No. 09-291

IN THE

Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a third party afforded protection under the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a) based *solely* upon his association with an employee who has engaged in protected activity?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Respondent, North American Stainless ("NAS"), formerly known as North American Stainless LP, pursuant to Supreme Court Rule 29.6, hereby discloses that, as of November 9, 2009, it is a general partnership with no parent corporation. The managing general partner of NAS is Stainless Steel Invest, Inc., a Delaware corporation which is not a publicly held corporation. The only other partner of NAS is Stainless Alloys, Inc., a Delaware corporation, which is not a publicly held corporation. The two partners of NAS are owned by North American Stainless, Inc., a Delaware corporation, which is owned by Acerinox S.A., whose shares are publicly traded on the Madrid Stock Exchange.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Page

Statutes:

Regulations:

STATEMENT OF THE CASE

I. Statement of Facts.

NAS owns and operates a stainless steel manufacturing facility in Carroll County, Kentucky. During all relevant times to this action, Petitioner Eric Thompson (hereinafter "Petitioner") and his then fiancée, Miriam Regalado (hereinafter "Regalado") were at-will employees of NAS. Regalado filed a charge of discrimination against NAS with the EEOC in September 2002 alleging that her supervisors had discriminated against her on the basis of her gender.[1] Petitioner did not voice any complaints to NAS regarding NAS's alleged unlawful treatment of Regalado or otherwise assist his fiancée with her charge of discrimination. There is no claim that Petitioner is in a protected category or that he engaged in any protected activity.

Petitioner was terminated from his employment on March 7, 2003. Petitioner had submitted an unsolicited memorandum to his supervisor in which he asked rhetorical questions that demonstrated his disagreement with NAS's management practices.[2]

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[1] The EEOC investigated Regalado's allegations of gender discrimination against NAS but found no basis to support her Charge of Discrimination.

[2] Some of the philosophical questions in Petitioner's memorandum written to NAS included: "Where is NAS going to be in 5 years? Where is Eric Thompson going to be in 5 years?" "Who possesses the leadership, communication skills, (Cont'd)

Petitioner believed that his termination was not the result of this insubordinate memorandum, but was based instead solely upon his relationship with his fianceé who had filed a separate charge of discrimination with the EEOC. Petitioner subsequently filed his own charge of discrimination with the EEOC.

II. District Court Dismissal by Summary Judgment and Denial of Motion for Reconsideration.

After receiving the necessary right-to-sue letter from the EEOC, Petitioner filed a Title VII action against NAS in the Eastern District of Kentucky. Petitioner alleged in his Complaint that his relationship with Regalado was "the sole motivating factor in his termination," but he did not allege that *he* had engaged in any protected behavior on behalf of himself or Regalado, a fact he confirmed in his deposition. NAS moved for summary judgment presenting the legal issue

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(Cont'd)

motivational skills, who are the strong problem solvers, and who provides independent contributions to lead NAS for the next 5 years?" "Who would be the next general V.P. today?" "If your managers would not make a good V.P. Why not?" and "Is today's management cut out for tomorrow?" In the final paragraph, Petitioner wrote that he was "surprised to see engineers being replaced by less qualified personnel." Petitioner bemoaned that it was not lawful for a person to represent himself as a physician or attorney without the required qualifications, but that there were, unfortunately, no such standards for engineers. In the final sentence of his statement, Petitioner expressed his opinion that he "would like to see a professional engineer in our department, which is a requirement to work under, before also becoming licensed."

of whether the Petitioner's relationship with Regalado, as the sole motivating factor in his termination, was sufficient — as a matter of law — to support his Title VII retaliation claim.[3]

The district court granted NAS's motion for summary judgment, holding that Petitioner had failed to state a claim under either Title VII's discriminatory discharge provision contained in 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision of set forth at 42 U.S.C. § 2000e-3. The district court found that the anti-retaliation statute did not protect Petitioner where his fiancée had engaged in protected activity on behalf of herself, but not on behalf of Petitioner, and Petitioner had not engaged in protected activity on behalf of himself or his fiancée.

Petitioner subsequently filed a Motion to Alter or Amend based upon this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006). The district court appropriately recognized that *Burlington* did not address the narrow statutory construction issue in this case of whether Title VII permits a retaliation claim by a plaintiff/employee who did not himself engage in protected activity and denied Thompson's motion. Petitioner then appealed to the Sixth Circuit Court of Appeals.

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[3] For purposes of summary judgment, NAS accepted that contention, but argued even if true the allegations did not support a claim.

III. Sixth Circuit's Initial Reversal of the District Court.

In a 2-1 decision issued on March 31, 2008, a three judge panel of the Sixth Circuit Court of Appeals reversed the summary judgment.[4] The panel majority's holding acknowledged that the plain language of the statute applies only to those parties who are engaged in a protected activity. While Petitioner's claim should be excluded on the plain language of the statute as he clearly was not engaged in any protected activity, the panel majority held that such a decision "defeats the plain purpose of the Title VII." Accordingly, the panel majority found that the statute should be interpreted more broadly than written.

