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

BRIEF OF PROFESSORS SUJA A. THOMAS AND AMY J. WILDERMUTH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

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SUMMARY OF THE ARGUMENT

Title VII is unambiguous, and its ordinary public meaning at the time it was enacted made unlawful a wide range of actions employers may take because of a protected trait, including transfers. The phrase "significant disadvantage" appears nowhere in the language. Courts have nevertheless added this

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[1] In accordance with Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amici Curiae*, has made a monetary contribution for the preparation or submission of this brief.

language to create a "significant disadvantage" exception to the statute. But it is inconsistent with the statute's plain text and ordinary meaning.

Title VII has specific exceptions that permit lawful discrimination in certain limited circumstances. For example, employers must reasonably accommodate religion, unless the reasonable accommodation presents an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Based on this text, the Court recently decided that, unless an employer faces a "substantial" hardship, the employer must accommodate religion. *Groff v. DeJoy*, 143 S. Ct. 2279, 2296 (2023).

Unlike *Groff*, there is no statutory language creating an exception that permits an employer to act because of a protected trait unless the employee faces a substantial hardship. The Eighth Circuit, like other courts, has nonetheless, and with no basis in the text of the statute, added a requirement that transfers must cause a significant disadvantage to be unlawful.

The Eighth Circuit also effectively mandated that all transfers affect compensation. In so holding, the court again ignored the plain language of the statute that includes both "with respect to . . . compensation" and "with respect to . . . terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

This Court should give Title VII its plain meaning and hold that an employer's discriminatory action "with respect to [an employee's] compensation, terms,

conditions, or privileges of employment," including transfers, need not cause a significant disadvantage to be unlawful.

ARGUMENT

I. The statutory language is unambiguous and covers all transfers taken because of a protected trait.

A. Title VII's text encompasses a wide range of employment actions including transfers.

Where the language of a statute is unambiguous, we examine the meaning of those words. "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted."). In this case, the relevant statutory language from Title VII is as follows: "It shall be an unlawful employment practice 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). Because Congress enacted Title VII in 1964, the original public meaning of Title VII's text in 1964 controls. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 255.

The ordinary meaning of that language is set forth below.

*"[H]ire" meant "to engage the personal services of for a fixed sum: employ for wages." *Webster's Third New International Dictionary* 1072 (1961).[2]

*"[D]ischarge," was defined as the "release or dismissal esp. from an office or employment." *Webster's Third New International Dictionary* 644 (1961).[3]

This plain language provides that these two specific practices would be unlawful if taken because of a protected trait. Congress also set forth additional grounds that would be unlawful using the language "otherwise to discriminate."

*"[O]therwise" was commonly defined as "in a different way or manner." *Webster's Third New International Dictionary* 1598 (1961).[4]

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[2] *See, e.g.*, *Hire*, *The American Heritage Dictionary of the English Language* 624 (1969) ("to engage the services of (a person) for a fee; to employ"); *Hire*, *The Random House Dictionary of the English Language* 673 (1966) ("to engage the services of for wages or other payment"); *Hire*, *Black's Law Dictionary* 863 (4th ed. 1968) ("[c]ompensation for the use of a thing, or for labor or services").

[3] *See, e.g.*, *Discharge*, *The American Heritage Dictionary of the English Language* 375 (1969) ("[t]o dismiss from employment"); *Discharge*, *The Random House Dictionary of the English Language* 409 (1966) ("to relieve or deprive of office, employment, etc."); *Discharge*, *Black's Law Dictionary* 549 (4th ed. 1968) ("[t]o . . . remove from employment").

[4] *See, e.g.*, *Otherwise*, *The American Heritage Dictionary of the English Language* 931 (1969) ("[i]n another way; differently"); *Otherwise*, *The Random House Dictionary of the English*

*"[T]o" was "a function word to indicate addition, attachment, connection, belonging, possession, accompaniment, or response." *Webster's Third New International Dictionary* 2401 (1961).[5]

*"[D]iscriminate" was commonly defined as "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 (1961).[6]

Using the phrase "otherwise to discriminate," Congress provided additional employer actions that would violate Title VII. These other unlawful actions were "with respect to [the employee's] compensation, terms, conditions, or privileges of employment."

