No. 18-1401

IN THE

Supreme Court of the United States

DAVID D. PETERSON,

Petitioner,

v.

LINEAR CONTROLS, INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Daniel E. Broussard, Jr.
1025 Hidden Ridge Dr.
Woodworth, LA 71485
P.O. Box 13018
Alexandria, LA 71315

Pamela S. Karlan
Counsel of Record
Brian H. Fletcher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

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In this case, the Fifth Circuit reaffirmed its longstanding position that Title VII's prohibition on discrimination "include[s] *only* 'ultimate employment decisions,' such as 'hiring, granting leave, discharging, promoting, or compensating.'" Pet. App. 4a (emphasis added) (quoting *McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007)). Applying that rule, the Fifth Circuit held that Title VII's central antidiscrimination provision does not prohibit an employer from segregating its work assignments so that black employees "work outside without access to water" in the Louisiana summer while "white team members work[] inside with air conditioning." *Id.*

Respondent offers no defense of the Fifth Circuit's restrictive rule—a rule that finds no support in the text of Section 703(a), which covers *all* "terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1). *See* Pet. 23-26. Indeed, respondent admits that the Fifth Circuit's test "is a judicially coined term for the actual language of § 703(a)(1)," BIO 23—one that has taken on a life of its own despite this Court's repeated warnings that lower courts should not "engraft[]" additional tests onto straightforward statutory language. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2361 (2019).

Nor does respondent contest the importance of the question presented. As petitioner and the Solicitor General have explained, restrictive judicial glosses like the Fifth Circuit's "ultimate employment decisions" requirement reflect a "significant and widespread misreading of Title VII." Pet. 31-32

(quoting Brief in Opposition at 16, *Forgus v. Shanahan* (No. 18-942) (U.S. *Forgus* Br.)).

Ultimately, respondent argues only that review should be denied because petitioner has "overstated the degree" of the conflict among the circuits, BIO 13, and because this case is not the right vehicle for addressing this important question, *id.* at 14-21, 36-37. These arguments are meritless. First, there is a genuine split over whether Section 703(a) is limited to the subset of employers' decisions that fall within the Fifth Circuit's standard. Because this split is rooted in some lower courts' erroneous reliance on this Court's vicarious-liability decision in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the split will not go away without this Court's intervention. *See* Pet. 8-9, 11; U.S. *Forgus* Br. 15-16; *see also* BIO 24-25 (acknowledging that the Fifth Circuit's rule mirrors *Ellerth* and analyzing petitioner's claim under it). Second, this case is an excellent vehicle for resolving that split and clarifying that Section 703(a) means what it says.

I. The conflict among the courts of appeals is both real and significant.

The petition described a three-way split among the courts of appeals over the scope of Section 703(a). The Fifth Circuit has "strictly" limited the employment practices covered by Section 703(a) to a narrow list of "ultimate employment decisions," Pet. App. 4a, and the Third Circuit has effectively done the same, *see* Pet. 10-12. The Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have rejected that restrictive approach. Pet. 12-16. And the three remaining regional circuits—the First, Fourth,

and D.C. Circuits—have failed to adopt a consistent position on the question. Pet. 16-19.

Respondent acknowledges that "variances exist among the measures the courts of appeals utilize" for deciding whether "claimed adverse employment actions" can give rise to "Title VII § 703 discrimination claims." BIO 24. But it insists that these differences are "minor," *id.* at 13, and that they make no practical difference to the outcome of cases like petitioner's, *id.* at 24. Respondent is wrong on both counts.

1. Respondent's own characterization of the state of the law confirms the existence of a meaningful split among the circuits.

Respondent does not dispute that the Fifth Circuit restricts Section 703(a)'s coverage to a closed list of five "ultimate employment decisions," BIO 25, and that "the Third Circuit's 'test produces the same results as the Fifth Circuit's "ultimate employment decisions" standard,'" *id.* at 27 (quoting Pet. 11). It insists that the Fourth Circuit also falls in the "ultimate employment decisions" camp. BIO 28. *But see* Pet. 17-18 (describing the Fourth Circuit as one of three circuits whose position is more equivocal).

