No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

By Written Consent of Petitioner and Respondent

BRUCE B. ELFVIN*
ELFVIN & BESSER
4070 MAYFIELD ROAD
CLEVELAND, OHIO 44121
(216) 382-2500

CHRISTINA M. ROYER
CHRISTINA M. ROYER, LTD.
237 EAST MAIN STREET
KENT, OHIO 44240
(330) 677-4701

MARISSA M. TIRONA
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 MONTGOMERY STREET, STE. 2080
SAN FRANCISCO, CA 94104
(415) 296-7629

*Counsel of Record

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION AND STATUTES

MISCELLANEOUS

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism, ethics, and judicial integrity.

NELA is interested in this case, and is filing a Petition in support of Petitioner Vicky S. Crawford because of the potential detrimental effects that the Sixth Circuit's decision, if left intact, will have on workers' rights and employers' responsibilities regarding sexual harassment investigations. The Sixth Circuit's narrow interpretation of "protected activity" for purposes of Title VII's anti-retaliation provision conflicts with precedent from this Court regarding the scope of, and protections afforded under, Section 704(a) of Title VII. Thus, this Court must grant Crawford's petition for certiorari to decide the appropriate manner in which to determine if particular conduct is protected under the "opposition" and "participation" clauses of Section 704(a), in

---

[1] Pursuant to Rule 37.6, NELA submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than NELA, has made any monetary contribution to the preparation and submission of this document. Pursuant to Rule 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

light of Congress's intent in passing this provision, and the manner in which this Court has repeatedly held that Title VII is to be interpreted.

SUMMARY OF THE ARGUMENT OF AMICUS CURIAE

This case presents a critical question of federal law that this Court has not previously addressed, but must now address in order to restore proper balance to Section 704(a) of Title VII, which prohibits employers from retaliating against employees who oppose unlawful practices, or participate in various types of Title VII proceedings. In this case, the Sixth Circuit has essentially held that employers are free to terminate employees who provide truthful information to their employers during an internal sexual-harassment investigation of a co-worker's complaint.

This decision must be reviewed because it is contrary to this Court's prior decisions recognizing and construing the broad remedial purposes of Title VII's anti-retaliation provision. As recently as 2006, in *Burlington Northern & Santa Fe Railway Co. v. White*, this Court recognized that one of the goals of Section 704(a) is to provide unfettered access to the broad remedies available under Title VII, and that enforcement of Title VII's anti-discrimination provisions depends, in large part, on witnesses who are willing to provide information without fear of reprisal.

The Sixth Circuit's decision also directly conflicts with this Court's pronouncements regarding the manner in which the statutory language of Title VII is to be construed. Instead of interpreting the language broadly, in keeping with this Court's precedent, the Sixth Circuit engrafted onto the language of Section 704(a) narrow restrictions that are simply

not present in the statutory text, and that are wholly inconsistent with the purposes of Title VII and Section 704(a).

By severely restricting the types of conduct that are protected under Section 704(a) of Title VII, the Sixth Circuit's decision eviscerates the holding in *Burlington Northern* regarding what amounts to "adverse action" under Section 704(a), and creates a *prima facie* test that is unworkable for employers and employees, alike. Moreover, the Sixth Circuit's decision will create a scenario where victims of, and witnesses to, sexual harassment will have no choice but to deluge the EEOC with "preemptive" charges, for the sole purpose of protecting themselves from retaliation for either reporting sexual harassment, or complying with an employer's internal investigation of a harassment complaint.

Because the Sixth Circuit's decision so severely restricts the types of employee conduct that are protected by Title VII's anti-retaliation provisions, it will have far-reaching and deleterious effects on employees' and employers' interests in identifying and preventing sexual harassment – and other types of unlawful discrimination – in the workplace. Accordingly, NELA respectfully requests that this Court grant the petition for certiorari and hear this case.

ARGUMENT

NELA, as *amicus curiae*, respectfully requests that this Court grant Vicky S. Crawford's petition for certiorari because this case involves an important question of federal law that requires resolution by this Court. At least three other federal circuits have taken the same overly restrictive view of Title VII's anti-retaliation provision as the Sixth Circuit has in this case.

These decisions severely threaten the efficacy of Section 704(a) of Title VII, especially in light of recent precedent from this Court, and will create havoc for the EEOC, which must enforce Title VII in all jurisdictions. Accordingly, this Court must now resolve the manner in which lower courts must construe employee conduct to determine whether it is the type of conduct that Congress intended to protect under Title VII's anti-retaliation provision.

