No. 21-16962

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAKE PECCIA,

Plaintiff-Appellant

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL ON THE ISSUE PRESENTED HEREIN

KRISTEN CLARKE
Assistant Attorney General

TOVAH R. CALDERON
ANNA M. BALDWIN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4278

TABLE OF CONTENTS

PAGE

INTEREST OF THE UNITED STATES 1

STATEMENT OF THE ISSUE 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT

ALL DISCRIMINATORY JOB TRANSFERS ARE ACTIONABLE UNDER SECTION 703(A)(1) BECAUSE THEY AFFECT THE "TERMS" AND "CONDITIONS" OF EMPLOYMENT 9

A. *Where A Person Is Assigned To Work Falls Within The Plain Meaning Of "Terms" And "Conditions" Of Employment* 10

B. *Section 703(a)(1) Does Not Require An Additional, Atextual Showing Of "Substantial" Or "Tangible" Harm Resulting From Prohibited Discrimination* 13

C. *The Decisions Of This Court That The Magistrate Judge Relied On Do Not Support A Heightened Injury Requirement For Section 703(a)(1) Claims* 17

CONCLUSION 22

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Bostock v. *Clayton Cnty.*, 140 S. Ct. 1731 (2020) .... *passim*

Burlington N. & Santa Fe Ry. Co. v. *White*, 548 U.S. 53 (2006) 15, 19-20

Chuang v. *University of Cal. Davis Bd. of Trs.*,
225 F.3d 1115 (9th Cir. 2000) .... *passim*

Davis v. *Team Elec. Co.*, 520 F.3d 1080 (9th Cir. 2008) 12, 19

EEOC v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) 15

Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 14

Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) 17

Harris v. *Forklift Sys., Inc.*, 510 U.S. 17 (1993) 14

Keene Corp. v. *United States*, 508 U.S. 200 (1993) 14

Lewis v. *City of Chicago*, 560 U.S. 205 (2010) 10

Meritor Sav. Bank, FSB v. *Vinson*, 477 U.S. 57 (1986) 7, 10, 13

Oncale v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) 13

Robino v. *Iranon*, 145 F.3d 1109 (9th Cir. 1998) .... *passim*

Taniguchi v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012) 10

Threat v. *City of Cleveland*, 6 F.4th 672 (6th Cir. 2021) .... *passim*

Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 8, 17

STATUTES: **PAGE**

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*
42 U.S.C. 2000e 1
42 U.S.C. 2000e-2(a) 4
42 U.S.C. 2000e-2(a)(1) .... *passim*
42 U.S.C. 2000e-2(a)(2) 14
42 U.S.C. 2000e-2(e)(1) 5, 20
42 U.S.C. 2000e-2(m) 16
42 U.S.C. 2000e-3(a) 19
42 U.S.C. 2000e-5(f)(1) 1
42 U.S.C. 2000e-16 4

42 U.S.C. 12112(a) 2

RULE:

Fed. R. App. P. 29(a) 3

MISCELLANEOUS:

Webster's New International Dictionary of the English Language
(2d ed. 1958) 11

Random House Dictionary of the English Language (1st ed. 1966) 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-16962

JAKE PECCIA,

Plaintiff-Appellant

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANT AND URGING REVERSAL
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*. The Attorney General has enforcement responsibilities under Title VII. See 42 U.S.C. 2000e-5(f)(1).

This case presents an important question regarding the scope of actionable discrimination under Section 703(a)(1) of Title VII, an issue that the United States

addressed in briefs filed before the Supreme Court in *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily dismissed), and in *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (cert. denied).[1] In addition, the United States has recently filed amicus briefs similar to this one discussing the scope of the prohibition on discrimination in the "terms, conditions, or privileges of employment" under Section 703(a)(1) in a number of other courts of appeals. See U.S. Br. as Amicus Curiae, *Lyons* v. *City of Alexandria*, No. 20-1656 (4th Cir. Sept. 22, 2020); U.S. Br. as Amicus Curiae, *Harrison* v. *Brookhaven Sch. Dist.*, No. 21-60771 (5th Cir. Dec. 15, 2021); U.S. Br. as Amicus Curiae, *Hamilton* v. *Dallas Cnty.*, No. 21-10133 (5th Cir. May 21, 2021); U.S. Br. as Amicus Curiae, *Threat* v. *City of Cleveland*, No. 20-4165 (6th Cir. Jan. 4, 2021); U.S. Br. as Amicus Curiae, *Muldrow* v. *City of St. Louis*, No. 20-2975 (8th Cir. Dec. 10, 2020); U.S. En Banc Br. as Amicus Curiae, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir. July 7, 2021); see also *Neri* v. *Board of Educ. for Albuquerque Pub. Schs.*, No. 20-2088 (10th Cir. Nov. 16, 2020) (addressing the same issue under Title I of the Americans with Disabilities Act, 42 U.S.C. 12112(a)).

