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Supplemental Brief for Petitioner. Thompson v. North American Stainless, LP, 562 U.S. 170 (2011) (No. 09-291), 2010 U.S. S. Ct. Briefs LEXIS 2990

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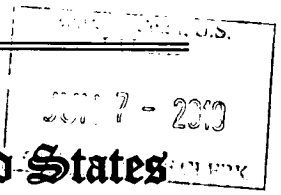

In The
Supreme Court of the United States

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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I. THE DECISION BELOW ENLARGES A SERIOUS GAP IN THE PROTECTIONS OF TITLE VII

The United States has long maintained that enforcement of Title VII and other federal employment statutes would be seriously obstructed if employers could with impunity retaliate against family members or others closely associated with employees who complain about illegal action, file charges with federal agencies, or bring private actions. (Pet. 18-22). The Solicitor General expressly reaffirms that position. The prospect that filing a lawsuit or an EEOC charge would lead to the dismissal of a family member or other closely associated person, the United States explains, "might very well persuade [a worker] not to file." (U.S.Br. 14). "[A]n employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their rights." (*Id.*) (*quoting Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561, 564 (3d Cir.2002)). The gap in the protections of Title VII to which the government objects clearly exists today in the Third and Eighth Circuits, where the United States concedes third party reprisals are lawful under Title VII. (U.S.Br. 7).

That same gap exists as well in the Sixth Circuit, which has rejected the only known method of private enforcement of Title VII – a lawsuit by an individual who was fired (or otherwise retaliated against) in violation of federal law. The deterrent effect of third

party reprisals is precisely the same if there is no prohibition against third party reprisals (as in the Third and Eighth Circuits), or if any such prohibition is as a practical matter unenforceable. The Sixth Circuit has indisputably held that an employee who is dismissed as a reprisal cannot sue for any relief whatever. The substitute enforcement mechanism hypothesized by the government does not exist under Title VII, and is inconsistent with the standing requirements delineated by this Court and long advocated by the United States itself.

The Solicitor General hypothesizes that there might in the future be a new, entirely novel method of redressing such a violation. The hypothesized proceeding would be brought by the worker who had engaged in protected activity, but would request no remedy for the plaintiff herself; instead the plaintiff would seek "recompense" for the dismissed worker who was not a party to the proceeding. (U.S.Br. 12). Thus in the instant case the government suggests that Ms. Regalado might file suit and ask the court to order the defendants to pay damages or backpay to Thompson.

The government does not contend that any federal court has ever actually permitted that sort of suit under Title VII, or indeed any other federal statute. Nor does it contend that the EEOC or Department of Justice have ever before suggested that Title VII could be enforced in this manner. The Solicitor General, although drawing on the considerable experience and resources of both the EEOC and

the Civil Rights Division, cannot identify a single case in the forty-five year history of Title VII in which any federal court has awarded this sort of relief for a non-party. The only Title VII case cited in the government's brief is one in which the dismissed worker was seeking back pay and other remedies for himself, and the court held that a district judge "has broad discretion to fashion appropriate equitable relief *for a Title VII plaintiff*," *Castle v. Rubin*, 78 F.3d 654, 657 (D.C.Cir.1996) (emphasis added), not equitable relief for someone other than the actual plaintiff.

The government suggests that in an individual Title VII action brought by one individual (e.g. Regalado) a federal court could "use[] its broad equitable power to fashion an appropriate remedy" for someone else (e.g. Thompson). (U.S.Br. 12). But in other briefs in this Court the Solicitor General has correctly pointed out that the power of a federal court is limited by the standing requirement of Article III.

> Article III of the Constitution limits the power of federal courts to deciding "Cases" and "Controversies." One aspect of the case or controversy requirement is that a party who invokes the jurisdiction of a federal court must have standing to sue.[1]

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[1] Brief for the United States as Amicus Curiae Addressing Standing, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), at 9, available at 1996 WL 422137.

The government has on repeated occasions successfully invoked that standing requirement to persuade this Court to deny a plaintiff the most common form of equitable relief, an injunction.

The core standing requirement, the Solicitor General has often explained, is that a plaintiff have a "personal stake" in the outcome of a particular claim.[2] "To demonstrate standing, a plaintiff must have 'alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" *Salazar v. Buono*, 130 S.Ct. 1803, 1814 (2010) (*quoting Horne v. Flores*, 557 U.S. ___, ___, 129 S.Ct. 2479, 2592 (2009) (emphasis in original)). A plaintiff's hope that a relative or close friend will receive a monetary award or a job is not such a "personal stake." If Mr. Thompson had been injured in an accident, Ms. Regalado obviously would not have had the requisite "personal stake" in whether a court might award damages to her fiance or husband. A litigant only has standing to seek "remediation of its own injury," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998), not remediation of harms done to others. Standing is

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[2] Within the last year alone the Solicitor General has filed three briefs making this very point. Motion to Dismiss or Affirm, *Rodearmel v. Clinton*, No. 09-797, at 13, available at 2010 WL 1848214 (May 10, 2010); Brief of Respondent in Opposition, *Curr-Spec Partners, L.P. v. C.I.R.*, 2010 WL 265882 (S.Ct. 2010), at 13, available at 2010 WL 1653078 (April 23, 2010); Brief for Petitioners, *Salazar v. Buono*, 130 S.Ct. 1803 (2010), at 12, available at 2009 WL 1526915 (June 1, 2009).

determined by the identity of the party to whom a court orders that monetary relief be paid. It does not "matter what the [plaintiff] do[es] with the money afterward." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, ___, 128 S.Ct. 2531, 2543 (2008).

