No. 18-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 703(a)(1) of 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" because of the individual's race, religion, sex, or other protected status. 42 U.S.C. § 2000e-2(a)(1). The question presented is:

Are the "terms, conditions, or privileges of employment" covered by Section 703(a)(1) limited only to hiring, firing, promotions, compensation, and leave?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David D. Peterson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-10a) is reported at 757 Fed. Appx. 370. The district court's memorandum ruling granting defendant's motion for summary judgment (Pet. App. 11a-47a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2019 (Pet. App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(a) of Title VII 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; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in

> any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

INTRODUCTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibits a range of employment practices. As is relevant here, Section 703(a)(1) of that Title forbids racial discrimination with respect to an employee's "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

In this case, respondent required a group of its black employees to work outdoors in the Louisiana summer while assigning their white counterparts to work indoors with air conditioning. The Fifth Circuit held that this assignment did not violate Section 703(a) because the differential treatment of black and white employees did not affect their terms or conditions of employment. *See* Pet. App. 5a. This decision further entrenches a longstanding conflict among the circuits about the scope of Section 703(a)(1). And the Fifth Circuit's consistent limitation of that provision to what it has termed "ultimate employment decisions"—"hiring, granting leave, discharging, promoting, or compensating"—Pet. App. 4a, is flatly inconsistent with the plain text of Section 703(a).

STATEMENT OF THE CASE

1. Respondent Linear Controls, Inc., is a Louisiana-based corporation that provides electrical maintenance and mechanical services. Petitioner

David D. Peterson, an electrician, began working there in 2008. Pet. App. 16a. Petitioner is African-American.

In July 2015, petitioner was assigned to work on an offshore oil platform in the Gulf of Mexico. Pet. App. 2a, 16a. Petitioner worked on a team of five white and five black Linear Controls employees. The team was expected to live and work on the platform for the duration of the assignment. *See id.* 5a. As with any "typical offshore site," the team's tasks included some work outdoors, where team members would be "affected by outside temperatures." *Id.* 19a. But other portions of the team's work were done inside in air-conditioned facilities. *Id.* 34a.[1]

The assignment that gave rise to this lawsuit lasted from July 15 to July 26. Pet. App. 23a. For the entirety of that period, the five black team members "had to work outside without access to water," while "white team members worked inside with air conditioning." *Id.* 4a. And "[d]espite alleged requests by the black employees to their white supervisors, there was no rotation from outside to inside among white and black crew members." *Id.* 23a.

When black employees attempted to take indoor water breaks, white supervisors "curse[d] and yell[ed]" and ordered them back to work. Pet. App. 23a. During the assignment, one supervisor said of petitioner, "[f***] that [n*****]." *Id.* 5a.

2. Shortly after the assignment ended, petitioner resigned from Linear Controls. He then filed a timely

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[1] Because this case was decided on respondent's 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).

charge with the Equal Employment Opportunity Commission (EEOC). Pet. App. 2a. Among other things, that charge asserted that the differential work assignments on the offshore oil platform were racially discriminatory. *See id.* 22a (quoting petitioner's EEOC charge). The EEOC issued petitioner a right to sue letter. *Id.* 18a.

3. Petitioner then filed suit in the U.S. District Court for the Western District of Louisiana. As is relevant here, the complaint alleged that respondent had violated Title VII because black crew members were "required by Linear Controls' white supervisors to work every day outside, in the heat while white crew members worked exclusively inside, in air-conditioned facilities." Pet. App. 23a. The complaint further alleged that white supervisors denied the black employees' requests to rotate the crews so that all workers would have some chance to work inside. *Id.*[2]

The district court (a magistrate judge acting with the parties' consent) granted respondent's motion for summary judgment. Pet. App. 11a.

The court held that petitioner's race discrimination claim failed "as a matter of law" because he had not alleged "any" employment practice that violated Title VII. Pet. App. 38a-39a. The district court noted that binding authority from the Fifth Circuit took a "narrow view" of what constitutes prohibited discrimination under Section 703(a). Pet. App. 40a (citing *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000)). Under that view, Section 703(a)'s prohibition on "discriminat[ion]" reaches only

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[2] Petitioner also raised other Title VII and state law claims not at issue here.

"ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." Pet. App. 39a (quoting *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)). Because petitioner's claim implicated none of those categories, he could not proceed. *Id.* 38a-39a. The court also noted this outcome was consistent with a recent Third Circuit decision rejecting a claim by black workers who had been required to work outside in dangerous heat while white staff were allowed to stop. *Id.* 39a (citing *Harris v. Attorney Gen. United States*, 687 Fed. Appx. 167 (3d Cir. 2017)).[3]

4. On appeal, the Fifth Circuit affirmed.

The court recognized that petitioner's claim was "disturbing." Pet. App. 9a. But even taking as true that petitioner "and his black team members had to work outside without access to water, while his white team members worked inside with air conditioning," the court concluded that petitioner had failed to allege a prima facie case of disparate treatment. Pet. App. 4a. Although Section 703(a) prohibits discrimination with respect to "terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), the court of

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[3] The district court also found that petitioner had "failed to identify a similarly situated Caucasian comparator." Pet. App. 38a. But the Fifth Circuit assumed the contrary on appeal. *Id.* 4a. And it had good reason to do so. The district court refused to consider two affidavits from other Linear Controls employees who had each stated that the black crew worked outside and the white crew worked inside. *See id.* 36a-38a. Nor did the district court address petitioner's testimony at his deposition that he had worked outside, that "they wouldn't give me no rotation," and that the other black workers had been "with me the whole time." *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Exh. F. at 26, ECF Doc. No. 33-6.

appeals held that the "working conditions" to which petitioner had been subjected did not violate the statute, Pet. App. 4a.

