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 A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE*, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, IN SUPPORT OF PETITIONER

CAROLYN L. WHEELER
Counsel of Record
KATZ BANKS KUMIN LLP
11 Dupont Circle
Suite 600
Washington, D.C. 20036
(202) 299-1140
wheeler@katzbanks.com

STEPHEN B. PERSHING
PERSHING LAW PLLC
1416 E Street, N.E.
Washington, D.C. 20002
(202) 642-1431

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1985, the National Employment Lawyers Association (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

Petitioner has asked the Court to resolve whether Title VII's prohibition of discrimination in "terms, conditions, or privileges of employment," 42 U.S.C.

[1] Pursuant to S. Ct. R. 37.6, *Amicus Curiae* submits that no counsel for any party participated in any way in the authoring of this Brief. In addition, no other person or entity, other than *Amicus Curiae*, has made any monetary contribution to the preparation and/or submission of this Brief. Counsel of record for all parties received timely notice of *Amicus*'s intent to file this Brief, and counsel for all parties consented in writing to the filing of this Brief pursuant to S. Ct. R. 37.2.

§ 2000e-2(a)(1), applies only to conduct that, in a court's view, causes materially significant disadvantages for employees. Pet. for Writ of Cert. at i. *Amicus Curiae* NELA joins Petitioner in urging the Court to grant the petition in this case because of the disarray in the law, *see* Pet. for Writ of Cert. at 10-24, which can only be alleviated by the Court's announcement of a clear rule that is faithful to the statutory text. *Amicus Curiae* urges review because the Eighth Circuit's rule that blatant employment discrimination is actionable only when it constitutes a "tangible change in working conditions that produces a material employment disadvantage," Pet. App. at 9a (citing *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922 926 (8th Cir. 2007)), is untenable. It has no textual support, conflicts with this Court's precedent defining actionable discrimination and retaliation under Title VII, denies to victims of discrimination remedies that Congress designed for their protection, leads to inconsistent results, and fails to recognize the significant effects of non-economic injuries in the workplace.

ARGUMENT

I. The Court should review this case to clarify that the Eighth Circuit's atextual standard creates an impermissible barrier to the adjudication of meritorious employment discrimination claims.[2]

Petitioner has comprehensively demonstrated the entrenched circuit split on the applicable standard for cases challenging discrimination in terms, conditions, and privileges of employment. Pet. for Writ of Cert. at 10-24. As that survey demonstrates, under formulations requiring proof of tangible harm or, as here, materially significant disadvantages, all of the lower courts prior to the recent decisions by the D.C. Circuit in *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (*en banc*), and the Sixth Circuit in *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021), occasionally denied relief to victims of discrimination on the basis that the employment actions they challenged were beyond the reach of the statute because they did not have economic consequences. Such a categorical limitation cannot be squared with Title VII's commands.

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[2] The Court's ruling in this case would have profound importance to claims of employment discrimination beyond those brought under Title VII, as the proper understanding of discrimination in terms, conditions, and privileges of employment impacts similar claims under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), the Americans with Disabilities Act, 42 U.S.C. § 12112(a), the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff-1(a)(1), and Section 1981, 42 U.S.C. § 1981(b).

Section 703(a)(1) of Title VII bars "discriminat[ion]" based on protected characteristics "with respect to [an individual's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Discrimination simply means differential treatment, or, as this Court has explained, "[a]s used in Title VII, the term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1740 (2020) (quoting *Burlington Northern*, 548 U.S. at 59); *see also Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020) (discrimination carries its "'normal definition,'" which is "'differential treatment'" (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005))). In *Bostock*, the Court held that the touchstone inquiry under Title VII is not whether an employee suffered economic harm, but whether she was treated "worse" than men in the same job. *Bostock*, 140 S. Ct. at 1740.

Congress intended the prohibition on discrimination in the "terms, conditions, or privileges" of employment "to strike at the entire spectrum of disparate treatment," not merely "economic or tangible discrimination." *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (internal quotation marks and citation omitted). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (noting that Title VII's prohibition on discrimination extends beyond "'terms' and 'conditions' in the narrow contractual sense" (quoting 42 U.S.C. § 2000e-2(a)(1))); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976)

("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination.").

