No. 20-1373

IN THE

Supreme Court of the United States

WANZA COLE,
Petitioner,

v.

WAKE COUNTY BOARD OF EDUCATION,
Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAYNA J. ZOLLE
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

April 30, 2021

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MOTION FOR LEAVE TO FILE BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Constitutional Accountability Center (CAC) respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as *amicus curiae* in support of Petitioner Wanza Cole.

All parties were timely notified of CAC's intent to file this *amicus* brief. Petitioner consents to its filing. Respondent does not consent. CAC thus files this motion seeking leave to file the attached brief.

CAC is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain

faithful to the text and history of key federal statutes like Title VII of the Civil Rights Act.

CAC has a strong interest in ensuring that Title VII is understood, in accordance with its text, history, and Congress's plan in passing it, to prohibit an employer from discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin, regardless of whether that disparate treatment produces adverse effects. It therefore has an interest in this case. Notwithstanding the statute's plain text, the court below held that an employer did not violate Title VII when it transferred an employee to a different job because she is Black, reasoning that the employee did not establish that her reassignment constituted an "adverse employment action" that had a "significant detrimental effect." Pet. App. 4a. This decision should not stand because Title VII's antidiscrimination provision contains no such requirements.

Because the court below imposed requirements that are at odds with the text and history of Title VII, as well as with Congress's plan in passing it, this Court should grant the petition and reverse the judgment below. CAC seeks leave to file the attached brief so that it can explain why the Court should do so. More specifically, the attached brief explains why a discriminatory transfer violates Title VII by altering an employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), regardless of whether it produces adverse effects.

For the foregoing reasons, CAC respectfully requests that it be allowed to file the attached brief as *amicus curiae*.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAYNA J. ZOLLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of key federal statutes like Title VII of the Civil Rights Act. CAC therefore has a strong interest in ensuring that Title VII is understood, in accordance with its text, history, and Congress's plan in passing it, to prohibit an employer from discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin, regardless of whether that disparate treatment produces adverse effects. It therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. Petitioner consents to the filing of this brief; Respondent does not consent. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Notwithstanding this plain text, the court below held that Respondent Wake County Board of Education did not violate Title VII when it transferred Petitioner Wanza Cole to a different job because she is Black, *see* Pet. App. 2a, reasoning that Petitioner did not establish that her reassignment from school principal to a position in the school district's central office constituted an "adverse employment action" that had a "significant detrimental effect," *id.* at 4a. This decision should not stand because Title VII's antidiscrimination provision contains no such requirements.

Under the statute's plain language, a plaintiff alleging discrimination under Title VII must show that an employer discriminated against her "with respect to [her] compensation, terms, conditions, or privileges of employment" because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). An employee who shows that she was transferred to a new job because of her race easily satisfies this standard. *See Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev., Office of Inspector Gen.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) ("All discriminatory transfers . . . are actionable under Title VII. As I see it, transferring an employee because of the employee's race . . . plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." (quoting 42 U.S.C. § 2000e-2(a))).

Title VII's text, which prohibits discriminatory job transfers regardless of whether those transfers produce adverse effects, is consistent with Congress's plan in passing Title VII, as well as the law's history. Congress passed Title VII "to root out discrimination in

employment," *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) [hereinafter *Shell Oil Co.*], and "to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin," *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982). Indeed, a bill that served as a precursor to the Civil Rights Act would have prohibited the denial of "equal employment opportunity to any individual because of race, color, religion, or national origin," and it specifically defined "[e]qual employment opportunity" to "include all the compensation, terms, conditions, and privileges of employment *including but not restricted to: hiring, promotion, [and] transfer*." S. Rep. No. 88-867, at 24 (1964) (emphasis added). In other words, it would have expressly barred discriminatory transfers, regardless of whether the transferred employee could show adverse effects. Although the Civil Rights Act that Congress ultimately passed did not include this itemized list detailing what the phrase "compensation, terms, conditions, or privileges of employment" covers, the historical record makes clear that it was understood to operate in the same way. *See* 110 Cong. Rec. 7763 (Apr. 13, 1964) (statement of Sen. Hill) (explaining that Title VII "would control and regiment compensation, terms, conditions, and privileges of employment *including but not restricted to: Hiring, promotion, [and] transfer*" (emphasis added)); *id.* at 7778 (statement of Sen. Tower) (lamenting that under Title VII, "[a]ll compensation, terms, conditions, or privileges of employment must be free from any discrimination" and therefore "every assignment of duty . . . could be subject to review").

