No. 22-___

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,
v.
CITY OF ST. LOUIS, STATE OF MISSOURI ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 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 "compensation, terms, conditions, or privileges of employment" on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). The Eighth Circuit below followed binding circuit precedent to hold that discriminatory job transfers (and denials of requested transfers) are lawful under Title VII when they do not impose "materially significant disadvantages" on employees.

The question presented is:

> Does Title VII prohibit discrimination as to all "terms, conditions, or privileges of employment," or is its reach limited to discriminatory employer conduct that courts determine causes materially significant disadvantages for employees?

PARTIES TO THE PROCEEDINGS

The parties are petitioner Jatonya Clayborn Muldrow and respondents the City of St. Louis, Missouri, and Police Captain Michael Deeba. In the district court, Muldrow pursued claims under Title VII of the Civil Rights Act of 1964 against the City alone and state-law claims against both the City and Deeba. Only the Title VII claims against the City are at issue in this Court.

RELATED PROCEEDINGS

Muldrow v. City of St. Louis et al., No. 4:18-CV-02150-AGF, 2020 WL 5505113 (E.D. Mo. Sept. 11, 2020)

Muldrow v. City of St. Louis et al., No. 20-2975, 30 F.4th 680 (8th Cir. Apr. 4, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jatonya Clayborn Muldrow respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, Pet. App. 1a, is available at 30 F.4th 680. The opinion of the United States District Court for the Eastern District of Missouri, Pet. App. 21a, is available at 2020 WL 5505113.

JURISDICTION

The Eighth Circuit entered judgment on April 4, 2022. Pet. App. 1a. On June 21, 2022, Justice Kavanaugh extended the time to file this petition for a writ of certiorari to and including September 1, 2022. *See* No. 21A835. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides:

> (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[.]

INTRODUCTION

Title VII of the Civil Rights Act of 1964 forbids employers from discriminating on the basis of race, color, religion, sex, or national origin with respect to their employees' "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Petitioner Jatonya Clayborn Muldrow maintains that respondent City of St. Louis transferred her to a different job and then denied her a requested transfer because of her sex in violation of Title VII.

The Eighth Circuit held that the forced transfer and transfer denial did not violate Title VII solely because, in its view, Title VII outlaws only employers' "adverse employment action[s]" that impose "materially significant disadvantage[s]" on employees. Pet. App. 9a. This decision contributes to a longstanding, deepening circuit conflict over what kinds of discriminatory conduct are actionable under Title VII, or, to use the judicially created parlance, what constitutes an "adverse employment action." The circuit split is especially in need of attention because it emerges from a misunderstanding of this Court's precedent and because, among the circuits' divergent approaches, only two circuits have sought to apply the statutory text as written even though every regional circuit has weighed in.

In *Peterson v. Linear Controls, Inc.*, No. 18-1401, this Court was presented with a question nearly identical to the question presented here. There, this Court called for the views of the United States. 140 S. Ct. 387 (2019) (Mem.). The Solicitor General explained that interpreting Title VII to cover only "'significant and material' employment actions" is "atextual and mistaken" and recommended a grant of certiorari. Br.

for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020). Shortly thereafter, *Peterson* apparently settled, *see* Jt. Mot. to Defer Consideration of Pet. for a Writ of Cert., No. 18-1401 (May 28, 2020), preventing the Court from resolving the important question presented. *Peterson v. Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (Mem.) (dismissing petition).

The Court should do now what it did not have the opportunity to do in *Peterson*: grant review, resolve the confusion among the circuits, and reject the atextual adverse-employment-action doctrine. In doing so, it should reverse the Eighth Circuit's application of that doctrine and hold that "[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." *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc).

STATEMENT OF THE CASE

I. Factual background

For many years, petitioner Jatonya Clayborn Muldrow was a Sergeant with the St. Louis, Missouri, Police Department. From 2008 through 2017, she worked in the Department's Intelligence Division on public-corruption and human-trafficking cases. Eighth Circuit Joint Appendix (CA8JA) 681. She also served as head of the Gun Crimes Unit and, at one point, oversaw the Gang Unit. CA8JA 375, 414. Muldrow thus had considerable experience with

violent crime. CA8JA 414. She was known as a "workhorse." CA8JA 600.[1]

A. Muldrow's forced transfer

As described further below, this lawsuit was precipitated by a forced transfer imposed on Muldrow by her supervisor, Intelligence Commander Michael Deeba. In the lead up to the transfer, Muldrow noticed that Deeba referred to similarly situated male officers according to their rank but called Muldrow "Mrs. Clayborn" instead of Sergeant Muldrow, including in front of her colleagues. CA8JA 347-48.

Just before the transfer, Deeba told sergeants in Intelligence that he did not believe in "blind transfers"—that is, forcing an employee to transfer jobs without prior discussion. CA8JA 350. He promised that "if he had plans" to transfer "anyone," he would discuss the transfer with them first. *Id.* And, in any case, even absent Deeba's promise, someone with Muldrow's experience in the Department would typically be informed of a pending transfer before receiving an email finalizing the transfer. CA8JA 601-03.

Yet, without warning, Deeba transferred Muldrow to the Department's Fifth District. CA8JA 254-55, 350-51. Muldrow learned of the transfer from a department-wide email. *Id.* Deeba transferred Muldrow purportedly because he viewed the role that Muldrow had been in for the last ten years as too "dangerous." CA8JA 479. Deeba replaced Muldrow

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[1] Because this case was decided in the Department's favor on its motion for summary judgment, this Court "must assume the facts to be as alleged by petitioner." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

with a male officer with whom he had previously worked. Pet. App. 24a. Deeba also transferred the other two female officers in the Intelligence Division out of the unit. CA8JA 375.