---

[1] The United States' brief in *Peterson* can be found at https://www.justice.gov/sites/default/files/briefs/2020/03/23/18-1401_peterson_ac_pet.pdf, and the United States' brief in *Forgus* can be found at https://www.justice.gov/sites/default/files/briefs/2019/05/07/18-942_forgus_opp.pdf.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

This appeal presents the question of whether a lateral job transfer from one position to another, allegedly made on the basis of the employee's sex, but involving no change in benefits or salary, may constitute discrimination "with respect to * * * terms, conditions, or privileges of employment" under Section 703(a)(1) of Title VII. 42 U.S.C. 2000e-2(a)(1).[2]

As relevant here, Section 703(a)(1) 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).

STATEMENT OF THE CASE

Plaintiff-Appellant Jake Peccia, who is male, is employed by the California Department of Corrections and Rehabilitation (CDCR) and works as

[2] The United States takes no position on the merits of Peccia's Title VII discrimination claim or on any other issues presented in this appeal.

a prison nurse. Doc. 94, at 8.[3] Peccia sued under Title VII, alleging that because of his sex, he was transferred from working exclusively at a women's prison, to a post with work assignments at both a men's prison (a post that Peccia found less desirable) and a women's prison, depending on the day. Doc. 94, at 2, 14. By the time that the CDCR filed for summary judgment, Peccia was proceeding pro se, and his case had been referred to a magistrate judge. Doc. 94, at 1.[4]

The magistrate judge recommended that the district court grant summary judgment to the CDCR. As relevant here, the magistrate judge concluded that Peccia could not establish a "materially adverse employment action" under Title VII, because his job transfer from one facility to another did not "rise to the level of substantial and tangible harm." Doc. 94, at 12-13. Citing this Court's decision in *Chuang* v. *University of California Davis Board of Trustees*, 225 F.3d 1115, 1126 (9th Cir. 2000), the magistrate judge explained that, while

---

[3] "Doc. __, at __" refers to the docket entry number and relevant pages of the district court filings in *Peccia* v. *CDCR*, No. 2:18-cv-3049 (C.D. Cal.).

[4] Both the magistrate judge's decision (Doc. 94, at 11) and the complaint (Doc. 1, at 5) asserted that Peccia's Title VII discrimination claim was brought under 42 U.S.C. 2000e-16, but that is the provision of Title VII applicable to the federal government. Peccia's Title VII discrimination claim is properly brought under 42 U.S.C. 2000e-2(a), which applies to state-and-local-government and private-sector employers.

"[i]nvoluntary relocation from one physical facility to another can rise to the level of [an] adverse employment action," it did not do so here because the transfer did not "involve[] 'the removal of or substantial interference with work facilities important to the performance of the job.'" Doc. 94, at 13 (citation omitted). The magistrate judge analogized this case to *Robino* v. *Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998), where this Court stated that the exclusion of male guards from eligibility for certain shifts was permissible because the guards "had 'not suffered any tangible job detriment beyond a reduced ability to select their preferred watches.'" Doc. 94, at 14 (quoting *Robino*, 145 F.3d at 1110). The magistrate judge observed that, "[l]ike the plaintiffs in *Robino*," Peccia did not suffer a tangible job detriment "but only lost his preferred assignment" at the women's prison. Doc. 94, at 14. Because the magistrate judge concluded that Peccia's transfer "did not rise to the level of an adverse employment action," the judge did not consider whether Peccia had put forward sufficient evidence to establish pretext or a discriminatory motive. Doc. 94, at 15-16.[5]

---

[5] The magistrate judge also noted that, because Peccia did not allege that male nurses are categorically excluded from working in the women's prison, this case does not present the question of whether sex was a bona fide occupational qualification (BFOQ), 42 U.S.C. 2000e-2(e)(1), relating to the job transfer.
(continued…)

The district court adopted the magistrate's findings and recommendations in full and granted summary judgment to CDCR. Doc. 97, at 2.

