

No. 09-834

IN THE
Supreme Court of the United States

KEVIN KASTEN,

Petitioner,

v.

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Fair Labor Standards Act prohibits retaliation against any employee who has “filed any complaint” or “instituted any proceeding” under or related to the Act. 29 U.S.C. § 215(a)(3).

The question presented is: Whether § 215(a)(3) protects oral complaints to an employer about alleged violations of the Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Saint-Gobain Performance Plastics Corporation is a wholly owned subsidiary of Saint-Gobain Ceramics & Plastics, Inc., which is in turn a wholly owned subsidiary of Saint-Gobain Abrasives, Inc., which is a wholly owned subsidiary of Saint-Gobain Delaware, which is a wholly owned subsidiary of Saint-Gobain Corporation, which is an indirect subsidiary of Compagnie de Saint-Gobain, a Paris-based corporation which is publicly owned and traded on the French Bourse.

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INTRODUCTION

In 1938, Congress enacted the wage-and-hour and retaliation provisions of the Fair Labor Standards Act (FLSA) and imposed criminal sanctions for their willful violation. The text of the retaliation provision, which prohibits retaliation against an employee who has “filed any complaint” under or related to the Act, and the context of the prohibition, which lists three other types of protected conduct involving governmental proceedings, show that it is triggered only by a complaint to the government. This conclusion is underlined by examination of Congress’s primary purpose—to encourage information-sharing between employees and enforcement officials. And this reading of the statute is confirmed by considering how improbable and unprecedented it would be for Congress to impose criminal sanctions based on employer retaliation against an employee who complained to an employer on any subject, including a wage-and-hour dispute.

Even if the statute does not require an official complaint, there is no warrant for imposing criminal sanctions when an employee orally complains to an employer about a possible FLSA violation. The text of § 215(a)(3) requires a written complaint, particularly when the provision and the FLSA as a whole are examined and other tools of statutory interpretation are applied. If there remained any doubt about this provision’s reach, the rule of lenity should be applied to narrow the potential criminal liability employers face; the Act should not be interpreted to authorize criminal sanctions based on alleged retaliation for oral complaints to employers. Petitioner and his *amici* urge a contrary result as a matter of policy, but those arguments are better presented to Congress.

Indeed, Congress has often used broader language in retaliation provisions such as those in Title VII and the ADEA, teaching by contrast that the FLSA's retaliation provision is narrower. This Court should respect Congress's choice to require the clear notice, evidentiary clarity, and certainty needed for criminal liability that is provided by limiting retaliation claims to those based on official or written complaints. The judgment below should be affirmed.

STATUTORY PROVISIONS

29 U.S.C. § 215(a)(3) provides 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. § 216(a) provides:

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

STATEMENT OF THE CASE

A. Kasten's Employment At Saint-Gobain.

Respondent Saint-Gobain Performance Plastics Corporation manufactures high-performance materials, such as ceramics, glass, plastics, and silicone.

Saint-Gobain operates numerous facilities throughout the country, including one in Portage, Wisconsin. Petitioner Kevin Kasten worked as a fabricator and utility employee at Saint-Gobain's Portage facility from October 2003 to December 2006.

Like every hourly employee at Saint-Gobain, Kasten was required to record his time by swiping a time clock. Saint-Gobain's employee handbook provides that failure to comply with the company's time-clock policy "will result in disciplinary action up to and including termination of employment." Dkt. #91, Ex. 12, at 7. The handbook also outlines a progressive disciplinary procedure under which an employee's violation of company policies will lead first to a verbal reminder, then to a written warning, and finally to termination. *Id.* at 22–23.

Kasten was no model employee. During his three-year tenure at Saint-Gobain, Kasten was disciplined more than ten times for violating various company policies, including for numerous violations of the time-clock policy. Dkt. #168, at 76; Dkt. #127, at 3. In his final year alone, Kasten was disciplined seven times, including twice for violating the company's safety policies and four times for violating the time-clock policy. Dkt. #127, at 3. That series of time-clock violations, described fully below, ultimately led Saint-Gobain to terminate Kasten's employment in December 2006.

B. Kasten's Multiple Time-Clock Violations.

Kasten's problems with the time clocks began in January 2006, nearly a year before his termination. On February 13, 2006, in accordance with the company's progressive disciplinary procedure, Saint-Gobain issued Kasten a disciplinary notice as a result of "several Kronos issues" in January 2006. Dkt. #62-

1, at 49. The notice cited the applicable section of the employee handbook and warned Kasten that “[i]f the same or any another violation occurs in the subsequent 12-month period from this date of verbal reminder, a written warning may be issued.” *Id.* Kasten signed the notice, acknowledging that he read and understood it. *Id.*

Six months later, on August 31, 2006, Saint-Gobain issued a written warning to Kasten for having “several Kronos issues while working at Saint-Gobain.” Dkt. #62-1, at 52. The warning again cited the handbook and warned Kasten that another violation within 12 months “will result in further disciplinary action up to and including termination.” *Id.* Again, Kasten signed the warning, acknowledging that he read and understood it. *Id.*

Two months later, on October 31, 2006, Kasten again violated Saint-Gobain’s time-clock policy by failing to clock-in. Dkt. #62-1, at 54. On November 10, 2006, Saint-Gobain issued yet another written warning to Kasten and suspended him for a day without pay. *Id.* The warning stated that “[t]his is the last step in the disciplinary process,” and warned Kasten that another time-clock violation “will result in further disciplinary action up to and including termination.” *Id.* Kasten signed the warning, again acknowledging that he read and understood it. *Id.*

After being notified that he could be terminated for further violations of the time-clock policy, Kasten told a coworker that he did not know if he could go 12 months without missing another punch. Dkt. #168, at 106–07. That statement proved prophetic: On November 28, 2006, Kasten forgot to clock-in after his lunch break. Dkt. #129, at 13. He told another coworker that he was probably going to be fired over not punching-in from lunch. Dkt. #168, at 108.

On December 6, 2006, Saint-Gobain suspended Kasten pending termination for his November 28 time-clock violation. Dkt. #129, at 13. At a meeting that day with local human-resources manager Dennis Brown and operations manager Steven Stanford, Kasten admitted that he had not punched the time clock. Dkt. #168, at 113. Five days later, on December 11, 2006, Brown informed Kasten by telephone that Saint-Gobain had decided to terminate his employment. *Id.* at 115. Shortly thereafter, Saint-Gobain sent Kasten a formal termination letter outlining his repeated violations of the time-clock policy and noting that he had been “progressively warned” about such violations. Dkt. #62-2, at 5.

Contrary to Kasten’s contention, Kasten is not the only employee whom Saint-Gobain has terminated for violating the company’s time-clock policy. Saint-Gobain has terminated numerous employees because of missed or forgotten punches. Dkt. #121, at 1. Kasten himself recalled that his coworker, Art Brederson, had previously been terminated for missed time-clock punches. Dkt. #168, at 143–44, 149. Kasten and Brederson had worked side-by-side on the same shift. *Id.* at 144.

C. Kasten’s Alleged Oral Complaints.

Kasten claims that in September 2006—*after* he had already been disciplined twice that year for violating Saint-Gobain’s time-clock policy—he began orally complaining to his supervisors about the location of the time clocks. Pet. Br. 7. Kasten thus misrepresents the record when he claims that he “had no disciplinary action for almost seven months” before he began complaining, and that he was thereafter disciplined “more often and more severely for infractions that were not previously problematic.” *Id.* at 9. In fact, Kasten had already been warned

that his job was in jeopardy because of repeated time-clock violations.

Nor did Kasten “repor[t] up the chain of command” as outlined in the employee handbook. Pet. Br. 7. Saint-Gobain’s problem-resolution procedure states that in the event of any questions, complaints, or problems, an employee should raise the issue first with his supervisor, then with the next level of management, then with the local human-resources manager, and finally with the regional human-resources manager or the human-resources department at headquarters. Dkt. #91, Ex. 12, at 3.

Kasten did not follow this procedure. None of the individuals to whom Kasten allegedly complained recalled him raising any issues about the legality of the time clocks’ location until after his December 6 suspension. Dkt. #129, at 9. The emails Kasten cites documenting his complaints about the time clocks were all sent on or after December 6, 2006. Pet. Br. 9–11. But even if all of Kasten’s allegations are credited, they show at most that he made a few stray complaints about the time clocks—complaints that had more to do with Kasten’s problems punching-in than they did with any legal issues relating to the the time clocks’ location.

First, Kasten claims that he spoke with his shift supervisor, Dennis Woolverton, sometime in September or October. Dkt. #168, at 124. He told Woolverton that the clocks’ location created practical difficulties for him because his coworkers would often “flag [him] down” and ask for his help while he was on his way to punch-in. *Id.* at 122, 125. He also claims that he “raised a concern stating how [he] thought it was illegal for the time clocks to be where they were.” *Id.* at 124. This conversation, which according to Kasten took place in the hallway, was

the only time Kasten remembered discussing the legal implications of the time clocks' location with Woolverton. *Id.* at 125, 128–29, 162. Woolverton did not recall having such a conversation with Kasten. Dkt. #125-4, at 79.

