# No. 12-4521

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DARNELL GREATHOUSE,
PLAINTIFF-APPELLANT,

v.

JHS SECURITY, INC. and MELVIN WILCOX,
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE ACTING SECRETARY OF LABOR
AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT
AND URGING REVERSAL OF THE DISTRICT COURT

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Acting Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the employee in this Fair Labor Standards Act ("FLSA" or "the Act") case. The federal statutory issue presented in this case is identical to the issue presented in *Neviaser v. Mazel Tec, Inc.*, No. 12-3948, a case pending before this Court in which the Secretary filed an amicus brief on January 15, 2013.

## STATEMENT OF THE INTEREST OF *AMICUS CURIAE* AND HIS AUTHORITY TO FILE A BRIEF IN THIS CASE

The Secretary, who administers and enforces the FLSA's wage and hour protections, *see* 29 U.S.C. 204(a), (b); 216(c); 217, has a substantial interest in

this case, which concerns how the Act's section 15(a)(3) anti-retaliation provision, 29 U.S.C. 215(a)(3) (prohibiting retaliation "because such employee has filed any complaint" related to the FLSA), should be interpreted. Specifically, the Secretary believes that the scope of protection afforded to employees' complaints of FLSA violations plays a critical role in achieving compliance with the workplace standards prescribed by the Act.

Federal Rule of Appellate Procedure 29(a) permits an agency of the United States to file an amicus brief without consent of the parties or leave of the court.

## STATEMENT OF THE ISSUE

Every other circuit addressing the scope of the section 15(a)(3) anti-retaliation provision has held that it protects employees who complain internally to their employers about FLSA violations. This interpretation is consistent with the Act's goal of eradicating substandard workplace conditions, and has long been the view of the Secretary. The issue here is whether, in light of a Supreme Court decision undermining the reasoning of this Court's decision denying such protection, this Court should now deem internal complaints to be protected.

## STATEMENT OF THE CASE

1. Darnell Greathouse was employed by JHS Security as a security guard from September 2006 to October 14, 2011, making $7.50 to $8.50 per hour for work performed on weekdays, and $16.50 per hour for work performed on

Saturdays or Sundays. *Greathouse v. JHS Security*, No. 11 Civ. 7845, 2012 WL 3871523, at * 2 (Mag. Rep.) (S.D.N.Y. Sept. 7, 2012).[1] He worked approximately 56 to 60 hours per week, but was never given additional compensation "beyond his ordinary rate of pay" when he worked in excess of 40 hours in a particular week. *Id.* For some weeks, Greathouse received no compensation at all for his work. *Id.* On October 14, 2011, Greathouse complained to Melvin Wilcox, the president and owner of JHS, that he had not received a paycheck in several months. *Id.* Wilcox responded, "I'll pay you when I feel like it," and then "pulled a gun on [Greathouse]." *Id.* After Wilcox pulled the gun, Greathouse left the premises immediately and "considered that to be the end of [his] employment with JHS." *Id.*

2. Greathouse filed a complaint in the District Court for the Southern District of New York on November 2, 2011, alleging various state and federal wage claims against JHS and Wilcox, including claims for overtime and unpaid wages. *Greathouse*, 2012 WL 3871523, at *1, *4-*5. One of Greathouse's contentions was that JHS violated the FLSA's anti-retaliation provision when the company effectively terminated him for making an FLSA-related complaint to the owner. *Id.* at *8. Because neither JHS nor Wilcox responded to his complaint, on March 15, 2012, the district court entered a default judgment in favor of

[1] These facts, which were derived from Greathouse's complaint, were set forth in a magistrate judge's report and were later adopted by the district court.

Greathouse. *Id.* at *1. A magistrate judge then conducted an inquiry to ascertain the amount of damages and issued a Report and Recommendation which, *inter alia*, denied damages for Greathouse's retaliation claim. *Id.* at *8.

