No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Sheena Hamilton
City Counselor
Counsel of Record
Alexis Silsbe
Associate City
Counselor
CITY OF ST. LOUIS
LAW DEPARTMENT
1200 Market Street
Room 314
St. Louis, MO 63103
(314) 622-4621
hamiltons@stlouis-mo.gov

Counsel for Respondent City of St. Louis

QUESTION PRESENTED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it 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." 42 U.S.C. § 2000e-2(a)(1). The regional circuits that have definitively interpreted this language have construed it to reach only actions that cause material, objective harm to employees.

The question presented is:

Whether a violation of § 703(a)(1) of Title VII requires material, objective harm, as the only courts that have definitively spoken have held.

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STATEMENT OF THE CASE

Both Male And Female Police Officers, Including Petitioner, Are Transferred Across The St. Louis Police Department

On April 17, 2017, Respondent City of St. Louis appointed Lawrence O'Toole Interim Police Commissioner for the St. Louis Police Department. Police Captain Michael Deeba became Commander of the Intelligence Division. Pet. App. 3a. Commissioner O'Toole announced the transfer or detachment of 17 male officers and 5 female officers across the Department. *Id.* These kinds of staffing changes are common at the Department "when a new commander comes in." C.A. App. 213; *see* C.A. App. 52 (Petitioner acknowledging that "periodic[]" reassignments are "normal").

Petitioner Jatonya Clayborn Muldrow, a police sergeant, was one of four officers—two male and two female—transferred out of the Intelligence Division. Pet. App. 3a.[1] Petitioner was laterally transferred to the Fifth District, where the Department needed additional sergeants. C.A. App. 309. Petitioner retained her pay and rank, a supervisory role, and responsibility for investigating violent crimes, like homicides and robberies. Pet. App. 10a. The Fifth District position was also no less dangerous than Petitioner's desk job in the Intelligence Division. Indeed, in the Fifth District Petitioner was responsible for street-level

[1] Contrary to Petitioner's representation (at 5), there were female officers in the Intelligence Division who retained their positions there. C.A. App. 310.

patrolling and responding to "Code 1" calls related to crimes like homicides, robberies, assaults, and home invasions. Pet. App. 3a-4a.

Soon after, Petitioner informally sought a transfer, not back to her previous role in the Intelligence Division, but to the Second District. Pet. App. 5a-6a, 32a. She said that, upon transfer, she would have been assigned as an administrative aide to the Second District Captain, Angela Coonce. *Id.*

Before the Department acted on any transfer request, Petitioner was transferred back to her former position in the Intelligence Division. Pet. App. 6a.

Out of Petitioner's over two-decade career in the Department, *see* C.A. App. 52, she spent only eight months as a sergeant in the Fifth District, Pet. App. 10a. According to Petitioner's own deposition testimony, her time in that position had no harmful effect whatsoever on her career prospects. Pet. App. 10a, 41a-42a.

Petitioner Sues For Gender Discrimination And Loses In The District Court For Failure To Adduce Evidence Of Harm

Petitioner brought this gender-discrimination action under Title VII of the Civil Rights Act of 1964. Pet. App. 6a. Petitioner claimed that her transfer to the Fifth District, and the alleged failure to approve her transfer requests thereafter, violated § 703(a)(1) of the Act, which makes it 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 … sex[.]" 42 U.S.C. § 2000e-2(a)(1).

The district court granted summary judgment for the City, reasoning that Petitioner failed to offer evidence of an "adverse employment action." Pet. App. 39a-44a, 47a-49a. The district court did not proceed to evaluate whether Petitioner failed to present evidence adequately supporting the allegation that it acted with discriminatory animus. *See* Pet. App. 44a, 48a-49a.

The district court determined that Petitioner had not presented evidence that would allow a reasonable jury to find that she had been transferred to a less desirable position, Pet. App. 41a-43a, or that the alleged failure to transfer her to an administrative aide position harmed her career, Pet. App. 47a-48a. In so finding, the court stressed that Petitioner "herself admitted that her transfer to the Fifth District did not cause any harm to her opportunities for advancement." Pet App. 41a-42a. The court also observed that she failed to show that her Fifth District responsibilities "material[ly] deviat[ed] from" those she had in the Intelligence Division. Pet. App. 43a.

The court added that certain allegations of "alterations of employment" resulting from her transfer (such as schedule changes, the geographic limits imposed on her investigations, and her new uniform)

were not raised in her summary-judgment opposition and were therefore forfeited. Pet. App. 44a n.20.[2]

The Eighth Circuit Affirms On The Same Basis

The court of appeals affirmed. The Eighth Circuit agreed with the district court that summary judgment was proper because Petitioner failed to submit evidence allowing a jury to find that "she experienced an adverse employment action." Pet. App. 9a.

