

No. 08-204

IN THE  
SUPREME COURT OF THE UNITED STATES

DAWN V. MARTIN, ESQUIRE  
*Petitioner*

v.

HOWARD UNIVERSITY,  
HOWARD UNIVERSITY LAW SCHOOL  
and  
ALICE GRESHAM BULLOCK, ESQUIRE  
*Respondents.*

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ON PETITION FOR WRIT OF *CERTIORARI*  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE D.C. CIRCUIT

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MOTION FOR AN ENLARGMENT OF TIME AND  
LEAVE TO FILE *SUPPLEMENTAL PETITION*  
*FOR REHEARING* OR *SECOND PETITION FOR*  
*REHEARING*, RELYING ON THIS COURT'S NEW,  
CONTROLLING DECISION IN *CRAWFORD*

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Petitioner, Dawn Martin, Esquire, respectfully requests an enlargement of time to file a *Supplemental Petition for Rehearing*, relying on this Court's January 26, 2009 unanimous, controlling decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, -- U.S. --, 2009 WL 160424 (U.S.) (2009).

*Crawford* is a retaliation case, brought under Title VII of the Civil Rights Act of 1964, for reporting sexual harassment. *Martin* is a sexual harassment and retaliation case, also brought under Title VII.

## **I. Authority for Granting the Motion**

### **A. There is “Good Cause” for an Enlargement of Time**

A party may file a motion with an individual Justice for an enlargement of time, for “good cause” shown, as long as the extension does not exceed sixty days.<sup>1</sup> Sup. Ct. Rules 13.5 and 30.3. Ms. Martin timely offers the proposed *Supplemental Brief* attached to this motion, within sixty days of the December 12, 2008 deadline.

Ms. Martin was not negligent in meeting any Court deadlines. Recognizing that the pending decision in *Crawford* would control the decision in *Martin*, she filed a *Petition for Rehearing* on December 12, 2008 – the last day that she could file. Unfortunately, since *Crawford* was then pending, she could only make arguments based on *predictions* about the outcome of *Crawford*. She could not make specific arguments based on a decision not yet issued. Forty-five days later – and nine days after

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<sup>1</sup>The Clerk cannot file an out of time *Petition for Rehearing* unless ordered to do so. Sup. Ct. Rule 44.4.

the Court denied Ms. Martin's December 12, 2008 *Petition for Rehearing*, this Court decided *Crawford*.

This Court's conclusion of law -- that Ms. Crawford's conduct constituted "protected activity" -- demonstrates that it is the duty of the Court -- not a jury -- to determine whether this undisputed conduct constitutes "protected activity," as a matter of law. *Crawford* therefore compels the conclusion that the trial court in *Martin* erred by requiring *the jury to decide* whether Prof. Martin's undisputed written complaints of a delusional campus stalker pursuing her to be his "wife," constituted "protected activity" under Title VII.

Justice and fairness, as well as consistency in the circuits, should not be denied simply because the Court decided *Crawford* nine days after it denied Ms. Martin's *Petition for Rehearing*. There should not be inconsistent rulings of law in *Crawford* and *Martin*. Both women are entitled to the same justice.

### **B. Standard for Granting *Petition for Rehearing***

This Court may reconsider a denial of *certiorari*, on a *Petition for Rehearing*, based on intervening circumstances of substantial and controlling effect. Sup. Ct. Rule 44.2. A new controlling Supreme Court decision presents an intervening circumstance justifying the grant of a rehearing. *Friend v. United States*, 517 U. S. 1152 (1996); *Lords Landing Village Condominium v. Continental Ins. Co.*, 520 U.S. 893 (1997); *Beardslee v. Brown*, 393 F.3d 899 (9<sup>th</sup> Cir. 2004). The interest in finality of litigation must yield where the interests of justice would make the strict application of the rules unfair. *United States v. Ohio Power Company*, 353 U.S. 98, 99 (1957).

