# ONE LANGUAGE, MANY REALITIES:[1] AN INTERPRETATION OF LANGUAGE, LAW, AND SECTION 215(A)(3) OF THE FAIR LABOR STANDARDS ACT

## INTRODUCTION

What do lawyers do? This question yields a mélange of answers.[2] Nonetheless, the majority of people share "central notions about lawyering: a lawyer is a litigator, . . . [one who is] knowledgeable about both legal doctrine and procedure,"[3] and who "engage[s] in . . . prototypically lawyerly endeavor[s]."[4] To perform prototypically lawyerly endeavors, such as drafting pleadings or arguing motions, lawyers rely on words. As such, the practice of law involves more than rights, obligations, and procedure.[5] "The law is a profession of words."[6]

Most people, including those in the legal profession, would agree that legal language[7] tends to be complex or confusing.[8] In fact, legal language has been characterized as a "specialized tongue"[9] and has earned such a designation for a handful of reasons. First, those who draft laws, contracts, and legal memoranda regularly employ common words in uncommon ways.[10] Second, laws and other legal documents often include words that have unfixed or flexible meanings.[11] Third, legal language tends to be populated by Latin words and phrases.[12] Additionally, the complexity of legal language is

1. BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE, at xi (2d ed. 2003).

2. Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 555 (1980).

3. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 325 (1995).

4. *Id.* at 324.

5. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW, at vii (1963).

6. *Id.*

7. In this Comment, the phrase "legal language" includes, but is not limited to, laws, contracts, leases, pleadings, court orders, and opinions.

8. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) ("I have not encountered a single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how."); Brandt Goldstein, *Lost in Translation? Some Brief Notes on Writing About Law for the Layperson*, 52 N.Y.L. SCH. L. REV. 373, 375 (2008).

9. MELLINKOFF, *supra* note 5, at 11.

10. *Id.*

11. *Id.*

12. *Id.*

compounded by language itself:[13] language is durable, precise, yet temporary and inexact.[14] America's English is "as absorbent as a sponge, as flexible as a rubber band, and it simply won't stand still."[15] "Change may be [one of English's] greatest strength[s] . . . ."[16] On the other hand, change may be "the source of a lot of unnecessary angst[,]"[17] particularly when it frustrates a principal purpose of language, which is to communicate.[18]

The malleability of language together with the hallmarks of legal language[19] tend to aid and abet litigation.[20] If a law is subject to varying interpretations by various individuals, "parties having an interest in what is meant may . . . ask the court to come up with its interpretation,"[21] and the court's interpretation often hinges upon the meaning of a single word.[22]

Ambiguous legal language, aside from encouraging litigation, also gives rise to an interdisciplinary study: the nexus between language (linguistics) and the law. From this vantage point, a series of questions crystallize. First, "[t]o what extent should we worry about . . . defining words—that is, about . . . getting the law right?"[23] Second, how is the law to endure if words do not?[24] Third, can communities be governed effectively by vague laws?[25] Certain

13. *See id.* at 396 ("The language of the law shares the imperfections of the common language and of language itself.").

14. *See* ANATOLY LIBERMAN, WORD ORIGINS . . . AND HOW WE KNOW THEM: ETYMOLOGY FOR EVERYONE 191, 250 (2005). "Words change both their phonetic shape and meaning . . . . This is not a trivial statement. We understand the oldest people around us and our great-grandchildren, and the ease of communication emphasizes the stability of language. Some words appear and disappear in our lifetime . . . ." *Id.* at 157.

15. PATRICIA T. O'CONNER & STEWART KELLERMAN, ORIGINS OF THE SPECIOUS: MYTHS AND MISCONCEPTIONS OF THE ENGLISH LANGUAGE, at xvi (2009).

16. *Id.* at xvii.

17. *Id.*

18. S.-Y. Kuroda, *Some Thoughts on the Foundations of the Theory of Language Use*, 3 LINGUISTICS & PHIL., no. 1, 1979 at 1, 3 (1979) ("Language is most commonly considered to be a means of communication, to be, in fact, *the* system of communication *par excellence*.").

19. *See supra* notes 10–12 and accompanying text.

20. See *infra* notes 21–22 and accompanying text.

21. SANFORD SCHANE, LANGUAGE AND THE LAW 12 (2006).

22. MELLINKOFF, *supra* note 5, at 397 ("Nowhere else can so much hinge on a word—not merely billions of dollars, but weightier intangibles . . . ."); *see* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (interpreting the word "chicken"); United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 706 (2d Cir. 1934) (interpreting the word "obscene"); Muscarello v. United States, 524 U.S. 125, 126, 127–28 (1998) (interpreting the word "carries").

23. Bryan A. Garner, *Legal Lexicography: A View from the Front Lines*, 6 GREEN BAG 2D 151, 151 (2003).

24. MELLINKOFF, *supra* note 5, at 437 ("Change the words; you lose the law.").

25. Timothy Endicott, *Law Is Necessarily Vague*, 7 LEGAL THEORY 379, 379 (2001) [hereinafter Endicott, *Law Is Necessarily Vague*].

scholars have argued that vague laws have a place in society.[26] However, imprecise laws displace definite bounds and create uncertainty in places where certainty is desired and necessary.

For instance, vague employment laws can be detrimental to the workplace,[27] in part, because laws that govern the employer-employee relationship "aim to regulate . . . a wide range of personal interactions."[28] In fact, data shows that employment law is "'the fastest growing area of litigation in the country.'"[29] Legal commentator Walter Olson pins the rise of employment litigation on the nature of new employment laws.[30] He suggests that new employment laws "tend to avoid giving employers definite rules to obey but instead lay out sweeping if vague aspirations."[31]

Olson's characterization of new employment laws resonates with the majority's interpretation of Section 215(a)(3) of the Fair Labor Standards Act ("Act"), a statutory regime that is not so new.[32] Most courts have construed the scope of the Act's anti-retaliation provision liberally.[33] Apparently, Olson's description of new employment laws—they "lay out sweeping if vague aspirations"[34]—is an apt description of old employment laws, too. Notwithstanding the majority's liberal interpretation of the Act's anti-retaliation provision, the Seventh Circuit in *Kasten v. Saint-Gobain Performance Plastics Corp.* declined to follow suit.[35]

26. *See id.* (arguing that "precision is not always useful in regulating communities").

27. *See* Mark A. Rothstein, Serge A. Martinez & W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L. Q. 243, 244 (2002) ("The vagueness of the definition of 'individual with a disability' has frustrated employers and other parties responsible for complying with ADA requirements. It has also left individuals uncertain of whether they have standing to ask for the reasonable accommodations reserved under the law for individuals with 'covered' disabilities."); *Disabilities Act Raises Questions for Employers Over Health Insurance*, Daily Lab. Rep. (BNA) No. 51, at A–1 (Mar. 16, 1992) ("Many private-sector employers are confused about their health insurance obligations under the Americans With Disabilities Act . . . .").

28. *See* WALTER OLSON, THE EXCUSE FACTORY 3 (1997).

29. *Id.*

30. *See id.*

31. *Id.*

32. *See* Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 721 (1988) (explaining the implementation of the Fair Labor Standards Act, which became effective on October 24, 1938).

33. Cooke v. Rosenker, 601 F. Supp. 2d 64, 74 (D.C.C. 2009) ("The Courts of Appeals for the First, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have concluded that an informal complaint to an employer can constitute protected activity for purposes of the FLSA.").

34. OLSON, *supra* note 28, at 3.

35. Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 840 (7th Cir. 2009), ("[W]e believe that the FLSA's use of the phrase 'file any complaint' requires a plaintiff

Section 215(a)(3) of the Act makes it "unlawful for any person . . . to discharge . . . any employee because such employee has filed any complaint."[36] In *Kasten*, a former employee desired to invoke the aegis of Section 215(a)(3).[37] The substantive issue presented by this case is whether purely oral complaints constitute "filing" a complaint and thereby trigger the Act's protection.[38] The lion's share of the court's analysis concerned the contours of the word "filed."[39] The breadth of the statutory text, "filed any complaint," engendered a circuit split.[40] However, the Supreme Court resolved the split on March 22, 2011.[41]

The judiciary's interpretation of the word "filed" has inspired the following query: Should tribunals, when interpreting the meaning of statutory text, be mindful of both linguistic and legal concerns? This Comment explores the ambit of Section 215(a)(3) and examines the implications of the law's relation to language and language's relation to the law. Part I provides a brief introduction to the Act's anti-retaliation clause and summarizes the bifurcated interpretations of the text "filed any complaint." Part II discusses the confluence of language and the law and details the Seventh Circuit's interpretation of Section 215(a)(3). Part III provides an overview of statutory construction, surveys the analytical tools employed by lower courts, and canvasses the Supreme Court's jurisprudence of the Act. Part IV summarizes oral arguments heard by the Supreme Court, the Supreme Court's ruling, and considers the implications of the Court's opinion. This author argues that the Supreme Court should have affirmed the Seventh Circuit's ruling; by doing so,

employee to submit some sort of writing . . . ."), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011).

36. 29 U.S.C. § 215(a)(3) (2006).

37. *Kasten*, 570 F.3d at 837.

38. *Id.*

39. *Id.* at 838–40.

40. Cooke v. Rosenker, 601 F. Supp. 2d 64, 74 (D.C.C. 2009).

> There is some disagreement among the circuits whether an informal or internal complaint constitutes "any complaint" within the meaning of Section 215(a)(3). The Courts of Appeals for the First, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have concluded that an informal complaint to an employer can constitute protected activity for purposes of the FLSA. . . . On the other hand, the Second and Fourth Circuits have ruled that an informal complaint to an employer is not protected activity under the FLSA.

*Id. See* Lambert v. Ackerley, 180 F.3d 997, 1007–08 (9th Cir. 1999); Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 43 (1st Cir. 1999); Saffels v. Rice, 40 F.3d 1546, 1549–50 (8th Cir. 1994); Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993), *overruled by* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011); EEOC v. Romeo Cmty. Sch., 976 F.2d 985, 989–90 (6th Cir. 1992); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989).

41. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1325, 1335 (2011).

the Court would have preserved a venerable piece of federal legislation and resisted the commission of verbicide.[42]

## I. BACKGROUND

The Act endeavors to standardize rules that govern the workforce[43] and promote fairness at the workplace.[44] The Act has three overarching goals: (1) to establish minimum wages; (2) to devise a schedule for overtime pay; and (3) to eliminate child labor.[45] The linchpin of this statutory scheme is its "remedial and humanitarian . . . purpose."[46]

Franklin D. Roosevelt characterized the Act as "the most far-reaching, far-sighted, program for the benefit of workers ever adopted here or in any other country."[47] As of late, this piece of legislation furnishes protection to over 130 million American workers.[48] Signed into law in 1938, the Act has been amended a handful of times,[49] perhaps because it "imposes *basic* labor standards."[50]

### *A. The Act's Anti-Retaliation Provision*

Section 215(a)(3) of the Act makes it unlawful for an employer:

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee . . . .[51]

The Act's anti-retaliation provision contains three discrete clauses:[52] the complaint clause,[53] the testimony clause,[54] and the industry committee

42. *See infra* Part IV.E and note 380 (explaining that verbicide occurs when an entity ignores the accepted meaning of a word, thereby weakening its value and clarity).

