No. 22-193

# In The
# Supreme Court of the United States

JAYTONYA 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 THE LEGAL AID SOCIETY AND THE NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICI CURIAE*

The Legal Aid Society is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. The Society's Civil Practice operates trial offices in all five boroughs of New York City providing comprehensive legal assistance. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for discrimination, unpaid wages, and retaliation for objecting to wage theft or discrimination. In the Society's experience, low-wage workers, who generally lack means of recourse, are all too often subjected to discriminatory treatment in the day-to-day terms and conditions of their employment, including discriminatory job scheduling and work assignments, discriminatory evaluations and discipline, and discriminatory denial of access to training and other growth opportunities. These forms of discriminatory mistreatment have a profound impact on our clients' well-being. Moreover, in *Amicus*'s experience, employers who discriminate based on prohibited characteristics often use these forms of discriminatory treatment to try to force employees out of their jobs without having to fire them.[1]

The National Employment Law Project ("NELP") is a national non-profit legal organization with over 50

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[1] *Amici* file this brief pursuant to Sup. Ct. R. 37.3. This brief has been authored entirely by *Amici*'s counsel, and no Party or Party counsel, or any other person or entity, has contributed money or other financial support to fund the preparation or filing of this brief. *See* Sup. Ct. R. 37.6.

years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, including protections against discrimination at work. NELP's community-based partners, including worker centers, unions, and other worker-support organizations in communities across the 50 states, have long seen the kinds of discrimination at issue here, and have a particular interest in how this Court resolves this case. NELP has litigated and participated as an *amicus curiae* in numerous cases in a variety of fora, including at this Court, to address the importance of eradicating discrimination in labor and employment.

## SUMMARY OF ARGUMENT

In both her certiorari petition and opening brief, Appellant persuasively explains why the various glosses that the Courts of Appeal have applied to Title VII contravene the text of the statute. *See* 42 U.S.C. § 2000e-2(a)(1). This Court should restore Title VII to the scope of its plain text, giving effect to the statute as enacted by Congress, and need not consider more than the text and surrounding statutory provisions to do so. *Amici* write to underscore the stakes of this case for millions of workers across the country, and to explain to the Court the effect of well-developed but atextual doctrines through which federal courts have for

decades imposed heightened requirements on workers who have suffered discrimination.

By requiring "material disadvantage," "objectively tangible harm," an "ultimate employment decision," or, as the Eighth Circuit has framed its longstanding precedent in this and other cases, "significant disadvantage," the Courts of Appeals have tacitly blessed numerous forms of unlawful workplace discrimination that impose enormous burdens on workers. Indeed, attorneys at the Legal Aid Society and elsewhere have long had to explain to current and prospective clients that federal courts have allowed discrimination in, for example: lateral job transfers; shift scheduling; imposition of discipline; performance evaluations; denial of training; and provision of merit-based performance awards. These types of discrimination impose dignitary, professional, and—even where Courts do not recognize it as such—economic harm, which poisons American workplaces. *Amici* urge the Court to consider this context on the way to reversing the Eighth Circuit and restoring Title VII to the clear bounds set out in its plain text.

## ARGUMENT

The Courts of Appeals have all imposed different but uniformly atextual glosses on the plain text of Title VII. Title VII makes it unlawful for an employer to discriminate against an employee "with respect to his compensation, terms, conditions, or privileges of

employment," on the basis of various characteristics. 42 U.S.C. § 2000e-2(a)(1). By purporting to require some sort of heightened showing of harm for plaintiffs alleging discrimination as to terms and conditions of their employment, federal courts have effectively removed workers who experience several types of clear workplace discrimination from receiving the protection of the law. And as a survey of some of the decisions creating and applying those atextual standards demonstrates, the people who lost those suits suffered real and serious discrimination of exactly the types that Congress addressed.

The types of discrimination that have flourished under the erroneous interpretation of the law affect workers of all sorts. Discrimination falls particularly hard on hourly workers and others who do not control their own schedules, because courts have treated avowedly discriminatory schedule assignments as non-actionable. But even salaried workers in fields requiring advanced degrees regularly suffer workplace discrimination with no remedy. *Amici* highlight for the Court four different types of discrimination that federal courts have allowed: 1) discrimination in job scheduling and transfers; 2) discrimination in performance evaluations, discipline, and workplace recognition; 3) discrimination in provision and denial of workplace training; and 4) discrimination in physical working conditions. The decisions allowing these types of discrimination downplay clear and intentional discrimination, ignore dignitary harms the law intended to address, and even often lack internal consistency on

their own terms—including by dismissing or refusing to draw inferences about future economic harm that might result from poor performance evaluations or denial of training. But the human toll suffered by the workers in these cases—and by the greater number of workers who faced discrimination but never filed suit precisely *because* of the state of the law—underscores the need for reversal and restoration of Title VII to its textual bounds.

