Title VII and Discrimination Against Third-Party Advocates: Interpreting Greater Protections to Further the Greater Goal

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Advocacy discrimination theory could become a tool in the litigator's toolbox as social media, the pandemic, and heightened political controversy combine to stoke the peoples' movements in the workplace. Recognizing advocacy discrimination claims under Title VII could broaden protections for the "advocate-plaintiff" when discrimination occurs because of advocacy on behalf of other employees and their protected characteristics. These claims could protect advocates of controversial workplace decisions that are rooted in protected characteristics, such as the decision to provide gender affirming health insurance benefits for transgender employees or reproductive health services for female employees.

For now, the question stands as to whether advocates attempting to advance the intent of Title VII are protected against discrimination when they support fellow employees on the basis race, color, religion, sex, and national origin. While the First Circuit's decision in Frith v. Whole Foods Market, Inc. *may lead us to believe* Bostock v. Clayton County *forecloses advocacy discrimination claims, it is both possible and practical to construe Title VII to protect the advocates of employees who are discriminated against on the basis of race, color, religion, sex, and national origin. First, this article reviews the background of Title VII, the Sixth Circuit cases that established advocacy discrimination theory, and the First Circuit case that attempted to foreclose it. Then, it contemplates possible statutory interpretations to demonstrate how advocacy discrimination claims are consistent with the discrimination clause of Title VII. Finally, it discusses alternative solutions to protect the advocate-plaintiff given that the present-day Supreme Court could likely affirm the holding of* Frith v. Whole Foods Market*.*

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 has long protected employees from discrimination in the workplace.[1] It prohibits discriminatory employer conduct including retaliation, harassment, disparate impact, disparate treatment, and general forms of discrimination on the basis of race, color, religion, sex, and national origin.[2] In a traditional Title VII discrimination claim, the plaintiff must prove he or she was discriminated against because of her protected characteristic(s).[3] However, in 2000, the Sixth Circuit expanded the traditional understanding of Title VII's discrimination protections when it ruled that plaintiff John B. Johnson's claim of discrimination had standing in the case *Johnson v. University of Cincinnati*; Johnson plead that he was discriminated against "because of his *advocacy* on behalf of women and minorities" rather

[1] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2).
[2] *See id.* § 703–04.
[3] *See, e.g.*, Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253–54 (1981).

than because of his *own* sex, race, or other protected characteristics.[4] The court reasoned that the protected characteristics of the third-parties for whom Johnson advocated could be imputed to Johnson to establish a claim of discrimination.[5] The court held that, in the workplace, Title VII protected advocacy for and association with third-parties on the basis of their protected characteristics.[6] Thus, should courts choose to interpret Title VII to protect the advocate-plaintiff, animus directed toward the advocacy of matters related to protected characteristics—rather than the protected characteristics themselves—fulfills the first element of the discrimination prima facie claim.[7]

Advocacy discrimination claims have since become more relevant in the wake of larger mass movements such as the Black Lives Matter movement and the #MeToo movement.[8] In the summer of 2020 in particular, employers were flooded with demands for improved hiring practices, employment benefits, and general treatment of Black employees.[9] *Frith v. Whole Foods Market, Inc.* is one of the most recent court cases to rise from this intersection of the Covid-19 pandemic and the Black Lives Matter movement to address the viability of the advocacy discrimination theory under Title VII.[10] In *Frith,* non-Black and Black employees brought advocacy discrimination claims against their employer, arguing that they were discriminated against for advocating on behalf of their Black coworkers and for their association with their Black coworkers.[11] Applying the broad theory of discrimination already followed in the Sixth Circuit, the plaintiffs argued that their employer discriminated against them when it selectively enforced the workplace dress code as pretext to prohibit

[4] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 572, 577 (6th Cir. 2000) (emphasis added).

[5] *Id.* at 575.

[6] *Id.*

[7] *See id.* at 572, 575.

[8] *See generally* Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 267 (1st Cir. 2022); Lily Zheng, *Do Your Employees Feel Safe Reporting Abuse and Discrimination?*, HARV. BUS. REV. (Oct. 8, 2020), https://hbr.org/2020/10/do-your-employees-feel-safe-reporting-abuse-and-discrimination [https://perma.cc/FHG5-UW4Z]; Kelly M. Cardin & Evan B. Citron, *#MeToo and the Workplace: Five Years and a Pandemic Later*, OGLETREE DEAKINS (May 24, 2022), https://ogletree.com/insights-resources/blog-posts/metoo-and-the-workplace-five-years-and-a-pandemic-later/ [https://perma.cc/6LR4-2VSU].

[9] *See* Carmen Morris, *Racial Inclusion: What Your Black Employees Really Need You To Know*, FORBES (July 23, 2020), https://www.forbes.com/sites/carmenmorris/2020/07/23/racial-inclusion--what-your-black-employees-really-need-you-to-know/ [https://perma.cc/H9DZ-AMD3]. Note that throughout this paper, I will be alternating between the words "Black," "minority," "African American," and other labels to identify race. Because race is a social construct, I use whichever word is used in the source to which I refer. For example, the plaintiff in *Johnson* is identified as "African American" while the plaintiffs in *Frith* are identified as "Black." My words and my capitalization reflect what the author of the source has chosen to use.

[10] *See Frith*, 38 F.4th at 267–68.

[11] *Id.* at 273.

employees from wearing masks and clothing with the controversial racial justice slogan "Black Lives Matter."[12] The First Circuit in *Frith* held that advocacy discrimination was not cognizable under Title VII because the statute's language only prohibits discrimination on the basis of the plaintiff's protected characteristics and reasoned that the Supreme Court's discussion in *Bostock v. Clayton County* precluded statutory protection for discrimination on the basis of advocacy for a third-party.[13]

In light of the First Circuit's ruling in *Frith*, which leaves the advocate-plaintiff without remedy at a critical time,[14] contradicts over two decades of advocacy claim recognition in the Sixth Circuit,[15] and creates an official circuit split,[16] this Note analyzes the current state of advocacy discrimination claims. Advocacy discrimination claims are critical to understand as social media, the pandemic, and heightened political controversy combine to stoke the peoples' movements in the workplace.[17] Perhaps soon we will see these claims increase to protect advocates of gender affirming health insurance benefits for transgender employees or reproductive health services for employees assigned female at birth. Courts should establish a reasonable scope to provide employers with notice of what constitutes advocacy. For now, the question stands as to whether advocates attempting to advance the intent of Title VII are protected against discrimination when they support fellow employees on the basis of race, color, religion, sex, and national origin.

This Note argues that while *Frith* may lead us to believe *Bostock* forecloses advocacy discrimination claims, it is both possible and practical to construe Title VII to protect the advocates of employees who are discriminated against on the basis of race, color, religion, sex, and national origin. Part II describes the relevant background of Title VII, the Sixth Circuit cases that established advocacy discrimination theory, and the First Circuit case that attempted to foreclose the theory. Part III analyzes the statutory construction of Title VII to demonstrate how advocacy discrimination claims are consistent with the discrimination clause of Title VII. Finally, Part IV proposes both the associational discrimination and retaliation frameworks as alternative litigation solutions to protect the advocate-plaintiff given that the present-day Supreme Court could likely affirm the holding of *Frith v. Whole Foods Market.* Ultimately, this Note is an exploration of creative litigation solutions to ensure

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[12] *Id.*

[13] *See id.* at 271–72.

[14] *See, e.g.*, Bernie Pazanowski, *Whole Foods Sheds Retaliation Suit by Workers Who Wore BLM Masks*, BLOOMBERG L. (Jan. 24, 2023) (on file with the *Ohio State Law Journal*).

[15] *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), provides the first explicitly documented instance of an advocacy discrimination claim in which the court relied on the third parties' protected characteristics to fulfill the first prong required to establish a prima facie case. *See generally id.*

[16] *Compare Johnson*, 215 F.3d at 575, *with Frith*, 38 F.4th at 273.

[17] *See* sources cited *supra* note 8.

that bystander interveners and advocates against discrimination in the workplace have standing under Title VII.

II. THE LANDSCAPE OF ADVOCACY DISCRIMINATION CLAIMS

A. *The Standard of Law Under Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 prohibits employers from engaging in three main types of discrimination: individual disparate treatment, systemic disparate treatment, and disparate impact.[18] The disparate treatment clause of Title VII—originally Section 703(a)—has been codified at 42 U.S.C. § 2000e-2(a).[19] The clause prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"[20] This type of discrimination includes harassment, a hostile work environment, and "disparate treatment" discrimination in which "an employer has treated [a] particular person less favorably than others because of the plaintiff's race, color, religion, sex, or national origin."[21] To establish a claim of disparate treatment, a plaintiff can show discrimination through the *McDonnell Douglas* burden-shifting framework in which the plaintiff must first plead:

> 1) he is a member of a protected class; 2) he was qualified for his job and performed it satisfactorily; 3) despite his qualifications and performance, he suffered an adverse employment action; and 4) that he was replaced by a person outside the protected class or was treated less favorably than a similarly situated individual outside his protected class.[22]

[18] *See* 42 U.S.C. § 2000e-2; *Frith*, 38 F.4th at 270–71, 271 n.6.

[19] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2).

[20] *Id.* This Note refers to "employers" and "employees" as defined in 42 U.S.C §§ 2000e-2(b) and (e). However, Title VII also prohibits *prospective* employers from engaging in certain activities—such as failing to hire a person on the basis of a protected characteristic—and protects *former* employees from certain adverse actions—such as retaliation. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997); *Frith*, 38 F.4th at 270 n.5 ("Title VII also prohibits prospective employers from failing to hire a person because of that person's protected characteristic." (citing Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986))). Moreover, a "protected characteristic" refers to a person's race, color, religion, sex, or national origin. *See id.* at 271.

