No. 20-813

In The Supreme Court of the United States

JAMES SIMMONS,
Petitioner,
v.

UBS FINANCIAL SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Standing under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 requires a claim to be brought "by the person claiming to be aggrieved . . . by [an] unlawful employment practice." 42 U.S.C. § 2000e–5(f)(1). The Court has found that provision requires a claim to fall "within the zone of interests sought to be protected by [Title VII]." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011). Title VII seeks to "protect employees from their employers' unlawful actions." *Id.*

Petitioner was neither an employee of nor applicant to Respondent during the time period at issue. Did the Fifth Circuit correctly affirm the District Court's dismissal of Petitioner's Title VII retaliation claim because he did not have standing to assert it against Respondent?

PARTIES TO THE PROCEEDING

1. Petitioner, James Simmons ("Petitioner"), was the plaintiff/appellant in the Court of Appeals.

2. Respondent, UBS Financial Services, Inc. ("UBS") was the defendants/appellee in the Court of Appeals.

RULE 29.6 DISCLOSURE STATEMENT

Respondent UBS Financial Services, Inc. states it is a wholly owned subsidiary of UBS Americas Inc. That company is a wholly owned subsidiary of UBS Americas Holding LLC. That company is itself a wholly owned subsidiary of UBS AG. Finally, that company is a wholly owned subsidiary of UBS Group AG. UBS Group AG is a publicly owned corporation and does not have a parent company. There are no publicly held corporations that own ten percent or more of UBS Group AG stock.

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INTRODUCTION

This case centers on a statute that the Court has already interpreted and does not merit review. The facts are straightforward. Petitioner alleges he worked for a company that serviced UBS clients and that his daughter, Jo Aldridge ("Aldridge") worked for UBS. Petitioner further alleges Aldridge filed a charge of discrimination against UBS, and, as a result, UBS no longer permitted him to service UBS clients. Petitioner then sued UBS, claiming it violated Title VII of the Civil Rights Act of 1964 ("Title VII") by retaliating against him. The courts below uniformly found Petitioner lacked standing to bring a Title VII retaliation claim because he was not a UBS employee.

The lower courts' opinions were based on the Court's decision in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011). In *Thompson*, the Court found that third-party standing under Title VII is only available to plaintiffs within the "zone of interests" protected by the specific statutory provision whose violation forms the legal basis for the plaintiffs' complaint. 562 U.S. at 178. Applying that rule, the Court held that the plaintiff in *Thompson* was within the anti-retaliation provision's zone of interests because he was both an employee of the defendant and an intentional target of retaliation against another employee's protected activity. The United States Court of Appeals for the Fifth Circuit correctly applied the "zone of interests" test from *Thompson* to hold that Petitioner, who was neither a UBS employee nor a job applicant at the relevant time, lacked standing under Title VII's anti-retaliation provision.

Petitioner urges the Court to take the case and reverse the Fifth Circuit by ignoring the first criterion

(employee status) while shining a spotlight on the second (purposeful retaliation). The Court should deny the petition. The Fifth Circuit's decision is consistent with *Thompson* and does not conflict with that of any other United States court of appeals. What is more, the Fifth Circuit correctly found that *Thompson* doomed Petitioner's claim. Finally, the Court should not consider Petitioner's policy arguments because doing so would be out of step with its limited role to adjudicate a case based on the plain text and meaning of a statute.

STATEMENT OF THE CASE

I. Factual Background

Petitioner alleges that in December 2015, he was an employee of Prelle Financial Group, Inc. ("Prelle"), and his business was derived from selling insurance contracts to UBS customers. Pl.'s App. 24–25. At that time, Aldridge was a UBS employee and she filed an administrative charge of discrimination against UBS with the United States Equal Employment Opportunity Commission. Pl.'s App. 25. Petitioner claims UBS responded to Aldridge's administrative proceedings by retaliating against him, which culminated with the company informing Prelle in the summer of 2016 it would no longer permit Petitioner to do business with UBS clients. Pl.'s App. 25–26. Prelle ultimately terminated Petitioner's employment. Pl.'s App. 26–27.

II. Proceedings Below

After pursuing administrative remedies, Petitioner sued UBS and Prelle. Petitioner alleged only one claim against UBS: a third-party retaliation claim under Title VII. Pl.'s App. 28–29. On January 6, 2020, the District Court dismissed Petitioner's

claim, finding he lacked Title VII standing because, at all times relevant to the case, he was not employed by UBS. Pl.'s App. 20. After the District Court granted Petitioner's unopposed request to enter a partial judgment in UBS's favor under Federal Rule of Civil Procedure 54(b), Pl.'s App. 21, he appealed to the Fifth Circuit.

