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 FOR PETITIONER

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QUESTIONS PRESENTED

Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

(1) Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, who is closely associated with the employee who engaged in such protected activity?

(2) If so, may that prohibition be enforced in a civil action brought by the third party victim?

PARTIES

The parties to this proceeding are set forth in the caption.

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OPINIONS BELOW

The June 5, 2009 en banc opinion of the Court of Appeals, which is reported at 567 F.3d 804 (6th Cir.2009) (en banc), is set out at pp. 1a-63a of the Petition Appendix. The March 31, 2008 panel opinion of the Court of Appeals, which is reported at 520 F.3d 644 (6th Cir.2008), is set out at pp. 64a-90a of the Petition Appendix. The December 18, 2006 order and opinion of the District Court for the Eastern District of Kentucky, which is not reported, is set out at pp. 91a-94a of the Petition Appendix. The June 20, 2006 opinion and order of the District Court, which is reported at 435 F.Supp.2d 633 (E.D.Ky.2006), is set out at pp. 95a-109a of the Petition Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on June 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This court granted certiorari on June 29, 2010.

STATUTES INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

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

Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved ... alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall ... make an investigation thereof.

Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to section (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge ... the Commission has not filed a civil action under this section ... , the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

At the time when this action arose, Eric Thompson was an employee of North American Stainless, LP, as was Miriam Regalado. Thompson and Regalado were engaged to be married,[1] and "their relationship was common knowledge at North American Stainless." (Pet. App. 66a). In September 2002 Regalado filed a charge with the Equal Employment Opportunity Commission, asserting that her supervisors had discriminated against her based on her gender. Regalado alleged that she had twice been demoted because of her gender, and that for the same unlawful reason she was paid less than a male employee.[2]

On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. On February 27, 2003, Thompson's supervisors were directed to prepare a memorandum indicating that Thompson was to be dismissed.[3] On March 7, 2003, barely three weeks after receiving the notice of Regalado's charge, North American Stainless dismissed Thompson. Thompson alleges that he was fired in retaliation for his then-fiancée's (now wife's) EEOC charge. (Pet. App. 3a-4a).

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[1] Thompson and Regalado were subsequently married.

[2] Notice of Charge of Discrimination, JA 16-18.

[3] Doc. 15-6, at 5-7, 21-22. Thompson had received a performance-based wage increase only three months earlier. Doc. 15-11, at 7.

Thompson himself filed a timely charge with the EEOC,[4] which conducted an investigation and found "reasonable cause to believe that [the defendant] violated Title VII." (Pet. App. 4a).[5] After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson brought this action against North American Stainless. Thompson's complaint alleged that the employer had dismissed him in retaliation for his then-fiancée's EEOC charge.[6] Retaliating in that way, Thompson asserted, violated section 704(a) of Title VII, which forbids an employer to "discriminate against any of his employees ... because he has ... made a charge ... under this title." 42 U.S.C. § 2000e-3(a).

North American Stainless moved for summary judgment, contending that as a matter of law

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[4] Charge of Discrimination, Doc. 20-4 ("I believe I was discharged because my fiancee filed a charge of discrimination against the company").

The EEOC "Initial Investigation Information Sheet" filled out by Thompson asserted that he had been fired because his "employer knew of status of relationship [with Regalado] and future marriage. By firing, the others would be intimidated from doing the same (EEOC claim)." Doc. 15-9 at 6.

[5] Determination, Doc. 15-4, at 1 ("Evidence obtained during the investigation supports Charging Party's allegations that the Respondent retaliated against him by discharging him because his fiance had filed a charge of discrimination.").

[6] JA 12, ¶ 9 ("When the Defendant received notice that Miriam Regal[a]do had filed an EEOC charge against it based on gender discrimination, the Defendant retaliated against Plaintiff by terminating him....").

reprisals against a third party would not "support a Title VII cause of action."[7] The District Court granted the motion and dismissed Thompson's complaint, holding that Title VII "does not permit third party retaliation claims." (Pet. App. 108a).[8]

A divided panel of the Sixth Circuit initially overturned the dismissal of the complaint. (Pet. App. 64a-90a). The court of appeals granted North American Stainless' petition for rehearing en banc. A splintered en banc court upheld the dismissal of Thompson's complaint. In addition to the majority opinion, there was a separate concurring opinion and three dissenting opinions.

The problem of reprisals against third parties is not limited to Title VII. Virtually all major federal statutes governing the employment relationship prohibit employers from retaliating against employees for engaging in certain specified protected activity. The question of whether third party reprisals are forbidden and redressable has arisen under a wide variety of those statutes: the National Labor Relations Act,[9] the Americans With Disabilities

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[7] North American Stainless's Memorandum in Support of Motion for Summary Judgment, Doc. 12, 5.

[8] The District Court subsequently denied a motion to reconsider its decision in light of this Court's decision in *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006). (Pet. App. 91a-94a).

[9] See pp. 18-19, 23, *infra*.

Act,[10] the Age Discrimination in Employment Act,[11] the Occupational Safety and Health Act,[12] the Family and Medical Leave Act,[13] the Rehabilitation Act,[14] ERISA,[15] the Equal Pay Act,[16] the Whistleblower Protection Act,[17] the Federal Mine Safety and Health Act,[18] Title IX,[19] and 42 U.S.C. § 1981.[20]

This Court granted review to address these recurring issues.

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[10] *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir.2002).

[11] *Id*.

[12] *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994).

[13] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 (E.D.La.2007).

[14] *Mutts v. Southern Connecticut State University*, 2006 WL 1806179 (D.Conn.2006).

[15] *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir.1989).

[16] *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322, 1331 (M.D.Ga.1980).

[17] *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 447 (1991).

[18] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

[19] *Dawn L. v. Greater Johnstown School Dist.*, 586 F.Supp.2d 332, 380 (W.D.Pa.2008).

[20] *Allen-Sherrod v. Henry County School Dist.*, 2007 WL 1020843 at *3 (N.D.Ga.2007).

SUMMARY OF ARGUMENT

I. Section 704(a) forbids an employer "to discriminate against any of his employees because he ... has made a charge ... under this title." Third party reprisals fall within the language of that prohibition; those reprisals are a method of retaliating against the person who engaged in protected activity. The employer in this case clearly "discriminate[d]" against Regalado for having filed a Title VII charge when it selected Regalado (and *her* fiancé Thompson) for adverse action, and did so "because" Regalado had filed "a charge" with the EEOC.

The prohibitions of section 704(a) are not limited to any particular type of retaliatory act. Congress undoubtedly anticipated that third party reprisals could be among the forms of retaliation to which employers might resort. "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1087 (7th Cir.1987).

