No. 05-259

IN THE
Supreme Court of the United States

Burlington Northern & Santa Fe Railway Co.,
Petitioner,

v.

Sheila White,
Respondent.

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

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT
(Additional *Amici* Listed on Inside Cover)

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March 9, 2006

ADDITIONAL *AMICI CURIAE*

American Association of University Women
American Civil Liberties Union
Association for Gender Equity Leadership in Education
Association of Trial Lawyers of America
Business and Professional Women/USA
California Women's Law Center
Connecticut Women's Education and Legal Fund
Dads and Daughters
Equal Rights Advocates
Feminist Majority
Legal Aid Society – Employment Law Center
Legal Momentum
Myra Sadker Advocates for Gender Equity
National Alliance for Partnerships in Equity
National Association of Collegiate Women Athletics Administrators
National Association of Women Lawyers
National Council of Jewish Women
National Council of Women's Organizations
National Education Association
National Partnership for Women and Families
National Women's History Project
Northwest Women's Law Center
Pick Up the Pace
United Church of Christ
Women Employed
Women Work! The National Network for Women's Employment
Women's Law Center of Maryland
Women's Law Project
Women's Sports Foundation

QUESTION PRESENTED

Whether an employer is immune from liability for retaliation in violation of Title VII of the Civil Rights Act of 1964 when, in response to an employee's discrimination claim, that employer suspends the employee without pay for more than a month or reassigns the employee to a less desirable position within her employer-defined job description.

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INTEREST OF *AMICUS CURIAE*

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, with special attention given to low-income women and women in non-traditional work environments. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court, the federal courts of appeals, and state courts.[1] NWLC is joined in filing this brief by twenty-nine organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT

Petitioner Burlington Northern concedes that Sheila White, the respondent in this case, was the victim of unlawful sexual harassment by a supervisor. A jury found that after White complained to petitioner and the EEOC about that discrimination, petitioner retaliated by transferring her out of her coveted position as a forklift operator and by attempting to terminate her on false charges of insubordination, resulting in an unpaid suspension of more than a month over the Christmas holidays. Unable to contest the sufficiency of the evidence supporting these factual findings, petitioner asks this Court to hold that such conduct is permissible under Title VII of the Civil Rights Act of 1964, as a matter of law. This Court should reject the invitation. What happened to respondent in this case is emblematic of a continuing widespread problem of sex discrimination against women,

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[1] Letters of consent are on file with the Clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

particularly in non-traditional settings, and of the nearly limitless methods some employers use to punish and deter employees seeking to enforce their Title VII rights.

Section 704 of Title VII, 42 U.S.C. 2000e-3, prohibits any "discrimination against" an employee who alleges a Title VII violation to her employer or to the EEOC, or assists in a Title VII proceeding. The Seventh, Ninth, and D.C. Circuits have properly construed that language to prohibit any retaliation that is likely to deter a reasonable person in the plaintiff's position from engaging in protected activity. This standard is flexible enough to consider the circumstances of each case while also protecting employers and the courts from trivial claims. It is also consistent with the interpretation of similar retaliation provisions adopted by this Court and the courts of appeals in related contexts. Moreover, prohibiting retaliation that would deter a reasonable person from complaining of discrimination is most consistent with this Court's efforts to construe Title VII in a manner that encourages use of internal grievance procedures and voluntary compliance.

Petitioner's contrary construction of Section 704 should be rejected. Petitioner does not contest that it discriminated against respondent because of her protected conduct. But it argues that its conduct was nonetheless lawful because that discrimination did not, in petitioner's view, "affect the terms and conditions of [respondent's] employment," Pet. Br. 8. Petitioner's argument, which seeks to transplant a limitation imposed in a *separate* provision of Title VII (Section 703, the general prohibition against employment discrimination) into the very different soil of the statute's anti-retaliation provision, is doubly flawed.

First, there is no basis for importing into Section 704 a textual limitation Congress imposed only in Section 703. Petitioner is correct that the two terms are related: the purpose of Section 704 is to provide full enforcement of all of Title VII's protections, including those in Section 703. But petitioner's request for a court-approved list of retaliatory

techniques categorically beyond the reach of Section 704 is entirely inconsistent with that goal. As this Court has observed, "it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Second, petitioner loses – and the judgment should be affirmed – even under its own proposed standard. The job transfer and attempted termination with unpaid suspension that occurred in this case both constitute "tangible employment actions" under this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). This Court has already recognized that an "undesirable reassignment" is a tangible employment action. *Ellerth*, 524 U.S. at 764. Moreover, a suspension and threatened termination, even if subject to further management review, come within this Court's definition of a "tangible employment action" because they "fall within the special province of the supervisor" and "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id*. at 762.

ARGUMENT

I. Introduction

1. Respondent Sheila White was the only woman working in the Maintenance of Way department of a railyard operated by petitioner Burlington Northern & Santa Fe Railway Co. See Pet. App. 3a. It is uncontested that there were no complaints about White's performance of her job duties. It is also uncontested that White was subjected to harassment by coworkers and a supervisor who believed that a railway yard was no place for a woman. *Ibid.* As the jury found, after respondent complained about sex discrimination to her employer and the EEOC, petitioner retaliated against her by transferring her from her position as a forklift operator and by suspending her for more than thirty days without pay

on false charges of insubordination (an action that would have resulted in termination had she not successfully grieved it).

That experience is not uncommon for women attempting to break into traditionally male-dominated fields. Although such jobs pay far more, on average, than positions traditionally filled by women, the rate of sexual harassment is also much higher.[2] Those subject to discrimination – particularly women attempting to fit into a non-traditional work environment – already face substantial pressure to remain silent rather than rock the boat. See, *e.g.*, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 28-29 & nn.24-25 (2005) (collecting social science studies). In far too many cases, moreover, employees have also faced the real risk of retaliation by their employers. For example, one study found that among women complaining of sex discrimination, "over 40% of the respondents cited one or more instances of retaliation." Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983).[3]

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[2] See NATIONAL WOMEN'S LAW CENTER, TOOLS OF THE TRADE 7 (2005) (data show that "while occupations in the male-dominated categories pay an average median hourly wage of $17.69, the traditionally female fields pay just $13.33 on average"); James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 313 (1998) (studies have found that there is a twenty-four percent greater rate of reported incidents of sexual harassment in male-dominated work environments); P. K. Mansfield et al., *The Job Climate for Women in Traditionally Male Blue-Collar Occupations*, 25 SEX ROLES 63, 71 (1991) (finding that sixty percent of women in the trades had been sexually harassed, compared to six percent of women in clerical positions).

[3] See also Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOC. ISSUES 117, 122 (1995) (survey of state employees that found that sixty-

There also is no doubt that such retaliation is effective in suppressing Title VII complaints, and therefore undermines enforcement of the statute. See, *e.g.*, Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Relation Protection: Why Everyone, Including the Employer, Loses*, 5 EMPLOYEE RTS. & EMPLOYEE POL'Y J. 549, 586-87 (2001) (citing studies demonstrating that "nearly 70 percent of female employees questioned about their failure to report sexual harassment in the workplace considered the potential for retaliation to be a moderate or strong influence on their decision").

2. To protect employees from retaliation for complaining about discrimination, Congress enacted Section 704 of Title VII, which provides that it shall be "an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. 2000e-3(a).