## I. Discriminatory job scheduling and work assignments impose real harms that Title VII remedies by its text.

Courts have regularly dismissed claims or granted summary judgment to employers when workers have alleged clear and offensive workplace discrimination concerning shift scheduling; time and location of work assignments; permission to leave or miss work for emergencies or other necessary appointments; and even inter-city or -state job transfers (or transfer request rejections) that burden workers and should be actionable. While shift-scheduling often implicates the interests of hourly workers, salaried workers are not exempt from these types of discrimination. And as anyone who has ever worked a job understands, the time and place of one's employment often has an outsized effect on the "terms" and "conditions" of one's employment—certainly, of one's day-to-day experience of their job. The stories of the workers involved in these failed cases underscore why situations like these should fall within Title VII protections.

**1.** Felicia Lopez exemplifies the outsized effect that work assignments and scheduling can have on a worker's life. For nearly a year, her employer discriminatorily blocked her from working pursuant to "a telecommuting agreement even though she lived 78 miles from work and the stress of driving round trip each day" aggravated an underlying medical condition. *Lopez v. Kempthorne*, 684 F.Supp.2d 827, 847-48 (S.D. Tex. 2010). Her employer took many other steps to make her conditions of employment impossible, including "withholding approval and signature of engagement letters" she needed to proceed with work, "giving her uncertain workloads to create chaos, making numerous management changes" that affected her, and "forcing [her] to perform secretarial tasks" despite that being outside of her job description as a Supervisory Auditor at the Department of the Interior. *Id*. at 845, 848. The Department also denied her the opportunity "to work on many projects," including ones with supervisory responsibilities that would have helped advance her career. *Id*. at 847. Despite all of this, the Court granted summary judgment on every one of her Title VII claims except as to having been unlawfully denied a promotion with a pay increase, treating the rest as not an "adverse employment action" because it did not involve an "ultimate employment decision." *Id.* at 885.

The Department denying Lopez a promotion straightforwardly violated the law because of the lost raise, but some courts have relied upon precedents holding that claims about shift scheduling do not meet wrongly heightened standards to ignore even

monetary harms that result from such discrimination. Joseph Monroe sued the City of Danbury because his employer, the Police Department, had refused a potential transfer to a special investigative division. It had the same base salary and job description but came with "flexible hours" and "increased income potential by virtue of more overtime hours and more job opportunities," to say nothing of "greater prestige" given the work involved. *Monroe v. City of Danbury*, No. 3:09-cv-2132, 2014 WL 3943632, *16 (D. Conn. Aug. 11, 2014). The Court granted the City's motion for summary judgment because it did not view the lateral transfer as "materially significant for purposes of establishing an adverse employment action. *Id*. at *16. By treating the claim as primarily about a lateral transfer, the Court downplayed the potential income that Monroe alleged (and testified at his deposition) that he stood to lose. Similarly, Lisa Payton faced discrimination that a court deemed non-actionable after dismissing clear monetary harms. Ms. Payton worked as a bartender for a casino that had two very different bars—one at the center of the floor, and one near the lobby. *United States Equal Emp't Opportunity Comm'n v. Golden Entm't*, 20-cv-2811, 2023 WL 4134696, *1 (D. Md. Jun. 22, 2023). Ms. Payton was initially assigned primarily to the one at the center of the floor, where bartenders could made as much as *ten times* the amount of tips during an average shift. *Id.* at *2. After reporting physical and verbal sexual harassment, the casino stopped assigning her shifts at the more lucrative bar. *Id*. at *4. Despite acknowledging the resulting economic injury—"the amount of tips received at [the lobby] bar

are typically lower than [the floor bar]"—the District Court treated the discriminatory scheduling as "not an adverse employment action" because "a change in work schedule is not typically" treated as one by courts. *Id*. at *9.

Regardless of lost pay, however, the days and times that someone works can have an outsized impact on a worker's quality of life. Despite the ways that workers experience discrimination in those conditions of employment, numerous Circuits treat discriminatory shift assignments as non-actionable. The case of Angel David Morales-Vallellanes illustrates how these precedents have built upon each other over time. Mr. Morales sued his employer, the United States Postal Service, because he "expressed interest in . . . [a] position that was expected to come with Saturdays and Sundays off, a coveted position given that many USPS employees had an irregular weekend schedule," only for the USPS to immediately turn around and "reclassif[y] the position so that . . . it came with Thursdays and Sundays off instead." *Morales-Vallellanes v. Potter*, 605 F.3d 27, 30 (1st Cir. 2010). The USPS also required him to perform more onerous and less desirable tasks within his job compared to his colleagues. *Id*. at 38. Initially, a jury awarded Mr. Morales $500,000, *id.* at 29—but the First Circuit vacated the verdict and damages award after finding that what he had proven at trial did not amount to "any material adverse employment action." *Id*. at 30. In explaining why, the Court cited and characterized its own prior precedent as rejecting Title VII liability for "[s]uch a minor

disruption," in a case that had "involved a permanent lateral reassignment" and the plaintiff had been "required to do more work, subjected to 'extreme supervision,' and forced to undergo a period of probation." *Id*. at 38 (citing *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 23 (1st Cir. 2002)). Because a different, prior worker had been subjected to workplace discrimination under a wrongly heightened standard, Mr. Morales was, too.