[21] Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985–86 (1988); *see also* Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

[22] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 572–73 (6th Cir. 2000); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

The burden then shifts to the employer to establish a legitimate, nondiscriminatory reason for the employer's action.[23] Finally, the burden may then shift back to the plaintiff to show the employer's alleged nondiscriminatory reason is mere pretext.[24]

Based on the first prong of the *prima facie* discrimination claim, plaintiffs must plead that they are a member of one of the protected categories.[25] Courts interpret this pleading requirement to simply require plaintiffs to plead the characteristic(s) for which they faced discrimination so long as the characteristic is a race, color, religion, sex, or national origin.[26] Thus, the statute protects all employees regardless of *how* they identify so long as the plaintiffs name the enumerated characteristic for which they were discriminated.[27]

The Supreme Court has made clear that the "precise nature of the . . . [employer's] motivation" is immaterial when an employee is treated "less favorably than they would otherwise be treated 'because of' their [protected characteristic, such as] race."[28] For example, in a race discrimination claim, "[a] plaintiff is not required to plead . . . that an employer was motivated by racial animus, and an employer may violate Title VII even if its reason for engaging in racial discrimination is less invidious than antipathy toward a given race."[29] All that a plaintiff must show is less favorable treatment because of one of the five enumerated, protected characteristics regardless of the employer's intention.[30] Thus, Title VII's scope is broad, and Congress intended it to be broad.[31]

B. *The Sixth Circuit's Advocacy Discrimination Theory Under Title VII*

The Sixth Circuit first established that "advocacy discrimination" claims were cognizable under Title VII in 2000, when it held that the plaintiff in *Johnson v. University of Cincinnati* "need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status

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[23] *McDonnell Douglas Corp.*, 411 U.S. at 792, 802.

[24] *Id.* at 804.

[25] *See generally* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253–54 (1981).

[26] *Cf.* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976).

[27] *See* Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 891 (11th Cir. 1986) ("The statute has been held to prohibit discrimination against white as well as black persons." (citing *McDonald*, 427 U.S. 273 (1976))). To satisfactorily plead a protected characteristic, an employee does not need to be in a minoritized category, such as a female employee or a Black employee. *See id.* Additionally, non-binary and gender non-conforming identities would still constitute as a "sex" for pleading purposes. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 662–63 (2020).

[28] Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 273 n.7 (1st Cir. 2022) (citing *Bostock*, 590 U.S. at 662 (2020)).

[29] *Id.*

[30] CHARLES A. SULLIVAN, STEPHANIE BORNSTEIN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 6–10 (Aspen Publishing, 10th ed. 2021).

[31] *See infra* note 64.

requirement of his claims."[32] The court believed instead that a "racial situation" was sufficient to establish the first element of the discrimination *prima facie* case using the *McDonnell Douglas* burden shifting framework.[33] The circuit has continued to recognize such claims.[34]

In *Johnson v. University of Cincinnati,* the plaintiff, John B. Johnson, was employed as the Vice President of Human Resources and Human Relations at the University of Cincinnati.[35] In his role, he managed the university's affirmative action program.[36] Johnson was terminated in January 1996 after serving in his role for almost two and a half years.[37] Johnson brought claims of discrimination and retaliation under Title VII, 42 U.S.C. § 2000e-2, alleging that the university discriminated against him "because of his efforts to insure [sic] that the [u]niversity complied with its affirmative action policies, and because of his advocacy on behalf of women and minorities."[38] Using the *McDonnell Douglas* test, the district court held that, as a matter of law, Johnson failed to establish the *prima facie* case of discrimination.[39] The district court reasoned that Johnson had failed to plead he was a member of a protected class when he pled he was discriminated against as a person who advocated on behalf of women and minorities rather than as an African American man himself.[40]

The Sixth Circuit disagreed with both the holding and the reasoning of the district court.[41] First, the Circuit Court, citing congressional intent, binding case law, and the statute itself, denounced the district court's assumption that the plaintiff must be a member of a protected group to bring a discrimination claim.[42] It leaned upon its then-recent decision in *Tetro v. Poham* and the Eleventh Circuit's decision in *Parr v. Woodmen of the World Life Insurance Co.* to affirm that, instead, Title VII "[was designed] to protect individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate."[43] In *Tetro*, a white employee's claim against his employer was cognizable under Title VII when he suffered an adverse action because his child was biracial.[44] Despite the direction of the employer's

[32] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 575 (6th Cir. 2000).
[33] *See id.* at 572–73.
[34] *See, e.g.*, Barrett v. Whirlpool Corp., 556 F.3d 502, 513–14 (6th Cir. 2009).
[35] *Johnson*, 215 F.3d at 566.
[36] *Id.* at 566.
[37] *Id.*
[38] *Id.* at 572.
[39] *Id.* at 573.
[40] *Id.*
[41] *Johnson*, 215 F.3d at 573.
[42] *Id.* at 573–74.
[43] *Id.* at 574 (first quoting Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999); then quoting Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986)).
[44] *See* Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999).

animus—aimed towards the child's race rather than the employee's characteristics—the court in *Tetro* held the claim was viable because the statute simply stated "because of such individual's race" without mention of the words "directly" or "indirectly."[45] The court in *Johnson* reiterated the *Tetro* court's reasoning to declare:

> [T]he fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved—Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices—that resulted in Plaintiff's discharge from employment.[46]

The court then continued to reason that the interpretation would hold true whether Johnson were white or African American as "the race of the minorities for which he was advocating would be 'imputed' . . . to [the plaintiff]."[47]

In *Barrett v. Whirlpool Corp.*, the Sixth Circuit again recognized advocacy discrimination as a violation of Title VII when three employees and former employees of Whirlpool Corporation alleged racial discrimination and retaliation due to their "friendships with and advocacy for certain African-American co-workers."[48] The district court determined the plaintiffs "failed to establish the requisite degree of association with their African-American co-workers to support their claim of discrimination based on such association . . . ."[49] However, the Circuit Court again ruled in the opposite direction to establish that the degree of association was not relevant and ruled in favor of the third-party advocates.[50]

C. *The First Circuit's Foreclosure of Advocacy Discrimination Theory Under Title VII*

In *Frith v. Whole Foods Market, Inc.*, the First Circuit ruled that the advocate-appellants failed to state a claim under Title VII.[51] The First Circuit heavily relied on the Supreme Court's reasoning in *Bostock v. Clayton County*, in which the Supreme Court ruled that a plaintiff was protected by Title VII because discrimination on the basis of gender identity and sexual orientation constituted discrimination "because of" the individual's sex.[52]

The First Circuit extended the Supreme Court's reasoning that employers violate Title VII when they "intentionally rel[y] . . . on an individual employee's

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[45] *Id.* at 995.
[46] *Johnson*, 215 F.3d at 575.
[47] *See id.* at 575.
[48] Barrett v. Whirlpool Corp., 556 F.3d 502, 506 (6th Cir. 2009).
[49] *Id.* at 506–07.
[50] *Id.* at 513.
[51] Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 270 (1st Cir. 2022).
[52] *Id.* at 272. *See generally* Bostock v. Clayton Cnty., 590 U.S. 644, 681 (2020).

[protected characteristic] when deciding to discharge the employee" to mean that "an employment action must have been taken 'because of' the [protected characteristic] of the individual plaintiff."[53] Thus, the First Circuit reasoned that *Bostock* indicated "the proper focus is on the protected characteristic of *the individual plaintiff*."[54] Subsequently, the First Circuit held that discrimination based on one's "advocacy *on behalf of protected class members*" is unprotected by Title VII's language.[55] The First Circuit stated:

> In other words, unlike an associational claim, the race of the plaintiff is irrelevant for purposes of this "advocacy" theory of discrimination—all that matters is the race of the persons on whose behalf the advocacy is occurring. Title VII's language, as discussed in *Bostock*, forecloses such a theory, which essentially replaces the textual "because of such individual's race" with the atextual "because of such individual's advocacy for protected individuals."[56]

However, the First Circuit is incorrect in its reading of *Bostock*. The Court in *Bostock* merely elaborates on how discrimination because of gender identity or sexual orientation constitutes discrimination because of sex.[57] It does not elaborate on the standing of an individual who advocates for someone based on sex or any other protected characteristic.[58] Thus, *Frith* jumps to the conclusion of an issue that *Bostock* never addressed. Importantly, *Bostock* cannot foreclose a theory if it did not address it, and any resemblance of an advocacy theory discussion in *Bostock* would be mere dicta.

The First Circuit in *Frith*, however, contradicts itself. First, it notes that "[t]here is nothing in the language of Title VII that would categorically foreclose an associational claim based on a Black employee's association with Black coworkers or other Black people."[59] Therefore, it acknowledges that an associational claim does not need to be one in which the plaintiff is of a different race or protected characteristic than the person with whom they associate to bring a Title VII claim. Leaning on the language from Title VII and the court reasoning in *Bostock*, the First Circuit also states that "Title VII does not necessarily foreclose an associational claim rooted in an employer's disapproval of its non-Black employees' support of Black coworkers."[60] Therefore, it should hold that Title VII does not foreclose an associational claim rooted in an employers' disapproval of its Black employees' support or non-Black employees' support of Black coworkers. This seems to demonstrate that *Frith*'s

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[53] *Frith*, 38 F.4th at 271. *See generally Bostock*, 590 U.S. 644.

[54] *Frith*, 38 F.4th at 271 (emphasis added).

[55] *Id.* at 272 (quoting *Barrett*, 556 F.3d at 513).