In light of the jury verdict below, petitioner does not (and cannot) dispute that it discriminated against respondent by transferring her from her job as a forklift operator to a track laborer position and by falsely accusing her of insubordination and suspending her without pay (with risk of termination) for more than a month. Instead, petitioner argues that respondent's treatment falls within a broadly defined class of retaliatory acts that should be permitted under Title VII.

This view runs afoul of *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997), in which this Court recognized that "a primary purpose" of Section 704 is "[m]aintaining unfettered access to statutory remedial mechanisms." This Court further

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two percent of the respondents stated that they suffered retaliation after reporting harassment).

found that "it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Ibid.* Yet that is precisely what petitioner asks for in this case: permission to retaliate with impunity through broad classes of acts it would have this Court declare outside the scope of Section 704.

Petitioner's interpretation would allow employers to engage in a wide range of conduct that is both openly retaliatory and predictably effective in suppressing legitimate complaints of discrimination as well as discouraging cooperation with government investigations and prosecutions of Title VII claims. For example, under petitioner's view, an employer could suspend every complaining employee without pay for the duration of any EEOC investigation, so long as the employee was eventually reinstated with backpay if the claim was sustained. Indeed, under petitioner's view, an employer would face no Title VII liability for knowingly filing false criminal charges against the employee as punishment for the complaint, because doing so would not be considered to affect a "term or condition" of employment. See, *e.g.*, *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 984 (CA10 1996).

Employers could do all of these things even while making absolutely clear to the entire workforce that these actions were in retribution for the victim's Title VII complaint or EEOC cooperation and that the same would happen to anyone else who failed to learn from the example. Moreover, because petitioner insists that the same rules apply to Section 703 and Section 704, the employer could engage in this conduct expressly on the basis of race, national origin, sex, or religion. Thus, for example, petitioner could have reassigned White from her forklift position on the express ground that "women should not operate heavy machinery."

None of these consequences is consistent with the text, purposes, or prior judicial interpretation of Title VII. And none is required in order to place reasonable limitations on the scope of Section 704.

II. To Fulfill Its Statutory Purpose, Section 704 Should Be Construed To Prohibit Retaliation That Would Deter A Reasonable Employee From Engaging In Protected Conduct.

In this case, petitioner's conduct violated Section 704 under any reasonable construction, as the Sixth Circuit's majority and concurring opinions illustrate. However, the articulation of Section 704 most faithful to the statutory mandate is the "deterrence" standard adopted by the Seventh, Ninth, and D.C. Circuits. Under that standard, Section 704 is not limited to acts of discrimination affecting the employee's "terms, conditions or privileges of employment" as required under Section 703. Instead, Section 704 prohibits any adverse treatment that is "reasonably likely to deter the charging party or others from engaging in protected activity." *Ray* v. *Henderson*, 217 F.3d 1234, 1242-43 (CA9 2000); see also *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116 (CADC Feb. 28, 2006) (same); *Washington* v. *Illinois Dep't of Revenue*, 420 F.3d 658, 662 (CA7 2005) (same); cf. also *Noviello* v. *City of Boston*, 398 F.3d 76, 90 (CA1 2005) (citing deterrence standard with approval). The same interpretation of Section 704 has been advanced by the EEOC, the expert agency charged with the administration of Title VII, in its Compliance Manual. See EEOC COMPLIANCE MANUAL 8-13 (1998), available at *http://www.eeoc.gov/policy/compliance.html*;[4] see also *AMTRAK* v. *Morgan*, 536

[4] See also EEOC COMPLIANCE MANUAL (CCH) § 491.2 (1975) ("Every instance of unremedied retaliation against persons who engage in Section 704(a) opposition * * * has a long term chilling effect upon the willingness of these persons and others to actively oppose Title VII discrimination"); EEOC Dec. No. 74-77 (Jan. 18, 1974), 1974 WL 3847, *4 (in considering whether adverse action was encompassed within section 704(a), applying test based on the "clear" purpose behind section 704(a): "to protect employees from being deterred from protesting what they consider to be unlawful employment practices and thereby to preserve the

U.S. 101, 111 (2002) (EEOC interpretations in Compliance Manual "entitled to respect").

A. The Plain Language Of Section 704.

The deterrence standard effectuates the broad language of Section 704, which forbids an employer to "discriminate against" an employee because of protected activity. 42 U.S.C. 2000e-3(a). This Court has recognized that retaliation is "a form of 'discrimination' because the complainant is being subject to differential treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) (construing prohibition against sex discrimination in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a)). "Discrimination" is therefore "a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Ibid.*

B. The Purpose Of Section 704.

The deterrence test is "consisten[t] with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Anti-retaliation provisions are common in the law and this Court has consistently construed such provisions broadly and flexibly to ensure that individuals are not deterred from seeking redress for alleged violations of their federal rights. Both this Court and the United States have observed that the goals of civil rights laws "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1508 (2005) (quoting brief of the United States).[5]

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integrity of the law that Congress enacted to eliminate and remedy such practices where they are found to exist").

[5] See also *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 293 (1960) (noting that an employee's "[r]esort to statutory remedies" will "often take on the character of a calculated risk,"

Retaliation interferes not only with individual rights, but also with the ability of federal agencies to exercise the enforcement powers Congress conferred upon them. Accordingly, this Court has construed retaliation provisions to ensure that neither victims nor witnesses are deterred from complaining to, or cooperating with, federal enforcement agencies like the EEOC. "This complete freedom is necessary," this Court has explained, "to prevent the [Government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972) (citation omitted) (cited by *Robinson*, 519 U.S. at 346). "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell* v. *Robert De Mario Jewelry, Inc*., 361 U.S. 288, 292 (1960) (cited by *Robinson*, 519 U.S. at 346).

At the same time, retaliation impedes Congress's larger goal of "encourag[ing] the creation of antiharrassment policies and effective grievance mechanisms" for bringing about voluntary compliance with Title VII. *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764 (1998). Retaliation can deter not only its target, but all other employees from bringing complaints of harassment to the employer's attention.

As discussed next, the deterrence standard is best adapted to serving these purposes, providing comprehensive protection that is tailored to the core concern with retaliation – namely, the objective risk of deterrence – rather than arbitrary proxies that create a "safe harbor" for retaliation.

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with vindication of the employee's federal rights "perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period" or other retaliatory conduct by the employer) (cited in *Robinson*, 519 U.S. at 346).

1. To Fulfill The Statutory Mandate, Section 704 Must Be Flexible Enough To Encompass The Full Range Of Retaliatory Conduct.

As an initial matter, this Court should reject petitioner's request for a list of court-approved retaliation techniques falling categorically outside the prohibitions of Section 704. In *Robinson*, 519 U.S. at 346, this Court specifically warned against construing Section 704 in a way that would permit an employer "to retaliate with impunity against an entire class of acts under Title VII." See also *Hishon* v. *King & Spalding*, 467 U.S. 69, 77 (1984) (rejecting suggestion that "Title VII categorically exempts partnership decisions from scrutiny" because there is "nothing in the statute or the legislative history that would support such a per se exemption").