With the transfer, although Muldrow's pay remained the same, her schedule, responsibilities, supervisor, workplace environment, and other job requirements and benefits changed wholesale. Pet. App. 10a; CA8JA 340-46, 570, 662-63.

Schedule. In Intelligence, Muldrow worked regular business hours on Monday through Friday, with weekends off. Pet. App. 2a, 22a, 44a, 55a; CA8JA 341. In the Fifth District, Muldrow was required to work a rotating schedule, with few weekends off. CA8JA 352.

Responsibilities. In the Fifth District, Muldrow no longer performed her Intelligence duties. CA8JA 582. All of her human-trafficking investigations were taken away. *Id.* She did only "routine" tasks like "patrolling and investigating crimes." *Id.* Her responsibilities shifted to "basic entry level police work," *id.*, instead of the "more sensitive" and "important investigations" that make Intelligence "the premier bureau" in the Department, CA8JA 340.

Workplace environment. Intelligence is housed in police headquarters, which allows its officers to work directly for the Chief of Police and improves their networking opportunities because of their proximity to commanders and high-profile individuals. CA8JA 570, 344, 346. For example, while reporting directly to the Chief, Muldrow met the local U.S. Attorney, the head of the region's Bureau of Alcohol, Tobacco, and Firearms office, and the FBI director. CA8JA 344. In

contrast, the Fifth District is housed in a bureau away from headquarters, where Muldrow "never really met anyone." CA8JA 570. As a Sergeant in the Fifth District, Muldrow had "no opportunities" to travel outside the District to complete her work. CA8JA 666. In contrast, in Intelligence, Muldrow could travel wherever an investigation took her, including out of state. CA8JA 575.

Other job requirements and benefits. In Intelligence, Muldrow could wear plainclothes on assignment. CA8JA 577. This privilege was lost with the transfer. In the Fifth District, Muldrow was required to wear a uniform, duty belt, and vest, adding an extra fifteen to twenty-five pounds. CA8JA 352-353. This change had a particularly significant impact on Muldrow because she suffered an on-the-job injury years ago that causes her ongoing back and neck problems. *Id.* The transfer also affected Muldrow's reputation. CA8JA 591-93, 594-95. She received questions from colleagues about why she had been transferred—questions that were difficult to answer because the transfer had not been justified to her and because the transfer made it appear that she had been disciplined. *Id.*

B. Denial of requested transfer

Dissatisfied with her forced transfer, Muldrow sought a new position within the Department as Captain Angela Coonce's administrative aide. CA8JA 604. Coonce had recently received a district assignment, a change that traditionally would have allowed her to choose her administrative aide. CA8JA 604, 628-29. But superior officers told Coonce that it "was not going to happen" and "there is no way we're

getting [Muldrow] here" because "they are not going to let you have her." CA8JA 604-05.

Only sergeants can be administrative aides, CA8JA 604, and the job includes serving as a district's liaison to City Hall and to federal and state agencies, making it "high profile," CA8JA 414-15. Aides work closely with the captain they support, making the position prestigious. CA8JA 386, 416. They also work a consistent rather than rotating schedule and have weekends off. CA8JA 386.

According to Coonce, the Department's refusal to hire Muldrow as Coonce's administrative aide caused damage to Muldrow's career because the position would have allowed her access to more contacts and networking opportunities than she was exposed to as a District Five Sergeant. CA8JA 386, 414-15. Administrative aides also have more "flexibility" in their schedules, and most "will get extra bonuses." CA8JA 414.

II. Procedural background

A. Muldrow sued the Department in Missouri state court, as relevant here, under Title VII of the Civil Rights Act of 1964. Pet. App. 6a. Section 703(a)(1) of the Act prohibits an employer from discriminating against its employees on the basis of various characteristics, including sex, with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Muldrow claimed that the Department violated Section 703(a)(1) by reassigning her to the Fifth District and by failing to transfer her to the administrative aide

position with Captain Coonce because of her sex. Pet. App. 5a-6a.[2]

The Department removed the case to the U.S. District Court for the Eastern District of Missouri, which had jurisdiction under 28 U.S.C. § 1441(a). The district court then granted the Department's motion for summary judgment. Pet. App. 22a. The court held that because, under Eighth Circuit precedent, a discriminatory transfer that does not "produce[] a material employment disadvantage" is "not an adverse employment action," Muldrow's sex-discrimination claim related to her transfer could not proceed to trial. *Id.* at 39a-40a, 41a.

With respect to the Department's refusal to hire Muldrow as Coonce's administrative aide, the district court held that the denial of Muldrow's requested transfer was not actionable because the transfer would not have "'significantly affect[ed] her future career prospects.'" Pet. App. 48a (quoting *Wedow v. City of Kansas City*, 442 F.3d 661, 675 (8th Cir. 2006)).

B. The Eighth Circuit affirmed, holding that the Department's forced transfer and refusal to transfer were not "adverse employment actions" and, therefore, are not actionable under Title VII. Pet. App. 10a-11a, 13a-14a. Effectively taking as true that the forced

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[2] Muldrow also brought a retaliation claim, pursued claims against Captain Deeba, and maintained that her loss of FBI credentials was actionable. *See* Pet. App. 6a-7a, 11a-12a. These claims are not pursued here. Muldrow also filed state-law discrimination claims under the Missouri Human Rights Act, which the district court rejected and were not pursued in the court of appeals. *See* Pet. App. 7a.

transfer was discriminatory, the court of appeals concluded that "a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." Pet. App. 9a (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)). In the Eighth Circuit's view, Muldrow had not presented evidence that her transfer from Intelligence to the Fifth District constituted an adverse employment action because she had not suffered a "materially significant disadvantage," Pet. App. 9a (quoting *Jackman v. Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013)), and lacked "proof of harm resulting from that reassignment." Pet. App. 11a.

