U.S.C. 215(a)(3), makes it unlawful, *inter alia*, for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint." The question presented is whether Section 215(a)(3) prevents an employer from discharging an employee for orally complaining about suspected violations of the Act.

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INTEREST OF THE UNITED STATES

This case presents the question of whether the anti-retaliation provision of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 215(a)(3), protects an employee who complains to his employer orally, rather than in writing, about suspected violations of the Act. The United States has a significant interest in the resolution of that question. The Secretary of Labor is responsible for enforcing the FLSA, including its anti-retaliation provision. See 29 U.S.C. 204(a) and (b), 216(b) and (c). In addition, the Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), which is codified as part of the FLSA and covered by the same anti-retaliation provision. Proper enforcement of the FLSA's anti-

retaliation provision is thus critical to ensuring compliance with both the FLSA and the EPA.

STATEMENT

1. In 1938, Congress enacted the Fair Labor Standards Act to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). To address substandard working conditions, Congress required employers covered by the FLSA to pay their employees a minimum wage for all hours worked. 29 U.S.C. 206 (2006 & Supp. II 2008). It also required employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207.

To protect employees who report suspected violations of those minimum wage and overtime pay requirements, Congress provided that

> it shall be unlawful for any person * * * to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. 215(a)(3). The question presented here is whether an employee who orally complains to his employer about suspected violations of the FLSA has "filed [a] complaint" within the meaning of the Act, and is thus protected against retaliation by his employer.

2. From October 2003 to December 2006, petitioner was employed by respondent Saint-Gobain Performance

Plastics Corporation as an hourly production worker at its facility in Portage, Wisconsin. In order to record his hours worked, petitioner was required to swipe a time card on an automated time clock at the beginning and end of his time spent working. On February 13, August 31, and November 10, 2006, petitioner received written warnings from respondent for failing to use the time clock properly. On December 6, 2006, respondent suspended petitioner for allegedly failing to use the time clock properly a fourth time. On December 11, 2006, human resources personnel informed petitioner that his employment was being terminated, and on December 19, 2006, they confirmed petitioner's termination in writing. Pet. App. 64-65.

On September 12, 2007, petitioner filed a written complaint with the Wisconsin Department of Workforce Development. Pet. App. 65. He contended that, between September and December 2006, he had repeatedly complained to human resources personnel at the Portage facility that the location of respondent's time clocks was unlawful. Petitioner claimed that, contrary to the requirements of the FLSA, the clocks' location resulted in employees not being compensated for all time spent donning and doffing required protective gear. See 29 U.S.C. 254(a); *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 29-30 (2005). Petitioner alleged that on the same day that he was informed of his termination, December 11, 2006, respondent moved its time clocks closer to the employee entrance. Pet. Br. 11.

3. On December 5, 2007, petitioner filed two actions against respondent. First, he brought a collective action (into which 156 co-workers eventually opted), alleging that respondent had violated the FLSA and Wisconsin state law by failing to compensate employees for don-

ning and doffing time. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, No. 07-cv-449-bbc (W.D. Wisc.). Second, petitioner brought this action, alleging that he had been terminated for complaining about the unlawful location of respondent's time clocks. Pet. App. 65. Those actions were initially consolidated, but the parties later stipulated to their severance. *Id.* at 73 n.1.

a. The district court granted plaintiffs' motion for summary judgment in the collective action. Pet. App. 73-113. Respondent did not dispute, the court noted, that "[e]mployees were not paid for some required donning and doffing because time clocks were located past locker rooms and gowning areas." *Id.* at 85. After rejecting respondent's various defenses, *id.* at 91-95, the court concluded that "[respondent] violated the FLSA and Wisconsin labor law by not compensating plaintiffs for all hours worked," *id.* at 96. The parties later settled the case for $1.425 million. Pet. Br. 12 n.8.

b. The district court, however, granted respondent's motion for summary judgment in this action. Pet. App. 63-72. As the court noted, the FLSA protects an employee who has "filed any complaint" from retaliatory discharge, 29 U.S.C. 215(a)(3). Pet. App. 66. In the court's view, "[t]he language of the statute covers employees that 'file[] *any* complaint,'" which includes complaints to employers as well as to governmental authorities. *Id.* at 70 (brackets and emphasis in original). But the court held that the complaint, whether to an employer or to an agency, must be made in writing: "One cannot 'file' an oral complaint. * * * An oral complaint can become a filed complaint only if it is committed to document form." *Ibid.*

4. a. The court of appeals affirmed. Pet. App. 32-43. The court held that "the plain language of the statute

indicates that internal, intracompany complaints are protected," because "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" *Id.* at 37. The court further held, however, that "unwritten, purely verbal complaints are not protected activity," because "[t]he use of the verb 'to file' connotes the use of a writing." *Id.* at 39. The court declined to defer to the Secretary's view that oral complaints are protected activity, because "the Secretary's interpretation * * * appears to rest solely on a litigating position rather than on a * * * regulation, ruling, or administrative practice." *Id.* at 39 n.2.

b. Judge Rovner, joined by Judges Wood and Williams, dissented from the denial of rehearing en banc. Pet. App. 2-14. She reasoned that although "the term 'to file' often connotes (particularly for lawyers) the submission of a document, it is by no means out of the ordinary to read and hear the term used in conjunction with oral complaints; in that sense, 'to file' is used more broadly to signify the making of a report or the lodging of a protest." *Id.* at 6. Judge Rovner observed that "the notion that one can 'file' an oral complaint or grievance is reflected in any number of federal opinions and regulations." *Id.* at 6-7. She also observed that "Congress in many other statutes has specifically required written complaints." *Id.* at 7-8. Judge Rovner further noted that treating oral complaints as protected activity is consistent with "the Department of Labor's view for nearly fifty years," *id.* at 6, as well as this Court's decisions construing the FLSA broadly to cover acts that culminate in the filing of a complaint, *id.* at 11-13.