Eschewing a categorical approach is critical to ensuring that Section 704 performs the function Congress intended. "The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit." *Knox* v. *Indiana*, 93 F.3d 1327, 1334 (CA7 1996). Indeed, the case law illustrates the breadth of retaliatory techniques and the depths to which those intent on punishing complainants will go in order to exact retribution.

Employers may, for example, use ordinary tools of workplace discipline – such as negative performance evaluations, temporary suspensions, shifts in job duties, and official reprimands[6] – to deter discrimination complaints or cooperation with the EEOC. While petitioner calls such punishment "trivial" (Pet. Br. 49), it relies on these modes of discipline to control employee behavior in areas of critical

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[6] See, *e.g.*, *Weeks* v. *New York State Div. of Parole*, 273 F.3d 76, 86 (CA2 2001) (notice of "incompetence" and a "counseling memo"); *Hill* v. *American Gen. Fin., Inc.*, 218 F.3d 639, 645 (CA7 2000) (negative performance reviews); *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 708 (CA5 1997) (reprimands and negative work evaluation, leading to missed opportunity for pay raise).

importance to the enterprise, ranging from workplace safety to the efficiency upon which the very existence of the company depends. Indeed, petitioner argues that temporary suspensions are a critical device for ensuring the safe and efficient operation of its railways. Pet. Br. 39-40. It cannot, in turn, plausibly deny that these methods are also effective when used to deter complaints rather than violations of workplace rules.

It is also "obvious that effective retaliation * * * need not take the form of a job action." *McDonnell* v. *Cisneros*, 84 F.3d 256, 259 (CA7 1996). The case law illustrates a range of retaliation methods that take place outside the workplace, and thus arguably do not affect the "terms and conditions" of employment, yet can be highly effective in deterring employees from asserting Title VII rights or cooperating with enforcement agencies. See, *e.g.*, *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116, at *1 (CADC Feb. 28, 2006) (retaliation against FBI agent "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [plaintiff] and his wife"); *id*. at *7 (noting that under standard protecting against only employment-related retaliation, "the IRS could retaliate against a complaining employee by subjecting him to a tax audit"); *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 984 (CA10 1996) (management caused malicious criminal forgery charges to be filed against former employee who had filed a discrimination complaint); *Richmond-Hopes* v. *City of Cleveland*, No. 97-3595, 1998 WL 808222, at *1 (CA6 Nov. 16, 1998) (per curiam) (supervisor told complainant's male coworkers that "he wouldn't hold it against any of them if 'something happened on the job' to her" and that "payback is a bitch"); *Pereira* v. *Schlage Elecs.*, 902 F. Supp. 1095 (N.D. Cal. 1995) (alleging employer took no action after learning that plaintiff's co-workers had responded to her sex discrimination complaints by threatening to kill her and her family, burn down her house, kidnap her and leave her in a bad neighborhood "so people can rape and kill" her); cf. also

Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883, 894 (1984) (employer retaliated by reporting undocumented employees to INS).

The ways in which employers may attempt to deter and punish those who raise complaints of discrimination are virtually limitless. See, *e.g.*, *Hoffman-Dombrowski* v. *Arlington Int'l Racecourse, Inc.*, 254 F.3d 644, 654 (CA7 2001) (secret videotaping)); *EEOC* v. *Navy Fed. Credit Union*, 424 F.3d 397, 407 (CA4 2005) (increased surveillance); *Diamond* v. *Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 314 (CA4 2005) (monitoring phone calls); *Sullivan-Obst* v. *Powell*, 300 F. Supp. 2d 85, 93 n.1 (D.D.C. 2004) (revealing private medical information).

2. To Fulfill The Statutory Mandate, Employers' Conduct Must Be Evaluated From The Perspective Of A Reasonable Person In The Plaintiff's Position.

In addition to eschewing categorical rules, the deterrence test properly takes into account that the efficacy of an act of retaliation often depends on the circumstances of each case. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships * * *." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). Accordingly, this Court has held that, when considering a hostile work environment claim, "the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Id.* at 81 (citation omitted). So, too, under Section 704, the deterrence standard prohibits retaliation that would deter *a reasonable person in the plaintiff's position* from engaging in protected activity, a lesson often lost by courts applying other standards.[7]

[7] While the test looks to the circumstances of the plaintiff, the inquiry is objective, not subjective. See, *e.g.*, *Rochon*, 2006 WL 463116, at *8 (employing "reasonable person" test). Employers

By contrast, a categorical approach to retaliatory conduct ignores the fact that even seemingly minor retaliation can have a substantial detrimental impact on an employee in particular circumstances. If categorical exemptions were allowed, as petitioner seeks, employers could exploit these exceptions to deter employees from raising complaints of discrimination. Respondent's suspension without pay in this case presents a vivid example. While a month-long suspension without pay might create little hardship (and therefore less risk of deterrence) to corporate executives or law firm partners, petitioner's attempts to minimize the hardship imposed on respondent is seriously out of touch with the reality faced by most working Americans. Losing pay for an uncertain or extended time period imposes great harm on a low- or middle-income worker. Going even a single week without pay is a severe burden for a great many Americans. See, *e.g.*, ACNielsen, "Large Number of U.S. Consumers Continuing to Live Paycheck to Paycheck" (June 13, 2005), available at *http://us.acnielsen.com/news/20050613.shtml* (twenty-eight percent of the workforce lives paycheck to paycheck).

In addition, many workers are vulnerable as a result of family circumstances. As an abstract concept, a "schedule change" might appear to be nothing more than a trivial annoyance. But for two-parent working families, single parents, and working adults with responsibility for the care of dependent relatives, schedule manipulation can be devastating. In *Ray* v. *Henderson*, 217 F.3d 1234, 1239 (CA9 2000), for example, the plaintiff had complained that a supervisor was sexually harassing female employees. In retaliation, the supervisor withdrew permission for the plaintiff to start and end work earlier than his scheduled shift. For many workers, such a change would amount to only a minor inconvenience, lacking any reasonable deterrent

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need not, therefore, fear exposure under Title VII based on the unreasonable responses of an atypical employee.

potential. However, the plaintiff in *Ray* had been given this dispensation in order to allow him to care for his sick wife. *Ibid.* The adjustment in schedule in that particular case, accordingly, imposed (and was intended to impose) a genuine hardship on the plaintiff as punishment for his discrimination complaint.

Likewise, in *Washington* v. *Illinois Dep't of Revenue*, 420 F.3d 658, 662 (CA7 2005), an employer retaliated against a complainant by withdrawing her flex-time schedule. While perhaps seemingly minor in the abstract, the retaliation was exceedingly harmful in this case because the plaintiff needed the flex-time to care for her child with Downs Syndrome. See also *Hoffman-Dombrowski*, 254 F.3d at 648 (CA7 2001) (employer changed complainant's schedule so that she could not drop her children off at daycare); *Scott-Brown* v. *Cohen*, 220 F. Supp. 2d 504, 510-11 (D. Md. 2002), aff'd, 54 Fed Appx. 140 (CA4 2002) (employee denied advanced sick leave for maternity leave, leading to pecuniary loss, in retaliation for complaint); *Randlett* v. *Shalala*, 118 F.3d 857, 859 (CA1 1997) (retaliatory denial of commonly available "hardship transfer" to care for seriously ill father).

