No. 09-1004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EMMETT JOHNSON JAFARI,

PLAINTIFF-APPELLANT,

v.

OLD DOMINION TRANSIT MANAGEMENT COMPANY,
a/k/a THE GREATER RICHMOND TRANSIT COMPANY

DEFENDANT-APPELLEE.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae* in support of the employee in this Fair Labor Standards Act ("FLSA" or "the Act") "anti-retaliation" case.[1]

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[1] The Secretary and the EEOC filed a brief as *amici curiae* in support of the employee in *Minor v. Bostwick Laboratories, Inc.*, No. 10-1258. *Minor* is currently before this Court and concerns the same issue present here. Because both cases concern whether internal complaints are protected under the FLSA, the Secretary believes that *Minor* should be consolidated with this case for purposes of oral argument.

STATEMENT OF THE INTEREST

The Secretary, who administers and enforces the FLSA, has a substantial interest in the proper construction of section 15(a)(3) of the FLSA, 29 U.S.C. 215(a)(3). *See* 29 U.S.C. 204(a), (b); 216(c); 217. The 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 is covered by the same anti-retaliation provision. As recognized by the Supreme Court, section 15(a)(3) is central to achieving FLSA compliance. *See Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). The proper enforcement of the FLSA's anti-retaliation provision is thus critical to ensuring compliance with the FLSA. The Secretary and the EEOC have consistently taken the position that section 15(a)(3) protects internal complaints to an employer. *See, e.g.*, Br. for the United States as Amicus Curiae, *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834 (U.S. June 21, 2010). If the district court's decision is allowed to stand, the intended scope and purpose of the FLSA's anti-retaliation protection would be severely narrowed.

Furthermore, the Department of Labor ("Department") administers and enforces numerous anti-retaliation provisions similar to section 15(a)(3) of the FLSA, which the Department has interpreted as protecting internal complaints. Thus, a decision by this Court that internal complaints are not

protected would have an adverse impact upon the effective administration of these other programs as well.

STATEMENT OF THE ISSUE

Whether section 15(a)(3) of the FLSA, 29 U.S.C. 215(a)(3), protects an employee who makes a complaint to his employer alleging violations of the Act.

STATEMENT OF THE CASE

1. On February 20, 2006, Emmett Johnson Jafari ("Jafari") was hired by Old Dominion Transit Management Company d/b/a The Greater Richmond Transit Company ("GRTC") as a Specialized Transportation Field Supervisor, and was responsible for supervising transit services for participants in the Virginia Initiative for Employment Not Welfare program and for performing duties related to the Henrico Community Assisted Ride Enterprise program. *See Jafari v. Old Dominion Transit Mgmt. Co.*, No. 3:08-cv-629, 2008 WL 5102010, at *1-2 (E.D. Va. Nov. 28, 2008). During the course of his employment, Jafari filed separate written complaints in December 2006 and December 2007 with Kimberly W. Ackerman, GRTC's Director of Human Resources, and filed several oral complaints, one during his February 2007 performance evaluation, raising concerns that he was not being paid proper wages in accordance with the new compensation plan, was not being paid for time spent every other weekend "on call," and was not being paid overtime. *Id.* After his December 2007

written complaint, Jafari stated that Eldridge Coles, the Chief Operating Officer of GRTC, told him that he (Coles) would take care of everything and asked Jafari to work with GRTC on the issues. *Id.* at *2. Sometime in January 2008, Jafari informed Coles that GRTC's response was not satisfactory. *Id.*

Soon after that, GRTC officials had several meetings with Jafari regarding his performance. At one such meeting, on January 18, 2008, Coles and Ackermann questioned Jafari about failing to approve driver leave requests and going to a client's house against orders. *See Jafari*, 2008 WL 5102010, at *2. Jafari alleged that at this meeting Coles threatened to terminate him if Coles discovered any wrongdoing. Shortly thereafter, on February 1, 2008, Coles terminated Jafari's employment with GRTC, providing Jafari with a termination letter and verbally informing him that he was being terminated because his "supervisory skills ha[d] diminished." *Id.* at *3.

