No. 09-291

In the Supreme Court of the United States

ERIC L. THOMPSON, PETITIONER

v.

NORTH AMERICAN STAINLESS, LP

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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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. Whether that closely associated employee may sue the employer for retaliation.

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964 prohibits an employer from retaliating against an employee because she engaged in protected activity, such as filing a complaint with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. 2000e-3(a). The Attorney General is responsible for enforcing Title VII against public employers, and the EEOC enforces Title VII against private employers. 42 U.S.C. 2000e-5(f)(1). In addition, Title VII applies to the United States in its capacity as the nation's largest employer. 42 U.S.C. 2000e-16. The United States thus has a strong interest in the proper interpretation of Title VII. The EEOC participated as amicus curiae in this case in the court of

appeals, and the United States filed a brief at the invitation of the Court at the petition stage of this case.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate against employees on a number of bases, including their sex. 42 U.S.C. 2000e-2(a)(1). The statute also makes it an unlawful employment practice for an employer "to discriminate against any of his employees * * * because [the employee] has opposed any practice made an unlawful employment practice by [Title VII] * * * or because he has made a charge [with the EEOC] * * * under [Title VII]." 42 U.S.C. 2000e-3(a). A separate provision of Title VII provides that a "person claiming to be aggrieved" may file a charge alleging that an employer "has engaged in an unlawful employment practice." 42 U.S.C. 2000e-5(b). Such "aggrieved" person may then intervene in a civil action instituted by the EEOC or, if the EEOC chooses not to institute such an action, file a suit himself. 42 U.S.C. 2000e-5(f)(1).

2. Miriam Regalado and petitioner both worked as quality control engineers at a stainless steel manufacturing plant in Kentucky owned by respondent. Pet. App. 3a; Thompson Dep. 15, 38. They began dating while employed there and were engaged to be married. Pet. App. 3a. "[T]heir relationship was common knowledge at North American Stainless." *Ibid.*

In September 2002, Regalado filed a charge with the EEOC alleging that her supervisors had discriminated against her based on her gender. Pet. App. 3a. The EEOC notified respondent of this charge on February 13, 2003. *Ibid.* On March 7, 2003, respondent terminated petitioner. *Ibid.*

3. 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. The EEOC investigated and concluded that there was "reasonable cause to believe that [respondent] violated Title VII." Pet. App. 4a.

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 engage in protected activity." Pet. App. 104a.

4. 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.

a. 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 acknowledged 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)). It 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. Petitioner was an "aggrieved person" under this standard, the court of appeals explained, 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). Pet. App. 8a. In its view, 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." *Ibid.* 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." *Id.* at 28a-29a. The court also noted 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 * * * defendant's termination of [petitioner] potentially could be deemed an 'adverse employment action' against her." *Id*. at 29a n.10 (citing *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53 (2006)).

b. 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 concluded that taking adverse action against someone closely associated with an employee in retaliation for the employee's filing an EEOC charge constituted unlawful retaliation against the complaining employee. *Id*. at 29a-30a. Nonetheless, Judge Rogers thought petitioner's suit failed because petitioner 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." *Id.* at 32a. Accordingly, Judge Rogers concluded that Regalado, not petitioner, should have brought the claim in this case. *Id.* at 32a-33a.

c. In one of three dissenting opinions, Judge White agreed with Judge Rogers that 42 U.S.C. 2000e-3(a) "addresses *what* is forbidden, rather than *who* is protected" or "who may and may not maintain a cause of action." Pet. App. 56a-57a (emphasis in original). "[O]nce the employer's conduct is found to violate" that section, Judge White concluded, "there is no reason to look back to [it] to determine who may maintain an action based on the violation." *Id.* at 58a. Rather, the question whether petitioner could sue turned solely on whether he was "aggrieved by an unlawful employment practice" within the meaning of Title VII's remedial provisions. *Ibid.* In Judge White's view, petitioner clearly was "aggrieved" because he had lost his job as a direct result of the unlawful employment practice he challenged. *Id.* at 58a-59a.