The Eighth Circuit listed the "factors" it generally considers when examining whether an "involuntary transfer" or "denial of a sought-after transfer" rises to the level of an adverse employment action: such as whether it results in (or, in the case of a denial, would have resulted in) "a change in supervisory duties, prestige, schedule and hours, or promotion potential." Pet. App. 13a. The court emphasized that differences between positions must be "material" to give rise to a discrimination claim. Pet. App. 9a, 13a. "Minor" or "trivial" changes do not suffice. Pet. App. 9a.

As to Petitioner's transfer to the Fifth District, the Eighth Circuit held that in her summary-judgment submission Petitioner failed to support her assertion that Fifth District work was "more administrative and less prestigious." Pet. App. 10a. The court explained that Petitioner did not offer evidence that would allow a reasonable jury to find that she "suffered a significant change in working conditions or responsibilities" or "proof of harm resulting from [her]

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[2] The court observed that these other changes likely were not "material" anyway. Pet. App. 44a n.20.

reassignment." Pet. App. 11a. All that was left was Petitioner's "mere preference for one position over the other." *Id.* The court held that this was insufficient to support a claim that Petitioner had suffered an adverse employment action. *Id.*

As to the alleged denial of Petitioner's request for a transfer to an administrative-aide position in the Second District, the Eighth Circuit noted that "there is, in fact, not a denial for us to review." Pet. App. 15a. Captain Coonce had "only made two informal requests" that never reached the Police Commissioner, and the only request that Petitioner herself had made (also informal, Pet. App. 32a & n.12) remained pending at the time of her transfer back to the Intelligence Division. Pet. App. 15a; *see* Pet. App. 30a-31a & n.11. The court concluded in any event that Petitioner had not offered sufficient evidence that the administrative aide position was more "high profile." Pet. App. 13a-15a. And it emphasized Petitioner's admission that her time in the Fifth District had not "harm[ed] her career prospects" in any way. Pet. App. 15a. Thus, the supposed denial of Petitioner's transfer request also did not amount to an adverse employment action. *Id.*

Like the district court, the court of appeals had no occasion to and did not address whether Petitioner presented adequate evidence at summary judgment that the City had acted with discriminatory animus. *See* Pet. App. 15a.

REASONS TO DENY CERTIORARI

There is no circuit conflict warranting this Court's review. The courts of appeals broadly agree that only

materially adverse employment actions are cognizable under § 703(a)(1) of Title VII. No court of appeals has read § 703(a)(1) as wholly eliminating a harm requirement. Petitioner points to different outcomes in different cases, but those results are the product of different factual circumstances, not materially different legal standards. The Fifth Circuit has adopted a more stringent requirement than other courts, but that court recently granted en banc review on that matter. *Hamilton v. Dallas Cnty.*, 42 F.4th 550, 555 (5th Cir.), *reh'g en banc granted*, 50 F.4th 1216 (5th Cir. 2022). Thus, there is no need for this Court to engage on the subject at this juncture.

This Court has repeatedly and recently denied certiorari petitions on the same question presented that petitioner seeks to raise here. The Court should deny this petition as well.

I. There Is No Circuit Split Warranting This Court's Review.

The courts of appeals broadly agree with the Eighth Circuit that, to prevail on a Title VII discrimination claim, a plaintiff must prove that there was an "adverse employment action." Pet. App. 8a. Under this standard, a plaintiff must be subject to "a *meaningful difference* in the terms [and conditions] of employment." *Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021) (Sutton, C.J.) (emphasis added); *see* Pet. App. 11a (requiring evidence of "a significant change in working conditions"); *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94 (1st Cir. 2012) (employer's action "must *materially* change the conditions of plaintiffs' employ"); *Davis v. N.Y. City*

Dep't of Educ., 804 F.3d 231, 235 (2d Cir. 2015) (requiring a "material[]" or "significant" employment action); *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004) (action must be "serious and tangible enough to alter" conditions of employment); *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (requiring "some significant detrimental effect"); *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 743-44 (7th Cir. 2002) (using "tangible," "significant," and "material[]" interchangeably); *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1012-13 (9th Cir. 2018) (action must "materially affect[] the terms or conditions of … employment"); *Piercy v. Maketa*, 480 F.3d 1192, 1204-05 (10th Cir. 2007) (change in employment must result in "*substantial[]* differen[ces]"); *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1265-66 (11th Cir. 2021) (requiring "tangible" or "significant" employment actions), *petition for cert. filed*, No. 22-231 (U.S. Sept. 8, 2022); *see also Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc) ("more than de minimis harms," like "depriv[ing] an employee of an employment opportunity," qualify).

