No. 09-09-440

In The
Supreme Court of the United States

WILLIAM H. SCHRAMM,

Petitioner,

v.

RAY LAHOOD,
Secretary, Department of Transportation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure provides that a notice of appeal must "designate the judgment, order, or part thereof being appealed." The first Question Presented is:

> What standard governs the determination as to whether a judgment or order has been adequately designated under Rule 3(c)(1)(B)?

(2) In *Robinson v. Shell Oil Corp.* this Court held that the anti-retaliation provision of Title VII of the 1964 Civil Rights Act protects former employees. The second Question Presented is:

> Is the standard governing when an employer is vicariously liable for unlawful retaliation under Title VII different when the victim is a former employee rather than a current employee?

PARTIES

The parties to this case are set out in the caption.

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Petitioner William H. Schramm respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on March 19, 2009.

OPINIONS BELOW

The March 19, 2009, opinion of the court of appeals, which is reported at 318 Fed. Appx. 337 (6th Cir. 2009), is set out at pp. 1a-23a of the Appendix. The March 25, 2008 order of the district court, which is unofficially reported at 2008 WL 820463 (N.D.Ohio), is set out at pp. 33a-42a of the Appendix. The February 11, 2008 order of the district court, which is unofficially reported at 2008 WL 397592 (N.D.Ohio), is set out at pp. 24a-32a of the Appendix. The July 14, 2009 order of the court of appeals, denying rehearing and rehearing en banc, which is not officially reported, is set out at pp. 43a-44a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on March 19, 2009. A timely petition for rehearing and rehearing en banc was denied on July 14, 2009. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE AND STATUTORY PROVISION INVOLVED

The rule and statutory provision involved are set out in the appendix to this document.

STATEMENT

For almost two decades prior to 1999 William Schramm worked as an air traffic controller for the Federal Aviation Administration. After his retirement in 1999 Schramm filed suit under Title VII of the 1964 Civil Rights Act, alleging inter alia that he had been the victim of gender-based discrimination while employed at the FAA. That original discrimination suit has since been resolved. That litigation, however, led to a number of alleged incidents of retaliation, resulting in two subsequent actions asserting that Schramm was the victim of unlawful reprisals, in violation of section 704(a) of Title VII. Although the two retaliation actions turned on different issues, the appeals in those cases were consolidated in the court of appeals and resolved in a single opinion.

(1) The Retaliatory Assault

In 2002 Schramm assisted a process server in serving subpoenas upon witnesses in the sex discrimination suit then pending trial. The process server enlisted Schramm to identify individuals to be served as they left the tower at the Toledo Airport. One of Schramm's former supervisors became

enraged when he was served. Shortly thereafter the supervisor driving a pick-up truck pulled alongside of Schramm and began verbally abusing him. The supervisor made statements to the effect that "they were not through with him" and "they would take care of him at trial." (App. 26a).

Schramm attempted to walk away from the moving truck. That provoked the supervisor to shift the truck into reverse, drive at Schramm at a high rate of speed, and swing around at the last possible second to avoid hitting the plaintiff. The supervisor continued to follow Schramm and verbally abuse him as Schramm walked to the airport Police Station to file a complaint. (App. 24a-26a).

After filing a charge with the EEOC, Schramm filed suit alleging that the supervisor had assaulted him in this manner in reprisal for Schramm's actions in filing suit under Title VII and in causing the supervisor to be subpoenaed as a witness. (App. 26a). The district court dismissed this complaint, holding that the anti-retaliation provision in section 704(a) of Title VII did not protect Schramm from a retaliatory assault because Schramm, in assisting the process server, had violated Rule 45(b)(1) of the Federal Rules of Civil Procedure. (App. 30a-31a).

The Sixth Circuit affirmed on other grounds. The court of appeals concluded that the government "cannot be held vicariously liable under Title VII for [the supervisor's] conduct." (App. 21a). An employer is ordinarily liable for retaliatory acts taken by

supervisor or management officials against current employees. The usual liability rules, the Sixth Circuit held, do not apply to former employees.

> Schramm had not been employed by the FAA for several years when the subpoena incident occurred, and the analyses that courts typically undertake to determine vicarious liability for a violation of Title VII's anti-retaliation provision simply do not apply to these facts.

(App. 21a).

The court of appeals held that an employer is not liable for retaliatory actions against a former employee where the victim had not been employed for "several years" and the retaliation occurred "outside of the workplace." (App. 21a and n.2).

(2) The Retaliatory Disqualification

In February 2003, following his retirement from the FAA, Schramm was hired to work as an air traffic controller for a private firm that contracted with the FAA to handle air traffic at a smaller airport in Michigan. In August 2003, Schramm was hired by the Department of Defense to work as a contract controller as part of Operation Enduring Freedom in Afghanistan. Schramm was deployed to Uzbekistan, and volunteered for duty in Kabul, Afghanistan. (App. 34a). As a condition of working as an air traffic controller for these employers, Schramm was required to obtain a medical certification from the Flight

Surgeon's Office of the FAA. Schramm was issued that certification in February 2003 and again in August 2003.

On November 7, 2003, Schramm commenced the civil action against the FAA for the retaliatory assault. On or about December 1, 2003, a copy of the summons and complaint were served on the Department of Transportation. Less than a month later, on December 30, 2003, without any prior notice or explanation, the FAA sent Schramm a letter rescinding his medical certification. As a result of the disqualification, Schramm's employment in Uzbekistan was terminated, and he was forced to return to the United States. The FAA did not reissue a medical certificate to Schramm until January 2005, and he was unable to resume employment as an air traffic controller until May of that year.

Schramm alleged that the medical disqualification issued in December 2003 was in retaliation for the lawsuit he had filed against the FAA regarding the retaliatory assault. After first filing an administrative complaint with the EEOC, Schramm filed a second retaliation lawsuit, in this action asserting that the medical disqualification was a reprisal for his earlier retaliation lawsuit, in violation of section 704(a) of Title VII.