As for Muldrow's failure-to-transfer claim, the court affirmed on the ground that Muldrow did "not demonstrate how the sought-after transfer would have resulted in a material, beneficial change to her employment." Pet. App. 13a. As with the forced transfer, the Eighth Circuit effectively took as true that the transfer denial was discriminatory yet affirmed the district court's decision on the ground that the refusal to transfer was not an actionable "adverse employment action." Pet. App. 13a-15a.[3]

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[3] The court noted in passing that Coonce made only "informal requests" for Muldrow to be transferred, but the court did not affirm the grant of summary judgment to the Department on that basis. Pet. App. 15a.

REASONS FOR GRANTING THE WRIT

I. There is an entrenched circuit split over which discriminatory employment practices are actionable under Section 703(a)(1).

Title VII makes it unlawful for an employer to discriminate against an employee "with respect to his compensation, terms, conditions, or privileges of employment" because of various characteristics, including the employee's sex. 42 U.S.C. § 2000e-2(a)(1). Although "terms, conditions, or privileges" are everyday English words with straightforward meanings, *see infra* at 30-31, the circuits have departed markedly from Title VII's text and are split over which discriminatory employment practices Section 703(a)(1) forbids. 1 Merrick T. Rossein, *Emp. Discrimination Law and Litig.* § 2.6 (Dec. 2020); *see Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (acknowledging but leaving unresolved the inconsistencies among the circuits about the level of harm required to prove a "substantive discrimination offense" under Section 703(a)(1)).

Only the D.C. and Sixth Circuits have applied the statutory text as written. Beyond those circuits, the Ninth Circuit's adverse-employment-action rule adheres most closely to Section 703(a)(1)'s text. That court thus rightly condemns as discriminatory a broader category of employment practices than other circuits, but still mistakenly restricts the meaning of "terms, conditions, or privileges."

By contrast, in the Fifth and Third Circuits, various discriminatory practices, such as discriminatory shift assignments, lateral transfers, and other actions that do not constitute "ultimate

employment decisions," are viewed as lawful under Title VII.

The remaining regional courts of appeals—the First, Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits—toggle between many varying adverse-employment-action tests, none of which has a foothold in Section 703(a)(1)'s text.

A. The D.C., Sixth, and Ninth Circuits. The en banc D.C. Circuit recently rejected the line of reasoning employed by the Eighth Circuit below. *See Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc). *Chambers* held, based on "the straightforward meaning of" Section 703(a)(1), that an employer's sex-based refusal to transfer an employee, without more, "'discriminate[s] against' the employee with respect to the 'terms, conditions, or privileges of employment.'" *Id.* The D.C. Circuit thus expressly spurned the notion—embraced by the Eighth Circuit below—that Title VII requires an employee to prove some additional harm over and above the discriminatory transfer (or the discriminatory refusal to transfer). *Id.* at 877.

Like the D.C. Circuit, the Sixth Circuit has explained that engrafting an adverse-employment-action requirement on Title VII is an atextual judicial "innovation[]." *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021) (Sutton, C.J.). It has thus held that discriminatory shift changes are generally actionable under Title VII, including when they are unaccompanied by reductions in pay or benefits. *See id.* at 680. The Sixth Circuit rejected the reasoning endorsed by other circuits, including the Eighth Circuit below, that Section 703(a)(1) "reaches only employment decisions that cause the employee

economic harm," because this interpretation "render[s] meaningless many of the words in the statutory phrase 'compensation, terms, conditions, or privileges of employment.'" *Id.*

Though it has not expressly employed text-based reasoning (like the D.C. and Sixth Circuits), the Ninth Circuit rejects a narrow adverse-employment-action rule in favor of what it calls the "the EEOC test," *Dimitrov v. Seattle Times Co.*, 2000 WL 1228995, at *2 (9th Cir. Aug. 29, 2000), which interprets Section 703(a)(1) to cover employment decisions like "lateral transfers, unfavorable job references, and changes in work schedules," *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). Because Section 703(a)(1) is not limited to "'terms' and 'conditions' in the narrow [contractual] sense," *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1125-26 (9th Cir. 2000) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)), the Ninth Circuit has held that an employee states a Section 703(a)(1) disparate-treatment claim when, as with Muldrow, her employer reassigns her based on a protected characteristic, even without alleging that the transfer caused a materially significant disadvantage, *see Albro v. Spencer*, 854 F. App'x 169, 170 (9th Cir. 2021).

B. The Fifth and Third Circuits. The Fifth and Third Circuits' understandings of Section 703(a)(1) stand out as especially restrictive and thus as especially at odds with the statutory text (and with the D.C. and Sixth Circuits). In these circuits, only employment actions that will result in tangible, pocketbook harms are actionable.

In the Fifth Circuit, only an "adverse employment action" that is an "ultimate employment decision"—

including a refusal to hire, a firing, a demotion, or the like—constitutes unlawful discrimination under Section 703(a)(1). *McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007). The Fifth Circuit's ultimate-employment-decision list parallels a catalogue of "tangible employment action[s]" enumerated by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), a decision that "did not discuss the scope of" Title VII's "general antidiscrimination provision" at issue here, *see Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 65 (discussing *Ellerth*).

Instead, *Ellerth* concerned when a supervisor's workplace harassment of an employee may be attributed to the employer in a Title VII hostile-work-environment case. In some circumstances, this Court held, the employer has an affirmative defense to vicarious liability if it has exercised reasonable care to prevent and promptly correct the harassment. 524 U.S. at 765. The employer does not have an affirmative defense, however, if the harassing supervisor has taken a "tangible employment action" against the employee that causes "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761.

