No. 20-___

IN THE

Supreme Court of the United States

WANZA COLE,

Petitioner,

v.

WAKE COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" with respect to "compensation, terms, conditions, or privileges of employment" on the basis of race, religion, sex, or other protected status. 42 U.S.C. § 2000e-2(a)(1). The Fourth Circuit below—following binding circuit precedent limiting the reach of Title VII to discriminatory conduct that imposes "significant detrimental effect" on employees—held that certain discriminatory job transfers are not prohibited by Title VII.

The question presented is:

> Does Title VII prohibit discrimination as to all "terms, conditions, or privileges of employment," or is its reach limited to only discriminatory employer conduct that courts determine have significant detrimental effects on employees?

RELATED PROCEEDINGS

Cole v. Wake Cnty. Bd. of Educ., No. 5:16-CV-765-D (E.D.N.C. Feb. 28, 2020)

Cole v. Wake Cnty. Bd. of Educ., No. 20-1364 (4th Cir. Feb. 4, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wanza Cole respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a) is available at 834 F. App'x 820. The opinion of the United States District Court for the Eastern District of North Carolina (Pet. App. 7a) is available at 2020 WL 1027944.

JURISDICTION

The Fourth Circuit entered judgment on February 4, 2021 (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) 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[.]

INTRODUCTION

Title VII of the Civil Rights Act of 1964 forbids discrimination by an employer "with respect to" an

employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

Petitioner Wanza Cole maintains that respondent Wake County Board of Education transferred her to a different job because she is Black. The Fourth Circuit held that the transfer did not violate Title VII solely because, in its view, Title VII's prohibition on discrimination reaches only "adverse employment action[s]" with "significant detrimental effect" on workplace terms, conditions, or privileges. Pet. App. 4a-5a. This decision reflects a deep and longstanding circuit conflict over what kinds of discriminatory conduct are actionable under Title VII, or, to use the judicially created parlance, what constitutes an "adverse employment action." The circuit split is especially in need of this Court's attention because it emerges from a misunderstanding of this Court's precedent and because—among the circuits' divergent approaches—no circuit applies the statutory text as written.

In *Peterson v. Linear Controls, Inc.*, No. 18-1401, this Court was presented with a nearly identical question to the question presented here. There, this Court called for the views of the United States. 140 S. Ct. 387 (2019) (Mem.). The Solicitor General explained that interpreting Title VII to cover only "'significant and material' employment actions" is "atextual and mistaken" and recommended a grant of certiorari. Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020). Shortly thereafter, *Peterson* apparently settled. *See* Jt. Mot. to Defer Consideration of Pet. for a Writ of Cert., No. 18-1401 (May 28, 2020). The Court then granted the petitioner's motion to

dismiss, rendering the Court unable to resolve the important question presented. *Peterson v. Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (Mem.).

The Court should do now what it could not do in *Peterson*: grant review, resolve the confusion among the circuits, and reject the atextual adverse-employment-action doctrine. In doing so, it should reverse the Fourth Circuit's application of that doctrine and hold that "transferring 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, terms, conditions, or privileges of employment' in violation of Title VII." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

STATEMENT OF THE CASE

I. Factual background

Petitioner Wanza Cole, who is Black, worked for respondent Wake County Board of Education as an educator from 1992 to 2015, rising through the ranks to become a school principal in 2007. Pet. App. 8a; Fourth Circuit Joint Appendix (CA4JA) 101.[1] Cole was known by colleagues as a "dedicated professional," a "problem-solver," and a "highly qualified" and "visionary and successful[]" leader. CA4JA 523, 526.

[1] Pin cites for the Fourth Circuit Joint Appendix are to page numbers assigned by the CM/ECF system in the Fourth Circuit.

Cole's performance evaluations reflect as much. *See id.* at 455-462.[2]

Things changed at the end of the 2013 school year, when the County hired a new Superintendent and promoted Douglas Thilman, a white principal, similarly-situated to Cole, to head its Human Resources division. CA4JA 162, 386, 463. With Thilman's promotion came an effort to push Cole out of her school-leadership position. *See id.* at 463, 390.

In June 2013, Cole received a threatening, diatribe-filled letter at her home address from an anonymous faculty member. CA4JA 463. It said: "We are all so happy that we have a new Superintendant [sic] and a new person in HR to get rid of your stupid self" and "We will be thinking of ways to get rid of your stupid self. Oh, and we will be thinking really hard. Better check the bookkeeping ... and the time sheets ... and everything else. We are coming for you, you ignorant bitch." *Id.* The letter called Cole an "overall bitch," asserted "[n]obody respects you," and labeled Cole's success undeserved. *Id.*

When Cole had previously mentioned receiving hate mail to her supervisor, she was advised not to report it to Human Resources. CA4JA 208-09. The supervisor told Cole that the "white men" in that department "don't care anything about you," so just "[i]gnore it and keep running your school." *Id.* Taking that approach during the 2013-2014 school year, Cole continued to do her job well, including by successfully

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[2] Because this case was decided on respondent's motion for summary judgment, this Court "must assume the facts to be as alleged by petitioner." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

implementing the "teacher evaluation process … within the district timeline." *Id.* at 455. Indeed, Cole's school was leading the district in teacher evaluations. Pet. App. 20a; CA4JA 217.