Language 1019 (1966) ("in another manner; differently"); *Otherwise*, *Black's Law Dictionary* 1253 (4th ed. 1968) ("[i]n a different manner; in another way, or in other ways").

[5] *See, e.g.*, *To*, *The American Heritage Dictionary of the English Language* 1349 (1969) ("[c]oncerning or regarding"); *To*, *The Random House Dictionary of the English Language* 1489 (1966) ("used for expressing aim, purpose, or intention").

[6] *See, e.g.*, *Discriminate*, *The American Heritage Dictionary of the English Language* 376 (1969) ("[t]o act on the basis of prejudice"); *Discriminate*, *The Random House Dictionary of the English Language* 411 (1966) ("to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs, rather than according to actual merit").

*"[W]ith" was "a function word to indicate a qualification or proviso." *Webster's Third New International Dictionary* 2626 (1961).[7]

*"[R]espect" was commonly defined as "to have regard or reference to: relate to: be concerned with." *Webster's Third New International Dictionary* 1934 (1961).[8]

When interpreting Title VII, courts have ignored the phrase "with respect to" by not defining or otherwise giving meaning to it. This phrase encompasses discrimination relating to or concerned with the language that follows it. In other words, it is unlawful for an employer "otherwise to discriminate" "with respect to" or "relat[ing] to" or *in ways having to do with* an employee's "compensation, terms, conditions, or privileges of employment." The meaning of the next words in the text, "compensation," "terms," "conditions," "privileges," and "of employment," in combination with "with respect to," describe the range of additional actions covered by the statute.

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[7] *See, e.g.*, *With*, *The American Heritage Dictionary of the English Language* 1471 (1969) ("in relationship to"); *With*, *The Random House Dictionary of the English Language* 1640 (1966) ("in some particular relation to"); *With*, *Black's Law Dictionary* 1776 (4th ed. 1968) ("denoting a relation of proximity, contiguity, or association").

[8] *See, e.g.*, *Respect*, *The American Heritage Dictionary of the English Language* 1107 (1969) ("[t]o relate or refer to; to concern"); *Respect*, *The Random House Dictionary of the English Language* 1221 (1966) ("relation or reference").

*"[C]ompensation" was defined as "payment for value received or service rendered." *Webster's Third New International Dictionary* 463 (1961).[9]

*"[T]erms" was defined as "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Webster's Third New International Dictionary* 2358 (1961).[10]

*"[C]onditions" was defined as "attendant circumstances: state of existing affairs." *Webster's Third New International Dictionary* 473 (1961).[11]

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[9] *See, e.g.*, *Compensation*, *The American Heritage Dictionary of the English Language* 271 (1969) ("[s]omething given or received as an equivalent or as reparation for a . . . service"); *Compensation*, *The Random House Dictionary of the English Language* 300 (1966) ("something given or received as an equivalent for services"); *Compensation*, *Black's Law Dictionary* 354 (4th ed. 1968) ("[t]he remuneration or wages given to an employee or, especially, to an officer. Salary, pay, or emolument").

[10] *See, e.g.*, *Terms*, *The American Heritage Dictionary of the English Language* 1328 (1969) ("[c]onditions or stipulations that define the nature and limits of an agreement"); *Terms*, *The Random House Dictionary of the English Language* 1464 (1966) ("conditions or stipulations limiting what is proposed to be granted or done").

[11] *See, e.g.*, *Condition*, *The American Heritage Dictionary of the English Language* 277 (1969) ("[t]he particular mode or state of being of a person or thing"); *Condition*, *The Random House Dictionary of the English Language* 306 (1966) ("particular mode of being of a person or thing; situation with respect to circumstances"); *Condition*, *Black's Law Dictionary* 365 (4th ed. 1968) ("[m]ode or state of being; state or situation; essential quality; property; attribute").

*"[P]rivilege" was defined as "a right or immunity granted as a peculiar benefit, advantage, or favor." *Webster's Third New International Dictionary* 1805 (1961).[12]

*"[O]f" meant "relating to: with reference to: as regards." *Webster's Third New International Dictionary* 1565 (1961).[13]

*"[E]mployment" was defined as "work . . . in which one's labor or services are paid for by an employer." *Webster's Third New International Dictionary* 743 (1961).[14]

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[12] *See, e.g.*, *Privilege*, *The American Heritage Dictionary of the English Language* 1042 (1969) "a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual . . . "); *Privilege*, *The Random House Dictionary of the English Language* 1145 (1966) ("a grant to an individual . . . of a special right or immunity under certain conditions"); *Privilege*, *Black's Law Dictionary* 1359 (4th ed. 1968) ("[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens").