Peccia timely appealed. Doc. 99.

SUMMARY OF ARGUMENT

This Court should hold that all discriminatory job transfers are actionable under Section 703(a)(1) of Title VII because they affect an employee's "terms" and "conditions" of employment. 42 U.S.C. 2000e-2(a)(1).

Section 703(a)(1)'s plain text makes clear that all discriminatory job transfers are actionable. Title VII does not itself define the phrase "terms, conditions, or privileges of employment," and so that phrase is given its ordinary meaning. The place where an employee is assigned to work is plainly a "term" and "condition" of employment, such that transferring an employee from one facility to another falls within the statutory language. The magistrate judge failed to address this statutory text and relied instead on Peccia's job description, which provided that his physical working location could be reassigned. Doc. 94, at 13 n.7. But an employer's discretion to transfer an employee is limited by Title VII, which plainly

---

(…continued)
Doc. 94, at 15 n.8. The United States takes no position on whether that defense could be properly applied to the facts of this case.

prohibits changing an employee's terms or conditions of employment based on a protected characteristic.

The magistrate judge's requirement that a plaintiff prove "substantial and tangible harm" above and beyond being subjected to a discriminatory transfer is unsupported by Section 703(a)(1)'s text, structure, and purpose. Instead, the Supreme Court has repeatedly stressed that the phrase "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), "is an expansive concept" with a broad sweep. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986). And it is unnecessary to import an atextual, additional harm requirement to ensure that Section 703(a)(1) is not stretched to cover the "ordinary tribulations" of the workplace. Doc. 94, at 14. The limitations on Title VII claims come from the statutory language as enacted by Congress. Thus, Section 703(a)(1) prohibits only actions regarding the terms, conditions, or privileges of employment that are based on a prohibited characteristic. In other words, such claims must be related to the workplace and based on race, color, sex, religion, or national origin. In departing from the statutory language, the "substantial and tangible harm" test applied by the magistrate judge would allow for brazen acts of discrimination—including openly assigning employees to different workplaces based on their race or sex—so long as there is no proof of a tangibly worse working environment, or economic harm. That result is at odds with Title VII's core purpose of "*eliminating* discrimination

in employment." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977) (emphasis added).

This Court's prior decisions do not compel a different result. In *Chuang* v. *University of California Davis Board of Trustees*, 225 F.3d 1115 (9th Cir. 2000), this Court stated that "a material change in the terms and conditions of a person's employment" could give rise to an actionable adverse employment action. *Id.* at 1126. *Chuang*'s discussion of "material" changes is best understood as distinguishing between employment actions that are sufficient to cause Article III injury and those that are insufficient to cause such injury. That approach is consistent with a recent Sixth Circuit decision, which this Court should follow. In *Threat* v. *City of Cleveland*, 6 F.4th 672 (6th Cir. 2021), Judge Sutton explained that "materiality" requirements in Section 703(a)(1) cases are best understood as "shorthand for the operative words in the statute," requiring proof of discrimination in the plaintiff's terms, conditions, or privileges of employment, that is sufficient to cause Article III injury. *Id.* at 678-679.

Likewise, in *Robino* v. *Iranon*, 145 F.3d 1109 (9th Cir. 1998), this Court concluded that male correctional officers challenging a shift assignment policy had not suffered "any tangible job detriment beyond a reduced ability to select their preferred watches." *Id.* at 1110. But *Robino* should not be read as mandating an atextual "tangible job detriment" standard for all Section 703(a)(1) claims. *Robino*

did not discuss Title VII's prohibition against discrimination in the "terms, conditions, or privileges" of employment. Moreover, *Robino* involved both a BFOQ defense, and a challenge to a shift assignment policy that arose from a prior settlement agreement. Those factors are absent in this case, which should instead be resolved on the basis of the statutory text.