By straying from Title VII's text and then grasping for clues about what discriminatory conduct it forbids in an off-topic case (*Ellerth*), the Fifth Circuit has so distorted the meaning of "terms, conditions, or privileges" that, for example, an employer in that circuit is free to demand that Black employees work outdoors in the Louisiana summer while white

employees work indoors in air-conditioned comfort. *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 372-73 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). So too may a Fifth Circuit employer subject a Black employee to drug tests because he is Black or assign extra responsibilities to Black employees only. *See, e.g.*, *Johnson v. Manpower Prof'l Servs., Inc.*, 442 F. App'x 977, 979, 983 (5th Cir. 2011); *Ellis v. Compass Grp. USA, Inc.*, 426 F. App'x 292, 296 (5th Cir. 2011). And, of particular salience here given Muldrow's claim, discriminatory job reassignments or denials of transfers do not violate Title VII in the Fifth Circuit unless they amount to a demotion or a denial of a promotion. *Alvarado v. Tex. Rangers*, 492 F.3d 605, 612 (5th Cir. 2007) (surveying circuit precedent).[4]

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[4] The Fifth Circuit recently reaffirmed its restrictive ultimate-employment-decision requirement in *Hamilton v. Dallas County*, 42 F.4th 550 (5th Cir. 2022), *pet. for reh'g en banc filed* (Aug. 16, 2022). There, female detention officers alleged that their employer had subjected them to an expressly sex-based scheduling policy, which permitted male officers to take weekend days off but required female officers to invariably work weekends. *Id.* at 552. The Fifth Circuit explained that "[t]he conduct complained of … fits squarely within the ambit of Title VII's proscribed conduct." *Id.* at 555. The panel felt constrained to affirm the district court's grant of the employer's motion to dismiss under the circuit's "ultimate employment decision" precedent, *id.*, but noted that the case was a strong candidate for en banc review. *Id.* at 557. Even if the en banc Fifth Circuit were to align itself with the Sixth and D.C. Circuits, that would only slightly reconfigure, not eliminate, the circuit split. And, in the meantime, the Fifth Circuit continues to apply its atextual rule that "the denial of a purely lateral transfer is not an adverse

The Third Circuit's rule appears, at first glance, at least somewhat tethered to Section 703(a)(1)'s text, but it yields the same results as the Fifth Circuit's ultimate-employment-decision standard. The Third Circuit asks whether discrimination is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004). Yet, in words nearly indistinguishable from the Eighth Circuit's lateral-transfer rule challenged here, *see* Pet. App. 9a, 11a, supposedly "minor actions" like "lateral transfers" that involve changes to "title, office, reporting relationship and responsibilities" are "generally insufficient" to alter terms, conditions, or privileges of employment. *Langley v. Merck & Co.*, 186 F. App'x 258, 260 (3d Cir. 2006).

And in *Stewart v. Union County Board of Education*, 655 F. App'x 151 (3d Cir. 2016), the Third Circuit used the *Ellerth* list to decide whether Section 703(a)(1) prohibited an employer's disparate-treatment practice. The plaintiff alleged, among other things, that a supervisor "moved all white security guards inside the building during the winter season" while requiring Black security staff to work "outdoors in the colder weather climates." Appellant's Informal Br. at 10, *Stewart v. Union Cnty. Bd. of Educ.*, No. 15-3970, 2016 WL 1104687 (3d Cir. Mar. 17, 2016). Despite this expressly race-based differential treatment in working conditions, the Third Circuit

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employment action." *Drerup v. Consol. Nuclear Sec. L.L.C.*, 2022 WL 3335780, at *4 (5th Cir. Aug. 12, 2022) (citation omitted).

affirmed the district court's grant of summary judgment on the ground that Stewart had not "suffered an actionable adverse action." *Stewart*, 655 F. App'x at 155; *see also Harris v. Att'y Gen. U.S.*, 687 F. App'x 167, 168-69 (3d Cir. 2017) (Black employee alleging that his employer required him to work outdoors despite "dangerously high" temperatures while "white staff were allowed to discontinue" outdoor work "failed to make out a prima facie case" of race discrimination because the employer had purportedly not altered the plaintiff's "terms, conditions, or privileges of employment.").

C. Atextual confusion in the remaining circuits. Each of the other circuits seesaws between embracing the restrictive *Ellerth* list and rejecting the Third and Fifth Circuits' cramped understanding of Title VII's "terms, conditions, or privileges" language (but without ever accepting the text-based approach of the D.C. and Sixth Circuits).

First Circuit. The First Circuit (like the Third) has often borrowed from this Court's vicarious-liability decision in *Ellerth* to articulate the scope of Section 703(a)(1). *See, e.g.*, *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010) (quoting *Ellerth*, 524 U.S. at 761). Relying on *Ellerth*, the First Circuit has held that discriminatory holiday shift assignments are lawful. *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94-95 (1st Cir. 2012). But the First Circuit is inconsistent—sometimes departing from the *Ellerth* list to adopt less-restrictive interpretations of Section 703(a)(1) applied in some other circuits. For instance, in *Caraballo-Caraballo v. Correctional Administration*, 892 F.3d 53 (1st Cir. 2018), the court "squarely rejected" the notion that a discriminatory

transfer or change in job responsibilities must result in a pocketbook harm to violate Title VII. *Id.* at 61.