The EEOC has consistently interpreted section 704(a) to forbid third party reprisals. The agency's construction of the statute, rooted in an intensely practical understanding of the obstacle which retaliation poses to the administration of Title VII, is entitled to significant deference.

The core purpose of section 704(a) is to maintain "unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346

(1997). Fear of third party reprisals can easily prevent a worker from complaining to or cooperating with federal officials. The district court below correctly recognized that "retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." (Pet. App. 108a).

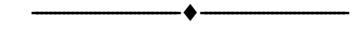
Interpreting section 704(a) to forbid third party reprisals is consistent with the holding in *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), that section 704(a) bans retaliation which is "likely to dissuade employees from complaining or assisting in complaints about discrimination."

II. Section 706(f)(1) authorizes a plaintiff such as Thompson, the direct victim of a third party reprisal, to maintain an action to redress the injuries he suffered as a consequence of the violation of Regalado's rights.

Section 706(f)(1) provides that "a civil action may be brought ... by the person claiming to be aggrieved." In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), this Court held that the phrase "person aggrieved" in the 1968 Fair Housing Act encompasses all individuals with Article III standing. *Trafficante* expressly relied on the construction which had been given to the words "person ... aggrieved" in section 706(f)(1). Person aggrieved should be accorded the same interpretation in both statutes.

Independent of this language in section 706(f)(1), in the instant case Thompson meets the requirements for third party standing. Thompson has clearly suffered a concrete injury in fact as a result of his dismissal. Thompson has a "close relationship" with Regalado (his then fiancée and now wife), the individual whose rights were violated. And Regalado herself would at the least face a serious hindrance if she brought suit on her own and attempted to obtain redress for the injuries suffered by Thompson.

The court of appeals acknowledged that Thompson was a person aggrieved under section 706(f)(1). The Sixth Circuit clearly erred in holding nonetheless that Thompson does not have a cause of action under Title VII. Section 706(f)(1) addresses precisely this issue, expressly stating that "a civil action may be brought" by a person aggrieved. Section 704(a) does not limit the cause of action provided by section 706(f)(1); section 704(a) addresses only what conduct is unlawful, not who can file suit to redress injuries caused by a violation.



ARGUMENT

I. THIRD PARTY REPRISALS VIOLATE SECTION 704(a) OF TITLE VII

A. The Terms of Section 704(a) Prohibit Third Party Reprisals

Third party reprisals fall squarely within the Title VII prohibition against retaliation. Section

704(a) forbids an employer "to discriminate against any of his employees because he ... has made a charge ... under this title." 42 U.S.C. § 2000e-3(a). The touchstone of the prohibition in section 704(a) of Title VII is the intent of the employer in taking the allegedly retaliatory action. That provision forbids an employer to retaliate "because" an individual "has made a charge." 42 U.S.C. § 2000e-5(a). That is precisely the motive alleged by Thompson: "I was discharged because my fiancee filed a charge of discrimination against the company."[21] The employer in this case clearly "discriminate[d]" against Regalado for having filed a Title VII charge when it selected Regalado (and *her* fiancé) for that adverse action, and did so because Regalado had "made a charge" under Title VII.

Petitioner claims that North American Stainless dismissed him as the *method* of retaliating against Regalado.[22] Such third party reprisals violate the section 704(a) rights of the individual – here Ms. Regalado – who filed a charge or engaged in protected activity; dismissing Thompson was "the very means by which" the employer retaliated against Regalado.

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[21] Charge of Discrimination, Doc. 20-4.

[22] See Pet. App. 57a (White, J., dissenting) (employer was "discriminating against the opposing employee through the vehicle of firing that employee's co-employee [fiancé]."); Pet. App. 43a (Moore, J., dissenting) (employer allegedly was "retaliating through Thompson against Thompson's then fiancée/now wife Miriam Regalado").

Blue Shield of Virginia v. McCready, 457 U.S. 465, 479 (1982).

The protections of section 704(a) are not limited to any particular form or type of retaliation. Section 704(a) does not contain an exclusive list of the types of retaliatory practices forbidden by Title VII; indeed, section 704(a) does not mention any specific methods of retaliation at all. Rather than attempt to fashion a list of specified forbidden retaliatory actions, thus protecting workers only from the listed (but not all) retaliatory tactics, Congress in section 704(a) broadly forbade any "discriminat[ion]" because an employee had engaged in protected activity. The sweeping scope of that prohibition differs from a number of other federal anti-retaliation statutes, which by their terms do apply only to certain specified types of retaliatory tactics.[23] By instead framing section 704(a) without

[23] E.g., 10 U.S.C. § 950t(24) (authorizing trial by military tribunal of a covered individual "who intentionally kills or inflicts great bodily harm on one or more protected persons ... to retaliate against government conduct"); 10 U.S.C. § 1034(b) ("No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for [engaging in certain protected activity]"); 18 U.S.C. § 115(a) (forbidding assault, murder, or certain other specified crimes of violence "to retaliate against [a federal] official, judge, or law enforcement officer on account of the performance of official duties"); 18 U.S.C. § 1513(a)(1) (forbidding killing or attempting to kill any person to retaliate for appearing as a witness or party or providing information to federal law enforcement officials); 18 U.S.C. § 1513(b) (forbidding conduct that "causes bodily injury to another person or damages the tangible property of another person" in order to retaliate for appearing as a witness or party

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any such limitations, Congress made clear its intent to forbid "the many forms that effective retaliation can take." *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 64 (2006).

The breadth of section 704(a) reflects the gravity of the times in which it was enacted.[24] In the period

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or providing information to federal law enforcement officials); 18 U.S.C. § 1521 (forbidding the "fil[ing] ... of ... any false lien or encumbrance against the real or personal property [of certain officials] on account of the performance of official duties by that individual"); 26 U.S.C. § 7804(b)(6) (requiring dismissal of an employee of the Internal Revenue Service for "violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service ... for the purpose of retaliating against ... a taxpayer"); see 116 Stat. 3242, sec. 102(1) ("Federal agencies should not retaliate for court judgments or settlements relating to discrimination and whistleblower laws by targeting the claimant or other employee with reductions in compensation, benefits, or workforce to pay for such judgments or settlements").

For example, federal law prohibits only certain specified types of retaliation against federal law enforcement officials; an embittered convicted felon is forbidden to assault or kidnap a law enforcement official, but could lawfully refuse to hire that official after the official retired. See 18 U.S.C. § 115.

[24] In 1949, at the behest of Thurgood Marshall, the Reverend J.A. DeLaine enlisted twenty parents in Clarendon County, South Carolina, to file suit challenging the separate and unequal public schools for black children.