SUMMARY OF ARGUMENT

I. A. The FLSA's anti-retaliation provision, 29 U.S.C. 215(a)(3), prevents an employer from discharging or discriminating against an employee "because such employee has filed any complaint." The court of appeals correctly held, and respondent did not dispute at the certiorari stage, that Section 215(a)(3)'s protection for "any complaint" includes an employee's internal complaint to his employer. But if an employee may not be discharged for an internal written complaint, there is no reason to allow discharge for an internal oral complaint. Section 215(a)(3) categorically prevents retaliation against an employee who has filed "any complaint." Neither the text nor the remedial purposes of the FLSA support interpreting the phrase "any complaint" broadly to include internal as well as external grievances, but interpreting the term "filed" narrowly to exclude a particular form of internal grievance.

B. The term "filed" does not implicitly narrow Section 215(a)(3)'s comprehensive protection for "any complaint." Contrary to the decision below, the verb "file" does not invariably refer to the submission of a written document. In many contexts, the verb "file" refers to the speaker's oral transmission of information. That is the relevant meaning in the employment context, where the term "file" refers to the submission or communication of a grievance. For that reason, as a matter of both regulation and common practice, employees file oral complaints under the vast majority of federal employment-related statutes. Moreover, the decision below fails to recognize that elsewhere in the FLSA and other statutes, Congress has expressly stated when a complaint or document must be in writing.

C. When Congress enacted the FLSA in 1938, the phrase "file a complaint" had an established meaning in labor laws as the making of any complaint by an employee. Congress thus understood the phrase "file a complaint" as no different in the labor context from phrases like "make a complaint" or "report a violation," *i.e.*, types of actions that naturally encompass both oral and written submissions by employees.

D. This Court has repeatedly interpreted the FLSA consistent with Congress's remedial purposes. The decision below undermines those purposes in several ways. In particular, it discourages informal resolution of pay disputes, creates a trap for unwary employees who comply with company procedures, encourages prompt termination of employees who complain orally, deters employees from asserting their rights, and disproportionately harms workers with low incomes or limited English skills. There is no practical reason to distinguish between oral and written communications in the workplace, particularly since employers, the Department of Labor, and the EEOC routinely record employees' oral complaints in written form. The decision below also threatens to undermine other statutory schemes that rely on similar anti-retaliation provisions for their enforcement.

II. At the very least, Section 215(a)(3) does not unambiguously state that an employee must communicate his complaint in writing to be protected against retaliation. To the extent that Section 215(a)(3) is ambiguous, the Secretary of Labor and the EEOC are entitled to resolve that ambiguity; they are charged with administering Section 215(a)(3), and their consistent interpretation for nearly a half-century is reasonable.

ARGUMENT

I. THE FLSA'S PROHIBITION ON RETALIATING AGAINST AN EMPLOYEE WHO HAS "FILED ANY COMPLAINT" PROTECTS ORAL COMPLAINTS ABOUT SUSPECTED FLSA VIOLATIONS

The FLSA's anti-retaliation provision, 29 U.S.C. 215(a)(3), makes it unlawful for any person

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

As relevant here, Section 215(a)(3) prevents an employer from retaliating against an employee "because such employee has filed any complaint * * * under or related to" the FLSA. In this case, petitioner alleges that he had several conversations with his supervisors during which he complained that employees were not being compensated for time spent donning and doffing required protective gear. There is no question that petitioner's statements concerned potential violations of the FLSA. The sole question presented is whether, by making those statements, petitioner "filed any complaint" and thus is protected by the FLSA against retaliatory discharge.

A. The Text Of The FLSA Protects Employees From Retaliation For Filing "Any Complaint," Including Oral Grievances To An Employer

1. Before the court of appeals, respondent argued that petitioner could be discharged not only because his

complaints were oral rather than written, but also because they were made to respondent rather than a governmental agency. The court of appeals rejected the latter argument. It held that "the plain language of the statute indicates that internal, intracompany complaints are protected," because "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" Pet. App. 37. Respondent did not argue in its brief in opposition to the petition for certiorari that the judgment should be affirmed on the alternate ground that internal complaints are unprotected, and thus any argument to that effect has been waived. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004); *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004).

As the court of appeals recognized, the vast majority of its sister circuits likewise have held that Section 215(a)(3) protects an employee from retaliation for filing an internal complaint with his employer. See *Hagan* v. *Echostar Satellite, L.L.C.*, 529 F.3d 617, 625-626 (5th Cir. 2008); *Pacheco* v. *Whiting Farms, Inc.*, 365 F.3d 1199, 1202, 1206 (10th Cir. 2004); *Moore* v. *Freeman*, 355 F.3d 558, 562-563 (6th Cir. 2004); *Lambert* v. *Ackerley*, 180 F.3d 997, 1004-1005 (9th Cir. 1999) (en banc), cert. denied, 528 U.S. 1116 (2000); *Valerio* v. *Putnam Assocs., Inc.*, 173 F.3d 35, 41-44 (1st Cir. 1999); *EEOC* v. *White & Son Enters.*, 881 F.2d 1006, 1011-1012 (11th Cir. 1989); *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); but see *Lambert* v. *Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), cert. denied, 511 U.S. 1052 (1994).

