No. 09-291

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC L. THOMPSON,
Petitioner,

v.

NORTH AMERICAN STAINLESS, LP
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AMERICAN ASSOCIATION FOR JUSTICE, AARP, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LEGAL AID SOCIETY OF SAN FRANCISCO-EMPLOYMENT LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA), American Association for Justice (AAJ), AARP, Disability Rights Education and Defense Fund, Inc. (DREDF), Lawyers' Committee for Civil Rights Under Law (the Lawyers' Committee), and Legal Aid Society of San Francisco-Employment Law Center (LAS-ELC) are organizations dedicated to ensuring Congress's goal that workers have both the right to a discrimination-free work environment as well as effective procedures for the enforcement of this right. Consistent with Congress's intent and this Court's prior interpretations, the *Amici* fulfill the role of private attorneys general by assisting in the enforcement of these laws. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981); *see N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) ("Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority'").

This case will substantially affect employee rights. It will determine whether all employees who are injured by unlawful retaliation have the right to challenge the unlawful action, or whether they must rely upon the employee who actually engaged in the protected activity to vindicate their rights. Based

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

upon *Amici*'s substantial experience supporting, monitoring, and enforcing anti-discrimination laws, their unequivocal position is that Title VII's anti-retaliation provision provides any employee, injured by an employer's unlawful retaliation, a cause of action. *Amici* believe that permitting any injured employee to pursue his own claim is indispensible to the efficient, effective enforcement of Title VII's anti-retaliation protections. More detailed background on the *Amici* follows.

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

AAJ is a voluntary national bar association. Its members primarily represent plaintiffs in personal injury suits, civil rights, and employment discrimination actions, and consumer litigation. It is AAJ's firm belief that the remedies Congress

provided in the civil rights statutes, including Title VII, serve both to compensate the victims of illegal discrimination and to foster equality and fair treatment for all Americans. AAJ is concerned that the lower court's narrow reading of Title VII's anti-retaliation provision will allow some employers to shield themselves from accountability under the statute.

AARP is a nonpartisan, nonprofit social welfare organization dedicated to addressing the needs and interests of older persons. AARP offers a membership to persons 50 years of age and older. Approximately half of those who have joined are in the work force and are protected by various federal employment discrimination laws, including Title VII of the Civil Rights Act of 1964, as well as the Age Discrimination in Employment Act of 1967. Vigorous enforcement of these laws, including Title VII, is of paramount importance to AARP, its working members, and the millions of older workers who rely on them to deter and remedy work place discrimination. AARP supports the rights of older workers and strives to preserve the legal means to enforce them.

DREDF, based in Berkeley, California, is a national non-profit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board-led and staff-led by members of the community it represents. DREDF pursues its mission through education, advocacy, and law reform efforts, and works to ensure that people with

disabilities have the legal protections, including broad legal remedies, necessary to vindicate their right to be free from discrimination. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws, including Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA) of 1990. The ADA incorporates the remedies of Title VII of the Civil Rights Act with respect to employment discrimination claims pursued under ADA Title I, and thus DREDF has an interest in the judicial interpretation of Title VII.

The Lawyers' Committee is a nonprofit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is interested in ensuring that Title VII's anti-retaliation provision is interpreted in a manner that fulfills the promise of "unfettered access to statutory remedial mechanisms."

LAS-ELC is a non-profit public interest law firm, the mission of which is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants,

individuals with disabilities, LGBT individuals, and the working poor. The LAS-ELC's interest in preserving the protections afforded employees by federal anti-discrimination laws is longstanding.

SUMMARY OF ARGUMENT

The unquestioned purpose of section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e-3(a) is to prohibit an employer's unlawful retaliatory conduct, which the Court has determined is conduct that a reasonable person would find interferes with "unfettered access to the statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). In Title VII, Congress sought to ensure a workplace free from discrimination and to provide a process for protecting these substantive rights. If an employee's right to be free from discrimination is not aggressively protected, the right to be free from discrimination becomes a hollow promise.

Title VII and the Court's interpretations of Title VII's anti-retaliation provision define the scope of unlawful retaliation; however, they do not specify who can bring a claim to challenge this unlawful conduct. Section 704(a), read literally, does not answer whether an employee who did not engage in protected activity, but was injured by an employer's unlawful retaliation, can bring a cause of action. Reading the statutory language in light of both Congress's intent and the Court's recognition of the purpose of the anti-retaliation protections compels the conclusion that third-party employees must be permitted to file claims to redress their own injuries.

