No. _____

In the Supreme Court of the United States

ASHIDDA FORGUS,

Petitioner,

v.

PATRICK M. SHANAHAN, Acting Secretary of Defense,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a "materially adverse action" under Title VII for an employer to deny, on account of discrimination and/or retaliation, an employee's request for a transfer to a lateral position, enjoying the same pay, responsibility and working conditions, in order to escape discriminatory treatment by her current supervisor?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption. Petitioner is Ashidda Forgus. Respondent is Patrick M. Shanahan, Acting Secretary of Defense.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ashidda Forgus respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the Fourth Circuit Court of Appeals, is reproduced in the appendix ("App.") at 1 and is unpublished. The opinion of the United States District Court for the Eastern District of Virginia, (App. 11), is not reported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 1343(3). The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The court of appeals filed its opinion on October 17, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> (a) 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 . . . .

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees, or applicants for employment . . . because he had opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in in any manner in an investigation, proceeding, or hearing under this subchapter.

INTRODUCTION

This is an appeal of a Fourth Circuit decision which held that denying an employee's request for a lateral transfer (involving no increase in pay or improvement of working conditions) does not arise to a "materially adverse action." (App. 5-7) Consequently, the Fourth Circuit panel concluded that petitioner failed to sufficiently allege the elements to state her race and sex discrimination claims, or her retaliation claim.

In so holding, the Fourth Circuit relied on decisions from the Fifth Circuit, *Wheat v. Fla. Parish Juvenile Justice Comm'n*, 811 F.3d 702, 709 (5th Cir. 2016) (holding that the "mere denial of a reassignment to a purely lateral position (no reduction in pay and no more than a minor change in working conditions), is typically not a materially adverse action."), and Seventh Circuit, *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1108 (7th Cir. 2012) (denial of a transfer would only be a materially adverse action if "the transfer would have resulted in higher pay or benefits." (App. 5-6)

These decisions stand in stark contrast to decisions reaching the opposite conclusion from the First Circuit, *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) ("Assuming an improper motive, it is hard to see why denial of a hardship transfer in this case could not be discrimination under Title VII."), and the Sixth Circuit, *Deleon v. Kalamazoo Cnty. Rd. Comm'n*, 739 F.3d 914, 923 (6th Cir. 2014) (Sutton, J., dissent) ("An employee may recover for a requested transfer when the employee . . . applies for a transfer seeking refuge from discriminatory conditions in his current position."); and *Taylor v. Geithner*, 703 F.3d 328, 338 (6th Cir. 2014) (finding that a plaintiff's allegation that "she applied for and was rejected" from a position was "plainly an adverse employment action."); and the District of Columbia Circuit in *Ortiz-Diaz v. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 74 (D.C. Cir. 2017) ("a discriminatory denial of a lateral transfer away from a biased supervisor can certainly be actionable under Title VII.")

Petitioner request this Court to resolve the conflict among the circuit courts and adopt a commonsense rule urged upon his colleagues by then-Judge Kavanaugh in *Ortiz-Diaz*, which is: all discriminatory and retaliatory transfers, or denials of requested transfers, are actionable under Title VII. Such a rule would be in keeping with the anti-discrimination and anti-retaliatory mandates of Title VII, as expressed by this Court in *Burlington N. & Santa Fe Ry v. White*, 548 U.S. 53 (2006).

STATEMENT OF THE CASE

I. Factual Background

A. Petitioner's Employment, Branch Assignment

Petitioner is an African American female, currently employed at the Defense Logistics Agency (DLA), part of the Department of Defense, in Richmond, Virginia. The DLA is divided into various divisions (with petitioner assigned to the Aviation Division). Aviation is further subdivided into various directorates, divisions and branches. Petitioner's position was Business Process Analyst (BPA) in the Business Process Support Directorate, Order Fulfillment Division, Order Management Branch. The two branches pertinent to her claims are Order Management (OM) and Inventory Management (IM).