2. On August 25, 2008, Jafari brought suit pro se against GRTC in the Circuit Court of the City of Richmond, asserting numerous claims, including that he had been improperly terminated under the FLSA in retaliation for filing a complaint about GRTC's wage pay practices. GRTC removed the matter to the District Court for the Eastern District of Virginia. On October 2, 2008, GRTC filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that, even if Jafari's claim

were true, his written internal complaints were not protected by the FLSA's anti-retaliation provision. *See* Def. Mot. to Dismiss, at 12-13; *Jafari*, 2008 WL 5102010, at *1. Jafari responded to the Motion to Dismiss on October 22, 2008, arguing that the FLSA anti-retaliation provision is silent on whether a complaint must be external and that the Fourth Circuit previously held that internal complaints are protected activity in *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989). *See* Pl. Opp. to Def. Mot. to Dismiss, at 8-10.

3. The district court granted GRTC's motion on November 28, 2008, holding that internal complaints are not protected activity under section 15(a)(3). *Jafari*, 2008 WL 5102010, at *5-6. The district court based its decision on the Fourth Circuit's unpublished decision in *Whitten v. City of Easley*, 62 F. App'x 477 (4th Cir. 2003), in which the Fourth Circuit interpreted its prior decision in *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363-65 (2000), as holding that the section 15(a)(3) does not protect internal complaints under the "complaint clause." *Jafari*, 2008 WL 5102010, at *5. Moreover, the district court rejected Jafari's argument that the Fourth Circuit's decision in *Rayner*, 873 F.2d at 63-64, which held that the anti-retaliation provision of the Federal Railroad Safety Act ("FRSA") protected internal complaints, applies to complaints under the FLSA, noting that a district court in the

Eastern District of Virginia had previously concluded that the analogy to the FRSA was unpersuasive because "'the reasons upon which the *Rayner* court based its decision were railroad and safety legislation-specific.'" *Id.* (quoting *Boateng v. Terminex Int'l Co.*, No. 07-617, 2007 WL 2572403, at *3 (E.D. Va. Sept. 4, 2007)).

ARGUMENT

THE COMPLAINT CLAUSE OF SECTION 15(a)(3) OF THE FLSA PROTECTS AN EMPLOYEE WHO FILES A COMPLAINT WITH HIS EMPLOYER ALLEGING VIOLATIONS OF THE ACT

Section 15(a)(3) prohibits an employer from retaliating against an employee "because such employee has filed any complaint . . . under or related to" the FLSA. Jafari alleged that he was improperly terminated under the FLSA in retaliation for filing written and oral complaints with company officials about suspected wage and overtime violations. There is no question that Jafari's statements to a company official concerned alleged violations of the FLSA. The sole question presented is whether the district court properly dismissed Jafari's anti-retaliation claims because those complaints were filed with his employer instead of with a governmental agency or the courts. It is the Secretary and EEOC's position that making internal complaints constitutes "fil[ing] any complaint" under the anti-retaliation provision of the FLSA and thus is protected activity.

A. "Filed Any Complaint" Includes Complaints Made to An Employer.

1. The plain meaning of section 15(a)(3) is that an employee's internal complaint related to an FLSA violation is protected. When interpreting a statute, this Court starts with the plain language. *See Barbour v. Int'l Union*, --F.3d--, 2011 WL 242131, *11 (4th Cir. Jan. 27, 2011) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). In interpreting the statute in accordance with its plain language, this Court gives the terms their "ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import." *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) (internal quotation marks omitted). This Court's analysis of particular statutory language is also informed by "the specific context in which that language is used, and the broader context of the statute as a whole." *Barbour*, 2011 WL 242131, at *11 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (internal quotation marks omitted).[2]

[2] While determining that the phrase "filed any complaint" was ambiguous in answering the question whether oral complaints were protected, the Supreme Court concluded that "the provision in

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.

Because section 15(a)(3) prohibits retaliation against an employee who has "filed any complaint" (emphasis added), it necessarily affords protection for different types of complaints, including those that might be filed with an employer. It defies logic to read "any complaint" differently; the plain and ordinary meaning of "any" is "one or some indiscriminately of whatever kind." *Merriam-Webster Online Dictionary* (2011), available at http://www.merriam-webster.com; *see Random House College Dictionary* 61 (rev. ed. 1982) (defining "any" as "one or more without specification or identification," and as "every; all"). The definition of "any" thus clearly cannot be read to restrict the term "complaint," defined broadly to include an "expression of grief, pain and dissatisfaction."

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conjunction with the purpose and context leads us to conclude that only one interpretation is permissible." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330-31 (2011) (holding that oral complaints fall within the scope of the phrase "filed any complaint" of the FLSA's anti-retaliation provision). The Court did not determine whether this phrase protects internal complaints and the decision mostly turned on the definition of "filed." Thus, the Court's decision does not preclude a plain language argument that "any complaint" encompasses internal complaints. *See id.* at 1332.