Second Circuit. In the Second Circuit, there is "no bright-line rule to determine whether a challenged employment action is sufficiently significant to serve as the basis for a claim of discrimination." *Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015). Unlike in the Third and Fifth Circuits, where employers may discriminate if they use practices not listed in *Ellerth*, in the Second Circuit, a discriminatory transfer is actionable if it involves "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities," or other practices relevant to a "particular situation." *Chung v. City Univ. of N.Y.*, 605 F. App'x 20, 22 (2d Cir. 2015). Because lateral transfers necessarily involve changes to workplaces terms, conditions, or privileges, the Second Circuit recognizes that Section 703(a)(1) generally protects employees against discriminatory reassignments. *See, e.g.*, *de la Cruz v. N.Y.C. Hum. Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996). In *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980), for example, the Second Circuit held that the transfer of an art teacher from a junior-high school to an elementary school "interfere[d] with a condition or privilege of employment." *Id.* at 364, 366. The teacher's salary, workload, and teaching subject did not change, but the transfer was professionally dissatisfying because she preferred teaching more advanced pupils and had graduate degrees in adolescent art education. *Id.*

But like the majority of circuits, the Second Circuit too has become ensnared in atextual confusion over the meaning of "terms, conditions, or privileges of

employment." 42 U.S.C. § 2000e-2(a)(1). For example, that court recently held that a plaintiff who maintained she had been transferred because of her race lacked an actionable Title VII claim because she "produced no evidence to suggest that her transfer … resulted in a setback to her career." *De Jesus-Hall v. N.Y. Unified Ct. Sys.*, 856 F. App'x 328, 330-31 (2d Cir. 2021). Thus, in the Second Circuit, not all discriminatory transfers violate Title VII.

Fourth Circuit. The Fourth Circuit similarly ping-pongs between approaches. At times it professes to reject the Fifth Circuit's ultimate-employment-decision test. *See James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375-76 (4th Cir. 2004) ("Conduct short of ultimate employment decisions can constitute adverse employment action.") (citation and quotation marks omitted). Yet, it has often required employees to plead conduct enumerated in *Ellerth* to establish a disparate-treatment claim. The court has thus held that discriminatory practices are unlawful under Title VII only when "the plaintiff can show that" the employer's conduct "had some significant detrimental effect" on the employee. *Cole v. Wake Cnty. Bd. of Educ.*, 834 F. App'x 820, 821 (4th Cir.) (quoting *James*, 368 F.3d at 376), *cert. denied*, 141 S. Ct. 2746 (2021).

Under the significant-detrimental-effect test, "absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not" violate Title VII even if the discriminatory transfer involves, for example, a change in management, increased stress, or altered working conditions. *Boone v. Goldin*, 178 F.3d 253, 255, 256-57 (4th Cir. 1999) (finding evidence

describing how "poor working conditions" made reassignment to a wind tunnel "undesirable" was insufficient to "show that the reassignment had some significant detrimental effect"); *see also, e.g.*, *Cole*, 834 F. App'x at 821 (holding that a principal who maintained she was transferred to a different job because she is Black did not have an actionable claim because, in the court's view, the transfer did not have a "significant detrimental effect" on workplace terms, conditions, or privileges); *Jensen-Graf v. Chesapeake Emps.' Ins. Co.*, 616 F. App'x 596, 597-98 (4th Cir. 2015) (holding that an employee could not challenge a sex-based placement on an employee improvement plan). In practice, then, discriminatory transfers without immediate pocketbook consequences constitute lawful disparate treatment in the Fourth Circuit. *See Cole*, 834 F. App'x at 821-22.

Seventh Circuit. The Seventh Circuit has said it refuses to interpret Section 703(a)(1) "so narrowly as to give an employer a 'license to discriminate.'" *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007) (quoting *Farrell v. Butler Univ.*, 421 F.3d 609, 614 (7th Cir. 2005)). It has sometimes acknowledged that limiting the scope of Section 703(a)(1) to the *Ellerth* list or another equivalently restrictive catalogue of employment practices would "create a loophole for discriminatory actions by employers" at odds with congressional intent. *See Lewis*, 496 F.3d at 654. Thus, in some Seventh Circuit decisions, Section 703(a)(1)'s "terms, conditions, and privileges" encompass not only "compensation, fringe benefits, or other financial terms of employment," but also lateral transfers that reduce "career prospects" or subject the employee to "humiliating, degrading, unsafe," or

"unhealthful" conditions. *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002). A reassignment might have consequences for future career employment if it prevents an employee "from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted." *Id.* A transfer may also cause an injury actionable under Section 703(a)(1) if it does not impact job responsibilities but nonetheless changes the setting in which an employee must work. *Id.*

Yet, at times, the Seventh Circuit has strayed far from Title VII's text in service of the statute's purported material adversity requirement. That court has held that an employer does not violate Title VII even when it "intentionally segregate[s]" an employee "because of his race." *EEOC v. AutoZone, Inc.*, 860 F.3d 564, 568, 569 (7th Cir. 2017). In *Autozone*, the Seventh Circuit accepted as true evidence that the employer transferred a Black employee away from a store that served "a largely Hispanic clientele" to create "a predominantly Hispanic" store. *Id.* at 565. Nonetheless, the court concluded that "no evidence" showed that the transfer adversely affected the employee's employment status or "even *tended* to deprive" him "of any job opportunity" under Section 703(a)(2). *Id.* at 569. The court also noted—consistent with the decision below, Pet. App. 9a-11a, but at odds with the D.C. Circuit's ruling in *Chambers*, *see supra* at 11—that "a purely lateral job transfer does not normally give rise to Title VII liability under subsection [703](a)(1) because it does not constitute a materially adverse employment action." *Id.* As the D.C. Circuit explained, *Autozone* illustrates the "wide

divergence in how other circuits treat discriminatory transfers." *Chambers*, 35 F.4th at 881 (comparing the Seventh Circuit's approach in *Autozone* with the Sixth Circuit's decision in *Threat*, 6 F.4th at 679, to illustrate the entrenched circuit split).

Eighth Circuit. As the decision below holds, in the Eighth Circuit, a "transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action." Pet App. 9a (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)). That means that an employer is free to change an employee's schedule, workplace, and job responsibilities based on race or sex or another protected characteristic. Pet. App. 4a, 22a, 44a, 55a; *see infra* at 25. The Eighth Circuit's precedent is thus squarely at odds with the rules in the Sixth and D.C. Circuits. Although the decision below purports to reject the rule that only "ultimate employment decisions" may violate Title VII, Pet. App. 9a (citing *Turner v. Gonzales*, 421 F.3d 688 (8th Cir. 2005)), the court routinely holds discrimination non-actionable when it does not affect salary or another monetizable benefit. *See, e.g.,* Pet. App. 11a; *Ledergerber*, 122 F.3d at 1144 (holding that "a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action").

