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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 09-834, Kasten v. Saint-Gobain
5 Performance Plastics Corporation.

6 Mr. Kaster.

7 ORAL ARGUMENT OF JAMES H. KASTER

8 ON BEHALF OF THE PETITIONER

9 MR. KASTER: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 When Kevin Kasten told his employer that the
12 location of the time clocks was illegal and that if they
13 were taken to the court they would lose, he filed any
14 complaint within the meaning of the 215(a)(3) under the
15 Fair Labor Standards Act, because filing includes an
16 oral communication, because "any" means any, which
17 includes formal or informal, written or unwritten
18 communications. And the words in the statute were
19 designed to have a broad construction under section 2 of
20 the statute 202 and under Mitchell v. DeMario and the
21 Tennessee Coal case.

22 I would like to begin with the Tennessee
23 Coal case, Tennessee Coal v. Muscoda. The Court
24 interpreted "work" in a broad fashion to include the
25 time in a mine when workers were moving from one place

1 to another, not actually engaged in physical labor.

2 In interpreting work that way, the Court
3 said that the act is not to be interpreted in a narrow,
4 grudging fashion.

5 JUSTICE ALITO: Let me give you this
6 example. Suppose a company has an established policy
7 that if you want to make a complaint, there's a
8 particular supervisor you should go to. And let's say
9 they say you can make this complaint in writing, you can
10 make it orally.

11 Now, there's -- something's going on in the
12 workplace and the supervisor happens to be walking by,
13 maybe a machine is broken, an employee has been hurt,
14 and an employee walks up to the supervisor who is
15 walking briskly by, taps the supervisor on the shoulder
16 and says the company is violating the Fair Labor
17 Standards Act because of the placement of a clock. You
18 said that filing has no formality requirement. Would
19 that be the filing of a complaint?

20 MR. KASTER: I think it would, Your Honor.
21 I don't think that the fact that the employer has a
22 policy that says you do it on Tuesday morning would
23 control what the statute says one way or the other, so I
24 think it would constitute a filing.

25 JUSTICE SOTOMAYOR: So you mean that if the

1 Government says you've got to file a complaint with us
2 by either calling us or submitting something in writing,
3 and at a cocktail party a worker goes up to a Government
4 employee in that agency, and says, you know, my company
5 is violating the law. That that's enough?

6 MR. KASTER: I don't -- you know, I don't
7 believe that that's -- in the context of a non-work
8 environment, Your Honor, I would note that, I don't know
9 exactly the answer to the Court's question, to be
10 honest.

11 JUSTICE SOTOMAYOR: The reason I'm asking
12 that question is related to Justice Alito's question,
13 which is, what does filing a complaint mean? Does it
14 have to be relative to the procedures adopted by the
15 person that you are reporting this to?

16 MR. KASTER: Filing means directing it to
17 somebody who can do something about it. And it doesn't
18 necessarily have to be.

19 JUSTICE SOTOMAYOR: Well, at a cocktail
20 party that employee may be there on personal time, but
21 when he goes back to work the next morning he could do
22 something. Is that enough?

23 MR. KASTER: Well, it may be. If it's
24 directed towards the responsible party, then it would be
25 filing a complaint. So it could occur outside of

1 work --

2 JUSTICE SOTOMAYOR: So what you are doing is
3 he is estopping the Government from saying, the only way
4 that you can file a complaint with us is to do it in
5 writing. We are now forcing the Government to adopt an
6 oral procedure even if it chose not to? Even if it
7 thought an oral procedure would create havoc, et cetera,
8 et cetera?

9 MR. KASTER: If the person is directing the
10 complaint to the Government and communicates that to the
11 responsible party who can do something about it, I think
12 that they are filing a complaint, Your Honor.

13 JUSTICE ALITO: It's one thing to say that
14 filing doesn't necessarily mean that something is
15 written, although that's usually what the word means,
16 isn't it?

17 MR. KASTER: It can often mean a written
18 communication.

19 JUSTICE ALITO: Are you filing your comments
20 right now?

21 MR. KASTER: I think I am, Your Honor.

22 JUSTICE ALITO: You are? Really?

23 MR. KASTER: I am directing them to the
24 Court.

25 JUSTICE ALITO: That's the ordinary usage of

1 the word. But to say that it includes no degree of
2 formality, that's your argument?

3 MR. KASTER: Well, Your Honor, I would say
4 there are no formal requirements for the filing.

5 JUSTICE ALITO: If that's the law and the
6 employee gets fired and the employee says, well, this
7 was done in retaliation for my having filed an FSLA
8 complaint three weeks ago, and the employer says what
9 complaint? We have no record of any such complaint and
10 the employee says, oh, yes, I said it orally to a
11 supervisor who was passing by and my buddy Joe was there
12 and he's going to corroborate this. So now we have a
13 trial about whether a complaint was filed?

14 MR. KASTER: You might have a trial, Your
15 Honor, depending on the circumstances. There might be
16 one. The thing is that that's no different from any
17 other retaliation case. They are trying to establish an
18 exception to the rule that retaliation occurs in verbal
19 forms. The communication, the underlying protective
20 conduct occurs in verbal forms all the time. They are
21 trying to establish the exception here. And I would
22 note that even under the National Labor Relations Act in
23 Scrivener, filing charges includes the verbal
24 communications that are antecedents, the predicates to
25 filing a charge.

1 JUSTICE ALITO: With whom?

2 MR. KASTER: With the responsible party who
3 can do something about it. I would note also, Your
4 Honor --

5 JUSTICE SCALIA: Well --

6 MR. KASTER: -- that Kevin Kasten doesn't
7 have an office. In terms of the formality of
8 communication, there is discussion about the fact that
9 this occurred in a hallway outside of the place where
10 they walked in and out of the factory. He doesn't have
11 an office. That's where he communicates with people.

12 JUSTICE BREYER: Why do you feel the need to
13 go beyond, say, what the AFL-CIO identifies as a normal
14 oral failing -- filing? They use language like, at the
15 initial stage of the grievance procedure, there is
16 confrontation with an eye to fact finding, and the
17 dispute is joined when the employee or the steward or
18 supervisor come face-to-face to identify, to discuss,
19 and hopefully to resolve a problem.

20 Now that's a formal kind of relationship.
21 It doesn't involve a cocktail party, and yet it is done
22 orally. And there is a tradition as to how that works.
23 But from you've said, I gather that you want to go well
24 beyond that and provide that cocktail parties -- perhaps
25 not cocktail parties, but just a tap on the shoulder

1 would be sufficient, where I take it that would normally
2 be sufficient in the grievance process.

3 MR. KASTER: The grievance process, Your
4 Honor, a grievance process is a formal process, and so I
5 wouldn't compare the average workplace --

6 JUSTICE BREYER: All right. Suppose I think
7 that that provides a good precedent for -- for oral
8 filings. What happens then? What am I supposed to do
9 in your case?

10 MR. KASTER: Your Honor, in the general
11 proposition we would be accepting of the Scrivener rule
12 that the Court adopted in the '70s, that is that the
13 filing of a charge includes those things that happened
14 orally prior to and around the time of the filing of the
15 charge. That's what this is about.

16 JUSTICE BREYER: Yes, we are talking about a
17 filing. In the grievance process -- I don't want to
18 repeat it, but it seems to me from having read the brief
19 that filing takes place without writing, provided that
20 there are these other safeguards which are described.

