

No. 09-291

IN THE
Supreme Court of the United States

ERIC L. THOMPSON,
Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF OF THE NATIONAL WOMEN'S LAW
CENTER, ET AL. AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

Section 704(a) of Title VII of the Civil Rights Act of 1964 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 – 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?

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INTEREST OF THE AMICI CURIAE

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to a workplace that is free from all forms of discrimination, including meaningful protection from retaliation. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court. It is joined in filing this brief by 26 organizations that share a longstanding commitment to civil rights and equality in the workplace for all employees. The individual organizations are described in the attached Appendix.¹

SUMMARY OF ARGUMENT

While discrimination in the workplace has been unlawful since 1964, it is unfortunately still prevalent, and workers who report potentially unlawful behavior, file discrimination charges, or engage in other activity protected by Title VII remain vulnerable to retaliation by employers who seek to punish and deter them from such activity. This is especially true for women in male-dominated

¹ Counsel of record states that the parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity -- other than the *amici curiae*, their members, and their counsel -- made a monetary contribution to the preparation or submission of this brief.

environments, as longstanding social science research makes clear that they experience higher levels of harassment and other forms of discrimination than do women in other fields. An extensive body of research further documents that fear of retaliation and other substantial barriers deter workers from reporting discrimination, and that such fears of retaliation are well-founded, especially for women in male-dominated fields.

If the decision below is not reversed, employers will be emboldened to punish a worker's close associates if the worker complains of discrimination, adding to the risks of reporting unlawful behavior and thus to the pressure to remain silent. Without employees who are willing to report unlawful conduct and file complaints, Title VII's goal of eliminating discrimination in the workplace cannot be achieved.

The case law reinforces research findings that fears of third-party retaliation are not unfounded. It reveals a wide variety of allegations of such employer reprisals against the family members or other close associates of workers who engaged in protected activity. The number and breadth of these allegations suggest that employers not infrequently use such measures as a tremendously effective form of retaliation that may go unremedied unless the Court rejects the Sixth Circuit's rule.

To ensure that Title VII's anti-retaliation provisions provide meaningful protection for workers who challenge possible job discrimination, this Court should reverse the decision below, and recognize that Title VII permits suit by an employee harmed by the

retaliatory actions of an employer in response to the protected activity of close associates.

ARGUMENT

Miriam Regalado worked as a quality control engineer at Respondent's stainless steel manufacturing plant in Kentucky. Plaintiff's Memorandum of Law Opposing Defendant's Motion for Summary Judgment at 6. Petitioner Eric Thompson also worked there. Pet. App. 3a. Ms. Regalado and Mr. Thompson began dating and later became engaged to be married; their relationship was "common knowledge" at the plant. *Id.*

Ms. Regalado was one of only a few women in Respondent's technical department. Plaintiff's Memorandum of Law Opposing Defendant's Motion for Summary Judgment at 8. She felt that her supervisors treated her differently because of her sex, *id.*, and that her subordinates did not respect her because of her supervisor's open disrespect of her. *Id.* at 9.

Ms. Regalado filed a charge of discrimination with the EEOC in September 2002, alleging that the Respondent had discriminated against her on the basis of gender. Pet. App. 3a. The EEOC notified the Respondent of this charge in February 2003. *Id.* Just over three weeks later, the Respondent fired Mr. Thompson, the Petitioner, even though he had received a performance-based pay increase just three months previously. *Id.*

Mr. Thompson alleges that Respondent terminated him in retaliation for Ms. Regalado's protected activity. *Id.* The *en banc* Sixth Circuit affirmed the district court's order granting the Respondent's motion for summary judgment, holding that Title VII's anti-retaliation protections provide a cause of action only for those individuals who have themselves engaged in protected activity. Pet. App. 2a.