Further, providing third-party employees the right to file for their own injuries caused by an employer's unlawful retaliation is consistent with the United States Equal Employment Opportunity

Commission's (EEOC) reasonable and longstanding interpretation of Title VII. Accordingly, this interpretation is entitled to deference. Finally, if a person is subject to an adverse employment action because of protected activity, sound public policy dictates that the injured person be permitted to file a claim. Such an interpretation of section 704(a) will not increase employer liability, nor will it burden either the EEOC or the courts with claims.

ARGUMENT

Petitioner has persuasively discussed in his brief why Mr. Thompson is an "aggrieved" party entitled to pursue a claim in his own right under Title VII. To the extent that the Court believes that in order to answer the questions presented it must determine whether section 704(a) provides a cause of action for a third-party employee, we believe that the language of the statute read in light of its purpose provides a third-party employee [2] a cause of action for retaliation.

I. Providing All Employees Injured By Unlawful Retaliation a Cause of Action Maintains the Integrity of Title VII.

Recently, the Court reiterated that the purpose of section 704(a) is to "avoid harm to employees." *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009) (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998)).

[2] In this brief, the term "third-party employee" refers to any employee injured by the employer's adverse employment action as a result of another employee's protected activity as defined by section 704(a).

Section 704(a) attempts to avoid harm to employees by making an employer's retaliatory actions unlawful if the conduct interferes with "unfettered access to statutory remedial mechanisms." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (quoting *Robinson*, 519 U.S. at 346).

Section 704(a) makes it an unlawful employment practice for an employer to "discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Because section 704(a) is ambiguous, a strict literal interpretation is untenable. However, when this provision is examined within the context of the statute as a whole and the purpose of Title VII's anti-discrimination protections, the proper reach of the protections becomes clear. Any employee injured should be permitted to challenge the retaliatory action.

A. Section 704(a) Does Not Directly Answer Who Can File A Claim.

Section 704(a) is ambiguous as to whether it provides a third-party employee a cause of action for retaliation.[3] Ultimately, as instructed by this Court,

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[3] Prior to the Sixth Circuit's holding in *Thompson*, some courts believed that "[t]he plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity." *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3d Cir. 2002); *see also Smith v.*

the meaning of section 704(a) and the rights it creates must be gleaned from the context of the entire statute and the statute's purpose. *See, e.g.*, *Robinson*, 519 U.S. at 341.

The Sixth Circuit majority's myopic reading of the statute ignores this Court's rules of statutory interpretation by failing to consider section 704(a) within the broader context and purpose of Title VII. The majority read section 704(a) to require that the person filing the claim must also be the person who engaged in the protected activity, and it reasoned that the pronoun "he" within section 704(a) refers to one person: the person who engaged in the protected activity. *Thompson v. North American Stainless, LP*, 567 F.3d 804, 807 (6th Cir. 2009) (en banc).

However, as the Court has stated, the "plainness or ambiguity of a statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson,* 519 U.S. at 341. Moreover, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996). These cases were decided before the Court's *Crawford* and *Burlington Northern* decisions, which highlighted the broad scope and purpose of the anti-retaliation protections and so are of questionable utility. *See supra*, Part I(B).

While Congress's use of the word "he" can be read to imply a limitation on the scope of the anti-retaliation protections, Congress's repeated use of "any" within the same section can alternatively be read to imply that Congress intended for the provision to have a much broader effect. Therefore, in light of Title VII's purpose, the Court could read section 704(a) as providing anti-retaliation protections to "any of [the employer's] employees" if any employee has opposed "any [unlawful] practice" or participated "in any manner" in the enforcement process. 42 U.S.C. § 2000e-3(a). A reasonable interpretation of this language is that by using "any," Congress sought to ensure that all employees were protected against unlawful retaliation. The confusion is created by the use of the word "he" later in the text, but this may have simply been Congress's way of making it clear that what makes a claim actionable is that *a person* needs to have engaged in protected activity.[4]

Indeed, if Congress wanted to limit a retaliation cause of action to only those who participated in opposing an unlawful employment practice, it could