I. Whether a witness's providing information during an employer's internal sexual-harassment investigation amounts to protected activity under Section 704(a) of Title VII is an important question of federal law that must now be settled by this Court because the Sixth Circuit's narrow interpretation of the "participation" and "opposition" clauses conflicts with this Court's prior cases recognizing the broad remedial purposes of Section 704(a).

Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII, or who participate in Title VII proceedings:

> 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) (2007).

In order to establish a *prima facie* case of retaliation under Section 704(a), an employee must show that: (1.) he or she engaged in protected activity; (2.) the employer knew that the employee engaged in this protected conduct; (3.) the employer subsequently took an adverse employment action against the employee; and (4.) there is a causal connection between the protected activity and the adverse employment action. *E.g., Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003).

According to this Court, the first step in interpreting the statutory language of Title VII is to determine whether the statute is ambiguous in light of both the plain meaning of its terms and the statutory scheme:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S. Ct. 843 (1997). If the statutory language is ambiguous, then that language must be construed in a manner that is consistent with the statutory scheme, including its purpose. *See id.* at 345-46.

In *Burlington Northern & Santa Fe Ry. Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405 (2006), this Court examined the third prong of the *prima facie* case, and how to determine whether certain employment actions are "adverse" in light of the purposes of Section 704(a). Discussing Title VII's anti-discrimination provisions, this Court explained that a workplace free from discrimination based on race, ethnicity, religion, or sex is the primary objective of Title VII. This

Court then explained how Section 704(a) relates to this primary objective:

> The anti-retaliation 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.

Id. at 2412.

The *Burlington Northern* Court further declared that Section 704(a) should be construed to provide employees with broad protections:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.

Id. at 2414 (internal citation omitted).

In light of these broad purposes, this Court rejected the Railway's argument that "adverse action" should be construed narrowly to include only actions that impact the terms and conditions of employment. *Id.* at 2411. Instead, this Court adopted a broad view of what could amount to an "adverse action," recognizing that employers could "effectively retaliate against an employee by taking actions not directly

related to his employment or by causing him harm *outside* the workplace." *Id.* at 2412 (emphasis sic).

Prior to the *Burlington Northern* decision, this Court had occasion to construe the meaning of the term "employee," as used in Section 704(a), and determine whether this term is broad enough to include former employees. *See generally Robinson*, 519 U.S. at 337. The *Robinson* Court ultimately held that the term "employee" indeed includes former employees, reasoning that this broad interpretation of the term is consistent with the purpose of Section 704(a):

> It being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage.

Id. at 346 (Thomas, J.). As this Court recognized in *Robinson*, and reiterated in *Burlington Northern*, the purpose of Section 704(a) is to maintain "unfettered access" to Title VII's statutory remedial scheme. *Id.*

This Court has also recognized that Title VII's statutory scheme encourages voluntary compliance by employers. In *E.E.O.C. v. Shell Oil*, this Court explained Congress's intent, stating: "when it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the act." 466 U.S. 54, 77, 104 S.Ct. 1621, 1635 (1984). In addition, in *Occidental Life Insurance Company of California v. E.E.O.C.*, this Court recognized that, in enacting the Equal Employment Opportunity Act of 1972, Congress established an integrated, multi-step enforcement procedure, the goal of which was to foster cooperation and voluntary compliance as the "preferred means for achieving the goal of equality of

equal employment opportunities." *See* 432 U.S. 355, 359; 367-68, 97 S. Ct. 2447 (1977) (internal citation omitted).

Moreover, when Congress amended Title VII in 1991, it explicitly identified private fact-finding as a process to be used in enforcing the Act:

> Where appropriate, and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified as amended in scattered sections of 42 U.S.C.). Four years after the 1991 amendments, this Court reiterated the "self-monitoring" purpose of Title VII:

> Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination.

McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358, 115 S.Ct. 879, 884 (1995) (internal citations omitted).

Despite this Court's clear pronouncements regarding the purposes of Section 704(a) and how the language of this provision should be interpreted, nothing in the Sixth Circuit's opinion indicates that it considered this Court's prior holdings. Rather, in stark contrast to this Court's guidance in the decisions described above, the Sixth Circuit narrowly

construed Section 704(a) with respect to what amounts to "protected activity."

According to the Sixth Circuit, Petitioner Vicky Crawford's conduct was not protected under Section 704(a) when she reported, in detail, repeated instances where the male subject of the employer's investigation made explicit and vulgar sexual comments and gestures toward her, and even grabbed her head in a sexually offensive manner. Finding that Crawford's actions did not amount to protected activity under Section 704(a) is wholly inconsistent with this Court's view of the broad remedial purpose of this provision.

