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 OF THE NATIONAL EMPLOYMENT LAW PROJECT, INTERFAITH WORKER JUSTICE, LEGAL AID SOCIETY, LEGAL MOMENTUM, NATIONAL DOMESTIC WORKERS ALLIANCE, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, RESTAURANT OPPORTUNITIES CENTER UNITED, TEXAS RIOGRANDE LEGAL AID, SOUTHERN POVERTY LAW CENTER, CALIFORNIA RURAL LEGAL ASSISTANCE, INC., UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AND THE EQUAL JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*[1]

The National Employment Law Project (NELP) is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. Protecting workers who have come forward to inquire or complain orally about workplace rights is a critical component to these protections. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act (FLSA), as well as other workplace laws.

Interfaith Worker Justice (IWJ) is a national organization that calls upon religious values to improve wages, benefits, and working conditions for workers by educating and organizing current and future religious leaders, interfaith groups, and worker centers. IWJ supports a network of more than 60 affiliates, including 27 worker centers. IWJ worker center members work in restaurants, manufacturing, construction, poultry processing, day labor, janitorial,

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[1] *Amici* have obtained written consent from all parties to file this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

retail, and other service industries. Approximately 80 percent of workers who come to the IWJ-affiliated worker centers report having been victims of wage theft. They are routinely threatened with termination or other discipline when they complain about pay or other conditions of work. Most of the worker centers' members are low-wage and immigrant workers who on their own would not file written complaints with their employers or with government agencies. They must be protected from retaliation for verbally asserting their rights.

The Legal Aid Society is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. The Society's Civil Practice operates offices in all five boroughs of New York City providing comprehensive legal assistance in housing, public assistance, and other areas of primary concern to low-income clients. The Society's Employment Law Project represents low-wage workers in employment-related matters such as unemployment insurance hearings, claims for unpaid wages, and claims of discrimination. The Project conducts litigation, outreach, and advocacy designed to assist the most vulnerable workers in New York City, among them, workers who have been terminated for complaining to supervisors about illegal workplace practices. Many of these clients do not read or write any language at more than a basic level.

Founded in 1970 as the NOW Legal Defense and Education Fund, Legal Momentum is the nation's oldest legal advocacy organization dedicated solely to

advancing the rights of women and girls. Since its inception, Legal Momentum has been at the forefront of litigation, policy development, and public education on issues related to women's equality and rights, including workplace rights. Legal Momentum advocates strong and vigorous enforcement of federal worker protection laws including the provisions protecting complaining workers against retaliation. Legal Momentum pays special attention to the protection of women who are vulnerable or marginalized, including low-wage workers, a disproportionate share of whom are women.

The National Domestic Workers Alliance (NDWA) is a national alliance of over 27 domestic worker groups in 17 cities across the country. NDWA endeavors to improve the working and living conditions of domestic workers through state legislative proposals and federal regulatory reform to establish core labor standards and stronger enforcement. Excluded from some of the most basic workplace protections, domestic workers are among the most vulnerable workers in the country, working in isolation and suffering egregious violations of the FLSA. Many domestic workers – and live-in ones in particular – are likely to complain orally to their employers. Limiting the anti-retaliation protection to those who file in writing would exclude an overwhelming number of domestic workers who are the most in need of such protection.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers

who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been treated illegally in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized.

Restaurant Opportunities Center United is a national restaurant workers' organization that seeks to improve the working conditions of restaurant workers through promoting national policies, conducting national research on the restaurant industry, and developing and providing training and technical assistance to restaurant worker centers. The restaurant industry is currently one of the largest private sector employers nationwide and one of the fastest growing industries in most regions across the country. Yet too many workers suffer from low wages, poor working conditions, and retaliation for asserting their rights to the minimum wage or overtime pay. When restaurant workers inquire or orally complain to their immediate supervisors regarding their wages or rates of pay, they are often retaliated against by being terminated or by having their hours significantly reduced. These workers, like many other workers in

the low-wage sector who come forward to complain to their employers orally, must be afforded protection under the FLSA.

Established in 1970, Texas RioGrande Legal Aid (TRLA) provides free civil legal assistance, including representation on employment claims, to the poor in a 68-county service area covering central, south, and west Texas. TRLA and its Southern Migrant Legal Services (SMLS) project in Nashville, Tennessee also represent migrant farm workers on employment matters who work or are based in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Tennessee, and Texas. The farm worker and other low-wage worker clients of TRLA and SMLS experience rampant retaliation for complaining about wage theft and other violations of their workplace rights. Many of these workers have difficulty making written complaints because they speak only Spanish or an indigenous language, are marginally literate at best in any language, or are foreign guest workers unfamiliar with the U.S. legal system.

The Southern Poverty Law Center has enforced civil rights protections since 1971, and its Immigrant Justice Project (IJP) has represented thousands of low-wage workers in wage claims across nine Southern states since 2004, collecting millions of dollars in unpaid wages. IJP's advocacy focuses on employers who routinely and flagrantly disregard relevant minimum wage, overtime, anti-discrimination, and other legal protections. IJP frequently reaches out to workers to inform them of basic rights under the FLSA

and similar employment statutes. IJP has encountered many workers afraid to join lawsuits, complain to state or federal agencies, consult with legal counsel about their workplace rights, or address their employers directly regarding known or suspected violations of the FLSA. A failure to protect workers in their informal or oral attempts to enforce the rule of law would render employment laws entirely meaningless. IJP joins this brief to protect the rights of its clients and other workers who, through necessity, fear, or desire to avoid litigation, protest FLSA violations without written complaints.