[56] *Id.* at 272.

[57] *See Bostock*, 590 U.S. at 666–73.

[58] *Id.* at 653–54 (describing that all plaintiffs were terminated shortly after revealing that he or she is homosexual or transgender).

[59] *Frith*, 38 F.4th at 273 n.8.

[60] *Id.* at 274.

clarification is that a viable claim must be one which claims discrimination is the employers' disapproval of its employees' support of Black coworkers or, in other words, an employers' disapproval of its employees' advocacy for coworkers of a specific protected characteristic. In fact, *Frith* goes further to declare "appellants have pleaded discrimination claims that are, conceptually, consistent with Title VII" because they fall into two categories: "Black employees who are subject to racial discrimination and non-Black employees who are subject to racial discrimination."[61] Thus, to foreclose advocacy discrimination the court in *Frith* is merely playing a game of semantics which both the Fifth and Eleventh Circuits condemn in the context of Title VII.[62] As the circuit court rooted its analysis in the language of Title VII in *Frith*, a close examination of Title VII's statutory language and purpose is necessary.

III. THE PLAIN MEANING AND PURPOSE OF TITLE VII PROTECTS AGAINST THIRD-PARTY DISCRIMINATION

Given that there is a strong consensus in the present-day courts to acknowledge the role of the judge as a faithful agent and an interpreter of the text,[63] this Part begins with a textualist approach to statutory interpretation. While plain language might at first seem to indicate that Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, only prohibits discrimination on the bases of a specific individual's protected characteristic, the balance of textual interpretation, statutory construction, statutory purpose, and legislative history seem to indicate that an advocacy discrimination claim—discrimination *because of* a protected characteristic—is cognizable under Title VII. While there may be limits such that not *all* matters related to the protected characteristics of race, color, religion, sex, and national origin are protected under Title VII, the statute's scope is broad to prohibit the mischief Congress intended to address and fulfill the purpose Congress intended to advance.[64]

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[61] *Id.*

[62] The Fifth Circuit specifically warned against the use of semantics in this context and the Eleventh Circuit reemphasized that "[i]t is . . . the duty of the courts to make sure that [Title VII of the 1964 Civil Rights Act] works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in *battle with semantics*." Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (quoting Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970), *aff'd*, 442 F.2d 1078 (5th Cir. 1971)).

[63] Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 906–07 (2016).

[64] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 573 (6th Cir. 2000) (recognizing Title VII's broad reach and design and stating "[i]t is an established principle that Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was the plight of the African American in our economic society"); Ann K. Wooster, Annotation, *Associational Employment Retaliation on Basis of Race Under Title VII of Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-3(a)*, 80 A.L.R. Fed. 3d § 2 (2023) ("Federal courts have construed Title VII broadly in this context to accord with Congress's

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e–2(a)(1) provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[65]

Discrimination claims—whether disparate treatment or hostile work environment claims—rely on the above text, and decisions often turn on the phrase "because of such individual's [protected characteristic]."[66] Many courts have interpreted the plain meaning of the statute to indicate a plaintiff may only bring a discrimination claim under Title VII if the employment actions are because of the plaintiff's *own* race, color, religion, sex, or national origin.[67] In fact, courts go to great lengths to support associational discrimination claims under the statutory interpretation in which the claim of discrimination must be against the plaintiff's own protected characteristic.[68] The Supreme Court in

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stated purpose of ending racial discrimination in the workplace[.]"); United Steelworkers of Am. v. Kaiser Aluminum & Chem. Corp., 443 U.S. 193, 201 (1979) (stating that Title VII was "triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long'" (citing 110 CONG. REC. 6,552 (1964) (remarks of Sen. Humphrey))).

[65] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e–2(a)(1)).

[66] *See* Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 271 (1st Cir. 2022) (turning on the phrase "because of such individual's race"); Frith v. Whole Foods Mkt., Inc., 517 F. Supp. 3d 60, 70 (D. Mass. 2021) (stating disparate treatment claim under 42 U.S.C. § 2000e-2(a)); Barrett v. Whirlpool Corp., 543 F. Supp. 2d 812, 820 (M.D. Tenn. 2008) (stating hostile work environment claim under 42 U.S.C. § 2000e-2(a)).

[67] *See* Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) ("[W]e find that [the plaintiff] has stated a claim upon which relief can be granted under Title VII. A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child."); *Parr*, 791 F.2d at 892 ("Where a plaintiff claims discrimination [in a Title VII action] based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").

[68] *See, e.g.*, Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298, 300 (S.D.N.Y. 1996) ("[The p]laintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race."); Zarda v. Altitude Express, Inc., 883 F.3d 100, 124 (2d Cir. 2018) (en banc) ("[W]hen an employer fires a gay man based on the belief that men should not be attracted to other men, the employer discriminates based on the employee's own sex."), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644, 662 (2020).

Bostock v. Clayton County provides one example.[69] Even the case of *Johnson v. University of Cincinnati* recognized this plain meaning to an extent: by establishing that the protected categories for whom the plaintiff advocated could be imputed unto the plaintiff himself to plead a Title VII discrimination claim, the court implicitly suggested that the plaintiff's *own* identity or protected characteristic was an important element of a prima facie case.[70]

However, not every court has interpreted the plain language of this statute to only protect a plaintiff on the basis of his or her own protected characteristic. Rather, courts within the Sixth Circuit have held a looser interpretation of who Title VII can protect: "[i]t is not necessary, however, for a plaintiff to demonstrate 'strict membership' in a protected class to prevail on a Title VII claim"[71] and "Title VII protects not only individuals who themselves are members of a protected class, but also those individuals who, though not members of a protected class, are nevertheless 'victims of discriminatory animus toward third persons with whom the individuals associate.'"[72] To support this interpretation, the Sixth Circuit Court of Appeals in *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.* reasoned that because the statute merely prohibits discrimination "because of such individual's race" and fails to include the words "directly" or "indirectly," the statute is ambiguous as to whether it protects employees whose protected characteristics are not directly involved.[73] Later, the Sixth Circuit in *Barrett* went so far as to say that "as long as a plaintiff offers proof that she was, in fact, discriminated against *because* she advocated for protected employees, she may state a discrimination claim under Title VII."[74] With competing interpretations of the text, the statute is ambiguous.[75]

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[69] *See* Bostock v. Clayton Cnty., 590 U.S. 644, 662 (2020).

[70] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 575 (6th Cir. 2000); *see also infra* notes 185–190–189 and accompanying text (demonstrating why this was unnecessary, inconsistent, and irrelevant).

[71] *See Barrett*, 543 F. Supp. 2d at 820 (citing Wanchik v. Great Lakes Health Plan, Inc., 6 F. App'x 252, 266 (6th Cir. 2001)).

[72] *Id.* (quoting *Tetro*, 173 F.3d at 994).

[73] Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 995 (6th Cir. 1999).

[74] Barrett v. Whirlpool Corp., 556 F.3d 502, 514 (6th Cir. 2009); *see also Johnson*, 215 F.3d at 574 (quoting Winston v. Lear–Siegler, Inc., 558 F.2d 1268, 1270 (6th Cir. 1977)) (allowing the Title VII claim to stand even though the plaintiff "was not fired because of his race, [but rather] a racial situation in which he became involved that resulted in his discharge from his employment").

[75] *See* Immigr. & Naturalization Serv. v. Errico, 385 U.S. 214, 218 (1966) (reasoning that the divergence among the circuit judges demonstrates the interpretation of the statute is not obvious and requires legislative history to determine the correct interpretation).

A. *The Plain Meaning of Title VII*

In Section 703(a) of Title VII, the text clearly states that it is unlawful to discriminate against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[76] Statutes are often given the ordinary meaning of their words unless they are identified to be technical in nature.[77] Most courts presume the ordinary meaning of 42 U.S.C § 2000e-2 implies a plaintiff has standing to bring a Title VII claim when he or she is discriminated against because of his or her own characteristics—namely race, color, religion, sex, and national origin.[78] But, if Congress intended to *only* protect employees from discrimination against their *own* characteristics, then it would have said "because of *his* race, color, religion, sex, or national origin."[79]

Congress has shown that it is capable of clarifying *whose* characteristics are protected. In the subsections following Section 703(a), Congress mimicked the language of Section 703(a) to define the unlawful employment practices for employment agencies but included a few minor edits; it changed the phrase from "it shall be an unlawful employment practice . . . to discriminate because of such individual's [protected characteristic]" to the phrase "it shall be an unlawful employment practice . . . to discriminate against[] any individual because of *his* [protected characteristic]."[80] It did the same in Section 703(c) to define unlawful employment practices for labor organizations and in Section 703(d) to define unlawful employment training program practices.[81] Thus, Congress has shown that it can and has considered using the phrase "because of *his* [protected characteristics]" and chose not to do so in the context of Section 703(a).

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[76] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000(e)-2(a)(1)).

[77] *See generally* Nix v. Hedden, 149 U.S. 304 (1893); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

[78] *Barrett*, 556 F.3d at 512 ("Courts have construed Title VII broadly in this context to accord with Congress's stated purpose of ending racial discrimination in the workplace."); *see, e.g.*, Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."); Parr v. Woodmen of World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").

[79] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703(b)–(d), 78 Stat. 255–56 (emphasis added).

[80] *Compare id.* (emphasis added), *with id.* § 703(a). The subsections that follow § 703(a) are § 703(b) (defining the unlawful conduct for employment agencies), § 703(c) (defining the unlawful conduct for labor organizations), and § 703(d) (defining unlawful conduct in the context of employment training programs). *Id.* §§ 703(b)–(d).

[81] *Id.* §§ 703(c)–(d).

