No. 21-1874

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MATTHEW URONIS,

Plaintiff – Appellant,

v.

CABOT OIL & GAS CORP., and
GASSEARCH DRILLING SERVICES, CORP.,

Defendants – Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania (No. 3:19-cv-1557, Honorable Malachy E. Mannion)

SECRETARY OF LABOR'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT'S DECISION

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The Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Plaintiff-Appellant Matthew Uronis. For the reasons set forth below, the district court erred in concluding that the anti-discrimination provision of the Fair Labor Standards Act of 1938 ("FLSA" or "the Act") at section 15(a)(3), which prohibits discrimination against an employee who is "about to testify" in an FLSA proceeding, 29 U.S.C. 215(a)(3), does not apply to an employee who will soon file

or is anticipated to file a consent to join an FLSA collective action, or who will soon provide or is anticipated to provide evidence in that action.

SECRETARY'S INTEREST AND AUTHORITY

The Secretary has a substantial interest in the proper construction of section 15(a)(3) because the Secretary administers and enforces the FLSA, which serves an important remedial purpose of protecting employees from substandard working conditions. 29 U.S.C. 202(a), 204, 211(a), 216(c), 217. Section 15(a)(3) is central to effective enforcement of the FLSA's substantive provisions. *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). FLSA collective actions filed under section 16(b), 29 U.S.C. 216(b), brought by one or more employees on behalf of themselves and other "similarly situated" employees, also are critical to effective enforcement of the Act. *Halle v. West Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 223 (3d Cir. 2016). "Similarly situated" employees become party plaintiffs in a collective action when they file a written consent to join the action with the appropriate district court. 29 U.S.C. 216(b). In this case, this Court will decide whether section 15(a)(3) protects from discrimination an employee who will soon file or is anticipated to file a consent to join a section 16(b) collective action, or will soon provide or is anticipated to provide evidence therein. If this Court affirms the district court's decision excluding such employees from the Act's protections, employees likely will be reluctant to file, join, or testify in collective

actions for fear of discrimination against themselves or other similarly situated employees. This result would significantly undermine the remedial purpose of the FLSA and the efficacy of section 15(a)(3) in effectuating that purpose.

Federal Rule of Appellate Procedure 29(a) authorizes the Secretary to file this brief.

ISSUE PRESENTED

Whether section 15(a)(3), which prohibits discrimination against an employee who is "about to testify" in an FLSA proceeding, 29 U.S.C. 215(a)(3), applies to an employee who will soon file or is anticipated to file a consent to join an FLSA collective action, or who will soon provide or is anticipated to provide evidence in that action.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff is a former employee of Cabot Oil & Gas Corp. ("Cabot"), an "oil and natural gas production and exploration company." Joint App'x ("JA") 3, 26. On February 22, 2019, Plaintiff's former co-worker, Michael Messenger, filed a section 16(b) collective action against Cabot and another entity, "Carrie's," on behalf of himself and other employees similarly situated, alleging that Cabot and Carrie's jointly employed the employees and failed to pay them overtime pay required under the FLSA. *Id*. 4, 29. As a similarly situated employee who had yet

to join the collective action as a party plaintiff, Plaintiff was a "putative member" of the *Messenger* collective action during the relevant time period in the instant case. *Id*. 4.

In August 2019, Plaintiff applied for a position at Gassearch Drilling Services, Corp. ("GDS"), a subsidiary of Cabot. JA 4. Before applying for the job, Plaintiff contacted Messenger about joining the *Messenger* collective action to recover unpaid overtime compensation. *Id*. 72.

On August 23, 2019, Messenger filed a motion to conditionally certify the case as an FLSA collective action. *Messenger v. Cabot Oil & Gas Corp.*, No. 3:19-cv-00308, ECF No. 39 (M.D. Pa.). Also on August 23, 2019, an employee filed with the *Messenger* district court a consent to join the collective action, joining three other employees who had recently "opted-in" as well. *Id*., ECF Nos. 20 (filed June 13, 2019), 32 (July 19, 2019), 35 (July 31, 2019), 38 (August 23, 2019).

As of August 28, 2019, Plaintiff planned to testify in the *Messenger* collective action and had signed (and would soon file) his consent to join the collective action. JA 72-74; *see also Messenger*, No. 3:19-cv-00308, ECF No. 48-1 (Plaintiff's signed consent notice). On August 28, 2019, a manager at GDS notified Plaintiff by text that he would not be hired at GDS because of the *Messenger* collective action. JA 4-5. Specifically, the text stated:

> Unfortunately I found out the day after I talked to you that no one who worked for [Carrie's] is supposed to be on a Cabot location. Pretty much because of the lawsuit that's going on. I know you're a worker but I can't do anything to get you into gds. . . . I went to my bosses[']boss and tried but we can't. Maybe once the lawsuit deal dies out it might be a possibility again. I wish I could get you in, believe me you'd be better than some of the guys we've been interviewing. Also turning a lot down for the same reasons.