Indeed, until the decision below, no court of appeals had held that internal written complaints are covered, while internal oral complaints are not. The Fifth and

Ninth Circuits have concluded that an employee's internal oral complaints are protected activity under the FLSA. See *Hagan*, 529 F.3d at 626; *Ackerley*, 180 F.3d at 1004. The Sixth, Eighth, Tenth and Eleventh Circuits have treated an employee's internal oral complaints as protected activity, without drawing any distinction between whether the complaint was oral or written. See *Moore*, 355 F.3d at 562; *Brennan*, 513 F.2d at 181; *Pacheco*, 365 F.3d at 1202, 1206; *White & Son Enters.*, 881 F.2d at 1011. And although the Second Circuit has held that an employee's internal complaint to his employer is not protected activity, see *Genesee Hosp.*, 10 F.3d at 55, that court did not distinguish between whether the internal complaint was oral or written.[1]

2. Assuming that, as the court of appeals held, an employee may not be discharged for a *written* complaint to his employer, there is no reason to allow retaliatory discharge for an *oral* complaint. Section 215(a)(3) categorically prevents retaliation against an employee who has "filed *any* complaint" (emphasis added). See, *e.g.*,

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[1] The court of appeals incorrectly relied on *Ball* v. *Memphis Bar-B-Q Co.*, 228 F.3d 360 (4th Cir. 2000). Pet. App. 40. In *Ball*, an employee (Linton) was preparing to file an action under the FLSA. A fellow employee (Ball) then brought a separate action for retaliatory discharge, alleging that he had been terminated for telling their employer that he would testify in Linton's favor if asked to do so. The court held that Ball was not "about to testify in any * * * proceeding" within the meaning of Section 215(a)(3), because Linton had yet to institute a lawsuit against their employer. *Ball*, 228 F.3d at 364. The court did not address the meaning of other clauses in Section 215(a)(3), including the ban on retaliation for "fil[ing] any complaint." The Fourth Circuit has construed similar language in the Surface Transportation Assistance Act, 49 U.S.C. 31105(a)(1)(A)(i) (Supp. II 2008), to include "internal complaints to company management, whether written or oral." *Calhoun* v. *Department of Labor*, 576 F.3d 201, 212 (2009).

Republic of Iraq v. *Beaty*, 129 S. Ct. 2183, 2189 (2009) ("Of course the word 'any' * * * has an 'expansive meaning.'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). The plain text of Section 215(a)(3) thus affords protection for a complaint in "any" form. As explained in Point B, *infra*, the term "filed" does not implicitly narrow that comprehensive protection. Rather, the term "filed" simply refers to an actual submission or communication of a grievance. It would make little sense, particularly in light of the remedial purposes of the FLSA, to interpret the phrase "any complaint" broadly to include internal as well as external grievances, but to interpret the term "filed" narrowly to exclude a particular form of internal grievance. See, *e.g.*, *SEC* v. *Central-Illinois Sec. Corp.*, 338 U.S. 96, 124 (1949) ("Both sections are parts of the same statute, designed to give effect to the same legislative policies.").

B. The Term "Filed" Does Not Restrict The FLSA's Protection For "Any Complaint"

1. The court of appeals concluded that "unwritten, purely verbal complaints are not protected activity," because "[t]he use of the verb 'to file' connotes the use of a writing." Pet. App. 39. The term "filed" is often used in association with a written document, and its use thus may suggest the existence of such a document. But that is so because the nature of a proceeding or other circumstances make clear that a written document is necessary. For example, in federal court, "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. Such language reflects the obvious point that one common use of the term "file" is to refer to the submission of a written document to a court, governmental agency, or administrative body. Pet. App. 40;

see, *e.g.*, *The American Heritage Dictionary of the English Language* 658 (4th ed. 2006) (defining the verb "file" in part as "[t]o enter (a legal document) on public official record") (*American Heritage Dictionary*).

The court of appeals erred, however, in concluding that the term "file" can only refer to the submission of a written document. In many contexts, the term "file" means simply to submit or present information to another, including through speech. For instance, a newspaper reporter may "file" a story with his editor over the telephone. See *American Heritage Dictionary* 658 (defining the verb "file" in part as "[t]o send or submit (copy) to a newspaper"). An airplane pilot may "file" his flight plan with air traffic controllers over the radio. See 14 C.F.R. 1.1 (defining "flight plan" to include information "that is filed orally or in writing with air traffic control"). An insured may "file" a proof of loss or claim over the telephone. See *Parks* v. *Farmers Ins. Co.*, 227 P.3d 1127, 1131-1132 (Or. 2009) (en banc). Or an employee may "file" a complaint by speaking with her employer or an administrative body. See *Encarta World English Dictionary* (2009) (defining the verb "file" in part as "to submit something such as a claim or complaint to the appropriate authority so that it can be put on record"). In those contexts, the term "file" includes a speaker's oral transmission of information.

Consistent with that understanding, "the notion that one can 'file' an oral complaint or grievance is reflected in any number of federal * * * regulations." Pet. App. 6. Many federal regulations, including those promulgated by the Departments of Defense, Energy, and Health and Human Services, establish procedures that

allow parties to "file" oral complaints or grievances.[2] Many other federal regulations provide that parties may orally "file" an application, motion, or appeal.[3] One federal regulation even employs both meanings of the term "filed"—*i.e.*, the submission of oral information to make a record and the submission of a written document for the same purpose. See 20 C.F.R. 416.325(b)(2) (considering an application for supplemental security income

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[2] See, *e.g.*, 10 C.F.R. 501.161(a) (providing in requirements for "[f]iling a complaint" that the Office of Fossil Energy "will accept oral complaints"); 32 C.F.R. 842.20 (providing in requirements for "[f]iling a claim" that members of the Air Force may "complain[] (orally or in writing) to the commander of a military organization or unit of the alleged offending member"); 42 C.F.R. 422.564(d)(1) ("An enrollee may file a grievance with the [Medicare Advantage] organization either orally or in writing."); 423.564(d)(1) ("An enrollee may file a grievance with the [Medicare] Part D plan sponsor either orally or in writing."); 438.402(b)(3)(i) ("The enrollee [in a managed care organization] may file a grievance either orally or in writing."); 438.402(b)(3)(ii) ("The enrollee or the provider may file an appeal either orally or in writing, and unless he or she requests expedited resolution, must follow an oral filing with a written, signed, appeal."); 494.180(e) ("The [end-stage renal disease] facility's internal grievance process must be implemented so that the patient may file an oral or written grievance with the facility without reprisal or denial of services."); cf. 21 C.F.R. 211.198(a) (providing that in maintaining its "[c]omplaint files," the Food and Drug Administration will establish "[w]ritten procedures describing the handling of all written and oral complaints regarding a drug product").