> Before it was over, they fired him from the little schoolhouse at which he taught devotedly for ten years. And they fired his wife and two of his sisters and a niece. And they threatened him with bodily harm. And they sued him on trumped-up charges and convicted him in a kangaroo court and left him with a judgment that denied him credit from any bank. And

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leading up to the adoption of Title VII, hostility towards civil rights workers and racial integration had reached dangerous levels throughout much of the South. Homes and churches had been bombed. Civil rights workers had been murdered. Crosses had been set aflame to create an atmosphere of intimidation. Two Presidents had been required to call up the National Guard to protect African-American students who wanted to attend previously all-white schools. Fear of reprisals was deterring many African-Americans from attempting to exercise their legal and constitutional rights. In that dangerous environment, Congress understandably framed section 704(a) in sweeping language intended to eliminate root and branch the use of threats and retaliation to obstruct implementation of the promise of equal employment opportunity in the Civil Rights Act of 1964.

The terms of the anti-retaliation provision of section 704(a) are deliberately broader than the

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> they burned his house to the ground while the fire department stood around watching the flames consume the night. And they stoned the church at which he pastored. And fired shotguns at him out of the dark.... Soon after, they burned his church to the ground....
>
> All of this happened because he was black and brave. And because others followed when he had decided the time had come to lead.

R. Kluger, Simple Justice, at 3 (1975).

The lawsuit which Reverend DeLaine helped to organize, *Briggs v. Elliott*, was consolidated on appeal with similar actions from Virginia, Delaware and Kansas and was decided by this Court sub nom. *Brown v. Board of Education*, 347 U.S. 483 (1954).

language of the anti-discrimination provision of section 703(a). The reprisals forbidden by section 704(a) are not limited to actions affecting the employment of the particular individual who engaged in the protected activity. *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 66-67 (2006). Section 703(a), on the other hand, imposes just such a restriction on discrimination claims. In a discrimination claim under section 703(a) a plaintiff must show not only that the action complained of was motivated by the plaintiff's race, color, religion, sex or national origin, but also that that discrimination adversely affected the plaintiff's *own* employment.

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discrimination against any individual with respect to *his* compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect *his* status as an

> employee, because of *such individual's* race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added). The emphasized words in section 703(a) limit the scope of that provision to cases in which the plaintiff's protected status is the basis for an adverse action related to his own employment status. No similar restriction is found in the terms of section 704(a). This linguistic difference indicates that Congress intended its different words to make a legal difference.

> We normally presume that, where words differ as they differ here, "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983).

Burlington Northern, 548 U.S. at 63.

Retaliation is "against" a worker who engaged in protected activity even where the employer's action achieves its unlawful purpose by affecting another worker or individual. See *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-89 (7th Cir.1987) (dismissal of mother of male shop steward was "[a]n effective method of getting at him, a protected worker"; "[i]f he loves his mother, this had to hurt him as well"). The law has long recognized that injury to one individual can cause emotional distress for a family member or other associated individual, and that such consequent

injury may at times be the very purpose of an intentional tort. State tort law has in varying circumstances provided redress in such circumstances for that emotional distress. D. Dobbs, The Law of Torts, 833-37 (2000); see Doc. 15-8, at 23 (Dep. of Eric Thompson) ("It's been a huge emotional tribulation for both of us").

It is of no consequence that the employer in this case allegedly retaliated against Regalado indirectly, by firing Thompson, rather than directly, by firing Regalado herself. Either type of reprisal would "discriminate against" Regalado. "Section 704(a)['s] ... broad based protection should not be undermined by allowing the [employer] to accomplish indirectly what it cannot accomplish directly." (EEOC Decision No. 77-343, 1977 WL 5345, at *1). Surely section 704(a) would be violated if an employer applied a policy of kidnapping the children of any worker who filed a charge with the EEOC. If indirect retaliatory methods were permitted by section 704(a), there would be any number of ways in which an ingenious employer could lawfully punish and deter protected activity. For example, at a plant with a seniority system, an employer could eliminate the job of one worker knowing that he or she in turn would use seniority to displace some other employee whom the employer wished to harm.

Congress undoubtedly anticipated that third party reprisals would be among the forms of retaliation to which employers might resort. "To retaliate

against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1087 (7th Cir.1987). Such reprisals against an individual's family or close associates have a long and deplorable history as a method of punishing enemies, deterring conduct, and coercing disclosure of information, and remain all too common in events both at home and abroad.[25]

Congressional awareness of this type of retaliation is reflected in legislation forbidding crimes of

[25] H.R.Rep. 111-166 at 173 (recommending approval of special immigration visas for Iraqi citizens who assisted coalition forces "at great risk to themselves or their families"); H.R.Rep. 106-487(I) at 21 (traffickers met women at airport and "threatened to kill their families if the women refused to dance nude in a nightclub"); H.R.Rep. 105-508 at 36 ("prudence dictates that if former or current CIA personnel are threatened with harm, the protection provided to them should, in appropriate circumstances, be extended to their immediate families as well"); H.R.Rep. 105-258 at *2 ("Police and prosecutors report an increased incidence of threats of physical violence against victims, witnesses, and their families.... In many cities there are as many requests for protection of threatened family members as there are for protection of witnesses themselves."); H.R.Rep. 90-658 at *4 ("Experience has evidenced that potential witnesses or their families are often intimidated, threatened, or even gravely injured during the investigative preliminaries to a criminal prosecution"). See *Wilson v. Libby*, 535 F.3d 697 (D.C.Cir.2008).

violence against federal officials; those prohibitions also apply to crimes against the families of those officials. Section 115 of the criminal code, for example, makes it a federal offense to murder or assault

> the immediate family of a United States official ... with intent to impede, intimidate, or interfere with such official ... on account of the performance of official duties....

18 U.S.C. § 115(a)(1).[26] Congress enacted the Taft Hartley Act in part because it found that if a union

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[26] Similarly, section 115(a)(2) declares it a crime to murder or assault the immediate family of a person who formerly served as a United States official "with intent to retaliate against such person on account of the performance of official duties during the term of service of such person." 18 U.S.C. § 115(a)(2).

> Section 119 forbids the public release of restricted personal information about [jurors, witnesses, and certain government officials], or a member of the immediate family of that covered person, ... with the intent and knowledge that the restricted personal information will be used to threaten, intimate, or facilitate the commission of a crime of violence against ... a member of the immediate family of that covered person.

18 U.S.C. § 119(a).

The prohibition against retaliatory killings in section 1513 is even broader; it applies without limitation to the murder of

> another person with intent to retaliate against any person for ... the attendance of a witness or party at an official proceeding ... or ... providing to a law enforcement officer any information relating to the commission ... of a Federal offense....

