No. 06-1595

IN THE
Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

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

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Ms. Crawford was interviewed by the Metropolitan Government's Human Resources Department in-house sexual harassment investigators on July 22, 2002, in connection with a sexual harassment complaint made by someone else. Cert. Br. Opp. App. 5-6. Prior to that meeting with the investigators, Ms. Crawford did not even know that a sexual harassment investigation was underway. Cert. Br. Opp. App. 6. She had no idea why she was summoned to Human Resources. *Id*. The target of the investigation was Gene Hughes, the Director of Employee Relations, a division of the Metropolitan Board of Public Education's Human Resources Department.[1]

At the July 22, 2002, interview, Ms. Crawford related the alleged incidents of sexual harassment she described in her deposition. JA 16-20. Mr. Hughes's objectionable conduct allegedly occurred from August 2001 to May 2002 (Ms. Crawford was out of the office for six to eight weeks in April and May). JA 19.

Veronica Frazier, the Assistant Director of the Metropolitan Government's Human Resources Department who conducted the investigation, recalls that Ms. Crawford stated she and Mr. Hughes had "banter back and forth . . . which was inappropriate."[2]

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[1] Mr. Hughes worked in an entirely different division of the school administration from Ms. Crawford. He was **not** Ms. Crawford's supervisor. JA 71, 95.

[2] The Board of Education's Human Resources Department is separate from the Metropolitan Government's Human Resources Department. Mr. Hughes and Ms. Frazier worked in separate Human Resources departments.

JA 46. She recalls Ms. Crawford mentioning the use of the phrase "bite me" and Mr. Hughes grabbing his crotch. *Id.* Ms. Crawford acknowledged to Ms. Frazier that she (Ms. Crawford) would "flip him a bird." JA 48. One of Ms. Frazier's impressions was that this inappropriate, unprofessional banter had unfortunately become "established . . . [as] their interaction in workplace culture." *Id.* Ms. Frazier concluded that when "there are two employees, two co-workers, who engage in that inappropriate . . . unprofessional conduct, they don't consider themselves sexually harassing one another. It becomes part of, as I said, the workplace culture." JA 49-50.

Ms. Frazier continued her investigation through the summer, and on September 13, 2002, she issued her Fact Finding Report. Cert. Br. Opp. App. 8. She described the circumstances which gave rise to her investigation, she listed the persons interviewed, she anonymously summarized the substance of the witness statements, and she stated her conclusions and observations. Cert. Br. Opp. App. 8 – 17. Generally, she concluded that while inappropriate and unprofessional conduct had occurred, the most egregious allegations of sexual misconduct directed at Mr. Hughes could not be corroborated. *Id.* at 15. She recommended training and education for the management and staff at the Board of Education geared towards "establish[ing] and maintain[ing] a productive workplace that is respectful of all employees."

Id. at 17. Ms. Frazier sent the report to Dr. Pedro Garcia, Director of Schools.[3]

Upon reviewing the Fact Finding Report, Dr. Garcia verbally reprimanded Mr. Hughes, reiterating that sexual harassment is not allowed, and making clear that Mr. Hughes needed to "watch very carefully what you say and do." JA 67-68.

During the sexual harassment investigation, Ms. Frazier "learned about other general allegations concerning the workplace environment at the Board of Education." Cert. Br. Opp. App. 9. "[D]ue to the severity and seriousness of these claims . . . [she notified] the Internal Audit Division of the Finance Department . . . in order to ensure that these matters [were] investigated and resolved." *Id.* To that end, Ms. Frazier sent another letter on September 13, 2002, this one to Kim McDoniel, the head of the Internal Audit Division of the Department of Finance of the Metropolitan Government (the city's Finance Department, a completely separate entity from the Board of Education). Cert. Br. Opp. App. 18. This letter outlined the specific concerns Ms. Frazier had discovered regarding the business practices of the school system's Payroll Division, which was headed by Ms. Crawford.[4] These concerns included the Payroll Division's failure to honor certain wage garnishments, including those for child support payments. *Id.*

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[3] Ms. Frazier's September 13, 2002 cover letter to Dr. Garcia is at Record, 51, Motion for Summary Judgment, Ex. D.

[4] Ms. Frazier communicated these same concerns to Dr. Garcia in her cover letter to him. Record, 51, Motion for Summary Judgment, Ex. D.

Chris Henson, the Assistant Superintendent for Business and Facilities Services, started working for the school system on July 1, 2002. JA 89. He had supervisory authority over the Payroll Division. JA 90. He did not know either Dr. Garcia or Gene Hughes prior to his arrival. JA 81.

In the fall of 2002 Mr. Henson learned that the Internal Audit Division of the city's Finance Department had requested assistance from the outside accounting firm KPMG, LLP, to review the business practices of the Board of Education's Payroll Division. JA 90-91. The KPMG auditors brought to his attention problems they had uncovered in the Payroll Division, such as garnishments on employee paychecks not being paid to the courts, employee annuity payments not being made to the appropriate companies, checks payable to the Metropolitan Government not being deposited, and payroll taxes being paid to the IRS in an untimely manner.[5] JA 93. Furthermore, the three Payroll Division employees who worked under Ms. Crawford visited Mr. Henson, and made similar complaints. JA 92-93.

As a result of the mounting complaints of operational irregularities in the Payroll Division, the Department of Law of the Metropolitan Government contracted with KPMG for additional forensic accountant services to investigate the Payroll Division's operations.[6]

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[5] Ms. Crawford's untimely payment of payroll taxes to the IRS resulted in a penalty of over $1,000,000 being assessed against the Board of Education. Cert. Br. Opp. App. 34; Record, 51, Motion for Summary Judgment, Ex. L (Bates stamped pp. 380-81). Fortunately, after negotiation, the IRS rescinded the assessment of this penalty.

[6] A copy of the contract with KPMG for forensic accountant services is at Record, 51, Motion for Summary Judgment, Ex. I.