[3] See 7 C.F.R. 42.108(f)(2) (providing that a party may "file an appeal" by making an oral request); 56.62 (same); 70.102 (same); 75.27 (same); 9 C.F.R. 590.320 (same); see also 5 C.F.R. 630.402 ("An employee must file an application—written, oral, or electronic, as required by the agency—for sick leave."); 20 C.F.R. 408.301 ("This subpart also explains when a written statement or an oral inquiry may be considered to establish your application filing date [for certain types of veterans' benefits]."); 49 C.F.R. 1503.629(c) ("Filing of motions. A motion made prior to the hearing must be in writing or orally on the record.").

benefits "to be filed on the date of the filing of a written statement or the making of an oral inquiry under [certain] conditions"). Those regulations—drawn from a variety of different sectors of our government and economy—"put to rest the notion that filing a complaint invariably means filing a *written* complaint." Pet. App. 7 (emphasis in original).[4]

2. Significantly, in the employment context, employees routinely "file" oral complaints, charges, or grievances under statutes administered by the Department of Labor and the EEOC. In fact, the EEOC has been explicit that employees may file oral complaints under both the Equal Pay Act—which is governed by the FLSA's anti-retaliation provision—and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* See *EEOC Compliance Manual* § 2.4(a)(1)(ii) (2010) (stating that complaints under the EPA "need not be written and may be filed in person, by mail or by phone"); *id.* § 2.7; 29 C.F.R. 1626.7(b)(3) (providing that "the date of filing" for "[o]ral charges filed in person or by telephone" with the EEOC under the ADEA is the date on which the "oral communication [is] received by [the] Commission").[5]

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[4] Numerous state statutes also provide that parties may file an oral complaint or grievance. See, *e.g.*, Alaska Stat. § 47.32.090 (2008); Cal. Health & Safety Code § 17055(a) (West 2006); D.C. Code § 7-1231.12 (2008); Ind. Code Ann. § 27-8-28-14 (West 2008); Me. Rev. Stat. Ann. tit. 34-B, § 5604.3.A (2009); Miss. Code Ann. § 69-47-23(4) (West 2009); Nev. Rev. Stat. § 618.336 (2006); N.J. Stat. Ann. § 30:4C-12 (West 2008); N.Y. Ins. Law § 3217-a(a)(7) (McKinney 2006).

[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, specifies that "[c]harges shall be in writing." 42 U.S.C. 2000e-5(b). Title VII, however, prohibits retaliation not only because an employee has filed a charge, but also "because he has opposed any practice made an unlawful employment practice." 42 U.S.C. 2000e-3(a). An employee

The Department of Labor administers a number of federal employment-related statutes besides the FLSA, including the Davis-Bacon Act (DBA), the Family and Medical Leave Act of 1993 (FMLA), the McNamara-O'Hara Service Contract Act (SCA), the Occupational Safety and Health Act of 1970 (OSHA), and the Walsh-Healey Act (WHA). The FLSA and those other statutes require covered employers to post notices that inform employees how to obtain additional information about their legal rights and obligations. See 29 C.F.R. 516.4 (FLSA); see also 29 C.F.R. 5.5(a)(1)(i) (DBA); 29 U.S.C. 2619 (FMLA); 29 C.F.R. 825.300(a) (same); 29 C.F.R. 4.183 and 4.184 (SCA and WHA); 29 U.S.C. 657(c)(1) and 29 C.F.R. 1903.2(a) (OSHA). Those notices contain toll-free numbers, such as 1-866-4-USA-DOL or 1-866-4-USWAGE, that employees may call in order to obtain such information.

Employees who call those toll-free numbers to complain about suspected violations of the FLSA will be given the contact information for one of the Wage and Hour Division's local offices, which employees can visit or call directly. According to the Department, when an employee complains to a local office—whether in person, by mail, or by telephone—the complaint is entered into the Wage and Hour Investigative Support and Reporting Database (WHISARD), and regional staff then determine the appropriate response. From the viewpoint of both the employee and the Department, there is no difference between an oral and a written complaint: either is recorded in the Department's database and reviewed for further action. Indeed, the Wage and Hour

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who orally complains to his employer or the EEOC thus has "opposed" the relevant practice and is protected against retaliation even if he has not yet filed a written charge. See, *e.g.*, *Genesee Hosp.*, 10 F.3d at 55.

