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 FOR NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AARP, EQUAL JUSTICE SOCIETY AND NATIONAL DISABILITY RIGHTS NETWORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES

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INTEREST OF *AMICI CURIAE*[1]

All *amici* here, either organizationally or through their members, represent individuals under Federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Family and Medical Leave Act. *Amici* include

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

non-profit organizations that advocate in favor of vigorous enforcement of these laws and advise individuals of their rights under them, and their memberships include attorneys who represent clients in litigation involving claims under these statutes.

Amici know from experience that scrupulous adherence to anti-retaliation strictures is essential if underlying statutory prohibitions (such as Title VII's ban on racial discrimination in employment) are to be meaningful. *Amici* are vitally concerned that these laws be read as written and in particular that the shelter from retaliation under Title VII be as broad as Congress intended.

Fuller statements of interest for all *amici* are included in the appendix to this brief.

STATEMENT

Respondent Sheila White was the only woman employed in the Maintenance of Way department at the Tennessee Yard of petitioner Burlington Northern & Santa Fe Railroad Company (BNSF). White's immediate supervisor and several other employees did not think that a woman should work there, and the supervisor and a co-worker admitted at trial that there was a "general anti-woman feeling" in the workplace. After about three months of working in this environment, White complained about discrimination based on her sex. Ten days later, her job duties were changed. Instead of spending most of her time sitting down, operating a forklift, she now had to perform tasks that her co-workers agreed were dirtier and far more arduous, involving heavy lifting. The jury did not believe BNSF's explanation for altering White's duties and found that the company initiated the changes to retaliate against her for reporting discrimination.

White filed a charge with the EEOC, and then later filed a second charge alleging retaliation. One week after she filed the retaliation charge, she was summarily suspended without

pay. She spent 37 days off work, unpaid, before BNSF management conceded that she had not done anything wrong. Finally, she was reinstated with back pay, after having spent the entire holiday season (December 11, 1997—January 16, 1998) without pay and uncertain whether she would ever be reinstated. Again, the jury did not believe BNSF's explanation and found that this unpaid suspension was also intended to retaliate against White for protesting discrimination. In addition, the jury found that White had suffered $43,250 in compensatory damages over and above the back pay she received after reinstatement.

A divided panel of the Sixth Circuit reversed, saying that neither retaliatory action was sufficiently "adverse" to state a claim for relief. The Sixth Circuit, sitting *en banc*, reinstated the verdict and held that the change in duties and the unpaid suspension were each, standing alone, sufficient injury for White to state a claim for relief under Title VII. *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789 (6th Cir. 2004) (*en banc*).[2]

SUMMARY OF ARGUMENT

This case focuses on the type of employer conduct that is actionable under Title VII. If BNSF has its way, companies will be free to announce that any employee who complains of discrimination will be immediately suspended without pay, or will be given dirtier, more arduous duties, or both. Such conduct, though, violates both the text of Title VII and this Court's consistent reading of the anti-retaliation language in the Act and other legislation affecting the workplace.

Section 704(a) of Title VII (42 U.S.C. § 2000e-3(a)), which prohibits retaliation, serves a crucial role: "Maintaining unfettered access to statutory remedial mechanisms." *Robinson v.*

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[2] The "Background" section of the *en banc* decision, *White*, 364 F.3d at 792-94, is the source for the facts in this Statement.

Shell Oil Co., 519 U.S. 337, 346 (1997). Unlike § 703(a) (42 U.S.C. § 2000e-2(a)), which bars discrimination in employment on the basis of race, sex, religion or national origin, § 704(a) is not limited to employer conduct arising in the context of employment. *See, e.g.*, *Robinson* (applying § 704(a)'s protections to former employee), and *Rochon v. Gonzales*, ___ F.3d ___, 2006 WL 463116 (D.C. Cir. Feb. 28, 2006) (Ginsburg, C.J.) (holding actionable the allegedly retaliatory refusal of the FBI to investigate a threat on plaintiff's life).

The difference between the two provisions is evident in the statutory text. Under § 703(a), discriminatory conduct by an employer is actionable if it affects a worker's employment status in myriad ways—if it (1) involves compensation or other terms, conditions or privileges of employment, or (2) deprives or *tends to deprive* a worker of employment opportunities, or (3) adversely affects his status as an employee in any other way. As is evident, § 703(a) sweeps broadly, but it is confined to actions related to employment.

Section 704(a) is broader still, simply prohibiting employers from discriminating against employees because they have protested practices that are unlawful under Title VII, but without limiting the prohibited discrimination to the field of employment. The standard for actionability under § 704(a) is accordingly different, centering on conduct that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon*, 2006 WL 463116 at *8 (citation omitted).

In the present case, respondent White challenges employment-related conduct—an unpaid suspension and a reassignment—and she satisfies the standard for bringing claims under § 703(a), as well as § 704(a). In these circumstances, the Court need not define the outer limits of actionability under the latter.

1. *Section 704(a). Amici* represent workers in employment litigation day in and day out. We have encountered first hand

the rich variety of stratagems used by employers to punish workers who complain about discrimination and to deter them—and other workers who might support them—from exercising their statutory rights. These retaliatory practices run a wide gamut, from firings and threats of firing, to the filing of phony criminal reports with the police and the institution of frivolous civil litigation, to altering a worker's hours to prevent him from picking up his young son, who was dependent on his dad to get home after school. Unchecked, these practices and their numerous kin would gut effective enforcement of Title VII and shatter the promise of work-place equality that lies at the heart of the Act.

