ORAL ARGUMENT SCHEDULED FOR OCTOBER 26, 2021

No. 19-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY E. CHAMBERS,

Plaintiff-Appellant

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL ON THE ISSUE PRESENTED HEREIN

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties appearing in the district court and before this Court are listed in the En Banc Brief for Appellant. The United States files this brief as *amicus curiae* and did not participate in the district court proceedings.

B. Ruling Under Review

References to the ruling at issue appear in the En Banc Brief for Appellant.

C. Related Cases

The United States is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Anna M. Baldwin
ANNA M. BALDWIN
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Date: July 7, 2021

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ON THE ISSUE PRESENTED HEREIN

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII). The Attorney General and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibility for the provisions of Title VII applicable to private-sector and state-and-local-government employers. See 42 U.S.C. 2000e-5(a) and (f)(1). In addition, Title VII applies to the United States in its capacity as

the Nation's largest employer. 42 U.S.C. 2000e-16. The United States filed an amicus brief at the panel stage of this case addressing the question presented. The United States also addressed that question in briefs before the Supreme Court in *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (cert. denied), and *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily dismissed).[1] The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

As relevant here, Section 703(a)(1) of Title VII provides that:

> [i]t 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.

42 U.S.C. 2000e-2(a)(1). At issue in this appeal is whether the denial of a request for a lateral transfer—*i.e.*, a transfer involving the same pay and benefits—on the basis of the requesting employee's sex constitutes discrimination "with respect to * * * compensation, terms, conditions, or privileges of employment" under Section 703(a)(1). *Ibid.*

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[1] The United States attached its brief in *Forgus* v. *Esper* to its earlier amicus brief. See Attachment, U.S. Brief as Amicus Curiae, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir.) (filed March 12, 2020) (U.S. *Forgus* Br.). The United States later provided this Court with its brief in *Peterson* v. *Linear Controls, Inc.* as an enclosure to a Rule 28(j) letter. See Enclosure, Notice of Supp. Authority, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir.) (filed March 26, 2020) (U.S. *Peterson* Br.).

PERTINENT STATUTE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), states:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

> (1) 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[.]

STATEMENT OF THE CASE

1. Statutory Background

a. In 1964, Congress enacted Title VII to "assure equality of employment opportunities and to eliminate * * * discriminatory practices and devices" in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). This case involves "Title VII's core antidiscrimination provision," Section 703(a)(1). *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). Section 703(a)(1) makes it unlawful for a private employer or a state or local government "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." 42 U.S.C. 2000e-2(a)(1); see 42 U.S.C. 2000e(a)-(b).

Title VII includes several other relevant provisions. Section 703(a)(2) makes it unlawful for a private employer or a state or local government "to limit, segregate, or classify * * * employees or applicants for employment 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." 42 U.S.C. 2000e-2(a)(2). Section 704(a) prohibits retaliation by a private employer or a state or local government against employees or applicants for engaging in conduct protected by Title VII. 42 U.S.C. 2000e-3(a). And Section 717(a) provides that federal-sector "personnel actions * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a).

b. In *Brown* v. *Brody*, 199 F.3d 446 (D.C. Cir. 1999), this Court considered Title VII claims arising from two allegedly discriminatory "lateral transfer decisions." *Id.* at 455. First, the employer "assigned [the plaintiff] to a position she did not desire." *Ibid.* Second, the employer "declined to assign [the plaintiff] to a newly created position [that] she did desire." *Ibid.* There was "no dispute that the pay and benefits were the same in [the plaintiff's] original job, in the job to which she was sent, and in the job she was denied."

Ibid. The court accordingly characterized both the involuntary transfer and the requested transfer as "purely lateral." *Id.* at 456 (citation omitted).