As this Court put it in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), "terms, conditions, or privileges" of employment under Title VII include any and all benefits that are "part and parcel of the employment relationship," that are "'incidents of employment,'" or that "'form an aspect of the relationship between the employer and employees[,]'" and they may "not be doled out in a discriminatory fashion, even if the employer would be free . . . simply not to provide the benefit at all." *Id*. at 74-75 (citations omitted). To obtain or keep the position one desires is clearly a fundamental term or condition of employment, in the transfer context as much as in the hiring context, and thus, a discriminatory transfer or the discriminatory denial of a transfer request should be actionable just as a discriminatory failure to hire is actionable.

It should be noted that the term "adverse employment action" itself is a judicial gloss on Title VII, not a part of the statutory text. The concept of "adverse action" arose out of the original articulation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), of a *prima facie* evidentiary burden on plaintiffs as part of an "order and allocation of proof" in Title VII cases. *Id.* at 800. The Court specified, in the failure-to-hire context of its decision, that as part of the *prima facie* showing a plaintiff had to show "that, despite his qualifications, he was rejected." *Id*. at 802. As the Court later explained, this production burden was designed

to eliminate the two most likely legitimate explanations for the employment action—lack of qualifications, and absence of a job opening (the latter specifically for failure-to-hire cases like *McDonnell Douglas* itself). *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (explaining the evidentiary purpose of the *prima facie* showing).

In adapting the *prima facie* evidentiary burden to non-hiring cases, courts extrapolated from the third element a general requirement that plaintiffs must identify an "adverse action" to state a claim. However, the *McDonnell Douglas* Court did not hold, and Title VII itself does not provide, that the only cognizable "adverse actions" are those with direct monetary consequences to the employee. The Eighth Circuit and others that have required a showing of additional "materially adverse consequences" causing "objectively tangible harm," by which they mean economic harm, have embroidered the statutory language in a manner that totally obscures the simple command of Title VII that there be no discrimination in terms, conditions, or privileges of employment.

People are injured by discriminatory treatment that does not necessarily have an economic dimension. That is precisely why Congress amended Title VII in 1991 to add compensatory and punitive damages to the available remedies under the statute. Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a(a)-(b). As the Court explained in discussing the damages provisions of the 1991 Act, Title VII now "allows monetary relief for some forms of workplace discrimination that would not

previously have justified *any* relief under Title VII" because monetary relief was unavailable absent "some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994) (emphasis in original). The *Landgraf* Court further clarified that Title VII now "allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the 'terms, conditions or privileges of employment,' 42 U.S.C. § 2000e-2(a)(1), even though the discrimination did not involve a discharge or a loss of pay." *Id.* This "major expansion in the relief available to victims of employment discrimination," the Court recognized, was designed to further Title VII's "'central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" *Id.* at 254-55 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

Moreover, the development of harassment jurisprudence over the past four decades is rooted in the premise that Title VII reaches far beyond "'economic or tangible discrimination'" and extends to the "'entire spectrum of disparate treatment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). This Court's explication of the liability standards applicable to supervisory harassment confirms that employment actions like the denial of transfer requests in this case constitute "tangible

employment actions," and if they occurred in the context of other harassing conduct would render the employer vicariously liable. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). Although the Court in *Ellerth* expressed the expectation that a tangible employment action "in most cases inflicts direct economic harm," resulting from events "such as hiring, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," *id.* at 762, the decision did not require proof of economic harm to prove an action was "tangible." The limiting term "in most cases" plainly signals that in some cases actionable tangible employment actions will not inflict economic harm. The Court's purpose in contrasting tangible and intangible supervisory actions was to create different standards for employer liability in distinct categories of cases, not to explicate the contours of tangible actions. Thus, the Court distinguished between supervisory actions that alter the work environment but are not employment actions, such as verbal threats and propositions (which are actionable under a hostile environment theory when they are severe or pervasive, but for which the employer has an affirmative defense to liability), and employment actions that are the official acts of the enterprise, such as the denial of a transfer (for which there is no such affirmative defense). *Id.*

The Court further reinforced the principle that Title VII prohibits more than economic forms of discrimination when it articulated a rule for the limitations period applicable to hostile work environment cases in

National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002). There the Court distinguished hostile environment harassment cases in which the unlawful employment practice does not occur on any particular day, but takes place over a series of days, from discrete acts which do occur on a particular day, and which constitute separate actionable employment practices. *Morgan* specifically identified discrete acts "such as termination, failure to promote, denial of transfer, or refusal to hire" which are easily identifiable and are each separately actionable. *Id.* The Court's inclusion of denial of transfers as one of the discrete, identifiable, actionable practices under Title VII further confirms that claims of discriminatory transfer (or discriminatory denial of a transfer) should be treated no differently from claims of bias-based termination, refusal to hire, or failure to promote.