Fortunately, this Court has consistently given a broad reading to § 704(a) and similar anti-retaliation provisions in other statutes regulating employment. In particular, those decisions focus on penalizing employer conduct that could deter employee participation in remedial processes.

Most significant, the Court in *Robinson*, 519 U.S. at 346, which considered whether § 704(a)'s protections extend to former employees, agreed with the EEOC that excluding ex-employees "would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to *deter* victims of discrimination from complaining to the EEOC" (emphasis added). The Court said that the Commission's "arguments carr[ied] persuasive force given their coherence and their consistence with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory re-medial mechanisms." *Id.*

In so holding, the Court cited two cases, one arising under the National Labor Relations Act, *National Labor Relations Board v. Scrivener*, 405 U.S. 117 (1972), and the other under the Fair Labor Standards Act, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). Both cases viewed a broad reading of anti-retaliation provisions as essential to effective enforcement. Thus *Scrivener* explained that "com-

plete freedom [from retaliation] is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" 405 U.S. at 122 (citation omitted). And *Mitchell* noted that Congress did not seek to secure compliance with the FLSA through "detailed federal supervision or inspection of payrolls," and instead "chose to rely on information and complaints received from employees." 361 U.S. at 292. In these circumstances, "[p]lainly, effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances." *Id.*

The Court's approach to retaliation is fully consistent with the expansive reach of § 704(a), which bars employers from discriminating against workers for complaining about bias or assisting others who do, without in any way limiting the types of discrimination covered by the prohibition. The District of Columbia Circuit, citing *Robinson* and the EEOC Compliance Manual, recently held that "an alleged act of retaliation by the Government need not be related to the plaintiff's employment in order to state a claim of discrimination under Title VII." *Rochon*, 2006 WL 463116 at *7. In so ruling, the court pointed to "the decisions of the four other circuits that do not require that a retaliatory action be employment-related in order to state a claim under Title VII." *Id.* at *6.

Citing the law in other circuits, *Rochon* recognized that § 704(a)'s standard of actionability should focus on deterrence. The court said that "in order to support a claim of retaliation a plaintiff must demonstrate the 'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at *8 (citation omitted).

In *Rochon*, the court itself was able to determine that the conduct alleged—refusal to investigate a death threat—"meets this threshold of significance." *Id.* Here, as else-

where in our legal system, close calls on reasonableness are the province of the jury.

2. *Section 703(a).* BNSF errs in saying that §§ 703(a) and 704(a) should be construed in identical fashion. It compounds this error by reading § 703(a) too narrowly in the first instance and then seeking to import its cramped construction into § 704(a).

An "adverse employment action [covered by § 703(a) includes] 'discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment,' as subsection [703](a)(1) puts it, or 'limiting, segregating, or classifying . . . employees . . . in any way that would deprive or *tend to deprive* any individual of employment opportunities or otherwise adversely affect his status as an employee,' as subsection [703](a)(2) puts it." *McDonnell v. Cisneros*, 84 F.3d 256, 258-59 (7th Cir. 1996) (Posner, C.J.) (emphasis added). This language is confined to the employment setting, but it too is expansive, as the Court has confirmed: "the language of [§ 703(a) of] Title VII is not limited to 'economic' or 'tangible' discrimination" and instead is intended "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (citations and some internal quotation marks omitted). The precise contours of the challenged action—its form—is not important: "in enacting Title VII . . . Congress intended to prohibit all practices *in whatever form* which create inequality in employment opportunity due to discrimination." *Franks v. Bowman Transportation. Co., Inc.*, 424 U.S. 747, 763 (1976) (emphasis added).

Despite *Vinson*'s admonition that Title VII "is not limited to 'economic' or 'tangible' discrimination," BNSF argues that the concept of a "tangible employment action," developed in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998),

sets the floor on actionable employer conduct under Title VII. That is wrong. The presence of a tangible employment action, as that term is used in *Ellerth* and *Faragher*, serves only to denote those situations in which an affirmative defense is *not* available to an employer accused of creating a hostile work environment through supervisory harassment. That is, the Court created an affirmative defense precisely for actionable cases of harassment in which a tangible employment action is lacking.

Actionable employer conduct need not be economic or tangible; nor must it inflict serious psychological harm: "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

Since there is no requirement that actionable employer conduct must, in every case, lead to economic, tangible or psychological injury, a plaintiff possesses a viable § 703(a) claim if a reasonable person could conclude that the conduct under scrutiny (1) altered the terms, conditions or privileges of his employment, or (2) deprived or *tended to deprive* him of employment opportunities, or (3) adversely affected his status as an employee in any other way. In short, even were retaliation claims under § 704(a) held exactly to § 703(a)'s actionability standards—and they should not be—those standards are broad indeed.

3. *The conduct challenged here.* The two employer actions about which White complains are each actionable under both § 703(a) and § 704(a). BNSF suspended White without pay for 37 days. Such conduct, if discriminatory (and the jury found it was), quite clearly falls within the plain language of § 703(a)(1), which prohibits an employer from "discriminat[ing] against any individual with respect to his *compensation*" (emphasis added). So even if § 703(a)'s criteria are applied to this § 704(a) action, White will prevail.