The basis for the court of appeals' holding was longstanding circuit precedent that "strictly construes" Section 703(a)'s prohibition on disparate treatment to reach "only 'ultimate employment decisions,' such as 'hiring, granting leave, discharging, promoting, or compensating'" employees. Pet. App. 4a (quoting *McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007)). Because petitioner had not been discharged, denied leave or promotion, or paid differently from white workers, Title VII had nothing to say.

REASONS FOR GRANTING THE WRIT

I. There is an intractable split over which employment practices can form the basis for a Section 703(a) claim.

Section 703(a) of Title VII makes it an "unlawful employment practice" to "discriminate against any individual" with respect to "terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In short, "employers cannot take adverse employment actions because of an individual's race." *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (citing 42 U.S.C. § 2000e-2(a)); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

In this case, the Fifth Circuit adhered to its longstanding rule that only "ultimate" employment practices (such as hiring and firing) fall within Section 703(a)'s prohibition on discrimination. Pet. App. 4a. The court assumed that respondent assigned

petitioner and his black colleagues to physically separate and more arduous tasks. *Id.* It was nevertheless bound by circuit precedent to hold that this difference in what the court itself described as "working conditions," *id.*, somehow did not affect petitioner's "conditions" of employment.

Not surprisingly, other courts of appeals have rejected the proposition that acts short of "ultimate" employment decisions are immune from liability under Title VII. In the words of a leading treatise, "[t]he circuits are split" on which discriminatory employment practices Section 703(a) forbids. 1 Merrick T. Rossein, Employment Discrimination Law and Litigation § 2:4.20 (Dec. 2018).

A. The split stems from a gap in this Court's precedents.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court articulated the basic framework for plaintiffs seeking to establish a disparate treatment claim under Section 703(a) through circumstantial evidence. The plaintiff in that case challenged a covered employment practice because he showed that "despite his qualifications he was rejected" when he applied for a job. *Id.* at 802.[4]

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[4] The Court explained that the plaintiff could establish his prima facie case "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802.

In later cases, plaintiffs challenged employer actions other than failure to hire. So lower federal courts came to describe Section 703(a) as requiring the plaintiff to show some "adverse employment action." *See, e.g.*, *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1211 n.5 (8th Cir. 1985) (challenging a job reassignment). But although "hundreds if not thousands of decisions say that an 'adverse employment action' is essential to the plaintiff's prima facie case, that term does not appear" anywhere in Section 703(a). *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006). In fact, this Court "has never adopted it as a legal requirement" or explained its scope. *Id.*

Lacking definitive guidance from this Court about what "terms" or "conditions" of employment Section 703(a) reaches, some courts have grasped for clues in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). But neither decision provides guidance on the question presented here.

Ellerth "did not discuss the scope of the general antidiscrimination provision" in Section 703(a). *Burlington Northern*, 548 U.S. at 65. Rather, it concerned when an employer would face vicarious liability for a hostile work environment created by a supervisor's explicit, but unfulfilled, threat regarding "a subordinate's terms or conditions of employment." *Ellerth*, 524 U.S. at 754. This Court held that under those circumstances, employers who exercised reasonable care to prevent and promptly correct sexual harassment would have an affirmative defense so long as they had taken no "tangible employment action" against the subordinate. *Id.* at 765. Because taking

such an action would deny an otherwise-blameless employer any defense, the Court limited the actions to those involving "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.

Despite this Court's warning that *Ellerth* did not concern the overall scope of Section 703(a)(1), lower courts have frequently pointed to *Ellerth*'s list of "tangible" and "significant change[s] in employment status" to limit whether something is an "employment practice" for purposes of a Section 703(a) disparate treatment claim. *See infra* pp. 12, 17-18.

Burlington Northern involved a different provision of Title VII: Section 704's prohibition on retaliation, which contains no reference to "terms" or "conditions" of employment. 42 U.S.C. § 2000e-3(a). The courts of appeals had "come to different conclusions" about whether the antiretaliation provision was confined to "activity that affect[ed]" those "terms and conditions" and "how harmful" the "adverse actions" had to be. *Burlington Northern*, 548 U.S. at 57. The Court held that retaliation was not limited to employer acts within the workplace but that the acts, wherever they occurred, needed to be "materially adverse." *Id.*

Although the case did not involve Section 703, this Court pointed out that, in addition to the conflict on which it had granted review, there was also a conflict among the circuits about the standard for a "substantive discrimination offense" under Section 703. *Burlington Northern*, 548 U.S. at 60. It noted that some circuits required only that the challenged action

have some "adverse effect on the 'terms, conditions, or benefits,' of employment." *Id.* (citation omitted). By contrast, this Court described the Fifth Circuit's "'ultimate employment decisio[n]' standard" as "a more restrictive approach." *Id.* More than a dozen years have now passed. Not only have the lower courts failed to coalesce around a clear position, but their divergences have further cemented.