(Cont'd)

As a result of the evidence uncovered by KPMG's preliminary investigation, on November 7, 2002, Mr. Henson placed Ms. Crawford on paid administrative leave which allowed KPMG to further investigate the problems within her office. Cert. Br. Opp. App. 20. On December 4, 2002, Mr. Henson sent Ms. Crawford a letter detailing numerous operational irregularities within her office that raised serious concerns about her ability to perform as Payroll Coordinator. *Id.* at 21- 24. Ms. Crawford was given an opportunity to appear and present evidence on her behalf at a name-clearing hearing. *Id.* at 23. That hearing occurred on December 12, 2002.[7] Ms. Crawford was represented by counsel who made opening and closing statements, introduced documents into evidence, and presented the testimony of three witnesses. Ms. Crawford elected not to testify.[8]

Ms. Crawford remained on administrative leave with pay. On January 6, 2003, Mr. Henson sent Ms. Crawford a letter setting forth the charges against her and summarizing what transpired at the December 12, 2002 hearing. Cert. Br. Opp. App. 25-26. Based on the serious nature of the charges and the fact that Ms. Crawford

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(Cont'd)

The scope of the proposed work is set forth on page 6 thereof. A total of $85,656.00 was paid to KPMG for forensic accountant services under this contract. Record, 51, Motion for Summary Judgment, Ex. S.

[7] The entire transcript of this hearing appears at Record, 51, Motion for Summary Judgment, Ex. M. The documents introduced in evidence at this hearing are included.

[8] Record, 51, Ex. M, at 3.

presented "little defense or explanation . . . in response to the enumerated irregularites . . ." he terminated her employment. *Id*. at 26.

Ms. Crawford appealed Mr. Henson's decision to Dr. Garcia, the Director of Schools. Dr. Garcia conducted a hearing on February 6, 2003, at which Ms. Crawford again was represented by counsel.[9] The hearing lasted from 8:00 a.m. to 12:50 p.m. Record, 51, Motion for Summary Judgment, Ex. J, at 4, 198. On March 31, 2003, Dr. Garcia issued his 13-page decision, in which he described the evidence and testimony adduced at the hearing, and he affirmed Mr. Henson's decision to terminate Ms. Crawford's employment. Cert. Br. Opp. App. 28 – 41.[10]

Three months later, on June 24, 2003, Ms. Crawford filed a Charge of Discrimination with the EEOC claiming retaliation (not sexual harassment). Cert. Br. Opp. App. 42 - 43. In her Charge, she claimed she was "suspended then discharged in retaliation for [her] participation in a sexual harassment investigation." *Id*. at 43. Ms. Crawford did not claim she was sexually harassed.

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[9] The entire transcript of this hearing appears at Record, 51, Motion for Summary Judgment, Ex. J.

[10] The first eight of the twenty-four items that Dr. Garcia found Ms. Crawford mishandled were stale checks payable to the Metropolitan Government, which were found haphazardly lying around her office. Cert. Br. Opp. App. 31-32. The failure of a county official to deposit public funds within three days after receipt thereof is a crime in Tennessee. Tenn. Code Ann. § 5-8-207.

The EEOC issued Ms. Crawford a Dismissal and Notice of Rights letter on September 10, 2003. Cert. Br. Opp. App. 44 – 46. The EEOC was unable to conclude that the information obtained during its investigation established violations of the statutes. *Id.* at 45.[11]

Ms. Crawford filed suit against the Metropolitan Government, Dr. Garcia, and Gene Hughes, asserting sexual harassment and retaliation claims under 42 U.S.C. § 2000e, *et seq*. ("Title VII"), and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq*. ("THRA"). Record, 1, Complaint. She later filed an Amended Complaint, adding a claim under Tenn. Code Ann. § 50-1-304 (the Tennessee "Whistleblower Act"). Record, 8. However, the District Court subsequently dismissed all claims against Dr. Garcia and Gene Hughes individually, as well as the sexual harassment claim (because Ms. Crawford did not claim sexual harassment in her EEOC Charge of Discrimination). Record, 23 & 24, Memorandum and Order.

After a lengthy period of discovery, the District Court granted the Metropolitan Government's Motion for Summary Judgment relying on the well-established body of law holding that "protected activity" under Title VII does not include participation in internal investigations conducted while no EEOC charge is pending. Cert. Pet. App. 15. The court also held that

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[11] More specifically, when the EEOC dismissed Ms. Crawford's claim it determined "there is not reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b).

Ms. Crawford's act of merely answering questions in a previously pending internal investigation initiated by someone else did not constitute "opposition" under Title VII. The sole operative factual finding made by the District Court was that no EEOC charge was pending when Ms. Crawford was interviewed. Cert. Pet. App. 16a. [12]

On November 14, 2006, the Sixth Circuit affirmed the District Court's decision. Cert. Pet. App. 3a–10a.[13] The Court held that Ms. Crawford's conduct did not

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[12] The District Court granted summary judgment on the first ground advanced in the summary judgment motion. The Metropolitan Government made two additional arguments for summary judgment: (1) Ms. Crawford had no evidence the decision-makers knew what she allegedly told Veronica Frazier; and (2) assuming *arguendo* she could state a *prima facie* case, there were legitimate, non-discriminatory business reasons to terminate her employment, which were not pretextual. Record, 51, Motion for Summary Judgment, at 7 – 8; Cert. Br. App. 13a – 14a. The District Court did not consider these two arguments, because it found the first argument dispositive. Significantly, the District Court made no factual findings whatsoever about the circumstances surrounding the departures of Dianne Proffitt and Tamara Sadler. Cert. Br. App. 13a-14a.

[13] In passing, the Sixth Circuit mentioned the "three employees" Ms. Crawford contends were investigated and "promptly discharged," but that court attached no significance to this factual allegation in its decision. Pet. Cert. App. 5a. Now, however, Ms. Crawford presents detailed factual allegations supporting her contention that Ms. Proffitt and Ms. Sadler were also victims of retaliation. Pet. Br. 4 – 5. These facts were never developed by either the trial or appellate court. This leaves the Metropolitan Government no alternative but to cite to the relevant portions of the record to rebut Ms. Crawford's new factual allegations.

constitute "opposition" because she did not instigate or initiate any complaint prior to her interview, nor did she take any further action after her interview to "oppose" what she ostensibly believed to be an unlawful employment practice. *Id.* at 7a. The Court also found Ms. Crawford had not "participated" in an investigation under Title VII because no EEOC charge had been filed at the time of her interview or prior to her termination of employment. *Id.* at 8a. The Sixth Circuit's analysis of the participation clause was fully consistent with the approach taken by all other Circuit Courts of Appeal that have considered the issue. *Id.* In fact, the Court considered its decision sufficiently grounded in established precedent that its decision was unpublished.

