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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), forbids an employer to retaliate against an employee or job applicant because that individual engaged in certain protected activity pertaining to the enforcement of Title VII rights. The questions presented by petitioner are:

I. Whether Section 704(a) forbids an employer from retaliating for such activity by inflicting reprisals on a third party who is closely associated with the employee who engaged in protected activity.

II. Whether the prohibition on retaliation can be enforced in a civil action brought by the third party victim.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing approximately 300,000 direct members with an underlying membership of more than three million businesses and organizations of every size, in every sector, and from every region of the Country. More than 96 percent of the Chamber's members are small businesses with 100 employees or fewer. A significant majority of the Chamber's members are employers who are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as other federal antidiscrimination laws. The Chamber has represented the interests of its members before this Court on numerous occasions, including in Title VII cases. *See, e.g.*, *Crawford v. Metropolitan Gov. of Nashville*, 129 S. Ct. 846 (2009); *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009); *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

This case involves Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3. Retaliation claims under that law, as well as under the anti-retaliation provisions of other employment laws, have increased

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters with the Clerk of the Court providing consent to the filing of this and all other *amicus* briefs.

dramatically over the last two decades. In 1992, when the Equal Employment Opportunity Commission began collecting charge data, 10,499 retaliation claims were filed under Title VII, which accounted for 14.5 percent of all charges filed with the EEOC. In 2009, complainants filed 28,948 Title VII retaliation claims, which accounted for 31 percent of all the charges filed. *See* EEOC, Charge Statistics, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (data for 1997 to 2009); http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm (data for years prior to 1997). Put another way, the number of retaliation charges ballooned by 175 percent, and their share of the EEOC's charge docket has more than doubled.

The Chamber and its members are committed to achieving workplaces free of the racial, ethnic, gender, and religious discrimination that Title VII proscribes, and they strongly oppose any effort by employers to retaliate against individuals for exercising their rights under federal law. At the same time, not all claims brought against employers are meritorious, and some disgruntled individuals wield "anemic" or "largely groundless" claims as an "*in terrorem*" means of obtaining money or inflicting retribution on a disliked superior, co-worker, or employer. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Furthermore, studies have estimated that it costs, on average, over $120,000 just to defend a wrongful discharge claim. *See* Lewis Maltby, *The Projected Economic Impact of the Model Employment Termination Act*, 536 Annals Am. Acad. Pol. & Soc. Sci. 103, 107 (1994). That sum does not include the costs of any settlement or judgment that an employer may have to pay. For small businesses in difficult

economic times, expanding litigation costs and the opportunities for meritless claims have a direct impact on business viability, growth, and survival. The Chamber and its members thus have a vital interest in the outcome of this litigation, and present this brief to place the perspective and extensive experience of a broad range of American employers before the Court.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act protects two classes of employees. First, it protects employees who suffer discrimination on the basis of status, *i.e.*, race, color, religion, sex, or national origin. Second, it protects employees who engage in protected conduct, such as opposing discrimination or participating in the complaint process. Petitioner argues that this Court should extend Title VII to protect a third category of employees, who have not suffered discrimination on the basis of a protected status, nor participated in protected conduct, but who are "closely associated" with other employees who are protected. This claim to "litigation by association" finds no support in the text, structure, or purpose of the statute, and the extensive line-drawing challenges it would impose and the costs it would exact require that any judgment about expanding Title VII in this manner be made by Congress.

Moreover, petitioner's proposed rule would stretch the terms of Section 2000e-3 and standing principles beyond their breaking point, all in order to offer relief to a class of plaintiffs that neither meets Congress's criteria for retaliation claims nor requires a right to sue to fulfill Title VII's purposes. Section 2000e-3 already protects a broad range of employees,

including anybody who "opposes" discrimination, or who participates "*in any manner*" in the complaints process. In the broad run of cases, family members and other genuinely close associates will do something to oppose discrimination against their family member or friend, and will likely participate in helping to remedy that discrimination. If they suffer reprisals, all of those individuals will be able to articulate their own retaliation claims that fall squarely within Title VII's text. Petitioner's case does not fit that mold because, while eager to file his own Title VII suit, his complaint identifies nothing he did to support the fiancée whose legal rights he now wants to borrow.

Congress did not intend for Section 2000e-3 to protect such unusual close-enough-to-sue-but-not-close-enough-to-help associates of protected employees. The text of the statute not only fails to mention third parties, but is precisely framed in terms of protecting only the employee who engaged in privileged conduct. Nor, if the aim of Section 2000e-3 is to vindicate the rights of the protected employee – here, petitioner's fiancée – does it make sense for litigation to proceed when the complaint is devoid of any allegation of injury to or intimidation of that employee. Furthermore, there is no sound reason for the Court to open Title VII up to "litigation by association" claims because the protected employee already can enforce her rights when retaliation takes the form of action against friends and family, and she has every incentive to do so. That course of action would be consistent with the language of the statute, as well as the longstanding prudential norm that the victims of discrimination should assert their own rights themselves.

Petitioner's reformulation of Title VII, moreover, would steer the courts into a storm of definitional line-drawing, unhinged from statutory text or congressional direction. It would also impose upon employers the task of monitoring their employees' associations to determine which ones are "close enough" to confer protection from discipline. And courts would have to devise a network of rules to ensure that the third-party complaint actually addresses the protected employee's legal injury, rather than exclusively benefitting the third party. That litany of interpretive and implementation problems is a good sign that any decision to modify the statute's coverage should be left to Congress.