B. Disparate Treatment in Cubicle, Training and Work Assignments

Petitioner was assigned work space that adversely affected her training, and denied work opportunities, which she perceived was motivated by race or sex discrimination. For example, petitioner was assigned a cubicle in a separate building from the rest of her team and away from her training area. This arrangement was not simply inconvenient, but kept her isolated from trainers, co-workers who could assist her in learning her tasks, and apart from her supervisors who distributed work assignments.

In addition, petitioner was not assigned "alternates" for her tasks; i.e., co-workers responsible for handling assignments when employees are on leave, away from

the office, or to offer support when workloads become particularly heavy. Petitioner was assigned as an alternate to male BPAs, but no alternates were assigned for her. Finally, at various times petitioner was not assigned adequate workloads, which prevented her from learning the work processes.

Petitioner complained several times to her supervisors about the inequitable assignments and workloads. In January 2011, petitioner complained to management that the disparate treatment seemed to be motivated by her female gender, possibly in violation of Title VII. In response, petitioner's workload was reduced, then increased excessively, as if to set her up for failure.

C. Discriminatory and Retaliatory Denial of Requested Transfer to IM Branch

During the same time period of petitioner's discrimination complaint, the employees of her OM branch were informed of a vacancy in the IM branch, and invited to apply. Petitioner applied for the vacancy, seeking refuge from the supervisors she believed were subjecting her to discrimination. Her transfer request was ignored, however, and she was treated to varying excuses as to why.

Petitioner was falsely told that the position was in the OM branch, where she resided, rather than the IM branch. Then she was told that her application "knocked" other applicants from consideration. Later, it was alleged that petition failed to apply through the "proper methods," -- that she needed to request a transfer rather than apply for the vacancy. Petitioner submitted the transfer request, and asked if anything

further needed to be done for consideration. Her managers replied no. Finally, when petitioner approached Deputy Division Chief in February 2011 about her application, petitioner was told: "Well, anyway, you're not getting the position." Eventually, a male was selected for the IM vacancy.

Petitioner thereafter submitted additional requests for transfer to the IM branch. Her requests were repeatedly denied. Sometimes petitioner was told that no transfers between branches were permitted, other times she was told that no transfers could be accommodated due to on-going workload. Other excuses included her branch was short staffed, the division could not afford to train transferees, and so forth. Petitioner was also denied cross-branch training opportunities afforded other BPAs. Petitioner was aware of at least one white female who was permitted a transfer between branches during the relevant timeframe.

Petitioner faced uncomfortable and hostile working relationships with her male co-workers, which she attributed to her repeated discrimination complaints and transfer requests. One male co-worker expressed that he no longer wanted to work with petitioner and became verbally abusive and made disparaging remarks to her. Petitioner became noticeably more anxious at work as the discrimination continued and took a physical and an emotional toll.

In October 2011, after being assigned to a project, Division management began assigning much of petitioner's workload to male co-workers. After when management denied petitioner's request to a project meeting, she made an informal discrimination and

retaliation complaint with the agency's Equal Employment Opportunity counselor in November 2011. The following March 2012, petitioner filed a formal, written Title VII complaint. On the day of her interview with the EEO investigator, petitioner was issued a letter of reprimand for staying late on a particular workday and not reporting her additional hours on her timesheet. This was an "offense" previously committed by other Division co-workers without reprimand.

II. Proceedings Below

On August 15, 2016, acting *pro se*, petitioner filed a civil action in the U.S. District Court for the Eastern District of Virginia alleging: (1) disparate treatment based on race and sex, and (2) retaliation, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.[1]

Finding petitioner's pro se Complaint defective, the District Court twice permitted her to amend. On December 12, 2017, the court granted respondent's Motion to Dismiss petitioner's Second Amended Complaint under Fed. R. Civ. P. 12(b)(6). The District Court concluded that respondent failed "to identify an adverse employment action required for her disparate treatment and retaliation claims." (App. 12)

Petitioner, with the aid of counsel, filed a timely appeal with the Fourth Circuit Court of Appeals. On October 17, 2018, the Fourth Circuit affirmed the dismissal by a *Per Curiam* decision. First, the Court of

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[1] Petitioner also claimed hostile work environment under Title VII, which she did not pursue in the Court of Appeals.

