No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT CITY OF ST. LOUIS

Robert M. Loeb
Thomas M. Bondy
Robbie Manhas
James Anglin Flynn
Zachary J. Hennessee
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Sheena Hamilton
City Counselor
Counsel of Record
Alexis Silsbe
CITY OF ST. LOUIS
LAW DEPARTMENT
1200 Market Street
Room 314
St. Louis, MO 63103
(314) 622-4621
hamiltons@stlouis-mo.gov

Counsel for Respondent City of St. Louis

QUESTION PRESENTED

Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

INTRODUCTION

A police chief must make countless decisions about the allocation of law-enforcement resources and staffing in response to real-time public-safety demands. When crime concentrates in a neighborhood, when a tip indicates a threat to a particular target, or when one precinct experiences a serious staffing shortage, police departments rightly react by shifting their workforce from precinct to precinct, from drug crimes to homicide, or from investigation to patrol. Such decisions, including lateral assignment changes, reflect the flexibility essential to running the most critical of government functions. The question here is whether a Title VII action may be premised on such a change in assignments when it causes the plaintiff no objectively meaningful harm.

No one disputes that changes in job assignments and transfers within a department can amount to changes in the "terms" or "conditions" of employment within the meaning of § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). But the statute's text makes such a change actionable only when it amounts to "discrim[ination] against" an individual based on a protected status. As this Court has recognized, Congress's usage of the term "discriminate against" in Title VII inherently means "treating [an] individual worse than others who are similarly situated." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020). To "discriminate against" someone requires drawing "distinctions or differences" among individuals in a way that "injure[s]" the protected individual. *Id.* at 1753 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)). Indeed, Petitioner and

the Solicitor General now agree that the statutory phrase "discriminate against" as used in § 703(a)(1) requires harm.

A § 703(a)(1) claim regarding a job assignment or transfer cannot be based on mere personal preference or an objectively insubstantial slight. Rather, there must be some objectively meaningful harm. The statutory phrase "discriminate against," the surrounding statutory text, and the statutory context all compel reading § 703(a)(1) to require *material, objective* harm. Reading out such a requirement would vastly broaden the number and types of claims that could be brought against private, state, and local employers—a result that should not be lightly assumed and should not be embraced absent further guidance from Congress.

While Petitioner and the Solicitor General concede that harm is a necessary element of a § 703(a)(1) claim, they argue that this Court should adopt a per se rule where the harm requirement is automatically satisfied any time a Title VII plaintiff challenges a job assignment, transfer, or other change in the terms or conditions of employment based on an employer's purportedly improper intent.

That proposed per se rule is illogical on its face—not every job transfer or assignment, regardless of its motivation, harms the transferred employee. Nor is the proposed per se rule justified by anything in the statutory text, its context, or any other traditional source of statutory meaning. Congress did not intend for § 703(a)(1) claims to proceed based purely on an

employee's subjective personal preferences, without any showing of objectively meaningful harm.

The administrative and judicial systems are already inundated with employment-discrimination claims. Broadening § 703(a)(1)'s scope beyond its text to reach employment decisions and actions without any objectively material harm would compound the problem by tasking federal courts with micromanaging the everyday decisionmaking of American employers, including state and local governments. But Congress expressly sought to preserve employers' management prerogatives; it did not intend to promulgate a general workplace civility code to be policed by federal judges.

The Eighth Circuit properly required Petitioner here to supply evidence at summary judgment that could support a finding of a significant disadvantage in the form of objectively meaningful harm—and correctly concluded that such evidence was lacking. This Court should affirm.