[13] *See, e.g.*, *Of*, *The American Heritage Dictionary of the English Language* 911 (1969) ("[b]elonging or connected to . . . [p]ossessing; having"); *Of*, *The Random House Dictionary of the English Language* 999 (1966) ("used to indicate possession, connection, or association"); *Of*, *Black's Law Dictionary* 1232 (4th ed. 1968) ("[a]ssociated with or connected with").

[14] *See, e.g.*, *Employment*, *The American Heritage Dictionary of the English Language* 428 (1969) ("the work in which one is engaged; business; profession"); *Employment*, *The Random House Dictionary of the English Language* 468 (1966) ("an occupation by which a person earns a living; work; business"); *Employment*, *Black's Law Dictionary* 618 (4th ed. 1968) ("an occupation, profession, trade, post or business").

These 1964 public meanings of "otherwise to discriminate," and "with respect to," "compensation," "terms," "conditions," and "privileges" "of employment" are broad, covering a wide range of employer action.

Although Congress defined many words in Title VII including employer, employee, and religion, it did not define "otherwise to discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment." Without specific definitions, those words are given their ordinary broad meaning. *See* Scalia & Garner, *supra*, at 69 ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."). This plain language of the statute broadly prohibits employers from taking actions that discriminate with respect to an employee's compensation, terms, conditions, or privileges of employment. *See Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022).

The statute reaches the employer action in this case. Petitioner was transferred from the Intelligence Division of the St. Louis Police Department to a different job and later did not receive a transfer to another different job. *See Muldrow v. City of St. Louis*, 30 F.4th 680, 684-86 (8th Cir. 2022). These actions have to do with the "conditions" or circumstances of employment—in particular, Petitioner's job description and other conditions of work. *See id.* The actions also could fall within "with respect to . . . terms . . . or privileges of employment." For example, the employer could have awarded transfers as a privilege of employment—such that it was a special advantage

for some employees and not others—and those transfers ended up being conferred because of a protected trait.

Given Title VII's text, when an employer takes an action to transfer an employee, the relevant question is whether that action was taken because of a protected trait. The plain language of the statute requires nothing more.

Despite this statutory command, courts have examined the effect of employers' discriminatory actions on employees, like Petitioner, to assess whether the harm is big enough to be unlawful. *See Hamilton v. Dallas Cnty.*, 42 F.4th 550, 556 (5th Cir. 2022) (examining alleged policy of discriminatory shift assignments because of sex and holding they are not actionable adverse employment actions), *overruled by Hamilton v. Dallas Cnty.*, No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023) (en banc); *Peterson v. Linear Controls*, *Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019) (examining alleged policy of working outside for black employees and inside for white employees and holding they are not actionable adverse employment actions), *questioned by Hamilton v. Dallas Cnty.*, No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023) (en banc); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004) (examining alleged discriminatory reassignment and negative evaluations and stating "'[a]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does

not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position' ") (quoting *Boone v. Goldin*, 178 F.3d 253, 256-57 (4th Cir. 1999)); *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002) (examining alleged discriminatory transfer and stating " '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. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either' ") (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239-46 (11th Cir. 2001) (examining work assignment changes and negative reviews and stating "a *serious and material* change in the terms, conditions, or privileges of employment" not present and ordering judgment as a matter of law after jury verdict favoring plaintiff).

This is inconsistent with the statute. None of the words in the statute permits a court to analyze whether the employer's action causes a significant disadvantage to the employee.

Some courts have attempted to find such a requirement in other language in the statute. They argue that Title VII's language that an employer "discriminate against" an individual and that the party be "aggrieved" requires an employer's discriminatory action cause a significant disadvantage to the employee to be unlawful. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1); *Chambers*, 35 F.4th at 889-90 (Katsas,

J., dissenting). They say these words mean an individual must suffer injury, and the person must suffer material injury because the statute does not cover de minimis injury. *See, e.g.*, *Chambers*, 35 F.4th at 889-90 (Katsas, J., dissenting).