At the beginning of the 2014-2015 school year, however, after two teachers complained about flaws in the evaluation system, Thilman launched an investigation into Cole's approach to teacher evaluations. Pet App. 9a-10a. It revealed that Cole's school had conducted more than the average number of teacher evaluations district wide, but that Cole had purportedly not performed the evaluations herself, instead delegating the task to her assistant principal. CA4JA 453-54. No policy requires school principals to perform evaluations themselves, *id.* at 328, 348, 548, and the calendar that the Human Resources department provides to principals is meant only to guide when teachers should be evaluated but is not mandatory. Pet. App. 9a. In any case, Cole "had, in fact, conducted teacher evaluations," but the evaluation system "did not reflect her completed evaluations" because of widespread technological problems. *Id.* at 10a.

Having found a hook for "get[ting] rid of" Cole, CA4JA 463, a member of Thilman's staff and the County's new Superintendent met with Cole on February 11, 2015 to discuss the investigation. Pet. App. 10a-11a. Taking the keep-your-head-down approach that had generally worked for her in the past, CA4JA 208-09, Cole did not dispute the allegations in the moment and simply stated that she "would get the necessary observations completed." Pet. App. 11a.

Less than three weeks later, on February 27, 2015, Cole again met with Human Resources and the Superintendent about the alleged problems with her approach to evaluations. Pet App. 10a. At that point, a letter demoting Cole to an assistant-principal position because of purported concerns about her "conduct relating to the evaluation of teachers" had already been drafted. CA4JA 467-68. The County did not present the February 2015 demotion letter to Cole, however. *See* Pet. App. 5a. Instead, on April 9, 2015, the Superintendent performed a mid-year review in which he rated Cole as "'not progressing' on her personal goal of Human Resources Leadership relating to teacher evaluations." *Id.* at 11a-12a. On her later year-end review, the Superintendent rated Cole's "Human Resources Leadership" as "Developing." *Id.* at 12a. Then, the County decided not to officially demote Cole, as the draft letter had proposed, but rather to transfer her to a position in the school system's central office. *Id.* The transfer became official on June 23, 2015. *Id.*

With the transfer, although Cole's pay and benefits would have remained the same, her title, responsibilities, supervisor, and workplace would have changed wholesale. Pet. App. 12a-13a; CA4JA 157. After over twenty years of working in the County's schools and having close contact with students, Cole now would have an office job. *See* Pet. App. 12a; CA4JA 157. As a principal, Cole's responsibilities included recruiting and mentoring teachers, overseeing conflict resolution among staff, setting school expectations for students and staff, assisting with instructional leadership and curriculum development, and building relationships

with parents. *See* CA4JA 455-56. The new role stripped Cole of these responsibilities. Pet. App. 12a. She would be reviewing the budget related to behavioral-intervention services and participating "in central office committees and task forces." CA4JA 157-58. Instead of leading an entire school, in the new position, Cole would be supervising only a small team of behavior-support coaches and coordinating teachers. *Id.* at 157. And despite the County's claim that it transferred Cole because of a performance problem related to evaluations, one of the few responsibilities that carried over to Cole's new role was "[s]upervis[ing] and evaluat[ing] staff performance according to system guidelines." *Id.* at 158.

Cole was devastated, both because of how the transfer would change her job and also because she realized she had been treated differently from her white peers. CA4JA 379, 317-19, 353-54, 390-91, 525. She knew, for example, that the County had promoted Thilman, who is white, despite his past involvement in a "grade-changing scandal" when he was a high school principal. *Id.* at 318-19, 353-54, 525.

Cole fell into a depression and started seeing a psychiatrist. CA4JA 379, 383. The mental-health crisis triggered by the reassignment was serious enough that Cole considered hospitalizing herself in the days after she received the County's formal reassignment letter. *Id.* at 379. She was diagnosed with post-traumatic stress disorder, anxiety, and depression. *Id.* at 383. Too sick to report to work, *id.* at 378-79, she used her accrued sick leave from the start date of her new role until no more sick days remained. Pet. App. 12a-13a. The school board then terminated

her employment, voting not to renew her contract because of her "failure to report to work." *Id.* at 13a. She has since been "unable to work" in light of continuing post-traumatic stress, anxiety, and depression. CA4JA 382-83.