STATEMENT OF THE CASE

The St. Louis Police Department Reassigns Petitioner And 21 Other Male And Female Officers To Various Positions Across The Department As Part Of A Routine Staffing Reallocation

In April 2017, Respondent City of St. Louis appointed Lawrence O'Toole Interim Police Commissioner for the St. Louis Police Department. Police Captain Michael Deeba became Commander of the Intelligence Division. Pet. App. 3a. The summary-

judgment record[1] shows that Commissioner O'Toole announced the transfer or detachment of 22 officers—17 male officers and 5 female officers—across the Department in June 2017. *Id.* These kinds of assignment changes are common at the Department "when a new commander comes in." J.A. 157; Pet. App. 24a; J.A. 39 (Petitioner conceding that it is "not uncommon for a captain to request a particular officer who they have experience working with be assigned to them"). Reassignments may also be necessary to respond to changing crime conditions across the city, *e.g.*, J.A. 95, "dire [staffing] shortage[s]," *e.g.*, J.A. 65, 95-96, or other needs of the Department. Accordingly, as Petitioner has acknowledged (J.A. 103; J.A. 32), it is "normal" for the St. Louis Police Department to "periodically" "reassign people from one department to another or one assignment to another." Petitioner herself had been transferred out of and back into the Intelligence Division at least once before and has received numerous reassignments during her tenure in the Department. Pet. App. 22a & n.1; C.A. App. 554.

As to the June 2017 reassignments within the Department, Petitioner was among four officers—two male and two female—who were assigned from the

[1] Contrary to Petitioner's assertion (at 3 n.1), "a party opposing a properly supported motion for summary judgment may not rest upon … mere allegations or denials … but … must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Consistent with that rule, this statement of the case is based on the summary-judgment record, not mere allegations. At summary judgment, testimony that is conclusory or "blatantly contradicted by the record" does not establish a genuine dispute of fact. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Intelligence Division to other units. J.A. 39. Two female officers—one sergeant and one detective—were retained within the Intelligence Division. J.A. 39-40; C.A. App. 481. All reassigned officers received notice of their reassignment by Department-wide email, per standard Department policy. C.A. App. 130-31, 253-54; J.A. 43. Male and female officers alike received no other advance notice of the transfer decision. C.A. App. 421-22; J.A. 147.

Per Captain Deeba's request, the position in the Intelligence Division previously held by Petitioner was assigned to another officer, Sergeant Jackson. Captain Deeba made this request because he had 20 years of experience working with Sergeant Jackson and no prior working experience with Petitioner. J.A. 38-39; Pet. App. 24a; J.A. 139-40.

Petitioner's lateral reassignment to the Fifth District filled a need for sergeants in that District. J.A. 38; Pet. App. 25a. Petitioner retained her pay, sergeant rank, and supervisory role in her Fifth District position. Pet. App. 10a; J.A. 40. The Fifth District assignment was also no less dangerous than Petitioner's prior position. In the Fifth District, Petitioner was responsible for street-level patrolling and responding to "Code 1" calls related to crimes like homicides, robberies, assaults, and home invasions. Pet. App. 3a-4a; J.A. 110, 120. While Petitioner also had various administrative responsibilities in the Fifth District, she had such administrative duties in the Intelligence Division as well. J.A. 36, 166.

Before Petitioner's assignment to the Fifth District, the FBI had granted Petitioner credentials to

work as a Task Force Officer (TFO) for its Human Trafficking Unit. As a TFO, Petitioner could work in plain clothes, had a take-home FBI work vehicle, did not have to work weekends, could pursue human trafficking investigations outside the city of St. Louis, and was eligible for FBI overtime pay. Pet. App. 22a-23a; J.A. 85; C.A. App. 11. After Petitioner was assigned to the Fifth District, Captain Deeba gave the responsible FBI agent the contact information for Petitioner's new supervisor and informed the agent that she could ask the new captain for Petitioner's help with ongoing investigations. Pet. App. 47a; J.A. 182-83; J.A. 145-46. However, the FBI decided to revoke Petitioner's TFO credentials. Pet. App. 29a, 46a-47a. Petitioner was required to return the FBI vehicle and resume wearing a police uniform and working within her district on a rotating schedule. Petitioner was also no longer eligible for FBI overtime pay, though there were other overtime opportunities available in her assigned position that she did not pursue. Pet. App. 10a; J.A. 126-27.

Petitioner Informally Requests To Transfer To The Second District But Is Transferred Back To The Intelligence Unit Before The Department Acts On Her Transfer Request

In July 2017, not long after her transfer to the Fifth District, Petitioner submitted an informal request to transfer to the Second District to act as an administrative aide to Captain Angela Coonce—a position Petitioner conceded came with no change in pay or rank. Pet. App. 5a-6a, 15a, 32a; J.A. 65. Captain Coonce also made two informal transfer requests on Petitioner's behalf. Pet. App. 30a.