Although this harm/adversity requirement is a "limiting principle," it is not a high bar: The purpose is to divide "meritorious cases from trivial personnel actions." *Lewis v. City of Chicago*, 496 F.3d 645, 653 (7th Cir. 2007); *see Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (the "adverse employment action" requirement is based on the understanding that "Title VII [does not] provide redress for trivial discomforts endemic to employment"); *Davis*, 804 F.3d at 235 (requiring an employer's action to be "more disruptive than a mere inconvenience"). That is, the requirement

is aimed at foreclosing claims, like Petitioner's, grounded on nothing besides a plaintiff's bare "preference." Pet. App. 11a. The district court and the Eighth Circuit reasonably applied this more-than-de-minimis-harm requirement here. As both courts found—because Petitioner admitted it—the transfer and the alleged denial of a transfer at issue "did not harm her future career prospects." Pet. App. 10a, 15a, 41a-42a, 48a; *see* Pet. App. 11a (noting further that she "offer[ed] no evidence that she suffered a significant change in working conditions or responsibilities").

The Fifth Circuit stands apart from the other circuits in applying an "especially restrictive" understanding of § 703(a)(1) that affects outcomes in some cases. *See* Pet. 12. There, only "ultimate employment decisions, such as hiring, granting leave, discharging, promoting, or compensating" are actionable under Title VII. *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007). But two months ago, the Fifth Circuit vacated a decision applying its "ultimate employment decisions" standard, deciding to reconsider its outlier position en banc. *Hamilton v. Dallas Cnty.*, 42 F.4th 550, 555 (5th Cir.), *reh'g en banc granted*, 50 F.4th 1216 (5th Cir. 2022). Thus, there is no need or reason to grant review here based on a claimed conflict with that position. And this case, where the Fifth Circuit's approach was not applied, would not be a proper vehicle for reviewing that Circuit's approach in any event.[3]

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[3] Petitioner's lengthy discussion (at 12-14) of the reasoning underpinning the Fifth Circuit's rule and its purportedly

Beyond the Fifth Circuit's position (now being reconsidered en banc), Petitioner's claimed circuit split is largely a creature of invention. None of the remaining regional circuits constrains cognizable adverse employment actions under Title VII to those that entail "ultimate employment decisions." *Contra* Pet. 10-11, 15. And none of them—not even the Fifth Circuit—requires "pocketbook" economic harm, as much as Petitioner attempts to point to that formulation as another line of distinction. *See* Pet. 12, 16-17, 19, 21, 25. Moreover, the circuits are in agreement that a lateral transfer may at least in some circumstances give rise to a Title VII claim, depending on the factual context. As we detail below, a fair assessment of the cases reveals not "confusion," Pet. 23, but general consensus.

First Circuit. In the First Circuit, an employer's action sufficient to trigger Title VII "must materially change the conditions of plaintiffs' employ." *Cham*, 685 F.3d at 94. Petitioner tries to paint several circuits, including the First, as "toggl[ing] between many varying adverse-employment-action tests." Pet. 11. But even if there were *intra*-circuit discord, which is what Petitioner seems to be suggesting, that would

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aberrant outcomes are thus beside the point. Similarly, Petitioner is wrong to cast this case (at 2-3) as a chance for the Court to "do … what it did not have the opportunity to do" in *Peterson v. Linear Controls, Inc.*, No. 18-1401. *Peterson* arose out of the Fifth Circuit and presented the question whether the employment actions "covered by Section 703(a)(1) [are] limited only to hiring, firing, promotions, compensation, and leave[.]" Pet., No. 18-1401 at i (U.S. May 7, 2019), 2019 WL 2024844. Far from being "identical" to the question presented here, Pet. 2, that question is simply not at issue.

not be a basis for this Court's review. The cases that Petitioner cites simply reflect application of an adverse-employment-action test to a wide range of varying factual circumstances.

For example, there is no "inconsisten[cy]" in the First Circuit decisions that Petitioner compares (at 16-17) when one looks at the underlying facts. The First Circuit reasonably held in *Cham* that the "loss of three shifts … where schedules fluctuate and no employee is entitled to any given shift" did not constitute a "material" change in plaintiff's conditions of employment. 685 F.3d at 94-95. Meanwhile, the court held actionable the transfer of a correctional officer from a radio-communications position to an inmate-commissary position with "significantly different responsibilities." *Caraballo-Caraballo v. Corr. Admin.*, 892 F.3d 53, 61 (1st Cir. 2018). The different outcomes reflect materially different fact patterns, not different legal standards.