B. The courts of appeals are deeply divided.

1. The Fifth and Third Circuits have narrowed Section 703(a)'s prohibition on discrimination to only a few employment practices.

The Fifth Circuit interprets Title VII's substantive prohibition on discrimination to reach only "ultimate employment decisions." *McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007). This restrictive construction dates back decades. *See Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995). And the Fifth Circuit's decisions have consistently limited what counts as an "ultimate" decision to only "hiring, granting leave, discharging, promoting, or compensating." *McCoy*, 492 F.3d at 559 (quoting *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)). Although this Court's decision in *Burlington Northern* required the circuit to abandon this narrow construction for Section 704 cases, the circuit has held that this construction "remains controlling for Title VII *discrimination* claims" under Section 703. *McCoy*, 492 F.3d at 560.

In light of its limitation of Title VII's antidiscrimination provision to "ultimate" decisions, the Fifth Circuit has held that subjecting only a black individual to drug tests or assigning additional work

responsibilities only to a black employee would not violate Section 703(a). *See, e.g.*, *Johnson v. Manpower Prof'l Servs., Inc.*, 442 Fed. Appx. 977, 983 (5th Cir. 2011); *Ellis v. Compass Grp. USA, Inc.*, 426 Fed. Appx. 292, 296 (5th Cir. 2011).

The Third Circuit nominally asks whether a particular discriminatory act 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). In practice, this test produces the same results as the Fifth Circuit's "ultimate employment decisions" standard.

In *Stewart v. Union County Board of Education*, 655 Fed. Appx. 151 (3d Cir. 2016), the Third Circuit actually used the *Ellerth* list (which closely parallels the Fifth Circuit's list of "ultimate employment decisions") to decide whether the plaintiff had challenged an employment decision covered by Section 703(a). Stewart alleged, among other things, that a supervisor "moved all white security guards inside the building during the winter season and the black African American security staff were assigned outdoors in the colder weather climates"; he also alleged that his supervisor refused to "rotat[e]" the assignments. Appellant's Informal Brief at 10, *Stewart v. Union Cty. Bd. of Educ.*, 655 Fed. Appx. 151 (3d Cir. 2016) (No. 15-3970), 2016 WL 1104687. Nonetheless, the Third Circuit affirmed the district court's grant of summary judgment on the ground that Stewart had not "suffered an actionable adverse action." *Stewart*, 655 Fed. Appx. at 155.

In another recent case that bears a striking resemblance to petitioner's, the Third Circuit again

reached the same conclusion. In *Harris v. Attorney General United States*, 687 Fed. Appx. 167 (3d Cir. 2017), a black employee brought suit alleging that he had been required to continue working outdoors despite "dangerously high" temperatures while "white staff were allowed to discontinue their work activities outside." *Id.* at 168-69. The Third Circuit "d[id] not doubt" the plaintiff's account of what happened. *Id.* at 169. Nor did it purport to "minimize the seriousness of [the] injury" the plaintiff suffered. *Id.* Nevertheless, it held that he had "failed to make out a prima facie case of prohibited race or color discrimination" because the employer had not acted with respect to the plaintiff's "compensation, terms, conditions, or privileges of employment." *Id.* (quoting *Storey*, 390 F.3d at 764).

2. Seven other circuits—the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh—reject the restrictive approach taken by the Third and Fifth Circuits.

The Second Circuit "ha[s] 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). Therefore, in a Title VII case, discrimination 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 Fed. Appx. 20, 22 (2d Cir. 2015).

Thus, the Second Circuit has held, contrary to the Third and Fifth Circuits, that discriminatory allocation of work assignments is cognizable under Section 703(a). In *Feingold v. New York*, 366 F.3d 138

(2d Cir. 2004), for example, the Second Circuit held that the plaintiff had established a prima facie case of disparate treatment through evidence that white state ALJs had been assigned heavier caseloads than their minority colleagues. *Id.* at 152-53. Even "performance of normal job duties can amount to an adverse employment action if they are divvied between co-workers in a discriminatory fashion." *Lopez v. Flight Servs. & Sys., Inc.*, 881 F. Supp. 2d 431, 441 (W.D.N.Y. 2012). Thus, unevenly allocating baggage unloading duties between Puerto Rican and white employees could constitute a prohibited employment practice. *Id.* at 442.

The Sixth Circuit has "rejected the rule that only 'ultimate employment decisions' such as hirings, firing, promotions, and demotions" can give rise to a "discrimination claim" under Section 703(a)(1). *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 594 (6th Cir. 2004).

The Seventh Circuit has likewise squarely refused to interpret Section 703(a) "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)). A narrow definition that excludes all but a few employment decisions from the section's ambit would "create a loophole for discriminatory actions by employers." *Id.* Accordingly, Section 703(a) forbids discriminatorily subjecting a worker to "conditions" that are "humiliating, degrading, unsafe, [or] unhealthful." *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002).