Merriam-Webster Online Dictionary; *see Random House College Dictionary* 274 (rev. ed. 1982) (defining "complaint" as an "expression of discontent, pain, censure, grief, or the like"). Indeed, nothing in the FLSA or the legislative history suggests that the complaint must be made externally to an administrative or judicial body in order to qualify for protection. Any such reading would read words into the provision that simply do not exist. Therefore, the broad phrase "any complaint" refutes a narrow reading of section 15(a)(3) that would limit the anti-retaliation provision to external complaints.

In *Minor v. Bostwick Laboratories, Inc.*, 654 F. Supp. 2d 433 (E.D. Va. 2009), the district court concluded that the "complaint clause's requirement that an employee 'institute' a 'proceeding' to receive protection likewise seems to require that an employee's complaint result in or relate to 'some formal, official procedure' or investigation." *Id.* at 439 (citing *Bell-Holcombe v. Ki, LLC*, 582 F. Supp. 2d 761, 764 (E.D. Va. 2008) (claims under the Equal Pay Act)); *see Boateng*, 2007 WL 2572403, at *2. This interpretation is flawed because it overlooks the basic rule of statutory construction that the use of "or" between "filed any complaint" and "instituted or caused to be instituted any proceeding" is intended to be disjunctive and the provisions should thus be read separately. *See generally Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)

("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."). Indeed, the Supreme Court recently analyzed the meaning of the "filed any complaint" provision as a distinct clause separate from the "instituted or caused to be instituted any proceeding" clause in *Kasten*. *See* 131 S. Ct. at 1329. Thus, the district court's understanding in *Minor* of the meaning of "instituted" or "proceeding" is simply not relevant in analyzing the meaning of "filed any complaint" and should not be adopted by this Court. *Cf. Valerio v. Putnam Associates, Inc.*, 173 F.3d 35, 42 (1st Cir. 1999) (if "filed any complaint" was meant to pertain only to filings with an administrative or judicial body, then the phrase "or instituted or caused to be instituted any proceeding under or related to this chapter" would be rendered mere surplusage).

The plain language meaning of "any complaint" has been explicitly recognized by the Seventh and Ninth Circuits. The Seventh Circuit recently held that the plain language of the statute indicates that internal, intra-company 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.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838 (7th Cir. 2009), rev'd on other grounds, 131 S. Ct. 1325 (2011). Similarly, the

Ninth Circuit, in holding that employees who complain to their employer about an alleged violation of the Act are protected, concluded that the word "complaint" is modified by the word "any," and "if 'any complaint' means 'any complaint,' then the provision extends to complaints made to employers." *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999); *cf. Valerio*, 173 F.3d at 41-42 (although concluding that the phrase "filed any complaint" is "susceptible to differ[ent] interpretations," the court stated that "[t]he word 'any' embraces all types of complaints, including those that might be filed with an employer" and that "[b]y failing to specify that the filing of any complaint need be with a court or an agency, and by using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest . . . conveyed to an employer"); *but see Lambert v. Genesee Hosp.*, 10 F.3d 46, 55-56 (2d Cir. 1993) (plain language of section 15(a)(3) precludes protecting oral complaints made to a supervisor).[3]

[3] The term "filed" does not restrict the FLSA's protection for "any complaint." Indeed, several circuits have explicitly concluded that the term "filed" encompasses internal complaints. *See Ackerley*, 180 F.3d at 1004 ("Given the widespread use of the term 'file' to include the filing of complaints with employers, it is therefore reasonable to assume that Congress intended that term as used in § 215(a)(3) to include the filing of such complaints."); *Valerio*, 173 F.3d at 41-42 (concluding that the Webster's dictionary definition of "file" is "sufficiently

2. Other circuit courts have concluded that section 15(a)(3) protects an employee from retaliation for filing a complaint with his employer. These decisions, however, generally rely on the remedial purpose of the FLSA, rather than a plain meaning analysis. *See Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 625-26 (5th Cir. 2008) (informal, internal complaint constitutes protected activity under the FLSA's anti-retaliation clause "because it better captures the anti-retaliation goals of that section"); *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206-07 (10th Cir. 2004) (an employee's oral request to his supervisor for overtime wages is protected activity under section 15(a)(3)); *Moore v. Freeman*, 355 F.3d 558, 562 (6th Cir. 2004) (section 15(a)(3) can be triggered by informal complaints); *Valerio*, 173 F.3d at 41 (section 15(a)(3) protects an employee who has filed a complaint with the employer); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992) (employee's internal complaint about sexual harassment before filing a formal charge was protected); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (employees' internal complaints to supervisor about unequal pay were protected assertions of rights under the Equal Pay Act, which forms a part of the FLSA); *Love v. RE/MAX of America, Inc.*, 738

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elastic to encompass an internal complaint made to a private employer").