Judge Moore dissented because, in her view, the majority's interpretation of Title VII "defeats the Congressional purpose" and contradicts this Court's repeated holdings that the statute's anti-retaliation provision should be interpreted broadly enough to ensure that its purpose is satisfied. Pet. App. 41a.[1]

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[1] Judge Martin dissented on the further ground that petitioner should be afforded an opportunity to prove that he personally "opposed" sex discrimination and respondent fired him for that reason. Pet. App. 33a-38a. Petitioner did not seek certiorari on that ground.

SUMMARY OF ARGUMENT

Title VII's anti-retaliation provision prohibits an employer from firing an employee because someone close to him filed an EEOC complaint. When an employer engages in this form of unlawful retaliation, the dismissed employee is "aggrieved" by an unlawful employment practice and thus has a cause of action under Title VII.

1. Title VII makes it an "unlawful employment practice[]" to "discriminate" against an employee for filing a complaint with the EEOC or engaging in other protected activity. 42 U.S.C. 2000e-3(a). In order to achieve its purpose of assuring that employees have "unfettered access to statutory remedial mechanisms," Congress intended this broadly worded provision to "deter the many forms that effective retaliation can take." *Burlington N. & Sante Fe Ry.* v. *White*, 548 U.S. 53, 64 (2006) (citation omitted). Accordingly, this Court has interpreted the statute's prohibition on retaliation to cover any action that "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 every member of the en banc court of appeals agreed, firing an employee's spouse or fiancé because of the employee's EEOC complaint is unlawful retaliation against the complaining employee. The prospect that such a fate could befall a spouse, family member, or other closely associated person well might dissuade a reasonable employee from exercising her statutory right to complain about discrimination.

2. Title VII provides an express cause of action to a "person * * * aggrieved" by an employer's unlawful employment practice. See 42 U.S.C. 2000e-5(b) and (f).

This cause of action appears in Title VII's detailed remedial provisions, which are distinct from its substantive prohibitions on employer conduct.

This Court has held that statutory cause of action provisions providing remedies to those "aggrieved" by unlawful actions are meant to be "broad and inclusive." *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). As the court of appeals correctly found, petitioner was "aggrieved" within the meaning of Title VII by his own dismissal. Petitioner lost his job as the direct and intentional result of his employer's unlawful actions, and Title VII was enacted "to make" such employees "whole." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).

The general prudential bar against asserting the legal interests of others does not preclude petitioner's claim. Congress has the power to define statutory causes of action and, in exercising such power, may decide whether to incorporate or modify default prudential standing rules. When Congress provided a cause of action to a "person"—as opposed to simply an employee—"aggrieved" by an unlawful employment practice, it intended to broadly provide a remedy to injured parties and thus relaxed prudential standing requirements. The fact that respondent's motivation in dismissing petitioner was to retaliate against his fiancée does not make him any less "aggrieved" by his own termination. He was not a mere bystander or derivative victim. He suffered direct and intended injury at the hands of respondent.

The court of appeals' conclusion that petitioner, although aggrieved, had no "cause of action" under Title VII was wrong. In reaching this determination, the court mistakenly examined the statute's prohibition on

retaliation in isolation and attempted to divine whether Congress would have wanted plaintiffs like petitioner to be able to enforce that provision. This exercise was unnecessary, since Title VII's remedial provisions provide an express textual answer to the question the court of appeals asked: A "person * * * aggrieved" by an unlawful employment practice has a cause of action to challenge it. 42 U.S.C. 2000e-5(f)(1).

Title VII's plain text controls both questions presented and, moreover, is consistent both with the EEOC's longstanding interpretation of the relevant law and with sound enforcement policy. For more than 30 years, the EEOC has said that it is unlawful to dismiss an employee's family member for the employee's protected activity. Interpreting Title VII's anti-retaliation provision to permit such a pernicious form of retribution would undermine the statutory scheme, which depends on employees' willingness to file complaints. Moreover, the EEOC has also consistently taken the position that the dismissed employee in such cases has a cause of action under Title VII. That position also best effectuates the statutory scheme, as it is the dismissed employee who has the greatest economic interest in suing and is the most likely candidate to vindicate the statutory interest in a workplace free of unlawful retaliation.