18 U.S.C. § 1513(a)(1).

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member opposed corrupt union officials he faced reprisals, including having "his family threatened." 105 Cong. Rec. 6472 (1959); 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1098 (1959). See *Gray v. Netherland*, 518 U.S. 152, 155 (1996) (armed kidnapper threatened to harm family of store manager if he did not cooperate with robbery); *Herrera v. Collins*, 506 U.S. 390, 398 n.4 (1993) (potential witness assertedly silenced by threats of harm to his family).

Since at least 1962 the National Labor Relations Board has interpreted the National Labor Relations Act to forbid reprisals against third parties because of protected activities by union members, officials or supporters.

> A restraint on the exercise of employee rights is readily apparent where ... the supervisor is discharged because she is the wife of an employee who has engaged in union or other protected activities.... Under these circumstances, the rank-and-file employees ... can

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> Section 1951 defines "robbery" to include the unlawful taking or obtaining of personal property from the person ... against his will, by means of fear of injury, immediate or future, to ... the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1).

> "reasonably ... fear that the employer would take similar action against them if they continued to support the Union." *Jackson Tile Manufacturing Co*. [122 NLRB 764 (1958)].

Golub Bros. Concessions, 140 NLRB 120, 127 (1962).[27] This Court has repeatedly relied on the established interpretation of the NLRA in construing Title VII. See *Burlington Northern*, 548 U.S. at 66 ("[t]he National Labor Relations Act, to which this Court has 'drawn analogies ... in other title VII contexts.' *Hishon v. King & Spaulding*, 467 U.S. 69, 76, n.8 (1984)").[28]

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[27] In *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956), the union had "threatened [workers] and their families with physical injury" if they worked during strike. 351 U.S. at 269. This Court noted that "the alleged conduct of the union in coercing employees in the exercise of their rights is a violation of section 8(b)(1) of th[e NLRA.]" 351 U.S. at 270.

[28] In concluding that section 704(a) forbids third party reprisals, the EEOC itself has correctly relied on the NLRB's interpretation of the NLRA. EEOC Decision No. 77-343, 1977 WL 5345 at *1 ("The National Labor Relations Board in similar circumstances has frequently held that discrimination against an employee because he or she has a familial relationship with a union activist violates the National Labor Relations Act. *Illinois Bell Telephone Company*, 228 NLRB 114 (1977); *Hickman Garment Company*, 216 NLRB 801 (1975); *Forest City Containers, Inc.*, 212 NLRB 38 (1974). Accordingly, we conclude that discrimination against an employee because he or she has a familial relationship with a person who has filed a charge of discrimination is violative of Section 704(a) of Title VII.").

B. The EEOC's Interpretation of Section 704(a) Is Entitled To Deference

The EEOC has long and consistently interpreted section 704(a) to forbid an employer to retaliate against a worker who engaged in protected activity by inflicting reprisals on a relative or other associated individual.

The Commission has applied this interpretation in a series of administrative determinations and adjudications dating from 1977.[29]

> Certainly, where it can be shown that an employer discriminated against an individual because he or she was related to a person who filed a charge, it is clear that the employer's intent is to retaliate against the person who filed the charge.... [D]iscrimination against an employee because he or she has a familial relationship with a person who has filed a charge of discrimination is violative of Section 704(a) of Title VII.

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[29] EEOC Decision 77-343, 1977 WL 5345 (EEOC); see *Ray v. TVA*, 1982 WL 532146 at *3-*4 (EEOC) (applying *De Medina v. Reinhardt*, 444 F.Supp. 573 (D.D.C.1979)); *Bates v. Widnall*, No. 01963655, 1997 WL 332902 (EEOC June 10, 1997) ("[I]t is long settled that third party reprisals are cognizable under EEOC law"); *Alexander v. Peters*, No. 05980788, 2000 WL 1218139 (EEOC).

(EEOC Decision No. 77-343, 1977 WL 5345 at *1). Since 1984[30] the Commission's Compliance Manual has stated that third party reprisals violate section 704(a). The current version of the compliance manual states:

> The retaliation provisions of Title VII, the ADEA, the EPA and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage

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[30] Section 614.4(b) of the 1984 Compliance Manual provided:

> [T]he retaliation provisions of Title VII prohibit retaliation against someone so closely related to the person exercising his/her Title VII rights that it would discourage or prevent the person from exercising those rights.... For example, where the son or daughter of an employee protests unlawful employment practices, the respondent may try to retaliate against the employee.

Section 614.3 of the 1988 Compliance Manual provided:

> When investigating a retaliation violation it must first be determined whether a covered respondent has discriminated against an individual because ... someone closely related to that individual has opposed what (s)he reasonably believes to be Title VII or ADEA discrimination or has participated in the Title VII or ADEA process.... [A]s to both opposition and participation, the retaliation provisions of Title VII and the ADEA ... prohibit retaliation against someone so closely related to the person exercising his/her statutory rights that it would discourage or prevent the person from exercising those rights.

> or prevent the person from pursuing those rights. For example, it would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge.

2 EEOC Compliance Manual § 8.II(B)(3)(c) (1998). The Commission has repeatedly advanced that same interpretation of section 704(a) by filing suit on behalf of the victims of third party reprisals[31] and by submitting amicus briefs in support of private lawsuits raising such claims.[32]

The Commission's longstanding construction of section 704(a) is of substantial importance. This Court has repeatedly recognized that the Commission's interpretation of Title VII "reflect[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance" *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399

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[31] *EEOC v. Wal-Mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.Mex.2008) (retaliation against children because of protected activity of mother); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206 (E.D.Cal.1998) (retaliation against brother because of protected activity of sister); *EEOC v. V & J Foods, Inc.*, 2006 WL 3203713 (E.D.Wis.2006) (retaliation against daughter because of protected activity of mother).

[32] Brief of the EEOC as Amicus in Support of Thompson and for Reversal, *Thompson v. North American Stainless, LP*, (No. 07-5040) (6th Cir.), available at 2007 WL 2477626; Brief of the EEOC as Amicus Curiae in Support of the Appellant, *Fogelman v. Mercy Hosp.*, (No. 00-2263) (3d Cir.), available at 2001 WL 34119171.

(2008).[33] Because, as this Court noted in *Burlington Northern*, the proper application of section 704(a) turns in part on an evaluation of the deterrent consequences of particular forms of retaliation, the Commission's assessment of this intensely practical issue, reflecting the Commission's extensive experience with the fears and concerns of countless Charging Parties over several decades, is entitled to especial weight. See *Robinson*, 519 U.S. at 345-46 (noting position of EEOC that excluding former employees from the protections of section 704(a) "would undermine the effectiveness of Title VII").