ARGUMENT

TITLE VII'S ANTI-RETALIATION PROVISION APPLIES ONLY TO INDIVIDUALS WHO THEMSELVES ENGAGE IN PROTECTED CONDUCT

At bottom, petitioner's and the Solicitor General's argument is this: petitioner has an injury but no retaliation claim or statutory protection of his own; his fiancée enjoys statutory protection against retaliation, but has no legally cognizable injury of her own; and the "close association" between the two of them alchemizes the two non-claims into a viable cause of action for retaliation under Title VII. But two "noes" do not make a "yes." When Congress wants association with a protected person to constitute unlawful employment discrimination, it says so directly. It did not say so in Title VII. Quite the opposite, the plain text of the retaliation provision focuses singularly on protecting the individual who actually engaged in protected

conduct. That is dispositive. The profoundly complicated policy judgments and definitional line-drawing involved in expanding the statute to permit litigation by anyone who meets the entirely atextual standard of "close-enough association" are not for the courts to undertake in the first instance.

A. Petitioner's Claim Does Not Fall Within Title VII's Retaliation Provision Because He Did Not Engage in Any Protected Conduct

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, protects two classes of employees from discrimination. First, Title VII makes it illegal "to discriminate against any individual" in employment "because of such individual's" protected status: his or her "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Petitioner does not argue that his termination violated that provision. While his claim of discrimination is a status-based claim – his status as the fiancé of an alleged discriminatee – that is not a status that Section 2000e-2(a) protects.

Unlike Section 2000e-2(a), Title VII's retaliation provision focuses on protected conduct, not status. *Burlington Northern. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). More specifically, Title VII separately makes it unlawful for an employer:

> to discriminate against any of his employees * * * because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-3(a).

Petitioner's claim does not fit within Section 2000e-3(a) either. He does not allege that respondent fired him because of anything he did. In particular, he does not allege that he "has opposed any practice" made unlawful by Title VII, nor that he "made a charge, testified, assisted, or participated in" any aspect of his fiancée's effort to vindicate her rights under Title VII. The complaint, instead, is quite explicit that petitioner (allegedly) was fired "sole[ly]" because of his "relationship to Miriam Thompson," his then-fiancée. J.A. 12-13.[2]

This case thus is not about whether a related individual who meets the elements of Section 2000e-3 enjoys Title VII's protection. Instead, this case is about revamping the anti-retaliation provision from a conduct-based protection into a protection for associational status, even when the plaintiff admits that he has not suffered and cannot prove the indispensable statutory element of discrimination *on the basis of conduct* proscribed by Section 2000e-3. *See Burlington Northern*, 548 U.S. at 63.

Congress undoubtedly could craft a retaliation provision along the lines that petitioner suggests. Indeed, Congress did just that in the Americans with Disabilities Act, which expressly defines "discrimination" to include discrimination against

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[2] In a deposition, petitioner stated that he had helped Regalado prepare her EEOC complaint. *See* Pet. App. 47a However, his complaint in the district court disavows the notion that this conduct – which would have been protected under Section 2000e-3(a) – had anything to do with his termination.

third parties "with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).[3] Likewise here, Congress could have said that "it shall be an unlawful employment action for an employer to discriminate against any of his employees *or any closely associated third party* because *the employee* has opposed any practice, made an unlawful employment practice under Title VII." But Congress did not say that. And courts cannot say it for Congress. This Court's "charge is to give effect to the law Congress enacted." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010).

Petitioner compares Title VII to the National Labor Relations Act ("NLRA"), Pet. Br. 24-26, but that comparison favors the Chamber. None of the NLRA cases granting relief to third parties were decided under that statute's retaliation provision, which (like Section 2000e-3) makes it unlawful to "discriminate against an employee" in retaliation for protected conduct. 29 U.S.C. § 158(a)(4). Instead, these cases applied the much broader language of 29 U.S.C. § 158(a)(1), which makes it unlawful to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA.[4]

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[3] *See also* 18 U.S.C. § 3521 (vesting Attorney General with discretion to protect "the immediate family of, or a person otherwise closely associated with [a federal] witness"); 18 U.S.C. § 115(a)(1) (criminalizing murder or assault of "the immediate family of a United States official").

[4] *See* Pet Br. 24 n.34 (citing six cases, all conforming to this pattern); *see also Tasty Baking Co. v. NLRB*, 254 F.3d 114, 127 (D.C. Cir. 2001) (relying on Section 158(a)(1) to grant relief); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 402 (3d

Congress excluded similarly capacious language from Title VII's retaliation provision and, given the acknowledged similarity between the two statutes, Congress must have "intended its different words to make a legal difference." *Burlington Northern*, 548 U.S. at 62-63.

B. Regalado Did Not Suffer Discrimination Under Section 2000e-3

Petitioner's and the Solicitor General's central argument is that petitioner's firing was actually retaliatory discrimination against his fiancée, Miriam Regalado, who had earlier filed a gender discrimination complaint against respondent. Pet. Br. 9-20; U.S. Br. 11-14. That argument fails, for three reasons.

1. Petitioner's Termination Was Not Discrimination "Against" Regalado

The text of Section 2000e-3 is pointed, defining unlawful retaliation specifically as an adverse action directed "against" the same individual that opposed or complained about unlawful discrimination. Title VII's retaliation provision makes it unlawful for an employer to "discriminate *against* any individual * * * because *he*" has engaged in protected conduct. 42 U.S.C. § 2000e-3(a) (emphases added). "Against" means "with respect to," or "toward." Webster's Third New International Dictionary 39 (1971).

Accordingly, to discriminate "against" an individual who engaged in protected conduct under

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Cir. 1990) (en banc) (same); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987) (same).

