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Protected by Association? The Supreme Court's Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine

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For decades, courts have struggled with how to treat claims of "third-party retaliation"—situations where one employee engages in some protected activity for purposes of Title VII but where the employer retaliates not against that employee, but rather against one of her coworkers—her spouse, or sibling, or mere workplace acquaintance. With its January 2011 decision in Thompson v. North American Stainless, LP, *the U.S. Supreme Court finally has weighed in on this issue, deeming employees protected against third-party retaliation under Title VII.*

This Article stands as one of the first in-depth examinations of Thompson *and its potential impact on both employers and employees. While this Article approves of the Supreme Court's decision to deem third-party retaliation claims viable under Title VII, this Article proposes a different framework for analyzing these claims than that applied by the Supreme Court in* Thompson. *Specifically, this Article argues that courts should apply jurisprudence from negligent infliction of emotional distress cases to conduct a more structured analysis of third-party retaliation claims. In addition, this Article argues that courts should define the class of plaintiffs who can assert third-party retaliation claims by requiring that only individuals who have engaged in some protected activity can sue. Other employees affected by employer retaliation—those who receive adverse treatment from their employer, but who did not themselves engage in any protected activity—should not be permitted to bring third-party retaliation claims. In articulating this framework, this Article seeks to strike a balance between deterring employers from engaging in retaliatory behavior and avoiding the negative consequences that could result from failing to place reasonable limits on the third-party retaliation doctrine.*

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TABLE OF CONTENTS

INTRODUCTION

For some time, one of the most perplexing areas of antidiscrimination law has involved how courts should treat claims of "third-party retaliation"—situations where one employee engages in some protected activity and the employer takes adverse action not

against that employee, but rather against one of her coworkers. For example, an employee files a discrimination charge against her employer, and the employer seeks to retaliate against the employee for filing this charge. However, instead of taking adverse action against the employee, the employer takes action against one of her *coworkers*—her spouse, or sibling, or perhaps a mere workplace friend. For many years, the courts reached varying conclusions regarding the extent to which Title VII of the Civil Rights Act of 1964[1] should bar this type of third-party retaliation. On the one hand, some courts emphasized the importance of providing robust safeguards against discrimination and retaliation in the workplace, including by enacting broad protections with respect to employers retaliating against employees who opposed workplace discrimination.[2] On the other hand, some courts expressed concerns about creating a slippery slope of liability for employers, whereby every time an employee complained of workplace discrimination, the employer would be exposed to liability not only for subsequent actions taken against *that employee*, but also for actions taken against *anyone* in the workplace associated with that employee.[3]

Finally, the U.S. Supreme Court has weighed in on this issue. In its recent decision in *Thompson v. North American Stainless, LP*, the Court unanimously held that Title VII bars employers from engaging in third-party retaliation.[4] In so doing, the Court took an important step toward resolving long-standing ambiguity with respect to the scope of Title VII's retaliation provision. Yet while the Court's decision in *Thompson* made clear that at least some third-party retaliation claims will be viable, it ultimately failed to sufficiently define the scope of the third-party retaliation doctrine, both with respect to the types of claims that should be recognized by the courts and with respect to who should be able to bring these types of claims.

This Article examines the impact of the Supreme Court's decision in *Thompson*, analyzing the strengths and weaknesses of the Court's position and proposing a different framework for analyzing third-party retaliation claims. Specifically, while this Article agrees with the Court's decision to deem third-party retaliation claims viable (at least in some circumstances), it asserts that the Court did not go far enough in articulating the outer boundaries of this doctrine. In that vein, this Article makes two suggestions for further establishing the parameters of the third-party retaliation doctrine. First, this Article suggests that courts should analyze third-party retaliation claims through a framework

1. 42 U.S.C. §§ 2000e–2000e-17 (2010), *amended by* Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (2010) [hereinafter Title VII].

2. *See infra* notes 30–34 and accompanying text.

3. *See infra* notes 26–28 and accompanying text.

4. 131 S. Ct. 863, 870 (2011).

applied in cases alleging negligent infliction of emotional distress ("NIED"). As discussed further below, many of the same concerns that arise in a NIED context—regarding frivolous claims and excessive liability—also emerge in cases involving third-party retaliation. Thus, the same factors that courts use to define the scope of the NIED doctrine also can be applied to claims alleging third-party retaliation. Second, this Article argues that courts should limit which parties can instigate a third-party retaliation claim by holding that only individuals who engage in some protected activity should be permitted to sue. Other employees affected by employer retaliation—those who receive adverse treatment from their employer but who did not themselves engage in any protected activity—should not be permitted to bring a third-party retaliation claim.

Part I of this Article provides background regarding the third-party retaliation doctrine, describing how various courts—including, most recently, the Supreme Court—have treated cases asserting this cause of action. Part II expands upon the above-mentioned suggestions for defining the scope of the third-party retaliation doctrine, first explaining how courts could apply a NIED analysis to these claims, and then explaining why only individuals who personally have engaged in protected activity should be permitted to serve as plaintiffs in these cases. Part III anticipates and responds to potential objections to these proposed changes to the third-party retaliation framework, focusing in particular on the suggestion that only individuals who have engaged in protected activity can sue. Finally, the Conclusion provides some thoughts regarding the implications of the Supreme Court's decision in *Thompson,* including the Court's failure to establish firmer limits on the scope of the third-party retaliation doctrine.

I. WHAT IS "THIRD PARTY RETALIATION" UNDER TITLE VII?

In enacting Title VII of the Civil Rights Act of 1964,[5] Congress created sweeping protections for employees against workplace discrimination. In addition to prohibiting employers from discriminating against employees on the basis of race, sex, color, religion, or national origin,[6] Title VII also bars employers from "retaliating" against employees who have exercised certain rights under Title VII.[7]

5. Pub. L. No. 88-352, tit. 7, 78 Stat. 241, 253–266 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2010)).

6. *See* 42 U.S.C. § 2000e-2(a).

7. *See id.* § 2000e-3(a) ("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 subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."). Some of the cases cited in this Article deal with retaliation alleged under other federal antidiscrimination statutes, such as the Age Discrimination in Employment Act of 1967 ("ADEA") or the Americans with Disabilities Act of 1990 ("ADA"). Because the retaliation provisions in the ADEA and ADA are

Specifically, Title VII's retaliation provision (found in section 704(a) of the law) protects two types of activities by employees. First, the "participation clause" within Title VII's retaliation provision bars employers from taking adverse action against employees who "ha[ve] made a charge, testified, assisted, or participated in any manner" in the investigation or litigation of any discrimination complaint.[8] Second, the "opposition clause" of the statute protects employees who have "opposed any practice made an unlawful employment practice" under Title VII.[9] With respect to both of these clauses, the Supreme Court has observed that the underlying purpose of Title VII's section 704(a) is to "maintain[] unfettered access to statutory remedial mechanisms."[10] In this respect, the Supreme Court seems to have recognized that part of preventing unlawful workplace discrimination in the first place is ensuring that the potential victims of this conduct have an unimpeded ability to expose and combat this type of illegal employer behavior. Employees who fear reprisal for reporting alleged discrimination may never come forward, thus allowing the unlawful activity to continue.

A. THE HISTORY OF THE THIRD-PARTY RETALIATION DOCTRINE PRIOR TO *THOMPSON V. NORTH AMERICAN STAINLESS, LP*

This retaliation provision within Title VII has taken on greater significance in recent years. Retaliation claims comprise a rapidly growing percentage of the total number of Title VII claims filed by individuals. Indeed, retaliation claims have increased substantially in the past decade, and now comprise more than one-third of all Equal Employment Opportunity Commission (EEOC) charges.[11] For example, in 1999, the EEOC received 19,694 charges of retaliation,[12] constituting 25.4% of the

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virtually identical to that within Title VII, courts generally use precedent under these antidiscrimination statutes interchangeably. *See* Fogleman v. Mercy Hosp., 283 F.3d 561, 567 (3d Cir. 2002).

8. 42 U.S.C. § 2000e-3(a).

9. *Id.*

10. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 950 (2007) (omission in original) (internal quotation marks omitted) (quoting Robinson v. Shell Oil, 519 U.S. 337, 346 (1997)); *see also* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 55 n.130 (2005); Natalie Watson Winslow, Note, *When Just Saying "No" Is Not Enough: How an Employee Who Rejects a Supervisor's Sexual Advances May Not Be Protected from Retaliation—and What the Supreme Court Can Do About It*, 46 CAL. W. L. REV. 211, 215 (2009) ("[T]he purpose of [Title VII's] anti-retaliation provision is to prevent an employer from retaliating against an employee who seeks to enforce the guarantees of the Act.").

11. *See Charge Statistics*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (2011) (last visited Dec. 23, 2011) [hereinafter EEOC, *Charge Statistics*]; *see also* Long, *supra* note 10, at 935; Carrie B. Temm, Comment, *Third-Party Retaliation Claims: Where to Draw the Line*, 54 U. KAN. L. REV. 865, 867 (2006) ("While the total number of Title VII charges has not shown a recent growth trend, Title VII retaliation charges have doubled in the past ten years."(footnote omitted)). It is unclear what percentage of these retaliation charges involve claims of third-party retaliation.

12. EEOC, *Charge Statistics*, *supra* note 11. The "total retaliation charges" described in this Part

total charges received by the agency.[13] A mere decade later, in 2009, the EEOC received 33,613 charges of retaliation, comprising 36% of the total charges received.[14]

In most cases, a plaintiff seeking to establish *a prima facie* case of retaliation under Title VII will face a fairly straightforward task. The plaintiff must show: (1) that she engaged in some "protected activity" for purposes of Title VII, under either the statute's "participation" or "opposition" frameworks; (2) that she suffered some adverse employment action; and (3) that there is some causal connection between the protected activity and the adverse action.[15] Thus, an employee could assert a retaliation claim against her employer if the employee was terminated or denied a promotion because *that employee* had engaged in some "protected activity," perhaps by filing a charge of discrimination or bringing a Title VII lawsuit against her employer.[16] Similarly, an employee could assert a retaliation claim against her employer if the employer took adverse action against the employee because the employee *actively supported* the discrimination allegations of a coworker, such as by assisting in an EEOC investigation of the coworker's discrimination allegations or by testifying in support of the coworker at her Title VII trial.[17]

Third-party retaliation claims also arise in a different context, however. Sometimes an employee may not have engaged in any protected activity of her own: She may not have filed her own charge of discrimination or have done anything actively to support a coworker's allegations of discrimination. However, this employee might receive adverse action from an employer in the wake of protected activity by a *coworker*, due to the employee's *relationship* with the coworker who engaged in protected activity. For example, Joe Senior gets fired because his son, Joe Junior, filed a discrimination charge against their mutual

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refer to charges of retaliation under all relevant statutes: Title VII, the ADEA, the ADA, and the Equal Pay Act of 1963.

13. EEOC, *Charge Statistics*, *supra* note 11.

14. *Id.*; *see also* Transcript of Oral Argument at 49, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) (No. 09-291) [hereinafter *Thompson* Oral Argument Transcript] ("According to the EEOC statistics, in 1992 . . . 14.5 percent of charges filed with the EEOC were retaliation claims. By 2009 that had risen by 31 percent.").

15. *See* Fogleman v. Mercy Hosp., 283 F.3d 561, 567–68 (3d Cir. 2002); Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002).

16. *See, e.g.*, Decker v. Andersen Consulting, 860 F. Supp. 1300, 1306–07 (N.D. Ill. 1994) (allowing a retaliation claim to proceed where the employee presented a genuine issue of material fact that her employer reduced her responsibilities and terminated her employment in response to her filing an EEOC charge of discrimination and informing her employer of her intent to pursue a discrimination claim).

17. Glover v. S.C. Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999) (allowing a retaliation claim to proceed where the plaintiff claimed that her employer discharged her in retaliation for her testimony against the employer in a gender discrimination suit filed by another employee).

employer; Wendy Wife is demoted because her spouse and coworker, Harry Husband, called the EEOC to report workplace discrimination. In these situations, an employee (the "Target") receives adverse action from an employer not because of her own protected activity, but rather because of the protected activity of some *other* employee (the "Actor"), with whom this Target has some type of relationship.[18]

Despite suffering from adverse employment action, these Targets of employer retaliation historically have faced problems in their efforts to assert Title VII retaliation claims. Neither Joe Senior nor Wendy Wife personally engaged in any protected activity. While these potential plaintiffs can demonstrate that they have suffered from some adverse employment action, satisfying the second prong of the prima facie test, they may not be able to satisfy the first prong of this test, in that they themselves have not engaged in the type of active "participation" or "opposition" contemplated by Title VII's retaliation provision and may not be able to show that some protected activity *caused* the adverse action they experienced. Accordingly, courts have split regarding whether to recognize a retaliation claim in this context.

1. Courts Opposed to the Third-Party Retaliation Doctrine

Prior to the Supreme Court's recent decision in *Thompson,* federal courts of appeals faced with third-party retaliation claims uniformly had refused to recognize these claims, deeming them outside the scope of Title VII's retaliation provision.[19] These courts relied substantially on the text of Title VII in refusing to recognize third-party retaliation claims. Title VII's retaliation provision, section 704(a), provides:

> 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.[20]

Courts interpreting this language had held that the use of the term "he" within this provision meant that the individual receiving adverse

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18. The terms "Actor" and "Target" will be used throughout this Article to describe, respectively, the individual who engaged in a protected activity for purposes of Title VII and the third party who received adverse action from her employer as a result of the Actor's protected activity.