Work scheduling can have an outsized effect on a worker's quality of life for many reasons, even besides when a person has time off work. Jaie Israel, for example, sought a transfer to a different branch of her bank because her existing branch manager initially did not provide her with a chair—and later, provided an "unsafe" chair—during the late stages of her pregnancy. *Israel v. U.S. Bank*, ___ F.Supp.3d ___, 2023 WL 1331329, *2 (D. Ariz. Jan. 31, 2023). Her boss also "critiqued her for taking time off for her doctor's appointments." *Id.* During and after her maternity leave, her boss took other steps that reemphasized to her that another location might serve her better, including removing her business cards without her knowledge and refusing to offer a "private and sanitary location to pump breast milk." *Id*. at *3. Ms. Israel had difficulty securing a lateral transfer to avoid that discrimination and had to take disability leave; ultimately she was verbally offered a personal banker position at another branch but "did not receive the position" because after offering it to her, the "role was offered to someone else" by the bank. *Id*. at *4. Despite this, the Court granted summary judgment to her employer as to the denial of

the personal banker position and removal of her business cards, finding that neither could amount to an "adverse employment action." *Id*. at *14-15.

**2.** Like days and times, the location of one's work has an outsized effect on a worker's life, and discrimination in *where* people work should be actionable, too. Joanne Stone, like Ms. Lopez, repeatedly had her employer force her to undertake time-consuming commutes for discriminatory reasons. First, her boss "slowed down her transfer to Houston," a better location for her. *Stone v. La. Dep't of Revenue*, 590 F. App'x 332, 334 (5th Cir. 2014). Then, her boss "reduced" her telecommuting privileges "from three days per week to one day per week," even while "Caucasian employees were granted more telecommuting privileges." *Id*. at 335. Later, when she "requested an out-of-state position near her home in Mobile, Alabama," her employer denied that request twice, even though "Caucasian employees were being granted similar requests." *Id*. Her allegations show how difficult an employer can make life for a worker when it decides to discriminate—the commutes at issue, and the frequency with which it forced Ms. Stone to undertake them, were time-consuming and onerous. But the Fifth Circuit affirmed a dismissal of her complaint because she had not alleged an "adverse employment action," which it further explained required an "ultimate employment decision." *Id*. at 339. (The Fifth Circuit very recently corrected its precedent, acknowledging that its atextual standard had stripped legal protections from workers exactly

like Ms. Stone. *Hamilton v. Dallas Cnty.*, No. 21-10133, ___ F.4th ___ (5th Cir. Aug. 18, 2023) (en banc).)

The Second Circuit also affirmed summary judgment entered in favor of Charlina Williams' employer, after the employer had denied her a requested geographical transfer for discriminatory reasons. *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 124 (2d Cir. 2004). In doing so, it illustrated a recurring disconnect between courts and the everyday experience of workers. The Court there treated the denial of Williams' transfer request as not an adverse employment action because it would have involved a reduction in pay. *Id*. at 128. But the Court ignored Williams' reasons for wanting the transfer despite the pay cut—she had lived and worked in Las Vegas for years and had ended up having to "relocate to Purchase, New York" to take a promotion within the company. *Id*. at 124. She wanted the internal lateral transfer because it meant returning to Las Vegas, "where she still maintained a home" and was still already working "one week out of every month." *Id*. at 125. Work is about more than money; a company that denied Williams a transfer for discriminatory reasons and required her to work in Purchase, NY instead of Las Vegas would certainly have affected the terms and conditions of her employment.

**3.** Treating discriminatory scheduling as nonactionable because of wrongly heightened pleading standards ultimately ends up allowing offensive, explicit animus, despite the command of Title VII's plain text. While working for a company called Linear

Controls, David Peterson, who is Black, alleged that "his supervisor denied him leave from work to visit a sick family member" on a discriminatory basis—which would be bad enough as it was. But Peterson also alleged that his employer, in discussing the denial with another employee, "said 'f*** that n*****.'" *Peterson v. Linear Controls*, 757 F. App'x 370, 373 (5th Cir. 2019) (per curiam) (asterisks in original). The Fifth Circuit affirmed the dismissal of his Title VII claim "because Peterson was not subjected to an adverse employment action." *Id*. at 374. Similarly, The Eighth Circuit affirmed summary judgment in a case where Ebony Jackman's supervisor explicitly said that "she did not like the three black women," "suggested that Jackman switch to a part-time schedule to better care for her familial responsibilities," and subjected her to other race and sex discrimination. *Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 802-03 (8th Cir. 2013). The Court held that none of that amounted to "[a]n adverse employment action," which it "define[d] as a tangible change in working conditions that produces a material employment disadvantage." *Id*. at 804. And Faye Haugerud, while trying to do her job as a high school custodian, suffered "numerous discriminatory and harassing incidents" that included a male colleague explicitly and repeatedly telling their coworkers that "no woman could do my job" and that "women working in the kitchen at the high school should not get the same pay as men." *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 686 (7th Cir. 2001). The Seventh Circuit held that "[w]hile many of these instances might have been harassing . . . none of them

resulted in any materially adverse change in the terms, conditions, or privileges of plaintiff's employment" under that Court's wrongly heightened standard for Title VII claims. *Id*. at 691-92.