The EEOC is not alone in construing federal anti-retaliation statutes in this manner. The NLRB has applied this interpretation of the NLRA in cases in which the injured third party was a non-supervisory employee, a supervisory employee, and an independent contractor.[34] The Department of

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[33] See *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S.Ct. 846, 851 (2009); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449 n.9 (2003); *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

[34] *Advertisers Mfg. Co.*, 280 NLRB 1185, 1186 (1986) (retaliation against mother because of protected activities of son); *International Union of Operating Engineers, Local 400*, 265 NLRB 1316, 1320 (1982) (retaliation against wife for protected activities of husband; independent contractor); *Hickman Garment Co.*, 216 NLRB 801 (1975) (retaliation against daughter-in-law because of protected activities of mother-in-law); *American*

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Labor has repeatedly construed in the same manner the federal employment laws which it enforces. In *Reich v. Cambridgeport Air Systems, Inc.*, the Department of Labor advanced a similar construction of the anti-retaliation provision of the Occupational Health and Safety Act. The Department relied on precedents regarding section 704(a) and the NLRA in arguing that the anti-retaliation provision of OSHA forbids third party reprisals.[35] The Department interprets the anti-retaliation provision of the Federal Mine Safety and Health Act in the same way, there too relying on cases holding that third party reprisals violate the NLRA and Title VII.[36] In *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322 (M.D.Ga.1980), the Department argued that the anti-retaliation provision of the Fair Labor Standards Act, which applies to the Equal Pay Act, forbids an employer to force a male employee to resign his position because his wife had filed a complaint about discrimination in compensation.

Buslines, Inc., 211 NLRB 947, 948 (1974) (retaliation against wife for protected activities of husband); *Forest City Containers, Inc.*, 212 NLRB 38, 40 (1974) (retaliation against worker because of protected activity of her fiancé's mother); *Ridgely Mfg. Co.*, 207 NLRB 83, 88-89 (1973) (retaliation against wives because of protected activities of husbands).

[35] Brief for the Secretary of Labor, *Reich v. Cambridgeport Air Systems, Inc.*, (1st Cir.1994) (No. 93-2287) at 18-21, available at 1994 WL 16506060.

[36] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

As this Court noted in *Burlington Northern*, "Congress has provided similar kinds of protection from retaliation in comparable statutes." 548 U.S. at 66 (citing Title VII and the NLRA). Although there are some textual differences among these statutes, the government's construction of these various laws reflects a consistent concern that permitting third party reprisals would reduce access to remedial mechanisms, impair the willingness of employees to contact or provide information to federal agencies, and thus undermine enforcement of the underlying substantive provisions. Interpreting these anti-retaliation provisions in a similar manner, except where unambiguous textual differences compel some distinction, would be consistent with the congressional understanding that comparable federal provisions would be construed alike.

C. Applying Section 704(a) To Third Party Reprisals Advances The Purposes of That Provision

Interpreting the terms of section 704(a) to forbid third party reprisals is important to assuring that the anti-retaliation provision will be effective in protecting workers who file charges or engage in other covered activities. In this respect the "purpose [of section 704(a)] reinforces what language already indicates." *Burlington Northern*, 548 U.S. at 64; see *Robinson*, 519 U.S. at 849 (where language of section 704(a) is ambiguous, Court adopts construction that

is "more consistent with the broader context of Title VII and the primary purpose of § 704(a)").

"Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington Northern*, 548 U.S. at 67. Because most charging parties (and most witnesses) would be employees of the employer alleged to have violated Title VII, that employer usually has the economic power to deter or punish those who complain to or cooperate with the Commission.

> [T]he anti-retaliation provision's "primary purpose," [is] "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).
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> * * *
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> "Plainly effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.
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> * * *
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> The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson* [*v. Shell Oil Co.*,] 519 U.S. [337,] 346 [(1997)].

Burlington Northern, 548 U.S. at 64-68; see *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (purpose of the NLRA anti-retaliation provision is to ensure employees are "'completely free from coercion against reporting'" unlawful practices) (quoting *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967)). Preventing all forms of retaliation is particularly important in light of "documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S.Ct. 846, 852 (2009) (quoting Brake, Retaliation, 90 Minn. L. Rev. 18, 20, 37 and n.58 (2005)).

The deterrent effect of third party reprisals is widely recognized. The district judge in this case, although concluding that Sixth Circuit precedent barred any action for third party reprisals, candidly recognized that "retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." (Pet. App. 108a).

> 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.
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> * * *
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> [A]ction taken against the third party employee can have the effect of coercing the

> employee engaged in protected activity, and may also coerce other employees of the company from engaging in protected activity in the future.

Fogelman v. Mercy Hospital, Inc., 283 F.3d 561, 568-70 and n.5 (3d Cir.2002); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224, 1233 (5th Cir.1996) (Dennis, J., dissenting) ("the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA").[37] Indeed, as the EEOC has observed,

[37] See *Rainer v. Refco, Inc.*, 464 F.Supp. 742, 746 (S.D.Ohio 2006) ("[c]learly, if an employer were free to discharge any relative of an employee who complained about discrimination without fear of liability, there would be a chilling effect on the inclination of employees whose relatives were part of the same workforce to complain about discrimination"); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206, 1210 (E.D.Cal.1998) ("an interpretation [that permitted third party reprisals] would chill employees from exercising their Title VII rights against unlawful employment practices out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative"); *Clark v. R.J.Reynolds Tobacco Co.*, 1982 WL 2277 at *7 (E.D.La.) ("[p]laintiff's son would certainly be deterred from exercising his rights under Title VII if there was a threat that his former employer would fire his father if he were to file a charge of discrimination against it"); *De Medina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C.1978) ("tolerance of third-party reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII").

threats of reprisals against third parties can be especially efficacious.[38]

In *Burlington Northern* this Court cited as an example of "effective[ ] retaliat[ion] against an employee ... causing him harm outside the workplace" the reprisal in *Rochon v. Gonzalez*, 438 F.3d 1211, 1213 (D.C.Cir.2006), in which the FBI retaliation against the plaintiff "took the form of the FBI's refusal ... to investigate death threats a federal prisoner made against [the Special Agent] and *his wife*." 548 U.S. at 63-64 (emphasis added and omitted). It is inconceivable that in a situation such as *Rochon* section 704(a) permits a government agency to retaliate against a law enforcement officer who filed a charge with the EEOC by refusing to protect his family from death threats, so long as the agency

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[38] Brief of the EEOC as Amicus Curiae In Support of the Appellant, *Fogelman v. Mercy Hosp.*, (No. 00-2263) (3d Cir.) at 25-26.

