No. 18-1401

In the Supreme Court of the United States

DAVID D. PETERSON, PETITIONER

v.

LINEAR CONTROLS, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it unlawful for a private employer or a state or local government "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).

The question presented is whether that prohibition includes discriminatory working conditions, or is instead limited to discrimination in "ultimate employment decisions," such as hiring, granting leave to, discharging, promoting, or compensating individuals.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

INTEREST OF THE UNITED STATES

This case concerns the scope of the employment-discrimination protections in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Equal Employment Opportunity Commission (EEOC) enforces Title VII's anti-discrimination provisions against private employers. The Department of Justice enforces those provisions against state- and local-government employers. 42 U.S.C. 2000e-5(f)(1). Title VII also includes anti-discrimination provisions applicable to the federal government as an employer. 42 U.S.C. 2000e-16. The United States accordingly has a substantial interest in this Court's resolution of the question presented.

STATEMENT

Petitioner, who worked for respondent on an offshore oil platform, alleges that he and other "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." Pet. App. 2a. Petitioner sued respondent for racial discrimination "with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The district court granted summary judgment to respondent. Pet. App. 11a-47a. The court of appeals affirmed. *Id.* at 1a-10a.

A. Statutory Background

Congress enacted Title VII of the Civil Rights Act of 1964 to "assure equality of employment opportunities and to eliminate * * * discriminatory practices and devices" in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). This case involves "Title VII's core antidiscrimination provision," Section 703(a)(1). *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). Section 703(a)(1) makes it unlawful for a private employer or a state or local government "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); see 42 U.S.C. 2000e(a)-(b).

Title VII includes several other relevant provisions. Section 703(a)(2) makes it unlawful for a private employer or a state or local government "to limit, segregate, or classify * * * employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). Section 704(a) prohibits retaliation by a private employer or a state or local government against employees or applicants for engaging in conduct protected by Title VII. 42 U.S.C. 2000e-3(a). And Section 717(a) provides that federal-sector "personnel actions * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a).

B. Proceedings Below

1. Petitioner is an electrician formerly employed by respondent to perform construction and maintenance on offshore oil platforms. Pet. App. 2a, 11a. This case involves petitioner's work on a platform in the Gulf of Mexico during an 11-day period in July 2015. *Id.* at 23a. Petitioner alleges that, during that period, he and other "black crew members were required by [respondents'] white supervisors to work every day outside, in the heat[,] while white crew members worked exclusively inside, in air-conditioned facilities." *Ibid.* (citation omitted). Petitioner further alleges, "if any black crew member * * * took a water break inside, the white supervisors would curse and yell and order him back to work." *Ibid.* (citation omitted). According to petitioner, black employees on the platform asked their supervisors to order a "rotation from outside to inside among white and black crew members," but "no [such] rotation" occurred. *Ibid.* (citation omitted).

2. After resigning his position, petitioner filed an EEOC charge alleging, *inter alia*, racial discrimination

in violation of Title VII. Pet. App. 18a. The EEOC issued a Notice of Right to Sue "at [petitioner's] request." D. Ct. Doc. 29-3, at 107 (Feb. 22, 2016).[1]

Petitioner filed suit in federal court. Pet. App. 12a. As relevant here, he claimed that respondent had violated Section 703(a)(1) during his offshore assignment in July 2015. *Id.* at 31a. Specifically, he alleged that requiring black employees to "work every day outside while the [white] crew members worked exclusively inside in air-conditioned facilities," *id.* at 34a, constituted discrimination "with respect to his compensation, terms, conditions, or privileges of employment, because of * * * race," 42 U.S.C. 2000e-2(a)(1). He testified in a deposition and submitted declarations from two witnesses corroborating his account. Pet. App. 34a-36a. Respondent produced testimony to the contrary. See *id.* at 34a-35a.