Because the court below imposed requirements that are at odds with the text and history of the statute, this Court should grant the petition and reverse

the judgment below. In doing so, it should hold that a discriminatory transfer violates Title VII by altering an employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), regardless of whether it produces adverse effects.

ARGUMENT

I. Title VII's Plain Text Prohibits Transferring an Employee Because of Race.

Section 703(a)(1) of Title VII prohibits an employer from "fail[ing] or refus[ing] to hire," "discharg[ing]," or "otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race" or other protected characteristic. 42 U.S.C. § 2000e-2(a)(1). In considering whether this provision proscribes an employer from reassigning an employee from one position to another based on race, this Court's "task is clear[:] [It] must determine the ordinary public meaning of Title VII's command that it is '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 his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). To discern that meaning, the Court must look "to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms." *Id.* at 1738-39.

Under the original public meaning of its text, Title VII plainly prohibits transferring an employee from one position to another because of race. At the time of Title VII's passage, the ordinary meaning of "discriminate" was "to separate [or] distinguish between" or to "recognize as being different from others." *Webster's*

Third New International Dictionary 648 (Philip Babcock Gove, ed., 1961); *see* 110 Cong. Rec. 7213 (Apr. 8, 1964) (Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Sens. Clark & Case, Floor Managers) ("To discriminate is to make a distinction, to make a difference in treatment or favor . . . ."); *id.* at 8177 (Apr. 16, 1964) (Minority Committee Report on S. 3368—Summary Statement) ("Presumably, 'discriminate' would have its commonly accepted meaning which, according to Webster's International Dictionary, is 'to make a distinction' or . . . 'to make a difference in treatment or favor . . . as to discriminate in favor of one's friends; to discriminate against a special class.'"). Thus, Title VII "make[s] it unlawful for an employer to make any distinction or any difference in treatment of employees because of race." 110 Cong. Rec. 8177.

Specifically, the statute prohibits "any distinction or any difference in treatment," *id.*, "with respect to [an individual's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1). In 1964, much like today, "terms" meant "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Webster's Third New International Dictionary*, *supra*, at 2358. Similarly, the word "conditions" referred to "attendant circumstances [or an] existing state of affairs," and a "condition" meant "a mode or state of being," a "social estate: rank, position," or a "quality, attribute, [or] trait." *Id.* at 473. And a "privilege" meant "a right or immunity granted as a peculiar benefit, advantage, or favor" or "such right or immunity attaching specif[ically] to a position or an office." *Id.* at 1805.

Under the original public meaning of those words, Title VII prohibits an employer from transferring an

employee from one position to another because of race, even if the employee's compensation and other monetary benefits remain the same. Such a transfer necessarily changes the "terms" of an individual's employment (that is, its "nature and scope," *id.* at 2358) because the employee who initially agreed to fill one role will instead have a new role that differs in at least some way, whether it is with respect to location, responsibilities, title, colleagues, or some other job-related characteristic. For the same reasons, a transfer also alters the "conditions" of an individual's employment by changing the "circumstances," "qualit[ies]" "attribute[s]," or "trait[s]" of her job. *See id.* at 473. Indeed, in this case, Petitioner was assigned a different role altogether with a different "rank" or "position," *id.*, than her prior status as school principal, further altering the conditions of her employment. Finally, when an employee changes positions at work, she necessarily receives different "right[s] or immunit[ies] attach[ed] specif[ically] to a position or an office." *See id.* at 1805. A school principal, for instance, has specific rights and immunities—such as the right to organize an all-school assembly—that a district office worker does not, and vice versa. An employee's "privileges" therefore change according to her position.

Thus, an employer who reassigns an employee because of race discriminates with respect to the employee's terms, conditions, and privileges of employment, regardless of whether the employee receives the same monetary compensation and benefits in her new position. At a minimum, an employer who makes such a transfer discriminates with respect to the "terms, conditions, *or* privileges of employment," violating Title VII's express prohibition. 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see United States v. Woods*, 571 U.S.