Second, Kasten claims that around November 15, he discussed the location of the time clocks with Lani Wruck-Williams, a human-resources generalist. Dkt. #168, at 121. He purportedly told her precisely what he had told Woolverton about the problem with coworkers flagging him down before he could clock-in. *Id.* at 122. He also told her that if the time clocks were located near the employee entrance, he would not have missed as many punches because he would have remembered to clock-in. *Id.* at 116. In addition, Kasten claims to have told Wruck-Williams that he “didn’t think it was legal for the time clocks to be where they were and if they were challenged on it in court, they would lose.” *Id.* at 122. Asked whether he had any notes to support his recollection of that conversation, Kasten responded that the exchange was “[s]trictly verbal.” *Id.* at 123. Wruck-Williams denied the exchange. Dkt. #157, at 32–33.

Third, Kasten claims that on several occasions in the two-to-three months before he was terminated, he discussed the location of the time clocks with April Luther, an hourly employee whom he described as a “supervisor’s assistant.” Dkt. #168, at 125. He told Luther the “[s]ame thing again about the practicality” issue with having to “walk by people that need[ed] [his] service” on his way to the time clocks, and suggested that “it would be better if they were in a different spot.” *Id.* at 125–26. He also claims to have spoken with Luther “on the legal aspects about it and even told her that [he] was thinking of starting a lawsuit about the placement of the time clocks.” *Id.* at

126. According to Kasten, these conversations took place at the supervisor's desk; to his knowledge no one else observed them. *Id.* at 126–28. Luther denied such conversations took place. Dkt. #151, at 21.

Fourth, during the December 6 meeting regarding his suspension, Kasten told Brown and Stanford that the new location of the time clocks would help prevent him from missing punches.¹ Dkt. #168, at 131. Kasten claims that he also told Brown and Stanford that the old location of the clocks was a legal issue for the company and that “if they were to be taken to court, they are going to lose.” *Id.* at 130. Kasten did not tell Brown and Stanford that he intended to file a lawsuit against the company. *Id.* at 131. Moreover, he acknowledged that before the December 6 meeting, he had never raised any legal issues relating to the time clocks with Brown, the local human-resources manager. *Id.* at 130.

Kasten's own testimony thus shows that he did not follow Saint-Gobain's problem-resolution procedure: He never invoked that procedure; he raised the issue with his supervisor only once, merely expressing “a concern” in the hallway about the legality of the time clocks' location; he did not take the issue to the next level of management; and he did not raise the issue with the local human-resources manager until after he had already been suspended pending termination for his fourth time-clock violation. Nor is there any allegation that Kasten ever called the hotline Saint-

¹ In early December 2006, Saint-Gobain installed a new time clock at the entrance to the building. Dkt. #168, at 75. According to Kasten, the new clock was installed a few days before his last day at work. *Id.* at 75, 137. Saint-Gobain had been planning to install new time clocks for several months before Kasten's termination. Dkt. #129, at 16.

Gobain maintains for employees to report legal or ethical issues to the company. See Pet. Br. 6–7.

Finally, it is undisputed that before he was terminated, Kasten never put his complaints about the time clocks in writing; never made any complaint to the Department of Labor or any other agency about the location of Saint-Gobain’s time clocks; and never filed any complaint against Saint-Gobain in federal or state court.

D. Kasten’s Retaliation Claim.

On December 5, 2007, almost a year after he was terminated, Kasten filed this lawsuit under the FLSA, claiming that he had been terminated in violation of § 215(a)(3) because he had complained to his supervisors about the location of the time clocks.² Saint-Gobain moved for summary judgment, arguing that Kasten’s alleged oral complaints to his supervisors were not protected conduct under § 215(a)(3), and in any event Kasten could not make out a prima facie case of retaliation because Saint-Gobain had terminated him for his repeated time-clock violations, not for any complaints about the location of the clocks.

The district court granted Saint-Gobain’s motion, holding that Kasten “did not engage in any protected activity listed under § 215(a)(3).” Pet. App. 67. The court concluded that although “complaints filed with an employer are protected under the provision’s ‘any’

² On the same day, Kasten filed a class-action complaint against Saint-Gobain alleging that the location of the time clocks violated the FLSA’s wage-and-hour provisions. That case ultimately settled without any admission of liability by Saint-Gobain. Order on Motion to Approve Settlement Agreement, *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 07-cv-0449 (W.D. Wisc. Feb. 4, 2009).

complaint language,” oral complaints are not protected because “the plain language of § 215(a)(3) requires that the complaint be ‘filed.’” *Id.* at 70. “One cannot ‘file’ an oral complaint,” the court explained, because the verb “to file” denotes the use of a writing. *Id.* Although the court “agree[d] that the remedial nature of the FLSA justifies a broad interpretation of its provisions,” the court could not “ignore the explicit language Congress used in writing the statute.” *Id.* at 69.

The Seventh Circuit affirmed. It agreed with the district court that “internal, intracompany complaints are protected” because the statute “modifies the word ‘complaint’ with the word ‘any.’” Pet. App. 37. Like the district court, however, it held that purely oral complaints are not protected because “the natural understanding of the phrase ‘file any complaint’ requires the submission of some writing to an employer, court, or administrative body.” *Id.* at 40. The court found it “significant” that Congress has used “broader language” in other retaliation provisions. *Id.* at 42. The court declined to defer to the Secretary of Labor’s contrary interpretation because it rested “solely on a litigating position” rather than a “regulation, ruling, or administrative practice.” *Id.* at 39 n.2. And the court agreed with the district court that the FLSA’s remedial purpose does not justify ignoring the statute’s plain language: “expansive interpretation is one thing; reading words out of a statute is quite another.” *Id.* at 42–43.

The court of appeals denied Kasten’s petition for rehearing en banc by a 7–3 vote, Pet. App. 1, and this Court granted certiorari, 130 S. Ct. 1890 (2010).

SUMMARY OF ARGUMENT

I. A. The FLSA’s retaliation provision, 29 U.S.C. § 215(a)(3), protects only complaints to a governmental authority such as a court or administrative agency, and not internal complaints to an employer. The question whether internal complaints are protected was both pressed and passed upon below and is well within the scope of the question presented, or at the very least predicate to an intelligent resolution of that question. And the text, history, and purpose of § 215(a)(3) all confirm that Congress protected only complaints to the government.

The word “complaint” in the FLSA always refers to an official grievance filed with a governmental authority; the phrase “filed any complaint” appears alongside three other forms of protected conduct involving governmental proceedings; and the entire context of § 215(a)(3) is one of formal legal process. In addition, § 215(a)(3)’s immediate statutory predecessor protected employees who had “filed charges,” a phrase that clearly contemplates an official grievance filed with a court or agency. And Congress’s principal purpose in enacting § 215(a)(3) was to promote information-sharing between employees and enforcement officials—a purpose that would not be served, and indeed would be undermined, by protecting internal complaints.

B. Even if § 215(a)(3) could be read to protect internal complaints, the court of appeals correctly held that oral complaints to an employer are not protected. The phrase “filed any complaint” unambiguously requires a writing. By definition, the verb “to file” denotes delivery of a document to an official whose duty it is to keep it on file. Consistent with this plain meaning, every other time the word “file”

appears in the FLSA, it refers to a writing. Had Congress intended to protect oral complaints, it could easily have used a phrase such as “made a complaint” or “expressed a complaint.” Instead it used a phrase that clearly entails a writing.

None of Kasten’s arguments to the contrary overcomes the plain meaning of the phrase “filed any complaint.” Nor did that phrase have an established meaning in 1938 that included oral complaints. Indeed, the government’s argument from the legislative history shows precisely the opposite: If Congress understood the phrases “making a complaint” and “filed charges” synonymously, then both protected only written complaints filed with a governmental authority.

C. Congress’s use of broader language in other statutes further confirms the limited reach of § 215(a)(3). Many statutes use language that either expressly protects or at least comfortably accommodates oral complaints to an employer. Title VII, the Age Discrimination in Employment Act, and other statutes protect any employee who has “opposed any practice” made unlawful by those statutes. Other statutes expressly protect employees who have “provided information” or “made a complaint” to “the employer,” to “a person with supervisory authority over the employee,” or to “any other person.”

These statutes demonstrate the kind of language Congress uses when it intends to protect oral complaints to an employer. They are not irrelevant simply because they were enacted after § 215(a)(3). Congress has enacted many modern statutes using narrow language similar to that of § 215(a)(3). And Congress has repeatedly amended retaliation provisions when convinced that broader protection

was warranted, but has not amended § 215(a)(3) despite numerous opportunities to do so.

D. The tools of statutory construction thus make clear that § 215(a)(3) does not protect oral complaints to an employer. To the extent that any ambiguity remains, however, it must be construed narrowly under the rule of lenity because § 215(a)(3)—unlike almost every other retaliation provision—gives rise to potential criminal liability. Kasten and the government instead ask the Court to adopt the broadest possible construction of § 215(a)(3), one that would require the Court to construe *two* levels of ambiguity broadly. That is not how this Court ordinarily interprets criminal laws.

E. Kasten’s policy arguments do not support a different conclusion. Many of them are irrelevant because they erroneously assume either that written complaints to an employer are protected or that adhering to the ordinary meaning of “filed” would leave oral complaints to an agency unprotected. Others ignore both the significant costs that a private cause of action for retaliation imposes on law-abiding employers and the significant benefits that a writing requirement entails. All are misguided: Congress already struck the balance it deemed appropriate between the costs and benefits of protection from retaliation, and the courts are neither authorized nor equipped to strike a different one.

II. The interpretation urged by the Secretary of Labor and Equal Employment Opportunity Commission (EEOC) is not entitled to deference. After applying the ordinary tools of statutory construction—including the rule of lenity—no ambiguity remains for the agencies to resolve. In any event, Congress has not delegated authority to the Secretary or EEOC to authoritatively construe § 215(a)(3), and

even if it had, the interpretation they advance here was not promulgated in an exercise of such authority. Their interpretation is therefore not entitled to *Chevron* deference. Nor is it entitled to any lesser degree of deference: For all of the reasons given above and those explained more fully below, the agencies' position lacks power to persuade.