The district court granted respondent's motion for summary judgment. Pet. App. 11a. The court first held that petitioner had "identified no similarly situated [white] employee who * * * was allowed to work exclusively indoors." *Id.* at 35a. The court stated that petitioner's deposition contained only "general claims that [white] workers were treated better than him." *Ibid.* And the court excluded the declarations supporting petitioner because the court found they lacked an adequate foundation or personal knowledge. *Id.* at 36a-38a.

The district court further held that "[e]ven if [petitioner] had identified a similarly situated [white] comparator," his claims would "still fail as a matter of law because he has not alleged or testified to any adverse

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[1] The district court's statement that "the EEOC ruled in [respondent's] favor and found that the evidence did not establish a violation of Title VII" is accordingly incorrect. Pet. App. 12a.

employment action." Pet. App. 38a-39a. The court explained that, under Fifth Circuit precedent, Section 703(a)(1)'s prohibition on discrimination "with respect to [an employee's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), "'include[s] only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating,'" Pet. App. 39a (quoting *Green* v. *Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)). Under that interpretation, "[a]ctions such as assigning an employee more difficult work" and "giving employees unequal break times * * * are not 'adverse actions' within the meaning of Title VII." *Id.* at 40a (citation omitted).

3. The court of appeals affirmed. Pet. App. 1a-10a. The court did not review the district court's evidentiary ruling or its conclusion that petitioner had not identified a white comparator. *Id.* at 4a. The court of appeals instead held that petitioner "cannot satisfy Title VII's adverse employment action requirement," even "[a]ssuming the declarations identify similarly situated comparators." *Ibid.* The court explained that it "strictly construes adverse employment actions to include only 'ultimate employment decisions,' such as 'hiring, granting leave, discharging, promoting, or compensating.'" *Ibid.* (quoting *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (per curiam)). Applying that interpretation, the court held that, even if petitioner's allegation "that he and his black team members had to work outside without access to water, while his white team members worked inside with air conditioning," is "[t]ak[en] * * * as true," the district court "did not err in holding

that these working conditions are not adverse employment actions because they do not concern ultimate employment decisions." *Ibid.*

DISCUSSION

The court of appeals erred in holding that racial discrimination in "working conditions," Pet. App. 4a, is not discrimination "with respect to * * * terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1). The court's reasoning that Section 703(a)(1) prohibits discrimination only in "ultimate employment decisions," Pet. App. 4a, has no foundation in Title VII's text, Congress's purpose, or this Court's precedents. And the startling result in this case—that an employer may racially segregate its workforce by requiring black employees to work outside in the summer heat while white employees work indoors with air conditioning—underscores the defects in the court of appeals' position.

Other courts of appeals have expressly rejected the reading of Title VII adopted by the Fifth Circuit below. And while some other Fifth Circuit decisions suggest a different interpretation limiting Section 703(a)(1) to certain "significant and material" employment actions, *Welsh* v. *Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (2019) (citation omitted), that reading is equally atextual and mistaken. See *Ortiz-Diaz* v. *United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring); Gov't Br. in Opp. at 13-17, *Forgus* v. *Esper*, No. 18-942 (May 6, 2019) (Gov't *Forgus* Br.). The question presented is important, frequently recurring, and suitable for resolution in this case. The petition for a writ of certiorari therefore should be granted.

A. The Decision Below Is Incorrect

1. The court of appeals held that Section 703(a)(1) prohibits discrimination only in "ultimate employment decisions." Pet. App. 4a. That reading contradicts Title VII's text, structure, and purpose.

a. In interpreting Title VII, this Court looks to "the language of" the statute. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986); see, *e.g.*, *University of Texas Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 352-353 (2013); *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 62-64 (2006). That approach reflects this Court's "charge * * * to give effect to the law Congress enacted." *Lewis* v. *City of Chicago*, 560 U.S. 205, 215, 217 (2010); cf. *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 24-27 (2018).