F.2d 383, 387 (10th Cir. 1984) (Equal Pay Act's anti-retaliation provision "applies to the unofficial assertion of rights through complaints at work"); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181-82 (8th Cir. 1975) (employee protected under section 15(a)(3) for complaining to employer about returning back wages following employer's settlement with the Wage and Hour Division); *see also Brock v. Richardson*, 812 F.2d 121, 124-25 (3d Cir. 1987) (an employer's mistaken belief that an employee had complained to the Wage and Hour Division about FLSA violations is sufficient to bring employee under the Act).

Similarly, this Court has interpreted anti-retaliation language almost identical to that found in the FLSA as protecting an employee's internal complaints. *See Calhoun v. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) ("[T]his Circuit adopted the ARB's view that internal complaints to company management, whether written or oral, suffice to satisfy the complaint requirement [under the Surface Transportation Assistance Act ("STAA")]."") (citing *Yellow Freight Sys. Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993)); *Rayner*, 873 F.2d at 64 ("[I]t was Congress' intent to protect all railroad employees who report safety violations. The distinction between intra-corporate complaints and those made to outside agencies is therefore an 'artificial' one [under the FRSA]."); *cf. Memphis Bar-B-Q*, 228 F.3d at 363 n.* (noting that it had interpreted

similar complaint-clause language in the FRSA to include internal complaints).

3. This Court's decisions in *Whitten* and *Memphis Bar-B-Q* cannot be used to assail the conclusion that the "complaint clause" of section 15(a)(3) protects an employee who files an internal complaint. In holding that internal complaints are not covered under section 15(a)(3), the district court relied on this Court's unpublished decision in *Whitten*, which in turn relies on an earlier decision of this Court in *Memphis Bar-B-Q*. At issue in *Memphis Bar-B-Q* was whether the second clause of section 15(a)(3) – the "testimony clause" – protects an employee who informs his employer that, if deposed in a FLSA lawsuit that another employee threatened to file against the employer, he would not testify in the manner suggested by the employer. *See* 228 F.3d at 362. This Court concluded that although section 15(a)(3) protects an employee "about to testify in [a] proceeding," it does not protect an employee who may testify in another employee's not-yet-filed lawsuit. *Id.* at 363-65. It based its decision on what it considered to be the "formality" of the anti-retaliation provision's "testimony clause," reasoning that

> [b]y referring to a proceeding that has been 'instituted' and in which 'testimony' can be given, Congress signaled its intent to proscribe retaliatory employment actions taken after formal proceedings have begun, but not in the

> context of a complaint made by an employee to a supervisor about a violation of the FLSA.

Id. at 364. This Court emphasized that its decision in *Memphis Bar-B-Q* extended only to the "testimony clause" of section 15(a)(3) because the petitioner (unlike the employee in the case here) had not invoked the section's "complaint clause," and further noted that it had previously interpreted similar "complaint clause" language in the FRSA to include internal complaints. *Id.* at 363 n.* (citing *Rayner,* 873 F.2d at 63-64).

Later, in a short unpublished, per curiam opinion, this Court in *Whitten* erroneously interpreted *Memphis Bar-B-Q* as applying to the FLSA anti-retaliation provision's "complaint clause." *See* 62 F. App'x at 480. Providing no further explanation or analysis, as correctly recognized by the district court in *Minor*, 654 F. Supp. 2d at 438, the *Whitten* decision merely states: "[T]his Court has expressly held that the FLSA's anti-retaliation provision does not extend to internal complaints." 62 F. App'x at 480. *Whitten* cites the following statement in *Memphis Bar-B-Q* as the basis for its holding: "We would be [un]faithful to the language of the testimony clause of the FLSA's anti-retaliation provision if we were to expand its applicability to intra-company complaints," 228 F.3d at 364, without noting that the statement was limited to the testimony clause and without any consideration of the statement regarding

internal complaints made elsewhere in the *Memphis Bar-B-Q* opinion. *See Minor*, 654 F. Supp. 2d at 438 (noting that this Court's decision in *Whitten* "apparently did not recognize that [*Memphis Bar-B-Q*] construed a separate clause of the FLSA's anti-retaliation provision").

