18-9593

No. [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

FAYE BEATRICE HAYES — PETITIONER
(Your Name)

vs.

Terri Gorman et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

FAYE BEATRICE HAYES
(Your Name)

3518 CARDENAS AVENUE
(Address)

BALTIMORE. MARYLAND 21213
(City, State, Zip Code)

(667)303-3123
(Phone Number)

QUESTIONS PRESENTED

1. Whether excluding internal complaints for the plaintiff's retaliation claim on the ground that the claim was administratively barred because it was not specifically articulated in her charge previously filed with the Equal Employment Opportunity Commission (EEOC).

2. Whether the defendants violated the opposition clause of section 704(a) of Title VII; because the internal complaints resulted in suspending and terminating.

LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 22, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 4, 2019, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 2000e-5(b)(f), 42 U.S.C. § 2000e-3(a), this Court's, and 42 U.S.C. § 2000e-2(a)(1).

Title VII of the Civil Rights Act of 1964 requires individuals complaining of employment discrimination to file a charge with the Equal Employment Opportunity Commission (EEOC) before proceeding to federal court. 42 U.S.C. § 2000e-5(b)(f). This exhaustion requirement ensures that the EEOC has an opportunity to investigate and resolve credible claims of discrimination before those claims give rise to litigation. And it guarantees employers fair notice of the charges against them, and a chance to remediate the discriminatory practices being complained of.

42 U.S.C. § 2000e-3(a)
Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-2(a)(1)
Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, or national origin."

STATEMENT OF THE CASE

The Fourth Circuit, "We dispense with oral argument because the facts and legal contention are adequately presented in the materials before this court and argument would not aid the decisional process.

The lower courts, in this case, erroneously dismissed Petitioner Faye Beatrice Hayes' retaliation claim on the ground that the claim was administratively barred because her internal complaints was not specifically articulated in her charge previously filed with the Equal Employment Opportunity Commission (EEOC).

The "failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal court of subject matter jurisdiction over the claim." In a lawsuit following an EEOC charge, a federal court may only consider the allegations included in the charge. Claims that "exceed the scope of the EEOC charge, and any changes that would naturally have arisen from an investigation thereof, are procedurally barred. The EEOC charge did not provide adequate notice of these internal complaints.

Hayes' Amended Complaint introduces many new factual allegations to support her claims. Among these new facts, Hayes alleges that she made three internal complaints to various MTA personnel, including Senior Executive Paul Comfort and Senior Executive Peter Tollini about "unlawful employment action" and "prohibited employment practices." The EEOC charge did not provide adequate notice of these internal complaints. These new facts are unlike anything described in the Charge—the complaints were addressed to individuals whom the Charge did not identify, and they have been proffered to support a new theory that Hayes faced retaliation for making internal complaints of discrimination. Hayes' Amended Complaint introduces vastly different facts, involving new actors, to support a brand-new theory of retaliation. Accordingly, this Court lacks subject matter jurisdiction over Hayes' claims of retaliation based on filing internal complaints.

Secondly, the lower courts, in this case, erroneously dismissed Petitioner Faye Beatrice Hayes' retaliation because the opposition clause protects employees before a formal charge is filed.

Hayes has failed to make out a prima facie case of retaliation with regard to her December 22, 2016 EEOC Charge because she

cannot show that her employer retaliated against her for filing this Charge. To establish causation, Hayes must at least show that her employer was aware of her protected activity.

Defendants argue that they were not aware of the Charge until after Hayes' employment with the MTA ended. (Def.'s Mem. Mot.to Dismiss 20.) They have produced the Affidavit of Bart P. Plano, Chief EEOC Compliance Officer, which claims that his office did not receive notice of the charge until February 3, 2017. (Aff. of Bart P. Plano at ¶ 7, ECF No. 17-2.) Email correspondence from the EEOC dated February 3, 2017 notifying Plano of Hayes' Charge corroborates the claim. (ECF No. 17-3.)

Lastly, the lower courts, in this case, erroneously disregard, the Respondents suspended and terminated the Petitioner in order to retaliate against her for internally complaining under the opposition clause of section 704(a) of Title VII

Hayes, however, has established a prima facie case of retaliation based on pursuing FMLA leave. Close temporal proximity between protected activity and an adverse action suffices to establish a prima facie case of retaliation. Here, the record supports Hayes's claim that her employer approved her for FMLA leave sometime in December 2016 or January 2017 and that she was scheduled to return to work on January 4, 2017. She was suspended in December 2016, and her employment was terminated in January 2017. Because Hayes engaged in protected activity (taking FMLA leave), was suspended, and ultimately lost her job all within a two-month period, she has established a prima face case of retaliation.