Drawing on what it called a "clear trend of authority" in other courts, this Court held that a purely lateral transfer (or the denial of a requested lateral transfer) does not violate Title VII without "a clear showing of adversity" above and beyond the transfer decision itself. *Brown*, 199 F.3d at 455-456 (citation omitted). Specifically, the Court announced "the following rule" for Title VII discrimination cases:

> a plaintiff who is made to undertake or who is denied a lateral transfer—that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment * * * such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.

Id. at 457. The Court contrasted the required "tangible harm" necessary to state a Title VII claim with "[m]ere idiosyncracies of personal preference," which "are not sufficient to state an injury." *Ibid.*; see *ibid.* (citing cases from other circuits holding that an allegedly discriminatory transfer affecting only an employee's "subjective preferences" or that "makes an employee unhappy" is not actionable under Title VII) (citations omitted).[2]

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[2] While *Brown* involved a Title VII claim by a federal employee under Section 717(a), this Court relied on cases decided under Section 703(a)(1) and held that its reasoning applied equally to both sections. 199 F.3d at 452-453.

Brown based its holding in part on the Supreme Court's then-recent decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). See *Brown*, 199 F.3d at 456-457 (citing *Ellerth*, 524 U.S. at 761). In *Ellerth*, the Supreme Court considered the appropriate standard for imposing vicarious liability on an employer for a supervisor's acts of sexual harassment. 524 U.S. at 761-763. The Court held that an employer is always vicariously liable for a supervisor's discriminatory harassment if it culminates in a "tangible employment action," defined as "a significant change in employment status, such as a hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. By contrast, where there is no "tangible employment action," an employer may avoid vicarious liability for a supervisor's discriminatory harassment by successfully asserting an affirmative defense. *Id.* at 764-765.

Applying the "tangible employment action" standard in *Ellerth* to the lateral-transfer claims in *Brown*, this Court held that the employee's claim failed because she had not provided sufficient evidence of a "discharge," "demotion," or other "tangible" harm of the kind the Supreme Court had described in *Ellerth*. *Brown*, 199 F.3d at 457 (citation omitted).

c. In a later decision—*Burlington Northern & Santa Fe Railway Company* v. *White*, 548 U.S. 53 (2006)—the Supreme Court expressly stated that *Ellerth*

"did not discuss the scope of" Title VII's "general antidiscrimination provision" but invoked the concept of a "'tangible employment action' * * * only to 'identify a class of [hostile work environment] cases in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *White*, 548 U.S. at 64-65 (brackets in original) (quoting *Ellerth*, 524 U.S. at 760-761).

Both before and after the Supreme Court's decision in *White*, this Court has repeatedly relied on its holding in *Brown* that lateral transfer decisions are not actionable under Title VII without a further showing of a materially adverse consequence or objectively tangible harm, such as a demotion, or change in benefits. See, *e.g.*, *Ortiz-Diaz* v. *United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 74 (D.C. Cir. 2017); *Czekalski* v. *Peters*, 475 F.3d 360, 364-365 (D.C. Cir. 2007); *Stewart* v. *Ashcroft*, 352 F.3d 422, 426 (D.C. Cir. 2003). In recent years, however, several judges of this Court have called for *Brown* to be revisited and overruled. See *Ortiz-Diaz*, 867 F.3d at 81 (Rogers, J., concurring) ("[I]t remains long past time for the *en banc* court * * * to make clear that transfers denied because of race, color, religion, sex, or national origin are barred under Title VII[.]"); *ibid.* (Kavanaugh, J., concurring) ("[T]he en banc Court at some point should * * * definitively establish the following clear

principle: All discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII.”).

d. In May 2019, the federal government filed a Supreme Court brief taking the position that discriminatory lateral transfers state a claim under Title VII. See U.S. *Forgus* Br. at 8, 10-16. The government identified this Court’s decision in *Brown* as one of the many court of appeals decisions misinterpreting the statute, and the government endorsed the position advocated by Judges Rogers and Kavanaugh in their *Ortiz-Diaz* concurrences. *Id.* at 12-13. The government reiterated its position in a subsequent amicus brief, filed at the invitation of the Supreme Court, in March 2020. See U.S. *Peterson* Br. at 6-17. The Court ultimately denied certiorari at the government’s request in the first case, and the second case was dismissed after the parties settled.