Rather, Congress's choice of "such individual" instead of "his" may indicate that discrimination against *someone's* protected characteristic is enough to satisfy an unlawful employment practice and that the protected characteristic at issue does not necessarily have to belong to the person ultimately injured. There are only three other sections or subsections that repeat the phrase "such individual" in the entire Act.[82] In these instances, Congress seems to use "such individual" to distinguish between the employer and the employee rather than to limit the boundaries of a possible claim.[83] Here, Congress could be doing just that: distinguishing that the discrimination must be because of a relevant individual's protected characteristic but not necessarily limiting the boundaries of which injured employees may come forward with a cognizable claim.

The plain text makes it clear that *any* individual may bring a claim so long as the employer's actions were because of an individual's race, color, religion, sex, or national origin: "It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge *any* individual or to discriminate against *any* individual[.]"[84] Congress also specifies that it is unlawful for an employer "to limit, segregate, or classify in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect *his* status as an employee, because of *such individual's* race, color, religion, sex, or national origin."[85]

General references to the discrimination clause that omit the words "such individual" suggest that a different interpretation of the statutory language is available. In common usage, courts often refer to the discrimination clause as that which "prohibits discrimination *on the basis of* race, color, religion, sex, and national origin[;]" when describing the clause, courts often shorten the statutory language and drop the specification of "such individual[.]"[86]

Other sections of the Civil Rights Act of 1964 support the notion that the discrimination clause should be construed liberally to support the overall purpose of Title VII. First, the title of Section 703(a) is broad: "Discrimination *Because of* Race, Color, Religion, Sex, or National Origin."[87] Congress omitted

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[82] These instances include section 703(g)(2) declaring "it shall not be unlawful . . . for an employer to [employ, discharge, or fail to refer] any individual . . . in any position, if . . . such individual has not fulfilled . . . that requirement"; Section 703(j) declaring "[n]othing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group"; and section 101(a)(2)(B) of the same Act declaring, "[n]o person acting under color of law shall . . . deny the right of any individual to vote . . . because of an error . . . if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]" *Id.* §§ 101(a)(2)(B), 703(g)(2), (j).

[83] *See id.* § 703(g)(2).

[84] *Id.* § 703(a)(1).

[85] Civil Rights Act of 1964 § 703(a)(2).

[86] *See, e.g.*, Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 173 (2011) (emphasis added).

[87] Civil Rights Act of 1964 § 703.

any direct reference to the type of discrimination Title VII intended to encompass.[88] Thus, it is possible Title VII encompasses discrimination toward an employee's advocacy for a protected characteristic when the employer discriminates because of race by firing that employee for racial advocacy.

Second, when listing what are *not* prohibited employment practices, Congress clarifies that its intention is the broad goal of prohibiting discrimination because of race, color, religion, sex, or national origin. For example, in Section 703(h) Congress clarifies that it shall not be unlawful for an employer to apply different standards within the employment context "provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."[89] Had Congress *only* intended to protect people from discrimination against his or her own protected characteristics, it would have said so.[90] Instead, Congress seems to intend to protect discrimination because of protected characteristics without consideration of whether the characteristics belong to the person injured or to an associate.

Third, Congress seems to use phrases such as "on account of," "because of his," "his," and "such individual's" to indicate different meanings, with "such individual" casting a wider net than "his." In Title IX of the same Act, which is often analyzed similarly to Title VII,[91] Congress used the phrase "*on account of* race, color, religion, or national origin" when describing the actions for relief for denial of equal protection subject to the intervention amendment.[92] In contrast, Congress stated in Title VIII, "no person shall be compelled to disclose *his* race, color, [or] national origin."[93] The diversity of the word choice preceding the protected characteristics throughout the Act and Section 703 itself likely demonstrates that Congress was aware of the language it chose and intended to differentiate among "on account of," "because of his," "his," and "such individual's" to specify particular meanings.[94]

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[88] *Id.*

[89] *Id.* § 703(h).

[90] Simmons v. Himmelreich, 578 U.S. 621, 627 (2016) ("Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says."); VICTORIA L. KILLION, CONG. RSCH. SERV., R4684, UNDERSTANDING FEDERAL LEGISLATION: A SECTION-BY-SECTION GUIDE TO KEY LEGAL CONSIDERATIONS 15 (2021), https://sgp.fas.org/crs/misc/R46484.pdf [https://perma.cc/K3XW-KSFQ].

[91] Nelson v. Christian Bros. Univ., 226 F. App'x 448, 454 (6th Cir. 2007) ("Generally, courts have looked to Title VII, 42 U.S.C. §§ 2000e, as an analog for the legal standards in both Title IX discrimination and retaliation claims.").

[92] Civil Rights Act of 1964 § 902 (emphasis added).

[93] *Id.* § 801 (emphasis added); *see* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972) (comparing the code into which Title VII was codified with the code into which Title VIII was codified).

[94] *See* Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) ("There is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Congress seems to consistently use the category "such individual" as a general reference to the person "aggrieved."[95] To bolster this interpretation, Section 704—which the Supreme Court has ruled should be interpreted more broadly than Section 703—prohibits "discrimination *based on* [protected characteristics]," a broad configuration of the phrase which excludes "such individual."[96] Thus, "such individual" seems to be broader and more indirect than "his," but narrower and more direct than "on account of" or "based on." This construction supports the interpretation that plaintiffs may not bring Title VII disparate treatment claims for any matter of race, color, religion, sex, or national origin, but may bring claims when their discrimination is a result of discrimination against some other individual.

Finally, even the Equal Employment Opportunity Commission's (EEOC) rulings and guidance indicate little about how to interpret the phrase "such individual's." While the EEOC's "interpretation of Title VII is to be accorded 'great deference[,]'" the EEOC has provided little guidance on protections for the advocate-plaintiff.[97] However, the EEOC has recognized protections for plaintiffs who are subject to associational discrimination because of interracial associations.[98] On January 6, 2010, the EEOC announced, "[t]hese rules and

[95] Congress also uses "such individual" as a general reference to a type of individual rather than a specific individual. The Americans with Disabilities Act (ADA), though written and enacted over twenty years later, is often grouped with Title VII as a civil rights act for employment opportunities. *See Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 12, 2012), https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who [https://perma.cc/973G-T2Q3]. It is possible that the legislators of the ADA looked to Title VII and its language as it drafted the employment section of the ADA. *See* Americans with Disabilities Act of 1990, Pub. L. 101-336, § 101(8), 104 Stat. 327, 331 (1990) (current version at 42 U.S.C. § 12131(2)) ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."); *id.* § 102(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

[96] Civil Rights Act of 1964 § 704(b) (emphasis added); *see* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 174–75 (2011) (declaring that after a thoughtful analysis comparing the antiretaliation provision and the substantive antidiscrimination provision, the antiretaliation provision should be construed more broadly).

[97] Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

[98] *See* Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (citing Decision 71–969, 1973 EEOC Dec. (CCH) § 6193 (Dec. 24, 1970); Decision 71–1902, 1973 EEOC Dec. (CCH) § 6281 (April 28, 1971); Decision 76–23, 1983 EEOC Dec. (CCH) § 6615 (Aug. 25, 1975); and Decision 79–03, 1983 EEOC Dec. (CCH) § 6734 (Oct. 6, 1978)); *see also infra* Part IV (reasoning why the EEOC's recognition of associational discrimination claims bodes well for the advocate-plaintiff).

regulations shall be liberally construed to effectuate the purpose and provisions of [T]itle VII."[99] This statement demonstrates that the EEOC may be open to supporting advocacy discrimination if given the chance to issue guidance because the Commission would further the overall goal of Title VII by enabling employees to advocate for equal opportunities.

B. *The Purpose of Title VII*

Advocacy discrimination claims would be realistic and consistent with the Supreme Court's past interpretations of Title VII. When determining whether Title VII prohibited an employer from requiring a high school diploma or an intelligence test as an employment prerequisite, the Supreme Court in *Griggs v. Duke Power Co.*, stated:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[100]

As a matter of consistency, advocacy discrimination supports the Supreme Court's interpretation of Title VII because it too promotes equality and removes barriers by protecting well positioned employees when they advocate for colleagues facing discrimination.[101] Additionally, Title VII is uniquely positioned to support the advocate-plaintiff because it supports freedom of expression in a way that is sufficiently limited to improve the workplace and applies to both private and public employers.[102]

An interpretation of Title VII that encompasses advocacy discrimination claims would move Title VII from a retroactive to a proactive statute and reduce

[99] 29 C.F.R. § 1601.34 (2009).

[100] *Griggs*, 401 U.S. at 429–30. The Court concluded by implying that Congress structured Title VII so race, religion, nationality, and sex become irrelevant in the workplace. *Id.* at 436. Today's scholars would likely acknowledge that these characteristics are relevant because they shape how people operate in and perceive the world but agree with the sentiment that they should not negatively impact hiring and employment practices. *See, e.g.*, Robert Livingston, *How to Promote Racial Equity in the Workplace*, HARV. BUS. REV., Sept.–Oct. 2020, https://hbr.org/2020/09/how-to-promote-racial-equity-in-the-workplace [https://perma.cc/N6T8-VAEE].

[101] *Accord id.* (advising managers and leaders to take an active role in the workplace to promote diversity and to increase awareness of discrimination within their organization).

