No. 09-834

In the Supreme Court of the United States

Kevin Kasten,

Petitioner,

v.

Saint-Gobain Performance Plastics Corporation,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent fails to adequately confront the clear split among the circuits regarding whether 29 U.S.C. § 215(a)(3) protects oral complaints, is unable to explain how the Fair Labor Standards Act ("FLSA") can be enforced when employees have reason to fear retaliation for discussing violations, and presents an interpretation of section 215(a)(3) which is contrary to evidence of Congressional intent. Certiorari should be granted.

I. THIS CASE PRESENTS A SUBSTANTIAL INTER-CIRCUIT CONFLICT.

Respondent does not seriously dispute the existence of the inter-circuit conflict, which even the Seventh Circuit and district court candidly recognized. Respondent expressly acknowledges that the Fifth, Sixth, Eighth and Eleventh Circuits have all held that oral complaints are protected by section 215(a). Br. Opp. 15-16.[1] Respondent asserts that any Tenth Circuit language indicating that oral complaints are protected is dicta which should be disregarded.

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[1] Respondent describes the decision in *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F. 3d 360 (4th Cir. 2000), as "excluding oral statements to a supervisor from statutory protection." Br. Opp. 14. *Ball* actually held only that such statements do not constitute "testimony" at a "proceeding" under the FLSA. 228 F. 3d at 384.

Br. Opp. 4. In *Pacheco v. Whiting Farms, Inc.*, 365 F. 3d 1199, 1203, 1206 (10th Cir. 2004), however, the only complaint was oral, and the Tenth Circuit expressly held that it constituted protected activity. Respondent also claims that the Ninth Circuit did not expressly hold that oral complaints are protected. Br. Opp. 4. However, in *Lambert v. Ackerley*, the Ninth Circuit expressly held that the plaintiff's oral and written complaints were *both* protected. 180 F.3d 997, 1001, 1007-08 (9th Cir. 1999) (*en banc*) ("[T]he employee may communicate such allegations orally or in writing, and need not refer to the statute by name.").[2]

Although conceding that several circuits hold that oral complaints are protected, Respondent suggests that they now "may follow" the Seventh Circuit, and overturn their own longstanding precedents. Br. Opp. 16. The circuits may repudiate their prior decisions, Respondent urges, because they "relied heavily on a liberal interpretation and expansive reading," whereas Seventh Circuit provided a "reasoned interpretation" of section 215(a)(3) Br. Opp. 15, 16.

That is not a plausible basis for denying review. The construction of section 215(a) in the Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh

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[2] *See Bates v. Lucht's Concrete Pumping, Inc.*, No. CV. 05-796-PK, 2006 WL 4097295 at *2, *5 (D. Or. Dec. 6, 2006) (applying *Ackerley*'s protection of oral complaints).

Circuits *is* the majority view. The clear conflict at issue could only end if all of these Circuits now reheard this issue *en banc*. There is no remote possibility that that will occur. The Seventh Circuit's interpretation of section 215(a) is hardly so obviously correct that six other Circuits will abandon precedent reaching back more than three decades. Indeed, the Seventh Circuit even failed to persuade several other members of its own court. Certiorari is warranted to resolve this conflict.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

As the Department of Labor explained, oral complaints are common under the FLSA. App. 23, 59-60.[3] The dissenting opinion warns

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[3] *See e.g.*, *Knickerbocker v. City of Stockton*, 81 F.3d 907 (9th Cir. 1996); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993); *Ritchie v. St. Louis Jewish Light*, No. 4:09-CV-1947, 2010 WL 502946 at * 5 (E.D. Mo. Feb. 8, 2010); *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 996 (E.D. Mo. 2009); *Jackson v. Advantage Commc'n, Inc.*, No. 4:08CV00353, 2009 WL 2508210 at *6 (E.D. Ark. Aug. 14, 2009); *Burns v. Blackhawk Mgmt. Corp.*, 494 F. Supp. 2d 427 (S.D. Miss. 2007); *Ergo v. Int'l Merch. Servs., Inc.*, 519 F. Supp. 2d 765, 778 (N.D. Ill. 2007); *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 690 (E.D. Wis. 2007); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *Skelton v. Am. Intercontinental Univ. Online*, 382 F. Supp. 2d 1068, 1076 (N.D. Ill. 2005); *Truex v. Hearst Commc'n, Inc.*, 96 F. Supp. 2d 652 (S.D. Tex. 2000); *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322 (W.D. Va. 1999).