The Sixth Circuit first found that Crawford's actions did not rise to the level of "opposition conduct" under Section 704(a) because, according to the Sixth Circuit's interpretation, Title VII "demands active, consistent opposing activities to warrant protection against retaliation." *Crawford v. Metropolitan Gov't of Nashville & Davidson Cty.*, 211 Fed. Appx. 373, 376 (6th Cir. 2006) (internal citation omitted).

But requiring "overt opposition" in order to qualify for protection under Title VII is contrary to the purpose of Section 704(a), as this Court has previously recognized. Nothing in the statutory language states that opposition conduct must be "active" or "consistent" in order to be protected, and restricting the protections of Section 704(a) to such conduct is wholly at odds with the purpose of providing unfettered access to statutory mechanisms to redress retaliation.[2]

---

[2] In fact, in prior cases, the Sixth Circuit itself has recognized that the only limitation on "opposition conduct" was that it must be

The Sixth Circuit's interpretation of the statutory language of Section 704(a) with respect to the term "opposes" is also at odds with prior precedent from this Court relating to statutory construction. Where a literal interpretation of a particular statute would produce a result "demonstrably at odds with the intentions of its drafters," the intention of the drafters, rather than the "strict language," controls. *E.g., United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527, 1026 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring).

Here, interpreting the term "opposes" to require "overt" and "ongoing" opposition is demonstrably at odds with the intent of the drafters of Title VII, who, as this Court has recognized, designed the anti-retaliation provisions to provide broad protections for employees who oppose unlawful practices or participate in proceedings designed to enforce Title VII.

After concluding that Crawford did not engage in "opposition" conduct under Section 704(a), the Sixth Circuit also decided that her conduct was not protected under the "participation clause" either. *Crawford*, 211 Fed. Appx. at 376. According to the Sixth Circuit, no protected "participation" can occur until an EEOC charge has been filed. In reaching this conclusion, the Sixth Circuit read into Section 704(a) a limitation that is simply not there, purporting to rely on the statutory language: "We will not alter this limit delineated by the language of Title VII and recognized by this court and others." *Id.* at 377.

---

reasonable. *E.g., Johnson v. University of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2001).

The Sixth Circuit's analysis, however, is contrary to both the Congress's intent and this Court's direction with respect to the manner in which Title VII – and Section 704(a) itself – should be interpreted. Contrary to the *Robinson* Court's mandate, the Sixth Circuit failed to consider whether its conclusion with respect to "participation" in a Title VII "investigation" or "proceeding" fit into a coherent and consistent statutory scheme, and it did not construe Section 704(a) in light of the overarching purpose of Title VII.

Instead, the Sixth Circuit construed the statutory language so narrowly as to create inconsistency with the remedial scheme and purpose of Section 704(a), and with this Court's prior decisions. To rationalize its narrow holding, the Sixth Circuit opined – without any supporting authority – that one of the purposes of Title VII's anti-retaliation provision is to "prevent[...] the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation." *Crawford*, 211 Fed. Appx. at 377.

The Sixth Circuit's rationale is not consistent with Title VII's statutory scheme or its purpose. Directly contrary to the result reached by the Sixth Circuit, this Court has explained that Section 704(a) prevents employers from taking actions that will deter employees from complaining *to their employers*:

> The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial measures. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers.

Burlington Northern, 126 S. Ct. at 2415 (citations omitted).

Nevertheless, the Sixth Circuit endorsed Metro's decision to fire Vicky Crawford after she reported to Metro that she, too, had been sexually harassed, by finding that Crawford did not engage in participation conduct when she reported the harassment to her employer during its internal investigation of another employee's complaint. Indeed, in this case, the burden of Title VII fell on Crawford – not her employer – simply because she responded truthfully to a factual inquiry that was solely under the control of her employer.

As this Court has recognized, while the anti-discrimination provisions of Title VII protect employees for "who they are," the anti-retaliation provisions protect "what they do." *Id.* at 2412. But the Sixth Circuit has added a temporal constraint to protection under Section 704(a), requiring employees to demonstrate not only "what they did," but also "when they did it." And, if their timing is not right, employers will be free to retaliate against their employees for engaging in the very conduct that Congress and this Court have recognized should be protected: participating in investigations and proceedings initiated under Title VII.

Moreover, contrary to the Sixth Circuit's pronouncement, nothing in Title VII's statutory scheme suggests that Congress wanted to ease any burdens of the Act on employers by limiting the conduct protected by the anti-retaliation provisions. The legitimate business interests of employers are protected not by limiting the time when conduct becomes protected under Section 704(a), but by ensuring that only conduct producing real harm is actionable:

> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing

> those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

Burlington Northern, 126 S. Ct. at 2416.