Diane Proffitt was one of Ms. Crawford's former colleagues who participated in the investigation and whom Ms. Crawford claims also was allegedly terminated in retaliation for her participation. Pet. Br. 4. However, in her own retaliation lawsuit, both the District Court and the Sixth Circuit found that Ms. Proffitt's claim failed because she had no evidence that the decision-maker in her case knew what Ms. Proffitt allegedly told Veronica Frazier during the Gene Hughes investigation. Record, 51, Motion for Summary Judgment, Ex. A; *Proffitt v. Metropolitan Government*, 150 Fed. Apx. 439, 2005 WL 2446006, at *3-4 (6th Cir. Sept. 29, 2005), *cert. denied*, 547 U.S. 1003 (2006).

Tamara Sadler is Ms. Crawford's other former colleague whom she claims was retaliated against for her participation in the Gene Hughes investigation "only minutes after" receiving a copy of the Fact Finding

Report. Pet. Br. 5.[14] However, the reasons for Ms. Sadler's departure are clear from the record. On September 24, 2002, someone anonymously provided the Assistant Superintendent for Human Resources (Dr. Julie Williams) a copy of Ms. Sadler's felony conviction for embezzlement which had occurred on February 11, 1999, while she was a government employee. Record, 51, Motion for Summary Judgment, Ex. Q. Ms. Sadler never informed the Metropolitan Government of the fact that she was convicted of this felony while in the Metropolitan Government's employ.[15] *Id.* When confronted with this information, Ms. Sadler declined to participate in a name-clearing hearing, choosing instead not to return to work. Record, 51, Motion for Summary Judgment, Ex. R. As a result, Dr. Williams terminated her employment by letter dated October 1, 2002. *Id.* Understandably, given these circumstances, Ms. Sadler never filed an EEOC charge or a lawsuit claiming retaliation.

Ms. Crawford has no evidence that anything she told the Human Resources investigators about Gene Hughes

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[14] Tamara Sadler held the position of Director of Employee Relations until she was replaced by Gene Hughes in 2001. JA 63. Ms. Sadler was transferred to a secretarial position well before the incidents that are the subject of this case occurred. JA 67.

[15] Dr. Williams described the conviction as one for "fraud and theft." Record, 51, Motion for Summary Judgment, Ex. Q. Although the conviction occurred while Ms. Sadler was a government employee, the act of embezzlement occurred during her employment with a prior employer.

was ever communicated to Chris Henson or Dr. Garcia (the decision-makers regarding her employment). JA 24-28.[16]

SUMMARY OF ARGUMENT

I. The first step in statutory construction is to determine whether the language at issue is plain and unambiguous. In analyzing the reach of the "participation" clause, the term "investigation" in § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, clearly refers only to participation in investigations conducted after an EEOC charge is filed.

A. An examination of Congress's choice of words surrounding the term "investigation" in § 704(a) results in the conclusion that a covered "investigation" is one occurring after an EEOC charge has been filed. The use of the terms "charge," "testified," "proceeding," and "hearing" all indicate that Congress intended Title VII to protect employees from retaliation when they participate in the more formal investigations occurring after the statutory mechanisms of Title VII have been invoked, as opposed to the comparatively informal investigations that employers may conduct on their own.

The sequence of Congress's phrasing is also important. In describing the process, Congress starts

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[16] In this respect, Ms. Crawford's retaliation claim suffers from the same infirmity that resulted in summary judgment being entered against her former colleague Ms. Proffitt, a case which arose out of the same investigation as this one. *See Proffitt*, 2005 WL 2446006, at *3.

with the making of a "charge," and then logically progresses through the possible levels of involvement after an EEOC charge is filed – "testify[ing], assist[ing], or participat[ing] in any manner in an investigation, proceeding or hearing under this title." Based on a natural reading of the statute, Congress intended the filing of a charge to be the initial step to trigger the protections of the participation clause.

B. The most significant indicia of Congress's intent is that every time the words "investigation" or "investigate" appear in Title VII, without exception, they refer to an investigation actually conducted by the EEOC. As a result, the five Circuit Courts of Appeal that have squarely considered the issue have already given the term "investigation" in § 704(a) an expansive interpretation, by holding that the term applies to in-house, employer initiated investigations, as long as they follow the filing of an EEOC charge. Ms. Crawford advocates for an even more expansive interpretation that would extend the reach of § 704(a) well beyond what the natural meaning of the statute can support.

II. Ms. Crawford's answers to the interviewer's questions do not constitute protected "opposition" conduct. Ms. Crawford, her *amici*, and the Metropolitan Government have all invited the Court to consider various dictionary definitions of "oppose" or "opposition." The common thread in all these definitions is that the person doing the "opposing" has to communicate "resistance," or "hostile or contrary action."

Requiring a plaintiff ostensibly engaging in "opposition" conduct to actually communicate resistance mirrors the requirement that an employee take advantage of workplace procedures to actively report alleged discrimination, as set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) and *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998). Requiring the employee to communicate resistance to a perceived unlawful employment practice conforms with the employee's "obligation of reasonable care to avoid harm" articulated in *Faragher* and *Ellerth*. It is axiomatic that to avail oneself of the opposition clause, an employee actually has to "oppose" something.

The Sixth Circuit's use of terms such as "active" and "overt" was a legitimate attempt to describe the type of conduct protected by the opposition clause. An employee should be expected to take some affirmative steps to communicate resistance to sexual harassment in order to "oppose" it.

The concept of "opposition" inherently includes the notion that the employee's "opposition" is communicated to the individuals who allegedly retaliated against the employee. Pursuant to the Board of Education's anti-harassment policy, Ms. Crawford made her statements in the context of an investigation in which "[c]onfidentiality of employees shall be maintained, to the extent possible . . . ." At deposition, Ms. Crawford admitted she has no proof Veronica Frazier violated that confidentiality by communicating the substance of her statements to either Chris Henson or Dr. Garcia. JA 24-28. Ms. Crawford's statements do not constitute

"opposition" conduct since they were never communicated to the decision-makers.

III. The bulk of Ms. Crawford's brief, as well as those of her *amici,* consists of policy arguments in favor of an expansive interpretation of the term "investigation" in § 704(a). These policy arguments contain boundless speculation about employers' ability to subvert the integrity of their own harassment investigations if "investigation" is defined less expansively than Ms. Crawford suggests. Ms. Crawford cites an abundance of law firm client development material in support of her policy arguments.