3. In denying damages for retaliation, the magistrate judge pointed to this Court's decision in *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993), which he described as holding that a complaint to a supervisor, as opposed to one to a governmental authority, "cannot serve as the predicate for a [section 15(a)(3)] retaliation claim." *Greathouse*, 2012 WL 3871523, at *8. Because Greathouse's complaint was solely to a company official, the magistrate judge concluded that, under circuit precedent, it was not covered by section 15(a)(3) and therefore Greathouse could not be awarded damages for this claim. *Id.* The magistrate judge rejected the argument that the Supreme Court's decision in *Kasten v. Saint-Gobain Plastics*, 131 S. Ct. 1325 (2011), which held that oral complaints are protected by section 15(a)(3), had abrogated *Genesee Hospital*'s holding that internal complaints are not covered. *Id.* The magistrate judge noted several district court cases within the Second Circuit that held that *Genesee Hospital* remained good law on the question of intracompany complaints and was not abrogated by *Kasten*. *Id.* (citing *Duarte v. Tri–State Physical Med. & Rehab., P.C.*, 2012 WL 2847741, at *3 (S.D.N.Y. July 11, 2012); *Son v. Reina Bijoux, Inc.*, 823 F.Supp.2d 238, 244 (S.D.N.Y. 2011); *Neviaser v. Mazel Tec, Inc.*, 2012 WL

3028464, at *2 (D.Vt. July 25, 2012); *Ryder v.. Platon*, 2012 WL 2317772, at *7–8 (E.D.N.Y. June 19, 2012)).

On October 19, 2012, the district court adopted most of the magistrate judge's recommendations, including the ruling denying damages for the retaliation claim. *Greathouse v. JHS Security*, No. 11 Civ. 7845, 2012 WL 5185591, at *3 (S.D.N.Y. Oct. 19, 2012). Greathouse appealed to this Court the district court's ruling that section 15(a)(3) does not cover internal complaints.[2]

## SUMMARY OF THE ARGUMENT

In its *Genesee Hospital* decision, this Court reasoned that because section 15(a)(3), in contrast to Title VII's anti-retaliation provision, failed to state explicitly that complaints to one's employer – often referred to as internal complaints – were covered, the plain language of that section barred such an interpretation. *See* 10 F.3d at 55. Notably, every other circuit to have addressed this issue has reached the contrary conclusion that internal complaints are protected. And in 2011, the Supreme Court, in determining whether section 15(a)(3) protects oral complaints, declined to give weight to the fact that other statutes contain language more explicitly protective of oral complaints. *See Kasten*, 131 S. Ct. at 1332-33. Instead, *Kasten* engaged in a thorough analysis of

[2] Greathouse also argues in his appeal that the district court erred when it held that his state law retaliation claim for damages was not properly raised. This amicus brief does not address that issue.

the plain language of section 15(a)(3) and closely examined the Act's underlying policies to conclude that section 15(a)(3) should be read broadly. *Id.* at 1331-34. The intervening authority of *Kasten* calls into question this Court's earlier reliance on the language of Title VII, and warrants revisiting the *Genesee Hospital* decision. Indeed, when a subsequent Supreme Court decision casts doubt on a panel decision, this Court permits a three-judge panel to reverse the earlier panel's decision without the need for an *en banc* proceeding.

An analysis of section 15(a)(3) in light of *Kasten*, whether by means of panel or *en banc* review, compellingly shows that internal complaints should be protected. An interpretation of section 15(a)(3) that protects internal complaints is supported by the expansive plain language of the provision – which covers "*any* complaint," 29 U.S.C. 215(a)(3) (emphasis added) – as well as the Act's underlying policies, since compliance with its core protections depends on individual employees' ability to report violations to their supervisors.

## ARGUMENT

### I. IN LIGHT OF THE REASONING OF THE SUPREME COURT'S DECISION IN *KASTEN* AND THE DECISIONS OF EVERY OTHER CIRCUIT COURT TO HAVE ADDRESSED THE QUESTION, THIS COURT SHOULD REVISIT ITS RULING THAT INTERNAL COMPLAINTS ARE NOT COVERED UNDER SECTION 15(a)(3) OF THE FLSA

Section 15(a)(3) prohibits an employer from retaliating against an employee "because such employee has filed any complaint … under or related to" the FLSA.

The plain language of the provision and its underlying purpose compel a broad reading that protects internal complaints. Indeed, all the other circuits that have decided this issue have held that internal complaints are protected.[3]

Although this Court, in *Lambert v. Genesee Hospital*, held that internal complaints are not protected, 10 F.3d at 55, the Second Circuit permits a panel to reexamine the decision of a prior panel if an intervening Supreme Court decision has "cast doubt" on the earlier holding. *Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992). The Supreme Court in *Kasten* engaged in a probing analysis of section 15(a)(3) in concluding that oral complaints are protected; while it did not directly hold that internal complaints are covered, *see* 131 S. Ct. at 1336 ("we