Section 2000e-3(a), the employer must single out *that individual* for adverse treatment. Indeed, "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure [the] protected individuals." *Burlington Northern*, 548 U.S. at 59; *see Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 174 (2005) (holding that retaliation constitutes "a form of 'discrimination' because *the complainant* is being subjected to differential treatment") (emphasis added). Thus, the statute requires that the person "against" whom the employer acts and the person that engaged in the statutorily protected conduct be one and the same, and not merely "associated," as petitioner proposes.

2. Regalado Did Not Suffer Injury or Harm, and Therefore Did Not Suffer "Discrimination" Under Section 2000e-3

Regalado was not subjected to "discrimination," and petitioner's claim that his termination constituted "discrimination" against his fiancée relies on a definition of the term "discrimination" that effectively empties it of meaning. In petitioner's view, "discrimination" need not involve any actual harm, injury to, or differential treatment of its intended victim. The text of Section 2000e-3 and this Court's precedent applying that language foreclose petitioner's interpretation.

First, this Court recently established that Section 2000e-3(a) protects an individual "not from all retaliation, but from retaliation that produces an injury or harm." *Burlington Northern*, 548 U.S. at 67. But nowhere does the complaint allege that Regalado herself suffered any injury at all, let alone

legally cognizable "discriminat[ion]" under Section 2000e-3. Nor does the complaint seek any remedy (monetary or equitable) that would run to Regalado. The complaint plainly identifies only injury to petitioner, in the form of lost wages, personal humiliation, and embarrassment, and those are the only injuries for which relief is sought. J.A. 13. The rest of the record is similarly devoid of evidence that Regalado suffered any injury. In her deposition, she never mentioned any harm to herself resulting from petitioner's termination. And in his brief to this Court, petitioner affirmatively argues that his termination did *not* cause his fiancée to suffer a remediable injury of her own. Pet. Br. 43 ("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."). Without the essential element of harm to a protected person, a claim for retaliation does not arise.[5]

Second, the essence of "discrimination" is differentially adverse treatment. *Burlington Northern*, 548 U.S. at 59; *id.* at 65 (citing EEOC Compliance Manuals from 1988 and 1991); *see also*

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[5] In making this statement, petitioner attempts to thread a needle, arguing that his fiancée suffered just enough injury to be a victim of discrimination so that he can sue, Pet. Br. 10, but not enough injury to have standing to vindicate her own rights, *id.* at 43. That makes no sense. If Article III bars Regalado from suing, it would equally bar petitioner from suing to remedy the same non-injury. Conversely, if Article III does not bar Regalado from bringing her own claim, then it is difficult to understand why this Court should wring and strain the statutory text to enable petitioner to sue on her behalf.

Jackson, 544 U.S. at 174 (noting that retaliation "is a form of 'discrimination' because the complainant is being subjected to differential treatment"). But nowhere does petitioner allege, or the record reflect, any adverse change in Regalado's working conditions, any differential treatment of Regalado by respondent, or any other "distinctions or differences," inside the workplace or out, in how respondent treated her, which is what Section 2000e-3's "discriminate against" language requires. *Burlington Northern*, 548 U.S. at 59.

Third, petitioner argues that the "touchstone" of the retaliation provision is not the phrase "discriminate against," but the word "because," and that "the intent of the employer in taking the allegedly retaliatory action" is key. Pet. Br. 10. No doubt petitioner must prove intent as *one* essential element of any retaliation claim. But the two elements listed above – harm and differential treatment – are equally indispensable. *Burlington Northern*, 548 U.S. at 65-67. It is the absence of those two elements from the complaint that dooms petitioner's claim, and also establishes that his interpretation of the statute is at odds with its core requirements.

Fourth, petitioner argues that this Court should expand the scope of Section 2000e-3 to include his claim because otherwise Title VII would not provide a satisfactory remedy for Regalado's (non-alleged) injury. Pet. Br. 43. The United States, however, says the opposite, explaining that Regalado could sue to obtain petitioner's back wages or reinstatement. U.S. Br. 27. If the United States is correct, then there is no reason to expand Title VII in the manner

petitioner proposes because the person who engaged in protected conduct can be made whole without grafting a "close associates" addendum on to the statutory text. *See* U.S. Cert. Br. 11 (foreclosing third-party actions would "Not Leave A Substantial Gap In Title VII's Coverage").

In any event, dissatisfaction with the scope of Title VII's remedies is not a reason to judicially modify the scope of the statute. Congress proceeded circumspectly in formulating damages remedies under Title VII. When first enacted, the statute did not permit compensatory or punitive damages. *See United States v. Burke*, 504 U.S. 229, 238 (1992). After study, Congress amended the statute in 1991, *see* 42 U.S.C. § 1981a, to expand the relief available in a manner consistent with the careful balance between employers and employees that Title VII strikes. *See United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 (1979) (to obtain the support of "legislators in both Houses who traditionally resisted federal regulation of private business," Title VII's proponents carefully formulated damages provisions that left "management prerogatives * * * undisturbed to the greatest extent possible" (quoting H.R. Rep. No. 914, 88 Cong., 1st Sess., pt. 2, p. 29 (1963)). Judicially altering Title VII in a manner that changes who can sue for what would unravel the balance that Congress struck.

Finally, petitioner argues that the Court should defer to the EEOC's interpretation of the statute as permitting such third-party suits. But, to the extent that the EEOC has weighed in on this question, it has only done so in its compliance manual, not by regulation. While the compliance manual is "entitled

to respect," it is by no means controlling on this Court. *See Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2371 (2008). That is particularly true here, where the EEOC's position is rooted in policy arguments rather than any ambiguity in statutory text.