A party may file a *Supplemental Brief* to address intervening matters while a *Petition for Certiorari* is pending. Rule 15.8. Rule 21, which regulates the form of motions, does not prohibit a motion for leave to file a *Second Petition for Rehearing* or for an extension to file a *Supplemental Brief* after a denial of *Rehearing*. This Court has granted motions for leave to file a *Second Petition for Rehearing*. *Pope v. U.S.*, 328 U.S. 879 (1946); *Farrell v. Com, of Massachusetts*, 328 U.S. 879 (1946); *Autocar Sales and Service Company v. Leonard*, 328 U.S. 879 (1946); *Royer v. Greiner*, 320 U.S. 816 (1944); *Sabin v. Home Owners' Loan Corporation*, 316 U.S. 713 (1942).

This Court retains the inherent power and discretion to fashion a remedy, in the interests of justice and fundamental fairness. *See* Rule 20.1. It may reconsider its denial of *certiorari*, in light of *Crawford*. It may also summarily remand the case to the D.C. Circuit, for a decision consistent with *Crawford*.

## **II. *Crawford* Constitutes Controlling, Intervening Law, Compelling Reversal in *Martin***

In both *Crawford* and *Martin*, the respective Circuit Courts held that the plaintiffs did not engage in “protected activity” because of *how* they reported the sexual harassment to their employers. Both Ms. Crawford and Prof. Martin lost their jobs shortly after reporting the harassment.

In *Crawford*, this Court unanimously held that Ms. Crawford’s conduct *did* qualify as “protected activity” within the meaning of Title VII, as a matter of law. 2009 WL 160424 (U.S.) at \*3-5,

8.<sup>2</sup> *Crawford* makes it clear that *it is the province of the Court*, as a matter of law -- *not a jury*, as a matter of fact -- to decide whether undisputed conduct constitutes “protected activity.”

In *Martin*, the trial court improperly required *the jury* to decide whether Prof. Martin’s complaints of harassment constituted “protected activity.” (See *Pet.* at 19-23 and *Petition for Rehearing* at 3-8.)<sup>3</sup> It is undisputed that she complained verbally and in writing to the Law School administration of a delusional, serial campus stalker, Leonard Harrison, harassing in her within the law school building.<sup>4</sup>

It is undisputed that Harrison’s voicemail messages and letters -- slipped under Prof. Martin’s office door -- stated that he was contacting her because she fit his concept of an ideal “wife.” Harrison created a profile of his “natural wife” based on a *fictional female character*, in a book, written by the renowned civil rights professor, Derrick Bell. Harrison had conducted research on Prof. Martin and watched her at the law school, unbeknownst to her. Harrison concluded that Prof. Martin might fulfill his quest for his perfect “wife.”

It was the duty of the trial judge to decide, as a matter of law, whether the undisputed facts established that Prof. Martin engaged in “protected

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<sup>2</sup>This Court remanded the remaining questions whether the Defendant’s stated reason for Ms. Crawford’s termination was pre-textual and whether the employer’s motive was retaliation for her protected activity. *Id.* at 5.

<sup>3</sup>See also *EEOC v. PVNF, LLC*, 487 F.3d 790, 803-804 (10<sup>th</sup> Cir. 2007); *McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994).

<sup>4</sup>The Law School consists of three adjoining buildings, located on Van Ness Avenue in Washington, D.C., far removed from its main campus on Georgia Avenue.

activity” under Title VII, as this Court did in *Crawford*. Instead, the trial court improperly required the jury to decide whether Prof. Martin’s complaints were protected by Title VII in the first place.

Howard repeatedly told the jury that, since Prof. Martin’s memoranda to the Dean referred to Harrison as a “stalker” -- rather than as a “sexual harasser,”<sup>5</sup> the harassment was not “sexual” harassment and therefore not covered by Title VII. In order to counteract Howard’s improper argument, it was therefore crucial that the jury understand that a plaintiff need not use the precise words “sexual harassment” to invoke Title VII protection.

