No. _____

In The

Supreme Court of the United States

JAMES SIMMONS,

Petitioner,

v.

UBS FINANCIAL SERVICES, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 prohibits an employer from retaliating against an employee who engages in protected conduct, such as opposing discrimination or filing a lawsuit under Title VII. In *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), this Court held that the retaliation provisions of Title VII apply not only to direct retaliation against an employee who opposes discriminatory conduct, but also to retaliation against the family members of an employee who opposes discriminatory conduct. The Court held that the family members could sue for their own injuries if they qualified as "persons aggrieved" under Title VII. The Court applied the "zone of interests" test to determine whether a family member qualified as a "person aggrieved."

This case presents the following issues:

1. Whether a family member who is the intentional target of retaliatory actions by an employer is a "person aggrieved" for purposes of Title VII only if the family member happens to be an employee of the defendant.

2. Whether the Fifth Circuit erred by limiting *Thompson* to cases in which the family member happens to be an employee of the defendant.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties in the Fifth Circuit.

OTHER PROCEEDINGS

James Simmons v. UBS Financial Services, Inc. and Prelle Financial Group, Inc., No. 4:19cv3301, Southern District of Texas. Final judgment entered on January 24, 2020 as to claims against UBS Financial Services, Inc. The claims against Prelle Financial Group, Inc. remain pending.

James Simmons v. UBS Financial Services, Inc., No. 20-20034, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on August 24, 2020.

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PETITION FOR A WRIT OF CERTIORARI

James Simmons respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 972 F.3d 664 and is reprinted in the Appendix (App.) at App. 1. The opinion of the district court is unreported and is reprinted at App. 16.

JURISDICTION

The court of appeals entered its judgment on August 24, 2020, and denied a petition for rehearing on September 9, 2020. App. 1, 22. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 2000e-3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . 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-5(f)(1) states, in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b), is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . , the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

In the current procedural posture, the facts of the case come from Mr. Simmons' complaint in the district court. App. 23.

Mr. Simmons markets life insurance products. He had a longstanding relationship with UBS, which is a brokerage house. At one point, he was actually an employee of UBS. In August 2015, UBS required him to

go to work for Prelle Financial, which was a third-party wholesaler. He continued to work regularly at UBS's offices in the Houston area.

Mr. Simmons' daughter, Jo Aldridge, was an employee of UBS and remained an employee after Mr. Simmons' departure. Several months after the end of Mr. Simmons' employment with UBS, Ms. Aldridge made an internal complaint of pregnancy discrimination. In December 2015, Ms. Aldridge filed a charge of discrimination with the EEOC.

In April 2016, while Ms. Aldridge was on maternity leave, Mr. Simmons noticed that Ms. Aldridge's office had been emptied and that her nameplate had been removed. He mentioned this to his daughter. At this point, UBS began to take adverse actions against Mr. Simmons. UBS restricted Mr. Simmons' access at the downtown office to the lobby conference room unless accompanied by a UBS financial advisor. This restriction did not apply to other third-party wholesalers and thus was based solely on Mr. Simmons' relationship to Ms. Aldridge. In May 2016, the new office manager in Houston began lecturing Mr. Simmons about "taking pictures" in the office. This had never actually happened.

During the summer of 2016, Ms. Aldridge resigned her position at UBS. She would eventually settle her claims against UBS.

Around the same time, UBS apparently instructed Prelle Financial that UBS did not want Mr. Simmons to continue working in their offices in any capacity.

Mr. Simmons could finish out the life insurance cases he was working on, but that was it. In September 2016, Warren Prelle of Prelle Financial informed Mr. Simmons of this development. After Mr. Simmons repeatedly pressed for an explanation, Mr. Prelle claimed that UBS gave no reason for this instruction. UBS's instruction caused Mr. Simmons' pipeline of new business to dry up. Prelle Financial told Mr. Simmons to keep working and to see what happened.

In the following months, UBS concocted reasons to rid itself of Mr. Simmons completely. UBS claimed that it had determined that Mr. Simmons was not meeting its "performance needs," even though he had worked successfully at UBS for many years. Later, UBS claimed that Mr. Simmons had made a "ticketing" error, even though Mr. Simmons did not even have access to the ticketing system. UBS told Prelle Financial that it would no longer allow Mr. Simmons to do any business with its clients.

Prelle Financial informed Mr. Simmons of this development in February 2017. This effectively ended Mr. Simmons' employment.