As this Court has recognized, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington Northern & Santa Fe Railway Co v. White*, 548 U.S. 53, 67 (2006). The allegations in this case illustrate the continuing problem of retaliation in the workplace as a deterrent to employees taking such action. In *Burlington Northern*, this Court also noted the wide range of ways in which an employer might punish and thus deter reports of discrimination and other forms of protected activity. 548 U.S. at 63-64. Firing or otherwise punishing a worker's close associates in retaliation for her protected activity is a particularly effective means of deterring such activity, and thus adds to the considerable barriers that discrimination victims face when challenging workplace bias. To ensure that Title VII's anti-retaliation provisions provide meaningful protection for workers who challenge possible job discrimination, and that Title VII can be enforced, this Court should recognize that Title VII permits suit by an employee harmed by the retaliatory actions of an employer in response to the protected activity of a family member or other close associate.

I. WORKERS – ESPECIALLY WOMEN IN TRADITIONALLY MALE JOBS – CONTINUE TO SUFFER DISCRIMINATION AND FACE SUBSTANTIAL PRESSURES TO REMAIN SILENT RATHER THAN REPORT SUCH DISCRIMINATION.

Miriam Regalado is an engineer and was one of only a few women in the Respondent's technical department at the time of the events in question. Plaintiff's Memorandum of Law Opposing Defendant's Motion for Summary Judgment at 8. Engineering remains a predominantly male job to this day. U.S. Bureau of Labor Statistics, *Household Data Annual Averages: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity* (2009), available at <http://www.bls.gov/cps/cpsaat11.pdf> (reporting that women comprise only 10% of aerospace engineers, 18.4% of chemical engineers, 7.1% of civil engineers, 8.6% of computer hardware engineers, 9.4% of electrical engineers, 17.4% of industrial engineers, 5.9% of mechanical engineers, and 13.8% of "all other" engineers).

Workers in all fields remain vulnerable to harassment and other forms of discrimination, and this is especially true for women like Miriam Regalado in traditionally male jobs. As longstanding social science evidence makes clear, women in male-dominated environments experience higher levels of harassment and other forms of discrimination generally. For example, a ground-breaking early study focusing specifically on women in engineering found that female engineers frequently experience the

sort of sex discrimination alleged by Ms. Regalado. CYNTHIA COCKBURN, *MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW* 185-86 (1985) (describing how male engineers frequently engaged in sexual stereotyping of their female colleagues by characterizing them as unable to master technology and as instead proficient at “boring and repetitive tasks” and at providing a pleasant atmosphere as “aspects of the décor”); *see also* Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1789, 1835 (1990) (“In nontraditional white-collar occupations, male workers – including elite professionals – also guard their territory against female incursion. Their conduct, too, runs the gamut from overtly sexual behavior, to discriminatory work assignments and performance evaluations, to day-to-day personal interactions that send women the message that they are ‘different’ and ‘out of place.’”).

As exemplified by the discrimination about which Miriam Regalado complained, these dynamics continue in a wide range of traditionally male occupations. *See* James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment*, 12 GENDER & SOC’Y 301, 314 (1998) (finding that “predominantly male environments are more physically hostile and intimidating than other work environments. Women are more apt to be touched, grabbed, or stalked.”); Shultz, *supra* at 1832 (“Overtly sexual behavior is only the tip of a tremendous iceberg that confronts women in nontraditional jobs. They

face a wide-ranging set of behaviors and attitudes by their male supervisors and co-workers that make the culture of nontraditional work hostile and alienating.”); *cf.* NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 35: BEYOND THE HEADLINES 30 (2008) (describing ongoing barriers to women’s progress in academic careers in science, technology, engineering, and mathematics). Indeed, this Court’s recent docket highlights examples of proven discrimination experienced by women in such fields. *See Burlington Northern*, 548 U.S. at 57-59 (jury found that the plaintiff – a forklift operator and the only woman in the defendant railroad’s maintenance department – had proved sex-based discrimination and retaliation); *Ledbetter v. Goodyear Tire & Rubber, Inc.*, 550 U.S. 618, 621-22 (2007) (jury found that female supervisor in tire plant had proved sex-based pay discrimination).²

The available research further demonstrates the substantial barriers that deter workers from reporting such harassment and other forms of discrimination. Fear of retaliation, for example, is the most significant barrier to reporting sexual harassment on the job, as numerous studies report that women fear that complaining about harassment will make things worse for them at work. *See* Louise F. Fitzgerald et al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES

² The Supreme Court then dismissed her claim as time-barred, with a decision that was overturned by Congress in the Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5 (2009).