Nevertheless, Hayes has failed to establish that Defendants' proffered explanations for her suspension were pretextual. Defendants argue that her employment was suspended because the MTA had evidence that she attended a party at Pimlico Racetrack while claiming to require FMLA leave. (Def.'s Mem. Mot. 21; Aff. of Bart Plano at ¶ 8.) James C. Newton, Sr., the MTA Deputy Director of the Office of the Operations Control Center, attests that in November 2016, his office obtained a picture of Hayes attending a party in spite of her representations that she required FMLA leave at the time. (Aff. of James C. Newton, Sr. at ¶ 6.) Defendants have produced this picture. (Def.'s Ex. 2, Attach. 3, ECF No. 17-11.)

The photograph purportedly shows Hayes wearing black clothes, as required by the event organizers. (*Id.*; Def.'s Ex. 2, Attach. 2, ECF No. 17-10.) Moreover, Defendants have produced a

"Disciplinary Action Appeal Form" under Hayes' signature which alleges that she "did not attend the reunion, I only dropped someone off." (Def.'s Ex. 2, Attach. 3.) In Response, Hayes only disputes the authenticity of the photograph by arguing that it *could have* been manipulated. (Pl.'s Resp. ¶¶ 14-16.) This does not establish a genuine issue of material
fact. The evidence clearly supports Defendant's good faith belief to suspend Hayes' employment. Hayes has not produced any evidence to challenge Defendant's proffered explanation. Accordingly, Hayes' retaliation claims arising from her suspension cannot
survive summary judgment.

Finally, Hayes has failed to produce evidence to challenge her employer's explanation for her employment termination. Defendants argue that Hayes effectively resigned from her employment by remaining absent from work without contacting her employer. (Def.'s Mem. Mot. 22.)
They have provided a contemporaneous letter from the MTA explaining her dismissal on these grounds. (Def.'s Ex. 1, Attach. 4, ECF No. 17-6.) Hayes has not produced evidence of any kind to refute this assertion. Accordingly, Hayes has not met her burden to show that there is a genuine issue of fact with regard to her claims of retaliatory termination. Because Hayes has failed to muster any evidence to challenge her employer's proffered explanations for her suspension and employment termination, her retaliation claims under any theory—whether under the ADA, the FMLA, Title VII, or the MFEPA— must fail.

WHETHER EXCLUDING INTERNAL COMPLAINTS FOR THE PLAINTIFF'S RETALIATION CLAIM ON THE GROUND THAT THE CLAIM WAS ADMINISTRATIVELY BARRED BECAUSE IT WAS NOT SPECIFICALLY ARTICULATED IN HER CHARGE PREVIOUSLY FILED WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC).

On December 22, 2016, after the Petitioner suspension but before her termination, she filed a charge of discrimination with the EEOC without the aid of counsel: (1)description of the alleged discriminatory acts did not include internal complaints, (2) the boxes labeled "retaliation" on the charge form are marked,(3) suspended and discharged in retaliation for engaging in a protected activity in violation of Title VII of the Civil Rights Act of 1964, as amended, and (4) dates the discrimination took place March 1, 2016, thru January 3, 2017. On January 28, 2017, she filed an amended charge, she checked the same three checkbox and it describes conduct occurring between March 1, 2016, and

January 6, 2017, and further alleges "Continuing Action. After filing the EEOC charge all the corresponding was done via email. There was not an intake interview with the Petitioner who filed a charge conducted by an Equal Opportunity Specialist (EOS).

To compel the charging party to specifically articulate in a charge filed with the Commission, the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected. King v. Georgia Power Co., N.D.Ga. 1968, 295 F. Supp. 943, 947.

Why would any federal court add to the "procedural minefield, a Title VII plaintiff must overcome to take her claim to trial by requiring compliance with administrative procedures before an agency that lacks the ability to enforce Title VII. That a plaintiff with a claim arising under federal law must take additional steps to establish that a court may hear its claim is counterintuitive, whether in the context of Title VII or any other established federal statutory right.