On August 24, 2020, the Fifth Circuit affirmed the District Court in full, citing *Thompson* to find Petitioner lacked third-party standing for a Title VII retaliation claim because he was not a UBS employee at all relevant times. Pl.'s App. 8, 15. Petitioner then unsuccessfully sought rehearing. Now, he turns to the Court, asking it to extend *Thompson* and bestow third-party standing for a Title VII retaliation claim to a company's non-employees.

REASONS TO DENY THE PETITION

I. There is No Compelling Reason to Grant the Petition

As a threshold matter, there is no basis for the Court to grant the petition. "A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. The Court's Rules list the following instances in which certiorari may be granted:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

> lower court, as to call for an exercise of this Court's supervisory power;
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> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
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> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. The Rule also provides that, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner does not satisfy any of these thresholds. Regardless of the merits of the Fifth Circuit's decision, it was the first federal appellate decision weighing in on the limited availability of Title VII third-party retaliation claims to non-employees who claim to have been targeted in retaliation for protected activity by an employee. Pl.'s App. 3. Thus, there is no circuit split on the issue. Likewise, no other state court of last resort has issued an opinion on the subject. Despite Title VII's 57 years of existence, Petitioner is able to cite only two unpublished *district court* opinions that allow a Title VII retaliation claim by a non-employee against a relative's employer. *See Tolar v. Cummings*, 2014 WL 3974671, at *8 (N.D. Ala. Aug. 11, 2014); *see also McGhee v. Healthcare Servs. Grp., Inc.*, 2011 WL

818662, at *2 (N.D. Fla. Mar. 2, 2011). Those decisions are inconsistent with *Thompson* and, in any event, do not create a circuit split. As such, Petitioner's citation of these cases is simply not enough to merit the Court's attention.

Moreover, the paucity of cases addressing third-party Title VII retaliation standing indicates that the issue is still too premature for resolution by the Court. *See Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); *see also McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) (citing need for "the issue [to] receive[ ] further study [in the lower courts] before it is addressed by this Court."). Should the Court deny the petition, it is possible that other courts of appeal will resolve the issue of third-party Title VII retaliation standing in the same manner as the Fifth Circuit by following the Court's decision in *Thompson*. And even if they do not, the percolation of the issue will facilitate a sharper presentation to the Court in the future. Consequently, the Court should decline to take up the issue at this point.

Finally, and contrary to Petitioner's arguments, the Fifth Circuit's decision was correct and Petitioner has not shown that it misapplied the law. It cited *Thompson* to hold that third-party Title VII retaliation standing requires a plaintiff to be an employee of a defendant employer and an intentional target of retaliation against another employee's

protected activity. Through that lens, the Fifth Circuit found that Petitioner lacked standing because he was not a UBS employee. This fits squarely with *Thompson*, and the purpose of Title VII's anti-retaliation provision. And even if the Fifth Circuit did misapply the law – and it did not – the Court should not expend its limited resources on an issue because Petitioner has not shown that it is a sufficiently compelling issue of pressing national importance that would merit review. *See* SUP. CT. R. 10. Nor could he, given the dearth of developed case law on the issue since Title VII was established.

In short, there is no compelling reason for the Court to grant the petition.

II. *Thompson* Does Not Convey Third-Party Standing for Title VII Retaliation Claims Upon Non-Employee Family Members

In substance, Petitioner initially claims his case "falls squarely" within the Court's decision in *Thompson,* by contending *Thompson* enables "[f]amily [m]embers of an [e]mployee" to pursue third-party retaliation claims. Pet. 5. He is wrong because *Thompson* does no such thing.

In *Thompson*, a man ("plaintiff") and his fiancé were employed by the same company. 562 U.S. at 172. When the fiancé filed a charge of discrimination, the company fired the plaintiff. *Id*. The plaintiff brought a Title VII retaliation claim. *Id*. While *Thompson* considered the plaintiff's familial link to another employee who engaged in protected activity in analyzing whether Title VII retaliation occurred, it did *not* rely on that relationship in determining that the plaintiff could bring a retaliation claim himself. *See id*. at 175 (acknowledging that "firing a close

family member will almost always meet" the standard for retaliation under Title VII).

Thompson then found that, because the plaintiff was a third-party, there were questions of standing. *Id.* at 173. The Court focused on two issues to determine whether the plaintiff had third-party standing to bring a Title VII retaliation claim: the plaintiff's employee status, and the allegation that the company intentionally retaliated against him. *Id.* at 178. This is, of course, the logical outgrowth of the rule laid down in *Thompson* – that the zone of interests, and therefore, standing, is determined by looking to the statutory provision whose violation forms the legal basis for the complaint. Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), consists of two parts – identifying who is covered by the statute (an employer's employees and applicants for employment) and identifying reasons for discrimination against those persons that would be unlawful (because the employee or applicant opposed unlawful employment practices or participated in proceedings, investigations, or hearings under Title VII). Petitioner cannot viably claim that *Thompson* gives him a right to bring a Title VII retaliation claim against UBS as a non-employee simply because of his familial link to a protected UBS employee.