Shortly after it was commenced, the retaliatory disqualification case was reassigned to the district judge already responsible for the retaliatory assault case. The two cases were subsequently consolidated,

although the cases retained different docket sheets and docket numbers and continued to be litigated separately. That assignment and consolidation, however, set in motion the events which ultimately led the court of appeals to dismiss Schramm's appeal in the retaliatory disqualification case.

After a period of discovery the defendant filed a motion for summary judgment in the retaliatory disqualification case. On February 11, 2008, while that motion was still pending in the retaliatory disqualification case, the judge to whom both cases had been assigned granted summary judgment in the separate retaliatory assault case. For reasons that remain unexplained, the Clerk's office filed the February 11 order not only in the retaliatory assault case (which that order resolved), but also in the retaliatory disqualification case (which that order did not mention).

Approximately six weeks later, on March 25, 2008, the same district judge granted summary judgment in the retaliatory disqualification case. The district court concluded that Schramm could not show that the disqualification was issued for a retaliatory purpose because there was insufficient evidence that the FAA officials involved in the decision to cancel Schramm's medical qualification were aware of the protected activity, the filing of the earlier retaliation case. (App. 37a-42a).

On the front page of the Civil Docket for the retaliatory disqualification case, the Clerk's Office

subsequently wrote "Date Terminated: 02/11/2008."[1] February 11, 2008, was actually the date on which the retaliatory assault case had been terminated, not the date on which the retaliatory disqualification case ended.

On April 1, 2008, Schramm filed two notices of appeal, one in each case, and paid separate filing fees in each case. The notice of appeal in the retaliatory disqualification case stated that Schramm was appealing "from the Summary Judgment and Termination entered in this action on the 11th day of February, 2008."[2] A month later, on April 21, 2008, pursuant to Sixth Circuit practice, Schramm filed in the court of appeals regarding the appeal in the retaliatory disqualification case a "Statement of Parties and Issues." The "proposed issues" set out in that Statement clearly referred to the substance of the March 25 summary judgment decision in the retaliatory disqualification case.[3] That Statement in the

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[1] See: http://ecf.ohnd.uscourts.gov/cgi-bin/DktRpt.pl?480295896743097-L

[2] R. 52 Notice, J.A. 56.

[3] For example, the first proposed issue concerned the portion of the March 25 order in which the district judge had concluded there was insufficient evidence that the officials who approved the disputed December 2003 disqualification were aware of the lawsuit that Schramm had filed the month before:

> I. Whether knowledge of Title VII activity may be established through the statements of the plaintiff as well as the contradictions in sworn testimony among the defense witnesses when that evidence shows that a secretary working [in] the medical department of

(Continued on following page)

appeal of the retaliatory disqualification case, however, also recited that Schramm was appealing from "an order rendering summary judgment in ... favor [of the defendant] on February 11, 2008."

In his brief in the Sixth Circuit Schramm interpreted the opinions and docket sheet to mean that the district court's February 11, 2008 order had granted summary judgment in both cases, and that the March 25, 2008 order had set out an additional reason for the award of summary judgment in the retaliatory disqualification case.[4] The government's appellate brief did not dispute this characterization of the events in the district court; that brief was silent as to whether summary judgment in the retaliatory disqualification case had been granted on February 11, 2008, on March 25, 2008, or both. The government's brief did state with regard to the two district court cases that

> The district court granted summary judgment in favor of the Appellee ... in both cases.... Final judgments that disposed of all

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> the defendant accessed the medical records of the plaintiff at the request of an unauthorized person from a department which knew of the plaintiff's Title VII activity, and who, together with that secretary, used the information to retaliate against the plaintiff shortly after the service of his Title VII Compliant upon the defendant.

Statement of Parties and Issues, filed April 21, 2008.

[4] Brief of Appellant, Nos. 08-3420 and 08-3421 (6th Cir.), at 24-25.

> parties' claims were entered by the district court on March 25, 2008.[5]

In fact there was only a single final judgment entered on March 25, and that was in the retaliatory disqualification case. The government's brief on appeal noted with regard to the retaliatory disqualification case that "the [district] court granted the FAA's Motion for Summary Judgment. Schramm filed a Notice of Appeal from the district court's decision on April 1, 2008."[6] That statement reflected the defendant's understanding that Schramm's notice of appeal concerned the award of summary judgment in the disqualification case.

At the oral argument the court of appeals, sua sponte, raised a question as to whether it lacked jurisdiction to hear the appeal of the retaliatory certification case because Schramm's notice of appeal in that case referred only to the February 11, 2008 opinion and order. The Sixth Circuit directed the parties to file supplemental briefs on that issue.

In response the government now asserted that the February 11, 2008 order, although entered in the retaliatory disqualification case, had no application to that case. The United States made clear that it understood that Schramm intended to appeal the award of summary judgment in that case, and

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[5] Brief of Appellee, Nos. 08-3420 and 08-3421 (6th Cir.) at 1.

[6] *Id.* at 6.

asserted that he had mistakenly identified the wrong district court order.

> [T]he Notice of Appeal in the Medical Certification Case incorrectly referred to the Opinion and Order of February 11, 2008.... The district court did not issue an Opinion and Order in the Medical Certification Case until March 25, 2008.... The only document filed by the district court in the Medical Certification Case on February 11, 2008, was the Opinion and Order in the Assault Case.[7]

The United States "concede[d] that [it] was not harmed by Schramm's failure to designate the correct judgment entry."[8] The government nonetheless contended that Schramm's notice of appeal was insufficient to create jurisdiction over any appeal regarding the March 25, 2008 order. The United States noted that Sixth Circuit precedent mandated "a strict application of Rule 3(c)(1)(B)," rather than the "functional notice" approach in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The government urged the court of appeals to adhere to its more stringent standard.[9] The United States asked the

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[7] Supplemental Brief of Appellee, No. 08-3420, at 3.