California Rural Legal Assistance, Inc. (CRLA) is a California not-for-profit corporation founded in 1966 to provide a wide range of free legal assistance and representation to low-income communities throughout rural California. CRLA provides legal services to the poor in 16 California counties, serving a poverty population of over 555,000 in a range of industries, including agriculture, landscaping, construction, janitorial, and service jobs. CRLA's lengthy experience enables it to understand and speak authoritatively to the characteristics of seasonal, short-term, low-wage employment, overwhelmingly offered through intermediary contractors, that are the core of California agricultural employment. Agricultural employment is also characterized by a widespread perception among workers that they are replaceable at the proverbial drop of a hat – a fear held nearly equally among authorized workers, those who are unauthorized immigrants, and U.S. citizens. Most of the workers seen

by CRLA have limited English or limited written literacy. Limiting anti-retaliation protections to situations where they can prepare and submit a written complaint will severely impair their ability and willingness to raise issues such as the failure to pay minimum wage and overtime.

United Food and Commercial Workers International Union (UFCW) represents more than 1.3 million workers in a variety of industries throughout the United States, including primarily the retail and meatpacking, food processing, and poultry industries. More than 250,000 members work in meatpacking and poultry. The UFCW supports broad enforcement of the FLSA through a comprehensive mechanism for initiating complaints as necessary to support the fulfillment of labor rights in the very diverse, complex, and stratified work environments of today.

The Equal Justice Center (EJC) is a non-profit employment justice organization with offices in Austin and San Antonio, Texas, specializing in promoting workplace fairness for low-income working men and women. The EJC, and its affiliated clinical educational program at the University of Texas Law School, provide legal services and employment rights assistance to help low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people throughout Texas in their efforts to recover unpaid wages and protect their rights under the FLSA. One of the most pernicious barriers that our clients face in trying to secure their FLSA wage protections is retaliation and threats of retaliation

against employees who voice complaints. Our clients are far more likely to approach their employer with a verbal complaint about wage violations than with a formal, written complaint. This is because a verbal complaint seems less confrontational, less risky, more conciliatory, and more likely to be successful in resolving the wage violation. Our clients have a vital interest in a decision by this Court reversing the Circuit Court's ruling below, which will otherwise seriously undermine their basic wage protections.

Amici submit this brief not to repeat the arguments made by the parties, but to bring our unique perspective of the realities of low-wage workers to this Court's attention and to urge the Court to consider the large number of workers in today's modern workplaces whose rights would be undermined by a narrow requirement that complaints be provided in writing in order for anti-retaliation protections to apply.

STATEMENT OF THE CASE

Petitioner seeks review of a June 29, 2009 decision by the Seventh Circuit Court of Appeals, which affirmed the dismissal of Petitioner's retaliation claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), holding that Petitioner's oral complaints were not protected activity under the Act's anti-retaliation provision because "FLSA's use of the phrase 'file any complaint' requires a plaintiff

employee to submit some sort of writing." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009). *Amici* submit this brief in support of the Petitioner.

SUMMARY OF THE ARGUMENT

As courts have long recognized, the purpose of the Fair Labor Standards Act's (FLSA) anti-retaliation provision in 29 U.S.C. § 215(a)(3) is to effectuate compliance by encouraging employees to report wage and hour violations. Workers already legitimately fear employer reprisals for making wage and hour complaints, and a narrow reading of the anti-retaliation provision will only heighten the chilling effect that keeps workers from asserting their rights under the statute. For a variety of reasons, including a hope or necessity of a quicker remedy through informal discussion, unfamiliarity with their rights and the ways to remedy violations, language and literacy limitations, and confusion about the proper person(s) to whom to complain, workers are likely to voice their concerns orally with their supervisor or employer. A rigid reading of the anti-retaliation provision of the FLSA leaves unprotected the kind of informal, internal complaints on which our nation's lowest paid workers in particular rely to assert their workplace rights.

Enforcement of the FLSA depends on employees coming forward to report violations of the law.

Research has shown that the overwhelming majority of wage and hour complaints in low-wage industries are made orally by workers to an employer or supervisor. These low-wage workers are the ones most in need of protection when they do inquire or complain about wage and hour matters. Excluding oral complaints from protection under § 215(a)(3) would discourage informal resolution of workplace inquiries or complaints, and would provide employers with a perverse incentive to retaliate against workers as soon as they orally object to a potential violation of their rights under the FLSA. It would also leave unprotected those workers in workplaces where the primary communication with employers is oral, including workplaces that are decentralized, dispersed, or paperless, or workplaces where workers face literacy barriers.

ARGUMENT

I. A NARROW READING OF SECTION 215(a)(3) THAT DOES NOT PROTECT ORAL COMPLAINTS WILL FRUSTRATE THE PURPOSES OF THE FLSA, WHICH RELIES ON INDIVIDUAL WORKER COMPLAINTS FOR ITS ENFORCEMENT.