Division receives a substantial number, if not the majority, of complaints by telephone, especially from low-income workers who are reluctant or unable to visit a local office or to complete written forms outlining their grievances. Wage and Hour Division policy prohibits requiring employees to complain in writing or in person.[6]

In addition, employers often encourage employees to complain internally, whether orally or in writing. For instance, respondent encourages its employees to report suspected legal violations to their supervisors or human resources personnel, and it has a designated telephone line so that employees may call and complain orally. Pet. Br. 5-7. Consistent with that practice, the term "filed" is used in construing private labor agreements to mean the submission of a complaint to an employer or regulatory authority. See *NLRB* v. *Southwestern Elec. Coop., Inc.*, 794 F.2d 276, 279 (7th Cir. 1986) (affirming the NLRB's finding that a collective bargaining agreement included "the right to file oral grievances"). The decision below thus is at odds with the ordinary meaning of the phrase "file[] any complaint" in the employment context, as well as with the common practice among em-

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[6] Like the FLSA, OSHA has an anti-retaliation provision that protects an employee who has "filed any complaint." 29 U.S.C. 660(c)(1). The Department interprets that provision to protect "lodging complaints" with employers, 29 C.F.R. 1977.9(c), including oral complaints, see *OSHA Instruction, Directive No. DIS-0-0.9*, Section 7-1 (Aug. 22, 2003) ("Section 11(c) whistleblower complaints may be filed in any form (verbal, written, fax, etc.)."), http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf. Although the Department has interpreted the FLSA in similar fashion through administrative adjudication rather than regulation, its interpretation remains entitled to deference. See p. 31, *infra*.

ployees of filing complaints orally with their employers or governmental authorities.[7]

3. The court of appeals reasoned that interpreting the term "filed" to include an employee's submission of an oral complaint would require "reading words out of [the] statute." Pet. App. 42-43. Precisely the opposite is true: the court's interpretation requires reading words *into* the FLSA. When Congress has intended to require that a complaint be filed in writing rather than orally, it has expressly so provided.[8] Indeed, in surrounding provisions of the FLSA itself, Congress has specified that parties must file certain types of written documents. See 29 U.S.C. 210(a) (requiring the "filing" in court of "a written petition"); 214(c)(2) (requiring "written assurances to the Secretary"); 214(c)(5)(A) (re-

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[7] As the courts of appeals have recognized, an employee's "abstract grumbling[]" or "amorphous expression[] of discontent" is not sufficient to invoke Section 215(a)(3). *Ackerley*, 180 F.3d at 1007; see *Valerio*, 173 F.3d at 44. Regardless of whether an employee's complaint is oral or written, the question is "whether the complaining employee has communicated the substance of his concerns to the employer." Pet. App. 9; see *EEOC* v. *Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992).

[8] See, *e.g.*, Federal Election Campaign Act of 1971, 2 U.S.C. 437g(a)(1) ("Any person who believes a violation of this Act * * * has occurred, may file a complaint * * * . Such complaint shall be in writing."); Veterans Employment Opportunities Act of 1998, 5 U.S.C. 3330a(a)(1)(A) and (2)(B); Packers and Stockyards Act, 7 U.S.C. 193(a); 7 U.S.C. 228b-2(a); Federal Seed Act, 7 U.S.C. 1599(a); 20 U.S.C. 7704(e)(1)(A); 28 U.S.C. 351(a); 36 U.S.C. 220527(a)(1); Uniformed Services Employment & Reemployment Act of 1994, 38 U.S.C 4322(a) and (b); Civil Rights Act of 1964, 42 U.S.C. 2000b(a); 42 U.S.C. 2000c-6(a); Fair Housing Act, 42 U.S.C. 3610(a)(1)(A)(i) and (ii); Americans with Disabilities Act of 1990, 42 U.S.C. 12217(a); Help America Vote Act of 2002, 42 U.S.C. 15512(a)(2)(C); Cable Communications Policy Act of 1984, 47 U.S.C. 554(g); Federal Aviation Act of 1958, 49 U.S.C. 46101(a)(1).

quiring "consent in writing" that "is filed with the Secretary"); 216(b) (requiring "consent in writing" that "is filed in the [appropriate] court"). The decision below effectively reads into Section 215(a)(3) the same requirement of a written document in order to trigger the statutory protection against retaliation. Congress knows how to specify when it wants such a requirement, and it did not do so in Section 215(a)(3).

Congress's practice of specifying when a complaint must be filed in writing is significant for other reasons as well. The express requirement of a written complaint in other federal statutes would be entirely superfluous if, as the court of appeals held, "the natural understanding of the phrase 'file any complaint' requires the submission of some writing." Pet. App. 40; see *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) (recognizing as "one of the most basic interpretive canons" that statutes should be construed "so that no part will be inoperative or superfluous") (quoting *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004)). By contrast, the government has not identified any instance in which Congress has specified that a complaint may be filed orally. The clear implication is that, unless the text or context otherwise establishes that a written complaint is necessary, Congress contemplates that a complaint may be filed orally or in writing.

4. The court of appeals found its interpretation "confirmed by the fact that Congress could have, but did not, use broader language" in Section 215(a)(3). Pet. App. 42. Specifically, the court pointed to provisions in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the ADEA forbidding retaliation against an employee who "has opposed any practice" made unlawful under those statutes. 42 U.S.C. 2000e-3(a); 29 U.S.C.

623(d). According to the court, the "broader phrase, 'opposed any practice,' does not require" the filing of a written document, meaning that "Congress's selection of the narrower 'file any complaint' language in the FLSA thus appears to be significant." Pet. App. 42.

The court of appeals ignored the timing of the respective statutes' enactment. The FLSA was enacted in 1938, more than a quarter-century before Title VII and the ADEA in 1964 and 1967. The fact that Congress included "a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII [and the ADEA], tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA." *Ackerley*, 180 F.3d at 1005; cf. *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1945-1946 (2008) ("[N]egative implications raised by disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously.") (citations omitted). Congress's use of more detailed language in anti-discrimination statutes like Title VII and the ADEA does not indicate that Congress intended to narrow, *sub silentio*, the protections of the FLSA.[9]

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[9] In 1985, Congress amended the FLSA, see Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787-791, in response to this Court's holding in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that the Act applies to States and municipalities. The amendments delayed applicability of the FLSA's overtime provision, 29 U.S.C. 207, to state and local public employees until April 15, 1986, and provided that state and local governments could defer paying any such earned overtime wages until August 1, 1986. To provide public employees with protection against retaliation during the interim period, the amendments provided that "on or after February 19, 1985," States and municipalities could not discriminate against any public employee who "asserted coverage under [Section 207]"; however, to be protected from discrimination "after August 1, 1986," the em-