Notably, neither Petitioner nor Captain Coonce ever submitted a formal request for Petitioner's transfer. Pet. App. 30a-32a & n.12. Nor is there any evidence in the summary-judgment record that any of Petitioner's or Captain Coonce's informal requests ever reached the Police Commissioner. Pet. App. 31a & n.11, 58a-59a.

Just a few months later, in February 2018, the Department assigned Petitioner back to the Intelligence Division, without having acted on the informal transfer requests. Pet. App. 6a & n.4. Petitioner then withdrew her still-pending informal request. J.A. 94.

All told, Petitioner spent only eight months out of her over 20-year career with the Department as a sergeant in the Fifth District. Pet. App. 10a; J.A. 103. According to Petitioner's own testimony, her assignment to the Fifth District did not cause any "harm to [her] career prospects." Pet. App. 41a-42a; J.A. 129.

Plaintiff Sues And Loses On Summary Judgment In District Court For Failure To Adduce Evidence Of Material, Objective Harm

Petitioner brought this gender-discrimination action under Title VII, claiming that her transfer to the Fifth District, and the failure to approve her transfer request thereafter to the Second District, violated § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). Pet. App. 6a. After discovery and full briefing, the district court granted summary judgment for the City. The court held that Petitioner had failed to provide evidence that would enable a reasonable jury to find that

Petitioner had suffered the harm necessary to support her claim. Pet. App. 44a, 48a-49a.

Regarding the assignment to the Fifth District, the district court found that Petitioner had preserved arguments relating to only two alleged harms resulting from the transfer: (1) a loss of prestige and "networking opportunities" that "could elevate her career prospects"; and (2) a "change" in Petitioner's job "responsibilities," since Petitioner's Fifth District duties were assertedly "limited to administrative tasks concerning personnel and supervising officers who were on patrol." Pet. App. 40a-41a. The court found that Petitioner's assertions regarding greater networking opportunities in the Intelligence Division were "conclusory" and "undercut" by her own "admi[ssion] that her transfer to the Fifth District did not cause any harm to her opportunities for advancement." *Id.* The court also found that Petitioner had failed to provide evidence to support her claim that her Fifth District responsibilities "material[ly] deviat[ed] from" her Intelligence Division responsibilities, as the Fifth District position involved responding to violent crimes, not just administrative duties as Petitioner had asserted. Pet. App. 43a. The court emphasized that Petitioner "does not argue" that she "experienced a significant reduction in her supervisory role" or that her Fifth District responsibilities were otherwise "beneath her skill level." *Id.*

The district court also addressed Petitioner's assertions of changed conditions regarding: "(1) having to return her take-home vehicle; (2) changes to her schedule, including having to work weekends; (3) not being able to work on investigations outside of St.

Louis; and (4) having to work in plain clothes." Pet. App. 44a n.20. Because Petitioner failed to mention these changes in her argument against summary judgment, the court found them forfeited. *Id.* The court also noted that the summary-judgment evidence did not support a finding of objectively material harm even taking account of these changes. *Id*.

Moreover, many or all these conditions were associated with Petitioner's TFO status. Pet. App. 22a-23a; C.A. App. 11; J.A. 85; *see, e.g.*, J.A. 113 ("Q. Okay … other than by virtue of being a task force officer for the FBI, you wouldn't be able to investigate crimes outside the city, right? A. Correct."). The district court found that the Department did not cause the FBI to revoke Petitioner's TFO status. Pet. App. 46a-47a.

Finally, the district court found that Petitioner had failed to provide evidence at summary judgment allowing a finding of any adversity resulting from the Department's "inaction" on Petitioner's request for reassignment to the Second District. Pet. App. 52a-53a; Pet. App. 47a-49a. Petitioner failed to show that "Defendant's failure to act upon" this "purely lateral transfer" was "harmful," the court found, because Petitioner provided no evidence that the transfer would have resulted in any benefits, such as better pay, a higher rank, "a take-home car, a better schedule, or better career prospects." Pet. App. 52a.