ARGUMENT

I. TITLE VII BARS AN EMPLOYER FROM RETALIATING AGAINST AN EMPLOYEE WHO ENGAGES IN PROTECTED ACTIVITY BY DISMISSING THE EMPLOYEE'S RELATIVE OR OTHER CLOSE ASSOCIATE

A reasonable employee would be less likely to file an EEOC charge if she knew that doing so would lead her employer to fire her fiancé. As all the judges on the en

banc court of appeals agreed, such action by an employer thus constitutes unlawful retaliation. See *Burlington N. & Sante Fe Ry.* v. *White*, 548 U.S. 53, 68 (2006) (*Burlington Northern*); see also Pet. App. 29a n.10; *id*. at 53a (White, J., dissenting).

A. Title VII's Prohibition On Retaliation Bars All Materially Adverse Actions Taken Against Employees Because Of Their Protected Activity

Title VII makes it "an unlawful employment practice" for an employer "to discriminate against any of his employees" because of that employee's protected activity. 42 U.S.C. 2000e-3(a). In *Burlington Northern*, this Court rejected a reading of this provision that would have prohibited only retaliation that took the form of changes to the terms or conditions of employment. 548 U.S. at 60, 64. The Court concluded that such a crabbed interpretation of the anti-retaliation provision's scope was inconsistent with both its text and the role it plays in the statutory scheme.

As the Court in *Burlington Northern* noted, Title VII's central prohibition bars employers from "discriminat[ing] 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." 548 U.S. at 62 (quoting 42 U.S.C. 2000e-2(a)(1)) (emphasis in original). "The italicized words in the substantive provision * * * explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Ibid.* As the Court emphasized, however, "[n]o such limiting words appear in the antiretaliation provision." *Ibid.* That portion of the statute simply makes it an unlawful employment practice "for an employer *to*

discriminate against any of his employees" because of their protected activity. *Ibid.* (quoting 42 U.S.C. 2000e-3(a))(emphasis in original); see *id.* at 59 ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."). The Court concluded that "Congress intended its different words to make a legal difference." *Id.* at 62-63.

The Court in *Burlington Northern* also noted that the distinct language of the two provisions reflected their different purposes. While the substantive provision "seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," the "antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington Northern*, 548 U.S. at 63; see *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (anti-retaliation provision must be interpreted consistent with its purpose of ensuring that employees have "unfettered access to statutory remedial mechanisms").

The Court further explained that the anti-retaliation provision's purpose could not be achieved "by focusing only upon employer actions and harms that concern employment and the workplace" because "[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." *Burlington Northern*, 548 U.S. at 63 (emphasis in original); see also *id.* at 64 ("A provision limited to employment-related actions would not deter the many forms that effective retaliation can take.").

The Court stressed, however, that the "antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington Northern*, 548 U.S. at 67. The Court thus held that the statute prohibits any "action" 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 citation omitted).

B. Dismissal Of A Complaining Employee's Fiancé Is Materially Adverse And Thus Constitutes Unlawful Retaliation

Petitioner's dismissal constituted retaliation against Regalado under the *Burlington Northern* standard: it was a "materially adverse" action that "might * * * dissuade[] a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 68 (internal quotation marks and citation omitted).

1. As a number of courts have recognized, retaliation against an employee's family member or other close associate can be a particularly effective form of retaliation. "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB* v. *Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987) (Posner, J.); accord *Tasty Baking Co.* v. *NLRB*, 254 F.3d 114, 128 (D.C. Cir. 2001); see *Fogleman* v. *Mercy Hosp., Inc.*, 283 F.3d 561, 568-569 (3d Cir.) ("There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate antidiscrimination proceedings will deter employees from exercising their protected rights."), cert. denied,

537 U.S. 824 (2002). Indeed, this Court in *Burlington Northern* cited as an example of unlawful retaliation a case involving the Federal Bureau of Investigation's alleged "refusal, contrary to policy, to investigate death threats a federal prisoner made against [an agent who had engaged in protected activity] *and his wife*." 548 U.S. at 63-64 (quoting *Rochon* v. *Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006)) (emphasis added). The FBI's alleged refusal to investigate the death threats in that case would have been no less retaliatory had the threats been made against the agent's wife alone.