that if section 215(a) does not apply to oral complaints, there will be no protection for workers who contact the Department in person or by telephone. App. 9-10. Respondent does not deny that such contacts would not be protected as "complain[ts]" under the panel decision; it suggests, however, that a worker who speaks with the Department of Labor might be covered by the clause forbidding retaliation against any person who "instituted any proceeding under or related to this Act." Br. Opp. 14, 18, 19. Respondent offers no authority to support this proposition.[4]

A mere conversation between a worker and Labor Department officials could not plausibly be described as "institut[ing] any proceeding."[5] There is a distinct difference between filing an oral complaint and instituting

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[4] Respondent asserts that in *Ackerley*, "the plaintiffs' initiation of contact with the Department of Labor would have 'instituted a proceeding' under the Act." (R.Br. 14). However, the court relied exclusively on the "complaint" clause in that decision. *Ackerley*, 180 F.3d at 1004. The original panel decision expressly held that the "instituted any proceeding" clause did not apply. *Lambert v. Ackerley*, 156 F.3d 1018, 1023-24 (9th Cir. 1999) (reversed on other grounds).

[5] Congress rejected the following language, which would have protected workers who complain orally to the Department and the complaint leads to investigation or suit, as Respondent suggests: "instituted or caused to be instituted any investigation or proceeding". 83 Cong. Rec. 7377 (1938) (Remarks of Rep. Ramspeck).

proceedings. "Institute[] any proceeding" refers to the commencement of some form of structured proceeding such as a lawsuit or administrative hearing:

> As used in the Act, "proceeding" is modified by attributes of administrative or court proceedings; it must be "instituted," and it must provide for "testimony." . . . The term "instituted" connotes a formality that does not attend an employee's oral complaint.

Ball, 228 F. 3d at 364. Federal agencies themselves—not complaing workers—regularly decide not to "institute proceedings" by taking enforcement action or filing a lawsuit in response to complaints. *See Heckley v. Chaney*, 470 U.S. 831, 834-35, 838 (1985) (there is a "presumption that agency decisions not to *institute proceedings* [in response to complaints or inquiries] are unreviewable") (emphasis added). Thus, while employees may file an oral complaint with the Department, it would not qualify as instituting a proceeding, and would remain unprotected.

Respondent insists that workers in the Illinois, Indiana and Wisconsin will understand that only written complaints are protected, and will thus be unlikely to complain orally, "now that the law in the Seventh Circuit has been plainly stated for the first time so that employees may understand it." Br. Opp. 17. But there is no realistic possibility that workers will learn

what was "stated" in the "clear" decision below. Few workers have lawyers on retainer to provide legal advice about such matters, and employers are not going to warn their employees that they can be dismissed for oral but not written complaints. Many employers (Respondent included) do the opposite, implementing a complaint hotline or an oral complaint process, which invite employees to report orally up the chain of command. This, combined with administrative agencies' publications encouraging employees to verbally report violations,[6] will ensure that employees remain unaware that they can be fired for following company or administrative protocol.

Respondent relies on the denial of certiorari in *Ackerley v. Lambert*, 528 U.S. 1116 (2000), and *Lambert v. Genesee Hospital*, 511 U.S. 1052 (1994) to claim that the question presented is not of exceptional importance. However, the questions presented in those petitions concerned whether internal complaints to employers are protected, not whether oral complaints are protected. In both *Ackerley*[7] and *Lambert*,[8] the

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[6] *See e.g.*, Employee Rights Under The Fair Labor Standards Act (Jul. 2009), http://www.dol.gov/whd/regs/compliance/posters/minwage.pdf (last visited Feb. 19, 2010); Equal Employment Opportunity Is The Law (Nov. 2009), http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf (last visited Feb. 19, 2010).

[7] In *Ackerley*, petitioners asserted that *Genesee Hospital*, 10 F. 3d 46 was in conflict. Respondents disagreed:

briefs in opposition advanced substantial arguments that there was no genuine inter-circuit conflict. Similar arguments are unavailing here, where the conflict has been consistently acknowledged at all judicial levels and by all parties. Certiorari is appropriate to resolve this question of exceptional importance.