2. Procedural History

a. Plaintiff-Appellant Mary Chambers was employed as a Support Enforcement Specialist in the Interstate Unit of the Child Support Services Division of the District of Columbia’s Office of Attorney General. J.A. 276. As relevant here, Chambers alleged that the District “permitt[ed] male employees to transfer to other departments * * * but denied [Chambers] * * * the same opportunity to transfer” because of her sex. J.A. 276 (first set of brackets in original).

The district court granted summary judgment to the District. J.A. 293-295. The court explained that under this Court's precedent in *Brown* and subsequent cases, the denial of a purely lateral transfer is not actionable under Section 703(a)(1) "unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of [an employee's] employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm." J.A. 293 (brackets in original) (quoting *Brown*, 199 F.3d at 457). Accordingly, the court held that the District was entitled to summary judgment because Chambers had adduced no evidence that she "suffered any harm, let alone any material adverse consequences," from the denial of any requested transfer. J.A. 294 (rejecting as unsupported by the record Chambers' contentions that she suffered "a loss in pay" or was "delayed in receiving" a pay increase as a result of the denied transfers) (citations omitted).

b. Chambers appealed. J.A. 296. The United States filed a brief as amicus curiae reiterating its position that all discriminatory job transfers (and discriminatory denials of job transfers) are actionable under Section 703(a)(1) of Title VII. U.S. Brief as Amicus Curiae 4-7.

In its now-vacated decision, the panel recognized that it was bound by this Court's decision in *Brown* and affirmed the grant of summary judgment, holding

that "no reasonable jury could conclude that Chambers suffered materially adverse consequences associated with the denial of her lateral transfer requests." *Chambers* v. *District of Columbia*, 988 F.3d 497, 501 (D.C. Cir. 2021). Judges Tatel and Ginsburg issued a separate concurrence calling for the Court to take this case en banc to overrule *Brown*. *Id.* at 503, 506 (Tatel and Ginsburg, JJ., concurring).[3] Relying in part on the position advocated by the United States, the concurrence noted that *Brown*'s reasoning is inconsistent with the Supreme Court's subsequent decision in *White* and urged that "statutory text, Supreme Court precedent, and Title VII's objectives make clear that employers should never be permitted to transfer an employee or deny an employee's transfer request merely because of that employee's race, color, religion, sex, or national origin." *Id.* at 506; see *id.* at 503-504 (Tatel and Ginsburg, JJ., concurring).

The full Court subsequently voted to rehear this case en banc. The Court directed the parties to submit supplemental briefing limited to the question of whether the Court should retain the rule from *Brown* "that the denial or forced acceptance of a job transfer is actionable" under Section 703(a)(1) of Title VII "only if there is 'objectively tangible harm.'" Order 2, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir. May 5, 2021) (quoting *Brown*, 199 F.3d at 457).

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[3] Then-Judge Garland was a member of the panel at the time that the case was argued, but did not participate in the decision in the case. See *Chambers*, 988 F.3d at 499 n.*.

Because the District did not endorse that rule at the panel stage, the Court appointed an amicus curiae to defend *Brown*'s holding before the en banc Court. Order 1, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir. May 5, 2021).

SUMMARY OF ARGUMENT

As the United States has contended before the Supreme Court, and as multiple judges of this Court have recognized in recent years, all forced job transfers and denials of requested job transfers based on an employee's race, color, religion, sex, or national origin are actionable under Title VII. 42 U.S.C. 2000e-2(a)(1). This Court's contrary rule in *Brown*—requiring plaintiffs to prove certain "materially adverse consequences" or "objectively tangible harm" in order to have an actionable discrimination claim, 199 F.3d at 457—is at odds with the text, structure, and purpose of Title VII, as well as with Supreme Court precedent. This Court should overrule *Brown* and give effect to the plain language of the statute by holding that all discriminatory job transfers and discriminatory denials of requested job transfers are actionable under Section 703(a)(1) of Title VII.[4]

[4] The United States takes no position on the merits of plaintiff's claim or on any other issue presented in this case.