The Court's treatment of retaliation claims demonstrates the same recognition of Title VII's sweeping scope. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). In *White*, the Court held that the anti-retaliation provision of Title VII prohibits materially adverse actions, which means, in the retaliation context, that they are sufficiently detrimental to dissuade a reasonable worker from pursuing a discrimination complaint. *Id.* at 68. Nothing in that formulation requires that either a retaliation or a discrimination plaintiff must meet a burden of showing that an undesirable transfer's materially adverse consequences include an economic detriment. Although the Court emphasized the differences in the language of the

discrimination and retaliation provisions of Title VII, it did so only to explain why the retaliation provision could apply to actions unrelated to employment or causing harm outside the workplace. *Id.* at 63-64.

Of course, a discrimination plaintiff must prove some harm to be entitled to equitable or monetary relief, but that is the only constraint needed to "separate significant from trivial harms" in discrimination cases. *See id.* at 68. As the Court said in *Bostock*, the differential treatment in Title VII cases is treatment " 'that injure[s] [protected individuals.' " 140 S. Ct. at 1740 (citation omitted). This Court has observed in another context that victims of intentional discrimination "suffer[ ] a profound personal humiliation." *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (exclusion from jury service). The humiliation and distress caused by being treated differently in a term, condition, or privilege of employment because of one's sex or race is the injury Title VII is designed to redress, and to create an extra hurdle to obtaining that relief by requiring that the challenged employment action have an economic dimension intolerably subverts the purpose of the statute.

II. The Court should reject the economic "tangible harm" requirement because its pernicious effects are manifest in the decisions rejecting viable claims on this basis.

Courts that require a showing of a "materially adverse action" often leave employees with no remedy for egregious discrimination except to quit their jobs and

hope a court will understand they suffered a constructive discharge. For example, in *Stewart v. Union Cty. Bd. of Educ.*, 655 Fed. App'x. 151, 157 (3d Cir. 2016), the Third Circuit said a Black school security guard could not establish a materially adverse action based on his transfer from his position at a high school to a middle school, which he alleged was a less prestigious position. The plaintiff in *Stewart* also alleged that the racially discriminatory transfer ignored the satisfaction he derived from being valued and needed at the high school. *Id*. The Third Circuit held that because job transfers were not listed as potentially actionable tangible actions in *Ellerth*, 524 U.S. at 761, Stewart could not base a claim on his transfer. *Stewart*, 655 Fed. App'x. at 155.

In a similar case, an ADEA plaintiff resigned because "her new assignment was a public humiliation." *Spring v. Sheboygan Area School District*, 865 F.2d 883, 885 (7th Cir. 1989). The Seventh Circuit affirmed summary judgment for the employer, holding that an ADEA plaintiff (like a Title VII plaintiff) must prove she suffered a "materially adverse" change in the terms or conditions of her employment because of the challenged conduct. *Id*. Ms. Spring's new contract was for a longer term and she would have received a pay increase, but the panel opinion also cited facts including that Ms. Spring would have been transferring from a school with students of diverse backgrounds to the principalship of two schools with students of upper middle class backgrounds, and from a school with a program for emotionally disturbed children to schools

with no special programs, implying that the conditions of the new assignment were the opposite of materially adverse. Thus, the court not only discounted the plaintiff's evidence of adverse consequences, but also substituted its own racially insensitive view of the circumstances to support its conclusion that her transfer was not materially adverse. *Id.* at 886.