III. The Fifth Circuit Correctly Applied *Thompson* to Find Petitioner Had No Standing for a Third-Party Title VII Retaliation Claim

The Fifth Circuit followed *Thompson* to the letter by finding Petitioner lacked standing to bring a third-party Title VII retaliation claim. As the Fifth Circuit recognized, Title VII's statutory provision

prohibiting retaliation "is the one that matters here," and it specifically forbids employers from retaliating against "any of [their] employees or applicants for employment." Pl.'s App. 9 (quoting 42 U.S.C. § 2000e-3(a)) (emphasis added in opinion).[1] Protecting non-employees (or those who do not have the potential for an employment relationship such as applicants) is not part of the anti-retaliation provision's purpose or that of Title VII more generally, as the Fifth Circuit correctly recognized. *See Thompson*, 562 U.S. at 178 ("[T]he purpose of Title VII is to protect employees from their employers' unlawful actions."); Pl.'s App. 9 (internal punctuation marks and citations omitted) (noting that Title VII's anti-retaliation provision "forbids discrimination by an employer against any of his employees or applicants for employment," while Title VII more broadly encompasses "terms, conditions, or privileges of employment"); *Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 226 (2d Cir. 2008) (quoting 42 U.S.C. § 2000e(f)) ("Title VII, by its terms, applies only to 'employees.'"); *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004) ("As a general rule, the federal employment discrimination statutes protect employees, but not independent contractors."). Consequently, and correctly, the Fifth Circuit held that Petitioner's third-party retaliation claim was properly dismissed as the statute does not "protect [him] from mistreatment by someone else's employer." Pl.'s App. 15.

Petitioner repeatedly claims that simply because he was allegedly the intended victim of intentional retaliation, he is a "person aggrieved," and

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[1] Although the anti-retaliation provision speaks in terms of both employees and applicants, Petitioner has never alleged he was an applicant for employment with UBS at any relevant time.

thus has standing to bring a third-party retaliation claim. *See, e.g.*, Pet. 10 (claiming Petitioner "was a 'person aggrieved' within the holding in *Thompson*" as he was allegedly intentionally retaliated against). In making such a claim, Petitioner cherry-picks language from the Court's decision highlighting the second reason the *Thompson* plaintiff could maintain a third-party retaliation claim (allegedly being intentionally targeted for retaliation) while ignoring the first reason (being an employee of the defendant). And because that first reason encompasses the individuals expressly protected by Title VII's anti-retaliation provision in particular and the Title VII statute more generally, that is a critical omission.

IV. Petitioner's Potential Remedy Is Irrelevant and Immaterial to a Determination of Third-Party Standing Under Title VII

Petitioner's final argument is that if the Fifth Circuit's decision stands, he and others would be left remediless under Title VII if an employer retaliates against an employee by targeting a non-employee family member. Pet. 10–12. That argument fails for several reasons.

For starters, Petitioner cannot make this argument to the Court because he failed to raise it both in front of the District Court and in his initial briefing for the Fifth Circuit on appeal. Instead, he made the argument for the first time in an unsuccessful motion for rehearing before the Fifth Circuit. That is far too late. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *see also Neely v.*

Martin K. Eby Constr. Co., 386 U.S. 317, 330 (1967) ("[W]e see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here."). The Court should not reward Petitioner's delay.

Even if the Court considers the argument, Petitioner merely presumes, but does not prove, that his inability to recover damages under Title VII is a problem that the Court must cure. But as discussed above, Title VII's statutory language, in conjunction with the Court's zone of interests test, leads inexorably to the conclusion that Petitioner cannot bring a third-party retaliation claim under Title VII. Whether he *should* be allowed to do so is not a matter for the Court to resolve, but for Congress to consider. *See SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed.").

In any event, Petitioner is not remediless under Title VII. He is currently litigating a Title VII retaliation claim against Prelle, who was his employer, regarding the same facts underlying his Petition, and he is seeking the same relief there that he seeks here. Pl.'s App. 28–29. Moreover, as the Fifth Circuit itself noted, state tort law claims may remain available for third-party plaintiffs like Petitioner to seek relief. Pl.'s App. 14. Petitioner has not shown, or even attempted to show, that he would be without any remedy, only that he would be without remedy against UBS under Title VII. Given that Petitioner did not make a coverage gap argument until he

requested rehearing with the Fifth Circuit, the coverage gap argument is not ripe for review here.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Dated: January 14, 2021

Respectfully submitted,

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