[102] *Title VII and Employees' Legal Rights*, JUSTIA (Oct. 2023), https://www.justia.com/employment/employment-discrimination/title-vii/ [https://perma.cc/Z35S-53CU]; *see* Mary E. Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 816–17 (1996).

the power imbalance Title VII has inadvertently imposed.[103] If the statute only allows protection for employees discriminated against on the basis of their own protected characteristic, then only the employees *already* being actively discriminated against can advocate for themselves with statutory protection. Employees without the affected protected characteristics—and arguably the employees occasionally better positioned to advocate for their affected colleagues[104]—would be left unprotected by Title VII if they choose to advocate for the same goals; instead they would be discriminated against because of their association with or advocacy for their affected colleagues, and therefore discriminated against because of someone else's protected characteristic. This situates employees in a power imbalance: those who are discriminated against must bear the additional burden of fending for themselves while those who are advantaged by remaining free from discrimination are discouraged from advocating for their colleagues without statutory protection. However, if the statute was interpreted such that employees were protected from discrimination because of protected characteristics in general, then the advocate-employees would be protected and consequently incentivized to advocate for the equal workplace Title VII was legislated to establish.[105] In this scenario, employees could advocate under Title VII's protections before discrimination occurs.

The Supreme Court has interpreted a broad and sweeping civil rights act to include advocacy protection before. It would not be unprecedented to do so again. In *Sullivan v. Little Huntington Park*, the U.S. Supreme Court held that Paul Sullivan, a white homeowner, had standing to sue under 42 U.S.C. § 1982 when he was expelled from his community corporation after advocating on behalf of his tenant T.R. Freeman, a Black man.[106] The court leaned on the purpose of the statute and a construction that was consistent with prohibiting the mischief the statute was created to address, declaring "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights

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[103] *See* JENNY R. YANG & JANE LIU, ECON. POL'Y INST., STRENGTHENING ACCOUNTABILITY FOR DISCRIMINATION: CONFRONTING FUNDAMENTAL POWER IMBALANCES IN THE EMPLOYMENT RELATIONSHIP 1, 9 (Jan. 2021), https://files.epi.org/pdf/218473.pdf [https://perma.cc/3V9F-M6FF].

[104] *See* Dragana Stojmenovska, Stephanie Steinmetz & Beate Volker, *The Gender Gap in Workplace Authority: Variation Across Types of Authority Positions*, 100 SOC. FORCES 599, 600 (2021); James R. Elliott & Ryan A. Smith, *Race, Gender, and Workplace Power*, 69 AM. SOCIO. REV. 366, 384 (2004); a*ccord* Audra Wilson, *There's No Room for White Fragility in the Fight for Racial Justice*, SHRIVER CTR. ON POVERTY L. (Apr. 28, 2023), https://www.povertylaw.org/article/no-room-for-white-fragility/ [https://perma.cc/CQJ4-QSKV] ("To advance more equitable laws and policies, white people working at the intersection of race and poverty need to be aware and act in ways that always account for their power and privilege.").

[105] *See* 110 CONG. REC. 13,090 (daily ed. June 9, 1964) (statement of Sen. Humphrey) (stating that the principle of the statute is "fairness that is so morally and ethically correct that its validity should long ago have been universally recognized").

[106] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234–35 (1969).

Act of 1866, 14 Stat. 27, from which § 1982 was derived."[107] When Sullivan first leased his home to Freeman, he assigned to Freeman his membership share of the corporation that operated the park and playground facilities for residents.[108] Upon doing so, Sullivan was met with disapproval from the board of Little Hunting Park, Inc. because Freeman was a Black man.[109] When Sullivan protested the board's refusal to approve the assignment, he was expelled.[110] In its reasoning, the Court stated:

> We turn to Sullivan's *expulsion for the advocacy of Freeman's cause*. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259 (1953), that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.[111]

Like 42 U.S.C. § 1982, 42 U.S.C. § 2000e-2 is derived from a civil rights act with a broad and sweeping nature.[112] Leaning on the Court's actions in *Sullivan,* the Sixth Circuit in *Johnson* reasoned, if the plaintiff's injuries "were allowed to go unredressed, it would give impetus to the perpetuation of racial and minority discrimination in hiring which Title VII of the Civil Rights Act of 1964, affirmative action programs, and § 1981, were designed to prevent."[113]

Given that Title VII was designed to uproot systemic and institutional discrimination, it should be applied as extensively as possible, including to situations in which fellow employees support and advocate for the working conditions of their fellow Black coworkers or any other marginalized coworker.[114] Should courts choose not to recognize the design and purpose of Title VII nor extend it to employees who advocate for equality, then litigators should explore alternative frameworks to protect advocate-plaintiff may still be protected.

IV. ALTERNATIVE LITIGATION STRATEGIES TO PROTECT THIRD-PARTY ADVOCATES

As *Johnson* made clear, by failing to interpret protections for plaintiffs who advocate for better working conditions and equal employment opportunities, the

[107] *Id.* at 237.
[108] *Id.* at 236–37.
[109] *See id.* at 234–35.
[110] *Id.* at 235.
[111] *Sullivan*, 396 U.S. at 237.
[112] *Id.*
[113] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 576 (6th Cir. 2000).
[114] *Id.* at 576 (citing Winston v. Lear–Siegler, Inc., 558 F.2d 1266, 1270 (6th Cir. 1977)).

court encourages employees who are indirectly affected by discrimination to "either remain silent or be 'punished.'"[115] This creates a world in which, under Title VII, the only employees able to advocate for equal opportunities and employment conditions are those who are already directly discriminated against because of their own protected characteristic. It also situates employees in yet another power imbalance: only those already being actively discriminated against can advocate for themselves with statutory protections.[116] Meanwhile, employees initially unaffected by direct discrimination—and thus well-positioned to advocate for equal opportunities—are vulnerable to statutorily unprotected discrimination after their intervention and advocacy. Finally, there is not time to wait for the slower solutions of legislative reform or judicial activism: the current political landscape is turning employment settings into political battlefields as employees are terminated for their fundamental beliefs.[117]

In *Frith,* employees wore masks that displayed racial justice slogans to advocate for equal opportunities and employment conditions for their coworkers.[118] Banding together likely made their voices louder and improved their positioning to encourage company change.[119] Without protections for advocates and bystander-interveners, employees must rely on those already disadvantaged by discrimination to advocate for themselves. Without a reading of Title VII to protect advocacy discrimination claims, the law leaves those who stand up for the purpose of Title VII and subsequently face discrimination without redress.[120] It is for this reason, Title VII should be read in such a way as to protect advocates of those who are subjects of discrimination. If courts refuse to do so through the Sixth Circuit's advocacy discrimination theory, then we must rely on the following avenues to protect advocates of equal opportunity in the workplace.

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[115] *Id.* at 577.

[116] *See id.*

[117] *See, e.g.*, Zach Blanchard, *Brewer Teacher Sues School Department Following Claims of LGBTQ Discrimination*, NEWS CTR. ME. (Feb. 2, 2022), https://www.newscentermaine.com/article/news/education/brewer-teacher-sues-school-department-following-claims-of-lgbtq-discrimination [https://perma.cc/DJY3-YYHK]; Khorri Atkinson, *Fight Over Transgender Pronouns at Work Faces Muddy Legal Waters*, BLOOMBERG L. (Apr. 13, 2023), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X7LVQVIO000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/YX5G-WG9K].

[118] Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 268 (1st Cir. 2022).

[119] *See* Zheng, *supra* note 8.

[120] *See, e.g.*, Krasner v. HSH Nordbank AG, 680 F. Supp. 2d 502, 510–11, 522 (S.D.N.Y. 2010) (dismissing plaintiff's Title VII discrimination and retaliation claims for lack of standing because, despite being terminated after complaining of hostile work environment toward women, plaintiff identified as a man).

A. *Congress: Legislative Reform*

Legislating protections for advocates in the workplace would be the most effective path forward because it would most clearly define what activities are protected, incorporate a thoughtful balance between employee protections and employer interests, and promote consistency across the courts. Title VII's language of "such individual" is antiquated. The courts that colloquially abbreviate to "because of . . . [a protected characteristic]" demonstrate that the time has come to recognize new law.[121] In November of 2021, the 117th Congress introduced Senate Bill 3219 *Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act* or the *BE HEARD in the Workplace Act.*[122] The bill re-examines the protections against workplace discrimination.[123] As the name in the "BE HEARD" bill suggests, one might believe that advocacy—a form of voicing one's opinion and being heard—could be codified into this legislation. However, this bill did not envision protections for the advocate-plaintiff, indicating that future legislative protections are far from fruition.[124]

B. *Courts: Statutory Interpretation*

While the statutory interpretation and analysis in Part III establishes how advocacy discrimination claims align with the text of Title VII, Justice Clarence Thomas foreshadowed that the current Supreme Court is unlikely to adopt this interpretation unless the Equal Employment Opportunity Commission (EEOC), the agency charged with administering Title VII, clarifies its guidance on protections from discrimination on the basis of a third-party's protected characteristics.[125] In *General Dynamics Land Systems, Inc. v. Cline*, Justice Thomas offered a lengthy dissent to express his strong belief that interpreting the plain language of the Age Discrimination in Employment Act of 1967 (ADEA) should have been an easy task.[126] His immediate turn to plain language was expected and his dismissal of the majority opinion's use of "social history" and legislative history to address the language's ambiguity is also of no surprise.[127] Instead, to bolster his interpretation of plain language, he leaned on the EEOC's guidance.[128] Thus, while advocacy discrimination claims further

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[121] *See* Barrett v. Whirlpool Corp., 556 F.3d 502, 512–13 (6th Cir. 2009).

[122] S. 3219, 117th Cong. (2021). The House of Representatives also introduced an identical bill, H.R. 5994, 117th Cong. (2021).

[123] S. 3219, 117th Cong. §§ 301–04 (2021).

[124] *See generally id.*

[125] *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 602, 605, 611 (2004) (Thomas, J., dissenting).

