No. 22-193

In the Supreme Court of the United States

JATONYA CLAYBORN MULDROW, PETITIONER

v.

CITY OF ST. LOUIS, MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 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).

The question presented is whether that prohibition includes discrimination as to all "terms, conditions, or privileges of employment," or whether it reaches only discriminatory conduct that causes an employee to suffer a materially significant disadvantage.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

Petitioner worked as a sergeant with the St. Louis Metropolitan Police Department and alleges that she was involuntarily transferred from her position as an officer in the Intelligence Division because she is a woman and her supervisor wished to replace her with a man. Pet. App. 24a, 39a. Petitioner sued respondent, the City of St. Louis, alleging that she had suffered sex discrimination with respect to her "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The district court granted summary judgment to respondent,

reasoning that petitioner had not experienced an adverse employment action because her transfer did not produce a material employment disadvantage. Pet. App. 21a-65a. The court of appeals affirmed. *Id.* at 1a-20a.

A. Statutory Background

Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., 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 the meaning of Section 2000e-2(a)(1), "Title VII's core antidiscrimination provision." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). Section 2000e-2(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).

Title VII includes several other related provisions. Section 2000e-2(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 2000e-3(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.

And Section 2000e-16(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. The Present Controversy

1. Petitioner worked as a sergeant with the St. Louis Metropolitan Police Department. See Pet. App. 22a. From 2008 through June 2017, petitioner was assigned to the Intelligence Division, where her work included matters relating to public corruption, human trafficking, and gun and gang violence. *Ibid.* In April 2017, Captain Michael Deeba was hired as the Commander of Intelligence and became petitioner's supervisor. *Id.* at 23a. The outgoing Commander of Intelligence, Captain Angela Coonce, informed Captain Deeba that petitioner was a "workhorse" and that, "if there was one sergeant he could count on in the Division, it would be [petitioner] because of her experience." *Ibid.*

At the start of his tenure, Captain Deeba reorganized the Intelligence Division to focus on violent crime. Pet App. 24a. Deeba requested that petitioner, whom he publicly addressed as "Mrs.," rather than by her rank as "Sergeant," be transferred out of the Intelligence Division and replaced with a male officer with whom he had previously worked to oversee the "very dangerous work" of street operations. *Ibid.* Petitioner was accordingly transferred from the Intelligence Division in June 2017, and was required to work as a patrol sergeant in the Fifth District. *Id.* at 25a.

Petitioner's salary remained the same following the transfer, but her schedule and job responsibilities did not. Pet. App. 25a, 40a. In the Intelligence Division, petitioner interacted with high-ranking law enforcement officials, worked straight eight-hour days, had

weekends off, wore plain clothes, had an unmarked take-home car, and was deputized as a Task Force Officer for the Federal Bureau of Investigation's Human Trafficking Unit—allowing her to pursue human trafficking investigations in and outside the City of St. Louis. *Id.* at 22a-23a. After the transfer, petitioner's job responsibilities included "administrative upkeep of the personnel assigned to her, supervising officers on patrol," "responding to Code 1 calls for service," and "reviewing and approving arrests." *Id.* at 25a-26a. Petitioner "was required to work on a rotating schedule; was assigned to a contained patrol area and could no longer travel outside of her district to perform job responsibilities; and was required to patrol in uniform with a marked police car." *Id.* at 25a.

Petitioner worked in the Fifth District for eight months before being transferred back to the Intelligence Division. Pet. App. 36a. Before her return, petitioner had requested a transfer to work as an aide to Captain Coonce in the Second District. *Id.* at 5a-6a. She did not receive that transfer. See *ibid.*

2. Petitioner sued respondent the City of St. Louis alleging, as relevant here, that she had been the victim of sex discrimination in violation of Title VII. Pet. App. 6a-7a. Petitioner argued that respondent violated Section 2000e-2(a)(1) by reassigning her to the Fifth District and failing to transfer her to the Second District because of her sex. *Id.* at 37a-38a.