In his precedent-setting 1999 decision in the case, Judge Hogan specifically held that a plaintiff need not use the words “sexual harassment” or any other “magic words” to invoke Title VII, but that it was enough to make the employer aware of the objectionable conduct and ask the employer to “Do something;” yet, Judge Hogan refused to convey this legal holding to the jury. *See Petition for Rehearing* at 7-8. He further refused even *the jury’s request* for additional instruction.

The issues presented in *Martin* are of paramount national importance, particular to the safety and employment of women. The *National Organization of Women* (NOW) and the *National Association of Women Lawyers* (NAWL), joined by additional women’s and victims’ advocacy groups, filed an *Amicus Brief* in this case. *Martin* has been – and continues to be discussed – all over the internet – with compelling support by women’s advocacy

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<sup>5</sup>Ms. Martin only began using the term “stalker” after the D.C. police department so characterized Harrison.

groups and women at large. See links to sites at [www.dvmartinlaw.com/MartinvHowardU](http://www.dvmartinlaw.com/MartinvHowardU).

Ms. Martin has been interviewed on several radio shows and featured on American Airlines' Sky Radio as part of its series on "*Salute to Women in Leadership*." A television documentary about this case was recently filmed and will soon be broadcast. See Insider Exclusive [www.insiderexclusive.tv](http://www.insiderexclusive.tv). This documentary includes Kim Gandy, the President of NOW, Roberta Wright, counsel for *Amici*, as well as Prof. Derrick Bell and other factual witnesses who have strongly supported Ms. Martin in this case.

The interests of justice -- to Ms. Martin and the many other women who are stalking victims in their workplaces -- compel consideration of the *Martin* under *Crawford*.

## CONCLUSION

Petitioner respectfully requests that the accompanying *Supplemental Brief* be filed and that this case be reconsidered consistently with *Crawford*.

Respectfully submitted,

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## QUESTIONS PRESENTED

- 1) Does *Crawford* Compel Reversal of the Trial Judge the Trial Judge Required *the Jury* to Determine whether the Plaintiff's Complaints of Harassment Constituted "Legally Protected Activity" under Title VII?
- 2) Must a Title VII Plaintiff Use the Precise Words "Sexual Harassment" or any other "Magic Words" when reporting conduct that constitutes violations of Title VII, to invoke Title VII Protection?

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## ARGUMENT

### I. Standard for Rehearing

Petitioner respectfully supplements her December 12, 2008 *Petition for Rehearing*. Pursuant to Rule 44, this *Supplement* is limited to arguments based on intervening circumstances of substantial and controlling effect.

A new controlling Supreme Court decision presents an intervening circumstance justifying the grant of a rehearing. *Friend v. United States*, 517 U.S. 1152 (1996); *Lords Landing Village Condominium v. Continental Ins. Co.*, 520 U.S. 893 (1997); *Beardslee v. Brown*, 393 F.3d 899 (9<sup>th</sup> Cir. 2004). The interest in finality of litigation must yield where the interests of justice would make the strict application of the rules unfair. *United States v. Ohio Power Company*, 353 U.S. 98, 99 (1957).

### II. *Crawford v. Nashville* Constitutes an “Intervening Circumstance of Substantial and Controlling Effect” on *Martin*, Defining of “Protected Activity” under Title VII

#### A. Precedent Set by *Crawford*

This Court’s January 26, 2009 decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 2009 WL 160424 (U.S.) (2009), is an intervening circumstance of substantial and controlling effect in *Martin*. *Crawford* clarified the definition “protected activity,” within the meaning of Title VII of the Civil Rights Act of 1964 – a determinative issue in *Martin*.

During the employer’s internal investigation, in response to questions about whether a supervisor engaged in "inappropriate behavior," Ms. Crawford detailed specific objectionable acts that she

witnessed. 2009 WL 160424 (U.S.) at \* 2 (2009). Shortly after the investigation, the Defendant fired her. After thirty years of employment, the Defendant claimed that it has just discovered that she had committed embezzlement. *Id.*

Reversing the Sixth Circuit's decision, this Court unanimously held that Ms. Crawford engaged in "protected activity" when she responded to questions asked during her employer's internal investigation about whether she had witnessed "inappropriate" behavior by a supervisor:

Crawford's conduct **is** covered by the opposition clause [of Title VII]. (Emphasis added)

2009 WL 160424 (U.S.) at \* 5. *See also* \*3, 8.

This Court interpreted "protected activity" broadly in order to further Title VII's purpose eradicating discrimination in employment. This Court acknowledged that:

"[F]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."