Much like the interpretation of Title VII's anti-retaliation provision the Court rejected in *Burlington Northern*, an interpretation that categorically excluded claims of third-party retaliation would fail to reach "many forms that effective retaliation can take." 548 U.S. at 64. Such an interpretation would thus "fail to fully achieve the antiretaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms." *Ibid.* (quoting *Robinson*, 519 U.S. at 346).

2. The EEOC has long held the view that Title VII's anti-retaliation provision prohibits the retaliatory termination of a complaining party's relative or other close associate. The *EEOC Compliance Manual* provides that "[t]he retaliation provision[] of Title VII * * * prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." *EEOC Compliance Manual* § 8-II(C)(3) (1998); accord *id.* § 8-II(B)(3)(c). The agency has espoused this view for more than 30 years. See, *e.g.*, EEOC Decision No. 77-34, 1977 WL 5345 (1977) ("[W]here it can be shown that an employer

discriminated against an individual because he or she was related to a person who filed a charge, it is clear that the employer's intent is to retaliate against the person who filed the charge."). Such statements, though not controlling, "reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (internal quotation marks and citations omitted); see *id.* at 399, 403 (*EEOC Compliance Manual*'s interpretation of Title VII entitled to *Skidmore* deference and will be upheld when the agency has "cho[sen] among reasonable alternatives" in interpreting the statute and "has applied its position with consistency"). The EEOC's interpretation of the statute provides additional support for the conclusion that petitioner's dismissal constituted unlawful retaliation against Regalado for the exercise of her statutory rights.

3. Despite the EEOC's longstanding position, respondent predicts the onset of "chaos in both the courts and the workplace" regarding "what types of relationships should be entitled to protection" if this Court were to adopt it. Br. in Opp. 31. But under *Burlington Northern*, the question is not whether a particular "type[] of relationship[]" is categorically "entitled to protection," *ibid.*, but instead whether an employer's action—in this case, targeting the particular relative or close associate at issue—"well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," 548 U.S. at 68 (internal quotation marks and citation omitted). That inquiry is necessarily context-specific, since "the significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 69; see *ibid.* (explaining that "[a] sched-

ule change in an employee's work schedule," for example, "may make little difference to many workers, but may matter enormously to a young mother with school-age children").

In *Burlington Northern*, the Court carefully examined the record before it to determine whether the evidence was sufficient to support a jury finding that an internal job reassignment "from forklift duty to standard track laborer tasks" and a "37-day suspension without pay" were materially adverse. 548 U.S. at 70-73. In so doing, the Court explained that "reassignment of job duties is not automatically actionable," and that the material adversity "depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position.'" *Id.* at 71 (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

Claims of third-party retaliation are subject to the same kind of examination. The closeness of the relationship will naturally play an important role in the inquiry: dismissal of a passing acquaintance is likely to bear far less significance to an employee who has engaged in protected activities than, for example, the dismissal of her fiancé. See Pet. App. 60a (White, J., dissenting) ("Where the relationship between the two employees is more attenuated, it will be more difficult to prove [an employer's] unlawful motivation."); see also *Millstein* v. *Henske*, 722 A.2d 850, 855 (D.C. 1999) ("We decline [plaintiff's] invitation to adopt a third-party reprisal theory [under the District of Columbia Human Rights Act] embracing so attenuated a relationship."). There is no basis for respondent's concern that the courts will be unable to apply the *Burlington Northern* standard to this form of retaliation, just as they do to every other.

II. PETITIONER WAS "AGGRIEVED" BY RESPONDENT'S UNLAWFUL EMPLOYMENT PRACTICE AND THUS HAS A CAUSE OF ACTION TO CHALLENGE IT

Petitioner has a cause of action under Title VII to challenge respondent's unlawful retaliation because he was "aggrieved" by his own dismissal. 42 U.S.C. 2000e-5(f). Petitioner is thus entitled to seek a remedy under Title VII.