The Court should decline the invitation to delve into the relative merits of policy goals and the best way to implement them. This is a function left to Congress, not the courts. While Ms. Crawford has articulated reasons for expanding the protections of the anti-retaliation provision of Title VII, there are equally persuasive policy arguments disfavoring such an expansive approach. The Court should decline to partake of the "temptations" inherent in the "statesmanship of policy-making," and leave that task to Congress.

IV. Any deference the Court may be inclined to afford the EEOC's policy pronouncements in its Compliance Manual and elsewhere should be tempered by the fact that the agency has already investigated the facts of this very case and determined that "there is not reasonable cause to believe that [Ms. Crawford's charge of retaliation] is true." 42 U.S.C. § 2000e-3.

A. Under Title VII, the EEOC has the authority to adopt "suitable procedural regulations" – but it lacks the authority to promulgate regulations addressing "substantive" issues under this Title. 42 U.S.C. § 2000e-12. Even if the Court gives "a measure of respect" to the agency's policy positions espoused by Ms. Crawford regarding the "participation" clause, there are countervailing statements of agency "policy" that negate the value of the policy statements upon which she relies.

B. In providing examples of protected "opposition" conduct, the EEOC repeatedly uses active verbs: "threatening" to file a charge or complaint; "complaining"; "protest[ing]"; "picketing"; "refusing" to obey an order; and "requesting" reasonable accommodation. All of these activities require initiative by the employee. None describe Ms. Crawford's act of answering questions in an interview. Even if the Court does grant the EEOC's policy statements "a measure of respect," close scrutiny of the agency's conflicting positions reveals the agency's policy statements are inconsistent at best.

V. The legislative branch is uniquely equipped to hold hearings, gather information, and weigh the relative merits of whether witnesses who participate in employers' internal harassment investigations should be entitled to protection under § 704(a). If the reach of § 704(a) is to be expanded to include employer-initiated investigations conducted prior to the filing of an EEOC charge, Congress should make that decision, not this Court.

Alternatively, Congress could broaden the EEOC's rule-making authority and enable it to adopt formal regulations regarding the reach of Title VII's anti-retaliation clause. As long as the EEOC's interpretations of the statutory provisions are reasonable in light of the statutory construction principles courts normally employ, its interpretations would receive more deference than the degree of deference to which its policy pronouncements are presently afforded.

Finally, the method of divining Congressional intent that is least likely to reflect considered policy judgments made after a period of information-gathering designed to achieve consensus is for this Court to resolve the issue. Through the means discussed above, both the legislative and executive branches are better suited to this task.

ARGUMENT

I. THE PLAIN MEANING OF § 704(a) IS THAT ONLY PARTICIPATION IN INVESTIGATIONS CONDUCTED PURSUANT TO AN EEOC CHARGE IS PROTECTED UNDER THE "PARTICIPATION" CLAUSE

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. If the statutory language is unambiguous and "the statutory scheme is coherent and consistent," the inquiry is over. *Robinson v. Shell Oil*

Co., 519 U.S. 337, 341 (1997); *quoting United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989).

The plainness or ambiguity of 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; *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). Against this backdrop, the term "investigation" in § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), clearly refers only to investigations conducted after an EEOC charge is filed.[17]

A. THE WORDS SURROUNDING "INVESTIGATION" AND THE SEQUENCE OF THE TERMS USED REVEAL CONGRESS'S INTENT

Section 704(a) of Title VII makes it unlawful for an employer to discriminate against any employee:

> because he has opposed any practice made an unlawful practice by this title, or because he

[17] Ms. Crawford points out that the codifiers used the word "subchapter" instead of "title" in § 704(a) when editing the text of the Civil Rights Act of 1964 for inclusion in the United States Code. This is true. However, Congress's choice of the word "title" actually strengthens the Metropolitan Government's argument that Congress intended the anti-retaliation protections of Title VII to extend only to investigations conducted after an EEOC charge was filed. When all the provisions of Title VII as enacted in 1964 are considered as a whole, it becomes even more plain that an "investigation . . . under this title" means one that occurs after the machinery of Title VII has been invoked through the filing of an EEOC charge. The Civil Rights Act of 1964 can be viewed at www.ourdocuments.gov.

> has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title.

42 U.S.C. § 2000e-3(a). The operative words appearing near the term "investigation" shed light on the meaning of that term. For instance, Congress referred to making "a charge," as a way to participate in an activity under Title VII. The term "charge" clearly refers to an actual "charge" of discrimination, which has to contain – at a minimum – an allegation of discrimination, the name of the employer, and a request that the EEOC take remedial action to protect the employee's rights. *Fed. Express Corp. v. Holowecki*, 128 S.Ct. 1147, 1157-58 (2008). (Ms. Crawford's Charge of Discrimination appears at Cert. Br. Opp. App. 42-43.)

Similarly, Congress used the term "testified," the common meaning of which implies actually giving sworn testimony in some type of formal proceeding. As happened in this case, when witnesses are asked to be interviewed in connection with an employer's in-house sexual harassment investigation, they are not asked to "testify." They are not sworn. They are not subject to potential liability for perjury. They are simply interviewed.

The same logic applies to the use of the phrase "proceeding or hearing under this title." Participation in a "proceeding" or a "hearing" under this title implies a more formal process – like one conducted by the EEOC, or at least by an employer after an EEOC charge is filed – as opposed to the relative informality

of an employer's self-initiated sexual harassment investigation. In common parlance, the term "proceeding" would not be understood to refer to an employer's own internal sexual harassment investigation.

The same is true for the word "hearing." An employer's internal sexual harassment investigation bears no attributes of an administrative or judicial "hearing." There is no presiding officer, no "testimony" is taken, and nothing is adjudicated. The purpose of an internal sexual harassment investigation is to ferret out facts, which allows the investigator to draw conclusions based upon those facts. The investigator then submits factual findings and conclusions to the appropriate official charged with the authority to take appropriate action regarding the situation. This process does not resemble a "hearing" at all. Congress's choice of operative language surrounding the term "investigation" reveals that it means "investigations" conducted after an actual "charge" is made "under this title."

Finally, the sequence of Congress's phrasing is important. The statute protects an employee from retaliation when "he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Sequentially, the phrasing first contemplates the actual filing of a "charge" of discrimination with the EEOC (by someone), and then the logical progression of what follows the filing of a charge – testifying, assisting, or participating in any manner in the investigation of that charge (by anyone),

which includes participation in a proceeding or hearing "under Title VII." Logically, after a charge is filed anyone may be asked to "testify," "assist," or otherwise "participate" in an investigation of that charge. The investigation may lead to a "proceeding" or "hearing" under Title VII.