II. Procedural background

Cole sued the County under Title VII of the Civil Rights Act of 1964 in the U.S. District Court for the Eastern District of North Carolina, which had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Section 703(a)(1) of the Act prohibits an employer from discriminating against its employees on the basis of race with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

Cole claimed, among other things, that the County discriminated against her by reassigning her because of her race. Pet. App. 7a.[3] The district court granted the County's motion for summary judgment. *Id.* at 8a. As relevant here, the court held that because, under binding Fourth Circuit precedent, a "lateral transfer with no effect on pay, benefits, or seniority" is "not an adverse employment action," Cole's race-discrimination claim could not proceed to trial. *Id.* at 16a-18a. Alternatively, the court reasoned that Cole had "failed to create a genuine issue of material fact concerning whether she was meeting" the County's "legitimate expectations of employment at the time of the transfer" or that the County's asserted reasoning

[3] Cole also brought a retaliation claim, *see* Pet. App. 7a, which is not pursued here.

for transferring her was a pretext for discrimination. *Id.* at 18a, 23a-25a.

The Fourth Circuit affirmed based solely on the district court's principal rationale: that Cole's transfer was not an "adverse employment action" and, therefore, is not actionable under Title VII. Pet App. 3a-5a. Effectively taking as true that Cole's transfer was discriminatory, the court of appeals concluded that a "reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect" such as a "decrease in compensation, job title, level of responsibility, or opportunity for promotion." *Id.* at 4a (quoting *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004)). In the Fourth Circuit's view, it could not determine whether the reassignment met its significant-detrimental-effect standard because Cole did not report to her new position and the County terminated her as a result. *Id.* at 4a. The court chose not to address the district court's alternative holdings. *Id.* at 5a n.3.

REASONS FOR GRANTING THE WRIT

I. There is an entrenched circuit split over what discriminatory employment practices are actionable under Section 703(a)(1).

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, including race. 42 U.S.C. § 2000e-2(a)(1). Although "terms, conditions, or privileges" are everyday English words with straightforward meanings, *see infra* at 26-28, the circuits have departed markedly from Title

VII's text and are therefore split over which discriminatory employment practices Section 703(a)(1) forbids. 1 Merrick T. Rossein, *Emp. Discrimination Law and Litig.* § 2.6 (Dec. 2020); *see Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (acknowledging but leaving unresolved the inconsistencies among the circuits about the level of harm required to prove a "substantive discrimination offense" under Section 703(a)(1)).

In the Fifth and Third Circuits, discriminatory practices like race-based shift assignments, lateral transfers, and other actions that do not constitute "ultimate employment decisions" are viewed as permissible under Title VII. The majority of courts of appeals—the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits—rightly condemn as discriminatory a broader category of employment practices but still mistakenly restrict the meaning of "terms, conditions, or privileges." The remaining regional circuits toggle between their sister circuits' varying disparate-treatment tests—none of which has a foothold in Section 703(a)(1)'s text.

A. The Fifth and Third Circuits. The precedents in the Fifth and Third Circuits stand out as especially restrictive. In these circuits, only employment actions that result in tangible, immediate pocketbook harms are actionable under Section 703(a)(1).

In the Fifth Circuit, only an "adverse employment action" that is an "ultimate employment decision"—including a refusal to hire, a firing, a demotion, or the like—constitutes impermissible discrimination under Section 703(a)(1). *McCoy v. City of Shreveport*, 492 F.3d 551, 559, 560 (5th Cir. 2007). The ultimate-employment-decision list parallels a catalogue of

"tangible employment action[s]" enumerated by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 744 (1998), a decision that "did not discuss the scope of" Title VII's "general antidiscrimination provision" at issue here. *See Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 65 (discussing *Ellerth*).

Instead, *Ellerth* concerned the circumstances under which an employee's workplace harassment can be attributed to an employer under Title VII. Specifically, *Ellerth* involved whether an employee whose supervisor threatens to alter her job-related terms or conditions, but does not act on those threats, may hold her employer vicariously liable for the hostile work environment created by the supervisor's unfulfilled threats. 524 U.S. at 754. Under those circumstances, an employer has an affirmative defense if it has exercised reasonable care to prevent and promptly correct the harassment. *Id.* at 761. The employer does not have an affirmative defense, however, if the harassing supervisor has taken a "tangible employment action" against the subordinate that causes "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.* at 761.

By straying from Title VII's text and then grasping for clues about what discriminatory conduct it forbids in an off-topic case (*Ellerth*), the Fifth Circuit has so distorted the meaning of "terms, conditions, or privileges" that, for example, an employer in that circuit is free to demand that Black employees work outdoors in the Louisiana summer while white employees work indoors in air-conditioned comfort.

Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). So too may a Fifth Circuit employer subject a Black employee to drug tests because he is Black or assign extra responsibilities to Black employees only. *See, e.g.*, *Johnson v. Manpower Prof'l Servs., Inc.*, 442 F. App'x 977, 983 (5th Cir. 2011); *Ellis v. Compass Grp. USA, Inc.*, 426 F. App'x 292, 296 (5th Cir. 2011). In sum, race-based job reassignments or denials of transfers do not violate Title VII in the Fifth Circuit unless they amount to a demotion or a denial of a promotion. *Alvarado v. Tex. Rangers*, 492 F.3d 605, 612 (5th Cir. 2007).