Second Circuit. Under *Davis*, 804 F.3d at 235, the Second Circuit requires a "material[]" or "significant" employment action. Petitioner's claim (at 17) of "confusion" simply reflects that "not all" job transfers meet the adverse-employment-action test. The court applied identical legal standards to reach appropriately disparate outcomes in *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980), and *De Jesus-Hall v. New York Unified Court System*, 856 F. App'x 328 (2d Cir. 2021), the cases Petitioner cites, based on the different facts presented by each case. In *Rodriguez*, an art teacher's transfer from junior high to elementary school was actionable because it led to a "radical change in the nature of the work" performed.

620 F.2d at 366. But a clerk's transfer from one division to another did not violate the statute, because the clerk demonstrated only that she "subjectively disliked" the new position. *De Jesus-Hall*, 856 F. App'x at 331.

Third Circuit. Consistent with the circuit consensus, the court holds that an employment action must be "serious and tangible enough to alter" conditions of employment in order to implicate Title VII. *Storey*, 390 F.3d at 764. Petitioner tries to group the Third Circuit together with the Fifth, reading it (at 15) to effectively apply the "ultimate-employment-decision standard." But Petitioner does not cite any Third Circuit case that turns on application of that standard. Indeed, the Third Circuit has held that a lateral transfer "even without loss of pay or benefits, may … constitute an adverse job action." *Torre v. Casio, Inc.*, 42 F.3d 825, 831 n.7 (3d Cir. 1994). And to the extent the Third Circuit has held that a particular lateral transfer failed to give rise to a Title VII claim, it emphasized that its decision was "depend[ent] on the attendant circumstances." *Langley v. Merck & Co.*, 186 F. App'x 258, 260 n.3 (3d Cir. 2006). The court recognized that "minor actions" like "moving a person's office to an undesirable location" could be actionable depending on the context, but that in the case at hand, the plaintiff had presented no "evidence that the new facilities [were] demonstrably inferior." *Id.* at 260 & n.3.[4]

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[4] Petitioner's descriptions (at 15-16) of *Stewart v. Union County Board of Education*, 655 F. App'x 151 (3d Cir. 2016), and

Fourth Circuit. The court requires "some significant detrimental effect." *Holland*, 487 F.3d at 219. Petitioner seeks to portray the court as holding that only conduct with "pocketbook consequences" is actionable under Title VII. Pet. 19. But in *Boone*, the court merely held, on the facts before it, that the plaintiff failed to show that her new position was "significantly more stressful than the last." 178 F.3d at 256.[5]

Sixth Circuit. While Petitioner claims that the Sixth Circuit has rejected an "adverse-employment-action requirement," Pet. 11, the court is firmly part of the circuit consensus, holding that a plaintiff must show "a meaningful difference in the terms [and

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Harris v. Attorney General United States, 687 F. App'x 167 (3d Cir. 2017), are likewise inapt because Petitioner discusses only the factual allegations at issue, and not the courts' determinations of evidentiary sufficiency. In *Stewart*, the plaintiff had "[c]rucially … neglected to respond to the defendants' Rule 56.1 Statement," and the court thus based its decision on the defendants' undisputed account of the material facts, which demonstrated no adverse employment action. 655 F. App'x at 153. Plaintiff's allegations in *Harris* similarly fell apart on summary judgment, after it became clear that plaintiff had been subject to no differential treatment but merely "assigned to complete one of his regular job duties." 687 F. App'x at 169.

[5] Neither of the other cases Petitioner cites (at 18-19) turns on the lack of pocketbook consequences. *See Cole v. Wake Cnty. Bd. of Educ.*, 834 F. App'x 820, 821-22 (4th Cir.), *cert. denied*, 141 S. Ct. 2746 (2021) (rejecting plaintiff's argument that was based on "mere speculation" that a new position would entail less responsibility); *Jensen-Graf v. Chesapeake Emps.' Ins. Co.*, 616 F. App'x 596, 597-98 (4th Cir. 2015) (plaintiff made no showing of an adverse employment action beyond her "dissatisfaction" with the job and "small, additional commuting expenses").

conditions] of employment." *Threat*, 6 F.4th at 678. The court is clear that "an employer's alteration of the 'terms' or 'privileges' of an employee's work is actionable only when it is 'adverse' and 'material' to the work." *Id.* And the court there expressly reconciled prior Sixth Circuit decisions which had found no material adversity in the context of "shift changes" and "related reassignment cases," emphasizing the factual and "contextual nature of these inquiries." *Id.* at 679.

The Sixth Circuit in *Threat* created no anomaly in rejecting the theory that § 703(a)(1) "reaches only employment decisions that cause the employee economic harm." *Id.* at 680. Petitioner provides no support for her contention (at 11-12) that any circuit has "endorsed" such an economic-harm test. The reality is that, like the other circuits, the Sixth Circuit applies an "adverse employment action" test that requires a "meaningful difference" in the terms and conditions of employment. *Threat*, 6 F.4th at 678.