[8] *Id.* at 11-12.

[9] *Id.* at 11:

> Following *Torres*, the Notice of Appeal would ... be valid if it gave functional notice of the judgment being appealed.... On the other hand, a strict application of Rule 3(c)(1)(B), as illustrated in *[United States v.] Glover* [, 242 F.3d 333 (6th Cir. 2001)] and *Isert [v.*

(Continued on following page)

Sixth Circuit to hold that in determining the sufficiency of a notice of appeal, the court should consider only the content of the notice of appeal itself. The appellate courts, it urged, should not "review ... surrounding circumstances to determine [an appellant's] intent."[10]

The court of appeals applied the standard proposed by the government, relying on the Sixth Circuit precedents cited in the government's brief. In determining under Rule 3(c)(1)(B) what order is the subject of an appeal, the Sixth Circuit held, the appellate court can consider only the content of the notice of appeal itself, and must disregard any other circumstances.

> Our precedents do not allow us to examine the circumstances surrounding an appeal in an effort to determine whether an appellant has made a mistake in designating the order he wishes to appeal. They instead require that we ... look to the notice of appeal to

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Ford Motor Co., 462 F.3d 756 (6th Cir. 2006)], would mandate dismissal of Schramm's appeal.

[10] *Id.* at 12. Among the surrounding circumstances which the court of appeals should not consider, the government suggested, was the fact that

> there was only one judgment entry entered in the case, reducing the chance that the court or opposing party would be confused as to the judgment or issues appealed.

Id. at 11.

> ascertain the judgments and orders the notice encompasses.

(App. 15a). Thus although the Sixth Circuit, and the government, both understood that Schramm had actually intended to appeal the dismissal of his retaliatory disqualification claim, the court of appeals concluded that the notice of appeal filed in, and bearing the docket number of, the disqualification case, technically constituted an appeal of the dismissal of the retaliatory assault case.

> It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs and that the Secretary was not prejudiced by his mistake in identifying the wrong order. What matters is that Schramm's intent to appeal the March 25, 2008 order is not discernable from *the notice of appeal itself*. To the contrary, it appears from the notice that Schramm intended to appeal only the order that granted summary judgment in the retaliatory assault case but which was entered into the record in both that case and the medical disqualification case.

(App. 15a-16a) (emphasis added).

Plaintiff filed a timely petition for rehearing and rehearing en banc regarding the panel disposition of both appeals. That petition was denied on July 14, 2009. (App. 43a-44a).

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING THE ORDER-DESIGNATION PROVISION OF RULE 3(c)(1)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

A. The Decision of The Sixth Circuit Is In Conflict With Decisions In Ten Circuits

Rules 3 and 4 of the Federal Rules of Appellate Procedure play a pivotal role in determining what appeals may be heard by the circuit courts. Because of the central importance of those provisions in the administration of justice in the appellate courts, this Court has repeatedly granted certiorari to resolve disagreements among the lower courts regarding the proper interpretation of Rules 3 and 4.[11] This case concerns a sharp inter-circuit conflict regarding the

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[11] *United States, ex rel. Eisenstein v. City of New York*, 129 S.Ct. 2230 (2009) (interpreting Rule 4(a)(1)); *Bowles v. Russell*, 551 U.S. 205 (2007) (interpreting Rule 4(a)(1)(A)); *Becker v. Montgomery*, 532 U.S. 757 (2001) (evaluating the "complementary operation" of Rule 4(a)(1) and Rule 11 of the Federal Rules of Civil Procedure); *Smith v. Barry*, 502 U.S. 244 (1992) (applying Rule 3 to determination of whether an informal brief may constitute a notice of appeal); *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991) (construing Rule 4(a)); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (construing Rule 3(c)(1)(A)); *Foman v. Davis*, 371 U.S. 178 (1962) (reversing decision that notice of appeal was defective because it assertedly "failed to specify that the appeal was being taken from" a particular judgment).

construction of Rule 3(c)(1)(B), which requires that a notice of appeal "designate the judgment, order, or part thereof being appealed."

The Sixth Circuit applies a uniquely stringent interpretation of Rule 3(c)(1)(B). In determining what order or judgment is being appealed, the Sixth Circuit holds, an appellate court may consider only "the notice of appeal itself," and must disregard any of "the circumstances surrounding an appeal." (App. 15a, 16a). Applying that rigid rule, the court of appeals has concluded that the notice of appeal in the retaliatory disqualification case was actually an appeal of an order in an entirely different case; as so construed the notice of appeal was both manifestly pointless (because the same party had filed a separate appeal in that other case) and entirely ineffective (because it was not filed in the case to which the circuit court held it pertained).

The decision in the instant case applies well-established Sixth Circuit case law embodied in a series of officially reported decisions in that circuit. The panel refused to construe the notice of appeal in light of facts extrinsic to the notice itself because "[o]ur precedents do not allow us to examine the circumstances surrounding an appeal in an effort" to construe a notice of appeal. (App. 15a). The outcome of the dispute regarding the application of Rule 3(a)(1)(B) in this case, the court below explained, was governed by "our prior decisions." (*Id.*; see *id.* ("case law of this circuit")).

The Sixth Circuit rule forbidding consideration of matters outside the notice of appeal was firmly established by that circuit's decision in *United States v. Glover*, 242 F.3d 333 (6th Cir. 2001).[12] *Glover* concluded that the courts should not look at factors outside the notice of appeal because there could be "a morass of objective and subjective factors," and it would be unduly difficult to "divine the [appellant's] intended appellate targets." 242 F.3d at 337.[13] The

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[12] Although the Sixth Circuit had earlier "loosen[ed]" the requirement in F.R.App.P. 3(c)(1)(A) regarding the requirement that a notice of appeal designate the court appealed to, it insisted on a more stringent interpretation of Rule 3(c)(1)(B).