31, 45-46 (2013) (emphasizing that the "ordinary use" of the word "or" "is almost always disjunctive," so "the preceding items are alternatives").

In fact, this Court has recognized that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept," *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)), that "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the *entire spectrum* of disparate treatment . . . in employment," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (emphasis added) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (explaining that it has "repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to economic or tangible discrimination'" (internal quotation marks omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). This Court has explained that "Title VII tolerates no racial discrimination, subtle or otherwise," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973), including with respect to any "benefits that comprise the 'incidents of employment' . . . or that form 'an aspect of the relationship between the employer and employees,'" *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984) (quoting S. Rep. No. 88-867, at 11, and *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). In short, this Court has recognized that "Title VII prohibits 'discriminat[ion] . . . . ' of any kind that meets the statutory requirements." *Oncale*, 523 U.S. at 79-80 (brackets in original).

II. The Court Below Imposed Requirements with No Basis in the Statutory Text.

Despite the straightforward statutory language, which plainly bars discriminatory job transfers, the court below imposed requirements with no basis in Section 703(a)(1)'s text. Relying on circuit precedent, the court below stated that a Title VII plaintiff needs to show that the challenged employment action "*adversely affects* the terms, conditions, or benefits of the plaintiff's employment," Pet. App. 4a (emphasis added) (quoting *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007)), and that "[a] reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some *significant detrimental effect*," *id.* (emphasis added) (quoting *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004)). It concluded that Petitioner failed to make that showing, reasoning that "[w]hile Cole would have supervised fewer employees" in her new position, "her pay and benefits did not change," and her "personal preference to remain a principal" was insufficient to demonstrate that she suffered an adverse employment action with a significant detrimental effect. *Id.* The court below also faulted Petitioner for failing to report to her new job, suggesting that the district court was unable to assess whether, after her transfer, "her level of responsibility was *significantly reduced* from her position as a principal." *Id.* (emphasis added).

The court below was wrong to impose these requirements that do not exist anywhere in the operative text of the statute. Section 703(a)(1) of Title VII nowhere indicates that a plaintiff must show that she suffered an "adverse employment action" or any "detrimental effect[s]"—let alone "*significant detrimental effect[s]*"—or a "significant[] reduc[tion]" in

responsibilities. *Id.* (emphasis added). Rather, as explained above, a Title VII plaintiff must simply show that she was treated differently because of her race (or another protected characteristic) with respect to the compensation, terms, conditions, or privileges of her employment. *Cf. City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (explaining that Title VII requires a "simple test" asking whether an employer treated an employee "in a manner which but for that person's [race] would be different"); *Bostock*, 140 S. Ct. at 1743 (same). Petitioner made this showing. *See* Pet. App. 4a, 12a (indicating that Respondent reassigned Petitioner, who was serving as a school principal, to a position in the school district's central office, where she would supervise fewer employees, allegedly because of race).

To be sure, Section 703(a)(2)—the subsequent subsection in Title VII—uses the phrase "adversely affect" when it prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees . . . in any way which would 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." 42 U.S.C. § 2000e-2(a)(2); *see* Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1149-50 (1998) (explaining that Section 703(a)(2) has been interpreted to prohibit "disparate impact" as well as "disparate treatment" discrimination and that "[f]or impact claims, that adversity element makes sense"). But that provision is not at issue in this case, as Petitioner brought her discrimination claim under Section 703(a)(1) alone. Pet. 8. In fact, Congress's inclusion of the phrase "adversely affect" in Section 703(a)(2) only underscores that it intentionally omitted similar language from Section 703(a)(1) and that the court below

was wrong to graft this language onto that provision. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Moreover, although this Court has required a showing of "material adversity" for a claim under Title VII's antiretaliation provision in Section 704(a) (codified at 42 U.S.C. § 2000e-3(a)), *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (emphasis omitted), that provision operates differently than the antidiscrimination provision in Section 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)). Title VII's antiretaliation provision "prohibits an employer from 'discriminat[ing] against' an employee or job applicant because that individual 'opposed any practice' made unlawful by Title VII or 'made a charge, testified, assisted, or participated in' a Title VII proceeding or investigation." *White*, 548 U.S. at 56 (quoting 42 U.S.C. § 2000e-3(a)). This Court has concluded that under that provision, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks omitted) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). This Court has interpreted the antiretaliation provision in this way because a "primary purpose" of that provision is to "[m]aintain *unfettered access* to [Title VII's] remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (emphasis added), and "[i]t does so by

prohibiting employer actions that are likely 'to deter victims of discrimination from complaining,'" *White*, 548 U.S. at 68 (quoting *Robinson*, 519 U.S. at 346). Thus, the antiretaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant," or actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 57.