Seventh Circuit. In articulating the applicable Title VII standard, the court uses "tangible," "significant," and "material[]" interchangeably. *Herrnreiter*, 315 F.3d at 743-44. Petitioner (at 20-21) claims that the Seventh Circuit strayed from Title VII's text in *EEOC v. Autozone, Inc.*, 860 F.3d 564 (7th Cir. 2017). But that case involved a claim arising not under § 703(a)(1), but under § 703(a)(2), which makes it unlawful to "limit, segregate, or classify … in any way which would … *adversely affect* [one's] status as an employee" on the basis of protected characteristics. 42 U.S.C. § 2000e-2(a)(2) (emphasis added). And the court there properly rejected the EEOC's argument

that it should overlook an "adverse [e]ffect[]" requirement taken directly from the statutory text. 860 F.3d at 568-69. *Autozone* does not distinguish the Seventh Circuit from its sister circuits on the question presented. Petitioner recognizes elsewhere (at 19-20) that, in § 703(a)(1) cases, the Seventh Circuit applies a garden-variety adverse-employment-action test.

Eighth Circuit. As the present case shows, the court holds that an employer's action must be "material" to give rise to a discrimination claim. Pet. App. 9a, 13a. "Minor" or "trivial" changes do not suffice. Pet. App. 9a.

Ninth Circuit. The court is part of the broad circuit consensus, holding an employment action must "materially affect[] the terms or conditions of … employment." *Campbell*, 892 F.3d at 1013. Contrary to Petitioner's suggestion (at 12), the court does not hold that lateral transfers categorically amount to adverse employment actions. In *Campbell*, for example, the plaintiff alleged that she was reassigned to teaching remedial math classes—rather than the music and French classes in which she had received training and certification. *Id.* at 1014-15. But there was no evidence that this reassignment "materially altered" the teacher's terms or conditions of employment, and the Ninth Circuit determined that her mere "prefer[ence]" for teaching certain classes did not suffice for a Title VII claim. *Id.* Nor does *Albro v. Spencer*, 854 F. App'x 169 (9th Cir. 2021), stand for the proposition that a transfer need not "cause[] a materially significant disadvantage." Pet. 12. There, the fact that the plaintiff experienced an adverse employment action was undisputed. 854 F. App'x at 170.

Tenth Circuit. Under *Piercy*, 480 F.3d at 1204-05, an employment action must result in "*substantial[]* differen[ces]" in the job. Petitioner misreads the case as somehow allowing a shift-assignment policy that consigns "women to objectively less-desirable shifts." Pet. 22. The court instead held that, notwithstanding plaintiff's views regarding the "desirability of certain shifts," the shifts were all in fact substantially similar. 480 F.3d at 1203-04. And where the plaintiff did produce evidence that a job transfer led to "substantial" differences in work conditions and duties, the court held there was an adverse employment action. *Id.* at 1205.

Eleventh Circuit. The court too is part of the consensus, holding that a "tangible" or "significant" employment action is required. *Davis*, 19 F.4th at 1265-66. Petitioner wrongly claims (at 22-23) that the Eleventh Circuit's determination in *Hinson v. Clinch County, Georgia Board of Education*, 231 F.3d 821, 830 (11th Cir. 2000), conflicts with the Eighth Circuit's decision below because it determined that a job transfer resulting in "a loss of prestige and responsibility" was actionable under Title VII. The Eighth Circuit concluded here that Petitioner failed to produce evidence that her job transfer resulted in a loss of prestige and responsibility. Pet. App. 10a-11a. By contrast, a wealth of evidence, beyond the plaintiff's mere say-so, led the court in *Hinson* to conclude that a "reasonable factfinder could conclude that [the plaintiff] suffered a loss of prestige and responsibility" as a result of her transfer. 231 F.3d at 829-30. Here again,

Petitioner confuses factual differences with different legal standards.[6]

D.C. Circuit. Petitioner correctly notes (at 11) that the en banc D.C. Circuit recently held that discriminatory employment actions amounting to "transfers" or "deni[als] [of] an employee's transfer request" violate Title VII. *Chambers*, 35 F.4th at 872. But the meaning and application of the D.C. Circuit's formulation in practice are still unknown.