19. *See* Thompson v. N. Am. Stainless, 567 F.3d 804, 811 (6th Cir. 2009) ("In sum, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in protected activity."); *see also* Lawrence L. Lee & Brandon D. Saxon, *The Supreme Court's 2010 Upcoming Employment Law Docket*, MUNICIPAL LAWYER, Sept./Oct. 2010, at 24, 26. While the Sixth Circuit seemed to permit consideration of a third-party retaliation claim in *EEOC v. Ohio Edison*, 7 F.3d 541 (6th Cir. 1993), that same court subsequently characterized as dicta the relevant portion of that decision and distinguished the facts of that case from those involved in a true third-party retaliation situation. *See Thompson*, 567 F.3d at 809.

20. 42 U.S.C. § 2000e-3(a) (2010) (emphasis added).

action from an employer must be the same person who engaged in some protected activity.[21] As one court observed, "it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity."[22] While courts acknowledged that this narrow reading of section 704(a) could stymie the ability of some plaintiffs to seek relief in the wake of employer retaliation,[23] these courts felt constrained by what they saw as Congress's stated intent with respect to the scope of this provision.[24] Another court observed, "[The court] must look to what Congress actually enacted, not what [it] believe[s] Congress might have passed were it confronted with the facts at bar."[25]

In addition to focusing on the text of Title VII, courts that rejected third-party retaliation claims also expressed concern about opening the floodgates to frivolous litigation, whereby "anyone who suffered an adverse action close in time after any other employee engaged in a protected activity would have a cause of action [under Title VII]."[26]

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21. *See* Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998) ("We believe that the rule advocated by Thomas—that a plaintiff bringing a retaliation claim need not have personally engaged in statutorily protected activity if his or her spouse or significant other, who works for the same employer, has done so—is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation."); *see also* Long, *supra* note 10, at 950 ("The statute's use of the word 'he' clearly seems to indicate that the person complaining of unlawful retaliation also must have been the person participating in the protected activity." (footnote omitted)).

22. Fogleman v. Mercy Hosp., 283 F.3d 561, 568 (3d Cir. 2002) (refusing to allow a third-party retaliation claim under comparable retaliation provisions within the ADEA, the ADA, and state antidiscrimination law). *But see* EEOC v. Nalbandian Sales, 36 F. Supp. 2d 1206, 1210–11 (E.D. Cal. 1998) (characterizing the Title VII retaliation provision as "ambiguous" with respect to whether it covers third-party retaliation).

23. *See, e.g.*, *Fogleman*, 283 F.3d at 568–69; EEOC v. Wal-Mart Stores, 576 F. Supp. 2d 1240, 1246 (D.N.M. 2008).

24. *See Fogleman*, 283 F.3d at 569; *Wal-Mart Stores*, 576 F. Supp. 2d at 1246–47.

25. Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 816 (6th Cir. 2009); *see also Fogleman*, 283 F.3d at 564 ("Although we recognize that allowing an employer to retaliate against a third party with impunity can interfere with the overall purpose of the anti-discrimination laws, we believe that by referencing to 'such individual,' the plain text of these statutes clearly prohibits only retaliation against the actual person who engaged in protected activity."); EEOC v. Bojangles Rest., Inc., 284 F. Supp. 2d 320, 327 (M.D.N.C. 2003) ("It is entirely possible that Congress could have written the statute as it did to eliminate frivolous suits by friends, relatives, or acquaintances of persons who do fall within the language of the statute."); Brief in Opposition to Certiorari at 25, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) (No. 09-291) ("If Congress had intended to allow third-party retaliation claims under Title VII, it certainly knew how to do so.").

26. Temm, *supra* note 11, at 878; *see* Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 649 (6th Cir. 2008), *vacated*, 567 F.3d 804 (6th Cir. 2009) (noting that courts faced with third-party retaliation claims "have expressed concerns as to whether this decision will result in a flood of suits from relatives and associates of those who file EEOC charges"); *see also Thompson*, 567 F.3d at 813 (citing concerns expressed in a concurring opinion in *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 129 S. Ct. 846, 854 (2009) (Alito, J., concurring), about "open[ing] the door to retaliation claims by employees who never expressed a word of opposition to their employers" and opining that this is "exactly the conundrum presented in the instant case").

Every time an employee engaged in protected activity, her employer might face a retaliation claim for taking adverse action against any of that employee's relatives, friends, or even mere acquaintances in the workplace.[27] From this perspective, for every Actor in the workplace that engaged in protected activity, there could be an endless number of Targets: an endless number of employees associated in some way with the Actor who might claim third-party retaliation upon receiving any future adverse treatment at work. Courts feared that, without any clear limits on this doctrine, employers likely would be hesitant to take *any* adverse action in the workplace, thus stymieing employer operations in a significant way.[28]

Finally, courts that refused to recognize third-party retaliation claims frequently argued that allowing such claims is not necessary to protect employees from workplace retaliation. According to these courts, this is because parties alleging third-party retaliation typically will have experienced some *direct* retaliation.[29] In other words, the employee likely will have played some "active" role in her coworker's discrimination claim—whether in the filing of the claim itself or in the subsequent investigation of the claim. Wendy Wife likely helped Harry Husband file his discrimination charge against their shared employer; Joe Senior probably assisted the EEOC in its investigation of Joe Junior's discrimination charge or assisted the employer in its gathering of evidence with respect to this charge. These employees not only may have experienced adverse treatment at work because of their *coworker's* protected activity, but also because of their *own* protected activity. Accordingly, it may not be necessary to stretch section 704(a) to accommodate this scenario of third-party retaliation because the Target may have a straightforward, traditional retaliation claim.

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27. *See, e.g.*, Wychock v. Coordinated Health Sys., No. CIV.A. 01-3873, 2003 WL 927704, at *7 (E.D. Pa. Mar. 4, 2003) (rejecting a third-party retaliation claim where the plaintiff was not even distantly related to the individual who had filed the discrimination complaints and where she "d[id] not even appear to be close friends with the claimants"); O'Connell v. Isocor Corp., 56 F. Supp. 2d 649, 654 (E.D. Va. 1999) ("[T]he third-party retaliation doctrine does not cover two people whose only connection is that they happened to work for the same company. If the doctrine stretched that far, any employee who is terminated around the time that another employee files a discrimination suit would have standing to sue the employer.").

28. For a more detailed discussion of this argument, see *infra* notes 112–13 and accompanying text.

29. *See Thompson*, 567 F.3d at 810 (citing a previous Fifth Circuit decision for the idea that "[i]n most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination" (citation omitted)); *see also Bojangles Rest.*, 284 F. Supp. 2d at 327–29 (declining to recognize the third-party retaliation claim of a plaintiff fired after her fiancé engaged in protected activity, but finding that the plaintiff might have a retaliation claim based on her own protected activity via "participation" in her fiancé's protected activity).

2. *Courts That Have Permitted Third-Party Retaliation Claims*

In contrast to those courts that have refused to recognize third-party retaliation claims, various lower courts (as well as the EEOC) have long permitted these claims to proceed.[30] To a large extent, courts that have allowed third-party retaliation claims have relied primarily on the broader purpose of Title VII's retaliation provision. As noted above, the purpose of antiretaliation provisions like that found in section 704(a) is to "maintain[] unfettered access to statutory remedial mechanisms."[31] In other words, in creating section 704(a), Congress apparently was concerned that employees would forego availing themselves of statutory remedial mechanisms if they feared that doing so would lead to reprisals by their employers.

With this statutory purpose in mind, courts that have recognized third-party retaliation claims "have done so largely on the premise that not permitting such claims would, in effect, make a mockery of the goals of anti-discrimination law."[32] If employers had free reign to retaliate against employees who reported alleged workplace discrimination, then fewer individuals would be likely to bring this type of behavior to light.[33] While this recognition of third-party retaliation claims might create tension with the literal terms of section 704(a), "courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear purpose in proscribing retaliatory activity."[34]

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30. *See* Temm, *supra* note 11, at 870–71; *see also* Singh v. Green Thumb Landscaping, 390 F. Supp. 2d 1129, 1135–37 (M.D. Fla. 2005) (collecting cases). The EEOC's Compliance Manual states that the retaliation provisions within various federal antidiscrimination statutes, including Title VII, "prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." EEOC, DIRECTIVES TRANSMITTAL No. 915.003, COMPLIANCE MANUAL § 8-II(C)(3) (1998) [hereinafter EEOC, COMPLIANCE MANUAL] (footnote omitted).

31. Long, *supra* note 10, at 950 (omission in original) (internal quotation marks omitted) (quoting Robinson v. Shell Oil, 519 U.S. 337, 346 (1997)).

32. Long, *supra* note 10, at 950; *see* Temm, *supra* note 11, at 885–86 (asserting that interpreting Title VII to allow third-party retaliation claims would be consistent with the overall purpose of Title VII because "if the claims were not allowed, employees who did not engage in a protected activity but who were retaliated against would be left without a remedy. This would produce an absurd result of allowing employers to do indirectly what they cannot do directly" (footnotes omitted)); *see also* EEOC v. Nalbandian Sales, 36 F. Supp. 2d 1206, 1212 (E.D. Cal. 1998) ("To hold otherwise, would thwart congressional intent and produce an absurd result.").

33. *See* Morgan v. Napolitano, No. CIV S-09-2649, 2010 WL 3749260, at *1, *8 (E.D. Cal. Sept. 23, 2010) (asserting that, in enacting Title VII, Congress contemplated that individuals would act as "private attorneys general" by bringing to light discriminatory conduct in the workplace).

34. Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 648 (6th Cir. 2008), *vacated*, 567 F.3d 804 (6th Cir. 2009) (quoting EEOC v. Ohio Edison, 7 F.3d 541, 545 (6th Cir. 1993)).

B. THE SUPREME COURT'S DECISION IN *THOMPSON*

Faced with these competing arguments for and against the third-party retaliation doctrine, and with a split of authority in the lower courts, the Supreme Court finally weighed in on this debate. On January 24, 2011, the Court issued an opinion in *Thompson v. North American Stainless, LP*,[35] a case that placed the viability and scope of the third-party retaliation doctrine squarely at issue. In a unanimous 8–0 decision,[36] the Court held that (1) Title VII would bar an employer from retaliating against an employee's protected activity by taking adverse action against a third party in the workplace, and (2) that this third party (the "Target" of the employer's adverse action) could assert a retaliation claim in these circumstances.[37]

Thompson involved a claim brought by Eric Thompson, who, along with his then-fiancée, Miriam Regalado, worked for the defendant, North American Stainless, LP.[38] Thompson claimed that shortly after Regalado filed a discrimination charge against North American, North American terminated Thompson's employment.[39] According to Thompson, North American terminated him solely in retaliation for Regalado's protected activity.[40]

Notably, Thompson cast his case as a fairly straightforward third-party retaliation claim: Thompson did not claim that he himself engaged in any protected activity, such as by assisting Regalado in filing her discrimination charge or otherwise opposing North American's alleged treatment of Regalado.[41] Rather, Thompson explicitly alleged in his complaint that his "relationship to Miriam Thompson [neé Regalado] was the sole motivating factor in his termination."[42]

Based upon these allegations, the district court granted summary judgment to North American, finding that Title VII "does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity."[43] While a three-judge panel of the Sixth Circuit initially reversed the district court, holding that Thompson could pursue his claim against North American,[44] the full Sixth Circuit ultimately reached the

35. 131 S. Ct. 863 (2011).

36. Justice Kagan took no part in the consideration of this case, having recused herself. *Id.* at 866.

37. *Id.* at 868, 870.

38. Thompson v. N. Am. Stainless, 567 F.3d 804, 806 (6th Cir. 2009).

39. *Id.*

40. *Id.*

41. *See id.* at 807.

42. *Id.* at 808 (emphasis removed); *see also id.* (observing that Thompson's "Statement of the Issue" on appeal and "Statement of Facts" also made clear that Thompson's retaliation claim was based upon the protected activity of his fiancée, as opposed to any activity that he engaged in himself).

43. Thompson v. N. Am. Stainless, LP, 435 F. Supp. 2d 633, 638 (E.D. Ky. 2006).

44. Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 645 (6th Cir. 2008), *vacated*, 567 F.3d 804 (6th Cir. 2009).

opposite conclusion, holding that Thompson could not proceed with his retaliation claim.[45] According to the en banc court, "the authorized class of claimants [under section 704(a)] is limited to persons who have personally engaged in protected activity."[46] Because Thompson did not claim to have engaged personally in any protected activity, but rather merely claimed to have been retaliated against as a result of *Regalado's* protected activity, the Sixth Circuit held that his retaliation claim could not proceed.[47]

In reaching this conclusion, the Sixth Circuit, like other courts that have rejected third-party retaliation claims, relied in large part on what it deemed to be the plain meaning of the statute, noting that "[c]ertainly it was Congress's prerogative to create—or refrain from creating—a federal cause of action for civil rights retaliation and to mold the scope of such legislation."[48] The court concluded that it "must look to what Congress actually enacted, not what we believe Congress might have passed were it confronted with the facts at bar."[49] In addition, the court seemed troubled by the potential "slippery slope" that could arise if it allowed a claim like Thompson's to proceed, whereby the court would "open the door to retaliation claims by employees who never expressed a word of opposition to their employers."[50]

The Supreme Court, however, took a different approach than that adopted by the en banc Sixth Circuit, finding that Thompson could allege a third-party retaliation claim based upon Regalado's protected activity. First, relying in large part on its previous decision in *Burlington Northern & Santa Fe Railway Co. v. White*, in which it had expanded its view of what would constitute an "adverse action" for purposes of section 704(a),[51] the Court emphasized that the retaliation provision of Title VII (unlike the statute's substantive provision) "is not limited to discriminatory actions that affect the terms and conditions of employment,"[52] but rather "prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[53] In other words, courts should ask whether the employer conduct in question—whether directed at the Actor who engaged in protected activity or at a coworker of that Actor—might

45. *Thompson*, 567 F.3d at 804.