Judge Griffin authored a well-researched and reasoned dissent in agreement with NAS's position that the plain and unambiguous language of Title VII's retaliation statute does not provide a cause of action for Petitioner to recover against NAS. The dissent appropriately and correctly recognized that the majority's opinion made the Sixth Circuit the only appellate court to hold that third parties who do not belong to any protected category and who do not, as set forth in the statute, engage in any protected activity are entitled to protection under the anti-retaliation provisions of Title VII. The dissent further correctly noted that the Fifth, Eighth and Third Circuits had rejected the argument that "third-party claims" are

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[4] The Opinion was authored by United States District Judge for the Eastern District of Michigan, the Honorable Arthur J. Tarnow.

covered under Title VII's anti-retaliation provisions. Thus, this decision created a clear split in the circuits for "third-party retaliation claims" with the Sixth Circuit standing alone in the minority.

IV. *En Banc* Rehearing and Affirming of District Court

On July 28, 2008, the Sixth Circuit granted NAS's Petition for Rehearing *En Banc*. The *en banc* Court issued its opinion on June 5, 2009, reversing the decision of the three judge panel and affirming the decision of the district court. Specifically, a majority of the *en banc* Court acknowledged that it was joining the circuits having ruled on this narrow issue, holding that a cause of action under § 2000e-3(a) is limited to persons who have personally engaged in protected activity. Petitioner had not engaged in any protected activity, and thus dismissal was warranted.

The *en banc* majority first recognized that § 2000e-3(a) is clear in limiting the class of persons it protects. Particularly, this class is limited to persons who engage in protected activity as set forth in the statute. Thus, as the Court recognized, it was required to enforce the statute according to its terms.

The Court next examined whether Petitioner asserted a proper cause of action under the statute. It noted that the first element a retaliation plaintiff must prove is that he engaged in protected activity. Petitioner had not alleged that he engaged in any such activity, and thus he did not establish this element of his claim. Therefore, the district court's summary judgment in

favor of NAS was proper. The Sixth Circuit specifically recognized that whether Petitioner had standing under § 2000e-5(f)(1) was a distinct and separate issue from whether he had a cause of action under § 2000e-3(a), and that his standing was not at issue in this case.

Finally, a majority of the *en banc* Court reviewed this Court's recent decisions in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __ U.S. __, 129 S.Ct. 846 (2009), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006), to determine whether those decisions might affect the Court's holding in this case. The Sixth Circuit, while specifically noting that *Crawford*'s holding that active opposition was not required for a retaliation claim, nevertheless did not reach the circumstances of this case because Petitioner had engaged in no opposition whatsoever. Additionally, the Court recognized that *Burlington Northern* addressed a wholly separate issue—the scope of retaliation under the statute—from whether an employee, such as Petitioner, who does not engage in protected activity has a viable cause of action. Petitioner subsequently filed his Petition for Writ of Certiorari to this Court.

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate any compelling reasons for his Petition to be granted. While he asserts that an inter-circuit conflict exists with respect to the issue of third-party retaliation claims, such a conflict does not actually exist. Rather, all of the circuits who have considered this issue have squarely rejected such claims.

Further, the *en banc* Sixth Circuit properly recognized that § 2000e-3(a) is unambiguous and must be enforced as written. The anti-retaliation provision specifically requires that an employee must have engaged in one of the actions enumerated therein. However, Petitioner admittedly took no such actions and is pursuing his claims solely on the basis of his association with another employee who did engage in protected activity under the statute.

Finally, Petitioner's public policy arguments, that enforcing the statute as written will discourage employees from reporting discrimination and frustrate the remedial purpose of the statute, are without merit. In actuality, requiring employees to take some affirmative step to be protected under the statute will actually encourage reporting. Additionally, enforcing the statute as written will ensure that courts and employers both have objective criteria for determining who or what activities are protected. Otherwise, both courts and employers will be required to delve into the highly subjective, personal, and ever-changing relationships of employees to determine whether or not an employee may be protected under the statute.

REASONS FOR DENYING THE PETITION

The *en banc* decision of the Sixth Circuit does not conflict with the decision of any other United States Court of Appeals that has ruled on the specific issue of a third party retaliation claim based solely on a plaintiff's association with a protected party, nor does the decision below implicate an important question of federal law that must be answered by this Court. Thus, Petitioner has failed to carry his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Sixth Circuit's Decision Is In Accord With All Other Circuits That Have Addressed Third Party Retaliation Claims Based Solely On Association.

Contrary to the Petitioner's assertions, no inter-circuit conflict exists to justify granting the Petition. Rather, the Sixth Circuit's *en banc* opinion is in accord with all other circuits having occasion to rule on the same specific issue. Specifically, Petitioner points to two decisions from the Seventh and Eleventh Circuits which he claims constitute the other side of this purported split of authority.[5] However, those cases do not address the same matter at issue in this case and are thus distinguishable.[6]

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[5] *See McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996); *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989).

[6] *See infra* pp. 12-14.