By contrast, respondent acknowledges that the Seventh Circuit "applies a broad standard" under which "'changes to work conditions that include humiliating, degrading, unsafe, unhealthy, or otherwise significant negative alteration in the workplace'" are actionable. BIO 30-31 (quoting *Boss v. Castro*, 816 F.3d 910, 917 (7th Cir. 2016)); *see* Pet. 13-14. Respondent also concedes that the Tenth Circuit defines Section 703(a) "'liberally'" to include any employer decision that "carries 'a significant risk of humiliation, damage to reputation, and a concomitant

harm to future employment prospects.'" BIO 33 (quoting *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1239 (10th Cir. 2004)); *see* Pet. 15-16. And with respect to the Second and Sixth Circuits, respondent admits that these circuits have rejected a bright-line rule like the Fifth Circuit's, because they permit challenges to significant changes in job "responsibilities, or other indices that may be unique to a particular situation." BIO 27, 29 (quoting *Sanders v. N.Y.C. Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004), and *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 625 (6th Cir. 2013)). These circuits therefore hold that Section 703(a) covers employer actions beyond "hiring, granting leave, discharging, promoting, or compensating"—the Fifth Circuit's exclusive list of "ultimate employment decisions," Pet. App. 4a. *See* Pet. 12-13.

To be sure, in each of these circuits there are cases—some of which respondent cites—where courts have held that the particular decision a worker challenges is so insignificant that it does not actually alter his "terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1). But that simply illustrates that "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992); *see also* Br. of Brian Wolfman *et al.* as Amici Curiae 19-21. Those cases do nothing to undermine petitioner's showing that the Second, Sixth, Seventh, and Tenth Circuits have rejected the

Fifth Circuit's "ultimate employment decisions" standard.[1]

Thus, under respondent's own account of the law, there is a three-to-four conflict among the courts of appeals. Even without more, that would be reason enough for the Court to grant review on this frequently recurring question.

2. But the split runs even deeper. Contrary to respondent's arguments, the remaining circuits also apply divergent standards to determine what employment actions are covered by Title VII.

First, the Ninth and Eleventh Circuits' rules directly conflict with the Fifth Circuit's "ultimate employment decisions" standard. Respondent's discussion of the Ninth Circuit, BIO 32-33, simply gets the law wrong. The principal case it cites, *Schlosser v. Potter*, 248 Fed. Appx. 812 (9th Cir. 2007), is an unpublished decision addressing a retaliation claim under the Rehabilitation Act, not a substantive discrimination claim under Title VII. *Id.* at 817. And the second opinion it cites, *Vasquez v. County of Los Angeles*, 307 F.3d 884 (9th Cir. 2002), was superseded by an opinion, 349 F.3d 634 (9th Cir. 2003), that omits the language on which respondent relies. In fact, the Ninth Circuit has "held that assigning more, or more burdensome, work responsibilities" can give rise to a Title VII claim. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008); *see* Pet. 14-15. And while

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[1] And the harmful effect of racially segregated workspaces can hardly be described as *de minimis* in light of Title VII's central ambition to "eliminate those discriminatory practices and devices which have fostered racially stratified job environments." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

the Eleventh Circuit has stated that work assignments "*typically* do not constitute adverse employment actions" cognizable under Section 703(a), BIO 35 (emphasis added) (quoting *McCone v. Pitney Bowes, Inc.*, 582 Fed. Appx. 798, 800 (2014)), it has refused to adopt a bright-line test categorically excluding discriminatory work-assignment claims from Section 703(a). *See* Pet. 16 (citing cases at odds with the Fifth Circuit's restrictive test).

Second, the petition demonstrated that the First and D.C. Circuits have not adopted a clear position on the question presented. Respondent disagrees, asserting that those circuits have followed the Fifth Circuit in adopting a restrictive test based on *Ellerth*. Even if that were true, it would only further deepen the conflict.

But respondent overlooks decisions from both courts that cut the other way. With respect to the D.C. Circuit, respondent points to decisions standing for the unexceptionable proposition that "not everything that makes an employee unhappy" constitutes a term or condition of employment. BIO 35 (quoting *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010)). That, however, does not answer the question whether the D.C. Circuit has consistently limited the terms or conditions of employment to a narrow list of "ultimate employment decisions." Respondent ignores then-Judge Kavanaugh's observation that the D.C. Circuit has sometimes rejected the more narrow interpretation adopted by circuits like the Fifth. *See* Pet. 18-19. Respondent also ignores the D.C. Circuit's decision in *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001), holding that

discriminatorily assigning an employee to the night shift would be actionable under Title VII. *See* Pet. 18.