> Unlike the decision *where* to appeal, the decision *what* to appeal is left almost exclusively to the discretion of the appellant. Furthermore, it generally is true that numerous potentially appealable issues have been generated by the district court before an appeal is taken. Whether any of those issues actually will be appealed depends upon a number of factors.... Thus, unlike the decision ... loosening ... the requirement "to name the court to which the appeal is taken" ... a similar loosening of the requirement "to designate the judgment, order or part thereof appealed" ... would, if approved, too frequently require this Court to sort through a morass of objective and subjective factors to meditate upon and divine the party's intended appellate targets.

242 F.3d at 336-37 (emphasis in original). The Sixth Circuit reaffirmed the rule in *Glover* in *Isert v. Ford Motor Co.*, 461 F.3d 756, 760 (6th Cir. 2006).

[13] The majority in *Glover* rejected the argument of the dissenting judge that the order appealed from could readily be identified by looking at the timing and procedural context of the notice of appeal. The notice had been filed shortly after a

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panel in the instant case expressly relied on *Glover*, as the United States had urged it to do. (App. 12a-13a). The Sixth Circuit has been particularly aggressive in invoking Rule 3(c)(1)(B) to dismiss appeals, repeatedly doing so when the appellee itself had not questioned the sufficiency of the notice of appeal.[14]

The court of appeals below candidly acknowledged that the Sixth Circuit standard is different than the standard in several other circuits.

> Schramm ... cites two cases from other circuits in support of his argument that a party should be permitted to pursue an appeal from a specific judgment when the intent to do so can fairly be inferred from the appellant's notice and subsequent filings and when the opposing party is not misled by the mistake. *See Messina v. Krakower*, 439 F.3d 755 (D.C.Cir. 2006); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No.*

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hearing at which the district judge ruled in favor of the defendant on a hotly disputed issue, and "the Assistant United States Attorney noted her objection to this ruling on the record. No other issue was argued at this conference." 242 F.3d at 338.

[14] In *Martin v. General Electric Co.*, 187 Fed. Appx. 553 (6th Cir. 2006), the Sixth Circuit dismissed part of an appeal on this basis even though "[t]he parties did not question our jurisdiction to entertain this appeal in their briefs." 187 Fed. Appx. at 557. In *United States v. Universal Management Services, Inc., Corp.*, 191 F.3d 750 (6th Cir. 1999), the court of appeals did the same, even though the United States, as the appellee, had apparently argued that the court had jurisdiction over the question briefed by the appellant. 191 F.3d at 755.

> *69*, 374 F.3d 857 (9th Cir. 2004). Insofar as these decisions allow the court to look beyond the notice of appeal to discern an appellant's intent and determine whether the functional requirements of Rule 3 are fulfilled, they are not consistent with the case law of this circuit.... Our precedents do not allow us to examine the circumstances surrounding an appeal in an effort to determine whether an appellant has made a mistake in designating the order he wishes to appeal.

(App. 14a-15a).

Ten circuits apply the very standard rejected by the Sixth Circuit, holding that appellate courts can and should look to documents and events outside the notice of appeal itself in determining what orders and issues have been appealed and are within the jurisdiction of the appellate courts.

The First Circuit has repeatedly insisted that appellate courts should consider surrounding circumstances – as the Sixth Circuit does not – in interpreting a notice of appeal.

> [B]ecause the "failure to name the underlying judgment is usually a slip of the pen and rarely causes any prejudice to the other side," courts often "rescue the technically defaulted portion of the appeal." ... [W]e review the notice of appeal in the context of the entire record.

Blockel v. J.C. Penney Co., Inc., 337 F.2d 17, 24 (1st Cir. 2003) (quoting *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 415 (1st Cir. 2000)). In *Blockel* the First Circuit, "reviewing the record as a whole," held that issues not expressly mentioned in the notice of appeal were nonetheless within the scope of that notice. The First Circuit relied in part on the appellant's appellate brief, which (like the brief in the instant case) had expressly addressed those issues. 337 F.3d at 24. The First Circuit has repeatedly applied this standard that a notice of appeal is to be construed in light of the contents of the entire record in a case.[15]

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[15] *Chamorro v. Puerto Rican Cars, Inc.*, 304 F.2d 1, 3 (1st Cir. 2002):

> [First Circuit precedent] does not mean ... that an appellate court invariably is bound to read the notice of appeal literally.... [I]nstead, our precedents encourage us to construe notice of appeal liberally and examine them in the context of the record as a whole.

The court in *Chamorro* relied on the appellant's appellate brief in construing his notice of appeal. *Id.* In *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 415 (1st Cir. 2000), the First Circuit relied on the content of the appellant's trial court motions in construing its subsequent notice of appeal. In *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 839 (1st Cir. 1993), the First Circuit explained that a notice of appeal was sufficient to encompass a judgment not mentioned therein

> where the appellant's intent to appeal from the judgment is clear.... In making this assessment, we consider the notice of appeal "in the context of the record as a whole." *Kotler* [*v. American Tobacco Co.*,] 981 F.2d [7,] 11 [(1st Cir. 1992)].

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In the Second Circuit a notice of appeal entails any order or judgment where an "intent to appeal from [that] specific judgment [or order] can fairly be inferred." *Matarese v. LeFevre*, 801 F.2d 98, 105 (2d Cir. 1986). In ascertaining the intent of the appellant, the Second Circuit routinely looks beyond the terms of the notice itself. In *Sahu v. Union Carbide Corp.*, 538 F.3d 59 (2d Cir. 2008), the court relied on the content of the appellant's Pre-Argument Statement, "together" with the notice of appeal, in concluding that the two documents were the "functional equivalent" of a notice of appeal of the order discussed in that statement, but not mentioned in the notice itself. 538 F.3d at 66. In *Mallis v. Bankers Trust Co.*, 717 F.2d 683 (2d Cir. 1983), the court explained that given the overall history of the case, "we cannot see how the notice of appeal ... could have conveyed anything to [the appellee] other than the plaintiffs' dissatisfaction

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The court in *LeBlanc* relied on the content of a separate notice of appeal in construing the disputed notice. *Kotler* explained that "we do not examine the notice in a vacuum but in the context of the record as a whole." 981 F.2d at 11. An earlier decision in that litigation, *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990), announced the same rule.

