No. 18-1401

In The Supreme Court of the United States

DAVID D. PETERSON,

Petitioner,

v.

LINEAR CONTROLS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES' BRIEF AS AMICUS CURIAE

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I. Introduction

LINEAR CONTROLS, INC.'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES' BRIEF AS AMICUS CURIAE

In accordance with Supreme Court Rule 15.8, Respondent Linear Controls, Inc. submits this supplemental brief in response to the brief of the United States as amicus curiae.[1] In support, Linear Controls would respectfully show as follows:

SUPPLEMENT

In recommending the Court grant certiorari to review the Fifth Circuit's decision below, the Solicitor General urges the Court to adopt an expansive and unsupported interpretation of Section 703(a), Title VII of the Civil Rights Act of 1964's private-sector antidiscrimination provision, 42 U.S.C. § 2000e-2(a). To do so, the Solicitor General, like Peterson, overlooks the underlying pleading and evidentiary bases upon which the district and circuit court rejected Peterson's disparate treatment claim including Peterson's failure[2] to

[1] Linear Controls refers to the Government's amicus brief as "CVSG." Linear Controls refers to its brief in opposition to Peterson's petition for writ of certiorari as "Opp. Br."

[2] In his opening appellate brief, Peterson stated, in pertinent part, that:

> In this case, it is respectfully submitted that the District Judge misread [Peterson's] charge [of discrimination]. While it was questionable whether [Peterson] raised the issue that he was subjected to an adverse

allege or identify any adverse employment action.[3] Specifically, the district court and the circuit court ultimately found summary judgment – based on the evidence and not a legal question – to be appropriate. Because the undisputed evidentiary record and Peterson's own pleading admissions belie the questions the Solicitor General and Peterson hypothesize for the Court's consideration, this case is not suitable for this Court's review.

Beyond this preliminary factual point, the Solicitor General argues the Fifth Circuit's interpretation of adverse employment action to include only ultimate employment decisions, i.e., hiring, granting leave, discharging, promoting, or compensating, is not consistent with Title VII's "text, structure, and purpose." But the Solicitor General's argument relies upon interpreting disparate treatment claims in the context of claims for hostile work environment or disparate impact. Since disparate treatment under Section 703(a)(1) is the only claim at issue here, the ostensibly broader standards or different protections of a different type of discrimination claim simply do not apply.

Further, the Fifth Circuit's interpretation of adverse employment action is consistent with this

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> employment decision, that issue was not required in a hostile work environment claim.

Appellant's Br. at 24, Nov. 11, 2017; Case No. 17-30790.

[3] The term "adverse employment action" broadly includes similarly or identically defined terms including, among others, "tangible employment action" or "materially adverse employment action."

Court's decision in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) importing well-established circuit court precedent and which the circuit courts have cited approvingly in Section 703(a) disparate treatment cases for over two decades. There is simply no reason for the Court to consider the question the Solicitor General presents.

II. Argument

Unable to harmonize the precedential bases requiring Section 703(a) disparate treatment claimants to plead and prove some type of adverse employment action with the Government's admittedly new policy position seeking an expansive, if not unlimited, interpretation of actionable discrimination, the Solicitor General contends, without citing to any authority at all, that the question the Government presents is undeniably important given the significant number of Section 703(a) disparate treatment claims asserted annually. But this argument would risk extending Title VII protection to "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). Such a nebulous standard would invite litigation over routine employment issues allowing meritless claims under the *Ellerth* standard to become actionable. Such expansion would lead to "untenable results" quite inconsistent with Title VII's text, structure, and purpose. (CVSG at 14).

A. The pleading and factual bases for denial of certiorari should be fatal to Peterson's petition.

At the outset, *Peterson* is not an appropriate case for Supreme Court review because the fact-bound assessment of the adequacy of Peterson's pleadings provides an independent basis to support the decision below and does not warrant Supreme Court review. To be sure, both the underlying pleading and **undisputed** evidentiary bases upon which the district and circuit court rejected Peterson's claims disprove Peterson's unsupported allegation that Linear Controls required Peterson and other African American employees to work exclusively outdoors on an oil rig in the Gulf of Mexico for an eleven-day period in 2015 with limited access to water while Linear Controls permitted Caucasian employees to work exclusively indoors in air-conditioning with longer water breaks. (App.34a-35a), mere allegations the trial court found disproven by the evidence.