46. *Id.* at 805.

47. *Id.* at 805–06.

48. *Id.* at 807.

49. *Id.* at 816.

50. *Id.* at 813 (internal quotation marks omitted) (quoting Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 129 S. Ct. 846, 854 (2009) (Alito, J., concurring)).

51. 548 U.S. 53, 57 (2006); *see also infra* notes 145–46, 150–56 and accompanying text.

52. Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868 (2011) (citation and internal quotation marks omitted).

53. *Id.* (citation and internal quotation marks omitted).

reasonably have changed the Actor's mind about engaging in protected activity in the first place.

The Court also responded to concerns regarding the "difficult line-drawing problems" that might emerge from allowing third-party retaliation claims.[54] While the Court acknowledged the existence of these concerns, it declined to let such worries preclude the viability of third-party retaliation claims generally.[55] Moreover, the Court declined to provide any specific guidance regarding the types of relationships that could support a third-party retaliation claim.[56] Instead, the Court indicated that courts should examine the "particular circumstances" in any given case to determine whether to recognize a claim of third-party retaliation,[57] emphasizing only that "the provision's standard for judging harm must be objective," as opposed to relying upon a plaintiff's subjective feelings.[58] In other words, the Court merely indicated that third-party retaliation claims could (sometimes) be brought, without outlining any guidelines for defining the scope such claims.

In addition to deeming third-party retaliation claims generally cognizable under Title VII, the *Thompson* Court also addressed who should be permitted to bring these types of claims. Title VII permits a person "claiming to be aggrieved" to bring a civil action,[59] which North American had argued should be interpreted to allow only the employee who engaged in protected activity to sue.[60] The Court, however, rejected this view, drawing upon a body of administrative law to conclude that a "person aggrieved" for purposes of Title VII would be anyone within the "zone of interests" of the statute.[61] Applying this "zone of interests" test, the Court held that so long as the interests that a plaintiff sought to protect were sufficiently related to the purposes of Title VII, that individual would be permitted to bring a third-party retaliation claim, regardless of whether the employee personally had engaged in protected activity.[62]

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54. *Id.*

55. *See id.*

56. *Id.* ("We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful.").

57. *Id.*

58. *Id.* (citation and internal quotation marks omitted).

59. 42 U.S.C. § 2000e-5(b) (2010).

60. *Thompson*, 131 S. Ct. at 870.

61. *Id.*

62. *See id.* ("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." (citations and internal quotation marks omitted)).

II. WHERE THE SUPREME COURT FALLS SHORT: THE NEED TO FURTHER DEFINE *WHEN* A THIRD-PARTY RETALIATION CLAIM EXISTS AND *WHO* HAS THE POWER TO LITIGATE THIS CLAIM

Those courts that have recognized third-party retaliation claims—including, most recently, the Supreme Court—have articulated compelling reasons for permitting these types of claims to proceed. One such reason is the tremendous loophole that would arise if employers, barred from retaliating directly against employees who engage in some protected activity, simply could take out their ire on those "associated" with such employees. However, no court (not even the Supreme Court) has adequately addressed the concerns raised by opponents to third-party retaliation claims, including the need to articulate some limit on these types of claims. Absent any such limits, many fear that courts will be inundated with frivolous suits brought by *any* employee who receives adverse action after one of her coworkers has engaged in some protected activity. Yet when it came to confronting these concerns in its most recent decision, the Supreme Court essentially punted, expressly declining to provide lower courts with significant guidance regarding what logical limits might be placed on third-party retaliation claims.

This Part addresses this void in the Supreme Court's opinion by articulating two sets of limits that should apply to third-party retaliation claims. While this Article agrees with the Court that courts should not close the door entirely to claims of third-party retaliation, it asserts that courts should define the scope of the third-party retaliation doctrine in two ways: (1) by applying a framework used in negligent infliction of emotional distress claims to identify viable third-party retaliation claims, and (2) by requiring that only a party who engaged in protected activity (the Actor) be permitted to bring a third-party retaliation claim.

A. HOW A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ANALYSIS CAN INFORM COURTS CONSIDERING THIRD-PARTY RETALIATION CLAIMS

As noted above, a primary concern raised by courts that oppose recognition of third-party retaliation claims is the fear of boundless liability for employers, if claims can be made by anyone in the workplace who is associated with an employee engaging in protected activity, no matter the length of time that has passed since that activity and no matter the relationship between the two employees. In this vein, even some proponents of the third-party retaliation doctrine have recognized the need to place some limits on this doctrine.[63] Yet the scholarship in this

63. *See, e.g.*, Temm, *supra* note 11, at 865 (advocating that "third-party retaliation claims should be allowed but . . . a line must be drawn to limit these claims," and focusing on the relationship between the plaintiff and third-party to limit the scope of this doctrine); *see also* Thomas v. Am. Horse Shows Assoc., No. 97-CV-3513 JG, 1999 WL 287721 at *1, *12 (E.D.N.Y Apr. 23, 1999) (recognizing

area thus far has failed to articulate a framework that properly balances the need to punish and deter third-party retaliation while still imposing appropriate boundaries on this doctrine.

This Article attempts to establish such boundaries by drawing upon a seemingly unrelated area of the law: cases alleging negligent infliction of emotional distress ("NIED"). This Article asserts that the factors applied by many courts in analyzing NIED claims also can define the scope of the third-party retaliation doctrine. Specifically, just as courts in a NIED context often apply a multifactor "bystander analysis" to ensure a sufficient link between the plaintiff's mental injury and the defendant's alleged wrongful conduct,[64] courts could apply these same factors to a plaintiff's third-party retaliation claim to define the contours of section 704(a).

Negligent infliction of emotional distress claims arise when an actor's unintentional, negligent conduct inflicts emotional harm on another individual.[65] One common scenario in which this claim will occur involves a plaintiff who was not the target of negligence by the defendant, but who suffers emotional distress upon observing or otherwise perceiving harm to a third party.[66] Notably, courts reviewing NIED claims frequently have expressed the same types of concerns as have courts analyzing third-party retaliation claims. Courts in NIED cases express wariness of the potential for unwarranted, excessive exposure for defendants[67] and the potential for fraudulent or frivolous claims.[68]

Thus, just as in the context of third-party retaliation claims, a looming question for courts in the NIED context involves how to limit the scope of the NIED doctrine—how to decide which plaintiffs properly can seek judicial relief versus which plaintiffs' harm should be deemed too remote.[69] In response to this question, courts have adopted a variety

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the potential for plaintiffs to assert third-party retaliation claims but rejecting the plaintiff's claim due to the lack of a causal nexus between her sister's protected activity and adverse action toward the plaintiff); O'Connell v. Isocor Corp., 56 F. Supp. 2d 649, 654 (E.D. Va. 1999) (recognizing the viability of third-party retaliation doctrine but declining to extend this doctrine to cover unrelated coworkers).

64. *See infra* notes 74–80 and accompanying text.

65. *See* BLACK'S LAW DICTIONARY 1135 (9th ed. 2009).

66. The tentative draft of the Restatement (Third) of Torts proposes three specific scenarios in which a NIED claim could arise: First, an actor's negligent conduct might have created the *potential* for bodily harm to the emotionally harmed plaintiff, but ultimately only caused emotional harm; second, the negligent conduct might involve activity that does not create any risk of bodily harm, but nevertheless poses a risk of serious emotional harm; or third, an actor's negligence might cause emotional harm to a bystander through the mechanism of bodily harm to another person. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 46, 47 (Tentative Draft No. 5, 2007). This Article focuses on the third type of NIED, in which emotional distress is the *indirect* result of bodily harm to another individual.

67. *See* Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 831–34 (2004).

68. *See id.*

69. *See* Meredith E. Green, Note, *Who Knows Where the Love Grows?: Unmarried Cohabitants*

of approaches for addressing these types of NIED claims and have exhibited varying degrees of acceptance for these claims.[70] Some courts previously imposed a "physical impact" requirement as a prerequisite to bringing a NIED claim, insisting that a mental injury must result from some contemporaneous physical impact,[71] or must manifest into actual physical symptoms in order for the NIED claim to proceed.[72] Later decisions have adhered to a "zone of danger" test, allowing a plaintiff to recover for mental injuries that result from witnessing harm to another individual, or from the fear of harm to herself, so long as the plaintiff was in sufficient physical proximity to this potential harm.[73]

Other jurisdictions have adopted a "bystander theory" for NIED claims.[74] First recognized by the California Supreme Court in the seminal case of *Dillon v. Legg*,[75] and now widely accepted (including within the tentative draft of the Restatement (Third) of Torts),[76] the bystander theory for NIED recovery focuses on three elements to determine whether to allow compensation to an emotionally injured plaintiff under a NIED theory. First, the court will examine the plaintiff's physical proximity to the event giving rise to the emotional distress ("spatial proximity").[77] Was the emotionally distressed plaintiff "located near the scene of the accident as contrasted with one who was a distance away from it"?[78] Second, the court will examine whether the plaintiff's

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and Bystander Recovery for Negligent Infliction of Emotional Distress, 44 WAKE FOREST L. REV. 1093, 1094 (2009) (noting that courts limit the scope of NIED claims due, among other things, to "concern about the potential flood of litigation resulting from recognition of stand-alone emotional harm as a cognizable injury" and to "concern over the lack of objective verification of emotional distress and the resulting potential for fraudulent claims" (footnotes omitted)).

70. *See id.* at 1094–97; Rhee, *supra* note 67, at 813–18; *see also* Dan B. Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 ARIZ. L. REV. 49, 51–53 (2008).

71. *See* Rhee, *supra* note 67, at 815–16.

72. *See* Dobbs, *supra* note 70, at 52 ("[Courts adhering to the physical impact test] insist[] that the plaintiff must prove the reality of emotional distress by showing that it resulted in physical harm or physical symptoms." (footnote omitted)).

73. Rhee, *supra* note 67, at 817. While courts applying this "zone of danger" test have required that the plaintiff actually fall within the "zone of danger" in order to proceed with an NIED claim, other courts have deemed it sufficient for a plaintiff merely to have been present to perceive an injury to her child or family member. *See* Dobbs, *supra* note 70, at 52–53.

74. *See* Dobbs *supra* note 70, at 52–53; Rhee, *supra* note 67, at 819–23.

75. 441 P.2d 912 (Cal. 1968).

76. Green, *supra* note 69, at 1096; *see also id.* at 1097 n.27 (noting that twenty-nine jurisdictions currently follow the *Dillon* "bystander theory" or some version thereof when analyzing NIED claims). Section 47 of the Restatement (Third) of Torts describes this test in a somewhat different manner and condenses its analysis into two (as opposed to three) inquiries: "An actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who: (a) perceives the event contemporaneously, and (b) is a close family member of the person suffering the bodily injury." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 47 (Tentative Draft No. 5, 2007).

77. *See Dillon*, 441 P.2d at 920; *see also* Green, *supra* note 69, at 1096.

78. *Dillon*, 441 P.2d at 920.

emotional distress resulted from a sensory and contemporaneous observation of the accident or injury ("temporal proximity").[79] Was the emotionally distressed plaintiff present at the time that the defendant's negligent act took place, or did the plaintiff arrive on the scene long after the fact? Finally, the court will examine the relationship between the emotionally distressed plaintiff and the individual who suffered physical harm ("relational proximity").[80] Were these parties spouses? Blood relatives? Mere friends or acquaintances?

1. *Applying a Negligent Infliction of Emotional Distress Framework to Third-Party Retaliation Claims*

This three-factor bystander framework for analyzing NIED claims provides a viable framework for courts seeking to define the scope of the third-party retaliation doctrine. Each of the three factors used by courts to decide whether a NIED claim can proceed could be applied to third-party retaliation claims to determine *which* potential plaintiffs should be permitted to sue based upon an employer's alleged third-party retaliation.

At first blush, it may seem unusual to apply a common law doctrine to a federal statutory claim. Yet the Supreme Court has done this in the past, including in the context of Title VII itself. In describing the framework for sexual harassment liability under Title VII, the Court relied in large part on common law agency principles, looking to the agency relationship between the particular employee accused of harassing behavior and her employer.[81] Applying these agency principles, the Court held that, in some circumstances, an employer may be vicariously liable for the unlawful harassing conduct of its employees.[82] Common law notions of agency expanded the scope of employer liability for the unlawful behavior of the employer's employees.

An additional challenge in applying these NIED factors to a third-party retaliation claim involves whether it is proper to apply a *negligence* framework to what consistently is seen as an *intentional* wrong by employers. Unlike a negligence claim, an allegation of retaliation under Title VII focuses in large part on an employer's intent: retaliation is seen as an intentional harm.[83] Negligence, of course, presumes a *lack* of any

79. *See id.*; *see also* Green, *supra* note 69, at 1096.

80. *See Dillon*, 441 P.2d at 920; *see also* Green, *supra* note 69, at 1096.

81. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754, 764–65 (1998); *see also* Faragher v. Boca Raton, 524 U.S. 775, 802–03 (1998).

82. *See Ellerth*, 524 U.S. at 754, 756, 765.