ARGUMENT

ALL DISCRIMINATORY JOB TRANSFERS ARE ACTIONABLE UNDER SECTION 703(A)(1) BECAUSE THEY AFFECT THE "TERMS" AND "CONDITIONS" OF EMPLOYMENT

Section 703(a)(1) makes it unlawful 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). Peccia does not allege that the CDCR made a "hir[ing]" or "discharge" decision based on his sex, nor does he contend that sex played a role in his "compensation." *Ibid.* Rather, this appeal asks whether an allegedly discriminatory job transfer, from one facility to another, but with the same salary and level of responsibilities, can involve discrimination "with respect to * * * terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1).

A. Where A Person Is Assigned To Work Falls Within The Plain Meaning Of "Terms" And "Conditions" Of Employment

In interpreting Title VII, the starting point, as always, is "the language of" the statute. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986). "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). "[The] charge [in interpreting Title VII's text] is to give effect to the law Congress enacted." *Lewis* v. *City of Chicago*, 560 U.S. 205, 217 (2010).

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); see also *Bostock*, 140 S. Ct. at 1738 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). Under the ordinary meaning of the statutory language at issue here, formally transferring an employee from working only at one facility (a women's prison) to working at two different facilities (a men's prison and a women's prison) plainly involves the "terms" or "conditions" of employment. 42 U.S.C. 2000e-2(a)(1).

Just as a "shift schedule is a term of employment," *Threat* v. *City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021), so too is the location of where those shifts are to be worked. The "where" of a job—as in, the location where the

employee is assigned to work—falls squarely within the "terms" and "conditions" of employment. See *ibid.* A typical employee asked to describe his "terms" or "conditions * * * of employment," 42 U.S.C. 2000e-2(a)(1), would almost surely mention where he works and what he does. See also EEOC Compliance Manual § 15-VII(B)(1) (2006) ("Work assignments are part-and-parcel of employees' everyday terms and conditions of employment.").

In addition, while "it's not even clear that we need dictionaries to confirm what fluent speakers of English know," *Threat*, 6 F.4th at 677, dictionary definitions from the period of Title VII's enactment confirm that a job location falls within the meaning of "terms" and "conditions" of employment. See Webster's New International Dictionary of the English Language 556 (2d ed. 1958) (defining "conditions" to include "[a]ttendant circumstances * * * as [in], living conditions; playing conditions"); *id.* at 2604-2605 (defining "terms" to include "[p]ropositions, limitations, or provisions, stated or offered, as in contracts * * * determining the nature and scope of the agreement" as well as "circumstances, esp. circumstances that limit or control"); see also, *e.g.*, Random House Dictionary of the English Language 306 (1st ed. 1966) (defining "conditions" to include "situation with respect to circumstances"); *id.* at 1464-1465 (defining "terms" to include "state, situation, or circumstances" and "stipulations limiting what is proposed to be granted or done").

The magistrate judge in this case overlooked Title VII's plain text and focused instead on language in Peccia's job description, which the magistrate judge found "specifically stated that [Peccia's] physical working location could be reassigned or redirected." Doc. 94, at 13 n.7. To the contrary: the job description *confirms* that the physical location where Peccia is to work is one of the terms or conditions of his employment. What Title VII provides is that CDCR cannot discriminate against Peccia on bases prohibited by Title VII when it implements that term.

For example, providing employees with a position description that includes some outdoor work would not license an employer to assign such outdoor work only to women, because of their sex, while assigning men, because of their sex, to work indoors. See, *e.g.*, *Davis* v. *Team Elec. Co.*, 520 F.3d 1080, 1090-1092 (9th Cir. 2008) (concluding that plaintiff's "allegations that she was assigned a disproportionate amount of hazardous work compared to her male co-workers establish[ed] a prima facie case of disparate treatment" under Section 703(a)(1)). The magistrate judge thus erred by looking to Peccia's job description instead of to Title VII's text to determine whether Peccia had a valid claim challenging his allegedly discriminatory job transfer.

In sum, under Section 703(a)(1)'s text, discriminatory job transfers are actionable because they affect an employee's "terms" and "conditions" of employment within the plain meaning of those terms. 42 U.S.C. 2000e-2(a)(1).

B. Section 703(a)(1) Does Not Require An Additional, Atextual Showing Of "Substantial" Or "Tangible" Harm Resulting From Prohibited Discrimination

In granting summary judgment to CDCR, the magistrate judge held that Peccia failed to prove that his transfer caused "substantial and tangible harm." Doc. 94, at 13. But requiring proof of "substantial and tangible harm" beyond the allegedly discriminatory transfer itself is unsupported by Title VII's text, structure, and purpose.