The district court granted respondent's motion for summary judgment. Pet. App. 21a-65a. The court held that petitioner's discrimination claim based on her transfer from the Intelligence Division failed because she could not prove that the transfer "actually amounted to an adverse employment action," which Eighth Circuit

precedent defines as "'a tangible change in working conditions that produces a material employment disadvantage.'" *Id.* at 39a-40a (quoting *Rester* v. *Stephens Media, LLC*, 739 F.3d 1127, 1131 (8th Cir. 2014)). The court concluded that petitioner "experienced no change in salary or rank" and did not "suffer[] a significant alteration to her work responsibilities." *Id.* at 43a. Accordingly, the transfer did not "rise[] to the level of a material change in employment necessary to demonstrate an adverse employment action." *Ibid.* The court likewise concluded that petitioner had not shown that she suffered "any harm to her career prospects" as a result of not receiving a transfer to the Second Division to work as Captain Coonce's aide. *Id.* at 48a.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court reaffirmed that "[a]n adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Id.* at 9a (quoting *Clegg* v. *Arkansas Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007)). The court explained that a "transfer that does not involve a demotion in form or substance[] cannot rise to the level of a materially adverse employment action." *Ibid.* (citation omitted). The court held that petitioner failed to show that her unwanted transfer from the Intelligence Division constituted an adverse employment action because she had not suffered a "materially significant disadvantage." *Ibid.* (citation omitted).

As to petitioner's requested transfer to the Second District, the court of appeals likewise held that petitioner had not "demonstrate[d] how the sought-after transfer would have resulted in a material, beneficial change to her employment." Pet. App. 13a. The court further held that petitioner's transfer request remained

pending at the time that she was reassigned to the Intelligence Division, so there was "not a denial for [the court] to review." *Id.* at 15a.

DISCUSSION

All forced job transfers and denials of 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). See Gov't Br. in Opp. at 12-16, *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (No. 18-942); Gov't Amicus Br. at 15-17, *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (No. 18-1401); see also Gov't Amicus Br. at 2, *Naes* v. *City of St. Louis*, No. 22-2021 (8th Cir. filed Aug. 12, 2022) (citing other briefs). The Eighth Circuit's contrary rule—that a plaintiff must prove that a discriminatory job transfer resulted in a "materially significant disadvantage," Pet. App. 9a (citation omitted)—has no foundation in Title VII's text, structure, or purpose. The question presented has divided the courts of appeals and is important, frequently recurring, and suitable for resolution in this case. The petition for a writ of certiorari should therefore be granted along with the petition in *Davis* v. *Legal Services Alabama, Inc.*, No. 22-231 (filed Sept. 8, 2022), a case presenting a similar question in which the United States is also filing a brief recommending that the Court grant review.

A. The Decision Below Is Incorrect

The court of appeals held that Section 2000e-2(a)(1) prohibits discrimination only when it results in a "materially significant disadvantage" to employees. Pet. App. 9a (citation omitted). That reading contradicts Title VII's text, structure, and purpose, and has no basis in this Court's precedents.

1. 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). That approach reflects this Court's "charge * * * to give effect to the law Congress enacted." *Lewis* v. *City of Chicago*, 560 U.S. 205, 217 (2010).

As relevant here, Section 2000e-2(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). This case turns on whether respondent "discriminate[d] against" petitioner "with respect to h[er] * * * terms, conditions, or privileges of employment." *Ibid.*

Because Title VII does not define those terms, they should be given their "ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). And formally transferring an employee from one job to another falls within the heartland of employer actions that affect an employee's "terms" or "conditions" of employment as those words are ordinarily understood. 42 U.S.C. 2000e-2(a)(1). See *Webster's New International Dictionary of the English Language* 556 (2d ed. 1957) (defining "*conditions*" to include "[a]ttendant circumstances * * * as [in] living *conditions*; playing *conditions*"); see also, *e.g.*, *The Random House Dictionary of the English Language* 306 (1966) (defining "condition" to include "situation with respect to circumstances") (emphasis omitted). A typical employee asked to describe her "terms" or "conditions * * * of employment," 42 U.S.C. 2000e-2(a)(1), would surely mention

where she works and what she 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."). As the en banc D.C. Circuit recently explained, "it is difficult to imagine a more fundamental term or condition of employment than the position itself." *Chambers* v. *District of Columbia*, 35 F.4th 870, 874 (2022) (quoting Gov't Br. in Opp. at 13, *Forgus*, *supra* (No. 18-942)).