3. Policy Arguments Do Not Create an Injury that the Complaint Does Not Allege or that Title VII Has Not Already Solved

Petitioner argues that "hurting a member of his family" constitutes an "ancient method of revenge," Pet. Br. 17. That is no doubt true. The problem here, however, is that his case does not present that problem and, as the United States makes clear, construing Section 2000e-3(a) to reach petitioner's claim is not necessary to protect against ancient modes of revenge.

First, petitioner's arguments and complaint do not match up. He was not a "member of [Regalado's] family" at the time of his termination and his complaint alleges no harm or injury to Regalado. Nor has Regalado asserted any violation of her own rights under Title VII's retaliation provision or claimed any injury herself. None of the remedies sought run to her either. Thus, rather than track any ancient pattern of vengeance, this case presents the quite unusual scenario of action (i) taken against a non-family member (ii) who offered no show of support for the protected employee's conduct, (iii) that does not result in any alleged harm or injury to the protected employee or have any discernible dissuasive effect on her willingness to continue pursuing her legal claims.

Second, expanding Section 2000e-3 to encompass petitioner's unusual complaint is not necessary because, as the United States argues (U.S. Br. 27) and the court of appeals agreed (Pet. App. 29a n.10), the protected employee herself could bring suit under the retaliation provision and could obtain effective relief. Section 2000e-3 thus affords Regalado all the protection Congress intended against any alleged "revenge," however inflicted. Accordingly, judicially expanding Title VII is "simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes v. Securities Investor Prot. Corp.,* 503 U.S. 258, 269 (1992).

Furthermore, it would be unusual for a genuinely "close associate" or family member to take no steps whatsoever to support the protected employee in a claim of Title VII's caliber, especially if that same "close associate" is fully willing to litigate a Title VII claim himself. Indeed, case law corroborates that, in the vast majority of cases, "closely associated" third parties do oppose discrimination or participate in the complaint process. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996). Thus close family members will commonly be able to fit within the natural sweep of Section 2000e-3(a).

Amicus National Women's Law Council ("NWLC") argues that cases of third-party retaliation are not, in fact, rare. But its proof demonstrates the opposite. NWLC scoured federal and state reporters

over a fifteen-year period and found only seventeen third-party retaliation cases – barely more than one case a year – from 1995 to 2009. *See* NWLC Br. iv-v. During that same period, complainants filed 340,023 federal retaliation charges with the EEOC.[6] NWLC's third-party suits thus accounted for only .005 percent of all retaliation charges.

Third, the fact that Congress already crafted the statute in a manner that covers the ordinary sweep of retaliation claims against family members suggests that any small gaps in coverage, such as those presented by petitioner's anomalous no-help-by-him/no-harm-to-her scenario, reflect deliberate line-drawing by Congress. After all, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

To begin with, the focused text of the anti-retaliation provision encourages use of the complaints process and supports those who join in opposing unlawful conduct. Congress deliberately linked the statutory protection to an individual's engaging in protected conduct, and "vague notions of

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[6] *See* EEOC, Charge Statistics, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (data for 1997 to 2009) and http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm (data for years prior to 1997). The numbers in this paragraph refer to all retaliation claims, not only those under Title VII, because NWLC did not restrict its presentation to Title VII retaliation cases.

a statute's 'basic purpose' are * * * inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). The statute as-is balances the needs of a discrimination-free workplace and creating incentives to report discrimination against protecting employers from litigation by the boundless class of "close-enough associates" who could dispute management decisions simply by claiming some affiliation with a protected employee.

Likewise, the limitations of the statutory text may reflect Congress's balancing of its interest in non-discrimination with an interest in employees' ability to keep most of their private associations just that – private. Employers have a legitimate interest in maintaining sufficient information so that they can ensure compliance with the law. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (recognizing affirmative defense for employers who implement compliance programs). As written, the retaliation provision allows employers to fulfill this imperative without probing the private lives of employees. But once the status of "close associate" is accorded independent legal significance under Section 2000e-3, employers will need to learn about and document in records, 42 U.S.C. § 2000e-8(c), the now not-so-private and non-familial relationships of employees.

It is no answer to that concern to argue, simplistically, that employers should just not fire individuals without legitimate cause. That would mean that Title VII effectively disposed of at-will employment. It did not. "'[E]mployers may hire and fire, promote and refuse to promote for any reason,

good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin.'" *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 462 n.35 (1986) (quoting 110 Cong. Rec., at 6549 (remarks of Sen. Humphrey)).

The argument also ignores the significant volume of meritless Title VII claims brought and the enormous employer and judicial resources they consume. The Federal Judicial Center recently compared the number of employment discrimination claims terminated by summary judgment with other lawsuits to arrive at the "striking" result that federal district courts were three to five times more likely to grant summary judgment motions on employment discrimination claims. *See* Joe Cecil & George Cort, Report on Summary Judgment Practice Across Districts with Variations in Local Rules 3, 17 (Aug. 13, 2008), *available at* http://www.fjc.gov/public /pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf. Those findings are unsurprising, since Title VII retaliation claims are easy to plead. "[I]n order to survive a motion to dismiss, 'all [the] complaint has to say, is the [employer] retaliated against me because I engaged in protected activity.'" *Rochon v. Gonzales*, 438 F.3d 1211, 1220 (D.C. Cir. 2006) (citations omitted). Additionally, this Court has held that an employee can sometimes demonstrate causation simply by showing that the action taken against him occurred shortly after protected activity. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that "mere temporal proximity" might suffice if the time period is "very close").