Beyond explicit verbal discrimination, some courts have even treated undisputed physical harassment as non-actionable because of the atextual standards. Mary Raley, for example, had a boss who "touched her on various occasions," subjected her to "various offensive touchings and other sexual innuendos," and "uninvitedly placed his hand on her thigh underneath her dress." *Raley v. Board of St. Mary's Cnty. Com'rs*, 752 F.Supp. 1272, 1274-75 (D. Md. 1990). Indeed, the record there showed that her boss "admit[ted] doing" this to various women employees. He ultimately gave her an unsatisfactory performance evaluation, issued discipline that a board unanimously reversed, and proposed to laterally transfer her. *Id.* at 1275. But the District Court granted summary judgment to her employer because in its view, "[t]he touches and verbal comments were not employment decisions" at all, and thus did "not rise to the level of being 'ultimate employment decisions.'" *Id.* at 1278. Indeed, the Court neatly illustrated the effect of the atextual standard, explaining that in a sexual harassment case, the standard is "offensive and hostile work environment . . . rather than the higher sex discrimination standard of adverse employment action" courts imposed on Title VII plaintiffs. *Id*. It similarly characterized the performance evaluation, discipline, and proposed lateral transfer as "an increase of predictable tension in an office after a

discrimination charge is filed," but "not adverse employment action." *Id*. at 1281.

**4.** Whether involving explicit animus or not, workplace discrimination that involves assigning people different work on categorical bases affects workers' day-to-day experience of their job. Haugerud, for example, also saw her School District employer instruct male custodians "not to assist female custodians,"—i.e., Haugerud, the only female custodian at her school—and even tell "maintenance people [not to] assist her with maintenance tasks even though her job is primarily custodial." *Id.* One male maintenance worker's boss reprimanded him for helping Haugerud, and when she requested assistance she "often [did] not hear back or receive[d] a delayed response" and "was forced to enlist her husband," who was not employed by the School District. Her boss also assigned her "extra maintenance duties" to try to force her to take a less desirable overnight shift so that a male colleague could take her more desirable (and generally easier) day shift. *Id*. at 685. When she stayed on the day shift in the face of pressure, the District "required [her] to clean restrooms at the high school though the male day custodian at the middle school [ ] is not required to do so." *Id*. at 687. And as noted, the Seventh Circuit described all of that as not having "resulted in any materially adverse change" in the terms or conditions of her employment. *Id*. at 691-92.

Haugerud's case is not uncommon. Many workplaces assign "certain job duties . . . restricted by the sex of an employee," for purportedly legitimate

reasons, like the El Paso County Sheriffs Office. *Piercy v. Maketa*, 480 F.3d 1192, 1195 (10th Cir. 2007). There, by policy, "women are allowed to work in Alpha 3"—a wing of the Colorado Springs Jail—"by themselves, but men can work there only if accompanied by another deputy sheriff (male or female)." *Id*. Because "women are often required to work on Alpha 3 alone," women like Linda Piercy were "not allowed to bid for shifts in other areas, despite any seniority they might have." *Id*. The jail justified this on the basis that it did not want male deputies engaging with women detainees alone (although it allowed women deputies to engage with male detainees alone). But because of that policy, when the office posted a new job opening at a different facility, it specified that "only requests from male deputies will be accepted." *Id*. at 1196. This mattered particularly because "work in Metro," the other facility, "would be less arduous and stressful" than at the Alpha 3 wing and would involve more flexibility for leave. *Id*. at 1204. The Tenth Circuit affirmed summary judgment as to the discriminatory shift-assignment polices, calling them "a mere inconvenience" that "did not constitute an adverse employment action." *Id.* And while it reversed in part as to the explicitly male-only hiring, it still explained that on remand, if El Paso County could establish that the Metro job amounted to a lateral transfer from the Alpha 3 wing, then even that would not amount to an actionable "adverse employment action" under Title VII. *Id*.

## II. Discriminatory performance evaluations and discipline impose real harms that Title VII remedies by its text.

Courts have also regularly dismissed claims or granted summary judgment when workers have alleged that their employers disciplined them but not other workers (or disciplined them more harshly than other workers) who undertook the same conduct, solely on the basis of a protected characteristic; gave them worse performance reviews based on racial or other animus; and otherwise held workers to different standards on the basis of race, gender, religion, or other statutorily-identified bases. In doing so, Courts' logic often falls apart even on its own terms—performance reviews regularly set employees up for promotions or other changes in roles that come with pay increases, meaning that discriminatory discipline and negative reviews create actionable economic harm even under most Circuits' atextual current standards. Such obvious resulting economic harm should not be necessary, however, as the facts of the cases illustrate.