21 Now, I want to know in your opinion, is
22 there a reason for not importing that into this system?
23 I take it you win the case -- or maybe you lose it, I
24 don't know how it works on the fact. I don't know what
25 the filing was.

1 MR. KASTER: In terms of the formality of
2 requirements, the Court may adopt formal requirements.
3 The employer certainly did, Mr. Kasten followed those.
4 What I am looking at are the words of the statute that
5 cover normally --

6 JUSTICE BREYER: There is a word "filing" in
7 the AFL-CIO statute as well. So I am looking for a way
8 of interpreting the one in light of the other. Do you
9 favor that? Are you against that? If so, why or why
10 not?

11 MR. KASTER: In terms of the procedure that
12 they adopt, Your Honor, that may be an acceptable
13 procedure. The thing that I am looking at is the
14 statutory language in the case.

15 JUSTICE GINSBURG: And there wasn't -- he
16 didn't invoke the grievance procedure.

17 MR. KASTEN: He didn't --

18 JUSTICE GINSBURG: In this case, he didn't
19 invoke the grievance procedure.

20 MR. KASTER: That's correct, Your Honor.

21 JUSTICE GINSBURG: So that would keep you
22 out, if that were the test, that you have to formally
23 invoke the grievance procedure. But we are told that
24 every other time the word "file" is used in this Act,
25 Fair Labor Standards Act, it refers to a writing. And

1 so you are urging a meaning that deviates from the
2 standard meaning of the term in the very Act at issue.

3 MR. KASTER: I don't think I am doing that,
4 Your Honor, with all due respect.

5 JUSTICE GINSBURG: Is there another
6 provision where the word file is used to mean something
7 other than a writing.

8 MR. KASTER: It means, according to the
9 first enforcement action back in 1961, it means submit
10 or lodge, Your Honor. I would note that the defendant's
11 own policies use it to describe a verbal communication
12 by protecting against retaliation for somebody who has
13 filed a complaint for sexual harassment. They have used
14 it in a manner that -- as an example to obviously
15 include both verbal and written communications.

16 I would note there was a procedure in place
17 here, Your Honor, that was the policy manual. This --
18 there was no grievance procedure for Mr. Kasten. He did
19 not have a --

20 JUSTICE SCALIA: That's -- that's the
21 problem. I mean, you can talk about a grievance
22 procedure. I suppose there's always one in -- in
23 companies that -- that are unionized, but an awful lot
24 of companies aren't.

25 Your -- the -- the Respondent is -- is going

1 to argue that this statute doesn't apply to private
2 filings of complaints anyway, that it relates only to
3 the filing of a complaint with the government. And
4 that -- that's a new -- a new point in this case, and
5 normally I would not be disposed to consider it.

6 My problem is, I cannot decide on -- on the
7 question of whether filing means filing only in writing
8 or also includes verbal filing, without resolving that
9 other question. That is to say, if indeed the complaint
10 has to be quote, "filed" with the government, I'm
11 inclined to think that an oral complaint pursuant to
12 procedures established by the agency which permit an
13 oral complaint, even a complaint by telephone that would
14 be okay.

15 But my goodness, if it applies to private
16 employers as well including employers that have no
17 grievance procedures, including employers who have
18 employees who go to cocktail parties, I am -- I am very
19 disinclined to think that it -- that it could mean an
20 oral complaint in -- in that context.

21 MR. KASTER: Your Honor, I'm just looking at
22 the statutory language -- file "any complaint." It's
23 important -- the word "any" has a particular meaning. I
24 would not that if --

25 JUSTICE SOTOMAYOR: What does file -- what

1 is the meaning of "filed"?

2 MR. KASTER: It means to submit or lodge,
3 Your Honor.

4 JUSTICE SCALIA: So you are filing your
5 argument right now. Now come on, people don't talk like
6 that.

7 MR. KASTEN: I think --

8 JUSTICE SCALIA: That -- that -- that is
9 absurd. You are not filing an argument right now.
10 Nobody uses the language that way.

11 MR. KASTER: If I submit or lodge, that is
12 the -- and it's directed at a particular -- I have to be
13 asserting a statutory right.

14 JUSTICE KENNEDY: Well, I'd like to go
15 back to the question --

16 MR. KASTEN: I am not asserting --

17 JUSTICE KENNEDY: I would like to go back to
18 the question Justice Scalia filed just earlier.

19 (Laughter.)

20 JUSTICE KENNEDY: What -- what would you say
21 about his point that it seems to me had substantial
22 merit? It - it's really our determination -- our
23 interpretation of what filing means might well depend on
24 whether filing in -- or a complaint includes
25 intracompany complaints, the grumbling of an employee

1 and so forth; and I recognize this -- this argument
2 comes up late. Has it been addressed in any of the
3 other circuits?

4 MR. KASTER: Yes, Your Honor. There has
5 been -- a number of the circuits have interpreted this
6 statute and included -- the Ninth Circuit, the First
7 Circuit, the Tenth Circuit have all --

8 JUSTICE KENNEDY: All have said that
9 intracompany complaints --

10 MR. KASTER: Intracompany complaints; that
11 is true as well in the Sixth Circuit. And it's easier
12 to talk about the cases where that hasn't been true --
13 in Memphis Barbecue, the Fourth Circuit; in Genesee
14 Hospital, the Second Circuit. Memphis -- the Memphis
15 Barbecue case really addresses the testimonial clause.

16 Genesee Hospital is the only case in the
17 Second Circuit where they have held that all complaints
18 need to go to the Department of Labor. The one thing I
19 would say about that particular argument, Your Honor.
20 Is it makes superfluous instituted proceeding. It makes
21 superfluous instituted proceeding which -- or cause to
22 be instituted.

23 If you file a complaint -- it - then -- with
24 the Department of Labor, their argument is, and I think
25 it's true, that you institute a proceeding. So the

1 statute would be redundant, and "file any complaint"
2 would cover a null set.

3 JUSTICE SCALIA: I'm not sure that's true.
4 You -- you can complain orally to somebody at the Labor
5 Department who decides that the complaint isn't serious
6 enough to -- to warrant commencing a proceeding. I
7 mean, if you go in and insist, I -- you know, I want to
8 begin a proceeding, that's -- that's something else.
9 But you can file a complaint orally without -- without
10 doing that, it seems to me.

11 MR. KASTER: Well, Your Honor, if you have
12 made the phone call and started the process I think you
13 have instituted a proceeding. Now whether it gets -- at
14 what stage of formality it gets to, I'm not sure, Your
15 Honor, but I think you have begun the process of
16 instituting a proceeding or causing it to be instituted.
17 That's one. The other thing I --

18 JUSTICE SCALIA: Not if it's never
19 instituted. Not if it's never instituted. If no
20 proceeding is ever instituted, you can hardly be accused
21 of having caused a proceeding to be instituted.

22 MR. KASTEN: There's a --

23 JUSTICE SCALIA: So if you make an informal
24 complaint and it doesn't go any further, and they ask --
25 "You know, do you want to" -- "No, I don't want to start

1 a proceeding, but -- but this company is just, you know,
2 it's acting improperly, you guys ought to look into
3 that."