ARGUMENT

I. SECTION 215(a)(3) DOES NOT PROTECT ORAL COMPLAINTS TO AN EMPLOYER.

A. Section 215(a)(3) Protects Only Complaints To The Government.

The text, history, and purpose of § 215(a)(3) all confirm that Congress protected only complaints to a court or administrative agency, and not internal complaints to an employer.

1. Initially, the government errs in contending that Saint-Gobain waived this argument. U.S. Br. 9. The question whether § 215(a)(3) protects internal complaints was both raised before and decided by the courts below, and it is well within the scope of the question presented. See Pet. for Cert. i (framing the question presented as whether “an oral complaint of a violation of the Fair Labor Standards Act [is] protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)”).

The government asks this Court to answer the question presented in the abstract, divorced from the context of this case. As Saint-Gobain noted in its brief in opposition, however, the answer to the question presented (as framed in the petition for certiorari) may well depend on whether the “oral complaint of a violation” is made to an employer or to an agency. See Br. in Opp. 14 (noting that an oral complaint to an

agency may “institut[e] [a] proceeding” within the meaning of § 215(a)(3)); *id.* at 18 (noting that the court of appeals addressed only “the circumstances under which a grievance to an employer may constitute statutorily protected activity”). Whether complaints to an employer are protected is thus fairly included in the question presented. See *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 n.1 (2009) (“Although the parties did not specifically frame the question to include this threshold inquiry, ‘[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.’” (quoting Sup. Ct. R. 14.1)).

Moreover, even when this Court *may* deem an argument waived, it “ha[s] not done so when the issue not raised in the brief in opposition was ‘predicate to an intelligent resolution of the question presented.’” *Jones v. United States*, 527 U.S. 373, 397 n.12 (1999) (plurality opinion). That is the case here. The only question presented by the facts of this case is whether § 215(a)(3) protects oral complaints *to an employer*; whether oral complaints *to an agency* are protected is not before the Court. And it would make little sense to address whether § 215(a)(3) protects oral complaints to an employer if § 215(a)(3) does not protect complaints of any kind merely to employers. See *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006). The government effectively concedes as much by arguing only that “*if* an employee may not be discharged for an internal written complaint, there is no reason to allow discharge for an internal oral complaint.” U.S. Br. 6 (emphasis added). The question presented cannot be intelligently decided without analyzing the government’s antecedent “if.”

Nor is there any reason *not* to decide whether § 215(a)(3) protects internal complaints. The question

is squarely presented, and it has been fully aired in the courts of appeals; indeed, it is that question, much more so than whether § 215(a)(3) protects oral complaints, that has divided the courts of appeals. See U.S. Br. 9 (“[U]ntil the decision below, no court of appeals had held that internal written complaints are covered, while internal oral complaints are not.”). Sidestepping the question would only needlessly prolong the confusion in the lower courts. This Court therefore can and should decide whether § 215(a)(3) protects internal complaints.

2. “As with any question of statutory interpretation,” the analysis of whether § 215(a)(3) protects internal complaints “begins with the plain language of the statute.” *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009). Section 215(a)(3) prohibits retaliation against any employee who has “filed any complaint . . . under or related to” the Act. The key word is “complaint.”

Standing alone, the word “complaint” is ambiguous. In general usage, a “complaint” is simply “[a]n utterance or statement of grievance or injustice suffered,” 3 *Oxford English Dictionary* 608 (2d ed. 1989), or “a statement that something is wrong or not good enough,” *Cambridge Dictionary of American English* 172 (2000); see also *Webster’s New International Dictionary of the English Language* 546 (2d ed. 1941) (“Expression of grief, regret, pain, censure, grievance, or resentment . . .”). But the word “complaint” also has a specialized legal meaning: “a formal statement to a government authority that you have a legal cause to complain about the way you have been treated.” *Cambridge Dictionary of American English* at 172; see also 3 *Oxford English Dictionary* at 608 (“A statement of injury or grievance laid before a court or judicial authority . . . for

purposes of prosecution or of redress”); *Webster’s New International Dictionary* at 546 (“A formal allegation or charge against a party, made or presented to the appropriate court or officer”). The question is whether Congress used the word “complaint” in its general sense or in its specialized legal sense when it prohibited retaliation against any employee who has “filed any complaint” under or related to the FLSA.

The court of appeals thought this ambiguity was resolved by Congress’s use of the word “any.” Pet. App. 37. That is superficially appealing but wrong. When a word has more than one potential meaning, modifying it with the word “any” does not resolve the ambiguity. Rather, it is the *context* in which a word is used that clarifies which meaning the speaker intends. See *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“Ambiguity is a creature not of definitional possibilities but of statutory context.”). By itself, for example, the word “bank” could refer to a variety of objects, including a financial institution, the edge of a river, a depository for blood donations, or a group of elevators. But if a person says, “You may deposit this check in any bank,” no one would think that the speaker means for the check to be deposited in a riverbank. The context makes clear that the speaker means only any financial institution and not any other kind of bank.

Likewise, the context in which Congress used the word “complaint” in § 215(a)(3) makes clear that Congress meant only an official grievance filed with a governmental authority. For three reasons, Congress plainly used the word “complaint” in its specialized legal sense when it prohibited retaliation, not against any employee who complained, but against any

employee who “filed any complaint” under or related to the FLSA.

First, elsewhere in the FLSA where Congress used the word “complaint,” it always meant an official grievance filed with a governmental authority. See § 216(b) (referring to the “filing of a complaint by the Secretary of Labor” in an enforcement action); § 216(c) (providing for the “filing of a complaint” to recover unpaid minimum wages or overtime compensation); *id.* (specifying that the statute of limitations begins to run “when the complaint is filed” if the claimant is “named as a party plaintiff in the complaint”). The word “complaint” in § 215(a)(3) should be construed similarly under the “normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning.” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005).

Second, the phrase “filed any complaint” appears alongside three other protected activities, each of which involves resort to a governmental authority or participation in governmental proceedings. See *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.” (internal quotation marks omitted)). In addition to employees who have “filed any complaint,” § 215(a)(3) also protects any employee who has (1) “instituted or caused to be instituted any proceeding under or related to” the Act; (2) “testified or is about to testify in any such proceeding”; or (3) “served or is about to serve on an industry committee.”

A “proceeding,” in turn, is “[a]ny procedural means for seeking redress from a tribunal or agency.” *Black’s Law Dictionary* 1324 (9th ed. 2009). That

Congress used “proceeding” in this formal sense, and not in the looser sense of any series of activities involving a set procedure, is confirmed by the fact that the word “proceeding” is “modified by attributes of administrative or court proceedings; it must be ‘instituted,’ and it must provide for ‘testimony.’” *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000). In addition, every other time the word “proceeding” appears in the FLSA, it refers to a judicial or administrative proceeding. See § 207(o)(6)(A)(iii); § 210(a), (b); § 214(c)(5)(C); § 216(d), (e)(4); § 216b; § 217.

Service on an industry committee likewise involved participation in governmental proceedings. Section 5 of the original Act, which has since been repealed, provided for appointment of industry committees charged with recommending to the Department of Labor the appropriate minimum wage for particular industries. Fair Labor Standards Act of 1938, ch. 676, § 5, 52 Stat. 1060, 1062. The committees were authorized, among other things, to “investigate conditions in the industry,” to “hear . . . witnesses,” and to “receive . . . evidence” to enable them to “perform [their] duties and functions under this Act.” *Id.* § 8(b), 52 Stat. at 1064.

Third, the phrase “filed any complaint,” particularly when used in conjunction with the phrase “instituted any proceeding,” connotes the beginning of a legal process. See *Cambridge Dictionary of American English* at 318 (“To file something can mean to make an official record of it, or to begin a legal process.”). The word “filed,” both in its ordinary sense and as Congress used it repeatedly throughout the FLSA, requires a writing. See *infra*, 25–26. The word “filed” also suggests a formal or official act. See 5 *Oxford English Dictionary* at 904 (“To place (a

document) in due manner among the records of a court or public office.”); *A Dictionary of Modern American Usage* 130–31 (1935) (“[T]he formal presentation of a document to the official whose duty it will then be to place it on his file.”). Although it is of course possible to speak of filing a complaint with one’s employer, the entire sense of § 215(a)(3) is one of formal legal process.

All of the textual evidence thus indicates that the phrase “filed any complaint” refers only to formal complaints filed with a court or administrative agency. That reading is further confirmed by the history of § 215(a)(3).

3. As the government notes, U.S. Br. 20, § 215(a)(3) was preceded by the retaliation provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(4), which in turn was preceded by Executive Order No. 6711 (1934). The Executive Order prohibited retaliation against any employee “for making a complaint or giving evidence with respect to an alleged violation.” And § 158(a)(4) prohibited retaliation against any employee “because he has filed charges or given testimony” under the NLRA. Despite the change from “making a complaint” to “filed charges,” § 158(a)(4) was described in the legislative history as “merely a reiteration” of the Executive Order. *Comparison of S. 2926 and S. 1958*, at 29 (1935 Comm. Print), *reprinted in 1 Legislative History of the National Labor Relations Act of 1935*, at 1319, 1355 (1949) (“Bill Comparison”).