In this case, petitioner's unwanted transfer changed the position she held and the nature of her work assignments, as well as when, where, and with whom she was required to work. See Pet. App. 22a-26a, 40a-41a. The "when," "where," and "what" of a job—when the employee is required to work, at what location, and the position she is assigned and tasks she is required to perform with other employees—fall squarely within the "terms" and "conditions" of employment. See, *e.g.*, *Threat* v. *City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) ("How could the *when* of employment not be a *term* of employment?"). For that reason, all discriminatory job transfers "plainly constitute[] 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)(1)).

Indeed, this Court has already recognized that the 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 (citation omitted). And this Court has rejected attempts to impose extratextual limits on the statute, explaining that the language evinces Congress's intent "to strike at the entire spectrum of disparate treatment of men and women in employment," and not simply "economic or tangible discrimination." *Id.* at 64 (citations and internal quotation marks omitted); see *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); *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Scalia, J., concurring) (explaining that "the term 'conditions of employment'" in Section 2000e-2(a)(1) supports a claim that "working conditions have been discriminatorily altered").

The lack of any textual requirement that discriminatory conduct with respect to an employee's terms, conditions, or privileges of employment must result in a certain level of harm is especially notable in light of the surrounding provisions. The very next subsection of Title VII 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). That language shows that Congress knows how to require a particular showing of harm for an employment discrimination claim, and the absence of similar qualifying language in Section 2000e-2(a)(1) is thus notable. See *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) ("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.") (brackets and citation omitted).

In imposing a requirement to prove a "materially significant disadvantage" such that a challenged transfer is equivalent to a "demotion in form or substance," Pet. App. 9a (citations omitted), the court of appeals did not rely on any textual analysis of Title VII. The court instead relied on prior Eighth Circuit cases reasoning that such a requirement is necessary because otherwise, "every trivial personnel action that an irritable . . . employee did not like would form the basis of a discrimination suit." *Ibid.* (quoting *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)).

But the prohibition of employment actions taken because of race, sex, color, religion or national origin is not, as the court of appeals reasoned, a matter of enforcing an employee's "mere preference" with respect to the terms of her job. Pet. App. 11a. Instead, it is 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* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (citation omitted), sex also should not be a relevant consideration in denying or mandating a job transfer (absent an affirmative defense not at issue here, see 42 U.S.C. 2000e-2(e)(1)).

Respondent's attempts to find a textual hook for the court of appeals' reasoning likewise fail. Respondent contends that a plain-meaning interpretation of Section 2000e-2(a)(1)'s "terms, conditions, or privileges" element would "effectively erase" Section 2000e-2(a)(2).

Br. in Opp. 24. That is incorrect. To be sure, an employer practice "which violates § [2000e-2](a)(2) can also violate § [2000e-2](a)(1)." EEOC, *Compliance Manual* § 618.1(b). But while Section 2000e-2(a)(1) bars disparate treatment, Section 2000e-2(a)(2) proscribes "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 531 (2015) (citation omitted).

Respondent fares no better in suggesting (Br. in Opp. 25) that Title VII's provision creating a private right of action supplies a basis for the Eighth Circuit's heightened proof-of-harm requirement. That provision states that "aggrieved" individuals may pursue civil actions for violations of Section 2000e-2(a)(1). 42 U.S.C. 2000e-5(f)(1). As respondent notes, the ordinary meaning of "aggrieved" is "[h]aving suffered loss or injury." Br. in Opp. 25 (quoting *Black's Law Dictionary* 87 (rev. 4th ed. 1968)) (brackets in original). An employee who shows discriminatory treatment in her terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin has necessarily been subjected to meaningful injury. Cf. *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984) (recognizing the "serious noneconomic injuries" suffered by those who are "personally denied equal treatment solely because of their membership in a disfavored group"). Title VII requires nothing more.