Fourth, the United States contends that third-party retaliation suits are worthwhile because those individuals are "more likely to sue." U.S. Br. 26. However, the point of the retaliation provision is not to maximize the number of lawsuits filed. The point is to permit those who have meritorious retaliation claims to bring them. And it is far from clear – indeed, unlikely – that third parties will bring more meritorious claims than the actual victims.

Furthermore, if the plaintiff and the direct victim are, in fact, "closely associated," the litigation effort is likely to be so integrated and the burden jointly borne that it is hard to understand, as a practical matter, why one would sue rather than the other. Presumably, their litigation resources could just as easily be channeled into a lawsuit by the employee who engaged in the conduct that Title VII protects, rather than leaving that employee on the sidelines, while the "close associate" brings a retaliation once-removed lawsuit.

The United States also argues that it would be "simpler" to allow petitioner to sue on his own. U.S. Br. 27. That makes little sense since retaliation against the primary victim will still have to be proven, and the third-party standing questions that petitioner's position raises are anything but simple, *see* Section C, *infra*. Beyond that, the drive for simplicity does not constitute a sufficiently weighty interest to overcome the clear limitations imposed by the statute's text.

The United States then protests that unrepresented plaintiffs would find the scheme counterintuitive. But every Title VII claim must begin with a charge filed with the EEOC, and the

agency is in a good position to inform whoever makes a charge – whether the protected employee or her close associate – of the proper course of action. Furthermore, there is nothing counterintuitive about enforcing Title VII's plain text or requiring that victims bring suit themselves.

Fifth and finally, while there is little to gain by extending the retaliation provision to the close associate who does nothing to help the protected employee, there is much to lose. The test that petitioner advances has no meaningful boundaries. Employers would face a compliance nightmare, as they would have no realistic way of knowing which employees are "close enough" to trigger Section 2000e-3's protection. When it last considered "close association," as a proposed standard for administering *res judicata* principles, this Court unanimously rejected it as unworkable, explaining that determining whether two people were "close enough" would "create more headaches than it relieves" by "spark[ing] wide-ranging, time-consuming, and expensive discovery," which district courts would then have to "evaluate * * * under a standard that provides no firm guidance." *Taylor v. Sturgell*, 553 U.S. 880, 898, 901 (2008).

Likewise, in *Lans v. Digital Equipment Corp.*, 252 F.3d 1320 (Fed. Cir. 2001), the Federal Circuit declared "closely associated" to be an "unworkable" standard for identifying notice from a patentee. Adopting that standard, the court explained, would "present difficult, if not unworkable, enforcement problems," because "[c]ourts would have to decide the degree of association sufficient to satisfy the rule,"

and the outcomes would inevitably prove arbitrary. *Id*. at 1327.

Indeed, the limitless reach of the phrase "closely associated" is legendary, with courts of appeals having already held, in a variety of contexts, that the following individuals are "closely associated" or "close associates": people who kiss, *United States v. Devine*, 934 F.2d 1325, 1337 (5th Cir. 1991); police officers who worked a beat together, *Moore v. City of Phila.*, 461 F.3d 331, 334, 344 (3d Cir. 2006); partners in a law office, *United States v. Hively*, 437 F.3d 752, 765-766 (8th Cir. 2006); "friends or family," *Zhang v. Gonzales*, 408 F.3d 1239, 1249 (9th Cir. 2005); "a brother and a university colleague," *Ghebremedhin v. Ashcroft*, 385 F.3d 1116, 1120 (7th Cir. 2004); a trusted aide, *Camacho v. Brandon*, 317 F.3d 153, 157 (2d Cir. 2003); friends who use nicknames for each other and share common interests, *United States v. Cervine*, 347 F.3d 865, 872 (10th Cir. 2003); a judge's secretaries and law clerk, *Humphreys v. Drug Enforcement Admin.*, 96 F.3d 658, 660 (3d Cir. 1996); business associates who "went on road trips to car shows together and spent time together on vacation with their families in Florida," *United States v. Marek*, 548 F.3d 147, 153 (1st Cir. 2008); business partners and people in a vendor-customer relationship, *Juicy Whip, Inc., v. Orange Bang, Inc.*, 292 F.3d 728, 743 (Fed. Cir. 2002); a hanger-on to a street gang, *United States v. Matthews*, 312 F.3d 652, 666 (5th Cir. 2002); a client's "long-time lawyer," *United States v. Colton*, 231 F.3d 890, 895 (4th Cir. 2000); "partners in crime," *United States v. Jones*, 432 F.3d 34, 42-43 (1st Cir. 2005); and fellow prison inmates, *United States v. McCullough*, 457 F.3d 1150, 1166 (10th Cir. 2006).

Further, if pre-marital engagement constitutes a close association, as petitioner contends, there is no logical reason why living together, dating, having an affair, sharing a close friendship, or working together on a lengthy project would not also suffice. Courts, in fact, have often defaulted to the phrases "close associate" and "closely associated" to describe people who share confidences or have loyalty to each other. *See, e.g.*, *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 608 (9th Cir. 2010); *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 125 (2d Cir. 2009); *United States v. Magluta*, 418 F.3d 1166, 1181 (11th Cir. 2005).

In sum, simply identifying a perceived gap in coverage, as petitioner does, says nothing about whether that gap was intended or unforeseen. Either way, its mere existence does not empower the Court to graft new language onto otherwise unaccommodating statutory text just because it is deemed to be good policy. *See Hubbard v. United States*, 514 U.S. 695, 703 (1995) ("[A]bsent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.") (quotation marks omitted). If new lines are to be drawn, they should be drawn by Congress in the first instance.

