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

REPLY BRIEF FOR PETITIONER

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

DAVID O'BRIEN SUETHOLZ
3666 S. Property Rd.
Eminence, KY 40019
(859) 466-4317

LISA S. BLATT
ANTHONY FRANZE
ARNOLD & PORTER LLP
555 Twelfth St., N.W.
Washington, D.C. 20004
(202) 942-5842

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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

The first question presented is whether section 704(a) forbids an employer from retaliating for protected 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." (Pet. i). Such reprisals are unlawful in that they "discriminate against an[ ] ... employee[ ] ... because he has opposed" practices forbidden by Title VII. 42 U.S.C. § 2000e-(3)(a). It is unclear whether respondent contends that such reprisals are legally permissible.

Some passages in respondent's brief suggest that third-party reprisals may be forbidden. (E.g. R.Br. 7 ("Thompson's concern that employers will be free to retaliate against family members ... is unfounded"), 8 ("The summary judgment of the district court left Regalado's right to pursue a retaliation claim intact")). Elsewhere respondent indicates doubt that such reprisals are unlawful. (R.Br. 33 ("even if [firing Thompson to retaliate against Regalado] violates Title VII's anti-retaliation provision")). Respondent advised the court of appeals that

> if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to § 704(a) and, under *Burlington Northern* [*& Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)], defendant's termination of Thompson potentially could

> be deemed an "adverse employment action" against her.

(Pet. App. 29a n.10). Respondent presumably meant by that assurance that such an action by Regalado would actually state a claim on which relief could be granted, and was not merely acknowledging that Regalado would be free to file a complaint alleging such a (possibly legally insufficient) claim.

Respondent argues that this Court should not decide whether in the instant case the employer in fact acted with a retaliatory motive when it dismissed Thompson. We agree that question is not before the Court. This factual issue was not raised by respondent's motion for summary judgment, which (although framed as a motion for summary judgment) challenged the legal sufficiency of Thompson's claim. See Fed. Rule Civ. Pro. 56(f) (summary judgment on grounds not raised by a party may be granted only "[a]fter giving notice and a reasonable time to respond").

Respondent also argues that this Court should not decide whether in this case the dismissal of Thompson was "materially adverse," the standard established by *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). (R.Br. 47-48). Here too we agree. A retaliatory act is materially adverse 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)). Fear that an employer would dismiss a fiancé or family member would in most circumstances be likely to dissuade a reasonable employee from complaining about unlawful discrimination. But *Burlington Northern* made clear that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 548 U.S. at 69. Thus in *Burlington Northern* the Court insisted that it was for the jury to determine whether the material adversity standard had been met in that case, and the Court reviewed the relevant trial testimony before concluding that the evidence was sufficient to support such a jury determination. E.g. 548 U.S. at 70 ("Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.").

It would ordinarily be true that fear of dismissal of a fiancé or family member would deter an employee from engaging in protected activity. But respondent is entitled to an opportunity to offer evidence that in the circumstances of this case a reasonable employee in Regalado's position would not have been dissuaded from opposing discrimination even if she had known that it would result in Thompson's dismissal. At trial the controlling standard will be whether a reasonable person in the position of Regalado (not in Thompson's position) would have regarded the dismissal of Thompson as materially adverse.

Respondent devotes a significant portion of its merits brief to a different liability theory. Even if

section 704(a) forbids third-party reprisals, respondent argues, section 704(a) does not *also* give to other employees a "right to associate" with workers who have opposed discrimination. (R.Br. 15, 16, 19).[1] In other words, regardless of whether the alleged third-party reprisal in this case violated a right of Regalado, respondent contends that the reprisal did also not violate some separate right of Thompson himself to associate with Regalado. We do not contend that the third-party reprisal alleged in this case violated any such right of association to which Thompson was entitled; we urge only that the reprisal violated the rights of Regalado.

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[1] If section 704(a) embodied a right of association, respondent objects, the courts would have to develop some legal definition of which types of associations are protected, and an employer would have to investigate the private lives of its workers to ascertain the personal relationships among them. (R.Br. 8, 23, 26-27).