117, 122-23 (1995) (identifying fear of retaliation as the explanation most commonly provided by harassment victims for their decision not to take formal action challenging their experience of discrimination). “Studies of victims consistently report that fear of personal or organizational retaliation is the major constraint on assertive responding.” *Id.* at 127; *see also* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 818-19 (2006) (describing studies concluding that individuals who complain about discrimination suffer interpersonal costs because they are perceived as troublemakers).

Moreover, the workplace characteristics that increase the likelihood of discrimination also increase the likelihood of retaliation for reporting such discrimination. For these reasons, women in traditionally male jobs may especially fear retaliation, as a woman in such an environment who reports discrimination only heightens her visibility as an outsider and further deviates from the rules of the workplace culture. *See* Gruber, *supra* at 303 (concluding that “numerical dominance of the workplace by men heightens visibility of, and hostility toward, women workers who are perceived as violating male territory”). Indeed, “[b]ecause they are under great pressure to ‘fit in,’ women in nontraditional occupational occupations are less likely to report incidents of sexual harassment than their counterparts in more gender-traditional occupations.” Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACADEMY OF MANAGEMENT REVIEW

687, 703-04 (1997) (canvassing studies). As Deborah Brake observes, “[t]he fear of retaliation is particularly debilitating for persons with low-institutional power across multiple dimensions. For example, women who are especially isolated and tokens in their jobs, women in nontraditional employment, and women who are especially vulnerable in their jobs are more likely to be silenced by the threat or fear of retaliation.” Deborah Brake, *The Function of Retaliation: Silencing Challengers and Preserving Existing Power Structures*, 90 MINN. L. REV. 18, 36 (2005).

An extensive body of evidence confirms that such fears of retaliation are well-founded, especially for women in nontraditional jobs. “Many retaliatory harassment cases, in particular, involve women in traditionally male-dominated employment sectors, such as law enforcement, manufacturing, and engineering.” Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 408 n.19 (canvassing examples); see also Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. ORG. BEHAV. 329, 334 (1998) (finding that those who formally reported harassment experienced more negative outcomes than those who did nothing); Mindy E. Bergman et al., *The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 230 (2002) (summarizing studies finding that those who report harassment experience worsened job outcomes).

For these reasons, “[t]he widespread failure to confront discrimination publicly – by confronting the perpetrator, lodging an internal complaint, or filing an EEOC charge – is driven largely by an accurate perception that the costs of such responses will likely outweigh the benefits.” Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 860, 900 (2005); see also Bergman, et al., *supra* at 230-42 (surveying body of research on whistleblowing to conclude that workers engage in cost-benefit analysis when determining whether to report on-the-job wrongdoing).

Indeed, this Court has already acknowledged “the 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. Metro. Gov’t of Nashville & Davidson County*, 129 S. Ct. 846, 852 (2009) (quoting Brake, *supra* at 20). Employers’ willingness to punish a worker’s close associates for her protected activity only adds to these costs, and thus to the pressure to remain silent in the face of harassment and other forms of discrimination.

II. THE CASE LAW INDICATES THAT IT IS NOT UNUSUAL FOR EMPLOYERS TO RETALIATE AGAINST THE FAMILY MEMBERS AND OTHER CLOSE ASSOCIATES OF WORKERS WHO REPORT DISCRIMINATION, THUS ADDING TO THE PRESSURES ON WORKERS TO REMAIN SILENT.

The case law suggests the potential breadth of ways in which employers may engage in reprisals against the close associates of workers who engage in activity protected by Title VII and other federal employment laws. These take a wide variety of forms, including allegations that employers fired, suspended, refused to hire, or inflicted a hostile work environment upon spouses, partners, parents, children, and siblings in retaliation for workers' protected activity.