Id.

On September 6, 2019, Plaintiff filed with the *Messenger* district court his consent to join the *Messenger* action. JA 9. Plaintiff declared in his consent that he was "similarly situated" to Messenger because he "performed similar duties for [Cabot and Carrie's] as a laborer on Cabot oil well pads and was paid in the same manner" as Messenger. *Messenger*, No. 3:19-cv-00308, ECF No. 48-1.

B. Procedural Background and District Court Decision

Plaintiff filed a complaint against Cabot and GDS (collectively, "Defendants") on behalf of himself and others similarly situated, alleging that Defendants violated section 15(a)(3) of the FLSA when they refused to hire him and others because they were about to testify in the *Messenger* collective action. JA 3-4, 72-74. In support of these claims, Plaintiff pointed to the August 28, 2019 text message. *Id*.

Defendants moved for dismissal of the complaint, arguing *inter alia* that Plaintiff failed to sufficiently allege protected activity under section 15(a)(3) and a necessary employment relationship with GDS. JA 5, 7-8.

On March 31, 2021, the district court granted Defendants' motion, holding that Plaintiff failed to sufficiently allege protected activity under section 15(a)(3). JA 3-16. In so holding, the court adopted the rationale of the district court's decision in *Ball v. Memphis B-B-Q Co., Inc.*, 34 F. Supp. 2d 342 (E.D. Va. 1999), *aff'd*, 228 F.3d 360 (4th Cir. 2000), to conclude that "the unambiguous meaning" of the phrase "about to testify" under section 15(a)(3) is that it protects an employee only when the employee "*is scheduled to testify* in a then-pending FLSA proceeding." JA 12 (citation omitted) (emphasis in *Uronis*). The court opined that, "[h]ad Congress intended [section 15(a)(3)] to apply to scenarios in which putative collective action members might potentially testify at some point in the proceeding, it would have said so. Instead, Section 15 uses the phrase 'about to testify,' suggesting some sense of certainty and immediacy as opposed to mere possibility." *Id*. 12-13. Applying this standard to Plaintiff's complaint, the district court concluded that Plaintiff "alleged no facts whatsoever to support the allegation that he or those similarly situated to him were 'about to testify'" because he did not allege he or others "were subpoenaed to testify or that they were told they would be called upon to testify, nor has he alleged any facts that Defendants had a reason to know that [he] or any others would be testifying." *Id*. 13.

The district court further added that Plaintiff's claim against GDS would likely fail for the additional reason that "a job applicant cannot bring an FLSA

claim for retaliation against a prospective employer," but the court declined to reach that issue. JA 7.[1]

ARGUMENT

SECTION 15(A)(3) APPLIES TO AN EMPLOYEE WHO WILL SOON FILE OR IS ANTICIPATED TO FILE A CONSENT TO JOIN A COLLECTIVE ACTION, OR WILL SOON GIVE OR IS ANTICIPATED TO GIVE EVIDENCE IN THAT ACTION

The FLSA establishes certain minimum wage, maximum hours, and other working conditions to protect the "health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). To achieve compliance with the Act's substantive requirements, Congress "chose to rely on information and complaints received from employees seeking to vindicate" their rights instead of a detailed federal inspection and enforcement regime. *De Mario*, 361 U.S. at 292. Accordingly, Congress included the anti-discrimination provision at section 15(a)(3) to encourage employees to assert their rights without "fear of economic retaliation

[1] Although this issue is not before this Court, the Secretary notes the Department's interpretation that applicants are covered "employees" under section 15(a)(3) and may bring section 15(a)(3) claims against prospective employers because section 15(a)(3) prohibits retaliation by "any person." *See, e.g., Dellinger v. Science Applications Int'l Corp.*, 649 F.3d 226 (4th Cir. 2011), Br. for Sec'y as Amicus Curiae Supp. Appellant at 6-25, 2011 WL 4006536. This Court's decision in *Bowe v. Judson C. Burns, Inc.,* 137 F.2d 37, 38–39 (3d Cir. 1943), further demonstrates that section 15(a)(3) does not require an employment relationship to bring a claim.