The majority of federal courts who have considered the issue of third-party causes of action have refused to recognize such claims as valid causes of action under federal anti-retaliation laws. *See Fogleman v. Mercy Hospital*, 283 F.3d 561 (3rd Cir. 2002); *Smith v. Riceland Foods*, 151 F.3d 813 (8th Cir. 1998); *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996); *Bell v. Safety Grooving & Grinding*, 107 Fed. Appx. 607 (6th Cir. 2004), *abrogated on other grounds by Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __U.S. __, 129 S.Ct. 846 (2009); *Rainer v. Refco, Incorporated*, 464 F. Supp.2d 742 (S.D. Ohio 2006); *Singh v. Green Thumb Landscaping*, 390 F. Supp.2d 1129, 1136 (M.D. Fla. 2005); *Sukenic v. Maricopa County*, 2004 WL 3522690 (D. Ariz. 2004); *Higgins v. TJX Cos., Inc.*, 328 F. Supp. 2d 122, 123 (D. Me. 2004); *U.S. E.E.O.C. v. Bojangles Rest. Inc.*, 284 F. Supp.2d 320, 327 (M.D.N.C. 2003); *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F. Supp.2d 1123, 1143 (D. Kan. 2002); *Freeman v. Barnhart*, 2008 WL 744827 (N.D. Cal. 2008); *Dawn L. v. Greater Johnstown School District*, 586 F. Supp. 2d 332 (W.D. Pa. 2008); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240 (D.N.M. 2008). State courts, likewise, have examined this issue regarding state equivalent Title VII statutes and agree that that no cause of action exists. *See Dias v. Goodman Manufacturing Co.*, 214 S.W.3d 672 (Tex. App. 2007); *Pope v. Motel 6*, 114 P.3d 277 (Nev. 2005); *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171 (Minn. App. 2007); *Shoecraft v. Univ. of Houston-Victoria*, 2006 WL 870432 (S.D. Tex. 2006).

Conversely, Petitioner contends that the alleged conflict over the viability of third-party retaliation claims stems from "confusion" over two issues—(1) whether third party reprisals are unlawful, and (2) whether the law authorizes third parties to obtain judicial redress. *See* Petition for Writ of Certiorari, pp. 25-26. However, the lawful or unlawful nature of third-party reprisals is not at issue in this case. Rather, this Court has already recognized that retaliation is unlawful if "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 2415 (2006) (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Thus, the sole issue before this Court is whether Petitioner, as a third party, is afforded protection under the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a) based solely upon his association with an employee who has engaged in protected activity.

Petitioner then cites to dicta in a number of cases to purportedly show that an inter-circuit conflict exists. Notably, though, the very cases Petitioner cites for this premise actually support the Sixth Circuit's *en banc* decision in this case, finding no cause of action to exist under the relevant statute.[7] *See Fogleman v. Mercy*

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[7] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 (E.D. La. 2007) (Plaintiff who did not involve himself in wife's FMLA claim except to give her moral support did not fall under anti-retaliation provision of FMLA); *Strickland v. Aaron Rents, Inc.*, 2006 WL770578 (W.D. Tex. 2006) (retaliation claim (Cont'd)

Hospital, Inc., 283 F.3d 561, 568 (3rd Cir. 2002) ("[I]t is hard to imagine any clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity."); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996). Of the remaining cases cited by Petitioner, the bulk of them do not even reach the issue of whether a cause of action exists in this scenario. *See Rubin v. Kirkland Chrysler-Jeep, Inc.*, 2006 WL 1009338 (W.D. Wash. 2006) (Court did not reach issue of retaliation claim based solely on association because plaintiff established *prima facie* case of retaliation based on her own complaints); *Sacay v. The Research Foundation of the City University of New York*, 193 F. Supp. 2d 611, 634 (E.D.N.Y. 2002) ("This Court need not resolve the issue because [plaintiff] has raised a genuine issue of material fact that she engaged in protected activity by writing a letter on June 5, 1995 in support of her mother

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dismissed because plaintiff had not engaged in protected activity and could not rely upon protected activity of friend to support her claim); *Mutts v. Southern Connecticut State University*, 2006 WL1806179 (D.Conn. 2006) ("[T]he Court concludes that Mrs. Mutts cannot establish a *prima facie* case because she did not personally engage in any protected activity that resulted in retaliatory action."); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1143 ("[T]he court believes that the plain text of the provision clearly prohibits only retaliation against the individual who engaged in protected activity."); *Dias v. Goodman Manufacturing Co., L.P.*, 214 S.W.3d 672 (declining to expand the class of people to whom state equivalent of Title VII applies); *Dawn L. v. Greater Johnstown School District*, 586 F. Supp. 2d 332 (W.D. Penn. 2008) (holding that only persons personally engaging in protected activity have a viable cause of action under Title IX).

and her mother's exercise of rights under the ADA."); *Millstein v. Henske*, 722 A.2d 850 (D.C. App. 1999) (holding that even if cause of action were recognized, relationship between parties was too attenuated to support claim).

Petitioner further cites decisions from the Eleventh and Seventh Circuits as being on the other side of the alleged circuit split. *See Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989); *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996). Although these cases are Title VII retaliation cases, the plaintiffs there were not "third parties." That is, the plaintiffs were not like Petitioner in this case who is not in a protected category and has not engaged in any protected activity. The alleged split amongst the circuits simply does not exist in this case.

In *Wu*, the plaintiffs were husband and wife faculty members. Both of the plaintiffs had filed a Title VII claim against their employer. Unlike Petitioner, however, who denied having engaged in any protected activity on behalf of his fianceé, and who was not otherwise in a protected category, the husband and wife plaintiffs in *Wu* alleged the following in their joint Complaint:

> [T]he defendants have violated the rights of the plaintiffs under [42] U.S.C. § 2000e and 42 U.S.C. § 1983 by unlawfully retaliating against plaintiffs ***because they have made civil rights complaints against the defendants*** and ***because they have sought to enforce Title VII*** of the Civil Rights Act of 1964 and the Equal Pay Act of 1963.