4 That's -- I'm 00 I'm prepared to say that's
5 filing a complaint, if you are only talking about filing
6 complaint with the government. But if you are talking
7 about oral filings of the complaints with employer, I am
8 very troubled.

9 MR. KASTER: Well, Your Honor, I'm going to
10 reserve the rest of my time for rebuttal.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Wall.

13 ORAL ARGUMENT OF JEFFREY B. WALL,
14 ON BEHALF OF THE UNITED STATES, AS
15 AMICUS CURIAE, SUPPORTING PETITIONER

16 MR. WALL: Mr. Chief Justice, and may it
17 please the Court:

18 A number of the Court's questions are
19 focusing on some of the practical difficulties here.
20 The Government wants to start by pointing out there are
21 a number of statutes, 20 or more, that have similar
22 anti-retaliation provisions. Most of those statutes
23 cover all the complaints, either because Congress has
24 said so in administering, agencies have said so or the
25 courts have said so. And the kind of practical

1 difficulties that the court is raising have not proven
2 unworkable under any statutory schemes.

3 The Respondent can't point to a single other
4 statute addressing these kinds -- this labor context
5 that has been narrowed -- excuse me -- to cover only
6 oral complaints. What we're --

7 JUSTICE SCALIA: This is one of the oldest,
8 though, isn't it.

9 MR. WALL: Yes. I mean, it --

10 JUSTICE SCALIA: Is it the very oldest? It
11 may well be the very oldest. You are talking about a
12 really old fogey Congress that -- that passed this
13 thing.

14 MR. WALL: Justice Scalia, it's not the
15 older. It was model on the NLRA, which is even older.
16 For instance, the NLRB has found that if, you know,
17 employees are complaining to each other, that they can't
18 be discharged under the NLRA's anti-retaliation
19 provision, or if an employee orally says to his
20 employer, I'm about to go to the Board and tell them you
21 are doing something unlawful, the Board has said you
22 can't be discharged.

23 JUSTICE SCALIA: What -- what is the
24 language in those statutes? All those statutes use the
25 language "file a complaint"?

1 MR. WALL: The language in the NLRA is "file
2 charges" or "give testimony." So, instead of filing a
3 complaint, it says "file charges." But the language in
4 many of these statutes, and they are cited in all of the
5 briefs, is extremely similar. They refer to filing
6 complaints or charges, instituting proceedings. As you
7 pointed --

8 JUSTICE GINSBURG: Are you -- you -- are you
9 urging that if you just tell a coworker, that that's
10 enough? I thought the whole idea is to give the
11 employer notice that something is amiss. So, how would
12 telling a coworker serve that purpose?

13 MR. WALL: It wouldn't under this particular
14 statute, Justice Ginsburg. I didn't mean to imply under
15 the FLSA. The FLSA anti-retaliation provision does not
16 have an opposing any practice clause in the way that
17 some civil rights statutes do like Title VII. So, it
18 does require submission of a complaint to an employer,
19 but that could take many forms.

20 And as you pointed out, Justice Scalia, in
21 this particular context, filing something orally makes
22 perfect sense. We are not -- we are talking about the
23 kinds of industries, truck drivers, coal miners and
24 migrant workers where that's a perfectly normal use of
25 speech. Oral communication --

1 JUSTICE BREYER: Yes. Fine. It's a
2 perfectly normal use of speech, I accept that. But what
3 is it that would surround this use of speech on a
4 particular occasion with enough formality that we know
5 it isn't something that could pass unnoticed and bring
6 in a whole lot of things like the cocktail party
7 example, et cetera?

8 I noticed there was a paragraph in the
9 AFL-CIO -- that's why I brought it up. Is that the
10 right standard? What we say here may take effect or
11 have influence, so -- so I want to say it correctly.
12 What kinds of oral complaints count as filing a
13 complaint?

14 MR. WALL: Justice Breyer, I don't think the
15 Government has any objection to that standard. Although
16 I do think --

17 JUSTICE BREYER: But I would like more than
18 that. The Government sees these statutes as a whole, so
19 I would like the Government's assistance on what words
20 to write to be able to get this right so it will not be
21 too formal, it will not be too informal, it will do the
22 job.

23 MR. WALL: I -- I think the kind of indicia
24 or formality you are talking about are signs that the
25 employer has submitted to his employer an assertion of

1 statutory rights under the FLSA. I think those are the
2 two things that the lower courts have consistently
3 looked to. And I think those indicia of formality are a
4 good sign that the employer has, but they are not the
5 only sign.

6 If I walk into the happy hour and I have
7 actually written down on a form that my employer
8 promulgates and I hand it off to my supervisor --

9 JUSTICE BREYER: All right. Now, fill in
10 this blank then, there must be surrounding the oral
11 complaint sufficient elements of formality such that --

12 MR. WALL: That the employer has -- the
13 employee has indicated to his employer, someone in
14 supervisory authority, that he is asserting statutory
15 rights under the FLSA.

16 CHIEF JUSTICE ROBERTS: So if he just says
17 to the employer, "You know, I think we ought to have a
18 little more time to put on our gear," is that an
19 assertion of statutory rights under the FLSA?

20 MR. WALL: Mr. Chief Justice, I think that's
21 a difficult question. I don't think it is presented
22 here, because this isn't a content case.

23 CHIEF JUSTICE ROBERTS: Yes, I know, but the
24 idea -- one of the objections to your position is that
25 it's going to be very hard to figure out in any

1 particular case what is a filing an oral complaint under
2 the FLSA, because one, it's got to be reconstructed,
3 unlike the situation where you had have a government
4 agency that's doing it, or you have a written complaint;
5 and second of all, it's -- it's unclear perhaps for the
6 employer to know that he's being charged with a
7 violation of the FLSA.

8 MR. WALL: But that question comes up in
9 every case, whether the complaint is written or oral to
10 the Government or an employer. If I write down --

11 CHIEF JUSTICE ROBERTS: Well, if it's
12 written -- if it's written, you have got a document that
13 people can look like -- look at, whether it's the NLRB
14 or a court, that -- that they can look at and say, yes,
15 this is a -- an assertion of a violation.

16 MR. WALL: If I write down on a form
17 promulgated by my employer I don't like where the time
18 clocks are or I think the time --

19 JUSTICE BREYER: But it's on a form. So we
20 have got that -- that helps a lot. Also an employer
21 could have a notice. Notice, if you really are upset
22 because you think there is a violation going here, go to
23 this microphone which is directly connected to the
24 complaint department and cite the statute. That would
25 work, too.

1 (Laughter.)

2 JUSTICE BREYER: But -- but there have been
3 years and years of -- you have just said, of statutes
4 like this, you say that many of them operate orally.
5 All right. What kind of thing, if you can help, maybe
6 you can't -- which is dangerous, but then we just try to
7 do our best, and we don't have the labor law experience
8 necessarily, but -- but what is the -- the form of words
9 that we can use to separate the wheat from the chaff?

10 MR. WALL: Justice Breyer, I'm sorry if --
11 if -- if it the formulation I have given you is not
12 helpful, but in -- in these statutes where either by
13 expressed language or regulation, so for instance, the
14 Surface Transportation Assistance Act, and ADA or OSHA,
15 the -- the language varies from regulation to
16 regulation. In some of them it says lodge complaints,
17 and some of them it says make a complaint. But what the
18 courts have --

19 JUSTICE BREYER: Let me see if I can look,
20 because in about 2 minutes you are going to hear, I
21 suspect and the other side, say see, see, we told you,
22 that's why you have to have it in writing.