2. The Eighth Circuit's "materially significant disadvantage" standard also conflicts with Title VII's objectives. Under that standard, even brazen acts of workplace discrimination—*i.e.*, transferring all female, Black, Jewish, or Mexican employees from one position to another based explicitly on their race, sex, religion,

color, or national origin—cannot give rise to an actionable discrimination claim unless there is a showing of "materially significant disadvantage," such as a decrease in salary or reduced 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 Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 338 n.18 (1977) (emphasis added).

An atextual requirement to prove "significant" or "material" harm would produce other untenable results as well. For example, courts applying such a requirement have held that assigning employees to night shifts versus preferred day shifts based on their protected status is not "material" or "significant." See, *e.g.*, *Daniels* v. *United Parcel Serv., Inc.*, 701 F.3d 620, 635 (10th Cir. 2012). But 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 language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to *eliminate* those discriminatory practices and devices" that operate in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973) (emphasis added). The limits that the court of appeals imposed are contrary to that purpose in permitting discriminatory practices so long as they do not rise above a threshold that is absent from the statute.

3. The test that the court of appeals applied below has no basis in this Court's prior Title VII decisions. In

Burlington N. & Santa Fe Ry. Co. v. *White*, 548 U.S. 53 (2006), this Court held that *retaliation* claims under a different provision 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.[1] But *White*'s reasoning does not support applying a "materially significant harm" standard to Section 2000e-2(a)(1) *discrimination* claims.

"Unlike the antidiscrimination provision, the antiretaliation provision is not expressly limited to actions affecting the terms, conditions, or privileges of employment." *Chambers*, 35 F.4th at 876. As such, *White* adopted a limiting principle for retaliation claims. Explaining that it is "important to separate significant from trivial harms," 548 U.S. at 68, the Court held that only a retaliatory act that is "materially adverse" to the plaintiff is actionable, *ibid.*; see *id.* at 67-68. Because Section 2000e-2(a)(1) already "tether[s] actionable behavior to that which affects an employee's 'terms, conditions, or privileges of employment,'" a further, court-created limiting principle for Title VII's antidiscrimination provision is unnecessary. *Chambers*, 35 F.4th at 877.

Under Section 2000e-2(a)(1)'s plain text, no amount of race, sex, religion, or national origin discrimination that affects the terms, conditions, or privileges of employment is lawful (absent affirmative defenses that are not at issue in this case, see 42 U.S.C. 2000e-2(e)). That is because, unlike the antiretaliation provision, which protects individuals based on their actions, Section

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[1] The relevant provision makes it an "unlawful employment practice for an employer to discriminate against * * * any individual * * * because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. 2000e-3(a).

2000e-2(a)(1) works to "prevent injury to individuals based on who they are." *White*, 548 U.S. at 63. To hold otherwise and conclude that Title VII prohibits only decisions that cause a certain level of adversity would undermine "the important purpose of Title VII—that the workplace be an environment free of discrimination." *Ricci* v. *DeStefano*, 557 U.S. 557, 580 (2009).

Nor is the standard applied below consistent with *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). A number of courts of appeals incorrectly cite *Ellerth* as supporting a requirement to prove "material" or "tangible" harm beyond being subjected to discriminatory terms, conditions, or privileges of employment. See Pet. 13-16, 18 (collecting cases). But *Ellerth* "did not discuss the scope of" Section 2000e-2(a)(1), Title VII's "general antidiscrimination provision." *White*, 548 U.S. at 65. Instead, *Ellerth* involved a claim against an employer alleging that a supervisor had created a hostile work environment through "severe or pervasive" sexual harassment of an employee. 524 U.S. at 752.

The question in *Ellerth* concerned the circumstances in which "an employer has vicarious liability" for sexual harassment by a supervisor. 524 U.S. at 754. After reviewing agency-law principles, this Court explained that there are two paths to such vicarious liability. First, vicarious liability exists, with no affirmative defense, "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* at 765. Such a "tangible employment action" by a supervisor necessarily "requires an official act of the enterprise," and therefore supports automatic imputation of vicarious liability on the employer. *Id.* at 761-762. Second, *Ellerth*

held that an employer is liable for a hostile work environment created by a supervisor even in the *absence* of any tangible employment action, unless the employer can establish the "affirmative defense" that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Id.* at 765.