A. Title VII Provides A Cause Of Action To A Person "Aggrieved" By An Unlawful Employment Practice

1. Title VII contains separate provisions proscribing unlawful employment practices on the one hand and governing enforcement on the other. In 42 U.S.C. 2000e-2, Congress made it "an unlawful employment practice" to, among other things, "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). In 42 U.S.C. 2000e-3 (titled "Other unlawful employment practices"), Congress prohibited retaliation. Both of those provisions proscribe certain actions by employers. Neither provision specifies how those proscriptions are to be enforced. See Pet. App. 56a (White, J., dissenting).

Congress addressed enforcement of these prohibitions in a separate portion of the statute: 42 U.S.C. 2000e-5 (titled "Enforcement provisions"). That part of Title VII makes clear that a "person" who is "aggrieved" by an unlawful employment practice may challenge it. A "person claiming to be aggrieved" may file a charge with the EEOC alleging an unlawful employment practice. 42 U.S.C. 2000e-5(b). If the EEOC (in the case of a private employer) or the Attorney General

(in the case of a public employer) later files suit, "[t]he person or persons aggrieved shall have the right to intervene." 42 U.S.C. 2000e-5(f)(1). And if neither the EEOC nor the Attorney General files suit, "the person claiming to be aggrieved" may bring his own civil action. *Ibid.*

B. Petitioner Was "Aggrieved" Within The Meaning Of Title VII

Petitioner was "aggrieved" within the meaning of Title VII's remedial provisions. He lost his job as the direct result of an unlawful employment practice—namely, unlawful retaliation against his fianceé. That injury is sufficient to provide him with a cause of action under the statute.

1. Congress's choice of the term "aggrieved" signals its intention broadly to permit individuals injured by unlawful employment practices to challenge those practices in court. See, *e.g.*, *FEC* v. *Akins*, 524 U.S. 11, 19 (1998); see also *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (calling similar cause of action provision in the Fair Housing Act "broad and inclusive"). Congress chose this broad term as a foundational element of a statutory remedial scheme whose purpose is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). And while the portion of the anti-retaliation provision applicable to employers bars retaliation against "employees or applicants," 42 U.S.C. 2000e-3(a), Title VII provides a cause of action broadly to a "*person* claiming to be aggrieved" by such an act of retaliation (or other violation of the statute), 42 U.S.C. 2000e-5(f)(1) (emphasis added).

In this case, petitioner's injury renders him "aggrieved" within the meaning of Section 2000e-5(f). The employer action he seeks to challenge was his own termination—a direct, palpable injury consciously caused by respondent. An employee whose dismissal was itself an unlawful employment practice is "aggrieved" under a statute intended to prevent and remedy exactly that type of harm. Cf. *Albemarle Paper Co.*, 422 U.S. at 421 ("[T]he scope of relief" provided in Title VII "is intended to make the victims of unlawful discrimination whole, and * * * the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.") (quoting 118 Cong. Rec. 7168 (1972)).

2. Although the majority of the court of appeals did not dispute that petitioner has standing as an "aggrieved" person, see Pet. App. 10a n.1, the concurring judge concluded that petitioner was not entitled to challenge his own retaliatory dismissal because he was not the person against whom respondent was retaliating, see *id.* at 31a-32a (Rogers, J., concurring). That conclusion is incorrect.

a. "[U]nlike their constitutional counterparts," prudential standing requirements, such as the rule limiting third-party standing, "can be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997); see *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) (same). As a general matter, this Court has made clear that Congress's use of the term "aggrieved" in a statutory cause of action provision signals Congress's intent to exercise

this authority over prudential standing rules by relaxing the normal limitation on "rest[ing] [a] claim to relief on the legal rights or interests of third parties," *Id.* at 499; see *Akins*, 524 U.S. at 19 ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested.").