The theory of liability that we advance in this case, however, poses no such difficulties. The identity of individuals who might have a claim is a function of the employer's own intent; the only individuals with potential claims are those whom the employer itself intended to punish as a means of retaliating against a worker who engaged in protected activity. The identity of the individuals whom the employer intended to punish would of course be known to a retaliatory employer. An employer would have no reason to investigate the personal relationships of its workers, except as part of an unlawful scheme to identify a potential target for a third-party reprisal. An employer's ignorance of a private relationship between two workers would necessarily bar a third-party reprisal claim.

The prohibition against third-party reprisals does not mean, as respondent suggests, that section 704(a) somehow forbids an employer to discipline any worker who happens to be related to or closely associated with an employee who has engaged in protected activity. (R.Br. 8, 14, 25, 27). Even the very employee who engaged in such protected activity remains subject to the normal disciplinary standards and processes; so long as an employer is acting for a lawful reason, it may for example dismiss a worker who has filed a charge with the EEOC or has brought suit under Title VII. Family members and others connected to an individual who engaged in protected activity also remain subject to lawfully motivated adverse employment actions.

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

The second question presented is whether Thompson can himself maintain an action if respondent dismissed him in order to retaliate against Regalado for her opposition to gender-based discrimination. Thompson has standing to do so for two independent reasons. First, Thompson's claim falls within the established exception to the prudential standing rule barring claims based on a violation of the rights of a third party. Second, even if the general rule regarding claims based on the rights of third parties would otherwise apply here, section 706(f)(1) authorizes such suits by an employee injured by a violation of the right of another worker.

A. Thompson's Claim Falls Within The Exception To The Prudential Rule Barring Claims Based On The Rights of Third Parties

Although a litigant must generally base a claim on a violation of his or her own legal rights, that prudential standing rule does not apply in all cases. As we explained in our opening brief, the nature of Thompson's claim, and his relationship with Regalado, clearly place Thompson in the category of plaintiffs to whom this Court's decisions accord third-party standing. (Pet. Br. 39-45). Respondent refers to the general prudential rule (R.Br. 9, 36-37), but advances no argument in response to our contentions that this case satisfies the standards established by this Court to warrant third-party standing.

If, as we urge, Thompson's claim satisfies the requirements for third-party standing, he is entitled to maintain this action unless the terms of Title VII itself somehow create an additional obstacle and affirmatively exclude claims by individuals who have such third-party standing. It is unclear whether respondent contends that section 706 contains such an affirmative prohibition. Section 706 does not.

B. The Victim of A Third-Party Reprisal Is A "Person Aggrieved" Within The Meaning of Section 706

Section 706(f)(1) of Title VII provides that a civil action may be brought by a "person ... aggrieved." Thompson is a "person aggrieved" within the meaning of the statute.

(1) Respondent urges this Court not to decide whether Thompson is a "person aggrieved" under section 706. (R.Br. 26-30). But that issue is certainly encompassed within the scope of the question presented; the circuit conflict regarding the meaning of "person aggrieved" was a linchpin of the certiorari petition. (Pet. 34-37).[2]

Respondent insists that the en banc majority never decided, or even mentioned, the scope of the statutory authorization of suit by a "person ... aggrieved." (R.Br. 30 ("the issue ... was clearly not addressed by the majority"); see *id.* at 28 ("[t]he decision by the *en banc* majority does not mention the enforcement provision"). That is not correct. The majority squarely addressed this very issue, holding that Thompson was indeed a "person aggrieved" with standing to sue.

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[2] The dispute about the meaning of the phrase "person aggrieved" was also addressed in the Reply Brief for Petitioner, at 6, the Brief for the United States as Amicus Curiae, at 16-17, and the Supplemental Brief for Petitioner, at 9-12.

> Distinct from the question whether Thompson has asserted a cause of action under § 704(a), his *standing* to assert his Title VII retaliation claim is not at issue in this appeal.... The remedial section of Title VII, 42 U.S.C. § 2000e-5(f)(1), empowers a "person claiming to be aggrieved" to bring a civil action to enforce ... the statute.... We have held that the "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.... Defendant does not challenge Thompson's standing as an "aggrieved" person....