**1.** The recurring threat of discriminatory discipline can affect a worker's terms and conditions of their job. Take, for example, Susan Sanchez. Ms. Sanchez taught fourth grade for fourteen years in the Denver Public School District—after twenty-four years of teaching elsewhere and five years of serving as a principal. When the School District transferred her to teach second grade at a different school, her new principal revealed clear age-based animus immediately—the new principal "introduced all the new teachers

except her and said something like 'it is so nice to have some beginning bright, young teachers in the building," and then only eventually introduced Ms. Sanchez "after prompting." *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 530 (10th Cir. 1998). The new principal wielded her disciplinary powers over Ms. Sanchez—and the outsized effect that discipline could have on Ms. Sanchez's career—to control the terms and conditions of Ms. Sanchez's job. She "threatened to put Ms. Sanchez on a plan for improvement" with no real basis, and without making similar threats to younger teachers. *Id*. She also enforced rules against Ms. Sanchez that she did not enforce against others, "requir[ing] Ms. Sanchez to bring in a doctor's note whenever she took sick leave, even though other teachers were not required to do so." *Id*. The Tenth Circuit affirmed summary judgment because in its view those facts "simply [did] not rise to the level of materially adverse employment action" from that Circuit's atextual gloss on Title VII. *Id*. at 533.

Relatedly, courts use atextual standards to absolve employers that wrongfully impose discriminatory discipline and subject workers to onerous dispute processes to reverse it. Carol Stavropoulos had received years of "excellent performance evaluations," but after she helped a colleague dispute sex discrimination, "the faculty voted not to renew Stavropoulos's contract," because they suddenly viewed her as "not collegial." *Stavropoulos v. Firestone*, 361 F.3d 610, 613 (11th Cir. 2014). Her supervisor, the Director of her School, specifically "solicited and compiled letters" to support the

non-renewal, and only the intervention of the Dean allowed her to keep her job. *Id*. The Director gave her a negative performance evaluation the ensuing year and "encouraged faculty members to relate to [her tenure review] committee their negative experiences" with her, and another school leader fabricated rumors that she had a mental illness to impede her achieving tenure. *Id*. at 614. When that committee voted not to renew her contract, she had to hire an attorney and appeal to the full faculty senate—which "concluded that the art school faculty had improperly voted not to renew [her] because of her sex," and protected her job. *Id*. at 615. The entire ordeal affected her job, cost her money, and even the school regarded it as sex discrimination—but both the District Court and the Eleventh Circuit treated it as non-actionable. In their view, "the acts [she] complains of ultimately had no effect on her employment status" and were thus "too insubstantial to be considered an adverse employment action." *Id*. at 617-18. That rule protects avowedly discriminatory intent by an employer, because of the greater lengths a worker went to fight aggressive discrimination.

Numerous employers, however, go beyond threatening or failing to impose discriminatory discipline to imposing and upholding it—which Courts also generally hold non-actionable. George Perez, for example, was put on probation and received a negative performance rating for discriminatory reasons, including having his employer "repeatedly remove[ ]" his accomplishments "from the official performance record system." *Perez v. Guzman*, No. 20-1484, 2022 WL 1746658,

*15 (D.D.C. May 31, 2022). This came after Mr. Perez's boss had failed to provide him with a requested performance assessment that he'd sought to ascertain his standing—a worry that his employer validated by revoking his supervisory duties and demoting him from his Branch Chief role entirely. *Id*. at *3. His employer replaced Mr. Perez, a Hispanic man, with a Caucasian man, and then also paid his replacement more. *Id*. The Court there explained that "removal of important assignments, lowered performance evaluations, and close scrutiny of assignments by management" could not amount to adverse employment actions. *Id*. at *10-11, *16.

Employers also discriminate by imposing harsher penalties on some workers than others for discriminatory reasons—and even when it clearly alters the conditions of someone's job, courts treat that as nonactionable, too. When Artur Davis ran Legal Services of Alabama, for example, the Board accused him of spending "outside the approved budget" and "creating new initiatives without Board approval," among other conduct. *Davis v. Legal Servs. Ala.*, 19 F.4th 1261, 1264 (11th Cir. 2021). It suspended him with pay pending an investigation. *Id.* The Board's treatment of Davis, who is Black, stood in stark contrast to the treatment of two former white leaders at the organization—both of whom "participated in worse alleged misconduct," including having "made sexually harassing remarks to female employees" and having "abused mileage expenses" for personal financial gain. *Id*. "Neither was placed on suspension," paid or otherwise, before

departing the organization. *Id.* Davis's suspension, unlike the absence of discipline the Board imposed on his predecessors, entirely stopped him from doing his job—by physically barring him from his office and preventing him from directing any of the employees of the organization, the Board had assuredly altered the terms and conditions of the job they had hired him to do. But the Eleventh Circuit affirmed summary judgment because the paid suspension "could not constitute an adverse employment action" under Title VII. *Id*. at 1263.