83. *See, e.g.*, Gomez-Perez v. Potter, 553 U.S. 474, 480–81 (2008) (citing with approval language from *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173–74, which analyzed Title IX of the Education Amendments of 1972 and held that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination . . . . Retaliation is, by definition, an intentional act" (ellipses in original)).

intent to cause harm.[84]

Yet despite this difference in the mental states of the wrongdoers in each of these claims, the NIED factors provide a useful framework for defining the scope of the third-party retaliation doctrine. Both NIED claims and third-party retaliation claims raise complicated questions of causation for a court to resolve. In the NIED context, the court must sort out whether a sufficient connection exists between a plaintiff's mental injury and some physical harm or act that did not directly impact the plaintiff.[85] In other words, the court must determine whether this physical act was the *cause* of the plaintiff's mental injury. In a way, the three factors cited above—spatial proximity, temporal proximity, and relational proximity—serve as a proxy for testing causation, by determining whether a close enough relationship exists between the external physical harm and the plaintiff's mental injury.

Third-party retaliation claims raise similar concerns about attenuated causation, and these three factors therefore may serve a similar function in this context. Even in a straightforward, traditional retaliation claim, causation often presents complicated questions for the court due to conflicting arguments by the plaintiff and defendant regarding the real reason for the adverse action toward the plaintiff. However, causation is even more complex in a third-party retaliation case, where an even greater distance inherently exists between the protected activity engaged in by one party and the adverse action experienced by another. The link between the protected activity and the adverse action is even harder to sort out. The NIED factors can help in this respect. Just as these factors help courts analyze causation in a NIED context, so too can they help courts to structure the causation inquiry in a third-party retaliation context, by providing courts with some *structure* for conducting this causation analysis. The fact that NIED claims require mere negligence while retaliation claims require intent becomes largely irrelevant when one focuses on the basic idea that in *both* contexts, the plaintiff must prove causation.

In the context of a NIED claim, courts that adhere to the "bystander" theory will focus upon how physically close the mentally injured plaintiff was to the accident or event that caused harm to

84. *See* BLACK'S LAW DICTIONARY, *supra* note 65, (defining "negligence," as, inter alia, "any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights").

85. *See* Cohen v. Nuvasive, Inc., Nos. B194078, B196905, 2010 WL 1380447, at *9 (Cal. Ct. App. Apr. 7, 2010) ("A plaintiff seeking to recover damages for the negligent infliction of emotional distress must establish a direct causal connection between the defendant's misconduct and the plaintiff's emotional distress." (citation and internal quotation marks omitted)); *see also* Rhee, *supra* note 67, at 808–09 (discussing the difficulty in verifying mental injuries and in gauging individual emotional responses to horrendous circumstances).

someone else.[86] For example, one court permitted a plaintiff to proceed with her NIED claim when she claimed to have been in a room adjoining—and thus, presumably, mere feet away from—the one in which a propane explosion killed one of her daughters and severely injured another.[87] In contrast, another court refused to permit a NIED claim by a father who was at least a half-mile away when his son was shot accidentally.[88] According to the court, this physical distance between the plaintiff and the accident causing harm to his son meant that the plaintiff could not be deemed a "bystander" for purposes of his NIED claim.[89]

In this way, courts faced with NIED claims apply this notion of spatial proximity to ensure that a mentally injured plaintiff was "close enough" to the physical harm so as to find a connection between these two injuries. Courts analyzing third-party retaliation claims could apply this same spatial proximity analysis to determine causation with respect to a retaliation claim. Spatial proximity would be one part of the courts' inquiry in determining whether an Actor's protected activity caused the adverse action toward the Target. The closer the spatial proximity between the Actor and the Target, the more inclined the court should be to find this connection. In conducting this analysis, courts would examine the "spatial distance" between the Actor and the Target on various levels, both concrete and physical as well as metaphorical. Did these two individuals simply work for the same employer, or were they located in the same building? Did these two employees work within the same department or division? Were they working on projects together? Did they share the same supervisor? All of these questions might be very relevant to deciding whether an Actor should be able to sue for third-party retaliation based upon adverse action to a Target.

In other words, courts examining spatial proximity would focus not only on the physical distance between the Actor and Target but also on other types of separation in the workplace between the Actor and the Target, such as their respective locations within the company hierarchy and supervisory structures. A Target within the same chain of command as an Actor would be better positioned to bring a third-party retaliation claim, because the same decisionmaker who received notice of the Actor's protected activity likely would be involved in taking adverse action against the Target. For example, if Joe Senior and Joe Junior worked in the same department and reported to the same supervisor, a court understandably might be somewhat suspicious if Joe Junior was

86. *See supra* text accompanying notes 77–78.

87. *See* Wilks v. Hom, 3 Cal. Rptr. 2d 803, 804 (Cal. Ct. App. 1992).

88. Lehmann v. Wieghat, 917 S.W.2d 379, 384 (Tex. App. 1996); *see also* Thing v. La Chusa, 771 P.2d 814, 814 (Cal. 1989) (refusing to permit a NIED claim by a mother who was not at the scene when the defendant's car hit her child, but rather who arrived at the scene several moments later).

89. *Lehmann*, 917 S.W.2d at 384.

fired a short time after Joe Senior filed a discrimination complaint. However, where businesses may have thousands of employees and operations all over the world, greater "distance" between an Actor and Target might cast doubt on a plaintiff's third-party retaliation claim. If Joe Junior worked across the country from his father, in a different department reporting to different superiors, a court looking only at the spatial proximity between these two individuals might question whether some protected activity by Joe Senior would have any bearing on Joe Junior's treatment at work.

Thus, courts could use the distance in the workplace (both physical and otherwise) between the Actor and Target as one means of limiting the scope of the third-party retaliation doctrine. The closer the distance between these two individuals, the more plausible it should seem to find a connection between the Actor's protected activity and subsequent adverse action experienced by the Target.

A second factor that courts should apply in adopting the NIED "bystander" theory to third-party retaliation claims is the above-described notion of temporal proximity. As previously discussed, courts that apply the bystander theory to NIED claims will examine whether the plaintiff's alleged emotional distress resulted from a "sensory and contemporaneous observance of the accident," as opposed to situations where a plaintiff merely learned about the accident from others after the fact.[90] Courts will be less likely to entertain NIED claims made by plaintiffs who did not observe the accident in question personally, as it occurred.[91]

In the context of a third-party retaliation claim, a court would want to evaluate the amount of time between the Actor engaging in protected activity and the Target receiving adverse action from her employer. Was the Target fired within hours or days of the employer learning that a coworker—the employee's spouse or sibling or friend—engaged in some protected activity?[92] Or did months, or even years, pass between the Actor's protected activity and the Target suffering any adverse workplace action?[93] The more time that has passed between the Actor

90. *See supra* note 79 and accompanying text; *see also* Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968).

91. *See, e.g.*, *Lehmann*, 917 S.W.2d at 384 (noting that the plaintiff did not learn of her son's accident until five or ten minutes after it occurred).

92. *Cf.* Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 519, 523 (6th Cir. 2008) (reversing summary judgment for the defendant in a direct (as opposed to third-party) retaliation case where the employer terminated the employee on the same day that it learned of the employee's EEOC charge).

93. *See, e.g.*, Thomas v. Am. Horse Shows Assoc., No. 97-CV-3513 JG, 1999 WL 287721 at *13–14 (E.D.N.Y Apr. 23, 1999) (granting summary judgment for the defendant on a third-party retaliation claim where eighteen months passed between the plaintiff's sister engaging in protected activity and the alleged adverse action toward the plaintiff); *see also* Zuk v. Onondaga Cnty., No. 5:07-CV-732 (GTS/GJD), 2010 WL 3909524, at *1, *18 (N.D.N.Y. Sept. 30, 2010) (rejecting the plaintiff's third-party retaliation claim because, inter alia, the plaintiff experienced adverse action approximately eight

engaging in a protected activity and the Target receiving some adverse action, the less likely it is that the Actor's conduct caused the Target's adverse action.

Finally, courts could apply the relational proximity factor from the NIED bystander framework to define the scope of permissible third-party retaliation claims. As noted above, in the NIED context, courts examine the relationship between the individual who suffered from some physical injury and the plaintiff who suffered mental harm from exposure to this other person's physical injury.[94] Notably, courts analyzing this factor for purposes of NIED claims have adopted differing views regarding precisely how close these two parties must be before the court will allow the NIED claim to proceed.[95] Most jurisdictions require fairly close ties between the mentally injured plaintiff and the individual who suffered physical harm—generally something akin to immediate family.[96]

Just as with the other two criteria from the NIED bystander framework, this relational proximity component also could help courts determine the viability of a plaintiff's third-party retaliation claim. A court would look at the nature of the relationship between the Actor who engaged in the protected activity and the Target who later received adverse action. Were these two parties immediate family: spouses, siblings, or parent and child?[97] Or were they mere casual workplace acquaintances?[98] The closer the relationship between the plaintiff-Actor and the third-party-Target, the more likely a court would be to allow the plaintiff's third-party retaliation claim to proceed.

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years after his future fiancée engaged in protected activity).

94. *See Dillon*, 441 P.2d at 920 ("[C]ourts will take into account . . . [w]hether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it."); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 47 (Tentative Draft No. 5, 2007) (finding liability for negligent infliction of emotional disturbance only where the person suffering emotional distress "is a close family member of the person suffering the bodily injury").

95. *See* Green, *supra* note 69, at 1097–98 (discussing the debate among courts regarding the required "closeness of the relationship" between the plaintiff and the injured third-party victim for purposes of an NIED claim).

96. *See id.* (noting that many American jurisdictions adhere to a rule that limits recovery to relatives residing in the same household or to other immediate family members, such as parents, siblings, children, or grandparents of the injured third-party). *But see* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. e (Tentative Draft No. 5, 2007) ("When defining what constitutes a close family relationship, courts should take into account changing practices and social norms and employ a functional approach to determine what constitutes a family.").

97. *See, e.g.*, Fogleman v. Mercy Hosp., 283 F.3d 561, 564 (3d Cir. 2002) (refusing to allow a third-party retaliation claim where a son claimed to have been terminated due to the protected activities of his father); EEOC v. Nalbandian Sales, 36 F. Supp. 2d 1206, 1210–13 (E.D. Cal. 1998) (permitting a third-party retaliation claim where an employee claimed not to have been rehired in retaliation for protected activity of his sister); Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1118 (W.D.N.Y. 1996) (permitting a third-party retaliation claim where a husband claimed to have been retaliated against for protected activity of his wife).

98. *See, e.g.*, Freeman v. Barnhart, No. C 06-04900 JSW, 2008 WL 744827, at *5, *7, *11 (N.D. Cal. Mar. 18, 2008).

In trying to pin down this criterion in particular, scholars and courts have fretted about the particular types of relationships that should be able to support a third-party retaliation claim. If the third-party retaliation doctrine were truly unlimited by the relationship between the two parties, it would mean that every time an employee engaged in protected activity for purposes of Title VII, her employer would have exposure to a retaliation claim under Title VII for taking adverse action against *any* relative, friend, or acquaintance of this original employee.[99] In this respect, some courts have been wary of applying the third-party retaliation doctrine in cases involving relatively attenuated relationships between the Actor and Target. In *O'Connell v. Isocor Corp.*, for example, the plaintiff claimed third-party retaliation based upon the protected activity of a mere coworker—someone with whom the plaintiff shared little more than the fact that they both worked for the same company.[100] Rejecting the plaintiff's third-party retaliation claim, the court observed that "[i]f the doctrine stretched that far, any employee who is terminated around the time that another employee files a discrimination suit would have standing to sue the employer."[101] In *Morgan v. Napolitano,* the plaintiff stretched this argument in a different direction, claiming retaliation based upon the protected activity of his wife, who was not even employed by the same employer as the plaintiff.[102]

During the oral argument before the Supreme Court in *Thompson*, Justice Alito focused upon these types of concerns regarding the scope of the relationships covered by the third-party retaliation doctrine, inquiring of Thompson's counsel, "Suppose Thompson were not Regalado's fiancé at the time. Suppose they were . . . just good friends . . . . The way the company wanted to get at her was by firing her friend. Would that be enough?"[103] Advocating for what he called a "clear line" in this area, Justice Alito observed, "I can imagine a whole spectrum of cases in which there is a lesser relationship between those two persons, and . . . unless there's a clear line there someplace, this

99. *See* Temm, *supra* note 11, at 878; *see also* Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 654 (6th Cir. 2008), *vacated*, 567 F.3d 804 (6th Cir. 2009) (Griffin, J., dissenting) (criticizing the majority as creating a situation where "[a]ll persons, no matter how loosely related or 'associated' to the person who engaged in protected activity, may sue for retaliation if they can show that adverse action taken against them would 'discourage' the employee who actually engaged in the protected activity from exercising *his* rights").

100. 56 F. Supp. 2d 649, 653–54 (E.D. Va. 1999).

101. *Id.* at 654; *see also Freeman*, 2008 WL 744827, at *7 (rejecting a third-party retaliation claim where the plaintiff "[wa]s not related, even distantly, to the employees who filed complaints," and "[did] not even appear to be close friends with the claimants").

102. No. CIV S-09-2649, 2010 WL 3749260, at *1, *8 (E.D. Cal. Sept. 23, 2010) (finding that a plaintiff may state a claim for third-party retaliation based upon the conduct of his nonemployee lawyer-wife, who represented the plaintiff's coworkers in discrimination suits).