ARGUMENT

ALL DISCRIMINATORY JOB TRANSFERS AND DISCRIMINATORY DENIALS OF REQUESTED JOB TRANSFERS ARE ACTIONABLE UNDER SECTION 703(a)(1) OF TITLE VII

In interpreting Title VII, the starting point, as always, is "the language of" the statute. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986); see, *e.g.*, *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738-1739 (2020); *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 352-353 (2013); *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 62-64 (2006). The focus on "applying Title VII's text" to the question at hand reflects the Supreme Court's "charge * * * to give effect to the law Congress enacted." *Lewis* v. *City of Chi.*, 560 U.S. 205, 215, 217 (2010); cf. *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 24-27 (2018).

The key statutory text in this case, Section 703(a)(1), makes it unlawful for a private employer or a state or local government "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." 42 U.S.C. 2000e-2(a)(1). Chambers does not allege that the District made a "hir[ing]" or "discharge" decision based on her sex, nor does she contend at this stage of the case that sex played a role in her "compensation." *Ibid.* The question before the

Court is therefore whether the discriminatory denial (or forced acceptance) of a purely lateral transfer—*i.e.*, to a position that carries the same salary, level of responsibilities, and possibility for career advancement—involves discrimination "with respect to * * * terms, conditions, or privileges of employment."

Congress did not define the phrase "terms, conditions, or privileges of employment" in Title VII. "When a term goes undefined in a statute," courts give "the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Under the ordinary meaning of the statutory language at issue here, formally transferring an employee from one job to another, or denying such a transfer, plainly involves the "terms" or "conditions" of employment. 42 U.S.C. 2000e-2(a)(1). See *Chambers* v. *District of Columbia*, 988 F.3d 497, 503-504 (D.C. Cir. 2021) (Tatel and Ginsburg, JJ., concurring). Indeed, as the United States has previously argued, it is difficult to imagine a more fundamental "term[]" or "condition[]" of employment than *the position itself*. See U.S. *Forgus* Br. at 13 (citation omitted; brackets in original). Thus, "transferring an employee because of the employee's race[,] [color, religion, sex, or national origin] (or denying an employee's requested transfer because of the employee's race[,] [color, religion, sex, or national origin]) plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII," regardless of whether the two positions have the same salary, level of

responsibilities, and possibilities for career advancement. *Ortiz-Diaz* v. *United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (quoting 42 U.S.C. 2000e-2(a)).

Under that straightforward reading of the statutory text, "[a]ll discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII." *Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring); accord *id.* at 80-81 (Rogers, J., concurring); *Chambers*, 988 F.3d at 503-504 (Tatel and Ginsburg, JJ., concurring).

A. This Court's "Objectively Tangible Harm" Requirement Is At Odds With The Text, Structure, And Purpose Of Title VII

The restriction on the scope of actionable discrimination that this Court adopted in *Brown*—requiring that a plaintiff establish "objectively tangible harm" above and beyond the transfer or denial of a transfer itself, *Brown* v. *Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)—is at odds with the text, structure, and purpose of Title VII.

1. The text of Section 703(a)(1) contains no requirement that plaintiffs prove a "materially adverse consequence[]" or other "objectively tangible harm," *Brown*, 199 F.3d at 457. Instead, Section 703(a)(1) "flatly makes it unlawful" for an employer to discriminate against an employee because of a protected characteristic with respect to the employee's terms, condition, or privileges of employment. *Chambers*, 988 F.3d at 503 (Tatel and Ginsburg, JJ., concurring).

