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 *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council, National Association of Manufacturers and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*. The brief supports the position of Respondent before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is

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other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

the nation's leading small business association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

All of EEAC's members, and many of NAM's and NFIB's members, are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, and other federal and state employment nondiscrimination laws. As potential defendants to claims of discrimination under Title VII, *amici's* members thus have a direct and ongoing interest in the issue of whether an individual can state a claim for unlawful retaliation under Title VII based solely upon the protected conduct of an individual who is a relative or close associate. The *en banc* court below properly concluded that the plain text of Title VII does not support the viability of such "friends and family" retaliation claims.

Because of their interest in the application of the nation's fair employment laws, EEAC, NAM and/or NFIB Small Business Legal Center have filed *amicus curiae* briefs in a number of cases before this Court involving the proper interpretation of Title VII,[2] as

[2] *See, e.g., Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009); *Ledbetter v. Goodyear*

well as those involving other important labor and employment issues.[3] Given their significant experience, *amici* are well-situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner's employment was terminated for performance-related reasons shortly after Respondent, his employer, was served with notice of an administrative charge of discrimination that had been filed with the U.S. Equal Employment Opportunity Commission (EEOC) by his co-worker and then-fiancée (now wife), Miriam Regalado. Pet. App. 3a. He sued Respondent in federal court, accusing it of unlawfully retaliating against him based on the protected activity of Regalado, with whom he is closely associated, in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq*. Pet. App. 4a. Petitioner does not allege that he was retaliated against based on his own statutorily protected activity, but instead contends that Section 704(a) confers an independent right of action for so-called "third party" retaliation. *Id.*

Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act, 123 Stat. 5 (2009); *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006); and *AMTRAK v. Morgan*, 536 U.S. 101 (2002).

[3] *See, e.g.*, *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

In granting Respondent's motion for summary judgment, the district court concluded that Petitioner failed to show that he was the victim of unlawful "association" discrimination based on his advocacy of women or minorities or because "his relationship with his wife made [his] own race or gender the basis of his employer's discrimination." Pet. App. 101a. It also found that Petitioner Thompson failed to demonstrate that he participated in a Title VII proceeding or otherwise opposed discriminatory conduct such that he was entitled to pursue a retaliation claim in his own right. *Id.* Lacking Sixth Circuit guidance on the question of third party coverage, the district court was persuaded by the plain text of Title VII, which it found extends protection only to individuals who actually have opposed discrimination or have participated in a Title VII proceeding. *Id.* at 102a-103a.

A divided, three-judge panel of the Sixth Circuit reversed. While acknowledging that the plain language of Title VII suggests that only the individual who has opposed discriminatory employment practices or participated in a Title VII investigation or proceeding is protected from retaliation, the panel majority nevertheless concluded that not expanding the statute's anti-retaliation provision to cover third party claims would undermine the purposes of Title VII. *Id.* at 74a.

On Respondent's petition for rehearing *en banc*, the court below vacated the panel decision and affirmed dismissal of Petitioner's retaliation claim. It determined that the plain text of Title VII establishes that the "authorized class of claimants" eligible to bring a Title VII retaliation claim is limited to those who themselves – and not through their relatives or close

associates – have engaged in statutorily protected conduct. Pet. App. 2a. The *en banc* majority observed that Section 704(a) expressly bars discrimination against an individual because *he* has opposed discrimination or because *he* has "made a charge, testified, assisted, or participated in any manner" in a Title VII proceeding. Pet App. 5a, 7a.

Because the actual text of the statute does not extend to those who have not personally engaged in statutorily protected conduct, the *en banc* majority concluded that it would be improper to judicially expand the scope of Section 704(a) in the manner urged by Petitioner, thus declining his "invitation to rewrite the law." Pet App. 9a. In doing so, it joined the Third, Fifth and Eighth Circuit Courts of Appeals, which also have refused to recognize a third party, or "friends and family," retaliation cause of action under Section 704(a). *Id.*

Petitioner filed a petition for a writ of certiorari, which this Court granted on June 29, 2010.

SUMMARY OF ARGUMENT

Section 704(a) of Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against any employee "because *he* has opposed any practice made an unlawful employment practice … or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter]." 42 U.S.C. § 2000e-3(a) (emphasis added). Section 704(a) plainly protects *only* those who themselves have engaged in either "opposition" or "participation" protected activity; it does not permit friends and family to assert retaliation claims based on the protected activity of a loved one or associate. The *en banc* court

therefore concluded correctly, as have the Third, Fifth, and Eighth Circuits, that Section 704(a) precludes third party retaliation claims.