> [A]ll indications are that the Ninth Circuit would *not* disagree with the Second Circuit's resolution of that issue. . . . Nor do the Second Circuit's precedents clearly indicate that it would reach a result different from that of the Ninth Circuit on the facts of this case.

Brief of Respondents in Opposition to Petition for Writ of Certiorari at 10-12, *Ackerley v. Lambert,* 528 U.S. 1116 (2000) (No. 99-681).

[8] Respondents in *Genesee Hospital* explained:

> [The Second] Circuit's actual holding does not create a conflict with [other Circuits'] opinions, given the circumstances of this case. In none of those opinions did a court permit an informal complaint to a supervisor to serve as a predicate for an Equal Pay Act retaliation claim where the complaint is merely one of "unfair" wages. . . . The Second Circuit has not indicated whether it will expand its holding below to include informal complaints that clearly state their basis in the Equal Pay Act.

Brief of Respondents in Opposition to Petition for Writ of Certiorari at 20-21, *Lambert v. Genesee Hosp.*, 511 U.S. 1052 (1994) (No. 93-1388), *available at* 1994 WL 16100427.

III. THE COURT OF APPEALS' DECISION IS INCORRECT.

Respondent's defense of the Seventh Circuit opinion rests on a single, ultimately unpersuasive premise: there is a "common understanding that 'to file' requires the submission of a writing." Br. Opp. 9. Respondent concedes that there are numerous statues, regulations and judicial decisions which refer to "filing" oral complaints, objections, and motions, but nevertheless claims that the word "file" unambiguously requires a writing. Br. Opp. 9, 12. If "file" meant "submit in writing", these would be nonsense statements, like "photocopy a scent." Respondent dismisses this language as mere "imprecise use of language." Br. Opp. 9. To the contrary, as the dissent pointed out, the language deliberately chosen by federal and state officials reflects a common usage. App. 6.

The dissent emphasized that when Congress wants to require a *written* complaint it expressly says so in the statute. App. 7-8. Respondent objects that this limiting language in numerous statutes is irrelevant because Congress used "written" as an adjective to modify "complaint" (i.e., "file a written complaint") rather than utilizing an adverbial phrase to modify "file" (i.e., "file in writing a complaint"). Br. Opp. 8-9. This grammatical distinction makes no sense. The other statutes including this language are probative for two reasons. First, they demonstrate that Congress, having

chosen to expressly impose such a limitation in other statutes, can be assumed not to have meant to do so in the FLSA. Second, if Congress understood "file" to mean "file in writing," these other statutes would have been redundant, requiring that individuals "file in writing a written complaint."

The broader intent of Congress is confirmed by the fact that section 215(a) protects a worker who "filed *any* complaint." (emphasis added). The adjective "any" makes clear that Congress did not want the protections in section 215(a) to be limited to certain types of complaints.

Respondent urges that Congress made a "legislative choice[]" to afford less protection under the FLSA by using more restrictive language than in other statutes. Br. Opp. 6-7. This argument is unavailing for two reasons. First, the FLSA was enacted in 1938; Title VII and the Age Discrimination in Employment Act ("ADEA"), on which Respondent primarily relies, were adopted in 1964 and 1967[9] respectively. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d) Obviously, Congressional choice of language in 1938 did not

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[9] The additional cited statutes in Respondent's footnote 1 were also enacted decades after the FLSA. Energy Policy Act, 42 U.S.C. § 5851(a)(1)(F) (1974); Clean Air Act, 42 U.S.C. § 7622 (1977) (amending the 1955 Act); ERISA, 29 U.S.C § 1140(a) (1974); Migrant and Seasonal Agricultural Protection Act, 29 U.S.C. § 1855(a) (1983) (protecting workers who "filed any complaint").

represent a rejection of the wording of statutes not enacted until three decades later. Second, the "opposition clause" protections in those later statutes extend far beyond oral complaints. For example, Title VII's "opposition clause" includes protection for silently refusing to obey an order that could violate the statute, picketing, production slow-downs, or requesting religious accommodations. *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S.Ct. 846 (2009); 2 EEOC Compliance Manual § 8-II-B(2), 614. An "opposition" clause is therefore not an alternative to the "file any complaint" language in the FLSA, but actually encompasses that language as only one of several forms of protected activity.