These burdens can be especially acute for many women. As the Court observed in *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721, 737 (2003), "two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women" (citation omitted), not to mention that women continue to bear a greater portion of childcare responsibilities in many families. The economic consequences and deterrent effect of such actions can be at least as severe as "failing to promote" the employee or a "reassignment with significantly different responsibilities" – actions petitioner concedes (Pet. Br. 22) fall within the scope of Section 704. See *Randlett*, 118 F.3d at 862 (noting that "the transfer here was doubtless as important as a promotion").

Finally, the individual circumstances of a particular plaintiff are also important because Section 704 protects not

only individuals who complain about discrimination against themselves, but also those who complain about discrimination against others or cooperate with government enforcement agencies. See 42 U.S.C. 2000e-3(a). As Judge Posner has rightly observed, "it presumably takes rather little to deter such altruistic action." *Herrnreiter* v. *Chicago Hous. Auth.*, 315 F.3d 742, 746 (CA7 2002). This Court has acknowledged that if potential defendants "were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of * * * violations might go unremedied as a result." *Jackson*, 125 S. Ct. at 1508. Taking this reality into account is not "arbitrary," Pet. Br. 48-49 n.17, but rather essential to fulfilling Section 704's central function.

C. Courts Have Long Applied Deterrence Tests To Implement Prohibitions Against Retaliation In Related Contexts.

While petitioner asserts that the deterrence standard is "newly minted" and unworkable, Pet. Br. 45, 46-49, this Court and courts of appeals have applied essentially the same standard in related contexts. For example, this Court has construed a nearly identical provision of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*,[8] "as prohibiting a wide variety of employer conduct that is *intended to restrain, or that has the likely effect of restraining*, employees in the exercise of protected activities." *Bill Johnson's Rests.* v. *NLRB*, 461 U.S. 731, 740 (1983) (emphasis added). In the

[8] Like Title VII, the NLRA prohibits discrimination in "any term or condition of employment," Section 8(a)(3), while separately prohibiting an employer from "discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under this Act." Section 8(a)(4). This Court has "drawn analogies to the NLRA in other Title VII contexts" because "certain sections of Title VII were expressly patterned after the NLRA." *Hishon* v. *King & Spalding*, 467 U.S. 69, 76 n.8 (1984) (collecting cases).

First Amendment context, a majority of courts hold that a public employee's right to be free from retaliation for protected speech is violated if "the alleged retaliatory conduct was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights * * *." *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000) (internal quotes omitted).[9] There is no evidence that these well-established standards in analogous contexts have proven unworkable.

D. The Deterrence Standard Complements This Court's Decisions In *Ellerth* And *Faragher.*

The deterrence standard is also consistent with this Court's decisions seeking to increase voluntary resolution of discrimination complaints through internal grievance procedures.

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court established a limited affirmative defense in hostile work environment sexual harassment cases. An employer may avoid liability by showing that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided." *Ellerth*, 524 U.S. at 764. This Court adopted the defense to "encourage the creation of

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[9] See also *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004); *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (CA4 2000), cert. denied, 531 U.S. 1126 (2001); *Farmer* v. *Cleveland Pub. Power*, 295 F.3d 593, 602 (CA6 2002); *McGill* v. *Bd. of Educ. of Pekin Elementary Sch. Dist. No. 108*, 602 F.2d 774, 780 (CA7 1979); *Coszalter* v. *City of Salem*, 320 F.3d 968, 976 (CA9 2003); *Bass* v. *Richards*, 308 F.3d 1081, 1088 (CA10 2002); *Tao* v. *Freeh*, 27 F.3d 635, 639 (CADC 1994). But see *Breaux* v. *City of Garland*, 205 F.3d 150, 157 (CA5), cert. denied, 531 U.S. 816 (2000); *Jones* v. *Fitzgerald*, 285 F.3d 705, 713 (CA8 2002); *Stavropoulos* v. *Firestone*, 361 F.3d 610, 619 (CA11 2004), cert. denied, 125 S. Ct. 1850 (2005).

antiharassment policies and effective grievance mechanisms." *Ibid.*

The deterrence standard dovetails with the *Faragher/Ellerth* affirmative defense, effectively prohibiting under Section 704 the kind of retaliatory conduct that might foreseeably lead an employee not to use the employer's internal grievance procedure. Adopting petitioner's approach, on the other hand, would make it reasonable for employees to forgo employer grievance systems in many cases. That is, an employee's failure to complain about harassment will not be unreasonable – and therefore the employer will be unable to establish the affirmative defense – when the employee is deterred from complaining by the employer's retaliatory acts against other complainants. Indeed, the narrower the construction of Section 704, the greater the likelihood that employers will not hear of harassment until the employee has filed a charge with the EEOC.

E. Petitioner's Objections To The Deterrence Standard Are Meritless.

Petitioner's objections to the deterrence standard have no merit. They rest either on an ill-founded equation of Sections 704 and 703 or on illusory fears about the consequences of the approach already in effect in the Seventh, Ninth, and D.C. Circuits.

1. Petitioner argues first (Pet. Br. 45) that the deterrence standard conflicts with Congress's putative intent to limit claims under Section 704 to retaliation that takes the form of an "adverse employment action" that alters an employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1). A number of courts have rightly rejected this interpretation. See, *e.g.*, *Rochon* v. *Gonzales*, No. 04-5278, 2006 WL 463116 (CADC Feb. 28, 2006); *Ray* v. *Henderson*, 217 F.3d 1234, 1243 (CA9 2000); *Herrnreiter* v. *Chicago Housing Auth.*, 315 F.3d 742, 746 (CA7 2002); see also *Noviello* v. *City of Boston*, 398 F.3d 76, 90 (CA1 2005); Pet. App. 36a (Clay, J., concurring).

Even though the "terms and conditions" qualifying language appears nowhere in Section 704, petitioner argues that Congress nonetheless intended to include that limitation in Section 704 because Congress expressly included it in a *different* statutory provision, Section 703. Pet. Br. 13-15, 18. But that is precisely the opposite inference that this Court normally draws in such circumstances: "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). See also *O'Gilvie* v. *United States*, 519 U.S. 79, 95 (1996) (finding that this canon is particularly apt when "the contrasting phrases appear in adjoining provisions that address precisely the same subject matter and that even have identical grammatical structure"). Here, as this Court has repeatedly observed, the term "discriminate" has a broad plain meaning that is not limited to any particular form of "intentional unequal treatment." *Jackson*, 125 S. Ct. at 1505. It is obviously for that very reason that Congress understood that a qualification was necessary in Section 703 if *that* provision was to be limited to discrimination affecting only the "terms and conditions" of employment.[10]

Petitioner asserts that Congress could not possibly have intended to provide Section 704 a greater scope than Section 703, because that would mean Congress intended to provide "*less* protection to victims of the most hateful forms of discrimination." Pet. Br. 47. To the contrary, the difference

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[10] Petitioner suggests that the "terms and conditions" qualifier of Section 703 is incorporated into Section 704 by the latter provision's use of the words "employment practice." Pet. Br. 18-19. But if prohibiting an "employment practice" necessarily required proof of an alteration in the "terms and conditions and privileges of employment," there would have been no need for the "terms and conditions" language in Section 703 (which also defines an "unlawful employment practice").

in scope arises because Sections 703 and 704 serve different purposes and implicate a different balance of interests.