Read according to its plain meaning, that key statutory phrase—"terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1)—"is an expansive concept" with a broad sweep, *Meritor*, 477 U.S. at 66. Indeed, the Supreme Court has explained that the statutory phrase "terms, conditions, or privileges of employment" evinces Congress's intent "to strike at the entire spectrum" of prohibited disparate treatment. *Id.* at 64 (citation omitted). Accordingly, "the language of Title VII is not limited to 'economic' or 'tangible' discrimination," but naturally covers discriminatory transfers between positions that are economically equivalent. *Ibid.*; see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (confirming that the statutory phrase "terms, conditions, or privileges" is not limited to "the narrow contractual sense") (citation omitted).

In imposing an "objectively tangible harm" requirement, *Brown* did not rely on any textual analysis of Title VII. The Court instead relied largely on the reasoning of other courts to conclude that "[m]ere idiosyncracies of personal preference are not sufficient to state an injury." *Brown*, 199 F.3d at 457.[5] But the prohibition of employment actions taken because of race, sex, color, religion or national origin is not a matter of enforcing an employee's "subjective preferences"

[5] *Brown* recognized that one prior decision of this Court had read Title VII in a way that would appear to cover lateral transfers that do not "cause[] other tangible or economic loss." 199 F.3d at 453 (quoting *Palmer* v. *Shultz*, 815 F.2d 84, 98 (D.C. Cir. 1987)). *Brown*, however, found that result inconsistent with other circuit precedent and accordingly distinguished *Palmer*. *Id.* at 453-454.

with respect to the terms of her job, *ibid.* (citation omitted), but a matter of enforcing the statute as written by Congress, which guarantees an employee's right to be free from unlawful discrimination. Just as "[a]n individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees,'" *Bostock*, 140 S. Ct. at 1741 (quoting *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion)), sex should also be a generally prohibited basis for denying or forcing a job transfer.

In enacting Section 703(a)(1), Congress did not include a requirement that, to be actionable, discriminatory conduct with respect to an employee's terms, conditions, or privileges of employment must result in a certain level of harm. That omission is especially notable because Congress knows how to require a particular showing of harm for an employment-discrimination claim. Indeed, the very next statutory paragraph—Section 703(a)(2)—makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment 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." 42 U.S.C. 2000e-2(a)(2) (emphasis added); see *Chambers*, 988 F.3d at 504 (Tatel and Ginsburg, JJ., concurring) see also U.S. *Peterson* Br. at 14-15 n.3. "Where Congress includes particular language in one section of a statute but omits it in

another * * * , it is generally presumed that Congress acts intentionally and purposely." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993).

2. The rule announced in *Brown* also conflicts with the statute's objectives. Under *Brown*, even brazen acts of workplace discrimination—*i.e.*, transferring an employee from one position to another based explicitly on her race, sex, religion, color, or national origin—cannot give rise to an actionable discrimination claim unless there is a further showing of "objectively tangible harm," such as a decrease in salary or fewer opportunities for career advancement. One purpose of Title VII, however, is to "provide[] * * * equal opportunity to compete for *any* job, whether it is thought better or worse than another," or as here, provides materially the same pay and benefits. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 338 n.18 (1977) (emphasis added). Indeed, by prohibiting discrimination relating to the terms, conditions, or privileges of employment, "Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). "The emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977) (emphasis added).

In short, there is no question that transferring employees between positions (or rejecting requested transfers) because of race, sex, or another protected characteristic directly undermines "the important purpose of Title VII—that the workplace be an environment free of discrimination." *Ricci* v. *DeStefano*, 557 U.S. 557, 580 (2009).