2009 WL 160424 (U.S.) at \* 5.

By establishing that Ms. Crawford's conduct *definitively* qualified as "protected activity," this Court made clear that it is *the province of the Court* and *not a jury* to assess whether undisputed conduct

meets the legal definition of “protected activity.”<sup>1</sup> This Court did *not* remand *Crawford* for a *jury finding* whether Ms. Crawford engaged in “protected activity.” This question was properly decided, as a matter of law, by this Court and will not be revisited by a jury.<sup>2</sup>

Although there is no indication in the decision, Briefs or Oral Argument that Ms. Crawford used the words “sexual harassment” in describing the objectionable conduct, this Court concluded that the conduct constituted “sexually obnoxious behavior.”<sup>3</sup> Ms. Crawford’s report of this conduct therefore constituted harassment on the basis of sex/gender, bringing it within Title VII coverage.

### **B. Common Facts and Issues in *Crawford* and *Martin***

*Crawford* constitutes controlling law in *Martin*, with respect to: 1) whether the question of “protected activity” is properly decided by a Court, as a matter of law, or submitted to a jury, as an issue of fact; and 2) the manner in which sexual harassment must be reported in order to constitute “protected activity.”

In both *Crawford* and *Martin*, the respective trial courts and Circuit Courts held that the plaintiffs did not engage in “protected activity” because of *how* they reported conduct constituting

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<sup>1</sup>*Accord, McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994); *EEOC v. PVNF, LLC*, 487 F.3d 790, 803-804 (10<sup>th</sup> Cir. 2007).

<sup>2</sup>The Court did remand Ms. Crawford’s retaliation claim for determinations on whether the Defendant’s stated reason for her termination was pre-textual and whether the real motive was retaliation. *Id.* at 5.

<sup>3</sup> 2009 WL 160424 (U.S.) at \* 2.

sexual harassment to their employers. Both Ms. Crawford and Prof. Martin detailed the harassers' specific conduct to their employers. Both Ms. Crawford and Prof. Martin lost their jobs shortly after reporting the harassment to their employers.

At the respective trial and Circuit Court levels, both Ms. Crawford and Prof. Martin were deprived of the opportunity to prove that they lost their jobs due to retaliation for reporting the harassment because the lower courts concluded that they had not engaged in "protected activity" under Title VII.

**C. *Crawford* Compels Reversal of the Trial Court's Submission of the Question of "Protected Activity" to a Jury**

Prof. Martin was far more active in her opposition to the conduct than was Ms. Crawford. She complained both verbally and in memoranda to her supervisor, then Law School Dean Alice Gresham Bullock, about a homeless, delusional stranger roaming through the law school buildings and leaving her letters and messages expressing his desire for her to become his "wife."

Prof. Martin entitled her memos "Security Problem on Campus," in order to stress the need for employing campus security procedures to keep this non-employee stalker out of the law school buildings. She referred to Harrison as a "stalker" after he was so characterized by the D.C. Metropolitan Police Department.<sup>4</sup> She attached copies of Harrison's handwritten letters to the memos and transcribed his voicemail messages. Harrison's letters included

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<sup>4</sup>She initially referred to Harrison's conduct as "sexual harassment." Bruner deposition at 137:4-13 (JA6,808).

his confession that he had pursued numerous other women of color, in addition to her, searching for the physical embodiment of a fictional character in a book, written by renowned Prof. Derrick Bell. Harrison stated that he believed that the woman who served as the model for this fictional character was meant to be his “natural wife.”