Consider, for example, the following: Debra Smith and Mark Thomas both worked for Riceland Foods, Inc. *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 815 (8th Cir. 1998). Their employer was aware that they were romantically involved and that they were contemplating marriage. *Id.* at 815-16. Ms. Smith, an African-American, applied for a plant operator position but was rejected in favor of a white male candidate with less seniority. *Id.* at 816. Believing that this decision was motivated by gender and race discrimination, Ms. Smith filed a charge with the EEOC in October 1995. *Id.* The employer then fired both Ms. Smith and Mr. Thomas in December 1995, claiming that they had falsified timesheets. Ms. Smith and Mr. Thomas contested

that claim and a jury found in favor of both plaintiffs, concluding that the employer had fired them in retaliation for Ms. Smith's protected activity. *Id.* at 816-17. On appeal, the court reversed the verdict for Mr. Thomas on the grounds that Title VII's anti-retaliation protections do not protect those individuals who have not themselves engaged in protected activity. *Id.* at 819.

As another example, consider the allegations of Wal-Mart employee Ramona Kay Bradford that her employer refused to hire her children in retaliation for her own protected activity. *E.E.O.C. v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1241-42 (D.N.M. 2008). Ms. Bradford filed a discrimination charge against her employer in August 2004. In October 2004 her daughter Robin applied for available positions for which she was qualified:

Although she received positive feedback from her first interview, Robin was not called back for a second interview with a manager. Robin was not notified why she was not allowed to proceed in the hiring process. However, at least five individuals who had less schedule availability and lower qualifications than Robin were hired.

Id. at 1242. In January 2005, Ms. Bradford's son John interviewed for a position, only to be told that Wal-Mart was under a hiring freeze. "[B]ut, during the time that John's application was active, at least three other qualified individuals were hired." *Id.* The district court dismissed the retaliation claims of Robin and John on the grounds that Title VII's anti-

retaliation protections do not protect those individuals who have not themselves engaged in protected activity. *Id.* at 1246-47. The court, however, denied the defendant's summary judgment motion with respect to Ramona Bradford's retaliation claim, concluding that "[a] reasonable person in [her] position might be dissuaded from opposing discrimination or filing a charge of discrimination if that person believed a family member would not be employed," *E.E.O.C. v. Wal-Mart Stores*, No. 07-0300, 2009 WL 3028981 at *5 (D.N.M. Sept. 8, 2009), and that she had established genuine issues of material fact as to whether the defendant refused to hire her children because of her own protected activity, *id.* at *9.

Similarly, in *E.E.O.C. v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1208 (E.D. Cal. 1998), a brother was allegedly denied rehire in retaliation for his sister's filing of a discrimination charge, stating that he had been told by a supervisor that he could not be hired back because of his family member's lawsuit. The federal district court denied the defendant's motion to dismiss, ruling that such third-party retaliation claims are actionable under Title VII. *Id.* at 1210-12.

Indeed, paralleling the allegations of Ms. Regalado and Mr. Thompson, women not infrequently report that their employers punished their spouses and partners in retaliation for their complaints of sexual harassment or other forms of discrimination. *See, e.g., Elsensohn v. Parish of St. Tammany*, No. 06-11393, 2007 WL 1799684 (E.D. La. June 19, 2007) (husband allegedly passed over for promotion and

otherwise subject to adverse actions in retaliation for his wife's successful settlement of an FMLA claim with their employer); *Whittaker v. N. Ill. Univ.*, No. 02-50503, 2003 WL 21403520 (N.D. Ill. June 16, 2003) (husband allegedly fired in retaliation for his ex-wife's complaint of sexual harassment); *Murphy v. Cadillac Rubber and Plastics, Inc.*, 946 F. Supp. 1108 (W.D.N.Y. 1996) (husband allegedly suspended in retaliation for his wife's complaints of sex discrimination); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996) (husband allegedly placed on administrative leave and then transferred to another location in retaliation for his wife's age discrimination complaint); *McKenzie v. Atl. Richfield Co.*, 906 F. Supp. 572 (D. Colo. 1995) (husband allegedly suspended in retaliation for his wife's complaint of sexual harassment).