Id. at 1549 (emphasis added). Thus, both of the plaintiffs in *Wu* had engaged in protected activity. Neither of the *Wu* plaintiffs alleged employer retaliation solely because of their relationship with the other. That narrow issue—whether Title VII's anti-retaliation provision protects third-parties from retaliation based solely upon the plaintiff's relationship—was not before the Eleventh Circuit Court of Appeals.

Likewise, Petitioner's contention that the Seventh Circuit Court Appeals allowed third-party retaliation claims in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), does not accurately reflect the Seventh Circuit's decision in that case. The plaintiff in *McDonnell* had not filed a charge of discrimination, but he, contrary to his employer's wishes, had failed to prevent employees under his supervision from filing charges against the employer. The plaintiff was discharged for this failure.

The Court did not, as urged by Petitioner in this case, find that the supervisor was entitled to protection under the statute based solely upon his association with those whom he supervised and who filed the charges of discrimination. Rather, the Court found that the plaintiff had engaged in protected activity when he supported the other employees in pursuing their Title VII claims. That is, the supervisor could have otherwise prevented or impaired their ability to make the charge, but affirmatively chose not to do so. Thus, the Court held that while the plaintiff's assistance to his co-workers was passive, his assistance nonetheless constituted protected activity. Petitioner, on the other hand, admittedly engaged in no protected activity—either passive or active. He alleged that he was terminated

solely based upon his relationship with Regalado, not based upon something he did or did not do that in some manner related to Regalado's discrimination claim against NAS.

Petitioner further claims that subsequent Seventh and Fourth Circuit cases, as well as a number of district court cases, have relied on these decisions as establishing the viability of such third-party claims.[8] However, these subsequent cases do not stand for the premise Petitioner claims they do. In *Drake*, the Court stated that it was simply *assuming,* for summary judgment purposes, that the plaintiff was protected from retaliation based on her husband's protected activities. *Drake,* 134 F.3d at 886. In fact, the district court in *Whittaker* specifically noted that, "The Seventh Circuit, however, *has assumed, though it has not specifically held,* that an employee is protected from retaliation under Title VII based on the protected activities of that employee's spouse." *Whittaker*, 2003 WL 21403520 at *1 (emphasis added). The Fourth Circuit did not explicitly recognize third-party claims in *Iturbe*, either. Rather, the Court disposed of that case when it noted that the plaintiff's retaliation claim "misse[d] the mark," because he could not show a causal connection between

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[8] *See Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878 (7th Cir. 1998); *Iturbe v. Wandel & Golterman Technologies, Inc,* 1994 WL 118103 (4th Cir. 1994); *Whittaker v. Northern Illinois University*, 2003 WL 21403520 (N.D. Ill. 2003); *Riley v. UOP, LLC,* 244 F. Supp. 2d 928 (N.D.Ill. 2003); *Reiter v. Metropolitan Transportation Authority of the State of New York*, 2002 WL 31190167 (S.D. N.Y. 2002); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108 (W.D. N.Y. 1996).

his wife's EEOC claim and his transfer to a different position. *Iturbe*, 1994 WL 118103 at *5.

A number of the remaining cases that Petitioner claims purportedly rely on *Wu* to recognize third-party retaliation claims are also readily distinguishable. The plaintiff in *Riley* did not even make a retaliation claim, and thus the district court found *Wu* to be inapplicable. *Riley,* 244 F. Supp. 2d at 940. In actuality, the plaintiff there alleged that she was discriminated against on account of her race, sex, and age. *Id.* In *Reiter*, the Court never reached the issue of whether the third-party retaliation claim was viable. Whether or not the plaintiff could assert such a claim, the Court noted, no reasonable juror could find that he was retaliated against because of his wife's protected activities. *Reiter*, 2002 WL 31190167 at *8. Finally, *Murphy* is factually distinguishable because the plaintiff there alleged that he assisted and supported his wife in her complaints of discrimination, and that the defendants knew of his assistance. *Murphy,* 946 F. Supp. at 1113. Thus, the plaintiff there had himself engaged in protected activity. Conversely, Petitioner is asserting retaliation based solely upon his relationship with Regalado, not because he himself engaged in any protected activity.

Contrary to Petitioner's assertions, *no circuit* has held that a cause of action exists under § 2000e-3(a) when the plaintiff has not personally engaged in any of the protected activities set forth in the statute. The cases upon which Petitioner relies to demonstrate the purported split are factually distinguishable and simply do not address the narrow issue of whether § 2000e-3(a) protects third parties from retaliation based solely

upon his association with another. In actuality, all of the circuits which have addressed this issue have rejected such claims. Thus, contrary to Petitioner's contention, no inter-circuit conflict exists to justify granting the Petition.

II. The Title VII Anti-Retaliation Statute is Unambiguous and Requires No Statutory Interpretation.

Not only is there no inter-circuit conflict to support disturbance of the Sixth Circuit's *en banc* decision, but there is also no important question of federal law to be decided by this Court. Rather, the *en banc* Sixth Circuit properly recognized that § 2000e-3(a) is unambiguous and must be applied as written. As set forth below, this holding is amply supported by the rules of statutory construction as well as the holdings of the other circuits that have ruled on this narrow issue.