The two provisions, while related, ultimately serve distinct functions. The principal harm Congress intended to address in Section 703 is the denial of equal access to employment opportunities. See *McKennon* v. *Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995). In limiting the types of job-related discrimination claims cognizable under Section 703, Congress balanced the interest of employees in equal access to the most important incidents of employment and the employers' interest in limiting exposure to claims of workplace discrimination.

Section 704, on the other hand, addresses different harms and a substantially different balance of interests. The principal harm addressed by Section 704 is interference with Title VII enforcement. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997). When an employer retaliates against an employee who has complained about discrimination, or cooperated with an EEOC investigation, there is a significant public interest at stake as well. For one thing, retaliation often has the effect, very often specifically intended, of deterring not only the direct victim, but also all other employees who observe the retaliation. In addition, conduct such as occurred in this case interferes not only with individual rights, but also with the operations of government enforcement agencies and, as noted above, with the effectiveness of internal grievance processes. Moreover, retaliation substantially reduces the efficacy of *all* of Title VII's prohibitions: even a relatively minor act of retaliation can effectively preclude redress for the most severe forms of discrimination prohibited by Title VII. This very different balance of interests precludes importing the limitations on actions under Section 703 into the text of Section 704.

Petitioner's argument moreover is inconsistent with both the holding and the rationale of this Court's decision in *Robinson*. In that case, this Court held that giving a former employee a negative job reference in retaliation for an EEOC

complaint was actionable under Title VII. 519 U.S. at 345-46. That holding is impossible to square with petitioner's assertion that Section 704 only prohibits employer conduct that adversely affects the terms and conditions of the plaintiff's employment, as the plaintiff in *Robinson* was no longer even employed by the defendant, a point made by the lower court in that case. See *Robinson* v. *EEOC*, 70 F.3d 325, 331 (CA4 1995). Moreover, this Court's reasoning in *Robinson* fatally undermines petitioner's position. To decide whether the negative job reference was actionable, this Court did not look to the terms of Section 703, or ask whether the reference was an "adverse employment action." Instead, the Court looked to the language and purposes of the applicable provision, Section 704 itself. *Id.* at 345-46. That same analysis should be applied in this case.

2. Petitioner is also wrong in asserting (Pet. Br. 46-47) that the deterrence standard is an undue interference with employer prerogatives, and fails to protect employers adequately against meritless or trivial retaliation claims. First, the deterrence standard protects employers by retaining the requirement that the plaintiff must show a causal nexus between the complaint of discrimination and the employer's action. Thus, an employer may take any action it desires against an employee – including a job reassignment or suspension without pay without fear of Section 704 liability – so long as it does so for non-retaliatory reasons. Accordingly, an employer may, with impunity, transfer an employee because of concerns about seniority, or suspend her out of a bona fide concern for safety. What it may not do is to take these actions in order to retaliate against an employee who opposes discrimination under the Act.

Second, the deterrence standard protects employers by proscribing only such retaliation as would deter a reasonable employee in the plaintiff's position from engaging in protected activities. Thus, a retaliatory "dirty look," *Herrnreiter*, 315 F.3d at 744, or "trifling slight" (Pet. Br. 13) would not be actionable. See, *e.g.*, *Brooks* v. *City of San*

Mateo, 229 F.3d 917, 929-30 (CA9 2000) (rejecting retaliation claims as alleging insufficiently adverse employment actions because "only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation"); *Manatt* v. *Bank of America*, 339 F.3d 792, 803 (CA9 2003).

3. Although petitioner complains that the deterrence standard is unworkable (Pet. Br. 48), such "reasonable person" tests are common in the law, including under the hostile work environment analysis that petitioner argues (Pet. Br. 32 n.8) should govern many retaliation claims. See *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (establishing "reasonable person" standard for hostile work environment claims); see also *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 147 (2004) (applying "reasonable person" standard to constructive discharge claim). Indeed, while petitioner complains (Pet. Br. 46-47) that the deterrence standard could be misapplied, it also asserts that the standard *it* supports was misapplied in this very case (and in many others), see *id*. 24. Between the two, the deterrence standard provides courts with much more substantial guidance by focusing on the deterrent potential of the challenged act of retaliation.

4. Finally, there is no evidence to support petitioner's claim that the deterrence standard would lead to a flood of meritless claims. See Pet. App. 43a-44a (Clay, J., concurring). Indeed, the deterrence standard has been in place in the nation's largest and most populous circuit since 2000. *Ray* v. *Henderson*, 217 F.3d 1234 (CA9 2000); Office of the Circuit Executive, *History and Guide to the U.S. Courts* (2005), available at *http://www.ce9.uscourts.gov* (last visited Mar. 3, 2006) (Ninth Circuit handles twenty percent of the nation's litigation and exceeds all other circuits in geographic size, population, and volume of litigation). Yet petitioner has put forward no evidence to suggest that the Ninth Circuit has been overwhelmed by meritless Title VII

retaliation claims since that time.

III. Petitioner's Retaliatory Conduct Violated Section 704 Under Any Reasonable Standard.

Petitioner's protestations to the contrary, there can be little doubt that its conduct in this case, undertaken for the undisputed purpose of punishing respondent for her discrimination complaints, is prohibited by Section 704.

A. Respondent's Retaliatory Suspension Without Pay Was Unlawful.

The jury found, and the Sixth Circuit confirmed, that when respondent complained of discrimination to the EEOC, petitioner responded by suspending her for more than a month not because of any genuine belief that she had engaged in actual insubordination, much less insubordination that posed a risk to public safety, but rather as retaliation for her complaints. Moreover, as the en banc court explained, that suspension "would automatically become a termination if White did not file a grievance with her union appealing the decision within fifteen days." Pet. App. 6a. The Sixth Circuit rightly rejected petitioner's assertion that such action falls outside the protection of Section 704. See, *e.g.*, *Roberts* v. *Roadway Express, Inc.*, 149 F.3d 1098, 1104 (CA10 1998) ("Actions such as suspensions or terminations are by their nature adverse, even if subsequently withdrawn.").

1. As an initial matter, there is no dispute that petitioner's attempted termination and suspension without pay constitutes "discrimination" within the ordinary meaning of the term. Nor can petitioner seriously contend that a thirty-seven-day suspension without pay was so insignificant as to amount to *de minimis* discrimination beyond the purview of Title VII. Indeed, the retaliation caused respondent serious and genuine harm as demonstrated by the jury's award of more than $40,000 in compensatory damages.

Petitioner's detachment from (or disregard for) the reality faced by working Americans is aptly illustrated by its suggestion that respondent "did not have to work and

therefore was free to obtain temporary, substitute employment." Pet. Br. 41. Who would hire someone who had become available for work only because she was on an unpaid suspension for alleged insubordination, especially if she were seeking to be reinstated? Moreover, even if a job search were successful under such trying circumstances, there would inevitably be some period of unemployment before a new job was found and the worker could begin earning any money.

Petitioner's further assertion that the payment of back wages negates any injury suffered during the suspension also misperceives the real world consequences of such retaliation. Respondent explained that being without work and an income for more than a month was particularly difficult because "it was around the holiday":

> That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. And I got very deep – I got very depressed because I didn't have no – I couldn't even have a Christmas dinner, a meal, and so like I said, I had – I was anxious, couldn't sleep at all, and I was just destroyed, I was just upset about the whole thing, no income coming in or anything.