In fact, the actionability standard covering § 704(a) should apply, since this case arose under that provision. And here there can be no doubt that a "reasonable worker" might well be "dissuaded" from pursuing an EEO claim if she knew she would be put off the property—without pay—and with no assurance that she would ever get her job back. *See Rochon*, 2006 WL 463116 at *8; *Mitchell*, 361 U.S. at 292 ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.").

BNSF's action in reassigning White's duties was likewise subject to challenge even under the language of § 703(a)(1), as an alteration in the "terms, conditions, or privileges of employment." White operated a forklift before she complained of discrimination. After her complaint, however, her supervisor took her off the forklift and assigned her to physically demanding and dirty train-yard work. Again, the jury found retaliatory animus.

This was not a situation in which White's opposition to the new duties was based on "[m]ere idiosyncrasies of personal preference." *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999). In BNSF's Statement of the Case—but nowhere in its argument—the company concedes that "other employees in the yard believed White had been unfairly assigned *forklift duties* (which are perceived by some as *less physically demanding and cleaner* than other track work)." Brief for Petitioner at 4 (emphasis added).

Since the dawn of Title VII, courts have recognized that the discriminatory assignment of workers to dirtier, more arduous duties violates the Act, *see United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 658 (2d Cir. 1971), and that principle applies here as well. And once again, a "reasonable worker" could easily be "dissuaded" from resorting to "statutory remedial mechanisms," *Robinson*, 519 U.S. at 346,

if he knew he faced reassignment to duties that his co-workers agreed were dirtier and more arduous.

Many other types of allegedly retaliatory conduct by an employer, including lateral transfers, public humiliation, threats of economic harm and poor evaluations, may also be actionable. As always, the question is whether a reasonable person might be dissuaded from complaining about work-place bias (under § 704(a)), or would see the conduct as changing his terms, conditions or privileges of employment, or depriving or tending to deprive him of employment opportunities, or otherwise adversely affecting his status as an employee (under § 703(a)).

BNSF and its *amici* say the sky will fall if this Court affirms the decision below. It won't. In any event, the statutory language is clear, and "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citation omitted). This principle leads to affirmance.

ARGUMENT

I. THE BROAD LANGUAGE OF § 704(a) OF TITLE VII COVERS ALL EMPLOYER CONDUCT THAT MIGHT DISSUADE A REASONABLE WORKER FROM PARTIPATING IN THE EEO PROCESS

We agree with BNSF that the "starting point in any matter of statutory construction is the text of the statute," and that this Court does not "'construe statutory phrases in isolation; we read statutes as a whole.'" Brief for Petitioner at 13, *quoting United States v. Morton*, 467 U.S. 822, 828 (1984).

A. The Statutory Text Is Expansive in Both §§ 703(a) and 704(a), but It Is Broader in § 704(a)

Section 703(a) of Title VII provides:

> (a) *Employer practices.* It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Subsection (a)(1) speaks to discrimination with respect to "compensation, terms, conditions, or privileges of employment." Subsection (a)(2)—which BNSF ignores—is broader, barring any limitation, segregation or classification based on suspect motivation that "deprive[s] or *tend[s] to deprive* any individual of employment opportunities or otherwise adversely affect his status as an employee" (emphasis added).[3]

When subsections (a)(1) and (a)(2) are considered together, "as a whole," *United States v. Morton*, 467 U.S. at 828, it is evident that Congress intended to interdict all manner of

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[3] Subsection (a)(2) provides the foundation for disparate impact analysis, *see, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991 (1988), but it applies to disparate treatment cases (like this one) as well. *See Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 1550-51 (2005) (O'Connor, J., concurring in the judgment) (discussing parallel provision of Age Discrimination in Employment Act).

discriminatory employer actions that affect "terms, conditions, or privileges of employment," that "deprive or tend to deprive" a worker of "employment opportunities," or that "adversely affect his status as an employee" in any other way. This is a sweeping standard, but the one in § 704(a) is even broader because, unlike in § 703(a), the prohibited discrimination is not confined to the sphere of employment:

> (a) *Discrimination for making charges, testifying, assisting, or participating in enforcement 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 title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 703(a) forbids employers from "discriminat[ing]" against employees (subsection (1)) or "limit[ing], segregat[ing], or classify[ing]" them (subsection (2)) in terms of various aspects of employment. But § 704(a) simply proscribes "discriminat[ion]," without more, and plainly reaches beyond the employment arena. *See Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S.Ct. 1497, 1505 (2005) ("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave [Title IX of the Education Amendments of 1972] a broad reach.").

B. The Court's Decisions on Statutory Retaliation Stress the Necessity to Protect Workers from Conduct that Might Deter Them from Participating in Remedial Processes

In its construction of § 704(a) and comparable anti-retaliation provisions in other legislation regulating the workplace, the Court has consistently emphasized the need to protect workers from conduct that might deter them from exercising their statutory right to seek a remedy for employer

violations. The Court's most significant decision interpreting § 704(a) itself, *Robinson*, 519 U.S. at 337, held that its protections extended to former employees. In reaching this conclusion, the Court concurred with EEOC's position that excluding ex-employees "would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to *deter* victims of discrimination from complaining to the EEOC." *Id.* at 346 (emphasis added). In particular, the Commission's arguments advanced "a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." *Id.*

In support, the Court cited *National Labor Relations Board v. Scrivener*, 405 U.S. 117 (1972), which arose under the National Labor Relations Act, and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), a case under the Fair Labor Standards Act. *Robinson*, 519 U.S. at 346. In both *Scrivener* and *Mitchell*, the Court saw a broad reading of anti-retaliation provisions as crucial to effective enforcement.