Despite having opportunity to do so, Congress thus far has declined to amend Section 704(a) to provide for a third party right of action as exists under other federal workplace protection laws. The Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, for instance, contains not only a provision prohibiting retaliation against those who "oppose" discrimination or "participate" in EEO proceedings, but also one that makes it unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of … or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act." 42 U.S.C. § 12203(b). This more expansive language has been construed by some courts as being sufficiently broad to permit claims by third parties injured by retaliatory conduct. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002).

On its face, Section 704(a)'s reach is limited to retaliation against persons who have engaged in statutorily-protected conduct. It is the responsibility of Congress, not the courts, to expand Title VII's scope to permit a cause of action for third party retaliation. This Court therefore should decline Petitioner's invitation to interpret the statute in such a manner. Not only would such an interpretation be improper, but it also would be unnecessary, since Section 704(a) already contains sufficiently broad anti-retaliation protection for those who themselves oppose discriminatory employment practices or par-

ticipate in EEO proceedings on behalf of a close associate.

The decision below adheres not only to the plain text of Title VII, but also serves the broader purposes of the Act by maintaining a framework for protection that is broad in scope, but which does not unnecessarily undercut important interests of the employer community, including the ability to manage their workforces without fear of being accused of retaliation based solely on the conduct of others somehow connected to or associated with the complaining party. A rule permitting third parties to sue for retaliation based on the protected activity of their relatives or close associates also would create substantial confusion in the courts, and among employers seeking to comply with the law, regarding which relationships or associations qualify for anti-retaliation protection.

ARGUMENT

I. THE PLAIN AND UNAMBIGUOUS TEXT OF TITLE VII SUPPORTS THE WIDELY ACCEPTED VIEW THAT ONLY INDIVIDUALS WHO THEMSELVES HAVE ENGAGED IN PROTECTED ACTIVITY MAY BRING A SECTION 704(a) WORKPLACE RETALIATION CLAIM

A. The Third, Fifth And Eighth Circuits All Have Concluded Correctly, As Did The Court Below, That The Plain Text Of Section 704(a) Precludes Third Party Retaliation Claims

Section 704(a) of Title VII expressly provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of

> his employees or applicants for employment … 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 [subchapter].

42 U.S.C. § 2000e-3(a) (emphasis added). In comparison, Title VII's substantive nondiscrimination provision states:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

Unlike Title VII's nondiscrimination provision – which bars employment bias based on an individual's *status* as member of a protected class – its anti-retaliation provision "seeks to prevent harm to individuals based on *what they do*, *i.e.*, their *conduct*." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (emphasis added). Thus, a critical element of a retaliation plaintiff's prima facie case is that he or she actually personally "opposed" a discriminatory employment practice or personally "made a charge, testified, assisted, or participated" in a Title VII proceeding. 42 U.S.C. § 2000e-3(a).

The *en banc* court below therefore was correct in refusing to recognize Petitioner's third party retaliation cause of action, which is premised on someone else's protected conduct. In doing so, it joins three

other courts of appeals, and a number of federal district courts, in soundly refusing to extend Section 704(a)'s scope to encompass such claims. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226-27 (5th Cir. 1996); *see also Torres v. McHugh*, 701 F. Supp. 2d 1215, 1219-20 (D.N.M. 2010) ("When presented with this question, all four Courts of Appeals held that, in order to bring a retaliation claim under Title VII, the plaintiff must have personally engaged in some form of protected activity. Mere association with a person who engaged in protected activity is not sufficient").

While considering whether public policy might be better served by a rule allowing a cause of action under Title VII for those who suffer retaliation as a result of a close associate's protected conduct, the courts of appeals ultimately have concluded that it is not for the courts, but for Congress, to establish such an automatic rule of standing under the statute. *See Fogleman*, 283 F.3d at 569 ("The preference for plain meaning is based on the constitutional separation of powers – Congress makes the law and the judiciary interprets it. In doing so we generally assume that the best evidence of Congress's intent is what it says in the texts of the statutes"); *EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1247 (D.N.M. 2008) ("expanding the scope of persons by whom an action can be brought beyond the clear language of the statute is not within the purview of the courts, but is the responsibility of Congress").

Petitioner argues that "Congress undoubtedly anticipated that third party reprisals would be among the forms of retaliation to which employers might

resort," Pet. Brief at 16, pointing out that a number of federal statutes specifically bar certain forms of third party retaliation. *Id.* at 18. That Congress has seen fit to include explicit third party retaliation protection in other statutes but not in Title VII, however, only further undermines the notion that Section 704(a), by its terms, permits such a cause of action.