Men too may find their spouses or partners punished on the job in retaliation for their own reports of race discrimination or other protected activity. *See, e.g., Shoecraft v. Univ. of Houston-Victoria*, No. 03-85, 2006 WL 870432 (S.D. Tex. Mar. 28, 2006) (wife's job allegedly eliminated in retaliation for her husband's protected activity); *E.E.O.C. v. Bojangles Rest., Inc.*, 284 F. Supp. 2d 320, 324 (M.D.N.C. 2003) (plaintiff alleged that employer did not permit her to return to her job after maternity leave in retaliation for her fiancé's plans to file an EEOC charge).

Other family members may also be at risk from retaliation for their loved ones' protected activity. *See, e.g., E.E.O.C. v. V & J Foods*, 507 F.3d 575, 577 (7th Cir. 2007) (daughter who had just turned 16 who

was sexually harassed by employer was fired after her mother complained; the employer objected that the daughter “had involved her mother in the matter rather than handling it ‘like a lady’”); *Dias v. Goodman*, 214 S.W.3d 672 (Tex. App. 2007) (son allegedly fired in retaliation for his mother’s filing of an age discrimination complaint against their employer); *Rainer v. Refco, Inc.*, 464 F. Supp. 2d 742 (S.D. Ohio 2006) (mother and son both fired on same day in alleged retaliation for mother’s protected activity); *Fogelman v. Mercy Hospital*, 283 F.3d 561, 565-66 (3d Cir. 2002) (son allegedly fired in retaliation for his father’s complaints of age and disability discrimination).

Although most of these decisions do not reach the merits, the number of reported cases indicates that third-party reprisals of the sort alleged by Mr. Thompson are not an isolated phenomenon, and instead reflect a pattern of retaliatory abuses that may go unremedied unless the Court rejects the Sixth Circuit's rule. This in turn will embolden employers to retaliate against third parties and further discourage the reporting of discrimination.

III. TO ENSURE EFFECTIVE PROTECTION FOR WORKERS WHO CHALLENGE DISCRIMINATION, THIS COURT SHOULD RECOGNIZE THAT TITLE VII PERMITS SUIT BY AN EMPLOYEE HARMED BY THE RETALIATORY ACTIONS OF AN EMPLOYER.

As this Court has observed, the goals of federal antidiscrimination laws “would be difficult, if not

impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (quoting brief of United States). If Title VII is to be enforced and discrimination is to be eliminated from the workplace, employees must not be intimidated from filing complaints. “Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.” *Burlington Northern*, 548 U.S. at 67. Indeed, this Court has noted the wide range of ways in which an employer might choose to punish and thus deter reports of discrimination and other forms of protected activity. *See id.* at 68 (holding that Title VII’s anti-retaliation protections prohibit all actions that a “reasonable employee would have found . . . materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination”); *id.* at 63-64 (citing as an example of unlawful retaliation the employer FBI’s “refusal, contrary to policy, to investigate death threats a federal prisoner made against [the plaintiff employee] *and his wife*”) (internal quotation marks and citations omitted; emphasis added).

The Sixth Circuit’s rule, however, does not permit a Title VII challenge by a friend or family member punished on the job in retaliation for the protected activity of his or her close associate. It thus does not provide a meaningful deterrent to employers who seek to retaliate in that tremendously effective way, and instead chills protected activity because

workers considering such activity cannot be confident that their friends and family will be protected from reprisal.

Rather than permitting a third party like Mr. Thompson to bring suit himself and seek relief for the harm he suffered, the Sixth Circuit's rule instead offers an unsatisfactory alternative that fails to provide meaningful protection from retaliation. It suggests that the employee who engaged in protected activity – here, Ms. Regalado – should bring a retaliation suit herself, even though a court's ability to award damages or backpay to the third party based on a complaint filed by the employee who engaged in protected activity remains decidedly unclear. Indeed, some courts have denied claims seeking such relief on behalf of third parties on standing grounds. See, e.g., *Smith v. Frye*, 488 F.3d 263, 272-73 (4th Cir. 2007) (holding that son who engaged in protected activity lacked standing to seek relief for mother harmed by employer's reprisal).