Tenth Circuit. In the Tenth Circuit, as in the majority of circuits, if a transfer motivated by discrimination "involves no *significant* changes in an employee's conditions of employment," it will escape Title VII's reach. *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 n.6 (10th Cir. 1998) (emphasis added). This approach has led to confounding results. In

Piercy v. Maketa, 480 F.3d 1192 (10th Cir. 2007), the court held that because of differences in the nature of work assignments at two detention facilities, female officers could challenge a policy preventing them from transferring to the facility with significantly less arduous work. *Id.* at 1205. Yet, the same officers could not challenge the same employer's sex-based shift-assignment policy, which consigned women to objectively less-desirable shifts within a given facility, because the work itself was substantially the same. *Id.* at 1203-04. That result conflicts with, for instance, the Sixth Circuit's decision in *Threat*, which held that race-based shift assignments violate Title VII. 6 F.4th at 677.

Eleventh Circuit. The Eleventh Circuit rejects a "bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged discrimination must have for it to be actionable." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001). To determine whether a discriminatory reassignment comports with the words of Section 703(a)(1), the circuit asks "whether 'a reasonable person in [the plaintiff's] position would view the employment action in question as adverse.'" *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000) (quoting *Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1449 (11th Cir. 1998)).

In *Hinson*, a female principal alleged that two individuals who had recently "moved into positions of power over her" were "plotting," because of her sex, "to remove her as principal." 231 F.3d at 824. The scheme materialized, and although the principal "preferred a job where she would have contact with students," the

school board voted to "move her to an administrative position." *Id.* The superintendent billed the transfer as a promotion, but the plaintiff "suspected it was merely a make-work position designed to facilitate her removal." *Id.* In contrast to the decision below, the Eleventh Circuit concluded that lateral transfers that result in "a loss of prestige and responsibility" are actionable under Section 703(a)(1). *Id.* at 830.

But, still, the Eleventh Circuit's atextual adverse-employment-action rule blesses an array of discriminatory practices. Discriminatory paid suspensions, *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1267 (11th Cir. 2021), shift assignments, *Jackson v. Hall Cnty. Gov't*, 518 F. App'x 771, 773 (11th Cir. 2013), and negative performance evaluations, *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001), are not actionable, even though each affects an employee's terms, conditions, or privileges of employment, and thus violates the statute, "[i]f the words of Title VII are our compass," *Threat*, 6 F.4th at 677.

* * *

In short, every regional circuit has confronted the question presented, and most circuits have deviated from (and, almost invariably, ignored) Title VII's text. Profound confusion among the circuits has endured as a result. And, as a few courts have stepped back and considered the statute's words, the circuit split over which employment practices are prohibited by Title VII has deepened and metastasized. This Court's intervention is needed.

II. The question presented is important and recurring.

A. The courts of appeals' various atextual adverse-employment-action rules impose far-reaching consequences. The discussion above shows that, even when motivated by discrimination, employers may, blessed by circuit precedent, transfer employees to new job assignments, deny employees requested transfers, or make shift assignments based on race, color, religion, sex, and national origin. These employment practices do not necessarily affect pay, title, or benefits, but they are surely "terms, conditions, or privileges of employment" common to the workplace. *See, e.g.*, *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021); *Hamilton v. Dallas County*, 42 F.4th 550, 555 (5th Cir. 2022), *pet. for reh'g en banc filed* (Aug. 16, 2022).

Limiting actionable discrimination to the *Ellerth* list allows employers to engage in various discriminatory practices beyond the transfer at issue in this case. Discriminatory negative performance evaluations are not actionable. *See, e.g., Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 n.11 (5th Cir. 1998). A plaintiff has no Title VII remedy when she is denied training on a discriminatory basis. *See e.g.*, *Shackelford v. Deloitte & Touche, LLP,* 190 F.3d 398, 407 (5th Cir. 1999); *Ford v. County of Hudson*, 729 F. App'x 188, 195 (3d Cir. 2018). An employer is free to suspend an employee with pay even if motivated by discrimination. *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1267 (11th Cir. 2021). And an employer may give out performance awards on the basis of race. *Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 885 (S.D. Tex. 2010). In some circuits,

Title VII's "terms, conditions, or privileges" do not cover employee probation, *Thompson v. Liberty Mut. Ins.*, No. 18-6092, 2021 WL 1712277, at *5 n.8 (D.N.J. Apr. 29, 2021), placement on medical leave, *Trevillion v. Union Pac. R.R.*, No. 18-610, 2021 WL 1762112, at *5 (W.D. La. May 4, 2021), or delayed compensation for paid leave, *Alvares v. Bd. of Educ. of the City of Chi.*, No. 18-CV-5201, 2021 WL 1853220, at *9 (N.D. Ill. May 10, 2021).

To be clear, the circuit precedents do more than fail to hold employers accountable for idiosyncratic discriminatory acts after they have occurred. Under the Fifth Circuit's approach, for instance, an employer may lawfully adopt the following prospective policy: "Pay, titles, and job descriptions are based on merit without regard to race, but we require Black employees to work outside in the heat because they are Black while white employees may work inside with air conditioning." *See Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). And we know from the precedential decision below, that, in the Eighth Circuit, a district court would be powerless to enjoin a police department's express policy stating that it transfers women but not men to certain job assignments or that it grants transfer requests to white employees only. *See* Pet. App. 9a-10a, 13a-14a.