The enforcement of the FLSA depends on individuals coming forward to report violations of the law. Workers, particularly low-wage workers, frequently communicate their complaints orally, and already justifiably fear retaliation when asserting their rights

under the Act. As courts have long recognized, § 215(a)(3) is the cornerstone for upholding FLSA's complaint-driven enforcement scheme. A rigid reading of this anti-retaliation provision to exclude oral complaints from protection would severely frustrate the FLSA's enforcement by deterring workers from speaking up, discouraging informal resolution of wage and hour disputes, and providing employers with a perverse incentive to retaliate against workers after they have made an oral complaint but before they have committed this complaint to writing.

A. Enforcement of the FLSA Depends on Individual Workers' Reports and Must Encourage and Protect Oral Complaints in Order to Prevent Violations.

As this Court recognized a half-century ago, "Congress did not seek to secure compliance with [the FLSA] 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." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S.Ct. 332, 335 (1960).

To trigger enforcement of the Act, workers may complain to their employer or to the U.S. Department of Labor (DOL). Worker complaints are virtually the only way that violations are brought to the attention of the DOL or the courts, because workers know what is happening in their workplaces and have an

incentive to come forward if something seems wrong. Most workers, and low-wage workers in particular, complain or inquire orally first. *See* discussion at Section III, *infra.* These oral inquiries and complaints must be encouraged and protected.

"For weighty practical and other reasons," *Mitchell*, 361 U.S. at 292, 80 S.Ct. at 335, the Wage and Hour Division (WHD) of the DOL relies heavily on worker complaints, as opposed to self-initiated inspections, in its enforcement of the FLSA. In recent reports, the U.S. Government Accountability Office found that 72 percent of the WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers,[2] and also found that the WHD often relies on *oral* communications with workers to receive complaints of violations.[3] The WHD

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[2] U.S. Gov't Accountability Office, GAO-08-962T, *Better Use of Available Resources and Consistent Reporting Could Improve Compliance* 7 (July 15, 2008). *See also* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 59-60 (2005) (finding that in 2004 complaint inspections constituted about 78 percent of all inspections undertaken by WHD, an increase from about 70 percent in the mid 1990's); U.S. Gov't Accountability Office, GAO-09-458T, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft* 1 (March 25, 2009) ("[C]onducting investigations based on complaints is WHD's first priority.").

[3] *Id*. at 18 (noting that wage theft victims may file complaints with WHD in writing, over the phone, or in person). The WHD also encourages workers to call them with questions or concerns about their workplace. Its website, on a page entitled

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needs help from workers unafraid to come forward in order to do its job. For a host of reasons, including lack of resources and an expansion of covered workplaces and laws to enforce, the likelihood of an affirmative investigation by the DOL not triggered by a worker complaint, even among low-wage workplaces with documented histories of wage and hour violations, is infinitesimal.[4]

"How to File a Complaint: General Information for Workers," explains that "[i]f you have questions or concerns, you can contact us at 1-866-487-9243." http://www.dol.gov/wecanhelp/howtofilecomplaint.htm. Under its "Frequently Asked Questions" section, the website explains that workers "can call or visit any Wage and Hour Office to ask about the laws or file a complaint. [They] can also call WHD's toll-free help line." http://www.dol.gov/wecanhelp/faq.htm. Similarly, a PowerPoint presentation available on the website explains that "[g]enerally complaints are submitted in person or by phone," and instructs workers to "[c]all the WHD toll-free information and helpline at 1-866-4US-WAGE (1-866-487-9243)." http://www.dol.gov/wecanhelp/presentation/1.htm

[4] Weil & Pyles, *supra* note 2, at 62 (the annual probability of receiving an inspection for one of the 7 million establishments covered by OSHA or FLSA is well below 0.001 percent); David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* 6 (June 2010), http://ssrn.com/abstract=1623390 (the annual probability of one of the top twenty fast food restaurants receiving an investigation is approximately 0.008). This near-total reliance on individual complaints may soon be reversed to some extent. On November 19, 2009, the DOL announced that the WHD would hire 250 new investigators, in part in order to pursue more effective affirmative targeted enforcement. U.S. Dep't of Labor, *Statement by US Secretary of Labor Hilda L. Solis on Wage and Hour Division's Increased Enforcement and Outreach Efforts* (Nov.

(Continued on following page)

In many workplaces, workers do not know how to contact the DOL or otherwise prepare and submit a written complaint to the DOL or to their employer. They may have limited literacy, have a low level of education, face language barriers, and have limited access to legal counsel or other means of finding out about their rights, as discussed *infra,* in Section III. When they do take action, their first step is likely to talk to a supervisor or their employer.

This means that worker complaints to employers are key to enforcement of the FLSA more generally. And because workers often raise questions and assert their wage and hour rights orally with their supervisor or employer – in low-wage industries, researchers have found that the overwhelming majority of workers (95.5 percent) make wage and hour complaints orally to an employer or supervisor – oral complaints and inquiries must be protected.[5]

Given the high percentage of workers making oral inquiries or complaints to their employers, an affirmation by this Court of the Seventh Circuit's decision would mean that employers would be permitted to lawfully terminate the majority of workers – low-wage workers in particular – who attempt to

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19, 2009), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm.