[3] *See Minor v. Bostwick Laboratories*, 669 F.3d 428, 438 (4th Cir. 2012) (internal complaints are protected)*; Kasten v. Saint-Gobain Plastics*, 570 F.3d 834, 838 (7th Cir. 2009) (same), *rev'd on other grounds*, 131 S. Ct. 1325 (2011); *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008) (same); *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (*en banc*) (same); *Valerio v. Putnam Associates*, 173 F.3d 35, 43 (1st Cir. 1999) (same); *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992) (same); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (same); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (same); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (same). Although the Third Circuit has not directly ruled on this issue, it has construed the FLSA anti-retaliation provision broadly. *See Brock v. Richardson*, 812 F.2d 121, 124–25 (3d Cir. 1987) (holding that, because of the FLSA's remedial purpose, a retaliatory firing based on an employer's belief that an employee had filed a complaint with the government – even when he had not – was prohibited by section 15(a)(3)). District courts within the Third Circuit have accordingly held internal complaints to be protected. *See, e.g., Chennisi v. Communications Const. Group, LLC*, No. 04-4826, 2005 WL 387594, at *2 (E.D. Pa. 2005).

state no view on the merits of Saint–Gobain's alternative claim"), the Supreme Court's analysis in *Kasten* "casts doubt" on the Second Circuit's *Genesee Hospital* ruling that internal complaints are unprotected. As the Fourth Circuit recently determined, the reasoning of *Kasten* weighs in favor of the conclusion that internal complaints are protected. *See Minor*, 669 F.3d at 433 (finding *Kasten*'s "reasoning applicable to our analysis"). Thus, this panel is empowered to revisit and overrule *Genesee Hospital*. Alternatively, if this panel declines to overrule *Genesee Hospital*, we urge this Court to conduct an *en banc* review.

A. The Supreme Court's *Kasten* Decision Has Cast Doubt on the *Genesee Hospital* Holding; Thus, this Panel Should Overrule It.

1.a. The Second Circuit in *Genesee Hospital* dispensed with the argument that the FLSA's anti-retaliation language covers internal complaints by observing that, unlike Title VII, which has broad language that protects employees who "oppose[] any [unlawful employment] practice," 42 U.S.C. 2000e-3(a), the narrower language of section 15(a)(3) implies a more limited scope that includes "retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." 10 F.3d at 55.[4] The lone

[4] The Second Circuit acknowledged "that this issue was not presented to this court, and that the lower court assumed that informal complaints would be sufficient to state a claim under the EPA. However, we have discretion to consider and decide *sua sponte* a dispositive issue of law that, taking a plaintiff's factual allegations to be true, would prevent a plaintiff from recovering." *Genesee Hospital*, 10 F.3d at 56 (citations omitted).

authority *Genesee Hospital* cited for its plain language analysis was the Sixth Circuit *dissent* in *Romeo*, which relied on the fact that Title VII, unlike the FLSA, clearly affords protection for internal complaints, while the absence of such language in the FLSA suggests that such complaints are not covered by the Act. *See* 10 F.3d at 55 (citing *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 990 (6th Cir.1992) (Surheinrich, J., dissenting)).

But the Supreme Court in *Kasten*, in analyzing whether section 15(a)(3) of the FLSA protects oral complaints, rejected such reasoning. It noted, with respect to the oral complaint issue, that "[s]ome of this language [from other statutes' anti-retaliation provisions] is broader than the phrase before us, but, given the fact that the phrase before us lends itself linguistically to the broader 'oral' interpretation, the use of broader language elsewhere *may* mean (1) that Congress wanted to limit the scope of the phrase before us to writing, or (2) that Congress did not believe the different phraseology made a significant difference in this respect." 131 S. Ct. at 1333. In other words, the Supreme Court in a context analogous to this case concluded that, where the statutory language on its face could be read to establish that a complaint is protected, the mere fact that other statutes specify broader protection does not mean that Congress intended to leave such complaints unprotected. *Id.* Notably, in *Minor* the Fourth Circuit followed *Kasten* in determining that Congress' failure to amend the FLSA by adopting protective

language from Title VII was a "'poor indication'" of congressional intent with respect to whether the FLSA protects internal complaints. 669 F.3d at 436 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 440 (1988)).