[126] *Id.* at 602.

[127] *Id.* at 602–03; *see also* H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U. L. REV. 365, 365–68 (2000).

[128] *Cline*, 540 U.S. at 605 (Thomas, J., dissenting).

Congress's overall intent for Title VII, the Court's approval or dismissal of advocacy discrimination theory will likely turn on whether the justices believe the plain meaning to be clear and whether the EEOC delivers guidance related to discrimination on the basis of third-parties.[129] Therefore, the EEOC should establish guidance on protections for the advocate-plaintiff to support the Court's decision-making and eliminate the split between the circuits.

C. *Civil Rights Advocates: Alternative Litigation Strategies*

While legislative reform or court activism might seem appealing, they are not likely to happen quickly nor without red tape. Instead, a more practical and swifter path forward is through litigative grassroots efforts. Litigators can expedite change and broaden protections without waiting on a system of lawmaking by applying advocacy discrimination theory within associational discrimination claims or retaliation claims or by applying the "zone of interest" test to bring the advocate-plaintiff within the "person aggrieved" definition required for standing under Sections 703(a) and 704(a).[130] Thus, civil rights advocates have alternative litigation routes to protect this particular category of plaintiff by bringing traditional associational claims, retaliation claims, or novel "zone of interest claims."

1. *Advocacy Discrimination Claims as a Subsect of the Recognized Associational Discrimination Claims*

In an associational discrimination claim, Title VII may protect employees who are not members of a protected class if they can sufficiently establish their association with members of a protected class.[131] Bringing traditional associational claims in place of advocacy discrimination claims may be an easy adjustment when the plaintiff can establish a sufficient nexus between his or her own protected characteristic and the employer's adverse action. Though initially a surprising outcome, the Sixth Circuit's holding in *Johnson* may be read as an expansion of the widely recognized "associational discrimination" theory.[132] Associational discrimination claims parallel advocacy discrimination claims because they too protect a person from discrimination because of a third-party's protected characteristic.[133] In associational claims, the animus is usually

[129] *See generally* Shannon McCambridge, *Third-Party Retaliation: "The Shoes of an Employer*,*"* 7 J. MARSHALL L.J. 41 (2013) (noting that Justice Alito has advocated for "gap-filling assistance" from the EEOC to clarify how to treat third-party retaliation claims).

[130] *See* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 176 (2011).

[131] Barrett v. Whirlpool Corp., 556 F.3d 502, 512, 515 (6th Cir. 2009).

[132] *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 359 (7th Cir. 2017) (en banc); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 574–75 (6th Cir. 2000).

[133] *See* Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds sub nom.* Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1118 (9th Cir. 2004),

directed toward the plaintiff's *association* with a third-party, but the courts square the direction of the discrimination with the language in Title VII by reasoning that when a defendant takes issue with the plaintiff's association, the defendant actually takes issue with the plaintiff's own protected characteristic.[134] For example, in *Parr v. Woodmen of the World Life Ins. Co.* the court stated that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race. It makes no difference whether the plaintiff specifically alleges in his complaint that he has been discriminated against because of his race."[135] The reasoning is as follows: when a white plaintiff marries a Black third-party and is discriminated against because of his association with the Black third-party, the defendant's animus is with the interracial association and therefore with both the third-party and the plaintiff's race.[136] One might even go so far as to say that if the plaintiff were Black, then the animus would not be with the interracial association; thus, it is the plaintiff's white race that is cause for discrimination.[137] Therefore, to protect the advocate-plaintiff, one needs to expand the associational discrimination claim to incorporate additional fact patterns. Michelle MacDonald attempted to do just that when she plead that the Brewer School District of Maine discriminated against her when it fired her for advocating for and associating with members of the LGBTQ+ community—a claim of associational discrimination on the basis of sex.[138]

One implication of attempting to establish advocacy claims as an iteration of associational claims is that associational claims usually only recognize claims in which the analysis immediately implies the plaintiff's own protected characteristic is implicated.[139] Further, an associational claim may require the plaintiff and third-party who are associating to always be of different identities. For example, the precedential cases protecting employees in interracial marriages are founded on the presumption that one partner is facing

aff'd 247 F. App'x 72 (9th Cir. 2007); Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008); *Barrett*, 556 F.3d at 512–13; *Hively*, 853 F.3d at 349; Kengerski v. Harper, 6 F.4th 531, 538 (3d Cir. 2021).

[134] Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 891 (11th Cir. 1986).

[135] *Id.* at 892.

[136] Note that these two protected characteristics-white and Black-serve only as an example based on the case of *Parr*. Any two protected characteristics could fulfill this reasoning.

[137] Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298, 300 (S.D.N.Y. 1996) ("[The p]laintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race.").

[138] MacDonald v. Brewer Sch. Dep't, 651 F. Supp. 3d 243, 258 (D. Me. 2023).

[139] *Holcomb*, 521 F.3d at 139 ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race."); *Barrett*, 556 F.3d at 512 (collecting cases).

discrimination because of the second partner's *different* race.[140] However, *Bostock v. Clayton County* suggests that perhaps associating employees can bring a viable associational discrimination claim even when each employee pleads the same protected characteristic.[141] *Bostock* reasons that discrimination because of one's sexual orientation is associational discrimination on the basis sex and, thus, founded on the presumption that one partner is facing discrimination because of the second partner's *same* sex or gender.[142] Had the association been defined by two people of the opposite sex, then the discriminatory animus may not have existed.[143] Thus, while *Frith* seems to believe *Bostock v. Clayton County* forecloses a claim of advocacy discrimination, *Bostock* instead seems to be the solution because it recognizes that same sex couples can establish an associational discrimination claim despite identifying with the same protected characteristic.[144] This is of significance because, like the plaintiff in *Johnson*, not all employees plead that they were discriminated against because of their own characteristics, but rather, because of another employee's characteristic for whom they advocated.[145]

"[C]ourts . . . have broadly construed Title VII to protect individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate."[146] In *Barrett v. Whirlpool Corporation*, the Sixth Circuit reasoned that "a white Title VII plaintiff must demonstrate an association with a member of a protected class, . . . [but] that relationship need not necessarily be familial or intimate."[147] Further, both the Sixth Circuit and Seventh Circuit have held that "the degree of association is irrelevant, and that 'the key inquiries should be whether the employee has been discriminated against and whether

[140] *See Rosenblatt*, 946 F. Supp. at 300. If the plaintiff and third-party identified with the *same* protected characteristic, then the plaintiff would merely bring a direct discrimination claim. *See* Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) (citing Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986) (ruling that both Title VII and § 1981 prohibit hiring discrimination based on an individual's association with African-Americans, or based on interracial marriage); Chacon v. Ochs, 780 F. Supp. 680, 680–82 (C.D. Cal. 1991) (holding that it is unlawful under Title VII to discriminate against a white woman married to a Hispanic man); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (ruling that Title VII provides a cause of action for a white plaintiff who is discriminated against because of the plaintiff's relationship with African–Americans).

[141] *See* Bostock v. Clayton Cnty., 590 U.S. 644, 659–61 (2020).

[142] *See id.* at 661.

[143] *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345–46 (7th Cir. 2017) (en banc).

[144] *See Bostock*, 590 U.S. at 659–61.

[145] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 572 (6th Cir. 2000).

[146] Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir.1999) (citing Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986) and collecting cases).

[147] *See* Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009) (quoting Barrett v. Whirlpool Corp., 543 F. Supp. 2d 812, 826 (M.D. Tenn. 2008)).

that discrimination was "because of" the employee's race.'"[148] In these associational discrimination claims, the focus is not on the protected characteristic of the individual plaintiff but rather on the social relationship and the protected characteristic of the third party with whom the employee has a social relationship.[149] Therefore, the act of advocating for a protected employee can be translated into a form of association because the type and degree of social relationship is not of significant import. Instead, an employee and her coworker or a teacher and her students may both be social relationships that satisfy the element of association.

Further, *Bostock* does not foreclose advocacy claims as *Frith* states because it simply clarifies how gender discrimination and sexual orientation discrimination are forms of discrimination based on sex. *Bostock* attempts to define "because of" and "sex," while the advocate-plaintiff's protections turn on "such individual."[150] Establishing how gender discrimination and sexual orientation discrimination fit into the text of Title VII does not preclude the advocate-plaintiff from also establishing how advocacy discrimination might fit into the text of Title VII. Rather, *Bostock* seems to expound on associational discrimination such that social relationships of the same protected characteristic are now covered under associational discrimination.[151] The form of association pled in *Frith* happens to be a social relationship in which the coworkers advocate for one another.[152] This is no different from the social relationships that are protected by associational claims. Therefore, whether the court chooses to categorize the advocate-third-party relationship as a form of "association" or label it separately as "advocacy," the discrimination claim should stand on the same reasoning that *Frith* uses to maintain associational claims under Title VII.

Advocacy discrimination claims are a subsect of an associational discrimination claim as they both address victims of discrimination as a result of animus toward a third-party.[153] This is especially true given that the degree of association is irrelevant and that the protected association can be between people of the same or different protected characteristics. In conclusion, this solution would be successful for plaintiffs who can establish that their form of advocacy is association with a third-party and the employer's adverse action was a result of their association with the third-party.

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[148] *Id.* (quoting Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998)).

[149] *See, e.g.*, *id.* at 512; Kengerski v. Harper, 6 F.4th 531, 538 (3d Cir. 2021); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir.1998); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 349 (7th Cir. 2017) (en banc); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588–89 (5th Cir. 1998), *vacated in part on other grounds sub nom.* Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc) (per curiam); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986).