Congress's phrasing was not accidental. The statute lays out the natural progression of events that may occur after an EEOC charge is filed. Ms. Crawford's proposed interpretation of the term "investigation" disrupts the logical meaning of the statute and places an "investigation" outside the context of the sequence of events Congress envisioned in § 704(a).

B. THE TERM INVESTIGATION, AT MOST, MEANS AN INVESTIGATION CONDUCTED AFTER AN EEOC CHARGE IS FILED

When considering the term "investigation" within the broader context of Title VII, it is significant that every time the term "investigation" or its derivative "investigate" appears, without exception, the context indicates that the statute is concerned with EEOC investigations. These terms are found in the sections of Title VII that establish the EEOC's power to conduct investigations of charges of unlawful employment practices.

For example, in 42 U.S.C. § 2000e-5(b), "investigation" clearly refers to an EEOC investigation:

> Whenever a charge is filed by . . . a person . . . alleging that an employer . . . has engaged

> in an unlawful employment practice the Commission . . . shall make an **investigation** thereof . . . . If the Commission determines after such **investigation** that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge. . . . If the Commission determines after such **investigation** that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice . . . .

42 U.S.C. § 2000e-5(b) (emphasis added). This language mandates that the EEOC shall investigate all charges of discrimination filed with it – by definition such an "investigation . . . under this title" will be an EEOC investigation.

Similarly, 42 U.S.C. § 2000e-5(f)(2) suggests that any "investigation" must be conducted by the EEOC, because that provision authorizes the EEOC to file suit, should its investigation suggest that such action is necessary:

> Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary **investigation** that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action. . . .

42 U.S.C. § 2000e-5(f)(2) (emphasis added). Because the EEOC uses the results of its investigation to determine

whether to file a lawsuit, the statutory language authorizing the EEOC to file suit contemplates that an EEOC investigation will precede such a lawsuit.

The EEOC's authority to conduct official investigations of allegedly unlawful discriminatory employment practices is set forth in 42 U.S.C. § 2000e-6(e). In that section, the term "investigate" appears as follows:

> [T]he Commission shall have authority to **investigate** and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission.

42 U.S.C. § 2000e-6(e) (emphasis added).

To facilitate the EEOC's investigatory role, 42 U.S.C. § 2000e-8(a) gives the EEOC broad access to evidence in conjunction with investigations, supporting the conclusion that it is responsible for conducting those investigations:

> In connection with any **investigation** of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful

> employment practices covered by this subchapter and is relevant to the charge under **investigation**.

42 U.S.C. § 2000e-8(a) (emphasis added).

The final mention of "investigations" occurs in § 2000e-9, which states:

> For the purpose of all hearings and **investigations** conducted by the Commission or its duly appointed agents or agencies, section 161 of Title 29 shall apply.[18]

42 U.S.C. § 2000e-9 (emphasis added).

The use of the term "investigations" in this last section is consistent with that of the other sections. In context, each time the term "investigation" appears it refers to an EEOC investigation after a charge has been filed.

Against this backdrop, Ms. Crawford argues for an interpretation of "investigation" to include employer-initiated investigations with no connection to the EEOC, and no connection to a pending EEOC charge. This would be an unwarranted expansion of the meaning of the term, divorcing it from its consistent meaning in Title VII.

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[18] 29 U.S.C. § 161 grants the EEOC identical powers to those of the National Labor Relations Board in compelling the appearance of witnesses and the production of evidence in its proceedings and investigations.

In contrast, the Sixth Circuit and the four other Circuit Courts of Appeal that have directly considered the issue have given the term "investigation" its correct meaning, one which more closely comports with Congressional intent: only after an EEOC charge has been filed does an employee's participation in an employer-initiated investigation become protected conduct. *See Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *Brower v. Runyon*, 178 F.3d 1002, 1005-06 (8th Cir. 1999); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *EEOC v. Total Sys. Servs., Inc.* 221 F.3d 1171, 1174 (11th Cir. 2000); *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003).

Taken literally, the context of the term "investigation" in Title VII arguably indicates only participation in EEOC investigations is protected under the statute. These five circuits have already taken an expansive approach to defining the term, making the "machinery of Title VII available" to a much larger group of individuals, by extending its coverage to investigations conducted by employers, as long as an EEOC charge was filed first. Ms. Crawford and her *amici* argue for a further extension of the concept of "investigations," an interpretation that dramatically departs from the context in which the term is used in Title VII. This departure is unwarranted.

The use of the terms "investigation" and "investigate" is consistent throughout Title VII. Interpreting "investigation" in § 704(a) in harmony with its meaning in the other sections of Title VII results in

the statutory language being unambiguous and "the statutory scheme [being] coherent and consistent." *Robinson*, 519 U.S. at 340; *quoting Ron Pair Enter., Inc.*, 489 U.S. at 240. Statutes are to be read as a whole. *United States v. Morton*, 467 U.S. 822, 828 (1984). Identical words within a statute should be construed *in pari materia*. *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005).

The Court's inquiry should end here. *Robinson*, 519 U.S. at 340. Ms. Crawford's act of answering questions in an internal sexual harassment investigation – neither an EEOC investigation nor an investigation pursuant to an EEOC charge – is not covered under Title VII's "participation" clause.

II. MS. CRAWFORD'S ACTIONS ARE NOT COVERED UNDER THE "OPPOSITION" CLAUSE

Ms. Crawford and her *amici* ask the Court to embrace a definition of "opposition" conduct that warps the meaning of the term and renders the "participation" clause superfluous. Under Ms. Crawford's paradigm, there would be no need for the participation clause because "opposition" would be defined so broadly as to include the most casual conversation between a potential plaintiff and another.

This Court has not had occasion to directly consider the quality or quantity of an individual's conduct which may qualify for protection under the "opposition" clause. However, in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269-74 (2001) (per curiam), plaintiff invoked

Title VII's anti-retaliation provisions under both the "opposition" and "participation" clauses.