(Pet. App. 9a-10a n.1) (emphasis in original). Three of the four other opinions in the en banc court also addressed this issue. (Pet. App. 32a (Rogers, J., concurring), 50a-53a (Moore, J., dissenting), 58a-63a (White, J. dissenting)). Petitioner is assuredly permitted to advance in this Court the same interpretation of "person aggrieved" that was accepted by the majority opinion and two separate opinions in the Sixth Circuit.

Respondent asserts that in its Brief in Opposition it "specifically objected to the inclusion of this issue by Thompson.... *See* Brief in Opposition 26-27." (R.Br. 29). The most specific statement about this issue in the Brief in Opposition, however, was that "[t]he Sixth Circuit did acknowledge ... that NAS did not challenge Petitioner's standing as an 'aggrieved' person under § 2000e-5(f)(1)." (Br. Opp. 27 n.10).

In its Brief in Opposition respondent argued only that it was irrelevant that Thompson was a "person aggrieved," which it had not disputed below, because Thompson nonetheless lacked a cause of action.

> Petitioner ... argues that because he is "aggrieved" pursuant to § 2000e-5(f)(1), he therefore has a cause of action. However, this Court recognized the difference between being "aggrieved," and thus having standing, and having a viable cause of action.... Whether one is "aggrieved" under § 2000e-5(f)(1) is a question of standing, not whether he has a cause of action.... Thus, the fact that Petitioner may be "aggrieved" under § 2000e-5(f)(1) is not dispositive of whether he has a cause of action under § 2000e-3(a).

(Br. Opp. 26-27). Respondent cannot complain now about its earlier decision to advance a more limited argument. See Supreme Court Rule 15.2.

(2) Thompson is certainly "aggrieved" in the ordinary meaning of that term; he alleges that he was fired from his job and that he "has suffered lost wages, fringe benefits, and other" damages.[3] Such a claim falls easily into the ordinary definition of "aggrieved." Random House Webster's College Dictionary, 27 (1991) ("wronged, offended, or injured"); Funk & Wagnall's Standard Dictionary of the English Language, 28 (1966) ("[s]ubjected to ill-treatment;

[3] Complaint, ¶ 15.

feeling an injury or injustice"); Chambers English Dictionary, 25 (1988) ("injured; having a grievance"); American Heritage Dictionary of the English Language, 25 (1969) ("[f]eeling distress or affliction ... [t]reated wrongly; offended"). In ordinary English it would make no apparent sense to say that a worker was not "aggrieved" by being fired from a job he wanted to keep. It would seem equally peculiar to state that only the worker's fiancé, but not the dismissed worker himself, was aggrieved.

Respondent objects that section 706 refers to a person who was "aggrieved," rather than to a person who was "injured" by a violation. (R.Br. 31, 35-36). "Injured," respondent insists, is not the "ordinary meaning" of "aggrieved." (R.Br. 35). But as the dictionaries quoted above make clear, "injured" clearly is one of the common meanings of "aggrieved." Federal courts often treat "aggrieved" and "injured" as synonyms.[4] Private enforcement of Title VII would have been significantly impaired if Congress had

[4] E.g., *ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 669 (3d Cir. 1998) ("This is especially so where an injured party is entitled to recover for breach of contract, but recovery based on traditional notions of expectation damages is clouded because of the uncertainty in measuring the loss in value to the aggrieved contracting party"); see *Ex parte Wall*, 107 U.S. 265, 277-78 (1980) ("This expression, about leaving the party aggrieved to his remedy by a criminal prosecution, is frequently found in English cases, and has reference to the practice in that country of regarding the party injured by the perpetration of a crime as the proper person to prosecute the offender.").

limited lawsuits to claims by "persons injured" rather than by "persons aggrieved." Such a limitation would have restricted civil actions to plaintiffs who had already been harmed, and would have precluded suits, seeking prospective injunctive relief, brought by plaintiffs who asserted that in the future they would be harmed (e.g., because an employer intended in the next year to lay off all its non-white workers) or were likely to be harmed (e.g., because an employer intended in the next year to promote women only if they were far better qualified than any male applicant).