The Third Circuit's rule appears, at first glance, somewhat more tethered to Section 703(a)(1)'s text, but it yields the same results as the Fifth Circuit's ultimate-employment-decision standard. The Third Circuit asks whether discrimination is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004). But supposedly "minor actions" like "lateral transfers" that involve changes to "title, office, reporting relationship and responsibilities" are "generally insufficient" to alter terms, conditions, or privileges of employment. *Langley v. Merck & Co.*, 186 F. App'x 258, 260 (3d Cir. 2006).

In *Stewart v. Union County Board of Education*, 655 F. App'x 151 (3d Cir. 2016), the Third Circuit used the *Ellerth* list to decide whether Section 703(a)(1) prohibited an employer's disparate-treatment practice. The plaintiff alleged, among other things, that a supervisor "moved all white security guards inside the building during the winter season" while

requiring Black security staff to work "outdoors in the colder weather climates." Appellant's Informal Br. at 10, *Stewart v. Union Cnty. Bd. of Educ.*, 655 F. App'x 151 (3d Cir. 2016) (No. 15-3970), 2016 WL 1104687 (Mar. 17, 2016). Despite this differential treatment in working conditions, the Third Circuit affirmed the district court's grant of summary judgment on the ground that Stewart had not "suffered an actionable adverse action." *Stewart*, 655 F. App'x at 155; *see also Harris v. Att'y Gen. U.S.*, 687 F. App'x 167, 168-69 (3d Cir. 2017) (Black employee alleging that his employer required him to work outdoors despite "dangerously high" temperatures while "white staff were allowed to discontinue" outdoor work "failed to make out a prima facie case" of race discrimination because the employer had purportedly not altered the plaintiff's "terms, conditions, or privileges of employment.").

B. The Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. Six other circuits reject the Third and Fifth Circuits' cramped interpretation of "terms, conditions, or privileges."

In the Second Circuit, there is "no bright-line rule to determine whether a challenged employment action is sufficiently significant to serve as the basis for a claim of discrimination." *Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015). Unlike in the Third and Fifth Circuits, where employers may discriminate if they use practices not listed in *Ellerth*, in the Second Circuit, a discriminatory transfer is actionable if it involves "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities," or other practices relevant to a "particular situation." *Chung v. City Univ. of N.Y.*, 605 F. App'x 20, 22 (2d Cir. 2015). Because lateral

transfers necessarily involve changes to workplaces terms, conditions, or privileges, the Second Circuit recognizes that Section 703(a)(1) generally protects against discriminatory reassignments. *See, e.g.*, *de la Cruz v. N.Y.C. Human Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996). In *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980), for example, the Second Circuit held that the transfer of an art teacher from a junior-high school to an elementary school "interfere[d] with a condition or privilege of employment." *Id.* at 364, 366. The teacher's salary, workload, and teaching subject did not change, but the transfer was professionally dissatisfying because she preferred teaching more advanced pupils and had graduate degrees in adolescent art education. *Id.*

The Sixth Circuit has also rejected the ultimate-employment-decision rule. *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 594 (6th Cir. 2004). Transfers may be actionable in the Sixth Circuit, but only when they involve "a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 886 (6th Cir. 1996). And, in *Spees v. James Marine, Inc.*, 617 F.3d 380 (6th Cir. 2010), the Sixth Circuit held that a discriminatory shift change may violate Title VII when it causes "inconvenience resulting from a less favorable schedule," feels like a demotion as judged from the perspective of a reasonable employee in the plaintiff's position, or leaves the employee "unchallenged." *Id.* at 392.

The Seventh Circuit also refuses to interpret Section 703(a)(1) "so narrowly as to give an employer a 'license to discriminate.'" *Lewis v. City of Chi.*, 496 F.3d 645, 654 (7th Cir. 2007) (quoting *Farrell v. Butler Univ.*, 421 F.3d 609, 614 (7th Cir. 2005)). Limiting the scope of Section 703(a)(1) to the *Ellerth* list or some equivalently restrictive catalogue of employment practices, that court has observed, would "create a loophole for discriminatory actions by employers" at odds with congressional intent. *See id.* Thus, Section 703(a)(1)'s terms, conditions, and privileges encompass not only "compensation, fringe benefits, or other financial terms of employment," but also lateral transfers that reduce "career prospects" or subject the employee to "humiliating, degrading, unsafe," or "unhealthful" conditions. *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002). A reassignment might have consequences for future career employment if it prevents an employee "from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted." *Id.* A transfer may also cause an injury actionable under Section 703(a)(1) if it does not impact job responsibilities but nonetheless changes the setting in which an employee must work. *Id.*

The Eighth Circuit also holds that discriminatory workplace practices other than "ultimate employment decisions" may violate Title VII. For instance, in *Turner v. Gonzales*, 421 F.3d 688 (8th Cir. 2005), it reversed a grant of summary judgment to an employer that downgraded an employee's performance evaluations and then laterally transferred the employee to a new city based on her sex. *Id.* at 697.