Title VII was meant to eliminate practices that inhibit employment opportunity equality. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); *Griggs*, 401 U.S. at 429-30)

Alongside Title VII, Congress created the EEOC. The EEOC was designed to act as Title VII's lead enforcement agency *(Gardner-Denver Co.*, 415 U.S. at 44 (stating Congress created EEOC to enforce Title VII); H.R. Rep. No. 88-914, at 11 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401) instead of regular litigation. Rather, the EEOC was meant to serve a unique purpose in Title VII's enforcement, giving employers and employees the chance to settle disputes informally. See *Gardner-Denver Co.*, 415 U.S. at 44 (noting Congress intended cooperation and voluntary compliance [to be] . . . the preferred means" for settling disputes).

The EEOC was given the power to mediate employment disputes in order to render litigation rare. See *id.*; Edwards v. N. Am. Rockwell Corp., 291 F. Supp. 199, 203 (C.D. Cal. 1968).

In fact, Title VII was not a statute intended to "breed litigation;" rather, it was intended to encourage "voluntary resolution of all but the most serious types of discrimination." See Lauren LeGrand, Note, *Proving Retaliation After* Burlington v. White, 52 ST. LOUIS U. L.J. 1221, 1223 (2008) (citing H.R. Rep. No. 88-914, at 3, 11 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2392, 2401).

The EEOC will not dismiss a charge prior to commencing an investigation so long as the charge is "sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b) (2009). These minimal requirements stand in stark contrast to the standards federal courts impose upon the charge. Federal courts require that the charge give both the EEOC and employers "notice" of the sort of discrimination claim that the charging party might eventually bring in federal court.

Once the charge is brought in federal court, federal courts impose a rule akin to Rule 8 of the Federal Rules of Civil Procedure onto the charge, a document created before the litigation commenced. *See, e.g.,* EEOC v. Concentra Health Services, Inc., 496 F.3d 773, 776, 779 (7th Cir. 2007) (finding that an EEOC complaint must satisfy the standard in Fed. R. Civ. P. 8(a)(2)requiring a "short and plain statement of the claim showing that the pleader is entitled to relief."(quoting FED. R. CIV. P. 8(a)(2)).

However, according to the EEOC, all that must be listed in a charge to avoid pre-investigation dismissal is contact information for the charging party and the employer, but only "if known;" a statement of relevant facts *and* dates, not claims; and, "if known," information regarding the number of persons the employer employs. The requirements are general and lenient. Notably, most EEOC charges are completed by the complaining parties themselves, not lawyers. Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994) (citing Taylor v. W & S. Life Ins. Co., 966 F.2d 1188, 1195 (7th Cir. 1992)). Once the charge is received, the EEOC must notify the respondent accused of discriminatory conduct within ten *(10)* days. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1) (2006).

After notice is sent, the EEOC's investigation begins. The EEOC will arrange for an in-person intake interview with the individual who filed a charge, conducted by an Equal Opportunity Specialist (EOS). In the course of its investigation, the EEOC may request that both the charging party and the respondent

employer provide information regarding the charge's allegations. *The Charge Handling Process*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www. eeoc.gov/employers/process.cfm.

The EEOC's investigation is not curtailed by the scope of the allegations in the charge. *See* EEOC, COMPLIANCE MANUAL, *supra* note 104, at § 22.3(a). The EEOC may look into violations that are not alleged in the charge. For example, the EEOC requires EEOC employees investigating Title VII allegations who also uncover uncharged Equal Pay Act violations in the course of the Title VII investigation to pursue the Equal Pay Act violation "regardless of the scope of the charge." *Id.* (describing investigation scope). Further, during an investigation, the EEOC is entitled to examine any evidence relevant to the charge EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984) and has access "to virtually any material that might cast light on the allegations against the employer." *Id.*

The administrative exhaustion doctrine in the context of administrative law, explaining how the doctrine protects an agency's ability to enforce the very laws it was created to enforce.

Secondly, Complaints about discrimination that are not made in conjunction with an EEOC charge are protected, if at all, under the opposition clause. The clause is generally considered to protect employees who complain informally about discrimination by, for instance, raising the issue of alleged discrimination directly with an employer.[1] The opposition clause is worded more narrowly than the participation clause. Unlike its sister clause, it does not protect employees who oppose unlawful discrimination *in any manner*. *See* 42 U.S.C. § 2000e-3(a) (2006). Congress arguably intended to place some limits on the circumstances in which employees are protected for protesting alleged discriminatory practices in the workplace.

Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII, and who participate in Title VII proceedings: It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . .

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[1] *See, e.g.*, Brake & Grossman, *supra* note 14, at 914 (explaining courts that have recognized the opposition clause encourage employees to bring suspected discrimination to the attention of employers before involving the courts and the EEOC). Employees also may oppose alleged unlawful discrimination other than by directly raising it with employers. *See e.g.*, Adams v. Northstar Location Servs., No. 09-CV-1063-JTC, 2010 WL 3911415, at *4 (W.D.N.Y. Oct. 5, 2010) (opposition conduct may include "making complaints to management, writing critical letters to customers, protesting against discrimination by industry, and expressing support of co-workers who have filed formal charges").

because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a).

Congress enacted Title VII to eradicate discrimination and included an anti-retaliation provision to secure that objective by preventing employers from interfering with employee efforts to advance the goals of Title VII's anti-discrimination provisions.

The anti-retaliation provision was added to Title VII as a means to secure the statute's principle objective of a discrimination-free workplace by "preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.

Title VII's anti-retaliation provision in pertinent part provides: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . [1] because he has *opposed* any practice made an unlawful employment practice by [Title VII], or [2] because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under [Title VII].42 U.S.C. § 2000e-3(a) (2006) (emphasis added).

As is clear from the language above, Title VII's anti-retaliation provision contains two clauses relevant to the protected activity inquiry: the opposition clause and the participation clause. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013) (explaining that Title VII's anti-retaliation provision protects "the employee's opposition to employment discrimination, and the employee's submission of or support for a complaint that alleges employment discrimination").

The opposition clause functions to protect employees who vocalize concerns about their employer's unlawful employment practices. See Oberti, *New Wave*, *supra* note 43. On the contrary, an employee's communication to her employer that she believes the employer has engaged in discrimination virtually always constitutes the employee's opposition to the discriminatory activity.

A plaintiff does not have to show that he or she opposed a practice that was actually unlawful under Title VII, but typically, that he or she had a reasonable, good-faith belief that the practice was unlawful. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261-62 (1st Cir. 1999) (explaining that Title VII does not require that the activity complained of actually be unlawful only that the employee reasonably believed that it was unlawful and communicates that belief to the employer in good faith); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140 & n. 11 (5th Cir. 1981) ("To effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise, we are compelled to conclude that a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause . . . if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices.") (noting that other courts require the reasonable belief be held in "good faith"); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) (employee is protected under the opposition clause if he reasonably believes discrimination has occurred and opposes it, even if he is later mistaken).

To determine whether opposition conduct is protected, courts balance the purpose of the act to protect individuals engaging in reasonable opposition activities and Congress' desire not to tie the hands of employers to select and control personnel. See *Booker,* 879 F.2d at 1312 (noting that employees are not protected when they violate legitimate employer rules and orders, disrupt the employment environment or interfere with the employer's goals); *see also Shoaf,* 294 F. Supp. 2d at *754-55* (holding that employee's providing confidential information to another employee who had filed a discrimination claim against their employer was not protected opposition under Title VII, since the employee supplying the information breached the employer's trust and confidence).

Nonetheless, a wide array of conduct has been considered protected under the opposition clause. *See, e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 406 (4th Cir. 2005) (citing Bryant v. Aiken Reg'l Med. Ctrs., Inc., 33 F.3d 536, 543-44 (4th Cir. 2003)) (noting that protected opposition may include staging informal protests, voicing an opinion to an employer about discrimination or voicing complaints about suspected discrimination).

The Anti-Retaliation Principle explains the recent cases and provides a reasoned and consistent standard against which they can be evaluated. Furthermore, the Supreme Court's Anti-Retaliation Principle provides important lessons for courts as they confront the need to prevent employers from retaliating against employees who report illegalities. In each of five cases involving statutory retaliation claims by employees, the Supreme Court upheld the employee's claim and expanded protection from employer retaliation.[2]

The Title VII cases also adopted the Anti-Retaliation Principle by broadly interpreting the statute's express anti-retaliation provision. First, in *Burlington Northern*, the Court reiterated that the provision prevents employers "from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N.*, 548 U.S. at 63. In short, the "primary purpose" of the provision is to maintain "unfettered access to statutory remedial mechanisms." *Id.* at 64 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)) (internal quotation marks omitted). Because of this purpose, the Court held that the provision should be interpreted broadly so that employers would be deterred from retaliating against employees who might report wrongdoing. Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends. Id. at 67 (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)) (citation omitted).