Thus, the decision in *Kasten* calls the soundness of this Court's analysis in *Genesee Hospital* into doubt. Analyzing section 15(a)(3), the Supreme Court in *Kasten* eschewed reliance on other statutes' specific protection in interpreting the scope of the FLSA's anti-retaliation provision. It instead undertook an analysis of whether the plain language and policy considerations supported broad protection. *See generally* 131 S. Ct. at 1331-34; *id.* at 1332 ("[T]he phrase '*any* complaint' suggests a broad interpretation that would include an oral complaint."); *id.* at 1333 ("[A]n interpretation that limited the provision's coverage to written complaints would undermine the Act's basic objectives."). This Court in *Genesee Hospital* wrongly relied on Title VII's specific anti-retaliation language, and did not engage, as did the Supreme Court in *Kasten*, in either a thorough textual analysis or an analysis delving into the policy reasons underlying the FLSA's anti-retaliation provision. 10 F.3d at 55.

b. Moreover, although it did not so hold, the reasoning of the Supreme Court's *Kasten* decision supports the conclusion that internal complaints are protected. In determining that oral complaints under the FLSA are protected, the *Kasten* majority noted that "the phrase 'filed any complaint' contemplates some

degree of formality," because such formality is necessary to give an employer "fair notice" that a complaint about a violation of the Act is being asserted. 131 S. Ct. at 1334. The *Kasten* majority stated that to fall within the scope of the anti-retaliation provision, "a complaint must be sufficiently clear and detailed for a reasonable *employer* to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Id.* at 1335 (emphasis added). As the dissent pointed out, it would make little sense for the Supreme Court to even address the requisite level of formality needed to establish that one is asserting a statutory right unless one presumed internal complaints to be protected because "[f]iling a complaint with a judicial or administrative body is quite obviously an unambiguous assertion of one's rights." *See id.* at 1341 (Scalia, J., dissenting). The *Kasten* dissent concluded: "While claiming that it remains an open question whether intracompany complaints are covered, the opinion adopts a test for 'filed any complaint' that assumes a 'yes' answer." *Id.*; *cf. Minor*, 669 F.3d at 433 ("Notwithstanding the dissent's argument, we take the *Kasten* majority at its word. Therefore, although we find much of its reasoning applicable to our analysis, *Kasten* did not settle the question of whether intracompany company complaints are protected activity within the meaning of § 215(a)(3), and

consequently does not directly control the outcome of this case.").[5]

2. This Court permits a panel to overrule a prior panel decision based on a Supreme Court decision that casts doubt on the earlier opinion; indeed, on several occasions, a panel of the Second Circuit has overruled a prior panel's decision after determining that the Supreme Court had cast doubt on the prior ruling. In *Finkel v. Stratton Corp.*, a panel of this Court overruled a prior panel, stating that the general rule that "one panel of this court may not overrule the decision of a prior panel … does not apply where an intervening Supreme Court decision casts doubt on the prior ruling." 962 F.2d at 174-75 (citing *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786, 788 (2d Cir.1980), *aff'd*, 456 U.S. 461 (1982); *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir.1979)); *see Union of Needletrades, Indus. & Textile Employees v. U.S. I.N.S.*, 336 F.3d 200, 210 (2d Cir. 2003) (reiterating the "casts-doubt" rule and holding that the "reasoning [of an intervening Supreme Court decision was] sufficiently broad to support" overruling a prior panel); *Taylor v. Vt. Dept. of Educ.*, 313 F.3d 768, 782 (2d Cir. 2002) (overruling prior panel where Supreme Court called "continuing validity [of the precedent] into question"); *cf. Gelman v. Ashcroft*, 372 F.3d 495, 499 (2d Cir. 2004) (observing that panel can overrule precedent when Supreme Court decision casts doubt on it, but declining to

[5] The decision in *Minor* on this point is not in any way inconsistent with the "casting doubt" argument being advanced here: although it found that *Kasten* was not controlling, it found the *Kasten* majority's reasoning to be highly persuasive. *Minor*, 669 F.3d at 433.

do so where this Court had already affirmed the earlier precedent *after* the Supreme Court decision that supposedly cast it into doubt). Significantly, "[t]he intervening [Supreme Court] decision need not address the precise issue decided by the panel for this exception to apply." *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (citing *Wojchowski v. Daines*, 498 F.3d 99, 106 (2d Cir. 2007)); *see Rich v. Maranville*, 369 F.3d 83, 89 (2d Cir. 2004) ("[A]lthough [the Supreme Court's decision in] *Johnson* dealt only with supervised release, its logic extends to special parole as well.").[6]

None of the Supreme Court cases at issue in these decisions explicitly overruled the earlier Second Circuit decision, but in nearly every case the Supreme Court decision either rebutted an important premise of the earlier Second Circuit decision or dictated a different step in the analysis that the court had previously missed.[7] Because the Supreme Court's decision in *Kasten* reveals that the Second Circuit's analysis in *Genesee Hospital* as to whether section 15(a)(3) protects

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[6] A Second Circuit panel that seeks to overturn a prior panel's ruling routinely ensures that all judges are aware of, and do not object to, the overruling of the precedent. *See Taylor*, 313 F.3d at 786 n.13; *Finkel*, 962 F.2d at 175 n.1.