Construing "person aggrieved" to include the direct victims of third-party reprisals is "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). In the specific context of Title VII, "person aggrieved" cannot have a meaning that would as a practical matter render the statute unenforceable in certain circumstances. In the case of third-party reprisals, that would often be precisely the consequence of interpreting "aggrieved" to authorize suit only by the person who had engaged in protected activity, but not by the individual who was the direct victim of the reprisal. As we explained in our opening brief, the employee who engaged in the protected activity ordinarily would not have Article III standing to seek monetary or injunctive relief for the reprisal victim. (Pet. Br. 43-44; Supplemental Brief for Petitioner, 3-7). Respondent does not address that constitutional obstacle, and advances no

argument as to how, for example, Regalado would have had Article III standing to seek an award to Thompson of backpay or compensatory damages.

Some lower courts have suggested that it does not matter if the prohibition against third-party reprisals is unenforceable, speculating that family members or other possible third-party reprisal victims will invariably have supported or assisted in some way the employee who engaged in protected activity, and thus will have retaliation claims of their own. No empirical evidence is offered to justify this contention. Many forms of opposition are unlikely to have involved any such outside support. See, e.g., *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S.Ct. 846 (2009) (employee opposed sexual harassment by answering question from employer). The mere fact that such support or assistance was provided to another worker will not give rise to a colorable retaliation claim unless there is proof that the employer somehow knew of that aid; but assistance to a family member, such as urging that she file an EEOC charge, is unlikely to come to the attention of an employer. Even where employer knowledge could be shown, an employer could defeat a retaliation claim by demonstrating that it acted against the worker involved, not because he himself had aided someone else (and thus engaged in protected activity of his own), but as a method of punishing that other worker; third-party reprisals, in effect, would be an affirmative defense to this sort of retaliation claim.

"[I]t would be destructive of th[e] purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). It would be equally destructive of that purpose if an employer could with impunity retaliate against an entire class of employees – those who could be intimated by retaliatory actions against their relatives or others with whom they are closely associated.

Respondent argues that permitting suits by the direct victims of third-party reprisals would impose serious burdens on employers and pose substantial practical difficulties for the courts. (R.Br. 6, 8, 22-25). But as respondent itself notes, a number of other federal statutes have already been construed to authorize just such claims. (R.Br. 53-54; Petition, 26-32). Respondent does not contend that any of the problems that it predicts would arise under Title VII have actually occurred under those other statutes, and offers no reason to believe that such difficulties would be more likely under Title VII than under other laws.

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), cited with approval the Third Circuit decision in *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), which held that the phrase "person aggrieved" in section 706 evidenced "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." 409 U.S. at 367. The courts of appeals have long understood

Trafficante to mean that section 706 is to be construed in that manner.[5]

Respondent asserts that *Trafficante* is distinguishable on the ground that the plaintiffs in that case were "persons aggrieved" only because those plaintiffs "were asserting statutory violations of **their own** rights, not a third party's rights." (R.Br. 38) (emphasis in original). The plaintiffs in *Trafficante* were residents of an apartment complex that allegedly had excluded nonwhites on the basis of race, in violation of Title VIII of the Fair Housing Act. According to respondent those plaintiffs alleged that "**they** had a right under Title VIII to live in integrated housing and that **their right** to live in integrated housing had been violated." (R.Br. 40) (emphasis in original). That is not correct. The plaintiffs only "claimed ... they had lost the social *benefits* of living in an integrated community" because of discrimination against others; the plaintiffs did not assert that Title VIII guaranteed them a legal right to reside in integrated housing. 409 U.S. at 208 (emphasis added).

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[5] *Palmer v. Occidental Chemical Corp.*, 356 F.3d 235, 237 (2d Cir. 2004); *Anjelino v. The New York Times Co.*, 200 F.3d 73, 90, 91 and n.25 (3d Cir. 2000); *Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 964 (4th Cir. 1981); *EEOC v. Mississippi College*, 626 F.2d 477, 481-83 (5th Cir. 1980); *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 289, 295 (7th Cir. 2000); *Clayton v. White Hall School Dist.*, 875 F.2d 676, 679 (8th Cir. 1989); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 175-76 (D.C.Cir. 1976).