[4] Moreover, using "he" to modify "any of his employees or applicants" is grammatically awkward. When read literally, the statute prohibits an employer from discriminating against any of "his" employees because "he" [the employer] has engaged in protected activity. Despite the intervening clauses in the provision, the construction is unchanged. Thus, under standard principles of grammar, "he" modifies, independently, each of the preceding clauses of the provision, including the first provision. This illustrates the limits of a purely literal approach to an interpretation of this section which would ignore the statute's context and purpose.

have explicitly said so. For example, Congress could have said that it is an unlawful employment practice for an employer to "discriminate against [an] employee because [that] employee has opposed." Further, if the Sixth Circuit's interpretation is correct, it begs the question, why would Congress use the word "any?" The scope of section 704(a) is anything but clear: Congress's use of "any" in conjunction with "he" makes 704(a)'s scope ambiguous. As discussed *infra* Part II(A), reading the language as the Sixth Circuit majority did would require employees harmed by unlawful retaliation to rely on others to vindicate their rights—it is hard to fathom that this was the intention of Congress.

Further, the fact that many courts and jurists disagree on the meaning of section 704(a) also demonstrates its ambiguity. For example, although the Sixth Circuit claims to have been constrained by the plain language of section 704(a), the lack of a consensus among the judges as to the plain meaning of section 704(a)'s key terms speaks to the ambiguity of the statutory language.[5] The authors of the

[5] The majority concluded that "he" means that 704(a) provides a cause of action only to the employee who engaged in protected activity. *Thompson*, 567 F.3d at 807. Concurring, Judge Rogers reasoned that the language of 704(a) does not address who may sue, *id*. at 817 (Rogers, J., concurring in the result), but concluded 704(a) impliedly prohibits third-party employee causes of action because he or she is not an "intended beneficiar[y] of the anti- retaliation provision." *Id*. In dissent, Judges Martin and Moore, each joined by five judges, concluded that "oppose" within the meaning of 704(a) should be construed broadly to give third party standing. *See id*. at 818 (Martin, J., dissenting); *id*. at 823-24 (Moore, J., dissenting). Finally,

opinions seemed to agree that section 704(a) prohibits third-party retaliatory conduct, but they disagreed as to whether the language addresses who holds a cause of action for retaliation.[6] In sum, the wide swath of opinion within one circuit court of appeal on three key issues concerning the meaning of section 704(a) demonstrates the ambiguity of the statutory language.

B. When Read in Context, Section 704(a) Provides a Cause of Action for an Employee Injured by Unlawful

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Judge White, joined by one other judge, disagreed with the other dissents in their conclusion that this controversy turned on a broad definition of "oppose." *Id.* at 829 (White, J., dissenting). He concluded that the meaning of "aggrieved" within 42 U.S.C. § 2000e-5(b) determines this controversy. *Id.* at 830. Nevertheless, Judge White also concluded that the petitioner should be permitted to amend his complaint to reflect that he "opposed" the employer; ultimately, therefore, Judge White's dissent concludes that this controversy could turn on the definition of one of 704(a)'s terms. *Id.* at 829.

[6] The majority concluded that section 704(a) describes third-party retaliation as unlawful, but held that it confers a cause of action only upon the individual who engaged in the protected activity. *Thompson*, 567 F.3d at 807. Contrary to the majority, Judge Rogers, concurring, found that section 704(a) describes unlawful conduct and impliedly excludes third parties from having a cause of action. *See id.* at 817 (Rogers, J., concurring in the result) ("[Section 704(a)] dictates what practices amount to unlawful retaliation, not who may sue. . . . The question of who may sue is simply not addressed."). Judge White, dissenting, joined by one other judge, concluded that "the plain language of § 704(a)…does not tell us *who* falls under the umbrella of its protection, but, rather, *what* conduct is prohibited." *Id.* at 827 (White, J., dissenting) (internal citation and quotation omitted).

Retaliation, Even If That Employee Did Not Engage in Protected Activity.