[150] *Compare* Bostock v. Clayton Cnty., 590 U.S. 644, 656 (2020), *with* Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 272 (1st Cir. 2022).

[151] *See Bostock*, 590 U.S. at 659–62.

[152] *Frith*, 38 F.4th at 268.

[153] *Compare Barrett*, 556 F.3d at 512, *with Parr*, 791 F.2d at 892.

2. *Advocacy Discrimination Claims as a Subsect of Retaliation Claims*

Bringing retaliation claims in place of advocacy discrimination claims may be successful if the actions of a plaintiff's advocacy amounts to protected conduct. At least one court faced with a pleading of advocacy discrimination has proactively, and without prompting, fused the claim with a simultaneous claim of retaliation.[154] The court then analyzed the advocacy discrimination fact pattern through a retaliation claim framework, and the plaintiff faced nexus challenges rather than membership challenges.[155]

The First Circuit itself recognized that "the anti-retaliation provision of Title VII provides a 'very broad protective cloak[,]' [and thus,] mere 'informal opposition' to a discriminatory employment activity is sufficient to constitute protected activity under Title VII."[156] Retaliation claims protect employees when they vocalize their opposition to a perceived Title VII violation.[157] According to the Equal Employment Opportunity Commission (EEOC), unlawful retaliation can include retaliation against an applicant or employee for "complaining . . . about alleged discrimination against . . . others; . . . intervening to protect others; complaining to management about [Title VII]-related compensation disparities; or talking to coworkers to gather information or evidence in support of a potential [Title VII] claim."[158] Unlike the prohibition of discrimination, established by Section 703 and codified as 42 U.S.C § 2000e-2, the prohibition of retaliation was established by Section 704 and codified as 42 U.S.C § 2000e-3.[159] However, the claims are subject to a similar burden shifting framework of *McDonnell Douglas*: "To establish a prima facie case of retaliation, a plaintiff must prove that: (1) she engaged in protected conduct; (2) she was subjected to an adverse employment action; and (3) the adverse action was causally connected to the

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[154] Persson v. Boston Univ., No. 15-14037, 2019 WL 917205, at *11 (D. Mass. Feb. 25, 2019) ("Here, the plaintiff appears to be advancing two possible theories of associational discrimination. First, that she was discriminated against for advocating on behalf of her African-American coworkers . . . . [This theory] pertains to her claims of retaliation, i.e., that adverse actions were taken against her for speaking out and shall be discussed separately [as a retaliation claim below].").

[155] *Id.* at *17.

[156] *Id.* at *14 (quoting Franchina v. City of Providence, 881 F.3d 32, 45 (1st Cir. 2018)); *see also* Velazquez-Ortiz v. Vilsack, 657 F.3d 64, 72 (1st Cir. 2011) (confirming that Title VII prohibits "not only direct discrimination, but also retaliation against an individual who has complained about discriminatory employment practices").

[157] *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 26, 2016), https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues [https://perma.cc/ZX5B-APHC].

[158] *Id.*

[159] *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 [https://perma.cc/7TN6-4XUH].

protected conduct."[160] To establish an advocacy discrimination claim within the retaliation framework, plaintiffs would need to show that their advocacy amounted to protected conduct.[161]

To constitute protected conduct, the activity must be protected under either the "participation clause," which includes activities such as filing a formal complaint with the EEOC, or the "opposition clause," which includes more nuanced activities such as informal, internal complaints to management or responding to an employer's internal investigation.[162] The plaintiff must clearly be "opposing" an employer's action to constitute protected activity.[163]

For an advocacy claim to prevail under the retaliation framework, the advocate-plaintiff would need to demonstrate how his or her advocacy constituted "opposition" conduct. Moreover, the plaintiff would also need to demonstrate his or her oppositional advocacy was directly pointed toward the employer or a clear aspect of employment.[164] The plaintiff must have sufficiently "step[ped] outside" his or her traditional job role to establish the opposition as protected activity.[165] Note that in *Johnson v. University of Cincinnati*, the district court rejected the plaintiff's retaliation claims in addition to his discrimination claims. In *Johnson*, the plaintiff was "a high-level affirmative action official whose job responsibilities include[d] advocating minority rights[,]" and, therefore, the "[p]laintiff did not engage in protected activity when he engaged in such advocacy" because his actions were not sufficiently "outside" his traditional job role.[166] The circuit court did eventually overturn the district court's ruling on the basis that their reasoning would perpetuate discrimination by incentivizing employers to hire Diversity, Equity, and Inclusion directors to *look* like the institution was investing in Title VII's

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[160] *Compare Persson*, 2019 WL 917205, at *14 (citing Rivera-Rivera v. Medina & Medina, Inc., 898 F.3d 77, 94 (1st Cir. 2018)), *and* Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 258 (4th Cir. 1998), *with* sources cited *supra* notes 25–27 and accompanying text.

[161] *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, *supra* note 157.

[162] *See id.*; Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 275, 276 (2009).

[163] *Accord* EEOC v. N. Mem'l Health Care, 908 F.3d 1098, 1102 (8th Cir. 2018) (reasoning that requesting a religious accommodation was not equivalent to 'opposing' the employer's practices); *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, *supra* note 157.

[164] *See* Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 277 n.13 (1st Cir. 2022) (describing that the plaintiff's efforts of opposition to "'protest[] racism and discrimination in the workplace,' and to 'demand . . . better treatment of Black employees in the work place'" were general allegations and insufficient to establish opposition (quoting Amended Class Action Complaint Requesting Preliminary and Permanent Injunctive Relief, ¶¶ 68–69, Frith v. Whole Foods Mkt., Inc., 38 F.4th 263 (2022) (No. 21-1171)).

[165] *See, e.g.*, EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998); Brush v. Sears Holdings Corp., 466 F. App'x 781, 788 (11th Cir. 2012).

[166] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 573 (6th Cir. 2000).

goals while actually relying on the protection that the directors' opposition would not be covered by Title VII.[167]

However, while the implication may be that those who are opposing an employer while remaining within the boundaries of their job duties may not be protected, not all courts have found themselves bound to this "manager exception."[168] For example, when an employee "actively 'support[s]' other employees in asserting their Title VII rights or personally 'complain[s]' or is 'critical about the 'discriminatory employment practices' of her employer, that employee has engaged in a protected activity under § 704(a)'s opposition clause."[169] This type of support sounds curiously similar to "advocacy" for an individual.

Litigators should consider this framework because the elements of a retaliation claim do not take the plaintiff's own characteristics into account.[170] The analysis instead asks whether or not the plaintiff engaged in a protected activity.[171] The First Circuit seems to suggest that successful retaliation claims require a lower standard of proof than an advocacy discrimination claim: a "retaliation claim may be viable even if the underlying discrimination claim is not" and the employment practice opposed "need not be a Title VII violation so long as [the plaintiff] had a reasonable belief that it was, and [s]he communicated that belief to [her] employer in good faith."[172] Further, the courts allow circumstantial evidence to prove the causal connection of the third element including "whether the employer treated the plaintiff differently from similarly situated individuals" and "whether there is a temporal connection between the protected activity and the retaliatory action."[173] Thus, advocate-plaintiffs should lean on the broad protections of this particular Title VII section, and courts should feel comfortable construing the retaliation framework to protect the advocate-plaintiff.

In *Thompson v. North American Stainless, LP,* the Court established that a plaintiff may have standing under a Title VII retaliation framework even if he himself did not engage in protected activity.[174] The plaintiff in *Thompson* was terminated after his fiancé engaged in protected activity when she filed a

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[167] *Id.* at 577.

[168] *See* Patterson v. Georgia Pac., LLC, 38 F.4th 1336, 1346–48 (11th Cir. 2022); Ward v. Sys. Prod. & Sols., Inc., 631 F. Supp. 3d 1134, 1148–50 (N.D. Ala. 2022) ("[C]ourts in this Circuit are forbidden to unevenly construe the Opposition Clause's protections on account of job title."); Littlejohn v. City of N.Y., 795 F.3d 297, 318 (2d Cir. 2015).

[169] *Littlejohn*, 795 F.3d at 318.

[170] *See, e.g.*, Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011) (allowing a retaliation claim by a fiancé).

[171] *See id.* at 172–74.

[172] Benoit v. Tech. Mfg. Corp., 331 F.3d 166, 174–75 (1st Cir. 2003).

[173] Barrett v. Whirlpool Corp., 543 F. Supp. 2d 812, 821 (M.D. Tenn. 2008) (citing Allen v. Mich. Dep't of Corr., 165 F.3d 405, 413 (6th Cir. 1999)).

[174] *Thompson*, 562 U.S. at 173–74.

complaint with the EEOC.[175] However, because both the plaintiff and his fiancé were employees of the same company, the Court applied the test established in *Burlington Northern & Santa Fe Railway Co. v. White* which prohibits retaliatory employer actions that "might . . . dissuade[] a reasonable worker from making or supporting a charge of discrimination."[176] The Court reasoned that because the plaintiff's fiancé would be dissuaded from making or supporting a charge of discrimination if she knew that her fiancé would be terminated, the plaintiff himself was a person aggrieved.[177] However, the Court sufficiently limited this test for third-party recovery by applying a "zone of interests" test in which only third-parties with an interest "arguably [sought] to be protected by the statute" have standing.[178]

If this solution were employed, the advocate-plaintiff would need to clearly establish the nexus between the employee's protected conduct and the employer's adverse action. However, this nexus challenge would exist even with the original advocacy discrimination claim in which one has to prove the discrimination was "because of" the advocacy just as a retaliation plaintiff must prove the adverse action was due to her opposition. *Frith* serves as an example. In fact, it was due to the plaintiffs' inability to demonstrate a nexus in *Frith*'s fact pattern that the claim failed.[179] In conclusion, shifting an advocacy discrimination claim to a retaliation claim shifts only the question for the courts to consider. It becomes, "is the form of advocacy sufficient to fulfill Title VII's 'protected conduct' standard?"