As an unpublished decision, this Court's holding in *Whitten* is not binding and should not be accorded precedential value. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006) (recognizing that this Court "ordinarily do[es] not accord precedential value to [its] unpublished decision," and that such decisions "are entitled only to the weight they generate by the persuasiveness of their reasoning") (internal quotation marks omitted). Because the *Whitten* decision misinterprets the scope of the *Memphis Bar-B-Q* holding and does not provide "a persuasive rationale – indeed, any rationale whatsoever – for extending [*Memphis Bar-B-Q's*] construction of the testimony clause to the complaint clause," *Minor*, 654 F. Supp. 2d at 438, it lacks persuasiveness.

Rather than extending its holding in *Memphis Bar-B-Q* to the "complaint clause" of section 15(a)(3), this Court should adopt its broad readings of the complaint clauses discussed in *Rayner* and *Calhoun*. The district court rejected applying the reasoning of *Rayner* to the FLSA, concluding that the rationale underlying the *Rayner* decision was not persuasive in the FLSA context

because the FRSA's anti-retaliation language was "railroad and safety legislation-specific" and was driven principally by that particular legislative history. *See Jafari*, 2008 WL 5102010, at *5.[4] This Court, however, should reject the argument that the *Rayner* or *Calhoun* (STAA) cases are inapposite because they involve health or safety while the present case involves wage rights. The district court misses the point that the anti-retaliation provisions of all these statutes have nearly identical language and analogous purposes – to protect employees who complain about violations of the various Acts. *See Ackerley*, 180 F.3d at 1007 n.10. As the D.C. Circuit noted in *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), in holding that coverage of the Federal Coal Mine Health and Safety Act begins when a miner notifies his

[4] A review of the FRSA legislative history does not specify that internal complaints are protected. Rather, the House Report referenced by this Court in *Rayner* merely notes that the anti-retaliation provision is meant to protect railroad employees who are harassed, discriminated against, or discharged by their employers for reporting safety violations to authorities. *See Rayner*, 873 F.2d at 63 (citing H.R. Rep. No. 96-1025, 96th Cong., 2d Sess., reprinted in 1980 U.S.C.C.A.N. 3830, 3840). However, this Court in *Rayner* (after reviewing the statutory language and purpose) concluded that both internal and external complaints promote rail safety and are each within the contemplation of the FRSA. *Rayner*, 873 F.2d at 64. Congress used the exact same statutory language found in section 15(a)(3) of the FLSA – "has filed any complaint or instituted or caused to be instituted any proceeding" – in the FRSA. Thus, there is no basis for distinguishing the rationale of *Rayner* from the FLSA context.

supervisor of possible safety violations, the safety statutes were designed to give employees "the same protection against retaliation" as afforded by the FLSA. *Id.* at 782. Additionally, there certainly is no basis for holding that railroad safety is necessarily a more important objective than ensuring that workers receive the minimum wages and overtime which the law guarantees them. *See Ackerley*, 180 F.3d at 1007 n.10; *see also Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) ("[The FLSA is] remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil . . . . Those are rights that Congress has specifically legislated to protect.").[5]

[5] Any conclusion that Title VII's anti-retaliation provision should dictate a narrower scope for the FLSA's anti-retaliation provision is unpersuasive and should be rejected by this Court. The district court in *Minor* found "[f]urther support" for its "conclusion that the complaint clause does not protect an employee against retaliation for informal, intra-company complaints" by comparing the "considerably broader" language of Title VII's anti-retaliation provision with section 15(a)(3). 654 F. Supp. at 439. Specifically, the district court pointed to provisions in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, that forbid retaliation against an employee who has merely "opposed" an employment practice made unlawful. *See id.* at 439-40. According to the court, "Congress could have included a similarly open-ended opposition clause in the FLSA's anti-retaliation provision, [but] it apparently chose not to do so," thus, suggesting that "Congress intended much narrower coverage for both the complaint and testimony clauses of [section 15(a)(3)]." *Id.* at 440.

As with the FRSA, the distinction between external and internal complaints under the FLSA is artificial, see *Rayner*, 873 F.2d at 64, and to exclude the latter from coverage would undermine the purpose of the Act's anti-retaliation provision – to protect from retaliation an employee who raises a complaint about possible violations of the Act. Thus, when Jafari complained to company officials about suspected overtime violations, he "filed any complaint" and engaged in protected activity under 15(a)(3).