Scrivener interpreted § 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4), which makes it an unlawful labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The employer had terminated an employee who gave a written, sworn statement to an NLRB examiner during an investigation, but he had not filed a charge himself or testified at a formal hearing. The Board held that the firing violated §§ 8(a)(1) and (4) of the Act, but the court of appeals disagreed. This Court granted certiorari and held that § 8(a)(4) had been violated:

> Construing § 8(a)(4) to protect the employee during the investigative stage, as well as in connection with the filing of a formal charge or the giving of formal testimony, comports with the objective of that section. Mr. Justice Black, in no uncertain terms, spelled out the congressional purpose:

> Congress has made it clear that it wishes all persons with information about such practices to be *completely free* from coercion against reporting them to the Board. This is shown by its adoption of § 8(a)(4) which makes it an unfair labor practice for an employer to discriminate against employee because he has filed charges. And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges (citations omitted). *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967).

Scrivener, 405 U.S. at 121-22 (emphasis added) (parallel citations omitted). This "complete freedom is necessary," the Court explained, "'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *Id.* at 122 (citation omitted).

In *Nash*, from which *Scrivener* quoted, the Court considered a Supremacy Clause challenge to a Florida law that disqualified terminated employees from unemployment compensation if the state commission found that their unemployment resulted from an ongoing labor dispute. The state commission had held that Nash's unfair labor practice charge pending before the NLRB meant that she was involved in a labor dispute and was therefore disqualified from receiving unemployment compensation, simply because she had invoked the NLRA's statutory remedial mechanism. *See Nash*, 389 U.S. at 236-37.

In addition to the language from *Nash* quoted in *Scrivener*, the Court in *Nash* held that the Florida law frustrated congressional intent reflected in § 8(a)(4) because it imposed disincentives to making statutorily-authorized complaints:

> Florida has applied its . . . law so that an employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet and receive unem-

> ployment compensation until he finds a new job or (2) he may file an unfair labor practice charge, thus under Florida procedure surrendering his right to unemployment compensation, and risk financial ruin if the litigation is protracted. * * * It appears obvious to us that this financial burden which Florida imposes *will impede resort to the Act and thwart congressional reliance on individual action.*

389 U.S. at 239 (emphasis added).

Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, which was cited in *Robinson*, 519 U.S. at 346, examined the anti-retaliation provision of the FLSA, § 15(a)(3) of the Act, 29 U.S.C. § 215(a)(3), which makes it unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act." *Mitchell* involved a potential conflict between § 15(a)(3) and § 17 of the Act, which arguably barred awards of unpaid wages and liquidated damages where the Secretary of Labor prosecuted a violation of § 15.

The Court held, however, that such a restrictive construction of § 17 would be inconsistent with the purposes of the FLSA. *Id.* at 294-96. In reaching this conclusion, the Court said that Congress "chose to rely on information and complaints received from employees seeking to vindicate [FLSA] rights claimed to have been denied." *Id.* at 292. Effective enforcement of those rights, though, may "only be expected if employees felt free to approach officials with their grievances." *Id.* This will not be true if, for example, "fear of economic retaliation" is present in the workplace. *Id.* For these reasons, "[b]y the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary pursuant to § 17, Congress *sought to foster a climate* in which compliance with the substantive provisions of the Act would be enhanced." *Id.* (emphasis added).

Finally, in *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983), the Court considered whether or when the NLRB could enjoin under § 8(a)(4) a civil suit filed by an employer against an employee. Before holding that "the prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act that may be enjoined by the Board," *id*. at 744, the Court explained the purpose of § 8(a)(4) and the related § 8(a)(1):

> Sections 8(a)(1) and (4) of the Act are broad, remedial provisions that guarantee that employees will be able to enjoy their rights secured by § 7 of the Act—including the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes—without fear of restraint, coercion, discrimination, or interference from their employer. *The Court has liberally construed these laws as prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities.*

Id. at 740 (emphasis added) (footnote omitted). And the Court specifically expressed concern about "the chilling effect" a lawsuit might have "upon an employee's willingness to engage in protected activity." *Id.* at 741.

As is apparent from this review of the Court's treatment of the anti-retaliation provisions of Title VII, the NLRA and the FLSA, the Court places a premium on "[m]aintaining unfettered access to statutory remedial mechanisms," *Robinson*, 519 U.S. at 346, free from coercion, fear of economic reprisal or any form of restraint imposed by the employer on the exercise of statutory rights. As to Title VII, this perspective is congruent with, and flows from, the breadth of § 704(a).

C. Several Appellate Decisions Extend § 704(a) Beyond Job Actions and Agree that § 704(a)'s Standard of Actionability Focuses on Employer Conduct that Might Dissuade a Reasonable Worker from Participating in the Remedial Process

Because there are no textual limits on the type of employer conduct covered by § 704(a), five circuits have held that the provision reaches actions outside the traditional employment context. The most recent of the five is the D.C. Circuit in *Rochon v. Gonzales, supra*.