The Court has on several occasions interpreted statutory causes of action using words such as "aggrieved" to permit all plaintiffs with Article III standing to bring suit. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979) ("[A]s long as the [Fair Housing Act] plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by [the statute's substantive provision], but whether [plaintiffs] were genuinely injured by conduct that violates *someone's* * * * rights" under the statute.) (emphasis in original); *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 328-329 (1999) (language permitting suit by a "person aggrieved by" certain Census methodology conferred standing as broadly as permitted by Article III); *Bennett*, 520 U.S. at 165-166 (giving similar interpretation to provision giving "any person" the right to sue under environmental statute).

In *Trafficante*, this Court interpreted the cause of action provision of the Fair Housing Act (FHA), which authorized suit by "[a]ny person who claims to have been injured by a discriminatory housing practice * * * (hereafter 'person aggrieved')," to permit tenants of a housing complex, one of whom was white, to chal-

lenge racial discrimination directed against nonwhite rental applicants. 409 U.S. at 206 n.1 (quoting 42 U.S.C. 3610(a) (1970)).[2] In reaching that conclusion, the Court analogized the FHA provision to Title VII's similar enforcement provision and favorably cited a court of appeals decision holding that Congress had broadly expanded standing beyond prudential limits in Title VII. *Id.* at 209 (citing *Hackett* v. *McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971)).

As numerous courts of appeals have held, *Trafficante*'s analogy to Title VII and the two statutes' similar remedial language suggest that *Trafficante*'s analysis of the FHA applies equally to Title VII. See *Kyles* v. *J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) (collecting cases). That analysis makes clear that petitioner—who clearly has Article III standing, see Pet. App. 10a n.1—is not barred from challenging his own dismissal merely because he was not the intended target of respondent's unlawful retaliation.

b. Contrary to the concurring judge's opinion, to acknowledge that petitioner was "aggrieved" by his own dismissal will not lead to suits by plaintiffs with only speculative and derivative injuries, such as "someone interested in the financial health of a company" seeking to "challenge the firing of a particularly productive employee" or a suit by a "dismissed employee's creditor." Pet. App. 32a. For one thing, it is not clear that such hypothetical plaintiffs would have Article III standing. A shareholder of a company has a financial interest in the company's success, not the company's employment

[2] The FHA's language since has been amended to further conform with Title VII's. It now provides that "[a]n aggrieved person" may file an administrative complaint, 42 U.S.C. 3610(a)(1)(A)(i), or a civil action, 42 U.S.C. 3613(a)(1)(A).

of any particular person. The employment of an individual is far too attenuated from a company's success—which is dependent on any number of other factors—for a shareholder's losses to be "fairly traceable" to the company's firing of that individual, let alone its commission of a Title VII violation (as opposed to the dismissal of the individual for another, lawful purpose). *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); see *Anjelino* v. *New York Times Co.*, 200 F.3d 73, 92 (3d Cir. 2000) ("indirect victims" of Title VII violation must demonstrate injuries that are "fairly traceable" to the violation). Similarly, a dismissed employee's creditor would have no standing to seek the employee's reinstatement because the creditor's injury—the nonpayment of a debt by the employee—could be redressed only by the independent decision of the employee to pay, not by the employee's reinstatement. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (Article III does not confer jurisdiction over "injury that results from the independent action of some third party not before the court.").

In any event, such hypothetical plaintiffs bear little resemblance to petitioner, who was not merely "a passive bystander," Pet. App. 29a, nor one "incidentally hurt by the retaliation," *id.* at 32a (Rogers, J., concurring). See *id.* at 62a (White, J., dissenting) ("While an overly broad construction of 'aggrieved' might be problematic if taken to the extreme, one need not go down that path here because [petitioner] lost his job and it is difficult to conceive of a potential plaintiff being more aggrieved."). Even were it appropriate to read the term "aggrieved" in a more limited manner than this Court's cases have suggested, see *id.* at 32a (Rogers, J., concurring), any such limitation could not plausibly preclude

standing for a plaintiff seeking to challenge his own dismissal.