B. The Remedial Purpose of the FLSA Supports Interpreting the Phrase "Filed Any Complaint" Broadly to Include Internal Complaints.

1. The remedial purpose of the FLSA supports interpreting the phrase "filed any complaint" broadly to include internal complaints. This phrase should not be given a strict or limited meaning but should be construed expansively to accomplish the purposes of the FLSA. The Supreme Court has repeatedly

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The district court, however, ignored the timing of the respective statutes' enactment. The FLSA was enacted in 1938, more than a quarter-century before Title VII in 1964. The fact that Congress included "a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, 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*, 553 U.S. 474, 486 (2008) ("[N]egative implications raised by disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously.") (citations omitted). Thus, Congress' use of more detailed language in Title VII does not indicate that Congress intended a narrower scope with respect to the FLSA.

recognized that the FLSA is a statute that should be read broadly and was designed to serve the remedial purpose of eliminating substandard and detrimental working conditions for employees in covered industries. *See Kasten*, 131 S. Ct. at 1333; *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 this purpose, the 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*, 321 U.S. 590, 597 (1944) ("[The FLSA] must not be interpreted or applied in a narrow, grudging manner."); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 340 (4th Cir. 2008) (recognizing that the court "must interpret the [FLSA] retaliation provision bearing in mind the Supreme Court's admonition that the FLSA must not be interpreted or applied in a narrow, grudging manner").

The FLSA's anti-retaliation provision is critical to achieving elimination of substandard and detrimental working conditions and ensuring effective compliance with the substantive provisions of the FLSA. *See DeMario Jewelry*, 361 U.S. at 292. Compliance with the FLSA clearly depends on employees providing information about violations of the statute

without fear of retaliation. *Id.* ("[E]ffective enforcement could thus only be expected if employees felt free to approach officials with their grievances."). As noted by the Supreme Court, Congress chose to rely upon "'information and complaints received from employees seeking to vindicate rights claimed to have been denied,'" and not upon "'continuing detailed federal supervision or inspection of payrolls.'" *Kasten*, 131 S. Ct. at 1333 (quoting *DeMario Jewelry*, 361 U.S. at 292). Moreover, the Supreme Court recently took a broad interpretive approach in analyzing the meaning of "filed any complaint" under section 15(a)(3), concluding that the phrase "any complaint" suggests "a broad interpretation" and that the term "complaint" should be interpreted to provide "broad rather than narrow protection to the employee." *Id.* at 1332, 1334; *see NLRB v. Scrivener*, 405 U.S. 117, 123-24 (1972) (ruling that it is necessary to construe phrases like "filed charges" or "filed any complaint" liberally to include not only those ultimate acts but all of the steps leading to a filing of a charge or complaint).[6]

[6] In concluding that the FLSA's anti-retaliation provision should be interpreted broadly, the Supreme Court, recognizing the "similar enforcement needs" of the FLSA and the National Labor Relations Act ("NLRA"), relied upon its broad interpretation of the NLRA's anti-retaliation language – "filed charges or given testimony," 29 U.S.C. 158(a)(4) – "as protecting workers who neither filed charges nor were called formally to testify but simply participate[d] in a [National Labor Relations] Board investigation." *Kasten*, 131 S. Ct. at 1334 (internal quotation marks omitted); *see Rutherford Food*,

Thus, any interpretation of section 15(a)(3) that discourages an employee from complaining to his employer about minimum wage and overtime violations would undermine not only Congress' prescribed compliance mechanism but also the substantive rights of the FLSA. *See Ackerley*, 180 F.3d at 1004 ("[N]arrow construction of the anti-retaliation provision could create an atmosphere of intimidation and defeat the Act's purpose."). Congress' objectives clearly would go unrealized if employees would face retaliation for raising complaints regarding the FLSA or the EPA with their employers in the first instance. *See DeMario Jewelry*, 361 U.S. at 292 ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *White & Son*, 881 F.2d at 1011 ("The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance.").

A broad interpretation of section 15(a)(3) that protects employees' internal complaints promotes early and informal resolution of pay disputes, which in turn decreases costs to employers and their employees. Similarly, protecting employees'

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331 U.S. at 723-24 (noting that decisions interpreting coverage of NLRA have persuasive force as to coverage of FLSA). Thus, *Scrivener*'s broad interpretation of the anti-retaliation provision of the NLRA, which uses similar language to section 15(a)(3), should be considered persuasive authority.

internal complaints also promotes resolution without the need for drawn-out, contested litigation, which in turn decreases the number of cases brought before the overburdened court system. Many FLSA and EPA claims involve relatively small amounts of money that could be settled informally without the need for litigation. Any interpretation that internal complaints are not protected will encourage employees to file a lawsuit as a first recourse in order to protect themselves from retaliation. *See Valerio*, 173 F.3d at 43 n.6.[7] Congress clearly did not intend for this result when it passed the anti-retaliation provision of the FLSA.