Peterson's petition also fails because Peterson has not identified evidence of a similarly situated employee who received more favorable treatment in the relevant context. (App.35a). On appeal, the Fifth Circuit declined to address the merits of Peterson's purported evidence of similarly situated comparators (App.4a)[4] and Peterson has not re-asserted that argument before

[4] The district court analyzed the evidence and determined Peterson had failed to identify any similarly situated employee who received more favorable treatment in the relevant context. (App.38a). *See also* Opp. Br. at 36-37.

the Supreme Court, opting instead to pivot to a broader hypothetical question the trial court did not have to resolve in light of the evidence. (Opp. Br. at 14-17).

Even under such a broad, hypothetical scope Peterson and the Solicitor General suggest, Peterson's discrimination claim against Linear Controls would not lead to a different conclusion because Peterson failed to present evidence of *any* personnel action that he merely alleged Linear Controls perpetrated against him.

Since Peterson failed to plead facts, let alone present evidence on the disputed issue which forms the basis of his petition for writ of certiorari, the underlying decisions provide a poor factual basis for the Supreme Court's discretionary review.

B. The Solicitor General urges the Court to expand disparate treatment under Section 703(a) to prohibit conduct already proscribed by distinct claims under the same statute.

Section 703(a) of Title VII prohibits discrimination under two distinct theories enumerated in subsections (1) and (2). *Cf. Lewis v. City of Chicago*, 560 U.S. 205, 211 (2010). Under Section 703(a)(1), it is an "unlawful employment practice" for an employer "to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]" 42 U.S.C. § 2000e-2(a)(1). A plaintiff seeking relief under

Section 703(a)(1) can assert claims for, *inter alia*, disparate treatment or hostile work environment.

Section 703(a)(2), on the other hand, defines an "unlawful employment practice" for an employer "to limit, segregate, or classify his employees . . . 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[.]" § 2000e-2(a)(2). "Both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2)." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 141 (1977) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). A plaintiff seeking relief under Section 703(a)(2) can assert a claim alleging the plaintiff's employer "uses a particular employment practice that causes a disparate impact on the basis of race[.]" § 2000e-2(a)(2). *See*, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

Importantly, the Supreme Court has held subsections (a)(1) and (a)(2) are not "coextensive" or exclusive. *Lewis*, 560 U.S. at 215. To be sure, "[i]f the effect of applying Title VII's text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written." *Id*. Therefore, the Solicitor General's argument that the circuit courts' "widespread misreading" of Section 703(a)(1) to require disparate treatment plaintiffs plead and prove an adverse employment action "is not a plausible account of statutory language," is misplaced.

As Linear Controls discussed in its opposition brief, each circuit court[5] requires plaintiffs asserting disparate treatment under Section 703(a)(1) show at minimum an adverse action more than a mere inconvenience or an alteration of job responsibilities because that cause of action pertains to "decisions that have direct economic consequences, such as termination, demotion, and pay cuts," *Vance v. Ball State Univ.*, 570 U.S. 421, 426 (2013), that result in "economic or tangible discrimination." *AMTRAK v. Morgan*, 536 U.S. 101, 115-116 (2002) (internal quotations omitted) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986)).

But the protection of Section 703(a)(1) "is not limited to economic or tangible discrimination." *Id.* "[T]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment . . . in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 67). Accordingly, to address harm otherwise not subject to a disparate treatment claim, Section 703(a)(1) also "prohibits the creation of a hostile work environment," *Vance*, 570 U.S. at 427, "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the

[5] *See*, *e.g.*, Opp. Br. at 25-35.

victim's employment." *Morgan*, 536 U.S. at 116 (quoting *Harris*, 510 U.S. at 21 (1993)).