Under this standard, in a case that parallels petitioner's, the Seventh Circuit sustained a jury

verdict in favor of two black plaintiffs whose job assignments were changed so they were "outdoors nearly all the time"—one of them consigned to work "in a cold, wet, muddy trench." *Tart v. Ill. Power Co.*, 366 F.3d 461, 475 (7th Cir. 2004). Plaintiffs were "reassigned because of their race," *id.* at 478, to "significantly harsher working conditions," *id.* at 473. This violated Title VII. *Id.* at 472.

The Eighth Circuit takes the same approach as the majority of its sister circuits. For example, in *Wedow v. City of Kansas City*, 442 F.3d 661 (8th Cir. 2006), it affirmed a finding of liability under Title VII for an employer's discriminatory refusal to provide female firefighters with "adequate protective clothing and private, sanitary shower and restroom facilities." *Id.* at 671-72.[5]

The Ninth Circuit defines the employment practices prohibited by Section 703(a) as extending beyond "'terms' and 'conditions' in the narrow [contractual] sense." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1125 (9th Cir. 2000) (quoting *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 78 (1998)). Thus, as the court explained in *Dimitrov v. Seattle Times Co.*, 2000 WL 1228995 (9th Cir. 2000), it had previously "specifically rejected" the Fifth Circuit's rule "that only ultimate employment actions constitute adverse employment actions." *Id.* at *2. Instead, the Ninth Circuit has

[5] The Eighth Circuit did once suggest that it would require an "ultimate employment decision" to establish a prima facie case under Section 703(a). *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). But since this Court's decision in *Burlington Northern*, the circuit has never again used the "ultimate employment decision" language in 703(a)(1) cases.

"embraced the EEOC test," which, among other things, covers "changes in work schedules." *Id.* (quoting *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000)); *see infra* pp. 27-28, 31 (describing the EEOC's interpretation).

Applying its construction of forbidden employment practices, the Ninth Circuit held that Section 703(a) prohibited intentionally assigning the only female employee disproportionate amounts of "dangerous and strenuous" work and excluding her from areas of the worksite where she could take breaks or talk with her supervisor. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090-92 (9th Cir. 2008). In another case, plaintiffs established a prima facie case of disparate treatment in violation of Section 703(a) by pointing to evidence that black pipefitters "were separated from all other pipefitters" and assigned to a different workplace than their white counterparts. *DeWeese v. Cascade Gen. Shipyard*, 2011 WL 3298421, at *10-11 (D. Or. 2011). As the court explained, the defendant's contention that "segregation, without more, does not constitute an adverse employment action" is "reminiscent of a 'separate but equal' model of racial equality that federal courts have long rejected." *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

The Tenth Circuit interprets Section 703(a) "liberally"; in deciding whether the challenged practice falls within the scope of the statute, it uses a "'case-by-case approach,' examining the unique factors relevant to the situation at hand." *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998) (quoting *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998)). Using this standard, it held that, given the

differences in the nature of work assignments at two detention facilities, female guards could challenge a policy preventing them from transferring to the facility where the work was less arduous and stressful. *Piercy v. Maketa*, 480 F.3d 1192, 1205 (10th Cir. 2007).

Finally, the Eleventh Circuit refuses to adopt a "bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged discrimination must have to be actionable; nor would such a rigid test be proper." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001). In that circuit, job reassignments with "a loss of prestige and responsibility" are actionable. *Hinson v. Clinch Cty., Georgia Bd. of Educ.*, 231 F.3d 821, 830 (11th Cir. 2000).

Applying *Davis*, a district court within the circuit concluded that the plaintiffs had established a prima facie case of discrimination by pointing to evidence that the defendant had deliberately given difficult assignments to black technicians more often than to white technicians. This "work-assignment claim" was cognizable under Section 703(a)(1). *Hunter v. Army Fleet Support*, 530 F. Supp. 2d 1291, 1295 (M.D. Ala. 2007). Even if the difficult assignment was part of the job description, disproportionately assigning "dirtier, more strenuous, and more tedious" tasks to black workers than to white workers would be unlawful, *id.* at 1293.

3. The three remaining regional circuits also have repeatedly confronted the question of which employment practices fall within Section 703(a)'s antidiscrimination provision. They oscillate between embracing the restrictive *Ellerth* list and taking the approach of the majority circuits. The ongoing

inability of the First, Fourth, and D.C. Circuits to choose a side in the well-developed split—or to adopt any consistent position at all—underscores the need for this Court's guidance.

The First Circuit (like the Third) has often articulated a test for disparate treatment claims that borrows from this Court's vicarious liability decision in *Ellerth*. *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 assignment of holiday work shifts cannot constitute an unlawful employment practice. *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94-95 (1st Cir. 2012).

But the First Circuit sometimes departs from the *Ellerth* list to adopt the more capacious view of the majority circuits. For example, in *Caraballo-Caraballo v. Correctional Administration*, 892 F.3d 53 (1st Cir. 2018), the First Circuit "squarely rejected" the proposition that a discriminatory transfer or change in job responsibilities must result in a diminution in salary or benefits to fall within Section 703(a)(1)'s prohibition. *Id.* at 61.