The Eighth Circuit Affirms, Reiterating That A Plaintiff In A Title VII Action Must Show Material, Objective Harm

The Eighth Circuit affirmed, agreeing that summary judgment was proper because Petitioner failed to submit evidence that would allow a reasonable jury to find that "she experienced an adverse employment action." Pet. App. 9a.

The Eighth Circuit emphasized that, where a claim concerns a transfer, the differences between assignments must be "material" to support a Title VII claim. Pet. App. 9a, 13a. "Minor" or "trivial" changes do not suffice. Pet. App. 9a.

Regarding Petitioner's assignment to the Fifth District, the Eighth Circuit focused on the only argument Petitioner had preserved in the district court—that her Fifth District assignment was "more administrative and less prestigious." Pet. App. 10a. The court of appeals agreed with the district court's assessment of the summary-judgment record. The court explained that "the only evidence Sergeant Muldrow offer[ed] in support" of these assertions was "her own deposition testimony," which was insufficiently probative and contradicted by Petitioner's admissions that "her pay and rank remained the same, she was given a supervisory role, … she was responsible for investigating violent crimes," and the assignment to the Fifth District "did not harm her future career prospects." *Id.* The court also highlighted that Petitioner "was still eligible for overtime pay while assigned to the Fifth District and simply chose not to take advantage of those opportunities." *Id.*

The Eighth Circuit concluded that Petitioner had "at most … expresse[d] a mere preference for one position over the other." Pet. App. 11a. But the mere fact that Petitioner "did not like her assignment in the Fifth District as much as she liked her assignment in the Intelligence Division" was "insufficient to show that her transfer constituted an adverse employment action." *Id.*

Regarding the Department's inaction on Petitioner's request for a transfer to an administrative-aide position in the Second District, the Eighth Circuit provided two independent grounds for affirmance. As one independent ground, the court found that "there is, in fact, not a denial for us to review." Pet. App. 15a. "Captain Coonce only made two informal requests, and although Sergeant Muldrow made a request to transfer to the Second District, this request remained pending at the time of her transfer back to the Intelligence Division." *Id.*

Alternatively, the Eighth Circuit held that Petitioner had not offered sufficient evidence at summary judgment to support a finding that the transfer "would have resulted in a material, beneficial change to her employment." Pet. App. 13a.

SUMMARY OF THE ARGUMENT

I. To maintain a Title VII discrimination claim arising from a job assignment or transfer, a plaintiff must show a significant disadvantage in the form of material, objective harm. Read in context, the statute's text demands that showing, and that reading is

confirmed by the other indicators of statutory meaning.

A. To "discriminate against" an employee, as prohibited by § 703(a)(1), means to treat that employee differently in a way that causes harm. This Court has already held in the Title VII context that "the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals" in an objectively material manner. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59, 68-69 (2006). And in interpreting the very provision at issue here, § 703(a)(1), this Court has instructed that the requisite harm must be objectively material, based on a reasonable-person standard. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (quoting *Burlington*, 548 U.S. at 59).

The distinct statutory requirement that the challenged employment action must concern "the terms, conditions, or privileges of employment" further describes the sphere of actionable workplace conduct covered by the provision but does not alter or obviate the statutory harm requirement. A change to such terms and conditions is a necessary but not sufficient condition for a Title VII claim; a plaintiff must also establish material, objective harm arising from that change.

Two other components of the statutory text confirm this interpretation. First, the *ejusdem generis* canon counsels that "discriminate against" in

§ 703(a)(1) should be interpreted consistently with its accompanying terms—"fail to hire," "refuse to hire," and "discharge"—each of which entails material, objective harm. Second, § 703(a)(1) should be interpreted in tandem with Title VII's subsequent statutory section, § 703(a)(2), which prohibits certain employment actions that "adversely affect" an employee. 42 U.S.C. § 2000e-2(a)(2). The language in these sections should be interpreted consistently to require a showing of material, objective harm. Indeed, broadening the scope of § 703(a)(1) by eliminating the requirement of material, objective harm would improperly render § 703(a)(2) insignificant and superfluous.

