No. 05-259

In the Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

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

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an employer may be held liable for retaliatory discrimination under Title VII for any "materially adverse change in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "ultimate employment decision" (as two other courts of appeals hold).

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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT[1]

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), the Asian American Justice Center, the National Association for the Advancement of Colored People, and the Puerto Rican Legal Defense and Education Fund, Inc., respectfully submit this brief as *amici curiae* in support of Respondent pursuant to Supreme Court Rule 37.3(a) upon the consent of the parties.[2]

INTEREST OF THE AMICI CURIAE

The Lawyers' Committee is a nonprofit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country.

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[1] Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than counsel for the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

[2] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

The Asian American Justice Center ("AAJC") is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal, public policy, advocacy, and community education on discrimination issues. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national nonprofit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as amicus curiae in numerous cases throughout the country concerning the proper interpretation of the civil rights laws. The resolution of this case will have significant impact upon

the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

Amici are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination. In this case, *Amici* seek to ensure that Title VII's substantive bans on discrimination based upon race and other enumerated characteristics have meaning by defining the protections against retaliation to provide "unfettered access to statutory remedial mechanisms," a principle already recognized by the Court and driven by the purpose of the non-retaliation provision of Title VII.

SUMMARY OF ARGUMENT

Amici ask the Court to clarify that the Equal Employment Opportunity Commission's "reasonably likely to deter" standard is the controlling standard for establishing retaliation under Title VII. The EEOC standard should be adopted because it captures the full range of conduct intended to be covered under the plain terms of Title VII's anti-retaliation provision, is consistent with Supreme Court precedent recognizing that for the anti-retaliation provision to have meaning it must provide "unfettered access" to Title VII's substantive protections, and furthers the legislative purpose behind anti-retaliation protections.

In contrast to the "materially adverse" standard, the "reasonably likely to deter" standard avoids the creation of a list of "permissible" harmful actions that can be taken against employees in retaliation for asserting their Title VII rights. Also, the "materially adverse" standard only

addresses the actual harm suffered by the employee, while the "reasonably likely to deter standard" addresses another critical component of retaliation, namely, the threat that the employer's action carries for other employees. Title VII's anti-retaliation provision is concerned with both the individual harm suffered by the targeted employee *and* the chilling effect that the employer's act has on other employees that may raise discrimination claims, and requires a standard that gives weight to both considerations.

This case requires the Court to refine the Title VII anti-retaliation doctrine and determine whether the "materially adverse employment action" standard, as applied by the lower court, is sufficiently precise to be used in retaliation cases, given the myriad forms retaliation may take.[3] The liabilities of this standard are clear. Because the

[3] Even under the "materially adverse" standard adopted by the Sixth Circuit, Respondent should prevail because the supervisory actions taken against White caused her to suffer sufficient harm to constitute adverse employment actions. However the Sixth Circuit's standard, as discussed, furthers only one purpose of the anti-retaliation provision and ignores the chilling impact that retaliation can have on the actual exercise of the plaintiff's substantive Title VII rights. Petitioner's arguments in favor of the "materially adverse" standard also ignore the plain meaning of Title VII's statutory language and Supreme Court precedent. Also, petitioner's argument that "temporary and tentative" actions cannot give rise to § 704 liability would result in an "ultimate employment action" standard that distorts the plain meaning of the statute, stands the legislative purpose of anti-retaliation provision on its head, and most importantly, ignores the Court's rulings on this issue. *See* Brief of Petitioner ("Petitioner Br.") at 33-35.

construct is borrowed from the § 703 analysis, it focuses heavily on the actual harm suffered by the employee, and ignores the employer's desire to punish not only the current complainant but to quell future reporting. By focusing on the personal and particular harm suffered by the targeted employee, courts may overlook obvious retaliatory actions that are taken against an entire group of employees with the specific intent of injuring the complainant, or additionally to chill other employees. Also, the danger in instituting a standard focused on "material" harm is that this standard requires that the Court determine *ex ante* and without context that some employer action should be excluded from statutory coverage despite its retaliatory purpose. The "reasonably likely to deter" standard avoids these pitfalls; it clarifies the § 704 inquiry and brings unity to a currently conflicted area of Title VII law.