43. Nordlund, *supra* note 32, at 720–21.

44. *See id.*

45. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 6–7, 12, 52 Stat. 1060, 1062–63, 1067; E. Merrick Dodd, *The Supreme Court and Fair Labor Standards, 1941–1945*, 59 HARV. L. REV. 321, 321 (1946).

46. Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

47. Nordlund, *supra* note 32, at 715.

48. U.S. DEP'T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1 (July 2009), *available at* http://www.dol.gov/whd/regs/compliance/whdfs14.pdf.

49. Nordlund, *supra* note 32, at 724.

50. Minor v. Bostwick Labs., Inc., 654 F. Supp. 2d 433, 436 (E.D. Va. 2009) (emphasis added).

51. 29 U.S.C. § 215(a)(3) (2006).

52. O'Neill v. Allendale Mut. Ins. Co., 956 F. Supp. 661, 663 (E.D. Va. 1997).

clause.[55] Judicial intervention is triggered if an employee files any complaint, testifies or will testify in a proceeding, or has served or will serve on an industry committee.[56] Accordingly, to present a claim of retaliation under Section 215(a)(3), an employee must have engaged in one of the provision's enumerated categories of protected conduct.[57]

Section 215(a)(3) of the Act provides a safe harbor for employees who report an employer's violation of the Act.[58] In addition to encouraging employee reporting, Section 215(a)(3) doubles as an enforcement mechanism[59] since "Congress did not seek to secure compliance with [the Act's] standards through continuing detailed federal supervision . . . . Rather it chose to rely on information and complaints received from employees . . . ."[60] As such, the Act serves its purpose only if "employees fe[el] free to approach officials [and supervisors] with their grievances."[61]

### *B. The Act's Complaint Clause*

The Act's complaint clause, which has garnered judicial attention for years,[62] prohibits adverse employment action against an employee who has "filed any complaint."[63] Courts across the country have interpreted the reach of this statutory text.[64] Most lower courts have prioritized form over

> Specifically, § 215(a)(3) prohibits employers from taking adverse employment actions against employees who assert their FLSA rights in three enumerated ways. Thus, employees trigger the anti-retaliation provision when they have either: (1) "filed any complaint or instituted or caused to be instituted any proceedings" under the FLSA; (2) "testified or is about to testify in any [FLSA] proceeding"; or (3) "served or is about to serve on an industry committee".

*Id.*

53. *Minor*, 654 F. Supp. 2d at 436. ("[T]he 'complaint clause' . . . proscribes discharge of an employee who 'has filed any complaint or instituted . . . any proceeding' related to the FLSA . . . .").

54. *Id.* ("[T]he 'testimony clause' . . . forbids dismissal of an employee who 'has testified or is about to testify in any . . . proceeding' under or related to the FLSA.").

55. *See* Sandt v. Holden, 698 F. Supp. 64, 68–69 (M.D. Pa. 1988) (discussing the third clause of Section 215(a)(3): serving on an industry committee).

56. 29 U.S.C. § 215(a)(3) (2006); *Sandt*, 698 F. Supp. at 68.

57. *O'Neill*, 956 F. Supp. at 664 ("Thus, unless the conduct claimed to be the trigger for the retaliatory act falls within one of the three specified protected activity categories, the provision does not apply and there is no actionable retaliation under the FLSA.").

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

59. Saffels v. Rice, 40 F.3d 1546, 1550 (8th Cir. 1994).

60. *Mitchell*, 361 U.S. at 292.

61. *Id.*

62. See *supra* note 40 and accompanying text.

63. 29 U.S.C. § 215(a)(3) (2006).

64. *See supra* note 40 and accompanying text.

substance;[65] that is, they gloss over the content of the complaint and focus more on its delivery.[66] To determine whether Section 215(a)(3) applies to the parties' dispute, lower courts have addressed two recurring issues: one concerns the phrase "any complaint," and the other relates to the meaning of the word "filed."[67] With respect to the phrase "any complaint," there is some inconsistency among courts about whether an internal complaint constitutes protected activity.[68] However, most circuits agree that intra-corporate complaints trigger the protection of Section 215(a)(3).[69]

Unlike the more settled analysis of the text "any complaint," the meaning of the word "filed" has produced conflicting interpretations, namely because courts disagree about the character of formality required by the statute's language.[70] Some courts have held that purely oral complaints satisfy the language of the statute.[71] Such circuits champion a liberal construction of the verb "filed"[72] and have reasoned that the phrase "filed any complaint" is susceptible to differing interpretations.[73] These circuits, when analyzing the ambit of Section 215(a)(3), have deferred to the statute's "remedial and humanitarian . . . purpose."[74] Thus, the statute's ambiguous language in conjunction with the Act's remedial purpose have convinced a number of courts that Section 215(a)(3) of the Act is entitled to a broad interpretation.[75]

65. Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 541 (2001) ("The basic issue over which the circuits disagree is the degree of formality with which an employee must complain to be engaging in statutorily protected activity."); *see, e.g.*, Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 41 (1st Cir. 1999).

66. Clemons, *supra* note 65, at 541.

67. *See, e.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 838–40 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011).

68. *See infra* note 69.

69. *Kasten*, 570 F.3d at 838 (finding that the language of Section 215(a)(3) includes internal corporate complaints); Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 625–26 (5th Cir. 2008) (stating that internal corporate complaints are covered under the Act's anti-retaliation provision). *But see* Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000) (explaining that internal complaints filed by employees do not constitute protected activity.); Minor v. Bostwick Labs., Inc., 654 F. Supp. 2d 433, 440 (E.D. Va. 2009) (holding that "intra-company complaints made by an employee to her supervisors" do not trigger the protection of the Act's anti-retaliation clause).

70. Jennifer Lynne Redmond, *Are You Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision*, 42 WM. & MARY L. REV. 319, 325 (2000).

71. *Id.* at 325 n.44.

72. Lambert v. Ackerley, 180 F.3d 997, 1003 (9th Cir. 1999).

73. *See id.* at 1004.

74. Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

75. *Id.* ("But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. . . . Such a statute must not be interpreted or applied in a narrow, grudging manner."); Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir. 1999)

Conversely, courts that have conferred a narrow interpretation on the Act's anti-retaliation clause have concluded that the language of the "provision could scarcely be clearer."[76] A Virginia court explained: "[Section 215(a)(3) of the Act] defines in clear and unambiguous language three specific categories of conduct for which retaliation is prohibited. And it does so in terms that make unmistakably clear that the three categories of conduct comprise the complete universe of protected activity . . . ."[77] Because some judges have found that the phrase "filed any complaint" is plain and clear, they refused to expand the reach of the statute.[78] Thus, pursuant to a narrow interpretation, only written complaints entitle employees to invoke the protection of the Act's anti-retaliation clause.[79]

## II. LAW, LANGUAGE, AND THE ANTI-RETALIATION PROVISION

Lawyers, judges, and legislators "have been advised . . . to write *plainly*, *sensibly*, *simply*, *clearly*, *succinctly*, *interestingly*, [and] *forcibly*."[80] Nonetheless, most would agree that legal language is far from plain, sensible, simple, or clear.[81] The law's lack of clarity often inspires legal disputes, and disputants often seek judicial intervention.[82] "One look at any digest of

("Moreover, 'the remedial nature of the statute further warrants an expansive interpretation of its provisions . . . .'"); Brock v. Richardson, 812 F.2d 121, 123 (3d Cir. 1987) ("The Fair Labor Standards Act is part of the large body of humanitarian and remedial legislation enacted during the Great Depression, and has been liberally interpreted."); Clemons, *supra* note 65, at 553.

76. O'Neill v. Allendale Mut. Ins. Co., 956 F. Supp. 661, 663 (E.D. Va. 1997).

77. *Id.* at 663–64.

78. *Sapperstein*, 188 F.3d at 857 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990)) ("The starting point for the interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'").

79. Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993) ("The plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor."), *overruled by* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011); Minor v. Bostwick Labs., Inc., 654 F. Supp. 2d 433, 439 (E.D. Va. 2009) ("Further support for the Court's conclusion that the complaint clause does not protect an employee against retaliation for informal, intra-company complaints such as Minor's is found by comparing the circumscribed language employed in § 215(a)(3) with Title VII's considerably broader anti-retaliation provision."); *O'Neill*, 956 F. Supp. at 665 (quoting *Genesee Hosp.*, 10 F.3d at 55) ("'[T]he plain language of [§ 215(a)(3) ] limits the cause of action to retaliation for filing complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.'").

80. MELLINKOFF, *supra* note 5, at 287–88.

81. *Id.* at 386–87 (explaining that the imprecision of legal language results in a myriad of paradoxical questions about its use and development).

82. *See id.* at 387 (the outcome of litigation often "turn[s] repeatedly (and in many directions) on the interpretation not of layman's words but of law words").

cases . . . brings [about] a conviction of [the law's] imprecision" and the resulting popularity of judicial intervention.[83] As such, there must be a reason (or several) why legal language is, at times, imprecise. Part II of this Comment explores some of these explanations and addresses the legal and linguistic concerns that accompany the interpretation of law.

### *A. The Limits of Language*

Legal language is imprecise, in part, because language itself is imprecise and imperfect.[84] Many people, including judges, have recognized the shortcomings of language.[85] One such shortcoming arises from the "the inherent malleability of language."[86] Language is flexible, vulnerable, and tolerant, and its natural fluidity and accessibility invite speakers to tweak or transform the sound, shape, and meaning of words.[87] Having recognized the malleability of language, the Third Circuit issued the following admonishment: if "regulations [are] to have significance, we must recognize limits on the malleability of words."[88] That is to say, because the law is expressed in words, and the meaning of words changes over time, the law should not blindly uphold such changes. Additionally, "words do not maintain a strict one-to-one relation with the things symbolised [sic]."[89] Courts have recognized this reality and refer to it as the "one-word-one-meaning . . . fallacy."[90]

Aside from language itself, the legal profession's adherence to tradition may also explain why ambiguity lurks in the law. In fact, "[m]any of the words that lawyers traditionally use never have had any definite meaning."[91]

---

83. *Id.*

84. *Id.* at 396–97.

85. *See supra* notes 13–15, 17 and accompanying text.

86. Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 698 (2003) (explaining that the plaintiff's construction of the statute at issue "is hardly satisfied by the malleability of the term 'maintain'"); Broderick v. 119TCbay, LLC, 670 F. Supp. 2d 612, 616 (W.D. Mich. 2009) (noting that "'[l]anguage, as compared to mathematics, is inherently imprecise. Scant few words or phrases have one and only one meaning in all climates'") (citation omitted).

87. *See supra* notes 14–16 and accompanying text; *infra* notes 94–97 and accompanying text.

88. Revak v. Nat'l Mines Corp., 808 F.2d 996, 1004 (3d Cir. 1986); *see also* Watson v. United States, 552 U.S. 74, 83 (2007) (reasoning that "law depends on respect for language").

89. FREDERICK A. PHILBRICK, LANGUAGE AND THE LAW: THE SEMANTICS OF FORENSIC ENGLISH 26 (1949).

90. R.H. Johnson & Co. v. SEC, 198 F.2d 690, 696 (2d Cir. 1952); Irwin v. Simmons, 140 F.2d 558, 560 (2d Cir. 1944). Although courts have acknowledged that some words have flexible or multiple meanings, courts do not entertain baseless interpretations of legal language; *see* Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011).

91. MELLINKOFF, *supra* note 5, at 301.

"Words like *reasonable*, *substantial*, *satisfactory* . . . blatantly flaunt their lack of precision."[92] One legal scholar who has recognized the role of tradition in legal language opined "[w]ere it not for the fact that they have been used repeatedly, traditionally by other lawyers, no lawyer alive would independently choose any of these words."[93]

A third cause of vagueness in the law relates to society's use of language. Speakers of language, intentionally or unintentionally, effect change through use, misuse, and invention.[94] Patricia O'Conner, who writes about language and grammar, likens the "give-and-take of language" to "warfare."[95] "A word bravely soldiers on for years, until one day it falls facedown in the trenches, its original meaning a casualty of misuse. *Unique* is a good example: a crisp and accurate word meaning 'one of kind,' now frequently degraded to merely 'unusual.'"[96] Because language is subservient to its users, "words appear and disappear in our lifetime, stress can shift from the second syllable to the first, and usage does not remain the same from decade to decade."[97]

In sum, vagueness is endemic to legal language.[98] As such, we must ask whether vague laws are inimical or desirable. A host of scholars argue that ambiguities in law are necessary and desireable.[99] They claim that lawmakers deliberately select ambiguous expressions in order to "confer[] discretion on a court to formulate an individual norm by choosing from those meanings."[100] Another argument in favor of imprecise legal language is that laws are designed to regulate a range of conduct, and to best effectuate that purpose, laws should be abstract.[101] Ambiguous expressions, thus, facilitate the

92. *Id.*

93. *Id.* at 304.

94. *See* O'CONNER & KELLERMAN, *supra* note 15, at xvii, 43, 153 (explaining how common or colloquial use over hundreds of years and the merging of several languages have led to ambiguities and multiple meanings for many recognized words).

95. PATRICIA T. O'CONNER, WOE IS I: THE GRAMMARPHOBE'S GUIDE TO BETTER ENGLISH IN PLAIN ENGLISH 81 (1996).

96. *Id.*

97. LIBERMAN, *supra* note 14, at 157.

98. *See supra* notes 84–97 and accompanying text.

99. Endicott, *Law Is Necessarily Vague*, *supra* note 25, at 379 ("Law is vague because precision is not always useful in regulating communities, and lawmakers know that."); Timothy A.O. Endicott, *Vagueness and Legal Theory*, 3 LEGAL THEORY 37, 63 (1997) ("Whether vagueness is a necessary evil or a valuable legal technique, . . . [w]e can go so far as to say that vagueness is an essential feature of law.") [hereinafter Endicott, *Vagueness and Legal Theory*]; Kent Greenawalt, *Vagueness and Judicial Responses to Legal Indeterminacy*, 7 LEGAL THEORY 433, 435 (2001) ("The legislature may adopt a vague standard that is to be applied in the first instance by an administrative agency.").

100. Endicott, *Vagueness and Legal Theory*, *supra* note 99, at 43.

101. Endicott, *Law Is Necessarily Vague*, *supra* note 25, at 382.

regulation of "human activity in a *general* way."[102] Some scholars believe that "to pursue precision—or even to avoid significant vagueness" is undesirable because "[l]aw, like language, should not make arbitrary, pointless distinctions."[103] This line of reasoning ignores the advantages that coincide with distinctions, even those perceived as arbitrary.[104]

The pursuit of precise law yields note-worthy benefits.[105] Precise law "tells people governed by law where they stand[] and . . . avoids legal disputes."[106] When vague laws give rise to legal disputes, litigants expect courts to determine the "true" meaning of a word.[107] The interpretation of legal language unveils a tension between the seemingly fixed nature of law and the unfixed nature of language. To minimize this tension, should courts, when engaged in the interpretation of law, be entitled to re-write the law or re-shape the English language? Further, should the judiciary consider a word's common usage and thereby empower language users to re-write the law?

These questions are raised obliquely by the *Kasten* case,[108] a case that has climbed the judicial ranks. On March 22, 2010, the Supreme Court granted certiorari to *Kasten v. Saint-Gobain Performance Plastics Corporation*.[109] By granting certiorari, the Supreme Court agreed to determine the "true" meaning of the word "filed."[110] A year later, the Supreme Court handed down its decision and defined, for all of America, the scope of the verb "filed."[111] Prior to reaching America's highest court, *Kasten* was first heard by the U.S. District Court for the Western District of Wisconsin.[112] Following a judgment in favor of Defendant Saint-Gobain, Plaintiff Kasten appealed.[113] Accordingly, the case was sent to the Seventh Circuit Court of Appeals for review.[114]

102. *Id.*

103. *Id.* at 385.

104. *Id.* at 379–80.

105. *Id.*

106. Endicott, *Law is Necessarily Vague*, *supra* note 25, at 379.

107. PHILBRICK, *supra* note 89, at 34.

108. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 837, 838–39 (7th Cir. 2009) (construing the meaning of "file" to determine "whether unwritten verbal complaints are protected activity"), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011).

109. Kasten v. Saint-Gobain Performance Plastics Corp., 130 S. Ct. 1890 (2010) (mem.).

110. *Kasten*, 570 F.3d at 837 (explaining that the crux of this case is "whether unwritten verbal complaints are protected activity").

111. *Kasten*, 131 S. Ct. at 1325, 1336.

112. Kasten v. Saint-Gobain Performance Plastics Corp., 619 F. Supp. 2d 608, 609 (W.D. Wis. 2008), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011).

113. *Kasten*, 570 F.3d at 835.

114. *Id.* at 834.

### *B.* Kasten v. Saint-Gobain Performance Plastics Corporation*: The Facts*

Plaintiff Kevin Kasten alleged that Defendant Saint-Gobain violated Section 215(a)(3) of the Act when Kasten was fired for complaining about the location of Defendant's time clocks.[115] Kasten had been an hourly employee of Saint-Gobain for approximately three years.[116] Hourly employees are required to "use a time card to swipe in and out of an on-site Kronos time clock."[117] Kasten received a disciplinary warning from Saint-Gobain that concerned his use of Saint Gobain's time clocks.[118] The disciplinary warning provided, "[i]f the same or any other violation occurs in the subsequent 12-month period from this date of verbal reminder, a written warning may be issued."[119] Roughly six months later, Kasten was issued a written warning because of his improper use of Saint Gobain's time clocks.[120] This notice, which was signed and acknowledged by Kasten himself, stated, "[i]f the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination."[121]

Following the second warning, Kasten received a third warning for his failure to clock in and out and a one-day suspension.[122] Saint-Gobain notified Kasten that if another violation were to occur, additional disciplinary actions would be imposed and may include termination.[123] Four weeks later, Kasten failed to follow the company's time clock policy, and Saint-Gobain suspended him.[124] Five days after he was suspended, Kasten was terminated.[125]

Kasten claimed that he orally complained to supervisors and human resources personnel "about the legality of the location of Saint-Gobain's time clocks."[126] He believed that the placement of the "clocks prevented employees from being paid for time spent donning and doffing their required protective gear."[127] Kasten insisted that on four separate occasions, he complained about

115. *Id.* at 837.
116. *Id.* at 836.
117. *Id.*
118. *Kasten*, 570 F.3d at 836.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Kasten*, 570 F.3d at 836.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

the location of the time clocks.[128] Saint-Gobain contended that Kasten never complained about the location of its time clocks.[129]

### *C.* Kasten v. Saint-Gobain Performance Plastics Corporation*: The Analysis*

The district court granted summary judgment in favor of Saint-Gobain, "finding that Kasten had not engaged in protected activity because he had not 'filed any complaint' about the allegedly illegal location of the time clocks."[130] On review, the Seventh Circuit framed its analysis as a two-part inquiry: "first, whether intra-company complaints that are not formally filed with any judicial or administrative body are protected activity; and second, whether unwritten verbal complaints are protected activity."[131] The second inquiry obliged the Seventh Circuit to determine the "true" meaning of the verb "filed."[132]

#### 1. Intra-Corporate Complaints

The issue of whether internal complaints constitute protected activity under the Act's anti-retaliation provision was one of first impression for the Seventh Circuit.[133] The Seventh Circuit began its analysis by referencing a fundamental precept of statutory interpretation: "Statutory interpretation begins with 'the language of the statute itself [and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"[134] The Seventh Circuit held that the Act's anti-retaliation statute protects intra-corporate complaints as evinced by the adjective "any," which modifies the noun, "complaint."[135] The Seventh Circuit, for interpretative guidance, engaged in groupthink when it took notice of other courts' conclusions on this issue.[136]

#### 2. Unwritten Oral Complaints

To determine whether unwritten oral complaints constitute protected activity—in other words, to define the word "filed"—the Seventh Circuit began its analysis by identifying the relevant language of the statute.[137] Next, the appellate court reviewed the district court's findings and cited a portion of

128. *Kasten*, 570 F.3d at 836.
129. *Id.*
130. *Id.* at 837.
131. *Id.*
132. *Id.* at 838–40.
133. *Kasten*, 570 F.3d at 837.
134. *Id.* at 837–38 (quoting Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir. 1999)).
135. *Id.* at 838.
136. *Id.* (citing opinions from the First, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh circuits).
137. *Id.*

the lower court's opinion,[138] which provided: "By definition, the word 'file' refers to 'a collection of papers, records, etc., arranged in a convenient order,' . . . or . . . '[t]o deliver (a paper or instrument) to the proper officer so that it is received by him to kept [sic] on file, or among the records of his office . . . .'"[139] Each definition contains direct, explicit references to a paper, a writing.