A. Rules of Statutory Construction.

This Court recently emphasized the following fundamental principle of statutory construction which was properly applied in this case by the Sixth Circuit:

> We have "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). When the statutory "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." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

Arlington Central Sch. Dist. Bd. of Education v. Murphy, 548 U.S. 291, 296, 126 S.Ct. 2455, 2459 (2006). The beginning point of a court's examination is the statute and the language chosen by Congress:

> [W]ith any question of statutory construction, [the court] must first look to the language of the statute itself. [internal citations omitted]. If the language of the statute is clear, then the inquiry is complete, and the court should look no further. Only if the statute is 'inescapably ambiguous' should a court look to other persuasive authority in an attempt to discern legislative meaning.

See Brilliance Audio, Inc. v. Haights Cross Communications, 474 F.3d 365, 371-72 (6th Cir. 2005). As set forth below, there is nothing "absurd," as Petitioner claims, about applying the anti-retaliation provision as written so that it only protects those persons who themselves oppose unlawful behavior. While this statute may not reach as far as desired by Petitioner, the anti-retaliation provision of Title VII is not "inescapably ambiguous."

B. Plain Language of Anti-Retaliation Provision

The anti-retaliation provision of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

There can be little dispute that on the face of the statute no protection is afforded to third-parties. The *en banc* Sixth Circuit recognized that:

> By application of the plain language of the statute, Thompson is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation.

Thompson v. North American Stainless, LP, 567 F.3d 804, 808 (6th Cir. 2009). In short, as written, the anti-retaliation provision of the statute only affords protection to individuals who have taken some action which could be construed as supporting the anti-discrimination provisions of Title VII. Congress used

the words "opposed any practice," "made a charge," "testified," "assisted" or "participated in any manner" in the statute, choosing action words, not words of association. *See Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 63, 126 S.Ct. 2405, 2412 (2006) (The "anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e. their conduct."). Given the conclusion that the anti-retaliation provision seeks to prevent harm based upon an employee's conduct, Petitioner's contention that Congress intended the anti-retaliation provision to provide a cause of action to employees who have not engaged in the conduct referenced by the statute is without merit. Congress went into significant detail to describe the types of conduct that would be included, which would not have been necessary if an employee had a viable cause of action without engaging in such conduct.

Petitioner incredulously claims that, because nothing in § 2000e-3(a) explicitly excludes from prohibition the use of third party reprisals, they must necessarily be included. However, such logic was recently rejected by this Court. *See Dean v. United States*, __ U.S. __, 129 S.Ct. 1849, 1853 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). This Court similarly refused to insert additional words or requirements into § 2000e-3(a) in *Burlington Northern.* Rather, this Court determined that the anti-retaliation provision must be enforced *as written.*

Petitioner further argues that this Court's decision in *Burlington Northern* requires the Court to add a

classification of persons to the anti-retaliation statute. This claim is based on the assumption that enforcing the statute as written would purportedly frustrate the purpose of the statute—"unfettered access to statutory remedial mechanisms." *Burlington*, 548 U.S. at 64, 126 S.Ct. at 2412 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S.Ct. 843 (1997)). The *en banc* Sixth Circuit explicitly rejected this contention, noting that, "The plain text simply cannot be read to encompass 'piggyback' protection of employees like Thompson, who by his own admission, did not engage in protected activity, but who is merely associated with another employee who did oppose an allegedly unlawful employment practice." *Thompson*, 567 F.3d at 816.

While expanding coverage may foster the remedial purpose of the statute, that reason is not sufficient for this Court to defy the rule of statutory construction that a court's obligation is to enforce the statute according to its terms. *See Arlington Central,* 548 U.S. at 296, 126 S.Ct. at 2459. In *Rodriguez v. United States*, 480 U.S. 522 107 S.Ct. 1391 (1987), this Court further noted that:

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the

> additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute.'

Id. at 526, 1393 (quoting *Aaron v. SEC*, 446 U.S. 680, 695, 100 S.Ct. 1945, 1954 (1980)). *See also Commissioner of Internal Revenue v. Asphalt Products, Inc.*, 482 U.S. 117, 121, 107 S.Ct. 2275, 2278 (1987) ("Judicial perception that a particular result would be unreasonable . . . cannot justify disregard of what Congress has plainly and intentionally provided."). There is simply no support for the proposition that a statute should be expanded beyond what it expressly states for no reason other than that doing so may foster the purpose of the statute. Under the circumstances of this case, broadening the scope for the purpose of effectuating the remedial purpose of Title VII will lead to uncertainty regarding which third parties receive protection, as further discussed in Section III below.

In fact, *Burlington Northern* actually supports the Sixth Circuit's conclusion and the statutory interpretation arguments set forth above. In that case, this Court compared the language of the substantive Title VII provision, 42 U.S.C. § 2000e-2, with the language in the anti-retaliation provision, 42 U.S.C. § 2000e-3. *Id.* at 61-62, 2411. Applying statutory construction principles, this Court carefully examined the statute and determined that Congress had taken great care in drafting the language of this statute and that the Court should "presume" that Congress had drafted the statute as written "intentionally and purposely." *Id.* at 62, 2412.