ARGUMENT

I. TITLE VII'S ANTI-RETALIATION PROVISION REQUIRES A BROAD READING OF THE TERM DISCRIMINATION.

A. This Court Has Consistently Interpreted Anti-Retaliation Provisions Broadly.

If the employee's right to claim unlawful discrimination is not absolutely protected, the substantive protections offered by Title VII ring hollow. This Court has already recognized this vital principle and stressed that Title VII's anti-retaliation provision should be interpreted to ensure "unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (interpreting the statutory term "employees" to permit former employees to sue for post-employment retaliation).

The broad reach of Title VII's anti-retaliation provision is consistent with the Court's interpretation of anti-retaliation provisions in other statutes protecting employees' rights. In cases arising under the National Labor Relations Act ("NLRA") and the Fair Labor Standards Act ("FLSA"), the Court has recognized that Congress provided employees with robust protection from employers' retaliatory actions. *See NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972) ("Congress has made it clear that it wishes all persons with information about [prohibited practices] to be *completely free from coercion* against reporting them to the [authorities] . . . . *This complete freedom is necessary* . . . to prevent the [government's] channels of information from being dried up

by employer intimidation of prospective complainants and witnesses) (emphasis added, internal citations omitted); *see also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("By the proscription of retaliatory acts set forth in [the FLSA], . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced."). In the absence of legislative history to the contrary, the Court must conclude that similar concerns inform Title VII's anti-retaliation provision. *See* 110 CONG. REC. 3086, 7210-11, 8453 (1964) (explaining that Title VII was patterned after earlier labor laws, including the NLRA).

The Court has recognized that, as a practical matter, employers can and will use what seems like justified, legal conduct as a method of retaliation. The employer's retaliatory animus is what transforms the action into a violation of an anti-retaliation statute: "if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise legal or even praiseworthy is not controlling." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 (1984) (employer's lawful reporting of immigrant employees to INS for deportation was unlawful retaliation under the NLRA because the supervisor's motive was retaliation); *see also Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 744 (1983) (recognizing NLRB's power to enjoin sham lawsuits when the employer's motive is retaliation). Therefore, to the extent Petitioner alleges that a retaliation claim cannot be based on any action an employer is legally and contractually entitled to take with regard to an employee – including employment changes within the employee's job description

or strict enforcement of employer rules – the Court has already rejected this proposition.

Consistent with this view, the Court has acknowledged that retaliation takes a wide variety of forms, and certainly cannot be limited to a set of "ultimate" or "material" employment actions. In interpreting other civil rights statutes, this Court has also held that the word "discriminate" is a "term that covers a broad range of intentional unequal treatment." *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 125 S. Ct. 1497, 1505 (2005) ("by using such a broad term, Congress gave the statute a broad reach"). In recent years, the Court has considered retaliation claims involving a negative employment reference, *Robinson*, 519 U.S. 337, a transfer, *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), and suspension, improper discipline, and failure to train claims, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Also, Congress continues to recognize that robust protection from retaliation is necessary because employers continually adapt their behavior to retaliate within the confines of the law. *See, e.g.*, S. Comm. on the Judiciary, The Corporate Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, at 19 (2002) (explaining that the whistleblower protections ultimately enacted in § 806 of the Sarbanes-Oxley Act of 2002 were necessary because "[u]nfortunately, … most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law").

Collectively, these authorities demonstrate the need for an expansive standard to address retaliation by employers effectively. In keeping with this precedent, the Court should adopt the "reasonably likely to deter" standard as the proper interpretation of Title VII's anti-retaliation provision. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 77 (1982) (rejecting petitioner's attempt to limit Title VII provision's interpretation as contrary to the statute's plain language, inconsistent with the Court's prior cases, and contrary to national labor policy).

B. The Supreme Court's Jurisprudence Recognizes That Title VII's Plain Language Requires An Expansive Definition Of Retaliatory Discrimination.