**2.** Beyond discipline, many employers use discriminatory performance evaluations to create possible pretext to cover for other discriminatory job decisions. The D.C. Circuit has only very recently fixed its own atextual interpretation of Title VII. *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc). But before it did, worker litigants in that Circuit had employers use performance evaluations to discriminate against them, safe from any legal remedies under Title VII. Carolyn Taylor worked for the federal government at the Smithsonian Institution, where her employer dropped her down a performance rating even though she had "met or exceeded both of her critical responsibilities" on which the evaluation depended. *Taylor v. Small*, 350 F.3d 1286, 1289 (D.C. Cir. 2003). Despite Ms. Taylor trying to get the evaluation corrected, her boss not only declined to fix it, but gave her "the same overall rating" the next year. *Id*. Indeed, like Ms. Sanchez, Ms. Taylor's boss wrongly put her on a performance improvement plan and didn't promptly remove her from it despite acknowledging that she had

satisfied it. *Id*. at 1289. That plan and her wrongfully lower rating even had an undisputed economic effect, as it deprived Ms. Taylor of $500 worth of bonus pay. *Id.* at 1290. Despite all of this, the D.C. Circuit affirmed summary judgment to her employer based upon the lack of an "adverse employment action." *Id*. at 1292. Perplexingly, the Court noted that there was no evidence that the long delay before getting her evaluations corrected and getting the attendant bonus—and ultimately having to go to the EEOC to get her boss to do it—"affected her grade or salary," *id.* at 1293, apparently distinguishing salary from total compensation.

Atextual standards encourage exactly such parsimonious interpretation of possible economic harms, rather than treating the unlawful discrimination itself as the problem. For example, when Frederick Douglas's boss "guaranteed that Douglas would not receive an award" for discriminatory reasons, the D.C. Circuit treated it as non-actionable because Douglas might not have received the award—which had a "substantial monetary" component—even if his boss had not discriminated against him. *Douglas v. Donovan*, 559 F.3d 549, 555 n.3 (D.C. Cir. 2009). In finding that he had not provided enough evidence to make out an "objectively tangible harm," *id*., the Court dismissed not only the denied chance at real money, but the clear animus that drove his boss's discriminatory action—exactly what Title VII remedies. Scrutinizing the chance that he would have had at the award followed directly from the wrongly heightened standard that

the D.C. Circuit employed pre-*Chambers*, and missed the point of Title VII entirely.

## III. Discriminatory denial of job training and opportunities to build skills imposes real harms that Title VII remedies by text.

Courts also regularly dismiss claims or grant summary judgment to employers when workers have alleged that their employers denied them access to job training or skill-building classes; denied them opportunities to learn new skills on the job; and otherwise hampered their changes to advance in their careers, on the basis of race, gender, religion, or other discriminatory bases. As with performance reviews and workplace discipline, training and skill-building opportunities have a clear connection to future career opportunities and pay increases—meaning that suits about this type of conduct should meet even federal courts' heightened, atextual standards. But here, too, many courts' opinions often fail even on their own terms and illustrate why this Court should reverse and restore Title VII to its textual boundary.

**1.** Johnnie Shackelford's employer specifically deterred her from applying for a new position, she alleged, on the basis of her race. Her manager presented the deterrence as a favor, advising her not to seek the new job because "she would 'probably be better off' remaining" in her existing position, which he said presented better prospects to work more overtime and make more money. *Shackelford v. Deloitte Touche*, 190

F.3d 398, 402 (5th Cir. 1999). That turned out to be a lie—which Ms. Shackelford figured out when the position "was instead filled by a white woman who has since frequently worked overtime." *Id*. For training opportunities that she ultimately did seek, her boss simply denied them outright. Ms. Shackelford "requested training on a new computer software used for filing" because she was occasionally "required to assist in that task." *Id*. Despite denying her request, her boss actively trained a white coworker on the new software. The lies and denials in that case were especially brazen; when they happened, Ms. Shackelford was "the only potential class member" in her boss's department, of a pending class action suit "alleging company-wide race discrimination." *Id*.[2] Despite all of this, the Fifth Circuit affirmed summary judgment on her claims about training because the denials of training were not "ultimate employment decision[s]." *Id*. at 406. In doing so, the Court illustrated how pernicious the heightened standards are—even though training specifically allows people to take on more responsibilities and advance in their career, the Court wrote that there was "no significant evidence that a denial of such training would tend to affect her employment status or benefits." *Id*.

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[2] Even though she had not been involved in the suit, her boss also subsequently retaliated against her when, in response to human resources asking her after the suit was filed if she had ever experienced discrimination and mistreatment, she confirmed that she had. After that conversation, her boss gave her "two negative performance evaluations" literally "the next day." *Id*. at 402.

Emory Johnson suffered a similar fate. Mr. Johnson's employer subjected him to "a one and a half year delay in receiving training for the newly-created position of Smelter Operator," *Johnson v. Aluminum Co. of America*, 397 F.Supp.2d 688, 691 (M.D.N.C. 2005), *aff'd*, 205 F. App'x 152 (4th Cir. 2006), even though he already performed much of the involved work. The training was not difficult to schedule because it was time-intensive; when they finally did give him the training, it "ultimately took just three days." *Id.* The training mattered tremendously to him, though, because for the intervening year and a half, he "was not eligible for overtime work that would have come with this position and therefore lost a number of opportunities to earn overtime pay." *Id*. Of course, when he finally did get to work overtime, he was "given extra, more difficult work during overtime shifts compared to white employees." *Id*. at 691, 692. ALCOA also ultimately denied Mr. Johnson a separate position that should have been awarded to him based on seniority, in favor of a "less senior, white employee." *Id*. at 692. Despite all of this, the District Court granted summary judgment, and the Fourth Circuit affirmed, because it did not believe that any of the foregoing "can be considered adverse employment actions." *Id*. at 696. Underscoring how these atextual standards adopted by the Courts of Appeals put federal courts in the position of tacitly endorsing discrimination, the Court wrote that "although Mr. Johnson claims that he was given extra work during overtime assignments, he does not explain how this extra work altered the 'terms, conditions or benefits' of his employment." *Id*. It said the

same thing about the training because it "paid the same hourly rate regardless," simply ignoring the question of access to more lucrative overtime. *Id*. at 697.