Section 704(a) evinces Congress's intent to ensure that individuals who have engaged in protected activity have a claim for injuries caused by retaliation.[7] Within the context of the statute as a whole and the purpose of these protections, it is also reasonable to conclude that Congress intended to proscribe adverse employment actions taken against a third-party employee in retaliation for another employee's protected activity, and to permit the third-party employee to file a claim on his own behalf.[8]

Over the past decade, the Court has sent a clear and consistent message—retaliation against employees because of an employee's exercise of a

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[7] It appears that all of the Sixth Circuit judges, and most of the other courts who have addressed this issue, agree that the person who engaged in the protected activity would have a claim for injuries to other employees harmed by the retaliation. *See Thompson,* 567 F.3d at 816 n.10 (quoting *Burlington Northern*, 548 U.S. at 63). Further, because Petitioner and the Solicitor General discuss this in detail, it will not be addressed further here. *See* Pet. Br. 9; Brief for the United States as *Amicus Curiae*, opposing *certiorari, Thompson v. North American Stainless*, *LP*, Supreme Court Docket 09-291 (May 25, 2010) (hereinafter "US Amicus at").

[8] Some members of the Sixth Circuit raised the issue regarding whether a third-party employee has either Article III or prudential standing. This issue has been addressed in detail in the Petitioner's brief and will not be repeated here. Title VII permits a claim by a "person aggrieved." *Thompson*, 567 F.3d at 809 (majority opinion). Termination surely qualifies under any definition of "injury" or "aggrieved."

statutorily protected activity will not be tolerated.[9] In these cases, the Court often looked beyond the literal words of the statute. In *Robinson,* the Court held that the anti-retaliation provisions applied not only to current employees, but to former employees as well. 519 U.S. at 346. The Court came to this conclusion despite arguments that the text of Title VII limited coverage to those having an existing employment relationship with the employer. *Id.* at 344-45. It also noted that this broad application was required to fulfill the goals of Title VII. *Id.* at 346.

In *Burlington Northern,* the Court stressed the importance of broadly interpreting the anti-retaliation provisions, and it observed that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing harm *outside* the workplace." 548 U.S. at 63; *see also Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008) (finding that the ADEA prohibits retaliation against a federal employee despite the fact that the statute does not expressly provide coverage). The text of the statute itself does not compel this interpretation.

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[9] The Court has interpreted these protections broadly both within the context of Title VII and in other statutes as well. *See CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (finding that workplace retaliation is actionable under 42 U.S.C. § 1981 even though the statute is silent on retaliation); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (finding that Title IX necessarily encompasses claims of retaliation for complaints of sex discrimination, even though Title IX does not mention retaliation expressly).

Similarly, in *Crawford,* the Court held that the opposition clause protected an employee's statements made, not on her own initiative, but in response to questions asked of her during an employer's internal investigation. The Court again noted that the more restrictive interpretation of this provision would undermine the statute's "primary objective" of "avoid[ing] harm" to employees. 129 S. Ct. at 852 (quoting *Faragher*, 524 U.S. at 806).

These cases illustrate the Court's desire to uphold Congress's intent to eliminate discriminatory and retaliatory practices from the workplace, even when Congress did not explicitly prohibit the employer conduct in question. Consistent with this precedent and to fulfill the congressional purpose of these protections, section 704(a) should be construed to permit a third-party employee to file a claim when he or she has been injured by retaliation, even if the retaliation was triggered by another employee's protected activity.

The Sixth Circuit majority's restrictive reading of section 704(a) creates unnecessary tension with the Court's most recent anti-retaliation decisions and undermines the purpose of these protections.[10] As the trial court here noted, "retaliating against the friends and relatives of employees who oppose unlawful employment practices will deter employees from exercising their protected rights just as much as retaliating against the employees themselves . . . " *Thompson v. North American Stainless, LP*, 435 F. Supp. 2d 633, 637 (E.D. Ky. 2006); *cf. EEOC v.*

[10] *See supra*, Part I(A).

Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1211 (E.D. Cal. 1998) (noting that "recognizing third-party retaliation claims effectuates the underlying purpose of Title VII's anti-retaliation provision and the statute's broad remedial purpose. To hold otherwise, would thwart congressional intent and produce an absurd result.").

At least one of the courts that felt constrained to limit their analysis to a purely textual review concedes that prohibiting a third party to file on his or her own behalf undermines the purpose of the statute. For example, in *Fogleman*, the Third Circuit acknowledged that the outcome of its literal reading of section 704(a) is inconsistent with the purpose of the law. "There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights." *Fogleman*, 283 F.3d at 568-69.