The employee's "title, salary and benefits were not affected by the transfer," but her responsibilities shifted. *Id.*

The Ninth Circuit similarly rejects the ultimate-employment-decision rule in favor of what it calls the "the EEOC test," *Dimitrov v. Seattle Times Co.*, No. 98-36156, 2000 WL 1228995, at *2 (9th Cir. Aug. 29, 2000), which interprets Section 703(a)(1) to cover "lateral transfers, unfavorable job references, and changes in work schedules," *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). Because Section 703(a)(1) is not limited to "'terms' and 'conditions' in the narrow [contractual] sense," relocating an employee's workspace in a way that makes it difficult for the employee to carry out his responsibilities changes "working conditions" and thus violates Title VII. *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1125-26 (9th Cir. 2000) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)).

Finally, the Eleventh Circuit rejects a "bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged discrimination must have for it to be actionable." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001). Rather, to determine whether a discriminatory reassignment violates Section 703(a)(1), the circuit applies an "objective test, asking whether 'a reasonable person in [the plaintiff's] position would view the employment action in question as adverse.'" *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000) (quoting *Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1449 (11th Cir. 1998)).

Hinson bears a closes resemblance to petitioner Cole's case. 231 F.3d at 830. There, a female principal alleged that two individuals who had recently "moved into positions of power over her" were "plotting," because of her sex, "to remove her as principal." *Id.* at 824. The scheme materialized, and although the principal "preferred a job where she would have contact with students," the school board voted to "move her to an administrative position." *Id.* The superintendent billed the transfer as a promotion, but the plaintiff "suspected it was merely a make-work position designed to facilitate her removal." *Id.* In contrast to the decision below, the Eleventh Circuit concluded that lateral transfers that result in "a loss of prestige and responsibility" are actionable under Section 703(a)(1). *Id.* at 830.

C. Additional, atextual confusion in the circuits. The four remaining regional circuits seesaw between embracing the restrictive *Ellerth* list and applying the more flexible approach similar to that taken by the majority of circuits, further underscoring the need for this Court's guidance.

First Circuit. The First Circuit (like the Third) has often borrowed from this Court's vicarious-liability decision in *Ellerth* to articulate the scope of Section 703(a)(1). *See, e.g.*, *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010) (quoting *Ellerth*, 524 U.S. at 761). Relying on *Ellerth*, the First Circuit has held that discriminatory holiday-work-shift assignments are lawful. *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94-95 (1st Cir. 2012). But the First Circuit is inconsistent—sometimes departing from the *Ellerth* list to adopt the more expansive interpretation of Section 703(a)(1) applied in the majority of circuits.

It did that in *Caraballo-Caraballo v. Correctional Administration*, 892 F.3d 53 (1st Cir. 2018), where the court "squarely rejected" that a discriminatory transfer or change in job responsibilities must result in a pocketbook harm to violate Title VII. *Id.* at 61.

Fourth Circuit. The Fourth Circuit similarly ping-pongs between approaches. Although the decision below cites precedent purporting to reject the Fifth Circuit's ultimate-employment-decision test, the Fourth Circuit has often required employees to plead conduct enumerated in *Ellerth* to establish a disparate-treatment claim. *Compare* Pet. App. 4a (citing *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004)), *with Jensen-Graf v. Chesapeake Emp'rs' Ins. Co.*, 616 F. App'x 596, 597-98 (4th Cir. 2015) (holding that an employee could not challenge sex-based placement on an employee improvement plan). For instance, in *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, the Fourth Circuit held that "[c]onduct short of ultimate employment decisions can constitute adverse employment action." *Id.* at 375-76 (citation and quotation marks omitted). But the court has also held that discriminatory practices are unlawful under Title VII only when "the plaintiff can show that" the conduct "had some significant detrimental effect." Pet. App. 4a (quoting *James*, 368 F.3d at 376). Under that significant-detrimental-effect test, "absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not" violate Title VII even if the discriminatory transfer involves, for example, a change in management, increased stress, or altered

working conditions. *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999) (evidence describing how "poor working conditions" made reassignment to a wind tunnel "undesirable" was insufficient to "show that the reassignment had some significant detrimental effect."). In practice, this generally means that race-based transfers without immediate pocketbook consequences, like the one that the County imposed on Cole, are deemed lawful disparate treatment. *See* Pet. App. 4a-5a.