> In determining whether appellant's notice of appeal, despite their obvious failure to mention the May 1988 order, sufficiently demonstrated an intent to appeal that order, we are not limited to the four corners of the notices, but examine them in the context of the record as a whole.

926 F.2d at 1221.

with the [non-listed] judgment." 717 F.2d at 693.[16] The Second Circuit also applies a second more liberal rule that differs from the standard in most other circuits. Even if the appellant's intent to appeal a particular order or judgment

> cannot be inferred, [if] the appellee "has not been prejudiced" by the inaccuracy and ... has "responded in full" to the appellant's substantive arguments, the court has jurisdiction.

Ametex Fabrics, Inc. v. Just In Materials, Inc., 140 F.3d 101, 106 (2d Cir. 1998) (quoting *Karuse v. Bennett*, 887 F.2d 362, 367 n.2 (2d Cir. 1989)).

In the Third Circuit it has long been the rule that "if from the notice of appeal *and the subsequent proceedings on appeal* it appears that the appeal was intended to have been taken from an unspecified judgment order or part thereof, the notice may be construed as bringing up the unspecified order for review." *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977) (emphasis added).[17]

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[16] See *Bancroft Nav. Co. v. Chadade S.S. Co.*, 349 F.2d 527, 528 (2d Cir. 1965) ("[u]nder the circumstances specification of the September 23 order in the notice of appeal could hardly have conveyed anything to [the appellee] other than [the appellant's] unwillingness to accept the ... September 14 decision.").

[17] This holding in *Elfman* has been repeatedly applied in the Third Circuit. *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 236 (3d Cir. 2005); *Nationwide Mutual Ins. Co. v. Cosenza*, 258 F.3d 197, 203 n.1 2001); *Shea v. Smith*, 966 F.2d 127, 129 (3d Cir. 1992); *CTC Imports and Exports v. Nigerian Petroleum*

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"[A] policy of liberal construction of notices of appeal prevails in the Third Circuit where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party." *Nationwide Mutual Ins. Co. v. Cosenza*, 258 F.3d 197, 202 n.1 (3d Cir. 2001). That rule was applied most recently in *Satterfield v. Johnson*, 434 F.3d 185 (3d Cir. 2006) (opinion joined by Alito, J.). In *Satterfield* the appellant's "intention to appeal the issue" in question, although the order involved was not mentioned in the notice of appeal, was "'clearly manifest' from its first brief ... [which] devote[d] thirteen pages to [that] issue." 434 F.3d at 191. There was no prejudice to the appellee, which had ample time to include a response in its own appellate brief. *Id.* Similarly, in *Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir. 1999) (opinion by Alito, J.), the court noted that the defendant "had notice of plaintiffs' intent to appeal" an order not mentioned in the notice of appeal because the appellants "argued the merits of the ... order in their opening appellate brief."

In the Fourth Circuit the requirements of Rule 3(c)(1)(B) are satisfied, regardless of the language of a notice of appeal, if the issue raised by a district court order is briefed by the appellant on appeal.

Corp., 951 F.2d 573, 577 (3d Cir. 1991); *New Castle County v. Hartford Acc. and Indemn. Co.*, 933 F.2d 1162, 1179 n.1 (3d Cir. 1992); *Williams v. Guzzardi*, 875 F.2d 46, 49 (3d Cir. 1989).

> The appellant simply needs to address the merits of a particular issue in her opening brief in order to demonstrate she had the intent to appeal that issue and the appellees were not prejudiced by her mistake, inasmuch as they had notice of the issue and the opportunity to fully brief it.

Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005).[18] That circuit has also noted that an intent to appeal an order can be inferred where that order resolved the sole issue that determined the outcome of the case below. *Dang v. C.I.R.*, 359 F.3d 204, 208 (4th Cir. 2001).

In the Fifth Circuit, where a notice of appeal

> failed to designate or "misdesignated" the ruling being appealed ... we liberally construe the order designation portion of Rule 3(c) and, when the intent to appeal an unnamed or mislabeled ruling is apparent (from the briefs or otherwise) and no prejudice results to the adverse party, the appeal is not jurisdictionally defective.

United States v. Rodriguez, 932 F.2d 374, 375 (5th Cir. 1991). In *Rodriguez* the notice of appeal, "when viewed in isolation, ... would indicate a clear intent

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[18] This Fourth Circuit rule was applied in *United States v. Taylor*, 2000 WL 1763466 at n.* (4th Cir. 2000), *Reardon v. Adden Furniture, Inc.*, 1998 WL 77788 at *4 n.4 (4th Cir. 1998), *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 771 (4th Cir. 1997), and *Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 974 (4th Cir. 1997).

not to appeal [the matter in question]." 932 F.2d at 375-76. The requisite intent to appeal the order in question was demonstrated, however, by the action of the appellant in addressing the matter in question in its appellate brief and by ordering the portions of the trial transcript dealing with that issue. 932 F.2d at 376. The Fifth Circuit has repeatedly relied on appellate briefs or other matters extrinsic to the notice of appeal in determining compliance with Rule 3(c)(1)(B).[19]

In the Eighth Circuit

> in accordance with a policy of liberal interpretations of notices of appeal[,] in situations where intent is apparent and there is no prejudice to the adverse party, this court will consider [an] appeal on its merits.