Respondent asserts that "[t]he court [in *Trafficante*] determined that Title VIII's definition of 'person aggrieved' ... evidence[d] 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" (R.Br. 39-40). The material quoted in *Trafficante* regarding "congressional intention," however, is actually from the holding in *Hackett v. McGuire Bros, Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), regarding the meaning of the words "person claiming to be aggrieved" in section 706 of Title VII. 409 U.S. at 367. *Trafficante* relied in part on the fact that in enforcing Title VIII "the main generating force must be private suits," because government enforcement of Title VIII was limited to a handful of pattern or practice suits that might be brought by the Department of Justice. 409 U.S. at 211. Respondent asserts that there is a "difference in the enforcement mechanisms" under Title VIII and Title VII. (R.Br. 42). To the contrary, as we explained in our opening brief, when Title VII was enacted in 1964 (and the phrase "person aggrieved" was adopted) the enforcement mechanism under Title VII was the same as under Title VIII. (Pet. Br. 37-38).

Respondent also attempts to distinguish *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). (R.Br. 43; cf. Pet. Br. 10-11, U.S. Br. 21-22). Respondent contends that the plaintiff in *McCready* "was not, like Thompson in this case, asserting she had been injured by the violation of some third-party's rights." (R.Br. 43). But the plaintiff in that case was making the same type of assertion; McCready claimed that

she was harmed by a conspiracy involving a state organization of psychiatrists that sought to exclude psychologists from the market. That is why the defendants argued that "only psychologists might maintain suit." 457 U.S. at 479. Even though policy holders were not the target of that conspiracy, this Court held that McCready could sue because economic injury to her was "the very means by which it is alleged that [the conspirators] sought to achieve [their] illegal ends." *Id.* at 479. In the instant case injury to Thompson was similarly the "very means" by which respondent sought to achieve the illegal end of retaliating against Regalado.

Respondent argues that the phrase "person aggrieved" in Title VII should be given the same interpretation as the phrase "person ... adversely affected or aggrieved" in section 10(a) of the Administrative Procedure Act, which encompasses individuals or entities within the zone of interests protected by the underlying statute. 5 U.S.C. § 702 (R.Br. 32-34). Section 10(a) delineates those who can seek review of federal "agency action." But in enacting section 706(f) as part of the 1964 Civil Rights Act, Congress assuredly did not intend to incorporate by reference the APA "zone of interests" standard; that standard was not articulated by this Court until 1970, six years after the adoption of Title VII. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156 (1970). There is little reason to think that Congress in 1964 intended to tie the meaning of "person aggrieved" in Title VII to unforeseeable future

developments in the interpretation of the Administrative Procedure Act. The term "aggrieved" is used in hundreds of provisions in the United States Code, modifying nouns such as "person" or "party." The interpretation of each of these provisions turns on the statutory context in which it occurs.

Discrimination and retaliation claims under Title VII have little in common with judicial review of federal agency actions under the Administrative Procedure Act. The typical Title VII plaintiff is challenging a specific employment decision; when originally enacted in 1964 Title VII did not apply at all to employment decisions by federal officials. An individual employment decision, unlike agency actions subject to review under the APA, usually involves only a few workers and thus rarely poses problems similar to review of agency action. See *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 (1987). It seems most appropriate to give the phrase "person aggrieved" in Title VII the same meaning that it has under other civil rights statutes,[6] which have far more in common with one another than with the type of litigation that occurs under the APA.

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[6] In addition to its use in Title VII and Title VIII, references to a person or employee "aggrieved" are also found in Title I of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3, in section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1), in the Voting Rights Act, 42 U.S.C. § 1973a(a), and in several provisions of the Age Discrimination in Employment Act. 29 U.S.C. §§ 626(c)(1), 633a(c).

The APA standard, in any event, is more inclusive than respondent suggests. Relying on this Court's interpretation of section 10(a), respondent argues that

> Thompson is ... not aggrieved within the meaning of the statute because he is not the intended beneficiary of Title VII's anti-retaliation protections. He is not the intended beneficiary because he did not engage in any protected conduct.

(R.Br. 33). But the zone of interest test

> is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Industry Association, 479 U.S. 388, 399-400 (1987).