"'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004)). Because the text of Section 704(a) plainly applies only to those who personally have engaged in statutorily protected conduct, third party retaliation claims are not available under Title VII, and the court below was correct in refusing to allow Petitioner to proceed on that basis.

B. Third Parties Do Not Have Standing To Sue Under Section 704(a), And Even Assuming They Do, Third Parties Who Have Not Personally "Opposed" Discriminatory Employment Practices Or "Participated" In An EEO Proceeding Cannot State A Claim For Which Relief May Be Granted

Petitioner's contention that Section 706(f)(1) gives third party litigants standing to sue under Section 704(a) is equally incorrect. On its face, Section 706(f)(1) provides a right of action only for those who personally have suffered protected-status discrimina-

tion in violation of Section 703 or engaged in protected activity under Section 704(a).

Section 706, codified at 42 U.S.C. § 2000e-5, begins by authorizing the EEOC to "prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title."[4] 42 U.S.C. § 2000e-5(a); among other things, Section 706 directs the EEOC to investigate charges filed by or on behalf of aggrieved persons "alleging that an employer … has engaged in an unlawful employment practice …." 42 U.S.C. § 2000e-5(b). After setting forth the rights and responsibilities of those seeking to file administrative charges of discrimination, Section 706 goes on, in subsection (f)(1), to grant a private right of action to the charging party "claiming to be aggrieved … by an alleged unlawful employment practice." 42 U.S.C. § 2000e-5(f)(1).

Contrary to Petitioner's contention, Section 706(f)(1) provides only those who have been aggrieved by an unlawful employment practice, as defined in Sections 703 and 704, with a private right of action. Accordingly, Petitioner would have standing to sue under Section 706(f)(1) only if he alleged that he either was discharged because of his own race, color, religion, sex or national origin, or was retaliated against because he opposed discriminatory employment practices or participated in an EEO proceeding.

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[4] Section 703 defines "unlawful employment practice" as discrimination "because of" an individual's race, color, religion, sex or national origin, 42 U.S.C. § 2000e-2(a)(1), and Section 704 defines "unlawful employment practice" as discrimination against any employee because he has either opposed discriminatory employment practices or has "made a charge, testified, assisted, or participated in any manner" in a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a).

As this Court has observed, "[s]tatutory construction … is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear …." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). To the extent that a Title VII plaintiff has standing to sue under Section 706(f)(1) only if he or she has suffered an "unlawful employment practice" as defined by Sections 703 and 704, Petitioner's contention that Section 706(f)(1) provides an independent basis for his third party retaliation claim is mistaken.

Unlike Title VII, the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, not only prohibits retaliation against those who oppose discrimination or participate in proceedings under the Act, but also provides that "it shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of … or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act." 42 U.S.C. § 12203(b). Based on its similarities to language contained in the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, courts have construed Section 12203 as allowing certain third party retaliation claims. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002).

The ADA also contains a provision expressly prohibiting discrimination against those associated with individuals with disabilities. Under Section 102 of the ADA, an employer commits a discriminatory employment practice by "excluding or otherwise

denying equal jobs or benefits to a qualified individual because of the known disability of an individual *with whom the qualified individual is known to have a relationship or association* ...." 42 U.S.C. § 12112 (emphasis added).

Thus, even though Title VII and the ADA share a common goal of redressing unlawful workplace discrimination, Congress included an express association discrimination provision in the ADA, but not in Title VII. And although Title VII preceded the enactment in 1990 of the ADA, Congress had an opportunity, but declined, to include similar language in Title VII when it amended the statute in 1991 – only one year after it passed the ADA. Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. Furthermore, as the Court has explained, 'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2349 (2009) (citations omitted).

Title VII does not contain broad anti-intimidation language or any provision expressly prohibiting discrimination against an individual based on his or her association with a member of a Title VII-protected class. Nor is there a single shred of textual support for creating an implied right of action or conferring "aggrieved person" status upon a third party who neither has (1) alleged discrimination because of *his* race, color, religion, sex or national origin nor (2) *himself* opposed Title VII discrimination or participated in a Title VII proceeding. Courts that have recognized an implied Title VII "association" dis-

crimination cause of action generally have done so on the basis that the plaintiff's *own* protected status actually resulted in the discriminatory employment practice, *e.g.*, but for the plaintiff's race (white), she would not have been subjected to unlawful workplace harassment based on her marriage to an African-American man. *See Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008) ("where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race"). Therefore, whether "aggrieved" in a broad sense or not, third party associates who have not personally engaged in statutorily protected conduct cannot state an actionable claim under Section 704(a).

