No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

CITY OF ST. LOUIS, STATE OF MISSOURI, *et al.*,
Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm 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 materially 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 individual's race, color, religion, sex, or national origin."

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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; the parties have consented to the filing of this brief. 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.

42 U.S.C. § 2000e-2(a)(1). Notwithstanding this plain text, the court below held that Respondent City of St. Louis did not violate Title VII when it transferred Petitioner Jatonya Clayborn Muldrow to a different job and denied her a requested transfer, allegedly because of her sex. *See* Pet. App. 15a. According to the court below, Muldrow needed to establish that either her reassignment from the Intelligence Division to a position in the Fifth District or her denied request to transfer to an administrative aide position constituted an "adverse employment action," that is, "a tangible change in working conditions that produces a material employment disadvantage." *Id.* at 9a. This decision should not stand because Title VII's antidiscrimination provision contains no such requirement.

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 or had a transfer request denied because of her sex easily satisfies this standard. *See Chambers v. District of Columbia*, 35 F.4th 870, 872 (D.C. Cir. 2022) ("[A]n employer that transfers an employee or denies an employee's transfer request because of the employee's . . . sex . . . violates Title VII by discriminating against the employee with respect to the terms, conditions, or privileges of employment."); *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 or a material employment disadvantage, 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), 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 materially adverse effects.

Although the Civil Rights Act that Congress ultimately passed did not include this itemized list detailing the extent of "terms, conditions, or privileges of employment," 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 (Apr. 13, 1964) (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"); *id.* at 11251 (May 19, 1964) (statement of Sen. Tower) (offering amendment to Title VII that he explained would permit employers to give certain ability tests to those "seeking employment or being considered for promotion *or transfer*, and then act upon the results" (emphasis added)).

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 constitutes a "demotion in form or substance" or causes a "materially significant disadvantage" for the employee, Pet. App. 9a.

ARGUMENT

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

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 . . . sex" or other protected characteristic. 42 U.S.C. § 2000e-2(a)(1). In considering whether this provision proscribes an employer from making employee transfer decisions based on sex, 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, or rejecting an employee's transfer request, because of sex or another protected characteristic. At the time of Title VII's passage, the ordinary meaning of "discriminate" was to "make a difference in treatment or favor (of one as compared with others)," *Webster's New International Dictionary* 745 (2d ed. 1959) [hereinafter *Webster's Second*], or to "make a difference in treatment or favor on a class or categorical basis in disregard of individual merit," *Webster's Third New International Dictionary* 648 (Philip Babcock Gove ed., 1961) [hereinafter *Webster's Third*]; *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 7218 (Apr. 8, 1964) (Sen. Clark Response to Dirksen Memorandum) ("To discriminate is to make distinctions or differences in the treatment of employees . . . ."); *id.* at 8177 (Apr. 16, 1964) (Sen. Tower reading Title VII Summary Prepared by National Association of Manufacturers) ("Presumably, 'discriminate' would have its commonly accepted meaning which . . . 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.'"); *id.* at 12617 (June 3, 1964) (statement of Sen. Muskie) ("Discrimination in this bill means just what it means anywhere: a distinction in treatment given to different individuals because of their [protected status]."). Thus, Title VII "make[s] it unlawful for an employer to make any distinction or any difference in treatment of employees because of [a protected characteristic]." *Id.* at 8177; *see also Chambers*, 35 F.4th at 874 ("'No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals.'" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006))).

Specifically, the statute prohibits "mak[ing] a difference in treatment or favor," *Webster's Second*, *supra*, at 745, "with respect to [an individual's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), on the basis of a protected characteristic. In 1964, much like today, "terms" meant "[p]ropositions, limitations, or provisions, stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement." *Webster's Second*, *supra*, at 2604. Similarly, the word "conditions" referred to "[a]ttendant circumstances [or an] existing state of affairs," and a "condition" meant "[s]omething established or agreed upon as a requisite to the doing or taking effect of something else." *Id.* at 556. And a "privilege" meant "[a] right or immunity granted as a peculiar benefit, advantage, or favor," *id.* at 1969, or "such right or immunity attaching specif[ically] to a position or an office," *Webster's Third*, *supra*, 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 sex, 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," *Webster's Second*, *supra*, at 2604) 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. Here, for example, Muldrow's transfer changed her work schedule from a traditional Monday-through-Friday schedule to a rotating schedule requiring her to work on weekends. Pet. App. 2a-4a; *see also Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) ("[I]t is straightforward to say that a shift schedule . . . counts as a term of employment.").