3. Contrary to this Court's reasoning in *Brown*, there is no need to import an atextual additional harm requirement in order to limit the scope of Section 703(a)(1) or to ensure that the provision is not applied as a "general civility code" for the workplace. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). The limits on Section 703(a)(1) come from the statutory text, not from "add[ing] words to the law to produce what is thought to be a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). By limiting actionable discrimination under Section 703(a)(1) to discrimination "with respect to * * * compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), Section 703(a)(1) already makes clear that it "protects an individual only from *employment-related* discrimination." *White*, 548 U.S. at 61 (emphasis added). Likewise, in a decision recognizing that a discriminatory hostile work environment is actionable under Title VII, the Supreme Court has emphasized that "merely offensive" conduct does not alone "alter[] the conditions

of the victim's employment." *Harris* v. *Forklift Sys. Inc.*, 510 U.S. 17, 21-22 (1993).

Moreover, identifying an employer action that implicates the "terms, conditions, or privileges of employment" satisfies only one element of a Section 703(a)(1) claim. To establish a Section 703(a)(1) violation, an employee must also prove that the employer "discriminate[d] * * * *because of*" a protected trait. 42 U.S.C. 2000e-2(a)(1) (emphasis added); see 42 U.S.C. 2000e-2(m). Thus, a plaintiff must prove that her employer has intentionally treated her "worse than others who are similarly situated" on the basis of a prohibited characteristic. *Bostock*, 140 S. Ct. at 1740. Taken together, these requirements, as set by Congress, ensure that a plaintiff must do more than simply allege unfavorable treatment in order to have an actionable claim. See U.S. *Peterson* Br. at 10.

B. This Court's "Objectively Tangible Harm" Requirement Is At Odds With Supreme Court Precedent

The rule that this Court announced in *Brown* is based on a misreading of the Supreme Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). The Supreme Court's later decision in *Burlington Northern & Santa Fe Railway Company* v. *White*, 548 U.S. 53 (2006), confirms that *Ellerth* provides no support for a requirement that an employee alleging a discriminatory transfer or denial of a requested transfer prove that she has suffered a "materially adverse

consequence[]" that amounts to an "objectively tangible harm." *Brown*, 199 F.3d at 457.

1. *Ellerth* involved a claim against an employer alleging that a supervisor had created a hostile work environment—and thereby altered "the terms or conditions of employment"—through "severe or pervasive" sexual harassment of an employee. 524 U.S. at 752. The question in *Ellerth* was not the substantive standard for such a claim; the question was under what circumstances "an employer has vicarious liability" for sexual harassment by a supervisor. *Id.* at 754. After reviewing agency-law principles, the Supreme Court determined that vicarious liability exists "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* at 765. The Court reasoned that such a "tangible employment action" by a supervisor necessarily "requires an official act of the enterprise," and therefore supports imposing vicarious liability on the employer. *Id.* at 761-762. When no such "tangible employment action" is taken by a supervisor, the Court explained, an employer may still be held liable, but it can avoid vicarious liability in certain circumstances by establishing an "affirmative defense." *Id.* at 764-765.

Ellerth's identification of the "tangible employment action[s]" that support automatic imputation of vicarious liability to an employer in cases involving supervisory harassment says nothing about the meaning of "terms, conditions, or

privileges of employment" in Section 703(a)(1). 42 U.S.C. 2000e-2(a)(1). Moreover, because *Ellerth* held that an employer should be held liable for a hostile work environment created by a supervisor even in the absence of any tangible employment action, so long as the employer does not establish an affirmative defense, the Supreme Court made clear that a tangible employment action is not a necessary ingredient of a Title VII discrimination claim. See *Ellerth*, 524 U.S. at 764-765. Indeed, in *Ellerth* itself, the Supreme Court explicitly refused to endorse use of the tangible employment action standard to define or limit the substantive scope of claims brought under Section 703(a)(1). See *id.* at 761 (noting that the concept of a "tangible employment action appears in numerous [discrimination] cases in the Courts of Appeals" and "[w]ithout endorsing the specific results of those decisions," the Court found it "prudent to import the concept" only for the purpose of "resolution of the vicarious liability issue"); see U.S. *Forgus* Br. at 16 n.4.