23 MR. WALL: Again -- and agencies have put
24 these in writing, so at footnote 6 on page, I think it's
25 16 of the Government's brief, we have the OSHA

1 regulations. The STAA regulations appear at page, I
2 think it's 21 --

3 JUSTICE ALITO: It would really be helpful
4 if you could just give us the rule that you think should
5 apply. Is the rule -- your -- your -- Mr. Kaster's
6 argument seems to be anything goes, any oral
7 communication to a supervisor goes.

8 MR. WALL: I think --

9 JUSTICE ALITO: Let me go back to the
10 example I started out with. A worker has been hurt, a
11 supervisor is going to attend to the hurt worker, and an
12 employee says, the company is violating the FLSA. And
13 the supervisor says, don't tell me, and don't tell me
14 about it now. I'm doing something else. That's enough?

15 MR. WALL: I think the test, Justice Alito,
16 is whether the employee has submitted a complaint to his
17 employer that has put the employer on notice that that
18 employee is asserting statutory rights under the FLSA,
19 claiming that he is legally entitled to something he is
20 not receiving.

21 If the supervisor walks in the next morning
22 and says to his boss, yesterday morning while I was
23 attending to the plant accident, Joe told me that the
24 time clocks are in the wrong place. He's about to file.
25 I think we need to fire him, he's a troublemaker. That

1 employee has stated a claim to the FLSA.

2 CHIEF JUSTICE ROBERTS: Well, what if he
3 goes to the boss and says, boss, you ought to do
4 something, that railing is -- is pretty dangerous over
5 there.

6 MR. WALL: Again --

7 CHIEF JUSTICE ROBERTS: Is the boss supposed
8 to know, well, he is asserting statutory rights under
9 the FLSA?

10 MR. WALL: Mr. Chief Justice, I think there
11 probably not. The employee --

12 CHIEF JUSTICE ROBERTS: That would not be
13 filing a complaint?

14 MR. WALL: I mean, I think as a content
15 case, which it is not, it's unlikely that that is.
16 Saying that you don't like something or you think it is
17 unsafe is not actually saying you have are asserting a
18 right to have it differently. But those are content
19 cases. And here there is no question the Petitioner
20 asserted his statutory rights to a number of different
21 people at the company.

22 What Respondent is saying is he didn't do it
23 the right way. If he had done exactly what he did in
24 exactly the same words, but he had done it some other
25 way, then it would be covered. So, this is a form case.

1 JUSTICE GINSBURG: What did he do? What did
2 he do specifically? I mean, you are saying that -- that
3 the employer has to know that he is making a complaint
4 under the Act. So what -- and you said here are the
5 facts that was clear that he did.

6 MR. WALL: If you credit his allegations,
7 which you have to at this point, because the district
8 court granted summary judgment on a legal ground, what
9 Petitioner says he did is he went to his supervisor. He
10 said the time clocks are in the wrong place. We are not
11 getting paid for all of our time. And then he went up
12 the ladder to human resources personnel at the company,
13 and he said exactly the same thing, and he said I
14 thinking about challenging you on it in court, and if I
15 challenge you, you will lose.

16 Now, whatever the test is, that clearly
17 meets the bar for asserting statutory rights under the
18 FLSA. And I think what is important to not is that this
19 Court has consistently, from the 1940s on, both with
20 respect to the FLSA and anti-retaliation provisions more
21 generally in Title VII and other statutes, it has always
22 given them a broader reading to effectuate their
23 purposes.

24 CHIEF JUSTICE ROBERTS: Mr. Wall, I -- this
25 is just a factual. Were you saying that the employee

1 has to know that he is submitting a claim of statutory
2 violation or the employer?

3 MR. WALL: I think what the lower courts
4 have said, and I think this makes sense, is that the
5 question of whether a reasonable, objective person would
6 have understood the employee to have submitted a claim
7 complaint. So if the employee does everything he can to
8 put the employer on notice, it's not a defense for the
9 employer to say that subjectively he didn't understand
10 it to be a complaint.

11 JUSTICE KENNEDY: In those circuits where
12 they allow intercompany complaints that are oral, can
13 you give me any sense of how often this leads to claim
14 for retaliation? I mean, are they in the hundreds or.

15 MR. WALL: I can't, Justice Kennedy. All I
16 can tell you is that the vast majority of circuits have
17 found that intracompany complaints are protected and --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. WALL: Thank you.

20 Mr. Phillips?

21 ORAL ARGUMENT OF CARTER G. PHILLIPS

22 ON BEHALF OF THE RESPONDENT

23 MR. PHILLIPS: Thank you, Mr. Chief Justice,
24 and may it please the Court:

25 Justice Breyer, I will say to you what you

1 asked me to say, which is I believe if you get done
2 listening to my colleagues on the other side, it will be
3 quite clear that this is an inherently unworkable
4 standard that they asked us to adopt under these --

5 JUSTICE SOTOMAYOR: So why is it inherently
6 unworkable here in any greater extent that it is
7 unworkable in all of the other statutes where oral
8 complaints are permitted? What makes this worse than
9 these other statutes? What would create more cases in
10 this area as opposed to some of the other areas? Oral
11 complaints are explicitly --

12 MR. PHILLIPS: I don't know that it is
13 necessarily any worse in this particular context. I do
14 think what it suggests is that the Congress that looked
15 at this problem, which as Justice Scalia pointed out was
16 the 1938 Congress, and what that Congress was saying is
17 we are taking a very dramatic step. We are moving in
18 the direction of Federal regulation --

19 JUSTICE SOTOMAYOR: This is the -- this was
20 the Lochner era where they weren't even sure they could
21 do this. But why should we read their language with a
22 narrow reading of any complaint?

23 MR. PHILLIPS: Well, I think you have to
24 read their language as the way it was written and as the
25 way they would have understood it at the time, which was

1 to file any complaint, which as it would have been
2 understood in '38 and frankly after that, when you file
3 a complaint that usually entails some notion of
4 formality and when you put it in the context of a
5 specific provision where it is not only filing a
6 complaint, but institute any proceeding, caused any
7 proceeding to be instituted, justify any proceeding.

8 JUSTICE SOTOMAYOR: What grievance -- would
9 the bringing of a grievance, the example that
10 Justice Breyer suggested, an employee goes to his union
11 and says, they are violating the statute. Let's grieve
12 it. And according to the proceedings established by the
13 employer, they meet with the employer, and the employee
14 does everything in the grievance and they now fire that
15 employee. Under your reading, that's not instituting a
16 proceeding?

17 MR. PHILLIPS: No, because a proceeding is
18 understood and it's used consistently in the FLSA as an
19 official action by a government agency. So no, I don't
20 believe that is instituting a proceeding.

21 JUSTICE SOTOMAYOR: Then we have to address
22 your second question, not the first. You are saying the
23 oral wouldn't work in there?

24 MR. PHILLIPS: Right. The oral doesn't work
25 in that particular context.

1 JUSTICE SOTOMAYOR: Would it work if they
2 instituted a proceeding orally and the proceeding
3 required itself to start orally?