So too in the Fourth Circuit. That circuit has repeatedly required employees to plead conduct enumerated in *Ellerth*'s list to establish a prima facie case of disparate treatment. *See, e.g.*, *Jensen-Graf v. Chesapeake Emp'rs' Ins. Co.*, 616 Fed. Appx. 596, 597-98 (4th Cir. 2015); *Webster v. Rumsfeld*, 156 Fed. Appx. 571, 578 (4th Cir. 2005). Applying this standard, the court held that an employee could not challenge being placed on an employee improvement plan because of her sex. *Jensen-Graf*, 616 Fed. Appx. at 598.

On the other hand, the Fourth Circuit has rejected the Fifth Circuit's "ultimate employment decisions" test. In *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004), the court held that "[c]onduct short of ultimate employment decisions can constitute adverse employment action." *Id.* at 375-76 (citation omitted).

Finally, the D.C. Circuit's approach is particularly chaotic. On the one hand, the circuit has numerous cases where it has limited Title VII's reach in disparate treatment claims to the *Ellerth* list. *See, e.g.*, *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009); *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2007). Thus, racially motivated reassignments unaccompanied by diminished pay, benefits, or responsibilities are not prohibited. *Sykes v. Napolitano*, 710 F. Supp. 2d 133, 142 (D.D.C. 2010).

On the other hand, the D.C. Circuit does not always restrict itself to the *Ellerth* list. For example, it has held that discriminatorily assigning an Orthodox Jewish employee to the night shift would establish a prima face case of discrimination because it would constitute a change in the "terms, conditions, or privileges of employment." *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001). Decisions like this led then-Judge Kavanaugh to acknowledge that decisions from the D.C. Circuit conflict with decisions from other circuits that interpret Section 703(a) "more narrowly." *Baloch v. Kempthorne*, 550 F.3d 1191, 1196 n.1 (D.C. Cir. 2008) (opinion for the court).

"[U]ncertainty" over the D.C. Circuit's standard has persisted. *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017)

(Kavanaugh, J., concurring). And despite then-Judge Kavanaugh's urging, *id.*, the D.C. Circuit has not taken the issue en banc.

In short, every regional circuit has weighed in. There is clear disagreement over which employment practices give rise to a disparate treatment claim.

II. The question presented involves an important and recurring issue that only this Court can resolve.

1. The answer to the question of which "employment practice[s]" can be challenged under Section 703(a) is important to countless employers and employees. As the number of cases in the split shows, this question is litigated frequently.

And the volume of reported decisions does not tell the full story: The Fifth Circuit's restrictive and longstanding "ultimate employment decisions" test deters some cases from being filed at all. Even if there is strong evidence of disparate treatment, attorneys are unlikely to file suit unless they can plausibly allege either an "ultimate employment decision" or some other legal claim beyond disparate treatment (such as a separate retaliation claim under Section 704). Unless this Court grants review, the next time an employee within the Fifth Circuit seeks a lawyer to challenge on-the-job racial segregation or discriminatory job assignments, he may be turned away at the door.

2. Even the frequency with which this question arises in Title VII cases understates its importance. The question presented is critical to the construction of a number of other major antidiscrimination statutes as well.

Nearly identical prohibitions to Section 703(a) appear in other major federal fair employment statutes like the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a); and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. § 2000ff-1(a). And 42 U.S.C. § 1981(b), which addresses racial discrimination in contracting and covers smaller employers, also contains language that parallels Section 703(a).

Similar statutory provisions in comparable statutory schemes are presumptively read *in pari materia*. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005); *McFarland v. Scott*, 512 U.S. 849, 858 (1994); *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990).

So it is entirely predictable that the circuits' conflicting interpretations of Section 703(a) have spilled over into these other statutes. The Fifth Circuit applies its "ultimate employment decisions" restriction to claims under the ADA and the ADEA. *See, e.g.*, *Stringer v. N. Bolivar Consol. Sch. Dist.*, 727 Fed. Appx. 793, 799 (5th Cir. 2018) (ADA); *Ogden v. Brennan*, 657 Fed. Appx. 232, 235 (5th Cir. 2016) (ADEA). By contrast, circuits in the majority do not apply an "ultimate employment decisions" test to those statutes. Instead, they apply their own circuit rules to determine whether the plaintiff has met his burden of pointing to a challengeable employment practice. *See, e.g.*, *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 71 (2d Cir. 2019) (ADA); *Madlock v. WEC Energy Grp., Inc.*, 885 F.3d 465, 470 (7th Cir. 2018) (Section 1981); *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1040 (10th Cir. 2011) (ADA).

3. Only this Court can resolve the entrenched and well-recognized conflict on the question presented. The circuits understand that after *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), they cannot apply an "ultimate employment decisions" test in Section 704 retaliation cases. *Id.* at 67. But *Burlington Northern* did not directly resolve whether a court can continue to apply that test to claims under Section 703(a).