Less than a month after the stalking began, and while she was still requesting that Howard ban the stalker from campus, Howard refused to renew Prof. Martin’s teaching contract. Howard left, at least three faculty vacancies unfilled -- despite student protests praising Prof. Martin’s teaching ability and dedication to students. The harm to Prof. Martin’s reputation caused by this “non-renewal,” the year before she would have been eligible for tenure, ended her career in academia and thwarted her ability to obtain any legal or comparable position that she had held during her prestigious seventeen year legal career prior to being stalked.<sup>5</sup>

Not only *should* a reasonable person – particularly law professors – be expected to

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<sup>5</sup>Dawn Martin was a law professor at Howard University from July 1996 through June 1998 and at Cleveland State University from 1994-1996. She taught Equal Employment Opportunity (EEO) law and other courses for four years. Prior to teaching, she served as: 1) a trial attorney with the U.S. Department of Justice, Civil Rights Division (Honors Program); 2) the New York State Office of the Attorney General, Civil Rights Bureau; 3) Special Assistant to Commissioner Tucker at the Equal Employment Opportunity Commission (EEOC), helping to develop national policy; and 4) Assistant General Counsel for the D.C. Police Department. Prof. Martin published articles in the area of EEO law. She graduated from Columbia University (1978) and New York University School of Law (1981).

understand that Harrison's harassment was sexual in nature and/or based on her gender, but the people she told *did, in fact*, understand it. On November 20<sup>th</sup> and 21,<sup>st</sup> *all* persons whom she told about Harrison's stalking readily recognized that the Harrison was stalking her as a woman. These people included Howard administrators,<sup>6</sup> colleagues,<sup>7</sup> staff members<sup>8</sup> and law enforcement officers.<sup>9</sup>

In her July 1, 1999 to Howard's General Counsel in response to Prof. Martin's sexual harassment and retaliation charges, Dean Bullock expressly admitted that she understood that Harrison was targeting *women* to "stalk" and "otherwise harass." (A-196)<sup>10</sup> In 1999, Judge Hogan held: "*it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female*" and that *Harrison "targeted women other than Plaintiff."* 1999 U.S. Dist. LEXIS 19516 at \*11-12, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) (A-27).

Judge Hogan held: "There are no 'magic words' which must be chanted in order to invoke Title VII protection," *citing EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-1013 (9th Cir. 1983) and *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992) (A-28). He held

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<sup>6</sup>Pl's Tr. Exhibit 8B (JA14,407); Tr. #490 at 50:5-51:4 (JA12,521-12,522).

<sup>7</sup>Tr. 1666:2-15 (JA12,460); Prof. Taslitz' comment that Prof. Martin would be "*raped and killed*" by Harrison if the matter were left up to campus security (*Id.*) even found its way into Prof. Martin's nightmares. Tr. #490 at 47:1-9 (JA12,518)

<sup>8</sup>Bruner depo at 137:4-13 (JA6,808).

<sup>9</sup>Sirleaf depo at 36:22-37:3 (JA6,658), 137:5-140:19 (JA6,698), 21:22-22:5 (JA6,652), 99:22-102:3 (JA6,683).

<sup>10</sup>Dean Bullock's trial testimony to the contrary constitutes perjury. See Pet. at 28; Reply Brief at 8-9.

that a simple request to the employer to "do something" was enough to invoke Title VII. *Id.*<sup>11</sup>

In 2006, when *Martin* finally went to trial, the jury determined that: 1) Harrison's harassment of Prof. Martin was severe and pervasive, creating a hostile work environment for her; 2) Harrison's conduct was unwelcome; 3) Howard administrators knew that Prof. Martin was being harassed by Harrison in her workplace; and 4) Howard failed to take reasonable steps to end the harassment -- or eliminate the hostile work environment. Jury Verdict, A-127; Pet. 10.

Based on the jury's factual findings, Ms. Martin was entitled to judgment, as a matter of law, on her Title VII sexual harassment claim. Had she prevailed on that issue, her complaints about that harassment would necessarily constitute protected activity" under Title VII; however, Judge Hogan, improperly charged the jury with the determining whether Harrison's harassment constituted was "sexual" harassment and whether Prof. Martin's complaints about Harrison constituted "protected activity" (*see* Pet. at 19-20; A-129).

