No. 20-1373

IN THE

Supreme Court of the United States

WANZA COLE,

Petitioner,

v.

WAKE COUNTY BOARD OF EDUCATION,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Respondent Wake County's brief in opposition is most noteworthy not for what it affirmatively argues but for what it ignores and tacitly concedes.

The County does not seriously contest that the circuits are intractably divided regarding the breadth of the atextual adverse-employment-action doctrine; indeed, the County itself recounts the courts of appeals' varying positions. Opp. 12-15. The County's point, it appears, is that Petitioner Wanza Cole would lose under any circuit's formulation. That is flatly incorrect, *see* Pet. 13-17; *infra* at 3-5, but also irrelevant, given that all of the circuits' varying rules are "inconsistent with both the text and purpose of Title VII." Br. for United States as Amicus Curiae at 14, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) (U.S. *Peterson* Br.).

Nor does the County dispute that the question presented is "undeniably important." U.S. *Peterson* Br. 20. It does not deny that the adverse-employment-action doctrine has profound effects on employees and employers, Pet. 21-24, or that "hundreds if not thousands of decisions" have reflexively held, without any serious analysis of the statutory text, "that an 'adverse employment action' is essential to the plaintiff's prima facie case." *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (Easterbrook, J.). And the County does not disagree that because many important federal anti-discrimination statutes prohibit discrimination in the "terms, conditions, or privileges of employment," "[r]esolving the question presented would thus have broad significance for

federal employment-discrimination law." U.S. *Peterson* Br. 21; *see* Pet. 22-23.

The County also does not contest that Cole's case is an excellent vehicle for resolving the question presented. It agrees (Opp. 10) that the sole basis for the Fourth Circuit's ruling was that Cole had not suffered an adverse employment action, squarely presenting the validity of the doctrine for this Court's review. *See* Pet. 24-26. The County thus nowhere disputes that although it asked the Fourth Circuit to affirm on the ground that Cole's transfer was not motivated by discrimination, that court pointedly declined to reach that issue, rendering the question presented here outcome-determinative. *See id.* at 25 & n.7.

And nowhere is the County's surrender more evident than in its evasion of the merits of the question presented. The County seeks to justify the Fourth Circuit's decision on the ground that Cole's objection to her transfer was "based solely on [Cole's] subjective preferences." Opp. i. That is not accurate. Given the profound differences between Cole's position as a school principal and the office position to which she was transferred, *see* Pet. 6-8, 29-30, a reasonable person in Cole's shoes would have viewed the transfer as a demotion, *see id.* But, more importantly, the County's speculation about Cole's subjective preferences has nothing to do with the question presented: Whether a forced job transfer motivated by an employee's race is discrimination in the "terms, conditions, or privileges of employment" under the express text of Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). *See* Constitutional Accountability Center Amicus 8-12.

On that score, the County simply abdicates, assuming the validity of the adverse-employment-action doctrine, *see, e.g.*, Opp. 11, but nowhere explaining why Cole's transfer did not alter the terms, conditions, or privileges of her employment. Indeed, the County's opposition does not so much as cite Section 703(a)(1), let alone do business with its text.

Rather than challenge the petition regarding these traditional pillars of certworthiness, the County insists that the acknowledged division among the circuits is unworthy of this Court's attention and then embarks on a lengthy, one-sided rendition of the record in a misguided effort to focus the Court on whether Cole's transfer was discriminatory—which, again, the Fourth Circuit did not reach.

As we now explain, neither of these diversions succeeds, and this Court should grant review.

1. The petition detailed a deep, long-festering split among the courts of appeals over Title VII's reach. Pet. 9-20; *see also* U.S. *Peterson* Br. 18-20. The Fifth Circuit strictly limits the employment practices covered by Section 703(a)(1) to a narrow list of "ultimate employment decisions," Pet. 10-12, and the Third Circuit has effectively followed suit, *see id.* at 12-13. The Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have rejected the ultimate-employment-decision rule in favor of less-restrictive, but still mistaken, adverse-employment-action doctrines. *See* Pet. 13-16. And the four remaining circuits—the First, Fourth, Tenth, and D.C. Circuits—take unpredictable, though always atextual, approaches. Pet. 17-20.

a. Because Cole presented evidence that "a reasonable person in [her] position would view the employment action in question as adverse," *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000), the discriminatory transfer that the Fourth Circuit here deemed permissible likely would have been considered by a jury in the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.