For the same reasons, a transfer also alters the "conditions" of an individual's employment by changing the "attendant circumstances" and "established or agreed upon" characteristics of her job. *See Webster's Second*, *supra*, at 556; *see also Chambers*, 35 F.4th at 874 ("[I]t is difficult to imagine a more fundamental term or condition of employment than the position itself." (quoting United States' Br. for Resp't in Opp. at 13, *Forgus v. Shanahan*, 141 S. Ct. 234 (2020), 2019 WL 2006239 (May 6, 2019), at *13)). Indeed, in this case, the "existing state of affairs," *Webster's Second*, *supra*, at 556, with respect to Muldrow's job was upended as a result of her transfer to a position at a new location with altogether different responsibilities than her prior assignment, Pet. 5-6; Pet. App. 2a-4a.

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 Webster's Third*, *supra*, at 1805. An officer in Muldrow's prior role, for instance, has specific rights and immunities—such as the right to work in

plain clothes and to pursue investigations outside of a fixed geographical area—that an officer in her subsequent role in the Fifth District did not, and vice versa. *See* Pet. App. 2a-4a. An employee's "privileges" therefore also change according to her position.

Thus, an employer who reassigns an employee or refuses to approve a requested transfer because of sex violates Title VII, even if the employee receives the same monetary compensation and benefits in her new position and cannot demonstrate harm to her future career prospects. At a minimum, an employer who makes such a transfer discriminates with respect to the "terms, conditions, *or* privileges of employment," as expressly prohibited by Section 703(a)(1). 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 Sav. 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 the Court 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 . . . discrimination [on the basis of a protected characteristic], 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 *Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). Given that, decisions regarding employee transfers that are made on the basis of sex necessarily affect the terms, conditions, or privileges of employment and accordingly violate Title VII.

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

Despite Title VII's straightforward language, which plainly bars discriminatory job transfer decisions, the court below imposed additional requirements with no basis in Section 703(a)(1)'s text. Relying on circuit precedent, the court below stated that in order to make a prima facie showing of discrimination, a Title VII plaintiff needs to show that she experienced a "tangible change in working conditions that produces a material employment disadvantage," Pet. App. 9a (quoting *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007)), and that "[a] transfer that does not involve a demotion in form or substance" cannot constitute the required "materially adverse employment action" for liability, *id.* (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)). It concluded that Muldrow failed to make that showing regarding her forced transfer, reasoning that her transfer "did not result in a diminution to her title, salary, or benefits" and noting that she offered "no evidence that she

suffered a *significant* change in working conditions or responsibilities and, at most, expresses a mere preference for one position over the other." *Id.* at 11a (emphasis added). It also concluded that Muldrow's showing as to her denied transfer request fell short because she did not "demonstrate how the sought-after transfer would have resulted in a material, beneficial change to her employment." *Id.* at 13a.

The court below was wrong to impose these requirements that do not exist anywhere in the text of the statute. Individuals "are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock*, 140 S. Ct. at 1749. Section 703(a)(1) of Title VII nowhere indicates that a plaintiff must show that she suffered an "adverse employment action" or any "material employment disadvantage"—let alone a "materially significant disadvantage" or that her transfer was a "demotion in form or substance." Pet. App. 9a; *see Chambers*, 35 F.4th at 875 (holding that "any additional requirement, such as . . . 'objectively tangible harm,' is a judicial gloss that lacks any textual support"). Rather, as explained above, a Title VII plaintiff must simply show that she was treated differently because of her sex (or another protected characteristic) with respect to the compensation, terms, conditions, or privileges of her employment. *See Bostock*, 140 S. Ct. at 1743 (explaining that an "employer violated Title VII because . . . it could not 'pass the simple test' asking whether an individual female employee would have been treated the same regardless of her sex" (quoting *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978))). Once this fact is established, "the analysis is complete." *Chambers*, 35 F.4th at 874-75. Petitioner made this showing. *See* Pet. App. 2a-4a, 6a (indicating that

Respondent reassigned Muldrow, who was serving in the Intelligence Division, to a position in the Fifth District, where she was "required to work a rotating schedule including weekends," lost the ability to work in plain clothes and in an unmarked vehicle, and had different responsibilities, allegedly because of sex).