In 2006, Judge Hogan *abandoned* his own 1999 holding. 2006 U.S. Dist. LEXIS 34446 (D.C.D.C. 2006). *After the trial*, submitted the question to the jury;<sup>12</sup> moreover, he denied Ms.

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<sup>11</sup>In *Crawford*, Justice Stevens indicated that "get the hell out of my office" is a response to sexual harassment that would constitute "opposition" to it and thus, protected activity. Oral Argument at 36. In *Crawford*, both parties and *Amici Curiae*, which included the Solicitor General, agreed that no "magic words" are necessary to qualify it as "protected activity" when reporting conduct that constitutes sexual harassment. Tr. Oral Argument at 17, 29. This Court's decision in *Crawford* indicates agreement with this position.

<sup>12</sup>Rule 56(d)(1) required that Judge Hogan's factual

Martin's requests for more specific jury instructions on the definition of "sexual harassment" and harassment based on sex. The jury's express request for additional instruction was also denied.

Howard repeatedly told the jury that Ms. Martin's claim must be defeated because she entitled her memos "Security Problem on Campus" rather than "Sexual Harassment;" yet, courts have long recognized that stalking is one of the most egregious forms of sexual harassment.<sup>13</sup> Ms. Martin requested a jury instruction that it is not necessary for a plaintiff to use the precise words "sexual harassment" to sustain her claim. Judge Hogan flatly refused to provide that instruction.

Without the proper legal framework for analyzing harassment based on sex, jurors were confused into accepting Howard's improper argument that the stalker's harassment was not sexual in nature or based on sex. The D.C. Circuit Court affirmed, without discussion of the applicable law. Pet. at 19-23.

Ms. Martin lost the case only because the trial court improperly submitted this question of law to the jury and refused to provide them with adequate instruction on Title VII definitions; however, as this Court demonstrated in *Crawford*, the question of whether specific conduct constitutes "legally protected activity" is one of law for the courts – not a question of fact for the jury. *Crawford* therefore compels reversal of the D.C. Circuit's decision and a restoration of her sexual harassment and retaliation claims.

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determination remain "*established through the action*" -- not re-litigated before a jury.

<sup>13</sup>See Pet. at 21, fn. 18.

### **III. *Martin* Would Supplement *Crawford* by Addressing “Protected Activity” where the Harasser is a Non-Employee in the Workplace**

If *Martin* is considered as a companion case to *Crawford*, or supplements *Crawford*, this Court would provide lower courts with a more comprehensive, or refined definition of “protected activity,” whether the harasser is an employee or a non-employee in the workplace.

In 1999, *Martin* set precedent in the D.C. Circuit, when district court adopted the Regulation of the U.S. Equal Employment Opportunity Commission (EEOC) Regulation, 29 C.F.R. § 1604.11(e) (A-21-22), holding that an employer is liable for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment, but failed to take reasonable steps to end it. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (A-17).

Complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. It would be futile and illogical to file a formal sexual harassment complaint against a *non-employee*, with the EEO office of an employer that has no means by which to discipline the *non-employee*. The first step in taking “reasonable measures” to end workplace harassment by a *non-employee* is to ban the *non-employee* from the workplace. Prof. Martin reasonably entitled her memos “Security Problem on Campus” because Harrison needed to be prevented from entering the law school buildings and particularly, her office.

#### **IV. Stalking in the Workplace is an Issue of National Importance**

The issues raised in *Martin* are of national importance. Stalking in the workplace is an issue of transcendental importance to women. Seventy-eight (78%) of stalking victims are women and 87% of stalkers are men.<sup>14</sup> Eight percent of all women in this country are stalked.<sup>15</sup> 54% of female murder victims reported their stalkers to the police before they were killed by their stalkers.<sup>16</sup> Stalking victims may be rendered unemployable, or under-employed, due to physical injury, mental/emotional injury, or simply due to employer retaliation against stalking victims.