Ellerth's "tangible employment action" path for automatically imputing vicarious liability to an employer in cases involving supervisory harassment says nothing about the meaning or scope of the phrase "terms, conditions, or privileges of employment" in Section 2000e-2(a)(1). To the contrary, *Ellerth* makes clear that a tangible employment action is *not* a necessary ingredient of a Title VII discrimination claim. That is because *Ellerth* held that an employer is liable for a hostile work environment created by a supervisor even in the *absence* of any tangible employment action, where the employer cannot establish that it is entitled to an "affirmative defense" based on its prompt action to prevent and correct harassing behavior. 524 U.S. at 765. Moreover, this Court explicitly refused to endorse using a tangible-employment-action standard to define or limit the substantive scope of discrimination claims brought under Section 2000e-2(a)(1). See *id.* at 761 (observing 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," determining it "prudent to import the concept" only for "resolution of the vicarious liability issue").

4. Finally, contrary to respondent's argument (Br. in Opp. 26), there is no need to import an atextual harm requirement to ensure that Section 2000e-2(a)(1) does not become a "general civility code" for the workplace. *Oncale*, 523 U.S. at 81. The limits on Section 2000e-2(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 to discrimination "with respect to * * * compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), Title VII already makes clear that it "protects an individual only from *employment-related* discrimination." *White*, 548 U.S. at 61 (emphasis added). Likewise, in the hostile work environment context, this Court has emphasized that "merely offensive" conduct alone does not "alter[] the conditions of the victim's employment." *Harris*, 510 U.S. at 21-22.

Moreover, identifying an employer action that implicates the "terms, conditions, or privileges of employment" satisfies only one element of a Title VII 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 42 U.S.C. 2000e-2(m). Thus, it is not enough for a plaintiff to allege simply that she has been involuntarily transferred. To state a claim under Section 2000e-2(a)(1), a plaintiff must plead facts that plausibly support an inference of discrimination on a statutorily prohibited basis. See *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007); *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

Taken together, Section 2000e-2(a)(1)'s requirements, as set by Congress, impose appropriate limits

for bringing a Title VII anti-discrimination claim. The other limit added by the court of appeals has no basis in the statutory text, structure, or purpose.

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The decision below conflicts with the decisions of other courts of appeals. Most obviously, the D.C. Circuit, sitting en banc, recently overturned its prior precedent and held that "the straightforward meaning" of Section 2000e-2(a)(1) "emphatic[ally]" prohibits any discriminatory grant or denial of a "job transfer," even if it does not result in reduced salary or benefits or worse working conditions. *Chambers*, 35 F.4th at 874 (overruling *Brown* v. *Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)). As Judges Ginsburg and Tatel explained for the en banc court, "[o]nce it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete." *Id.* at 874-875. Much like the Eighth Circuit here, the D.C. Circuit had previously held that a lateral job transfer was not actionable without an additional showing of "objectively tangible harm." *Id.* at 875. But *Chambers* squarely rejected that requirement as a "judicial gloss that lacks any textual support." *Ibid.*

The Sixth Circuit has similarly sought to align its interpretation of Section 2000e-2(a)(1) with the statutory text. In *Threat* v. *City of Cleveland*, *supra*, Chief Judge Sutton explained for the court that circuit precedent construing Title VII to cover only "materially adverse employment actions" should be understood as no more than shorthand for the statutory text and a *de minimis*, Article III injury requirement. 6 F.4th at 678-679; see

id. at 682. The court concluded that "employer-required shift changes from a preferred day to another day or from day shifts to night shifts exceed any de minimis exception" and, if discriminatory, "state a cognizable claim under Title VII"—even when they are not accompanied by a reduction in pay or benefits. *Id.* at 679.