3. *Advocacy Discrimination Claims Within the Zone of Interests Test*

The advocate-plaintiff may also establish a cause of action by invoking the "zone of interests" test. In *Thompson*—the same decision that reinforced the *Burlington Northern* test for prohibited retaliatory conduct—the Supreme Court invoked the "zone of interests" test to examine whether the plaintiff had standing to sue for his own termination after his fiancé filed an EEOC complaint against his employer.[180] Because the plaintiff himself had not filed the complaint with the EEOC, he could not fulfil the prong of his retaliation claim which required that he establish he engaged in protected activity; instead, his fiancé had engaged in the protected activity.[181] However, Title VII also includes an enforcement provision that permits "the person claiming to be

[175] *Id.* at 172.
[176] *Id.* at 174 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).
[177] *Id.* at 174, 176, 178.
[178] *Id.* at 178 (quoting Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 495 (1998)).
[179] Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 278 (1st Cir. 2022).
[180] *Thompson*, 562 U.S. at 178.
[181] *Id.* at 172.

aggrieved . . . by the alleged unlawful employment practice" to file suit.[182] The Court reasoned that the plaintiff had a cause of action as a person aggrieved and within the zone of interests sought to be protected by Title VII.[183]

The advocate-plaintiff should look to the enforcement provisions to support their claims—instead of the direct discrimination provision in 42 U.S.C. § 2000e-2—to establish his or her interests fall within the zone of interests of Title VII.[184] "[The] terms [of Title VII] are not limited to discrimination against members of any particular race" whether considered a 'minority' or a 'majority,' but rather "because of" a protected characteristic.[185] Therefore, imputing the protected characteristic—such as the race of the third-party with whom a person associates, as the Sixth Circuit attempts to do in *Johnson v. Cincinnati—*is both inconsistent with the statute and irrelevant.[186] The reasoning is inconsistent because Title VII does not protect specific categories of people, but, rather, it protects all employees from discrimination "because of" protected characteristics, namely race, color, religion, sex, or national origin.[187] It is also irrelevant because so long as the discrimination is "because of" the protected characteristic, the specific protected characteristic, such as Black or female, is not of import and the third-party's race need not be imputed to the plaintiff.[188] In fact, because the Supreme Court has held that even people who do not identify with a traditionally marginalized group can bring a claim,[189] pleading a

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[182] *Id.* at 173.

[183] *Id.* at 178.

[184] *Compare* 42 U.S.C. § 2000e-5 (omitting "such individual"), *with* 42 U.S.C. § 2000e-2.

[185] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976); *accord* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."). The reader should also note the court's acknowledgement in footnote 6 of *McDonald v. Santa Fe Trail Transportation Co.* which clarifies that the *McDonnell Douglas* framework to establish discrimination, though it uses the phrase "belong to a racial minority" to establish the first element, is not contrary as it serves only as an example and should not be limiting. *McDonald*, 427 U.S. at 279 n.6 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[186] While the court in *Johnson* does seem to point out the correct interpretation of the statute when it declares, "the plaintiff himself need not be a member of a recognized protected class; he need only allege that he was discriminated on the basis of his association with a member of a recognized protected class." Johnson v. Univ. of Cincinnati, 215 F.3d 561, 574 (6th Cir. 2000). The remainder of the opinion continues to operate on the need to demonstrate that the particular race or sex of those for whom he advocated can be imputed to the plaintiff to demonstrate that he is of a protected category. *Id.* at 574–75.

[187] 42 U.S.C. § 2000e-2(a). The court should not protect specific categories of employees, such as people of color or women, but rather protect all employees, whether people of color or white or women or men, from discrimination on the basis of race, color, religion, sex, or national origin.

[188] *See* sources cited *supra* notes 25–27, 184.

[189] *See, e.g.*, Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) (holding that discrimination against a white employee

particular race, sex, religion, etc. is irrelevant. Almost anyone can plead that they have a "race" or a "religion," thus negating the importance of pleading a particular immutable identity. Yet, pleading the specific immutable identity remains a requirement in the most basic discrimination prima facie.[190] Beyond lending support to why or how the facts might lead one to believe actions were *because of* an immutable characteristic, pleading the specific immutable characteristic—such as female or Christian—should not be relevant to whether or not a plaintiff has standing. Rather, it is more relevant to identify the protected category against which the employer allegedly discriminated—such as sex or religion. Thus, the analysis examines whether the protected characteristic in general was a factor in a discriminatory action and not *whose* protected characteristic was a factor in a discriminatory action.

In the case of *Frith,* the employees were advocating for improved pay, working conditions, and hiring practices for their existing Black coworkers and future Black coworkers.[191] The discrimination was "because of" their advocacy for "better treatment of Black employees in the work place" and thus, "because of" race in general.[192] Therefore, *Frith*'s attempt to foreclose advocacy is based on the wrong reasoning. Instead, the advocate-plaintiff may wish to lean on *Thompson v. North American Stainless LP*, in which the Supreme Court furthered the "zone of interests" test and the proximate cause test, consistent with the goals of advocacy discrimination claims.[193]

Title VII provides that "a civil action may be brought . . . by the person claiming to be aggrieved" if all available administrative remedies have been exhausted.[194] The Supreme Court in *Thompson v. National American Stainless* opined that standing for those "aggrieved" under Title VII is narrower than that of Article III of the Constitution.[195] However, the Court continued to state that the "person aggrieved" is not limited to the "person claiming to have been discriminated against" because "if that is what Congress intended it would more naturally have said [that]."[196] Instead, the Court need not give Title VII a

because of race violates Title VII); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 (1983) (holding that discrimination against a male employee because of sex violates Title VII); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (confirming that Title VII "protects men as well as women").

[190] *See, e.g.*, Perry v. Kelly, No. 18-CV-05116, 2019 WL 13277871, *1–2 (E.D.N.Y. Feb. 4, 2019) (dismissing plaintiff's Title VII claim because she "left blank the section on the form complaint that calls for the protected characteristic upon which her claims are based" but granting leave to amend because she was proceeding in forma pauperis).

[191] Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 268 (1st Cir. 2022).

[192] *Id.*

[193] Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177–78 (2011).

[194] *See* 42 U.S.C. §§ 2000e-5(b), (f)(1).

[195] *Thompson*, 562 U.S. at 176–77.

[196] *Id.* at 177.

narrower meaning than the previous holding of "person aggrieved" under Title VIII in *Trafficante v. Metropolitan Life Ins. Co*.[197]

The current zone of interests concept rose from the common law rule that "a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute 'is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.'"[198] The Supreme Court then furthered the concept "as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act" (APA) in the case of *Association of Data Processing Service Organizations, Inc. v. Camp.*[199] Later, the Court broadened the test to apply to "all statutorily created causes of action" and required for "'general application'" given that "Congress is presumed to 'legislate against the background of' the zone-of-interests limitation, 'which applies unless it is expressly negated.'"[200]

Since then, the major dictating case surrounding the "zone of interests" test is *Lexmark International*.[201] It suggests that the test is "not 'especially demanding'" and "forecloses suit only when a 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 authorized that plaintiff to sue."[202] Rather, a plaintiff has standing when the plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue under" a substantive statute.[203] More specifically, it "requires . . . using traditional tools of statutory interpretation [to determine] whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."[204] As Justice Scalia wrote for a unanimous Court, "[it is more accurate] to say that the limitation *always* applies and is never negated, but that our analysis of certain statutes will show that [the statutes] protect a more-than-usually 'expansive' range of interest."[205] He continued to describe that the APA context in which the zone of interest was initially applied often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff."[206]

While the range of the zone of interests varies based on the substantive law at issue,[207] *Thompson* recognizes that Title VII protects the interests of

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[197] *Id.* at 176–77.

[198] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 131 n.5 (2014).

[199] *Id.* at 129.

[200] *Id.* at 129 (quoting Bennett v. Spear, 520 U.S. 154, 163 (1997)); *see also* Holmes v. Secs. Inv. Prot. Corp., 503 U.S. 258, 287–88 (1992) (Scalia, J., concurring).

[201] *Lexmark*, 572 U.S. at 129.

[202] *Id.* at 130.

[203] *Id.* at 128.

[204] *Id.* at 127.

[205] *Id.* at 129–30 (quoting Bennett v. Spear, 520 U.S. 154, 164 (1997)).

[206] *Id.* at 130 (quoting Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012)).

[207] *Lexmark*, 572 U.S. at 130–31 (quoting Bennett v. Spear, 520 U.S. 154, 163 (1997)).

aggrieved third-parties when they are employees affected by their employer's unlawful actions.[208] Looking at the intent of Title VII, the advocate-plaintiff falls within the "zone of interests" when they are an employee affected by their employer's actions if their employer's actions are based on or motivated by the protected category of another employee.[209]

V. CONCLUSION

Whether due to the onset of social media, the charged political climate, or separate factors altogether, movements such as Black Lives Matter and #MeToo seem to be entering the workplace in daily and casual conversation. Employers will continue to face difficult questions that pivot on employees' protected categories, such as questions concerning health insurance coverage for transgender employees seeking gender affirming care or female employees seeking reproductive services. Fellow employees should have the freedom to advocate on behalf of their affected colleagues without fearing discrimination due to their advocacy for a better workplace.

[208] Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011).
[209] *See Lexmark*, 572 U.S. at 131 n.5.