[which] might often operate to induce aggrieved employees quietly to accept substandard conditions." *Id.*

Section 15(a)(3) makes it unlawful for any person to "discharge or in any other manner discriminate against any employee because such employee," as relevant here, "has testified or is about to testify in any [proceeding under or related to the Act]." 29 U.S.C. 215(a)(3). That an FLSA collective action is a "proceeding" under section 15(a)(3) is not in dispute. As such, this case turns on the meaning of the terms "about" and "testify," neither of which are defined in the statute.

Interpretation of section 15(a)(3)'s language "depends upon reading the whole statutory text, considering the purpose and context [of the statute], and consulting any precedents or authorities that inform the analysis." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) (citation omitted). The FLSA's "'remedial and humanitarian . . . purpose' cautions against 'narrow, grudging' interpretations" of section 15(a)(3), favoring "'broad rather than narrow protection'" for employees. *Id* at 13. (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) and *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972)). As this Court has explained, "the key to interpreting [section 15(a)(3)] is the need to prevent employees' 'fear of economic retaliation'

for voicing grievances about substandard conditions." *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987).

Applying these principles here demonstrates that section 15(a)(3)'s language prohibiting discrimination against an employee "about to testify" protects an employee who will soon file or is anticipated to file a consent to join a collective action, or who will soon provide or is anticipated to provide evidence therein. This interpretation is a reasonable construction of the statutory text and is consistent with the statute's purpose and context, and is entitled to substantial deference. *Kasten*, 563 U.S. at 14-16 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) to explain that Secretary's well-reasoned and consistent interpretation of section 15(a)(3) "add[s] force" to the Court's conclusion); *Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 427-29 (3d Cir. 2017) (affording substantial deference under *Skidmore* to Department's interpretation of the FLSA).

A. An Employee Is "About to Testify" under the Plain Language of Section 15(a)(3) when the Employee Will Soon File or Is Anticipated to File a Consent to Join a Collective Action, or Will Soon Give or Is Anticipated to Give Evidence in that Action.

1. An employee "testif[ies]" under section 15(a)(3) when the employee files a consent to join a collective action or gives evidence as a witness in that action.

The ordinary meaning of the term "testify" includes both the filing of a consent to join a collective action and the giving of evidence as a witness in a collective action. *See Kasten*, 563 U.S. at 7-8 (looking to ordinary dictionary

definitions and judicial precedent to interpret terms in text of section 15(a)(3)). Dictionaries define the term to mean "to give evidence as a witness," TESTIFY, Black's Law Dictionary (11th ed. 2019); or "to make a solemn declaration under oath for the purpose of establishing a fact (as in a court), to make a statement based on personal knowledge or belief: bear witness, or to serve as evidence or proof." TESTIFY, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/testify. *Cf. Crawford v. Washington*, 541 U.S. 36, 51 (2004) (defining "testimony" for purposes of the Confrontation Clause of the Sixth Amendment as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact") (citation omitted). Under these dictionary definitions, an employee testifies in an FLSA collective action when the employee gives evidence as a witness in that action, such as by oral or written testimony under oath or affirmation. An employee also testifies in an FLSA collective action when the employee files a consent to join the collective action, because the consent is a statement, filed with a court, based on the filer's personal knowledge or belief that serves to establish the fact that the filer is similarly situated to the named plaintiff with respect to the alleged FLSA violation. *Messenger*, No. 3:19-cv-00308, ECF No. 48-1 (Plaintiff's consent stating that he is "similarly situated to the named [p]laintiff in this matter . . . because [he] performed similar duties . . . and was paid in the same manner").

While no court has directly addressed whether filing a consent to join an FLSA collective action constitutes testimony within the meaning of section 15(a)(3), district courts have interpreted the term "testify" to include informational statements given with varying degrees of formality to a government entity. *Goins v. Newark Hous. Auth.*, No. 15-cv-2195, 2019 WL 1417850, at *15 (D.N.J. Mar. 29, 2019) (employee testified under section 15(a)(3) when the employee "act[ed] as a witness" during Department investigation by signing a statement, attesting that it was true and correct, pertaining to overtime pay); *Bowen v. M. Caratan, Inc.,* 142 F. Supp. 3d 1007, 1021-23 (E.D. Cal. 2015) (employee was about to testify under section 15(a)(3) when Department investigator identified the employee as someone who could potentially provide information to the Department during a Department investigation); *see also Scalia v. F.W. Webb Co.*, No. 20-cv-11450, 2021 WL 1565508, at *4 (D. Mass. Apr. 21, 2021) (employees engaged in protected activity under section 15(a)(3) because they had spoken or were about to speak with Department investigators); *Perez v. Fatima/Zahra, Inc.*, No. 14-cv-2337, 2014 WL 2154092, at *2 (N.D. Cal. May 22, 2014) (employer likely violated section 15(a)(3) when it threatened its workers with termination if they cooperated with a pending Department investigation). *Cf. Scrivener*, 405 U.S. 117 (interpreting the term "testimony" under the anti-discrimination provision of the National Labor Relations Act ("NLRA") broadly to include statements given to a

field investigator); *see Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947) (decisions under NLRA often considered persuasive authority when interpreting FLSA).