Notably, the D.C. Circuit's standard seems to still have some substantive bite. The court expressly rejected the notion that anything that could be labeled a "job transfer" or the denial of a job transfer is necessarily actionable. *Chambers*, 35 F.4th at 874. Changes in "mere formalit[ies]" do not count; the transfer must involve, based on an analysis that the court has yet to fully lay out, "a new role, unit, or location." *Id.*; *see id.* at 901 (Katsas, J., dissenting); *infra* 17. The D.C. Circuit seemed to assume that transfers would generally cross a materiality threshold because they would deprive "an employee of an employment opportunity." *Chambers*, 35 F.4th at 875; *see id.* (explaining that "refusing a job transfer request[] [is] the functional equivalent of refusing to hire an employee for a particular position" (internal quotation marks and original alterations omitted)). The court did not address a

[6] A petition for certiorari similar to this one is pending in *Davis v. Legal Servs. Ala. Inc.*, No. 22-231 (U.S. Sept. 8, 2022), a Title VII case arising from the Eleventh Circuit and involving a short period of involuntary paid leave. In contrast to Petitioner's argument here, the argument there is that the Eleventh and Eighth Circuits are in accord in applying an "intermediate" Title VII test. *See* Pet. No. 22-231 at 10-11, 17.

context like the one here, where Petitioner conceded that her brief time during her lateral transfer to the Fifth District had not "harm[ed] her career prospects" in any way. Pet. App. 15a.

At bottom, the D.C. Circuit's new formulation appears to merely shift the harm calculus to equally fact-bound disputes regarding whether a particular employment action is meaningful enough to rise to the level of "discriminat[ion] against an employee with respect to that employee's 'terms, conditions, or privileges of employment.'" *Chambers*, 35 F.4th at 874-75. As the majority itself acknowledged, "the phrase is not without limits—not everything that happens at the workplace affects an employee's 'terms, conditions, or privileges of employment.'" *Id.* at 874. Characterizing an act a certain way—for example, calling it a "job transfer" (or the denial of a transfer)—does not eliminate the need to substantively evaluate its significance. That is why the majority caveated its holding, noting that "the mere formality of a change in [job] title" would not suffice. *Id.*; *cf. id.* at 884 (Walker, J., concurring in the judgment in part, dissenting in part) ("For example, a city that is restructuring its police department could change an employee's title from 'head detective' to 'chief investigator' without altering the role. Is that a job transfer? Possibly. Is the change in the chief investigator's terms, conditions, and privileges of employment negligible? Almost certainly."). Even Petitioner tacitly concedes that some "transfers" fall outside the statute, positing (at 33) that "if a transfer does not change *some* term or condition of an employment relationship, it is not a transfer."

Moreover, the D.C. Circuit expressly declined to reach the question of whether there should be any floor—"de minimis" or otherwise—on discriminatory conduct that might give rise to a Title VII claim. *Chambers*, 35 F.4th at 875. The court simply held that the "objectively tangible harm" standard it had previously imposed was too restrictive in barring, for example, claims based on "public humiliation or loss of reputation." *Id.* That approach is not necessarily in tension with the Eighth Circuit's adverse-employment-action standard, which allows intangible injuries, like loss of reputation or prestige, to potentially give rise to a Title VII claim. *See, e.g.*, Pet. App. 13a (noting that change in "prestige" afforded by a position may constitute an adverse employment action). Thus, whether there ends up being meaningful daylight between the D.C. Circuit's new formulation and the other circuits' adverse-employment-action standard remains to be seen.

In short, there is no circuit conflict requiring this Court's resolution at this juncture.

II. The Question Presented Does Not Otherwise Warrant Review At This Time.

Beyond claiming that there is a circuit conflict, Petitioner argues that the issue's importance favors the grant of review. But nearly all of Petitioner's arguments regarding this case's importance are addressed to supposedly egregious outcomes that might result from application of an "ultimate employment decisions" or "pocketbook injury" standard for Title VII claims. *See* Pet. 24-26. As discussed above (at 8-9

& n.3), this case does not present a vehicle to review those tests.

Petitioner offers alarmist hypotheticals (at 25-26) suggesting that facial discrimination and offensive and hostile work environments would go unchecked under the Eighth Circuit's approach. That scare tactic cannot withstand scrutiny. Petitioner does not cite any decision reaching the results hypothesized. That is because they do not exist. Overt and undeniable discrimination and offensive and hostile work environments are harmful by definition. Nor would the cases that Petitioner speculates about necessarily be constrained by the adverse-employment-action inquiry in giving rise to a discrimination claim. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986) (Title VII prohibits "the practice of creating a working environment heavily charged with" discrimination on the basis of protected characteristics (internal quotation marks omitted)).

Petitioner also tries to bootstrap review here by pointing to the Government's recent stance in *Peterson,* No. 18-1401, and *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (U.S. May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020). The Government's flip-flop on this issue (*see Peterson* Gov't Br. 15, 2020 WL 1433451; *Forgus* Gov't Br. 13, 2019 WL 2006239), however, is not a reason for this Court to jump in where there is a broad circuit consensus. Notably, this Court has denied review on the question presented here even after the Government's change in position, *Cole*, 141 S. Ct. 2746, thereby continuing a series of certiorari denials predating *Peterson* and *Forgus*, *see, e.g.*, *Welsh v. Fort Bend Indep. Sch. Dist.*, 141 S. Ct.