The immediate statutory predecessor of § 215(a)(3) thus prohibited retaliation against any employee who “filed charges,” and there is evidence that Congress understood the words “filed charges” and “making a complaint” synonymously. Contrary to the government’s contention, however, this history does not

support the view that § 215(a)(3) protects internal complaints. Rather, the phrase “filed charges” clearly contemplates a formal grievance filed with a governmental authority. See *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (“[I]f a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action”); *id.* at 409 (Thomas, J., dissenting) (“In legal parlance, a ‘charge’ is generally a formal allegation of wrongdoing that initiates legal proceedings against an alleged wrongdoer.”).

Moreover, the legislative history of the NLRA contains no evidence that § 158(a)(4) protected employees who “filed charges” against their employers internally (if that counterintuitive notion is even possible). The committee report on which the government relies cited three decisions of the National Labor Relations Board (NLRB) under the 1934 Executive Order that “attested” to the “need for this provision.” Bill Comparison at 1355. Each decision involved retaliation for either a complaint to an agency, *Zenith Radio Corp.*, 1 N.L.R.B. Dec. 202 (1934); *N.Y. Rapid Transit Corp.*, 1 N.L.R.B. Dec. 192 (1934), or testimony given in judicial proceedings, *Ralph A. Freundlich, Inc.*, 2 N.L.R.B. Dec. 147 (1935). And the colloquy the government cites between Senators Wagner and Hastings concerned the possibility that § 158(a)(4) would protect employees who “file charges maliciously,” 79 Cong. Rec. 7648, 7676 (1935)—a concern that obviously pertained to the filing of charges with a governmental authority.³

³ The government also cites a 1939 NLRB decision for the proposition that § 158(a)(4) protected employees who orally complained to their employers. U.S. Br. 21 n.10 (citing *Viking Pump Co.*, 13 N.L.R.B. 576, 590 (1939)). That decision said nothing of the sort. It held only that the respondent had violated

The text and history of § 158(a)(4) thus demonstrate that Congress protected only charges filed with a court or administrative agency under the NLRA. Nothing in the legislative history of the FLSA suggests that Congress intended § 215(a)(3) to expand that protection to employees who complained internally to their employers. The legislative history of the FLSA contains numerous references to “complaints.” Without exception, they refer to complaints to a governmental authority; none involves a complaint by an employee to his employer.⁴

4. The purpose of § 215(a)(3) likewise supports the view that only complaints to governmental authorities are protected. The primary purpose of § 215(a)(3) is to aid the government’s enforcement efforts by ensuring that employees—who have the best access to relevant information—report violations to the appropriate authorities. As Attorney General Cummings explained in his memorandum to the President regarding the Executive Order of 1934:

Ordinarily only the employees will know about their employer’s violation of th[e] provisions [applicable to employees]. Obviously, the labor

§ 158(a)(4) by firing an employee “because he gave testimony under the Act,” *Viking Pump*, 13 N.L.R.B. at 590—conduct that is expressly protected under both § 158(a)(4) and § 215(a)(3).

⁴ See, e.g., *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the H. and S. Comms. on Labor*, 75th Cong. 29 (1937) (“Of course, anybody can go to the labor board . . . with any complaint . . .”); *id.* at 37 (“He can file a complaint He can go to the Board and complain of any unfair labor practice under this act.”); *id.* at 88 (citing “complaints” as one of the “methods by which a case can come before the Board”); *id.* at 100 (describing the Act’s policing mechanism as involving “complaint[s] . . . to the board”); *id.* at 695 (“[T]here has got to be a grievance, there has got to be a complaint filed by somebody with the Board.”).

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, however, as long as the employer retains the right to dismiss because of having filed a complaint against him. The proposed Executive order frees the workers from this form of restraint and directly tends to aid in the enforcement of the Codes.

37 Op. Att’y Gen. 515, 516 (1934).

This purpose—ensuring that the government has adequate information to enforce the Act—has always been understood to be at the heart of both § 215(a)(3) and its predecessor § 158(a)(4). As this Court explained in describing the purpose of § 158(a)(4), the “complete freedom” to file complaints with the NLRB “is necessary . . . ‘to prevent the Board’s channels of information from being dried up by employer intimidation of prospective complainants and witnesses.’” *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). And as this Court explained in its only pronouncement to date on the purpose of § 215(a)(3), the “end” that Congress sought to achieve by protecting employees from retaliation was open communication between employees and federal authorities responsible for enforcing the Act:

For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach

officials with their grievances. This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve.

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

That Congress was concerned primarily with ensuring that retaliation by employers does not frustrate the government's enforcement efforts is further evidenced by the fact that when Congress enacted § 215(a)(3) in 1938, it did not create a private right of action for retaliation. Not until 1977 did Congress amend the FLSA to allow aggrieved employees to sue for retaliation. Pub. L. No. 95-151, § 10, 91 Stat. 1245, 1252 (1977). Before that time, only the Secretary of Labor could enforce § 215(a)(3). See 1 *Legislative History of the Fair Labor Standards Amendments of 1977*, at 375 (1979 Comm. Print).

In light of § 215(a)(3)'s information-sharing purpose, it makes perfect sense for Congress to have limited protection to complaints to governmental authorities—complaints communicated only to employers do not enhance the government's knowledge of employers' compliance with the law or aid the government's enforcement efforts. Indeed, encouraging employees to complain only to their employers would be directly at odds with Congress's purpose. Kasten and his *amici* contend that Congress intended to allow employers in effect to police themselves by resolving disputes internally, but that is a patently revisionist reading of the Act. While self-policing and internal dispute-resolution may be a good idea, there is no evidence that it was the idea that animated Congress to enact § 215(a)(3).

B. Section 215(a)(3) Does Not Protect Oral Complaints To An Employer.

1. For these reasons, § 215(a)(3) is best read to protect only complaints to a court or administrative agency, and not internal complaints to an employer. But even if § 215(a)(3) could be read to protect internal complaints, the decision below should still be affirmed because the court of appeals correctly held that oral complaints to an employer are not protected.

In determining whether § 215(a)(3) protects oral complaints, the key statutory term is “filed.” Like any other undefined term, the word “filed” must be given its “ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import.” *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (internal quotation marks omitted); see also *United States v. Lombardo*, 241 U.S. 73, 76 (1916) (“The word ‘file’ was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied.”). Contrary to Kasten’s contention, the word “filed” does have an intrinsically plain meaning in this context: It requires a writing.

“The word ‘file’ is derived from the Latin word ‘*filum*,’ and relates to the ancient practice of placing papers on a thread or wire for safe-keeping and ready reference.” *Id.* By definition, the verb “to file” denotes delivery of a document. That was true in 1938. See, e.g., *Webster’s New International Dictionary of the English Language* 60 (2d. ed. 1935) (“To deliver (a paper or instrument) to the proper officer so that it is received by him to be kept on file, or among the records of his office.”); *Black’s Law Dictionary* 777 (3d ed. 1933) (“To deliver an instrument or other paper to the proper officer for the purpose of being kept on file by him in the proper

place.”). And it is true today. See, *e.g.*, *New Oxford American Dictionary* 627 (2d ed. 2005) (“submit (a legal document, application, or charge) to be placed on record by the appropriate authority”); 1 *Shorter Oxford English Dictionary* 955 (5th ed. 2002) (“Place (a document) on file among official records by formal procedures of registration; submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority.”); *Black’s Law Dictionary* 704 (9th ed. 2009) (“To deliver a legal document to the court clerk or record custodian for placement into the official record.”).

Consistent with this plain meaning, Congress used the word “file” multiple times in the FLSA—always in reference to a writing. See § 203(l) (requiring employers to “have on file an unexpired certificate”); § 210(a) (requiring the Secretary to “file in the court the record of the industry committee”); *id.* (requiring industry committees to “file” their findings and recommendations); § 210(b) (prohibiting a stay unless the movant “file[s] in court an undertaking”); § 214(c)(5)(A) (permitting employees to “file . . . a petition” for review of a special minimum-wage rate); *id.* (requiring employees’ written consent to join a class action to be “filed”); § 216(b) (same); § 216(c) (specifying that the statute of limitations begins to run on “the date when the complaint is filed”); see also ch. 676, § 8(d), 52 Stat. at 1064 (provision of original Act requiring an industry committee to “file with the Administrator a report containing its recommendations”).

Moreover, as discussed above, the word “complaint” as used in § 215(a)(3) means an official grievance, and the entire context of § 215(a)(3) is one of formal process—a context in which “proceeding[s]” are “instituted” and employees may be called upon to

“testify.” Even if this language can be stretched to reach complaints to an employer as opposed to a governmental authority, a written complaint fits much more comfortably in this context than an oral one. Certainly the words Congress chose in § 215(a)(3) would not ordinarily be used to describe the expression of a concern to one’s supervisor in the hallway.

Congress’s use of the words “filed any complaint” is thus dispositive. If Congress had intended to protect oral complaints, “[t]he idea . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it.” *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944). Congress could have written “made a complaint,” “expressed a complaint,” “stated a complaint,” “lodged a complaint,” or even simply “complained.” None of these formulations would necessarily have required a written complaint. Instead Congress chose to use the phrase “filed a complaint,” a phrase that clearly contemplates a writing. That choice must be respected.

2. Attempting to overcome the plain meaning of the phrase “filed any complaint,” Kasten makes essentially six arguments. None is persuasive.