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[19] *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 884 (5th Cir. 1998) (intent demonstrated by brief on appeal); *United States v. Knowles*, 29 F.3d 947, 949-50 (5th Cir. 1994) (intent demonstrated by brief on appeal); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 847 n.1 (5th Cir. 1993) (intent demonstrated by appellate brief and oral argument); *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (intent demonstrated by brief on appeal); *Turnbull v. United States*, 929 F.2d 173, 177 (5th Cir. 1991) (defect in notice may be cured by indication of intent in brief or otherwise); *United States v. Lopez-Escobar*, 920 F.2d 1241, 1244-45 (5th Cir. 1991) (intent demonstrated by brief and statement of issues); *United States v. Rochester*, 898 F.2d 971, 976 n.1 (5th Cir. 1990) ("[f]ailure to properly designate the order appealed from ... may be cured by an indication of intent in the briefs or otherwise"); *McLemore v. River Villa Partnership*, 898 F.2d 996, 1000 (5th Cir. 1990) (intent demonstrated by timing of appeal, status of the case when the notice was filed, and brief).

Simpson v. Norwesto, Inc., 583 F.2d 1007, 1009 n.2 (8th Cir. 1978). In determining the intent of the appellant, the Eighth Circuit relies on considerations other than the content of the notice itself. E.g., *Hawkins v. City of Farmington*, 189 F.3d 695, 703-05 (8th Cir. 1999) (procedural history of the case, appeal information form, statement of issue form, designation of the record); *ELCA Enterprises, Inc. v. Sisco Equipment Rental & Sales, Inc.*, 53 F.3d 186, 189 (8th Cir. 1995) (appeals information Form A); *McAninch v. Traders National Bank of Kansas City*, 779 F.2d 466, 467 n.2 (8th Cir. 1985) (appeal information form and briefs).

The Ninth Circuit applies an interpretation of Rule 3(c)(1)(B) that is avowedly less stringent than in other circuits.

> While some circuits construe Rule 3(c) strictly, ... this circuit has held that "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983).

Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1481 (9th Cir. 1986). That circuit has repeatedly held that the requisite intent is shown if the

appellant's brief addresses the correctness of the order not specified in the notice of appeal.[20]

The Tenth Circuit has been particularly specific in holding that the interpretation of a notice of appeal is not limited to the words of the notice itself. "Even if a notice fails to properly designate the order from which the appeal is taken, this court has jurisdiction if the appellant's intention was clear." *Fleming v. Evans*, 481 F.3d 1249, 1253-54 (10th Cir. 2007). In *United States v. Morales*, 108 F.3d 1213 (10th Cir. 1997), the government sought to appeal the failure of the trial court to impose the minimum mandatory ten years of imprisonment.

> Because the notice of appeal does not indicate the United States intends to appeal the sentence of Mr. Morales, the government failed to comply with Fed.R.App.P. 3(c). Nevertheless, our inquiry does not stop there.... Notwithstanding the wording of the notice of appeal in the present case, we are confident the notice was sufficient to inform Mr.

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[20] *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1171 (9th Cir. 1995) ("[w]e may infer from ... the arguments contained in Simpson's opening brief, that Simpson intended to appeal ... the order"); *Montes v. United States*, 37 F.3d 1347, 1351 (9th Cir. 1994) ("[f]rom his briefs, it is clear that Montes intended to appeal from the [omitted] judgment"); *Levald v. City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993); *Meehan v. County of Los Angeles*, 856 F.2d 102, 105-06 (9th Cir. 1988); *Lynn*, 804 F.2d at 1481; *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 451 (9th Cir. 1983).

> Morales that the government sought to appeal his sentence.

108 F.3d at 122-23. In holding the notice of appeal was nonetheless sufficient, the Tenth Circuit relied on matters outside the notice itself, the docketing statement the government later filed in the court of appeals, and the fact that the sentence was the only part of the district court decision which the United States could appeal. 108 F.3d at 123.[21] The Tenth Circuit attaches particular weight to documents filed close in time to the notice of appeal itself. *Denver & Rio Grande Western RR. Co. v. Union Pacific RR. Co.*, 119 F.3d 847, 849 (10th Cir. 1997).

The Eleventh Circuit standard is consistent with the majority rule.

> "[I]n this circuit, it is well settled that an appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent

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[21] See *Cooper v. American Automobile Ins. Co.*, 978 F.2d 602, 607-08 (10th Cir. 1992) (order appealed from determined by examining not only the notice of appeal but also "the supporting papers and particular circumstances surrounding it"; intent demonstrated by appellants' statement of points on which she intended to rely on appeal and by merits brief); *Wright v. American Home Assurance Co.*, 488 F.2d 361, 363 (10th Cir. 1974) ("[a]ppellant's intention to seek review of the judgment is manifest.... [A]ppellant ... briefed the merits, and the appellant's statement of issues similarly demonstrates an intent to challenge the judgment"); *Jones v. Nelson*, 484 F.2d 1165, 1168 (10th Cir. 1973) (scope of appeal determined "[b]y looking behind the form of notice").

> was effectively to appeal." *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 439 n.1 (5th Cir. 1980).... Here, it is overwhelmingly clear that the city intended to appeal the district court's ruling.... the appellant's brief addresses *only* that issue.

KH Outdoor, LLC v. Trussville, City of, 465 F.3d 1256, 1259 (11th Cir. 2006) (emphasis in original); see *Cornelius v. Home Comings Financial Network, Inc.*, 293 Fed. Appx. 723, 726 (11th Cir. 2008) ("Cornelius demonstrates 'overriding intent' to effectively appeal the grant of summary judgment.... Two of the three sections in his appellate brief are devoted to arguments concerning the summary judgment").

The District of Columbia Circuit applies a

> well-settled rule that a mistake in designating the specific judgment or order appealed from should not result in loss of the appeal so long as the intent to appeal from a specific judgment can be fairly inferred from the appellant's notice (*and subsequent filings*) and the opposing party is not misled by the mistake.