In contrast, as both petitioner and respondent catalog, several circuits agree with the Eighth Circuit and require proof that some kind of material or significant harm resulted from the challenged employment action. Pet. 12-23; Br. in Opp. 9-12, 15. As a result, multiple courts have long held that discriminatory lateral job transfers fall beyond Section 2000e-2(a)(1)'s reach. See, *e.g.*, *Boone* v. *Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); *O'Neal* v. *City of Chicago*, 392 F.3d 909, 912 (7th Cir. 2004); *Sanchez* v. *Denver Pub. Sch.*, 164 F.3d 527, 532 (10th Cir. 1998); *Webb-Edwards* v. *Orange Cnty. Sheriff's Office*, 525 F.3d 1013, 1032-1033 (11th Cir. 2008), cert. denied, 555 U.S. 1100 (2009).[2]

The failure of those courts to anchor their analysis in the text of the statute has resulted in incoherent results. When engaging in atextual line drawing exercises as to whether a job transfer involves sufficiently "significant" or "material" changes, courts have reached inconsistent

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[2] The Fifth Circuit currently applies an even stricter formulation, interpreting Section 2000e-2(a)(1) to prohibit discrimination only in "ultimate employment decisions," such as "'hiring, granting leave, discharging, promoting, or compensating,'" *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559-560 (2007) (per curiam) (citation omitted), or decisions that are tantamount to an ultimate employment decision, see, *e.g.*, *Thompson* v. *City of Waco*, 764 F.3d 500, 504-506 (2014). The en banc Fifth Circuit is currently reconsidering that standard, see *Hamilton* v. *Dallas Cnty.*, No. 21-10133 (argued Jan. 24, 2023), but the outcome of that case will not resolve the existing circuit split.

results as to whether plaintiffs challenging similar job transfers have an actionable Section 2000e-2(a)(1) claim. Compare, *e.g.*, *Hinson* v. *Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000) (holding that a school principal transferred to an administrative and teaching position had an actionable Section 2000e-2(a)(1) claim), with *Cole* v. *Wake Cnty. Bd. of Educ.*, 834 Fed. Appx. 820, 821 (4th Cir.) (per curiam) (holding that a school principal transferred to an administrative position where "she would have supervised fewer employees" did not have an actionable Section 2000e-2(a)(1) claim), cert. denied, 141 S. Ct. 2746 (2021).

In March 2020, even before the recent decisions by the D.C. and Sixth Circuits, the United States encouraged this Court to grant review in *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (No. 18-1401), to resolve the conflict in the lower courts and the widespread misreading of a key provision of federal antidiscrimination law. See Gov't Amicus Br. at 20, *Peterson*, *supra* (No. 18-1401); cf. *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 108-109 (2002) (granting certiorari to review lower courts' "various approaches" to a Title VII question, and adopting a different interpretation based on "the text of the statute"). The parties in *Peterson* settled before this Court acted on the petition in that case. But developments in the intervening three years have only underscored the need for this Court's review.

C. The Question Presented Warrants Review In This Case And In *Davis*

1. The question presented is undeniably important. Section 2000e-2(a)(1) is "Title VII's core antidiscrimination provision," *White*, 548 U.S. at 61, and questions arise frequently about whether employer actions fall

within the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1). In recent years, the EEOC has received between 13,000 and 19,000 Title VII administrative charges per year asserting discrimination in the "[t]erms [or] condition[s]" of employment. EEOC, *Statutes by Issue (Charges filed with EEOC) FY 2010 – FY 2021*, https://go.usa.gov/xdBBu. Those charges represent more than a quarter of all Title VII charges received by the EEOC in each fiscal year. See *ibid.*; EEOC, *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC) FY 1997 – FY 2021* https://go.usa.gov/xdBK3. The "proper interpretation and implementation of" Section 2000e-2(a)(1) thus has "central importance to" employment-discrimination litigation. *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 358 (2013) (similarly noting the large number of EEOC charges filed under Title VII's anti-retaliation provision).