[5] Nat'l Employment Law Project, *How do Workers Make Complaints about Working Conditions? Finding from the 2008 Unregulated Work Survey*, June 14, 2010, *available at* http://www.nelp.org/page/-/Justice/2010/ComplaintMethodsFactSheet2010.pdf.

enforce their FLSA rights at their worksite. A rule that would leave these workers completely unprotected from retaliation would drastically undermine the enforcement of the FLSA.

B. Requiring Written Complaints Will Immunize Employers Engaging in Unlawful Retaliation.

The decision below immunizes employers whose workers voice complaints about wage and hour violations, and creates a perverse incentive for employers to retaliate against a complaining worker as soon as she makes an oral inquiry or complaint. If this Court were to adopt a rigid rule requiring written submissions, employers would be free to respond to an employee's oral question about or objection to pay practices with swift public termination to make an example of her, and could even make direct threats to her co-employees that they will be terminated if they also complain. Employers need not conceal their retaliatory motive under this rule – they can declare to an employee, in front of her coworkers, that she is being fired because she asked about her pay.

The incentive to thwart the law in this way, in addition to the real harm it inflicts on the complaining worker, frustrates the national interest in upholding the rights accorded under the FLSA. *See Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) (in FLSA actions, "[e]mployee suits to enforce their statutory rights benefit

the general public"). It also sends a powerful message to other employees in the workplace that they complain at their peril. *See Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 880 (2d Cir. 1980) (explaining that the retaliatory discharge of workers provides the employer with "the advantage of the fearful silence of the remaining employees. This silence, until broken by a judgment against the employer, provides the employer an opportunity for continued wrongdoing and strikes at the core of the complaint-based enforcement mechanism contemplated by the FLSA."). Even when there is a judgment against the employer on the underlying minimum wage or overtime violations, it often comes so late after the employer's retaliatory conduct that the damage is done. The message to the remaining employees is still a resounding "don't complain."

Because employees are usually the ones with the knowledge and incentive to report wage and hour violations, and because FLSA enforcement relies so heavily on their willingness to report these violations, the chilling effect of failing to protect oral complaints under § 215(a)(3), as discussed in Section II *infra*, would permit violations of core workplace standards to go unchecked.

C. Protecting Oral Complaints is Consistent With the Act's Purpose to Encourage Workers to Report Violations.

Congress passed the FLSA in order to eliminate abusive and exploitative labor conditions that adversely impact the "health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The "prime purpose" behind the statute's enactment was "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18, 65 S.Ct. 895, 902 n.18 (1945). Courts have long recognized the centrality of the anti-retaliation provision in protecting both the rights accorded under the FLSA and its complaint-driven enforcement scheme. *See*, *e.g., Darveau v. Detecon, Inc.*, 515 F.3d 334, 340 (8th Cir. 2008) ("The retaliation provision of the FLSA is a central component of the Act's complaint-based enforcement mechanism."); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (*en banc*) ("Construing the anti-retaliation provision to exclude from its protection all those employees who seek to obtain fair treatment and a remedy for a perceived violation of the Act from their employers would jeopardize the protection promised by the provision and discourage employees from asserting their rights."); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 135 (W.D.N.Y. 2003) ("It is well established that the anti-retaliation

provision is critical to the entire enforcement scheme of the federal wage and hour law.").

This Court has cautioned that the FLSA is a "remedial and humanitarian" statute that "must not be . . . applied in a narrow, grudging manner." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 703 (1944). Protecting internal, oral, complaints is fully consistent with the text of § 215(a)(3). *See* Brief for the Petitioner at 31-44. Consistent with the *Tennessee Coal* Court's directive, the FLSA and its anti-retaliation provision have been interpreted in an expansive manner. For example, courts have found the need to protect employees from retaliation so compelling that they encompass acts not explicitly mentioned in the statute. In *Brock v. Casey Truck Sales, Inc.*, the Second Circuit held that the FLSA protected employees' refusal to repudiate, in a "loyalty oath," the overtime pay due to them. 839 F.2d at 879. The Third Circuit held that § 215(a)(3) protected an employee who was fired because his employer mistakenly believed that he had filed a complaint with the DOL, and noted that "courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language . . . [and in] each of these instances, the employee's activities were considered necessary to the effective assertion of employees' rights under the Fair Labor Standards Act, and thus

entitled to protection." *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987).[6] These interpretations are consistent with the broad readings given to the FLSA. *See Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211, 79 S.Ct. 260, 264 (1959) ("[W]ithin the tests of coverage fashioned by Congress, the [FLSA] has been construed liberally to apply to the furthest reaches consistent with congressional direction.").

D. Workers' Oral Complaints Can Encourage Informal Resolution.

Amici's experiences and the reports noted *infra* show that employees make oral reports of workplace violations to their employers or supervisors for many reasons, including: (1) a hope for a quick resolution of their question or complaint through an informal discussion that would likely not result from their filing a written complaint; (2) a hope that an answer to their oral inquiry would not lead to a time-consuming government investigation or lawsuit; (3) a lack of familiarity with their rights and with government enforcement mechanisms; (4) literacy or language barriers, and (5) a belief that an employer who espouses

[6] *See also Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 563 (W.D. Mo. 1990) ("Other courts have interpreted § 215(a)(3) broadly and have not limited its protection to activities explicitly covered by its language."); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 58 (N.D. Ga. 1985) ("[The] plaintiff's contact with [the WHD], without her filing a complaint or testifying in any proceeding, was sufficient to trigger the protection of § 215(a)(3).").

an "open door policy" is sincere about wanting to learn of workers' concerns directly and orally before they are articulated in other ways.