The key text in this case, Section 703(a)(1), makes it unlawful for a private employer or a state or local government "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). Petitioner does not allege that respondent made a "hir[ing]" or "discharge" decision based on his race, nor that race played a role in his "compensation." *Ibid.* This case accordingly turns on whether respondent "discriminate[d] against" petitioner "with respect to his * * * terms, conditions, or privileges of employment." *Ibid.*

"When a term goes undefined in a statute," as the key language here does, this Court gives "the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The ordinary meaning of

the phrase "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), plainly includes the working conditions petitioner challenges here—the location and nature of his job assignment, the rotation of employees between worksites, and the availability of breaks. See *Webster's New International Dictionary of the English Language* 556 (2d ed. 1958) (defining "conditions" to include "[a]ttendant circumstances * * * as [in], living *conditions*; playing *conditions*"); see also, *e.g.*, *Random House Dictionary of the English Language* 306 (1966) (defining "conditions" to include "situation with respect to circumstances"). That reading accords with common sense. A typical employee asked to describe his "terms" or "conditions * * * of employment," 42 U.S.C. 2000e-2(a)(1), would almost surely mention where he works and what he does. See *EEOC Compliance Manual* § 15-VII(B)(1) (2006) ("Work assignments are part-and-parcel of employees' everyday terms and conditions of employment.").

Respondent contends (Br. in Opp. 11, 15-17) that petitioner's allegations do not implicate his "terms, conditions, or privileges of employment" because working outdoors was part of his job description. But this Court has rejected that line of argument, holding that Section 703(a)(1) "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor*, 477 U.S. at 64); see, *e.g.*, *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The fact that a job description includes a particular duty thus does not license an employer to discriminate among employees in their performance of that duty.

In interpreting Section 703(a)(1), moreover, this Court has held that discrimination in the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), includes "discrimination based on [a protected trait that] has created a hostile or abusive work environment," *Meritor*, 477 U.S. at 66. The Court has grounded such hostile-work-environment claims in Section 703(a)(1)'s text by explaining that "the phrase 'terms, conditions or privileges of employment' in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with * * * discrimination." *Ibid.* (brackets and citation omitted). Respondent's contention that Section 703(a)(1) does not apply to discriminatory working conditions like those at issue here cannot be squared with this Court's reading of the statute. See *Harris*, 510 U.S. at 25 (Scalia, J., concurring) (explaining that "the term 'conditions of employment'" in Section 703(a)(1) supports a claim that "working conditions have been discriminatorily altered").

Respondent's position also conflicts with Title VII's objectives. Congress enacted Title VII to "assure equality of employment opportunities and to eliminate * * * discriminatory practices and devices" in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). Allowing an employer to make black employees "work every day outside, in the heat[,] while white crew members work[] exclusively inside, in air-conditioned facilities," Pet. App. 23a (citation omitted), is irreconcilable with that purpose. Indeed, while it may be possible to posit even more egregious discrimination in working conditions (*e.g.*, requiring only black employees to handle toxic waste), the facts alleged here present the kind of extreme scenario that would typically arise only as a

hypothetical to illustrate the flaws in respondent's interpretation of the statute.

Importantly, there are limits on the scope of the "terms, conditions, or privileges of employment" covered by Section 703(a)(1). 42 U.S.C. 2000e-2(a)(1). But those limits come from the statutory text, not from "add[ing] words to the law to produce what is thought to be a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015); see *Oncale*, 523 U.S. at 80. As this Court has explained in the hostile-work-environment context, "merely offensive" conduct alone does not violate Section 703(a)(1), because it does not "alter[] the conditions of the victim's employment." *Harris*, 510 U.S. at 21-22. Likewise, Section 703(a)(1) "protects an individual only from *employment*-related discrimination." *White*, 548 U.S. at 63 (emphasis added). An employer who engages in discrimination with no connection to the workplace therefore does not violate Section 703(a)(1).