Here, the filing of a consent to join a collective action is an informational statement (establishing that the employee is similarly situated to the named plaintiff with respect to the alleged FLSA violation) made to a government entity (the court). It is thus testimony under section 15(a)(3).

The district court here did not address the meaning of "testify" under section 15(a)(3). However, by requiring that an employee be scheduled, subpoenaed, or "called upon" to testify to be protected under section 15(a)(3), JA 12-13, the court seemed to have presumed that testimony under section 15(a)(3) includes only giving evidence as a witness under oath or affirmation. Although "testify" could be read in such a way, *see Ball*, 228 F.3d at 364 (opining in dictum that "[t]estimony amounts to statements given under oath or affirmation"); *accord Whyte v. PP & G, Inc.*, Nos. 13-2806, -3706, 2015 WL 3441955, at *7 (D. Md. May 26, 2015), such a narrow reading is not warranted in light of the other dictionary definitions and cases discussed above. And as discussed further *infra*, pp. 19-27, such a narrow reading of the term "testify" would undermine the statute's broad remedial purpose, and section 15(a)(3)'s role in effectuating that purpose, by curtailing participation in collective actions.

Instead, the Secretary's interpretation of the statutory term "testify"— which is consistent with the ordinary meaning of that term, and with the statute's purpose and context—should be afforded substantial weight under *Skidmore*.

2. An employee is "about" to testify under section 15(a)(3) when the employee will soon or is anticipated to testify.

The ordinary meaning of the term "about," in its temporal sense, includes activity that will soon or is anticipated to occur. Dictionaries define the term to mean "reasonably close to, almost, on the verge of," ABOUT, Merriam-Webster, *available at* https://www.merriamwebster.com/dictionary/about; or "intending to do something or close to doing something very soon," ABOUT TO DO SOMETHING, Oxford Free English Dictionary, *available at* https://www.lexico.com/en/definition/about; *see also Ball*, 34 F. Supp. 2d at 345 ("'near in time . . almost, or nearly'") (quoting ABOUT, Black's Law Dictionary 7 (5th ed.1979)). Under these definitions, section 15(a)(3)'s protection is triggered when an employee is reasonably close to, almost, or intending soon to testify, including by opting-in to a collective action or by giving evidence under oath or affirmation.

Consistent with these dictionary definitions, courts have interpreted "about" under section 15(a)(3) to include activity that is "impending or anticipated." In *Ball*, the Fourth Circuit interpreted the phrase "about to testify in any . . . proceeding [instituted under or related to the FLSA]" to require that the "proceeding" have already been initiated, though the testimony may be simply

"impending or anticipated." *Ball*, 228 F.3d at 365. Accordingly, under *Ball*, an employee is "about to testify" in a pending FLSA collective action if the employee's testimony is "impending or anticipated," such as where the employee will soon file or is anticipated to file a consent to join the collective action (i.e., testify).[2]

In *Hinsdale v. City of Liberal, Kansas*, 19 F. App'x 749, 756 (10th Cir. 2001), the Tenth Circuit concluded that under the "plain language" of section 15(a)(3), an employee is "about to testify" once the employee has "decided to testify" in a pending FLSA lawsuit. There, an employer demoted the chief of police after learning of his decision to testify in a pending FLSA lawsuit (filed by his spouse) but before he actually testified almost three months later. *Id*. Notably, there was no allegation that the chief was scheduled or subpoenaed to testify in the lawsuit. *Id*. Relying on *Ball*'s "impending or anticipated" interpretation of "about to testify," the Tenth Circuit concluded that the chief "engaged in protected activity when he decided to testify in his wife's instituted FLSA lawsuit." *Id.* (citing *Ball*,

[2] Interpreting "about to testify" to include testimony that is "anticipated" implicitly requires consideration of the decisionmaker's awareness or suspicion that the employee may testify to determine whether the employee engaged in a protected activity. This Court generally considers the decisionmaker's mindset as part of the causation element of a section 15(a)(3) claim. *See, e.g., Preobrazhenskaya v. Mercy Hall Infirmary*, 71 Fed. App'x 936, 939 (3d Cir. 2003). However articulated, the decisionmaker's awareness or suspicion of an employee's testimony is inarguably relevant to establishing a section 15(a)(3) "about to testify" claim.