Plaintiff Kasten urged the Seventh Circuit to adopt a different definition of the word "filed."[140] He argued that "filed" has multiple meanings, one of which is "to submit."[141] To assess the validity of Plaintiff's contention, the Seventh Circuit considered the verb's connotation.[142] The court reasoned that "[t]he use of the verb 'to file' connotes the use of a writing."[143] Next, the appellate court considered the word's denotation and consulted *Webster's Ninth New Collegiate Dictionary*.[144] *Webster's Dictionary* defines the verb "to file" as: "1. to arrange in order for preservation and reference <'file letters'> 2. a: to place among official records as prescribed by law <'file a mortgage'> b: to perform the first act of (as a lawsuit) <'threatened to file charges against him'>."[145] The entries in *Webster's Dictionary* lent ex post facto support to the lower court's findings and reinforced the Seventh Circuit's understanding of the verb.[146]

Plaintiff's liberal construction of the verb "filed" was rejected first by the lower court and again by the Seventh Circuit.[147] The lower court refused to "simply ignore[] the statute's use of the word 'filed,'" and reasoned that "[e]xpressing an oral complaint is not the same as filing a complaint."[148] The Seventh Circuit affirmed the lower court's findings and explained that Plaintiff's construction "seem[ed] . . . overbroad."[149] Notwithstanding that conclusion, the Seventh Circuit indulged Plaintiff and contextualized his proposed definition of "filed."[150] According to the court, "[i]f an individual told a friend that she 'filed a complaint with her employer,' we doubt the friend

138. *Kasten*, 570 F.3d at 838.
139. *Id.*
140. *Id.* at 838–39.
141. *Id.*
142. *Id.* at 839.
143. *Kasten*, 570 F.3d at 839.
144. *Id.*
145. *Id.*
146. *See id.*
147. Kasten v. Saint-Gobain Performance Plastics Corp., 619 F. Supp. 2d 608, 613 (W.D. Wis. 2008), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011); *Kasten*, 570 F.3d at 839.
148. *Kasten*, 619 F. Supp. 2d at 612–13.
149. *Kasten*, 570 F.3d at 839–40.
150. *Id.* at 839.

would understand her to possibly mean that she merely voiced displeasure to a supervisor."[151] The Seventh Circuit also considered the "natural understanding" of the word and reasoned that the verb "filed" imposes an expectation of a writing.[152]

The Seventh Circuit acknowledged the circuit split on this issue.[153] In fact, the court confronted the split by evaluating the strength of other courts' opinions.[154] In response to opinions that conferred a liberal interpretation on Section 215(a)(3), the Seventh Circuit noted that those opinions glossed over the presence of the verb "filed" and declined to define it.[155]

The Seventh Circuit also compared the language of the Act's anti-retaliation provision to analogous federal anti-retaliation statutes.[156] This analytical exercise convinced the court that a narrow interpretation of the phrase "file any complaint" was justified "by the fact that Congress could have, but did not, use broader language in the FLSA's retaliation provision."[157] Hence, the court concluded that the use of the verb "filed" in place of "opposed" limits the scope of protected conduct.[158]

The court closed its analysis with a nod to the remedial nature of the Act, which "warrants an expansive interpretation of its provisions."[159] Rather than reading the Act's animating spirit as a license to expand Section 215(a)(3), the Seventh Circuit issued an admonition about conferring a broad interpretation of the Act's anti-retaliation provision: "[E]xpansive interpretation is one thing; reading words out of a statute is quite another."[160] The Seventh Circuit, unlike other courts, paid homage to the language of the statute and refused to conflate the statute's remedial and humanitarian purpose with the statute's actual language.[161]

151. *Id.*

152. *Id.*

153. *Id.*

154. *Kasten*, 570 F.3d at 839–40.

155. *Id.*

156. *Id.* at 840.

157. *Id.*

> For example, analogous provisions in other statutes, including Title VII and the Age Discrimination in Employment Act, forbid employers from retaliating against any employee who "has opposed any practice" that is unlawful under the statutes. . . . This broader phrase, "opposed any practice," does not require a "fil[ing]," and has been interpreted to protect verbal complaints.

*Id.*

158. *Id.*

159. *Kasten*, 570 F.3d at 840 (quoting Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir.1999)).

160. *Id.*

161. *See id.* at 838–40.

## III. STATUTORY INTERPRETATION: THE INTERPRETATIVE DANCE PERFORMED BY COURTS

"The law has many gaps in which it fails to provide answers for judges"[162]—along with lawyers and American citizens. These gaps often become the subject of litigation.[163] In such instances, the task of interpreting legal language has been entrusted to the courts.[164] To construe statutory text, courts seek guidance from an arsenal of analytical tools.[165] Courts typically consult and apply canons of statutory construction—canons that "set default rules to assist in interpretation."[166] However, because canons of interpretation establish guidelines rather than rules, "[t]he practice of statutory interpretation does not follow any single inquiry."[167] In addition to following the canons, judges may decide cases by considering public policy, legislative history, community values, or *stare decisis*.[168] Nevertheless, the "canons are particularly popular today," and most courts abide by them.[169]

### *A. Statutory Interpretation in Broad Strokes*

Courts often begin statutory analysis with "the language of the statute itself."[170] An examination of the law's text tends to lead to the application of the "plain meaning rule."[171] The "plain meaning rule" calls for an interpretation of legislation "on the basis of the wording of the legislation itself, without reference to the legislature or the debates that surrounded the

162. Greenawalt, *supra* note 99, at 437.

163. *See supra* notes 20–22, 82–83 and accompanying text.

164. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 2 (1994); PHILBRICK, *supra* note 89, at 34.

165. For a detailed discussion of the canons of construction upon which courts rely in interpreting statutes, see generally YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 1 (2008), *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf.

166. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 13 (2007).

167. ESKRIDGE, *supra* note 164, at 13.

168. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 656, 661 (1992).

169. *Id.* at 665, 667.

170. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); KIM, *supra* note 165, at 2.

171. Barnhart v. Sigmon Coal Co., 534. U.S. 438, 450 (2002); KIM, *supra* note 165, at 2; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 320 (1985) ("For that rule [the plain meaning rule] urges that the ordinary meaning can be so plain in some cases that a court need look to nothing else in carrying out its interpretive task.").

creation of the legislation, or to any other sources for judgment."[172] The "plain meaning rule" encourages courts to consider the absence and presence of every word, in part, because no word is to be deemed superfluous.[173] In addition to a close analysis of the statutory text at issue, courts may refer to the statute's other provisions to determine whether the text has a plain meaning.[174] Courts, rightfully so, decline to read the disputed text in isolation and "consider the context in which the statutory words are used."[175] If, upon a close analysis of the statutory text, the court concludes that the language is unambiguous, the inquiry ceases;[176] "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[177] Hence, theoretically, the application of the "plain meaning rule," limits a court's authority to rewrite statutory text.

If, however, a close textual analysis of statutory text reveals that the text is susceptible to different interpretations, courts generally turn to secondary sources for answers.[178] If the ambiguity is caused by a word, ambiguous words "are customarily given their ordinary meanings, often derived from the dictionary."[179] Dictionaries are commonly perceived as authoritative

172. JOHN GIBBONS, FORENSIC LINGUISTICS: AN INTRODUCTION TO LANGUAGE IN THE JUSTICE SYSTEM 21 (2003).

173. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166 (2004) (reasoning that a court is loath to read a statute in a manner that would render part of it superfluous); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)) ("It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"); Montclair v. Ramsdell, 107 U.S. 147, 152 (1882) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute . . . .").

174. KIM, *supra* note 165, at 2.

175. *Ayes v. U.S. Dep't. of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006).

176. *Barnhart*, 534 U.S. at 450; Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); KIM, *supra* note 165, at 2 ("[I]f the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning.").

177. *Barnhart*, 534 U.S. at 461–62 (quoting *Conn. Nat'l Bank*, 503 U.S. at 253–54); *see, e.g.*, United States v. Goldenberg, 168 U.S. 95, 103 (1897) ("He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator."); Oneale v. Thornton, 10 U.S. 53, 68 (1810) ("Men use a language calculated to express the idea they mean to convey.").

178. *See infra* notes 179, 193, 195 and accompanying text.

179. KIM, *supra* note 165, at 6; *see* FDIC v. Meyer, 510 U.S. 471, 476 (1994) ("[W]e construe a statutory term in accordance with its ordinary or natural meaning" if that term is not defined in the statute itself).

sources;[180] however, their value, in terms of aiding the judiciary with interpretive missions, is questionable for several reasons.

First, dictionary definitions are not always clear.[181] Second, most dictionaries include multiple entries for each word.[182] Third, "dictionaries do not settle meanings";[183] they merely reflect common usage.[184] In other words, definitions are not divined from grammarians or linguists;[185] rather, definitions are determined by the American people, the speakers of English.[186] Therefore, dictionaries do not dictate what is right and wrong; they simply archive modern usage. For example, "[t]he words 'gantlet' and 'gauntlet[]' . . . have become so mixed up in people's mouths—and minds—that dictionaries now say it's OK to use them interchangeably."[187] One finds this "even when a new usage collides with an old established rule. If enough people break it, the [old] rule is dumped."[188] "This is how today's blunder in . . . meaning may become tomorrow's standard usage."[189] Since "[d]efinitions are fixed by usage," and "[d]ictionaries follow usage[,]"[190] courts should view entries in a dictionary as linguistic snapshots. Indeed, Judge Learned Hand cautioned against judicial reliance on the dictionary and believed that "it is one of the surest indexes of a mature and developed jurisprudence *not* to make a fortress out of the dictionary."[191] Similarly, Justice Stevens warned against the use of dictionaries as a panacea for ambiguity in law.[192]

In addition to or aside from the dictionary, courts may also seek analytical guidance from the law's legislative history.[193] "The legislative history of a

180. KIM, *supra* note 165, at 6.

181. *Id.*

182. *Id.*

183. PHILBRICK, *supra* note 89, at 32.

184. O'CONNER & KELLERMAN, *supra* note 15, at xvii ("People often ask me who decides what's right. The answer is we all do. Everybody has a vote. The 'rules' are simply what educated speakers generally accept as right or wrong at a given time. When enough of us decide that 'cool' can mean 'hot,' change happens."); PHILBRICK, *supra* note 89, at 32 ("Dictionaries follow usage; they do not decide or lead it.").

185. O'CONNER & KELLERMAN, *supra* note 15, at 43.

186. *See supra* note 184.

187. O'CONNER & KELLERMAN, *supra* note 15, at 153.

188. *Id.* at xvii.

189. *Id.*

190. PHILBRICK, *supra* note 89, at 32.

191. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (emphasis added).

192. *See* Hibbs v. Winn, 542 U.S. 88, 113 (2004) (Stevens, J., concurring) ("In a contest between the dictionary and the doctrine of *stare decisis*, the latter clearly wins.").

193. Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); United States v. Great N. Ry. Co., 287 U.S. 144, 154–55 (1932) ("In aid of the process of construction we are at liberty, if the meaning be

statute is the history of its consideration and enactment."[194] Further, some courts, when analyzing a statute's legislative history, also consider congressional intent.[195] However, other courts snub the import of congressional intent because "[j]udges interpret laws rather than reconstruct legislators' intentions."[196] Those who ignore congressional intent may do so because "[t]he search for a subjective and uniform intent motivating the hundreds of members of Congress who voted for a statute is . . . almost always a chimera" because "legislation is a compromise, the product of alternately opposing and cooperating political forces that may ultimately vote in favor of the same bill while harboring diametrically opposite intentions."[197]

When it comes to statutory interpretation or interpretation of any legal language, courts are not bound by the canons. "[C]anons of [statutory] construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ."[198] Courts are free to deviate from these conventions and "superimpose[] various presumptions favoring particular substantive results."[199] Because the canons are "merely axioms of experience" and "variables render every problem of statutory construction unique[,]"[200] there is no mandatory approach to statutory interpretation.

uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."); KIM, *supra* note 165, at 39–40.

194. Sullivan v. Finkelstein, 496 U.S. 617, 631 (1990) (Scalia, J., concurring).

195. Negonsott v. Samuels, 507 U.S. 99, 104 (1993) ("Our task is to give effect to the will of Congress . . . .").

196. INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring); *accord* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 167 (2004) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)) ("'[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

197. *In re* Kiefer, 276 B.R. 196, 201 (Bankr. E.D. Mich. 2002).

198. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992); *accord* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)) ("For one thing, canons [of statutory interpretation] are not mandatory rules. They are guides that 'need not be conclusive.'").

199. KIM, *supra* note 165, at 1; *see, e.g.*, United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 707 (2d Cir. 1934) (considering practical implications when construing the word "obscene"). The Second Circuit was presented with the task of interpreting the word "obscene" as used in Section 305(a) of the Tariff Act of 1930 when the Collector seized the novel *Ulysses*, a book penned by Irishman James Joyce. *Id.* at 706. The court's analysis of the term "obscene" was geared toward the practical implications of its interpretation. *Id.* at 707. Judge Learned Hand reasoned that "[i]f these [characteristics] are to make the book subject to confiscation, by the same test Venus and Adonis, Hamlet, Romeo and Juliet, and the story told in the Eighth Book of the Odyssey . . . as well as many other classics, would have to be suppressed." *Id.*

200. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952).

### *B. Lower Courts' Interpretations of the Word "Filed"*

Hordes of courts have interpreted the reach of Section 215(a)(3).[201] The majority of circuits have opted for a liberal construction of the Act's complaint clause.[202] However, a minority of circuits held that an expansive interpretation is not warranted by the language of the statute.[203] In light of the conflicting jurisprudence, this portion of the article will explore the underpinnings of courts' incompatible conclusions about the meaning of the verb "filed."

#### 1. First Circuit

As a threshold issue, the First Circuit considered whether the language of Section 215(a)(3) has a plain meaning.[204] The court found that the phrase "filed any complaint" was "susceptible to differing interpretations."[205] However, the First Circuit reasoned that "[t]he strongest case for non-ambiguity rests perhaps with the verb 'filed.'"[206] The court acknowledged the significance of Congress's use of the word "filed" instead of "making" or "voicing."[207] To determine the "true" meaning of the word "filed," the First Circuit sought interpretative guidance from *Webster's Dictionary*.[208]

The court declined to rule on the scope of Section 215(a)(3).[209] Nevertheless, it reasoned that the inquiry of whether an employee "filed any

201. A search conducted on LexisNexis for court opinions that comment on the scope of Section 215(a)(3) returned over 900 matches.

202. Lambert v. Ackerley, 180 F.3d 997, 1008 (9th Cir. 1999) (finding that "several circuits" have held oral complaints as protected by the Act); Valerio v. Putnam Assocs. Inc., 173 F.3d 35, 43 (1st Cir. 1999) ("[W]e, like many of our sister circuits, conclude that the animating spirit of the Act is best served by a construction of § 215(a)(3) under which the filing of a relevant complaint with the employer . . . may give rise to a retaliation claim."); Brock v. Richardson, 812 F.2d 121, 125 (3d Cir. 1987); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 181 (8th Cir. 1975).

203. Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993), *overruled by* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011); Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011); O'Neill v. Allendale Mut. Ins. Co., 956 F. Supp. 661, 664–65 (E.D. Va. 1997).

204. *Valerio*, 173 F.3d at 41. *Valerio v. Putnam Associates, Inc.* is the seminal case about the scope of the Act's anti-retaliation provision in the First Circuit and has been cited over 100 times. One of its oft-cited holdings is that the Act's anti-retaliation statute does not require an employee to file a complaint with a governmental or administrative agency in order to trigger the provision's protection. *Id.* at 45.

205. *Id.* at 41.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Valerio*, 173 F.3d at 45 ("We conclude, as did the panel in Clean Harbors, that we have little choice but to proceed on a case-by-case basis, addressing as a matter of factual analysis

complaint" is fact sensitive and should be decided on a case-by-case basis.[210] The court qualified the word "filed," explaining that "not all abstract grumblings will suffice to constitute the filing of a complaint."[211] Moreover, the First Circuit concluded that "'[t]here is a point at which an employee's . . . comments are too generalized and informal to constitute 'complaints' that are 'filed' with an employer within the meaning of the [statute].'"[212]

2. Fourth Circuit

In *O'Neill v. Allendale Mutual Insurance Co.*, District Judge T.S. Ellis began his analysis with the language itself and reasoned that the "provision could scarcely be clearer."[213] Consequently, the district court held that the anti-retaliation clause is triggered only when an employee engages in conduct specifically identified by Section 215(a)(3).[214] The court explained that because the statute does not identify purely oral complaints as protected activity, such conduct is not sufficient to trigger the Act's protection.[215]

Next, the court compared the language of Title VII's anti-retaliation provision with Section 215(a)(3) of the Act.[216] Unlike Section 215(a)(3), the court noted, the language of Title VII contains the word "opposed," and as such, has been interpreted expansively.[217] The juxtaposition of the anti-relation clauses of Title VII and the Act convinced the court that "[Congress] must be held to have said what it meant."[218] Accordingly, the absence of the verb "oppose" and presence of the verb "filed" in Section 215(a)(3) reinforced the court's narrow interpretation.[219] Judge Ellis concluded his opinion with an ultimatum: "Should Congress, on reflection, consider sound public policy to require a different result, it may follow the example of Title VII and amend the FLSA to add an 'opposition clause.'"[220]

3. Fifth Circuit

whether the internal communications to the employer were sufficient to amount to the 'filing of any complaint' within the statutory definition.").

210. *Id.*
211. *Id.* at 44.
212. *Id.*
213. O'Neill v. Allendale Mut. Ins. Co., 956 F. Supp. 661, 663 (E.D. Va. 1997).
214. *Id.* at 664.
215. *Id.*
216. *Id.*
217. *Id.*
218. *O'Neill*, 956 F. Supp. at 664.
219. *Id.*
220. *Id.* at 665.

In 2008, the Fifth Circuit interpreted the scope of Section 215(a)(3).[221] The court began its analysis by reviewing the district court's findings.[222] The Fifth Circuit held that purely oral protests constitute protected activity under the statute and explained that a broad interpretation of Section 215(a)(3) furthers the Act's goals.[223] To temper the court's expansive interpretation, the Fifth Circuit reasoned that an employee's informal complaint must allege a violation of the Act and not merely a "potential illegality."[224]

4. Sixth Circuit

In *EEOC v. Romeo Community Schools*, the Sixth Circuit spilled minimal ink in its interpretation of Section 215(a)(3).[225] The court cited an opinion from the Third Circuit, which explained: "[A]n informal complaint by an employee is sufficient to bring [that] employee under [the] Act; a formal filing is not necessary."[226] Next, the Sixth Circuit emphasized the temporal sequence of events that gave rise to the lawsuit and concluded that because Plaintiff's termination occurred after she "filed" a complaint, Plaintiff had successfully presented a prima facie case of retaliation.[227]

Judge Suhrheinrich of the Sixth Circuit disagreed with the majority's analysis and prepared a dissent.[228] His dissent examined the language of Section 215(a)(3) and identified three categories of protected conduct.[229] Accordingly, because Plaintiff had failed to engage in one of the three enumerated categories of protected conduct, Judge Suhrheinrich concluded that Plaintiff had not earned the protection of Section 215(a)(3).[230] If Plaintiff had brought her action under Title VII, the dissent posited, Plaintiff would have set forth a valid claim of retaliation.[231] The dissent explained that "Title VII expressly includes an opposition clause, which protects employees who protest unlawful employment practices"[232] whereas "Section 215(a)(3) contains no

221. Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 624, 626 (5th Cir. 2008).

222. *Id.* at 624–25 ("[T]he district court found that even an informal, internal complaint could constitute protected activity under the FLSA.").

223. *Id.* at 626.

224. *Id.*

225. *See* EEOC v. Romeo Cmty. Sch., 976 F.2d 985, 989–90 (6th Cir. 1992).

226. *Id.* at 989 (citing Brock v. Richardson, 812 F.2d 121, 124–25 (3rd Cir. 1987)).

227. *Id.* at 989–90.

228. *Id.* at 990 (Suhrheinrich, J., concurring in part and dissenting in part).

229. *Id.* ("(1) filed a Fair Labor Standards Act ('FLSA') complaint, (2) instituted an FLSA proceeding, or (3) testified in an FLSA proceeding.").

230. *Romeo Cmty. Schs.*, 976 F.2d at 990 (Suhrheinrich, J., concurring in part and dissenting in part).

231. *Id.* (Suhrheinrich, J., concurring in part and dissenting in part).

232. *Id.* (Suhrheinrich, J., concurring in part and dissenting in part).

such provision."[233] Judge Suhrheinrich refused to expand the Act's anti-retaliation clause and concluded that oral protests do not constitute protected activity.[234]

5. Ninth Circuit

The Ninth Circuit began its analysis with a sampling of circuit courts that have interpreted Section 215(a)(3) broadly.[235] The Ninth Circuit held that the Act's anti-retaliation is entitled to a broad construction.[236] If Section 215(a)(3) were applied in a narrow manner, the court reasoned, "such a construction would leave employees completely unprotected by the FLSA against retaliatory discharge when they complain to their employers about violations of the Act."[237] The court's overriding concern in construing the reach of Section 215(a)(3) was to effectuate the goals of the Act.[238]

Later in its analysis, the Ninth Circuit commented on the language of the statute.[239] The court characterized the language as "*possibly* subject to differing interpretations."[240] The circuit court acknowledged the all-inclusive language included in Title VII and the absence of similar language in the Act's anti-retaliation provision, but reasoned that the linguistic difference is not dispositive.[241] Accordingly, the Ninth Circuit concluded that Congress could not be held the meaning of words chosen for Title VII when construing a similar provision in the Act.[242] To explain away the linguistic discrepancies, the court reasoned that the Act, unlike Title VII, was enacted "at a time when statutes were far shorter and less detailed, and were written in more general and simpler terms."[243]

6. D.C. Circuit

233. *Id.* (Suhrheinrich, J., concurring in part and dissenting in part).