Tenth Circuit. The Tenth Circuit sometimes embraces a "'case-by-case approach,' examining the unique factors relevant to the situation at hand." *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998) (quoting *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998)). As in the Fourth Circuit, if a transfer "involves no *significant* changes in an employee's conditions of employment," the reassignment will escape Title VII's reach even if it is discriminatory. *Id.* at 532 n.6 (emphasis added). This case-by-case approach has led to arguably contradictory results. In *Piercy v. Maketa*, 480 F.3d 1192 (10th Cir. 2007), the court held that because of differences in the nature of work assignments at two detention facilities, female officers could challenge a policy preventing them from transferring to the facility with significantly less arduous work. *Id.* at 1205. Yet, the same officers could not challenge the same employer's sex-based shift-assignment policy, which consigned women to objectively less-desirable shifts, because the work itself was substantially the same. *Id.* at 1203-04.

D.C. Circuit. The D.C. Circuit's approach can fairly be described as consistently inconsistent. It

sometimes limits Section 703(a)(1)'s reach to the *Ellerth* list. *See, e.g.*, *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009); *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003). Thus, transfers (or denials of transfers) motivated by discriminatory intent but unaccompanied by diminished pay, benefits, or responsibilities are lawful. *Chambers v. Dist. of Columbia*, 988 F.3d 497, 501 (D.C. Cir. 2021) (per curiam) (citing *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999)). But the D.C. Circuit does not always cabin its analysis using the *Ellerth* list. It has held that an employer's decision to relegate an employee to the night shift on account of his religion constitutes a change in the "terms, conditions, or privileges of employment." *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001).

In 2017, then-Judge Kavanaugh urged the D.C. Circuit to reexamine its inconsistent and atextual understanding of "terms, conditions, or privileges of employment," but it has refused to do so. *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban & Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring); *see Chambers*, 988 F.3d at 503 (Tatel, J. & Ginsburg, J., concurring) (maintaining that it is "long past time for the en banc court to" reconsider the court's "incorrect interpretation of a straightforward statutory provision.") (quotation marks omitted).

* * *

In short, every regional circuit has confronted the question presented, and because all have deviated from Title VII's text, deep division over which discriminatory employment practices are prohibited by Title VII has endured. This Court's intervention is needed.

II. The question presented is important and recurring.

A. The courts of appeals' various atextual adverse-employment-action rules impose far-reaching consequences. The discussion above of the circuit precedent shows that, even when motivated by discrimination, a wide range of employer practices affecting the daily lives of employees cannot be remedied under Title VII. Limiting actionable discrimination to the *Ellerth* list effectively blesses an array of discriminatory practices beyond the lateral transfer at issue in this case. Discriminatory "negative performance evaluations" are not actionable. *See, e.g.*, *Douglas v. DynMcDermott Petroleum Operations Co.,* 144 F.3d 364, 373 n.11 (5th Cir. 1998); *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003). A plaintiff has no remedy when she is denied training on a discriminatory basis. *See e.g.*, *Shackelford v. Deloitte & Touche, LLP,* 190 F.3d 398, 407 (5th Cir. 1999); *Ford v. Cnty. of Hudson*, 729 F. App'x 188, 195 (3d Cir. 2018). And an employer is free to give out performance awards on the basis of race. *Douglas v. Donovan*, 559 F.3d 549, 553 (D.C. Cir. 2009); *Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 885 (S.D. Tex. 2010).

To be clear, then, the circuit precedents do more than fail to hold employers accountable for idiosyncratic discriminatory acts after they have occurred. Under the Fifth Circuit's approach, for instance, an employer may lawfully adopt the following prospective policy: "Pay, titles, and job descriptions are based on merit without regard to race, but we require Black employees to work outside in the heat because they are Black while white employees may work inside with air conditioning." *See Peterson*

v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). In the Fourth Circuit, a district court would be powerless to enjoin a school board's express policy requiring Black principals to complete teacher evaluations themselves while allowing white principals to delegate the task. *See, e.g.*, *Johnson v. Aluminum Co. of Am.*, 397 F. Supp. 2d 688, 697 (M.D.N.C. 2005), *aff'd*, 205 F. App'x 152 (4th Cir. 2006) (plaintiff who alleged "he was given extra work" because of his race did not have an actionable Title VII claim).

Because in some circuits discrimination is permissible so long as it does not involve an "ultimate employment decision" or impose an immediate pocketbook injury, an employer could, without legal consequence, require all of its Black employees to work under white supervisors, women to stand in every meeting while male counterparts sit comfortably around a table, and employees of certain national origins to wear standard business attire while allowing others to wear clothing associated with their native lands. Decades after Title VII's enactment, the importance of reviewing a doctrine that countenances these practices is manifest.

B. The question presented concerns the breadth of Title VII's ban on workplace discrimination. But it implicates the interests of employers and employees under other statutes as well. The Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act, and Section 1981, like Title VII, prohibit discrimination with respect to "terms, conditions, or privileges" of employment. *See* 42 U.S.C.