In *Breeden*, plaintiff's supervisor and one of plaintiff's male co-workers had what plaintiff considered to be an inappropriate verbal exchange in her presence. This exchange involved a comment in an employment application. *Id.* at 269-70. Ms. Breeden contended that her (presumably verbal) complaints to her supervisor, to her supervisor's supervisor (an assistant superintendent), and to another assistant superintendent of the school district constituted protected "opposition" conduct, even though no EEOC charge had been filed. This Court expressed skepticism that Ms. Breeden's complaints to these three supervisors constituted protected "opposition" activity. *Id.* at 270. However, the Court had no occasion to rule on the propriety of the Ninth Circuit's finding in this regard, holding instead that no one reasonably could believe the incident violated Title VII. *Id.*

In dicta, the Court dismissed Ms. Breeden's "utterly implausible" suggestion that the EEOC's issuance of a right to sue letter – an action in which the employee takes no part – was a protected activity under 42 U.S.C. § 2000e-3(a). *Id.* at 273. The Court also discussed the lack of evidence indicating the decision-maker knew of the existence of Ms. Breeden's right to sue letter. *Id.* The Court dismissed Ms. Breeden's temporal proximity argument, specifically citing to cases in which periods of three and four months between the alleged protected

activity and the adverse action were deemed insufficiently close to infer causation. *Id.* at 273-74.[19]

The difference between Ms. Breeden and Ms. Crawford is that Ms. Breeden actually did something – she sought out three supervisors and made complaints. These affirmative steps would constitute protected "opposition" if they reflected the employee's reasonable and good faith opposition to an employment practice made unlawful by Title VII. Ms. Crawford never took such affirmative steps.

Turning to the plain meaning of the word, to "oppose" something is "to place over against something so as to provide resistance, counterbalance or contrast; to place opposite or against something; to offer resistance to." Merriam-Webster Online Dictionary (2008 ed.). Among the definitions of "opposition" is "hostile or contrary action or condition." *Id.* The common thread in these definitions is the person doing the "opposing" has to actually communicate "resistance" or "hostile or contrary action."

Requiring a plaintiff ostensibly engaging in "opposition" conduct to actually communicate resistance mirrors the requirement that an employee take advantage of workplace procedures to actively report alleged discrimination, as set forth in *Faragher*, 524 U.S. at 806-07 and *Ellerth*, 524 U.S. at 764-65. In *Faragher*, this Court noted that the "primary objective" of Title

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[19] In Ms. Crawford's case, four and a half months passed from the date of her statement to Veronica Frazier (July 22, 2002) and her charge letter from Chris Henson (December 4, 2002). Br. Opp. Cert. App. 20.

VII is not to provide redress but to avoid harm in the first place. *Id.* at 806. To that end, Title VII encourages employers to establish a complaint procedure "designed to encourage victims of harassment to come forward . . ." to let their complaints be known. *Id.* The Court also recognized that a perceived victim of discrimination has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Id.* (internal citations omitted). Accordingly, the Court crafted the two-part affirmative defense now applicable in supervisory hostile work environment cases based in part on the recognition of the employee's "corresponding obligation of reasonable care to avoid harm." *Id.* at 807; *Ellerth*, 524 U.S. at 765.[20]

Requiring the employee to actually initiate a complaint to "oppose" an allegedly unlawful workplace practice conforms with the employee's "obligation of reasonable care to avoid harm" articulated in *Faragher* and *Ellerth*. It is axiomatic that to avail oneself of the opposition clause, an employee has to actually "oppose" something.[21]

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[20] Contrary to Ms. Crawford's assertions, the implementation of anti-harassment policies containing complaint procedures remains a voluntary activity. While such policies may go a long way towards establishing an employer's defense to a sexual harassment claim, employers are not legally mandated to implement them. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[21] The value of *Faragher* and *Ellerth* to the instant case is the Court's articulation of the employee's affirmative duty to

(Cont'd)

The Court again acknowledged the importance of the employee's obligation to come forward with complaints of perceived sexual harassment or discrimination in *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2414 (2006). In *White*, the Court interpreted the anti-retaliation provision of § 704(a) to prohibit employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. 126 S.Ct. at 2414 (quoting *Robinson*, 519 U.S. at 346). Significantly, Ms. White made a (presumably verbal) complaint to Burlington officials about repeated discriminatory comments made by her immediate supervisor, and within a month she had filed a charge with the EEOC. *White*, 126 S.Ct. at 2409. There was never any question that her initial, verbal complaint was treated as "opposition" conduct.

"Opposition" conduct includes making informal protests of discriminatory employment practices, making complaints to management, writing critical letters to customers, protesting against discrimination

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report sexual harassment. The acknowledgement of this obligation is crucial in deciding whether Ms. Crawford acted to "oppose" unlawful employment practices. However, Ms. Crawford's case is not directly governed by *Faragher* and *Ellerth* because: (1) Gene Hughes was not Ms. Crawford's supervisor; and (2) this is a retaliation case – *Faragher* and *Ellerth* were sexual harassment cases (Ms. Crawford never complained of sexual harassment in her EEOC charge and her sexual harassment claim in this case was dismissed as a result). JA 71, 95; Cert. Br. Opp. App. 42; Record, 23, 24, Memorandum and Order granting Motion for Partial Dismissal.

by industry or society in general, and expressing support for co-workers who have filed formal charges. *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 135 (3rd Cir. 2006).[22]

In contrast, Ms. Crawford complained to no one. She did not complain to her boss (Bob Bohnensteil), Mr. Bohnensteil's boss (John Dietz), or the Board of Education's Assistant Superintendent for Human Resources, Graciella Escobedo (a woman). Cert. Br. Opp. App. 1-2.

The Sixth Circuit's point was that it takes more than merely being in a re-active mode to put an employer on notice that an employee "opposes" an unlawful employment practice. An employee should be expected to take some affirmative steps to communicate opposition to sexual harassment to be considered to have "opposed" it. The Sixth Circuit was justified in using the terms "active" and "overt" to describe what is required for "opposition" conduct.

A key problem with treating Ms. Crawford's statements during her interview as "opposition" conduct is that her statements were made during an investigation in which the specific information furnished by each witness was kept confidential. The Fact Finding Report identifies the witnesses interviewed, but it is careful not to link the substance of any witness's statement with the identity of that witness. Cert. Br. Opp. App. 8–17. During her deposition, Veronica Frazier

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[22] Additional authorities describing opposition conduct are discussed at Cert. Br. Opp. 9.

testified this is by design, to maintain the integrity of the investigative process. JA 35-36. During interviews with witnesses, she does not disclose what other witnesses already have told her. *Id*. Ms. Frazier intentionally drafted the summary of witness statements in the Fact Finding Report to not reveal the witness's identities. Cert. Br. Opp. App. 9-14.

