No. 09-291

# In the Supreme Court of the United States

ERIC L. THOMPSON, PETITIONER

*v.*

NORTH AMERICAN STAINLESS, LP

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTIONS PRESENTED

1. Whether the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), prohibits an employer from responding to an employee's protected activity by dismissing a closely associated employee.

2. If so, whether the closely associated employee may sue the employer for retaliation.

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This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. Petitioner, Eric Thompson, and Miriam Regalado both worked at a stainless steel manufacturing plant in Kentucky owned by respondent. Pet. App. 3a. They began dating while employed at the plant and became engaged to be married. *Ibid.* "[T]heir relationship was common knowledge at North American Stainless." *Ibid.*

In September 2002, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that her supervisors had discriminated against her based on her sex. Pet. App. 3a. The EEOC notified respondent of this charge on February 13, 2003. *Ibid.*

On March 7, 2003, respondent terminated petitioner. *Ibid.*

2. Petitioner filed a charge with the EEOC alleging that respondent had terminated him solely because of his fiancée's protected activity and that this conduct violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* That provision provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice 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); see Pet. App. 4a. The EEOC investigated and concluded that there was "reasonable cause to believe that [respondent] violated Title VII." *Ibid.*

After the EEOC issued a right-to-sue letter, petitioner filed suit in district court. The district court granted respondent's motion for summary judgment. It concluded that "under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engaged in protected activity." Pet. App. 104a.

3. The court of appeals initially reversed, see Pet. App. 64a-90a, but then granted respondent's petition for rehearing en banc and affirmed the district court's grant of summary judgment for respondent. See *id.* at 1a-63a.

The en banc court concluded that "the plain and unambiguous statutory text" of 42 U.S.C. 2000e-3(a) limits "the authorized class of claimants * * * to persons who

have personally engaged in protected activity." Pet. App. 2a.

The court of appeals noted that Title VII "empowers a 'person claiming to be aggrieved' to bring a civil action to enforce the prohibitions against unlawful employment practices contained in the substantive provisions of the statute." Pet. App. 9a n.1 (quoting 42 U.S.C. 2000e-5(f)(1)). The court of appeals also noted that it had previously interpreted this provision to "show[] a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution." *Id.* at 10a n.1. In the court of appeals' view, petitioner was an "'aggrieved' person" under this standard since "(1) he suffered an injury-in-fact (termination of his employment), (2) as a result of [respondent's] putatively illegal conduct, and (3) it is possible, instead of merely speculative, that his injury is redressable." *Ibid.*

The court of appeals nonetheless held that petitioner did not have a "cause of action" under 42 U.S.C. 2000e-3(a) because petitioner "is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice." Pet. App. 8a. It noted that the Third, Fifth, and Eighth Circuits had all "rejected such third-party retaliation claims" and that "no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity." *Id.* at 11a, 17a.

The court said that its "interpretation does not undermine the anti-retaliation provision's purpose because retaliation is still actionable, but only in a suit by a primary actor who engaged in protected activity and not by a passive bystander." Pet. App. 28a-29a. It went on to

note that "[a]ll of the parties in this case agreed at oral argument that if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to [Section 2000e-3(a)] and, under *Burlington Northern*, defendant's termination of [petitioner] potentially could be deemed an 'adverse employment action' against her." *Id.* at 29a n.10 (quoting *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53 (2006) (*Burlington Northern*)).

Judge Rogers concurred in the result. Pet. App. 29a-33a. In his view, 42 U.S.C. 2000e-3(a) "dictates what practices amount to unlawful retaliation, not who may sue." Pet. App. 30a. He went on to conclude that taking adverse action against someone closely associated with an employee in retaliation for the employee's filing an EEOC charge would clearly constitute unlawful retaliation against the employee. *Id.* at 29a-30a. Nonetheless, the concurring judge thought that petitioner's suit failed because he was not a "person aggrieved" within the meaning of Section 2000e-5(f). "The intended beneficiaries of the anti-retaliation provision of [Section] 2000e-3(a) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation. It follows that in the retaliation context 'persons aggrieved' must be interpreted to be the persons retaliated against." *Id.* at 32a. Accordingly, Judge Rogers concluded that Regalado, not petitioner, should have brought the claim in this case. *Id.* at 32a-33a.