While Congress certainly was concerned about limiting Title VII's burdens, it addressed those concerns by limiting coverage of the Act to employers with 15 or more employees. Now, however, the Sixth Circuit's opinion upsets the balance between employer obligations and employee rights struck by Congress. The Sixth Circuit has turned the employee's anti-retaliation shield into the employer's defense sword by improperly narrowing the field of what can constitute "participation conduct" under Section 704(a).

Contrary to the Sixth Circuit's opinion, Congress intended to include within the scope of the participation clause reasonable employee conduct that occurs during an employer-initiated sexual-harassment investigation. To read Section 704(a)'s reference to "investigation" in a way that excludes an employer's internal investigation is inimical to Congress's desire to make employers and employees active participants in enforcing Title VII.

In fact, in light of Congress's and this Court's recognition of Title VII's goal of voluntary compliance, in addition to its broad remedial scheme, this Court created a Title VII affirmative defense that is predicated upon an employer's conducting – and an employee's *participating in* – an internal investigation responsive to sexual harassment allegations:

> In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally

> basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher v. Boca Raton*,...also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. ...The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 2270 (1998). In fact, this Court recognized that "...limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive," and that such reporting "would also serve Title VII's deterrent purpose." *Id.* at 764.

Thus, an employer's internal sexual-harassment investigation must be an investigation that "arises under Title VII" because the investigation's existence and methodology are intrinsic to whether employer liability for the harassment exists under Title VII. Absent the provisions of Title VII prohibiting sexual harassment in the workplace, and the affirmative defense to Title VII liability that this Court created in *Ellerth* and *Faragher*, an employer's investigation of a

complaint would not take on the significance that it does in today's workplace.[3]

In addition, in light of the fact that Title VII's provisions – including Section 704(a) – must be interpreted against the backdrop of the statute's purposes, an employer's investigation of a claim of sexual harassment must, by definition, amount to a Title VII "proceeding." The Sixth Circuit's distinction between investigations that occur before and after an EEOC charge is pending elevates form over substance, undermines the goal of Title VII's anti-retaliation provision, and is therefore inconsistent with this Court's precedent interpreting Title VII.

If the Sixth Circuit's analysis is correct, an employer's retaliatory intent is not the sole, or even the first, concern in determining whether an employee's conduct amounts to "participation" for purposes of Section 704(a). Rather, according to the Sixth Circuit, the technicality of timing is the primary concern. Indeed, if a charge had been pending at the EEOC at the time that Vicky Crawford had participated in her employer's investigation, Vicky Crawford's conduct certainly would have been protected, *even if her employer had no knowledge of the charge being filed with the EEOC.*

Because the Sixth Circuit's myopic interpretation of what may constitute protected activity under Section 704(a) of Title VII is wholly contrary to the purpose of this provision, and of

---

[3] Although the Sixth Circuit addressed *Ellerth* investigations, the analysis focused on whether the investigations would remain effective in light of its opinion in *Crawford*. The Sixth Circuit did not address whether the affirmative defense established by *Ellerth* includes participation in those investigations under the protection of Section 704(a).

Title VII in general – as well as with this Court's prior precedent – NELA as *amicus curiae*, respectfully requests that this Court issue a writ of certiorari to settle the important question of federal law presented in this case.

II. This Court has not previously addressed the important issue of what amounts to "protected activity" under Section 704(a), and must do so now in order to ensure that employees will have protection under consistent standards that are workable and predictable for those attempting to enforce and comply with Title VII.

The Sixth Circuit's decision in this case[4] has resulted in an unworkable framework for proving unlawful retaliation under Title VII utilizing indirect evidence. The elements of the *prima facie* case for retaliation are now internally inconsistent: the standards for determining what is "adverse action" are broad under *Burlington Northern*, while the standards for determining what is "protected activity" are narrow under the Sixth Circuit's decision.

---

[4] At least three other Circuits have also narrowly construed "protected activity" in a manner similar to the Sixth Circuit in this case. *See, e.g., Brower v. Runyon*, 178 F.3d 1002 (8th Cir. 1999); *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 1999); *Vasconcelos v. Meese*, 907 F.2d 111 (9th Cir. 1990). In addition, the Sixth Circuit's reported decision in *Abbott v. Crown Motor Company* was the first time the Court held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge." 348 F.3d 537 (6th Cir. 2003) (citing *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000)).

This internal inconsistency essentially eviscerates the holding of *Burlington Northern* because, from a practical standpoint, an aggrieved employee will never reach the "adverse action" prong of the *prima facie* test. If the categories of protected conduct are now so narrow as to exclude anything but "overt" and "continuing" opposition, or participation only with a pending EEOC charge, then it will not matter whether the employer's actions against the employee are "adverse" under *Burlington Northern*. This result is untenable not only in light of the purposes of Title VII and Section 704(a), but also in light of the deleterious effects it will have on employer-employee relations, as well as on both EEOC and private enforcement of Title VII.