In *Rochon*, the plaintiff—a Special Agent in the FBI who had successfully sued the agency under Title VII in the past—complained that the Bureau retaliated against him by refusing to investigate credible evidence of death threats directed at him and his wife by a Federal inmate. The district court dismissed the case, reasoning that actions outside the personnel realm are beyond the ken of Title VII, but the D.C. Circuit reversed.

The court noted that it had previously held in *Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C. Cir. 1991), that cancellation of a symposium honoring the plaintiff, which was not a personnel action, was actionable as retaliation under the Age Discrimination in Employment Act, which is in many respects parallel to Title VII. *See Rochon*, 2006 WL 463116 at *5. The court said that extending *Passer*'s rationale to Title VII "accords with the decisions of the four other circuits that do not require that a retaliatory action be employment-related in order to state a claim under Title VII." *Id.* at *6.[4]

[4] The four circuits are the Seventh in *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 606 (7th Cir. 1999); the Ninth in *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000); the Tenth in *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996); and the Eleventh in *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

The D.C. Circuit also considered this Court's decision in *Robinson*, as well as EEOC's position (reflected in its Compliance Manual) that § 704(a) prohibits "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." *Id.* The court ultimately held that "an alleged act of retaliation by the Government need not be related to the plaintiff's employment in order to state a claim of discrimination under Title VII." *Id.* at *7; *see also Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 745 (7th Cir. 2002) (Posner, J.), *cert. denied*, 540 U.S. 984 (2003) ("We do not mean to suggest . . . that retaliation, to be actionable under Title VII . . . has to involve an adverse employment action. It does not.").

The D.C. Circuit in *Rochon* also laid out the standard for actionability of retaliation claims: "a plaintiff must demonstrate the 'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 2006 WL 463116 at *8 (citations omitted). Finally, the court determined that the conduct alleged—the refusal to investigate a death threat— "meets this threshold of significance. In other words, a reasonable FBI agent well might be dissuaded from engaging in activity protected by Title VII if he knew that doing so would leave him unprotected by the FBI in the face of threats against him or his family." *Id.*

In sum, the expansive language of § 704(a), as well as the Court's interpretation of that language and other statutory bars to retaliation, leads to a standard for actionability focusing on employer conduct that "dissuade[s] a reasonable worker," *id.*, from exercising his rights under "statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. This is not the same as the standard under § 703(a).

II. A CLAIM IS ACTIONABLE UNDER § 703(a) IF A REASONABLE PERSON COULD CONCLUDE THAT THE CHALLENGED EMPLOYER CONDUCT EITHER (1) AFFECTED COMPENSATION OR OTHER TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT, OR (2) DEPRIVED OR TENDED TO DEPRIVE A WORKER OF EMPLOYMENT OPPORTUNITIES, OR (3) ADVERSELY AFFECTED HIS STATUS AS AN EMPLOYEE IN ANY OTHER WAY

A. Section 703(a)'s Standard for Actionability is Clear on the Face of the Statute

The standard for actionability under § 703(a) is embedded in the statute and phrased in the disjunctive, and no shorthand properly captures it. Discriminatory employer conduct is subject to challenge under § 703(a) if it (1) affects compensation or other terms, conditions or privileges of employment, or (2) deprives or *tends to deprive* a worker of employment opportunities, or (3) adversely affects his status as an employee in any other way.

Section 703(a)'s standard of actionability "is not limited to 'economic' or 'tangible' discrimination," because Title VII is intended "to strike at the entire spectrum of disparate treatment of men and women in employment." *Vinson*, 477 U.S. at 64 (citations and some internal quotation marks omitted). The form of the challenged action is not important, since Congress, "in enacting Title VII . . . intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. at 763.

Injuries need not be economic or tangible to be actionable under § 703(a). Nor must they inflict serious psychological harm:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

Harris, 510 U.S. at 22.

Here the types of consequences that concerned the Court—"detract[ing] from employees' job performance, discourag-[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers"—are all things that "tend to deprive an[] individual of employment opportunities" under § 703(a)(2). Such injuries are actionable, even if they do not flow from, in the D.C. Circuit's terminology, "a cognizable type" of personnel action. *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006).

B. *Ellerth* and *Faragher* Do Not Set a Floor on Actionability

BNSF seeks to argue that the concept of a "tangible employment action," developed in *Burlington Industries v. Ellerth*, and *Faragher v. City of Boca Raton*, sets the floor on actionable employer conduct under Title VII. That argument ignores this Court's admonition that Title VII "is not limited to 'economic' or 'tangible' discrimination," *Vinson*, 477 U.S. at 64, and it represents as well a flagrant misreading of *Ellerth* and *Faragher*.

In *Ellerth*, the Court focused on § 219(2) of the Restatement (Second) of Agency (1957), which sets forth criteria for imposing liability on an employer even when employees commit torts outside the scope of employment. The Court

looked especially at subsection (d)—in particular the language imposing vicarious liability when the employee "was aided in accomplishing the tort by the existence of the agency relation"—and held that this standard was satisfied, as a matter of law, where the harassing supervisor engaged in a tangible employment action. *Ellerth*, 524 U.S. at 762-63. Even where there is no tangible employment action, however, the employer is still subject to vicarious liability for harassment by a supervisor, but the employer is permitted to assert an affirmative defense. *Id.* at 765.