In one of three dissenting opinions, Judge White stated that "[a]ll members of the en banc panel appear to agree that the firing of an employee's co-worker-spouse (or co-worker-fianc[é]) in retaliation for the employee's opposition to an unlawful employment practice

is unlawful" under Section 2000e-3(a). Pet. App. 53a; see *id.* at 53a-63a. She said the only disagreement centered on whether "the fired spouse has a right to sue under Title VII." *Id.* at 53a.

In Judge White's view, the majority mistakenly looked for the answer to the question of who could sue in the substantive prohibition of 2000e-3(a). That provision "is addressed to declaring that particular conduct by an employer constitutes an unlawful employment practice," not to the separate question of who has a cause of action. Pet. App. 56a. "[O]nce the employer's conduct is found to violate" that section, "there is no reason to look back to [it] to determine who may maintain an action based on the violation." *Id.* at 58a. According to Judge White, the question of whether petitioner could sue turned solely on whether he was "aggrieved by the unlawful employment practice" within the meaning of Section 2000e-5(b). *Ibid.* He clearly was, in her view, because he had lost his job as a result of the unlawful employment practice he challenged. *Id.* at 58a-59a.

Judge Martin, in dissent, contended that petitioner should have been afforded an opportunity to prove he had actually engaged in protected activity himself and that "his employer knew of his unexpressed opposition [to its treatment of Regalado] and fired him for that reason." Pet. App. 38a; see *id.* at 33a-38a. Judge Moore argued that "the majority's plain-language interpretation of the statute defeats the Congressional purpose." *Id.* at 41a; see *id.* at 38a-53a.

## DISCUSSION

### CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION, WHILE ERRONEOUS, DID NOT CREATE A DIVISION IN THE CIRCUITS OR A SIGNIFICANT GAP IN THE STATUTE'S COVERAGE

As the court of appeals acknowledged, responding to an employee's protected activity by dismissing a closely associated employee is unlawful retaliation under 42 U.S.C. 2000e-3(a). The court nonetheless erred by concluding that the dismissed, closely-associated employee cannot challenge his dismissal in court. Title VII provides a cause of action for any party "aggrieved" by an unlawful employment practice, and an employee dismissed as a direct and proximate result of such a practice meets this standard. Although the court of appeals erred, this Court's review is not warranted. There is no conflict in the circuits on the dispositive question presented by this case. All four courts of appeals to address it have concluded that plaintiffs in petitioner's position cannot pursue retaliation claims under Title VII and civil rights statutes with analogous provisions. Decisions cited by petitioner permitting such claims to proceed under other statutes are inapposite because of differences in the relevant provisions and enforcement schemes. Finally, since third-party retaliation remains an illegal employment practice in the Sixth Circuit, the court of appeals' decision does not create the kind of disturbing gap in Title VII's coverage that might warrant this Court's intervention even without a conflict in the circuits.

#### A. There Is No Division In The Circuits

1. Four courts of appeals have considered third-party retaliation claims asserted by employees in the

position of petitioner under Title VII or statutes with substantially identical anti-retaliation provisions, and all four have rejected them. See Pet. App. 2a; *Fogleman* v. *Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3d Cir.) (Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*), cert. denied, 537 U.S. 824 (2002); *Smith* v. *Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (Title VII); *Holt* v. *JTM Indus., Inc.*, 89 F.3d 1224, 1226-1227 (5th Cir. 1996) (ADEA), cert. denied, 520 U.S. 1229 (1997).