As a practical matter, moreover, many employees may fail to realize that if one of them is fired or is otherwise the victim of a third-party reprisal, the *other* employee would have to file a charge with the EEOC within Title VII's very short limitations period³ to preserve the claim.

³ Title VII generally requires that “[a] charge under this section shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred.” 42 U.S.C. § 2000e-5(e)(1). Under certain circumstances, the limitations period is an even shorter 180 days. See *id.*

Because the Sixth Circuit's rule bars retaliation claims by the persons who are most directly injured, it thus bars claims by those who have the greatest incentive to pursue such claims (and to do so in a timely manner) and who are best positioned to claim and prove remedial relief. *See Singleton v. Wulff*, 428 U.S. 106, 114 (1976) ("The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them."). Because such victims have suffered tangible employment injury, they are "persons aggrieved" by a violation of Title VII's section 704(a) within the meaning of section 706(f)(1). Therefore, they should not remain dependent on the decision of another party in order to pursue and receive relief. Indeed, the worker who actually engaged in the protected activity may sometimes be hesitant to file suit on a third party's behalf, especially if he or she has been deterred from further action by the employer's reprisal or if the relationship with the reprisal victim has changed.

Moreover, by holding that Title VII permits suit only by individuals who have themselves engaged in protected activity, the Sixth Circuit's rule could create a perverse incentive for all the friends, family members, and other close associates of a worker who has complained to engage in protected activity themselves – such as by filing a charge or reporting discrimination – to ensure their own safety from reprisal. This hardly seems an efficient or wise approach to antidiscrimination enforcement, as it would mean that the EEOC – and employers – would be flooded by otherwise unnecessary charges.

By limiting any third-party reprisal claim to the worker who engaged in protected activity – and excluding claims by the actual third-party victim – the Sixth Circuit’s rule significantly, unnecessarily, and unwisely undercuts Title VII’s anti-retaliation protections. To ensure that Title VII provides meaningful protection for workers who challenge possible job discrimination, this Court should instead recognize the broad scope of Title VII and allow an employee who suffers retaliation because of the protected activity of another to file suit and seek meaningful relief.

Such a rule would not create chaos in the workplace or the courts, despite Respondent’s protestations to the contrary. *See* Respondent’s Brief in Opposition at 31. To prevail on such a third-party reprisal claim, a plaintiff must still meet the challenge of proving causation – i.e., that he or she suffered an adverse employment action *because of* the protected activity of a close associate that would “dissuade[] 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)). Upon such a showing, Title VII’s strong anti-retaliation provision and its underlying purposes as interpreted by this Court make clear that an employer should not be able to evade that anti-retaliation provision and should be liable to the victim of its unlawful conduct.

CONCLUSION

For these reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

For 125 years, the *American Association of University Women* (AAUW), an organization of over 100,000 members, has been a catalyst for the advancement of women and their transformations of American society. AAUW members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,000 branches across the country, AAUW members work to promote education and equity for all women and girls through education, research, and advocacy. AAUW mobilizes advocates nationwide on priority issues, and chief among them is women's economic security and equal opportunity in the workplace. AAUW supports workplace fairness programs and civil rights laws that promote and enforce equal employment opportunities for women, especially those that diminish sexual harassment, promote pay equity, break the glass ceiling, and provide family friendly workplaces.

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization of more than 500,000 dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*, in cases including *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009), and *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53 (2006). Through its Women's Rights Project, founded in 1972, the ACLU has long sought to ensure that the law provides robust legal protection from employment discrimination on the basis of sex, including meaningful protection against retaliation for bringing such discrimination to light. The

proper resolution of this case, which concerns retaliation against the fiancé of an employee who filed a sex discrimination charge with the EEOC, therefore is a matter of substantial interest to the ACLU and its members.

The *American Medical Women's Association* (AMWA) empowers women to lead in improving health for all within a model that reflects the unique perspective of women. Our organization functions at the local, national, and international level to advance women in medicine and improve women's health. We achieve this by providing and developing leadership, advocacy, education, expertise, mentoring, and strategic alliances.