Under *Ellerth* and *Faragher*, an employer is *always* subject to vicarious liability for harassment by one of its supervisors. The tangible employment action serves only to distinguish between those situations in which an affirmative defense is—or is not—available. The Court did not use the term to denote the types of employer conduct that are actionable. Indeed, "[a]lthough Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor] . . . *this is not dispositive*." *Ellerth*, 524 U.S. at 766 (emphasis added). Rather, "Burlington is still subject to vicarious liability for [the supervisor's] activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability." *Id.* Finally, *Faragher* itself confirmed that, "although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to 'economic' or 'tangible' discrimination." *Faragher*, 524 U.S. at 786 (citations and some internal quotation marks omitted).[5]

[5] *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), which applied the principles developed in *Ellerth* and *Faragher* to cases of constructive discharge, does not help BNSF, either. In particular, the affirmative defense fashioned in those cases may only be used in (actionable) situations *lacking* a tangible employment action, so *Suders* held that the "affirmative defense will not be available to the employer . . . if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation."

C. Section 703(a)'s Test of Actionability Will Often, but Not Always, Produce the Same Result as § 704(a)'s Test

Some courts have applied the language of § 703(a) to retaliation claims under § 704(a). For example, the Seventh Circuit said in *McDonnell v. Cisneros*, 84 F.3d at 258, that "[t]he language of 'materially adverse employment action' that some courts employ in retaliation cases is a paraphrase of Title VII's basic prohibition against employment discrimination, found in" § 703(a).

To the extent that the conduct challenged in a retaliation case is employment-related—as it is here—application of § 703(a)'s test may well lead to the same result as § 704(a)'s. In particular, *all* employer conduct that is actionable under § 703(a) will also be subject to challenge under § 704(a). That is, any conduct that a reasonable person could see, for example, as tending to deprive a worker of employment opportunities would likewise be action that would "dissuade[] a reasonable worker" from participating in the EEO process. *Rochon*, 2006 WL 463116 at *8. The converse, however, is not true; *i.e.*, all employer conduct that is actionable under § 704(a) is not necessarily sufficient to state a claim under § 703(a).

III. THE CONDUCT CHALLENGED BY WHITE IS ACTIONABLE UNDER BOTH § 703(a) AND § 704(a)

The conduct about which respondent White complains should be assessed under the actionability standard in § 704(a), since this is a retaliation case. But White also satisfies the standard under § 703(a).

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542 U.S. at 133. As in *Ellerth* and *Faragher*, the use in *Suders* of the concept of a tangible employment action does not set a floor on actionability; it simply indicates the types of constructive discharges to which the affirmative defense does not apply.

A. The Suspension Without Pay is Actionable Under Both §§ 703(a) and 704(a)

BNSF suspended White without pay for 37 days. Assuming the company was motivated by retaliation (and the jury found it was), the unpaid suspension quite clearly falls within the plain language of § 703(a)(1), which prohibits an employer from "discriminat[ing] against any individual with respect to his *compensation*" (emphasis added). By the same token, a "reasonable worker" would be "dissuaded" from pursuing her statutory remedies if she knew that she would immediately be suspended without pay, with no assurance that she would ever get her job back, so § 704(a)'s test is also satisfied.

BNSF argues, though, that the suspension is not actionable because it was "temporary" and "was not the official decision of the company under the terms of the CBA," *citing International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976). Brief for Petitioner at 33, 37. But in *Robbins & Myers*, the Court rejected the argument that a firing did not become "final" (and hence the statute of limitations did not begin to run) until completion of the contractually authorized grievance process. *Id.* at 234-35.

In *Robbins & Myers*, the Court noted that "the parties could conceivably have agreed to a contract under which management's ultimate adoption of a supervisor's *recommendation* would be deemed the relevant statutory 'occurrence,'" but said that had not happened. *Id.* at 234 (emphasis added). Nor did it happen here. This was not a situation in which a supervisor merely *recommended* that White be suspended. Instead, a supervisor actually suspended her. As in *Robbins & Myers*, White "was [suspended without pay] . . . and all parties so understood. She stopped work and ceased receiving pay and benefits." *Id.* at 234.

In addition to back pay, damages are available under Title VII through 42 U.S.C. § 1981a, by virtue of the Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1072, and in fact the jury awarded White $43,250 in compensatory damages. BNSF's argument means that its provision of a partial remedy to White (reinstatement with back pay) bars her from seeking full relief in the form of damages. Any such result is precluded by *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982), which held that an employer's unconditional job offer cut off further accumulation of back pay—but that the employee who accepted such an offer "retain[ed] his rights to an award by the court of back pay accrued prior to the effective date of the offer, and any court-ordered retroactive seniority," and other relief. *Id.* at 238.[6]

Finally, BNSF argues policy, saying that it is essential for employers to have the ability to suspend workers without pay pending investigation. An employer always has the capacity to suspend its workers, however—either with or without pay—as long as it does not act for unlawful reasons. And if an employee's suspension pending investigation is paid, the damages flowing from unlawful action would be minimized, although possibly not eliminated altogether. *See DeLaughter v. United States Postal Service*, 3 F.3d 1522, 1524 (Fed. Cir. 1993) ("There are many benefits, both tangible and intangible, which may accrue to an employee who is actually present and working, instead of being away from the work place while on administrative leave. For example, the employee may gain valuable work experience; he may be eligible for performance awards; he may be assigned overtime duty; or he may benefit psychologically from earning his pay rather than merely receiving it.").