"Hostile environment claims are different in kind" than disparate treatment claims, the latter arising out of a "discrete" adverse employment action. *Morgan*, 535 U.S. at 115. Thus, while a plaintiff must demonstrate he was the subject of an adverse employment action to establish a prima facie case of disparate treatment discrimination under Section 703(a)(1), *cf. Paske v. Fitzgerald* 785 F.3d 977 985 (5th Cir.), *cert. denied*, 136 S.Ct. 536 (2015), a plaintiff asserting a separate hostile work environment claim, as Peterson stated in his briefing below,[6] is not required to plead and prove an adverse employment action. *See*, *e.g.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

Indeed, the Supreme Court only recognized hostile work environment as a distinct cause of action under Section 703(a)(1) after the Fifth Circuit did so in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In *Meritor*, this Court held an "employee's protections under Title VII extend beyond the economic aspects of employment." *Meritor*, 477 U.S. at 66 (citing *Rogers*, 454 F.2d at 238). Notably, and contrary to the Solicitor General's argument the Fifth Circuit's interpretation of Section 703(a)(1) produces "untenable results," the Supreme Court has acknowledged *Rogers* as both the first case and the "leading case" on hostile work environment. *Vance*, 570

[6] *See* n.2 *supra*.

U.S. at 426-427. *See also Johnson v. Halstead*, 916 F.3d 410, 417 (5th Cir. 2019).

Since Peterson contests only the Fifth Circuit's affirmance of the district court's dismissal of Peterson's disparate treatment claim,[7] the distinct and broader protections of a hostile work environment claim simply do not and should not apply.

The Solicitor General's misstatement of the holdings in the trial and circuit court to advance the unsupported argument that "the startling result in this case – that an employer may racially segregate its workforce . . . underscores the defects" in the Fifth Circuit's "ultimate employment action" test[8] similarly fails since the argument not only misconstrues the Fifth Circuit's holding but, as discussed *supra*, racial segregation of a workforce is an express basis for a distinct cause of action under Section 703(a)(2). Thus, to expand the scope of Section 703(a)(1) disparate treatment claims to include racial segregation "where

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[7] While Peterson purported to assert a hostile work environment claim based on racial harassment against Linear Controls, Peterson does not contest that claim here. (Pet. at 4 n.2).

[8] The Solicitor General contends some Fifth Circuit decisions suggest applying a "significant and material" test instead of the ultimate employment action test. (CVSG at 19). But "significant and material" refers to "significant" diminishment of "material responsibilities," i.e., a demotion, not a different test. *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019). Notably, this phrase originates from *Ellerth*. "A materially adverse change might be indicated by . . . a demotion evidenced by . . . significantly diminished material responsibilities[.]" 524 U.S. at 761 (internal quotations omitted).

Congress include[d] particular language [proscribing racial segregation] in [Section 703(a)(2) of Title VII] but omit[ted] it in another section of the same Act," the Court "generally presume[s] that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Babb v. Wilkie*, 589 U.S. ___, ___ (2020) (slip op. at 12) (quotations omitted) (citing *Russello v. United States*, 464 U. S. 16, 23 (1983)).

C. The Supreme Court's interpretation of "adverse employment action" in *Burlington Industries, Inc. v. Ellerth* applies to Peterson's disparate treatment claim.

As discussed *supra*, to establish a prima facie case of disparate treatment under Section 703(a)(1), a plaintiff must demonstrate he was subjected to an adverse employment action. Importantly, the term "adverse employment action," to describe actionable employment practices under Title VII and other antidiscrimination statutes, predates the Supreme Court's opinion in *Ellerth*, wherein the Court "import[ed] the concept of a tangible employment action" *Ellerth*, 524 U.S. at 761, from circuit cases discussing, among other things, the substantive scope of Title VII's antidiscrimination provisions. *Ellerth*, 524 U.S. at 761.