Additionally, many employers affirmatively encourage their employees to report suspected violations internally. The district court's interpretation that internal complaints are not protected creates – and encourages employers to create – a trap for unwary employees, who comply with company procedures only to find themselves facing retaliation for having complained to their employer rather than a governmental agency. *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"). Thus, it would "discourage the use of desirable

[7] Such an interpretation also would increase the number of complaints made to the Department and the EEOC and thereby would increase their administrative burden.

informal workplace grievance procedures to secure compliance with the Act." *Kasten*, 131 S. Ct. at 1334. Moreover, the district court's interpretation 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. This result is contrary to Congress' intent.

Therefore, the remedial purpose of the FLSA "is best served by a construction of § 215(a)(3) under which the filing of a relevant complaint with the employer no less than with a court or agency may give rise to a retaliation claim." *Valerio*, 173 F.3d at 43; *see Ackerley*, 180 F.3d at 1004 ("[T]he animating spirit of the Act is best served by a construction of § 215(a)(3) under which the filing of a relevant complaint with the employer no less than with a court or agency may give rise to a retaliation claim.") (internal quotations marks omitted); *White & Son*, 881 F.2d at 1011 ("By giving a broad construction to the anti-retaliation provision to include [informal complaints made to employers], its purpose will be further promoted."); *Hagan*, 529 F.3d at 626 (internal complaint constitutes protected activity under the FLSA's anti-retaliation clause "because it better captures the anti-retaliation goals of that section").

2. Under a broad remedial reading of the FLSA's anti-retaliation provision, the phrase "filed any complaint" does not

require that an employee take some formal, prescribed external action to invoke the clause's protection. While the Supreme Court, in holding that oral complaints under the FLSA are protected, concluded that "the phrase 'filed any complaint' contemplates some degree of formality," it further concluded that this formality is satisfied when "the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns." *Kasten*, 131 S. Ct. at 1334.[8] Significantly, the Court stated, in agreement with the Government's position, that to fall within the scope of the anti-retaliation provision, "a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Id.* at 1335 (emphasis added).[9]

[8] Not all abstract grumblings will suffice to constitute the filing of a complaint with one's employer. *See Valerio*, 173 F.3d at 44; *Ackerley*, 180 F.3d at 1007. Jafari, however, raised concerns regarding the failure of his employers to pay him overtime. Such actions are not generalized grumblings, but rather are actions that should have put his employer on notice that he was asserting his rights and seeking the protections of the FLSA. Thus, these actions clearly amount to the filing of a complaint within the meaning of section 15(a)(3).

[9] "At oral argument, the Government said that a complaint is 'filed' when 'a reasonable, objective person would have understood the employee' to have 'put the employer on notice that [the] employee is asserting statutory rights under the [Act].' Tr. of Oral Arg. 23, 26. We agree." *Kasten*, 131 S. Ct. at 1335 (emphasis added).

Although the Supreme Court refused to reach the question of whether internal complaints are protected because Saint-Gobain failed to argue the issue in its brief in opposition to the petition for certiorari, *see Kasten*, 131 S. Ct. at 1336, the Court's rationale is applicable in analyzing the internal complaint issue and is consistent with the Secretary and EEOC's longstanding interpretation that "filed any complaints" encompasses internal complaints. Specifically, the Court's focus on whether a reasonable employer (and not a governmental agency or judicial court) would understand the complaint and whether the employer has fair notice of the complaint necessarily assumes that internal complaints can meet the standard. *See id.* at 1341 (Scalia, J., dissenting) ("While claiming that it remains an open question whether intracompany complaints are covered, the opinion adopts a test for 'filed any complaint' that assumes a 'yes' answer.").

C. The Secretary and EEOC's Longstanding Interpretation that "Filed Any Complaint" Encompasses Internal Complaints Is Reasonable and Entitled To Deference.