B. Statutory context and purpose further underscore that a Title VII discrimination claim must be grounded in material, objective harm. This Court has consistently explained that it is necessary to distinguish between objectively insubstantial and material harms to avoid interfering with the management prerogatives that Congress intended to preserve under Title VII. Congress has expressed no intent to regulate employment decisions based merely on an employee's subjective preferences or without a showing of material harm. If Congress wants to expand Title VII's reach to permit such claims against private, state-, and local-government employers, it can do so. But this Court in the meantime should adhere to *Burlington* and its other Title VII precedents and reaffirm that "discriminate against" requires a significant disadvantage in the form of material, objective harm.

II. Petitioner and the Solicitor General now concede that § 703(a)(1) requires a plaintiff to show

harm. While they agree that harm is a required element of the claim, they argue for an atextual per se rule that any § 703(a)(1) plaintiff challenging a job transfer or assignment automatically satisfies the statute's harm requirement. No legitimate basis exists for such a per se rule.

A. Petitioner and the Solicitor General's contention that any change to a term or condition of employment automatically imposes objectively meaningful harm ignores reality. Not all job transfers and assignments are harmful; many are objectively neutral toward or even beneficial to the employee, and others impose at most minor inconvenience or insubstantial costs. Moreover, adoption of such a per se rule would conflict with the context-specific, case-by-case approach to assessing harm that this Court has prescribed for Title VII claims.

B. Petitioner and the Solicitor General likewise assert that the proposed per se harm rule is supported by the statute's requirement that a plaintiff show improper intent. But the question of objectively material harm is distinct from a showing of improper intent as both a textual and a logical matter. Plaintiffs must satisfy both elements—harm and intent—to make out a valid claim.

C. Petitioner and the Solicitor General cannot salvage their proposed per se rule with their invocations of legislative history, NLRA interpretations, or EEOC material. The cited legislative history is insubstantial and does not speak to the harm required under the statute. Likewise, the cited NLRA and EEOC material is inapposite to Petitioner and the Solicitor

General's proposed statutory interpretation and cannot overcome the specific statutory text at issue here.

III. The per se rule proposed by Petitioner and the Solicitor General threatens to substantially enlarge the volume and expense of employment-discrimination litigation. It would invite lawsuits from employees who suffered only objectively insubstantial harms—or even obtained objective benefits—from claimed changes in the terms and conditions of their employment. And it would eliminate an important tool for weeding out meritless discrimination claims at early stages of litigation. The proposed per se rule would invite judicial micromanagement of American workplaces, including state and local law-enforcement agencies like the City's police department here. Petitioner and the Solicitor General fail to identify any limit on Title VII suits that would meaningfully alleviate these concerns.

IV. The Eighth Circuit properly affirmed summary judgment against Petitioner for failure to adduce evidence of material, objective harm. In reviewing Petitioner's job transfer, the Eighth Circuit correctly concluded that Petitioner had failed to offer evidence sufficient to allow a reasonable jury to find the requisite harm. Petitioner points to various purported effects of the job transfer, all of which were either conclusory, forfeited, or contradicted by Petitioner's admissions below. At most, Petitioner's evidence shows a subjective preference for one assignment over another, not that Petitioner suffered a significant disadvantage in the form of material, objective harm.

ARGUMENT

I. A Title VII Discrimination Claim Based On A Job Assignment Or Transfer Requires Material, Objective Harm.

To have a Title VII discrimination claim based on a job assignment or transfer, a plaintiff must have suffered a significant disadvantage in the form of material, objective harm. And at the summary-judgment stage, the plaintiff must supply sufficient evidence that would allow a reasonable jury to find such harm. Analyzed fully, the text of Title VII mandates that showing. § I.A. And statutory context confirms that it is required. Meanwhile, dispensing with the objectively-meaningful-harm requirement would balloon the statute's scope to significantly impede employers, including state and local governments, in the effective conduct of their operations; neither Title VII's text nor context suggests that Congress intended such a result. § I.B.

A. The Statutory Text Requires Material, Objective Harm.

In § 703(a)(1), Title VII 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 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) (emphasis added). Relevant here, this provision states on its face that, where a claim is premised on a change in the terms or conditions of a plaintiff's job, the change must amount

to "discrimin[ation] against" the plaintiff. Quite correctly, this Court has long understood the statutory phrase "discriminate against" as used in Title VII to require that the plaintiff have suffered objectively meaningful harm. The statutory phrase itself compels that harm requirement. And the surrounding language and provisions of Title VII confirm that requirement for a § 703(a)(1) claim.