C. The Background Of The FLSA's Enactment Reinforces The Conclusion That "Filed Any Complaint" Broadly Means The Making Of Any Complaint

1. When Congress enacted the Fair Labor Standards Act in 1938, the phrase "file any complaint" had a recognized meaning in labor laws as the making of any complaint by an employee, whether written or oral. Section 215(a)(3) was preceded by the anti-retaliation provision in the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(4), which in turn had been modeled on Executive Order No. 6711 (1934) (Order). See *NLRB* v. *Scrivener*, 405 U.S. 117, 122-123 (1972). That Order was issued in 1934 under the National Industrial Recovery Act, and it provided that "[n]o employer * * * shall dismiss or demote any employee for making a complaint or giving evidence with respect to an alleged violation." The Order thus referred to "making a complaint" or "giving evidence," acts that naturally encompass both oral and written submissions.

At the time the Order was proposed, Attorney General Cummings explained its purpose:

> Obviously, the labor provisions in Codes cannot be adequately enforced unless employees report violations of these provisions to the proper authorities. They will not be likely to report such violations, how-

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ployee had to "take[] an action described in [Section 215(a)(3)]." The amendments protected employees who "asserted coverage" because until August 1, 1986, disputes centered on whether such employees were covered by the FLSA's substantive requirements. As of August 1, 1986, the employees were entitled to payment of past overtime wages and Section 215(a)(3) provided sufficient protection. The 1985 amendments are not relevant to the question presented here.

> ever, as long as the employer retains the right to dismiss because of having filed a complaint against him.

37 Op. Att'y Gen. 515, 516 (1934). Whereas the Order prohibited retaliating against an employee for "making a complaint" or "giving evidence," the Attorney General's opinion described that Order as preventing retaliation against an employee for "report[ing] violations" or "fil[ing] a complaint." The phrase "fil[ing] a complaint" thus was understood as synonymous with "making a complaint" or "report[ing a] violation."

2. When Congress enacted the NLRA a year later in 1935, it made it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." 29 U.S.C. 158(a)(4). Although Congress used the phrase "filed charges" rather than "making a complaint," that change was not substantive. The Senate committee report explained that Section 158(a)(4) was "merely a reiteration of the Executive order of May 15, 1934." Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.), 74th Cong., 1st Sess. (Comm. Print), *reprinted in* 1 *Legislative History of the National Labor Relations Act of 1935*, at 1355 (1949). Indeed, in debating Section 158(a)(4), Senators used the phrases "filed charges" and "make [a] complaint" interchangeably. See 79 Cong. Rec. 7676 (1935) (statements of Senators Wagner and Hastings).[10]

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[10] Shortly after the NLRA's passage, the National Labor Relations Board construed Section 158(a)(4) to prevent retaliation against an employee for orally reporting a violation to a fellow employee and later testifying about it. See *Viking Pump Co.*, 13 N.L.R.B. 576, 590 (1939), aff'd, 113 F.2d 759 (8th Cir. 1940), cert. denied, 312 U.S. 680 (1941). Although the employee's statements were not even to his employer, the Board found that they fell within the scope of Section 158(a)(4).

3. When Congress enacted the FLSA in 1938, it borrowed the language of the NLRA but strengthened its protections. Section 215(a)(3) protects an employee who "has filed any complaint" or "has testified" in a relevant proceeding, but it also protects an employee who "[has] instituted or caused to be instituted any proceeding," "is about to testify in any such proceeding," or "has served or is about to serve on an industry committee." On its face, Section 215(a)(3) expanded, rather than contracted, the ability of employees to report FLSA violations in multiple ways. Although Section 215(a)(3) uses the phrase "filed any complaint," that minor variation in wording was not significant. In hearings on the FLSA, its sponsor in the House of Representatives, William Connery, and witnesses, including Assistant Attorney General Robert Jackson and Secretary of Labor Frances Perkins, referred to those who "make complaints" under the Act. See *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Educ. and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess. 100 (1937) (Connery); *id.* at 88 (Jackson); *id.* at 180 (Perkins). As those contemporaneous usages indicate, Congress understood the phrase "filed any complaint" in Section 215(a)(3) to mean simply the making of a complaint or reporting of a violation.

D. The Remedial Purposes Of The FLSA Warrant Protecting Oral Complaints To An Employer

1. This Court has repeatedly recognized that the FLSA is a broad statute designed to serve remedial purposes: namely, the elimination of substandard working conditions for employees in covered industries. See *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S.

728, 739 (1981); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 727 (1947). In order to effectuate those purposes, this Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)); see *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) ("[The FLSA] must not be interpreted or applied in a narrow, grudging manner.").

The Court took that interpretive approach in *Scrivener*, which concerned Section 158(a)(4) of the NLRA and its prohibition on retaliation "because [an employee] has filed charges or given testimony." In *Scrivener*, an employer had fired four of his employees for giving written statements as part of an investigation by the National Labor Relations Board. 405 U.S. at 118-120. Although this Court did not hold that the employees had "filed charges or given testimony" within the meaning of the NLRA, it held that they were protected for "participating in the investigative stage." *Id.* at 121. According to the Court, "Congress has made it clear that it wishes all persons with information about such [illegal] practices to be completely free from coercion against reporting them." *Ibid.* (quoting *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967)). The Court reasoned that "[i]t would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time." *Id.* at 124. The Court concluded that "[w]hich employees receive statutory protec-

tion should not turn on * * * events that have no relation to the need for protection." *Id.* at 123-124.