Section 703(a)(1)'s text does not require that plaintiffs prove that they have suffered "substantial and tangible harm" resulting from the discriminatory action. On the contrary, the 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 (citation omitted). The phrase "evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment." *Chuang* v. *University of Cal. Davis Bd. of Trs.*, 225 F.3d 1115, 1125 (9th Cir. 2000) (alteration in original) (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)). Moreover, the Supreme Court has "repeatedly made clear that * * * the scope of the prohibition" against discrimination in Section 703(a)(1) "is

not limited to 'economic' or 'tangible' discrimination." *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Thus, contrary to the magistrate judge's decision, Peccia's allegedly discriminatory job transfer is actionable under Section 703(a)(1), even though his "job classification was unchanged, his pay was unchanged, and all benefits were unchanged." Doc. 94, at 12.

If Congress had intended that Section 703(a)(1) reach only discriminatory conduct that results in a certain level of harm, it could have said so. 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). "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) (alteration in original; citation omitted).

In this case, the magistrate contrasted "tangible" harms with employment actions that are "merely contrary to the employee's * * * liking" or "preferences." Doc. 94, at 13 (citation omitted). 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. It is instead 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 (citation omitted), it also is not relevant (absent a properly raised BFOQ defense, see p. 4, n.3, *supra*) to where employees are assigned to work.

Contrary to the magistrate judge's decision, it is unnecessary to import an atextual, additional harm requirement to ensure that Section 703(a)(1) is not stretched to cover the "ordinary tribulations" of the workplace. Doc. 94, at 14. Section 703(a)(1)'s limits 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." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006) (emphasis added).

Indeed, identifying an employment action that implicates the "terms, conditions, or privileges of employment" satisfies only one element of a Section 703(a)(1) claim. To establish a 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 also 42 U.S.C. 2000e-2(m) (providing that a violation also may be established where a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor"). Ultimately, 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 ensure that a plaintiff must do more than simply allege unfavorable treatment in order to have an actionable claim.

In addition, endorsing the magistrate judge's "substantial and tangible harm" standard would lead to untenable results. Under that standard, an employer would be free to engage in brazen acts of discrimination—openly assigning employees to different workplaces on the basis of race or sex—so long as there is no further showing of worsened working environment or other "tangible" harm. But that result is contrary to Title VII's core purposes. 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).

C. The Decisions Of This Court That The Magistrate Judge Relied On Do Not Support A Heightened Injury Requirement For Section 703(a)(1) Claims

In applying a heightened and atextual harm requirement, the magistrate judge relied in part on this Court's decision in *Chuang*, stating that "a material change in the terms and conditions of a person's employment" could give rise to an actionable adverse employment action. 225 F.3d at 1126. In *Chuang*, this Court partially reversed a grant of summary judgment in favor of the employer, concluding that the forcible relocation of the plaintiffs' laboratory space was not, as the district court had characterized it, merely "a host of annoyances." *Ibid.* Rather, this Court explained that "[t]he removal of or substantial interference with work facilities important to the performance of the job constitutes a material change in the terms and conditions of the person's employment." *Ibid.* At the same time, the Court affirmed summary judgment with respect to the plaintiffs' claim that the employer discriminated against them by failing to respond to their grievances regarding the misappropriation of their research funds, explaining that, while a lack of response "was certainly irritating and perhaps unjustified, it did not

materially affect the compensation, terms, conditions, or privileges of the Chuangs' employment." *Ibid.*

Given this context, the magistrate judge erred in reading *Chuang* as supporting a heightened showing of harm as an element of the Section 703(a)(1) claim. To be sure, this Court in *Chuang* distinguished between material and non-material employment actions in deciding which actions could support a claim for disparate treatment. 225 F.3d at 1126. But, as explained below, *Chuang'*s discussion of "material" changes to the plaintiff's terms, conditions, or privileges of employment, *ibid.*, should be understood as distinguishing between employment actions that are sufficient to cause Article III injury in fact, and those that are not. That reading is consistent with the facts in *Chuang*, as well as with Section 703(a)(1)'s text, which does not require any additional showing of substantial or tangible harm. It is also supported by the reasoning of a recent Sixth Circuit decision holding that race-based shift assignment changes are actionable.