Compare, for example, Cole's experience to the harm suffered by a junior-high-school art teacher transferred to an elementary school and whose disparate-treatment claim overcame summary judgment in *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980). There, as here, the reassignment caused no change in salary or workload. But the Second Circuit explained that "job discrimination may take many forms," and "Congress cast the prohibitions of Title VII broadly to include subtle distinctions in the terms and conditions of employment as well as gross salary differentials based on forbidden classifications." *Id.* at 364. Because the programs at the elementary and junior-high school levels were so "profoundly different" as to render the teacher's twenty years of experience and study "utterly useless," the transfer interfered "with a condition or privilege of employment adversely affecting" the teacher's "status within the meaning of the statute." *Id.* at 366.

Cole suffered the same type of injuries. With the transfer, her job changed wholesale, rendering her over twenty years of experience working closely with students and parents useless because she was removed from a school setting and stripped of any responsibilities that would put her in contact with

students or parents. *See* Pet. App. 12a-13a; CA4JA 157-58, 455-56. Cole's reassignment from a school-leadership role to a central-office position was perhaps even more adverse than the "radical change" experienced by the teacher in *Rodriguez* who continued to teach the same subject and remained in a classroom. 620 F.2d at 366. The County's only answer to *Rodriguez* is that the teacher there presented "substantially uncontradicted evidence," Opp. 13, whereas the County here offers its side of the story to counter Cole's version of events. But the County's efforts to dispute Cole's evidence are irrelevant at the summary-judgment stage, when the facts must be viewed in Cole's favor.

Because the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have adopted adverse-employment-action rules similar to the rule in the Second Circuit, Opp. 12-15, Cole's claim likely would have overcome summary judgment in those circuits as well. In those circuits, too, workplace practices other than ultimate employment decisions may violate Title VII because there is no "bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged discrimination must have for it to be actionable." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001); *see generally* Pet. 13-17 (describing the rules in these circuits).

b. Even if (counterfactually) the County were correct, and the discriminatory transfer at issue here would not be actionable under any of the circuits' standards, Opp. 10, that would only highlight the need for this Court's review. What the petition explains (at 9-10, 26-28), and the County ignores, is that the circuit split is rooted in the courts of appeals'

departure from Title VII's text. As noted earlier, the County nowhere even attempts to square the courts of appeals' adverse-employment-action rules with the statute's words. It does not defend these various, judicially-coined doctrines, which exist only because the circuits have rewritten a statutory phrase—"terms, conditions, or privileges of employment"—that requires no gloss. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2361, 2364 (2019) (warning lower courts not to "engraft[]" tests onto straightforward statutory language).

c. The United States agrees with Cole and has taken specific aim at the standard applied by the Fourth Circuit below. In another case arising from the Fourth Circuit, the Government explained that "[d]espite its widespread acceptance by courts of appeals," the "view that a 'purely lateral' transfer is not actionable" disparate treatment "is incorrect." Br. in Opp. at 13, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020) (citation omitted) (U.S. *Forgus* Br.). Discriminatory lateral transfers are actionable, the Solicitor General observed, because "it is difficult to imagine a more fundamental 'term[]' or "condition[]' of employment than the position itself." *Id.* So, "[g]iven the significant and widespread misreading of Title VII embodied in the [Fourth Circuit's] decision below," *id.* at 16, this Court's intervention is necessary.

2.a. The County devotes half of its opposition to a partial, often misleading description of the summary-judgment record. Opp. 2-10. If the County's purpose is to suggest that review should be denied because it did not discriminate against Cole, its position is doubly misguided.

First, to repeat: The Fourth Circuit intentionally avoided deciding the discrimination question, Pet. App. 5a n.3, instead ruling that even if Cole's transfer was motivated by discrimination, her transfer did not violate Title VII because it did not constitute an adverse employment action. That dispositive holding is the only issue before this Court.

Second, even if the record were relevant, because Cole's case was decided on the County's motion for summary judgment, where the facts and all reasonable inferences derived from them must be construed in Cole's favor, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998), it is Cole's rendition of the facts, *see* Pet. 3-8, not the County's, that would matter.

b. The County seeks support for the Fourth Circuit's longstanding rule excluding lateral transfers from Title VII's coverage by noting that "[l]ateral transfers occur thousands, if not tens of thousands, of times a day." Opp. 16. This assertion simply highlights the petition's certworthiness by underscoring that the question presented is important and frequently recurs.