Tr. 154.

Petitioner nonetheless insists that the law turns a blind eye to such injuries, suggesting (Pet. Br. 41) that this Court has held that backpay is an adequate remedy for a discriminatory suspension or dismissal under Title VII. That suggestion is carefully worded for a good reason – the implication is demonstrably false.[11] Congress has specifically

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[11] *Sampson* v. *Murray*, 415 U.S. 61 (1974), held only that a termination allegedly in violation of federal civil service regulations fell "far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." *Id.* at 91-92. But even petitioner does not go so far as to argue that "irreparable injury" is the standard for actionable retaliation under Section 704.

authorized not only backpay for Title VII violations, 42 U.S.C. 2000e-5(g)(1), but also compensatory and punitive damages, *id.* § 1981a(a)(1). That Congress took care to provide a remedy for the injuries respondent suffered in this case is strong evidence that her claim is sufficiently substantial to warrant protection under Section 704.

The harm suffered by respondent is far greater than that caused by many forms of retaliation that even petitioner recognizes are actionable under Section 704. Petitioner cannot seriously contend that being passed over for a modest raise or promotion has more material consequences than being suspended from work for an indefinite period of time without pay while fighting off the prospect of termination.

2. Petitioner also argues that even if the suspension were sufficiently serious, it was not a final action of the employer. Pet. Br. 33-34. In particular, petitioner asserts that the suspension never became a "tangible employment action" under *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), because the suspension was never ratified by upper management through the grievance process. *Ibid.* This argument is meritless as well.

a. First, as explained by the court of appeals, the assertion that a suspension is not an unlawful employment action until ratified through a grievance process is incompatible with this Court's decision in *International Union of Electrical, Radio & Machine Workers, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). In that case, this Court held that an unlawful employment practice occurred when an employee was terminated – defined as when she "stopped work and ceased receiving pay and benefits" – even though that decision was made by a supervisor and was subject to reversal through a grievance process. *Id.* at 234-35. Accordingly, the Sixth Circuit correctly determined that the actionable retaliation in this case occurred when petitioner was suspended, *i.e.*, when she was sent home and stopped receiving her pay. Pet. App. 23a-24a.

There was nothing "tentative," Pet. Br. 37, about that suspension.

b. Second, petitioner's reliance on this Court's decision in *Ellerth* is entirely misplaced. Petitioner's argument confuses the question of whether an act constitutes actionable "discrimination" under Title VII with the distinct question of when liability for a supervisor's creation of hostile work environment is attributable to the employer. The "tangible employment action" concept was adopted by this Court to decide that question of vicarious liability, not to decide whether actionable discrimination had occurred in the first place. 524 U.S. at 754.

In this case, there is no issue of vicarious liability before the Court. Petitioner never argued below that the acts of its supervisors were not properly attributable to the employer. It argued only that respondent's suspension did not constitute actionable retaliation under Section 704. Pet. App. 8a-9a. Had such an argument been available to petitioner, it was waived by the failure to make it below.

Moreover, petitioner cannot plausibly contest that it is vicariously liable for the suspension in any event. What makes such actions attributable to the employer is not their finality, but the fact that the "injury could not have been inflicted absent the agency relation." *Ellerth*, 524 U.S. at 761-62. Nothing in the law of agency or the decisions of this Court makes an employer's displeasure with a supervisor's actions, or a later determination to reverse the supervisor's decision, a defense to vicarious liability for the damages inflicted by the supervisor's conduct in the interim.[12]

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[12] There is no merit to petitioner's suggestion (Pet. Br. 34-37) that a contrary conclusion is compelled by terms of its collective-bargaining agreement with respondent's union. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (Title VII rights may not be waived by the terms of a union contract). Relying on the terms of a collective-bargaining agreement would, in essence, improperly substitute state-law contracting principles for the "federal rule" this Court adopted in *Ellerth*. 524 U.S. at 754-55

Thus, even if *Ellerth* applied, respondent's suspension was a "tangible employment action." Suspensions, like terminations, "fall within the special province of the supervisor" and "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." 524 U.S. at 762. While petitioner stresses that the suspension was subject to further review and consideration (Pet. Br. 34-39), that is not the test under *Ellerth*. To the contrary, nearly every "tangible employment action" identified in *Ellerth* is routinely subject to challenge by aggrieved employees and reconsideration by upper management. See *id.* at 761 (giving examples of "firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). Indeed, the fact that such decisions are subject to further higher-level review is a reason this Court has given for considering them to be "tangible employment actions," not a reason for declining to impute them to the employer. See *id.* at 762 ("A tangible employment decision * * * *may be subject to review by higher level supervisors*.") (emphasis added).

3. Petitioner's claim (Pet. Br. 39) that an exception for suspensions is required by the interest in public safety is also misguided. As the Sixth Circuit explained, when an employer acts out of a concern for public safety – even if that concern is entirely unfounded or misguided – there is no prospect of liability under Section 704. It is only when, as in this case, the employer acts in retaliation and attempts to justify its actions by false pretenses of safety concerns that Section 704 is brought to bear, and properly so.

A "public safety" exception to Section 704 would, moreover, be difficult to confine. Petitioner's rationale would equally support precluding claims of race or sex discrimination on public safety grounds. Moreover, if

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(expressly rejecting the idea that standards for vicarious liability under Title VII should be governed by state law).

working in a railyard bears a sufficient relation to public safety to warrant an exception from Title VII, so must thousands, if not tens of thousands, of other positions throughout the nation. This Court, however, has repeatedly applied Title VII to public-safety-related jobs. See, *e.g.*, *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 134 (2004) (Title VII case involving police department); *Martin* v. *Wilks*, 490 U.S. 755 (1989) (fire department).

"When Congress wanted to grant an employer complete immunity, it expressly did so." *Hishon* v. *King & Spalding*, 467 U.S. 69, 77-78 (1984) (citing, *e.g.*, 42 U.S.C. 2000e(b)(1)-(2)); see also 42 U.S.C. 2000e-2(g) (making exception for certain positions involving national security). Congress's decision not to exempt safety-related employment actions from the scope of Title VII reflects its recognition that nothing in Title VII prohibits an employer from taking any action against an employee for bona-fide safety reasons and its judgment that the cost of having to defend against some ultimately meritless claims is worth the benefit of ensuring workplace equality.

B. Respondent's Involuntary Transfer Was Unlawful.

Petitioner's decision to transfer respondent from her job as a forklift operator in retaliation for her complaints of discrimination also satisfies any reasonable 704 standard. Again, petitioner cannot properly dispute that the transfer constitutes "discrimination" or ignore the jury's conclusion that it was undertaken in order to punish petitioner for her complaints of discrimination. The only question is whether such intentional retaliation is permitted under Title VII.