103. *Thompson* Oral Argument Transcript, *supra* note 14, at 11.

theory is rather troubling."[104] Chief Justice Roberts similarly expressed trepidation, inquiring of the Deputy Solicitor General (who was arguing in favor of the Petitioner, Thompson), "How are we supposed to tell, or how is an employer supposed to tell, whether somebody is close enough or not?"[105]

Faced with these types of line-drawing concerns, some scholars and courts have proposed limiting third-party retaliation claims to parties with particular types of relationships: spouses, siblings, parents, and children.[106] However, while one can understand the desire for a hard-and-fast rule regarding the types of relationships that will support third-party retaliation claims, this Article adopts a somewhat different perspective, declining to articulate particular relationships that should (or should not) qualify for protection in the context of a third-party retaliation claim. Indeed, the evolution and complexity of modern familial relationships may stymie any attempt at drawing clear lines in this context. For example, given that spouses likely would qualify for protection under a third-party retaliation framework, one might wonder whether such protection should apply equally to same-sex domestic partners, particularly in a jurisdiction that recognizes same-sex civil unions. Given the large number of couples who now live together prior to marriage,[107] some reasonably might question whether protection should extend to individuals in those relationships—even if the couple has no intention of marrying. Extended family members are living together in increasing numbers;[108] should protection extend to grandparents and children who reside in the same household? It is unlikely that these types of questions could be answered satisfactorily by an opinion that established bright lines regarding the types of relationships eligible for protection under the third-party retaliation doctrine.

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104. *Id.* at 12.

105. *Id.* at 20.

106. *See, e.g.*, Wychock v. Coordinated Health Sys., No. CIV.A. 01-3873, 2003 WL 927704, at *6 (E.D. Pa. Mar. 4, 2003) (stating that the retaliation provision in the ADA allows for third-party retaliation claims only where the plaintiff is "[a] close relative[] of an individual who did in fact engage in a protected activity"); *see also* Temm, *supra* note 11, at 865–66 ("Plaintiffs who have a relationship so close with the employee who took the protected action that deterrence may be presumed, such as spouses, siblings, and parents and children, should be allowed to have a cause of action because of the deterrent effect retaliation would have on the person exercising her rights.").

107. Jeremy Olson, *More Couples Opting for Apartment Before Altar*, CHI. TRIB., Oct. 18, 2010, at 13 (noting an increase nationally to 7.5 million unmarried couples living together in 2010, up from 6.7 million couples in 2009); Janice Shaw Crouse, *Cohabitation Nation: Growing Trend Results in Declining Household Stability*, WASH. TIMES, Nov. 22, 2010, at B1 (noting a dramatic increase of nearly 1000 percent since the 1970s in couples living together without marriage).

108. *See Grandparents Raising Grandchildren: Skipping a Generation*, ECONOMIST, June 16, 2007, at 84 (noting that in 2000, 2.4 million grandparents were raising their children's children); *cf. Reporter's Notebook*, CRAIN'S CLEV. BUS., Sept. 20, 2010, at 27 (discussing nontraditional families as the basis for amending the Family Medical Leave Act, highlighting grandparents who have taken in grandchildren and same-sex partners raising children together).

In this respect, this Article approves of the Supreme Court's election in *Thompson* to "decline to identify a fixed class of relationships for which third-party reprisals are unlawful."[109] To be sure, the Supreme Court is correct that "the significance of any given act of retaliation will often depend upon the particular circumstances."[110] Yet by refusing to provide *any* further guidance on this issue—other than to observe that "firing a close family member will almost always meet the . . . standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so"[111]—the Court missed an opportunity to provide direction to lower courts that will be faced with claims falling between these two ends of the spectrum. While it is true that these cases must be resolved on their facts, lower courts need some roadmap for analyzing these often complex situations.

This is where the application of the NIED bystander theory will play an important role in providing guidance to lower courts. Courts faced with claims of third-party retaliation should examine the relationship between the Actor and Target in light of the *other* NIED criteria mentioned above: spatial proximity and temporal proximity. For example, assume that Tammy Target was demoted after Alice Actor—a mere workplace friend—filed a discrimination claim against their mutual employer. Under an all-or-nothing framework that requires close "family-like" relationships between Actors and Targets, many courts likely would reject a third-party retaliation claim brought under these facts. But this perspective might change if Tammy Target and Alice Actor not only worked for the same employer, but also worked in the same department, for the same supervisor, and this supervisor made the demotion decision. It also might change if Tammy's demotion took place within hours or days of her supervisor learning about Alice's discrimination claim. Suddenly, the employer's conduct seems much more suspicious under section 704(a), despite the otherwise "distant" relationship between Tammy and Alice. By accounting for all of the NIED bystander theory factors—spatial, temporal, and relational proximity—a court could conduct a more nuanced analysis of this claim. The close spatial and temporal proximity in this scenario could raise sufficient suspicion by a court to allow Alice to bring a third-party

109. Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868 (2011). Notably, this stance is consistent with the EEOC's view that Title VII should "prohibit retaliation against someone so closely related to *or associated with* the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." EEOC, COMPLIANCE MANUAL, *supra* note 30, § 8-II(C)(3) (emphasis added).

110. *Thompson*, 131 S. Ct. at 868 (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006)) (internal quotation marks omitted).

111. *Id.*

retaliation claim, despite the attenuated relational proximity between her and Tammy.

Thus, one significant benefit of applying this three-factor NIED bystander framework to third-party retaliation claims is that it gives courts a clear outline for analyzing these claims, while still leaving them with sufficient flexibility to apply the facts within each part of the framework. Rather than having to come up with bright-line rules regarding the required distance in the workplace between the Target and the Actor, or regarding how much time can pass between the Actor's protected activity and the Target's experiencing adverse action, or regarding the type of relationship that must exist between the Actor and Target, courts would have leeway to examine the totality of a situation, using these three factors as a framework. In this way, the NIED bystander framework would allow courts to take into account all of the circumstances surrounding an employee's third-party retaliation claim before deciding whether to permit that claim to proceed.

Moreover, in addition to providing more flexibility to courts analyzing third-party retaliation claims, this framework could help to placate the concerns expressed by employers, courts, and other commentators about creating a slippery slope of liability for employers in this area. This slippery slope flows from the reality that, in the modern workplace, employers often act in prophylactic ways to avoid violating the law—taking measures not otherwise required by law in order to minimize their potential liability. Among other measures, employers will adopt extra precautions before taking adverse action against employees who fall within Title VII's protections.[112] For example, an employer might hesitate before terminating a particular employee who happens to be female or Hispanic. In the same respect, the employer might think twice before demoting a particular worker who previously complained of workplace discrimination. Even where the termination or demotion has nothing to do with the employee's gender or nationality or previous discrimination complaint, savvy employers know that it might cost them well into the six figures to defend against a Title VII discrimination or retaliation suit—even where the suit ultimately proves to be without merit.[113] By more thoroughly articulating the factors that lower courts

112. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 705 (2003) (acknowledging that Title VII enforcement litigation can provide a foundation for increased compliance with the law, but noting that it also leads to the "adoption of merely symbolic reform"); Audrey J. Lee, Comment, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 488 (2005) ("[E]mployers' heightened awareness of the legal ramifications for discriminatory transgressions—learned through litigation, among other means—suggests that employers will be increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging.").

113. According to one recent study, it costs, on average, over $120,000 simply to defend against a wrongful discharge claim, not including any costs of settling the claim or any judgment that a

should examine in evaluating a third-party retaliation claim, the Supreme Court would allow employers to better predict their potential exposure from taking (presumably legitimate) adverse action against an employee.

2. *Application of the Bystander Framework to the* Thompson *Case*

How would this framework affect the *Thompson* case? If the Supreme Court applied these NIED bystander factors to Thompson's claim, would the Court still find a viable third-party retaliation claim? First, in terms of spatial proximity, both Regalado and Thompson worked as quality-control engineers for North American.[114] While North American was a fairly large company, with approximately 500 to 600 employees by 2003 (the year that Thompson was terminated),[115] both Regalado and Thompson worked in the technical department, which was "a small department" according to North American's head of human resources at the time of Thompson's suit.[116] Moreover, both Regalado and Thompson reported to the same supervisors,[117] further strengthening this argument of close spatial proximity.

In terms of temporal proximity, the facts also weigh in favor of permitting Thompson to sue. According to Thompson's complaint, Regalado filed her gender discrimination charge with the EEOC in September 2002, and the EEOC notified North American of this charge on February 13, 2003.[118] Slightly more than three weeks later, on March 7, 2003, North American terminated Thompson's employment, allegedly for performance-based reasons.[119] Unlike those cases where many months (or even years) may have elapsed between an Actor engaging in protected activity and a Target receiving adverse action from an employer,[120] this relatively short time span would likely raise a court's suspicions about a link between North American learning of Regalado's protected activity and then making the decision to terminate Regalado's fiancé.

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defendant may ultimately have to pay. *See* Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondent at 2, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) (No. 09-291), 2010 WL 4339890 at *2; *see also* Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 340 (2008) ("Some estimate that an employer may spend close to $100,000 to defend against an individual claim of discrimination, and more than $460,000 to defend against a discrimination class action." (footnote omitted)).

114. Memorandum of Law Opposing Defendant's Motion for Summary Judgment, Thompson v. N. Am. Stainless, LP, 435 F. Supp. 2d 633 (E.D. Ky. 2006) (No. 3:05-02-JMH), 2006 WL 1493341 at *6 (hereinafter *Thompson* Plaintiff's Memorandum).

115. *See id.* at 2, 4.

116. *Id.* at 7, 9.

117. *Id.* at 2, 8.

118. *See* Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 806 (6th Cir. 2009).

119. *See id.*

120. *See supra* note 93.

Finally, the relational proximity between Thompson and Regalado likely would pass muster under this NIED bystander framework. To be sure, many third-party retaliation cases involve relationships closer than that in this case, such as where a child is fired in retaliation for the acts of a parent,[121] or where a husband is punished in retaliation for the acts of his wife.[122] But if the purpose of a court's inquiry under this factor is to determine whether the relationship between the Actor and Target is such that the Actor reasonably would be deterred from engaging in protected activity based upon adverse effects for the Target, then the relationship between Thompson and Regalado would likely suffice. Certainly, a court reasonably could assume that an individual might have second thoughts about complaining of workplace discrimination if she thought that such a complaint might lead to adverse action for her soon-to-be spouse.[123]

B. A Further Limit on This Proposed Framework: Permitting Only the Actor to Sue

Using the NIED bystander framework to define the scope of the third-party retaliation doctrine could go a long way toward balancing the desire to prevent employers from engaging in third-party retaliation, while still imposing reasonable limits on the scope of this doctrine. However, in addition to applying the NIED bystander framework to these claims, courts should adopt an additional step to define the scope of the third-party retaliation doctrine. Specifically, courts should mandate that only the *Actor*—the party who actually engaged in some protected activity—will have the power to bring a third-party retaliation claim. The party who merely was the Target of the employer's subsequent ire, but who did not personally engage in any protected activity, should not be permitted to sue.

Admittedly, the Supreme Court expressly rejected this approach in its recent *Thompson* decision. In analyzing the provision of Title VII that provides that a "civil action may be brought . . . by the person claiming to be aggrieved,"[124] the Court held that being a "person . . . aggrieved" required something more than mere Article III standing.[125] However, the Court declined to adopt North American's view that a "person . . . aggrieved" for purposes of this provision could be only the individual who engaged in protected activity, finding no basis in the text

121. *See* Fogleman v. Mercy Hosp., 283 F.3d 561, 564 (3d Cir. 2002).

122. *See* Holt v. JTM Indus., Inc., 89 F.3d 1224, 1225 (5th Cir. 1996).

123. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868 (2011). ("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."); *see also* Temm, *supra* note 11, at 889–91 (asserting that a deterrent effect may exist, but should not be presumed to exist, where the Actor and Target are engaged to be married).

124. 42 U.S.C. § 2000e-5(f)(1) (2010).

125. *Thompson*, 131 S. Ct. at 869–70.

of the statute or in the Court's past practice for construing this phase in this manner.[126] Rather, the Court interpreted this "person . . . aggrieved" limitation using its "zone of interests" doctrine—a doctrine commonly applied in administrative law.[127] In essence, this doctrine will bar a plaintiff from suing if her "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."[128] In other words, in applying this "zone of interests" doctrine, a court will ask itself whether a particular plaintiff falls within the class of individuals whom Congress intended to protect when it enacted a particular statute. Applying the "zone of interests" doctrine to the circumstances here, the Court held that a plaintiff should be able to bring a third-party retaliation claim if she has an interest that Congress arguably sought to protect in enacting Title VII.[129] According to the Court, Thompson fell into that category, because (1) he was an employee of North American, (2) the purpose of Title VII was to protect employees from unlawful action by employers, and (3) North American intended to harm Regalado, the Actor, by taking action against Thompson here.[130]

While the Supreme Court's holding in this respect is appealing in its simplicity, the Court's argument ignores various nuances regarding the nature of a Title VII retaliation claim and the impact this holding could have on employers more generally. In fact, several justifications would support holding that third-party retaliation claims, while permissible, should be brought only by the party who actually engaged in protected activity and not by the non-Actor "Target" of the employer's retaliation.

First, mandating that only the Actor can bring a third-party retaliation claim would be consistent with the purpose of the retaliation doctrine more generally. As previously noted, Congress included this prohibition on retaliation within Title VII to ensure that employees would not be chilled in exercising their rights under Title VII.[131] In application, however, Congress's mission seems to have been interpreted somewhat more specifically. Title VII does not bar employers from engaging in *any* "retaliatory" action in response to employee protected activity. Rather, the Supreme Court has made clear that section 704(a) bars "only those [actions] which courts believe would chill a reasonable person from coming forward with a complaint."[132] Specifically, a

126. *See id.* at 869.

127. *See id.* at 869–70.

128. *Id.* at 870 (quoting Clark v. Sec. Indus. Ass'n, 479 U.S. 338, 399–400 (1987)).

129. *Id.* (quoting *Clark*, 479 U.S. at 399–400).

130. *Id.*

131. *See supra* note 10 and accompanying text.

132. Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 718 (2007) (footnote omitted); *see also* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 61 (2006) ("The anti-retaliation

retaliation plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[133] In describing the purpose and scope of section 704(a) in this manner, the Supreme Court seems to support the idea that Congress's primary concern in enacting this law was with protecting the rights of the employee who *actually engaged* in protected activity and ensuring that she is not deterred from pursuing this behavior, as opposed to protecting the rights of those employees who might be *associated* with this Actor.[134] Congress wanted to protect the individuals who actually object to perceived discriminatory conduct in the workplace.

Notably, while the purpose of Title VII's retaliation provision may be to encourage individuals to report workplace discrimination, in reality employees frequently decide whether or not to come forward with these types of concerns only after weighing the costs and benefits of doing so.[135] An Actor will engage in protected activity only if she thinks that the potential benefits outweigh the potential costs to her.[136] These costs could include not only the harm suffered by the Actor personally, but also the harm to her friends and coworkers in the workplace. In other words, an employee may decide not to report workplace discrimination if she believes that her employer will respond by taking negative action against one of her coworkers. The *Actor* is the one who will make this calculation—who will decide whether or not to come forward with concerns about discrimination, based in part upon how she thinks her employer may react. Accordingly, it makes sense to let the *Actor* bring a third-party retaliation claim when an employer does respond adversely to the Actor's behavior, since the Actor is the one whose protected activity the courts want to encourage.[137]

In addition, allowing the Actor to bring the third-party retaliation claim reflects the social reality that the Actor may need this type of legal protection to a far greater degree than the Target. A wealth of social science evidence has demonstrated that individuals who complain of discrimination suffer a broad range of negative consequences, both

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provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.").

133. *Burlington N.*, 548 U.S. at 63 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (internal quotation marks omitted).

134. *See supra* notes 21–25 and accompanying text.

135. *See* Brake, *supra* note 10, at 36–37.

136. *See id.*

137. *See* Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 816 (6th Cir. 2009) (arguing that barring Thompson (the "Target") from suing under section 704(a) would "not undermine the anti-retaliation provision's purpose because retaliation is still actionable, but only in a suit by a *primary actor* who engaged in protected activity" (emphasis added)).

internally and externally.[138] Complaining about discrimination can threaten an individual's sense of control and invulnerability, undermining her belief that the world is a "just place."[139] The tendency for employees who are exposed to discrimination—particularly women and racial minorities—is to "look inward and blame themselves" for unfair treatment, rather than to attribute a negative situation to discrimination.[140] Moreover, a significant body of social science evidence has documented the severe social penalties incurred by individuals who complain about discrimination.[141] Indeed, those who do step forward to report discrimination often find themselves labeled as "troublemakers" or as "hypersensitive"—even when discrimination has, in fact, occurred.[142] In this way, an Actor may suffer significant social and psychological costs from engaging in protected activity, even when she was justified in taking this step. In the wake of this protected activity, the Actor may experience the ire of her employer, hostility from other coworkers, and internal doubts about engaging in this behavior.

Thus, there are significant pressures, both internal and external, that may prevent individuals from reporting workplace discrimination. Even for an employee who fervently believes she has suffered from workplace discrimination, the decision to step forward and expose this illegality may be rife with conflict. Accordingly, this potential Actor may need some extra assurance that reporting will be the right move. She may need the additional comfort of knowing that, in the event of any negative ramifications from her employer following this report, she will have the option to sue: that even if the employer's adverse action is directed at some third party, the *Actor* will be able to respond to this adverse action. For an employee wrestling with how to respond to perceived workplace discrimination—worrying about how her employer or coworkers will respond to this charge—simply knowing that *another* employee might be able to sue if the employer retaliates against some third party might not be sufficient comfort. Only by keeping the cause of action with the individual who engages in the protected activity do we sufficiently encourage such Actors to step forward.

By holding that only the Actor can sue, the Court would strike the proper balance between discouraging employers from engaging in this type of indirect retaliation, while providing employers with sufficient certainty regarding the legal landscape to allow them to make important business decisions. An employer engaging in third-party retaliation would remain liable under Title VII. However, rather than face an

138. *See infra* notes 139–43 and accompanying text.
139. Brake, *supra* note 10, at 28.
140. Winslow, *supra* note 10, at 233.
141. *See* Brake, *supra* note 10, at 32–36.
142. *See id.* at 33; *see also* Fink, *supra* note 113, at 341; Winslow, *supra* note 10, at 234.

endless number of potential lawsuits for every adverse action taken in the workplace against any individual who has any relationship to an Actor, the employer simply would face potential suits brought by the Actor.

III. Addressing Potential Criticisms of This Proposed Framework

Despite the compelling arguments in favor of limiting the third-party retaliation doctrine in the manner discussed above, these limits understandably might raise some concerns among those who support a different view of this doctrine. In fact, both employers and employees might raise objections to this proposed framework because while it potentially limits the scope of the third-party retaliation doctrine in some contexts—something to which employees might object—it also carves out areas where third-party retaliation claims clearly would be deemed viable, to the likely chagrin of many employers. This Part fleshes out some of the common objections raised in response to the types of limits articulated above (particularly the requirement that only an *Actor* can assert a third-party retaliation claim) and responds to those objections.

A. Will the Requirement That Only an *Actor* Can Assert a Third-Party Retaliation Claim Create Problems with Respect to the "Adverse Action" Requirement for Retaliation?

As noted above, in order to prevail in asserting a retaliation claim under Title VII, a plaintiff typically must show, among other things, that she suffered from some adverse action, and that this adverse action was causally connected to her engaging in some protected activity.[143] Accordingly, in order for the Actor to be able to sue for retaliation based upon adverse action to a *coworker* (the Target), an Actor would have to show that this negative treatment of a coworker also constituted adverse action as to *her*. Those opposed to permitting third-party retaliation claims (that is, employers) may assert that interpreting "adverse action" in this manner goes beyond the permissible bounds of Title VII precedent.

Fortunately, the Supreme Court's own prior retaliation jurisprudence would support this somewhat expansive interpretation of "adverse action." The Court has indicated that courts should define "adverse" fairly broadly, including in the Court's recent decision in *Burlington Northern*.[144] Specifically, in defining what constitutes adverse action for purposes of a retaliation claim, the Supreme Court has instructed courts to inquire whether an action is "materially adverse," meaning that it "well might have dissuaded a reasonable worker from making or

143. *See supra* note 15 and accompanying text.

144. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68–69 (2006).

supporting a charge of discrimination."[145] In other words, courts will bar as retaliatory those actions that chill the types of behavior that Title VII was designed to protect. Applied to the context of a third-party retaliation claim, a court would determine whether harm to a Target could constitute adverse action toward the Actor by asking: "If the Actor had known that the consequences for her protected activity would be this negative impact on the employment of her *coworker,* would she still have proceeded in the same way? Would she still have filed a charge of discrimination against the employer, or otherwise objected to discrimination in the workplace?"

In some third-party retaliation cases, this question will be fairly easy to answer, as it may be obvious that negative treatment directed toward a Target would likely alter the conduct of a coworker-Actor. For example, if Harry Husband and Wendy Wife work for the same employer and Wendy Wife is demoted after Harry Husband files a discrimination charge, this demotion readily could be viewed as an adverse action affecting *both* Wendy Wife and Harry Husband. Harry Husband likely would suffer negative financial consequences from Wendy Wife's demotion, due to their now reduced overall household income. Harry Husband also likely would be directly affected by the emotional impact of Wendy Wife's demotion, and would play a large role in providing emotional support to Wendy Wife in the wake of this disappointment. For these reasons, Wendy Wife's demotion likely would have the very chilling effect on Harry Husband that Title VII's retaliation clause was designed to prevent. Harry Husband understandably would be less likely to complain about workplace discrimination if he feared that Wendy Wife would suffer negative consequences of this nature. Thus, a court might well view Wendy Wife's firing as an adverse action to *Harry Husband.*[146]

Stepping outside of this fairly common sense example—such as where the Actor and Target are mere workplace friends—it may be more difficult to see how adverse action directed toward one employee (the Target) could be seen as adverse action toward the Actor as well. The impact of this action on the Actor is much less direct. Yet there are various legal or doctrinal bases upon which courts could rely to deem a Target's termination or demotion to be an adverse action with respect to an Actor.

First, the Supreme Court has demonstrated a general trend of defining Title VII's retaliation provision in a rather broad manner in order to effectuate the statute's remedial purpose.[147] Indeed, in the

145. *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (internal quotation marks omitted).

146. Of course, Wendy Wife's firing would remain an adverse action to her as well.

147. *See* Long, *supra* note 10, at 947–75; Winslow, *supra* note 10, at 215; *cf.* Michael J. Zimmer, *A*

Court's recent decision in *Thompson*, it reaffirmed this broad view of Title VII's retaliation provision, noting that "Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct."[148] This flexible interpretation of the retaliation doctrine has included adopting a broad definition of "adverse action." In *Burlington Northern,* the Supreme Court held that actionable retaliation would not be limited to employment-related activities, or to those affecting the terms and conditions of employment.[149] Rather, the Court held that Title VII's antiretaliation provision could reach beyond the employee's workplace.[150] Moreover, the Court defined the types of actions that could constitute "adverse actions" for purposes of Title VII. While not every retaliatory action by an employer necessarily would implicate section 704(a), this provision would bar retaliatory actions that "a reasonable employee would have found . . . materially adverse,"[151] meaning that the conduct "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[152] In other words, as noted above, the court will ask whether the employer's conduct was sufficiently serious or harmful so as to deter a reasonable employee from engaging in the type of conduct that Title VII is designed to protect.

Significantly, in examining whether conduct by an employer rises to this level of deterring an employee from engaging in her Title VII rights, the courts do not simply ask what the average, "reasonable" employee would do when faced with certain conduct by an employer. Rather, as *Burlington Northern* directs, the courts will examine the employee's actions from the perspective of a "reasonable person in the plaintiff's position, considering all the circumstances."[153] According to at least one commentator in this area, this standard "is almost certainly broad enough to include a situation in which an employer discharged or otherwise took action against a friend or loved one of a party who had opposed discrimination in the workplace,"[154] because the knowledge that an employer would take such action against a friend or loved one "would undoubtedly dissuade many reasonable employees from making or supporting a charge of discrimination."[155]

Pro-Employee Supreme Court?: The Retaliation Decisions, 60 S.C. L. REV. 917, 918 (2009) (asserting that the Supreme Court has adopted a pro-employee stance in retaliation cases by adopting a "pragmatic" approach to judicial decisionmaking in such cases).

148. Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 864 (2011).

149. *Burlington N.*, 548 U.S. at 53–54 (2006).

150. *Id.*

151. *Id.* at 68.

152. *Id.* (internal quotation marks omitted).

153. *Id.* at 71 (internal quotation marks omitted).

154. Long, *supra* note 10, at 980.

155. *Id.*

In this vein, while the full Sixth Circuit rejected the plaintiff's third-party retaliation claim in *Thompson*, one concurring judge emphatically supported the notion that the plaintiff could have brought suit against North American based upon the company's termination of her fiancé, observing that "[i]n my view, 'discrimination against' an employee may include hurting that employee's relative or friend, and imposing such a hurt would be unlawful if it is imposed 'because [the employee] has opposed any practice made an unlawful employment practice [under Title VII].'"[156] Thus, this judge opined that "[the] defendant's termination of Thompson potentially could be deemed an 'adverse employment action against her.'"[157] In this judge's view, a reasonable employee might well be dissuaded from engaging in protected activity if she knew that such conduct would bring negative consequences in the workplace for her beloved fiancé.

Social science evidence also supports viewing negative conduct directed toward a Target not only as adverse action to that employee, but also as adverse action with respect to an Actor. Professor Cynthia Estlund has described the extent to which working together as part of the same team can heighten feelings of interconnectedness and loyalty.[158] According to Estlund, "we spend much of our time in a social environment that, to varying degrees, is governed by norms of civility and reciprocity and fosters experiences of cooperation and feelings of solidarity, trust, and mutual responsibility."[159] Our workplace becomes a minicommunity, with its own powerful set of rules and relationships. Therefore, Estlund observes, "working together in this environment also engenders personal feelings of affection, sympathy, empathy, and friendship among coworkers."[160] Rather than working as isolated automatons, holding each other at arms' length, the modern workplace can foster significant positive relationships and emotions among employees. If Estlund's observations are true, then they support the idea that harm to one employee in a workplace also might cause harm to others in the workplace—particularly those who are related or who share an especially close relationship. Adverse action toward one employee could breach this sense of community, causing pain to other employees who have ties to the harmed individual. The adverse action to one individual may be experienced by many others.

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156. Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 816 (6th Cir. 2009) (Rogers, J., concurring) (citation omitted).

157. *Id.*

158. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9 (2000); *see also* Long, *supra* note 10, at 965.

159. Estlund, *supra* note 158, at 12.

160. *Id.*

B. WHAT IF THE ACTOR DOES NOT WANT TO SUE?

In addition to concerns about stretching the definition of "adverse action," another potential criticism of allowing only the Actor to bring a third-party retaliation claim involves whether one can be sure that an Actor would pursue this type of claim. According to the framework advocated in this Article, the Target of an employer's retaliatory behavior—the individual who actually has suffered from some concrete harm, and thus likely has the most obvious incentive to sue—would be barred from bringing a third-party retaliation claim. Rather, she would have to rely upon the Actor to bring this claim. Yet those who support permitting (and expanding) the third-party retaliation doctrine (that is, employees) might wonder how we can be sure that an Actor will go to the trouble of suing. While this might not be an issue in some scenarios, such as where the Actor and Target are spouses or parent and child, it might be difficult to persuade other Actors to sue—such as where the Target is a mere workplace friend or casual acquaintance of the Actor. Few Actors might be willing to undertake the rigors of litigation out of a mere altruistic concern for the coworker who was harmed as a result of the Actor's protected activity.[161] Thus, a significant aspect of the framework proposed herein involves motivating Actors to bring these retaliation claims.