Moreover, identifying an employer action that implicates the "terms, conditions, or privileges of employment" satisfies only one element of a Section 703(a)(1) claim. 42 U.S.C. 2000e-2(a)(1). To state a Section 703(a)(1) violation, an employee must also establish that the employer "discriminate[d] * * * because of" a protected trait. *Ibid.*; see 42 U.S.C. 2000e-2(m). "The critical issue" in evaluating such a claim "is whether members of [a protected category] are exposed to disadvantageous terms or conditions of employment to which [others] are not exposed." *Oncale*, 523 U.S. at 80 (citation omitted); see, *e.g.*, *White*, 548 U.S. at 59. Thus, making distinctions between employees based on *relevant* differences in a way that *does not create disadvantages* does not vi-

olate Section 703(a)(1). For example, employers generally may maintain equivalent, sex-specific bathrooms or changing facilities without violating Section 703(a)(1). Such facilities recognize relevant differences between male and female employees and thereby treat similarly situated men and women the same, provided that the facilities are of comparable quality and convenience.

b. The court of appeals did not attempt to square its position with Section 703(a)(1)'s text. The court instead relied on circuit precedent that "strictly construes" Section 703(a)(1) "to include only 'ultimate employment decisions,' such as 'hiring, granting leaving, discharging, promoting, or compensating.'" Pet. App. 4a (quoting *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (per curiam)). Because petitioner's allegation of discriminatory "working conditions" did not involve an "ultimate employment decision[]," the court held that he could not "satisfy Title VII's adverse employment action requirement." *Ibid.*

The court of appeals adopted its "ultimate employment decisions" limitation a quarter-century ago in *Dollis* v. *Rubin*, 77 F.3d 777 (5th Cir. 1995) (per curiam). The court there stated, without reference to the statutory text, that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Id.* at 781-782. The court then defined "ultimate employment decisions" based on another court of appeals' observation "that Title VII discrimination cases have focused upon ultimate employment decisions such as hiring,

granting leave, discharging, promoting, and compensating." *Id.* at 782 (citing *Page* v. *Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981)).[2]

The court of appeals' limitation of Section 703(a)(1) to "ultimate employment decision[s]," Pet. App. 4a, is flawed. Most fundamentally, "Title VII contains no such limitation." *Abercrombie*, 575 U.S. at 773 (declining to read an unstated limitation into Title VII). To the contrary, the text and structure of Section 703(a)(1) refute such a limitation. Section 703(a)(1) first makes it unlawful "to fail or refuse to hire or to discharge any individual" because of a protected trait, 42 U.S.C. 2000e-2(a)(1)—a prohibition that does involve "ultimate employment decisions," Pet. App. 4a. Section 703(a)(1) then makes it unlawful "*otherwise* to discriminate against any individual with respect to * * * terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1) (emphasis added). That part of the statute—particularly when set apart from hiring and firing by the word "otherwise," *ibid.*—cannot be read as limited to "ultimate employment decisions," Pet. App. 4a; see *Begay* v. *United States*, 553 U.S. 137, 144 (2008) (explaining that "otherwise" means "in a different way or manner") (citation omitted).

The court of appeals' own list of "ultimate employment decisions" highlights the disconnect with the statutory text. Pet. App. 4a. The court identified five examples

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[2] *Dollis* arose under Title VII's federal-sector provision, which provides that federal "personnel actions * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Although that text differs from the text of Section 703(a)(1), the Fifth Circuit regularly applies the "ultimate employment decisions" limitation adopted in *Dollis* to Section 703(a)(1) cases. See, *e.g.*, Pet. App. 4a; *McCoy*, 492 F.3d at 559.

of such decisions: "hiring, granting leave, discharging, promoting, or compensating." *Ibid.* (quoting *McCoy*, 492 F.3d at 559). Three of those actions—"hiring," "discharging," and "compensating"—are expressly covered by Section 703(a)(1). *Ibid.* The court of appeals thus effectively reads Section 703(a)(1)'s reference to "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), to cover only decisions such as "granting leave" and "promoting," Pet. App. 4a (citation omitted). That is not a plausible account of statutory language that "strike[s] at the *entire spectrum of disparate treatment* of men and women in employment." *Meritor*, 477 U.S. at 64 (emphasis added; citations and internal quotation marks omitted). By reading "ultimate employment decisions" into the statute, Pet. App. 4a, the Fifth Circuit thus reads "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), largely out of the statute.

The court of appeals' reading also departs from this Court's precedents. As noted above, the Court's hostile-work-environment decisions have interpreted Section 703(a)(1) to support a claim that "the work environment [may be] so pervaded by discrimination that the terms and conditions of employment [a]re altered." *Vance* v. *Ball State Univ.*, 570 U.S. 421, 427 (2013). But those decisions do not indicate that the "terms and conditions of employment" that can be altered, *ibid.*, are limited to "ultimate employment decisions," such as "discharging" an employee who is the victim of harassment, Pet. App. 4a (citation omitted). Neither the court of appeals nor respondent has explained how the same statutory text can mean one thing in a hostile-work-environment claim but something else in a discrimination claim like this one. Cf. *Clark* v. *Martinez*, 543 U.S.

371, 386 (2005) (declining to "give the same statutory text different meanings in different cases").

Finally, the court of appeals' interpretation would produce untenable results. By the court's logic, even brazen acts of workplace discrimination do not give rise to a Title VII claim if they are not manifested in "ultimate employment decisions." Pet. App. 4a. An employer could, for example, shut off the heat in the offices of only racial-minority or female employees without liability for discrimination in the "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). That result is "inconsistent with both the text and purpose of Title VII." *Nassar*, 570 U.S. at 359.

2. While maintaining its position that "'[a]dverse employment actions include only ultimate employment decisions,'" the Fifth Circuit has suggested in some decisions that, "in certain cases, 'a change in or loss of job responsibilities … may be so significant and material that it rises to the level of an adverse employment action.'" *Welsh*, 941 F.3d at 824 (citations omitted). Respondent observes (Br. in Opp. 25-35) that other courts of appeals have adopted analogous formulations. But a "significant and material" discrimination limitation on Section 703(a)(1) suffers from the same flaws as an "ultimate employment decisions" rule, *Welsh*, 941 F.3d at 824 (citations omitted)—Section 703(a)(1) "contains no such limitation," *Abercrombie*, 575 U.S. at 773.[3]

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[3] Congress knows how to require a particular showing of harm for an employment-discrimination claim. For example, Section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because

a. The government recently addressed a similar interpretation of Title VII in *Forgus* v. *Esper*, No. 18-942. There, the Fourth Circuit applied its precedent requiring an employee to show "some significant detrimental effect" from alleged discrimination to state a claim under Section 703(a)(1). *Forgus* v. *Mattis*, 753 Fed. Appx. 150, 153 (2018) (per curiam) (citation omitted), petition for cert. pending, No. 18-942 (filed Jan. 15, 2019). The court held that an employee who was denied a requested "lateral" transfer—a transfer that did not involve a change in pay or benefits—had not alleged the required "significant detrimental effect." *Ibid.* (citations omitted). The government opposed certiorari in that case on record-specific grounds, Gov't *Forgus* Br. 8-10, but acknowledged that the court's interpretation of Title VII was incorrect, even though the government had sometimes defended that reading in the past, *id.* at 10-16.[4]

Of particular relevance here, the government explained that discriminatorily transferring (or declining to transfer) an employee implicates the "terms" or "conditions" of employment under the ordinary meaning of Section 703(a)(1). Gov't *Forgus* Br. 13 (citation omitted); accord *Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring) ("[T]ransferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race) plainly constitutes discrimination with respect to 'compensation,

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of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2) (emphasis added).