228 F.3d at 365). Accordingly, under *Hinsdale*, an employee is "about" to testify in a pending collective action when the employee decides to testify in that action. *Id*.

District courts have taken a similar view of the meaning of "about" to testify under section 15(a)(3). In *Bowen,* the district court concluded that an employee whom the Secretary identified for a *potential* interview during an investigation was "about to testify" under the FLSA. 142 F. Supp. 3d at 1021-23. In *French v. Oxygen Plus Corp.*, citing *Hinsdale* and the Fourth Circuit's decision in *Ball*, the court held that the plaintiff was "about to testify" under section 15(a)(3) because the plaintiff's emails were attached to another employee's FLSA complaint filed in federal court and so the plaintiff's name *eventually* would be disclosed as a person with knowledge of the relevant matters. No. 3:13-cv-00577, 2015 WL 1467175, at *2 (M.D. Tenn. Mar. 30, 2015). And in *Fatima/Zahra*, the court held that an employer likely violated section 15(a)(3) by threatening employees in *anticipation* of their cooperation with a pending Department investigation. No. 14-cv-2337, 2014 WL 2154092, at *2. These cases thus reflect that an employee is "about" to testify within the meaning of section 15(a)(3) when the decisionmaker anticipates the employee's testimony, even if such testimony is not scheduled or even certain to occur.

Contrary to these authorities, the district court here concluded that "about" to testify in section 15(a)(3) unambiguously requires that an employee be *scheduled* to testify in an FLSA lawsuit because, the court opined, the term requires "some sense of certainty and immediacy as opposed to mere possibility." JA 13. The court then concluded that Plaintiff failed to allege that he or others were "about" to testify because he did not allege that he or others "were subpoenaed to testify or that they were told they would be called upon to testify, nor has he alleged any facts that Defendants had a reason to know that [he] or any others would be testifying." *Id*. The court's conclusion is in error.

In requiring that testimony be scheduled to be "about" to occur, the district court adopted the flawed rationale of the *Ball* district court. Both the district court here and the *Ball* district court cited a dictionary definition of the term "about," which the courts paraphrased as "relatively certain and near in time," to conclude that "the unambiguous meaning" of "about to testify" is that it protects an employee only when the employee "is *scheduled to testify* in a then-pending FLSA proceeding." JA 12 (citation omitted) (emphasis in *Uronis*); *Ball*, 34 F. Supp. 2d at 345; *see also EEOC v. Swift Transp. Co., Inc.*, 120 F. Supp. 2d 982, 992-93 (D. Kan. 2000) (adopting the *Ball* district court's scheduling requirement). But nothing in the dictionary definitions of "about" requires that testimony be *scheduled* to be "relatively certain and near in time," much less unambiguously so.

The *Uronis* district court also misread the import of the *Ball* district court's decision, JA 9-13, in light of the Fourth Circuit's ultimate conclusion in *Ball*, which implicitly rejected the district court's scheduling requirement by concluding that the employee's testimony may be simply "impending or anticipated." *Ball*, 228 F.3d at 365.

In addition, the district court's narrow reading of the term "about" would exclude from section 15(a)(3)'s protections employees who are anticipated to testify in an FLSA proceeding though the precise timing of that testimony is uncertain, as well as employees that are likely but not certain to testify. This interpretation would simply encourage employers and other persons to retaliate swiftly and early against employees with knowledge of the relevant facts in a pending FLSA lawsuit. As discussed further *infra*, pp. 19-27, such a narrow reading of the term "about" would significantly undermine enforcement of the Act and thus conflicts with the statute's remedial purpose. Instead, the Secretary's interpretation of the term "about," including testimony that will soon or is anticipated to occur, is consistent with the ordinary meaning of that term and the statute's purpose and context, and thus is entitled to substantial deference under *Skidmore*.

Finally, to the extent that the district court's articulation of the scheduling requirement amounts to a requirement that the employee's testimony be impending

or anticipated (i.e., that Defendants "had a reason to know" that Plaintiff and others would be testifying, JA 13), the district court failed to apply this standard to the facts here, most notably that at the time of the adverse action Plaintiff would soon file his consent to join the *Messenger* collective action (i.e., testify), and in fact did so just days later, and that the August 28, 2019 text message suggests that Defendants anticipated that he and others would do so. The gaining momentum in the *Messenger* action as of August 23, 2019, i.e., Messenger's motion for conditional certification and the four employees who recently opted-in, further suggests that Defendants anticipated that Plaintiff and others would testify in that action.[3] The result of the court's error is that, notwithstanding the above language in its decision, it still excluded from the statute's protections employees who would soon or were anticipated to testify in a collective action.