Ms. Frazier's investigative techniques comport with the Metropolitan Nashville Board of Public Education's Employee Harassment Policy, no. 3726, found at http://www.mnps.org/AssetFactory.aspx?did=3531. This policy, originally approved in 1992, states that during an investigation of employee to employee harassment, "[c]onfidentiality of employees shall be maintained, to the extent possible. . . ." [23]

It is difficult to treat Ms. Crawford's statements as "opposition" conduct because the concept of "opposition" inherently includes the notion that the employee's "opposition" is communicated to the individuals who allegedly retaliated against the employee. Here, Ms. Crawford's statements were made in the context of an investigation in which "[c]onfidentiality of employees shall be maintained, to the extent possible. . . ." During her deposition,

[23] Ms. Frazier's investigative techniques also comply with the EEOC's recommended confidentiality procedures governing such investigations. Enforcement Guidance, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1), at 615:0107 and Pt. V(C)(1)(d) at 615:0109 (Oct. 2002). The rationale for providing "confidentiality . . . to the extent possible," is presumably to minimize the likelihood of retaliation for participating in an investigation.

Ms. Crawford admitted she has no proof Veronica Frazier violated that confidentiality by communicating the substance of her statements to either Chris Henson or Dr. Garcia. JA 24-28.[24] Ms. Frazier herself indicated the importance of "keep[ing] names out of it" in an effort to "maintain the integrity of the investigative process." JA 36. If the Court were to adopt Ms. Crawford's definition of "opposition" conduct, it will allow employers to be "ambushed" by employees claiming retaliation based on "opposition" conduct occurring during an interview in which confidentiality was promised and delivered. That is exactly what happened here.

III. THE COURT SHOULD DECLINE TO EVALUATE THE WISDOM OF CONGRESS'S POLICY DECISIONS

The bulk of Ms. Crawford's brief, as well as those of her *amici*, consists of policy arguments in favor of an expansive interpretation of § 704(a), in which the term "investigation" would be construed to cover internal sexual harassment investigations undertaken by employers with no connection to an EEOC charge

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[24] Evidence that her statements were communicated to the decision-makers is an essential element of her claim. Ms. Crawford's admission that she has no proof in this regard is fatal to her case at the summary judgment stage. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Ms. Crawford presents the same evidentiary vacuum as her former colleague, Ms. Proffitt. *Proffitt*, 2005 WL 2446006, at *3. In fact, Ms. Crawford must rely on the same deposition testimony as did Ms. Proffitt, because all witnesses in both cases were deposed only once (at Ms. Crawford's and Ms. Proffitt's counsel's request) and the same depositions were used in both cases.

whatsoever. These arguments reflect a jaundiced view of employer-employee relations. Specifically, these arguments rest on speculative assertions about the types of "incentives" employers might have to subvert the integrity of their own investigations if § 704(a) is not interpreted as expansively as Ms. Crawford advocates. However, this Court has repeatedly recognized that weighing the relative merits of policy goals, and the best way to implement them, is a function left to Congress, not the courts. This Court should not second-guess the wisdom of Congress's actions. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *Felder v. Casey*, 487 U.S. 131, 149 (1988); *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

It may be sound policy to extend the protections of the anti-retaliation provision of § 704(a) to participants in internal sexual harassment investigations. Congress has that prerogative. However, the clear meaning of that section as presently worded, and the fact that, without exception, every time "investigate" or "investigation" is used in Title VII it refers to an EEOC investigation, confirms that extending protection to employers' internal investigations is not the result Congress intended. Interpreting "investigation" in § 704(a) consistently with its use in the rest of the statute, it is clear that when Title VII was enacted in 1964 Congress intended the anti-retaliation provision to cover (at most) participation in investigations after an EEOC charge is filed.

There are policy reasons why Congress may have chosen to limit the anti-retaliation provision's reach to participation in EEOC investigations, reasons that are

just as valid as the reasons articulated by Ms. Crawford. As the Sixth Circuit stated, in enacting Title VII, Congress may have thought that its impact on employers was onerous enough already, and it may not have wanted to burden employers with a new class of potential retaliation plaintiffs – those who participate in internal investigations. Cert. Pet. App. 10(a). By protecting only participation in investigations that occur relative to EEOC proceedings, Congress may have wanted to keep the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. *Id.*

Congress could have believed that including internal, employer-initiated investigations under the participation clause would "chill" an employer's willingness to conduct such investigations. Congress also could have felt that the risk that employers would retaliate against employees who cooperate in internal investigations was minimal.

This last point appears to have been proven true through the years. Since 1989, the principle that § 704(a) applies only to participation in investigations conducted after an EEOC charge has been filed has been the law in the Sixth Circuit. *Booker*, 879 F.2d at 1313. In 1990, the Ninth Circuit followed suit in *Vasconcelos*. 907 F.2d at 113. In 1999 and 2000, the Eighth, Fifth, and Eleventh Circuits, respectively, reached the same conclusion. *Brower*, 178 F.3d at 1005-06; *Byers*, 209 F.3d at 428; *Total Sys. Servs, Inc.* 221 F.3d at 1174.[25]

[25] Ms. Crawford and her *amici* portray the Sixth Circuit as a "renegade" in subscribing to this principle, but as these cases demonstrate, this has been the law in these other four circuits for a number of years.

Ms. Crawford points to no evidence – empirical or anecdotal – indicating that employers in these five judicial circuits have embarked upon campaigns to retaliate against participants in internal investigations. Since 1989, the law as stated by the Sixth Circuit has been the law in wide swaths of the country, yet there are no reports of increased retaliation against participants in internal investigations in these circuits. There is no evidence the "foreboding scenario" envisioned by Ms. Crawford has come to pass. Cert. Pet. App. 9a. As the Sixth Circuit noted, a purported practice or policy of retaliating against individuals who participate in internal sexual harassment investigations would be inherently unreasonable, thus precluding the employer's reliance on the *Faragher/Ellerth* affirmative defense in sexual harassment cases. *Id.*

Respectfully, even if the Court disagrees with Congress's choice to limit the reach of § 704(a) to participation in investigations after an EEOC charge is filed, it should not second-guess Congress's policy choices in this regard. "Whatever temptations the statesmanship of policy-making might wisely suggest," the judiciary's role is to construe the statute – not make it better. *Jones v. Bock*, 127 S.Ct. 910, 921 (2007) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947)).