4 MR. PHILLIPS: I don't -- the truth is, if
5 the employer envisions in its mind that it is
6 instituting a proceeding, that's still not a proceeding
7 within the meaning of what Congress meant in 1938. It
8 had in mind an official action by a government agency.
9 And no private employer is ever going to institute a
10 proceeding within the meaning of that particular scheme.

11 You know, it's extremely important in the
12 context of this particular statute, and the one thing I
13 should have answered, Justice Sotomayor, to your
14 question is, what's different about this statute than
15 any other? This statute carries a criminal penalty with
16 it. And no other retaliation statute except for one --

17 JUSTICE GINSBURG: But there is a protection
18 built in, Mr. Phillips, it says it's criminal liability
19 only if it's willful. And on the civil side, the civil
20 liability under the Fair Labor Standards Act, you
21 certainly don't have to prove willful, you just prove a
22 violation.

23 MR. PHILLIPS: Right, but the reality is
24 that this Court held in the CIT case that the Court
25 would not construe this statute broadly in order to

1 expose people to potential criminal liabilities.

2 JUSTICE SCALIA: Wouldn't any retaliatory
3 action be willful? I mean, to say it's in retaliation
4 means you are firing this person because of the
5 complaint.

6 JUSTICE GINSBURG: The question is whether
7 the violation is willful. The willful qualification in
8 the criminal context is are you willfully denying your
9 workers the wages and hours the statute requires?

10 MR. PHILLIPS: Right.

11 JUSTICE GINSBURG: Nothing to do with
12 retaliation.

13 MR. PHILLIPS: No, I -- well, it does have
14 something to do with retaliation, but, Justice Ginsburg,
15 it seems to me it's all of a piece, though. Because the
16 reason why you can be comfortable with a willfulness
17 standard even which extends to conscious disregard
18 beyond the intent as well, but the reason why you can be
19 comfortable with that is if you look at the way the
20 statute is crafted in terms of the retaliation provision
21 itself, it speaks specifically to formal actions that
22 are taken, the filing of a complaint, the institution of
23 a proceeding.

24 JUSTICE GINSBURG: Do you know, how common
25 is it to have criminal prosecutions under this section

1 of the Fair Labor Standards Act?

2 MR. PHILLIPS: I don't believe -- I mean,
3 it's not a null set, but I don't believe it's a
4 particularly, I don't think it's a large number of
5 proceedings. But it seems to me, though, in trying to
6 understand what the Congress of 1938 would have done and
7 trying to understand why it would have approached this
8 in a narrow way, and why this provision is aimed not
9 generally to protect workers, but is aimed really to
10 make sure that information gets to the Federal
11 Government.

12 JUSTICE GINSBURG: I thought that the whole
13 idea of this statute is to protect the workers, and I
14 would like you to address particularly the amici's
15 point, that this statute in 1938 affected people -- many
16 were illiterate, they couldn't write a complaint, many
17 were immigrants who weren't familiar with the language,
18 for that universe of people, wouldn't Congress have
19 meant that all complaints are okay?

20 MR. PHILLIPS: Let me start by saying, first
21 of all, even if the FLSA has broadly a pro employee
22 protective purpose, it's still important to recognize
23 that the retaliation provision we are talking about here
24 specifically did not provide a cause of action, a
25 private cause of action until 1977. So that when

1 Congress enacted this statute in 1938, it didn't say boo
2 about allowing the employees to show up in court and to
3 assert their rights. This is not part of that
4 expansive, grant rights to the employee's portion of
5 this legislation.

6 And then second, Justice Ginsburg, with
7 respect to the specifics of what did Congress have in
8 mind, it seems to me the better way to evaluate this is
9 not did Congress have in mind a group of illiterate
10 employees or not, but what language did Congress use in
11 trying to formulate the specific provision that gives
12 rise to the protections against retaliation.

13 JUSTICE SCALIA: Your case would be a lot
14 easier if you didn't try to have it both ways, to say,
15 number one, it only applies to filing a complaint with
16 the Government. And number two, you say, it also only
17 applies to written complaints to the Government. I
18 mean, why don't you --

19 MR. PHILLIPS: I will take the former
20 argument, Your Honor.

21 JUSTICE SCALIA: Why don't you give a break
22 to the illiterate and let them file oral complaints with
23 the Government?

24 MR. PHILLIPS: Well, my guess is the truth
25 is they will be able to file oral complaints with the

1 Government because, the only thing that is left open is
2 the precise hypothetical you gave, Justice Scalia, where
3 you make an oral complaint and nothing gets instituted
4 in those circumstances. And it seems to me, clearly, in
5 the Federal Government's authority to simply adopt a
6 rule that says any time anybody makes an oral complaint
7 to us we will institute a proceeding. And if the agency
8 adopted that view, I don't think there is anything we
9 could do about it.

10 JUSTICE SCALIA: Suppose it says we won't
11 necessarily institute a proceeding, but we will regard
12 it as a complaint?

13 MR. PHILLIPS: I -- I mean, my own view is
14 the better way of reading -- that is a much closer case,
15 I will concede that, Justice Scalia. My own view is
16 that when you talking about file a complaint, that is
17 just not the way Congress ordinarily thinks about file a
18 complaint. File always has in mind written -- I'm
19 sorry.

20 CHIEF JUSTICE ROBERTS: Justice Scalia's
21 hypothetical, unless I am misremembering, I think, is
22 very common. For example, the EEOC, people often file
23 complaints and then the EEOC considers whether it's
24 going to institute a proceeding or not.

25 MR. PHILLIPS: Right. And I'm not

1 quarrelling with that. I mean, I understand that. And
2 the truth is, you know, I think for another day the
3 issue will arise and the Court can decide whether or not
4 a mere oral complaint to a government agency is
5 sufficient to file a complaint within the meaning of
6 this statute.

7 I do think it is fundamentally important for
8 this Court to decide the underlying question of whether
9 oral complaints are sufficient only in the context in
10 the first instance of deciding whether or not it has to
11 go to a government agency as opposed to any kind of
12 private or intracorporate activity.

13 JUSTICE GINSBURG: How does it work with
14 respect to the more recent statutes? Title VII, The Age
15 Discrimination Act, Disabilities Act?

16 MR. PHILLIPS: In terms of retaliation,
17 Justice Ginsburg?

18 JUSTICE GINSBURG: Yes. If you have not
19 filed anything with the Government, but you have to your
20 supervisor opposed a practice.

21 MR. PHILLIPS: No, the vast majority of
22 those statutes talk about any action that -- opposing a
23 practice, and therefore they deal with a lot of
24 intracorporate activities, and obviously at some point
25 there is an issue as to sort of what the employer's

1 intent is and how far it got up the ladder --

2 JUSTICE GINSBURG: But is it -- so in those
3 cases I think you are quite right, intracorporate
4 complaints count as opposing any practice. Has there
5 been any huge problems about people saying, oh, I made
6 an oral complaint to my supervisor, and supervisor said
7 I never heard of it?

8 MR. PHILLIPS: Well, I suspect that issue
9 comes up almost every day, and it is a problem; but it's
10 a problem that Congress made a judgment that we would
11 rather go ahead and allow those matters to be litigated;
12 and language that is very expansive in protecting
13 employees from retaliation. And while I -- I may chafe
14 at that at times as a managing partner of a law firm, I
15 recognize that that is the judgment that Congress made.