234. *Id.* (Suhrheinrich, J., concurring in part and dissenting in part).

235. Lambert v. Ackerley, 180 F.3d 997, 1003 (9th Cir. 1999) ("The First, Third, Sixth, Eight, Tenth, and Eleventh circuits have all held that complaints similar to, and even far more 'informal' than those lodged by the plaintiffs here entitle the employee to coverage under the anti-retaliation provision of the FLSA.").

236. *Id.* at 1004.

237. *Id.*

238. *Id.* at 1003–04.

239. *Id.* at 1004–05.

240. *Ackerley*, 180 F.3d at 1004 (emphasis added).

241. *Id.* at 1005.

242. *Id.*

243. *Id.* ("The fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA.").

The D.C. Circuit began its analysis by canvassing opinions handed down by various circuit courts.[244] The D.C. Court explored the consequences of interpreting the anti-retaliation provision in both a narrow and broad manner.[245] In support of a narrow interpretation, the court cited opinions from the Second and Fourth Circuits[246] and reasoned that "Congress knows how to be broad when it wants to be broad."[247] Next, the D.C. Circuit reviewed opinions that held that Section 215(a)(3) is entitled to a liberal construction.[248] In doing so, the court identified a common thread: "[M]ost of them note[d] important Supreme Court decisions indicating that FLSA [the Act] should not be interpreted too narrowly . . . ."[249] The D.C. Circuit refrained from defining the reach of Section 215(a)(3), but expressed a preference for a narrow construction.[250]

### *C. The Supreme Court's Jurisprudence of the Fair Labor Standards Act*

Prior to granting certiorari to the *Kasten* case, the Supreme Court had relegated the interpretation of Section 215(a)(3) to the country's lower courts.[251] Over the years, however, the Court has issued opinions on other provisions of the Act.[252] In 1942, the Court agreed to interpret the word "wages" in Section 206(a)[253] and defined in Section 203(m);[254] the issue in that case was whether tips could be treated as wages.[255] Upon acknowledging the word's statutory definition, the Court assessed the word's connotation, which it

244. Rodriguez v. P.R. Fed. Affairs Admin., 338 F. Supp. 2d 125, 130 (D.D.C. 2004), *rev'd*, 435 F.3d 378 (D.C. Cir. 2006).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Rodriguez*, 338 F. Supp. 2d at 130.

250. *Id.* at 130–31 ("The narrow holdings of the Second and Fourth Circuits are more consistent with FLSA's language, but we do not know enough to apply that language with precision.").

251. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1330 (2011) (describing the circuit split regarding protection of oral complaints under section 215(a)(3)).

252. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 129 (1988); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 (1985); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 289 (1960); Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 756 (1949); Williams v. Jacksonville Terminal Co., 315 U.S. 386, 390 (1942).

253. 29 U.S.C. § 206(a) (2006); *Williams*, 315 U.S. at 390–91, 391 n.4. Section 206(a) of the Act provides: "Every employer shall pay to each of his employees who in any workweek is engaged in commerce . . . wages at the following rates . . . ." 29 U.S.C. § 206(a).

254. 29 U.S.C. § 203(m); *Williams*, 315 U.S. at 390–91, 391 n.4.

255. *Williams*, 315 U.S. at 390.

extrapolated from the Act's legislative purpose.[256] The Court also considered the ordinary meaning of the term "wages" as well as the absence of any qualifiers, such as "tip."[257] Had Congress intended the term "wages" to include tips, the Court reasoned, by a stroke of the legislative pen, such a provision could have been drafted.[258] The Court also examined the meaning of the word "wages" in other pieces of federal legislation and concluded that it lacked a uniform, fixed meaning.[259]

In 1949, the Supreme Court defined the word "agriculture" pursuant to its inclusion in Section 13(a)(6) of the Act.[260] The Court considered the contours of the word "agriculture" as understood apart from its use in law.[261] Further, "the . . . Act provides a carefully considered definition [of the word 'agriculture'],"[262] which, the Court noted, "is of substantial aid in helping us to make that determination."[263] Although helpful, the definition did not end the Court's inquiry, and the Court sought additional guidance from secondary sources.[264] However, it "refused to pervert the process of interpretation by [seeking assistance from the dictionary and] mechanically applying definitions in unintended contexts."[265] Having rejected the dictionary, the Court examined the statute's legislative history.[266]

Ten years later, the Supreme Court was asked to rule on an issue that implicated Section 215(a)(3) of the Act.[267] "The question for decision [wa]s whether, in an action brought by the Secretary of Labor to enjoin violations of § [2]15(a)(3), Section 17 empowers a District Court to order reimbursement for loss of wages caused by an unlawful discharge . . . ."[268] In that opinion, Justice Harlan reasoned the Act's anti-retaliation clause was designed to "foster a climate in which compliance with the substantive provisions of the Act would be enhanced."[269] Specifically, Section 215(a)(3), according to the

256. *Id.* at 404 ("What the word 'wages' connotes in addition to the items specified, we must deduce from other provisions of the act in the light of its legislative purpose.").

257. *Id.*

258. *Id.*

259. *Id.* at 404–07.

260. Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 756, 757 (1949) (Section 13(6) exempts persons employed in agriculture from the reach of the Act).

261. *Id.* at 760–62.

262. *Id.* at 762.

263. *Id.*

264. *See id.* at 763–65, 763 n.10 (examining company by-laws and legislative history to aid in defining "agriculture").

265. *Farmers Reservoir & Irrigation Co.*, 337 U.S. at 764.

266. *Id.* at 764–65.

267. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 289 (1960).

268. *Id.*

269. *Id.* at 289, 292.

Court, was enacted to insulate employees from economic reprisal if they reported an employer's unlawful employment practices.[270]

In 1985, the Supreme Court analyzed Section 203(r) of the Act; at issue was the scope of the word "enterprise."[271] The Court observed that in the past, the Act had been interpreted broadly in order to effectuate its goals.[272] The Court also considered the Act's legislative history, including the effects of the Act's 1961 amendment.[273]

Three years later, the Supreme Court construed "the meaning of the word 'willful' as used in [Section 255(a) of the Act]."[274] The Court began its analysis by examining the statute's legislative history, which revealed that the Act had been amended.[275] Accordingly, the Court contemplated the effects of Congress's amendment on the statute's meaning.[276] Another strand of analysis involved the Court's consideration of the ordinary meaning of the word "willful."[277] To accomplish this task, guidance was sought from *Roget's International Thesaurus*.[278] The Court concluded that the word "willful," which makes frequent appearances in the law, means that the "employer either knew or showed reckless disregard."[279]

Justice Marshall, joined by two other Justices, disagreed with the majority's construction of the word "willful."[280] They agreed that the Court's narrow construction of the Act's language frustrates the remedial purpose of the legislation.[281] In reaction to the majority's use of a thesaurus, Justice Marshall argued "the dictionary includes a wide variety of definitions[,]" including the "definition urged by the Secretary [Plaintiff]."[282]

270. *Id.*

271. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 293, 295 (1985) (examining Section 203(r) of the Act, which defines the word "enterprise").

272. *Id.* at 296.

273. *Id.* at 297–98.

274. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 129 (1988). Section 255(a) provides for a two-year statute of limitation "if the cause of action accrues on or after [the date of the enactment of this Act] . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a) (2006).

275. *McLaughlin*, 486 U.S. at 132 (noting that prior to its amendment, Section 255(a) did not distinguish between willful and nonwillful violations).

276. *Id.* (reasoning that "Congress intended to draw a significant distinction between ordinary violations and willful violations").

277. *Id.* at 133.

278. *Id.*

279. *Id.*

280. *McLaughlin*, 486 U.S. at 135–36 (Marshall, J., dissenting).

281. *Id.* at 138 (Marshall, J., dissenting) ("[T]he Court has adopted a definition of 'willful' that is improperly narrow in light of its effect on the remedial scope of the FLSA.").

282. *Id.* at 137 (Marshall, J., dissenting).

## IV. THE TENOR OF ORAL ARGUMENTS, THE SUPREME COURT'S RULING, AND THE IMPLICATIONS OF THE COURT'S DECISION

The Supreme Court heard oral arguments for the *Kasten* case on October 13, 2010.[283] In total, there were four waves of arguments. First, on behalf of Appellant, Mr. Kaster argued that Section 215(a)(3) is entitled to a broad interpretation.[284] Next, Jeffrey Wall, Assistant to the Solicitor General, as amicus curiae, appeared before the Court in support of Appellant.[285] Appellee Saint-Gobain's attorney, Mr. Phillips, urged the Justices of the Court to interpret the word "filed" in a narrow manner.[286] Mr. Kaster, who reserved time for rebuttal, rounded out oral arguments by reiterating his opening argument.[287]

283. Transcript of Oral Argument at 1, Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) (No. 09-834).

284. *Id.* at 3–16.

285. *Id.* at 16–26.

286. *Id.* at 26–50.

287. *Id.* at 50–54.

### *A. Oral Arguments: The Court's Comments, Questions, and Concerns*

In response to Mr. Kaster's opening statement, "filing includes an oral communication,"[288] Justice Alito inquired about the common usage of the verb "filed."[289] Similarly, Justice Sotomayor tested Mr. Kaster's definition of the word "filed" by posing a hypothetical.[290] The hypothetical revolves around an employee who, during a cocktail party, approaches a government employee and complains about the employer's illegal practices.[291] After contextualizing the word "filed" with a hypothetical, Justice Sotomayor asked Mr. Kaster to define the verb "filed."[292] Following Mr. Kaster's response, Justice Alito commented on the word's ordinary meaning.[293] Justice Alito also keyed in on a practical implication of construing the word "filed" liberally: absent a formality requirement, the issue of whether an employee engaged in protected conduct, that is whether an employee's alleged oral complaints were in fact communicated to the employer, will be more readily disputed and disputable.[294]

Justice Ginsburg brought the Court's attention back to the language of the statute and noted that "every other time the word 'file' is used . . . it refers to a writing."[295] She urged Mr. Kaster to explain why the Court should adopt an interpretation "that deviates from the standard meaning of the term in the very Act at issue."[296] After Mr. Kaster's response, Justice Sotomayor asked Mr. Kaster, for a second time, to define the word "filed."[297] Mr. Kaster reiterated that "[i]t means to submit or lodge."[298] To assess the merit of Mr. Kaster's definition, Justice Scalia reasoned that if filed means to submit or lodge that Mr. Kaster was currently filing a complaint before the Court.[299] Scalia, incited

288. Transcript of Oral Argument, *supra* note 283, at 3.

289. *See id.* at 4. Justice Alito explored the bounds of the verb "filed" with a hypothetical fact pattern. *Id.* "Now, there's—something's going on in the workplace and the supervisor happens to be walking by, maybe a machine is broken, an employee has been hurt, and an employee walks up to the supervisor who is walking briskly by, taps the supervisor on the shoulder and says the company is violating the Fair Labor Standards Act because of the placement of a clock. . . . Would that be the filing of a complaint?" *Id.*

290. *Id.* at 4–5.