Employers may also prefer the relative informality and efficiency of simple oral resolutions, and often enact policies to encourage workers to come forward with concerns in this way, as did the Respondents in this case. *See* Brief for the Petitioner at 5-7. Moreover, an employee's written complaint may "up the ante" – turning what should have been a simple question-and-answer interaction into a potentially adversarial action. Leaving workers unprotected in informal interactions creates incentives for them to simply remain quiet. Given these employee and employer inclinations and preferences, it makes little sense to discourage informal oral dispute resolution by leaving workers completely unprotected in those instances.

II. BECAUSE WORKERS ARE OFTEN FEARFUL OF RETALIATION, BROAD PROTECTIONS FOR ORAL COMPLAINTS ARE REQUIRED TO AVOID A CHILLING EFFECT.

Individual worker complaints about potential violations of the FLSA, either those received by an outside agency like the DOL or those received by an employer or supervisor, represent only a fraction of

workers who suffer from wage and hour violations.[7] Many more workers are deterred from speaking up about potential violations because they fear retaliation and other employer reprisals, or because they may not know or understand their rights under the statute. For this reason, the anti-retaliation provision of the FLSA is central to the enforcement of the statute, for "[p]lainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances . . . [for] it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell*, 361 U.S. at 292, 80 S.Ct. at 335.

This fear of retaliation for speaking up about workplace violations is well-established[8] and well-founded: the incidence of employer retaliation in response to workers' complaints is high. One survey found that 43 percent of the low-wage workers who complained about violations of workplace standards were retaliated against – including being fired, suspended, or threatened with cuts in their hours or

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[7] *See*, *e.g.*, Weil & Pyles, *supra* note 2, at 69 (noting that the incidence of workers complaining is exceedingly low – an average of less than 25 complaint cases for every 100,000 workers).

[8] *Id*. at 83 (noting studies suggesting that "despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights").

pay.[9] Among those workers who did not make a complaint, despite perceived violations, half said they feared they would be fired if they complained, and another 10 percent feared their wages or hours would be cut.[10]

News reports about wage and hour violations consistently cite workers' fear of retaliation, and document the negative repercussions among workers who do complain. In 2004, the New York Times reported the prevalence of employers across a number of industries forcing their employees to work "off-the-clock," and recounted workers' fear of coming forward to report these violations.[11] The report noted that workers who did complain "were weeded out and terminated."[12] Construction workers in Austin, Texas seeking to recover three weeks of unpaid wages

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[9] Bernhardt *et al.*, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 3 (September 2, 2009).

[10] *Id*.

[11] Steven Greenhouse, *Forced to Work Off the Clock, Some Fight Back*, N.Y. Times, Nov. 19, 2004 at A1 ("Although many employees fear retribution, a number of workers said they were now willing to talk because they were angry and involved in lawsuits seeking back pay. . . . Ms. Russel said she had considered, then ruled out, complaining to government officials, fearing retaliation by her bosses. 'I'm a single mom,' she said. 'I can't afford to be fired. I don't know if you've ever been in western New York, but it's the type of place where if you don't have a master's degree, all it is is Burger King or McDonald's jobs.' ").

[12] *Id.*

explained to a reporter that "there are many others who are owed money, but sometimes because of fear or because they don't want to lose time, they don't fight."[13]

Courts have recognized workers' fear of retaliation in a variety of FLSA cases, for example, citing such fear when preserving the anonymity of other witnesses. In *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282, 284 (5th Cir. 1987), *citing Wirtz v. Cont'l Fin & Loan Co. of W. End*, 326 F.2d 561, 564 (1964), the Fifth Circuit held that the Secretary of Labor did not have to comply with interrogatories seeking the identities of all individuals who provided the DOL with information in a wage and hour dispute, noting that "'[t]he purpose for allowing the informers privilege . . . is to make retaliation impossible.'"

Courts also recognize this fear when permitting workers to proceed with FLSA actions using pseudonyms. *See, e.g., Does I Thru XXIII* 214 F.3d at 1069 (district court abused its discretion in denying employees permission to proceed with their FLSA action anonymously where employees, garment workers on the island of Saipan, alleged that disclosure of their true identities would result in termination, deportation from Saipan, and arrest and imprisonment upon their return to China); *Javier v. Garcia-Botello*, 211

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[13] Jeremy Schwartz, *More Workers Seeing No Pay for Their Labor*, Austin-American Statesman, May 18, 2009 at A1.