As with the reversed discipline and non-renewal in Ms. Firestone's case, courts also occasionally absolve employers of denying workers training for discriminatory reasons if they later relent—including under duress. When Elias Pena worked for Clark County, Washington, for example, his employer told him that he would lose his position if he did not complete particular training—but also did not allow him to train on County equipment. *Pena v. Clark Cnty.*, 21-cv-5411, 2023 WL 3160157, *8 (W.D. Wash. Apr. 28, 2023). It also initially refused to send him to outside trucking school with the rest of his colleagues; it only did so when he filed a grievance and prevailed with the assistance of his union. *Id*. The record contained substantial evidence that it did this for straightforwardly discriminatory reasons; Mr. Pena's boss told him and a Latino colleague that "he admired Hitler and all the work he did" and that he had previously "sabotage[d] Mexican workers' equipment" at past jobs, and another boss told them that "he was building a border wall around" his job site and kicking them out. *Id*. at *1, *2. The District Court, however, credited the County for ultimately facilitating his training, even though he had to force it to do so; it held that he had "fail[ed] to present conduct rising to an adverse employment action," and cited Ninth Circuit precedent for the proposition that "a successful grievance could change the adverse

nature of an employment action." *Id*. at *8 (citing *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 848 (9th Cir. 2004)). Here, one effect of the adverse employment action doctrine is that workers whose training is delayed even for avowedly discriminatory reasons, and who must seek outside assistance to rectify that wrong, have no recourse.

**2.** Evangelina Hemphill's case also illustrates how courts' refusal to recognize the importance of training for a worker's job or career wrongly excludes serious discrimination from Title VII's textual coverage. Besides refusing to give a worker training that could facilitate career advancement, an employer can also decline to give someone necessary training to set them up for failure in an existing job. After seven years of good work, Ms. Hemphill's employer switched her bosses when she returned from maternity leave and ultimately subjected her to a lateral transfer against her wishes. *Hemphill v. United Parcel Serv., Inc.*, 975 F.Supp.2d 548, 553-54 (D.S.C. 2013). But while that transfer maintained her existing salary, it "was more difficult than her previous position, required more hours, and required training that she did not effectively receive." *Id*. at 555. (Her employer also ultimately reassigned Ms. Hemphill again to a position that "involved a longer commute" and a change in work hours, *id.*—which posed other difficulties. *See* Section I, *supra*.) The District Court viewed her bosses transferring her to a job for which she lacked training as not an "adverse employment action." *Hemphill*, 975 F.Supp.2d at 559. It did so despite acknowledging that

working more hours at the same pay might "effectively amount[] to a decrease in compensation," and did not address the lack of training that she received for the new position at all. *Id*. at 558.

## IV. Discriminatory day-to-day working conditions impose real harms that fall within the heartland of Title VII's text.

Courts have also regularly dismissed claims or granted summary judgment to employers when workers have alleged that their employers made them labor in notably worse conditions than colleagues, solely on the basis of race, gender, religion, or other statutorily-identified characteristics. Especially for workplaces where some similarly-qualified employees must work hard physical jobs while others work at desks, or where some people may work outside in the elements while others work inside, discrimination in conditions to which employers subject workers can have a substantial effect on the conditions of someone's employment. The stories of the workers involved in these failed cases underscore why this Court should restore Title VII's textual protections to cover these situations.

**1.** Some employers go out of their way to make the conditions of someone's job intolerable, yet courts reject the possibility of liability under the prevailing atextual interpretations of Title VII. Carlos Vega's school district employer attempted to make it as hard as possible for him to teach math—it forced him to "teach in an 'excessively noisy' media center," deactivated his password to make him unable to access

school computers, and "twice unsuccessfully attempted to transfer him out of the High School." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 89 (2d Cir. 2015). But because the Second Circuit viewed these as "mere inconveniences or annoyances" rather than his employer having "alter[ed] Vega's employment in a materially adverse way," the Court applied its atextual, heightened standard to hold that those allegations did not plausibly state a claim under Title VII. *Id*.

Emetria Wheeler's railroad employer similarly tried to make her job intolerable. It treated her differently than male coworkers by refusing to give her "keys to the facility or keys to her personal locker," and refusing to assign her a vehicle to use. *Wheeler v. BNSF Ry. Co.*, 418 F. App'x 738, 743 (10th Cir. 2011). Her boss refused to give her work assignments directly, sharing them with a male colleague of hers and making that man relay them to her; he also assigned her work "with unusually short time requirements" to try to cause her to fail. *Id*. The Tenth Circuit affirmed summary judgment, holding that none of those things constituted "adverse employment action." *Id*. at 745.