16 Here we are talking about a Congress that
17 made a very different judgment about how it wanted to
18 protect retaliation. And it was a judgment that was
19 made, it seems to me, very much in the context of 1938.
20 Justice Sotomayor, you are very right; they were not
21 sure they even had constitutional authority to be
22 adopting this approach; and they are attaching to it
23 criminal sanctions, and they are not providing a private
24 right of action; and in that context it seems to me that
25 this Court should comfortably say that this is a much

1 narrower proposition.

2 JUSTICE BREYER: What about Justice
3 Ginsburg's question?

4 MR. PHILLIPS: I'm sorry?

5 JUSTICE BREYER: What about her question?
6 In 1938 a lot of illiterate people couldn't have filed
7 written complaints.

8 MR. PHILLIPS: And Congress must have
9 recognized that fact, and --

10 JUSTICE BREYER: Well, if they did, isn't it
11 reasonable to think that they would have included in
12 filing, in such circumstances, oral filing?

13 MR. PHILLIPS: No, because if under those
14 circumstances when you're going to impose criminal
15 sanctions on somebody, you're going to say we are not
16 going to do that.

17 JUSTICE SCALIA: But your easier answer is,
18 "yes, but only with the government." Why isn't that an
19 easier answer?

20 MR. PHILLIPS: I mean, I am perfectly
21 comfortable with that.

22 JUSTICE BREYER: No, that -- your problem
23 is -- that in front of us, do we have to decide that
24 now? We've granted a different question, etc. So --

25 MR. PHILLIPS: The -- I mean, the truth

1 is --

2 JUSTICE BREYER: You may not want to give up
3 your first point.

4 MR. PHILLIPS: Well, I don't want to give up
5 either of the points, actually. But the bottom line is,
6 Justice Breyer, the question presented is -- is very
7 broad. I mean, the question of whether this goes to a
8 governmental entity is fairly --

9 JUSTICE BREYER: Right. Then it's odd that
10 you say -- it -- I gather, as well, for about 50 or
11 60 years the relevant agencies have interpreted the --
12 the statute the way that -- to include oral complaints.

13 And that seems to me a fairly strong reason
14 for continuing to do so, if -- where the language is
15 so -- allows it and there aren't any strong reasons the
16 other way.

17 MR. PHILLIPS: Well, I don't know that
18 there's 50 or 60 years of allowing oral complaints --

19 JUSTICE BREYER: Maybe it's 30 years. Maybe
20 it's 30.

21 MR. PHILLIPS: -- to be in the -- in the
22 private context.

23 There may be 50 to 60 years of allowing oral
24 complaints being brought to the government agency, which
25 I do think would go to Justice Scalia's point, but with

1 respect to intracorporate communications there is no
2 60-year practice --

3 JUSTICE SCALIA: Do we owe any deference to
4 the Government's position on this point?

5 MR. PHILLIPS: I would not give any
6 deference to the Government's position. Certainly not
7 Chevron deference because this is not a --

8 JUSTICE BREYER: Well, Chevron deference
9 would depend on an intent. I guess you are getting into
10 an argument here that there's no reason to repeat in
11 public. I mean, Justice Scalia and I don't necessarily
12 agree on this. Why would you --

13 JUSTICE SCALIA: Well, I mean, regardless of
14 whether we do, why -- why don't you think we -- we have
15 to give any deference, Chevron -- Chevron deference.

16 MR. PHILLIPS: Well, I mean I -- yes.

17 There is no Chevron deference --

18 JUSTICE BREYER: Why?

19 MR. PHILLIPS: -- because this is not a
20 matter that has been allocated to either the EEOC or the
21 Secretary of Labor to administer and to adopt
22 regulations.

23 JUSTICE BREYER: How do we know? I mean,
24 all right, if you want to get into it, this is a very
25 minor sort of interstitial point in a statute that they

1 administer, and there are lots of instances, I think
2 where the Court has said, where these minor matters of
3 how you work out the actual application of the word are
4 implicitly delegate it to the agency to determine within
5 the context of reasonable view.

6 MR. PHILLIPS: But Justice Breyer, that
7 would strike me as a more persuasive argument if
8 Congress hadn't -- hadn't delegated to the Secretary of
9 Labor specific rulemaking authority with respect to
10 specific provisions of the Fair Labor Standards Act, and
11 does not have a similar provision in connection with
12 section 215(a).

13 JUSTICE BREYER: But not everything has to
14 be done through formal rules. There -- there are many,
15 many ways of agencies determining practice.

16 MR. PHILLIPS: Right. But -- agency
17 decisionmaking, but we don't have that either. All we
18 have here are certain enforcement actions that are being
19 brought by the agency and indeed, if you look at the
20 enforcement actions, they all ultimately tie to some
21 official action by some government entity. None of the
22 actions that -- that you can go back to say I am going
23 to defer to this, go into the circumstance we are
24 talking about here, where it's a purely private action
25 as opposed to some kind of a public --

1 JUSTICE SOTOMAYOR: So we should give it no
2 weight at all?

3 MR. PHILLIPS: I would give it no weight at
4 all. But even if you gave it weight --

5 JUSTICE SOTOMAYOR: Not even Skidmore?

6 MR. PHILLIPS: -- its persuasive weight, its
7 persuasive weight as applied on a private side is
8 nonexistent. You know, again, if -- if the issue were
9 before -- if the --

10 JUSTICE BREYER: Why? Why would it be
11 different? If an agency work out a system of deciding
12 when a person is really making a complaint, as opposed
13 to an offhand remark, and that is good enough to run the
14 government of the United States, where they have --
15 where they are in this business, why -- why couldn't
16 whatever their indicia are there, also be transplanted
17 to the private sector --

18 MR. PHILLIPS: Well, it might be --

19 JUSTICE BREYER: -- and get that to work out
20 all right --

21 MR. PHILLIPS: Right, but we don't have --

22 JUSTICE BREYER: -- in which case you would
23 be left, if you are going to say that might work,
24 then -- the you are left with the simple argument that
25 you don't think that this statute means to apply to

1 complaints to an employer, written or oral?

2 MR. PHILLIPS: Well, I -- I think the answer
3 to that question is you don't have anywhere near the
4 50 years of practice dealing with the specific
5 hypothetical you posed, Justice Breyer.

6 JUSTICE BREYER: Would you accept -- you
7 think -- that a tenable interpretation? What this means
8 is that written complaints are good enough to count as
9 filings where you complained to your private employer,
10 but written or oral count as a filing where you deal to
11 -- with the government agency?

12 MR. PHILLIPS: I mean, I don't think that's
13 the most natural way --

14 JUSTICE BREYER: No, it isn't.

15 MR. PHILLIPS: -- to read this statute. And
16 I think the right way to read the statute is to either
17 say --

18 JUSTICE BREYER: Yes, I agree with you.

19 MR. PHILLIPS: -- that a -- that an oral
20 complaint is -- is not sufficient, but if -- but I don't
21 think you have to decide that issue. I think the better
22 way to decide this case and the more fundamental one; it
23 is the one Justice Scalia was coming back to, is does it
24 apply beyond the government agency context? And if
25 that isn't --

1 JUSTICE GINSBURG: That isn't even brought
2 up in the brief in opposition, right? It -- it's in
3 your brief on the merits.