The second Title VII case, *Crawford*, also emphasized the importance of the Anti-Retaliation Principle because of the Court's recognition of the important role employee whistleblowers play in enforcing Title VII. As in *Sullivan*, *Jackson*, and *CBOCS West*, the plaintiff in *Crawford* was more of a *reporter* of discrimination than a victim asserting her own rights. *Id.* at 69-70. Indeed, the Court made explicit its understanding that employees who report discrimination *against*

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[2] *See* Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 129 S. Ct. 846, 852-53 (2009) (interpreting Title VII, 42 U.S.C. § 2000e-3); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 128 S. Ct. 1951, 1961 (2008) (interpreting 42 U.S.C. § 1981); Gomez-Perez v. Potter, 553 U.S. 474, 128 S. Ct. 1931, 1943 (2008) (interpreting 29 U.S.C. § 633a(a)); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 56-57 (2006) (interpreting Title VII, 42 U.S.C. § 2000e-3); Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167, 171 (2005) (interpreting 20 U.S.C. § 1681(a)).

others may face retaliation even when the whistleblower was not personally discriminated against. *See id.* at 853 n.3 ("Employees will often face retaliation not for opposing discrimination they themselves face, but for reporting discrimination suffered by others. Thus, they are not 'victims' of anything until they are retaliated against. . . .") As important, after its discussion of various dictionary meanings of the word "oppose," the Crawford Court focused on the primary policy justification for protecting employees who participate in internal corporate investigations.

This policy rationale involved yet another restatement of the Anti-Retaliation Principle: If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that "fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Id.* at 852 (quoting Brake, *supra* note 7, at 20).

This Court recognized that employees often have the best information about wrongdoing committed by an employer—a fact underscored by the plaintiffs in these cases, two of whom reported illegal conduct that was not directed at them.[3] Second, as *Crawford, Burlington Northern*, and *Jackson* all recognized explicitly, employees will only come forward with this inside information if they are protected from retaliation. *See Crawford*, 129 S. Ct. at 852; *Burlington N.*, 548 U.S. at 67; *Jackson*, 544 U.S. at 180-81. Third, as *Jackson, Burlington Northern*, and *Crawford* made clear, effective law enforcement requires employees to report illegal conduct. *See Crawford*, 129 S. Ct. at 852; *Jackson*, 544 U.S. at 180-81; *Burlington N.*, 548 U.S. at 68.

While Title VII allows certain individuals to sue for discrimination proscribed by the statute (including retaliation), the statute's primary purpose is not to provide redress but to avoid harm to employees by ridding the workplace of discrimination. *See Faragher,* 524 U.S. at 806 ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the

[3] *See CBOCS West*, 128 S. Ct. at 1954; *Jackson*, 544 U.S. at 181. Moreover, a third employee, Crawford, was a victim of discrimination but reported the discrimination during her employer's investigation of her supervisor's actions more generally. *See Crawford*, 129 S. Ct. at 849.

employer's affirmative obligation to prevent violations . . ..."). Title VII in this sense seeks to avoid litigation where possible in favor of conciliation. *See Suders,* 542 U.S. at 145 (2004). ("The Court reasoned that tying the liability standard to an employer's effort to install effective grievance procedures would advance Congress' purpose 'to promote conciliation rather than litigation' of Title VII controversies." (citing *Burlington Industries, Inc., 524* U.S. at 764)).

Excluding the Petitioner's internal complaints of prohibit employment practices from protection under Title VII of the Civil Rights Act of 1964, chills the truth-finding process, which is protected by both the "participation" and "opposition" clauses of the anti-retaliation provision, and which is vital to upholding and enforcing Title VII's remedial scheme. As mention before a reasonable investigation by the EEOC would have determined that the Petitioner (1) had complained about the discriminatory conduct to her supervisor, and (2) was suspended and terminated shortly thereafter.

Employees will now be forced to file an EEOC charges for the sole purpose of employees who complain to their employers about Title VII violations. Such an influx of charges will strain the Such an influx of charges will strain resources of the EEOC, and puts the employers on notice of a claim, encouraging resolution of the conflict internally, and avoiding costly litigation.