Mr. Simmons filed a charge of discrimination with the EEOC in March 2017, alleging that UBS took adverse actions against him in retaliation for the protected activity of his daughter. The EEOC issued right to sue letters on June 3, 2019. Mr. Simmons filed this Title VII lawsuit against UBS and Prelle Financial on August 30, 2019.

UBS moved to dismiss on the ground that Mr. Simmons lacked standing under Title VII because he was not an employee of UBS. The district court granted the motion. App. 16. The district court then entered a final judgment as to UBS under Fed. R. Civ. P. 54(b). App. 21. Mr. Simmons appealed the judgment in favor of UBS. The Fifth Circuit affirmed the district court's judgment on August 24, 2020. App. 1. The Fifth Circuit then denied a motion for rehearing on September 9, 2020. App. 22.

REASONS FOR GRANTING THE PETITION

I. Under This Court's Decision in *Thompson*, Family Members of an Employee Who Opposes Discrimination Have Standing to Sue Under Title VII If the Employer Takes Adverse Actions Against Them.

This case falls squarely within *Thompson v. North Am. Stainless, LP*, 562 U.S. 170 (2011). In that case, the employer fired the fiancé of an employee who made a complaint of discrimination. This Court found that the fiancé had alleged a violation of Title VII. *Id*. at 174 ("We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."). The Court refused to adopt a bright line rule for which third parties would fall within this rule, but offered this guidance: "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will

almost never do so, but beyond that we are reluctant to generalize." *Id*. at 175 (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006)).

The Court also noted that the right to sue under Title VII is not limited to the employee who opposed discrimination, but rather that Title VII provides a cause of action to a "person aggrieved" by the retaliation. 42 U.S.C. § 2000e-5(f)(1) (providing that a private lawsuit may be brought "by the person claiming to be aggrieved"). The Court held that this required more than mere Article III standing (*i.e.*, injury in fact that is remediable by a court). Instead, the Court adopted the broad "zone of interests" test from case law under the Administrative Procedures Act:

> We have held that this language establishes a regime under which a plaintiff may not sue unless he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." We have described the "zone of interests" test as denying a right of review "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." **We hold that the term "aggrieved" in Title VII incorporates this test, enabling suit by any plaintiff with an interest "arguably [sought] to be protected by the statute," while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are**

> **unrelated to the statutory prohibitions in Title VII.**

562 U.S. at 177-78 (citations omitted) (emphasis added). The Court held that the fiancé easily met that test, given that he was also an employee of the company and that he was an intentional victim of the retaliation. 562 U.S. at 178 ("Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII.").

Applying these principles, it is apparent that Mr. Simmons has standing. He was a close family member (father) of an employee who opposed pregnancy discrimination. UBS refused to allow him into its offices and then refused to let him work with its clients, which effectively ended his employment with Prelle Financial. Mr. Simmons' interests are not "marginally related to or inconsistent with" the purposes implicit in Title VII. On the contrary, the purpose of Title VII is to prohibit discrimination and retaliation. When an employee complains about discrimination and files an EEOC charge, that is consistent with the purpose of Title VII. When the employer retaliates against the employee by taking adverse actions against a family member, it is consistent with the purposes of Title VII to provide a remedy to the family member.

In the Court's words, hurting Mr. Simmons was the unlawful act by which UBS punished his daughter. He was a "person aggrieved" by the retaliation.

Under the plain language and reasoning of *Thompson* Mr. Simmons has standing to sue UBS under Title VII. His daughter was an employee of UBS. She opposed pregnancy discrimination by UBS, which then took actions that caused harm to her father. Mr. Simmons is within the "zone of interests" protected by Title VII.[1]

II. The Fifth Circuit Disregarded This Court's Analysis and Essentially Limited *Thompson* to Its Facts, Holding That Family Members Have No Remedy Under Title VII Unless They Happen to Be Employees.

Notwithstanding the clear holding in *Thompson*, the Fifth Circuit limited *Thompson* to its facts. The Fifth Circuit noted that the plaintiff in *Thompson* (the fiancé of the employee who opposed discrimination) was also an employee of the defendant. In fact, the specific adverse action in *Thompson* was the firing of the fiancé. The Fifth Circuit seized on this fact and concluded that the fiancé had standing only because he happened to be an employee of the company:

> Because he was not a UBS employee, Simmons lacks Title VII standing. As *Thompson*

[1] Two district courts have considered the standing of non-employee family members under *Thompson*. Both courts found standing. *Tolar v. Cummings*, 2014 U.S. Dist. LEXIS 111448 (N.D. Ala. 2014); *McGhee v. Healthcare Servs. Grp.*, 2011 U.S. Dist. LEXIS 20897 (N.D. Fla. 2011); *see also* EEOC Enforcement Guidance on Retaliation and Related Issues § II(B)(4)(b) (August 26, 2016).