1. Section 703(a)(1)'s "discriminate against" language requires material, objective harm.

a. This Court has long held that the statutory phrase "discriminate against," as used in Title VII, requires the complaining plaintiff to show objectively material harm.

In 1998, Justice Scalia, writing for the Court, addressed the particular provision at issue here, § 703(a)(1), and explained that inclusion of the "discriminate against" language requires objectively material harm to prevent Title VII from turning into a "civility code." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-81 (1998). Addressing § 703(a)(1) discrimination claims relating to harassing "conditions" of employment, the Court held that the statutory prerequisite that the employer have engaged in discrimination requires plaintiffs to prove that they were subject to "disadvantageous terms or conditions of employment." *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

Then, in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court further addressed the meaning of "discriminate against" as used in Title VII. In the context of § 704(a), which prohibits retaliation, *see* 42 U.S.C. § 2000e-3(a), this Court held that "the term 'discriminate against' refers to distinctions or differences in treatment that *injure* protected individuals." *Id.* at 59 (emphasis added) (citing § 703(a)(1) precedent). The Court explained Title VII's "discriminate against" language encompasses only objectively material harms, rather than allowing suit over every possible slight experienced in the workplace. *Id.* at 68-69. In demanding an objective analysis, the Court stressed that the question of material harm must be undertaken from the perspective of a "*reasonable* employee." *Id.* at 68.

Although the specific question in *Burlington* was the meaning of "discriminate against" in the context of § 704(a), the Court's construction of that language as used in Title VII was not so limited and indicated that Title VII generally requires objectively material harm. The Court wrote that "Title VII"—far more than just § 704(a)—does not regulate trivial, de minimis harms. *Id.* at 68. Likewise, the Court based its holdings as to both materiality and objectivity on § 703(a)(1) precedent. For example, the Court reiterated § 703(a)(1) precedent that Congress did not "set forth 'a general civility code for the American workplace.'" *Id.* (quoting *Oncale*, 523 U.S. at 80). And it explained that "[w]e have emphasized the need for objective standards in other Title VII contexts"—by which the Court referred entirely to § 703(a)(1) cases—"and those same concerns animate our

decision here." *Id.* at 69 (citing *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004), and *Harris*, 510 U.S. at 21).

Subsequently, in the specific context of § 703(a)(1), this Court reaffirmed *Burlington's* reading of "discriminate against." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020). Quoting *Burlington*, this Court in *Bostock* explained: "As used in Title VII, the term 'discriminate against' refers to 'distinctions or differences in treatment that *injure* protected individuals.'" *Id.* (quoting 548 U.S. at 59) (emphasis added) (some internal quotation marks omitted); *accord id.* at 1740 ("To 'discriminate against' a person … mean[s] treating that individual *worse* than others who are similarly situated." (emphasis added)).

Taken together, this Court's precedents reading the same "discriminate against" language across §§ 703(a)(1) and 704(a) compel the conclusion that Congress's usage of that phrase in Title VII requires a plaintiff to show objectively material harm. Under both provisions, a plaintiff cannot make out a Title VII claim based on mere personal preference without any objectively material harm. Congress simply did not intend for courts to arbitrate "petty slights or minor annoyances that often take place at work." *Burlington*, 548 U.S. at 68-69.

b. Petitioner's and the Solicitor General's attempts to distinguish this Court's precedents interpreting the phrase "discriminate against" as used in Title VII are unavailing.

Petitioner argues (at 33-35) that this Court's § 703(a)(1) precedents support an objectively meaningful harm requirement "only in the hostile-work-environment context." But those precedents construe the same provision at issue here. And the precedents do not base the provision's harm requirement on any standalone hostile-work-environment principle. Rather, this Court based the requirement on the provision's "discriminate against" language. *See Bostock*, 140 S. Ct. at 1753 (reiterating in defining the contours of § 703(a)(1) in a wrongful-discharge case that, "[a]s used in Title VII, the term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals.'" (quoting *Burlington*, 548 U.S. at 59)); *Oncale*, 523 U.S. at 79-80.