4 MR. PHILLIPS: It wasn't brought up
5 specifically in the brief in opposition. On the other
6 hand, it was clearly presented and decided by the
7 Seventh Circuit, so it was in the case as it came to
8 this Court; and this Court's rule is that you can defend
9 the judgment on any ground that's fairly presented. And
10 -- and this ground seems to me more than fairly
11 presented, since it --

12 JUSTICE BREYER: On the ground itself, is
13 there anything in the legislative history of the statute
14 that says it's limited to the government?

15 MR. PHILLIPS: Well, the -- yes -- if you go
16 back to the legislative history there is a colloquy
17 between the two Senators, and I recognize some members
18 of the Court are unenthusiastic -- but -- but you know,
19 in that colloquy, they talk about malicious complaints,
20 and it seems to me malicious in that context is talking
21 about where you have essentially defamed your employer
22 through a government agency.

23 JUSTICE BREYER: That could be. It could be
24 that they are thinking of malicious complaints and they
25 are thinking of government agencies at the time, but

1 neither their language nor their purpose, as history
2 later shows, requires that limitation on scope.

3 MR. PHILLIPS: Well, I think if you are
4 going back and trying to figure out what the Congress of
5 1938 had in mind, the best way to do that is to look at
6 the language chosen and the company that that language
7 keeps. And when you take about filing a complaint and
8 you file a -- you talk about instituting a proceeding or
9 causing a proceeding to be instituted, or testifying at
10 a proceeding that's formal, or belonging to a -- to a
11 company committee that is again, a governmentally
12 instituted methodology, the best way to read that is to
13 say what they have in mind is an official government
14 action of some sort. And it makes perfect --

15 JUSTICE GINSBURG: How would it -- how would
16 it relate to, say, an equal pay complaint? Because
17 equal pay is formally part of the Fair --

18 MR. PHILLIPS: Right. It is tied to this.

19 JUSTICE GINSBURG: -- Labor Standards Act.
20 But an equal pay complaint could also be brought as a
21 Title VII suit.

22 MR. PHILLIPS: Right.

23 JUSTICE GINSBURG: So a -- a worker just
24 complains about the denial of equal pay to the
25 supervisor. Does that -- is that --

1 MR. PHILLIPS: I have no doubt that an
2 employee under those circumstances if -- if discharged
3 would be able to make a claim under Title VII of
4 retaliation for that particular conduct.

5 JUSTICE GINSBURG: And there's been -- you
6 said there was no evidence of the government for
7 60 years -- but there has been some 30 years or more
8 experience under Title VII of the statutes, with oral
9 complaints to the employer as being sufficient to ground
10 a retaliation claim.

11 MR. PHILLIPS: Right. And I -- I think the
12 key to this process, Justice Ginsburg, is what lens you
13 are looking at. Are you looking through the cracked and
14 yellowed glass that I am looking through from 1938, or
15 the glass as it looks through in 2010, and the truth is
16 if you were going to adopt --

17 JUSTICE GINSBURG: But it really -- it
18 starts in 1970.

19 MR. PHILLIPS: I'm sorry?

20 JUSTICE GINSBURG: It starts in the 1970s.

21 MR. PHILLIPS: To be sure, Justice Ginsburg,
22 but the -- but the -- this statute was enacted in 1938,
23 and it was enacted as fairly radical and made an -- an
24 initial incursion from protecting people from
25 rehabilitation. It doesn't purport to be as expansive

1 as any of the subsequent -- and the truth is -- can I
2 make this point?

3 JUSTICE SOTOMAYOR: How long have collective
4 bargaining arbitration agreements been in existence.

5 MR. PHILLIPS: Since the Federal Arbitration
6 Act -- well, it actually probably predates the Federal
7 Arbitration Act.

8 JUSTICE SOTOMAYOR: How old?

9 MR. PHILLIPS: Oh, it would have been back
10 around the same period of time, in the 1930s.

11 JUSTICE SOTOMAYOR: Do you think that when
12 Congress wrote or caused to be instituted any proceeding
13 under or related to this chapter, that they intended to
14 exclude that proceeding and intended to exclude people
15 who testified in that proceeding about a violation of
16 the statute?

17 MR. PHILLIPS: Yes. I don't -- I believe
18 that proceeding is used in the Fair Labor Standards Act
19 consistently throughout the statute to talk about
20 Government -- official Government actions and not
21 simply --

22 JUSTICE SOTOMAYOR: Can you point me to
23 something in the act that defines "proceedings" --

24 MR. PHILLIPS: No, nothing.

25 JUSTICE SOTOMAYOR: -- "related" -- the

1 words "proceedings related to this chapter," as limited
2 only to Government proceedings?

3 MR. PHILLIPS: Well, I mean, that -- in the
4 brief we identified a number of places where Congress
5 uses the word "proceedings," and every place where they
6 use the word "proceedings" they have in mind an official
7 Government activity. And so I think it is the most
8 reasonable -- logical way to read this particular
9 language as incorporating that.

10 Of course, even if that were true, even if
11 you would preserve that, that still wouldn't be a basis
12 for going forward with this case, because there was no
13 proceeding that was instituted pursuant to the informal
14 actions that were taken.

15 JUSTICE SOTOMAYOR: Then we're back to if
16 Congress meant filing any complaints, either oral or in
17 writing. I'm asking a different question, which is --

18 MR. PHILLIPS: I understand that, but I'm --

19 JUSTICE SOTOMAYOR: That Congress's intent
20 was not to protect a worker who publicly took an oath in
21 front of an arbitrator and testified about a violation
22 of law, that they would not have considered that
23 retaliatory under the statute.

24 MR. PHILLIPS: I do not believe they would
25 have regarded that as retaliatory under the statute

1 because of the fact that the way this is all set up is
2 the -- and the -- it's just the narrowness of the Fair
3 Labor Standards Act.

4 And, Justice Ginsburg, to your question
5 about the subsequent legislation that has all been
6 enacted, it seems to me in a lot of ways that that
7 reinforces the core interpretive approach that I have
8 taken in this case, because if it were absolutely clear
9 that the language about filing a complaint and
10 instituting a proceeding were as broad as -- certainly
11 as the Petitioner proposes in this case, where any kind
12 of oral grumbling is sufficient, Congress never would
13 have needed to deviate from that template and all the
14 legislation that came afterwards.

15 And there are tons of statutes that say:
16 File a complaint, institute a proceeding, and otherwise
17 oppose. And there would have been no reason for
18 Congress to do that if this language would have
19 accomplished precisely the same thing.

20 JUSTICE KENNEDY: It's more of a question
21 for the Petitioner's counsel than you, but are you aware
22 of any cases in any other jurisdictions where there have
23 been proceedings, actions for retaliation, based on
24 complaints to third parties, like complaining to the
25 press?

1 MR. PHILLIPS: Well, I'm sure there are such
2 cases, Your Honor. I mean, I doubt -- it probably
3 wouldn't come up so much in the Fair Labor Standards Act
4 process. And that's the problem: This has got a fairly
5 narrow sweep to it.