C. **Petitioner Cannot Bring Suit to Vindicate Alleged Retaliation Against Regalado**

Underscoring the calibrated reach of the anti-retaliation provision are parallel limitations on who can bring suit under Title VII. The statute's enforcement provision, 42 U.S.C. § 2000e-5(f),

provides that any "person aggrieved" may sue and, read in context, that does not extend to the type of third-party enforcement of the anti-retaliation provision proposed by petitioner, especially when, as here, there is no reason the protected employee could not have filed suit herself.

1. The Presumption Is Against Third-Party Standing

Petitioner's central argument is that his firing violated Regalado's Title VII rights and that Title VII permits him to press Regalado's claim for her. The mere articulation of the argument raises red flags because a central feature of this Court's prudential standing doctrine is "the general rule that a party 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Hinck v. United States*, 550 U.S. 501, 510 n.3 (2007) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004)); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (applying the "general prohibition on a litigant's raising another person's legal rights") (citation omitted); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). That principle holds "even when the very same allegedly illegal act that affects the litigant also affects a third party." *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). The Court has recently applied that principle to deny standing to litigants attempting to assert the rights of others. *See, e.g.*, *Hinck*, 550 U.S. at 510 n.3 (2007) (denying standing to taxpayers seeking to assert other taxpayers' due process challenge to Tax Court's jurisdictional limitations); *Kowalski*, 543 U.S. at 132

(denying standing to attorneys seeking to represent the interests of future clients).

The starting presumption thus is that, if respondent's termination of petitioner violated Regalado's rights, then Regalado – not petitioner – should file suit under Title VII to enforce the anti-retaliation provision. Here, petitioner offers only one objection to that ordinary rule: he objects to the scope of relief that Title VII affords Regalado. But statutory claims come with the relief that the statute prescribes – that is how statutory causes of action work. Here, that includes compensatory damages, 42 U.S.C. § 1981a, and equitable relief. A litigant's or court's dissatisfaction with that legislative judgment does not license casting aside prudential standing rules simply to forge a preferred remedial path.

2. The Phrase "Person Aggrieved" Does Not Expressly Negate the Rule Against Third Party Standing

Congress "legislates against the background of [the Court's] prudential standing doctrine," and thus the prohibition on third-party enforcement controls "unless it is expressly negated." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345-348 (1984)). Nothing in Title VII's text, however, expressly negates the background rule that Title VII plaintiffs who are able must press their claims themselves.

Petitioner argues that Congress's use of the phrase "person aggrieved" in its cause of action provision, 42 U.S.C. § 2000e-5(f), waives prudential standing requirements. Quite the opposite is true. In *Director, Officer of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry*

Dock Co., 514 U.S. 122 (1995), this Court held that the phrase "person * * * adversely affected or aggrieved" in the Administrative Procedure Act, 5 U.S.C. § 702, does not waive prudential standing requirements. 514 U.S. at 126. The phrase "person adversely affected or aggrieved," the Court explained, is a "term of art" that appears in many statutes, and does not suspend traditional prudential standing rules. *Id.* at 126-127 (citing the Federal Communications Act of 1934, 47 U.S.C. § 402(b)(6); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(a); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 816)); *see also Coalition for Pres. of Hispanic Broad. v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991) (dismissing the case under Federal Communications Act "on prudential standing grounds"); *R.T. Vanderbilt Co. v. Occupational Safety and Health Review Comm'n*, 728 F.2d 815, 818 (6th Cir. 1984) (same for Occupational Safety and Health Act case). This Court has also held that the analogous phrase "[a]ny person injured" in RICO, 18 U.S.C. § 1964(c), requires a plaintiff to show more than that "the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Holmes*, 503 U.S. at 265.

Petitioner relies on *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972), to assert that "person aggrieved" waives all prudential standing requirements. In *Trafficante*, this Court held that the cause of action provision in the Fair Housing Act, which refers to "person aggrieved" "define[s] standing as broadly as is permitted by Article III of the Constitution." *Id.* at 209. The problem for petitioner is that the Court so ruled

because the Fair Housing Act goes on to define a "person aggrieved" specifically as "any person who * * * claims to have been injured by a discriminatory housing practice," *id.* at 206 (quoting 42 U.S.C. 3602(i)(1)).

The fact that Congress found it necessary to define "aggrieved person" expressly to include any person claiming injury proves that the phrase "aggrieved person," standing alone, does not discard prudential standing principles and reach to the boundaries of Article III. Otherwise, there was no reason for Congress to add the extra definitional phrase, and the law is well-settled that the Court "must, if possible, construe a statute to give every word some operative effect." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). Indeed, in *Warth v. Seldin*, *supra*, this Court explained that the suspension of prudential standing limitations in *Trafficante* turned upon Congress's adoption of a particularly "broad definition of 'person aggrieved' in § 810(a) [of the Fair Housing Act]." 422 U.S. at 513.

The United States' reliance on *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), similarly depends upon a truncation of the relevant statutory language. In *Akins*, this Court held that voters could bring suit under a statutory provision stating that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party * * * may file a petition" for judicial review, 2 U.S.C. § 437g(a)(8)(A). *See Akins*, 524 U.S. at 19. But what was critical to the broad scope of "party aggrieved" in that statute was the predecessor statutory provision that expansively defined who could file a complaint with the Commission to include "[a]ny person who

believes that a violation of this Act * * * has occurred," 2 U.S.C. § 437(g)(a)(1). *See Akins*, 524 U.S. at 19. The scope of "part[ies] aggrieved" who could sue when their complaints were dismissed in that statute thus was pre-ordained by the sweeping definition of who could file a complaint in the first place.