1. Petitioner argues that respondent suffered no actionable retaliation in this case because she did not suffer "'a *significant* change in employment status' in the form of 'reassignment with *significantly different* responsibilities.'" Pet. Br. 26 (quoting *Ellerth*, 524 U.S. at 761 (emphasis added by petitioner)). Even if that were the correct legal standard, petitioner is simply wrong in asserting that its retaliation

against respondent did not meet it. Petitioner acknowledges that the forklift position was considered a favored position among the employees. Pet. Br. 4. As the court of appeals explained, "[a]ccording to Burlington Northern's own witnesses, the transfer occurred because the forklift operator position was objectively considered a better job and the male employees resented White for occupying it." Pet. App. 25a. Indeed, the pretext offered by petitioner for White's transfer was that other employees were upset that she was allowed to hold this more desirable position "instead of a more senior man." *Id.* 4a (quotes omitted).

To the extent petitioner contests this point, it asks this Court to substitute its view of the evidence for the jury's. That request is particularly inappropriate given this Court's instruction that a claim of discrimination must be considered in light of "all the circumstances" of the case. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Regardless, the jury's conclusion was well supported. As the court of appeals described, the forklift position was not only less arduous and cleaner, but – because it required greater skills and qualifications – also more prestigious. Pet. App. 25a. Indeed, the forklift duties were so different from those required of ordinary track laborers that respondent was the only person among her colleagues qualified to perform them. To replace her, petitioner was required to bring back the employee who had previously held the forklift position. *Id.* 4a.

2. Attempting to extricate itself from the adverse factual findings of the jury, petitioner seeks the protection of a per se rule, arguing that no transfer can ever amount to actionable retaliation under Title VII so long as the employee maintains the same pay and employer-designated job title. Pet. Br. 25-26. Such a per se rule is completely contrary to this Court's approach in Title VII cases of considering "all of the circumstances." *Oncale*, 523 U.S. at 81. Moreover, this Court has gone so far as to say that an "undesirable reassignment" may not only constitute a violation of Title

VII, but constitutes the type of decision that automatically establishes employer liability even when the discriminatory decision is undertaken by a low-level supervisor. *Ellerth*, 524 U.S. at 764; see also *id*. at 761 (same for a "reassignment with significantly different responsibilities"). Accordingly, in *Suders*, this Court gave an example of actionable retaliation by citing to the decision in *Robinson* v. *Sappington*, 351 F.3d 317 (CA7 2003), a case involving a transfer within the plaintiff's job description and without any change in pay, benefits, or title. See 542 U.S. at 140.

Adopting petitioner's proposed "job description" rule would lead to untenable disparities in treatment under Title VII depending on how broadly an employer chose to define its job classifications. According to petitioner, similarly situated employees faced with the exact same discriminatory conduct should be treated differently under Title VII depending on how their employer writes their job descriptions. That simply cannot be the law.

* * * * *

Petitioner inflicted substantial harm on respondent in an attempt to punish her for her complaints of discrimination to management and the EEOC. There is no question that if this Court holds such conduct permissible under Title VII, other employees at Burlington Northern will be understandably reluctant to complain of Title VII violations in the future or to cooperate with EEOC investigations. The enforcement scheme Congress established under Title VII cannot function in such an environment, which is why Congress enacted Section 704 using such broad, unqualified language. While there may be cases in which employees unreasonably allege retaliation arising from trivial employer conduct, this case is not one of them. Moreover, it is not necessary to establish broad categories of permissible methods of retaliation in order to avoid unfairly subjecting employers to unwarranted litigation. Adequate protection for employers can be found in the deterrence standard already applied by this Court under the NLRA, by three circuits under Title VII, and by many

circuits in the First Amendment context. Under that standard – or indeed, under *any* reasonable interpretation of Section 704 – petitioner's retaliatory conduct violated Title VII.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF AMICI CURIAE

Founded in 1881, the *American Association of University Women* (AAUW), an organization of over 100,000 members, has been a catalyst for the advancement of women and a leader in their transformations of American society. In more than 1,300 communities across the country, AAUW branches work to promote education and equity for all women and girls, lifelong learning, and positive societal change. For more than a century, AAUW has activated its advocates nationwide on its priority issues, including: gender equity in education; reproductive rights; economic security; and workplace fairness and civil rights issues. AAUW has long been an advocate of equal opportunity in the workplace, and strongly believes that protection from retaliation is a central component for the fair and effective enforcement of any civil rights law.

The *American Civil Liberties Union* (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Women's Rights Project (WRP) has been a leader in the efforts to eliminate barriers to women's full equality in American society. As part of that work, the ACLU WRP has dedicated vigorous efforts to opening doors to nontraditional work for women and to ensuring women's equal treatment in the workplace. The ACLU has appeared before this Court in numerous cases involving the proper interpretation of civil rights laws and has fought to ensure that all individuals, regardless of race, gender, or other protected characteristics, have equal opportunities in the workplace. The interpretation of Title VII's prohibition on retaliation is a matter of significant concern to the ACLU, because protection from retaliation is key to realizing Title VII's guarantees of equal opportunity and equal treatment.

The *Association for Gender Equity Leadership in Education* (AGELE) is a national organization that works to assure gender equity in education, with a major focus on preparing students for optimal career opportunities in workplaces that are free from discrimination. AGELE supports the amicus brief in *Burlington Northern Santa Fe Railway Co.* v. *Sheila White* because of the implications of the case in weakening protections for employees who claim discrimination and in potentially making it more difficult for complainants to prove discrimination.

The *Association of Trial Lawyers of America* (ATLA) is a voluntary national bar association of approximately 50,000 attorneys who practice in every state and who primarily represent plaintiffs in civil rights and employment discrimination cases as well as personal injury actions.

Business and Professional Women/USA (BPW/USA) is a nonprofit membership organization comprised of working women in 1,300 local organizations around the country. Founded in 1919 by suffragettes, BPW/USA's mission is to achieve equity for all women in the workplace through advocacy, education and information. BPW/USA's National Legislative Platform focuses on workplace equity and work-life balance issues that assist working women fulfill both their work and family responsibilities.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination, Women's Health, Race and Gender, Women's Economic Security, Exploitation of Women and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Burlington Northern Santa Fe Railway Co* v. *Sheila White* case raises questions within the expertise and concern of the California Women's Law Center.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces, and in their private lives. Since 1973, CWEALF has provided legal education and advocacy and conducted public policy work to ensure the enforcement of Title VII. CWEALF seeks to join this brief as *amicus curiae* because we are concerned about the weakening of protections for workers who file complaints of discrimination under Title VII.

Dads and Daughters (DADs) is a national advocacy nonprofit organization for fathers and daughters. DADs works to make the world better, safer, and fairer for all daughters. This includes encouraging girls to pursue all employment options, including those in non-traditional occupations.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA has litigated gender-based discrimination cases before this Court and the courts of appeals. It has also appeared as *amicus curiae* before this Court in Title VII cases, as well as in employment discrimination cases before the California Supreme Court. ERA believes that the full participation of women and minorities in the workforce requires vigorous enforcement of anti-discrimination laws and protection for workers who complain about discrimination.

Founded in 1987, the *Feminist Majority Foundation* (FMF) is a nationwide, nonprofit feminist research and action organization dedicated to advancing women's social, political, and economic equality. Our programs focus on advancing equality for women in all sectors of society as well as recruiting, training, and empowering young women leaders. Our work has supported the development, expansion

and enforcement of protections against all forms of sex discrimination in employment, including broad protections against sexual harassment and protections against retaliation. As a part of our ongoing commitment to advancing economic equality for women, FMF's programs seek to empower women in women in law and law enforcement, business, medicine, academia, sports, and technology.