These courts appear to suggest there is nothing in between significant and de minimis. That is not correct. "Significant" and "de minimis" are two very different concepts at two ends of the spectrum of unlawful employer actions that may be taken against employees because of a protected trait. *See Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021) (Sutton, J.) (stating "de minimis means de minimis" and expressing concern about the meaning of de minimis becoming like "'the children's game of telephone'") (quoting *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 337 (6th Cir. 2014)); *cf. Groff*, 143 S. Ct. at 2292 ("Of course, there is a big difference between costs and expenditures that are not 'substantial' and those that are 'de minimis,' which is to say, so 'very small or trifling' that they are not even worth noticing.") (quoting *Black's Law Dictionary* 388 (5th ed. 1979)).

Importantly, contrary to these courts' interpretation, the ordinary meaning of "discriminate against" and "aggrieved" does not denote significant disadvantage.

*"[D]iscriminate against" had a particular meaning at the time Title VII was enacted.

*"[A]gainst" was defined as "in opposition or hostility to." *Webster's Third New International Dictionary* 39 (1961).[15]

"[D]iscriminate against" meant to treat someone differently in a negative way. *See id.*; *Discriminate*, *Webster's Third New International Dictionary* 648 (1961) ("to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit"). "[A]ggrieved" also has a similar meaning.

*"[A]ggrieved" was defined as "showing grief, injury, or offense." *Webster's Third New International Dictionary* 41 (1961).[16]

These definitions show the meanings of "discriminate against" as well as "aggrieved" do not add any requirement of significant harm. Congress defined what was unlawful. If an employer takes an action because of a protected trait that affects an employee's "compensation, terms, conditions, or privileges of employment," it is actionable.

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[15] *See, e.g.*, *Against*, *The American Heritage Dictionary of the English Language* 23 (1969) ("contrary to; opposed to"); *Against*, *The Random House Dictionary of the English Language* 26 (1966) ("in opposition to; adverse or hostile to"); *Against*, *Black's Law Dictionary* 84 (4th ed. 1968) ("[o]pposed to").

[16] *See, e.g.*, *Aggrieved*, *The American Heritage Dictionary of the English Language* 25 (1969) ("treated wrongly; offended"); *Aggrieved*, *The Random House Dictionary of the English Language* 28 (1966) ("wronged, offended, or injured"); *Aggrieved*, *Black's Law Dictionary* 87 (4th ed. 1968) ("[h]aving suffered loss or injury; damnified; injured").

Under the plain meaning of all of Title VII's text, the words do not require significant harm. Title VII's text is broad and covers a wide range of employment actions taken because of a protected trait. "[W]here . . . the words of the statute are unambiguous, the '"judicial inquiry is complete."'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))).

B. Title VII is unambiguous, and canons, including *ejusdem generis*, do not apply.

Where, as here, a statute is unambiguous, canons are inapplicable. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). Even if the text here was unclear, *ejusdem generis* would not apply.

Ejusdem generis "instructs courts to interpret a 'general or collective term' at the end of *a list* of specific items in light of any 'common attribute[s]' shared by the specific items." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (emphasis added) (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008)). Using this canon, in the context of the Federal Arbitration Act ("FAA"), this Court held the phrase "any other class of workers" at the end of the list "'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,'" was controlled by the specific classes that preceded it and thus was limited to transportation workers. *Id.* at 1787, 1790 (quoting 9 U.S.C. § 1).

As relevant here, Title VII's language states: "It shall be an unlawful employment practice 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).

Unlike the FAA, this relevant language in Title VII does not have a general term at the end of a list or have "a catchall phrase at the end of an enumeration of specifics." Scalia & Garner, *supra*, at 199. The specific language is "to fail or refuse to hire or to discharge any individual." "Otherwise to discriminate against" is separated from those words and does not reside as a catchall phrase after them. Instead, "otherwise to discriminate against" is defined by a completely different set of words that follows it: "with respect to his compensation, terms, conditions, or privileges of employment."