A year after *Burlington Northern*, the Government urged this Court to give courts of appeals time to "clarify" their jurisprudence in Section 703(a) cases "in the wake of *Burlington Northern*." Brief in Opposition at 13, *Momah v. Earp*, 554 U.S. 902 (2008) (No. 07-991). But that clarification has not come. While many of the courts have now adopted a clear position on the meaning of "terms" and "conditions," their positions clearly conflict. Just as this Court granted review to resolve a similar conflict in *Burlington Northern*, it should do so here.

III. This case is an excellent vehicle for resolving the question presented.

1. The question presented was pressed and passed upon below. Beginning with his timely EEOC charge, petitioner has repeatedly asserted that he was subjected to differentiated (and harsher) working conditions based on race in violation of Title VII. Pet. App. 22a (quoting EEOC charge); *id.* 23a (quoting plaintiff's complaint).

The Fifth Circuit upheld the district court's grant of summary judgment solely because the "working conditions" petitioner had alleged—namely, that black electricians had been forced to work outside without

water breaks while their white teammates worked indoors with air conditioning—"are not adverse employment actions because they do not concern ultimate employment decisions." Pet. App. 4a.

2. The question presented is also outcome-determinative. Had petitioner brought suit in a circuit other than the Fifth (or the Third), his allegation that respondent gave different and more arduous work assignments to black employees would have established that element of his prima facie case of disparate treatment. *See, e.g.*, *Feingold v. New York*, 366 F.3d 138, 152-53 (2d Cir. 2004) (a showing that white workers were assigned heavier workloads than their minority colleagues established a prima facie case); *Tart v. Ill. Power Co.*, 366 F.3d 461, 473, 478 (7th Cir. 2004) (sustaining a jury verdict for black plaintiffs who had shown that they were "reassigned because of their race" to "significantly harsher working conditions"); *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090-91 (9th Cir. 2008) (permitting a claim to go forward regarding disparate treatment with respect to work assignments and exclusion from part of the worksite); *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001) (finding a prima facie case of discrimination when a worker was assigned to the less desirable night shift because of his religion).[6]

IV. The Fifth Circuit's decision is wrong.

The Fifth Circuit is wrong that only "ultimate employment decisions" can give rise to disparate treatment claims under Section 703(a). That position

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[6] On remand, the Fifth Circuit can resolve any remaining issues it did not reach.

flouts Section 703(a)'s plain text. It is inconsistent with federal employment law more generally. And it contradicts this Court's decisions and the EEOC's consistent interpretation of Section 703(a).

A. The Fifth Circuit's decision is contrary to the text of Section 703(a).

1. The phrase "ultimate employment decisions" appears nowhere in the text of Section 703(a). Rather, that phrase is the Fifth Circuit's judicial gloss on the phrase "adverse employment actions," Pet. App. 4a—which is itself a "judicial gloss" on the statutory text, *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006). But a judicial gloss, let alone a gloss-on-a-gloss, "must not be confused with the statute itself." *Id.* And that is even more true when the gloss-on-a-gloss ignores the key words in the statute.

The phrase that *does* appear in the statute prohibits discrimination with respect to the "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a). In interpreting a statute, courts must "start with the specific statutory language in dispute." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). Since Title VII provides no special definition of that phrase, the words should be "interpreted as taking their ordinary, contemporary, common meaning" at the time Section 703 was enacted, *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

It is obvious that the phrase "terms, conditions, or privileges of employment" reaches employment practices beyond "hiring, granting leave, discharging, promoting, or compensating," Pet. App. 4a. As long ago as *Lochner v. New York*, 198 U.S. 45 (1905), Members

of this Court described the physical environment in which employees perform their jobs as one of the "conditions" of employment. *Id.* at 70 (Harlan, J., dissenting) (quoting a description of "[t]he labor of the bakers" as being "performed under conditions injurious to the health of those engaged in it" because "it requires a great deal of physical exertion in an overheated workshop"). And shortly before Title VII was enacted, this Court referred to the "cold working conditions" that led to an employee walkout from a machine shop. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

Dictionary definitions contemporaneous with the enactment of Title VII confirm that the statutory language covers a wide spectrum of employment practices. Webster's *New International Dictionary* (2d ed. 1954) defined "conditions" as "attendant circumstances." *Condition*, Webster's New International Dictionary (2d ed. 1954); *see also Condition*, Black's Law Dictionary (4th ed. 1968) (including under the common law definitions of condition: "mode or state of being; state or situation").

Section 703(a) thus extends beyond a sharply limited list of ultimate employment decisions. In particular, having to work outside in the heat is an "attendant circumstance" or "state" of one's job that qualifies as a "term" or "condition" of employment. The Fifth Circuit itself inadvertently admitted as much when it referred to petitioner's having to "work outside without access to water" as involving "working conditions." Pet. App. 4a.