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id. at 399. But in this case the plaintiff *is* the subject of the contested action, and his interest in continued employment is not "marginally related" to the decision to fire him.

Respondent relies on a 1998 lower court concurring opinion which, based in part on a narrow reading of the phrase "person aggrieved" under section 10(a) of the APA, insisted that "person aggrieved" in section 706(f)(1) was a "term of art ... that ... includes prudential limits on standing." (R.Br. 35) (quoting *Childress v. City of Richmond, Virginia*, 134 F.3d 1205, 1209 (3d Cir. 1998) (Luttig, J., concurring)). But only six months after that lower court decision, this Court (also citing section 10(a)) held precisely the opposite.

> 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.... Cf. Administrative Procedure Act, 5 U.S.C. § 702.

Federal Election Commission v. Akins, 524 U.S. 11, 19 (1998).

C. Section 706(f)(1) Provides An Express Private Cause of Action for Individuals With Claims Under Title VII

Like the en banc majority below, respondent argues that even if Thompson is a "person aggrieved," he still lacks a private cause of action under Title VII. Respondent relies on this Court's decisions in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979), and *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979). (R.Br. 15).

Touche Ross and *Cannon*, however, set forth the standard for determining whether the courts should *imply* the existence of a private cause of action where the language of a statute contains no express private cause of action. *Touche Ross*, 442 U.S. at 562 ("we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one"); *Cannon*, 441 U.S. at 717 ("Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We ... conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.")

Section 706(f)(1), however, contains just such an express private cause of action to enforce Title VII. (See Pet. Br. 46-49; Brief for the United States as Amicus Curiae Supporting Petitioner, 24). This Court in *Cannon* noted the existence of this very express private cause of action. 441 U.S. at 710 and n.45 ("other Titles of the Civil Rights Act of 1964 ... created express private remedies.... See 42 U.S.C. §§ 2000e-5(f)(1), (3) (Title VII).")

III. THE EEOC'S INTERPRETATION OF SECTIONS 704(a) AND 706(f)(1) IS ENTITLED TO DEFERENCE

The language and context of sections 704(a) and 706(f)(1) make clear that third-party reprisals are unlawful, and that the direct victims of third-party

reprisals may obtain judicial relief for such violations. To the extent that the terms of those provisions may appear ambiguous, deference should be given to the EEOC's consistent interpretation of the two statutory provisions at issue.

Respondent argues that the Commission's interpretation of Title VII is essentially irrelevant, because the construction of sections 704(a) and 706(f)(1) is a matter to be resolved based on the "traditional tools of statutory construction," which are "within the special expertise of courts, not agencies." (R.Br. 52) (quoting *Lee v. Sullivan*, 787 F.Supp. 921, 937 (N.D.Ca. 1992)). But unless the language of section 704(a) (or section 706(f)(1) as the method by which section 704(a) is enforced) unequivocally requires a contrary result, the touchstone of sound interpretation is to avoid a construction that would "undermine the effectiveness of Title VII by allowing the threat of ... retaliation to deter victims of discrimination from complaining to the EEOC," or from opposing such discrimination at work. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

The essential purposes of 704(a) are "[m]aintaining unfettered access to statutory remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. at 346, and "preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). In any particular case the determination of whether a given retaliatory act

would be likely to obstruct employee efforts to obtain compliance with Title VII usually is – as respondent itself insists – a fact-bound question for the trier of fact. See *Burlington Northern*, 548 U.S. at 70-73. The determination of whether the purposes of section 704(a) would be undermined by permitting an entire category of retaliatory acts – in this instance retaliation against closely associated third parties – is an intensely practical question. In resolving that issue, the judgment and experience of the EEOC are entitled to significant weight.

The Commission's longstanding view that section 704(a) prohibits third-party reprisals reflects more than just the agency's reading of the words of the statute and the relevant caselaw.[7] As the federal

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[7] The cases cited in the EEOC Compliance Manual support the agency's interpretation of Title VII. *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108 (W.D.N.Y. 1996), held that a plaintiff states a cause of action on which relief can be granted by alleging "protected activity by a close relative, disadvantageous employment action, and a timeframe indicating a causal connection between the two." 946 F.Supp. at 1118. Respondent notes that the plaintiff in *Murphy* had asserted that he had assisted his wife in her own complaints of discrimination. (R.Br. 50). But the plaintiff did not allege that the employer was aware of that assistance, or that that assistance was a motivating factor in the actions taken against him by the employer. Rather, the plaintiff asserted only that the employer was retaliating against him because of his wife's complaints.