C. The EEOC's Interpretation Of The Breadth Of Section 704(a), As Expressed In Its Compliance Manual, Is Not Entitled To Any Judicial Deference

As Petitioner has observed, "[s]ince 1984, the [EEOC's] Compliance Manual has stated that third party reprisals violate section 704(a)." Pet. Brief at 22 (footnote omitted). Nevertheless, and despite Petitioner's contention to the contrary, the EEOC's view that Section 704(a) provides a cause of action for third party retaliation by those who have not personally engaged in statutorily protected conduct is not entitled to any judicial deference.

EEOC interpretations contained in its *Compliance Manual* are not entitled to any deference under the principles established by this Court in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). *See Ledbetter v. Goodyear Tire*

& Rubber Co., 550 U.S. 618, 643 (2007) ("we have previously declined to extend *Chevron* … deference to the Compliance Manual, and similarly decline to defer to the EEOC's adjudicatory positions") (citation omitted), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act, 123 Stat. 5 (2009); *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference"). As Judge Griffin, dissenting from the panel majority's decision below, observed, "the EEOC cannot expand its own authority by simply publishing a compliance manual and expect the court to defer to its view that the statute means more than what the statutory language supports," pointing out that "at oral argument, counsel for the EEOC conceded that, in the present case, its compliance manual is not entitled to *Chevron* deference." Pet. App. 90a.

Furthermore, this Court has said that EEOC interpretive guidance is "'entitled to respect' under our decision in *Skidmore v. Swift & Co*., 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *AMTRAK v. Morgan*, 536 U.S. 101, 111 (2002) (citations omitted). The EEOC in its *Compliance Manual* declares:

> Title VII, the ADEA, the EPA, and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights …. Retaliation against a close relative of

> an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees.

EEOC Compl. Man. § 8-II(B)(3)(c): Retaliation, at 8-9 (1998 & Supp. 2010) (footnote omitted).[5] That the EEOC treats both Title VII and the ADA's anti-retaliation provisions in an identical manner, despite their textual differences, is reason enough to reject its policy position. Further justification is found, however, in the fact that the EEOC cites only four federal court decisions in support of its contention that third party retaliation is cognizable under Section 704(a), only two of which (district court rulings) arguably advance the agency's policy position. Indeed, neither of the appeals court decisions cited by the EEOC actually supports its sweeping contention that third party retaliation claims are available under Title VII. *See EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993); *Holt v. JTM Indus.*, 89 F.3d 1224 (5th Cir. 1996).

In *EEOC v. Ohio Edison Co.*, the plaintiff's employer withdrew an offer of reinstatement after the plaintiff's co-worker "protested [the plaintiff's] discriminatory discharge on his behalf and threatened that a claim would be filed for the discriminatory discharge." *Holt*, 89 F.3d at 1227 n.2. There, the Sixth Circuit "held that an employee is protected from retaliation where the employee's representative opposes a discriminatory practice." *Id.*

Expressly declining to extend third party retaliation protection to a plaintiff suing under a similar provision of the Age Discrimination in Employment

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[5] *Available at* http://www.eeoc.gov/policy/docs/retal.pdf, at 16.

Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, the Fifth Circuit in *Holt*, distinguishing *Ohio Edison*, explained, "the fact that the employee [in *Ohio Edison*] had engaged a 'representative' to act on his behalf to protest his discharge illustrates that the employee had opposed a discriminatory employment practice, as required under the anti-retaliation provision of Title VII." 89 F.3d at 1227 n.2. Forced to reconcile *Holt* with its own, contrary interpretation, the EEOC in its enforcement guidance merely states, "[t]he Commission disagrees with the Fifth Circuit's holding." EEOC Compliance Manual § 8-II(B)(3)(c): Retaliation, at 8-10 n.27 (1998 & Supp. 2010).[6]

For the reasons expressed above, the EEOC's view that Section 704(a) should – and therefore does – expressly prohibit retaliation against third parties is singularly unpersuasive and therefore is not entitled even to *Skidmore* deference.