The Court's recognition that anti-retaliation provisions are intended to provide "unfettered access" to statutory rights is no doubt driven by its clear understanding of their legislative purpose and by common sense but also, at its heart, is driven by a reading of the plain language of Title VII. Section 704(a), Title VII's anti-retaliation provision, makes it "an unlawful employment practice" for an employer to "discriminate" against an individual who has filed or assisted in the prosecution of a Title VII claim, or who has opposed a discriminatory practice that violates the statute. *See* 42 U.S.C. § 2000e-3(a) (2000). "As in all cases involving statutory construction [the Court's] starting point must be the language employed by Congress, and [it] assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intent to the contrary, that language

must ordinarily be adopted as conclusive." *American Tobacco*, 456 U.S. at 69 (internal quotations omitted).

In Title VII's anti-retaliation provision, the word "discriminate" means to treat differently, and Congress intended this term to have its ordinary meaning: "[T]he concept of discrimination . . . is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor . . . ." 110 CONG. REC. 7212, 7213 (1964) (Interpretive Memorandum of Title VII by Sens. Clark and Case). The Sixth Circuit rejected this broad reading, and incorrectly looked to § 703 for guidance, despite obvious differences between the two sections. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 799 (6th Cir. 2004) (*en banc*). The statute's plain terms defy this reading. *See Robinson*, 519 U.S. at 341 (explaining that a statute is interpreted based on its "plain" terms, distilled "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

First, the use of the term "discriminate" in § 704(a) is unambiguously unconditional, as compared to § 703, which specifies that its focus is discrimination with respect to the "terms, conditions, or privileges of employment." The lack of limiting language in § 704(a) is intentional, and should be taken into account when interpreting the statute. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (interpreting Title VII's provisions: "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in

the disparate inclusion or exclusion") (internal citations and quotations omitted). As Judge Clay pointed out in the Sixth Circuit opinion, "Congress could quite easily have placed the same limitations on § 704(a) as it did on § 703(a), yet it chose not to do so." *White*, 364 F.3d at 810 (Clay, concurring).

Second, § 704 which is entitled "Other Unlawful Employment Practices," is separate and distinct from § 703, which is entitled "Discrimination *Because Of* Race, Color, Religion, Sex or National Origin" (emphasis added). Section 703's enumerated unlawful employment practices capture the illegal acts that constitute discrimination against a discrete set of protected class groups. Section 704 deals with an entirely different phenomenon, retaliation based on statutorily protected activity. The inclusion of the word "discriminate" in both sections does not establish that they have the same meaning. Indeed, "since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption [that they have identical meaning] readily yields" when the "words, though in the same act, are found in . . . dissimilar connections." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

Section 703's unlawful employment practices solely define discrimination *based on* race, sex, color, religion, and national origin. Retaliation was conspicuously set apart as an "other unlawful employment practice[]" under a separate section. One must conclude that Congress considered retaliatory discrimination distinct from the primary employment discrimination category under § 703. The

importance of this distinction, between the primary right and the anti-retaliation provision ensuring its exercise, is reaffirmed by the similar structure of other statutes protecting workers' rights.[4]

[4] Numerous worker protection statutes contain separate anti-retaliation provisions that broadly prohibit employers from "discriminating" with the intent to retaliate. *See, e.g.,* 29 U.S.C. § 158(a) (the NLRA provides "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act"); 29 U.S.C. § 215(a)(3) (the FLSA provides "[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee [for exercising rights under the statute]"); 29 U.S.C. § 623(d) (the Age Discrimination in Employment Act provides "It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section"); 42 U.S.C. § 12203(a) (the Americans with Disabilities Act provides "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act. . . . It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act."); 29 U.S.C. § 2615 (the Family and Medical Leave Act provides "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this [Act]. . . . It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this [Act]."); 29 U.S.C. § 660(c) (the Occupational Health and Safety Act provides "No person shall discharge or in any manner discriminate against any employee because such employee has [exercised rights under the

The same logic informs Supreme Court precedent, as the Court has recognized specifically in the Title VII context, that retaliation is not a subset of § 703 discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799-800 (1973) (holding that a race discrimination claim could proceed where the same evidence could not sustain a claim of retaliation). Also, because retaliation "is separate from direct protection of the primary right and serves as a prophylactic measure to guard the primary right," a retaliation claim may succeed where a discrimination claim fails. *See Jackson,* 544 U.S. 167, 125 S. Ct. at 1513 (Thomas, J., dissenting) (discussing Title IX sex discrimination). Consistent with this view, the Court should treat, and has treated, retaliatory discrimination under § 704(a) as distinct from discrimination under § 703.