Appeals disposed of petitioner's objection that the District Court impermissibly credited factual allegations proffered by the respondent in deciding the motion to dismiss. Ignoring the principle that in considering a motion to dismiss for failure to state a claim, a district court is to view the facts alleged in the light most favorable to the plaintiff. The Court of Appeals turned this principle on end by ruling that since respondent had attached numerous documents from the agency's investigative file to her Complaint, including sworn affidavits of several of respondent's employees, the District Court was somehow permitted to make findings of facts that were in dispute.

The Court of Appeals erroneously credited as incontrovertible facts assertions by employees of the agency, despite they're being disputed by facts asserted in petitioner's own affidavit and Complaint. The Court of Appeals indicated that petitioner "did not challenge the district court's reliance on the documents' contents in deciding the motion to dismiss," which is beside the point. The district court's wholesale adoption of respondent's version of disputed facts was entirely inappropriate in considering a motion under Fed. R. Civ. P. 12(b)(6).

Next, the Court of Appeals affirmed the dismissal of petitioner's race and sex discrimination claims, concluding that she failed to establish an "adverse employment action." The Court claimed that petitioner's allegations in her Complaint consisted "'labels and conclusions' that were insufficient to withstand a motion to dismiss, or complained of actions that were not 'adverse.'" (App. 5) The Court of Appeals ignored this Court's admonition that a complaint by a

pro se litigant "is to be liberally construed . . . and . . . must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)(internal quotation marks and citations omitted).

While the petitioner's self-prepared Complaint can be faulted for making conclusory statements, it also laid out the essence of her claims that respondent offered contradictory and pretextual reasons for denying her various requests to transfer from the OM branch to the IM branch, while allowing male and/or white females to transfer. From petitioner's Second Amended Complaint:

> [DLA] engaged in unlawful sex discrimination, disparate treatment and reprisal . . . [Order Fulfillment Division] Management refused to acknowledge Plaintiff's application or to grant an interview for position opening with [OM] branch. . . . It had been announced initially by the Division Chief (Dec, 2010) that a position opening would be announced soon and that it would be for a vacancy in [IM branch], citing that the position was for vacancy left from newly promoted [individual]. (Division Chief stated actual name of person who formerly held position; statement was made before all [OM branch] employees during a division staff meeting.)
>
> In January, Plaintiff met with Director [of Order Fulfillment Division], to discuss work environment and issues that Plaintiff had at the time. Afterwards, during and following interviews and selection of hired individuals, for

> the vacancy in [IM branch] various excuses were provided to Plaintiff verbally as to why Plaintiff was not going to be interviewed, considered or selected. Included, was that the position was not for [IM branch but for OM branch]. One comment made was that because Plaintiff had applied for the position, it "knocked" other applicants out of consideration. Further, it was stated to Plaintiff that Plaintiff was not considered or selected because she did not apply via the proper method – that, in Plaintiff's case, she would have had to apply via another procedure, altogether to be considered. Plaintiff worked in [the OM branch.] Plaintiff asked what procedures was required to apply for the position.
>
> Two male hires were made: one in [IM] and one in [OM]. (During this time, the new [OM] supervisor asked Plaintiff on at least two occasions whether she wished to later to [IM] to which Plaintiff replied in the affirmative, yet no further action was taken to move Plaintiff. Instead, Plaintiff was eventually assigned additional [IM] workload. Plaintiff requested the consideration in attempt to avoid further anticipated office politics in [OM], where she worked at the time. (January/February 2011)

(SAC pp. 10-11, J.A. 15-16) In essence, petitioner alleged:

- A vacancy in Inventory Management was announced to all Order Fulfillment BPAs (both branches).

- Forgus submitted an application for the vacancy in Inventory Management in order to change branches, and to escape the perceived the discrimination from supervisors the in Order Management branch.
- She was not interviewed, considered or selected, and various false excuses were given; e.g., the position was in Order Management, not Inventory Management; she did not apply using the proper procedures.
- Two males were hired instead of her.
- She asked to transfer to Inventory Management; but she was never considered.