Respondent mistakenly infers legislative intent to limit the scope of section 215(a)(3) from language included in the temporary anti-retaliation provision in the FLSA Amendments of 1985, Pub. L. No. 99-150, § 8, 99 Stat. 791 (1985). Respondent's inference stems from an incomplete picture of the historical context of Public Law 99-150. In 1985, this Court held that the FLSA was applicable to states and municipalities. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). To "ease the fiscal transition for state and local governments newly subject to the Act, Congress passed amendments . . . postpon[ing] the effective date of the Act's application to April 15, 1986". *Blanton v. City of Murfreesboro*, 856 F.2d 731, 732 (6th Cir. 1988);

see also Christensen v. Harris County, 529 U.S. 576, 579 (2000). Section 8 was designed "to prohibit governmental discrimination against employees newly entitled to financial benefits" during the transition between February 19, 1985 and August 1, 1986. *Blanton*, 856 F.2d at 733. Pub. L. No. 99-150, § 8; *See* Joint Explanatory Statement of the Committee of Conference, *House Conference Report No. 99-357*, at 8-9. This provision prohibited retaliation against employees who "asserted coverage" under the Act. Pub. L. No. 99-150, § 8.

The "asserted coverage" language created broader protection for public employees than section 215(a)(3) during the transition. Employees did not need to make a "complaint" of to be protected; rather, employees who simply attempted to discuss how the FLSA could be implemented would be protected as "assert[ing] coverage." Section 8 also prohibited states and municipalities from downwardly adjusting the base wage rates of employees in an effort to offset the cost implementing the FLSA's minimum wage and overtime requirements. *Blanton*, 856 F.2d at 732. This is certainly not the kind of activity prohibited under section 215(a)(3). From a practical standpoint, it is difficult to imagine what employees would complain about during the most of the transitional period to receive section 215(a)(3) protection, since the FLSA did not actually become effective for these public entities until April 1986. After this transitional period was complete, the FLSA was

to be fully in force, and public employees could complain of violations and obtain protection under section 215(a)(3) rather than needing the alternative coverage afforded under section 8. There is therefore no indication that Congress intended to limit the scope of the protections under section 215(a)(3) by discontinuing the heightened protections needed ensure a smooth transition for public employers.

Respondent next insists that the meaning of the term "filed" is "clear and unambiguous" on its face. Br. Opp. 5, 12. However, as the dissenting opinion below makes clear, the common usage of the term "file" is fairly broad, and certainly can include an oral statement. In these circumstances, the Department of Labor's consistent, reasonable interpretation of section 215(a)(3) is entitled to deference.[10] *Skidmore*

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[10] The panel declined to afford *Skidmore* deference, stating that Secretary's position "rest[ed] solely on a litigating position." App. 39 (citing *Smiley v. Citibank,* 517 U.S. 735, 741 (1996) and *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212 (1988)). The dissent disagreed:

> In *Auer v. Robbins,* 519 U.S. 452, 462 (1997), the Supreme Court [ruled] that the Secretary's position was worthy of deference even though advanced in litigation, [and] stated "[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." The Court contrasted the situation in *Bowen,* in which it rejected the Secretary of Health and Human Service's interpretation advanced in litigation because it was adopted

v. Swift & Co., 323 U.S. 134, 139-40 (1944). Since nothing in the statute indicates that a complaint must be "in writing", the Secretary's interpretation, which deems oral complaints to be protected activity under section 215(a)(3), is entitled to deference.

In sum, Respondent's injection of the phrase "in writing" into section 215(a)(3) of the FLSA is contrary to the language of the statute and evidence of Congressional intent. Because the Seventh Circuit's error not only creates a clear split among the circuits, but also causes difficulty in the enforcement of the FLSA and confuses interpretations of similar statutes, the petition for a writ of certiorari should be granted.

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there for the first time and was inconsistent with the Secretary's prior litigation positions. The Secretary's position here was not adopted for the first time in her *amicus* brief. Nor is the position inconsistent with the Secretary's prior litigating positions. Indeed, the Department has held the position since at least 1961 when it brought a section 15(a)(3) action on behalf of an employee who lodged an oral complaint. . . . Accordingly, there is no reason to suspect that the Secretary's interpretation "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 462.

App. 26.

CONCLUSION

For the above reasons, a writ of certiorari should issue, or in the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

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