AMWA is an organization of women physicians, medical students and other persons dedicated to serving as the unique voice for women's health and the advancement of women in medicine. The organization was founded by Dr. Bertha Van Hoosen in 1915 in Chicago, at a time when women physicians were an under-represented minority. As women in medicine increase in numbers, new problems and issues arise that were not anticipated. AMWA has been addressing these issues for 95 years.

This organization has stood for non-discrimination against women since its inception and for women being able to work in an environment free of harassment. AMWA also believes that friends or relatives should not suffer discrimination or harassment as punishment for the lawful action of a relative or friend to address such. AMWA has, thus, signed on to the brief, *Thompson v. North American Stainless*, in which the NWLC is filing with the Supreme Court to examine the question of whether an employee who was dismissed in retaliation for his fiancée's filing a complaint with the EEOC can sue to challenge his dismissal.

The *Asian American Justice Center* ("AAJC") is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian

Americans. AAJC is a member of the Asian American Center for Advancing Justice. Collectively, AAJC and its affiliates - the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center - have over 50 years of experience in litigation, public policy, advocacy and community education on a range of civil rights issues, including discrimination. AAJC's longstanding interest in employment discrimination issues that impact Asian American and other underserved communities has resulted in the organization's participation in numerous amicus curiae briefs before the courts.

The *Association for Women in Science* (AWIS) is the premier advocate organization for women in science, technology, engineering and mathematics (STEM). Founded in 1971, AWIS has consistently been in the forefront of building pathways to advancement, better work place environments, and positive educational experiences for women in STEM.

A major problem that continues to pervade the STEM workforce and hinder equity in career success is gender discrimination. AWIS supports individuals' ability to speak out against discrimination they face in the workplace, and Title VII is intended to protect this right. However, if a third party may be retaliated against as a result of speaking out against discrimination, protections are not adequate. On behalf of the 7.4 million women in STEM, AWIS supports the petitioner Eric Thompson and respectfully asks the Supreme Court to reject the narrow interpretation of Title VII and include protection of a third party against employment retaliation.

AWIS is headquartered in Washington, D.C. with chapters throughout the United States. As a multi-disciplinary organization, AWIS is able to leverage and mobilize action on common issues facing women in STEM along the entire educational and career pipeline.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the California Women's Law Center works in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in employment. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Thompson v. North American Stainless* case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in this case.

Equal Rights Advocates (ERA) is a national nonprofit law firm located in San Francisco, California dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation, advocacy, and a national toll-free legal hotline. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has litigated some of the nation's most important gender-based discrimination cases which have resulted in new law and provided significant benefits to large groups of women, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has represented clients in numerous individual and class sex discrimination cases under Title VII, including *AT&T Corp. v. Hulteen*, 129 S.Ct. 1962 (2009) and *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 3d (9th Cir. 2010), petition for cert. filed, (August 25, 2010) (No.10-277). ERA has also appeared as amicus curiae in a number of Supreme Court cases involving the interpretation of Title VII, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 U.S. Dist. LEXIS 19928; 66 Fair Empl. Prac. Cas. (BNA) 1886 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, 522 U.S. 1105 (1998); *Burlington*

Indus. v. Ellerth, 524 U.S. 742 (1998), *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); and *Ledbetter v. Goodyear*, 127 S. Ct. 2162 (2007). During the past three decades, ERA has worked closely with women in traditionally male jobs to expand and protect employment opportunities. ERA's advocacy work for these clients includes efforts to ensure that their worksites are free of discrimination and retaliation.

The *Feminist Majority Foundation*, a 501(c)(3) non-profit organization founded in 1987, is dedicated to the pursuit of women's equality, utilizing research and action to empower women economically, socially, and politically. FMF advocates for full enforcement of Title VII and other laws prohibiting discrimination and advancing workplace equality for women, and recognizes that full protection from retaliation against family members and associates is a necessary element to the adequate enforcement of Title VII.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for forty years. Assuring women's equality in the workplace is central to Legal Momentum's mission, including ensuring equal employment opportunity for women in historically male-dominated jobs, such as firefighting, law enforcement, and the construction trades. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote women's access to these jobs by combating sex discrimination and retaliation. Legal Momentum is fully aware that discrimination against women remains pervasive, and is deeply concerned with ensuring that women and their allies may continue to challenge unlawful employment practices under Title VII without fear of retaliation.