Thus, if the Court presumes that Congress intentionally and purposefully drafted the statute, then there is no conclusion to reach other than Petitioner, who did not engage in any "opposition" as set forth in the statute on behalf of his fianceé, cannot pursue this anti-retaliation cause of action. In this case, it is undisputed that Petitioner did not engage in any conduct identified by the anti-retaliation provision. None of the anti-retaliation provision's action words fit Petitioner's situation. His attempt to rely upon *Burlington Northern* as a means to expand the plain wording of the statute to include his claim should be rejected. As in *Burlington Northern*, the statute should be applied as written.

Lastly, while all of the other circuits which have had occasion to rule on this specific issue have recognized that allowing the third-party claims "presents a conflict between a statute's plain meaning and its general policy objectives," each circuit nonetheless found that the plain language of the statute could not be ignored. *Fogleman*, 283 F.3d at 569. In *Holt*, the Fifth Circuit Court of Appeals held that while allowing such claims "might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities" it would "contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." 89 F.3d at 1226. Likewise, the Eighth Circuit Court of Appeals in *Smith* held that "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for assisting or participating in any manner in a proceeding under Title VII." *Smith*, 151 F.3d at 819. Thus, the court determined "that a plaintiff

bringing a retaliation claim under Title VII must establish that she personally engaged in the protected conduct." *Id.* Finally, in *Fogleman*, the Third Circuit Court of Appeals stated that "[r]ead literally, the statutes are unambiguous—indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in the protected activity." *Fogleman*, 283 F.3d at 568. The Third Circuit recognized that there were protections built into the anti-retaliation provision which avoided the "dire results" suggested by Petitioner here. *Id.* at 570.

The Sixth Circuit was correct in holding that Petitioner did not assert a proper cause of action under § 2000e-3(a) in this case. In order to establish a Title VII retaliation claim, a plaintiff must first prove that he engaged in protected activity as set forth in the statute. *See Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008). Petitioner does not allege that he engaged in any protected activity either for himself or on behalf of his fiancée, and therefore, does not satisfy the criteria for protection. The plain language of § 2000e-3(a) limits the class of persons who may sue for retaliation to those who have engaged in the enumerated activities. By his own admission, Petitioner is not included in this class of persons.

C. Other Statutes Specifically Protect Associations, But Title VII Does Not.

There can be no doubt that Congress is cognizant of discrimination based upon third-party associations. The Americans with Disabilities Act specifically defines "discrimination" to include "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). *See also* 29 C.F.R. § 1630.8 (providing that "[i]t is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association."). Similarly, the Whistleblower Protection Act specifically provides that one who has authority over personnel actions shall not "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant...." 5 U.S.C. § 2302(b)(8). Thus, protection under that statute is afforded to any employee based on any other employee's disclosure—it is not limited to actions against the employee making the disclosure.

Petitioner devotes a substantial portion of his Petition to comparisons between Title VII and the National Labor Relations Act ("NLRA"), under which some courts have recognized third-party retaliation claims. However, the Third Circuit pointed out the key difference between the NLRA and statutes similar to

Title VII in *Fogleman*. While the Court, relying on Title VII precedent, held that the plaintiff did not have a cause of action under the ADEA, it did find that the ADA contained additional language similar to that of the NLRA which provided the plaintiff with a valid cause of action. *Folegman*, 283 F.3d at 564. Specifically, both the ADA and the NLRA make it unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual" exercising rights under the respective Act. *See* § 42 U.S.C. 12203(b); 29 U.S.C. § 158(a)(1). Thus, the Court found that such third-party retaliation claims were only cognizable under the additional language of the ADA and the NLRA, which Title VII does not contain.

Title VII's anti-retaliation provision only protects those persons who have themselves undertaken some protected activity. Thus, there is a fundamental difference between the protection afforded by the anti-retaliation provisions of the preceding statutes and Title VII. *See General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 139 n. 4 (5th Cir. 1967) ("Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed."); *United States v. Azeem*, 946 F.2d 13, 17 (2nd Cir. 1991) ("In general, congressional consideration of an issue in one context, but another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated."). If Congress had intended to allow third-party retaliation claims under Title VII, it certainly knew how to do so. The fact that Congress did not include these claims in Title VII demonstrates its intention that such claims not be recognized.

D. Petitioner Mischaracterizes the Issue as One of Standing Rather Than a Cause of Action.

Petitioner erroneously mischaracterizes the issue of whether he has a cause of action under § 2000e-3(a) by injecting unrelated arguments concerning standing under § 2000e-5(f)(1). Essentially, he argues that because he is "aggrieved" pursuant to § 2000e-5(f)(1), he therefore has a cause of action. However, this Court recognized the difference between being "aggrieved," and thus having standing, and having a viable cause of action in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264 (1979). To demonstrate standing, a plaintiff must simply show that he "'personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Id.* at 239, 2274 n.18 (*quoting Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608 (1979)). Whether one is "aggrieved" under § 2000e-5(f)(1) is a question of standing, not whether he has a cause of action. *Leibovitz v. New York City Transit Authority*, 252 F.3d 179, 185 (2nd Cir. 2001). *See also Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) ("Whether Waters has standing to sue . . . depends on whether she is a 'person claiming to be aggrieved'"). Thus, the fact that Petitioner may be "aggrieved" under § 2000e-5(f)(1) is not dispositive of whether he has a cause of action under § 2000e-3(a).