Some employers make workers' lives intolerable in other ways. Karen Morgan's male bosses "screamed at her" regularly, "stood outside the restroom with his arms crossed" when one perceived her as taking too long there, "would give her dirty looks," and would admonish her "for leaving her work area without permission, while male employees left for extended periods but were not questioned." *Morgan v. Triumph*

*Aerostructures, LLC*, 296 F.Supp.3d 911, 916, 918 (M.D. Tenn. 2017). One male colleague in particular "would stand behind [her]" while she worked, "go[ ] on her calls," and "scream[ ] obscenities at her across the hangar," and "was trying to find a way to get her terminated." *Id*. at 918-19. Despite the intolerable conditions of her job, the District Court granted summary judgment to her employer because "[m]onitoring bathroom breaks is not an adverse employment action," and "increased surveillance and discipline, whether warranted or not, do not constitute a material adverse change in the terms of employment." *Id*. at 922.

Companies also discriminate by assigning more or worse work to some people than to similarly-situated coworkers for unlawful reasons. Compass Group USA, for example, assigned Ora Ellis "a heavier workload than other employees" on the basis of her race. *Ellis v. Compass Group USA, Inc.*, 426 F. App'x 292, 295 (5th Cir. 2011). Even though her underlying health forced her to "[take] a voluntary medical leave of absence," *id.* at 294, Compass Group gave her no quarter, and actively "refus[ed] to provide workers to help with her workload." *Id*. at 296. The Fifth Circuit, however, treated this as non-actionable because she "cannot satisfy" the "adverse employment action" requirement. *Id*.

**2.** Some discrimination in physical working conditions, however, hearkens back to the ugliest period of American history. Let's return to Mr. Peterson, initially described in Section I, *supra*, because his employer denied him leave for discriminatory reasons. *See* Section I, *supra* at 12. Worse even than its discriminatory

scheduling decisions, however: Linear Controls straightforwardly discriminated against Peterson and other Black employees in the nature of the work it assigned them. Peterson "was on a team of five white employees and five black employees, and the black employees had to work outside and were not permitted water breaks, while the white employees worked inside with air conditioning and were given water breaks." *Peterson*, 757 F. App'x at 372. For Peterson, but not the white employees, managers would also "judge his appearance and overlook his work." *Id*. As noted before, the Fifth Circuit affirmed the dismissal of his complaint for failure to allege "an adverse employment action." *Id*. at 373.

Assigning Black workers to labor in the elements while allowing their white colleagues to work in comfort indoors is exactly the sort of discrimination Title VII intended to combat. And Peterson is hardly alone. Billy Stewart, a high school security officer, faced exactly that type of discrimination at his job. Despite an "unblemished" record while supervised by his school's assistant principal, when the School Board hired a new district-wide supervisor of security officers who harbored racial animus, Stewart, who is Black, was "assigned to work outside during the winter when conditions were unbearable" while colleagues were not. *Stewart v. Union Cnty. Bd. of Educ.*, 655 F. App'x 151, 152 (3d Cir. 2016).[3] Ugorji Ugorji, an administrative

[3] His new boss antagonized him in other ways that affected the conditions of his job, too: he was transferred to work at a "less prestigious" school, "questioned regarding receiving free items from the Athletic Department" while other coaches were not, and

assistant, had a boss who "assigned him to an office that was noisy, moldy, and without windows," which his boss forced him to stay in for more than two years until he eventually "presented a doctor's note about the effects of the interior office on his health." *Ugorji v. N.J. Envtl. Infrastructure Trust*, 529 F. App'x 145, 148 (3d Cir. 2013). His boss also forced Ugorji to "reorganize his office furniture" and "confiscate[ed] a space heater from Ugorji's office," among other discriminatory actions that his supervisors took. But the Third Circuit affirmed summary judgment in both Stewart's and Ugorji's cases because neither had met that Circuit's atextual and heightened standard. For Stewart, despite the clearly alleged racial animus, "he had not suffered an actionable adverse action," *Stewart*, 655 F. App'x at 156, which in that Circuit's view included only "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." *Id.* Similarly, for Ugorji, the Court explained that he had not suffered "an adverse employment action" because there had been no "significant change in employment status." *Ugorji*, 529 F. App'x at 151 n.4.

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As these cases demonstrate, the effect of numerous Circuits' atextual interpretation of Title VII is that millions of workers face odious workplace

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"not permitted to leave early to coach track and football" while other coaches were. *Id*. at 152-53.

discrimination with no legal remedy. Courts' imposition of heightened requirements, however phrased, has insulated employers who specifically intend to discriminate, and make life untenable for their employees. If they do that well enough, an employee will quit instead of the employer even having to subject them to the "ultimate employment action" that would meet most federal courts' heightened standard. The evolution of the doctrine has caused substantial harm to workers by suborning discrimination. Current doctrine is untethered to the text of the statute. This Court should restore Title VII to the boundaries of its plain text and ensure that workers have Congress's designed remedy when they face intentional discrimination in the workplace.

## CONCLUSION

The decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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