F.R.D. 194 (W.D.N.Y. 2002) (motion to proceed anonymously in FLSA action granted where court found plaintiffs had a well-founded fear of retaliation by employers who had been charged with threats of violence and intimidation).[14]

Fear of retaliation has also been cited as a factor behind employees' unwillingness to opt into FLSA class action suits. *Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528, 538 (S.D. Tex. 2008) (low response rate by putative class members in FLSA class action did not justify decertification because "[i]ndividuals may have myriad reasons for not wishing to opt-in to a lawsuit against their employer ranging from fear of retaliation to sheer inertia . . . "); *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 267 (D. Conn. 2002) (noting that there was evidence that "potential class members failed to join the FLSA class action because they feared reprisal").[15]

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[14] Immigrant workers in particular face severe chilling effects when employers retaliate against them for standing up for their FLSA rights. In *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002), a district court held that an employee whose employer turned him into the then-INS the day after settling a claim for unpaid wages had stated a claim for retaliation under § 215(a)(3). *See also Flores v. Amigon d/b/a Flor Bakery*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (stating that an inquiry into immigration status in FLSA action would "effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation").

[15] *See also* Andrew Brunson, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 286 (2008).

In addition, in granting injunctive relief to remedy an employer's retaliatory conduct under the FLSA, courts have expressly recognized that such retaliatory conduct chills other employees from asserting their own rights. In *Bailey v. Gulf Coast Transportation, Inc.*, 280 F.3d 1333, 1336, 1337 n.6 (11th Cir. 2002), the court granted injunctive relief for violations of § 215(a)(3), explaining that an injunction would help effectuate the purpose of the anti-retaliation provision, where the plaintiffs had already declared that others "feared participating in the suit" because of the employer's retaliatory conduct and where one plaintiff "withdrew his Consent to Join form with the understanding that he would be reinstated if he pulled out of the lawsuit."

III. REQUIRING WRITTEN COMPLAINTS WILL EXCLUDE LARGE SEGMENTS OF TODAY'S WORKFORCE FROM PROTECTION UNDER SECTION 215(a)(3).

In a recent study, 95.5 percent of low-wage workers surveyed made wage and hour complaints orally to an employer or supervisor.[16] This is in part due to the characteristics of the modern workplace.

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[16] Nat'l Employment Law Project, *supra* note 5. When asked "how did you make [a] complaint," survey responses included "discussed the problem with supervisor or employer" (95.5 percent); "filed a complaint with an agency, like the Department of Labor or OSHA" (1.2 percent); "asked a lawyer, union representative, worker center, or other community group to complain

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The U.S. workforce is varied, with many workers in virtually all sectors of our economy working in decentralized jobs and complicated employment schemes. Many of these workplaces may not have protocols and procedures in place for workers to file written complaints. In many industries, workers primarily engage with their employers orally; particularly in workplaces where there are few, if any, documents exchanged between employers and employees. The U.S. workforce also has a large share of workers who face literacy limitations and language barriers. For all of these workers, a requirement that wage and hour complaints must be filed in writing would pose such significant hurdles that these workers would effectively be excluded from the FLSA's anti-retaliation protection.

A. Filing Written Complaints Would be Impractical for Workers Who Primarily Communicate With Their Employers Orally, Including Workers in Dispersed, Paperless or Contingent Jobs.

Many of today's workplaces, especially in industries with the largest projected job growth,[17] are

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to employer on your behalf" (2.0 percent); and "made oral complaint to supervisor, combined with at least one other form of complaint" (1.3 percent). *Id.*

[17] According to projections through 2018 from the Bureau of Labor Statistics, industries with the largest job growth include

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characterized by dispersed, contingent, and paperless jobs, where oral communication may be the only way that workers and their employers interact. In 2005, an estimated 31 percent of the U.S. workforce were contingent workers in temporary or subcontracted jobs, or were treated as independent contractors, with no clear employer responsible for compliance with

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construction, employment services, home health care, and services to buildings and dwellings and retail, and occupations with the greatest growth will include waiters and waitresses, construction laborers, truck drivers, carpenters, and security guards. Rose A. Woods, *Industry Output and Employment Projections to 2018*, Monthly Lab. Rev. 58 tbl.4 (November 2009); T. Alan Lacey and Benjamin Wright, *Occupational Employment Projections to 2018*, Monthly Lab. Rev. 93 tbl.5 (November 2009). Many of the jobs in high-growth industries have persistently high violations of wage and hour laws. Government and private studies from the past few years show that many of our fastest-growing jobs have appalling minimum wage and overtime compliance rates. *See*, *e.g.,* Restaurant Opportunities Ctr. of N.Y. & N.Y.C. Restaurant Indus. Coal., *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* 14 (Jan. 25, 2005) (a majority of restaurant workers in New York City reported experiencing violations of minimum wage or overtime laws); Wage and Hour Div., U.S. Dep't of Labor, *Nursing Home 2000 Compliance Survey Fact Sheet*, *available at* http://www.dol.gov/whd/healthcare/surveys/nursing2000.htm (60 percent of nursing homes are out of compliance). For more statistics and information on the numbers of workers in the growing job sectors, *see* Nat'l Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (2006), http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf.

wage and hour protections.[18] Many of these workers do not report to a central office and have virtually no daily contact with their employers. Most of their employers have no human resource departments and no systems for written complaints. Furthermore, workplaces with large concentrations of low-wage workers tend to have very little, if any, documents exchanged between employers and employees. Requiring workers in these workplaces to file written complaints would be unworkable, and would result in their exclusion from protection under § 215(a)(3).