The Fifth Circuit recently passed on an opportunity to reconsider its ultimate-employment-decision rule in a case in which a district court held that it was powerless to enjoin an employer's explicitly sex-based shift-assignment policy requiring female detention officers, but not male officers, to work full weekends. *Hamilton v. Dallas Cnty.*, Order Den. Mot. for Hearing En Banc, No. 21-10133, Doc. 00515820735 (5th Cir. Apr. 14, 2021); *see Hamilton v. Dallas Cnty.*, 2020 WL 7047055, at *2 (N.D. Tex. Dec. 1, 2020). In contrast, the D.C. Circuit recently granted en banc

rehearing in *Chambers v. District of Columbia*, 988 F.3d 497 (D.C. Cir. 2021), to decide whether "the denial or forced acceptance of a job transfer is actionable under Title VII" only if it causes "objectively tangible harm." 2021 WL 1784792, at *1 (D.C. Cir. May 5, 2021) (quoting *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)).

Given the widespread uncertainty over Title VII's breadth—confusion that reaches every circuit, with consequences well beyond lateral-transfer cases—the courts of appeals cannot properly or uniformly resolve the question presented here without this Court's intervention. This need for review is especially compelling given that the circuit confusion is based not only on a misreading of Title VII's text but on a misinterpretation of this Court's precedent. *See* Pet. 10-11; Constitutional Accountability Center Amicus 10-11.

The adverse-employment-action doctrine has unfair and unwarranted effects on employees. Thus, what the County belittles as a "supposed parade of horribles," Opp. 16, is, in fact, a description of many real-life examples demonstrating the far-reaching consequences of the existing legal standards. In the last month alone, lower courts have applied various adverse-employment-action rules to hold that, even if an employer's conduct is motivated by discrimination, Title VII's "terms, conditions, or privileges" do not cover paid suspensions, *Townsend v. Rockwell Automation, Inc.*, No. 20-3079, 2021 WL 1625243, at *5 (6th Cir. Apr. 27, 2021), employee probation, *Thompson v. Liberty Mut. Ins.*, No. 18-6092, 2021 WL 1712277, at *5 n.8 (D.N.J. Apr. 29, 2021), placement on medical leave, *Trevillion v. Union Pac. R.R.*, No. 18-

610, 2021 WL 1762112, at *5 (W.D. La. May 4, 2021), or delayed compensation for paid leave, *Alvares v. Bd. of Educ. of the City of Chic.*, No. 18-5201, 2021 WL 1853220, at *9 (N.D. Ill. May 10, 2021).

c. The County's point in lamenting the frequency of lateral transfers may be that reversal here would authorize suit when an employee "subjectively preferred her original position." Opp. 16. The answers to that assertion are that Cole's transfer was objectively harmful, *see* Pet. 6-8, 29, and, more fundamentally, that the Fourth Circuit's rule disregarding employees' subjective preferences cannot be squared with the statutory text, which is exactly what the Solicitor General told this Court just two years ago, *see* U.S. *Forgus* Br. 13.

On the other hand, the County may be suggesting that a judicially created adverse-employment-action doctrine is necessary to prevent a torrent of Title VII suits regarding lateral transfers. That would make no sense. Tens of thousands of failures to hire and firings occur every day, and even accepting the validity of the adverse-employment-action doctrine, no one disputes that an employer would be liable for those actions *if they were undertaken for discriminatory reasons*. So, too, then, when an employer discriminates with respect to any other term, condition, or privilege of employment.

In any case, rejecting the lower courts' atextual adverse-employment-action doctrine would not impose any unreasonable obligations or litigation burdens on employers, but, rather, would apply Title VII as it was written and intended. *See* Constitutional Accountability Center Amicus 12-17. Liability for disparate-treatment discrimination would still be

limited to only those situations when the plaintiff can prove that the employer intentionally discriminated on the basis of race, color, religion, sex, or national origin. *See Tex. Dep't Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). That is a significant burden. *See id.* at 257-59; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-12 (1993). And the harm suffered by the employee must be attributable to the employer based on principles of agency law and this Court's precedent. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

In sum, the floodgates would not open, and the statute's text and purpose would be honored.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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