The United States' citation of *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), suffers from the same flaw. Unlike Title VII, Section 4 of the Clayton Act contains language that expressly abnegates prudential standing limitations because it directs that "*[a]ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws" can bring suit. *Id*. at 472.

The precedents that petitioner and the United States cite thus prove the Chamber's point: Title VII's cause-of-action provision is noteworthy for the absence of any language similar to the specialized definitions of "aggrieved person" that Congress has employed elsewhere to expressly negate prudential standing limitations. Beyond that, to the extent that precedent simply establishes the ambiguity of the phrase "aggrieved person," that proves that Congress's mere employment of that phrase did not "expressly negate" prudential standing limitations.

Furthermore, petitioner never addresses the necessary implications of his position. If he were correct that all prudential standing limitations were suspended by Congress's use of "aggrieved person," that rule would apply to *all* of Title VII's provisions, not just the anti-retaliation provision, because Section 2000e-5(f) applies across Title VII. In addition, *any* person with an Article III injury could

vicariously enforce Title VII claims because nothing in the phrase "aggrieved person" would confine its coverage to "close associates." "[A]ll sorts of persons who are not the intended beneficiaries of Title VII's protections" could bring third-party enforcement actions even when, as here, there is no barrier at all to the primary Title VII claimant (Regalado) bringing suit herself. Pet. App. 32a. Such a rule would effectively place the rights of the actual victims of discrimination at the mercy of third-party claimants, a result certainly not contemplated by the statute or consistent with Title VII's purpose.[7]

Finally, the "cardinal rule" of statutory construction is that "a statute is to be read as a whole." *Corley v. United States*, 129 S. Ct. 1558, 1566 n.5 (2009) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). Petitioner's effort to sever the plaintiff from the individual "discriminate[d] against" under Section 2000e-3 overlooks that Congress crafted Title VII's remedial provisions on the assumption that the individual retaliated against and the plaintiff would be one and the same. For example, 42 U.S.C. § 2000e-5(g)(1) provides that back pay awards shall be reduced by interim earnings that were or could have been obtained "by the person or persons discriminated against." But it would make no sense to have petitioner's back pay reduced by

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[7] Requiring the primary claimant to sue also creates a *de facto* check on the sweep of friends-and-family claims because it is likely that she would only go to the trouble of bringing a retaliation claim if the association were so intimate that it inflicted the type of distinct injury that Title VII aims to remediate – factors that are missing from this complaint.

amounts earned by Regalado, who remained employed by respondent until January 2004, almost a year after petitioner's termination. Resp. Br. 8a. Likewise, petitioner's reading could result in a windfall to a plaintiff who obtained interim income that would not be counted by this provision because the plaintiff was not the "person[] discriminated against."

3. Petitioner's Third-Party Claim Raises Additional Standing and Jurisprudential Concerns

a. No barrier to suit by protected employee

In addition to generally barring third-party enforcement of rights, the prudential standing doctrine forbids *jus tertii* litigation when there is no "hindrance to the third party's ability to protect his own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see Kowalski*, 543 U.S. at 132 (attorneys could not sue on behalf of indigent clients because the difficulty of proceeding without an attorney did not constitute "the type of hindrance necessary to allow another to assert the indigent defendants' rights").

There is no indication in Title VII's text that Congress intended to abandon that prudential standing limitation or, more particularly, that Congress perceived that there were significant hindrances to direct enforcement of retaliation claims by employees who had engaged in protected conduct. To the contrary, Congress's textual framing of the anti-retaliation provision in a manner that focuses singularly on the employee who him- or herself engaged in protected conduct indicates that Congress perceived no inherent barriers. Nor is there any allegation that Regalado faced barriers to filing suit

to enforce her rights under the anti-retaliation provision. Indeed, where associations are familial, one would expect that any hindrance to filing would apply equally to them both.

b. Procedural and administrability problems

There are still more problems with petitioner's proposed scheme. The line-drawing challenges that petitioner's theory creates would not stop with trying to define who counts as close-enough associates, but would extend to formulating a battery of procedural rules governing this new "litigation by association" claim. For example, petitioner nowhere explains – and nothing in Title VII indicates – how courts are to order and balance such litigation if one or more close associates and the protected employee all bring suit for the same retaliatory action either at the same time or in different order. Especially if non-family members are permitted to sue, courts will have to formulate unwritten rules governing notice, obtaining permission of the protected employee, ensuring alignment of interests, and any other needed process for protecting the rights and interests of the employee whose retaliation claim is being asserted by a third party. *See Taylor*, 553 U.S. at 900 (listing criteria for adequate representation by third parties).

Similarly, the courts will have to devise rules determining the extent to which the protected employee is bound by judgments already obtained enforcing her rights – which will land the court squarely in the "close enough" rule of *res judicata* that this Court just rejected in *Taylor v. Sturgell*. 553 U.S. at 898.

In addition, in most *jus tertii* cases, the relief sought is equitable or declaratory and thus, as a practical matter, runs equally to the plaintiff and to the person he represents.[8] However, when damages are at issue, this Court has long cautioned against the "hazard[s]" of having legal claims to those payments litigated by a third party. *United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 556 (1996). Here, if petitioner really envisions his claim as enforcement of Regalado's (potential) retaliation charge, then any damages that are to be awarded (on top of any equitable reinstatement relief) should belong to Regalado and should measure any harm that *she* suffered from petitioner's termination. It is, after all, *her* retaliation claim that is being litigated and thus only *her* injuries that can be remediated.