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 Muldrow brought her discrimination claim under Section 703(a)(1) alone. Pet. 7-8. In fact, Congress's inclusion of the phrase "adversely affect" in Section 703(a)(2) only underscores that it knew how to include such a requirement when it wanted to. It omitted similar language from Section 703(a)(1), and the court below was wrong to import a similar requirement into this provision. *See Barnhart v. Sigmon Coal Co.*, 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)), that provision is "not coterminous" with Title VII's *antidiscrimination* provision in Section 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)). *White*, 548 U.S. at 67-68 (emphasis omitted). 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." *Id.* at 56 (quoting 42 U.S.C. § 2000e-3(a)). Examining the two provisions' "linguistic differences," this Court has determined that, unlike the antidiscrimination provision, the antiretaliation provision "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 62-64.

"[O]nly after adopting this expansive interpretation of the antiretaliation provision" did this Court establish that provision's limiting principle. *Chambers*, 35 F.4th at 876-77. This Court held that the antiretaliation provision "prohibit[s] employer actions that are likely 'to deter victims of discrimination from complaining,'" *White*, 548 U.S. at 68 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)), in order to achieve the provision's "primary purpose" of "[m]aintaining *unfettered access* to [Title VII's] remedial mechanisms," *Robinson*, 519 U.S. at 346 (emphasis added). 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." *White*, 548 U.S. at 57.

Unlike the antiretaliation provision, Title VII's antidiscrimination provision (Section 703(a)(1)) should not be read to impose a heightened material 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 its purpose justifies imposing an additional

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[2] Furthermore, 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 under principles of agency, vicarious liability is appropriate when a "supervisor takes a tangible employment action against the subordinate"). Additionally, *Ellerth* permits employers to use an affirmative defense to avoid liability when no tangible employment action occurred, implicitly demonstrating that "there are cases covered by Title VII that are *not* tangible employment actions." 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, 384 (1999).

adversity requirement for a claim of discrimination under Section 703(a)(1).

III. Requiring a Plaintiff Alleging Disparate Treatment to Show a Materially Significant Disadvantage 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 N. Sanchez, Note, *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 a protected characteristic is not actionable under federal employment discrimination laws 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*, 122 F.3d at 1144 (same); *Trujillo v. New Mexico Dep't of Corr.*, 182 F.3d 933 (table), 1999 WL 194151 at *3 (10th Cir. Apr. 8, 1999) (same); *see also* Pet. 10 (explaining that the circuits have adopted divergent approaches to determining what conduct is actionable under Section 703(a)(1) and that "[o]nly the D.C. and Sixth Circuits have applied 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), *pet. dismissed*, 140 S. Ct. 2841 (2020) (mem.). In doing so, the court took as true that the plaintiff's employer discriminated against him as to his "*working conditions*"—plainly satisfying the terms of the statute—but it nevertheless affirmed the dismissal of his case based on the imposition of wholly atextual requirements. *Id.* at 373 (emphasis added). 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 . . . discrimination [on the basis of a protected characteristic], subtle or otherwise." *McDonnell Douglas*, 411 U.S. at 801. Thus, a transfer on the basis of sex or other protected characteristics is actionable under Title VII, regardless of whether a plaintiff can show that she suffered an "adverse employment action" that produces "a material employment disadvantage," Pet. App. 9a; *see Chambers*, 35 F.4th at 872 (holding that "an employer that transfers an employee or denies an employee's transfer request because of the employee's . . . sex . . . violates Title VII"); *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 sex-based job transfers that alter the terms, conditions, or privileges of an individual's employment, regardless of whether there are materially 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 define "terms, conditions, or privileges of employment," the historical record demonstrates that those terms should have the same meaning as in the Senate bill, which expressly prohibited discriminatory job transfers. Indeed, after H.R. 7152 was passed in the House of Representatives and 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 [EEOC] almost a free hand

to interfere with virtually every aspect of employer-employee relationships." 110 Cong. Rec. 7763 (Apr. 13, 1964). He worried that the EEOC Chair "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 id.* (emphases added); *see also id.* at 7778 (Apr. 13, 1964) (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)); *id.* at 11251 (May 19, 1964) (statement of Sen. Tower) (offering an amendment to Title VII that he explained would permit employers to give certain ability tests to those "seeking employment or being considered for promotion *or transfer*, and then act upon the results" (emphasis added)).

Indeed, in a debate a few weeks before Congress passed the Civil Rights Act, Senator Edmund Muskie twice 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 queried, "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. 12618 (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"); Lidge, *supra*, at 399 n.414, 403-04 (making this comparison and explaining the NLRA provision's comprehensive breadth).

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 a materially significant disadvantage.

CONCLUSION

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

Respectfully submitted,

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