The results in *Stewart* and *Spring* should have been foreclosed by this Court's analysis in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), in which a class of city truck drivers claimed that they were denied the opportunity to work as over-the-road, long-distance line drivers because of their race. The Court noted that the issue was whether they were being treated less favorably in any respect and rejected the notion of a "materially adverse" standard, holding that "Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another." *Id.* at 338 n.18. In making that simple, powerful statement, the Court embraced the definition of discrimination as meaning differential treatment without the need for an added showing that the treatment was economically worse, either in compensation or otherwise. *Id.*

The unwarranted material adverse action requirement has also denied relief in cases in which employers, based on prohibited factors, denied employees job training, *Shackleford v. Deloitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999); *Ford v. Cty. of Hudson*, 729 F. App'x 188, 195 (3d Cir. 2018), a choice of desirable work shifts, *Hamilton v. Dallas Cty.*, 42 F.4th 550

(5th Cir. 2022), *pet. for reh'g en banc filed* (Aug. 16, 2022), and the option of choosing to work remotely, *Kelso v. Perdue*, 2021 WL 3507683 at *5 (D.D.C. July 12, 2021). Additionally, courts have denied relief in cases in which employers, based on race or sex, gave an employee a negative performance review, *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 n.11 (5th Cir. 1998), forced employees to work in harsh weather conditions, *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.), or placed an employee on probation, *Thompson v. Liberty Mut. Ins.*, 2021 WL 1712277 at *5 n.8 (D.N.J. Apr. 29, 2021). None of these outcomes can be squared with the text or purpose of Title VII.

The D.C. Circuit recognized in *Ortiz-Diaz v. United States Department of Housing & Urban Development*, 867 F.3d 70 (D.C. Cir. 2017), that the administration of a purported bright-line rule that discriminatory transfers without pecuniary harm are beyond the reach of Title VII is problematic. The district court in *Ortiz-Diaz*, based on circuit precedent, held the plaintiff's lateral transfer did not amount to an adverse employment action, and granted summary judgment for the employer. 75 F. Supp. 3d 561, 565 (D.D.C. 2014). On appeal, the D.C. Circuit acknowledged that lateral transfers are ordinarily not changes in the terms, conditions, or privileges of employment, but then reversed summary judgment and held that the allegation that the plaintiff sought to move away from a biased supervisor to avoid harm to his career advancement potential,

rather than merely as a personal preference, was sufficient to state a claim, and in fact "falls within Title VII's heartland." 867 F.3d at 74, 75. In his concurrence, then-Judge Kavanaugh noted that the uncertainty involved in drawing the line between actionable and non-actionable transfers militated in favor of establishing the clear principle that "[a]ll discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII." *Id.* at 81 (Kavanaugh, J., concurring).

This line-drawing uncertainty leads courts to focus on egregious facts or "extraordinary circumstances," as the district court described them in *Ortiz-Diaz*, 75 F. Supp. 3d at 565, that might support finding that an unwanted transfer constitutes actionable discrimination. But as in other areas of the law, egregious facts do not "mark the boundary of what is actionable." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (noting that the appalling conduct alleged in *Vinson* and other egregious harassment cases did not set the standard for what is actionable, and that a worker's emotional and psychological stability need not be destroyed to state a claim).

So too here. Adherence to the straightforward language of the statute prohibiting discrimination because of sex in the terms, conditions, or privileges of employment will best serve the statutory purpose of eradicating employment discrimination. Plaintiffs in transfer cases, like all discrimination plaintiffs, will still have the burden of proving that the challenged employment action was taken because of their

membership in a protected class. Further, to obtain back pay or damages, plaintiffs in transfer cases, like all discrimination plaintiffs, will have to prove they suffered compensable harm. These burdens are sufficiently heavy to forestall any imagined flood of court challenges to employment decisions that are motivated by legitimate business purposes.

III. The Court should grant the petition and acknowledge, as contemporary social science research demonstrates and the noted cases illustrate, that non-economic aspects of terms, conditions, or privileges of employment are as critical to employees as wages or salaries.