The anti-retaliation provisions should not be used to allow the employer to accomplish indirectly that which he could not do directly. This case presents the Court with an opportunity to ensure that Congress's intent is construed in alignment with the statute's purpose. This clarification will eliminate the type of forced interpretation that was present in *Fogleman,* and it allows the type of legal analysis that is consistent with the spirit and letter of the law.

C. The Court Should Defer to the EEOC's Consistent, Longstanding, and Valid Interpretation of Section 704(a).

There is no need for the Court to chart its own course in interpreting section 704(a). Congress charged the EEOC with enforcing Title VII. For decades, the agency has taken the position that section 704(a) allows claims by employees other than those who have engaged in protected activity. This Court should defer to the EEOC's interpretation because it is a valid reading of 704(a)'s ambiguous language and furthers Title VII's purpose. [11]

In the past, the Court has accorded deference to the EEOC's interpretations of Title VII. Indeed, the Court has explained that EEOC interpretations are entitled to "great deference" when they are consistent with both the statutory language and purpose. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 433-44 (1971) (finding that because "the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress"). According such deference to the EEOC is in harmony with the Court's longstanding precedent that federal agency "rulings, interpretations, and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance . . . ," dependent upon "the thoroughness evident in its consideration, the

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[11] Both the Solicitor General in its opposition to certiorari and the Petitioner discuss in some detail why deference is proper. *See* U.S. *Amicus* at 18; Pet. Br. 16-20.

validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade." *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In *Clackamas Gastroenterology Associates v. Wells,* in order to "best fill the gap" in a statutory definition that was "nominal" and "circular," the Court sought guidance from the EEOC's interpretation. 538 U.S. 440, 448-50 (2003). The Court has also relied on the EEOC's interpretive guidance in defining a cause of action for sexual harassment under Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-72 (1986) (deferring to EEOC guidelines and stating that it agreed "with the EEOC that Congress wanted courts to look to agency principles for guidance in this area").

The current EEOC Compliance Manual explains that "[a charging party] can challenge retaliation by [an employer] based on a protected activity by someone closely related to or associated with the charging party." 2 EEOC Compliance Manual §§ 8-I (B) (1998). The Manual further explains that the victim of retaliation has a cause of action where the employee who participated in the protected activity and the victim of retaliation are both employees. 2 EEOC Compliance Manual §§ 8-II (B) (3) (c) (1998).[12] This is a reasonable interpretation of Title VII's

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[12] The EEOC has consistently taken this position in its Compliance Manuals for at least 25 years. *See* EEOC Compliance Manual § 614.4(b) of the 1984 EEOC Compliance Manual; EEOC Compliance Manual § 614.3 of the 1988 EEOC Compliance Manual. Petitioner covers this in depth and it will not be repeated here. *See* Pet. Br. 16.

ambiguous anti-retaliatory provisions. *See supra*, Part I(B). It is reasonable for the actual aggrieved employee to challenge the employer's unlawful action against him. *See infra*, Part II. What is unreasonable, however, is an interpretation that would force the aggrieved party to rely on another employee to enforce the injured third party's rights.

In addition to the interpretative guidance provided by the EEOC Compliance Manual, the EEOC, when finding reasonable cause to believe a charge or adjudicating federal employee claims, has for over 30 years ruled consistently that third-party retaliation is covered by section 704(a).[13] Similarly, the EEOC has repeatedly interpreted section 704(a) to permit the third-party employee to file a claim for his or her own injury.

In 1977, the agency exercised jurisdiction to hear a retaliation claim filed by the family member of an employee who engaged in protected activity. EEOC Decision No. 77-34, 1977 WL 5345 (E.E.O.C. Aug. 16, 1977). Similarly, in 1986, the EEOC held that an employee who was terminated after his step-mother engaged in protected activity was able to "file an allegation of [retaliation] based on his step-mother's [protected activity]"; this decision overruled a previous agency ruling which denied the step-son a cause of action because he had not personally engaged in protected activity. *Straining v. U.S.*

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[13] Since at least 1972, the EEOC has held that third-party retaliation is unlawful under the equal opportunity employment laws. *See* EEOC Decision No. 72-1267, 1972 WL 4006 (E.E.O.C. Mar. 6, 1972).