[3] Of course, there may be other circumstances under which an employee is "about to testify" or otherwise entitled to protection under section 15(a)(3). For example, an employee may be entitled to protection where the decisionmaker mistakenly believes that the employee is about to testify in an FLSA action, *see Richardson*, 812 F.2d 121, or where a decisionmaker preemptively retaliates against an employee to dissuade the employee from testifying, *see Fatima/Zahra*, 2014 WL 2154092, at *2.

B. Functional and Policy Considerations Further Support the Secretary's Interpretation.

1. The Secretary's interpretation is consistent with the statute's context and purpose.

To the extent the statutory text is not conclusive as to the meaning of "about to testify," the statute's context and purpose further support the Secretary's interpretation. *See Kasten*, 563 U.S. at 11-14 (considering the statute's purpose and context to interpret FLSA statutory text where text alone is inconclusive). As the Supreme Court explained in *Kasten* (a decision interpreting "filed any complaint" under section 15(a)(3)), the critical role of section 15(a)(3) in the FLSA's enforcement scheme favors a reading of the provision that furthers the Act's broad remedial purpose. 563 U.S. at 11-13. Specifically, the Court explained that the FLSA meets its "basic objective" (prohibiting substandard labor conditions), by setting forth minimum wage and overtime requirements. *Id*. at 11. Enforcement of these substantive requirements is dependent on information from and complaints by employees. *Id*. at 11-12. Section 15(a)(3) is critical to this enforcement scheme, as it serves to foster an environment in which workers feel free to assert their rights under the Act. *Id*. at 12. The Court reasoned that a narrow interpretation of the term "complaint" in section 15(a)(3) limited to written complaints "would undermine the Act's basic objectives" by making it more difficult for employees to report violations. *Id*. at 11-12. Thus, the Court

concluded, the Act's "enforcement needs" favored a broad interpretation of the word "complaint" that includes oral complaints. *Id*. at 13.[4]

This Court has long looked to the statute's context and purpose when interpreting section 15(a)(3) as well. In *Richardson*, this Court considered whether section 15(a)(3) protected an employee where the employer mistakenly believed the employee had filed a complaint with the Department when, in fact, the employee had not. 812 F.2d at 123-25. The Court framed its analysis by explaining first that the FLSA is a "humanitarian and remedial" statute and that

[4] The statute's remedial purpose remains a principal consideration when interpreting section 15(a)(3) notwithstanding the Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), and this Court's decision in *Department of Labor v. Bristol Excavating, Inc*., 935 F.3d 122, 135 (3d Cir. 2019). Neither *Encino* nor *Bristol* concerned section 15(a)(3)'s prohibition on discrimination and thus are inapposite here. In *Encino*, the Court rejected the "narrow-construction" principle for interpreting FLSA overtime exemptions in section 13, 29 U.S.C. 213, in favor of a "fair reading" approach. 138 S. Ct. at 1142. In *Bristol*, this Court adopted a "fair reading" approach to interpreting the FLSA's definition of "regular rate" in section 7(e) for purposes of calculating overtime pay. 935 F.3d at 135. Neither decision purported to disrupt the decades-long precedent requiring that section 15(a)(3) be interpreted consistently with the Act's broad remedial purpose. Indeed, even in the context of the overtime exemptions in section 13 of the Act at issue in *Encino*, the Supreme Court did not state that the remedial purpose of the statute should *never* be considered when it noted that the "narrow-construction principle" appeared to be premised on pursuing the Act's remedial purpose "at all costs." 138 S. Ct. at 1142. Nonetheless, if this Court were inclined to further extend *Encino*'s "fair reading" approach to the instant case, the Secretary's interpretation is a fair reading of the phrase "about to testify," as it is consistent with the plain language of the statute and the Act's remedial purpose, but does not pursue that purpose "at all costs" because it does not risk "curtailing employment or earning power" for employees, *Bristol*, 935 F.3d at 134 (citation omitted).

enforcement of the Act's substantive requirements is dependent on "a workplace environment conducive to employee reporting." *Id*. at 123-24. Thus, this Court explained, "the key" to interpreting section 15(a)(3) is preventing the fear of retaliation from having a chilling effect on employees' ability to assert their rights under the FLSA. *Id*. at 124. Reviewing relevant precedent, this Court observed that "courts interpreting the anti-retaliation provision have looked to its animating spirit" to prohibit retaliation not explicitly covered by the statute. *Id*. (*citing Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir.1984) (section 15(a)(3) protects employees who make internal complaints to employer); *Marshall v. Parking Co. of America*, 670 F.2d 141 (10th Cir.1982) (per curiam) (section 15(a)(3) protects employees who have refused to release back pay claims or return back pay awards to their employers); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 180-83 (8th Cir. 1975) (same); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 58-59 (N.D. Ga. 1985) (section 15(a)(3) protects employees who have consulted with the Department about whether certain timekeeping practices complied with the FLSA)). As this Court observed, "[i]n each of these instances, the employee's activities were considered necessary to the effective assertion of employees' rights under the [FLSA], and thus entitled to protection." *Richardson*, 812 F.2d at 124. Applying that framework to the case before it, this Court interpreted section 15(a)(3)'s protections to prohibit discrimination based on