Without a doubt, the most effective way of encouraging an Actor to sue based upon harm done to a Target would be to allow the Actor to receive some tangible benefit from the suit. While an Actor's options might be fairly limited in this respect—indeed, the Actor may have suffered minimal damages herself as a result of adverse action directed toward the Target—some Actors might be able to assert claims for intentional infliction of emotional distress based upon an employer's unlawful retaliation toward a Target. In *Gore v. Trustees of Deerfield Academy,* for example, the plaintiff claimed that the defendant, an independent secondary school where the plaintiff had worked, denied admission to the plaintiff's daughter in retaliation for the plaintiff's complaints regarding unlawful discrimination.[162] In response to this alleged retaliation directed at plaintiff's *daughter*, the plaintiff claimed *personal* damages for emotional distress.[163] The court permitted this claim to proceed, finding a link between the plaintiff's complaints and the defendant's denial of admission to the plaintiff's daughter sufficient to

161. Justice Scalia seemed to recognize this potential problem during the oral arguments in *Thompson*, asking—in a somewhat different context than that raised by a third-party retaliation claim—"why would [an Actor] bring a lawsuit if these people really are nothing to her? She just has a guilt of conscience or something? I mean, I don't see why she would bring the lawsuit. If it was her fiancée, maybe, but this . . . ." *Thompson* Oral Argument Transcript, *supra* note 14, at 31–32.

162. 385 F. Supp. 2d 65, 66–67, 70 (D. Mass. 2005).

163. *Id.* at 70.

withstand the defendant's motion for summary judgment.[164] Thus, while the bulk of the damages associated with a third-party retaliation claim likely would go to the Target who suffered adverse action, an Actor potentially could receive her own monetary recovery if the facts of the case supported awarding emotional distress damages to the Actor.[165]

Even without a financial stake in the outcome of a retaliation suit, however, an Actor still likely would proceed with a third-party retaliation claim in most cases (at least, in those cases that would pass muster under the NIED bystander framework). Under this framework, as noted above, courts would examine the spatial distance between the Actor and Target;[166] the time lag between the Actor's protected activity and the Target's receipt of adverse action;[167] and the relationship between the Target and Actor.[168] Each of these criteria might play a role in encouraging an Actor to bring such a claim. For example, an Actor who worked in close spatial proximity with a Target—such as one who worked on the same team as the Target and/or frequently collaborated with the Target—likely would experience greater personal ire upon learning of the Target's termination or demotion. This Actor therefore would be more likely to sue. Similarly, an Actor who discovered that a Target was fired within hours of the employer learning of the Actor's protected activity might more readily shoulder responsibility for this unfortunate result and might feel compelled to help alleviate this burden by bringing a suit. Finally, an Actor with close relational proximity to a Target, such as the Target's spouse or immediate family member, certainly would be hard-pressed to sit idly by in the wake of a loved one's adverse treatment at work. A proper application of the NIED bystander factors would mean that Actors whose claims could satisfy this framework likely would not need much encouragement to sue; they would be those Actors with the closest links to the adverse action in the first place.

In this respect, the concern about the Actor's reluctance to sue might "prove too much" in many cases. As noted above, the Supreme Court has held that an "adverse action" for purposes of the retaliation doctrine is one that would dissuade a reasonable worker in the plaintiff's

164. *Id.* at 73–74. Significant to the court's ruling, however, was the fact that the defendant had presumed for purposes of the summary judgment motion a causal connection between the plaintiff's protected activity and the defendant's denial of admission to the plaintiff's daughter.

165. In addition, jurisdictions seeking to encourage Actors to sue could enhance the financial incentives for Actors to do so by enacting legislation that would permit individuals to act as "private attorneys general" with respect to employer retaliation, whereby such individuals could collect some portion of any damages, fines, or penalties that result from a successful suit. For an example of such legislation, see CAL. LAB. CODE §§ 2698–2699 (2010).

166. *See supra* notes 86–89 and accompanying text.

167. *See supra* notes 90–93 and accompanying text.

168. *See supra* notes 94–98 and accompanying text.

position from making or supporting a charge of discrimination.[169] The Actor must perceive some harm before she can claim to have suffered retaliation by an employer. Accordingly, the argument that an Actor might need to be *persuaded* to sue based upon an alleged harm to a coworker undercuts the notion that the *Actor* has been harmed by this conduct. In other words, an Actor who lacks the motivation to object to harm to a coworker arguably would not have changed her *own* behavior as a result of such conduct—including her decision to engage in protected activity in the first place.[170]

The point is that it might not be necessary to find a financial incentive to encourage Actors to sue for harms done to Targets. The bystander framework may create equally powerful incentives that will motivate Actors to litigate these claims. By using the factors discussed above to require various types of closeness between the Actor and the Target, the bystander framework attempts to ensure that those Actors who have sufficient ties to Targets will pursue third-party retaliation claims.[171]

C. Assuming That the Actor Does Sue, Can the Actor Obtain Adequate Relief for the Target?

An additional critique of allowing only the Actor to bring a third-party retaliation claim involves the relief available to the Actor who brings such a suit. Those opposed to implementing this type of limit on who can sue (again, employees) might question whether the Actor will be able to secure meaningful relief for the Target who has been fired, demoted, or has had her pay cut. Thompson's attorney made this very assertion during oral arguments before the Supreme Court: When asked why Regalado had not brought the claim in this case, Thompson's attorney cited the concern that "this Court's Article III jurisprudence

169. *See supra* notes 51–53 and accompanying text.

170. Moreover, even if an Actor declined to sue based upon adverse action to the Target, the EEOC still could bring a retaliation claim here. Title VII not only authorizes private individuals to sue based upon perceived violations of this statute, but also permits the EEOC to bring its own suits and to seek a broad range of relief, including injunctions, reinstatement, back pay, compensatory damages, and punitive damages. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 286 (2001) (noting that Congress amended Title VII in 1972 to authorize the EEOC to bring its own actions, and observing that those amendments "created a system in which the EEOC was intended to bear the primary burden of litigation"); *see also* EEOC, Compliance Manual, *supra* note 30, § 2-V(C) ("An EEOC Commissioner may file a charge with the Commission under Title VII or the ADA"). Many Actors who might be reluctant to engage in full-blown litigation likely would be much more willing simply to notify the EEOC of concerns regarding unlawful retaliation, presumably allowing the EEOC to take on the litigation if it found sufficient evidence of third-party retaliation.

171. In addition, as discussed further below, in many cases a Target may be able to bring her own retaliation suit based upon the Target's own protected activity. *See infra* notes 187–94 and accompanying text.

would have precluded her from getting any remedy."[172] While such concerns are not entirely unfounded, the Actor should be able to make the Target whole in most cases.

Perhaps the most obvious remedy that many Targets would desire (at least, those who have been terminated or demoted due to a friend or family member's protected activity) would be reinstatement to their previous positions. Therefore, one might question whether an Actor suing for third-party retaliation could obtain this type of relief for a Target: whether the Actor could seek the reinstatement or promotion of *someone else*. In fact, there is a strong basis for permitting Actors to obtain this type of relief under Title VII itself. The very text of the statute authorizes a court in a Title VII case to award "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay," as well as "any other equitable relief as the court deems appropriate."[173] The Supreme Court has stated that a central purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[174] Thus, the Court has held that this remedial language within Title VII grants the federal courts "broad equitable discretion" to take appropriate steps to remedy workplace discrimination.[175] Certainly, a court exercising this broad statutory discretion could order relief not just for the Actor-plaintiff, but also for the Target who suffered adverse action. Moreover, as various courts have observed, reinstatement, where feasible, is the preferred equitable remedy under Title VII.[176] Thus, courts should be particularly willing to order the reinstatement of an employee who was terminated due to a coworker's protected activity.

Case law under the National Labor Relations Act ("NLRA") provides further support for allowing an Actor-plaintiff to obtain relief

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172. *Thompson* Oral Argument Transcript, *supra* note 14, at 4–5; *see* Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 822 n.5 (6th Cir. 2009) (Moore, J., dissenting) ("Regalado's ability to sue in this matter does not solve the instant problem because the relief Regalado would be able to seek would appear to differ substantially from the relief that Thompson can seek . . . ."); *see also* Long, *supra* note 10, at 980 (questioning whether a suit by the Actor could obtain appropriate relief for a Target in most cases).

173. 42 U.S.C. § 2000e-5(g)(1) (2010).

174. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

175. Franks v. Bowen Transp. Co., 424 U.S. 747, 763 (1951) (citations omitted); *see id.* (examining legislative history of Title VII and finding "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution"); *see also* Brief for United States as Amicus Curiae on Petition for Writ of Certiorari at 1, 12, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) (No. 09-291), 2010 WL 2101919 at *1, *12 ("[I]f Regalado had brought such a suit and established a violation, the district court could have used its broad equitable power to fashion an appropriate remedy, which could have included recompense for [Thompson].").

176. *See, e.g.*, Valentin-Almeyda v. Mun. of Aguadilla, 447 F.3d 85, 105 (1st Cir. 2006); Bruso v. United Airlines, Inc., 239 F.3d 848, 861 (7th Cir. 2001); Caudle v. Bristow Optical Co., 224 F.3d 1014, 1020 (9th Cir. 2000); *see also* Long, *supra* note 10, at 981.

for a third-party Target. The Supreme Court has indicated that jurisprudence developed under the NLRA can serve as a guide for interpreting remedies under Title VII as well.[177] Under the NLRA, supervisory employees are not deemed "employees" entitled to protection under the statute.[178] Yet where an employer has terminated a supervisory employee in retaliation for a family member's protected union activities, the courts consistently have supported the National Labor Relations Board's decision to award reinstatement or other appropriate relief to this supervisory employee.[179] As one court observed:

> While it is uncontestably true that the Act does not protect a supervisor from being discharged for engaging in concerted activity, this does not deprive the [National Labor Relations] Board of the authority to order the reinstatement of a supervisor whose firing resulted not from her own pro-union conduct, but from the employer's efforts to thwart the exercise of section 7 rights by protected rank-and-file employees.[180]

In other words, even though supervisory employees—like the Target in a third-party retaliation case—would not otherwise be protected under the relevant statute, they can receive relief from the court.

Providing relief to the otherwise unprotected supervisory employee in the NLRA context serves a similar purpose to that which allows an Actor to obtain relief for a Target in a third-party retaliation case. In the NLRA context, one court observed that reinstating the supervisory employee would protect the rights of covered, nonsupervisory employees "by assuring them that they need not fear that the exercise of their rights will give the company a license to inflict harm on their family."[181] The same argument could apply under Title VII's retaliation provision: Allowing the restatement of the Target in a suit by an Actor ensures other employees that their employer will not have free reign to respond to their protected activity actions by retaliating against friends and family in the workplace.

During the oral argument in *Thompson*, Justice Breyer challenged the idea that Regalado (the Actor) could not obtain relief for Thompson (the Target) via her own retaliation suit:

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177. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982) ("The principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII." (citation omitted)); *see also* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 431 (2010).

178. 29 U.S.C. § 152(3) (2010).

179. *See Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 407 (3d Cir. 1990) (listing cases in which courts have recognized the power of the National Labor Relations Board to order the reinstatement of a supervisor discharged due to the protected activities of nonsupervisory employees).

180. *Id.* at 406.

181. *Id.* at 409.

> Why couldn't she bring this suit? And she says, I was discriminated against because they did A, B, C, D to him, and the remedy is, cure the way in which I was discriminated against. And to cure that way, you would have to make the man whole in respect to those elements that we're discriminating against.
>
> Do you give him back pay? Do you restore him? You do everything you would normally have to do because otherwise, she is suffering the kind of injury, though it was to him, that amounts to discrimination for opposing a practice. What's wrong with that theory?[182]

Drawing analogies to trust law, Justice Breyer inquired, "[I]f you're a trustee, you certainly can sue to get the beneficiary put back. There are dozens of cases where you can sue to get somebody else paid back money, and—and why isn't this one of them?"[183]

Thus, there is a strong basis for finding that an Actor who brings a third-party retaliation claim could obtain relief for a Target. However, an additional layer of protection exists for Targets in these cases: If a Target is not satisfied with the relief that an Actor obtains in her third-party retaliation suit, the Target in most cases may be able to bring a retaliation suit of her *own*. As noted above, most Targets will experience adverse treatment in the workplace not only because of some passive relationship to the protected activity of a coworker.[184] Rather, most Targets will have played some *active* role in the coworker's protected activity, whether by assisting in the filing of the Actor's discrimination charge or participating in the investigation or litigation of that charge.[185] As the Sixth Circuit recently noted in its decision in *Thompson,* "Congress may have thought that friends or relatives who would be at risk of retaliation typically would have participated in some manner in the protected discrimination charge."[186]

The Supreme Court's decision in *Crawford v. Metropolitan Government of Nashville and Davidson County* supports the ability of a third party to bring her own direct retaliation suit in these circumstances.[187] *Crawford* established a fairly loose standard regarding what will constitute a "protected activity" for purposes of section 704(a), stating that "opposition" for purposes of section 704(a) need not involve active and consistent instigating behavior by an employee.[188] Rather, an employee may oppose discrimination for purposes of section 704(a)

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182. *Thompson* Oral Argument Transcript, *supra* note 14, at 13.