Foretich v. American Broadcasting Companies, 198 F.3d 270, 273 n.4 (D.C.Cir. 1999) (emphasis added). That circuit has repeatedly held it has jurisdiction to review orders mentioned in the statement of issues filed by the appellant in the court of appeals, even

though the order was not mentioned in the actual notice of appeal.[22]

This inter-circuit conflict has resulted in inconsistent decisions in cases in which the United States filed a notice of appeal that ran afoul of Rule 3(c)(1)(B). On occasions in which it filed a notice of appeal which failed to specify the order it wished to appeal, the government has successfully relied on the liberal construction of Rule 3(c)(1)(B) in the Fifth, Ninth and Tenth Circuits. *United States v. Belgarde*, 300 F.3d 1177, 1180 (9th Cir. 2002) ("all parties understood the government was appealing" the omitted order);[23] *United States v. Morales*, 108 F.3d

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[22] *Messina v. Krakower*, 439 F.3d 755, 759 (D.C.Cir. 2006) (order listed in statement filed under D.C.Cir. R. 28(a)(1)(B) of "Rulings Under Review"); *Independent Petroleum Ass'n of America v. Babbitt*, 235 F.3d 588, 593 (D.C.Cir. 2001) (order listed in "Non-Binding Statement of Issues to be Raised"); *Foretich*, 198 F.3d at 273 n.4 (order listed in "Docketing Statement").

[23] In its brief in *Belgarde*, the United States argued that the content of its appellate brief could be relied on to ascertain the intended scope of the appeal.

> Here, it was obvious that the underlying dismissal of the indictment was at stake.... [I]n its opining brief before this Court, the government explains that because of the arguments expressed in its brief, "the court's *order and judgment* should be reversed." ... The government's presentation in its opening brief deals entirely with the question of whether its indictment was properly dismissed on the merits. Under these circumstances, it is obvious that this appeal is an appeal of the order dismissing the indictment.

Reply Brief of Appellant/Cross Appellee, 2001 WL 34090113, at *10.

1213, 1223 (10th Cir. 1997) (government's intent to appeal demonstrated by government's subsequent docketing statement and fact the omitted order concerned the only issue which the government legally could appeal); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 847 n.3 (5th Cir. 1993) (government's intent to appeal demonstrated by its brief and oral argument); *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979) ("[i]t is apparent the Government intended to appeal both orders"). In *United States v. Glover*, on the other hand, the Sixth Circuit applied its particularly stringent standard to dismiss the government's appeal for failure to comply with Rule 3(c)(1)(B).

B. The Sixth Circuit Standard Is Inconsistent With the Decisions of This Court

The panel opinion rests on two distinct grounds. First, it held that in applying Rule 3(c) the meaning and intent behind a notice of appeal must be determined based solely on the words in the notice itself. The panel acknowledged that Schramm actually intended to appeal the March 25 order, but found the notice of appeal defective because that intent was not apparent on the face of the notice itself.

> It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs. What matters is that Schramm's intent to appeal the March 25, 2008 order is not discernable from the notice of appeal itself. To the contrary, it

> appears from the notice that Schramm intended to appeal only the [February 11, 2008] order....

(App. 15a-16a).

The panel's first reason is squarely inconsistent with the decision of this Court *Foman v. Davis*, 371 U.S. 178 (1962). The appellant in *Foman* had filed a notice of appeal that designated as the order appealed from a decision denying a motion to vacate the judgment and to amend the complaint. The court of appeals held that this notice was insufficient to also designate an earlier order dismissing the complaint; nothing on the face of the notice itself contained any mention of that earlier order. In reversing, this Court did precisely what the panel forbade, expressly relying on materials "beyond the notice of appeal" itself "to discern [the] appellant's intent." The decision in *Foman* rested on the content of an earlier premature notice of appeal and of the papers subsequently filed by appellant in the court of appeals.

> Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal.

371 U.S. at 229-30. Under the holding of the panel in the instant case, neither those briefs, the statement of points nor the other notice of appeal could have been considered.

This Court has repeatedly explained that under *Foman* a court is to consider "all the circumstances" – not merely the circumstances "discernable from the notice of appeal itself" – in deciding whether there has been sufficient compliance with Rule 3(c). *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269, 276 n.3 (1991). This Court reiterated this interpretation of Rule 3 in *Becker v. Montgomery*, 532 U.S. 757 (2001).

> [O]pinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to what appellate court.... *Foman v. Davis*, 371 U.S. 178 (1962) (holding that an appeal was improperly dismissed when the record as a whole – including a timely but incomplete notice of appeal and a premature but complete notice – revealed the orders petitioner sought to appeal).

532 U.S. at 657-68.

The panel held, second, that although a notice of appeal regarding a particular order or judgment might in some situations be deemed to encompass another order or judgment, that exception was limited

to cases in which the additional order or judgment had been entered *before* (or simultaneously with) the order or judgment specifically designated in the notice of appeal.

> In each of [the decisions relied on by Schramm], the appellant designated the final judgment or order in the notice of appeal and sought to appeal either an order that preceded the final judgment or a portion of the final judgment. This case is distinguishable in that Schramm seeks to appeal a final order that he did not designate in the notice of appeal, and the order that he did designate in the notice was a *previously*-issued order....

(App. 14a) (emphasis added). The panel's second reason is inconsistent with the this Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). In *FirsTier* the appellant had filed a notice of appeal designating the order appealed from as a January 26, 1989 bench ruling, a premature appeal permitted in some circumstances by Rule 4(a)(2). This Court held that notice of appeal sufficient to encompass the findings of fact and judgment issued by the district court several weeks later, on March 3, 1989. Just as in the instant case, the appellant in *FirsTier* relied on a notice of appeal regarding "a previously-issued order" to present for appeal a challenge to a latter-issued ruling.