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[6] Because *Ford Motor Co.* arose before enactment of the Civil Rights Act of 1991, damages were not available.

If BNSF had suspended White with pay, its investigation would likely have been completed in far less than 37 days, and she probably would not have suffered $43,250 in damages. In any event, the deprivation of pay suffered by White is actionable under the precise text of § 703(a)(1), as well as § 704(a).[7]

B. The Reassignment is Actionable Under Both §§ 703(a) and 704(a)

White's reassignment is also subject to challenge under § 703(a)(1)'s language, since the terms, conditions or privileges of her employment were altered. White was operating a forklift before she complained of discrimination. After her complaint, however, her supervisor took her off the forklift and assigned her to the more physically demanding and dirtier train-yard work. The jury found that this decision sprang from retaliatory animus.

Once again, BNSF erroneously relies on *Ellerth*, *Faragher* and *Suders* to argue that White's reassignment was not a tangible employment action. It need not be. Nor was this a situation in which White's objection to the reassignment sprang from "[m]ere idiosyncrasies of personal preference." *Brown*, 199 F.3d at 457.

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[7] BNSF also relies on *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000), which held that a professor who was denied tenure and informed that her appointment would expire, but who then secured tenure (and back pay) following the filing of a grievance, had not suffered an adverse action. The court below distinguished *Dobbs-Weinstein* based in part on "the unique nature of 'tenure decisions in an academic setting'" and did "not decide to what extent [the] holding in *Dobbs-Weinstein* survive[d] [its] decision." *White, supra*, 364 F.3d at 802. More to the point, *Dobbs-Weinstein* is fundamentally at odds with *Delaware State College v. Ricks*, 449 U.S. 250 (1980), which held that the running of the statute of limitations for a claim of tenure denial is not affected by the invocation of a grievance process.

BNSF concedes that "other employees in the yard believed . . . forklift duties . . . [were] less physically demanding and cleaner than other track work." Brief for Petitioner at 4. Indeed, the supervisor "informed White that he was removing her from the forklift position and assigning her to a standard track laborer position because of her co-workers' complaints." *White, supra*, 364 F.3d at 792-93. Hence there was record evidence—acknowledged by BNSF—that it was not only White who thought that forklift duties were more desirable. The other workers thought so, too, and they even went so far as to complain to management that White had been given this plum assignment.

It is far too late in the day to argue that discriminatory assignment of dirtier, more arduous duties is permissible under Title VII. *See, e.g., United States v. Bethlehem Steel Corp.*, 446 F.2d at 655 ("Job assignment practices were even more reprehensible. Over 80 per cent of black workers were placed in 11 departments, which contained the hotter and dirtier jobs in the plant."). The reality here was that White suffered a change in the terms, conditions or privileges of her employment when she was removed from forklift duties, making the reassignment actionable under § 703(a).

Once again, though, it makes more sense to apply the actionability standard in § 704(a) in this retaliation case. And a "reasonable worker" would easily be "dissuaded" from resorting to "statutory remedial mechanisms," *Robinson*, 519 U.S. at 346, if he knew he faced reassignment to duties that his co-workers everyone agreed were dirtier and more arduous, and therefore less desirable.

C. Other Employer Conduct is Also Actionable

Lateral transfers—those in which title, pay, benefits and duties are supposed to remain the same—may be actionable under § 703(a) if a jury could reasonably find that the transfer entailed a change in the terms, conditions or privileges of employment, a denial or a tendency to deny employment

opportunities, or any other adverse effect on a worker's status as an employee. In a case of retaliation under § 704(a), the transfer would be actionable if it would dissuade a reasonable worker from EEO participation. For example, in a § 703(a) case, the Seventh Circuit in *Collins v. State of Illinois*, 830 F.2d 692 (7th Cir. 1987), noted that "other courts have found adverse job impact, where there was no reduction in salary or benefits, in an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationery and support services." *Id.* at 703 (footnotes omitted). The court commented that:

> Title VII does not limit adverse job action to strictly monetary considerations. One does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture.

Id.

In the end, the *Collins* court held that the plaintiff suffered an actionable injury because, among other things, "[h]er supervisors seemed unsure of what [her] responsibility and authority would be at the newly created job," she was "relegated to doing reference work instead of consulting," and "[s]he did not have her own office" any longer. *Id.* at 704. *Collins* was correctly decided. Not only was there a change in the terms, conditions or privileges of the plaintiff's employment, placement in the new job tended to deprive her of employment opportunities, since her duties were uncertain and she was forced to do more menial work.

Some cases involving lateral transfers, however, are plainly wrong, *e.g.*, *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570, 575 (5th Cir. 2003), *cert. denied sub nom*, *Hernandez v. Crawford Bldg. Material Co.*, 540 U.S. 817 (2003), in which the court said that "a decision made by an

employer that only limits an employee's opportunities for promotion or lateral transfer does not qualify as an adverse employment action under Title VII." On the contrary, a limitation on "opportunities for promotion" fits squarely with the language of § 703(a)(2), since at a minimum the employer has "limit[ed]" the employee "in a[] way which would . . . tend to deprive [him] of employment opportunities."[8]

In similar fashion, the D.C. Circuit sweeps much too broadly in saying that "[p]urely subjective injuries, such as . . . public humiliation or loss of reputation . . . are not adverse actions." *Forkkio v. Powell*, 306 F.3d 1127, 1130 (D.C. Cir. 2002). It is easy to imagine factual situations in which a jury could reasonably conclude that loss of employment opportunities tended to flow from public humiliation of an employee or damage to his reputation. If so, the claim is actionable under § 703(a) and under § 704(a) as well, because an employee faced with such humiliation for complaining about discrimination would surely be dissuaded from making other complaints in the future.