Consistent with this understanding, the Supreme Court in *White* expressly stated that *Ellerth* "did *not* discuss the scope of" Title VII's "general antidiscrimination provision," but rather invoked the concept of a "'tangible employment action' * * * *only* to 'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *White*, 548 U.S. at 64-65 (quoting

Ellerth, 524 U.S. at 760-761) (emphases added; brackets in original). The decision in *White* therefore confirms that *Ellerth* provides no support for the atextual restriction on the scope of Section 703(a)(1) that this Court imposed in *Brown*.

2. That the Supreme Court in *White* held that *retaliation* claims under Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), may be based only on actions "that a reasonable employee would have found * * * materially adverse," 548 U.S. at 68, also provides no support for the rule announced in *Brown*. That limitation is appropriate in the retaliation context because Section 704(a) prohibits "discriminat[ion]" because of protected conduct but—in contrast to Section 703(a)(1)—does not specify any particular forms of discrimination. 42 U.S.C. 2000e-3(a). Furthermore, Section 704(a) is not limited to prohibiting retaliation that relates to employment-related terms, conditions, or privileges. 42 U.S.C. 2000e-3(a). Instead, as the Supreme Court recognized in *White*, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing harm *outside* the workplace." 548 U.S. at 63.

Therefore, a "*material* adversity" limitation is necessary in the retaliation context "to separate significant [harms] from trivial harms" that would not have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 68 (citation omitted). In adopting that reading of the retaliation provision, the Court in *White* expressly held that the scope of

Section 703(a)(1) is different because of its different text—a text with the avowed purpose of "prevent[ing] injury to individuals based on who they are." *Id.* at 63; see also *id.* at 61-67; U.S. *Peterson* Br. at 17-18 n.5.

* * *

In sum, the Court's "objectively tangible harm" rule announced in *Brown* is incompatible with Title VII's text, structure, and objectives, as well as with Supreme Court precedent. For the reasons set forth above, as well as those given in the United States' prior briefs and the opinions of multiple judges calling to revisit *Brown*, that rule should be abandoned.[6]

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[6] This Court is holding in abeyance *Townsend* v. *United States*, No. 19-5259 (D.C. Cir.), which involves a claim by a federal employee under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a(a). That provision, like the federal-sector provision of Title VII, prohibits specified discrimination against federal employees in "personnel actions." *Ibid.*; see 42 U.S.C. 2000e-16(a). As the government indicated in responding to the petition for initial hearing en banc in *Townsend*, a discriminatory lateral transfer is actionable under the federal-sector provisions of the ADEA and Title VII—as it is under the private-sector provisions—because a lateral transfer constitutes a "personnel action[]," *ibid.*; see Defendants-Appellees' Resp. to the Pet. for Initial Hearing En Banc at 13-14, *Townsend* v. *United States*, No. 19-5259 (D.C. Cir.) (filed March 10, 2021). That does not mean, however, that the ADEA provision at issue in *Townsend* and the similarly phrased federal-sector provision of Title VII are necessarily co-extensive in all respects with Section 703(a)(1). There may be cases in which meaningful differences exist between the scope of "personnel actions," 42 U.S.C. 2000e-16(a); 29 U.S.C. 633a(a), and "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a); 29 U.S.C. 623(a) (private-sector provision of the ADEA). The Court need not address that issue here, but it should avoid suggesting that Title VII's federal-sector provision necessarily prohibits the same conduct as Section 703(a)(1). Cf. *Brown*, 199 F.3d at 452.

CONCLUSION

The United States respectfully urges this Court to overrule *Brown* and hold that all denials or forced acceptances of a job transfer based on protected characteristics are actionable under Section 703(a)(1) of Title VII.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 29 and with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 5326 words according to the word processing program used to prepare the brief.

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

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