[7] For example, in *Finkel*, the Second Circuit reconsidered its previous holding that a fraud provision of the Securities Act conferred a private right of action. In finding a private right, it had relied in part on its conclusion that the provision contained a *scienter* requirement. But an intervening Supreme Court decision established there was no *scienter* requirement, and thus the case for a private right of action was weakened. *See* 962 F.2d at 174-75.

internal complaints is fundamentally flawed, review of that decision by a panel of this Court is warranted.[8]

B. *En Banc* Hearing Is Appropriate If the Panel Declines to Reverse *Genesee Hospital*.

Due to the stark circuit split (the nine other circuits to have addressed this issue are in accord that internal complaints are protected, and a tenth has strongly suggested that it would so hold, *see* n.2 *supra*), as well as the Supreme Court's decision in *Kasten* suggesting that *Genesee Hospital* was wrongly decided, this case presents a compelling basis for *en banc* review of the *Genesee Hospital* decision. *See* Fed. R. App. P. 35(b)(1)(B) (case may "present[] a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue").

Thus, if the panel declines to overrule *Genesee Hospital*, this Court should grant *en banc* review if Greathouse petitions for an *en banc* hearing. *See* Fed. R. App. P. 35(b), (c). Or, in the absence of such a request, the panel should consider

[8] Notably, the Second Circuit, in determining whether a panel can overrule a prior panel, considers how other courts of appeals have construed the Supreme Court decision at issue. *See Finkel*, 962 F.2d at 175. In its post-*Kasten* decision, the Fourth Circuit in *Minor* held that, although *Kasten* did not directly hold that internal complaints were protected, *Kasten*'s reasoning nonetheless led to that very conclusion. *See* 669 F.3d at 433 (observing that court "f[ound] much of [*Kasten*'s] reasoning applicable to our analysis").

exercising its discretion to urge that the full Court conduct *en banc* review. *Cf.* Fed. R. App. P. 35 advisory committee's note (pointing out that Rule "does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*"); *Hayden v. Pataki*, 449 F.3d 305, 370 (2d Cir. 2006) (court, on its own initiative, consolidated case with similar case already pending before *en banc* court).

## II. SECTION 15(a)(3) PROTECTS AN EMPLOYEE WHO FILES A COMPLAINT WITH HIS OR HER EMPLOYER ALLEGING VIOLATIONS OF THE ACT

Whether it is this panel or the *en banc* court that revisits *Genesee Hospital*, there are compelling reasons for this Court to reverse that decision and hold internal complaints protected. A plain language analysis of "any complaint" reveals that the term includes internal complaints. At minimum, the plain language of section 15(a)(3) does not exclude internal complaints and, if the plain language is not deemed conclusive, the underlying purposes of the FLSA compel an interpretation that protects those complaints.

### A. The Plain Language Is Broad in Scope and Encompasses Complaints to One's Employer.

When interpreting a statute, a court begins with the plain language. *See In re Caldor Corp.*, 303 F.3d 161, 168 (2d Cir. 2002) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.") (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Because section 15(a)(3) prohibits

retaliation against an employee who has filed "*any* complaint" (emphasis added), it necessarily affords protection for different types of complaints, including those that might be filed with an employer.[9]

The plain and ordinary meaning of "any" is "one or some indiscriminately of whatever kind." *Merriam-Webster Online Dictionary* (2011), available at http://www.merriam-webster.com; *see Random House College Dictionary* 61 (rev. ed. 1982) (defining "any" as "one or more without specification or identification," and as "every; all"); *cf. Kasten*, 131 S.Ct. at 1332 ("[T]he phrase '*any* complaint' suggests a broad interpretation that would include an oral complaint."). The modifier "any" thus points to the broadest possible construction of "complaint," a term which is defined to include "expression[s] of grief, pain and dissatisfaction." *Merriam-Webster Online Dictionary*; *see Random House College Dictionary* 274 (rev. ed. 1982) (defining "complaint" as an "expression of discontent, pain,