The *Legal Aid Society – Employment Law Center* (LAS-ELC) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor, and specializes in, among other areas of the law, sex discrimination and sexual harassment. The LAS-ELC has appeared in discrimination cases on numerous occasions before this Court both as counsel for plaintiffs and in an *amicus curiae* capacity.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote recruitment and retention of women in non-traditional jobs. Legal Momentum has litigated cases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area. Legal Momentum is deeply concerned with assuring the most expansive protection from retaliation for women who invoke their rights under anti-discrimination laws. Women in non-traditional jobs, like the respondent in this case, are especially vulnerable to a broad range of retaliatory conduct that can deter complaints about discrimination and harassment.

Myra Sadker Advocates (MSA) is a non-profit organization dedicated to promoting equity in and beyond schools. By working to eliminate gender bias, MSA enhances the academic, psychological, economic and physical potential of America's children. MSA is committed to strengthening laws again gender discrimination and harassment, ensuring that today's girls grow up to join work places that are free from bias and discrimination.

The *National Alliance for Partnerships in Equity* (NAPE) is a consortium of state and local agencies, corporations, and national organizations that collaborate to create equitable and diverse classrooms and workplaces where there are no barriers to opportunities. NAPE, the organization protecting the equity interests of 1,097,782 women and girls enrolled in classes that may lead to nontraditional employment, has a strong interest in assisting the courts and policymakers in striking the appropriate balance between private action and the public interest. The case at hand calls on this Court to address the proper standard for determining what constitutes retaliation that violates Title VII, a doctrine of critical interest to women considering employment in nontraditional occupations. NAPE believes it may have a perspective to share that is not represented by the parties to this appeal, neither of whom directly represents the interests of women in the pipeline to nontraditional careers.

The *National Association of Collegiate Women Athletics Administrators* (NACWAA), founded in 1979, is a non-profit organization dedicated to providing educational programs, professional and personal development opportunities, information exchange, and support services to enhance college athletics and to promote the growth, leadership, and success of women as athletics administrators, professional staff, coaches, and student-athletes. NACWAA is committed to promoting work places that provide equal opportunity for all and are free from discrimination.

The *National Association of Women Lawyers* (NAWL), headquartered in Chicago, is more than 100 years old. It was

the first and is the oldest women's bar association in the United States. Its members consist of individuals as well as professional associations. Part of NAWL's mission is to promote the welfare of women, children, and families in all aspects of society. Among NAWL's interests are economic justice, reproductive rights, and equal protection. NAWL supports equality for women and girls so that they may achieve their full potential. Given its interest in issues affecting women and families as a class, NAWL has participated as an *amicus curiae* in many courts of the United States, including the United States Supreme Court.

The *National Council of Jewish Women, Inc.* (NCJW) is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide. As such we endorse and resolve to work for "the elimination of and protection from, all forms of harassment." Our resolutions also state "equal rights and equal opportunities for women must be guaranteed." Consistent with our priorities and resolutions, NCJW joins this brief.

The *National Council of Women's Organizations* (NCWO) is a nonpartisan, nonprofit umbrella organization of over 200 groups that collectively represent more than ten million women across the United States. As the only national coalition of its kind, NCWO works to promote women's equity in the workplace and in particular to address the difficulties that women face in non-traditional employment. Because traditionally male occupations pay significantly more money than traditionally female occupations, the entry of more women into traditionally male occupations is a way of reducing the disparity in earnings between men and women and therefore is a worthy goal for a country committed to equal opportunity for all. Because there will always be resistance to this kind of cultural change, NCWO supports

effective protections against retaliation aimed at women who choose to work in traditionally male occupations.

The *National Education Association* (NEA) is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to opposing employment discrimination, including retaliation for complaining about sexual harassment, and firmly supports the vigorous enforcement of Title VII.

The *National Women's History Project* (NWHP) is an educational nonprofit organization, founded in 1980 and located in Santa Rosa, California. NWHP's mission is to recognize and celebrate the diverse and historic accomplishments of women by providing information and educational materials and programs. Since our inception, we have supported full employment opportunities for women and the elimination of discriminatory barriers that hamper women's advancement in the workplace. A broad and effective interpretation of Title VII of the Civil Rights Act of 1964 is essential to protect women's employment opportunities.

The *National Partnership for Women & Families* ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and for their families. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment dliscrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The *Northwest Women's Law Center* (NWWLC), based in Seattle, Washington, is a non-profit public interest legal organization that works to advance the legal rights of women through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its

founding in 1978, the Law Center has been dedicated to ending sex discrimination in the workplace. The Law Center has a long history of litigation and *amicus curiae* participation in cases throughout the country on behalf of individuals seeking remedies for unlawful sex discrimination in the workplace, in educational institutions and elsewhere.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace through research and writing, technical assistance, policy advocacy, and public education. Established in 2005 as the successor to Equal Rights Advocates' Higher Education Legal Advocacy Project, the organization files amicus briefs in cases raising issues affecting women's ability to succeed in the workplace, with special emphasis on glass ceiling discrimination, gender stereotyping, and work/family conflict.

The *United Church of Christ* (UCC), with 1.2 million members throughout the United States and Puerto Rico, has long supported the full inclusion and equal treatment of women in the workplace. We were the first to ordain a woman to the Christian ministry when Antoinette Brown was ordained by a Congregational church in Butler, New York, in 1853. Over the decades, our members have advocated for women's role in society and church as equal to that of men. The UCC has supported legislation and public policy calling for equal pay for equal work, equal access to all jobs for which women qualify whether they were "traditional" jobs for women or not. We have a long history calling for non-discrimination in employment, in inheritance law, in education, and in public office as well as within our own denomination. We supported Title VII when it was proposed and worked for its passage. The UCC believes that all workers regardless of gender, age, nationality, race, sexual orientation or ethnicity should receive equal and dignified treatment at the workplace, and should be accorded full due process.

Women Employed is a national membership association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace, and that being retaliated against for complaining about it is like being victimized a second time.

Women Work! The National Network for Women's Employment (Women Work!) is a nonprofit, nonpartisan organization that advocates for women's economic security through policies, programs and partnerships. Since 1978, the Network has assisted more than 10 million women to successfully enter, re-enter and advance in the workforce. Women Work! seeks to advance women's opportunities to pursue nontraditional jobs. For women to succeed in these male-dominated fields, employers must ensure their workplace is free of harassment, discrimination, intimidation, and retaliation.

The *Women's Law Center of Maryland, Inc.* (Women's Law Center) is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, workplace issues, and family law. The Women's Law Center seeks to protect women from discrimination in employment and from retaliatory actions against those who complain, such as the retaliatory actions taken by Burlington Northern against Ms. White.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through

litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

The *Women's Sports Foundation* is a 501(c)(3) nonprofit educational organization dedicated to ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports. Specifically, in our 28 years of experience assisting coaches of women's teams and female athletes and their parents in dealing with Title IX situations, we seldom encounter a case in which those who raise Title IX concerns do not encounter retaliation. Without strong enforcement of such a prohibition, there will be many parents and coaches who will not stand up for the rights of their daughters and players respectively because they fear that their daughters will be hurt or the coach's employment terminated.