Third, even if the term "discriminate" in § 704(a) is read in the context of its use in § 703, that section uses the phrase "or otherwise to discriminate," making it clear that the word "discriminate" was intended to be read broadly to capture behavior not specifically listed in the text. *See, e.g.*, *Scrivener*, 405 U.S. at 124 (in interpreting the NLRA, noting that "[o]n textual analysis alone, the presence of the preceding words 'to discharge or otherwise discriminate' reveals, we think, particularly by the word 'otherwise,' an

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statute]"); 29 U.S.C. § 1140 (the Employee Income and Retirement Security Act provides "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the [Act]").

intent on the part of Congress to afford broad rather than narrow protection to the employee"). Under any of these readings, Title VII's plain language indicates that Congress intended for retaliation-based discrimination to be a broad category.

Although the plain text of the statute shows that § 704(a)'s drafters made no attempt to define the scope of potential retaliatory discrimination *ex ante*, the language does not permit a court to simply import the § 703 definition of discriminate into the § 704 context, as suggested by the Sixth Circuit. Rather, the only way the Court can give effect to this broad definition is to employ a fact specific test that can account for the array of potential employment practices that constitute retaliation.

C. The EEOC Standard Is Entitled To Deference Because It Is Consistent With The Statute's Plain Meaning, Supreme Court Precedent, And The Statute's Legislative Purpose.

Courts rely on the EEOC's interpretations to inform their understanding of Title VII. *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (explaining that agencies charged with enforcing statutes serve as a body of expert opinion on which Courts can rely). The EEOC's interpretation of § 704(a) should be adopted because it has the "power to persuade" as described in *Skidmore*, when one considers "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all th[e other] factors which give it the

power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The standard enunciated in the EEOC Compliance Manual is based on a thorough, close reading of the statute's plain terms, giving them their clear and logical meaning. Contrary to the Sixth Circuit's holding, nothing in the plain language demonstrates that the Court should develop a pre-determined "materiality standard." Rather, the only valid limiting boundary on the term "discriminate" should be based on what the statute is designed to prohibit, namely, actions that are "reasonably likely to deter" protected activity.

Contrary to Petitioner's assertion, the EEOC standard is consistent with the Commission's long-standing view that § 704(a) affords "exceptionally broad" protection to individuals seeking to assert their Title VII rights or otherwise participate in the enforcement process. *See, e.g., 2 EEOC Compliance Manual*, 8-II.D.3 (May 1998) ("The anti-retaliation provisions are exceptionally broad."); *2 EEOC Compliance Manual*, § 614.1(a) (Jan. 1988) ("This section . . . reaffirms that the Commission's policy and position on protecting individuals [from retaliation] is exceptionally broad."); Brief for the United States and the EEOC as Amici Curiae in Support of Petitioner, *Robinson v. Shell Oil Co.*, No. 95-1376 (1995) at 13-14 ("EEOC Robinson Amicus Br.") ("[§704(a)] broadly prohibits [discrimination] against an employee because he or she has made a charge . . . ."). Also, the EEOC has made it clear that under this interpretation petty slights or trivial annoyances that would not chill an ordinary person from engaging in protected

activity would not be actionable under § 704(a).[5] *See 2 EEOC Compliance Manual*, 8-II.D.3 (May 1998).

Notwithstanding Petitioner's selective quotations from the Manual's provisions, the EEOC signaled as early as thirty years ago its concern that "[e]very instance of unremediated retaliation against persons who engage in Section 704 (a) opposition . . . has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination." *EEOC Compliance Manual* (CCH), § 491.2 (1975). *See also* EEOC Decision 74-77, 1974 WL *3847 (Jan. 18, 1974). Therefore, as the EEOC further explained, § 704(a) was not only concerned with the specific harm suffered by the individual employee, but with the concern that if retaliation "were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination." *2 EEOC Compliance Manual*, § 614.1(d) (Jan. 1988).[6] The "reasonably likely to deter" standard is

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[5] *See also* Brief of EEOC as Amicus Curiae in Support of Plaintiff-Appellee, *White v Burlington Northern & Santa Fe Ry. Co*., Nos. 00-6780 & 01-5024 (6th Cir. 2004) at 9 (*citing Primes v Reno*, 190 F.3d 765, 767 (6th Cir. 1999). This limitation on § 704(a) retaliation is consistent with the plain terms of the statute, as all statutes are interpreted to contain an implicit limitation, but that boundary that must be delineated in a manner that is consistent with the statute's specific purpose. *See Wisconsin Dep't. of Revenue v. Wrigley*, 505 U.S. 214, 231 (1992).