Lastly, Title VII require a plaintiff to file a "charge "of discrimination with the EEOC or an appropriate state or local agency within a specified time "after the alleged unlawful employment practice occurred." The time allotted to file a charge under Title VII depends on whether the plaintiff files the charge in a state (or, under Title VII, a local jurisdiction) that has a law prohibiting employment discrimination on the same bases that are covered by the federal statutes and authorizing a state or local agency to grant or seek relief from such discrimination. Such a state or local jurisdiction is sometimes called a "deferral" jurisdiction. See, e.g.,Edelman v. Lynchburg Coll., 300 F.3d 400, 404 & n.3 (4th Cir. 2002); Prelich v. Med. Resources, Inc., 813 F. Supp. 2d 654, 661-62 (D. Md. 2011).

The Equal employment opportunity ("EEO") laws are a set of federal laws and regulations that prohibit workplace discrimination against current and potential employees. Employers are prohibited from discriminating against an

individual for a number of reasons, including their age, sex, race, nationality, religion, disability and pregnancy status.

Their mission is to: (1) Administer and enforce State and federal equal employment opportunity laws and policies; (2) Promote a work environment free of any unlawful discrimination, harassment and retaliation; and (3) Assist in the building of a well-diversified workforce for Maryland State government employees and applicants.

The EEO laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment. Asserting these EEO rights is called "protected activity," and it can take many forms. For example, it is unlawful to retaliate against applicants or employees for: (1) filing or being a witness in an EEO charge, complaint, investigation, or lawsuit; (2) communicating with a supervisor or manager about employment discrimination, including harassment; (3) answering questions during an employer investigation of alleged harassment; (4) refusing to follow orders that would result in discrimination; (5) resisting sexual advances, or intervening to protect others; (6) requesting accommodation of a disability or for a religious practice; and (7) asking managers or co-workers about salary information to uncover potentially discriminatory wages.

Participating in a complaint process is protected from retaliation under all circumstances. Other acts to oppose discrimination are protected as long as the employee was acting on a reasonable belief that something in the workplace may violate EEO laws, even if he or she did not use legal terminology to describe it.

An employer is not allowed to do anything in response to EEO activity that would discourage someone from resisting or complaining about future discrimination. For example, depending on the facts, it could be retaliation if an employer act because of the employee's EEO activity to: (1) reprimand the employee or give a performance evaluation that is lower than it should be;(2) transfer the employee to a less desirable position; (3) engage in verbal or physical abuse; (4) threaten to make, or actually make reports to authorities (such as reporting immigration status or contacting the police); (5) increase scrutiny; (6) spread false rumors, treat a family member negatively (for example, cancel a contract with the person's spouse); or (7) make the person's work more difficult (for example, punishing an employee for an EEO complaint by

purposefully changing his work schedule to conflict with family responsibilities).

Employers must not retaliate against an individual for "opposing" a perceived unlawful EEO practice. This means that an employer must not punish an applicant or employee for *communicating opposition to a perceived EEO violation.*

For example, it is unlawful to retaliate against an applicant or employee for: (1) complaining or threatening to complain about alleged discrimination against oneself or others; (2) providing information in an employer's internal investigation of an EEO matter; (3) refusing to obey an order reasonably believed to be discriminatory; (4) advising an employer on EEO compliance; (5) resisting sexual advances or intervening to protect others; (6) passive resistance (allowing others to express opposition); (7) requesting reasonable accommodation for disability or religion; (8) complaining to management about EEO-related compensation disparities; or (9) talking to coworkers to gather information or evidence in support of a potential EEO claim.

Opposition can be protected even if it is informal or does not include the words "harassment," "discrimination," or other legal terminology. A communication or act is protected opposition as long as the circumstances show that the individual is conveying resistance to a perceived potential EEO violation.

The Equal Employment Opportunity Commission ("EEOC") enforces these laws at the federal level. There are also corresponding state laws and agencies that prohibit discrimination and allow for investigation and enforcement of the laws at the state level.

In the case of an alleged unlawful employment practice occurring in a State . . . which has a State . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . . no charge may be filed [with the EEOC] by the person aggrieved before the expiration of [120] days after proceedings have been commenced under the State . . . law.

If there are State laws to protect employees from discrimination and retaliation, why should an aggrieved employee have to file an EEOC charge? To force an aggrieved employee to file an EEOC charges for the sole purpose of protected opposition would engulf the EEOC as well as the Judicial System.

The opposition clause functions to protect employees who vocalize concerns about their employer's unlawful employment practices. On the contrary, an employee's communication to her employer that she believes the employer has engaged in discrimination virtually always constitutes the employee's opposition to the discriminatory activity.