In *Threat* v. *City of Cleveland*, Judge Sutton explained that the Sixth Circuit's "materiality" requirement is a "shorthand for the operative words in the statute," requiring proof of discrimination in the plaintiff's terms, conditions, or privileges of employment. 6 F.4th at 679. Judge Sutton further explained that this "materiality" shorthand in Section 703(a)(1) case law ensures "that any claim under Title VII involves an Article III injury—and not, for example, differential

treatment that helps the employee or perhaps even was requested by the employee." *Id.* at 678-679. This Court should adopt a similar reading of any prior "materiality" requirement in *Chuang* or in its other Section 703(a)(1) case law. See, *e.g.*, *Davis*, 520 F.3d at 1089 (stating that "an adverse employment action is one that materially affect[s] the compensation, terms, conditions, or privileges of . . . employment") (citation and internal quotation marks omitted; alteration in original).

As Judge Sutton explained in *Threat*, it is unnecessary to require proof of material adversity to ensure that Section 703(a)(1) is not turned "into a 'general civility code' that federal courts will use to police the pettiest forms of workplace misconduct." *Threat*, 6 F.4th at 680 (citation omitted). This is because unlike Section 704(a), 42 U.S.C. 2000e-3(a)—Title VII's anti-retaliation provision—Section 703(a)(1) "'protects an individual only from employment-related discrimination' based on a protected characteristic, not just any distinction in terms of employment." *Ibid.* (quoting *White*, 548 U.S. at 61). 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). But no such materiality requirement is necessary under Section 703(a)(1). That is so because there is no permissible amount of race, sex, religion,

or national origin discrimination that employers can engage in when that discrimination affects the terms, conditions, or privileges of employment. Instead, by prohibiting all such employment-related discrimination, Section 703(a)(1) works to "prevent injury to individuals based on who they are." *White*, 548 U.S. at 63.

Finally, this Court's decision in *Robino* v. *Iranon*, 145 F.3d 1109 (9th Cir. 1998), does not support the result below. The plaintiffs in *Robino* were male correctional officers who challenged a policy that allowed for a limited number of shift assignments to be made based on sex. 145 F.3d at 1110. That policy was created by a task force that had been appointed as part of an EEOC settlement agreement. The task force had determined that "designat[ing] six posts as female-only" was "the best policy to protect female inmates and to prevent allegations of sexual misconduct." *Ibid.* The district court granted summary judgment to the employer, holding that it had proven as a statutory defense that sex was a bona fide occupational qualification, see 42 U.S.C. 2000e-2(e)(1), for making the challenged shift assignments. See *Robino*, 145 F.3d at 1110. On appeal, this Court affirmed. *Ibid.*

This Court reasoned that "the policy limits eligibility for such a small number of positions (six out of forty-one) that it imposes such a *de minimus* [sic] restriction on the male [correctional officers'] employment opportunities that it is

unnecessary to decide whether gender is a BFOQ for the few positions affected." *Robino*, 145 F.3d at 1110. The court stated that the plaintiffs had accordingly not suffered "any tangible job detriment beyond a reduced ability to select their preferred watches." *Ibid.* In the alternative, *Robino* held that "assuming *arguendo* that plaintiffs raise a colorable Title VII claim * * * gender constitutes a BFOQ for the six posts at issue here." *Ibid.*

Robino did not discuss the text of Title VII's prohibition against discrimination in the "terms, conditions, or privileges" of employment. Instead, *Robino* involved both a BFOQ defense, and a shift assignment policy that was created by a task force that arose from a prior settlement agreement. Given that unique context, *Robino* should not be read as signaling approval of a statutorily atextual "tangible job detriment" standard for all Section 703(a)(1) claims.

CONCLUSION

The United States respectfully urges this Court to hold that all job transfers based on protected characteristics are actionable under Section 703(a)(1) of Title VII.

Respectfully submitted,

KRISTEN CLARKE
Assistant Attorney General

s/ Anna M. Baldwin
TOVAH R. CALDERON
ANNA M. BALDWIN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4278

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 4561 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.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Date: April 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system which will also send notice to the participants in this case who are registered CM/ECF users. I certify that I served the foregoing document on this date by Federal Express to the following unregistered case participant:

Jake Peccia, 8750 Ash Hill Court, Orangevale, CA 95662.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney