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

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BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS

The National Treasury Employees Union (NTEU) is a federal-sector labor organization that represents employees in thirty-five federal agencies and departments nationwide. NTEU has been before this Court often to advocate for federal employee interests, as a party (*see*, *e.g.*, *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989)) and as an *amicus* (*see*, *e.g.*, *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023); *Babb v. Wilkie*, 140 S. Ct. 1168 (2020)).[1]

NTEU's interest in this case is twofold. First, the Court's decision about whether employer conduct must cause a significant disadvantage to be actionable under Title VII may directly affect federal employees. To be sure, the federal-sector provision of Title VII, 42 U.S.C. § 2000e-16, does not contain the "terms, conditions, or privileges of employment" language in § 2000e-2, which controls here. And this Court's reasoning in *Babb* suggests that this difference in statutory language yields different statutory interpretations. Nevertheless, even after *Babb*, some courts still apply the requirement of a significant disadvantage—the gloss that the Eighth Circuit and other courts have imposed on § 2000e-2—to § 2000e-16 as well. *See Fortner v. DeJoy*, No. 2:19-cv-01409-NAD, 2022 U.S. Dist. LEXIS 177400, at *23-24 (N.D. Ala. Sept. 29, 2022); *cf. Lewis v. Kendall*, No. 5:18-cv-263-TKW-MJF, 2022 U.S. Dist. LEXIS 241189, at *8 (N.D. Fla. Dec. 12, 2022).

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus or its counsel made a monetary contribution to fund the preparation or submission of this brief.

Second, despite its differences from § 2000e-2, the federal-sector provision of Title VII and its use of the term "personnel action" (which is defined in 5 U.S.C. § 2302(a)(2)(A)) offers insight on the question presented. Indeed, that definition of "personnel action" suggests that Congress viewed a job transfer or reassignment like the one in this case to be the kind of significant change in working conditions that is actionable under Title VII—even under Respondent City of St. Louis's standards. NTEU is well versed in these federal-sector statutes and submits this brief to explain how they support Petitioner JaTonya Muldrow.

SUMMARY OF ARGUMENT

The federal-sector provision of Title VII offers two related insights on the question presented. Both suggest that the City of St. Louis's decision to transfer Ms. Muldrow from her job as police sergeant because her supervisor wanted to replace her with a male sergeant should be actionable under Title VII, even if this Court accepts the City's extratextual interpretation of § 2000e-2 as limited to *significant* employment actions.

First, the federal-sector provision of Title VII demonstrates that Congress viewed any transfer or reassignment as significant enough to challenge under the statute. The provision renders actionable any discriminatory "personnel action." 42 U.S.C. § 2000e-16(a). The definition of "personnel action," in turn, covers a "transfer," a "reassignment," and other specific types of employment decisions. 5 U.S.C. § 2302(a)(2)(A). The definition also includes a catchall provision, which covers "any other significant change in duties, responsibilities, or working conditions." *Id.* § 2302(a)(2)(A)(xii). The use of the word "other" in the catchall provision denotes that each type of employ-

ment decision in the preceding list—including a transfer or reassignment—constitutes a "*significant* change in duties, responsibilities, and working conditions." *Id.* § 2302(a)(2)(A)(xii) (emphasis added).

Second, the definition of personnel action lists adverse actions—which the Eighth Circuit holds are the *only* actions significant enough to challenge under Title VII—as a mere subcategory of all the actions covered under the federal-sector provision of Title VII. This underscores that Congress viewed any transfer or reassignment as significant, even without a concomitant demotion or reduction in pay. Limited to adverse actions only, the Eighth Circuit's view of significant employment actions is too narrow.

In sum, the federal-sector provision shows that Congress regards a transfer or reassignment like Ms. Muldrow's as a significant change to duties, responsibilities, or working conditions. For this reason, even if this Court re-writes § 2000e-2's text to cover only *significant* employment actions—which it should not do for the reasons expressed in Ms. Muldrow's brief—it must still reverse the Eighth Circuit's decision below.

ARGUMENT

The federal-sector provision of Title VII suggests that Congress viewed a job transfer or reassignment like the one in this case to be a significant change in working conditions that is actionable under Title VII. So, even if the City of St. Louis is correct that, contrary to the statutory text, some degree of significance is required, the Eighth Circuit still erred in finding Petitioner's transfer insignificant.

I. The Federal-Sector Provision of Title VII Demonstrates That Congress Viewed Any Transfer or Reassignment as a Significant Change in Working Conditions That Is Actionable Under the Statute.

The federal-sector provision of Title VII states that "[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). In *Babb*, this Court addressed the nearly identical language in the federal-sector provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a). The Court there described the meaning of "personnel action" as "easy to understand." *Babb*, 140 S. Ct. at 1173.

The Court explained that although neither the ADEA nor Title VII defines "personnel action," the Civil Service Reform Act of 1978 (CSRA) does. *Id.* That statute "broadly defines a 'personnel action' to include most employment-related decisions, such as appointment, promotion, work assignment, compensation, and performance reviews." *Id.* (citing 5 U.S.C. § 2302(a)(2)(A)). "This interpretation," the Court observed, "is consistent with the term's meaning in general usage." *Id.*

The specific language of the CSRA's broad definition of "personnel action" is instructive here. In clauses (i) through (xi), the definition in § 2302(a)(2)(A) lists eleven types of actions that constitute "personnel actions." 5 U.S.C. § 2302(a)(2)(A). Clause (iv), notably, lists a "transfer" or "reassignment." *Id.* § 2302(a)(2)(A)(iv). Then, clause (xii) is a catchall provision, which includes "any other significant change in duties, responsibilities, or working conditions." *Id.* § 2302(a)(2)(A)(xii).

The use of “other” in the catchall provision indicates that Congress considered each type of action in the preceding list to be a “significant change in duties, responsibilities, or working conditions.” *Cf. Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1790 (2022) (explaining that “[t]he use of ‘other’ in the catchall provision,” which included “any other matters in foreign commerce,” “indicates that Congress considered the preceding items to be ‘matters in foreign commerce.’ ”). So, Congress considered a transfer or reassignment, as listed in clause (iv) of § 2302(a)(2)(A), to be a “*significant* change in duties, responsibilities, or working conditions.” 5 U.S.C. § 2302(a)(2)(A) (emphasis added).

Thus, even if this Court accepts the City of St. Louis’s atextual interpretation of § 2000e-2, Ms. Muldrow’s transfer was nonetheless a significant personnel action. This Court would therefore still have to reverse the Eighth Circuit’s ruling that the City of St. Louis’s decision to transfer Ms. Muldrow because of her sex was not actionable under Title VII.

II. The Eighth Circuit’s View That an Actionable Title VII Claim Must Involve a Loss of One’s Job, Pay, or Benefits Is Too Limited.

The Eighth Circuit allows Title VII challenges only to “adverse employment actions.” Pet. App. 9a. To qualify, an action must carry with it some court-determined marker of harm, like “a diminution to [the employee’s] title, salary, or benefits.” Pet. App. 11a.

But “adverse actions” constitute a mere *subcategory* of all personnel actions covered under the federal-sector provision of Title VII. The definition of “personnel action” lists “an action under chapter 75 of this title”

among the many types of actions covered. 5 U.S.C. § 2302(a)(2)(A)(iii). Chapter 75 of the CSRA "enumerates the major adverse actions." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 11 (2012). The adverse actions enumerated in 5 U.S.C. § 7512 include "a reduction in grade," which is federal-sector speak for a demotion, and "a reduction in pay." 5 U.S.C. § 7512(3)–(4). These categories involve the diminution to the employee's title, salary, or benefits that, according to the Eighth Circuit, renders an action significant enough to challenge under Title VII.

The Eighth Circuit's conception of significant employment actions, though, is much more limited than Congress's. Whereas Congress regards all its defined personnel actions as significant for Title VII purposes (*see* 5 U.S.C. § 2302(a)(2)(A)), the Eighth Circuit views only the small slice of personnel actions that constitute adverse actions as significant.

To be sure, Congress may well choose "to hold the Federal Government to a stricter standard than private employers or state and local governments." *Babb*, 140 S. Ct. at 1176. But the relevant statutory language does not suggest that Congress chose to do so in Title VII. While Congress's definition of "personnel action" is "broad," *id.* at 1173, it still holds the Federal Government liable under Title VII only for discriminatory "change[s] in duties, responsibilities, or working conditions" that are "*significant*." 5 U.S.C. § 2302(a)(2)(A)(xii) (emphasis added). So, even if the provision of Title VII that applies to private employers and state and local governments only covers significant employment actions, those actions should include all those covered by the federal-sector provision, including all transfers and reassignments.

CONCLUSION

For the foregoing reasons and for those set forth in Petitioner Muldrow's brief, NTEU respectfully requests that this Court reverse the Eighth Circuit's decision.

Respectfully submitted,

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