2. Other language in Section 703(a)(1) confirms that "terms" and "conditions" carry their ordinary meaning here. Section 703(a)(1) makes it unlawful for

an employer to undertake certain acts "because of such individual's race, color, religion, sex, or national origin." The section begins by singling out decisions to "fail or refuse to hire" or to "discharge" an individual. 42 U.S.C. § 2000e-2(a)(1). But the text then continues that it is unlawful "*otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment." *Id.* (emphasis added). The use of the word "otherwise" signals, "[o]n textual analysis alone," that the provision is designed "to afford broad rather than narrow protection to the employee." *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). It signifies a "catchall phrase." *Helsinn Healthcare S.A. v. Teva Pharma. USA, Inc.*, 139 S. Ct. 628, 633 (2019); *see also Otherwise*, Black's Law Dictionary (10th ed. 2014) ("*otherwise* tends to be quite broad in scope").[7]

3. Lest there be any doubt, the Fifth Circuit's "ultimate employment decisions" standard also runs afoul of the surplusage canon. This Court has warned lower courts to avoid an interpretation that fails to give effect to all the words in a statute. *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-76 (2012).

In the past quarter-century, the Fifth Circuit has identified only five "ultimate employment decisions" it

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[7] *Scrivener* was construing the phrase "otherwise discriminate" in the context of the National Labor Relations Act; as this Court has explained, it often draws analogies between that Act and "Title VII contexts," *Hishon v. King & Spalding*, 467 U.S. 69, 76 n.8 (1984).

thinks fall within Section 703(a): "hiring, granting leave, discharging, promoting, or compensating." Pet. App. 4a (quoting *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007)). But a "refus[al] to hire," a "discharge," and an employee's "compensation" are already enumerated "employment practice[s]" with respect to which an employer may not discriminate. 42 U.S.C. § 2000e-2(a)(1). And a promotion can often be framed as "the opportunity to enter into a new contract with the employer." *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989). So under the Fifth Circuit's interpretation, the words "hiring," "discharge," and "compensation" are surplusage. Even worse, the phrase "terms, conditions, or privileges of employment" is reduced to those already enumerated acts plus "granting leave." That cannot be right. Congress would not have used so many general words to speak only to one discrete practice. To the contrary: Congress knows how to speak specifically to granting leave when it wishes to. *See* Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*

B. The Fifth Circuit's construction of Section 703(a)(1) is inconsistent with other provisions of federal employment law.

1. The Fifth Circuit's restriction of Section 703(a)(1) to hiring, granting leave, discharging, promoting, or compensating cannot be squared with the overall structure of Section 703(a). The statute clearly covers segregation: Section 703(a)(2) makes it unlawful for an employer to "limit, segregate, or classify" employees in any way that would "deprive or tend to deprive" them of "employment opportunities." 42 U.S.C. § 2000e-2(a)(2).

The statute's express condemnation of segregation confirms that segregated working conditions fall within the ambit of Section 703(a)(1). As the EEOC explains in its Compliance Manual—on which this Court frequently relies—because "§ 703(a)(1) is broader than § 703(a)(2)," an employer practice "which violates § 703(a)(2) can also violate § 703(a)(1)." EEOC Compliance Manual § 618.1(b), 2006 WL 4672738.[8]

Many early EEOC proceedings involved segregated job assignments or segregated working conditions. And in those cases, the EEOC repeatedly found that such segregation involved "discriminat[ion]," a word used in Section 703(a)(1) but not in Section 703(a)(2). *See, e.g.*, EEOC Decision No. 71-453, 3 Fair Empl. Prac. Cas. 384 (1970), at *2 (concluding that assigning workers to different "gangs" based on race involved both unlawful segregation and unlawful "discriminat[ion]"); EEOC Decision No. 71-32, 2 Fair Empl. Prac. Cas. 866 (1970), at *2 (finding that an employer's action of holding racially separate Christmas parties "discriminates against its Negro employees on the basis of race with respect [to] a condition or privilege of employment, because of their race").

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[8] The EEOC's Compliance Manual "reflect[s] 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *AT&T Corp. v. Hulteen*, 556 U.S. 701, 723 n.5 (2009) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008), and *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)). *See also Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 27 (2018) (relying on the Manual); *Green v. Brennan*, 136 S. Ct. 1769, 1784 (2016) (same).

Thus, to fully realize Section 703's command to desegregate the workforce, Section 703(a)(1) must reach beyond "ultimate" employment decisions.

2. Congress reaffirmed the expansive scope of Section 703(a)(1) when it amended 42 U.S.C. § 1981. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), this Court interpreted the then-existing version of Section 1981, which covered the right to "enforce contracts." It held that "conduct by the employer after the contract has been established"—specifically, the "imposition of discriminatory working conditions"—was not covered by that version of Section 1981. *Id.* at 177.

Congress "respond[ed]" to this Court's decision by "expanding the scope" of Section 1981 (and several other civil rights statutes). Pub. L. No. 102-166, § 3(4). It added a subsection to Section 1981 prohibiting racial discrimination that impairs the "enjoyment of all benefits, privileges, terms, and conditions" in any contractual relationship. 42 U.S.C. § 1981(b). Congress's choice to mirror Title VII's language reflected its understanding that Title VII already reached working conditions. *See also Patterson*, 491 U.S. at 180 (contrasting the pre-amendment version of Section 1981 with "the more expansive reach of Title VII of the Civil Rights Act of 1964").