First, Kasten asserts that “to file” means generally to submit information to another for consideration, including orally. Pet. Br. 22. No dictionary definition supports that assertion. The very dictionaries Kasten relies on demonstrate that when something is submitted by filing, the thing submitted must be a document (such as a patent application or a petition for a divorce). See *id.* at 22 n.10. And even if the word “file” can refer to oral transmissions in other contexts, such as in specialized usage in the news industry, the ordinary meaning of the word does not

include oral submissions either generally or in the specific context of filing a complaint about an alleged violation of law.

Second, Kasten notes that speakers sometimes refer in the colloquial to oral “filings.” Pet. Br. 22–24. But “[i]n statutory drafting, where precision is both important and expected, the sort of colloquial usage on which [Kasten] relies is not customary.” *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2129 (2008). Even in the colloquial, moreover, the phrase “filed a complaint” is more naturally understood as a reference to a written complaint than to an oral one. See Pet. App. 39–40 (“If an individual told a friend that she ‘filed a complaint with her employer,’ we doubt the friend would understand her possibly to mean that she merely voiced displeasure to a supervisor.”). Indeed, even courts that have adopted Kasten’s interpretation have acknowledged that it conflicts with the ordinary meaning of “filed.” See *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997) (“We have not read section 15(a)(3) literally, however”); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (“The charging parties did not perform an act that is explicitly listed in the FLSA’s anti-retaliation provision”); *Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, at 40,986 (D. Utah Aug. 2, 1961) (“I am mindful that the word ‘file’ ordinarily has reference to a written document”).

Third, Kasten cites a handful of regulations and state statutes that provide for oral “filings.” Pet. Br. 25–29. These statutes and regulations show only that their drafters used the word “file” in a way that departs from its ordinary meaning—there would be no need to specify that a “filing” may be either oral or

written if the ordinary meaning of the word already encompassed both methods.

These provisions are also of little utility in determining what *Congress* meant when it enacted § 215(a)(3). Far more probative on that score is the fact that Congress itself has never provided for a complaint (or anything else) to be “filed” orally. So far as the United States Code is concerned, the category of oral “filings” is a null set. See U.S. Br. 18 (“[T]he government has not identified any instance in which Congress has specified that a complaint may be filed orally.”).

Fourth, Kasten argues that Congress’s use of the words “any complaint” indicates that § 215(a)(3) encompasses complaints in any form, including oral complaints. Pet. Br. 32–37. This argument wrongly treats the words “any complaint” as if they stood alone. In fact, those words are governed by the verb “filed.” That choice of verb limits the range of protected “complaints” to those that can be “filed.” Returning to the bank example, if a person says, “You may deposit this check in any bank,” he obviously means only the type of bank in which a check can be deposited; a blood bank or an elevator bank would not do. So too here: Because an oral complaint cannot be “filed” unless it is reduced to writing, it does not fall within the plain meaning of the phrase “filed any complaint.” The word “any” signifies only that the statute protects complaints about any subject related to the FLSA.

Fifth, Kasten argues that oral complaints are protected because § 215(a)(3) does not expressly require a writing, whereas three other provisions in

the FLSA that use the word “file” do.⁵ Pet. Br. 37–38. In two of these provisions, however, the express writing requirement is essential to the provision’s meaning wholly apart from the filing requirement. Both provide that an employee may not join a class action unless he “gives [his] consent in writing” to become a party and such consent “is filed” with the court or agency. § 214(c)(5)(a); § 216(b). Congress separated the consent requirement from the filing requirement, using the active voice (“gives [his] consent”) for the former to indicate that the employee must personally give his written consent to join the class action, but the passive voice (“is filed”) for the latter to indicate that the employee need not personally file the consent. This makes clear that an employee may not simply give his oral consent to another person (*e.g.*, the class representative) who then files a document communicating the employee’s consent to the court or agency; the document filed must be one executed by the employee. Had Congress omitted the words “in writing,” this requirement would not have existed. The express writing requirements in § 214(c)(5)(a) and § 216(b) thus serve their own distinct purpose and say nothing about the absence of such a requirement in § 215(a)(3).

Nor does the third provision help Kasten. It allows a party to obtain judicial review of a wage order by “filing . . . a written petition” for review. § 210(a). Kasten is correct that the word “written” in § 210(a) is redundant, but that is no more than a debater’s point. Such minor redundancies in statutes are not uncommon. (An electronic search of the unannotated

⁵ The government cites a fourth provision requiring employers to “provid[e]” certain “written assurances to the Secretary.” § 214(c)(2). This provision is irrelevant because its operative verb is “provide,” which unlike “file” does not denote a writing.

U.S. Code on the words “written document” yields 39 hits.) Accepting Kasten’s argument, by contrast, would mean that if Congress had omitted the word “written” from § 210(a) and instead provided simply that a lawsuit could be commenced by “filing a petition” in the appropriate court—as Congress has done in countless other statutes providing for judicial review of agency action—then a person could have commenced a lawsuit by “filing” an oral petition for review. Better to indulge Congress in a trivial redundancy than to accept the improbable conclusion Kasten’s argument embraces.

Sixth, Kasten argues in a similar vein that oral complaints are protected because § 215(a)(3) does not expressly require complaints to be in writing, whereas several other statutes do. Pet. Br. 39. Many of the statutes Kasten cites, however, do not use the term “filed” and are thus irrelevant.⁶ Others lay out in detail the various requirements for the form and content of the complaint, specifying, for example, that it must be signed, sworn, and notarized.⁷ None suggests that absent an express writing requirement, Congress intends the verb “to file” to include oral submissions. The better inference—especially given the plain meaning of the word and the absence of any provision in the Code for “filing” an oral complaint—is that when Congress requires a person to “file” a complaint, it intends for the complaint to be in writing, regardless of whether it says so expressly.

⁶ *E.g.*, 7 U.S.C. § 193(a); *id.* § 228b-2(a); *id.* § 1599(a); 19 U.S.C. § 2561(a); 33 U.S.C. § 392; 42 U.S.C. § 2000b(a).

⁷ *E.g.*, 2 U.S.C. § 437g(a)(1); 5 U.S.C. § 3330a(a)(2)(B); 38 U.S.C. § 4322(b); 42 U.S.C. § 3610(a)(1)(A)(i)–(ii); *id.* § 15512(a)(2)(C); 47 U.S.C. § 554(g).

3. The government makes one additional argument against according the word “filed” its ordinary meaning: It contends that the phrase “filed any complaint” had a recognized meaning in labor law in 1938 that included oral complaints. U.S. Br. 20–22. This argument too is meritless.

The government does not cite any FLSA-era judicial decisions construing the phrase “filed any complaint” in the labor context. None appears to exist. Decisions from that era in other contexts, however, belie the government’s assertion that Congress would have understood the word “filed” to include oral submissions. See *Ritter v. United States*, 28 F.2d 265, 267 (3d Cir. 1928) (“The statute and regulations prescribed that a claim must be filed. This means a written claim, and not an oral one, because it is difficult to know just how to file an oral claim. It could not be done, unless it was reduced to writing”); *Bd. of Registration Comm’rs v. Campbell*, 65 S.W.2d 713, 718 (Ky. 1933) (“The fact that the act provides that in the event of a protest, it must be filed, clearly shows that by its use of the word ‘filed’ the Legislature intended that such protest must be in writing.”).

The government’s argument thus does not rely on any established judicial construction of the words “filed any complaint.” Instead, it rests entirely on the supposed equivalence between the Executive Order of 1934 and § 158(a)(4) of the NLRA. For the reasons already explained, both provisions protected only complaints to a governmental authority. But even if these provisions could have been understood to protect internal complaints, there is no evidence that they were understood to protect internal *oral* complaints.

To make that leap, the government reasons as follows: The Order prohibited retaliation for “making a complaint” and thereby protected both written and oral complaints. When Congress enacted § 158(a)(4) and prohibited retaliation against employees who had “filed charges,” it merely reiterated the Order and made no substantive change. Accordingly, § 158(a)(4) protected both written and oral charges. When Congress enacted § 215(a)(3), it did not intend to curtail that protection. Therefore, § 215(a)(3) protects both written and oral complaints.

The government’s reasoning is twice flawed. Initially, it is far from clear that § 158(a)(4) made no substantive change to the Order. The language changed significantly—from “making a complaint,” which at least on its face could encompass oral complaints, to “filed charges,” which clearly contemplates a writing. But even if § 158(a)(4) was merely a reiteration of the Order and the two must be viewed as coextensive, the government draws the wrong inference from that fact: It assumes that both provisions must have protected oral complaints, ignoring the possibility that neither did. It is far more likely that Congress understood the phrase “making a complaint” to encompass only written complaints filed with a governmental authority than it is that Congress understood the phrase “filed charges” to encompass oral complaints to an employer. The former possibility is at least linguistically defensible; the latter strains language to the breaking point. The government’s argument thus collapses on itself.

C. Congress’s Use Of Broader Language In Other Retaliation Provisions Confirms The Limited Reach Of § 215(a)(3).

1. Even if the text, history, and purpose of § 215(a)(3) were not sufficient to make clear that oral

complaints to an employer are not protected, that conclusion becomes inescapable when the narrow language Congress used in § 215(a)(3) is contrasted with the significantly broader language Congress has used in other statutes—language that expressly covers or readily encompasses internal complaints, oral complaints, or both.