[4] *Forgus* arose under Title VII's federal-sector provision, 42 U.S.C. 2000e-16(a), which has different language than Section 703(a)(1). See p. 12, n.2, *supra*. Consistent with Fourth Circuit precedent, however, the court and the parties analyzed the case under Section 703(a)(1). See 753 Fed. Appx. at 153.

terms, conditions, or privileges of employment' in violation of Title VII.") (quoting 42 U.S.C. 2000e-2(a)(1)). The government added that the Fourth Circuit's rule requiring "significant" discriminatory effects would produce untenable results. Gov't *Forgus* Br. 14. For example, under that rule, paying an employee one dollar less in annual salary based on race or sex would not be actionable because it would not qualify as "significant," even though such discrimination falls squarely within the text of Section 703(a)(1). *Ibid.*

The same analysis applies to the Fifth Circuit's decisions limiting Section 703(a)(1) to "significant and material" discrimination. *Welsh*, 941 F.3d at 824 (citation omitted). Indeed, the flawed decision in *Forgus* relied in part on Fifth Circuit precedent. See 753 Fed. Appx. at 153 (citing *Wheat* v. *Florida Parish Juvenile Justice Comm'n*, 811 F.3d 702, 709 (5th Cir. 2016)).

b. Respondent contends (Br. in Opp. 24-28) that this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), supports the "significant and material" discrimination limitation read into Section 703(a)(1) by the Fifth Circuit and other courts of appeals. That reasoning reflects a misunderstanding of *Ellerth*. See Gov't *Forgus* Br. 14-16.

Ellerth involved a claim that a supervisor had created a hostile work environment—and thereby altered "the terms or conditions of employment"—through "severe or pervasive" sexual harassment of an employee. 524 U.S. at 752. The question in *Ellerth* was not the substantive standard for such a claim; the question was under what circumstances "an employer has vicarious liability" for sexual harassment by a supervisor. *Id.* at 754. After reviewing agency-law principles, the Court

determined that vicarious liability exists "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* at 765. The Court reasoned that such a "tangible employment action" by a supervisor necessarily "requires an official act of the enterprise," and therefore supports imposing vicarious liability on the employer. *Id.* at 761-762. When no such "tangible employment action" is taken by a supervisor, the Court explained, an employer can avoid vicarious liability in certain circumstances by establishing an "affirmative defense." *Id.* at 764-765.

Ellerth's identification of the "tangible employment action[s]" that support automatic imputation of vicarious liability to an employer says nothing about the meaning of "terms, conditions, or privileges of employment" in Section 703(a)(1). 42 U.S.C. 2000e-2(a)(1). Indeed, this Court has expressly stated that *Ellerth* "did *not* discuss the scope of" Title VII's "general antidiscrimination provision," but rather invoked the concept of a "'tangible employment action' * * * *only* to 'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *White*, 548 U.S. at 64-65 (quoting *Ellerth*, 524 U.S. at 760-761) (emphases added; brackets in original). Contrary to respondent's contention (Br. in Opp. 24-28), *Ellerth* thus provides no support for the atextual restrictions on Section 703(a)(1) imposed by the Fifth Circuit and other courts of appeals.[5]

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[5] This Court in *White* held that retaliation claims under Section 704(a) may be based only on actions "that a reasonable employee would have found * * * materially adverse." 548 U.S. at 68. That

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The decision below conflicts with the decisions of other courts of appeals. First, the Fifth Circuit's interpretation of Section 703(a)(1) as prohibiting discrimination in "only 'ultimate employment decisions,'" Pet. App. 4a (quoting *McCoy*, 492 F.3d at 559), conflicts with the Sixth Circuit's "reject[ion of] the rule that only 'ultimate employment decisions[]' * * * can be materially adverse for the purpose of a Title VII retaliation or discrimination claim." *Michael* v. *Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 594 (2007), cert. denied, 552 U.S. 1258 (2008). The Ninth Circuit has also rejected "the Fifth * * * Circuit rule that only 'ultimate employment actions' such as hiring, firing, promoting and demoting constitute actionable adverse employment actions." *Ray* v. *Henderson*, 217 F.3d 1234, 1242 (2000) (rejecting the rule with respect to retaliation claims); see *Chuang* v. *University of California Davis*, 225 F.3d 1115, 1125 (9th Cir. 2000) (relying on *Ray* in interpreting Section 703(a)(1)).

In addition, several courts of appeals have reached results inconsistent with the Fifth Circuit's rejection of petitioner's claim. The Seventh Circuit, for example,

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limitation is appropriate in the retaliation context because Section 704(a) prohibits "discriminat[ion]" because of protected conduct but—in contrast to Section 703(a)(1)—does not specify any particular forms of discrimination. 42 U.S.C. 2000e-3(a). As the Court in *White* explained, a "*material* adversity" limitation is necessary in the retaliation context "to separate significant [harms] from trivial harms" that would not have "'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. at 68 (citation omitted). In adopting that reading of the retaliation provision, the Court expressly held that the scope of Section 703(a)(1) is different because of its different text. *Id.* at 61-67.

reversed a district-court decision that had set aside a jury verdict for employees who alleged a race-based reassignment to "ditch digging duty" involving "significantly harsher working conditions" than their prior office jobs. *Tart* v. *Illinois Power Co.*, 366 F.3d 461, 464, 473 (2004). The Fifth Circuit presumably could not reach that result given its position that the harsher "working conditions" identified by petitioner are not among the "ultimate employment decisions" actionable under Section 703(a)(1). Pet. App. 4a. Relatedly, the Fifth Circuit has held that "imposing a higher workload" on the alleged basis of a protected trait "does not qualify" as actionable under Section 703(a)(1). *Outley* v. *Luke & Assocs., Inc.*, 840 F.3d 212, 217 (2016); see Pet. App. 40a. But the Second and Ninth Circuits have taken the opposite position—that "the assignment of a disproportionately heavy workload" is actionable under Section 703(a)(1). *Feingold* v. *New York*, 366 F.3d 138, 153 (2d Cir. 2004); see *Davis* v. *Team Elec. Co.*, 520 F.3d 1080, 1090 (9th Cir. 2008) (similar).

To the extent the Fifth Circuit interprets Section 703(a)(1) to cover only "significant and material" discrimination, *Welsh*, 941 F.3d at 824 (citation omitted), that approach is more closely aligned with the formulations adopted by most other circuits, see Pet. 12-16; Br. in Opp. 26-35. But it is unclear how that standard applies in the Fifth Circuit, given that the court continues to articulate its "ultimate employment decisions" rule at the same time. *Welsh*, 941 F.3d at 824. In any event, the alternative formulation suggested by some Fifth Circuit decisions and adopted by most courts of appeals conflicts with the text and purpose of Title VII. See *Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring);

pp. 15-16, *supra*. Even if there were not a square circuit conflict, such a widespread misreading of a key employment-discrimination provision would warrant this Court's review. See *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 108-109 (2002) (granting certiorari to review lower courts' "various approaches" to a Title VII question, and adopting a different interpretation based on "the text of the statute").

Last May in *Forgus*, the government suggested that—particularly in light of the record-specific problems in that case—the Court might wish to allow further percolation on this question before granting review. See Gov't *Forgus* Br. 13-14. But it does not appear that any court has reconsidered its position in that time. Given that many circuits have entrenched precedents dating back decades that can only be revisited through rehearing en banc, see, *e.g.*, *Dollis*, 77 F.3d at 781-782, it may not be practically likely that courts of appeals will correct their own errors. The government therefore now agrees that this Court's review is warranted.

C. The Question Presented Warrants Review In This Case

1. The question presented is undeniably important. Section 703(a)(1) is "Title VII's core antidiscrimination provision," *White*, 548 U.S. at 61, and questions arise frequently about whether employer actions fall within the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1). In recent years, the EEOC has received between 15,000 and 19,000 Title VII administrative charges per year asserting discrimination in the "[t]erms [or] condition[s]" of employment. EEOC, *Statutes by Issue (Charges filed with EEOC), FY 2010-FY 2019*, https://go.usa.gov/xdBBu. Those charges represent more than a quarter of all Title VII charges received by the EEOC in each fiscal year. See *ibid.*;

EEOC, *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC), FY 1997–FY 2019*, https://go.usa.gov/xdBK3. The "proper interpretation and implementation of" Section 703(a)(1) thus has "central importance to" employment-discrimination litigation. *Nassar*, 570 U.S. at 358 (similarly noting the large number of EEOC charges filed under Title VII's anti-retaliation provision).