> [T]he fact that retaliation is against a third party only enhances the pressure on the employee contemplating the exercise of protected activity. Where an employee has already been the target of discrimination, the threat of economic sanction may be outweighed by the employee's personal desire to vindicate her statutory rights. If the employer, however, could reach into the workforce to target other employees, the aggrieved employee may be more reluctant to assert her statutory rights. In that case, the employee risks not only her own economic future, which has already been threatened by the employer, but the future of her fellow workers as well.

continues to protect the officer himself. In assessing whether the retaliatory actions against the plaintiff in *Burlington Northern* itself were sufficiently serious to be unlawful, the Court expressly considered the impact of that retaliation on the family of the worker involved, as well as on the worker herself.[39]

The chilling effect of third party reprisals is at least usually one of the very purposes of that form of retaliation. If third party reprisals are permissible under section 704(a), "employers can use Thompson, and others like him, as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals." (Pet. App. 43a-44a) (Moore, J., dissenting). In the absence of an enforceable prohibition against that practice, employers could deliberately

> evade the reach of the [anti-retaliation] statute by making relatives or friends of complaining parties the "whipping boys" for the protected conduct of others.

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[39] Cf. 548 U.S. at 72:

> White *and her family* had to live for 37 days without income. *They* did not know during that time whether or when White could return to work. White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused.... (" ... No income, no money, and that made *all of us* feel bad ... ")

(Emphasis added).

Holt v. JTM Industries, Inc., 89 F.3d at 1233 (Dennis, J., dissenting). As the EEOC has warned, if third party reprisals are not prohibited – or if any such prohibition is incapable of meaningful enforcement – an employer could adopt an express policy of inflicting such reprisals.

> [A]n employer could openly use the threat of third-party retaliations to ban the very activities protected by Section 704(a). An employer could adopt a policy of seeking reprisals in any case in which an employee protested discrimination, filed a charge with the Commission, or otherwise participated in the enforcement process. That policy could require the termination of any relative, friend, or co-worker of the individual engaging in the protected activity.[40]

In *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir.1987), the Seventh Circuit held that reprisals against supervisory officials violate the NLRA because "[i]f, as the Board found ... , the company fired [the mother] because of her son's union activities, there could be only one *purpose*, and that was to intimidate union supporters."[41] (Emphasis added).

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[40] Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Ohio Edison Co.*, (No. 92-3173) (6th Cir.), text at n.1.

[41] In *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994), the First Circuit upheld a retaliation claim under OSHA regarding the dismissal of a worker who was a "particularly close friend[ ]" of a worker who had complained about

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Unredressed third party reprisals could be a powerful deterrent to protected activity. In the wake of the dismissal of petitioner Thompson, and of the Sixth Circuit decision that followed, any worker of ordinary prudence at North American Stainless could be understandably reluctant to file a charge with the EEOC. Effective redress for the victims of third party reprisals is thus essential to remove the chilling effect that such a reprisal would have on other workers. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d at 1088-89 ("[The mother] is ... being reinstated so that ... protected employees will not be deterred from exercising their rights ... by fear that if they do the company will try to get back at them in any way it can, including firing their relatives."); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 410 (3d Cir. 1990) (en banc) ("reinstatement [of the dismissed family member] was ordered to demonstrate to the employees and supervisors at Kenrich that our labor laws do not permit employers to intimidate protected employees by using family members as hostages."). To deny judicial redress to those third party victims

> would encourage employers to take reprisals against the friends, relatives, and colleagues of an employee who ha[s] asserted a [discrimination] claim. Through coercion, intimidation, threats, or interference with an

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health and safety problems. That reprisal, the trial court had concluded, was inflicted to "'impress the other employees' not to associate with health and safety advocates." 26 F.3d at 1189.

> employee's co-workers, an employer could discourage an employee from asserting such a claim.

Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 630, 660 A.2d 505, 508 (1995).

D. The Standard In *Burlington Northern* Controls Which Third Party Reprisals Are Unlawful

This Court's decision in *Burlington Northern* provides the standard for determining when a third party reprisal sufficiently implicates the purpose of section 704(a) to violate the law. A particular retaliatory practice is forbidden by section 704(a) if "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern*, 548 U.S. at 67 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C.Cir.2006)); see 548 U.S. at 70 (reprisal unlawful if it is "likely to dissuade employees from complaining or assisting in complaints about discrimination").

Consistent with the standard in *Burlington Northern*, the EEOC has concluded that third party reprisals are unlawful if the adverse action is taken "against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." 2 EEOC Compliance Manual § 8.II(B)(3)(c) (1998). The retaliatory act itself must also be sufficiently serious to satisfy the *Burlington*

Northern standard. "[N]ormally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Burlington Northern*, 548 U.S. at 68.

II. SECTION 706(f)(1) AUTHORIZES SUITS BY THE VICTIMS OF THIRD PARTY REPRISALS

A. Victims of Third Party Reprisals Are "Persons ... Aggrieved" Within The Scope of Section 706(f)(1)

The retaliatory action alleged in this case violated the rights of Regalado, the individual whose action in filing a charge with the EEOC was protected by section 704(a). Section 706(f)(1) of Title VII authorizes Thompson, the immediate victim of that retaliation, to maintain this action to redress the injuries which he suffered as a consequence of the violation of Regalado's rights.

Section 706(f)(1) provides that when certain exhaustion requirements have been satisfied "a civil action may be brought against the respondent named in the charge ... by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). The court below correctly concluded, as have most courts of appeals to address this issue,[42] that by using the phrase "person

[42] *Anjelino v. The New York Times Co.*, 200 F.3d 73 (3d Cir.2000); *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 296 (7th Cir.2000); *Horne v. Firemen's Retirement System of*

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... aggrieved" in section 706(f)(1) Congress authorized suit by any plaintiff with Article III standing, thus lifting the usual prudential rule limiting standing to individuals whose own rights have been violated. "[T]he 'person claiming to be aggrieved' language of § 2000e-5 shows a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution." (Pet. App. 10a n.1).

In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), this Court held that the phrase "person aggrieved" in the Fair Housing Act of 1968 encompasses all individuals with Article III standing.[43] The decision in *Trafficante* expressly relied on a construction of those same words in section 706 of Title VII.

> *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (CA 3), which dealt with the phrase that allowed a suit to be started "by a person claiming to be aggrieved" under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a),

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St. Louis, 69 F.3d 233, 235 (8th Cir.1995); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C.Cir.1994).

[43] History associates the word "aggrieved" with a congressional intent to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which "prudential" standing traditionally rested. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

FEC v. Atkins, 524 U.S. 11, 20 (1998).

> concluded that the words used showed "a congressional intention to define standing as broadly as is permitted by Article III of the constitution." *Id*. at 446. With respect to suits brought under the 1968 Act, we reach the same conclusion....

409 U.S. at 366-67 (footnote omitted).

Trafficante concluded that this broad reading of "person aggrieved" in the Fair Housing Act was supported by the structure of that statute.