Postal Serv., Doc. No. 01842459, 1986 WL 635174 (E.E.O.C. July 10, 1986). *See also Sellard v. U.S. Postal Serv.*, Doc. No. 01862682, 1987 WL 908508 (E.E.O.C. Nov. 3, 1987) (finding that denying the aggrieved third party a cause of action "constitute[d] an error of law" and that the appellant "ha[d] standing to allege [retaliation] based on his mother's protected activity."); *Ray v. TVA*, 1982 WL 532146 (E.E.O.C. Aug. 19, 1982) (finding that "[t]he agency must accept and process petitioner's allegation of reprisal based on his wife's [protected activity]."

The EEOC has continued to take this position. For example, in *Bates v. Widnall*, the Commission explained that the "Appellant clearly allege[d] that as a result of her son's [protected] activity, she was subjected to an inquiry into the manner in which she performed her duties [and that this was] sufficient to state a claim." Doc. No. 01963655, 1997 WL 332902 (E.E.O.C. June 10, 1997). *See also Alexander v. Peters*, Doc. No. 05980788, 2000 WL 1218139 (E.E.O.C. Aug. 17, 2000) (ruling that both spouses may bring a claim in the case of retaliation against the spouse who did not engage in protected activity) (citing *Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934, 941 (N.D. Ga. 1994)).

Further, the EEOC has advocated that an aggrieved third party has his own cause of action under section 704(a) when it litigates cases as the federal agency charged with enforcing Title VII. In *Nalbandian Sales,* 36 F. Supp. 2d at 1211, the district court agreed with the agency's "long-standing policy [of] recognizing and enforcing third-party retaliation claims" and upheld a brother's right

to sue after he was retaliated against due to his sister's protected activity. Similarly, the EEOC argued, and the Sixth Circuit agreed, that the plaintiff had a cause of action when she alleged that she was retaliated against as a result of her husband's protected activity. *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 544 (6th Cir. 1993). The EEOC has argued this position in subsequent cases as well, even though in these cases the district court did not adopt the EEOC's position. *See EEOC v. V & J Foods, Inc.*, No. 05-194, 2006 WL 3203713 at *11 (E.D. Wis. Nov. 3, 2006), *rev'd,* (arguing on behalf of an employee terminated as a result of a relative's informal sexual harassment complaint when the relative was not employed by the company), 507 F.3d 575 (7th Cir. 2007); *EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1243 (D.N.M. 2008) (arguing that an injured third party has standing to sue when retaliated against for his mother's protected activity).

Additionally, the EEOC has consistently advocated for this interpretation in their *amicus* briefs. In *D'Aragona v. BellSouth,* the claimant alleged that he was unlawfully terminated because of his uncle's protected activity. 281 F.3d 1284 (11th Cir. 2001) (mem.). The EEOC filed an *amicus* brief in the Eleventh Circuit in support of D'Aragona's standing to file a claim. In opposition to BellSouth's argument that "if a related co-worker was allowed to challenge the employer's retaliation against him, it would lead to a situation in which 'everyone would be protected' from retaliation," the EEOC explained, "given Congress's desire to ensure unfettered access

to statutory remedial mechanisms, it is unclear why BellSouth views comprehensive protection from retaliation as inconsistent with Congress's goals." Brief of EEOC as *Amicus Curiae* in Support of Appellee at 11, *D'Aragona v. BellSouth Communications*, 281 F.3d 1284 (11th Cir. 2001) (No. 00-15550), *available at* 2001 WL 34137504.

Similarly in the Third Circuit, an employee alleged that his employer had unlawfully retaliated against him because of his father's participation in protected activity. *Fogleman*, 283 F.3d at 564. On appeal, the EEOC supported Fogleman's standing to sue and explained that if the district court's denial of standing remained in effect, it would "deal a severe blow to the enforcement of the anti-discrimination statutes." Brief of the EEOC as *Amicus Curiae* in Support of the Appellant at 2, *Fogleman v. Mercy Hosp. Inc.,* 283 F.3d 561 (3rd Cir. 2001) (No. 00-2263), *available at* 2001 WL 34119171. The EEOC further explained that the aggrieved third party has a claim if he can "establish a causal link between the adverse action and the protected activity of the other individual." *Id.* at 29.