291. *Id.*

292. *Id.* at 5.

293. Transcript of Oral Argument, *supra* note 283, at 6 ("It's one thing to say that filing doesn't necessarily mean that something is written, although that's usually what the word means, isn't it?").

294. *Id.* at 7.

295. *Id.* at 10.

296. *Id.* at 10–11.

297. *Id.* at 12–13.

298. Transcript of Oral Argument, *supra* note 283, at 13.

299. *Id.*

by such reasoning, remarked: "Now come on, people don't talk like that. . . . That—that—that is absurd. You are not filing an argument right now. Nobody uses the language that way."[300]

Amicus curiae, Mr. Wall, began his argument by paying deference to the Court's pragmatic concerns of according "filed" a liberal interpretation.[301] To convince the Court that an expansive interpretation is warranted, he explained that more than twenty statutes contain analogous language and that the majority of those statutes protect all forms of complaints.[302] Mr. Wall was directed by Justice Scalia to consider the year in which the Act was passed;[303] Justice Scalia also requested Mr. Wall to compare the language of the National Labor Relations Act's anti-retaliation clause with Section 215(a)(3) of the Act.[304] Following Mr. Wall's comparison, Justice Ginsburg turned the Court's attention to the practical purpose of a written complaint: "to give the employer notice that something is amiss."[305] Justice Kennedy, like Justice Alito, was interested in whether a broad interpretation of the Act's anti-retaliation provision would invite litigation.[306]

On behalf of Appellee Saint-Gobain, Mr. Phillips commenced his argument by describing Appellant's proposed meaning of Section 215(a)(3) as an "inherently unworkable standard."[307] Mr. Phillips conclusion prompted this question from the Court: "What makes this worse than these other statutes?"[308] Following Mr. Phillips's answer, Justice Ginsburg guided the conversation to context, but rather than context today, context in 1938, the year the statute was enacted.[309] Justice Ginsberg also asked Mr. Phillips whether "Congress . . . meant that all complaints are okay" in light of the purpose of the Act, which was "to protect the workers."[310]

The Court instructed Mr. Phillips to compare the phrase "filed any complaint" with similarly-worded provisions in "Title VII, The Age Discrimination Act, [and the] Disabilities Act[.]"[311] Next, revisiting a concern raised earlier in oral arguments by Justice Alito, the Court asked Mr. Phillips to

300. *Id.*
301. *Id.* at 16–17.
302. *Id.* at 16.
303. Transcript of Oral Argument, *supra* note 283, at 17.
304. *Id.*
305. *Id.* at 18.
306. *Id.* at 7, 26.
307. *Id.* at 27.
308. Transcript of Oral Argument, *supra* note 283, at 27.
309. *Id.* at 31; Nordlund, *supra* note 32, at 721 ("[T]he FLSA became effective on October 24, 1938.").
310. Transcript of Oral Argument, *supra* note 283, at 31.
311. *Id.* at 34.

comment on the likelihood and frequency of disputes arising over whether an employee orally protested about a violation of the Act.[312] Justice Sotomayor requested an explanation as to why the Court should interpret Section 215(a)(3) narrowly.[313] Mr. Phillips explained that the Court should read the language of the statute "the way it was written and as the way they would have understood it at the time."[314]

### *B. Interpretative Tools Employed by the Supreme Court During Oral Argument*

David Mellinkoff, a scholar who has written on the relationship between language and law, has generated a list of questions to determine whether a section of "[legal] language is appropriate or inexcusable."[315] The following is a sample of his questions: "Is that the only way it [the word at issue] can be used? . . . Did it ever have a definite meaning? . . . Does it have a definite meaning now? . . . Does this way make meaning more exact than ordinary English? . . . Is there any good reason for saying it this way now?"[316] Many of the questions posed by the Supreme Court during oral argument are strikingly similar to the questions on Mellinkoff's list.[317]

During oral arguments, the Court repeatedly invited both parties to define the verb "filed."[318] Justice Sotomayor inquired about the word's current definition, the natural understanding of the word today,[319] and Justice Ginsberg called for the term's definition as understood in 1938.[320] To further explore the scope of the word "filed," the Court created context by way of hypotheticals.[321] The Court's interest in contextualizing the word was far from surprising. After all, "[c]ontext is . . . relevant to determining what comes within a given sense of a word as used on a given occasion."[322] Moreover, the

312. *Id.* at 35.

313. *Id.* at 27.

314. *Id.*

315. MELLINKOFF, *supra* note 5, at 297–98 ("Is it a term of art? . . . Are its edges sharp or soft? . . . Is that the only way it can be used? . . . Is this the traditional way of saying it? . . . Does this way make meaning more exact than ordinary English? . . . Is there some requirement that it be said this way?").

316. *Id.* at 298.

317. *Compare* MELLINKOFF, *supra* note 5, at 298, *with* Transcript of Oral Argument, *supra* note 283, at 11–13.

318. Transcript of Oral Argument, *supra* note 283, at 5, 12–13.

319. *Id.*

320. *Id.* at 31.

321. *See, e.g.*, *id.* at 4–5, 7, 15–16, 20, 23, 28.

322. JIM EVANS, STATUTORY INTERPRETATION: PROBLEMS OF COMMUNICATION 22 (2d ed. 1989).

Court has a history of recognizing the value of context.[323] As Justice Homes reasoned in 1918, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the *circumstances* and the *time* in which it is used."[324]

The Justices also inquired about the practical effects of each party's construction of Section 215(a)(3)[325] and whether such a definition aligns with the Act's goals and legislative history.[326] Additionally, the Court's questions, on multiple occasions, required litigants to compare the language of Section 215(a)(3) with analogous anti-retaliation provisions.[327] Notwithstanding the questions concerning the Act's goals and legislative history, the Court seemed most concerned with developing a workable and fitting definition of the word "filed."[328]

### *C. The Supreme Court's Ruling*

In an opinion penned by Justice Breyer, the Supreme Court began its analysis of the phrase "filed any complaint" with the text of the statute.[329] However, the Court veered from the statute itself and devoted its attention to the meaning of the verb "filed."[330] Prior to fleshing out its analysis, the Court's opinion reports that "[t]he word 'filed' has different relevant meanings in different contexts."[331] In a single sentence, the Court paid homage to a fundamental truth: although we share a common language, one language, that language creates many realities.[332] To ferret out the definition of the word "filed," the Court consulted three separate dictionaries.[333] Two of the dictionaries include a definition that contemplates a writing.[334] The second entry in the third dictionary states that "to file is to 'present in the regular way, as to a judicial or legislative body, so that it shall go upon the records or into the order of business.'"[335] According to the Court, that definition "permit[s]

323. Towne v. Eisner, 245 U.S. 418, 425 (1918).

324. *Id.* (emphasis added).

325. *See, e.g.*, Transcript of Oral Argument, *supra* note 283, at 7, 35.

326. *Id.* at 31, 36, 42–43.

327. *Id.* at 10, 27, 34.

328. *Id.* at 4–5, 6, 7, 11–13, 31, 40–41.

329. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1329, 1331 (2011).

330. *Id.* at 1331.

331. *Id.*

332. *See id.*

333. *Id.* (using WEBSTER'S NEW INTERNATIONAL DICTIONARY, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, and FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE to define the word "file").

334. *Kasten*, 131 S. Ct. at 1331.

335. *Id.* (quoting 1 FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 920 (Isaac K. Funk ed., 1938)).

the use of the word 'file' in conjunction with oral material[,]"[336] which "is significant because it means that dictionary meanings, even if considered alone, do not *necessarily* limit the scope of the statutory phrase to written complaints."[337]

To buttress the validity of the Court's construction of the verb "file," first, the Court noted that "legislators, administrators, and judges have all *sometimes* used the word 'file' in conjunction with oral statements."[338] Second, the Court cited a list of federal regulations, which were promulgated by federal agencies, that "*sometimes* permit complaints to be filed orally."[339] Next, the Court referenced a handful of court opinions where the parties' dispute concerned or arose from an oral complaint.[340] Yet, the following sentence of the opinion included a curious confession: most complaints are made in writing.[341] To temper this concession, the Court reframed its inquiry: "[W]e are interested in the filing of '*any* complaint[,]'" not just the filing of a complaint.[342] By tweaking its approach, the Court reasoned that while the verb "'filed' . . . might suggest a narrow interpretation limited to writings, the phrase '*any* complaint' suggests a broad interpretation that would include an oral complaint."[343]

About halfway through the opinion, the Court shifted its gaze back to the language of Section 215(a)(3) and considered "other appearances of the word 'filed' in the Act."[344] Although the verb "filed" populates the text of the Act, the Court concluded that "its appearance elsewhere in the Act does not resolve the linguistic question before us."[345] Having parsed the language of the Act to its satiety, the Court considered other anti-retaliation provisions, but noted that they use different language, broader language.[346] To reconcile this, the Court proposed two irreconcilable explanations: "[T]he use of broader language elsewhere *may* mean (1) that Congress wanted to limit the scope of the phrase before us to writings, or (2) that Congress did not believe the different phraseology made a significant difference in this respect."[347] The Court then

336. *Id.*
337. *Id.*
338. *Id.* (emphasis added).
339. *Kasten*, 131 S. Ct. at 1331 (emphasis added).
340. *Id.* at 1332.
341. *Id.*
342. *Id.*
343. *Id.*
344. *Kasten*, 131 S. Ct. at 1332.
345. *Id.*
346. *Id.* 1332–33.
347. *Id.* at 1333.

stated that the statutory text fails to conclusively answer this question, so it turned to functional considerations.[348]

First, the Court addressed the practical effects of according Section 215(a)(3) a narrow interpretation and explained that such an interpretation "would undermine the Act's basic objectives."[349] The Court also posed a rhetorical question: "Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing . . . ?"[350] Next, the Court reasoned that a narrow interpretation of Section 215(a)(3) would "take needed flexibility from those charged with the Act's enforcement."[351] Although the Act seeks to protect employees from a spectrum of unsavory employment practices, the Court admitted that the Act also seeks to create a statutory scheme that is fair to employers.[352] To be fair to employers, the Court reasoned, "the employer must have fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation."[353]

Returning to the statutory text, the Court stated that the phrase "filed any complaint" denotes a certain degree of formality.[354] However, the degree of formality, according to the Supreme Court, "does not necessarily mean that notice must be in writing."[355] As such, Section 215(a)(3) is triggered when a complaint is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."[356] This standard can be satisfied by both oral and written complaints.[357]

### *D. Commentary on the Judiciary's Interpretations of Section 215(a)(3)*

To interpret the Act's anti-retaliation provision, many, if not most, lower courts concentrated on the Act's animating spirit and reasoned that the scope of Section 215(a)(3) should extend beyond the activities explicitly identified

348. *Id.*

349. *Kasten*, 131 S. Ct. at 1333. (reasoning that the Act proscribes certain employment practices and does so by relying on information and complaints from employees).