[9] The fact that the complaint must be "filed" does not suggest that its recipient must be a government entity. In the employment context, employees commonly "file" grievances and other protests with the employer. *See Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (*en banc*) ("[W]e are also convinced that the statutory term 'filed' includes the filing of complaints with employers. When drafting the language of § 215(a)(3), it is reasonable to assume that Congress was aware of the practice, in many union and non-union workplaces, of requiring employees to 'file' grievances and complaints with their union and/or employer before instituting any further internal or external proceedings. Given the widespread use of the term 'file' to include the filing of complaints with employers, it is therefore reasonable to assume that Congress intended that term as used in § 215(a)(3) to include the filing of such complaints.").

censure, grief, or the like"). These dictionary definitions are consistent with the colloquial usage of "any complaint" as encompassing a wide range of expressions of discontent. *See Caldor*, 303 F.3d at 168 ("We thus begin by inquiring whether the plain language of the statute, when given 'its ordinary, common meaning,'… is ambiguous.") (quoting *Tyler v. Douglas*, 280 F.3d 116, 122 (2d Cir. 2001)). Thus, expressions of discontent to one's employer are surely included within "any complaint." Indeed, nothing in the FLSA or the legislative history suggests that the complaint must be made externally to an administrative or judicial body in order to qualify for protection. Any such interpretation would read words into the provision that simply do not exist. Therefore, the broad phrase "any complaint" refutes a narrow construction of section 15(a)(3) that would limit the anti-retaliation provision to external complaints.

The fact that other statutes have used more explicit language to protect internal complaints is of no moment. As noted above, this Court in *Genesee Hospital* inferred that such language in Title VII indicates that internal complaints are unprotected under the FLSA. *See* 10 F.3d at 55 (citing *EEOC v. Romeo Community Sch.*, 976 F.2d at 990 (Surheinrich, J., dissenting)). But the Supreme Court found this very argument unpersuasive with respect to whether oral complaints are covered, stating that Congress may "not [have] believe[d] the different phraseology made a significant difference." *Kasten*, 131 S. Ct. at 1333.

*Kasten*'s reasoning holds true for the question whether internal complaints are protected. *See Minor*, 669 F.3d at 436 (finding comparison to Title VII anti-retaliation provision covering internal complaints to be unpersuasive because of the 25-year gulf between passage of the FLSA and Title VII). As the Ninth Circuit put it:

> [W]e disagree [with the Second Circuit's *Genesee Hospital* decision] that the breadth of Title VII's anti-retaliation provision dictates the construction we should give the FLSA provision. The FLSA was drafted some sixty-two years ago, at a time when statutes were far shorter and less detailed, and were written in more general and simpler terms. The fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA. In short, we find the view suggested by the defendants – that Congress' choice of words in 1964 can resolve the meaning of words chosen in 1937 – to be unpersuasive.

*Lambert v. Ackerley*, 180 F.3d 997, 1005 (9th Cir. 1999) (*en banc*) (footnote omitted).

The broad plain-language meaning of "any complaint" in section 15(a)(3) has been recognized by the courts. The Seventh Circuit held that the plain language of the statute indicates that internal, intracompany complaints are protected because "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" *Kasten v. Saint-Gobain Plastics*, 570 F.3d 834, 838 (7th Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 1325 (2011). The Ninth Circuit, in its *en banc* holding that employees

who complain to their employer about an alleged violation of the Act are protected, concluded that the word "complaint" is modified only by the word "any," and "[i]f 'any complaint' means 'any complaint,' then the provision extends to complaints made to employers." *Ackerley*, 180 F.3d at 1004. Although the Ninth Circuit acknowledged the possibility of differing interpretations, it concluded that a broad reading was most consistent with both the statutory language and the underlying policies of the FLSA. *Id.*; *cf. Valerio v. Putnam Associates*, 173 F.3d 35, 41-42 (1st Cir. 1999) (although the phrase "filed any complaint" is "susceptible to differ[ent] interpretations," "[t]he word 'any' embraces all types of complaints, including those that might be filed with an employer"; "[b]y failing to specify that the filing of any complaint need be with a court or an agency, and by using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest . . . conveyed to an employer"); *but see Minor*, 669 F.3d at 436 (noting that "[b]ecause we find that 'filed any complaint' is ambiguous as to whether intracompany complaints are protected activity under the FLSA, we must move to other interpretive tools," and ultimately holding internal complaints protected on policy grounds).

B. If the Statutory Language Alone Is Not Dispositive, the Policy Goals of Section 15(a)(3) Support a Reading that Covers Internal Complaints.