> In our view, a notice of appeal from a Rule 4(a)(2) "decision" – that is, a decision that

> would be appealable if immediately followed by the entry of judgment – sufficiently manifests an intent to appeal from the final judgment for purposes of Rule 3(c).

498 U.S. at 276 n.6.

C. This Case Is An Excellent Vehicle For Deciding The Question Presented

This case presents an excellent vehicle for resolving the question presented. The circumstances of this case are a classic application of the Sixth Circuit rule that the scope of a notice of appeal must be determined solely by the content of the notice itself. The same circumstances, on the other hand, would in ten other circuits be held sufficient to confer jurisdiction on the appellate court to review the dismissal of the claim in question.

A lawyer who read only that notice of appeal, and who knew nothing about the content of the February 11, 2008 order or the nature of the underlying lawsuit, undoubtedly would conclude (as the Sixth Circuit) that the issue which Schramm sought to raise on appeal in the retaliatory disqualification lawsuit was the correctness of the February 11 order. Nothing on the face of the notice of appeal itself gives any indication that the February 11 order was actually a decision in another case, and thus could not have been the order which the notice of appeal intended to appeal. The Sixth Circuit standard compels the conclusion that the notice of appeal filed in

the retaliatory disqualification case was an appeal of the February 11 order which actually dismissed the retaliatory assault case.

On the other hand, in the ten circuits which look outside the notice of appeal in applying Rule 3(c)(1)(B), an appellate court would assuredly conclude that the notice of appeal was intended to appeal the dismissal of the retaliatory disqualification action which actually occurred on March 25. First, of course, that would be apparent simply from a reading of the February 11 order, which has nothing to do with the retaliatory disqualification case, and of the March 25 order, which does dispose of that case. Second, the filing in the retaliatory disqualification case of an appeal from the February 11 order cannot have been intended as an appeal of the February 11 order itself, which resolved the retaliatory assault case. The record in the latter case contained a separate notice of appeal in that litigation, and Schramm's counsel had paid two $455 docketing fees in the two cases, clearly intending to initiate two appeals. Third, on April 21, 2008, within the time period for appealing from the dismissal of the retaliatory disqualification case, Schramm had filed in the court of appeals a Statement of Parties and Issues in that case which described the issues in the March 25 order, not those in the February 11 order. Fourth, Schramm's brief on appeal specifically challenged the reasoning and holding of the March 25 order.

In sum, this is precisely the type of case in which the application of Rule 3(c)(1)(B), and the existence of

appellate jurisdiction, turn on whether the court of appeals applies the Sixth Circuit standard or the very different standard utilized in the other circuits.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that the anti-retaliation provision of Title VII protects former employees. The decision of the Sixth Circuit effectively nullifies *Robinson* for a substantial and important group of workers.

The Sixth Circuit holds in the instant case that an employer is not liable for retaliation against a former worker if the victim has not been employed for several years and the retaliation occurs outside the workplace. That immunity from liability would, almost by definition, apply to an entire and important category of protected workers: former employees (or, presumably, unsuccessful applicants) who file suit under Title VII against their former employers.

Section 704(a) of Title VII expressly forbids retaliation against an individual because he or she "participated in any manner in a[ ] ... proceeding, or hearing under this title." 42 U.S.C. § 2000e-3(a). Participation in a lawsuit to enforce Title VII itself lies at the very core of the anti-retaliation protection. For a former employee asserting that he or she was dismissed or forced to resign in violation of Title VII,

a judicial proceeding under Title VII would as a practical matter usually occur "several years [after] the termination of the ... employment." (App. 21a n.2). Because of the exhaustion requirement in Title VII, most Title VII litigation only commences at least a year after a worker's dismissal or resignation, and normally continues for a significant period of time thereafter. Precisely because these plaintiffs are *former* employees, they are unlikely to set foot in their former workplace. Thus retaliation against a former employee who files suit under Title VII will ordinarily fall under the Sixth Circuit rule precluding employer liability for retaliation that is "several years" after the termination of the victim's employment and that "occurred outside of the workplace." (App. 22a).

In the context of Title VII, a rule that employers are not liable for such a category of retaliation is indistinguishable from a holding that that type of retaliation is lawful under section 704(a). Individual supervisors and managers are not personally liable for their role in violations of Title VII. Thus if the employer itself is not liable for a particular action, no one is liable at all. It makes no practical sense to say that retaliation against Schramm, or other former employees who sue their former employers, is "a violation of Title VII's anti-retaliation provision," and yet insist that employers "cannot be held vicariously liable" for that type of violation. (See App. 21a).

The loophole in the Title VII anti-retaliation provision created by the decision below is of considerable

practical importance. A majority of all Title VII lawsuits appear to be filed by former employees; a substantial majority of the employment discrimination cases decided by this Court were brought by such former employees.[24] If, as the Sixth Circuit held, employers are not (at least ordinarily) liable for retaliation against those plaintiffs, the statutory provision protecting these Title VII plaintiffs from retaliation would usually be meaningless.

It is particularly inappropriate that the Sixth Circuit rule, holding that Title VII generally affords no protection for non-workplace retaliation against former employees who file suit, was adopted at the behest of the United States. Only three years ago in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), this Court unanimously rejected the contention there advanced by the Solicitor General that section 704(a) is limited to retaliatory acts involving the "terms and conditions of employment." 548 U.S. at 62-67. "The scope of the anti-retaliation provision," the Court held, "extends beyond workplace-related ... acts and harm." 548 U.S. at 67. In the instant case, the government has obtained – at least for employers in the Sixth Circuit – a holding that employer liability for retaliation against former workers is limited to acts that have a "connection to the workplace" (App. 21a n.2), a connection that for many of those plaintiffs will not exist.

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[24] See Brief Appendix.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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