IV. ANY DEFERENCE ACCORDED TO THE EEOC'S COMPLIANCE MANUAL IS UNDERCUT BY ITS PRIOR DISMISSAL OF MS. CRAWFORD'S RETALIATION CLAIM

When engaging in statutory construction, courts only consider agency guidelines and policy interpretations if the words of a statute are ambiguous. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). As set forth in section I, the meaning of the term "investigation" in § 704(a) is clear. There is no need to look any further than the language of Title VII itself to determine Congress's intent on the dispositive issue in this case. However, should the Court accept Ms. Crawford's and the United States's invitation to examine EEOC policy pronouncements to ascertain the meaning of this purportedly ambiguous term, any discussion of the "deference" to be accorded to the EEOC's policy statements must be tempered by the fact that in this very case, the agency has already determined that "there is no[] reasonable cause to believe that [Ms. Crawford's charge of retaliation] is true." 42 U.S.C. § 2000e-5(b); Cert. Br. Opp. App. 45.

A. "PARTICIPATION"

In enacting Title VII, Congress only conferred upon the EEOC the authority to adopt "suitable procedural regulations" – the agency lacks the authority to promulgate regulations addressing "substantive" issues under this Title. 42 U.S.C. § 2000e-12(a); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (superceded by statute on unrelated grounds);

Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (superceded by statute on unrelated grounds). For the purposes of this case, however, the Metropolitan Government will assume that the EEOC's policy statements contained in its Compliance Manual and elsewhere are at least "entitled to a 'measure of respect'" by this Court under the lesser deference standard set forth in *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944), as opposed to the more deferential standard articulated in *Chevron*. *Holowecki*, 128 S.Ct. at 1156; *see Chevron*, 467 U.S. at 843-45.

EEOC policy pronouncements that touch on issues in this case are many and varied. Ms. Crawford and the United States point to some of them in their briefs. They fail, however, to cite to the Compliance Manual where the EEOC defines "participation" as "individuals challenging employment discrimination under the statues enforced by EEOC *in EEOC proceedings, state administrative or court proceedings, as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings.*" Compl. Man., *Section 8-II(C)(1), Retaliation*, (May 20, 1998) (http.www.eeoc.gov/policy/docs/retal.html) (emphasis added). The agency notes that in the federal sector, once an employee **initiates** contact with an EEO counselor, [s]he is engaging in "participation." *Id*. (emphasis added). Significantly, there is no mention of employers' own internal investigations in this definition of "participation."

Likewise, subsection 8-II(C)(2) of the Compliance Manual states, in pertinent part:

> While the opposition clause applies only to those who protest practices that they

> reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the **statutory** complaint process.

Id. (emphasis added). The reference to the "statutory" complaint process in the EEOC's own Compliance Manual indicates an intent to exclude an employer-initiated internal investigation from the ambit of the "participation" clause.

B. "OPPOSITION" CONDUCT

Similarly, in providing examples of "opposition" conduct, the EEOC repeatedly uses active verbs: "threatening" to file a charge or complaint; "complaining"; "protest[ing]"; "picketing"; "refusing" to obey an order; and "requesting" reasonable accommodation. Compl. Man., *Section 8-II(B)(2), Retaliation*, (May 20, 1998) (http.www.eeoc.gov/policy/docs/retal.html). All of these activities require initiative by the employee. None of them describe Ms. Crawford's act of answering questions during an interview.

In short, § 704(a) is not ambiguous. However, if the Court determines that it is, and if the Court turns to the EEOC for guidance, the Court should cast a discerning eye on any statements of agency policy, in light of the EEOC's specific finding in this case that "there is no[] reasonable cause to believe [Ms. Crawford's charge of retaliation] is true." Even if the Court does grant the EEOC's policy statements "a measure of respect" under the less deferential *Skidmore* standard, when the portions of its Compliance Manual cited above are compared with the sections upon which

Ms. Crawford and the Unites States rely, the EEOC's policy statements are inconsistent at best.

V. IF THE COURT FINDS CONGRESS'S INTENT UNCLEAR, THE COURT SHOULD ALLOW CONGRESS TO CLARIFY IT

The most effective way to resolve any perceived ambiguity in § 704(a) is to let Congress speak to the issue. The legislative branch is uniquely equipped to hold hearings, gather information, and weigh the relative merits of whether witnesses who participate in employers' internal harassment investigations should be entitled to protection under § 704(a). *Holowecki*, 128 S.Ct. at 1158.

Another option would be for Congress to broaden the EEOC's rule-making authority and enable it to adopt formal regulations regarding the reach of Title VII's anti-retaliation clause. Broadening the EEOC's power to include substantive rule-making under Title VII would allow its duly enacted regulations – after the attendant period of public comment and information gathering – to be given a higher degree of deference than is presently afforded EEOC policy pronouncements. As long as the EEOC enacted reasonable interpretations of the statutory provisions in light of the statutory construction principles courts normally employ, its interpretations would receive more deference than the degree of deference to which its policy pronouncements presently are afforded. *Id.*; *Arabian American Oil*, 499 U.S. at 260.

The method of divining Congressional intent that is least likely to reflect considered policy judgments made after a period of information-gathering designed to achieve consensus is for this Court to resolve the issue. Ms. Crawford and her *amici* urge the Court to resolve the issue in the context of this lawsuit because it is the path of least resistance. If the Court finds the statute ambiguous, the nature of the dispute and the paucity of legislative history on § 704(a) make ascertaining Congress's intent a tricky proposition. *Hochstadt v. Worcester Found. for Exper. Biology*, 545 F.2d 222, 230 (1st Cir. 1976); *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972). Either the legislative or executive branch, through the means discussed above, is better suited to resolve any perceived ambiguity.

CONCLUSION

The "participation" clause provides broad protection in a limited number of forums. The "opposition" clause offers narrower protection in a broad array of forums. Ms. Crawford is asking the Court to expand "protected activity" to include a broad range of activities in a broad set of forums. But that is not the law Congress enacted.

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Alternatively, the Metropolitan Government asks the Court to dismiss this case on the ground that *certiorari* was improvidently granted. Given the more thorough illumination of the facts which is now before the Court, the Court should remand the case to the District Court to rule on the two grounds for summary judgment that Court has yet to consider: (1) Ms. Crawford admittedly has no evidence the decision-makers knew what she allegedly told Veronica Frazier; and (2) assuming *arguendo* Ms. Crawford could state a *prima facie* case, there were legitimate, non-discriminatory business reasons to terminate her employment, which were not pretextual. This would negate the need for this Court to resolve the issue raised in this case.

Respectfully submitted,

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