The Court rejected just such a constricted reading of a broad statutory cause of action provision in *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982) (*Blue Shield*), an antitrust case in which the defendant directly harmed the plaintiff-customer as part of its illegal plan to injure its competitors. The health insurer-defendant in that case freely covered psychotherapy provided by psychiatrists but covered psychotherapy provided by psychologists only with significant limitations. *Id.* at 468. The plaintiff was a subscriber to the health insurer's plan whose claims for treatment by a psychologist were denied. *Ibid.* She brought a claim under Section 1 of the Sherman Act, 15 U.S.C. 1, alleging that the insurer's practice was part of an "unlawful conspiracy * * * to exclude and boycott clinical psychologists" and thus limit competition to physicians. *Blue Shield*, 457 U.S. at 469-470. She further contended that she was entitled to maintain suit under Section 4 of the Clayton Act as "[a] person * * * injured in [her] business or property by reason of anything forbidden in the antitrust laws." *Id.* at 470 & n.6 (quoting 15 U.S.C. 15).

The insurer contended that "because the alleged conspiracy was directed by its protagonists at psychologists, and not at subscribers to group health plans, only psychologists might maintain suit." *Blue Shield*, 457 U.S. at 478. The Court concluded that "[t]his argument [could] be quickly disposed of." *Ibid.* It observed that the "unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin [Section] 4 in ways that will defeat its broad remedial objective." *Id.* at 477.

The Court found no need to decide whether certain courts of appeals had correctly limited the Section 4 cause of action to plaintiffs who were within the "target area" of the alleged conspiracy, notwithstanding that the statutory text contained no such limitation, because the plaintiff was well within that area. *Blue Shield*, 457 U.S. at 476 n.12. The Court explained that "[d]enying reimbursement to subscribers of the cost of treatment was the very means by which it is alleged that [the insurer] sought to achieve its illegal end," *id.* at 479. "The harm to [plaintiff] and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy." *Ibid.* The plaintiff's injury thus fell "squarely within the area of congressional concern" even though she was not a competitor of the conspirators, because her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id.* at 484.

Here too, respondent's termination of petitioner was "the very means by which" respondent "sought to achieve its illegal ends." *Blue Shield*, 457 U.S. at 479. "The harm" to petitioner "was clearly foreseeable; indeed, it was a necessary step in effecting" the retaliation against Regalado. *Ibid.* Even though petitioner did not himself engage in protected activity, "the injury [he] suffered was inextricably intertwined with the injury [respondent] sought to inflict" on Regalado. *Id.* at 484. Petitioner requests relief that is not at all "speculative, abstract, or impractical," and that creates "not the slightest possibility of a duplicative exaction" from respondent. *Id.* at 475 & n.11. Like the plaintiff in *Blue Shield*, petitioner should be able to pursue his claim.

c. Finally, the core purpose behind the prudential limitation on third-party standing is not implicated by petitioner's claim. This Court has explained that "[w]ithout such limitation[]" on a plaintiff's ability to assert the rights of absent parties, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500. Petitioner does not ask for resolution of any abstract question. Rather, the harm that he alleges is not one shared by anyone else (rendering this case far different from cases such as *Warth*). Petitioner asserts a concrete challenge to his own dismissal and seeks a readily ascertainable remedy for it; prudential standing concerns are thus no barrier in light of Congress's decision to permit an aggrieved person to sue.

C. The Court Of Appeals Wrongly Imposed An Extra-Statutory "Cause Of Action" Requirement On Retaliation Claims

The court of appeals' (correct) conclusion that petitioner was aggrieved by his own dismissal, Pet. App. 10a n.1, should have ended its inquiry. The court of appeals, however, erroneously erected an additional, extra-statutory barrier and then found that petitioner did not surmount it. The court concluded that even though petitioner was aggrieved by the unlawful employment practice he sought to challenge, he could not sue because he "is not included in the class of persons for whom Congress created a retaliation cause of action." *Id.* at 8a; see *id.* at 2a (stating that "sole issue" presented by this case is whether 42 U.S.C. 2000e-3(a) "creates a cause of

action for third-party retaliation for persons who have not personally engaged in protected activity"). That formulation is based on a misunderstanding of the statutory scheme.