One reason for the use of the canon is an "obvious and readily identifiable genus" that can be "presume[d] that the . . . writer has . . . in mind for the entire passage." Scalia & Garner, *supra*, at 199. In the FAA, this genus was transportation workers. For Title VII's language, a genus does not exist. The words "otherwise to discriminate against . . . with respect to his compensation, terms, conditions, or privileges of employment" are not general words connected to and related to "hiring" and "discharge," like the general words of "any other class of workers" are connected to

and related to "seamen" and "railroad employees" in the FAA. Unlike how "seamen" and "railroad employees" help ascribe meaning to any other class of workers, we do not look to "hire" and "fire" to ascribe meaning to "otherwise to discriminate against." Instead, meaning is ascribed to "otherwise to discriminate against" through the words that follow it. Congress placed together "otherwise to discriminate against" and "with respect to compensation, terms, conditions, or privileges of employment" to cover different employer actions in the employment setting.

When reviewing this language, Judge Katsas identified the genus for "otherwise to discriminate against" as "material harm," while he also acknowledged "this phrase ["otherwise to discriminate against"] sweeps more broadly than the specific prohibitions regarding hiring and firing." *Chambers*, 35 F.4th at 890 (Katsas, J., dissenting). This Court, interpreting the same language in the Age Discrimination in Employment Act, noted that the obvious genus is "final decision[s]." *Babb v. Wilkie*, 140 S. Ct. 1168, 1176 n.4 (2020). These two readings—material harms versus final decisions—illustrate the problem with the use of the canon here. There is no genus. Trying to use this canon here is like fitting a square peg into a round hole. It does not work. *See* Scalia & Garner, *supra*, at 200-01 (showing many examples using canon).

Ejusdem generis also exists because the specific words would be superfluous if the general term is given "its broadest application." *Id.* at 199-200. For example,

if "any other class of workers" in the FAA meant all workers, "seamen" and "railroad employees" would be superfluous. "Hire" and "discharge" would not be superfluous if the meaning of "otherwise to discriminate against" was broad and not limited to material harms. Given its broadest application, "otherwise to discriminate against" would not encompass "hire" and "discharge." Instead, "otherwise to discriminate against" relates to a whole separate set of employment actions different from "hire" and "discharge," which means that "hire" and "discharge" would continue to have meaning and would not be superfluous.

C. Title VII has specific exceptions that permit employers to take actions because of a protected trait, and none applies to this case.

Under Title VII, if an employer discriminates because of a protected trait through hiring or firing or with respect to an employee's compensation, terms, conditions, or privileges of employment, the action is unlawful unless a statutory exception applies. "[W]hen Congress chooses *not to include* any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII." *Bostock*, 140 S. Ct. at 1747 (emphasis added).

Title VII contains several exceptions. For example, an employer can discriminate if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). Religious

institutions can discriminate by employing employees of a particular religion. 42 U.S.C. § 2000e-2(e)(2). Employers can discriminate in hiring and discharge because of a national security interest. 42 U.S.C. § 2000e-2(g)(1). There are also exceptions based on seniority and merit systems and professionally developed tests. 42 U.S.C. § 2000e-2(h). There is an exception to discriminate for the preferential treatment of Indians. 42 U.S.C. § 2000e-2(i). And employers must reasonably accommodate for religious observance or practice unless to reasonably accommodate would cause "an 'undue hardship on the conduct of the employer's business.'" *Groff*, 143 S. Ct. at 2286 (quoting 42 U.S.C. § 2000e(j)).

Nothing in Title VII permits an employer to transfer an employee because of a protected trait. Unlike the exceptions noted above, nothing in Title VII permits employers to discriminate when there is an undue hardship on the employer. Nor is there any provision that permits discrimination when there is something less than an undue hardship on the employee—or when there is less than a "substantial" or a "significant" disadvantage to the employee. The statute does not read, for example, that it is unlawful for an employer to discriminate with respect to an employee's compensation, terms, conditions, or privileges of employment "only where the employee faces a substantial hardship" or "only where the action causes a significant disadvantage to the employee." *Cf. Bostock*, 140 S. Ct. at 1740-41 ("Congress could have written the law differently. It might have said

that 'it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment.' . . . that is not the law we have.").