§ 12112(a); 29 U.S.C. § 623(a)(1); 42 U.S.C. § 2000ff-1(a)(1); 42 U.S.C. § 1981(b). And like Title VII, these statutes do not use the phrase "adverse employment action" (nor various circuit-court offshoots, such as "ultimate employment decision" or "significant detrimental effect"). Yet, current doctrine requires a plaintiff alleging disparate treatment under these statutes to plead and prove one.[4]

Thus, answering the question presented will provide guidance to employers and to many employees entitled to protection under a range of important federal laws aimed at eliminating workplace discrimination.

C. The United States has acknowledged the importance of the question presented and agrees with petitioner Cole. It has argued to this Court that the adverse-employment-action doctrine—and specifically the Fifth Circuit's ultimate-employment-decision and the Fourth Circuit's significant-detrimental-effect glosses on the statute—have "no foundation" in Title VII's text or this Court's precedent. Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar.

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[4] *See, e.g.*, *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 695, 700 (5th Cir. 2014) (requiring a plaintiff alleging ADA discrimination to prove she suffered an adverse employment action); *Baloch v. Kempthorne*, 550 F.3d 1191, 1196 (D.C. Cir. 2008) (describing an "adverse employment action" as an "essential element[]" of a plaintiff's ADEA and Rehabilitation Act claims) (Kavanaugh, J.); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001) (applying adverse-employment-action doctrine in the Section 1981 context).

20, 2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.); *accord* Br. in Opp'n at 13, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020).

The United States is a frequent defendant in employment-discrimination litigation, *see* 42 U.S.C. § 2000e-16, and the Equal Employment Opportunity Commission rules on thousands of employment-discrimination charges annually.[5] In just the last year, the Government has reiterated its disagreement with the adverse-employment-action doctrine before five circuits.[6] For these reasons as well, the question presented is important and ripe for this Court's resolution.

III. This case presents an excellent vehicle for reviewing the question presented.

This case presents an excellent vehicle for this Court's review. Only Cole's Title VII disparate-treatment claim is before this Court, and no

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[5] *See* EEOC, All Statutes (Charges filed with EEOC) FY 1997-FY 2019, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2019.

[6] Br. for United States as Amicus Curiae at 4-5, *Lyons v. City of Alexandria*, No. 20-1656, Dkt. 22 (4th Cir. Sept. 22, 2020); Br. for United States as Amicus Curiae at 5-7, *Threat v. City of Cleveland*, No. 20-4165, Dkt. 23 (6th Cir. Jan. 4, 2021); Br. for United States as Amicus Curiae at 5-6, *Muldrow v. City of St. Louis*, No. 20-2975, Doc. No. 4984015 (8th Cir. Dec. 14, 2020); Br. for United States as Amicus Curiae at 6-8, *Neri v. Bd. of Educ.*, No. 20-2088, Doc. No. 010110438908060 (10th Cir. Nov. 16, 2020)*;* Br. for United States as Amicus Curiae at 9, *Chambers v. Dist. of Columbia*, No. 19-7098, Doc. No. 1833276 (D.C. Cir. Mar. 12, 2020).

antecedent issues or other impediments could prevent the Court from addressing it.

Cole's claim that her employer transferred her on the basis of race is, thus, squarely presented. *See* Pet. App. 4a-5a. The Fourth Circuit—acknowledging that it was bound by its own precedent—effectively held that the County could reassign Cole solely because she is Black. *Id.* at 3a-5a. If this Court agrees, Cole's case would be over. But if this Court adopts the view that race-based lateral transfers "constitute[] discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII," Cole's disparate-treatment claim will survive and be remanded for further proceedings on the merits. *See Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

That the district court gave alternative reasons for rejecting Cole's discrimination claim is no barrier to this Court's review. The Fourth Circuit was presented with the parties' arguments about whether, on the summary-judgment record, the County had a non-discriminatory reason for reassigning Cole.[7] But the court of appeals expressly chose not to reach those arguments and affirmed for one reason only: that Cole's removal as school principal and transfer to a job in the central office, standing alone, was not an adverse employment action and thus did not violate Title VII, even if motivated by racial discrimination.

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[7] Br. of Appellant at 29-35, *Cole v. Wake Cnty. Bd. of Educ.*, 834 F. App'x 820 (4th Cir. 2021) (No. 20-1364), 2020 WL 4581931; Br. of Appellee at 26-32, *Cole*, 834 F. App'x 820 (No. 20-1364), 2020 WL 5496208.

Pet. App. 4a, 5a n.3. If this Court grants review and reverses, as Cole urges, the Fourth Circuit would be free on remand to take up any other issues properly before it.

IV. The Fourth Circuit's decision is wrong.

A. The phrase "adverse employment action" appears nowhere in Title VII's text. Yet, for decades, the Fourth Circuit and the other courts of appeals, as explained above (at 10-20), have required a Title VII disparate-treatment plaintiff to prove that she suffered one. *See, e.g.*, *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999). "[H]undreds if not thousands of decisions" have reflexively held "that an 'adverse employment action' is essential to the plaintiff's prima facie case," even though this Court "has never adopted it as a legal requirement" or analyzed its scope. *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006).