Whether one has a cause of action "depends not on the quality or extent of the injury, but on whether the class of litigants of which he is a member may use the courts to enforce the right at issue. The focus must therefore be on the nature of the right he asserts." *Davis*, 442 U.S. at 239, 99 S.Ct. at 2274 n.18. This Court further noted in *National Railroad Passenger Corp. v.*

National Association of Railroad Passengers, 414 U.S. 453, 456, 94 S.Ct. 690, 692 (1974), that the threshold question to be determined is whether a cause of action exists. If no cause of action is found to exist, questions of standing become immaterial. *Id.* at 465, 696 n.13. *See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 492, 102 S.Ct. 752, 769 (1982) (Brennan, J., dissenting)[9]

The *en banc* Sixth Circuit correctly recognized that Petitioner's standing under § 2000e-5(f)(1) was a distinct and separate issue from whether he had a viable cause of action under § 2000e-3(a). Petitioner claims that, because the Sixth Circuit did not address his standing to sue, it adopted a different interpretation from the Courts in *Holt, Smith, and Fogleman*. However, a cursory reading of the *en banc* opinion proves otherwise. Because the Sixth Circuit determined that Petitioner did not have a valid cause of action, it rightfully did not reach the issue of whether he had standing to pursue his claim.[10]

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[9] "The Court makes a fundamental mistake when it determines that a plaintiff has failed to satisfy the two-pronged 'injury-in-fact' test, or indeed any other test of 'standing,' without first determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstances presented to the Court."

Valley Forge, 454 U.S. at 492, 769.

[10] The Sixth Circuit did acknowledge in a footnote, though, that it was satisfied that he met the minimum standing requirements for a Title VII claim and that NAS did not challenge Petitioner's standing as an "aggrieved" person under § 2000e-5(f)(1). *See Thompson v. North American Stainless, LP*, 567 F.3d 804, 809 n.1. (6th Cir. 2009).

III. Petitioner's Public Policy Arguments Are Not Good Grounds for Reversing the Sixth Circuit's Decision.

A. Petitioner's Unfounded Concerns

In a final attempt to convince this Court to grant his Petition, Petitioner makes a number of specious predictions about the potential ramifications of this case. First, he claims that, while the Sixth Circuit's decision leaves open the possibility that the employee who engaged in protected activity (Regalado, in this case) could sue on behalf of the third party (Petitioner here), the Fourth Circuit has allegedly foreclosed upon that possibility. *See Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007). Second, Petitioner predicts that the EEOC will either have to warn employee witnesses that their cooperation may lead to reprisals, possibly deterring those witnesses from actually cooperating, or deliberately withholding that information from the witnesses, and having them potentially face consequences from their employer. However, such allegedly dire results are not certain to occur and should not be considered by this Court.

It is important to remember that the plaintiff in this case is the Petitioner, Eric Thompson, and not Miriam Regalado. The Sixth Circuit was not faced with a claim brought by Regalado on behalf of Thompson, nor is this Court faced with such a claim. Speculation about the viability of a claim brought by the employee who engaged in protected activity on behalf of a third party, or the

effect of a decision in this case on such claims in the future, is improper and would be tantamount to an advisory opinion. *See Princeton University v. Schmid*, 455 U.S. 100, 102, 102 S.Ct. 867, 869 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions"); *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334 (1975) (holding that federal court judgments "must resolve a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389 (1945) ("This Court is without power to give advisory opinions . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions"). Further, entertaining these hypothetical issues would constitute a waste of judicial resources, an abuse of the role of the judiciary, and interference with the other branches of government. *National Advertising Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005). In short, this Court should not concern itself with Petitioner's "what-ifs."

Further, *Smith v. Frye* is distinguishable from the facts of the instant action. In that case, a circuit court employee was discharged after her son, *who was not a circuit court employee at the time*, decided to run for circuit court clerk against the incumbent clerk. The Fourth Circuit held that the mother did not have a viable cause of action because she herself had not engaged in any protected activity, such as supporting

her son's campaign. *Smith,* 488 F.3d at 270-271. Moreover, the Court determined that the son did not have a cause of action, either because of the adverse employment action against his mother or for his own alleged emotional distress due to her discharge. *Id.* at 273-274. The Court's rationale for dismissal of their claims is clear. With respect to the mother, she, like Petitioner here, had not engaged in any sort of protected activity on behalf of herself or her son. As her son was not an employee of the circuit court at the time, he had not personally suffered any adverse employment action.

Petitioner's second alleged concern about the cooperation of witnesses with EEOC investigations was squarely addressed by this Court in its recent decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee,* __ U.S. __, 129 S.Ct. 846 (2009). Not only does § 2000e-3(a) protect employees who "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing", but this Court further recognized in *Crawford* that the opposition clause extended to an employee who involuntarily answered questions during an employer's investigation into a co-worker's complaints. Thus, an employee who participates in an EEOC investigation, even involuntarily, is protected by § 2000e-3(a). Petitioner's contentions are without merit.