It is true that the courts have taken somewhat different routes to this result. See Pet. 32-33, 35-36. The Third and Eighth Circuits appear to have concluded that the substantive prohibitions against retaliation do not prohibit actions taken against someone other than the employee engaged in protected activity. See *Fogleman*, 283 F.3d at 568; *Smith*, 151 F.3d at 819.[1] By contrast, the Fifth Circuit identified the defect in the suit before it as one of "standing," *Holt*, 89 F.3d at 1226, while the court of appeals in this case held that petitioner had no "cause of action," Pet. App. 9a. Such analytical deviations on route to the same bottom-line result, however, do not merit this Court's attention.[2]

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[1] As noted below (p. 15, *infra*), that conclusion is inconsistent with the interpretation of the anti-retaliation provision articulated in *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), and those courts would likely reconsider their views in light of that decision if presented with the question again.

[2] Nor is there any conflict with other Title VII cases briefly discussed by petitioner. See Pet. 30-31. Although *Wu* v. *Thomas*, 863 F.2d 1543 (11th Cir. 1989), involved a claim of third-party retaliation, both employees (the one who engaged in protected activity and the one who was allegedly the subject of adverse employment actions as a result) were plaintiffs, and the defendant did not make the argument advanced by respondent in this case. In *McDonnell* v. *Cisneros*, 84 F.3d 256 (7th

In addition, further percolation in the courts of appeals on this issue is warranted. Until the decision in this case, no court appears to have addressed petitioner's argument that he may challenge the retaliation directed at Regalado because he was "aggrieved" by it within the meaning of Article III and 42 U.S.C. 2000e-5(f)(1). See Pet. 22-23; see also Pet. App. 53a-63a (White, J., dissenting). This Court's ultimate review of this argument would benefit from its further evaluation by lower courts.

2. Nor is this Court's review warranted to reconcile what petitioner contends is a conflict between the court of appeals' decision and those from other courts construing third-party retaliation claims arising under a variety of other statutes. See Pet. 26-32. Those statutes have differently worded substantive provisions, different enforcement schemes, or both. The differences in outcomes highlighted by petitioner thus do not constitute a conflict.

For example, petitioner cites several cases involving the National Labor Relations Act (NLRA), 29 U.S.C. 158(a). See Pet. 26-28. Those cases found that third-party retaliation violated 29 U.S.C. 158(a)(1) of the NLRA, which makes it an unlawful labor practice "to interfere with, restrain, or coerce employees in the exer-

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Cir. 1996), the court held that an employee who was subject to retaliation for failing to have another employee withdraw her sexual harassment complaints had a cause of action because he had effectively "opposed" the sexual harassment himself by refusing to silence the complainant. *Id.* at 262. He had thus engaged in protected activity. *Ibid.* In *Drake* v. *Minnesota Mining & Manufacturing Co.*, 134 F.3d 878 (7th Cir. 1998), the court merely "assume[d]" without deciding that an employee could assert a claim for "retaliation based on her husband's protected activities," but found no retaliation because the actions she complained of were not substantial enough. *Id.* at 886.

cise of the rights guaranteed in" the NLRA. Title VII includes no comparable provision, so the two lines of authority are not in conflict.[3] In addition, individual employees cannot file unfair labor practice claims in the federal courts, but are limited to filing unfair labor practice charges with the NLRB. Whether to proceed at all on those charges is a matter confided to the unreviewable discretion of the NLRB General Counsel, who is responsible for prosecuting the case before the Board if a complaint issues. See *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987). Thus, the question of who is the proper plaintiff in a third-party retaliation case is not implicated in NLRA cases.

In *Reich* v. *Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir. 1994), the court found that the dismissal of an employee who was the "special friend" of another employee in response to the second employee's complaints about health and safety violations violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c).[4] *Reich*, 26 F.3d at 1188-1189; see Pet. 28.