This constitutional requirement cannot be avoided by joining a claim for which standing is lacking with a separate claim for which standing is present. As the Solicitor General has pointed out on several occasions, standing must be separately established for each item of relief requested.

> [A plaintiff] bears the burden of demonstrating that he has standing to seek that additional form of relief. See *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1148 (2009) ("[A plaintiff] bears the burden of showing that he has standing for each type of relief sought.")[3]

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000). In a third party reprisal case, the worker who engaged in protected activity

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[3] Reply Brief for the Petitioners, *Salazar v. Buono*, at 5, available at 2009 WL 2625777; see Brief of Appellee, *Davis v. Federal Election Commission,* 128 S.Ct. 2759 (2008), at 37 ("a plaintiff must demonstrate standing separately for each form of relief sought") (*quoting DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)), available at 2008 WL 742921.

might herself have been injured by the dismissal of another worker (e.g., incurring increased health insurance premiums to cover her unemployed husband); if so she would have standing to seek redress payable to herself for her own injuries. But that would not mean that such a plaintiff would *also* have standing to seek an award of damages or backpay payable to her spouse.

The government suggests that Title VII itself provides Regalado with the Article III standing (which she would otherwise lack) to maintain an action seeking monetary relief payable to Thompson. It relies entirely on a single sentence in a footnote in *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (U.S.Br. 12). But this Court long ago made clear that this passage means only that Congress can expand the *types* of injuries actually sustained by a plaintiff which the law will recognize and redress, not that Congress can confer Article III standing to provide a form of redress that does not remedy any injury to the plaintiff.

> Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto*, injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated

> community, see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972), and injury to a company's interest in marketing is product free from competition, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968)). As we said in *Sierra Club* [*v. Morton,* 405 U.S. 727 (1972)], "[Statutory] broadening [ ] of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have suffered an injury." 405 U.S. at 738.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992). Under *Linda R.S.* Congress could provide Regalado a damage remedy for any injuries that she herself suffered when Thompson was fired, but it could not accord her Article III standing to seek an order providing monetary redress to Thompson for injuries suffered by Thompson himself.

An unenforceable prohibition against third party reprisals creates the same gap in Title VII as the Third and Eighth Circuit rule that such reprisals are lawful. This Court's well established standing decisions, many of them adopted at the behest of the United States itself, manifestly preclude the lower courts from entertaining the sort of gerry-rigged claim hypothesized by the government's brief. This is not an issue that would benefit from percolation in the lower courts; those courts have no authority to disregard the constitutionally mandated standing

requirements delineated by the decisions of this Court.

II. THE DECISION BELOW PRESENTS AN IMPORTANT CONFLICT REGARDING TITLE VII

(1) The government suggests that the differences among the lower court decisions in this area are mere "analytical deviations on route to the same bottom-line result." (U.S.Br. 7). That is not correct. Those decisions actually present conflicting interpretations of three different provisions of federal law, each with distinct applications and consequences.

First, the Third and Eighth Circuits hold that under section 704(a) reprisals against third parties are lawful. (U.S.Br. 7) In those circuits no plaintiff – not even the EEOC or Department of Justice – could sue to enjoin or redress such reprisals. The government insists, on the other hand, that the Sixth Circuit decision in the instant case holds – to the contrary – that reprisals of that sort do violate section 704(a). (U.S.Br. 6, 11, 13). We noted in the petition that First and Eleventh Circuits have held that the identically worded provisions of OSHA and the Equal Pay Act do forbid third party reprisals. (Pet. 28). The United States does not contend that the substantive language of those two statutes is in any way distinguishable from the terms of Title VII, and does not suggest that under current law in the Third and Eighth Circuits either the Department of Labor or

the EEOC could enforce any of these statutes to prevent or redress third party reprisals. (U.S.Br. 9-10 and 10 n.5).

Second, the Fifth Circuit insists that individuals injured by violations of other employees are not "persons aggrieved," and thus cannot meet the requirements of prudential standing principles. *Holt v. JTM Indus., Inc.*, 151 F.3d 813, 819 (5th Cir.1996). If that is correct, it would bar relief in a wide range of cases other than third party reprisals. (See, e.g., *Anjelino v. The New York Times*, 299 F.3d 73 (3d Cir.2000) (employer suspended hiring whenever the most senior applicant was a woman, thus denying jobs as well to all less senior men)). As we noted in the petition, four circuits have held to the contrary that the statutory authority for a "person aggrieved" to file suit does confer standing to sue on individuals whose own rights were not violated. (Pet. 35).