Not surprisingly, the EEOC also filed an *amicus* brief in the Sixth Circuit in this case and argued that Thompson had standing to sue. Brief of the EEOC as *Amicus Curiae* in Support of Thompson and for Reversal, *Thompson v. North American. Stainless, LP*, (6th Cir. 2007) (No. 07-5040), *available at* 2007 WL 2477626. The EEOC urged the Sixth Circuit to follow its prior reasoning that "a plaintiff's allegation of reprisal for a relative's

antidiscrimination activities states a claim upon which can be granted under Title VII." *Id.* at 5.

The EEOC's longstanding interpretation of section 704(a) is a persuasive reading of the statute. It is consistent with both Congress's intent and the Court's broad view of Title VII's protections against workplace retaliation. This Court should defer to it.

II. Permitting a Third Party to File a Retaliation Claim in His Own Right Is Consistent with Congressional Intent and Will Not Burden the EEOC or the Courts with a Flood of Additional Claims.

Title VII established a right to work in an environment free of discrimination. In enacting Title VII, Congress also created protections against unlawful employer retaliation for an employee's exercise of this right. Congress envisioned a process where, in most cases, employees act as private attorneys general by having a role similar to the EEOC itself. *Associated Dry Goods Corp.*, 449 U.S. at 602.[14] This process is supposed to be initiated by "laypersons rather than lawyers." *Fed. Express*

[14] The statute also envisions roles for the EEOC and the Department of Justice in pursuing claims. However, employees must make these agencies aware of the employer's unlawful conduct in order for the agencies to file a claim. If employees are deterred from complaining because they have witnessed unlawful retaliation, these agencies have no basis for taking action. Additionally, as the Court has noted, the EEOC plays a limited role in securing relief for victims of unlawful discrimination, recognizing that the EEOC files suit in "a small fraction of the charges employees file." *EEOC v. Waffle House*, 534 U.S. 279, 290 n.7 (2002).

Corp. v. Holowecki, 552 U.S. 389, 402-03 (2008) (quoting *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988)). Because enforcement is employee-driven, it is vital that nothing deter individuals from asserting their rights under the Act. It is equally vital that employees injured by unlawful retaliation have the ability to seek redress for harms that they suffer. Denying third-party employees the right to file a claim will lead to results that are inconsistent with Congressional intent.

A. Congress Could Not Have Intended that a Third Party Injured by Retaliation Would Be Forced to Rely on Co-workers to Enforce Their Rights or that Employers Could Retaliate with Impunity.

Because Congress envisioned Title VII to function based on a system of individual complaints, it is unlikely that it intended to force any employee, injured by their employer's unlawful retaliation, to rely on another employee to enforce the rights of third parties. For example, if an employee sues her employer for gender discrimination, it is well established that the employer cannot retaliate against her. But, imagine that the employer says, "I know I can't go after you, but I'm going to fire three of your friends because you complained"? It is hard to believe that Congress intended to force the three fired employees to rely on the one employee left standing to enforce their rights. From a policy standpoint, it seems that when Congress prohibited retaliation in the workplace and provided that it is unlawful to discriminate against "any . . . employees

or applicants for employment," it intended this prohibition to allow *all* employees injured by unlawful retaliation to seek redress as "persons aggrieved." 42 U.S.C. §2000e-5(b).

Indeed, the person who is actually fired would be the logical person to initiate a claim with the EEOC. When an employee feels that his employer has unlawfully terminated him, all that he knows is that he has been harmed. When the employee knows he has been harmed, his first instinct is not to turn to a fellow employee and say, "I got fired because of your act, please go fix it for me." Rather, the first instinct would be to file a claim with the EEOC on his own behalf in hopes of securing redress. The EEOC, consistent with its longstanding interpretation of section 704(a), would agree and would allow the employee to file a claim. *See* discussion *supra* at Part I(C). Expecting the injured party to convince the employee who actually engaged in protected activity to file on his behalf is simply inconsistent with common sense and the framework of section 704(a).

The employee who actually engaged in protected activity may be deterred from instituting a claim on the fired employee's behalf for myriad reasons. Most importantly, the employee who engaged in protected activity may still have a job. A person is much more likely to file a charge if he or she is the subject of the adverse action. Furthermore, the employee may believe that instituting a claim on behalf of others may trigger another round of co-worker firings, or, as a practical matter, the employee simply may not want to file a suit on the fired employee's behalf.