If the statutory language is deemed at all unclear, the FLSA's statutory purposes compel a conclusion that internal complaints are covered. The Supreme Court's decision in *Kasten* counsels that where the plain language does not yield an answer, one should determine what meaning will best allow the statute to function in accord with congressional intent. *See* 131 S. Ct. at 1333. As nearly all the courts of appeals have recognized, the remedial purposes of the FLSA strongly support interpreting the phrase "filed any complaint" broadly to include internal complaints. *See, e.g., Hagan v. Echostar Satellite, LLC,* 529 F.3d 617, 626 (5th Cir. 2008).

The Supreme Court has repeatedly recognized that Congress intended the FLSA to have broad reach in order to achieve its underlying remedial purpose of eliminating substandard working conditions for employees in covered industries. *See Kasten*, 131 S. Ct. at 1333; *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). The Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)); *see Chao v. Gotham*

*Registry, Inc*., 514 F.3d 280, 285 (2d Cir. 2008) (noting that "the Supreme Court consistently has interpreted the Act liberally and afforded its protections exceptionally broad coverage") (citations omitted).

The FLSA's anti-retaliation provision is especially critical to eliminating substandard working conditions and ensuring compliance with the substantive provisions of the FLSA, thereby providing strong justification for a broad reading of the provision. *See Kasten*, 131 S.Ct. at 1333 ("[A]n interpretation that limited the provision's coverage to written complaints would undermine the Act's basic objectives."). Given the great number of workplaces – far too many for the government to effectively oversee – achieving compliance with the FLSA depends on employees' vigilance and their willingness to divulge information about violations of the statute. *See Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960) ("[E]ffective enforcement could thus only be expected if employees felt free to approach officials with their grievances," as "detailed federal supervision or inspection of payrolls" is simply not feasible). Because one's employer, and not the government, is frequently the body to which concerned employees bring their complaints, protecting such internal complaints is essential to promoting widespread compliance with the Act. *Cf. Passaic Valley Sewerage Comm'rs v. U.S. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (noting, in the

context of whistleblower case arising under the Clean Water Act, that "normal route" is for employees to bring grievances to their employer).

Allowing employers to wield the threat of discharge or other economic reprisal would chill internal reporting of possible FLSA violations and foreclose an important avenue for securing compliance with the Act. *See DeMario Jewelry*, 361 U.S. at 292 ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *Ackerley*, 180 F.3d at 1004 ("'[N]arrow construction of the anti-retaliation provision could create an atmosphere of intimidation and defeat the Act's purpose.'") (quoting *Valerio*, 173 F.3d at 43); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) ("The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance.").

Therefore, any interpretation of section 15(a)(3) that fails to protect an employee who reports possible wage and hour violations to his or her employer eliminates an important compliance mechanism and should be rejected as contrary to the purposes of the FLSA. Congress' core objective in enacting the FLSA – the elimination of substandard working conditions – "is best served by a construction of § 215(a)(3) under which the filing of a relevant complaint with the employer no less than with a court or agency may give rise to a retaliation claim." *Valerio*, 173

F.3d at 43; *see Minor*, 669 F.3d at 437 ("[W]e conclude that an interpretation that limits § 215(a)(3)'s coverage to complaints made before an administrative or judicial body would overly circumscribe the reach of the anti-retaliation provision in contravention of the FLSA's remedial purpose."); *Ackerley*, 180 F.3d at 1004 ("'[T]he animating spirit of the Act is best served by a construction of § 215(a)(3) under which the filing of a relevant complaint with the employer no less than with a court or agency may give rise to a retaliation claim.'") (quoting *Valerio*, 173 F.3d at 43); *Hagan*, 529 F.3d at 626 (internal complaint constitutes protected activity under the FLSA's anti-retaliation clause "because it better captures the anti-retaliation goals of that section"); *White & Son*, 881 F.2d at 1011 ("By giving a broad construction to the anti-retaliation provision to include [informal complaints made to employers], its purpose will be further promoted."); *see also Moore v. Freeman*, 355 F.3d 558, 562 (6th Cir. 2004); *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206 (10th Cir. 2004); *Romeo Community Sch.*, 976 F.2d at 989; *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975). The fundamental purposes of the FLSA strongly favor a broad reading of section 15(a)(3) that covers internal complaints.[10]

[10] The courts, recognizing the importance in a remedial scheme of protecting workplace whistleblowers, have taken a broad view of anti-retaliation provisions in other statutes as well. *See Ackerley*, 180 F.3d at 1007 (noting that "federal

A broad interpretation of section 15(a)(3) is supported by other policy considerations as well. Protecting employees' internal complaints promotes early and informal resolution of pay disputes, which in turn decreases costs to employers and their employees. Thus, protecting employees' internal complaints promotes resolution without the need for drawn-out, contested litigation. Indeed, many FLSA claims involve relatively small amounts of money that could be settled informally without resort to litigation. Any interpretation that internal complaints are not protected may encourage employees to file a lawsuit as a first recourse in order to protect themselves from retaliation. *See Valerio*, 173 F.3d at 43 n.6. Congress clearly did not intend for this result when it passed the anti-retaliation provision of the FLSA.