Turning to the Fourth Circuit's version of the adverse-employment-action doctrine at issue here, a "'reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect.'" *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004) (quoting *Boone*, 178 F.3d at 256). As the United States bluntly puts it, "that reading of the statute is incorrect." Br. in Opp'n at 10, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020) (Mem.). Indeed, it is at war with Title VII's text and this Court's understanding of the statute.

As noted, the statute nowhere demands that the plaintiff prove an "adverse employment action," be saddled with an "ultimate employment decision," or

suffer "significant detrimental effect." Rather, as relevant here, the statute says simply that an employer may not discriminate against an employee in the "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Those are ordinary English words and demand no judicial gloss. "Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third Dictionary 2358 (1961). A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third Dictionary 473 (1961). And "privilege" means to enjoy "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third Dictionary 1805 (1961). These words, taken together, then, refer to "the entire spectrum of disparate treatment," covering the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted).

In using the phrase "terms, conditions, or privileges," "Congress intended to prohibit all practices *in whatever form* which create inequality in employment opportunity due to discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (describing Title VII) (emphasis added). "The emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (emphasis added). That is, "Title VII tolerates no racial discrimination."

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

In sum, "terms, conditions, or privileges" is a catchall for all incidents of an employment relationship. Title VII is thus not limited to workplace discrimination that employers or courts view as particularly injurious. Indeed, the Act establishes no minimum level of actionable harm. The contrary decisions by lower courts discussed above, then, have effectively "rewrit[ten] the statute that Congress has enacted." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016)).

B. Applying this straightforward interpretation of Section 703(a)(1)'s text to Cole's situation, an employer may not transfer an employee because of her race. As the EEOC has explained, "job assignments" are workplace "terms, conditions, or privileges of employment." EEOC Comp. Man. § 613.1(a), 2006 WL 4672701; *see also* EEOC Comp. Man. § 2-II, 2009 WL 2966754. A work assignment thus determines the nature and scope of the employee's job, is agreed to between the employer and employee, and invests both parties with particular obligations and rights.

A *re*assignment—that is, a transfer—therefore necessarily alters previously established workplace "terms, conditions, or privileges." It alters terms, conditions, or privileges, whether it leaves an employee "unchallenged" and bored, making the transfer reasonably understood as a demotion, *Spees v. James Marine, Inc.*, 617 F.3d 380, 392 (6th Cir. 2010), requires an experienced employee to take on "menial duties," *Burns v. Johnson*, 829 F.3d 1, 11 (1st Cir. 2016), removes an employee from a role

demanding an advanced degree, *Rodriguez v. Bd. of Educ.*, 620 F.2d 362, 364, 366 (2d Cir. 1980), diminishes supervisory responsibilities, *Judie v. Hamilton*, 872 F.2d 919, 921 (9th Cir. 1989), downgrades an employee's title or prestige, places an employee under new management, or otherwise alters a reasonable employee's workplace experience.

Put differently, if a transfer does not change *some* term or condition of an employment relationship, it is not a transfer (and the employer would not have insisted on it). Reassignments thus alter workplace terms and conditions by design.

Here, Cole's job description shifted dramatically. She had served as an educator in the County for over twenty years, enjoying close contact with students, teachers, and parents, CA4JA 456, but with the reassignment she was "shipped over" to the "Central Office," *id.* at 391. After the reassignment became official, Cole could not (of course) have showed up at the middle school where she had served and expected to work there as principal. And despite her "distinguished" record recruiting, hiring, and mentoring teachers, *id.* at 455-56, she was stripped of this responsibility, *see id.* at 157-58. Likewise, the new role significantly diminished her supervisory responsibilities; rather than leading an entire school, she would be supervising only a small team. *Id.* at 157; *see also* Pet. App. 4a. Beyond the change in work environment and responsibilities, Cole had a new supervisor and title. CA4JA 157. Had she continued to engage in her old tasks, to report to her old boss, or to use her old title, she would have been in violation of the "terms" and "conditions" of her new job (and

presumably would have been disciplined or fired as a result).

According to the Fourth Circuit, Cole's reassignment was not harmful enough to violate Title VII because Cole did not report to her new position, leaving the court unable to assess whether Cole's transfer resulted in significant detriment. Pet. App. 4a. That reasoning wrongly assumed a legal conclusion—that the statute demands that an employee suffer significant detriment—that has no basis in Title VII's text. It is more than a little ironic as well: Cole's use of her accrued sick leave, rather than reporting to her new position, was triggered by the discriminatory transfer that led to Cole's termination. *Id.* at 12a-13a. That is, the County asserts that it did not renew Cole's contract precisely because of her noncompliance with the altered terms and conditions of her employment, *id.*, revealing exactly how Cole's reassignment violated Title VII's express words.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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