The administrative exhaustion requirement's purpose is, at least in part, to put potential defendants on notice while giving the EEOC the opportunity to investigate and, if possible, to mediate claims. This Court must reverse the Fourth Circuit's decision in this case because the Petitioner at least made a good faith attempt to raise her retaliation claim before the EEO. Good faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information is all that exhaustion requires.

There must be, or should be, an exception for the administrative exhaust requirements for protected opposition employee if not employers will continue to retaliate without any repercussion.

WHETHER THE DEFENDANTS VIOLATED THE OPPOSITION CLAUSE OF SECTION 704(A) OF TITLE VII; BECAUSE THE INTERNAL COMPLAINTS RESULTED IN SUSPENDING AND TERMINATING.

The Petitioner first engaged in protected activity on November 16, 2016, when she made a verbal complaint to Respondent Sean Adgerson, Deputy Chief of Operation Officer,(2) on the same day she made a verbal complaint to Respondent Bart P. Plano, Chief Equal Opportunity Compliance Program, (3)on November 17, 2016, telephone call to Paul Comfort Esq. Administrator and CEO office,(4) on November 28, 2016, December 10, 2016, December 23, 2016 and January 25, 2017, via email Paul Comfort Esq. Administrator and CEO, (terminated June 6, 2017), (5) on December 14, 2016, meeting with Peter Tollini Chief Administrator, on December 16, 2016, Brian Williams Director of Labor Relations (terminated February 2018) phone call and via email, and on January 12, 2017 meeting with John Duncan.

The more the she complained, the more the respondents would retaliate their retaliatory action dissuading her from filing a charge of discrimination. The Respondents deviated from their own policy and procedures that resulted in the Plaintiff termination on November 29, 2016, five days suspension without pay on December 9, 2016), and Terminated on January 6, 2017).

Title VII makes it unlawful for an employer to fire an employee because she "opposed any practice made an unlawful employment practice" under Title VII or because she has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e- 3(a).

The plain language of the anti-retaliation provision bars employers from retaliating against employees for the latter's opposition to discrimination. The statutory language is unambiguous. The statute imposes no intent requirement on the employee but only on the employer, which may not discriminate against the employee on the basis of that opposition. Thus, an employee is not required to oppose discrimination for any particular purpose, such as to end or prevent it as the active, purposive standard requires.

Because employee's engagement in protected activity, the anti-retaliation provision contains an implicit knowledge component as well. These concepts are intertwined. Unless the plaintiff can show that the employer knew of the protected activity, it is speculative at best to suggest the employer acted because of that protected activity. For this reason, courts typically hold that an employer must have actual knowledge of the protected activity.

Courts typically hold that the opposition clause protects employees at points before a formal charge is filed. Such protection makes sense only if, as is the case, Congress intended to create an environment where employees would feel free to speak up about workplace discrimination in an effort to eliminate it. Accordingly, even before employees file an EEOC charge, Congress intended that employees could take their grievances to their employers without fear of reprisal. By encouraging employees to do so, Congress sought to provide employers an opportunity to investigate claims of discrimination and to root it out voluntarily without in the first instance having to defend itself before the EEOC or in a court action.

Congress intended to achieve Title VII's primary goal of eliminating workplace discrimination via employers and employees working together is evidenced by Title VII's history. When Title VII was originally enacted, the EEOC's investigatory and enforcement authority was much more circumscribed than it is now because of Congress' desire that the statute would "encourage employers to comply voluntarily with the Act." 90 It was only when Congress realized its desire was too optimistic that it

enlarged the EEOC's authority. Congress, however, never abandoned its original desire to have statutory violations remedied through informal means, including through voluntary employer compliance once the employer is made aware of possible discrimination.

The goal of eliminating discrimination via informal means, however, would have been severely undermined if after being made aware of possible discrimination, the employer could have then punished employees for raising the issue. Indeed, failing to protect employees who report discrimination to their employers against retaliation might have actually spurred instead of reduced the need for government intervention and litigation as it would have forced employees to run to the EEOC in the first instance. Employees would have had absolutely no incentive to bring any claim to an employer's attention for informal resolution. As the Ninth Circuit recognized long ago, the opposition clause is necessary to encourage informal resolution of discrimination complaints without government meddling.