In *Groff*, this Court concluded that "[w]hat is most important is that 'undue hardship' in Title VII means what it says." *Groff*, 143 S. Ct. at 2296 (quoting 42 U.S.C. § 2000e(j)). Title VII means what it says. No such significant disadvantage to the employee is required. "[S]tatutory interpretation must 'begi[n] with,' and ultimately heed, what a statute actually says." *Id.* at 2294 (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 127 (2018)).

II. The Eighth Circuit added the language "significant disadvantage" to Title VII contrary to the plain meaning of the statute.

When examining the scope of Title VII's coverage of employment actions, courts have not focused on its actual language. Instead, they have added language. Almost all courts, including the Eighth Circuit, state an employer must take an "adverse" employment action. *See, e.g.*, *Muldrow*, 30 F.4th at 687 ("the plaintiff-employee must show . . . she experienced an adverse employment action"); *EEOC v. AutoZone, Inc.*, 860 F.3d 564, 569 (7th Cir. 2017) ("It's well established that a purely lateral job transfer does not normally give rise to Title VII liability under subsection (a)(1) because it does not constitute a materially adverse employment action."); *James*, 368 F.3d at 375 ("Regardless of the route a plaintiff follows in proving

a Title VII action . . . the existence of some adverse employment action is required."). But those words do not exist in the statute. *See Threat*, 6 F.4th at 678-79 (Sutton, J.) ("'[H]undreds if not thousands of decisions say that an "adverse employment action" is essential to the plaintiff's prima facie case' even though 'that term does not appear in any employment-discrimination statute.'") (quoting *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006)).

While shorthand language such as "adverse action" may be appropriate in certain settings, such language is inappropriate when it adds meaning to a statute. *See Threat*, 6 F.4th at 679 (Sutton, J.) ("[S]horthand characterizations of laws should not stray."). That is what has happened here. Through imported language, courts state what they think the statutory language should be—as opposed to state what the language actually is. For example, the Eighth Circuit used adverse employment action as a shorthand to describe Title VII's language and then defined "'[a]n adverse employment action'" as "'a tangible change in working conditions that produces a material employment disadvantage,'" and further stated that an action must have a "'materially significant disadvantage.'" *Muldrow*, 30 F.4th at 688 (quoting *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007) and *Jackman v. Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013)); *cf. Chambers*, 35 F.4th at 875 ("*Brown* made no attempt to ground the requirement of an 'objectively tangible harm' in the statute.").

None of those words—"tangible," "material," "significant," or "disadvantage"—appears in Title VII's text. *See Threat*, 6 F.4th at 678-79 (Sutton, J.) (after describing "'adverse employment action'" is not in Title VII, stating "the same can be said about a 'materiality' requirement") (quoting *Minor*, 457 F.3d at 634). Those words also do not appear in the definitions of the relevant statutory text. As this Court has recognized, "[i]f the statutory language is plain, we must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 486 (2015). For example, in *Costa*, the Court did not require direct evidence to obtain a mixed-motive instruction under Title VII because the language of the statute was clear. "On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Costa*, 539 U.S. at 98-99. Here, Title VII does not include any additional qualifying words such as "significant disadvantage." It therefore should not be required.

III. The Eighth Circuit did not give effect to Title VII's "with respect to compensation" language.

Almost every Circuit that has addressed the scope of Title VII ignores some of its language. Most Circuits refer only to the language "terms, conditions, or privileges." *See, e.g.*, *Chambers*, 35 F.4th at 874-75 ("Once it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the

analysis is complete. The plain text of Title VII requires no more."); *James*, 368 F.3d at 375 ("An adverse employment action is a discriminatory act which 'adversely affect[s] "the terms, conditions, or benefits" of the plaintiff's employment.'") (quoting *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) (quoting *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997))); *Sanders v. N.Y.C. Hum. Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004) (stating Title VII claim includes "a 'materially adverse change' in the terms and conditions of employment").

Courts also generally fail to define the relevant statutory text including the words they mention and thus ignore what those words mean. *See, e.g.*, *Chambers*, 35 F.4th at 874 (defining "discriminate against" but not "terms, conditions, or privileges of employment"); *Piercy v. Maketa*, 480 F.3d 1192, 1204 (10th Cir. 2007) (citing Title VII's language without defining its terms); *Storey v. Burns Int'l. Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004) (stating adverse employment action standard is derived from Title VII's language without defining the terms "compensation, terms, conditions, or privileges of employment").