To the extent that section 15(a)(3) is deemed to be ambiguous, the Secretary and EEOC's consistent interpretation about its meaning should be given weight; they are charged with administering section 15(a)(3), and their consistent interpretation is reasonable. Thus, the interpretation of section 15(a)(3) adopted by the Secretary and the EEOC is

entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (concluding that an agency's interpretation contained in formats such as opinion letters, enforcement guides, and agency manuals are "entitled to respect" under *Skidmore* if they have the "power to persuade"); *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 291 (4th Cir. 2011) ("Under *Skidmore*, an agency's interpretation merits deference to the extent that the interpretation has the power to persuade.") (internal quotation marks omitted).[10]

[10] Significantly, the Secretary's adjudicatory decisions interpreting whistleblower protection statutes with language similar to that contained in section 15(a)(3) of the FLSA are entitled to controlling deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See U.S. v. Mead Corp.*, 533 U.S. 218, 219 (2001) ("[A] reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the . . . adjudication process that produces the . . . rulings for which deference is claimed."); *see also Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (according *Chevron* deference to the Secretary's adjudicatory interpretation of the Sarbanes-Oxley Act). Indeed, appellate courts have affirmed decisions issued by the Secretary and the Administrative Review Board (to which the Secretary has delegated authority to issue final agency decisions in whistleblower cases, *see* Secretary's Order 1-2010, 75 Fed. Reg. 3924 (Jan. 15, 2010)), holding that internal complaints to employers are protected under whistleblower statutes that do not expressly cover internal complaints. *See, e.g.*, Bechtel *Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (Secretary's interpretation that pre-1992 amended Energy Reorganization Act ("ERA") whistleblower provision protects internal complaints entitled to *Chevron* deference); *Passaic*

As explained above, section 15(a)(3) should reasonably be read to prohibit retaliation against an employee who complains to his employer. Interpreting section 15(a)(3) in that way accords with common practice in the workplace, and best serves the remedial purpose of the FLSA by protecting employees from retaliation for asserting their FLSA rights. Moreover, both the Secretary and the EEOC have extensive experience administering section 15(a)(3) and repeatedly have argued in the courts that complaints to one's employer are protected under section 15(a)(3). *See, e.g.*, Br. for the United States as Amicus Curiae, *Kasten*, No. 09-834; Br. for the Secretary of Labor as Amicus Curiae, *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 08-2820 (7th Cir. Nov. 19, 2008); 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. Romeo Cmty. Sch.*, No. 91-2181 (6th Cir. Jan. 2, 1992); Br. for the EEOC, *EEOC v. White & Son Enters.*, No. 88-7658 (11th Cir. Mar. 1, 1989). The EEOC has also set forth this

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Valley Sewerage Comm'rs v. Dep't of Labor, 992 F.2d 474, 478 (3d Cir. 1993) (Clean Water Act's employee protection provision protects employees who complain to their employer); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-1512 (10th Cir. 1985) (pre-1992 amended ERA whistleblower provision covers internal complaints); *MacKowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (same).

position in its 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") (internal quotation marks omitted).

The Supreme Court recently granted *Skidmore* deference to the Secretary and EEOC's position that oral complaints are protected under section 15(a)(3). *See Kasten*, 131 S. Ct. at 1335-36 ("[G]iven Congress' delegation of enforcement powers to federal administrative agencies, we also give a degree of weight to [the Secretary and EEOC's] views about the meaning of this enforcement language."). In granting deference, the Court concluded that the agencies' views that "filed any complaint" covers oral complaints "are reasonable" and "are consistent with the Act," and further noted that the "length of time the agencies have held them suggests that they reflect careful consideration, not post hoc rationalizatio[n]." *Id.* at 1335 (internal quotation marks omitted). The Supreme Court's rationale for granting *Skidmore* deference in *Kasten* is equally applicable to the Secretary and EEOC's longstanding interpretation that "filed any complaints" encompasses internal

complaints – the views are reasonable, consistent with the Act, and reflect careful consideration. Thus, this Court should defer to the Secretary and EEOC's position that internal complaints are protected under section 15(a)(3) of the FLSA and hold that Jafari was engaged in protected activity when he complained to his employer about suspected overtime violations.

CONCLUSION

For the foregoing reasons, the Secretary and the EEOC request that this Court hold that the district court erred when it concluded that the "filed any complaint" provision of section 15(a)(3) of the FLSA does not include internal complaints.

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)(B)

I certify that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). The brief contains 6,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief was prepared using Microsoft Office Word, 2003 edition.

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CERTIFICATE OF SERVICE

I certify on that on July 8, 2011, I electronically filed the foregoing Brief for the Secretary of Labor and the EEOC as *Amici Curiae* in Support of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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