350. *Id.*

351. *Id.* at 1334.

352. *Id.*

353. *Id.*

354. *Kasten*, 131 S. Ct. at 1334.

355. *Id.* at 1335.

356. *Id.*

357. *Id.*

by the statutory text.[358] While the underlying current of a law is important, at what point "does an interpretation become so outrageous that it [should] be condemned as an invention?"[359] Courts should be wary of magnifying the importance of the Act's remedial and humanitarian purpose. A statute's purpose is not a license to expand the scope of its provisions. It is imprudent for courts to add words to a statute that Congress has clearly excluded. Had Congress desired to extend the reach of Section 215(a)(3), it could have done so with an amendment.

Some lower courts, like the Seventh Circuit, consulted the dictionary for analytical guidance.[360] Mr. Kaster, on behalf of Appellant Kasten, argued that the word "filed" is synonymous with the word "submitted."[361] If, as Mr. Kaster claimed, the word "filed" can also mean "submitted," the mere possibility that a word *can* mean one thing does not warrant the expansion of a piece of federal legislation.[362] If courts desire to supplement their analysis by referring to the dictionary, perhaps they should consult a dictionary whose copyright corresponds with the year of the Act's enactment. Alternatively, courts could consult a dictionary of etymology.[363] A dictionary of etymology or, in this case, a dictionary from the 1940's would accurately inform the court of the origins of the word "filed" or how the word "filed" was conceptualized by those who wrote the statutory text.

Although the Supreme Court ignored the etymology of the verb "filed," it sought analytical guidance from three dictionaries, two of which were published in the 1930's.[364] Two definitions, which were pulled from two

358. *See, e.g.*, Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 626 (5th Cir. 2008); Lambert v. Ackerley, 180 F.3d 997, 1004 (9th Cir. 1999); Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 42–44 (1st Cir. 1999); Saffels v. Rice, 40 F.3d 1546, 1548–49 (8th Cir. 1994).

359. TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 180 (2000).

360. Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 839 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011); Kasten v. Saint-Gobain Performance Plastics Corp., 619 F. Supp. 2d 608, 613 (W.D. Wis. 2008), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011); Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 41 (1st Cir. 1999).

361. *Kasten*, 570 F.3d at 838–39; Transcript of Oral Argument, *supra* note 283, at 11.

362. *Kasten*, 570 F.3d at 839.

363. *See, e.g.*, THE BARNHART DICTIONARY OF ETYMOLOGY 381 (Robert K. Barnhard & Sol Steinmetz eds., 1988) (The verb "filed" is defined as "to place (papers, etc.) in order."). THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY defines the verb "file" as: "place on or in a file." THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 355 (C. T. Onions et al. eds., 1966).

364. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1331 (2011) (The Court cited WEBSTER'S NEW INTERNATIONAL DICTIONARY, which was published in 1934, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY whose copyright is 1983, and FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE, which was published in 1938.).

discrete dictionaries, indicate that the word "filed" contemplates a writing.[365] However, those definitions appeared to displease the Court. As such, it scouted for a dictionary entry that cast a wider net.[366] The Court found such a definition.[367] The more inclusive definition—to file means to "'present in the regular way, as to a judicial or legislative body, so that it shall go upon the records'"[368]—lent a modicum of credibility to the Court's next deduction, which mirrored Plaintiff Kasten's argument: when a word might have another meaning, that meaning is just as forceful as the word's ordinary or principal meaning.[369] The Court characterized this possibility, that a word has dual meanings, as significant and concluded that because the definitions of "filed" lacked uniformity, the scope of the word is ambiguous.[370]

However, the court failed to examine the meaning of the third definition. The third definition places limits as to when filing constitutes presenting in the regular way.[371] Those limits require an individual to speak before a judicial or legislative body.[372] In this case, Plaintiff Kasten orally complained to his employer, not a judicial or legislative body.[373] Further, prior to invoking the Act's anti-retaliation provision, he had not presented his complaint to a judicial or legislative body.[374] Nonetheless, this definition alone was sufficient to convince the Court that the word "filed" could encompass oral and written complaints.[375] Moreover, this third definition requires the individual's statement to "'go upon the records or into the order of business.'"[376] The phrase "go upon the records" is clear; however, the neighboring phrase "into the order of business" is far less clear. Rather than consider whether the third definition applies to the *Kasten* case, the Court presumed that it did and forged

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* (quoting 1 FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 920 (Isaac K. Funk ed., 1938)).

369. *See Kasten*, 131 S. Ct. at 1331; Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 839 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (mem.), *and vacated*, 131 S. Ct. 1325 (2011); Transcript of Oral Argument, *supra* note 283, at 3–4, 11.

370. *Kasten*, 131 S. Ct. at 1331, 1333.

371. *See id.* at 1331.

372. *Id.*

373. *Id.* at 1329.

374. *See id.* (accepting Plaintiff Kasten's version of the story, in which he claimed to have "repeatedly called the unlawful timeclock location to Saint-Gobain's attention—in accordance with Saint-Gobain's internal grievance-resolution procedure").

375. *See Kasten*, 131 S. Ct. at 1331, 1335.

376. *Id.* at 1331 (quoting 1 FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 920 (Isaac K. Funk ed., 1938)).

ahead with its analysis.[377] However, had the Court parsed the language of this definition, its analysis might have been different.

Aside from the *possibility* that the word "filed" includes oral statements, the Court noted that "legislators, administrators, and judges have all *sometimes* used the word 'file' in conjunction with oral statements."[378] The adjective "sometimes" denotes a lack of agreement, an inconsistency. Had the Court selected a measure other than sometimes, such as frequently or regularly, this anecdotal data would carry more force. Also, it would be helpful to know what year and under what circumstances these legislators, administrators, and judges used the word "file" as a synonym for presenting an oral statement.

### *E. The Intersection of Language and Law*

In light of the relationship between law and language, a series of connected considerations materialize when courts are asked to interpret the law. First, we, as speakers of the English language, wield the power to control the meaning of words. Accordingly, because dictionaries reflect common usage and yesterday's blunder becomes tomorrow's standard usage,[379] we should ask whether common usage is an appropriate standard upon which to judge a word. Further, by virtue of our control over language, does it follow that we, the American people, control the law?

Second, when a court hands down an opinion that defines the "true" meaning of a word, that decision may shape common usage and thereby sharpen or blur the definition of a word. If the definition of a word has been expanded by the judiciary, are courts entitled to commit verbicide with impunity?[380] Verbicide occurs when a person or entity "injur[es] the language . . . both by helping to break down a serviceable distinction, and by giving currency to a mere token word in place of one that is alive."[381] If the judiciary is empowered to define words, we should also ask whether judges make good linguists.[382]

Third, because language is not static, how can courts, together with the American people, counteract the instability of language and by extension, the instability of law? As our first line of defense, we should recognize that "bad language usage can hurt good law; good language usage can promote respect

377. *See id.*

378. *Id.* (emphasis added).

379. *See* O'CONNER & KELLERMAN, *supra* note 15, at xvii.

380. *See* MARK DAVIDSON, RIGHT, WRONG, AND RISKY: A DICTIONARY OF TODAY'S AMERICAN ENGLISH USAGE 486 (2006).

381. *Id.*

382. CHRISTOPHER HUTTON, LANGUAGE, MEANING, AND THE LAW 171 (2009).

for good law."[383] Accordingly, the pursuit of stability in language and law is mutually inclusive. As a society, we control language, and to some extent, law. Therefore, although "language cannot stand still, the main thing for the public interest is that alterations in vocabulary . . . should not become too rapid, reckless, and wanton."[384]

The American people and the court system should be wary of condoning injudicious interpretations of words. For language to serve its purpose, words must signify clear, precise concepts; they must be distinguishable and distinct. The preservation of language will engender stability in law. A stable language will "enhance[] predictability in the application of law and, hence, liberty."[385] Further, linguistic stability together with precision in law may "reduce[] doubt and disagreement."[386] The law will be more accessible to American citizens, and consequently, the need for judicial intervention might decline.[387]

## CONCLUSION

"The paradox of language is that it changes fast and radically, without our noticing it."[388] Despite the ever-changing nature of language, "this language has preserved a body of law, given it continuity from backwater beginnings to world eminence."[389] Given the law's dependency on language and language's malleability, a conflict of interest crystallizes between the two: If language, an essential ingredient of law, is malleable and ever-changing, how can law endure and retain clarity?

This interdisciplinary inquiry inspired by *Kasten v. Saint-Gobain Performance Plastics Corp.* is the subject of a circuit split, which has now been resolved by the Supreme Court.[390] The substantive issue presented by this case is whether purely oral complaints constitute filing a complaint and are sufficient to trigger the Act's protection.[391] To determine the reach of the Act's anti-retaliation provision, the Supreme Court has identified the "true" meaning of the word "filed."[392] In doing so, how did the Court reach a

383. MELLINKOFF, *supra* note 5, at 453.

384. GARNER, *supra* note 1, at xxxix.

385. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 321 (1985).

386. Endicott, *Law Is Necessarily Vague*, *supra* note 25, at 379.

387. *Id.* at 379–80.

388. LIBERMAN, *supra* note 14, at 157.

389. MELLINKOFF, *supra* note 5, at 437.

390. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (2011).

391. *Id.* at 1329.

392. *Id.* at 1335 ("To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it . . . . This standard can be met, however, by oral complaints, as well as by written ones.").

decision, and what does its decision indicate about the relation between language and law? This case and the Court's opinion prompts a litany of linguistic and legal queries, such as whether law should evolve with language; whether the meaning of legal language should correspond with speakers' everyday use; and whether Americans and the judiciary should band together to preserve and honor language by preserving and honoring law.

JULIE L. NEWMAN*

* Julie L. Newman is a 2012 graduate of Saint Louis University School of Law. I would like to thank Professor Yvette Liebesman for her invaluable assistance and support throughout the writing process. I would also like to thank Professor Suellynn Duffey; she inspired me to become a better writer and a better teacher.