Unlike the antiretaliation provision, Title VII's antidiscrimination provision (Section 703(a)(1)) should not be read to impose an adversity requirement. Indeed, this Court has recognized that "the two provisions differ not only in language but in purpose as well." *Id.* at 63. While the antiretaliation provision "seeks to prevent harm to individuals based on what they do," *id.*, "[t]he antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," *id.* This Court has recognized that "[t]o secure [this] objective, Congress did not need to prohibit anything other than employment-related discrimination." *Id.*[2] Thus, neither Title VII's text nor

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[2] Moreover, although this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), "sp[oke] of a Title VII requirement that violations involve 'tangible employment action' such as . . . 'reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,'" *White*, 548 U.S. at 64 (quoting *Ellerth*, 524 U.S. at 761), that requirement has no bearing on this case. As this Court has made clear, it imposed that requirement "only to 'identify a class of . . . cases' in which an employer should be held vicariously liable . . . for the acts of supervisors." *Id.* (quoting *Ellerth*, 524 U.S. at 760); *see Ellerth*, 524 U.S. at 760, 763 (explaining that "agency principles constrain the imposition of vicarious liability in cases of supervisory harassment" and that under those principles, vicarious liability is

its purpose justifies imposing an adversity requirement for a claim of discrimination under Section 703(a)(1).

III. Requiring a Plaintiff Alleging Disparate Treatment to Show Adverse Effects Is Contrary to Congress's Plan in Passing Title VII and the Statute's History.

In addition to ignoring the statute's text, the approach of the court below compels outcomes that are flatly contrary to Congress's plan in passing Title VII. As this Court has stated time and again, and as the statutory text makes clear, "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977), and ensuring that "similarly situated employees are not . . . treated differently solely because they differ with respect to race, color, religion, sex, or national origin," *id.* at 71; *see Shell Oil Co.*, 466 U.S. at 77 ("The dominant purpose of [Title VII], of course, is to root out discrimination in employment."); *Kremer*, 456 U.S. at 468 ("Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin."); *McDonnell Douglas*, 411 U.S. at 801 ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

Despite this broad mandate, "employment discrimination decisions by the federal courts," like the one below, "have created a body of law that patently contradicts Title VII's aim of equal employment opportunity" by adding atextual requirements. Esperanza

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appropriate when a "supervisor takes a tangible employment action against the subordinate").

N. Sanchez, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 Cath. U. L. Rev. 575, 579 (2018). "In seeking to determine which employment actions are actionable, the lower federal courts have aggressively narrowed the scope of the 'terms, conditions, or privileges of employment' provision." *Id.* at 584. In fact, multiple circuits have held that a "purely lateral transfer" of an employee from one position to the same position elsewhere because of race is not actionable under Title VII because the employee cannot show that she suffered an adverse employment action, even though that requirement appears nowhere in Section 703(a)(1). *See, e.g.*, *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) ("Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action."); *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 879 (5th Cir. 1999) (same); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (same); *see also* Pet. 2 (explaining that the circuits have adopted divergent approaches to determining what conduct is actionable under Title VII and that "no circuit applies the statutory text as written").

A recent Fifth Circuit decision illustrates just how far some courts, like the court below, have strayed from the statutory text and from Congress's plan for Title VII. In *Peterson v. Linear Controls, Inc.*, the court held that a plaintiff alleging that he and the other Black employees at his workplace "had to work outside and were not permitted water breaks, while the white employees worked inside with air conditioning and were given water breaks" failed to state a claim of racial discrimination under Title VII because "these working conditions are not adverse employment

actions because they do not concern ultimate employment decisions." 757 F. App'x 370, 372-73 (5th Cir. 2019) (per curiam). In doing so, the court apparently acknowledged that the plaintiff's employer discriminated against him in his "*working conditions*"—plainly satisfying the terms of the statute—but it affirmed the dismissal of his case based on the imposition of wholly atextual requirements. In fact, the court's decision did not contain a single citation to Title VII or its text. *See id.* This decision was flatly contrary not only to the plain language of Title VII, but also to Congress's plan in passing the statute, which was to ensure that "similarly situated employees are not . . . treated differently solely because they differ with respect to race, color, religion, sex, or national origin," *Trans World Airlines*, 432 U.S. at 71.