The Court of Appeals erred by rejecting petitioner's allegations as merely "labels and conclusions." It also erred by concluding that the denial of petitioner's requested transfers was not actionable because it involved no difference in pay or work conditions. As then-Judge Kavanaugh correctly noted in his concurring opinion in *Ortiz-Diaz v. Dep't of Hous. & Urban Dev*., 831 F.3d 488, 494 (D.C. Cir. 2016), "a forced lateral transfer – **or the denial of a requested lateral transfer** – on the basis of race is actionable under Title VII."

Finally, the Court of Appeals likewise affirmed dismissal of petitioner's retaliation claim for the same supposed lack of materially adverse action. (App. 6-7) First, it claimed that petitioner – again, acting pro se – "failed to oppose Defendant's motion to dismiss her retaliation claims in any meaningful way and, thus, she waived appellate review over the district court's dismissal of those claims." (App. 6) This conclusion

does not hold up under examination of petitioner's response to respondent's motion to dismiss. Even in petitioner's untrained language, she manages to explain that she suffered retaliation by being denied transfer opportunities offered to co-workers.

Petitioner's memorandum in opposition to the motion to dismiss states:

> The court support that adverse employment actions may take many forms. The cited actions within the Plaintiff's complaint fall under the opposition clause such as the imposition of a more burdensome work schedule (Burlington, N. & S.F.R. Co. v. White 548 U.S. 53 (2006), **denial of transfer** (Manatt v. Bank of America, NA, 339 F.3d 792 (9th Cir. 2003) or decreased job responsibilities (one of several issues in Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 500-01, 506 (9th Cir. 2000)).
>
> Plaintiff acknowledges that under the opposition clause, as defined by EEOC Enforcement Guidance on Retaliation and Related Issues at (www.eeoc.gov/laws/guidance/retalliation-guidance.cfm) the very issues cited by Plaintiff are actionable against as relates to the opposition clause and resulting management actions taken. . . . **Additional examples include non-consideration of Plaintiff for position opening within Division, refusal to consider employee's request to move to alternate area within Division** . . . .

> Plaintiff strongly disagrees with Defendant's assertion that Plaintiff ". . . never lost . . . a promotion opportunity . . ." The assertion is deliberately misleading. As a direct result of comments stated by and actions taken by or on behalf of management against Plaintiff, the near certainty exists that Plaintiff has been likely placed in an unfavorable light regarding promotion opportunities and has been unable to successfully interview and compete for promotions, **despite Plaintiff's repeated attempts to do so when vacancies occur for which Plaintiff is aware**.

(Respondent's Memorandum Opposing Motion to Dismiss, at 4-5.)

Far from failing to oppose respondent's motion to dismiss "in any meaningful way," petitioner mentioned repeatedly in her memorandum that denial of her transfer requests were materially adverse actions. She did not waive appellate review of the issue, and it remains ripe for consideration by this Court.

The Court of Appeals thereafter determined that none petitioner's complaints – including the denials of her requested transfers to escape the disparate treatment that she complained of both informally and formally – amounted to anything more than "petty slights or minor annoyances that often take place at work and that all employees experience." (App. 7), quoting *Burlington N. & Santa Fe Ry v. White*, 548 U.S. 53, 68 (2006).

REASONS FOR GRANTING THE PETITION

I. The petition should be granted to resolve a circuit conflict over when an employer denies an employee's request for a lateral transfer to escape discrimination is an adverse action.

The circuit courts of appeal are in conflict over the test to use when analyzing a plaintiff's claim that denied job transfer request was an adverse action for purposes of federal anti-discrimination and retaliation laws.

Plaintiffs seeking to establish a discrimination claim must demonstrate an adverse employment action. This requirement is derived from Title VII's requirement that the employer's practice relate to "compensation, terms, conditions or privileges of employment" or that the practice "deprive any individual of employment opportunities or otherwise affect his status as an employee." 42 U.S.C. § 2000e-2(a)(1) & (2). Based on the statute, this Court has defined an adverse employment action as one that "constitutes 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." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

Plaintiffs seeking to establish a retaliation claim do not have to demonstrate a significant change in employment status, but only that the materially adverse action "might have dissuaded a reasonable worker from making or supporting a charge of

discrimination. *Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53, 68 (2006). This Court reasoned that Title VII must be read "to provide broader protection for victims of retaliation than for victims of race-based, ethnic-based, religion-based, or gender-based discrimination, [because] effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances." *Id*. at 66-67. This Court elaborated that what is "materially adverse depends on the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Id*. at 71.