By permitting retaliation against employees who reasonably provide information to their employers' investigators, and who corroborate allegations of sexual harassment, the Sixth Circuit's opinion undermines any effort to establish anti-harassment policies in the workplace. The EEOC has informed employers that anti-harassment policies are ineffective without assurances to employees that participation will not result in retaliation:

> An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.

Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability For Unlawful Harassment By Supervisors*, *available at* http://www.eeoc.gov /policy/docs/harassment.html

As a result of the Sixth Circuit's opinion, however, any such assurances from employers will be, at best, ineffective, and at worst, disingenuous. Employers and employees will know that the law permits retaliation against employees who respond honestly to their employers' questions during an internal investigation of unlawful discriminatory, or harassing, conduct. The practical effect is that employees will refrain from providing information to their employers regarding Title VII liability, out of fear of retaliation for doing so.

Responsible employees and employers, alike, want to eliminate sexual harassment from the workplace. Effective anti-harassment policies serve this objective. The Sixth Circuit's opinion, however, will make it nearly impossible for employers to investigate harassment complaints in a legitimate and meaningful manner.

Without protection against retaliation, witnesses to harassment are unlikely to risk their jobs by providing truthful information about the alleged harasser. In turn, without corroborating witnesses, employers' efforts to identify sexual harassment promptly, respond to a complaint adequately, and thus eliminate such harassment from the workplace, will be significantly diminished, and Congress's goal of making employers an effective part of Title VII enforcement will be thwarted.

The lack of corroborating witnesses will also make it difficult for employers to comply with this Court's directives in *Ellerth* and *Faragher*: that they must exercise reasonable care to prevent and correct any sexually harassing behavior. If employers are unable to obtain truthful information about sexual harassment occurring in the workplace, they will be unable to prevent or correct the behavior.

The Sixth Circuit's opinion is also likely to result in an influx of "preemptive" EEOC charges by harassment victims and witnesses. Attorneys representing harassment victims will know that they must advise their clients not only to report the harassment to the employer, but also to report it immediately to the EEOC. Under the Sixth Circuit's decision, the only way that a victim of sexual harassment can obtain cooperation from corroborating witnesses is to file an EEOC charge.[5] This is because an EEOC charge is the only way to assure corroborating witnesses that they can tell their employers the truth during an internal investigation without fear of retaliation.

Moreover, when attorneys representing harassment victims attempt to conduct their own investigations of the allegations of harassment, they will have to advise any witnesses that they should cooperate with any investigation by the employer, but that they should first file an EEOC charge in order to protect themselves against retaliation for having so cooperated. Then, because the victims' claims will unlikely meet the standards set forth by this Court in *Ellerth* and *Faragher*, many of these charges will simply be dismissed.

While the law allows a charge to be filed by any person on behalf of a victim of harassment, certainly the law was not enacted to protect against a timing technicality problem. Again, Congress's objective was to minimize the need to resort to the EEOC and the courts. In contrast, the Sixth

---

[5] In light of the Sixth Circuit's decision, the absence of a pending EEOC charge will create a Hobson's choice for employees who are witnesses: either provide truthful information in response to their employer's inquiry, or refuse to cooperate in the employer's investigation, at the risk of discipline or termination for insubordination.

Circuit's opinion drives victims and witnesses directly to the EEOC and the courts, in an effort to ensure that they will not suffer adverse employment action for providing their employers with truthful information in response to an internal sexual-harassment investigation.

Accordingly, for all of the foregoing reasons, NELA, as *amicus curiae*, respectfully requests that a writ certiorari issue to allow this Court to hear the case, and restore the appropriate balance to the elements of a *prima facie* case of unlawful retaliation under Section 704(a) of Title VII.

CONCLUSION

For all of the above reasons, the National Employment Lawyers Association as *Amicus Curiae*, respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

BRUCE B. ELFVIN (#0015694)
Counsel of Record
Elfvin & Besser
4070 Mayfield Road
Cleveland, Ohio 44113
(216) 382-2500 (Telephone)

Christina M. Royer (#0073695)
Christina M. Royer, Ltd.,
Attorney at Law
237 East Main Street
Kent, Ohio 44240
(330) 677-4701 (Telephone)

Marissa M. Tirona (#209604)
National Employment Lawyers
Association
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629 (Telephone)

Amicus Curiae Counsel for the
National Employment Lawyers
Association