B. Chaos Will Ensue in the Workplace and in the Courts if Petitioner Prevails.

On the other hand, the granting of the Petition in this case and the reversal of all of the circuits having ruled on this issue will create an environment of chaos in both the courts and the workplace. The Sixth Circuit's *en banc* holding and those of the other circuits ruling on this issue eliminate the necessity that courts will be required to determine what classifications of parties are entitled to third-party protection and the Pandora's box associated with leaving that issue open for judicial determination. Applying the statute as written will also foster and promote reporting discrimination in the workplace, and demonstrate compliance with the maxim *expressio unius est exclusio alterius*.

The rationale offered by Petitioner of providing third-party protection is to limit the situations where an employee will be afraid to voice his complaint of discrimination if the employee fears that someone whom the employee cares about—a spouse, fiancé, relative or friend—will suffer the wrath of the employer. However, the Petitioner does not speculate as to the extent of this protection, how courts would go about determining whether the relationship qualifies for third-party protection, or whether it is a legal question or one for the jury to decide. This uncertainty will necessarily result in excessive side bar litigation over what types of relationships should be entitled to protection. This concern was recognized in *E.E.O.C. v. Bojangles Restaurant*, 284 F. Supp. 2d 320 (M.D. N.C. 2003), in which the Court predicted that, "[t]he number of

lawsuits which could spawn from this rule could be enormous in a company of any size." *Id.* at 326.

Under Petitioner's logic, married employees would likely be granted automatic standing for third-party reprisal claims. That protection, however, leads to the question of whether employees who live together as husband and wife, but who have never been married, will be entitled to that same protection and, whether a state's recognition of common law marriages will be determinative of that issue. The same issues may arise in regard to same-sex relationships because some states recognize same-sex marriages and some do not. This deficiency leaves the decision to the courts to be decided piecemeal on a case by case basis, which leaves room for inconsistent standards in different circuits. Differences in opinion will undoubtedly arise over which relationships should be afforded protection. Some associations may be easy—parent/child, husband/wife, sister/brother—but, undoubtedly, there will be other relationships that are less clear—friends/ divorced couples/ former friends/ acquaintances/ cousins/ distant relatives. Further differences will arise over the varying state laws that may apply to the specific situation, as noted above.

Moreover, the lack of guidance will cause uncertainty for employers. As reflected in the Associations of Manufacturers and Chambers of Commerce amici briefs filed with the Sixth Circuit on behalf of NAS, this uncertainty will, as a practical matter, have a negative impact upon an employer's ability or willingness to issue needed disciplinary actions against employees for fear of Title VII litigation. *See* Brief of the Equal

Employment Advisory Council, National Association of Manufacturers, and Kentucky Association of Manufacturers as Amici Curiae in Support of NAS, p. 12; Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of NAS, p. 11. It is a reality in employment practices that an employee who takes any steps set forth in the anti-retaliation statute, as a practical matter, is no longer "at will" and is subject only to termination for cause. Once an employee comes forward to voice a complaint, the employee is entitled to automatic job protection. Thus, in the real world it is not uncommon for an employee who faces legitimate disciplinary action by an employer to seek protection from such discipline by alleging discrimination. If this Court were to accept Petitioner's proposed expansion of the statute, employees who otherwise would be subject to disciplinary actions and should be disciplined will likely seek protection by claiming protection as a "third-party." Thus, judicial creation of a third-party protection claim under the anti-retaliation provision of Title VII will create legitimate practical problems for employers who need to implement legal and necessary discipline in the workplace. *See Hill v. St. Louis University*, 123 F.3d 1114, 1120 (8th Cir. 1997) (noting that Title VII is not meant to transform "at will" employment into perpetual employment); Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of NAS, p. 9.

To impose such discipline, employers would also be required to speculate about the possible relationships an employee may have that could give rise to potential liability each time they contemplated disciplinary or

other action against that employee. *See* Brief of the Equal Employment Advisory Council, National Association of Manufacturers, and Kentucky Association of Manufacturers as Amici Curiae in Support of NAS, p. 12. Of course, these relationships often change over time, further requiring the employer to "map the web of associations among all employees". Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of NAS, p. 12. Additionally, it would be difficult for the employer to discern whether the relationship or association argument asserted by the employee was made in good faith. Frivolous claims would certainly increase in the absence of such identifiable screening criteria.

The anti-retaliation provision, as written, specifically describes those persons who are entitled to protection under the statute, *i.e.* those who have opposed the employer's unlawful employment practices and those who have made a charge, testified, assisted or participated in a Title VII investigation, proceeding or hearing. 42 U.S.C. § 2000e-3(a). Thus, the statute objectively identifies the criteria necessary for protection. This Court noted in *Burlington Northern* that:

> An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here.

548 U.S. at 68-69, 126 S.Ct. at 2415. Comparably, there are no criteria in the statute, and Petitioner does not suggest any, to guide courts on the level of association between protected parties and third parties necessary to receive protection. Any such criteria would be highly subjective at best.

The anti-retaliation provision of Title VII, on its face, affords protection to those employees who merely "assist" "in any manner." Petitioner, and other third-parties like him, could easily obtain protection under the statute by simply assisting a third-party. Thus, the effort required to obtain protection under the statute is quite minimal. It is reasonable and not "absurd," as alleged, to find that Congress anticipated the potential problems described above and determined that those problems outweigh placing a minimal burden on the party seeking protection. Imposing this minimal burden upon plaintiffs does not frustrate the remedial goal of this statute, but, in fact, fosters it by encouraging employees to seek protection by speaking out against discriminatory practices.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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