This Court has recognized that Title VII's statutory scheme and the goals that underlie it-attempting to root out discrimination that comes to the employer's attention by informal methods-apply in the pre-charge context. This recognition has most notably arisen in the Court's sexual harassment jurisprudence.

As long as the employee manifests an expression of opposition, the statute requires no more of that employee. If the employer discriminates against the employee based on that expression, the employee may assert a retaliation claim. Because the focus of opposition is properly placed on whether, rather than on how the employer learns of it, an employee may also manifest opposition unintentionally. The EEOC has long interpreted Title VII as permitting unintentional opposition.

According to the EEOC, if an employee's conduct is interpreted by an employer as opposing an unlawful practice and the employer retaliates on the basis of its own interpretation, the employer has violated Title VII's anti- retaliation provisions. An employee in these circumstances may not even be aware he or she is sending a message of opposition to a potentially unlawful employment practice.

In the recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*, this Court plainly held that Section 704(a) serves to protect employees who complain to their employers about Title VII violations. *See generally* 548 U.S. 53, 126 S.Ct. 2405 (2006). In the Title VII lawsuit, Burlington Northern & Santa Fe Railroad Co. v. White, 548 U.S. 53 (2006) an adverse employment action occurs when "a reasonable employee would have found the alleged retaliatory action materially adverse," and that a retaliatory action is "materially adverse" when the action "would have been likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."

In Vance, this Court resolved a circuit split and defined "supervisor" for purposes of imputed liability under Title VII. 570 U.S. at 430-31, 133 S.Ct. 2434. Specifically, it held that a supervisor is an individual who has been empowered "to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' " In doing so, the Court rejected "the more open-ended approach ... which ties supervisor status to the ability to exercise significant direction over another's daily work." *Id.* at 431, 133 S.Ct. 2434.

It is also of the purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secure complete justice," *Brown v. Swan*, 10 Pet. 497, 503 [9 L.Ed. 508 (1836)]; see also *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398 [66 S.Ct. 1086, 1089, 90 L.Ed. 1332 (1946)]. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 [66 S.Ct. 773, 777, 90 L.Ed. 939 (1946)]. . . . And where a legal injury is of an economic character, "the general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 6 Wall. 94, at 99 [18 L.Ed. 752 (1867)]. The "make whole" purpose of Title VII is made evident by the legislative history. 422 U.S. at 418-419, 95 S.Ct. at 2372.

Finally, an employer's failure to follow its own policies requiring fair and consistent investigations may also warrant an award of punitive damages under Title VII, particularly if the court finds that the employer deviated from its policy in order to avoid exposing facts which could result in liability. In *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7th Cir. 2001).

When determining whether an employer followed its own procedures, a court should ask whether "the factual basis on which the employer concluded (the employee committed an offense) was reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual." *Sheaffer v. State ex rel. University of Wyo.*, 202 P.3d 1030, 1043 (Wyo. 2009) (quotations omitted).

When reviewing a proffered reason for an adverse employment action and a plaintiff's corresponding claim of pretext, the court must "keep in mind that Title VII is not a vehicle for substituting the judgment of a court for that of the employer." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 298-99 (4th Cir. 1998) (internal quotation marks omitted) (quoting *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995)).

Where a defendant proffers a legitimate, nondiscriminatory reason for the adverse employment action, it is not the role of the court "to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason." *DeJarnette*, 133 F.3d at 299 (internal quotation marks omitted) (quoting *Giannopoulos*, 109 F.3d at 410-11).

REASONS FOR GRANTING THE PETITION

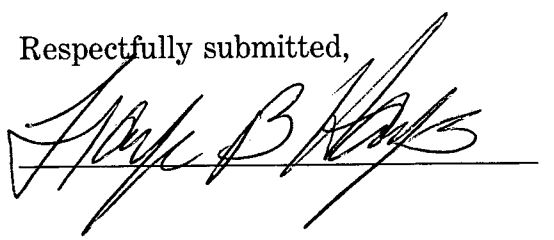
Because these outcomes are wholly undesirable and contrary to congressional intent with respect to both Title VII and its anti-retaliation provision, this Court must reverse the Fourth Circuit's decision in this case to maintain appropriate order and balance within Title VII's anti-retaliation scheme.

Under a retaliation theory, the Petitioner has legal redress if the Defendants takes materially adverse action against her for opposing discrimination, this Court must reverse the Fourth Circuit's decision in this case to make persons whole for injuries suffered on account of unlawful employment discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: May 31, 2019