The court of appeals identified two such examples. It emphasized that Title VII and the Age Discrimination in Employment Act (ADEA) both forbid employers to retaliate against any employee who has “opposed any practice” that is unlawful under those statutes. Pet App. 42 (citing 42 U.S.C. § 2000e-3(a), 29 U.S.C. § 623(d)); see also Family and Medical Leave Act, 29 U.S.C. § 2615(a)(2); Americans with Disabilities Act, 42 U.S.C. § 12203(a). “This broader phrase,” the court noted, “does not require a ‘fil[ing],’ and has been interpreted to protect verbal complaints.” Pet. App. 42. It also encompasses activities that an employee engages in at work in addition to formal administrative or judicial proceedings. See *Crawford v. Metro. Gov’t*, 129 S. Ct. 846, 850–52 (2009).

Other statutes use even more explicit language to protect oral complaints to an employer. Many statutes, for example, prohibit retaliation against any employee who has “provided information” or “made a complaint” regarding a potential violation to “the employer,” to “a person with supervisory authority over the employee,” or to “any other person.”⁸ Other

⁸ *E.g.*, National Transit Systems Security Act, 6 U.S.C. § 1142(a)(1)(C) (prohibiting retaliation against any employee who “provide[d] information” regarding a potential violation to “a person with supervisory authority over the employee”); Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(a)(1) (same as to any employee who “provided . . . to the

statutes use language that clearly protects oral complaints, without expressly stating whether internal complaints are protected.⁹

The government inexplicably cites many of these provisions as examples of statutes that would supposedly be endangered by holding that § 215(a)(3) does not protect internal oral complaints. U.S. Br. 27 n.12. It also contends—citing several court-of-appeals decisions but none from this Court—that various

employer . . . information relating to any violation”); Asbestos Hazard Emergency Response Act, *id.* § 2651 (same as to any employee who “provided information relating to a potential violation . . . to any other person”); Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a)(1)(C) (same as to any employee who “provide[d] information” regarding a potential violation to “a person with supervisory authority over the employee”); Mine Health and Safety Act, 30 U.S.C. § 815(c)(1) (same as to any miner who “has filed or made a complaint . . . including a complaint notifying the [mine] operator”); Energy Reorganization Act, 42 U.S.C. § 5851(a)(1) (same as to any employee who “notified his employer of an alleged violation”); Federal Rail Safety Act, 49 U.S.C. § 20109(a)(1)(C) (same as to any employee who “provide[d] information” regarding a potential violation to “a person with supervisory authority over the employee”); Federal Aviation Act, *id.* § 42121(a)(1) (same as to any employee who “provided . . . to the employer . . . information relating to any violation”); Pipeline Safety Improvement Act, *id.* § 60129(a)(1) (same).

⁹ The Employee Retirement Income Security Act, for example, prohibits retaliation against any employee who “has given information” in “any inquiry or proceeding” related to the statute. 29 U.S.C. § 1140. While this language clearly encompasses oral complaints, the circuits are split as to whether it covers internal complaints. *See Edwards v. A.H. Cornell & Son*, No. 09-3198, 2010 WL 2521033, at *3–4 (3d Cir. June 24, 2010) (describing split). Other statutes using similar formulations include the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7116(a)(4), and the Foreign Service Act, 22 U.S.C. § 4115(a)(4).

other statutes would be undermined by a ruling in Saint-Gobain’s favor. *Id.* at 27–28. Many of the statutes the government cites either expressly protect or could arguably be construed to protect internal oral complaints by virtue of additional language not included in § 215(a)(3). Others, like § 215(a)(3), may not protect internal oral complaints.

One thing is certain: Given the variety of formulations Congress has used to prohibit retaliation in different contexts, close attention must be paid to the language and structure of each statute. And the stark contrast between the broad language Congress used in other statutes and the narrow language it used in § 215(a)(3) is telling: It indicates that “the cause of action for retaliation under the FLSA is much more circumscribed.” *Ball*, 228 F.3d at 364.

2. Kasten argues that the broad language Congress used in other retaliation provisions is irrelevant because those provisions were enacted long after § 215(a)(3). Pet. Br. 44–46. This is surprising, since Kasten himself relies on legislation, including amendments to the FLSA, enacted well after 1938 to support his proposed construction. See, e.g., *id.* at 38–39. In any event, while it may be that “negative implications raised by disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously,” *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1940 (2008) (alteration and internal quotation marks omitted), those “implications” do not disappear merely because the enactments are some years apart. The Court must still strive to interpret the Code as a coherent body of law, and the marked difference in the language Congress used in other statutes cannot simply be ignored.

That is particularly true because Congress has enacted many modern statutes that use language identical or substantially similar to that of § 215(a)(3). These include the Occupational Safety and Health Act;¹⁰ the Clean Water Act;¹¹ the Resource Conservation and Recovery Act;¹² the Migrant and Seasonal Agricultural Worker Protection Act;¹³ the Employee Polygraph Protection Act;¹⁴ the Immigration and Nationality Act;¹⁵ the

¹⁰ Pub. L. No. 91-596, § 11(c)(1), 84 Stat. 1590, 1603 (1970) (29 U.S.C. § 660(c)(1)) (prohibiting retaliation against any employee who “has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act”).

¹¹ Pub. L. No. 92-500, sec. 2, § 507(a), 86 Stat. 816, 890 (1972) (33 U.S.C. § 1367(a)) (prohibiting retaliation against any employee who “has filed, instituted, or caused to be filed or instituted any proceeding under this Act”).

¹² Pub. L. No. 94-580, sec. 2, § 7001(a), 90 Stat. 2795, 2824 (1976) (42 U.S.C. § 6971(a)) (prohibiting retaliation against any employee who “has filed, instituted, or caused to be filed or instituted any proceeding under this Act”).

¹³ Pub. L. No. 97-470, § 505(a), 96 Stat. 2583, 2598 (1983) (29 U.S.C. § 1855(a)) (prohibiting retaliation against any worker who has “filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act”).

¹⁴ Pub. L. No. 100-347, § 3(4)(A), 102 Stat. 646, 647 (1988) (29 U.S.C. § 2002(4)(A)) (prohibiting retaliation against any employee who has “filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act”).

¹⁵ Pub. L. No. 101-649, § 534(a), 104 Stat. 4978, 5055 (1990) (8 U.S.C. § 1324b(a)(5)) (prohibiting retaliation against any individual who “intends to file or has filed a charge or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section”).

Surface Transportation Assistance Act;¹⁶ and the Workforce Investment Act.¹⁷ Kasten is thus wrong that the language Congress used in § 215(a)(3) is simply a relic of a bygone era of statutory simplicity. Congress's continued use of § 215(a)(3)'s narrow language, despite the ready availability of the broader language it has used in other statutes, shows that Congress appreciates the difference.

Congress has also repeatedly shown itself capable of amending the law when convinced that broader protection is warranted. In 1977, after a divided panel of the D.C. Circuit held that the Mine Safety Act protected internal complaints,¹⁸ Congress amended the statute to make that protection express.¹⁹ In 1992, after the Fifth Circuit held that the Energy Reorganization Act did not protect internal complaints,²⁰ Congress amended the statute to provide such protection.²¹ And as recently as 2007, Congress amended the Federal Rail Safety Act to

¹⁶ Pub. L. No. 103-272, sec. 1(e), § 31105(a)(1)(A), 108 Stat. 745, 990 (1994) (49 U.S.C. § 31105(a)(1)(A)(i)) (prohibiting retaliation against any employee who “has filed a complaint or begun a proceeding related to a violation”).

¹⁷ Pub. L. No. 105-220, § 184(f), 112 Stat. 936, 1046 (1998) (29 U.S.C. § 2934(f)) (prohibiting retaliation against any individual who “has filed any complaint or instituted or caused to be instituted any proceeding under or related to this title”).

¹⁸ *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974).

¹⁹ Pub. L. No. 95-164, sec. 201, § 105(c)(1), 91 Stat. 1290, 1304 (1977) (30 U.S.C. § 815(c)(1)).

²⁰ *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984).

²¹ Pub. L. No. 102-486, sec. 2902(a), § 210(a), 106 Stat. 2776, 3123 (1992) (42 U.S.C. § 5851(a)).

protect internal complaints,²² ratifying an earlier Fourth Circuit decision.²³ At least since the Second Circuit held in 1993 that § 215(a)(3) does not protect “informal workplace complaints,” Congress has been on notice of this issue.²⁴ Since that time Congress has amended the FLSA no fewer than 15 times, yet it has not expanded the narrow scope of § 215(a)(3) to protect internal oral complaints.²⁵ This Court should not do for Congress what Congress has been either unwilling or unable to do itself.

D. The Rule of Lenity Requires A Narrow Construction Of § 215(a)(3).

For the reasons given above, the ordinary tools of statutory construction yield a single, unambiguous conclusion: Section 215(a)(3) does not protect oral complaints to an employer. Even if the statute were ambiguous, however, the ambiguity would have to be construed narrowly because the FLSA imposes criminal liability for willfully violating § 215(a)(3).

²² Pub. L. No. 110-53, § 1521, 121 Stat. 266, 445 (2007) (49 U.S.C. § 20109(a)(1)(C)).

²³ *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989).

²⁴ *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993).