Petitioner is also wrong that § 703(a)(1) hostile-work-environment precedents require material, objective harm only because they involve constructive changes to conditions of employment, not actual changes. Rather, as Justice Scalia made clear regarding § 703(a)(1) claims based on alleged sexual harassment, the statutory requirement of "discriminate against" requires a showing of objectively meaningful harm, such that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)). In the harassment context, that objectively meaningful harm to the plaintiff will often be supplied by a showing of a pervasive and abusive working environment, but the requirement may also be met by a showing that the complained-of conduct undermined the employee's work performance or caused other objective harms. *See, e.g.*,

Harris, 510 U.S. at 23 (objective injury requirement could be met by showing that the alleged harassing conduct "unreasonably interferes with an employee's work performance.").[2]

Petitioner and the Solicitor General's efforts to distinguish *Burlington* are equally unfounded. They note (Pet. Br. 39-40; SG Br. 26-27) that § 703(a)(1) speaks to changes in "terms, conditions, or privileges of employment" whereas § 704(a) speaks to a broader class of adverse actions. But that does not suggest that the phrase "discriminate against" has a different meaning in these adjacent provisions. To the contrary, as this Court confirmed in *Bostock* and *Burlington*, in both §§ 703(a)(1) and 704(a), the harm requirement emanates from the same statutory phrase, "discriminate against." *Bostock*, 140 S. Ct. at 1753; *Burlington*, 548 U.S. at 59. "[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). That rule is "doubly appropriate

[2] This Court's hostile-work-environment precedents also clarify that, to make out a § 703(a)(1) claim, the alleged conduct must "affect the conditions of employment to [a] *sufficiently significant* degree to violate Title VII." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (emphasis added); *accord Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (conduct must "sufficiently alter terms and conditions of employment to violate Title VII"); *Harris*, 510 U.S. at 21 (conduct must "sufficiently affect the conditions of employment to implicate Title VII"). In other words, § 703(a)(1) does not render actionable *every* employer action arguably altering a condition of employment based on a protected characteristic—there must be a sufficiently significant alteration in the sense of one inflicting objectively meaningful harm.

here," given that §§ 703(a)(1) and 704(a) were enacted at the same time. *Powerex v. Reliant Energy Servs. Inc.*, 551 U.S. 224, 232 (2007). As Justice Gorsuch recently observed, "[t]he words of the Civil Rights Act of 1964 [including the word 'discrimination' in particular] are not like mood rings; they do not change their message from one moment to the next." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181, 302 (2023) (Gorsuch, J., concurring).

Underscoring that point, the Court in *Burlington* did not premise the materiality and objectivity components of the harm prerequisite based on the absence of language regarding the terms and conditions of employment. Rather, the Court supported both the condition of materiality and the condition of objectivity by invoking the "discriminate against" terminology and precedent discussing and applying that language in § 703(a)(1). *Burlington*, 548 U.S. at 68 (materiality discussion citing *Oncale*, 523 U.S. at 80; *Faragher*, 524 U.S. at 788); *id.* at 69 (objectivity discussion drawing upon "other Title VII contexts" that were all § 703(a)(1) contexts) (citing *Suders*, 542 U.S. at 141; *Harris*, 510 U.S. at 21); *see also Burlington*, 548 U.S. at 75 (Alito, J., concurring in the judgment) (recognizing that §§ 703(a)(1) and 704(a) must be read in "harmon[y]," with both evaluated under the same "objective standard that permits insignificant claims to be weeded out").

Nor are Petitioner and the Solicitor General correct that *Burlington*'s requirement of material, objective harm is a product of § 704(a)'s application to conduct "occurring outside the workplace" (Pet. Br.