When the Eighth Circuit decided *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997), the precedent cited in *Muldrow*, *see* Pet. App. at 9a, social scientists had just begun examining conditions other than wages or salaries as factors in employees' sense of self-worth, motivation, job satisfaction, and productivity. *See*, *e.g.*, Robert J. Bies and Thomas M. Tripp, *Two Faces of the Powerless: Coping with Tyranny*, in R. M. Kramer & M. A. Neale, eds., *Power and Influence in Organizations* 203-219 (Sage Pubs. 1998); Loraleigh Keashly, V.G. Trott, and L.M. MacLean, *Abusive Behavior in the Workplace: A Preliminary Investigation*, 9 Violence & Victims 341 (1994).

In the twenty-five years since the *Ledergerber* decision, survey research on these issues has convincingly demonstrated that non-monetary elements of

work are critical to employees' job satisfaction and performance. A comprehensive 2010 review of the social science literature on job satisfaction concluded that "in general[,] the findings [of the reviewed studies] suggested little relationship between level of pay and satisfaction with one's job or [with] one's pay." Timothy A. Judge, Ronald F. Piccolo, Nathan P. Podsakoff, John C. Shaw, and Bruce L. Rich, *The Relationship between Pay and Job Satisfaction: A Meta-analysis of the Literature*, 77 J. Voc. Behav. 157, 162-63 (2010). A 2012 report on federal employment concluded that "[j]ob characteristics such as autonomy, feedback, skill variety, task significance, and task identity" have as much influence on employee motivation as monetary rewards. U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* at 30 (2012) *available at* https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=780015&version=782964.

A 2001 study, not limited to employment, provided new evidence that "warm, trusting, and supportive interpersonal relationships" are essential for human well-being, both "hedonic" (measured by pleasure attainment and pain avoidance) and "eudaimonic" (focused on meaning, self-realization, and full functioning). Richard M. Ryan and Edward L. Deci, *On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being*, 52 Ann. Rev. Psychol. 141, 154 (2001). And a 2003 study of workplace dynamics found that "individuals seek meaning through a connection with others" in their

work. Amy Wrzesniewski, Jane E. Dutton and Gelaye Debebe, *Interpersonal Sensemaking and the Meaning of Work*, 25 Rsch. in Org. Beh. 93, 135 (2003).

An important 2006 study of American workplaces, using a new 21-item job design and satisfaction survey scale developed by the authors, cited the Ryan and Wrzesniewski findings and confirmed that "[t]hese kinds of positive work relationships are likely to be just as effective at producing [feelings of job satisfaction] as are the more traditionally studied motivational work characteristics." Frederick P. Morgeson and Stephen E. Humphrey, *The Work Design Questionnaire (WDQ): Developing and Validating a Comprehensive Measure for Assessing Job Design and the Nature of Work*, 91 J. Appl. Psychol. 1321, 1329 (2006).

Two key points emerge from the available social science. First, modern research strongly confirms that prosocial and antisocial behaviors in the workplace, and their constructive or destructive emotional consequences, are critically important to workers, often as or more important than wages or monetary benefits. Second, people value jobs for a variety of reasons, many of them intangible or values-based, and courts should not discount those reasons as mere personal preferences or discount to *de minimis* an employer's discriminatory attacks on them where employee compensation is not directly involved. On both these grounds, it would fly in the face of available science not to deem these important non-pecuniary aspects of work life to be "terms and conditions of employment" within the meaning of Section 703(a) of Title VII.

Petitioner Muldrow's desire to remain in a position that was less administrative and more prestigious, despite the equivalent compensation in the two positions, underscores the validity of these observations from social science research. *See* Pet. App. at 9. Likewise, the experiences of the security guard in *Stewart*, 655 Fed. App'x at 157, and the school principal in *Spring*, 865 F.2d at 885, exemplify the reality that values other than money weigh heavily in employees' assessment of the adversity of employers' discriminatory decisions.

This Court now has the opportunity to recognize that Title VII protects against employers' selective allocation of any benefits and burdens, including nonmonetary benefits, based on race, sex, religion, or other unlawful criteria.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* NELA respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

CAROLYN L. WHEELER
Counsel of Record
KATZ BANKS KUMIN LLP
11 Dupont Circle
Suite 600
Washington, D.C. 20036
(202) 299-1140
wheeler@katzbanks.com

STEPHEN B. PERSHING
PERSHING LAW PLLC
1416 E Street, N.E.
Washington, D.C. 20002
(202) 642-1431

Counsel for Amicus Curiae