[6] Previous versions of the Compliance Manual do not support the assertion that the Commission conflated the kinds of employment

simply a distillation of a proposition that always informed the Commission's understanding.[7] *See United States v. Mead Corp*. 533 U.S. 218, 235 (recognizing that current interpretation's "fit with prior interpretations" weighs in favor of persuasiveness of Commission's reading).

Other factors counsel in favor of adopting the EEOC's position. The "reasonably likely to deter" standard demonstrates a careful consideration of the various circuits' interpretations of the "materially adverse standard," setting forth the standard's strengths and liabilities in light of the agency's experiences. EEOC guidelines provide the courts with a source of expert opinion. As an "administrative interpretation of the Act by the enforcing agency," *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), the EEOC

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discrimination prohibited by § 703 with the forms of retaliation prohibited by § 704 in the years prior to its adoption of the "reasonably likely to deter" standard. Prior Manuals simply stated that retaliation "can take many forms." *2 EEOC Compliance Manual*, § 614.7 (Jan. 1988).

[7] *See 2 EEOC Compliance Manual*, § 614.1(b) (Jan. 1988) ("retaliation against a charging party or complainant can interfere with the investigation of the original charge or complaint; it can also have a chilling effect on the willingness of others to cooperate in . . . investigations conducted by the Commission . . . ."); *see also* EEOC Robinson Amicus Br. at 35 ("Acts of retaliation motivated to punish employees for filing discrimination charges threaten to impair the effectiveness of the administrative machinery for investigating, punishing, and deterring violations of Title VII. The threat of retaliation is likely to chill employees' willingness to file charges and to co-operate with the EEOC in investigating discrimination.").

Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore*, 323 U.S. at 140); *see also Meritor Savs. Bank*, 477 U.S. at 65 (same); *Christensen v. Harris County*, 529 U.S. 576, 597 (2000) (Breyer, J., dissenting) ("If statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experienced-based views of expert agencies.").

II. SOUND PUBLIC POLICY SUPPORTS ADOPTION OF THE "REASONABLY LIKELY TO DETER" STANDARD.

A. The EEOC Standard More Faithfully Interprets The Intent Of The Statute Than The "Materially Adverse" Standard, Because It Shifts The Focus To The Deterrent Effect Of Employer Actions.

The "reasonably likely to deter" standard precludes the creation of a category of "permissible" retaliation that nonetheless would chill or punish the exercise of Title VII rights. The EEOC has indicated that the proper standard for identifying actionable retaliation is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party and others from engaging in protected activity," explaining that this standard comports with the "exceptionally broad" protections provided by the various statutory anti-retaliation provisions that are under its purview. *2 EEOC Compliance Manual*, 8-II.D.3 (May

1998). As the EEOC explains, any other standard might "permit some forms of retaliation to go unpunished and would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions." *Id*.

Unlike the "materially adverse" standard, the "reasonably likely to deter" standard avoids providing employers with a judicially prescribed list of activities to hide behind while permissibly retaliating against their employees, thus deterring them from challenging illegal discrimination. In fact, adopting the "reasonably likely to deter" standard should actually *decrease* filings by creating a meaningful incentive for employers to refrain from engaging in any type of retaliatory activity.

The Commission appropriately resists setting forth absolute boundaries about what constitutes actionable conduct in recognition of the myriad forms that retaliation may take. The majority of circuits agree, as "[t]he law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit." *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000) (recognizing that a "wide array of disadvantageous changes in the workplace constitute adverse employment actions"); *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) ("Congress recognized that job discrimination can take many forms, and does not always manifest itself in easily documentable sanctions such as salary cuts or demotions."); *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (explaining that

the central inquiry is whether the challenged action would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."); *see also Rochon v. Gonzales*, No. 04-5278, 2006 WL 463116, at *18-19 (D.C. Cir. Feb. 28, 2006) (adopting a broad interpretation of § 704 consistent with the EEOC "reasonably likely to deter" standard); *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (parallel retaliation provision of the ADEA "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion").