These decisions by courts of appeals have ignored that when an employee is transferred from one position to another, the nature of her employment and its terms, conditions, and privileges are necessarily altered, even if in subtle ways. But Congress carefully drafted the statute to make "abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas*, 411 U.S. at 801. Thus, a race-based transfer is actionable under Title VII, regardless of whether a plaintiff can show that she suffered an "adverse employment action" with "significant detrimental effect[s]," Pet. App. 4a; *see Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring) ("As I see it, transferring an employee because of the employee's race . . . plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." (quoting 42 U.S.C. § 2000e-2(a))).

Title VII's history confirms that it bans race-based job transfers that alter the terms, conditions, or

privileges of an individual's employment, regardless of whether there are adverse effects. A Senate bill that served as a precursor to the Civil Rights Act would have prohibited the denial of "equal employment opportunity to any individual because of race, color, religion, or national origin," and it explicitly stated that "[e]qual employment opportunity shall include all the compensation, terms, conditions, and privileges of employment *including but not restricted to*: hiring, promotion, *transfer*, and seniority; . . . referrals for employment; . . . equality of access to facilities and services provided in employment; and equality of participation and membership in employee organizations and labor organizations." S. Rep. No. 88-867, at 24 (emphases added). This Court has observed that that bill "contained language similar to that ultimately found in the Civil Rights Act" but that the Senate "postponed [the bill] indefinitely after it amended a House version of what ultimately became the Civil Rights Act of 1964." *Hishon*, 467 U.S. at 75 n.7.

Although the bill that became the Civil Rights Act (H.R. 7152) did not expressly define "terms, conditions, or privileges of employment," the historical record demonstrates that those terms should have the same meaning in H.R. 7152 as in the Senate bill, which expressly prohibited discriminatory job transfers. Indeed, after the House of Representatives passed H.R. 7152, and it reached the Senate, Senator J. Lister Hill of Alabama, an opponent of the bill, lamented that "[t]he legislation would give the chairman of the Equal Employment Opportunity Commission almost a free hand to interfere with virtually every aspect of employer-employee relationships. It would control and regiment compensation, terms, conditions, and privileges of employment *including but not restricted to*: Hiring, promotion, *transfer*, and seniority," echoing

verbatim the broad list the Senate had included in its bill. *See* 110 Cong. Rec. 7763 (Apr. 13, 1964) (emphases added); *see also id.* at 7778 (statement of Sen. Tower) (criticizing H.R. 7152 and its declaration that "[a]ll compensation, terms, conditions, or privileges of employment must be free from any discrimination" because under the bill, "[e]very promotion, *every assignment of duty*, every privilege granted an employee . . . could be subject to review by the Federal commission" (emphasis added)).

Indeed, in a debate a few weeks before Congress passed the Civil Rights Act, Senator Edmund Muskie read aloud the text of H.R. 7152's Section 703(a)(1) banning "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment"—language that remained unchanged in the final Act—and demanded, "What more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation?" 110 Cong. Rec. 12,618 (June 3, 1964); *cf. First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981) ("Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' [in the National Labor Relations Act (NLRA)] without further definition, for it did not intend to deprive the [NLRB] of the power further to define those terms in light of specific industrial practices."); *see also Hishon*, 467 U.S. at 76 n.8 (explaining that "certain sections of Title VII were expressly patterned after the NLRA"); Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333, 399 n.414 (1999) (making this comparison).

Thus, even though Title VII does not enumerate every action that could constitute discrimination with respect to an individual's "terms, conditions, or privileges of employment," it plainly prohibits discriminatory job transfers, just as the Senate bill explicitly would have. Title VII's text and history, consistent with Congress's plan in passing the statute, make that clear. The statute requires no additional showing of adverse effects.

CONCLUSION

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

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAYNA J. ZOLLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

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