perceived protected activity because such discrimination "creates the same atmosphere of intimidation" as does retaliation for activities explicitly listed in the statute, even though section 15(a)(3)'s language could be read narrowly to apply only when an employee actually has engaged or is about to engage in protected activity. *Id*. at 125.

Other courts have similarly interpreted section 15(a)(3). *See*, *e.g.*, *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (citing *Richardson* and other authorities to conclude that the statute's context and purpose require that section 15(a)(3) protect internal complaints); *Saffels v. Rice*, 40 F.3d 1546, 1548-49 (8th Cir. 1994) (adopting *Richardson*'s interpretation of section 15(a)(3) as protecting perceived protected activity); *Crowley v. Pace Suburban Bus Div. of Reg'l Transp. Auth.*, 938 F.2d 797, 798 n.3 (7th Cir. 1991) (interpreting section 15(a)(3) to protect refusal to attend a meeting that would not be paid because the statute has been "construed broadly to include retaliation by the employer for an employee's assertion of rights protected under the FLSA"); *EEOC v. White and Son Enter., Inc.*, 881 F.2d 1006, 1011-12 (11th Cir. 1989) (interpreting section 15(a)(3) broadly to protect informal complaints, though not explicitly listed in the statute, to effectuate the intended purpose of the provision); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 879 (2d Cir. 1988) (citing *Richardson* to hold that employees who refused to repudiate their rights under the FLSA were protected from retaliation).

Here, these same considerations require that the phrase "about to testify" under section 15(a)(3) be interpreted to protect an employee who will soon testify or is anticipated to testify in a collective action, such as by filing a consent to join the collective action or by giving evidence in that action. The FLSA's "enforcement needs," necessary to effectuate the Act's remedial purpose, "argue for" this interpretation. *Kasten*, 563 U.S. at 13. Section 16(b) collective actions serve an important role in the context of FLSA enforcement, as they "provide[]employees the advantages of pooling resources and lowering individual costs so that those with relatively small claims may pursue relief where individual litigation might otherwise be cost-prohibitive." *Halle*, 842 F.3d at 223 (citing *Hoffman–La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). Collective actions also "yield[] efficiencies for the judicial system through resolution in one proceeding of common issues arising from the same allegedly wrongful activity affecting numerous individuals." *Id.* To effectively utilize this enforcement tool, however, employees must be free to file a consent to join a collective action, and to otherwise testify therein, without fear of economic reprisal. If employees are not so protected, they will be far less likely to ever assert their right to opt-in to FLSA collective actions. Employees also may be less likely to file a collective action in the first instance for fear of retaliation against their co-workers, or for fear that no one will be willing to join.

Indeed, the "animating spirit" of section 15(a)(3) demands the Secretary's interpretation here. Retaliation against an employee in anticipation of their joining or giving evidence in a collective action would create the same "atmosphere of intimidation" deterring participation in collective actions as retaliation against an employee who is scheduled to testify in an FLSA proceeding. *Richardson*, 812 F.2d at 125; *cf. Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993) (anticipatory retaliation under Title VII is just as likely to chill protected activity as retaliation taken after the fact). This chilling effect on the assertion of employee rights under section 16(b) is exactly the paradigm that section 15(a)(3) is designed to prevent. *Richardson*, 812 F.2d at 124-25. Yet that is precisely the result of the district court's decision here, based on its cramped reading of the statute. Such a "hypertechnical and purpose-defeating interpretation" must be rejected. *Anderson v. Stafford Const. Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984) (rejecting a literal interpretation of identical "about to testify" language under the Mine Safety and Health Act, 30 U.S.C. 815(c), that would exclude from protection an employee who refused to testify as the employer wished).

2. The district court here erroneously viewed section 15(a)(3)'s role in furthering the Act's remedial purpose as served only when employees have already asserted their FLSA rights.

The district court read *Richardson* and the cases cited therein to permit consideration of the statute's purpose when interpreting section 15(a)(3) only in

circumstances where an employee has engaged in some minimum activity to assert rights under the FLSA or has otherwise voiced a grievance under the FLSA. JA 13-14. The court concluded that similar consideration was not warranted here because, it found, Plaintiff "has not alleged that he or anyone else took any action or engaged in any activity that could be construed as voicing a grievance under the FLSA or making it known to Defendants that they would be testifying in the *Messenger* action." *Id*. 14.