> observed without controversy, "the purpose of Title VII is to protect employees from their employers' unlawful actions." And because the plaintiff was himself employed by the defendant, the Court permitted him to sue. It would be a remarkable extension of *Thompson*—and of Title VII generally—to rule that a nonemployee has the right to sue. The zone of interests that Title VII protects is limited to those in employment relationships with the defendant.

App. 8–9 (citation omitted).

While the Fifth Circuit considered Mr. Simmons to be arguing for a "remarkable" extension of *Thompson*, in fact Mr. Simmons is not arguing for an extension at all. On the contrary, Mr. Simmons' argument is based on this Court's clear language:

> Moreover, accepting the facts as alleged, Thompson [the fiancé] is not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado [the employee]. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.

562 U.S. at 178. This reasoning is squarely on point in the present case. Mr. Simmons was not "collateral damage." Injuring Mr. Simmons was UBS's intended means

of harming his daughter—it was the unlawful act by which the UBS punished her. Mr. Simmons was a "person aggrieved" within the holding in *Thompson*.

The Fifth Circuit stated that "Simmons's beef is with an independent entity's decision to stop doing business with him as a third-party wholesaler. That is not the stuff that Title VII was written to address." App. 14. While that is true in the abstract, Title VII *was* written to address retaliation against Mr. Simmons' daughter for making a claim of discrimination. Mr. Simmons was the intended victim of the retaliation. He was a "person aggrieved" by the retaliation. He was not a person "whose interests are unrelated to the statutory prohibitions in Title VII." *Thompson*, 562 U.S. at 178. On the contrary, Mr. Simmons was intentionally injured by a violation of one of the statutory prohibitions in Title VII.

III. The Court Should Reaffirm *Thompson* and Reject the Fifth Circuit's Attempt to Eviscerate This Court's Decision.

In *Thompson*, this Court avoided a gap in the coverage of Title VII. This is because retaliatory actions directed at an employee's family members will cause intentional injuries that cannot be redressed if standing is limited to employees. Notably, Congress extended standing to "persons aggrieved," not just to "employees."

There is no dispute in this case that Title VII prohibited UBS from retaliating against Mr. Simmons'

daughter. But limiting standing to Mr. Simmons' daughter would leave a gap in Title VII's coverage. This is because the retaliation caused damages that Mr. Simmons' daughter could not recover and injuries for which she could not seek redress. She could not recover Mr. Simmons' lost wages and benefits. She could seek damages for her own emotional distress and mental anguish, but not that of Mr. Simmons. She could not seek reinstatement or other equitable relief on behalf of Mr. Simmons.

If Mr. Simmons is not a "person aggrieved" with standing to sue under Title VII, then UBS is effectively immune for intentional injuries caused by its violation of Title VII. In the words of *Thompson*, "Hurting [Mr. Simmons] was the unlawful act by which the employer punished [his daughter]." *Thompson*, 562 U.S. at 178. If Mr. Simmons has no standing, then UBS escapes liability for intentionally injuring Mr. Simmons. This makes no sense and is at odds with the reasoning of *Thompson* and the language of the statute ("person aggrieved").

The Fifth Circuit stated that "It is not enough that permitting the suit would advance, generally speaking, Title VII's goal of eliminating retaliation." App. 13. While that may be true, this is a case in which UBS violated Title VII by intentionally causing an injury to Mr. Simmons. Under *Thompson*, Mr. Simmons was well within the zone of interests for Title VII.

This Court should reaffirm its holding in *Thompson* and reject the Fifth Circuit's attempt to limit

Thompson to its facts. If the Fifth Circuit's decision is allowed to stand, employers will be able to punish employees for their protected activity (such as opposition to discrimination or the filing of a Title VII lawsuit) by harming family members. This would create a gap in the coverage of Title VII that is contrary to public policy and to the plain language of the statute. An intentional victim of retaliation should have recourse under Title VII, even if the victim is not an employee.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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