Clarifying the meaning of "terms, conditions, or privileges of employment" in Section 2000e-2(a)(1) would also have beneficial effects beyond Title VII. Other prominent anti-discrimination statutes, such as the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, include provisions prohibiting discrimination with respect to "terms, conditions, or privileges of employment," 29 U.S.C. 623(a)(1); see 42 U.S.C. 12112(a). Numerous whistleblower-protection statutes prohibit discrimination in the "terms" or "conditions" of employment because of an employee's protected conduct. See, *e.g.*, 18 U.S.C. 1514A(a); 21 U.S.C. 399d(a); 49 U.S.C. 42121(a) (Supp. III 2021). And the Department of Labor enforces Executive Order No. 11,246, 3 C.F.R. 567 (1966), which incorporates Title VII

principles in regulating federal contractors. See Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, *Federal Contract Compliance Manual* §§ 2E03, 2J, 2K (May 1, 2020). Resolving the question presented would thus have broad significance for federal employment-discrimination law.

2. Although respondent attempts to identify purported impediments to review, this case provides a suitable vehicle for this Court to resolve the question presented.

Respondent first argues (Br. in Opp. 20) that petitioner forfeited reliance on various benefits of the position from which she was transferred, including that she worked straight days, had weekends off, and had an unmarked take-home police car. But proper resolution of the purely legal question presented does not turn on any of those (apparently undisputed) facts. The parties agree that petitioner was transferred to a different job with different responsibilities. The legal question in this case is not whether petitioner's transfer was to a worse job, but whether the job transfer implicated her "terms, conditions, or privileges" of employment at all.

In any event, there is no impediment to this Court's consideration of the changes that accompanied petitioner's transfer. Although the district court concluded that petitioner had forfeited reliance on certain alterations of her working conditions, the court stated that none of those changes would have impacted the court's holding that petitioner had not proven that her transfer caused "material harm[]." Pet. App. 44a n.20. On appeal, petitioner argued that the district court erred in failing to consider those changes to her working conditions and claimed that she had relied on such evidence. See Pet. C.A. Br. 33-34. Respondent did not defend the

district court's forfeiture holding but instead argued that none of those changes showed sufficient harm. Resp. C.A. Br. 11-13. The court of appeals did not mention forfeiture, and instead recited facts regarding the changes to petitioner's job position in its discussion of the facts, before concluding that the transfer was not an "adverse employment action" because it "did not result in a diminution to [petitioner's] title, salary, or benefits." Pet. App. 11a; see *id.* at 3a-4a, 10a-11a. Respondent's forfeiture argument thus poses no barrier to this Court's consideration of the full range of facts in this case.

Respondent also contends (Br. in Opp. 21) that there is an independent ground supporting the court of appeals' decision as to petitioner's refusal-to-transfer claim: that the Department never refused to make the transfer, as the request was pending when petitioner returned to her prior position. That is a correct reading of the court of appeals' decision. See Pet. App. 15a. But that holding did not affect petitioner's separate challenge to her initial transfer out of the Intelligence Division. As to that challenge, which was the primary focus of the decision below, the Eighth Circuit relied solely on its restrictive interpretation of Title VII's "terms, conditions, or privileges" language.

Finally, respondent argues (Br. in Opp. 21-22) that petitioner cannot prevail on the merits of her discrimination claim regardless of the standard because the evidence of discrimination "is extremely weak." But as respondent concedes (*id.* at 21) neither the district court nor the court of appeals addressed that issue. If this Court reverses the court of appeals' decision on the legal question presented in the petition, respondent can renew those evidentiary arguments on remand. But the

fact that respondent would have alternative arguments on remand provides no reason to decline to review the Eighth Circuit's legal holding, which implicates a disagreement among the circuits on an important and recurring question.

3. Along with this brief, the government is filing a brief recommending that the Court grant the petition for a writ of certiorari in *Davis*, *supra* (No. 22-231), which likewise concerns the meaning of Title VII's "terms, conditions, or privileges" language. In the government's view, the Court would benefit from hearing the two cases together because they would provide an opportunity to consider the application of that language to a broader range of employment actions (a transfer in this case and a paid suspension in *Davis*).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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