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[3] Petitioner also points to a portion of *Fogleman*, 283 F.3d at 564, 570-571, that permitted a claim for third-party retaliation to proceed under the Americans With Disabilities Act (ADA), 42 U.S.C. 12101, *et seq.* See Pet. 32. *Fogleman* rested its holding on 42 U.S.C. 12203(b), which, borrowing language from the NLRA, makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of * * * any right granted or protected by this chapter." 283 F.3d at 570. Since Title VII includes no such provision, *Fogleman*'s analysis of a claim of third-party retaliation under the ADA does not conflict with the court of appeals' decision in this case.

[4] That provision provides in relevant part that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise

The suit in that case was not brought by the discharged employee, however, but rather by the Secretary of Labor. See *Reich*, 26 F.3d at 1188; 29 U.S.C. 660(c)(2). It thus did not present the question of which employee would have a private "cause of action" in a case of third-party retaliation and does not conflict with the court of appeals' decision here.[5]

Nor is there any conflict between the court of appeals' decision here and *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586 (1st Cir. 1989). See Pet. 29. That case involved a provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, that makes it unlawful "to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." 29 U.S.C. 1140. The First Circuit found that an employer's dismissal of an employee (a "participant") because of a suit against the employer by his ex-wife (a "benefi-

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by such employee on behalf of himself or others of any right afforded by this chapter." 29 U.S.C. 660(c)(1).

[5] For the same reason, there is no conflict between the court of appeals' decision here and *Brock* v. *Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985), which involved the anti-retaliation provision applicable to the Equal Pay Act, 29 U.S.C. 215(a)(3) (making it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."). See Pet. 28. Like the court of appeals here (Pet. App. 29a n.10), the Eleventh Circuit found third-party retaliation unlawful. See *Brock*, 765 F.2d at 1037-1038. Since the suit was brought by the Secretary of Labor, see *id.* at 1029, *Brock* did not present the question of which employee would be the proper plaintiff in a private action challenging the discharge.

ciary") violated this provision and could be challenged in a suit by the dismissed employee. *Fitzgerald*, 882 F.2d at 589-590. Given that Section 1140 prohibits retaliation against both a "participant" and a "beneficiary" and that ERISA's civil enforcement provision expressly provides for suits by either, 29 U.S.C. 1132(a), the First Circuit's analysis does not conflict with the court of appeals' interpretation of the distinct terms of Title VII.

### B. The Court Of Appeals' Decision Does Not Leave A Substantial Gap In Title VII's Coverage

Petitioner contends that review is warranted because "[u]nder the decision of the court below, the very act of cooperating with EEOC investigators now carries a clear and unredressable risk of harm" because employers can freely retaliate against the cooperator's family members. Pet. 39-40. This concern is based on a misreading of the court of appeals' decision. The court of appeals did not hold that third-party retaliation is outside the scope of Section 2000e-3(a). See Pet. App. 28a-29a & n.10; see also *id.* at 53a (White, J., dissenting) ("All members of the en banc panel appear to agree that the firing of an employee's co-worker-spouse (or co-worker-fianc[é]) in retaliation for the employee's opposition to an unlawful employment practice is unlawful under [Section] 704(a), 42 U.S.C. § 2000e-3(a)."). Instead, the court of appeals held that this unlawful employment practice could be challenged only by the employee who engaged in the protected activity and not by the employee who did not. *Id.* at 28a-29a & n.10.

As explained below, the United States believes this interpretation of the statute was erroneous, and it also believes that it unnecessarily reduces the efficacy of the prohibition on retaliation by barring third-party retalia-

tion claims by plaintiffs with the greatest incentive to pursue them. Nonetheless, because third-party retaliation remains an unlawful employment practice in the Sixth Circuit, the court of appeals' decision has not created the kind of substantial gap in the statute's coverage that might merit this Court's review when there is no conflict in the circuits.

Although the United States agrees with petitioner that permitting suit by the employee who suffered the economic injury as the result of the retaliation (here, petitioner) would simplify remedial issues in a third-party retaliation case, it disagrees that a suit by the employee in Regalado's position would be incapable of providing a remedy to the dismissed employee. See Pet. 15. Regalado would have had Article III standing to challenge the dismissal of petitioner because that dismissal violated *her* statutory right to be free of retaliation for engaging in protected activity. See *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."). Moreover, if Regalado had brought such a suit and established a violation, the district court could have used its broad equitable power to fashion an appropriate remedy, which could have included recompense for petitioner. See 42 U.S.C. 2000e-5(g) (court in Title VII case authorized to award "such affirmative action as may be appropriate" and "any other equitable relief * * * the court deems appropriate"); *Castle* v. *Rubin*, 78 F.3d 654, 657 (D.C. Cir. 1996) ("The district court has broad discretion to fashion appropriate equitable relief for a Title VII plaintiff.").

### C. The Court Of Appeals Erred In Concluding That An Employee Dismissed Because Of The Protected Activity Of A Closely Associated Employee Cannot Maintain A Title VII Action

#### *1. Third-party retaliation is an unlawful employment practice*

As all the judges on the en banc court of appeals appear to have agreed, dismissing an employee as retaliation for his fiancée's protected activity is an unlawful employment practice prohibited by 42 U.S.C. 2000e-3(a). See Pet. App. 29a n.10; see also *id.* at 53a (White, J., dissenting). Respondent "discriminate[d] against" Regalado because she filed an EEOC complaint. 42 U.S.C. 2000e-3(a). Other employees—the ones who did not engage in protected activity—did not have their fiancés fired.

In *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), the Court held that Title VII's anti-retaliation provision prohibited more than just a "materially adverse change in the terms and conditions" of employment. *Id.* at 60 (citation omitted). Instead, it prohibits all actions that a "reasonable employee would have found * * * materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks and citations omitted). As the Court explained, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Id.* at 63.

An employer can effectively retaliate against an employee by directly causing a significant harm to a family member, spouse, or other closely associated individual.

See *Burlington Northern*, 548 U.S. at 63-64 (citing as example of unlawful retaliation by the Federal Bureau of Investigation (FBI) "the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] *and his wife*") (citation omitted; brackets in original; emphasis added). A reasonable employee would likely find dismissal of a family member or other closely associated person, such as a fiancé, "materially adverse": the prospect that it would happen upon filing a charge might very well persuade her not to file. Respondent's dismissal of petitioner in response to Regalado's protected activity thus constituted an unlawful employment practice in violation of Section 2000e-3(a).

In *Fogleman*, the Third Circuit held that the anti-retaliation provision of the ADEA, which is substantially identical to the one in Title VII, "allow[ed] an employer to retaliate against a third party with impunity" in response to an employee's protected activity. 283 F.3d at 564. The court acknowledged that this reading of the anti-retaliation provision was contrary to its purpose since "[t]here can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights." *Id.* at 568-569. Nonetheless, in the court's view, "[t]he plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity." *Id.* at 568. The Eighth Circuit also held that "Title VII's anti-retaliation provision" does not "prohibit employers from taking adverse action against employees whose spouses or significant others have engaged in statutorily protected activity against the employer." *Smith*, 151 F.3d at 819.

Both *Fogleman* and *Smith* were issued before this Court's decision in *Burlington Northern*. In light of that decision, it is now clear that responding to an employee's protected activity by dismissing a closely associated employee would violate the prohibition on retaliation. "[T]he person retaliated against" in such a case *is* "the person who engaged in the protected activity," *Fogleman*, 283 F.3d at 568, since a reasonable employee in that position "would have found" the dismissal of someone close to her "materially adverse, which in this context means it well might have dissuaded [her] from making or supporting a charge of discrimination," *Burlington Northern*, 548 U.S. at 68 (internal quotation marks and citation omitted).

***2. Petitioner was "aggrieved" by the unlawful employment practice he challenged and thus had standing and a cause of action***

a. The court of appeals concluded that petitioner could not challenge the unlawful employment practice at issue in this case because he had no "cause of action under [Section] 704(a) of Title VII." Pet. App. 9a. The court's analytical approach to this question was erroneous.