So too with respect to the First Circuit. While the case respondent cites, *Morales-Vallellanes v. Potter*, 605 F.3d 27 (1st Cir. 2010), BIO 26, does quote *Ellerth*, it then goes on to state that "[i]n appropriate circumstances, disadvantageous work assignments may qualify as materially adverse" and therefore actionable under Section 703(a), 605 F.3d at 38. This confirms petitioner's view that the First Circuit has not come down clearly on either side of the split.

3. Respondent is also wrong to downplay the practical effect of the conflict.

As the petition showed, the question presented arises frequently. Pet. 19-20. And it matters to the outcome of individual cases. Courts outside the Third and Fifth Circuits have found Section 703(a) to cover a wide range of employer practices that would not qualify as "ultimate employment decisions." *See* Br. of Brian Wolfman *et al.* as Amici Curiae 10-19 (collecting examples).

This case involves a particularly striking example of why the circuit split matters. It is true that racially segregated job assignments are no longer the norm in twenty-first century America. But contrary to respondent's assertion that petitioner cannot identify "any case opinion applying Section 703(a)" to find discrimination in a case like his, BIO 17, the petition actually identifies *five* such reported cases outside the Fifth Circuit. *See Feingold v. New York*, 366 F.3d 138, 152-54 (2d Cir. 2004) (Pet. 12-13); *Tart v. Ill. Power Co.*, 366 F.3d 461, 472-78 (7th Cir. 2004) (Pet. 13-14); *Hunter v. Army Fleet Support*, 530 F. Supp. 2d 1291, 1295 (M.D. Ala. 2007) (Pet. 16); *Lopez v. Flight Servs.*

& Sys., Inc., 881 F. Supp. 2d 431, 441 (W.D.N.Y. 2012) (Pet. 13); and *DeWeese v. Cascade Gen. Shipyard*, 2011 WL 3298421, at *10-11 (D. Or. 2011) (Pet. 15). Given the outcome below, premised on longstanding circuit precedent, each of those cases would have come out the other way in the Fifth Circuit.

Thus, not only is there a three-way conflict among all twelve regional courts of appeals over the general standard for which employer actions constitute "terms, conditions or privileges of employment," there is actually a two-to-two conflict in the courts of appeals over whether racial discrimination *in work assignments* is actionable under Title VII. The Second and Seventh Circuits hold that it is, while the Third and Fifth Circuits somehow have concluded, in the face of the statutory language, that it is not. That division cries out for this Court's intervention.

II. Respondent's vehicle arguments are meritless.

Respondent floats two vehicle arguments. First, it contends that petitioner waived his right to challenge the Fifth Circuit's "ultimate employment decisions" rule. BIO 18-21. Second, it asserts that the answer to the question presented does not matter because petitioner lacks sufficient evidence to support his claim. *Id.* at 14-16, 36-37. Both arguments are meritless, and for the same reason: they ignore what actually transpired in the Fifth Circuit.

1. Respondent does not—because it cannot—deny that the Fifth Circuit squarely passed on the question presented. *See* Pet. 21. In fact, the court's ruling on the question is indispensable to its judgment. The court of appeals held that petitioner's evidence of racial

segregation on the offshore platform was immaterial because petitioner "still cannot satisfy Title VII's adverse employment action requirement" given the circuit's "strict[]" requirement that plaintiffs identify an "ultimate employment decision[]." Pet. App. 4a.

Respondent nevertheless asserts that petitioner cannot raise the question presented in this Court because he did not challenge the "ultimate employment decisions" rule in his briefing to the Fifth Circuit. *See* BIO 18-19. Respondent is wrong.

This Court can grant review with respect to "[a]ny issue 'pressed or passed upon below' by a federal court." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41.