The district court's view of *Richardson* and related cases is flawed. First, while *Richardson* and the cases discussed therein concerned actions or perceived actions that employees had already taken to assert their FLSA rights, none of those cases addressed testimony that the employee was "about" to give or the meaning of "about to testify." *Supra*, pp. 20-22. Thus, the district court erred in relying on those cases for the proposition that section 15(a)(3)'s protection of an employee who is "about to testify" in an FLSA proceeding applies only if the employee has taken some overt act to assert the employee's FLSA rights or made it known to the employer that the employee intends to testify in an FLSA proceeding.

Instead, as discussed above, *Richardson* and the cases cited therein demonstrate that section 15(a)(3) must be interpreted in a manner consistent with the Act's broad remedial purpose. *Supra,* pp. 20-22. These cases extended section 15(a)(3)'s protections to activities not explicitly listed in the statute—and in some

cases, even where the employee did not in fact engage in the perceived protected activity—because to hold otherwise would frustrate section 15(a)(3)'s "animating spirit." *Id*. It was therefore the central *purpose* of the Act that warranted applying section 15(a)(3)'s protections to the employees in *Richardson* and the related cases, rather than any minimum threshold of activities an employee must engage in to merit protection. For the reasons discussed above, that central purpose supports the Secretary's interpretation here.

Second, the district court's interpretation of *Richardson* effectively ignores section 15(a)(3)'s explicit protection of an employee who is *about* to testify, and thus necessarily has not yet asserted the right to testify. As discussed above, under the plain language of the statute, an employee is "about" to testify when the employee will soon or is anticipated to testify. *Supra*, pp. 13-18. In some circumstances, the employee may soon testify or be anticipated to testify even in the absence of any affirmative act by the employee to convey the employee's impending or anticipated testimony, such as when the employee decides to testify and the employer learns of that decision through some means other than from the employee, *Hinsdale*, 19 F. App'x at 756 (employer "became aware" of employee's decision to testify in pending FLSA lawsuit at a city commission meeting), or when the employee has been identified by others as someone likely to testify in an FLSA proceeding, *Bowen*, 142 F. Supp. 3d at 1021-23; *French*, 2015 WL

1467175, at *2. The district court's interpretation of *Richardson* would exclude these employees from the Act's protections based on an arbitrary threshold of affirmative activity, thus conflicting with the statute's explicit protection of employees "about" to testify.

Finally, even if the statute could be read to require some affirmative act by an employee for the employee to be "about" to testify, such a threshold cannot be more burdensome than an act that shows that the employee will soon or is anticipated to testify. To hold otherwise, and thus require an employee to engage in some affirmative conduct beyond that necessary to motivate an employer to retaliate against the employee, would simply encourage early and swift retaliation. The statute's text, context, and purpose cannot support such an interpretation.

3. The Secretary's interpretation is entitled to substantial deference.

"[G]iven Congress' delegation of enforcement power[]" under the FLSA to the Secretary, this Court should grant a "degree of weight" to the Secretary's interpretation of section 15(a)(3)'s language. *Kasten*, 563 U.S. at 14-16 (citing *Skidmore*); *Am. Future Sys., Inc.*, 873 F.3d at 427.

The Secretary's interpretation here is a reasonable reading of the statutory text that effectuates the statute's remedial purpose and comports with the Supreme Court's and this Court's precedent. It is also consistent with the Department's longstanding position that section 15(a)(3), including the phrase "about to testify,"

must be interpreted in a manner consistent with both the text and the purpose of the statute. *See, e.g., Ball*, 228 F.3d 360, Br. for Sec'y as Amicus Curiae Supp. Appellant, 1999 WL 33616931; *Richardson*, 812 F.2d 121. Therefore, the Court should afford the Secretary's thorough and reasoned interpretation substantial deference.

CONCLUSION

For the foregoing reasons, the Secretary respectfully urges this Court to reverse the district court's decision.

Respectfully,

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COMBINED CERTIFICATIONS

1. Service. I hereby certify that I electronically filed the foregoing Secretary of Labor's Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 9, 2021. Service of the foregoing will be accomplished by the CM/ECF system for all participants in the case.

2. Identical copies. I hereby certify that the text of this electronic brief is identical to the text in the paper copies of this brief.

3. Virus scan. I hereby certify that a virus detection program, Microsoft Windows Defender Antivirus, last updated on August 9, 2021 and that no virus was detected.

s/ Katelyn J. Poe
KATELYN J. POE