In reaching its conclusion that petitioner had no "cause of action," the court of appeals relied on *Davis* v. *Passman*, 442 U.S. 228 (1979). See Pet. App. 9a & n.1. In that case, this Court addressed the question "whether a cause of action and a damages remedy can * * * be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated." *Davis*, 442 U.S. at 230. The answer to that question required an altogether different analysis than the one needed here. As *Davis* explained, "the question of who

may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241.

When statutory rights are at issue, "it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." *Davis*, 442 U.S. at 241. In the case of Title VII, Congress did so in 42 U.S.C. 2000e-5(f)(1), where it provided a cause of action for a "person claiming to be aggrieved" by a violation of the statute. The question of who is a proper Title VII plaintiff is thus governed by that express statutory provision, see Pet. App. 30a (Rogers, J., concurring), not by the test courts apply when deciding whether to provide a remedy in the *absence* of a statutory cause of action. See Pet. 23. Accordingly, the question whether petitioner can challenge the unlawful employment practice at issue in this case turns on whether he was a "person claiming to be aggrieved" by it within the meaning of the express statutory cause of action in 42 U.S.C. 2000e-5(f)(1). Since the court of appeals held that petitioner was in fact "aggrieved" within the meaning of this provision, see Pet. App. 10a n.1, 13a n.4, it should have concluded that his suit could proceed.

b. Judge Rogers in concurrence concluded that petitioner was not a "person aggrieved" within the meaning of 2000e-5(f)(1) because that provision had to be interpreted in light of the prudential standing rule that prohibits plaintiffs from asserting the legal rights of third-parties. Pet. App. 31a-32a (citing *Kowalski* v. *Tesmer*, 543 U.S. 125 (2004)). Because petitioner sought to challenge an act of retaliation taken in response to Regalado's activity, Judge Rogers concluded petitioner lacked prudential standing to proceed. See *ibid.* This analysis

fails in light of Congress's modification of prudential standing requirements in the context of Title VII. See *id.* at 9a n.1.

"[U]nlike their constitutional counterparts," prudential standing requirements "can be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Court held that Congress had relaxed prudential standing requirements for plaintiffs asserting claims under the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, which authorized suit by "[a]ny person who claims to have been injured by a discriminatory housing practice * * * (hereafter "person aggrieved")." *Trafficante*, 409 U.S. at 206 n.1 (quoting 42 U.S.C. 3610(a) (1982)). In doing so, the Court expressly analogized the Fair Housing Act's suit provision with the very similar one in Title VII and favorably cited a court of appeals decision holding that Congress had modified prudential standing requirements related to that statute as well. *Id.* at 209 (citing *Hackett* v. *McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971)).

In light of Congress's exercise of its prerogative to modify prudential standing requirements in Title VII cases, petitioner was "aggrieved" by his own dismissal within the meaning of 42 U.S.C. 2000e-5(f)(1). Crucially, his employment was terminated as a direct and proximate result of the unlawful employment practice he sought to challenge. He was thus not just "any person affected by the imposition of retaliation." Pet. App. 31a n.1 (Rogers, J., concurring). The purpose behind the

retaliation was to punish Regalado, but its sole practical target was petitioner.[6]

c. The conclusion that petitioner's suit should have been permitted to proceed is also consistent with the EEOC's longstanding view. The EEOC has stated that "[r]etaliation 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) (1998); see *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (EEOC Compliance Manual "reflect[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (internal quotation marks omitted).

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[6] Given the tight nexus between petitioner's injury and the employment practice he sought to challenge, the conclusion that he was a party "aggrieved" with his own cause of action did not require the court of appeals to rely on the full reach of its precedent holding that Congress intended the person "aggrieved" provision to eliminate *all* prudential standing requirements and thus "define standing under Title VII as broadly as is permitted by Article III of the Constitution." Pet. App. 10a n.1; see Pet. 24. Questions about the outer reaches of the meaning of persons "aggrieved" are therefore not presented by this case, and this case is not a suitable vehicle for resolving them.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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