Courts then add a requirement that the employer's action cause some type of "significant disadvantage" to the employee. *See, e.g.*, *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94 (1st Cir. 2012) ("[A]n employment action 'must *materially* change the conditions of plaintiffs' employ.'") (quoting *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010)); *James*, 368 F.3d at 376 ("The question is whether there was a change in

the terms or conditions of his employment which had a 'significant detrimental effect' on his opportunities for promotion or professional development.") (quoting *Boone*, 178 F.3d at 256); *Davis*, 245 F.3d at 1235 ("Because we agree that Davis failed to prove the kind of serious, material change to the terms, conditions, or privileges of his employment required to obtain relief under Title VII's anti-discrimination clause, we affirm.").

Almost invariably, these Circuits also say that the significant disadvantage has an economic effect or the possibility of affecting the employee's job prospects. Implicit is some economic loss then or in the future. *See, e.g.*, *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1316 (10th Cir. 2017) ("For discrimination claims, '[a]n adverse employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' ") (quoting *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 635 (10th Cir. 2012)); *Herrnreiter*, 315 F.3d at 744 ("The cases paraphrase this either as 'a tangible employment action,' that is, 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' ") (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)); *James*, 368 F.3d at 376 (" '[A]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new

position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position.'") (quoting *Boone*, 178 F.3d at 256-57); *Hinson v. Clinch Cnty.*, 231 F.3d 821, 829 (11th Cir. 2000) ("In a Title VII case, a transfer to a different position can be 'adverse' if it involves a reduction in pay, prestige or responsibility.").

In this case, the Eighth Circuit acted similarly. It ignored some of the relevant statutory text and added other requirements unconnected to the text. The court said to be unlawful the action must "'cause [a] materially significant disadvantage.'" *Muldrow*, 30 F.4th at 688 (quoting *Jackman*, 728 F.3d at 804). Discussing the meaning of its imported words "materially significant disadvantage," the Eighth Circuit repeatedly referred to requiring a reduction in pay and/or benefits, *id.* at 688 (citing *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997), *Holland v. Sam's Club*, 487 F.3d 641, 645 (8th Cir. 2007), and *Zhuang v. Datacard Corp.*, 414 F.3d 849, 854 (8th Cir. 2005)), appearing to mandate an economic effect on the employee for an employer's action to be unlawful.

Pay and benefits are always "with respect to . . . compensation." If an employer discriminates because of a protected trait having to do with pay or benefits, that would be a compensation claim. For example, a forced transfer that involved a reduction in pay would be a compensation claim.

Although the Eighth Circuit and most other circuits have ignored "with respect to . . . compensation," the Sixth Circuit focused on compensation as well as the subsequent language, stating that "[a]s the words after 'compensation' suggest, Title VII indeed extends beyond 'economic' discrimination." *Threat*, 6 F.4th at 680 (Sutton, J.) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). It then follows from Title VII's text that a forced transfer that did not involve a reduction in pay or benefits would be a claim "with respect to . . . terms, conditions, or privileges of employment." Similarly, in *Threat*, where the relevant action—a shift change—taken by the employer because of race did not involve a change in compensation, the court held the action was unlawful because the shift change was a term and a privilege of employment. 6 F.4th at 678-80.

Moreover, although not necessary, if the Court were to look to canons, requiring an economic effect on an employee violates the surplusage canon. A transfer that affects compensation is "with respect to his compensation" and one that does not affect compensation falls within "with respect to . . . a term, condition, or privilege of employment." The latter may involve a change in terms and conditions without a change in compensation such as new job responsibilities and a new location. If transfers must affect compensation, the language of "terms, conditions, or privileges of employment" will be rendered superfluous. Scalia & Garner, *supra*, at 174, 176 (stating to be consistent with surplusage canon "[i]f possible, every word and provision is to be given

effect. . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

* * * *

The plain text of Title VII says it is unlawful to discriminate because of a protected trait in hiring and discharge and otherwise to discriminate with respect to an employee's compensation, terms, conditions, or privileges of employment. This last phrase covers a broad array of actions related to employment, including the transfer at issue in this case. There is no language to support what courts have required, including, as here, that the action cause a significant disadvantage to the employee.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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