The "reasonably likely to deter" standard also would bring consistency and clarity to a currently muddled and confused area of case law. Application of the materially adverse standard has resulted in uneven and sometimes indefensible inconsistencies within individual circuits about the rationale for recognizing employer liability. *See White*, 364 F.3d at 801 (pointing out inconsistencies in the Fifth and Eighth Circuits). The virtue of the "reasonably likely to deter" standard is that it makes the competing considerations more clear in the Court's analysis. The Court must ensure "unfettered access" to the process. It is impossible to determine whether a change in an employee's responsibilities is sufficiently adverse to constitute retaliation without an understanding of the context in which the claim arose. Not all transfers are equal; some are sufficiently punitive in effect to be retaliation.

Additionally, it is impossible to judge what would likely deter future complaints without considering how the proposed action, if threatened to others, might discourage

them from engaging in protected activity. A less severe sanction might deter witnesses when it would not sway the primary complaining employee. *See Washington*, 420 F.3d at 662 (explaining that "it takes less to deter an altruistic act than to deter a self-interested one…; [t]he sort of [employer] response deemed immaterial to self-interested charges [raised by plaintiff] could be material to others, and thus could be deemed discriminatory").

Circuit case law also demonstrates that the "materially adverse standard" cannot be used to draw a pre-established baseline to identify punitive decisions. Several circuits have expressly conceded this point, explaining that the standard requires a fact specific inquiry. *See Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("Because there are no bright-line rules [under the materially adverse standard], courts must pore over each case to determine whether the challenged employment action reaches the level of adverse."); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 273-74 (7th Cir. 1996) ("The question whether a change in an employee's job or working conditions is materially adverse, rather than essentially neutral, is one of fact."); *Washington*, 420 F.3d at 661 (the term "material is one of those protean words that resists further definition. This holds open some potential to say that an act that would be immaterial in some situations is material in others.").

Simply put, one cannot exhaustively catalogue abuses of employer power prior to knowing what tools the supervisor has at his or her disposal, and without understanding how employees rely upon the workplace

benefits or rules being used for the purpose of retaliation. The EEOC standard captures the deleterious effects these actions have on employees, much of which goes unaddressed under the various circuits' standards. The "reasonably likely to deter" standard also avoids another stumbling block courts face under the "materially adverse" analysis – namely the circumstance where the action is undoubtedly intended to punish or suppress the exercise of Title VII rights, but fails to constitute a materially adverse employment action.

B. Adopting The "Reasonably Likely To Deter" Standard Will Not Result In A Flood Of Litigation.

In an attempt to distract the court from the real issue presented, the petitioner and their *Amici* raise the tired argument that any standard other than the one they propose will flood the courts. *Amici* supporting Petitioner rely upon a single statistic to argue that if the Court adopts a standard for retaliation that does not require a "materially adverse employment action," then the number of Title VII retaliation charges filed with EEOC "can be expected to increase even more dramatically, with resulting effects on caseloads not only of the EEOC, but of the Federal Courts themselves." Brief Amici Curiae of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America in Support of Petitioner at 11.

There is no reason to believe that any upward trend in retaliation findings is connected to the substantive standard set by the Court or the EEOC, or that adopting the "reasonably likely to deter" standard would create a

burdensome increase in filings of retaliation complaints. In fact, after the EEOC publicized its "reasonably likely to deter" standard in 1998,[8] there was no appreciable jump in the number of retaliation cases filed with the EEOC. See infra at 24, n.9. Since there was no significant increase when the EEOC adopted the standard, there is no reason to believe that there will be a change if the courts formally adopt it now.