Petitioner's denied transfer was adverse, just not materially so in the sense of increasing her pay or improving tangible working conditions. It was motivated by a hope to escape discrimination in the current position and so improve intangible conditions that were more important to her than pay or atmosphere. The Fourth Circuit determined that petitioner suffered no material harm, and thus established no foul. Depending on the circuit in which she brought her case, she could have state a claim for relief. Guidance from the Supreme Court is needed to provide unity in standards when a lateral transfer is denied on account of discrimination or retaliation.

The divisions among the various circuit courts of appeal are manifested in a recent decision of the District of Columbia Circuit in *Ortiz-Diaz v. Dep't of Hous. & Urban Dev*., 867 F.3d 70 (D.C. Cir. 2017). The panel initially held that an employee's denied request to transfer to another position to escape a supervisor engaging in discrimination could not be deemed a

materially adverse action. 831 F.3d 488, 493 (D.C. Cir. 2016) Faced with a petition for rehearing *en banc*, the panel *sua sponte* reversed and held that "a discriminatory denial of a lateral transfer away from a biased supervisor can certainly be actionable under Title VII. 867 F.2d at 74.

Circuit Judge Rogers felt so strongly about the issue that after authoring the panel's unanimous decision, she filed a separate concurring opinion to sharply criticize the circuit's "stifling materiality standard." Although the plaintiff there survived a motion for summary judgment, she expressed "fear that the next plaintiff, alleging a similar wrong, may not be as fortunate." *Id*. at 80-81. Judge Rogers appealed to the entire circuit

> to join its sister circuits to make clear that transfers denied because of race, color, religion, sex, or national origin are barred under Title VII, see Concurring Op. 81 (Kavanaugh, J.) and that any action by an employer to deny an employment benefit on such grounds is an adverse employment action under Title VII.

Id. at 81 (Rogers, J., concurring).

Similarly pleading for *en banc* review, then-Judge Kavanaugh asked for the circuit to "go further and definitively establish the following clear principle":

> That said, uncertainty will remain about the line separating transfers actionable under Title VII from those that are not actionable. In my view, the en banc Court at some point should go further and definitively establish the following clear principle: All discriminatory transfers (and

> discriminatory denials of requested transfers) are actionable under Title VII. As I see it, transferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race) plainly constitutes discrimination with respect to "compensation, terms, conditions, or privileges of employment" in violation of Title VII. 42 U.S.C. § 2000e-2(a). I look forward to a future case where our Court says as much.

Id. at 81 (Kavanaugh, J., concurring).

The First Circuit held in *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997): "Assuming an improper motive, it is hard to see why denial of a hardship transfer in this case could not be discrimination under Title VII."

The Second Circuit held in *Williams v. R.H. Donnelly, Corp*., 368 F.3d 123, 128 (2d Cir. 2004): "Clearly, an employer's denial of a transfer request that would have resulted in a reduction in pay and the employee's demotion within the organization, without more, does not constitute an adverse employment action."

The Fifth Circuit held in *Wheat v. Fla. Parish Juvenile Justice Comm'n*, 811 F.3d 702 (5th Cir. 2016), that a retaliatory denial of a transfer request, that involved no "objective" improvement in her pay or circumstances, cannot constitute a materially adverse action. Plaintiff "presented no evidence that the denial of the reassignment made her job 'objectively' worse. It did not 'affect[ ] her job title, grade, hours, salary, or benefits,' nor is there any indication that working with

females resulted in a 'diminution in prestige or change in standing among her co-workers.' Additionally, mere denial of a reassignment to a purely lateral position ('no reduction in pay and no more than a minor change in working conditions'), is typically not a materially adverse action." (Internal citations omitted). *Id*. at 709.