BNSF is dismissive of an associate in a law firm complaining about writing briefs rather than trying cases, "which might be perceived as advantageous to partnership prospects," Brief for Petitioner at 30, or an employee complaining about being excluded from "regular weekly lunches," *id.* at 46. But if the associate is right about partnership prospects

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[8] The *en banc* court below acknowledged that it was not applying the precise wording of Title VII and had "developed the adverse-employment-action element to prevent the kind of claims based upon trivial employment actions that a strictly literal reading of Title VII's anti-retaliation provision would allow." *White*, *supra*, 364 F.3d at 799. This Court has repeatedly cautioned, however, that the role of courts is to apply clear statutory text as written and not to impose their own policy choices. The Sixth Circuit's extra-textual approach produced the correct result here, but *Banks* illustrates its susceptibility to misuse, and it is preferable to derive actionability standards from the text of §§ 703(a) and 704(a), aided by the Court's decisions.

improving with litigation experience, or if lunches offer an informal opportunity for employees to be visible to upper management, then systematic exclusion from either litigation or lunch at a minimum "tends to deprive" the workers in question of employment opportunities and is actionable under § 703(a)(2). Such exclusion would also dissuade employees from exercising their statutory rights and would be subject to challenge under § 704(a) in a retaliation case. If the plaintiff can establish that the motive is discriminatory—*e.g.*, women are routinely denied the chance to try cases or attend power lunches—or retaliatory, Title VII provides a remedy.

An employer's *threat* to fire an employee for complaining about discrimination may also be actionable. Firing is the workplace equivalent of capital punishment, and in some circumstances a jury might reasonably find that the threat of this guillotine altered the terms, conditions or privileges of employment under § 703(a), or would dissuade a reasonable worker from EEO participation under § 704(a). *See Robinson*, 519 U.S. at 346 (excluding former employees from the protections of § 704(a) "would undermine the effectiveness of Title VII by allowing the *threat* of postemployment retaliation to deter victims of discrimination from complaining to the EEOC") (emphasis added); *see also Mitchell*, 361 U.S. at 292 ("*fear of economic retaliation* might often operate to induce aggrieved employees quietly to accept substandard conditions.") (emphasis added).

In *Brown*, 199 F.3d at 458, the D.C. Circuit rejected the notion that "formal criticism or poor performance evaluations are necessarily adverse actions." But an evaluation is the quintessential "company act"—typically signed by a supervisor (and often by a second-level supervisor or Human Relations official) as part of a formal process. If an evaluation operates to lock an employee into her job, with little hope of advancement, a jury could reasonably conclude that the appraisal tends to deny the worker's employment opportunities under § 703(a), as well as dissuading her from

making complaints of discrimination under § 704(a). Indeed, § 703(a)(2) prohibits employers from discriminatorily "classify[ing]" employees in ways that would tend to injure their employment opportunities, and labeling an outstanding employee as merely "satisfactory" (or worse) in an official company document at a minimum "classifies" the employee in a way that will tend to harm his career prospects.

CONCLUSION

BNSF and its *amici* claim that employers will be placed at a marked disadvantage if the decision below is affirmed. There is no support for that argument, and the statutory text is clear. Given this clarity, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (citation and internal quotation marks omitted).

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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 who are committed to working on behalf of those who have been victims of wrongful termination and unlawful employment discrimination. 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's members represent clients under all the statutes set forth in the Statement of Interest.

AARP is a nonprofit, nonpartisan membership organization of more than thirty-six million people age 50 and older that is dedicated to addressing the needs and interest of older Americans in ways that are beneficial and affordable to them and to society as a whole.

One of AARP's primary objectives is to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. Through its advocacy, research, publications, and training programs, AARP seeks to eliminate stereotypes, encourage employers to hire and to retain older workers, and to help older workers overcome obstacles they encounter, including discrimination on the job.

Over half of AARP members are employed, including eighty percent of AARP's membership between ages 50 and 54. All of these members have a strong interest in the outcome of this case, which will affect their rights under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), due to parallels in judicial interpretation of the ADEA, the ADA and Title VII.

Equal Justice Society (EJS) is a west coast based national civil rights organization that gives voice to all those reaching for racial and social justice. Using a three-prong strategy of law and public policy advocacy, cross-disciplinary convenings, and strategic public communications, EJS seeks to restore racial issues to the national consciousness, build effective progressive alliances and create a discourse on the positive role of government. EJS has played a defining role at the state and national levels in the courts, on policy initiatives, and in the public discourse on race. In this role, the organization works to dismantle the structural underpinnings of discrimination by crafting legal strategies and public policies that can withstand long-term challenges for the benefit of all members of our community.

The National Disability Rights Network ("NDRN"), formerly the National Association of Protection and Advocacy Systems ("NAPAS") is the membership association of protection and advocacy ("P&A") agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.