Clarifying the meaning of "terms, conditions, or privileges of employment" in Section 703(a)(1) would also have beneficial effects beyond Title VII. Other prominent anti-discrimination statutes, such as the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, include provisions prohibiting discrimination with respect to "terms, conditions, [or] privileges of employment," 29 U.S.C. 623(a)(1); 42 U.S.C. 12112(a). Numerous whistleblower-protection statutes prohibit discrimination in the "terms" or "conditions" of employment because of an employee's protected conduct. See, *e.g.*, 18 U.S.C. 1514A(a); 21 U.S.C. 399d(a); 49 U.S.C. 42121(a). And the Department of Labor enforces Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965), which incorporates Title VII principles in regulating federal contractors. See Office of Fed. Contract Compliance Programs, U.S. Dep't of Labor, *Federal Contract Compliance Manual* §§ 2E03, 2J, 2K, https://go.usa.gov/xdB8t. Resolving the question presented would thus have broad significance for federal employment-discrimination law.

2. Although respondent identifies several purported impediments to review, this case provides a suitable vehicle for this Court to resolve the question presented.

Respondent first observes (Br. in Opp. 14 & n.2) that the decision below is nonprecedential. But the court of appeals relied on a precedential decision for its relevant holding. See Pet. App. 4a (citing *McCoy*, 492 F.3d at 559). And it is not uncommon for this Court to review unpublished decisions that resolve important questions based on prior circuit precedent. See, *e.g.*, *Mont* v. *United States*, 139 S. Ct. 1826, 1831 (2019); *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1721 (2019).

Respondent also contends (Br. in Opp. 18-21) that petitioner failed to preserve the question presented in the court of appeals. But this Court may review "an issue not pressed [below] so long as it has been passed upon." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). And "[t]There is no doubt in the present case that the [court of appeals] decided the crucial issue," *id.* at 43, when it held that Section 703(a)(1) prohibits discrimination in "only 'ultimate employment decisions,' such as 'hiring, granting leave, discharging, promoting, or compensating,'" Pet. App. 4a (citation omitted); see Pet. i. Given the Fifth Circuit's deeply entrenched precedent, moreover, it seems unlikely that petitioner's raising the issue would have affected that court's resolution of his appeal.

Finally, respondent contends (Br. in Opp. 14-17, 36-37) that resolving the question presented would not alter the outcome of the case because petitioner cannot succeed on the merits. The record, however, does not clearly support that assertion. Petitioner testified in a deposition that black crew members were assigned to work outside "in the heat," while white crew members worked inside, and that his supervisors refused his requests for a "rotation." D. Ct. Doc. 33-6, at 20, 26-28 (June 29, 2017). Petitioner also submitted declarations

from two witnesses who purported to corroborate his account. D. Ct. Doc. 33-1, at 1-2 (June 29, 2017); D. Ct. Doc. 33-2, at 1-3 (June 29, 2017). The district court rejected those declarations for failure to establish foundation or personal knowledge and concluded that petitioner had failed to identify similarly situated white comparators. Pet. App. 35a-38a. The court of appeals, however, "[a]ssum[ed]" that "the declarations [had] identif[ied] similarly situated comparators," and then resolved the case on the purely legal ground that petitioner's allegations did not state a claim under Section 703(a)(1). *Id.* at 4a.

If this Court were to reverse the court of appeals' decision on that legal question, the lower courts could determine on remand whether petitioner presented sufficient evidence to allow his claim to proceed under a proper interpretation of Section 703(a)(1). The court of appeals could also, if appropriate, review the district court's ruling on the admissibility of the declarations supporting petitioner's account. The government takes no position on the proper resolution of those case-specific issues. But it appears from the record that petitioner has at least some possibility of surviving a motion for summary judgment. Respondent's assertion that this Court's resolution of the question presented could not have any practical effect is accordingly unsound.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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