The Sixth Circuit held in *Taylor v. Geithner*, 703 F.3d 328, 338 (6th Cir. 2014), that plaintiff's "averment that she applied for and was rejected from fifty-two [presumably lateral] positions is plainly an adverse employment action under binding precedent." *See also*, *Deleon v. Kalamazoo Cnty. Rd. Comm'n*, 739 F.3d 914, 923 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 783 (2015) (involuntary transfer to purely lateral position to which plaintiff had previously requested was still adverse action). That decision is important here in that a judge dissenting from the majority nonetheless declared without the need for citation: "An employee may recover for a requested transfer when the employee . . . applies for a transfer seeking refuge from discriminatory conditions in his current position.") (Sutton, J., dissenting).

Seventh Circuit held in *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1108 (7th Cir. 2012), that retaliation in the form of denial of transfer requests to sister hospitals "might be an adverse employment action, provided the transfer would have resulted in higher pay or benefits."

The Eighth Circuit held in *Lepique v. Hove*, 217 F.3d 1012, 1013 (8th Cir. 2000), that a retaliatory denial of a transfer to a job in another city, involving only minor changes in working conditions and no

reduction in pay or benefits, does not constitute an adverse employment action. The court stated:

> We have no wish to minimize the personal impact that transfers or refusals to transfer can have on an individual employee. This Court, however, has squarely held that a decision to transfer an employee to another city, a transfer that the employee did not want, is not an adverse employment action of sufficient consequence to justify an action under Title VII, assuming, as is the case here, that the job to which the employee is being transferred is of equal pay and rank and with no material change in working conditions.

The Tenth Circuit held in *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532-33, n.6 (10th Cir. 1998): "If a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer [an] adverse employment action."

The Eleventh Circuit held that a lateral transfer (or denial of a transfer request) is ordinarily not regarded as an adverse employment action under Title VII where the employee subjectively finds one position preferable to the other, absent some evidence that the plaintiff suffered a material loss of pay, prestige, or other quantifiable benefit. *See Weston-Brown v. Bank of America Corp.,* 167 Fed. Appx. 76, 80 (11th Cir. 2006) (plaintiff failed to establish a "failure to promote" claim because the position she sought was at the same level as her existing position, and would not have provided

a "greater wage or salary, a more distinguishable title, or significantly more responsibilities" (internal citation omitted)); *Wall v. Trust Co. of Ga.*, 946 F.2d 805, 808 (11th Cir. 1991) (the denial of a "promotion" was not actionable as the basis of a "failure to promote" claim under 42 U.S.C. § 1981 because the position the plaintiff held and the one she sought were both "nonexempt salaried jobs," similar in grade, offered the same pay and benefits, and incorporated the same policies).

The reason for the requested transfers differ in each of the foregoing cases. Some were requested out of subjective, personal desire or convenience. And some transfers were denied for non-discriminatory or non-retaliatory reasons. In petitioner's case, she requested the transfer to escape what she perceived as discrimination to her physical placement, her assignments, and her training. She also alleged that she was denied transfer precisely because of her African American race and/or her female sex; and in retaliation for her previous complaints of discrimination.

Nonetheless, while some circuits may allow a claim for denied transfers requested solely to seek refuge from discrimination, several others would still deny her claim because the transfer requested involved no change in pay, responsibilities or working conditions. An employee claiming discrimination or retaliation after an employer denies a request for transfer will experience a different result depending entirely on where the lawsuit is filed.

The importance and recurring nature of the question presented, the uncertainty of the law dividing

the various circuits, and the different outcomes all militate in favor of granting the petition.

II. The question presented is of national importance and requires guidance from the Supreme Court. This case is the ideal vehicle to accomplish that.

The numerous circuit court decisions addressing claims of discrimination and/or retaliation in transfer request denial cases (and cases of involuntary transfers, presenting similar or overlapping issues) demonstrate that the issue presented is recurring and in need of resolution. Several additional reasons support that conclusion.