The Court should take the same approach to the interpretation of Section 215(a)(3), which uses language similar to that of the NLRA. See pp. 21-22, *supra*; see also *McComb*, 331 U.S. at 723-724 (noting that decisions interpreting the coverage of the NLRA have persuasive force as to the coverage of the FLSA). The FLSA's anti-retaliation provision is crucial to achieving the remedial purposes of the entire statutory scheme. To ensure compliance by employers with the wage and hour requirements of the FLSA, Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). In Congress's view, "effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Ibid.* In short, "Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Ibid.*

2. Congress's objectives would go unrealized in several important respects if employees could face retaliation for oral complaints to their employers. As an initial matter, protecting employees' oral complaints promotes early and informal resolution of pay disputes, which in turn decreases costs to employers and their employees. See Pet. Br. 49. Many employers, including respondent, affirmatively encourage their employees to report suspected legal violations internally, without distinguishing between oral and written complaints. The court of appeals' interpretation thus creates—and encourages employers to create—a trap for unwary employees like petitioner, who comply with company procedures only

to find themselves facing retaliation for having complained orally rather than in writing. See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 904 (2007) (criticizing as "flawed" a statutory interpretation that "creat[es] legal distinctions that operate as traps for the unwary").[11]

At the least, leaving oral complaints unprotected would give "an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally." *Valerio*, 173 F.3d at 43. And more generally, it would deter employees from asserting their rights under the FLSA. See, *e.g.*, *DeMario Jewelry*, 361 U.S. at 292 ("For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); cf. *Crawford* v. *Metropolitan Gov't*, 129 S. Ct. 846, 852 (2009) ("If it were clear law that an employee who reported discrimination in answering an employer's questions could be

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[11] In dissenting from denial of rehearing en banc, Judge Rovner observed that the panel's decision "presumably would apply to an employee's external contacts with regulatory officials." Pet. App. 9-10. In that event, an employee could face retaliation for filing an oral complaint with the Department of Labor's Wage and Hour Division or the EEOC. Yet oral communications are a common way in which employees inquire about their statutory rights and register complaints with those agencies. See pp. 15-16, *supra*. Respondent suggests that contacting federal agencies might qualify as "institut[ing] or caus[ing] to be instituted any proceeding." 29 U.S.C. 215(a)(3); see Br. in Opp. 18. If that is because an oral complaint to the Department of Labor or the EEOC results in a written record by the agency that is processed for further action, then the same logic suggests that oral complaints to employers "institute[]" a "proceeding"—at least where, as here, the employer has procedures for processing oral complaints or records the complaint in writing and processes it for further action.

penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) ("The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII.").

Nor is there any practical reason to distinguish between oral and written communications. An employee who completes a written form or sends an e-mail to a supervisor is in no different position than an employee who communicates the same substance by voicemail or during a face-to-face meeting. See Pet. App. 9; *id.* at 14 ("Oral inquiries, protests, and information * * * play no less an important role in the statutory scheme than do letters, e-mails, and sworn statements."). Any distinction between oral and written communications would be all the more artificial in light of the practice of employers, the Department, and the EEOC, which routinely record employees' oral complaints in some written form. See pp. 15-16, *supra*. After all, that is what respondent did here. See Pet. Br. 9-11 nn.4-7.

By discouraging employees from filing oral complaints, the rule adopted by the decision below would disproportionately impact workers with low incomes or with limited English skills, *i.e.*, those workers who already are most reticent to complete written forms outlining their grievances. Indeed, the Wage and Hour Division is dependent on oral complaints, typically by telephone, from that sector of the workforce to monitor compliance with the FLSA. Respondent has not pointed to any evidence suggesting that as part of an Act targeted at aiding some of the most vulnerable persons in

the labor force, Congress intended to protect those laborers from retaliation only when they complain to their employers or regulatory officials in writing.

3. The reasoning of the court of appeals, if adopted by this Court, also would threaten to undermine a host of other statutory schemes. Many federal statutes contain anti-retaliation provisions that are similar or identical in relevant part to Section 215(a)(3).[12] For example, the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105(a)(1)(A)(i) (Supp. II 2008), prohibits retaliation against an "employee" who "has filed a complaint" that is "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." The courts of appeals to consider the question have held, in accordance with the view of the Department of Labor, that an employee's internal oral complaints are protected by the STAA. See *Calhoun* v. *Department of Labor*, 576 F.3d 201, 212 (4th Cir. 2009); *Clean Harbors Envt'l Servs. Inc.* v. *Herman*, 146 F.3d 12, 22 (1st Cir. 1998); see also *Jackson* v. *CPC Logistics*, No. 07-006, 2008 WL 4820117, at *2 (Dep't of Labor Adm. Rev. Bd. Oct. 31, 2008). Yet under the reasoning

[12] See, *e.g.*, Federal Service Labor-Management Relations Act, 5 U.S.C. 7116(a)(4); National Transit Systems Security Act, 6 U.S.C. 1142(a)(3) (Supp. II 2008); Immigration and Nationality Act, 8 U.S.C. 1182(n)(2)(C)(v), 1324b(a)(5); Foreign Service Act of 1980, 22 U.S.C. 4115(a)(4); National Labor Relations Act, 29 U.S.C. 158(a)(4); Occupational Safety and Health Act, 29 U.S.C. 660(c)(1); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1855(a); Employee Polygraph Protection Act, 29 U.S.C. 2002(4)(A); Family and Medical Leave Act, 29 U.S.C. 2615(b)(1); Workforce Investment Act, 29 U.S.C. 2934(f); Mine Health and Safety Act, 30 U.S.C. 815(c)(1); Older Americans Act of 1965, 42 U.S.C. 3058g(j); Railway Labor Act, 49 U.S.C. 20109(a)(3) (Supp. II 2008); Surface Transportation Assistance Act, 49 U.S.C. 31105(a)(1)(A)(i) (Supp. II 2008).

of the decision below, employees could be discharged for reporting many types of violations that are of serious public concern under such statutes. See, *e.g.*, *Passaic Valley Sewerage Comm'rs* v. *Department of Labor*, 992 F.2d 474, 478 (3d Cir.) ("Employees should not be discouraged from the normal route of pursuing internal remedies [under the Clean Water Act] before going public with their good faith allegations."), cert. denied, 510 U.S. 964 (1993); *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974) ("[C]overage of the [Coal Mine Health and Safety] Act begins when the miner notifies his foreman and/or safety committeeman of possible safety violations."), cert. denied, 420 U.S. 938 (1975).