160 (2020); *Cardenas-Garcia v. Tex. Tech Univ.*, 546 U.S. 811 (2005); *Vasquez v. Snow*, 541 U.S. 936 (2004). The same result is warranted here.

III. This Case Is A Poor Vehicle To Address The Question Presented.

This case also provides an inappropriate vehicle for addressing the question presented, for three separate reasons.

First, as to the job transfer, Petitioner forfeited reliance upon most of the changes she now invokes to press her claim of discrimination. The district court found that Petitioner premised her claim only on loss of "networking opportunities" and a "brief[] conten[tion]" that "her job responsibilities" shifted "to administrative tasks concerning personnel and supervising officers who were on patrol." Pet. App. 40a-41a; *see* Pet. App. 44a n.20. Although Petitioner perfunctorily "alleged other alterations to her working conditions" in her summary-judgment opposition's "statement of facts," she "did not mention any of these changes in her argument against summary judgment" and thus did not preserve reliance on them. Pet. App. 44a n.20 (noting that the forfeited bases for her claim included "(1) having to return her take-home vehicle; (2) changes to her schedule, including having to work weekends; (3) not being able to work on investigations outside of St. Louis; and (4) having to work in plain clothes"); *see* D. Ct. Dkt. 50 at 22-23. Yet these are the changes on which Petitioner largely predicates her claim in this Court. *See* Pet. 33-34; *see also* Pet. 5-6.

Second, as to the alleged denial of a job-transfer request, the Eighth Circuit independently rejected this theory because there was "not a denial … to review." Pet. App. 15a. Petitioner incorrectly asserts (at 9 n.3) that "the court did not affirm the grant of summary judgment to the Department on that basis." *See* Pet. 29. The court of appeals explained that the lack of a formal transfer request was a "[f]urther"—that is, independent—ground for affirmance. Pet. App. 15a. The district court's findings are in accord. Pet. App. 30a-31a & n.11 ("a formal request" was "never made" and "there is no evidence that [any informal] request ever reached Comm'r O'Toole's office").[7]

Third, it is highly unlikely in any event that Petitioner could ever prevail on the merits of her underlying discrimination claim. As to both the transfer and the alleged denial of a transfer request, neither the district court nor the Eighth Circuit in their decisions below addressed whether there was sufficient evidence that the challenged conduct was discriminatory. *See* Pet. App. 15a, 44a, 48a-49a (neither court

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[7] The informal requests discussed above are the only requests at issue. Specifically, before this Court, Petitioner bases (at 6-7) her allegation of a denied transfer request solely on "informal conversations" Captain Coonce had with superior officers that never reached the Police Commissioner. Pet. App. 30a-31a & n.11. Petitioner does not rely upon a separate informal request by Petitioner herself, Pet. App. 32a & n.12, which the Eighth Circuit found deficient because it "remained pending at the time of her transfer back to the Intelligence Division." Pet. App. 15a; *see* Pet. App. 35a; *see also* Pet. App. 57a-58a (district court explaining, in the context of a retaliation claim not before this Court, that Petitioner "withdrew the request after being transferred back to Intelligence").

addressing this issue). As the summary-judgment record shows, the evidence underlying Petitioner's discrimination claim is extremely weak. *See, e.g.*, Pet. 4 (citing C.A. App. 347-48 (Captain Deeba calls Petitioner "Mrs. [Muldrow]" one time)). For example, the record does not support the contention that Petitioner was transferred because her Intelligence Division job was too "dangerous." Pet. 4. To the contrary, addressing street-level violent crime in the Fifth District is arguably more dangerous. *See* Pet. App. 3a-4a (describing Fifth District responsibilities).

IV. The Decision Below Is Correct.

Finally, review is unwarranted because the decision of the court of appeals is correct.

1. As the Eighth Circuit explained, the text of both § 703(a)(1) and its surrounding provisions most naturally yields an adverse-employment-action requirement. Start with § 703(a)(1)'s phrase "discriminate against." The provision makes it unlawful for an employer "to fail or refuse to hire or to discharge ... 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." 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

To "discriminate against" somebody, one must injure them. This Court has said so: "No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006) (citing § 703(a)(1) precedent).