²⁵ Pub. L. No. 103-329, § 633(d), 108 Stat. 2382, 2428 (1994); Pub. L. No. 104-1, § 203, 109 Stat. 3, 10 (1995); Pub. L. No. 104-26, § 2, 109 Stat. 264, 264 (1995); Pub. L. No. 104-66, § 1102(a), 109 Stat. 707, 722 (1995); Pub. L. No. 104-88, § 340, 109 Stat. 803, 955 (1995); Pub. L. No. 104-174, § 1, 110 Stat. 1553, 1553 (1996); Pub. L. No. 104-188, § 2105, 110 Stat. 1755, 1929 (1996); Pub. L. No. 105-78, § 105, 111 Stat. 1467, 1477 (1997); Pub. L. No. 105-221, § 2, 112 Stat. 1248, 1248 (1998); Pub. L. No. 105-334, § 2(a), 112 Stat. 3137, 3137 (1998); Pub. L. No. 106-151, § 1, 113 Stat. 1731, 1731 (1999); Pub. L. No. 106-202, § 2, 114 Stat. 308, 308 (2000); Pub. L. No. 108-199, § 108, 118 Stat. 3, 236 (2004); Pub. L. No. 110-28, §§ 8101–8104, 121 Stat. 112, 188–89 (2007); Pub. L. No. 110-233, § 302(a), 122 Stat. 881, 920 (2008).

§ 216(a) (imposing criminal liability upon “[a]ny person who willfully violates any of the provisions of section 215”).

Statutes imposing criminal liability for retaliation are exceedingly rare. Saint-Gobain has found only one other retaliation provision that gives rise to criminal liability.²⁶ Otherwise § 215(a)(3) appears to be unique in the law. Even when Congress has modeled other statutes on the FLSA, it has declined to incorporate the FLSA’s criminal penalties. See *Lorillard v. Pons*, 434 U.S. 575, 578, 582 (1978) (noting that although Congress provided that “violations of the ADEA generally are to be treated as violations of the FLSA,” it “expressly declined to incorporate into the ADEA the criminal penalties established for violations of the FLSA”).

Because § 215(a)(3) gives rise to potential criminal liability, “it must be strictly construed, and any ambiguity must be resolved in favor of lenity.” *Scheidler v. NOW, Inc.*, 537 U.S. 393, 408 (2003) (internal quotation marks omitted). “This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain,” but “also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.” *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

²⁶ Like the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act makes it a criminal offense to willfully violate the statute’s retaliation provision. 29 U.S.C. §§ 1851, 1855. That provision contains an important limitation not present in § 215(a)(3): It prohibits retaliation only when a worker engages in protected conduct “with just cause.” *Id.* § 1855.

This Court has previously applied the rule of lenity to the FLSA. In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), the Court held that the “unit of prosecution” for a violation of the FLSA is a course of conduct, not every breach of an employer’s duty. *Id.* at 221, 224. Because Congress had not spoken to the issue in “clear and definite” language, the Court construed the statute narrowly, reasoning that “criminal outlawry” should not be derived from “some ambiguous implication.” *Id.* at 221–22; see also *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (Congress must “inform employers with definiteness and certainty” of the scope of the FLSA before criminal liability can be imposed).²⁷

The Court should do the same here, particularly in light of the FLSA’s expansive reach. The FLSA was at the time—and in many respects still is—an extraordinary federal intrusion into the workplace. It is highly unlikely that Congress in 1938 intended to expose employers to potential federal criminal liability every time an employee claims that he has been disciplined because he complained to his supervisor about the calculation of his wages or hours. Certainly had that been Congress’s intent, it was incumbent upon Congress to express it more clearly. See *Jones v. United States*, 529 U.S. 848, 858 (2000) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance’ in the prosecution of crimes”); *A.B. Kirschbaum Co. v. Walling*, 316 U.S.

²⁷ In this Court’s only prior case construing § 215(a)(3), the rule of lenity was not an issue because the question presented involved only the remedies available in a civil action, not the scope of § 215(a)(3)’s substantive prohibition. *DeMario Jewelry*, 361 U.S. at 296 (holding that courts may order reimbursement for lost wages).

517, 522 (1942) (“[W]hen the Federal Government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.”).

Nor does it matter that this is a civil action and not a criminal prosecution. The rule of lenity still applies, because the Court “must interpret the statute consistently, whether [it] encounter[s] its application in a criminal or noncriminal context.” *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); see also *Santos*, 128 S. Ct. at 2030 (plurality opinion) (“[T]he meaning of words in a statute cannot change with the statute’s application.”); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 & n.10 (1992) (plurality opinion) (applying lenity in interpreting a criminal statute invoked in a civil action); *Crandon v. United States*, 494 U.S. 152, 168 (1990) (same).

In short, the rule of lenity requires that any ambiguity in § 215(a)(3) be construed narrowly. Kasten and the government instead urge the Court to adopt the broadest possible construction of § 215(a)(3)—one that would require the Court to construe *two* levels of ambiguity against Saint-Gobain by holding *both* that internal complaints are protected *and* that they need not be in writing. To allow this “would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.” *Id.* at 178 (Scalia, J., concurring). That is not how penal statutes are construed.

E. Policy Arguments Do Not Justify Extending § 215(a)(3) Beyond Its Plain Terms.

1. Kasten devotes much of his brief to policy arguments for protecting oral complaints, arguing that such protection would serve the FLSA’s remedial purposes. Pet. Br. 46–64. The short answer to these arguments is that “it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses.” *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Because the ordinary meaning of the words Congress used in § 215(a)(3) is clear, this Court need not speculate as to Congress’s purpose. And even if a broader retaliation provision might better serve the FLSA’s purposes, “it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.” *Addison*, 322 U.S. at 617.

Kasten’s policy arguments are also unconvincing on their own terms. Most of his arguments pertain to whether an internal complaint must be in writing and are largely moot, since § 215(a)(3) does not protect internal complaints at all. Thus, for example, limiting protection to complaints to a governmental authority would not disadvantage workers with limited English-speaking or writing ability. See Pet. Br. 41–42. Nor would it create “mind-bending problems” as to what constitutes a writing or whether an employer could manufacture a “same-decision defense” when an employee complains both orally and in writing. See *id.* at 61–62. Many of the problems Kasten imagines simply disappear when the statute is properly construed to reach only complaints to a governmental authority—which is just another reason why this Court should decide that preliminary

question before worrying about the welter of arguments Kasten puts forward that assume the answer to this issue.

As explained above, moreover, protecting internal complaints would undermine § 215(a)(3)'s information-sharing purpose by discouraging employees from reporting violations to enforcement authorities. Kasten worries that the same problem would arise if oral complaints to an agency were not protected. Pet. Br. 53–58. But that worry need not detain the Court here, as this case does not involve an oral complaint to an agency. In any event, although an oral complaint to an agency would not be protected under § 215(a)(3)'s “filed any complaint” language, it would almost certainly “institut[e] [a] proceeding” within the meaning of § 215(a)(3) and would therefore be protected.²⁸ In fact, the government admits that when complaints are made to a governmental authority, there is no difference between an oral and written complaint—either is recorded in the Department's database and reviewed for further action. U.S. Br. 15. Interpreting § 215(a)(3) as written thus would not “silence the voice” of aggrieved employees, Pet. Br. 17; “dry up” the flow of information to the agencies, *id.* at 57; or cause any of

²⁸ Contrary to Kasten's suggestion, an internal complaint, whether oral or written, does not “institut[e] [a] proceeding” under § 215(a)(3), even if the employee (unlike Kasten) follows the employer's internal-complaint procedure. As explained, the word “proceeding” in § 215(a)(3) means a judicial or administrative proceeding—one that is “instituted” and may require the employee to “testify.” See *Ball*, 228 F.3d at 364 (“The term ‘instituted’ connotes a formality that does not attend an employee's oral complaint to his supervisor. And certainly, even if such an oral complaint somehow were understood to have instituted a proceeding, such a proceeding would not include the giving of testimony.”).

the other ill effects in Kasten’s parade of horrors. Holding that § 215(a)(3) does not protect internal complaints, or that it protects such complaints only when they are in writing, would promote, not frustrate, communication between employees and enforcement officials.

2. Even solely in terms of the oral-versus-written distinction, Kasten’s policy arguments do not support a countertextual interpretation of § 215(a)(3). The FLSA has remedial purposes, to be sure. “But no law pursues its purpose at all costs, and the textual limitations upon a law’s scope are no less a part of its ‘purpose’ than its substantive authorizations.” *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010) (alteration and internal quotation marks omitted). If the administration of justice were costless and error-free, it would of course be difficult to articulate a legitimate reason why an employer should be able to retaliate against an employee for orally complaining to his supervisor about an alleged violation of the law. Unfortunately, that is not the world we live in. Creating or expanding a cause of action for retaliation imposes significant costs on law-abiding employers—costs that must be weighed against the benefits of a privately enforceable prohibition on retaliation.

Retaliation claims, for example, are easy to make and difficult to defend, as factual disputes will often preclude summary judgment. The irreducible risk of error in the judicial process means that some innocent employers will be punished, and even those that are ultimately vindicated will often be required to spend significant sums defending themselves against nonmeritorious claims. These costs may induce excessive caution in employers, causing them “either to refrain from some legal conduct or to

refrain from firing inefficient or disruptive employees.” James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. Colo. L. Rev. 91, 111 (1989). Such costs may ultimately be passed on to workers in the form of lower wages or fewer jobs, thereby harming the very class that Congress intended to protect. See *id.* at 122.

Kasten ignores this side of the equation. He argues, for example, that if oral complaints to an employer are not protected, then employers will have a perverse incentive to fire employees immediately after they orally complain. Pet. Br. 51–52. Kasten has not shown that this concern is anything more than theoretical, if it is even that. See Hubbell, *supra*, at 107 (“[F]iring the employee after disclosure serves no rational purpose from the employer’s standpoint, unless the continued employment of the whistleblower will be disruptive in other ways.”). Retaliation only increases the odds that the employee will take his complaint about the alleged unlawful conduct to enforcement authorities.