The primary purpose of the anti-retaliation provision is to allow "unfettered access to statutory remedial mechanisms." *Robinson,* 519 U.S. at 346. Forcing injured employees to rely on co-workers is inconsistent with the statute's layperson-oriented framework. The employee's access to a remedy would be tightly tied to a co-worker's willingness and ability to file a claim on the aggrieved employee's behalf, frustrating the goal of providing "unfettered access."

Not granting injured third parties a claim could also lead to another result that would contradict congressional purpose and undermine the statute. As the trial court noted, "retaliat[ion] against a spouse or close associate of an employee will deter the employee from engaging in protected activity." *Thompson*, 435 F. Supp. 2d at 639. If employers are not accountable to third parties against whom they retaliate, unscrupulous employers may begin to retaliate with impunity and will inhibit the employees' willingness to file discrimination claims.

If a person is subject to a retaliatory, adverse employment action, public policy dictates that the injured person have the ability to sue. Title VII's framework cannot be squared with an interpretation that would require a layperson to convince a fellow employee to file on his or her behalf or that would allow employers to retaliate with impunity. To fully accomplish the statute's purpose, injured third parties must have the ability to file suit in their own right.

B. Allowing Third Party Retaliation Claims Has Not and Will Not Over-Burden EEOC or the Courts.

The respondent speculates that permitting third-party retaliation claims will open a Pandora's box of claims. Brief of the Defendant-Appellee North American Stainless, LP at 16-18 (6th Cir. 2007), *available at* 2007 WL 2477656.[15] This objection is one that is often made by employers; however, it is unsupported. A clear statement from this Court clarifying that third-party claims are permitted would reinforce the Court's repeated holding: the purpose of the anti-retaliation protections are to provide "unfettered access" to remedial mechanisms. Consistent application of this standard would clarify the substantive rights of employers and employees, even though, as a practical matter, it would not alter the procedural landscape.

Despite the fact that the EEOC and some courts have held third-party retaliation claims actionable since the 1970s,[16] no tidal wave of litigation has ensued. Even the Sixth Circuit concedes that there have not been a large number of claims. *Thompson,* 567 F.3d at 811 (quoting *Fogleman*, 283 F.3d at 569. Ironically, the Sixth Circuit uses the small number of claims to support its conclusion that there is no

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[15] *See also Fogleman*, 283 F.3d at 570 (recognizing that Congress may have feared that the expanding the class of potential plaintiffs would result in frivolous lawsuits).

[16] As provided *supra* in Part I(C), the EEOC and some courts have consistently maintained this interpretation in subsequent cases as well.

need to permit a third party to sue for his or her own injury. *Id.* at 810-11 (quoting *Fogleman*, 283 F.3d at 567-69). Although recognition of these claims has not spawned a flood of litigation, the rarity of such claims is not a basis to quickly dismiss as unimportant those instances where valid claims do occur.

An employee's burden of proving his or her case further undermines the respondent's fear of unchecked litigation is that employees must always prove their case. First, the employee must establish that he or she was harmed, because the anti-retaliation provision only protects an individual from "retaliation that produces an injury or harm." *Burlington Northern*, 548 U.S. at 68. Additionally, the third-party employee would have to show a causal connection between the protected conduct and the adverse employment action. The Second Circuit observed that it did not have to resolve the issue of whether the third party had standing to pursue the retaliation claim because they could not prove causation. *See Mutts v. S. Conn. St. Univ.*, 242 F. App'x 725 (2d Cir. 2007); *see also Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 609 (2d Cir. 2006) (holding plaintiff failed to establish the "causal connection between the protected activity and the adverse employment action"); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 520 (6th Cir. 2009) (holding that one plaintiff had not established her claim for retaliation because she could not "establish that her oppositional activity was causally connected to any tangible adverse employment action").

Courts are adept at dealing with causation issues, which are really at the heart of third-party retaliation claims; there is no basis to assume that explicit recognition of a third-party employee's right to challenge an employer's unlawful retaliation will burden the EEOC or the courts. This Court should continue to facilitate Title VII's true purpose by allowing the third-party employee to assert a claim when injured by retaliation.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* filing this brief in support of Petitioner Eric L. Thompson respectfully request that this Honorable Court REVERSE the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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