First, employers is several circuits believe that they can deny lateral transfers with impunity, even when the denials are motivated by discrimination or a desire for retribution, so long as the transfer requested involves no change in pay or responsibility. The transfer denials that mature into lawsuits are generally not pursued out of mere convenience, but from a desire to escape discriminatory supervisors or management. When the law is interpreted so even discriminatory or retaliatory denials of transfer requests are deemed outside the reach of Title VII, the discrimination practices are perpetuated, and the victim left with no succor except resignation to the situation or resignation of their position.

Without a remedy, the insidious employment practices continue unhindered, and the laws enacted to protect the victims are rendered meaningless, or worse, a dead letter. The anti-discrimination laws were designed to eradicate all forms of discrimination in the

workplace, not solely those forms of disparate treatment that results in unequal pay or working conditions. Continued application of the law in a manner that holds no remedy for intangible discrimination only fosters continued discrimination. Stopping such discrimination or retaliation from continuing, even when pay or working conditions are not implicated, is consistent with the Chief Justice's admonition: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.) It is also consistent with Justice Sotomayor's rejoinder: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes wide open to the unfortunate effects of centuries of racial discrimination." *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

Second, as it stands now, employers are left to guess what legal standard will be applied to decisions in response to an employee's transfer request. Does the inquiry turn on the pay and responsibility differential between the positions? Does it depend on the reason for the request, i.e., whether it is prompted by a desire to escape perceived discrimination, and not by mere convenience? Does it turn on whether the employee has already complained of discrimination, so that a denial is also retaliatory? Resolution of the question presented will undoubtedly add clarity to employers responding to many transfer requests made in the course of employment.

Third, the issue presented is ripe for review. At least ten different federal circuit courts have addressed the question and responded with rules that differ in varying degrees. The issue in the District of Columbia Circuit so roiled the panel that it vacated its initial decision and changed its results, with the original dissenting judge subsequently writing for a unanimous panel. Two of the three panel members, including Judge Kavanaugh before he was elevated to this Court, earnestly pleaded for *en banc* consideration by the circuit. It stands to reason that no such request would have been made by the panel judges had they considered the issue so unique, remote or esoteric as unlikely to ever to be raised again. Allowing this issue to remain unresolved on a national level will result in additional uncertainty and confusion.

Finally, this is an ideal vehicle to resolve the question presented. The issue requires this Court to answer a purely legal question: what are the circumstances that transform a denied request for lateral transfer into an adverse action?

Although the Fourth Circuit panel was united in its outcome, there is little doubt that had the panel drawn from principles cited by the District of Columbia Circuit, the First Circuit or the Sixth Circuit, petitioner's claim for discriminatory and/or retaliatory denial of her request for a lateral transfer would have stated a claim for relief. Instead, the Fourth Circuit relied on rulings from the Fifth Circuit and the Seventh Circuit and dismissed her claim. All of the rulings from the various circuits were authored by judges believing their respective decisions were faithful to this Court's holding in *Burlington Northern*.

Consistent with Justice Kavanaugh's concurrence in *Ortiz-Diaz v. Dep't of Hous. & Urban Dev*., 867 F.3d 70 (D.C. Cir. 2017), petitioner respectfully requests that the Court adopt the following rule: "All discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII." *Id*. at 81 (Kavanaugh, J., concurring). Denying an employee's requested transfer on account of unlawful discrimination, or in retribution for complaining of opposing unlawful discrimination plainly constitutes an unlawful employment practice under Title VII. This is especially true in petitioner's case where the transfer request was motivated by a desire to escape perceived discrimination.

Such a rule would place employers on notice that they face punishment for denying – on the basis of discrimination or retaliation – an employee's lateral transfer request. As the law is interpreted at present by too many circuit courts, employees facing discrimination are dissuaded from opposing it or complaining about it for fear that their requests to transfer to find refuge will be denied out of spite, with employers comforted that they will not be brought to account as overly-rigid application of adversity principles will ensure that transfer requests can be denied with impunity.

Such a rule would create consistency among the circuits and with this Court's precedent. It would also give employers clear guidance they need when evaluating employee transfer requests.

CONCLUSION

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

Respectfully submitted,

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