183. *Id.* at 14; *see also* George Gleason Bogert & George Taylor Bogert, THE LAW OF TRUSTS AND TRUSTEES § 869 (2d ed. 1995) ("Although the beneficiary is adversely affected by such acts of a third person, no cause of action inures to him on that account. The right to sue in the ordinary case vests in the trustee as representative." (footnote omitted)).

184. *See supra* note 29 and accompanying text.

185. *See supra* note 29 and accompanying text.

186. *See* Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 811 (6th Cir. 2009).

187. 129 S. Ct. 846, 850 (2009).

188. *Id.* at 851–52.

merely by participating in an employer's internal investigation of discrimination allegations, such as by responding to questions regarding such alleged workplace discrimination.[189] While the Court's willingness to extend this holding to other scenarios of passive opposition or participation remains unclear,[190] *Crawford* indicates some flexibility on the part of the Court in its interpretation of what constitutes "protected activity" for purposes of Title VII.[191]

Indeed, under the facts of *Thompson* itself, Thompson may have been able to bring his own direct retaliation claim. Thompson apparently "helped [Regalado] synthesize her experiences for the EEOC investigator and shared his perspective when the investigator questioned him about [Regalado's] complaint."[192] He also sent a memo to both his and Regalado's supervisors, in which he appeared to have included complaints regarding the alleged discrimination that Regalado was experiencing at work.[193] In this light, Thompson's failure to bring a direct retaliation claim—one based upon his own protected activity—seems curious to say the least. Thus, the scenario alleged in *Thompson*—where an individual with close ties to a victim of workplace discrimination had no involvement in the discrimination allegations of her spouse or parent or (as here) fiancé—may in fact be relatively rare. Rather than representing a pervasive gap in the coverage of Title VII, perhaps *Thompson* stemmed from little more than sloppy pleading by Thompson's attorney.[194]

CONCLUSION: THE FUTURE OF THIRD-PARTY RETALIATION CLAIMS IN A POST-*THOMPSON* WORLD

While the Supreme Court has provided lower courts with some much-needed guidance regarding the viability of the third-party retaliation doctrine generally, the Court in *Thompson* failed to fully articulate the scope of this doctrine and failed to place proper limits on this doctrine. To be sure, the Court provided additional protection to employees who wish to assert their rights under federal antidiscrimination

189. *See id.* at 851–53.

190. *See* Winslow, *supra* note 10, at 221 n.46.

191. *But see* Long, *supra* note 10, at 953–54, 986–87 (discussing challenges of asserting retaliation under Title VII's "opposition clause"). Accordingly, Professor Long argues for a broader reading of section 704(a)'s *participation* clause, proposing that "[t]he concept of assistance should not be limited to situations in which an employee provides active assistance in an investigation . . ." and that "subtle words of encouragement and assurances of support" should qualify as assistance for purposes of Title VII. *Id.* at 986.

192. *Thompson* Plaintiff's Memorandum, *supra* note 114 (citations omitted).

193. *See id.*

194. In addition, depending on the facts of a particular case or on the laws in the relevant jurisdiction, there might be other claims that a Target could bring besides a Title VII retaliation claim, such as a common law wrongful discharge claim.

laws—a laudable and important goal. Its decision properly closed a potential loophole in previously existing federal antiretaliation jurisprudence, making clear that just as employers cannot take action directly against an employee for engaging in protected activity, so too are employers barred from getting back at an employee by harming those in the workplace with whom that employee is close.

Yet the Court failed to balance these important protections for employees against the legitimate concerns of employers. Particularly, employers' fears that *any* adverse action taken in the wake of this decision, against *any* employee in the workplace, could create exposure to liability under the third-party retaliation doctrine, even if the Target of the adverse action has never engaged personally in protected activity, and even if she has a fairly attenuated relationship with a coworker who has engaged in protected activity.[195]

Much of the concern that employers might harbor in this respect stems from the gaping hole in the Supreme Court's decision regarding *how* lower courts should apply this analysis. While this Article does not advocate that the Court should have articulated some comprehensive list of the types of claims that will qualify for protection under the third-party retaliation doctrine, it does assert that lower courts should be given a more detailed framework regarding the factors to be used in conducting this analysis (in other words, the NIED bystander factors). Moreover, this Article asserts that the Court could have tempered the anxiety among employers about exposure in this area by limiting the class of plaintiffs who are able to sue (that is, by only allowing Actors to sue). The Court's failure to adopt either of these approaches may have significant implications for future third-party retaliation cases, as well as for employers more generally.

First, as noted above, while the Court made clear that Title VII will protect against third-party retaliation in some circumstances, the Court was surprisingly vague regarding what those circumstances might be. While the Court outlined the outer bounds of this decision, specifying that the doctrine almost always will cover retaliation against the coworker-spouse of an employee who engages in protected activity and likely will not cover a reprisal on a mere workplace friend,[196] the decision opened a wide gulf between these two extremes, into which many situations might fall. As one attorney-blogger observed in the wake of this decision, the doctrine covers "[s]ome people sometimes and other people other times. Sorry employers, it depends on the circumstances."[197]

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195. Indeed, the Court has been criticized more broadly for its failure to provide sufficient guidance to lower courts in a broad range of decisions. *See* Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1.

196. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 863 (2011).

197. Philip Miles, *SCOTUS Decides "Fire the Fiance" 3rd Party Retaliation*, LAWFFICE SPACE (Jan.

In the words of another observer: "The details of how this all works? The practical, decision-making paradigm for employers dealing daily in the trenches with these issues? It's anybody's guess."[198] While the criticisms of internet bloggers may represent little more than the unregulated (and often self-serving) rants of those who disagree with the Court's reasoning, the underlying premise of these complaints has significant merit. Instead of fully resolving the ambiguity that for years has plagued courts faced with third-party retaliation claims, the Court's decision merely resolved one small part of this complex inquiry.

This vagueness in the Court's opinion is not without consequences. As previously noted, retaliation claims already outnumber other Title VII complaints with respect to filings with the EEOC,[199] and the prevalence of these claims seems to be on the rise.[200] While third-party retaliation claims likely make up a small fraction of retaliation claims generally (precise statistics on this point not being readily available), third-party retaliation claims likely will increase in the wake of this decision, due to the absence of clear guidance from the Court regarding the outer boundaries of this doctrine. Indeed, without any clear limits here, an employer may face liability (or, at a minimum, costly litigation) for third-party retaliation upon taking adverse action against any employee with the slightest connection to a coworker who previously engaged in protected activity.[201] And, given that the Supreme Court has made the viability of this claim a factual issue—one that will "depend upon the particular circumstances" of a case[202]—employers will be hard pressed to resolve even the most seemingly preposterous of third-party claims via an early motion to dismiss. Rather, employers will have to litigate these claims at least through summary judgment, an expensive and time-consuming undertaking for both employers and the courts.[203] In other words, even if viable third-party retaliation claims make up a small minority of courts' dockets going forward, employers may be forced to

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24, 2011, 10:35 P.M.), http://www.lawfficespace.com.

198. Greenberg Traurig, *Supreme Court Finds That Employee Who Did Not Engage in Protected Activity Under Title VII Is Still Protected by Title VII's Anti-Retaliation Prohibition*, GT L&E BLOG (Jan. 24, 2011), http://www.gtleblog.com/2011/01/articles/legislation/supreme-court-finds-that-employee-who-did-not-engage-in-protected-activity-under-title-vii-is-still-protected-by-title-viis-antiretaliation-prohibition/.

199. *See supra* notes 11–14 and accompanying text.

200. *See supra* notes 11–14 and accompanying text.

201. *See* Amy Joseph Pedersen, *Supreme Court Holds Title VII Can Cover Third Party Retaliation Claims*, STOEL RIVES WORLD EMP. (Jan. 24, 2011), http://www.stoelrivesworldofemployment.com ("Employers probably didn't need another reminder that the potential claims they face are only limited by the imagination of plaintiffs' attorneys.").

202. Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 863 (2011) (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006)).

203. *See supra* note 113 and accompanying text (describing the exorbitant cost of litigating Title VII claims).

expend vast resources fending off meritless claims of this nature simply because the Court declined to more clearly define the scope of this doctrine.

Finally, perhaps the most interesting potential effect of the Court's decision in this case involves its potential to impact employee privacy in a significant way. As explained in detail above, the Court's decision in *Thompson* means that employers may be liable for taking adverse action against an employee if the employee has a sufficiently close relationship with a coworker who has engaged in protected activity.[204] As previously discussed, the reality is that many prudent and risk-averse employers want to guard against even the potential for liability before taking adverse action against an employee, even if it remains unclear what types of relationships will support this type of claim.[205] Even where an employer has perfectly legitimate reasons for firing an employee, the employer likely will want to know—prior to taking adverse action—what potential claims the employee can bring in the wake of her termination. Rather than evidencing some "sinister" motive, this stance merely reflects the reality that many employees will protest a termination decision, that such protests often take the form of a lawsuit, and that even where such suits are ultimately found to lack merit, they may cost an employer tens of thousands of dollars to defend.[206] As Justice Alito observed during the oral arguments in *Thompson* (despite ultimately signing on to the majority's decision):

> Put yourself in the . . . shoes of an employer, and you . . . want to take an adverse employment action against employee A. You think you have good grounds for doing that, but you want—before you do it, you want to know whether you're potentially opening yourself up to a retaliation claim.
>
> Now, what is the employer supposed to do then? They say . . . we need to survey everybody who is engaged in protected conduct, and now we need to see whether this person who we're thinking of taking the adverse employment action against has a . . . "close relationship" with any of those people.[207]

As Justice Alito's comments imply, a cautious employer may seek to minimize its liability before firing an employee (or at least to get a handle on its potential exposure) by thoroughly exploring the relationships among its employees. While an employee's membership in other protected categories typically will be fairly obvious—in most cases, the employer will know an employee's race, gender, age, and possibly their disability status—discovering an employee's *relationships* with coworkers

204. *See supra* notes 37, 56–58 and accompanying text.
205. *See supra* notes 112–13 and accompanying text.
206. *See supra* notes 112–13 and accompanying text.
207. *Thompson* Oral Argument Transcript, *supra* note 14, at 17–18.

will take much more work. Employers will want to know whether an employee is married to, engaged to, or even dating another employee; they will want to know whether the employee is the parent, child, or perhaps more distant relative of another employee; and they may even want to know whether the employee is close friends with other employees and may want details regarding the extent of those friendships.[208] At a time when employees increasingly are concerned about preventing unwarranted intrusions by employers into their private lives, a decision like this could lead to the opposite result.[209]

To be sure, as counsel for Thompson pointed out during oral arguments in this case, an employer should not be liable for third-party retaliation under section 704(a) if the employer was not aware of the Target-employee's relationship with a coworker-Actor.[210] In that vein, one could argue that an employer need not—and perhaps *should not*—make these types of inquiries prior to taking adverse action against an employee. However, particularly in a large company, it may be difficult to keep track of whether *someone* in management might have known about the Target-employee's relationship with a coworker-Actor such that this knowledge could be attributed to the decisionmaker in the Target's adverse action.[211] Moreover, the mere fact that an employee's claim *ultimately* might fail because an employer can show that it had no knowledge of the Target's relationship with the coworker-Actor will not prevent the employer from having to expend tremendous resources (financial and otherwise) to establish this point and obtain dismissal of the claim.

Finally, a further concern is not just *what* employers may ask in an effort to limit their exposure in these cases, but also *how* employers may try to gather this information. Employers have become increasingly adept at using technology to gather information about employees, from using internet sources like Google or Facebook to monitoring employees' use of employer-provided cell phones and computers.[212] Faced with

208. *See* Greenberg Traurig, *supra* note 198.

209. *See id.*

210. *See Thompson* Oral Argument Transcript, *supra* note 14, at 19 ("I think if the employer doesn't know about the relationship, any allegation like the allegation we have in this case simply isn't going to be plausible. It isn't going to be a plausible contention that there is a relationship between one employee's protected activity and an adverse action visited on the plaintiff.").

211. *See* EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 484–85 (10th Cir. 2006) (describing the "cat's paw" theory of discrimination or retaliation as "a situation in which a biased subordinate, who lacks decision-making power, uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action" (citation omitted)); *see also Thompson* Oral Argument Transcript, *supra* note 14, at 19 (collecting cases applying the "cat's paw" theory to Title VII claims).

212. *See* Jill Schachner Chanen, *The Boss Is Watching*, 94 A.B.A. J., 48, 49 (2008); *see also* Andrea Coombes, *Privacy at Work? Don't Count on It*, MARKETWATCH, (June 23, 2005) http://www.marketwatch.com/story/e-mail-internet-privacy-at-work-dont-count-on-it.

uncertainty regarding the scope of the third-party retaliation doctrine, employers understandably (and perhaps advisably) may step up this monitoring. If it is unclear whether co-workers who are mere "Facebook friends" could serve as Actor and Target in a successful third-party retaliation claim, then an employer may want to cover its bases by reviewing all of the Facebook friends of its employees. If the Court has not indicated the level of contact between an Actor and Target necessary to support a third-party retaliation claim, then a cautious employer might want to know the names of all of the coworkers whom an employee texted in some given period before the employer considers firing that employee. Such information-gathering measures by employers might seem extreme, but many employers, faced with uncertainty regarding their exposure under this evolving third-party retaliation doctrine, might well choose to take such proactive steps in order to minimize their potential liability.

The point is not that the Supreme Court "got it wrong" in *Thompson*. To the contrary, on the essential question—whether third-party retaliation should be barred under Title VII—the Supreme Court got it just right. However, in refusing to give lower courts more detailed criteria regarding when the third-party retaliation doctrine will apply, the Court missed an opportunity to balance the important protections that it was providing to employees against the realities that employers face when making difficult but important workplace decisions. This Article attempts to assist lower courts in finding that balance.