More to the point, however, Kasten ignores the equal and opposite perverse incentive underperforming employees would have under his proposed rule to begin grumbling about alleged violations of the law as soon as they see the writing on the wall, or to fabricate such allegations after the fact, for the purpose of bringing suit. See Hubbell, *supra*, at 117 (noting that “retaliatory discharge actions . . . give discharged employees reason to distort the actions of employers to bring their termination within the scope of retaliatory discharge law”). In fact, that is exactly what Kasten did in this case. Filing a complaint with a governmental authority or requiring a writing serves as an initial filter for screening legitimate claims from nonmeritorious ones.

A writing requirement also has other significant benefits. Chief among them is that a written complaint provides clear notice to the employer that the employee has an actual grievance as opposed to a mere question or an amorphous concern. Given the specter of criminal liability under § 215(a)(3), clear notice that an employee is engaged in protected conduct is not too much to ask. A writing also serves valuable evidentiary purposes. Determining whether an employee had an actual grievance or whether instead he simply engaged in the sort of “abstract grumbling” that all agree is not protected is much easier if the complaint is in writing. Cf. Pet. App. 71 (district court characterizing Kasten’s alleged complaints as “[a]t most . . . ‘abstract grumbling, or an ‘amorphous expression of discontent’”) (citations omitted). A writing also moots any issue as to the existence, timing, and content of the complaint, thereby avoiding he-said, she-said disputes and allowing the litigation to focus on the ultimate issue of the employer’s motivation. A writing requirement thus allows more claims to be resolved at earlier stages in litigation and decreases the incidence of error by factfinders.

Of course, protecting oral complaints to an employer may also have benefits, including some of those identified by Kasten and his *amici*. But that is ultimately beside the point. The point is that the appropriate scope of a cause of action for retaliation is fundamentally a legislative judgment involving the weighing of costs and benefits and inevitable tradeoffs—a judgment that Congress, with its greater access to information and political accountability for its policy choices, is better situated to make than are the courts.

Congress made that judgment when it enacted § 215(a)(3) and limited protection to employees who have “filed any complaint” or “instituted any proceeding” under or related to the Act. In so doing, Congress may well have sought “to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits.” Frank H. Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533, 541 (1983). If the courts reflexively “supply ‘more in the same vein,’ and mak[e] [their] share of errors, every one of them will carry the statute to where costs exceed benefits.” *Id.* Kasten’s policy arguments cannot justify expanding § 215(a)(3) beyond its plain terms.

II. THE SECRETARY OF LABOR AND EEOC’S POSITION IS NOT ENTITLED TO DEFERENCE.

1. After applying the ordinary tools of statutory interpretation, § 215(a)(3) is unambiguous: It does not protect oral complaints to an employer. Because “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); see also *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“[D]eference to [an agency’s] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”).

Even if § 215(a)(3) were ambiguous, however, the government’s interpretation still would not be entitled to deference. This Court has identified two prerequisites to *Chevron* deference: It is “warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules

carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)). Neither requirement is met here.

First, Congress has not delegated authority to the Secretary or EEOC to promulgate binding interpretations of § 215(a)(3). Although the Secretary has authority to issue regulations with respect to various matters under the FLSA, see § 203(l); § 206(a)(2); § 207(e)(3); § 211(c), (d); § 212(d); § 213(a), (e); § 214(a)–(d), Congress did not grant the Secretary either general authority to issue regulations interpreting the Act or specific authority to issue regulations interpreting § 215(a)(3). This is scarcely odd because the provision carries criminal sanctions, which is not normally a matter committed to administrative discretion. The government does not argue to the contrary, and it cites no provision granting either the Secretary or EEOC authority to issue regulations under § 215(a)(3). Cf. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (deferring to regulation issued pursuant to specific grant of authority under § 213(a)(15)).

Nor did Congress grant the Secretary or EEOC authority to adjudicate claims under § 215(a)(3). As this Court has explained, the FLSA does not provide “a preliminary administrative process for determining whether the particular situation is within the regulated area,” and therefore “puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations.” *Kirschbaum*, 316 U.S. at 523; see also *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 604 (1944)

(Frankfurter, J., concurring) (“An administrative agency for preliminary adjudication of issues arising under the Wages and Hours Law, like that established by the National Labor Relations Act, was not provided by Congress.”). The government’s assertion that the Secretary has authoritatively construed § 215(a)(3) “through administrative adjudication,” U.S. Br. 16 n.6, is simply wrong.

The only authority either the Secretary or EEOC has with respect to § 215(a)(3) is the power to bring an enforcement action, *i.e.*, to sue for an injunction under § 217. See *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 214 (1959) (“[T]he injunction is the only effective device available to the Secretary when coverage is in doubt and he wishes to establish the availability of the Act to employees not theretofore afforded its protections.”). Although the Secretary and EEOC of course must interpret § 215(a)(3) in deciding whether to bring an enforcement action, such interpretations do not receive *Chevron* deference. See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (interpretations “contained in . . . enforcement guidelines . . . lack the force of law” and “do not warrant *Chevron*-style deference”); cf. *Gonzales*, 546 U.S. at 264 (“[T]he Attorney General must . . . surely evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference.”).

Second, even if Congress had granted the Secretary or EEOC authority to issue binding interpretations of § 215(a)(3), the interpretation they advance here was not promulgated in the exercise of that authority. The government identifies no Department of Labor rule, regulation, order, or even policy statement or guideline reflecting the Secretary’s position. Instead, it cites a few appellate briefs and two enforcement

actions—both of which involved complaints to an employer in the context of formal administrative proceedings.²⁹ The Secretary’s position is thus solely a litigation position, and as such is not entitled to deference. See *Smiley v. Citibank*, 517 U.S. 735, 741 (1996).³⁰ And the EEOC’s position is set forth only in its compliance manual, which this Court has repeatedly held does not receive *Chevron* deference. *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 n.9 (2003); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110–11 n.6 (2002); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–57 (1991).

Because the Secretary and EEOC neither possess nor have exercised any power to issue binding interpretations of § 215(a)(3), their plea for *Chevron* deference is not credible. Perhaps that is why the government did not ask for *Chevron* deference below. Pet. App. 59 (asking only for deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). And

²⁹ In *Brennan v. Maxey’s Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the complainant was discharged for protesting her employer’s attempt to skirt its agreement with the Department of Labor to pay back wages for violations discovered during a Department of Labor investigation. *Id.* at 180–81. And in *Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, the complainant was discharged because the Department of Labor had initiated an investigation and the complainant “had supported this proceeding and insisted upon prompt payment of back wages due him under the Act.” *Id.* at 40,986.

³⁰ The government cites *Long Island Care at Home, Ltd. v. Coke* and *Auer v. Robbins*, 519 U.S. 452 (1997), for the proposition that an agency interpretation advanced in a brief receives deference. Both cases involved an agency’s interpretation of *its own regulations*, not, as here, an agency’s interpretation of the statute itself. *Long Island Care*, 551 U.S. at 171; *Auer*, 519 U.S. at 462–63.

perhaps that is why Kasten himself invokes only *Skidmore*. Pet. Br. 64.

2. For these reasons, the most the Secretary and EEOC could possibly claim for their position is *Skidmore* deference. But they are not entitled to that either. *Skidmore* deference applies only when the agency’s interpretation has “power to persuade, if lacking power to control.” 323 U.S. at 140. And for all the reasons outlined above, the government’s position is not a persuasive interpretation of § 215(a)(3). Because the government’s interpretation is “clearly wrong,” this Court need “neither defer nor settle on any degree of deference.” *Gen. Dynamics*, 540 U.S. at 600; see also *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2371 (2008) (declining to give *Skidmore* deference to unpersuasive agency position); *Gonzales*, 546 U.S. at 269 (same); *Christensen*, 529 U.S. at 587 (same); *Arabian Am. Oil*, 499 U.S. at 257–58 (same).

Deference is particularly unwarranted here because the question presented is a straightforward issue of statutory interpretation, not a complex or technical issue calling for an exercise of agency expertise. Cf. *Mead*, 533 U.S. at 235 (“There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions presented in this case.”). Nothing in the Secretary’s or EEOC’s statutory mandate or regulatory experience renders them uniquely qualified to say what the phrase “filed any complaint” means.

Finally, as discussed above, this case involves a criminal statute. When a criminal statute is ambiguous and an agency adopts a broad interpretation, principles of agency deference collide with the rule of lenity, which ordinarily requires ambiguity in a criminal statute to be construed narrowly. Although

this Court has not addressed whether the rule of lenity trumps agency deference as a general matter,³¹ it has held that canons of statutory construction—of which the rule of lenity is a cardinal one—precede agency deference in resolving facial ambiguities. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (canon of constitutional avoidance displaces agency deference); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (canon against “federal encroachment upon a traditional state power” displaces agency deference).

This approach makes sense. The government’s interpretation of criminal statutes traditionally receives skepticism, not deference. “Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts.” *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998); see also *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (Starr, J.) (lenity renders interpretation of statute of limitations “far outside *Chevron* territory”). At a minimum, an agency position adopting the broadest possible interpretation of a criminal statute without any apparent consideration of the rule of lenity or the values it embodies is seriously flawed and lacks power to persuade.

³¹ This Court has stated that “some degree of deference” is owed to an agency’s reasonable interpretation of a criminal statute when Congress has given the agency “latitude . . . in enforcing the statute,” a high “degree of regulatory expertise [is] necessary to its enforcement,” and the agency’s interpretation is embodied in a longstanding regulation. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 & n.18 (1995). None of these conditions obtains here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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