Additionally, many employers affirmatively encourage their employees to report suspected violations internally. *Kasten*, in discussing that the employer must receive fair notice of an employee's complaint, noted that one policy

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courts have consistently construed anti-retaliation provisions analogous to the FLSA's as extending protection to complaints made by employees to their employers"). The Supreme Court held that the National Labor Relations Act's ("NLRA") anti-retaliation language – covering employees who have "filed charges or given testimony," 29 U.S.C. 158(a)(4) – "protect[s] workers who *neither* filed charges *nor* were 'called *formally* to testify' but simply 'participate[d] in a [National Labor Relations] Board investigation.'" *Kasten*, 131 S. Ct. at 1334 (quoting *NLRB v. Scrivener*, 405 U.S. 117, 123 (1972)). Recognizing the "similar enforcement needs" of the contemporaneously-enacted FLSA and NLRA, the Supreme Court looked at the FLSA anti-retaliation language through the same broad prism. *See Kasten*, 131 S. Ct. at 1334.

consideration in interpreting the anti-retaliation language is whether it promotes fairness to employers. *See* 131 S. Ct. at 1334 ("The Act also seeks to establish an enforcement system that is fair to employers."). Employers that want to hear from their employees about possible FLSA violations so that they can be resolved informally will surely welcome having a legal standard in place by which employees know they are legally protected when they invoke workplace rights to their supervisor.

Further, the interpretation that internal complaints are not protected creates a trap for unwary employees who comply with company procedures to report concerns internally only to find themselves facing retaliation for having complained to their employer rather than a governmental agency or court. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 904 (2007) (criticizing as "flawed" a statutory interpretation that "creat[es] legal distinctions that operate as traps for the unwary"). Indeed, such an interpretation would give "an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally," because the employee's conduct would be unprotected until such time as he or she registered the complaint with a government agency. *Valerio*, 173 F.3d at 43. This result is plainly contrary to congressional intent and the remedial purpose of the FLSA. Thus, if the statutory language of section 15(a)(3) is deemed ambiguous as to

whether it protects internal complaints, the policy reasons in favor of such protection argue for a broad reading of that section.

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

The long-held view of the Secretary that internal complaints are protected should be accorded weight here as well. The Supreme Court in *Kasten* gave a "degree of weight" to the Secretary's view that oral complaints were covered, based on the reasonableness of the view, its consistency with the statute, and the length of time to which it had been adhered. *See* 131 S. Ct. at 1335-36.

On the question of whether internal complaints are protected, the Secretary's view is similarly well-considered and long-held. *See Minor*, 669 F.3d at 439 ("[B]ecause the Secretary and the EEOC have consistently advanced this reasonable and thoroughly considered position [that internal complaints are protected], it 'add[s] force to our conclusion.'") (quoting *Kasten*, 131 S.Ct. at 1335); *see also*, *e.g.*, Br. for the United States as *Amicus Curiae*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834 (U.S. June 21, 2010); Br. for the Secretary of Labor and EEOC as *Amici Curiae*, *Minor v. Bostwick Laboratories, Inc.*, No. 10-1258 (4th Cir. June 23, 2011); Br. for the Secretary of Labor as *Amicus Curiae*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 08-2820

(7th Cir. Nov. 19, 2008); Br. for the Secretary of Labor as *Amicus Curiae*, *Lambert v. Ackerley*, Nos. 96-36017, 96-36266, and 96-36267 (9th Cir. Apr. 12, 1999).

## CONCLUSION

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

Respectfully submitted,

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

I certify that the foregoing brief complies with the type- volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). The brief contains 6,568 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief was prepared using Microsoft Office Word, 2003 edition.

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CERTIFICATE OF SERVICE

I certify on that on February 26, 2013, I electronically filed the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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I certify that all other participants in the case are registered CM/ECF users and that service will be accomplished to the other participants by the appellate CM/ECF system.

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