II. SECTION 704(a) ALREADY CONTAINS SUFFICIENTLY BROAD ANTI-RETALIATION PROTECTION FOR THOSE WHO "OPPOSE" DISCRIMINATORY EMPLOYMENT PRACTICES OR "PARTICIPATE" IN EEO PROCEEDINGS

In addition to undermining the plain meaning of Title VII, expanding Section 704(a) to encompass claims of retaliation brought by third parties is unwarranted, since it "already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assisting or participating in any manner' in a proceeding under Title VII." *Smith v. Riceland Foods*, 151 F.3d 813, 819

[6] *Available at* http://www.eeoc.gov/policy/docs/retal.pdf, at 17.

(8th Cir. 1998) (citing *Holt*, 89 F.3d at 1226-27). As the Eighth Circuit in *Smith* observed, expanding Section 704(a) in such a manner thus "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation." *Id.*

Title VII already protects co-worker/relatives and co-worker/close associates who have taken purposeful action to support or assist in an individual's claim. Indeed, "[i]n most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination," *Holt*, 89 F.3d at 1227, which itself is statutorily protected conduct, either under Section 704(a)'s "opposition" clause or its "participation" clause. 42 U.S.C. § 2000e-3(a). *See also EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir. 1993) (worker who opposes Title VII discrimination as the representative of another employee is protected under Section 704(a)).

Petitioner and his *amici's* declaration that "third party reprisals … are not an isolated phenomenon, and instead reflect a pattern of retaliatory abuses …," Brief *Amici Curiae* of the National Women's Law Center, at 15, is a gross exaggeration. They contend that "the number and breadth" of third party retaliation allegations brought in federal court over the years "suggest that employers not infrequently use such measures as a tremendously effective form of retaliation that may go unremediated unless the Court rejects the Sixth Circuit's rule," *id.* at 2, yet they refer to only about a dozen cases, the earliest of which dates back to 1995.

In Fiscal Year 2009, the Administrative Office of the U.S. Courts reported that a total of 14,036 em-

ployment discrimination actions (excluding ADA cases and approximately 1,500 docketed appeals) were brought in federal court. Admin. Ofc. of the U.S. Courts, *Judicial Bus. of the U.S. Courts*, Tables B-7 & C-2 (FY 2009).[7] In addition, "the number of retaliation claims filed with the EEOC has proliferated in recent years," *see Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846, 855 (2009) (citations omitted), last year surpassing race discrimination as the most frequently-cited charge allegation. EEOC Charge Statistics (FY 2009).[8] If third party retaliation were as pervasive as Petitioner claims, surely the case law would amount to more than a handful of appeals court rulings and a dozen or so trial court decisions.

III. A RULE PERMITTING THIRD PARTIES TO SUE FOR RETALIATION BASED ON THE PROTECTED ACTIVITY OF THEIR ASSOCIATES WOULD CREATE UNACCEPTABLE CONFUSION IN THE COURTS – AND AMONG EMPLOYERS SEEKING TO COMPLY – AS TO WHICH RELATIONSHIPS OR ASSOCIATIONS WARRANT TITLE VII PROTECTION

Recognizing third party retaliation claims under Section 704(a) also would expose employers to the risk of having to defend lawsuits brought by an entirely new class of Title VII plaintiffs whose mere

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[7] *Available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/B07Sep09.pdf & http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02Sep09.pdf

[8] *Available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

association with an individual who engaged in statutorily-protected conduct would give rise to a viable cause of action under the Act. As the Fifth Circuit observed in *Holt*, "if we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation?" 89 F.3d at 1227.

Indeed, what standard would a court apply in deciding whether or not the plaintiff made out a *prima facie* case, or in instructing a jury at the conclusion of trial? Would it be sufficient for a plaintiff to allege that (1) her employer is aware that she is friends with her co-worker, Charlie, (2) Charlie complained internally of discrimination, and (3) because of *Charlie's* conduct – which she asserts constituted statutorily protected activity – *she* was discharged? How would an employer, as a threshold matter, go about defending itself against such a claim?

Subjecting employers to the predictable flood of frivolous retaliation charges and lawsuits that would result from an expansion of Section 704(a) – despite the questionable need for such an interpretation – would frustrate their efforts to address workplace issues proactively and would impose an unmanageable burden on their compliance efforts. Employers would be placed in the untenable position of having to speculate about possible relationship(s) an employee may have that could give rise to potential liability each time they contemplate disciplinary or other action against that employee. Such an interpretation of Title VII would be at odds with the fundamental purpose of the statute, which was not intended to "'diminish traditional management prerogatives.'" *Texas Dep't of Community Affairs v.*

Burdine, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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