3. When Congress has wanted to address only a narrow subset of employment practices, it has used language quite different from what it used in Section 703(a)(1). For example, the Immigration Reform and Control Act contains a provision governing "unfair immigration-related employment practice." 8 U.S.C. § 1324b(a)(1). But that provision, in sharp contradistinction to Section 703(a)(1), applies solely

when a covered party "discriminate[s] . . . with respect to the hiring, or recruitment or referral for a fee . . . or the discharging" of an individual. *Id.* The difference between the language of the two statutes confirms that in Section 703(a)(1), Congress went beyond protecting employees against discrimination with respect only to ultimate employment decisions.

C. The Fifth Circuit's "ultimate employment decisions" test is contrary to both this Court's and the EEOC's interpretations of Section 703(a).

Both this Court's decisions and EEOC interpretations confirm that when Section 703(a)(1) uses the words "terms" or "conditions" of employment, it does so to ensure that no racially discriminatory employer action in the workplace escapes Title VII's reach.

1. This Court's foundational decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), explained that Title VII is designed to "eliminate those discriminatory practices and devices which have fostered *racially stratified job environments*." *Id.* at 800 (emphasis added). There is no way to reconcile the Fifth Circuit's "ultimate employment decisions" restriction with this conception of Title VII. Under the Fifth Circuit's rule, Section 703(a)(1) has nothing to say when an employer deliberately segregates the workplace or otherwise subjects workers of one race to less desirable working conditions as long as employees are not fired, denied promotion, or paid less. Given that segregation and racially differentiated work assignments are the very essence of racial stratification, the "ultimate employment decisions" test cannot be right.

This Court itself has interpreted "terms, conditions, or privileges" under Title VII broadly. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court rejected the view that Section 703 is limited to "economic" or "tangible" discrimination. *Id.* at 64. To the contrary, it "strike[s] at the entire spectrum of disparate treatment." *Id.* And in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court reaffirmed that the phrase "terms" and "conditions" goes beyond "the narrow contractual sense." *Id.* at 78; *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (noting that Section 703 reaches "actions that affect employment or alter the *conditions of the workplace*") (emphasis added). Indeed, if "terms" and "conditions" were as narrow as the Fifth Circuit thinks they are, then this Court never could have held, as it did in *Meritor* and *Oncale*, that Section 703(a)(1) reaches racial and sexual harassment.[9]

2. The EEOC has consistently taken the position that the phrase "terms, conditions, or privileges of employment" reaches employer practices involving work assignments. The EEOC's Compliance Manual declares that "[t]he phrase 'terms, conditions, and privileges' has come to include a wide range of activities or practices which occur in the work place." EEOC Compliance Manual § 613.1(a), 2006 WL 4672701. In particular, the phrase covers "job assignments and duties." *Id.*; *see also* EEOC

[9] And it is no answer to suggest that such disparate treatment can be attacked by using this Court's hostile environment caselaw. That jurisprudence is aimed at a different problem altogether.

Compliance Manual § 2-II, 2009 WL 2966754 (stating that "work assignments" are covered).

In line with this longstanding interpretation, the EEOC has declared that "a prima facie case of discrimination would be established if [an] employer had a policy of assigning Blacks to one section of the plant and Whites to another, or women to one production line and men to another." EEOC Compliance Manual § 618.3(a), 2006 WL 4672740.

The Fifth Circuit's "ultimate employment decisions" test cannot be squared with this principle. The Fifth Circuit derived its requirement from the framework developed in *McDonnell Douglas* for analyzing disparate treatment claims involving only circumstantial evidence of a discriminatory purpose. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). But in *Stone v. Louisiana Department of Revenue*, 590 Fed. Appx. 332 (5th Cir. 2014), the Fifth Circuit confirmed that it sees "ultimate employment decisions" as synonymous with Section 703(a)(1)'s reference to "terms, conditions, or privileges of employment." *Id.* at 339. And the statutory phrase applies to *all* claims under Section 703(a)(1), including ones where there is direct evidence of discriminatory purpose. It follows inescapably that, under the Fifth Circuit's view, even a facial policy of workplace racial segregation would lie outside Section 703(a)(1) because there has been no "ultimate employment decision."

Earlier this week, the United States filed a Brief in Opposition that agrees with petitioner's arguments here. *See* Brief in Opposition at 12-16, *Forgus v. Shanahan* (No. 18-942). The Government then declared that, "[g]iven the significant and widespread

misreading of Title VII" in cases that impose a restriction on what counts as a term or condition, "this Court's review would likely be appropriate in a properly presented case." *Id.* at 16. Petitioner's is that case.

* * *

The centerpiece of Section 703(a) is its prohibition on "discriminat[ion]." As then-Judge Kavanaugh explained, when an individual is subjected to an employment practice "because of" his race, it does not matter whether he suffered other tangible consequences as well. *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017). The employer's action "plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." *Id.* (Kavanaugh, J., concurring) (quoting 42 U.S.C § 2000e-2(a)).

This simple principle, grounded in the text of Section 703(a), requires that petitioner have the opportunity to prove that respondent intentionally assigned him to harsher working conditions because of his race.

CONCLUSION

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

Respectfully submitted,

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