Petitioner, however, cuts Regalado out of the recovery altogether, framing his prayer for relief entirely in terms of a recovery that runs exclusively to himself. J.A. 13. That does not sound like enforcement of Regalado's statutory right. It sounds

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[8] Indeed, in equal protection and discrimination cases like *Trafficante*, the *jus tertii* label seems largely misplaced, because the Court has recognized that the right to a nondiscriminatory workplace, business operation, or housing runs to all involved. *See, e.g., Trafficante*, 409 U.S. at 210 (noting that the discrimination injury runs both to the excluded minorities and to white tenants who lose "important benefits from interracial associations"); *id.* at 211 ("The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is * * * 'the whole community.'"). The retaliation claim asserted here, by contrast, is explicitly individualized and targeted to the individual that engaged in the protected conduct.

like petitioner is instead creating a new statutory right against retaliation of his own that turns entirely on relational status, not conduct. So courts will have to make up all the rules for that too. But this Court recently cautioned against adopting readings of statutory text that compel courts "to develop, in the complete absence of any statutory text," a whole series of "rules governing" theories of legal liability that Congress never addressed. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 n.17 (2010).

c. Article III standing

The essential predicate to petitioner's and the United States' argument is the assumption (Pet. Br. 40-41; U.S. Br. 19) that petitioner independently has Article III standing to bring suit, and thus that the prudential barrier to third-party enforcement of claims is all that needs to be overcome. But the existence of Article III standing in this case, and other litigation-by-association cases, is not assured.

The "irreducible constitutional minimum of standing" requires that petitioner "have suffered an injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The premise of petitioner's argument is that his termination by respondent inflicted an Article III "injury in fact." But Article III requires more than just asserting some injury – that injury in fact must involve the "invasion of a legally protected interest." *Ibid.* And that legally protected interest must belong "*to the complaining* party." *Vermont Agency of Natural Res. v. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Warth*, 422 U.S. at 499) (emphasis added by *Stevens*); *see also Valley Forge*

Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982).

Petitioner, however, cites nothing that legally protects *his* interest in non-termination. Kentucky is an at-will employment state, *see Louisville & N.R. Co. v. Marshall*, 586 S.W.2d 274, 281 (Ky. Ct. App. 1979), and petitioner does not claim that his termination violated any contractual, constitutional, or other statutory rights of his own. Nor does he claim any violation of rights accorded to him – as opposed to Regalado – by Title VII. He was not fired because of his race, color, religion, gender, or national origin, or because he engaged in any protected conduct. He instead admits that he is enforcing Regalado's rights alone. Pet. Br. 35.

The problem is that the complaint alleges no injury to Regalado and makes no effort to remediate any assumed injury to her. Instead, given the absence of any claim in the complaint or her deposition of actual injury (adverse employment action, differential treatment, dissuasion from pursuing her rights, or even emotional distress) to Regalado, the remedies petitioner seeks appear to be unhinged from any retaliation relief she herself could obtain. Of course, petitioner may plan to share his recovery with his now-wife. But Article III's redressability prong is not met by showing "what the plaintiff ultimately intends to do with the money he recovers." *Sprint Communications Co. v. APCC Services, Inc.*, 128 S. Ct. 2531, 2542 (2008). It turns on "whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation." *Ibid.* And the complaint says nothing and does nothing about redressing *Regalado*'s retaliation (non-) injury,

which is the only legally relevant injury. Nor does petitioner's theory of "close association" litigation for his own damages provide any mechanism for courts to ensure that the legally-injured-but-not-suing individual is remediated by the litigation.

Instead, petitioner's argument seems to do one of two things. Either it adopts a legally conclusive presumption that the protected employee will have her interests redressed and vindicated by the close associate's litigation – a presumption that, while maybe true in happy marriages and happy families, ignores the reality that not all family members, and certainly not all close associates, are so cooperative. Or petitioner is, in actuality, creating a new and *independent* legal right and remedy for all of a protected employee's self-proclaimed "close associates" not to be subject to adverse treatment by their employers, even though they engaged in no protected conduct themselves. Whichever it is, the law forecloses it.

* * * * *

To be clear: petitioner's argument is that (i) a plaintiff who has no injury to a legally protected right of his own can sue (ii) to enforce the rights of a third party, even if the third party claims no injury of her own and faces no barrier to suit herself, (iii) for the sole purpose of recovering damages and relief that run exclusively to him – not to the third party – and (iv) bear no relation to the third party's remedial rights, (v) based on nothing more than an alleged "close association" with the third party. Apart from the Article III queasiness generated by that argument, *cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring),

the claim presses the Court to ignore the words that Congress wrote and to adopt a rule that raises deep-seated prudential standing concerns that the statutory text does not expressly negate.

And for what? Maybe all that pushing of the standing doctrine and judicial revamping of statutory text in service of an anomalous claimant would be worthwhile if it served some crucial good. But that is not so here. As the United States tells us, third-party lawsuits are not necessary to achieve the remedial purposes of Title VII, as the rule against them "does not leave a substantial gap in Title VII's coverage." U.S. Cert. Br. 11. On the other hand, petitioner's rule would cause the number of meritless retaliation claims not only to increase, but potentially to multiply, as every instance of protected conduct would give rise to an untold number of plaintiffs, each claiming a "close association" with the protected employee. Employers would face impossible compliance burdens and massive litigation costs as this potentially limitless class of "aggrieved" plaintiffs deploys retaliation claims to thwart management decisions with which they disagree.

Under these circumstances, the better answer is to leave standing principles and the statutory text intact. Those who have offered some measure of assistance or support to close associates in pressing their claims can file suit under Section 2000e-3. So can those protected employees who are themselves the victims of impermissible retaliation. Congress can decide the proper treatment of the rest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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