Congress did not create a "retaliation cause of action" for anyone. Instead, it made retaliation an "unlawful employment practice," 42 U.S.C. 2000e-3, and separately created a cause of action for a "person * * * aggrieved" by it (or any other unlawful employment practice established by the statute), 42 U.S.C. 2000e-5(f)(1). See *Fair Employment Council* v. *BMC Mktg. Corp.*, 28 F.3d 1268, 1277-1278 (D.C. Cir. 1994) (explaining that plaintiff who is "aggrieved" for purposes of 42 U.S.C. 2000e-5(f)(1) necessarily has a "cause of action" under Title VII). The statute's remedial provisions, not the anti-retaliation prohibition itself, establish how the statute is to be enforced and by whom.

In reaching its conclusion that petitioner had no "cause of action," the court of appeals mistakenly relied on *Davis* v. *Passman*, 442 U.S. 228 (1979). See Pet. App. 9a & n.1. *Davis* addressed the question whether, in the *absence* of any statutory cause of action, "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." 442 U.S. at 230. In answering that question, the Court said it was necessary to determine whether the substantive Constitutional provision at issue suggested that "a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 240 n.18.

As *Davis* itself explained, however, "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." 442 U.S. 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." *Ibid.* And when Congress does so, "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499-500 (1985); see *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2139 (2008) (declining to "read a first-party reliance requirement into [the statutory cause of action in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c)] that by its terms suggests none").

In the case of Title VII, Congress specified who may enforce the prohibitions on unlawful employment practices 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 constitutional remedy in the absence of a statutory cause of action.

D. Allowing Petitioner A Cause Of Action Is Consistent With Both The EEOC's Longstanding Position And Sound Enforcement Policy

The EEOC has long maintained 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 Compliance Manual* § 8-II(B)(3)(c) (1998); see p. 13, *supra* (discussing

deference owed EEOC's views). This interpretation of Title VII's remedial provisions is reasonable and also reflects sound enforcement policy.

The court of appeals opined that its "interpretation [did] 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." Pet. App. 28a-29a. That view would leave the individual who was fired at the mercy of someone else to remedy his injury. And while, years after petitioner's retaliatory dismissal, the interests of the now-married couple at issue here remain sufficiently aligned that Regalado would have had the incentive to fully vindicate petitioner's rights, that will not always be true. Marriages end; relatives become estranged; settlements are offered that divide interests.

Moreover, as a practical matter, it is the person who has been directly harmed by an employer's action, not the person whose exercise of underlying Title VII rights has been chilled, who is most likely to sue. That is true both because the person who suffers direct harm often has the most to gain from a lawsuit and because the person who is the intended target of the retaliation often has the most to lose. If, for example, a son were fired to retaliate against a father, the father would have little direct financial motive to sue and might well be afraid to pursue further action against the employer. The employer would still be in a position to do him harm, and he would be well aware that it already had sought to punish him for protected activity. The fired son, on the other hand, would have more incentive to sue and less fear of doing so.

Foreclosing suit by the person who suffered harm most directly would also unnecessarily complicate a

court's ability to provide adequate relief. To be sure, Title VII provides a court broad authority to craft equitable remedies, 42 U.S.C. 2000e-5(g)(1), and in a hypothetical retaliation suit by Regalado, she could have asked the district court to exercise that authority to secure some form of recompense for a third party such as petitioner. But the boundaries of such authority to order relief for a party not before the court remain untested. It would be far simpler to allow a lawsuit seeking reinstatement and back pay for a dismissed employee to be conducted by the person who suffers the direct harm, the dismissed employee himself.

Finally, limiting the class of people who can bring a Title VII complaint in a way that is not evident on the face of the statute amounts to a trap for unrepresented litigants. Title VII is "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972). Most couples in the position of petitioner and Regalado would likely conclude that the one who was fired (not the one still employed) should be the one to sue. In that case, the fired employee would likely be the only one to satisfy the prerequisite to suit by filing a timely charge with the EEOC. As a practical matter, an interpretation of Title VII that would bar a suit by the most obvious plaintiff would thus leave many injured parties without a remedy.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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