In particular, a party such as petitioner is not required to "demand overruling of a squarely applicable" circuit precedent before this Court can "grant[] certiorari upon an issue decided by a lower court" and review the circuit's preexisting rule. *Williams*, 504 U.S. at 44. *See also Lozman v. City of Riviera Beach,* 138 S. Ct. 1945, 1950-51 (2018) (review granted to address circuit precedent that formed the justification for disregarding an instructional error). Just as in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), granting review is appropriate here because "the court below passed on the issue presented"—"one of importance to the administration

of federal law," *id.* at 1099 n.8 (internal citations and quotation marks omitted).[2]

2. Respondent is flatly wrong to claim that the Fifth Circuit "determined [that] the evidence disproves" petitioner's allegation of discriminatory work assignments. BIO 14. To the contrary: the Fifth

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[2] In addition to being wrong on the law, respondent distorts the facts. To support its waiver argument, respondent plucks a phrase out of a sentence in petitioner's opening brief in the Fifth Circuit. It claims that petitioner "expressly acknowledged, without challenging the issue, that in the district court 'it was questionable whether [Peterson] raised the issue that he was subjected to an adverse employment decision.'" BIO 19 (quoting Pl. C.A. Br. 24).

Not so. The quoted phrase actually has nothing to do with what petitioner argued "in the district court," BIO 19. The sentence immediately preceding the quoted material makes clear that petitioner was referring to how the district court had interpreted "plaintiff's charge" *to the EEOC*. Pl. C.A. Br. 24. Petitioner was simply arguing that the district court had erred in interpreting the EEOC charge (quoted in Pet. App. 22a) too narrowly.

Contrary to respondent's assertion, petitioner expressly challenged the segregated job assignment in the district court. *See* Pet. App. 23a (quoting petitioner's complaint). The reason the district court ruled against petitioner was not his failure to press the claim that respondent's discriminatory job assignment violated Title VII, but rather its determination that, under binding Fifth Circuit precedent, the actions petitioner challenged were not prohibited by the Act. *See id.* at 39a-40a. On appeal, petitioner argued that his discrimination claim should be reinstated because the discriminatory job assignment had "alter[ed] the terms and conditions of the plaintiff's employment." Pl. C.A. Reply Br. 5. And, in ruling against petitioner, the Fifth Circuit acknowledged that petitioner was challenging the segregated job assignment. *See* Pet. App. 4a.

Circuit never even reached the question of evidentiary sufficiency. So the court of appeals did not address petitioner's argument that the district court had erred in ignoring his deposition testimony and in excluding two sworn declarations from individuals present on the platform. These declarations corroborated petitioner's claim that respondent required black workers to labor outside in harsh conditions while assigning white workers to an air-conditioned indoor workspace. *See* Pet. App. 4a.[3]

The Fifth Circuit resolved the case on an alternative ground that squarely tees up the question presented. It expressly assumed that petitioner *had* provided sufficient evidence. Pet. App. 4a. But it then held that, even "[t]aking" petitioner's evidence "as true," the "working conditions" he challenged were not "adverse employment actions because they [did] not concern ultimate employment decisions." *Id.* [4]

Respondent would be free to renew on remand its argument that petitioner has failed to provide

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[3] The relevant evidence from petitioner's deposition is presented in Pl. Mem. in Opp. to Mot. for Summ. J., Exh, F. at 27-28, *Peterson v. Linear Controls, Inc.*, No. 6:16-cv-00725 (W.D. La. June 29, 2017), ECF 33-6. The relevant evidence from the two sworn declarations is presented in Exh. A at 1-2, ECF 33-1, and Exh. B at 2, ECF 33-2.

[4] Respondent mistakenly tries to minimize petitioner's claim by fixating on the provision of water breaks standing alone, rather than on the question whether the work assignments themselves were made along racial lines. *See, e.g.*, BIO 15, 37. Moreover, its insistence that the job description required "both outdoors and inside" work, *id.* at 15, misses the point. Petitioner does not challenge the requirement of outside work; he challenges the decision to assign this more arduous work only to black workers.

sufficient evidence to support his allegations of racially discriminatory work assignments. But the existence of that alternative argument for affirmance provides no basis for denying review of the issue the Fifth Circuit actually addressed—that even irrefutable evidence of racial segregation does not violate Title VII.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel E. Broussard, Jr.
1025 Hidden Ridge Dr.
Woodworth, LA 71485
P.O. Box 13018
Alexandria, LA 71315

Pamela S. Karlan
Counsel of Record
Brian H. Fletcher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

September 25, 2019