The real reasons for the increase in EEOC filings alleging retaliation during the cited time period are not clear (although some of the increase in the early 1990s is almost definitely a reflection of the passage of the Americans With Disabilities Act in 1991, an increase in education about the right to file with the EEOC, and generally an increased population in the workforce.) A nonpartisan statistical analysis by researchers from the American Bar Foundation concluded that

> the reason for the rising number of retaliation charges is less obvious [than the reason for the rising number of disability claims]. It may reflect the rising proportion of charges that involve dismissal, a finding documented . . . for the period from 1965 to 1989. It may also reflect an increasing tendency for plaintiffs (and their lawyers) to add retaliation as a claim in discrimination disputes. It may reflect more

[8] Prior to 1998, the Manual simply stated that retaliation "can take many forms."

> retaliatory behavior by employers. Without an in-depth analysis of claims over time and the employment contexts that produce them, we are left to speculate about the reasons for this shift.

Laura Beth Nielsen and Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination as a Claiming System*, 2005 Wis. L. Rev. 663, 690-91 (2005). In other words, the cause for the increase in retaliation filings is unclear. The fact that the steady increase in retaliation charge filings before the EEOC remained steady when the EEOC changed its standard for retaliation suggests that the *number* of filings is not likely to greatly increase. Further, there is no link between increased retaliation filings with the EEOC and increased federal court filings.

Petitioner and its *Amici* attempt to create an unjustified fear that the federal courts will be flooded with discrimination cases. However, the number of employment cases filed in federal court has consistently *decreased* over the past six years, despite the increase in EEOC retaliation filings. According to Federal Judicial Caseload statistics for the year 2000, 21,928 employment civil rights cases were filed in Federal Court. This number has decreased *every* year since then. In 2005, 19,689 employment civil rights cases were filed. The United States Courts of Appeals saw a similar decrease, from 2,997 appeals in 2001 to 2,373 in 2005.[9]

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[9] *See U.S. Courts Statistical Reports*, http://www.uscourts.gov/library/statisticsalreports.html (last visited March 8, 2006).

Furthermore, many other filters and mechanisms will prevent abuse of Title VII's anti-retaliation provision. Proof that the defendant's conduct was "reasonably likely to deter" the plaintiff from engaging in protected activity is just one of the elements of the plaintiff's *prima facie* case of retaliation. The plaintiff must also establish that she engaged in protected activity, that the defendant had knowledge of the protected activity, and that there was a causal connection between the protected activity and the defendant's conduct. *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 381 (6th Cir. 2002) (applying the *McDonnell Douglas* burden-shifting framework). The causal link, the mental state of the employer, and the limited scope of protected activity all provide additional filters against excessive retaliation filings.

C. Promoting Conciliation Does Not Trump Title VII's Anti-Retaliation Protections.

Petitioner wrongly contends that the "reasonably likely to deter" standard will compromise employers' attempts at conciliation, which it alleges was central to Congress's vision of Title VII. A review of the statute's legislative history shows that Congress recognized that the potential for conciliation in addressing discrimination was limited, particularly where employers dealing with claims would be forced to accept that some of their formerly accepted practices constituted discrimination. *See* H.R. Rep. 92-238, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144 ("It was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially 'human'

problem. Litigation, it was thought, would be necessary only on an occasional basis. . . . Experience, however, has shown this view to be an oversimplification, incorrect in its conclusions.") The same concerns arise here where employers could ignore employee complaints about retaliatory exercise of supervisory power when it appears the conduct complained of is justified by workplace rules or the employee's job description. A statute that makes these claims actionable will require that employers advise and supervise lower level supervisors to ensure they do not use the power delegated to them to retaliate against persons engaging in conduct protected by Title VII.[10]

[10] The agency principles described in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), require that employers should not be permitted to block employee's retaliation claims based on the assertion that they must be filtered through an internal grievance mechanism. A supervisor's misconduct demonstrates that the employer has already squandered its opportunity to avoid liability by failing to offer effective prophylactic training. *Faragher*, 524 U.S. at 803 ("Recognition of employer liability [for] discriminatory misuse of supervisory authority . . . is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.")