> The design of the Act confirms this construction. HUD has no power of enforcement. So far as federal agencies are concerned only the Attorney General may sue; yet ... he may sue only to correct "a pattern or practice" of housing discrimination. That phrase "a pattern or practice" creates some limiting factors in his authority.... Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits.... We can give vitality to [the provision authorizing suit by a person aggrieved] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities....

Trafficante, 409 U.S. at 210-12. Those same practical considerations were applicable to Title VII at the time that statute, including section 706(f)(1), were

originally enacted. Under the terms of the 1964 Civil Rights Act, the EEOC itself had no authority to initiate litigation,[44] and the Department of Justice could file suit only to redress "a pattern or practice" of violations of Title VII.[45] Thus a broad authorization of private suits was as essential under Title VII of the 1964 Civil Rights Act as it was under the Fair Housing Act.

In framing civil rights legislation, Congress has repeatedly authorized lawsuits by "persons aggrieved," a legislative choice reflecting the unique importance and difficulty of enforcing these laws. In the 1964 Civil Rights Act itself Congress authorized persons "aggrieved" to enforce the public accommodations provision in Title II, 42 U.S.C. § 2000a-3(a). Suits by persons "aggrieved" were also authorized by the 1967 Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1), and the Rehabilitation Act Amendments of 1973. 29 U.S.C. § 794a. Subsequently both the 1991 Americans With Disabilities Act and

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[44] In 1972 Congress amended Title VII to authorize the EEOC to file suit to enforce Title VII. See 42 U.S.C. § 706(f)(1).

[45] The limited authority of the Department of Justice to bring pattern or practice actions under the Fair Housing Act of 1968 was undoubtedly modeled on the similar provision in section 707(a) of Title VII. 42 U.S.C. § 2000e-6. The first thirty-seven words of 42 U.S.C. § 3614(a), authorizing pattern or practice suits by the Attorney General, are taken verbatim from section 707(a) ("Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this....").

the Genetic Information Nondiscrimination Act of 2008 incorporated by reference the remedial provisions (including the "person aggrieved" provision of section 706(f)(1)) of Title VII. 42 U.S.C. §§ 2000ff-6(a)(1), 12117(a).

The EEOC construes Title VII to authorize action by the immediate victim of a third party reprisal, as well as by the employee whose protected activities triggered that reprisal. 2 Compliance Manual §§ 8-I(B) ("[A charging party] can ... challenge retaliation by a respondent based on ... protected activity by someone closely related to or associated with the charging party"), 8-II(B)(3)(c) (1998) ("[r]etaliation against a close relative can be challenged by both the individual who engaged in protected activity and the relative, where both are employees"). The Commission's construction of section 704(a) is to weight.

B. Thompson Satisfies The Standards for Third Party Standing

The Court need not rely on the "person ... aggrieved" provision in section 706(f)(1) to conclude that Thompson may bring this action. Independent of those words in section 706(f)(1), the circumstances of this case fall within the well established standard permitting suit by certain individuals injured by actions violating the rights of third parties.

A party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

Warth v. Seldin, 422 U.S. 490, 499 (1975). This Court "has not treated this rule as absolute, however, recognizing that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). A party seeking third-party standing must make three showings.

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, ... ; the litigant must have a close relation to the third party, ... ; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Singleton v. Wulff, 428 U.S. 106, 114-15 (1976).[46] All three of those requirements are met here.

First, Thompson indisputably suffered an injury in fact, having been dismissed from a position as a metallurgical engineer which he had held for seven years. Thompson was unemployed for a year after

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[46] *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998); *Georgia v. McCollum*, 505 U.S. 42, 55 (1992); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

that dismissal.[47] Thompson and Regalado were married shortly after his termination, and had to live apart for nearly a year when Thompson was forced to move to another city to find comparable employment.[48] Thompson testified that the resulting forced separation from his wife was a "huge hardship for our marriage."[49] The injury to Thompson was not an incidental and indirect consequence of some economic harm done to Regalado. Precisely to the contrary, it was Thompson himself who suffered the immediate injury caused by the retaliatory dismissal; injuring Thompson was the means by which the employer sought to punish Regalado. "[T]he harm [to Thompson] was the intended consequence of the unlawful practice (albeit an intermediate harm in path to the ultimate goal of harming Regalado)...." (Pet. App. 58a (White, J., dissenting); see Pet. App. 51a ("North American Stainless harmed Thompson in order to effectuate this retaliation [against Regalado]") (Moore, J. dissenting). Thompson clearly has a concrete interest in the monetary and injunctive relief sought in this action.

Second, there undeniably was a "close relationship" between Thompson and his then fiancée Regalado; by the time this lawsuit was filed, Thompson and Regalado were married.[50] The relationship of

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[47] Doc. 15-8 (Thompson Dep.), at 17.

[48] *Id.* at 14, 23.

[49] *Id.* at 23.

[50] JA 10, ¶ 1.

husband and wife is certainly closer than the relationships this Court has previously held sufficient to satisfy this element. E.g., *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (relationship of criminal defendant to prospective grand jurors); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991) (relationship of civil litigant to prospective jurors); *Powers v. Ohio*, 428 U.S. 400, 410-11 (1991) (relationship between criminal defendant and prospective jurors); *Craig v. Boren*, 429 U.S. 90 (1976) (relationship of liquor store to purchasers of alcoholic beverages under the age of twenty-one); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (relationship between family planning advocate and women to whom he provided birth control materials). "[T]here can be no doubt that [Thompson] will be a motivated, effective advocate for the ... rights [of Regalado]." *Powers v. Ohio*, 499 U.S. at 414.[51]

This Court has repeatedly recognized standing in situations such as this in which the defendant's action "'*against the litigant* would result indirectly in the violation of third parties' rights.'" *Kowalski*, 543 U.S. at 131 (emphasis in original) (quoting *Warth*, 422 U.S. at 510). The denial of relief to victims of third party reprisals, such as Thompson, "may 'materially impair the ability of' third persons in

[51] See *Singleton*, 428 U.S. at 115 (question is whether "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.")

[Regalado's] position to exercise their rights." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (quoting *Baird*, 405 U.S. at 445); see *Craig*, 429 U.S. at 196; *Baird*, 405 U.S. at 446.

Third, this is clearly a situation in which "there exists some hindrance to the third party's ability to protect its own interests." *Georgia v. McCollum*, 505 U.S. at 55; see *Kowalski*, 543 U.S. at 130 ("whether there is a 'hindrance' to the possessor's ability to protect his own interests") (quoting *Powers*, 499 U.S. at 411). Where such a hindrance exists, "the third party's absence from the court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Singleton*, 428 U.S. at 115.