II. THE SECRETARY OF LABOR AND EEOC'S LONGSTANDING INTERPRETATION IS REASONABLE AND ENTITLED TO DEFERENCE

At the very least, Section 215(a)(3) does not unambiguously state that an employee must communicate his complaint in writing to be shielded from possible retaliation. To the extent that Section 215(a)(3) is ambiguous, the Secretary of Labor and the EEOC are entitled to resolve that ambiguity; they are charged with administering Section 215(a)(3), and their longstanding and consistent interpretation of the statute is reasonable. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

1. Respondent does not dispute that the Secretary of Labor and the EEOC are charged by Congress with administering Section 215(a)(3). See Resp. C.A. Br. 19-20. Specifically, the Secretary is responsible for administering the entirety of the FLSA, including its anti-

retaliation provision, see 29 U.S.C. 204(a) and (b), 216(b) and (c); and the EEOC is responsible for enforcing the Equal Pay Act, see 29 U.S.C. 206(d), which is codified as part of the FLSA and subject to the same anti-retaliation provision.

2. The interpretation of Section 215(a)(3) adopted by the Secretary and the EEOC is entitled to deference. Both the Secretary and the EEOC have extensive experience in administering federal employment-related statutes generally; questions concerning prevention of retaliation against employees for their oral complaints are critical to the administration of the FLSA and the EPA specifically; and the Secretary and the EEOC have carefully considered those questions over a long period of time. Those factors "all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the [a]gency interpretation here at issue." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002); cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001). And the interpretation by the Secretary and the EEOC is entitled in any event to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because it reasonably interprets the statutory language, avoids severe practical difficulties, and represents the Secretary's and the EEOC's consistent position.

As explained above, the text of Section 215(a)(3) may reasonably be read to prohibit retaliation against an employee who orally complains to his employer or the appropriate enforcement agency. See pp. 11-14, *supra*; see also *Power City Elec., Inc.*, No. C-77-197, 1979 WL 23049, at *2 (E.D. Wash. Oct. 23, 1979) (holding that "the term 'filed' as used in [the anti-retaliation provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1)] means 'lodged' and is not limited to

a written form of complaint"). Interpreting Section 215(a)(3) in that way accords with common practice in the workplace, avoids a hollow distinction between oral and written communications, and best serves the purposes of the FLSA by protecting employees from retaliation for asserting their statutory rights.

The court of appeals held, however, that the position of the Secretary is not entitled to deference because it "appears to rest solely on a litigation position." Pet. App. 39 n.2. To the contrary, both the Secretary and the EEOC have long interpreted Section 215(a)(3) to prevent retaliation for filing an oral complaint. As early as 1961, the Secretary brought an enforcement action under Section 215(a)(3) on behalf of an employee who had orally complained about violations of the FLSA. See *Goldberg* v. *Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, at 40,986 (D. Utah 1961); *ibid.* ("In the context of the [FLSA], the term ['filed'] should not be given a strict or limited meaning but should be construed reasonably to accomplish the purposes the Congress obviously had in mind."); see also *Maxey's Yamaha*, 513 F.2d at 180-181 (enforcement action brought by the Secretary against an employer that had discharged an employee for an oral complaint); cf. *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991) ("The Secretary's interpretation of OSH Act regulations in an administrative adjudication * * * *is* agency action, not a *post hoc* rationalization of it.").

Since that time, both the Secretary and the EEOC repeatedly have argued in the courts that oral complaints to one's employer are protected under Section 215(a)(3). See, *e.g.*, Br. for the Secretary of Labor as Amicus Curiae, *Lambert* v. *Ackerley*, Nos. 96-36017, 96-36266, and 96-36267 (9th Cir. Apr. 12, 1999); Br. for the EEOC as Amicus Curiae, *Lambert* v. *Ackerley*,

Nos. 96-36017, 96-36266, and 96-36267 (9th Cir. Apr. 22, 1999); Br. for the EEOC, *EEOC* v. *White & Son Enters.*, No. 88-7658 (11th Cir. Mar. 1, 1989). And the EEOC has set forth its position in the compliance manual issued to field offices. See 2 *EEOC Compliance Manual*, *Section 8: Retaliation* §§ 8-I(A), 8-II(B) & n.12 (May 20, 1998), http://www.eeoc.gov/policy/docs/retal.pdf; see also *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (explaining that EEOC compliance manuals "reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance'") (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998)).

In light of that history, the court of appeals erred in speculating that "the Secretary's interpretation of 'filed any complaint' appears to rest solely on a litigating position." Pet. App. 39 n.2. Rather, the Secretary's interpretation originated in "administrative practice," *ibid.*—namely, enforcement actions instituted by the Secretary. And although the Secretary subsequently has articulated her interpretation in amicus briefs, that is a reason to grant deference, not to withhold it. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to Secretary's interpretation of FLSA advanced in amicus brief because "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question"); see also *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007). Indeed, the fact that for a half-century the Secretary and the EEOC have interpreted Section 215(a)(3) to protect oral complaints counsels strongly in favor of deference to their longstanding position. *Walton*, 535 U.S. at 222, 225; *Skidmore*, 323 U.S. at 140.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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