6 Obviously, wage and hours is not a
7 significant activity, but it doesn't tend to generate
8 the same kind of intensity that you might expect out of
9 Title VII or the Age Discrimination in Employment Act or
10 some of the other provisions.

11 If there are no further questions, Your
12 Honors, I would ask the Court to affirm the judgment.

13 JUSTICE GINSBURG: Just one more question.

14 MR. PHILLIPS: Sure.

15 JUSTICE GINSBURG: It seems to me you are
16 saying the only complaint that counts is the one to the
17 Government.

18 Isn't -- in the work setting that's being
19 regulated, wouldn't there be every reason to want the
20 employee to complain first to the employer rather than
21 making a Federal case out of it by complaining to a
22 Government agency?

23 MR. PHILLIPS: Intuitively, I don't disagree
24 with that, Justice Ginsburg, but we have to go, again:
25 What was the purpose of this particular statute? And

1 this statute was not intended as a protection to the
2 employer or to the employee -- or to the employer. This
3 was a provision that was designed to give information to
4 the Federal Government.

5 And we know that because there's no private
6 right of action to the employee that it is enforceable
7 as a criminal sanction. And if you go back to the
8 precursors of the Fair Labor Standards Act -- and
9 somebody asked; this was the first one. I gathered
10 there was a third one. There was the Railway Labor Act,
11 the NLRA, and then there was this particular provision.

12 But if you go back to these precursors, you
13 see that it's, again, a very narrow approach that was
14 taken under those statutes as well.

15 CHIEF JUSTICE ROBERTS: What if you are an
16 employee of the Treasury Department and there is an oral
17 complaint to your superior? Is that filing a complaint
18 with the Government?

19 MR. PHILLIPS: I mean, part of it depends on
20 whether the Fair Labor Standards Act applies to Federal
21 employees. There is a whole separate regime that deals
22 with Federal employees. And I can't -- I'm not
23 100 percent sure whether this provision applies under
24 those circumstances.

25 CHIEF JUSTICE ROBERTS: Okay. Thank you,

1 Mr. Phillips.

2 MR. PHILLIPS: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Mr. Kaster, you have
4 five minutes.

5 REBUTTAL ARGUMENT OF JAMES H. KASTER
6 ON BEHALF OF THE PETITIONER

7 MR. KASTER: Thank you, Your Honor.

8 We have two agencies here that have
9 interpreted this statute this way. And it's not just
10 enforcement actions, but we also have the EEOC manual.
11 We also have other acts. The Surface Transportation
12 Act --

13 JUSTICE SCALIA: Excuse me. I don't
14 understand how those agencies have any part in the
15 administration of private lawsuits under this statute.

16 MR. KASTER: The Department of Labor
17 administers all -- all of the --

18 JUSTICE SCALIA: It administers lawsuits?

19 MR. KASTER: No.

20 JUSTICE SCALIA: I mean, it seems to me it's
21 a matter for the courts. An agency interprets the
22 statutes that direct the agency's own actions if it has
23 to enforce things and so forth. But where there is a
24 provision for a suit in court, it seems to me it's up to
25 the courts to decide what it means.

1 MR. KASTER: That may be true, Your Honor.
2 We have the identical language in the Surface
3 Transportation Act in OSHA, which the agency does have
4 regulatory power over and has interpreted this precise
5 language to include oral communications.

6 In addition, the Migrant Workers Act --
7 counsel wants to suggest that all of this is a throwback
8 to '38. The Migrant Workers Act, which was adopted in
9 1982, has the very same language. It is implausible to
10 suggest that Congress would think that a migrant worker
11 was leaving the field and writing up a memo and bringing
12 it back to his supervisor in order to assert his
13 statutory rights.

14 JUSTICE SCALIA: What do you mean by the
15 very same language? Just --

16 MR. KASTER: Filed any complaint. Filed a
17 complaint.

18 JUSTICE SCALIA: And the remainder of it?
19 Institute a proceeding --

20 MR. KASTER: It goes beyond --

21 JUSTICE SCALIA: Be a member of a committee?
22 He is relying on large part on the context of filing a
23 complaint. Does this statute have those other
24 provisions?

25 MR. KASTER: It does not have those other

1 provisions, Your Honor.

2 JUSTICE SCALIA: That's a big difference.

3 MR. KASTER: Well, I respectfully disagree,
4 Your Honor.

5 I also suggest that what we are talking
6 about in the very first case that this Court dealt with
7 after the act was passed were coal miners. Nobody is
8 taking -- I don't think it would be plausible to suggest
9 that Congress thought that coal miners -- coal miners,
10 factory workers, line workers -- they don't write memos.
11 With all due respect, Your Honor, lawyers write memos.
12 People who this act was intended to cover, the poorest
13 and the least educated people in the country.

14 That's why under *Mitchell v. DeMario* and
15 that's why under *Tennessee Coal* the Court has taken the
16 position that this deserves, has to have, a broad
17 interpretation. Employees are the engine that actually
18 enforces this act.

19 JUSTICE SOTOMAYOR: That goes to your
20 adversary's first argument or second argument where he
21 says when this act was passed for all of those people,
22 they would never have thought of going to their employer
23 because the work ethos at the time was that those
24 employees couldn't complain to their employers. They
25 would always naturally go to the Government.

1 How do you answer that? How do you disprove
2 that point: That historically at the time this was
3 passed in 1938, that there was a number of those
4 employees who as a regular course of their business,
5 filed complaints with their employers as opposed to the
6 Government?

7 MR. KASTER: Any complaints, Your Honor.
8 Filed charges was the -- was the previous language in
9 the National Labor Relations Act. Congress adopted a
10 different phrase here, "any" -- "filed any complaint" --

11 JUSTICE SOTOMAYOR: I'm sorry.

12 MR. KASTER: "Filed any complaint." In
13 Rosenwasser, this Court said that the criminal liability
14 concerns of the employer were addressed by the word
15 "any." In other words, when they suggested under the
16 act that there was criminal liability and they didn't
17 know the piecework employees were covered, the Court
18 responded in 1945, the word "any" resolves any kind of
19 ambiguity that the employer should have had.

20 In this case "any" means any and all, and
21 that is without limitation. That is the kind of
22 complaint that is protected under the act. On
23 December 11 -- there is no question in this case Kevin
24 Kasten asserted his statutory rights. This is a case
25 about form over substance. Form over substance. That's

1 what we are talking about.

2 On December 11, 2006, Mr. Kaster was fired.

3 The same date, they changed the time clocks so that

4 everybody else would get paid, just as he complained

5 they weren't properly legally being paid before that.

6 They changed the clocks the same day. If -- now, there

7 were a half a million complaints last year in the

8 Department of Labor.

9 If the Court should find that every

10 complaint needs to go to the Department of Labor, then

11 when I get a call from an employee, a disgruntled

12 employee who says, my paycheck was wrong, or there is

13 something wrong with my overtime calculation, I'm going

14 to say, You can't afford to call the human resources

15 department and have a conversation, a friendly

16 conversation about this, because if you do, and you

17 happen to trigger a statutory assertion, that will be

18 unprotected. You are going to foreclose all the

19 internal communications that could occur.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MR. KASTER: Thank you.

22 CHIEF JUSTICE ROBERTS: The case is

23 submitted.

24 (Whereupon, at 12:01 p.m., the case in the

25 above-entitled matter was submitted.)

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