Legal Voice is a regional non-profit public interest organization that works to advance the rights of all women

in Washington, Alaska, Montana, Idaho and Oregon, through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has been dedicated to protecting and ensuring women's legal rights, including the right to equality in the workplace. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for robust interpretation and enforcement of anti-discrimination laws protecting women.

Founded in 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. The economic empowerment of all women is one of the central issues that forms the basis of NAPAWF's advocacy. NAPAWF supports the petitioner in this case because the persistence of discrimination and retaliation prevents women from achieving equality and economic security in the workplace.

Established in 1955, the *National Association of Social Workers* (NASW) is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. The NASW, Kentucky Chapter has 1,600 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession.

NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. The *NASW Code of Ethics* directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of . . . sex." NASW policies support "ending sexual harassment and occupational segregation, which clusters women in low-paying, "pink-collar" occupations." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 367, 370 (2009).

Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by sex and other forms of discrimination, sexual and other forms of harassment, and retaliation, as well as the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to protect women's rights in the workplace and end workplace discrimination. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their ability to achieve redress for workplace discrimination, harassment and retaliation.

The *National Council of Women's Organizations* is a non-profit, non-partisan coalition of more than 230 progressive women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal gender participation in the economic, social, and political life of their country and their world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to health and insurance challenges.

The *National Education Association* (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to opposing employment discrimination, including retaliation for complaining about sex discrimination and sexual harassment, and firmly supports the vigorous enforcement of Title VII.

The *National Organization for Women Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist grassroots organization in the United States, with hundreds of thousands of supporters and contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included closing the wage gap, eliminating sexual harassment and ending all other forms of sex discrimination in the workplace.

The *National Partnership for Women & Families* is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The *Older Women's League* (OWL) is a non-profit, non-partisan organization that accomplishes its work through research, education, and advocacy activities conducted through its chapter network. Now in its 30th year, OWL provides a strong and effective voice for the more than 70 million women age 40 and over in America. OWL has long advocated for equality and economic security, therefore we believe that all persons should be free from all forms of discrimination, including retaliation, in the workplace.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in efforts to combat discrimination in the workplace and promote equal rights, including efforts to protect the rights of women, issues which are directly involved in this case.

Pick Up the Pace is a San Francisco-based nonprofit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass

ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education and legal advocacy, most recently as amicus curiae before the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, *BCI Coca-Cola Bottling Co. v. EEOC*, *Ledbetter v. Goodyear Tire & Rubber Company, Inc.* and *AT&T v. Hulteen*.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's access to high-wage employment; this includes employment in nontraditional occupations. Discriminatory employment policies and practices have a negative impact on women's immediate and long-term employment and economic security. Nondiscrimination in all industries and occupations is vital if women are ever to obtain true economic well-being. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices that limit women's economic opportunities and serve as a barrier to economic equity.

Sociologists for Women in Society is an international organization that focuses on protecting the rights of women and other disadvantaged groups against discrimination and advancing their status.

The Union for Reform Judaism (“Union”) is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. The Union has a long-standing commitment to equal rights and social justice. In a 1992 resolution on sexual harassment, the Union noted a “deficiency of adequate legal remedies to compensate for emotional trauma and to deter future harassment” and resolved that “victims should have available to them the full panoply of remedies afforded for other forms of discrimination and injury.”

Women Employed’s mission is to improve the economic status of women and remove barriers to economic equity. *Women Employed* promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. *Women Employed* strongly supports Title VII’s provision against an employer retaliating against a third party closely associated with the employee who engaged in protected activity.

The *Women’s Law Center of Maryland, Inc.* is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services, including an Employment Law Hotline, and advocacy, the *Women’s Law Center* seeks to protect women’s legal rights and ensure gender equality in the workplace.

The *Women’s Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and

Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.