Third, the Sixth Circuit in the instant case insists that section 706(f)(1) (which applies to a "person ... aggrieved") does not create cause of action. That rule would mean that Title VII claimants generally, not just plaintiffs in third party reprisal cases, would be governed by the restrictive standards regarding implied causes of action, which the Sixth Circuit applied in this case. As we explain below, six circuits insist, to the contrary, that section 706(f)(1) does create a cause of action for any "person ... aggrieved."

(2) The government agrees that the Sixth Circuit rejected Thompson's claim on the ground that section 706 does not provide a cause of action to a "person ... aggrieved." (U.S.Br. 3, 15-16). But having identified the existence vel non of a cause of action under section 706 as the dispositive issue in the court below, the United States simply fails to address whether, as we asserted in the petition, there is an inter-circuit conflict on that very issue. (Pet. 37).

The en banc majority acknowledged that Thompson is a "person aggrieved" within the terms of section 706. Thus *if* section 706 itself provides a cause of action for "person[s] aggrieved," Thompson would indeed have a cause of action. As the United States explains, however, the majority below believed that whether a plaintiff has a cause of action for a violation of Title VII turns not on section 706, but on cases such as *Davis v. Passman*, 442 U.S. 228 (1979), regarding implied causes of action. (Pet. App. 9a; see U.S.Br. 15-16). In the court below Judges Rogers and White insisted, to the contrary, that who "may sue for Title VII violations" is expressly governed by section 706, which authorizes such suits by "person[s] aggrieved." (Pet. App. 30a (concurring opinion); see Pet. App. 58a (dissenting opinion)).

The government correctly agrees with Judges Rogers and White, insisting – contrary to the view of the majority below – that section 706 itself expressly provides a cause of action.

> Congress ... in [section 706(f)(1)] ... provided a cause of action for a 'person claiming to be aggrieved' by a violation of the statute.... Since the court of appeals held that petitioner was in fact 'aggrieved' within the meaning of this provision, ... it should have concluded that his suit could proceed.

(U.S.Br. 16).

The very interpretation of section 706 advanced by the Solicitor General – as inconsistent with the decision below – has been expressly adopted by six other courts of appeals, which hold that section 706 does indeed provide a cause of action for violations of Title VII. Although we expressly pointed to that line of decisions and conflict in the petition, the United States inexplicably does not mention any of these circuit court decisions which agree with its construction of section 706. The Solicitor General takes no position at all as to whether there is an inter-circuit conflict on the specific legal issue which the government insists was the basis of the Sixth Circuit decision. The brief for the United States simply is not helpful to the Court in determining whether there is such a conflict about whether section 706 provides a cause of action to a "person ... aggrieved."

Such a conflict clearly exists. In *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C.Cir.1994), the District of Columbia Circuit adopted precisely the view advanced by the United States, and by Judges

White and Rogers in their separate opinions, that section 706 provides a cause of action to any "person aggrieved" by a violation of Title VII.

> Congress specifically permitted any "person claiming to be aggrieved" by an unlawful employment practice to file suit.... See 42 U.S.C. § 20000e-(5)(f)(1). Accordingly, if the Council can back up its allegations of Article III standing with actual proof, it has a cause of action under Title VII.

28 F.3d at 1278.

Similarly, the Seventh Circuit holds that section 706 authorizes lawsuits by any person claiming to be aggrieved by a violation of Title VII. "The statute ... expressly permits ... a civil action in court 'by the person claiming to be aggrieved,' § 2000e-5(f)(1)." *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 389, 295 (7th Cir.2000); see *Leibovitz v. New York City Transit Authority*, 252 F.3d 179, 185 (2d Cir.2001) ("Title VII provides a private right of action for a 'person claiming to be aggrieved....' 42 U.S.C. § 2000e-5(f)(1)"); *Childress v. City of Richmond, Va.*, 120 F.3d 476, 480 (4th Cir.1997) ("Congress conferred a private right of action on 'the person claiming to be aggrieved ... ' 42 U.S.C. § 2000e-5(f)(1)"). The Fifth[4] and Ninth

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[4] *EEOC v. Louisville & Nashville R.R. Co.*, 505 F.2d 610, 613 (5th Cir.1984); *International Brotherhood of Elec. Workers v. Western Electric Co.*, 661 F.2d 514, 517 n.5 (5th Cir.1981); *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1205 (5th Cir.1981); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir.1977).

Circuits[5] also have repeatedly held that section 706(f)(1) creates a "cause of action" or "right of action."

Six of the seven circuits to address this issue agree with the position of the Solicitor General that the holding of the Sixth Circuit is incorrect. Certiorari should be granted to resolve this conflict.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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[5] *Etemad v. United States*, 1993 WL 114832 at *1 (9th Cir.); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 379 (9th Cir.1991); *Ward v. EEOC*, 719 F.2d 311, 314 (9th Cir.1983).