Because in some circuits discrimination is permissible so long as it does not involve an "ultimate employment decision" or impose a pocketbook injury, an employer could, without legal consequence, require all of its Black employees to work under white supervisors, women to stand in every meeting while male counterparts sit comfortably around a table, and

employees of certain national origins to wear standard business attire while allowing others to wear clothing associated with their native lands. Decades after Title VII's enactment, the importance of reviewing a doctrine that countenances these practices is manifest.

B. The question presented concerns the breadth of Title VII's ban on workplace discrimination. But it implicates the interests of employers and employees under other statutes as well. The Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act, and Section 1981, like Title VII, prohibit discrimination with respect to "terms, conditions, or privileges" of employment. *See* 42 U.S.C. § 12112(a); 29 U.S.C. § 623(a)(1); 42 U.S.C. § 2000ff-1(a)(1); 42 U.S.C. § 1981(b). And like Title VII, these statutes do not use the phrase "adverse employment action" (nor various circuit-court offshoots, such as "ultimate employment decision" or "significant detrimental effect"). Yet, current doctrine requires a plaintiff alleging disparate treatment under these statutes to plead and prove one.[5]

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[5] *See, e.g.*, *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 695, 700 (5th Cir. 2014) (requiring a plaintiff alleging ADA discrimination to prove she suffered an adverse employment action); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001) (applying adverse-employment-action doctrine in the Section 1981 context); *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1265 (11th Cir. 2021) (same); *Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 204 (2d Cir. 2006) (analyzing whether a plaintiff pursuing Title VII and ADEA claims suffered an "adverse employment action").

C. The United States has acknowledged the importance of the question presented. In calling for this Court's review, it argued that the adverse-employment-action doctrine—and specifically the Fifth Circuit's ultimate-employment-decision and the Fourth Circuit's significant-detrimental-effect glosses on the statute—have "no foundation" in Title VII's text and are odds with this Court's precedent. Br. for United States as Amicus Curiae at 6, 8, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.); *accord* Br. in Opp'n at 13, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020). In the Eighth Circuit below, the United States reiterated its view that transferring an employee (or denying an employee a requested transfer) on the basis of sex is actionable under Section 703(a)(1) without any "further showing of a 'material' harm or 'significant' change in employment status." Br. for United States as Amicus Curiae at 4-5, *Muldrow v. City of St. Louis*, No. 20-2975, 2020 WL 7482271 (8th Cir. Dec. 14, 2020). And, since 2020, it has opposed lower courts' adverse-employment-action requirements as atextual in four other circuits.[6]

The United States is a frequent defendant in employment-discrimination litigation infected by the adverse-employment-action gloss, *see* 42 U.S.C. § 2000e-16, and the Equal Employment Opportunity

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[6] *See* Br. for United States as Amicus Curiae at 2, *Harrison v. Brookhaven Sch. Dist.*, 21-60771 (5th Cir. Dec. 16, 2021) (listing amicus briefs).

Commission rules on thousands of employment-discrimination charges annually.[7] The United States' view that this gloss is a mistaken judicial innovation thus carries extra weight. For these reasons as well, the question presented is important and ripe for this Court's resolution.

III. This case provides an excellent vehicle for reviewing the question presented.

This case presents an excellent vehicle for this Court's review. Only Muldrow's Title VII Section 703(a)(1) claims are before this Court, and no antecedent issues or other impediments could prevent the Court from addressing them.

Muldrow's claim that her employer transferred her on the basis of sex is, thus, squarely presented. *See* Pet App. 10a-11a, 13a-14a. The Eighth Circuit—acknowledging that it was bound by circuit precedent—effectively held that the Department could transfer Muldrow and deny her a requested transfer solely because she is a woman. Pet App. App. 10a-11a, 13a-14a. If this Court agrees, Muldrow's case would be over. But if this Court adopts the view that sex-based lateral transfers "constitute[] discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII," Muldrow's disparate-treatment claim will survive and be remanded for further proceedings on the merits. *See Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev.*, 867

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[7] *See* EEOC, All Statutes (Charges filed with EEOC) FY 1997-FY 2021, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2021.

F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

That the court of appeals mentioned in passing that Muldrow was denied only informal transfer requests, Pet App. 15a, is no barrier to this Court's review of that issue. The City did not argue below that the informal nature of Muldrow's transfer requests affected her transfer-denial disparate-treatment claim. Br. of Appellees at 30-31, *Muldrow v. City of St. Louis et al.*, No. 20-2975, 2021 WL 1044273 (8th Cir. Mar. 29, 2022). And the court of appeals expressly reached the question whether a transfer denial is actionable under Title VII, holding that the transfer denial, standing alone, was not an adverse employment action and thus did not violate Title VII, even if motivated by sex discrimination. Pet App. 13a-14a. If this Court grants review and reverses, as Muldrow urges, the Eighth Circuit would be free on remand to take up any other issues properly before it. In any case, the court's reference to the informal nature of Muldrow's transfer requests could have no effect on Muldrow's forced-transfer claim.

IV. The Eighth Circuit's decision is wrong.

A. Title VII bans employment discrimination in "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The phrase "adverse employment action" appears nowhere in its text. It makes sense, then, that this Court "has never adopted" a legal rule requiring an "adverse employment action" as an element of a plaintiff's case. *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (Easterbrook, J.). This Court should reject that rule and apply the statute as written.

1. "It's not even clear that we need dictionaries to confirm what fluent speakers of English know" about Section 703(a)(1)'s ordinary English words. *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021). In any case, the dictionary definitions of the words "discriminate," "terms," "conditions," and "privileges" contemporaneous with Title VII's enactment are confirmatory.

"Discriminate" means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third New Int'l Dictionary 647-48 (1961) (Webster's Third). "As used in Title VII, the term 'discriminate against'" thus "refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (citation omitted). Put another way, no adverse-employment-action requirement can be derived from the word "discriminate" because it connotes any differential treatment. *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc).

"Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third 2358 (1961). A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third 473 (1961). And a "privilege" is the enjoyment of "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third 1805 (1961). These words, taken together, then, refer to "the entire spectrum of disparate treatment," covering the gamut

of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted).

In using the phrase "terms, conditions, or privileges," "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) (describing Title VII) (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). That is, "Title VII tolerates no racial [or sex] discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973); *Chambers*, 35 F.4th at 874. Title VII is thus not limited to workplace discrimination that employers or courts view as particularly injurious or as economically harmful. *Chambers*, 35 F.4th at 874. The statute's simple, unadorned words establish no minimum level of actionable harm. *See id.* The lower courts' contrary decisions discussed above, then, have effectively "rewrit[ten] the statute that Congress has enacted." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016)).

2. The Eighth Circuit below was wrong to conclude that only "tangible change[s] in working conditions that produce[] a material employment disadvantage" such as "[t]ermination, cuts in pay or benefits, and changes that affect an employee's future career prospects, as well as circumstances amounting

to a constructive discharge" are actionable. *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007); *see* Pet. App. 9a. As the United States bluntly puts it, "that reading of the statute is incorrect." Br. in Opp'n at 10, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020) (Mem.).

As noted, the statute nowhere demands that the plaintiff prove an "adverse employment action," be saddled with an "ultimate employment decision," or suffer a "materially significant disadvantage." Rather, the statute says simply that an employer may not discriminate against an employee with respect to the "terms, conditions, or privileges of employment."

B. Applying this straightforward understanding of Section 703(a)(1)'s text to Muldrow's situation, an employer may not transfer an employee (or deny a requested transfer) because of sex. As the EEOC has explained, "job assignments" are workplace "terms, conditions, or privileges of employment." EEOC Compliance Man. § 613.1(a), 2006 WL 4672701; *see also* EEOC Compliance Man. § 2-II, 2009 WL 2966754. A work assignment thus determines the nature and scope of the employee's job, is agreed to between the employer and employee, and invests both parties with particular obligations and rights.

A *re*assignment—that is, a transfer—therefore necessarily alters previously established workplace "terms, conditions, or privileges." It alters terms, conditions, or privileges, whether the transfer changes "the *when* of employment," *Threat*, 6 F.4th at 677, results in "a loss of prestige and responsibility," *Hinson v. Clinch County*, 231 F.3d 821, 830 (11th Cir. 2000), requires an experienced employee to take on

"menial duties," *Burns v. Johnson*, 829 F.3d 1, 11 (1st Cir. 2016), removes an employee from a role demanding specialized training, *Rodriguez v. Bd. of Educ.*, 620 F.2d 362, 364, 366 (2d Cir. 1980), diminishes supervisory responsibilities, *Judie v. Hamilton*, 872 F.2d 919, 921 (9th Cir. 1989), downgrades an employee's title or prestige, places an employee under new management, or otherwise modifies an employee's workplace experience. That is so because "it is difficult to imagine a more fundamental term or condition of employment than the position itself." *Chambers*, 35 F.4th at 874 (quoting United States' Br. for Resp't in Opp. at 13, *Forgus v. Shanahan*, 141 S. Ct. 234 (2020) (No. 18-942), 2019 WL 2006239, at *13).

Put differently, if a transfer does not change *some* term or condition of an employment relationship, it is not a transfer (and the employer would not have insisted on it). Transfers thus alter workplace terms and conditions by design.

Here, Muldrow's forced transfer altered the *when* of her employment. *See Threat*, 6 F.4th at 677. She previously worked regular business hours, with weekends off. Pet. App. 2a, 22a, 44a, 55a; CA8JA 341. In her new position, Muldrow was required to work a rotating schedule, with few weekends off. CA8JA 352. Muldrow could not disregard this change in her schedule by not reporting for work on the weekends; instead, after her transfer, the Department could presumably have disciplined her, including by firing her, if she failed to adhere to her new schedule. The Department's transfer thus imposed terms or conditions on Muldrow's employment and denied her privileges (weekends off).

The transfer also changed Muldrow's job responsibilities, workplace conditions and privileges, and other benefits. For instance, Muldrow's human-trafficking investigations were taken away from her. CA8JA 582. Her responsibilities shifted from the "more sensitive" and "important investigations" that make Intelligence "the premier bureau" in the Department, CA8JA 340, to entry-level police work, CA8JA 582. Moreover, she lost her office in police headquarters, CA8JA 570, and was no longer permitted to travel out of state to complete her duties, CA8JA 666; *see also* CA8JA 344, 346, 353, 577 (describing other privileges denied Muldrow by the forced transfer).

The Eighth Circuit also erred in holding non-actionable the Department's denial of Muldrow's requested transfer. Everyone agrees that, under Title VII's straightforward text, a discriminatory failure to hire based on sex is prohibited. 42 U.S.C. § 2000e-2(a)(1); *see, e.g.*, *Torgerson v. City of Rochester*, 643 F.3d 1031, 1036 (8th Cir. 2011). Indeed, a refusal to rehire was the relevant employment decision in this Court's pathmarking ruling in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 797 (1973).

There is no meaningful distinction between the harm suffered by Muldrow from the denied transfer and the injury a prospective employee suffers when denied a job in the first place. That prospective employee, too, would experience no diminution in pay or formal change in job responsibilities or title if an employer failed to hire her. Thus, "refusing a job transfer request" is "the functional equivalent of 'refusing to hire' an employee for a particular position," and doing so violates Title VII when based

on race, color, religion, sex, or national origin. *Chambers*, 35 F.4th at 875 (brackets omitted); *see McDonnell Douglas*, 411 U.S. at 797.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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