Or as an opinion directly interpreting § 703(a)(1) puts it, "[t]o 'discriminate against' a person … would seem to mean treating that individual *worse* than others who are similarly situated." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020) (emphasis added). Petitioner quotes *Bostock* but ignores what it says. *See* Pet. 30; *Bostock*, 140 S. Ct. at 1753 ("As used in Title VII, the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." (some internal quotation marks omitted)). Petitioner's substantively incomplete quotation of Judge Easterbrook's opinion in *Minor* misses a similar point. *See* Pet. 29; *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) ("[t]he statutory term is 'discrimination,' and a proxy such as 'adverse employment action' often may help to express the idea—which the Supreme Court *has* embraced—that it is essential to distinguish between material differences and the many day-to-day travails and disappointments that, although frustrating, are not so central to the employment relation" that they violate Title VII). So too does Petitioner's repeated reliance on Chief Judge Sutton's opinion in *Threat*. *See, e.g.*, Pet. 32-33; *Threat*, 6 F.4th at 678 ("To 'discriminate' reasonably sweeps in some form of an adversity and a materiality threshold.").

2. The *ejusdem generis* canon recognizes that when "general words" (like the phrase "otherwise to discriminate against") "follow an enumeration of two or more things" (like "to fail ... to hire," to "refuse to hire," or "to discharge"), the general words "apply only to … things of the same kind or class specifically mentioned." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012); *see*

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1625 (2018). Here, because the specifically enumerated things ("fail[ing] … to hire," "refus[ing] to hire," and "discharg[ing]") are adverse employment actions that cause harm, "otherwise to discriminate" should be read the same way. *See Babb v. Wilkie*, 140 S. Ct. 1168, 1176 & n.4 (2020) (applying the *ejusdem generis* canon to similar phrase in the Age Discrimination in Employment Act).

3. Petitioner's overly broad reading of § 703(a)(1) would effectively erase § 703(a)(2) and its adverse-effect requirement.[8] If Petitioner were right (at 30) that § 703(a)(1)'s phrase "otherwise to discriminate against" reaches "any differential treatment," that phrase in substance would cover any employment action that "limit[s], segregate[s], or classif[ies]" based on protected characteristics. But Congress knew how to reach that broader range of activity. It did so in § 703(a)(2). The "usual rule" is that "when the legislature uses certain language in one part of the statute and different language in another, ... different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (internal quotation marks omitted). More than that, when Congress employed the broader formulation in § 703(a)(2), Congress paired it with a requirement that the limitation,

[8] Section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to 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) (emphasis added).

segregation, or classification must "tend to deprive an[] individual of employment opportunities or otherwise adversely affect his status." Petitioner's interpretation is thus doubly flawed: It eliminates Congress's distinction between § 703(a)'s two paragraphs, and it does so to avoid the latter paragraph's adverse-effect requirement.[9]

4. Under § 706(f)(1), Title VII's private-cause-of-action provision, only "aggrieved" individuals may pursue civil actions for violations of § 703(a)(1). 42 U.S.C. § 2000e-5(f)(1). "[A]ggrieved" means "[h]aving suffered loss or injury." Black's Law Dictionary 87 (revised 4th ed. 1968); *accord* 42 U.S.C. § 3602(i)(1) (Fair Housing Act defining an "[a]ggrieved" person as one who has "been injured by" an unlawful practice). This Court has interpreted the use of "aggrieved" in Title VII's private-cause-of-action provision to require Article III injury and more, by "excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176-78 (2011).

5. Finally, the Eighth Circuit's reading of § 703(a)(1)'s language ("terms, conditions, or

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[9] The same point defeats the Government's suggestion in *Peterson* that, because § 703(a)(2) expressly requires an adverse effect, § 703(a)(1) cannot be construed to impose such an element. *See Peterson* Gov't Br. 14 & n.3. Section 703(a)(1) does not need to include a similarly express requirement because, as explained above (at 22-23), the natural meaning of the phrase "otherwise discriminate against" already includes an element of adversity.

privileges of employment") accords with this Court's precedents. For example, in *Meritor*, this Court explained that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. … [The] mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to sufficiently significant degree to violate Title VII." 477 U.S. at 67 (some internal quotation marks omitted); *accord Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). As this Court has observed, "Title VII … does not set forth 'a general civility code for the American workplace.'" *White*, 548 U.S. at 68 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). Indeed, this Court has noted as much in construing "discriminated against" in a parallel Title VII provision to require "*material* adversity"—that is, "injury or harm." *Id.* at 67-68.

For all these reasons, the Eighth Circuit's approach is well grounded in the text and statutory context, as well as this Court's precedents. It does not warrant this Court's intervention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Sheena Hamilton
City Counselor
Counsel of Record
Alexis Silsbe
Associate City
Counselor
CITY OF ST. LOUIS
LAW DEPARTMENT
1200 Market Street
Room 314
St. Louis, MO 63103
(314) 622-4621
hamiltons@stlouis-mo.gov

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