In *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993), the court of appeals endorsed the view that "if an employer retaliated against a close relative of the person engaging in protected activity, the relative may bring a claim under 42

(Continued on following page)

agency responsible for the day-to-day enforcement of Title VII, the EEOC draws on a broad body of experience in evaluating the likely impact of that category of reprisals. The Commission has several major responsibilities: investigating and evaluating the large number of discrimination complaints filed each year by individual employees, authorizing the commencement and settlement of civil actions against private employers, adjudicating appeals by federal employees of agency decisions involving discrimination claims, and coordinating overall federal equal employment opportunity policies. Those interrelated roles give the Commission a deep understanding of the realities of the workplace and of the practical problems involved in implementing Title VII.

With regard to the substantive requirements of section 704(a), the EEOC has long maintained that

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U.S.C. 2000e-3(a), even though the relative was not the person engaging in the protected activity." 7 F.3d at 543; see 7 F.3d at 544 ("We agree ... that a plaintiff's allegation of reprisal for a relative's antidiscrimination activities states a claim upon which relief can be granted under Title VII.")

Respondent suggests that *Thurman v. Robertshaw Control Co.*, 869 F.Supp. 934 (N.D.Ga. 1994) does not support the Commission's position because the court in that case "ultimately granted summary judgment to the employer on those claims." (R.Br. 51). But summary judgment was granted only on the ground that there was insufficient evidence that the protected activity of the plaintiff's wife was the reason for the plaintiff's dismissal. 869 F.Supp. at 941. The district court accepted plaintiff's theory that dismissal because of his wife's protected activity, if proven, would be actionable. 869 F.Supp. at 941 n.3.

the antiretaliation provision forbids reprisals against third parties who are so associated with the individual engaging in protected activity that the reprisals would be likely to deter those activities. In its brief in this Court, the Commission explains how such reprisals could be a potent tool for deterring employees from complaining to the Commission itself and from opposing discrimination in the workplace. (U.S. Br. 8, 11-13). The EEOC's considered evaluation of that intensely practical question, drawing upon the Commission's own unique and extensive experience dealing with charging parties, witnesses and plaintiffs, is entitled to deference unless clearly mistaken. Respondent does not appear to argue that EEOC has overstated the potential seriousness of third-party complaints.

The interpretation of section 706(f)(1), although involving a distinct question of statutory construction, turns to a significant degree on the practical implications of that construction for the viability of section 704(a). If section 706(f)(1) were interpreted in a manner that would preclude or seriously obstruct private enforcement of section 704(a) in a distinct category of retaliation cases, the viability of section 704(a) itself would in that respect be undermined. Here too the Commission has long maintained that third-party victims can themselves maintain an action under section 706(f)(1). In its brief in this Court, the EEOC explains the practical importance of such civil actions by the victims of third-party reprisals. (U.S.Br. 26-27). Respondent appears to disagree,

suggesting that the prohibition against third party reprisals might be enforced by the employee who had engaged in the protected activity. But that largely unexplained assertion is insufficient to overcome the deference due to the EEOC's evaluation of this intensely practical question.

Finally, respondent objects that some lower courts have disagreed with the Commission's interpretation of sections 704(a) or 706(f)(1). (R.Br. 49-50, 53 and n.13). But litigation in this Court ordinarily concerns legal issues regarding which the lower courts are divided. Thus it will usually be true that in cases in this Court that the position of the EEOC (or of any federal agency) conflicts with the decisions of at least some lower courts.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

DAVID O'BRIEN SUETHOLZ
3666 S. Property Rd.
Eminence, KY 40019
(859) 466-4317

LISA S. BLATT
ANTHONY FRANZE
ARNOLD & PORTER LLP
555 Twelfth St., N.W.
Washington, D.C. 20004
(202) 942-5842

Counsel for Petitioner

**Counsel of Record*