D. Adopting the "Reasonably Likely To Deter" Standard Also Avoids The "Catch-22" That Petitioner's Standard Would Create For Employees

Petitioner's standard wants to have it both ways. They argue that the decisions here were not final employer actions so under their "ultimate employment action" standard, the decisions would not be actionable. In addition to ignoring the Court's ruling that the anti-retaliation provisions are to provide "unfettered access" and ignoring the purpose of anti-retaliation provisions, Petitioner's standard creates an unworkable procedural nightmare. When employees made these exact arguments in attempting to extend the statute of limitations for filing with the EEOC, the Court explicitly rejected them. *See Electrical Workers v. Robbins & Myers, Inc*, 429 U.S. 229 (1976). The Court should reject these arguments now that the employer thinks they cut in its favor. If Ms. White's grievance process had taken 370 days instead of 37 days, and if the outcome been adverse to her, there is no doubt that Petitioner would have claimed that Ms. White waited too long to file an EEOC charge.

Moreover, ruling in favor of Petitioner would result in inconsistent case law. In *National R.R. Passenger Corp. v. Morgan*, the Court explicitly held that an adverse employment action occurs when it "happen[s]" and not after the resolution of an internal review procedure that may or may not undo that decision. 536 U.S. at 110-11 (collecting

cases). This holding is consistent with *Electrical Workers* and its progeny.[11]

Specifically, in *Electrical Workers*, the Court held that the unlawful employment practice occurred on the date the plaintiff was removed from her employment, not at the conclusion of an internal review process pursuant to the collective bargaining agreement ("CBA"). 429 U.S. at 234-35. In making its ruling, the Court relied heavily on facts that are remarkably similar to the facts in this case: "[The plaintiff] stopped work and ceased receiving pay and benefits as of that date. Unless the grievance procedure resulted in her reinstatement, she would not be entitled to be paid for the period during which the grievance procedures were being implemented." *Id*. at 235-36. In *Electrical Workers*, the plaintiff also affirmatively requested review of her termination. Similarly, Respondent White stopped receiving pay on the date of her suspension and, unless she challenged her suspension, she would not have been entitled to back pay. Pursuant to the CBA governing Respondent White's employment, one must "make written request for [an] investigation" of the discipline within 15 days. CBA R.91 (JA 56). Petitioner admits that Respondent White affirmatively "requested a Rule 91 investigation of the

[11] *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) (in holding that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods," noting that "[t]he grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made") (emphasis in original).

suspension[.]" Petitioner Br. at 6. In both *Electrical Workers* and the instant case, the internal review process was not "required." *See* 429 U.S. at 235, n.5. Applying this well-established precedent to the matter *sub judice* demonstrates that Respondent White had a valid claim of retaliation on the day she was suspended. Petitioner's position is inconsistent with this precedent.[12]

This awkward attempt by Petitioner and its *Amici* to create a "Catch-22" for the employee should be summarily rejected by the Court. Under their analysis, if an employee filed a charge at the time of the action, it would be considered premature. However, if the employee waited

[12] Petitioner uses semantics to distinguish *Electrical Workers* and its progeny, arguing that this case law applies only to "grievances" and that the present case involves an "investigation." Petitioner distinguishes these two terms by claiming that the "initial investigatory suspension was not the official decision of the company," Petitioner Br. at 33, but that a grievance involves dissatisfaction with an employer's final decision. Petitioner further alleges that the use of the word "decision" in the CBA when describing the final outcome of the investigation of discipline necessarily renders any discipline preceding an investigation as tentative and non-final. *See* Petitioner Br. at 34. However, nothing in the text of the CBA indicates that only "management's ultimate adoption of a supervisor's recommendation would be deemed the relevant statutory 'occurrence.'" *Electrical Workers*, 429 U.S. at 234. Furthermore, the Supreme Court has clarified that the holding in *Electrical Workers* does not apply just to a grievance procedure, but instead implicates all "method[s] of collateral review of an employment decision[.]" *Delaware State College*, 449 U.S. at 26.

until the conclusion of a lengthy investigation or grievance process, it would be considered untimely under *Electrical Workers*. For this reason, the Court should not adopt the untenable framework suggested by the Petitioner and its *Amici*.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to rule that the "reasonably likely to deter" standard is the controlling test for determining whether a retaliation claim is cognizable under § 704(a), and to hold that the Sixth Circuit correctly determined that the transfer and suspension White suffered in this case are sufficient to sustain her claim of retaliation.

Respectfully submitted,

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