Specifically, in support of its definition of adverse employment action, the *Ellerth* Court cited to *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993); *Flaherty v. Gas Research Institute*, 31

F.3d 451, 456 (7th Cir. 1994); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). Unlike *Ellerth – Crady*, *Flaherty*, *Kocsis*, and *Harlston* were not hostile work environment claims – *Crady* and *Flaherty* pertained to age discrimination claims under the Age Discrimination in Employment Act, *Kocsis* pertained to a disability discrimination claim under the Americans with Disabilities Act, and *Harlston* pertained to race and age discrimination claims under Title VII and the ADEA, respectively. Thus, as Linear Controls demonstrates in its opposition brief, (Opp. Br. at 24-25), the *Ellerth* opinion followed longstanding circuit court precedent interpreting adverse employment actions as those actions affecting hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Since the *Ellerth* Court's approval, federal courts have continued to cite *Ellerth* as a baseline for evaluating alleged adverse employment actions under Section 703(a)(1), whether in the context of a disparate treatment claim, as here, or the context of a hostile work environment claim as in *Ellerth*. *See*, *e.g.*, *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010); *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011); *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007); *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010). To contend, as the Solicitor General does, that the *Ellerth* Court's explication of the "adverse employment action" standard does not apply to disparate treatment

discrimination claims is clearly contrary to over two decades of Supreme Court and circuit court precedent. To be sure, in its opinion in *Morgan*, the Court identified "[d]screte acts such as termination, failure to promote, denial of transfer, or refusal to hire" as incidents of discriminatory "adverse employment decision[s] constitute[ing] separate actionable 'unlawful employment practice[s]'" under a Section 703(a)(1) disparate treatment claim. *Morgan*, 536 U.S. at 114.

Further, while it would make no sense for the Court to expand Section 703(a)(1) to proscribe conduct already proscribed elsewhere in Title VII, it would equally make no sense for the Court to distinguish adverse employment actions in a hostile work environment claim as distinct from adverse employment actions in a disparate treatment claim when both claims arise under the same subsection. Indeed, by relying on numerous hostile work environment decisions[9] to support the Government's unsupported policy argument in favor of expanding the scope of disparate treatment

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[9] The Solicitor General cites, discusses, and relies upon *Meritor*, *Harris*, *Oncale*, and *Vance*, all hostile work environment or harassment cases. (CVSG *passim*). The Solicitor General even states, in pertinent part, that;

> [i]n interpreting Section 703(a)(1) . . . this Court has held that discrimination in the "terms, conditions, or privileges of employment," includes "discrimination based on [a protected trait that] has created a hostile or abusive work environment". . . . [That phrase] "is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with . . . discrimination."

(CVSG at 9) (internal citations omitted).

claims, the Solicitor General belies his argument that *Ellerth*, a hostile work environment case, does not apply to disparate treatment claims.

Additionally, if the Supreme Court held the *Ellerth* interpretation of "adverse employment action" does not apply to disparate treatment claims and, thus, more broadly interpreted "compensation, terms, conditions, or privileges of employment" under Section 703(a)(1), "every minor employment action that an employee did not like could become the basis of a discrimination suit." *Cf. Vasquez v. County of L.A.*, 307 F.3d 884, 891 (9th Cir. 2002). To be sure, despite "the important purpose of Title VII – that the workplace be an environment free of discrimination," *Ricci*, 557 U.S. at 580, federal courts have consistently held that "Title VII does not presume to obliterate all manner of inequity." *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1026 (1st Cir. 1988). "The Equal Employment Opportunity Commission [] would be crushed, and serious complaints would be lost among the trivial." *Williams*, 85 F.3d at 274. It is appropriate to analyze Peterson's disparate treatment claim, and indeed all Section 703(a) disparate treatment claims, under *Ellerth*.

CONCLUSION

Discretionary review is not warranted because the district court properly entered, and the Fifth Circuit correctly affirmed, summary judgment in Linear Controls' favor. The law and the evidence showed

Peterson was not a victim of discrimination, he waived the issues he brings to this Court, and the Fifth Circuit did not enter a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter.

Respectfully submitted,

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