In high-growth jobs like home health care, temporary staffing, construction, trucking, and security, workers' primary interaction with their employers is oral, making written complaints impractical. For example, home health care workers are often hired by an agency that places them in homes or other institutions.[19] Typically, assignments are given and received over the telephone.[20] Employees report directly

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[18] U.S. Gov't Accountability Office, GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Work Classification* 3 (July 2006). 31 percent of the workforce translates to about 42.6 million workers, according the U.S. GAO report on contingent workers.

[19] *See*, *e.g.*, *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988); *Vaicaitiene v. Partners in Care, Inc.,* No. 04 Civ. 9125, 2005 WL 1593053 (S.D.N.Y. July 6, 2005); *People ex rel. Dept. of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d 10, 790 N.E.2d 38 (2003).

[20] *See, e.g., Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2008 WL 2944661, at *5 (M.D. Tenn. July 31, 2008) (noting that licensed practical nurses, after being placed on an

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to their assigned job sites, where they work with disabled and elderly individuals for months with little or no in-person contact with their agency employer.[21] While many agencies conduct site visits to the employees' job sites, the purpose of these visits is typically to check on the health status of the house-bound client, usually take place only once or twice a month, and are often conducted by other staff employed by the agency when the employee is not present.[22]

Similarly, construction workers, security guards, and truck drivers would find it difficult to submit written complaints, for all of these jobs entail being dispatched to various job sites or spending work time on the road, away from their employers' main offices and in locations where oral communication is the predominant way in which they interact with their supervisors and employers. Construction workers generally begin and end their work days at construction

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"active list," are then called by the agency when an assignment becomes available).

[21] *See, e.g., id.* at *6-7 ("[Licensed Practical Nurses] are not required to come into any of Defendants' offices, and rarely do so. Telecommunication from the clients' homes to Defendants' offices is thus paramount.").

[22] *See, e.g., Brock*, 840 F.2d at 1057 (noting that the referring agency conducted job site visits with nurses only once or twice a month); *MCC Home Health Care, Inc.*, 339 Ill. App. 3d at 14-15, 790 N.E.2d at 40 (noting that to ensure patient satisfaction, the referring agency conducted job sites visits when the assigned nurse was not present).

sites, rarely reporting to an employer's office.[23] Truck drivers have similar work days, where the bulk, if not all, of their work time is spent on the road driving from one location to another.[24] Drivers generally receive their assignments through radio dispatch services and often wait hours at ports and warehouses to pick up or drop off transported loads.[25] Security guards, many of whom work for employers who contract their services to businesses throughout a city, state, or region, are similarly dispatched to remote client sites, isolated from their co-workers, and rarely required to report to the employer's central office.[26]

In the jobs described above, and in many others, oral communication is the most practical and natural way for workers to communicate with their employers on any matter related to their work. This is particularly the case in situations where an immediate

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[23] *See, e.g., Quintanilla v. A & R Demolition, Inc.*, No. Civ.A. H-04-1965, 2005 WL 2095104 (S.D. Tex. Aug. 30, 2005). In *Quintanilla*, construction workers worked on construction sites in Houston while their employer's office headquarters was in Austin. As a result, their paychecks were delivered to them at their construction sites. *Id.* at *4.

[24] *See, e.g., Songer v. Dillon Resources, Inc.*, 636 F. Supp. 2d 516 (N.D. Tex. 2009).

[25] *Id.* at 520; David Bensman, *Stuck on the Low Road,* The American Prospect, Oct. 2009, *available at* http://www.prospect.org/cs/articles?article=stuck_on_the_road.

[26] *See, e.g.*, *McFarland v. Guardsmark*, 538 F. Supp. 2d 1209, 1210 (N.D. Cal. 2008); *Dice v. Weiser Sec. Servs. Inc.,* No. 06-61133, 2008 WL 269513, at *1-2 (S.D. Fla. Jan. 29, 2008).

response is necessary in order to prevent a FLSA violation. For example, in *Wilke v. Salamone*, 404 F. Supp. 2d 1040, 1043-44 (N.D. Ill. 2005), a group of carpenters working on a residential construction site alleged that their supervisor told them that they had to work on their day off "on their own time [or] he was going to terminate them." When the workers immediately protested, saying that they would not work for free, they were terminated. *Id.* at 1044. It would be illogical to require these workers – on a construction site, and not likely having pen and paper in hand – to stay silent until they found the opportunity to draft and hand over a written complaint, rather than raise their concerns on the spot in order to prevent a violation of their rights.[27] To require written communication in the first instance would leave these types of workers with an unappealing

[27] As the court noted in *Wilke*, "[i]f an employee has been told that he will not be paid, but nonetheless will be fired if he does not work, he need not work the hours, await his next deficient paycheck, and then complain, in order to have a retaliation claim in the event the employer makes good on that threat." 404 F. Supp. 2d at 1048. *See also Thomas v. S.E.A.L. Security, Inc.,* No. 04 Civ. 10248, 2007 WL 2446264, at *2 (S.D.N.Y. Aug. 30, 2007), where a security guard was orally instructed by his supervisor to relieve a co-worker before the official start of his shift, he immediately asked his supervisor whether he was going to be paid overtime for these additional hours. When his supervisor told the plaintiff that he should raise the issue with the director of his department, the plaintiff relieved his co-worker, accruing overtime hours. *Id.* The next day, the plaintiff received an official reprimand for being belligerent in his questioning. *Id.*

choice – quietly suffer a violation with no remedy, or complain orally to try to prevent a violation and thus become vulnerable to legally-permissible retaliation.