This Court has never addressed the issue of workplace stalking, *per se*; however, Justice Ginsberg characterized Title VII as “a statute that’s meant to govern the workplace with all its realities.” Tr. Oral Argument in *Crawford*, at 39. Workplace stalking is a terrible reality for many women. The long-established disparate impact theory holds that sex discrimination is established where a practice disproportionately adversely affects members of one sex. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height and weight requirements) and *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998) (offensive conduct affected “*primarily* one sex).<sup>17</sup> The D.C. Circuit never even acknowledged

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<sup>14</sup>“Stalking in America: Findings from the National Violence Against Women Survey” (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1998), 2, <http://www.ncjrs.gov/pdffiles/169592.pdf>.

<sup>15</sup>*Id.*

<sup>16</sup>The Stalking Resource Center, “Stalking Fact Sheet,” [www.ncvc.org/src](http://www.ncvc.org/src).

<sup>17</sup>*Pet.* at 11-12, 23.

the disparate impact arguments made by both Ms. Martin and *Amicus* NAWL – even though Judge Hogan acknowledged Ms. Martin’s adverse impact argument in his 1999 decision. 1999 U.S. Dist. LEXIS 19516 at \*10 (A-27).

*Martin* presents the classic example of “gender profiling.” Harrison’s gender specific desire to make each stalking victim his “wife” necessarily required that he stalk *only women*. Prof. Martin was stalked while doing nothing more than “working while female.” Pursuant to *Oncale*, where only members of one sex are subjected to a particular type of harassment, it is based on gender.<sup>18</sup>

If stalking victims are not protected from retaliation, they will be less likely to report the stalking to their employers, thus hindering the employer’s ability to protect the stalking victim or other employees.

*Martin* now sets precedent holding that a woman can be stalked in her workplace and fired for reporting it. This Court has the power to reverse that holding and set precedent that furthers the Title VII purpose of eliminating sexual harassment in the workplace -- whether the harasser is an employee or a non-employee workplace stalker. This Court’s reversal would serve the interests of justice, public safety and workplace equality.

#### **V. The Court and the Public would Benefit from Consideration of Arguments Made by NOW, NAWL and other Women’s Advocates**

The issues presented in *Martin* are of paramount national importance, particular to the

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<sup>18</sup>Harrison’s pursuit of Prof. Martin to be his “wife,” was also necessary “sexual in nature” since marriage inherently includes sex.

safety and employment of women. The *National Organization of Women* (NOW) and the *National Association of Women Lawyers* (NAWL), joined by additional women's and victims' advocacy groups, filed an *Amicus Brief* in this case, stressing the need to protect stalking victims from employer retaliation.

NOW is the pre-eminent collective voice of, and advocate for, women in this country. NAWL speaks on behalf of women lawyers. These potential *Amici* filed a *Motion to Late File an Amicus Brief*, including the jointly filed *Amicus Brief*. Their motion was denied, so the Court did not consider their Brief; however, if rehearing is granted, they will have an opportunity to submit a Brief on the merits. In the interests of the people whom they represent, their voices should be heard in this case.

*Martin* continues to be discussed all over the internet, with overwhelming support for Ms. Martin's arguments. See

[www.dvmartinlaw.com/MartinvHowardU](http://www.dvmartinlaw.com/MartinvHowardU). Ms. Martin has been interviewed on several radio shows, including American Airlines' Sky Radio as part of its series on "*Salute to Women in Leadership*." She was featured in Time Magazine, December 15, 2008 Global Edition. A television documentary about this case was recently filmed and will soon be broadcast. See Insider Exclusive [www.insiderexclusive.tv](http://www.insiderexclusive.tv). This documentary includes esteemed leaders such as NOW President Kim Gandy, Roberta Wright, counsel *Amici*, Prof. Derrick Bell, and a former Howard University Security Officer, who all strongly support Ms. Martin.

The interests of justice -- to Ms. Martin and other stalking victims -- compel reconsideration of the *Martin* under *Crawford*.

**CONCLUSION**

Petitioner respectfully requests that this Court grant her rehearing under *Crawford*.

Respectfully submitted,

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