If Regalado herself were to file suit, Article III would at the least pose a serious obstacle to obtaining any of the relief needed to redress the injuries caused by the unlawful third party reprisal against Thompson. Regalado would have considerable difficulty establishing the requisite Article III standing to seek an award of backpay or damages payable to Thompson. The core standing requirement imposed by Article III is that a plaintiff have a personal stake in the outcome of a particular claim. "To demonstrate standing, a plaintiff must have 'alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" *Salazar v. Buono*, 130 S.Ct. 1803, 1814 (2010)

(quoting *Horne v. Flores*, 557 U.S. ___, ___, 129 S.Ct. 2479, 2592 (2009) (emphasis in original)). A plaintiff's hope that a relative or close friend will receive a monetary award or a job is not such a "personal stake." If Mr. Thompson had been injured in an accident, Ms. Regalado obviously would not have had the requisite "personal stake" in whether a court might award damages payable to her fiancé or husband. A litigant only has standing to seek "remediation of its own injury," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998), not remediation of harms done to others. Standing is determined by the identity of the party to whom a court orders that monetary relief be paid. It does not "matter what the [plaintiff] do[es] with the money afterward." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, ___, 128 S.Ct. 2531, 2543 (2008). For similar reasons, Regalado would have serious difficulty establishing Article III standing to seek an injunction directing that Thompson be reinstated.[52]

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[52] See *De Medina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C.1978) ("while plaintiff's husband might be in a position to seek injunctive relief to prohibit future reprisals against his spouse, he would certainly not be in a position to seek back pay and/or retroactive promotion based on spouse's employment denial"); *Smith v. Frye*, 488 F.3d 263, 272-73 (4th Cir.2007) (son who engaged in protected activity lacks Article III standing to obtain redress for mother injured by third party reprisal); Pet. App. 43a n.5 (Moore, J., dissenting) ("Regalado's ability to sue in this matter does not solve the instant problem because the relief Regalado would be able to seek would appear to differ substantially from the relief that

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Regalado would presumably have Article III standing to obtain an injunction against future third party reprisals, if she could show, for example, that she had relatives who also worked for North American Stainless. But such prospective relief would do nothing to redress the harm caused by the past violation, or to remove the chilling effect of Thompson's dismissal.

The procedural provisions of Title VII present a second obstacle to enforcement of the prohibition against third party reprisals by the individual who engaged in protected activity. A plaintiff cannot bring suit under Title VII unless he or she has first filed a charge with the EEOC. But it would rarely if ever occur to most couples (or family members) that if one of them is the victim of a third party reprisal, the *other* employee is the person required to complain to the EEOC. Limiting redress to those rare instances in which an employee who engaged in protected activity somehow figured out that she, not the direct victim of the reprisal, was supposed to file a Title VII charge would usually be a fatal obstacle "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 440 U.S. 522, 527 (1972).[53]

Thompson can seek. Specifically, it is unclear whether Regalado would be able to sue to have Thompson reinstated.").

[53] See *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) ("a remedial scheme in which laypersons, rather than

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C. Section 704(f)(1) Provides a Cause of Action for "Persons ... Aggrieved"

The court below assumed that section 704(a) forbids third party reprisals, and acknowledged that Thompson is a "person aggrieved" under section 706(f)(1). It insisted, however, that Title VII does not provide Thompson with a "cause of action" to redress his injuries. (Pet. App. 8a, 9a and n.1, 27a). Whether a plaintiff has a cause of action under Title VII, the court of appeals reasoned, turns on whether he or she "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." (Pet. App. 9a (quoting *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979)). Thompson, the court below concluded, lacked "a cause of action under § 704(a)." (Pet. App. 9a, 9a n.1).

The issue in *Davis*, however, was whether the courts should infer the existence of a cause of action to enforce the Constitution in the absence of any applicable statutory cause of action.[54] *Davis* explained that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the

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lawyers, are expected to initiate the process") (quoting *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1988)).

[54] Section 1983 provides such a statutory cause of action where state and local officials have violated federal constitutional rights. *Davis*, however, concerned an alleged constitutional violation by federal officials. See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

constitution" 442 U.S. at 241 (emphasis in original). "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Id*. *Davis* thus concerns only the standard the courts would use in deciding who could sue in the *absence* of a statutory cause of action.

But the question of which "class of litigants may ... invoke the power of the court" to enforce Title VII is squarely answered by the unambiguous terms of section 706(f)(1), which states that "a civil action may be brought ... by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(1) creates an express cause of action[55] to obtain judicial redress, and spells out which individuals are accorded that cause of action: those persons who are "aggrieved" by the asserted violation. Once a plaintiff establishes that he or she is "aggrieved" within the meaning of section 706(f)(1), the inquiry as to whether he or she has a cause of action is at an end. There is thus no need to inquire (as did the court below) whether, in the absence of the express cause of action under section 706(a)(1), the courts would infer a "cause of

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[55] See *Smith v. Casellas*, 119 F.3d 33, 34 (D.C.Cir.1997) ("the private right of action provided for in section 706(f)(1)"); *Etemad v. United States*, 1993 WL 114831 at *1 (9th Cir.) ("[t]he private right of action ... under section 706(f)(1)"); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir.1977) ("section 706(f)(1)'s ... private cause of action").

action under 704(a)." The courts are not at liberty to engraft additional requirement onto section 706(f)(1), or to limit the cause of action provided by that provision to only some, but not all, "person[s] ... aggrieved."

The court of appeals asserted that "[s]ection 704(a) ... limits the class of claimants" who are afforded the right to sue for retaliation. (Pet. App. 27a). That is simply incorrect. Section 704(a) addresses only *what* conduct constitutes forbidden retaliation; section 704(a) does not even purport to address *who* can file suit to enforce that prohibition.[56] The "class of claimants" who are afforded the right to sue – for retaliation or any other violation of Title VII – is set out instead in section 706(f)(1), which requires only that a private plaintiff be "aggrieved." Similarly, the statutory authorization of suits by EEOC and the Department of Justice to enforce section 704(a) is found, not in section 704(a), but in sections 706(f)(1) and 707(a). If section 704(a) limited the parties

[56] See Pet. App. 30a (Rogers, J., concurring) ("[Section 704(a)] dictates what practices amount to unlawful retaliation, not who may sue.... The question of who may sue is simply not addressed by [section 704(a)]. Rather, the procedural provisions of Title VII provide that 'person[s] claiming to be aggrieved' and 'person[s] aggrieved' may sue for Title VII violations. [§§ 706(b), 706(f)(1)]"); 56a (White, J., dissenting) ("[T]he plain language of § 704(a) is addressed to declaring that particular conduct by an employer constitutes an unlawful employment practice. Contrary to the majority's characterization, the statutory language does not tell us '*who* falls under the umbrella of its protection,' ... but rather, *what* conduct is prohibited.") (emphasis in original).

authorized to enforce that provision to the persons who had engaged in protected activity, it would bar suits by the Department of Justice and by the EEOC.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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