Finally, the rise of contingent structures in many jobs means that workers may be confused about who their employers are and may need to make preliminary oral inquiries before making a formal complaint in writing.[28] When employees work in environments where their rights under the FLSA are not posted, where they are told that they are not employees, and where they are paid in cash or with no records or explanations of their pay and hours, or the identity of their employer, their first recourse is often to approach their employers or supervisors orally with questions regarding their status, required wages, and rates of pay.

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[28] These complicated employment schemes are common. In *Itzep v. Target Corp.*, 543 F. Supp. 2d 646, 649 (W.D. Tex. 2008), janitors were hired by a contracting company to clean Target stores in Texas and worked under a complex employment sharing setting where both Target and the contracting company supervised their daily work. In *Flores v. Albertson's Inc.*, No. CV 01-0515, 2003 WL 24216269, at *3-4 (C.D. Cal. Dec. 9, 2003), janitors who were hired by subcontractors to provide janitorial services to three large supermarket companies throughout California were paid by the subcontractors while their day-to-day supervision came principally from the supermarkets. In these contingent structures, if workers have questions about whom to direct a complaint to, it is reasonable to expect them to first approach any of those who are supervising their work to ask for clarification.

For example, in *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 931-32 (D.S.C. 1997), a former employee of Grimes Aerospace returned to work at the company through a temporary staffing agency. The woman believed that she was both an employee of the company and of the temporary staffing agency and orally complained to the company when she did not receive proper overtime pay. Upon receiving this complaint, the company told her that the staffing agency only was responsible for paying her wages. *Id.* at 932. Oral inquiries like this one – where employees are seeking to clarify which entity is responsible for compliance with wage and hour requirements – are necessary as individuals seek to protect their rights under wage and hour laws. However, such inquiries would be unprotected from employer reprisal under the Seventh Circuit's decision.

B. Requiring Written Complaints Would be Largely Impossible for Workers Who Are Functionally Illiterate.

A written complaint requirement would pose a significant challenge for workers who are functionally illiterate – a surprisingly large share of the U.S. workforce. For these workers, a requirement that they write out their objections, when they are unable to do so, will leave them unprotected from retaliatory conduct.

Adult illiteracy impacts a significant number of workers. A study by the Department of Education

found that 14 percent of people 16 and older had "below basic prose" literacy skills.[29] In four of the five boroughs of New York City, at least a quarter of adults are functionally illiterate, meaning that they are unable to perform tasks such as filling out a form or reading medical instructions.[30] Literacy problems are especially acute among low-wage workers. Results from the National Adult Literacy Survey found that just over 40 percent of the labor force scored at the two lowest levels of literacy proficiency, and that, on average, less literate workers were concentrated in low-wage industries like service, laborer, helper, cleaner, agriculture, forestry, and fishing.[31]

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[29] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *A First Look at the Literacy of America's Adults in the 21st Century* 4-5 (December 15, 2005), *available at* http://nces.ed.gov/NAAL/PDF/2006470.PDF (finding that "below basic prose" literacy skills defined as ranging from being completely nonliterate in English to being able to locate easily identifiable information in short, commonplace, prose texts).

[30] David Jason Fischer & Jeremy Reiss, Ctr. for an Urban Future and Community Serv. Soc'y, *Closing the Skills Gap: A Blueprint for Preparing New York City's Workforce to Meet the Evolving Needs of Employers* 5 (January 2010), *available at* http://www.nycfuture.org/images_pdfs/pdfs/SkillsGap.pdf. Moreover, these adults may work in a variety of occupations. For example, a New York Times piece profiled a high school graduate who was functionally illiterate, yet had held jobs ranging from hospital candy striper, to payroll office employee, to day care worker. Leslie Kaufman, *Can't Read, Can't Write, Can Hide It*, N.Y. Times, October 31, 2004, Section 10.

[31] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Literacy in the Labor Force: Results from the National Adult Literacy*

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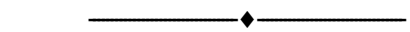
Workers who are functionally illiterate will be much less able to protest in writing – and may face the additional fear of alerting their employers that they are unable to read and write.[32] Immigrant workers in particular may also be precluded from filing a written complaint if their English writing skills are not adequate for the task.[33] Excluding oral complaints from retaliation protection would thus be completely impractical and unrealistic for the large number of workers with limited literacy or language barriers.



Survey xvi, 83 (September 1999), *available at* http://nces.ed.gov/pubs99/1999470.pdf.

[32] *See*, *e.g.,* Leslie Kaufman, *supra* note 29 (profiling a worker who explained that "I don't honestly know what [the employer would] do . . . but for me it is a dark secret and embarrassing. I am not comfortable with it and I will keep it confidential until I am").

[33] *See*, Urban Inst., *Immigrant Families and Workers: Facts and Perspectives* 3 (November 2003), *available at* http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf (46 percent of foreign-born workers are "Limited English Proficient").

CONCLUSION

This Court should reverse the Seventh Circuit's ruling and recognize that the FLSA's protection against retaliation includes employees who orally complain to a supervisor or employer about potential violations of their rights under the Act.

Respectfully submitted,

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