39) or conduct "unrelated to the workplace" (SG Br. 26). To the contrary, the Court in *Burlington* specifically acknowledged that the requirement of objectively meaningful harm precludes suits regarding "those petty slights or minor annoyances that *often take place at work*." 548 U.S. at 68 (emphasis added). Indeed—quoting § 703(a)(1) precedent—this Court in *Burlington* held that various instances of conduct altering the terms, conditions, or privileges of employment do not automatically satisfy either condition on the harm required. *See id.* at 71 ("*[A] reassignment of job duties is not automatically actionable*. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.'" (quoting *Oncale*, 523 U.S. at 81 (emphasis added) (some internal quotation marks omitted)); *see also id.* at 69 ("[a] schedule change in an employee's work schedule"); *id.* ("[a] supervisor's refusal to invite an employee to lunch"); *id.* at 71-73 ("37-day suspension without pay"); *id.* at 75-76, 79-80 (Alito, J., concurring in the judgment) (recognizing that the conduct at issue in the case involved a change in the terms, conditions, or privileges of employment but still calling for an inquiry into objectively meaningful harm).

Petitioner also attempts to distinguish *Burlington* (at 38-39) on the ground that § 703(a)(1) "seeks to prevent injury to individuals based on who they are, *i.e.*, their status," whereas § 704(a) "seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." 548 U.S. at 63. But the relevant aspect of that observation is that both provisions seek to

prevent *harm*—irrespective of the fact that one provision protects against actions taken with status-based improper intent and the other protects against actions taken with conduct-based improper intent. *See Faragher*, 524 U.S. at 805-06 (explaining that the "'primary objective'" of "Title VII" is "to avoid harm" (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975))). Hence, this Court held that the requirement of material, objective harm stems from the "discriminate against" language that §§ 703(a)(1) and 704(a) share. *Burlington,* 548 U.S. at 59, 68-69.

Confirming that §§ 703(a)(1) and 704(a)'s common "discriminate against" language controls, the Court in *Burlington* (548 U.S. at 68) cited approvingly an opinion by Judge Easterbrook that framed the harm requirement as identical across those two provisions based on precisely that overlapping language: "[M]ateriality or significance [is] integral to 'discrimination' rather than to anything that § [703(a)(1)] has and § [704(a)] lacks. … 'Discrimination' entails a requirement that the employee's challenged action would have been material to a reasonable employee, which means that the same requirement applies to § [704(a)], the anti-retaliation clause, as well as the other provisions in Title VII that use the word 'discrimination.'" *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 661-62 (7th Cir. 2005).

Burlington and other precedents are thus clear: The identical harm-requiring phrase in §§ 703(a)(1) and 704(a)—"discriminate against"—requires the plaintiff to show objectively material harm.

2. Section 703(a)(1)'s other language bolsters the requirement of material, objective harm.

The key statutory language at issue—"otherwise to discriminate against"—follows a list of several specific unlawful employment actions: "to fail ... to hire," to "refuse to hire," and "to discharge." 42 U.S.C. § 2000e-2(a)(1). The *ejusdem generis* canon recognizes that when "general words" (here, "otherwise to discriminate against") "follow an enumeration of two or more things" (here, "to fail ... to hire," to "refuse to hire," or "to discharge"), the general words "apply only to … things of the same general kind or class specifically mentioned." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018). Here, the specifically enumerated items are all employment actions that cause material, objective harm. Thus, the *ejusdem generis* canon supports reading the more general phrase that follows ("otherwise to discriminate against") also to speak to employment actions that cause material, objective harm.

Notably, in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), this Court recently invoked the *ejusdem generis* canon when examining nearly identical language found in the Age Discrimination in Employment Act. As here, that statute contains catch-all statutory language ("or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment"), which follows the specific actions of "refus[al] to hire" or "discharge" of "any individual." 29 U.S.C. § 623(a). This Court explained

that the *ejusdem generis* canon counseled in favor of reading that final more general phrase to be of a piece with the more specific employment actions that precede it. 140 S. Ct. at 1176 & n.4.

The canon applies with equal force here: Each of the prior terms ("fai[ling] or refus[ing] to hire" and "discharg[ing]") are actions that reflect material, objective harm, so the catch-all "otherwise discriminate against" language is properly read to be likewise limited to actions that inflict objectively material harm.

Petitioner argues (at 29-30) that the term "otherwise" in the statute here renders the canon inapplicable. But, of course, the same "otherwise" language was present in *Babb*. This Court has applied the canon to other general phrases beginning with "otherwise," too. *See Begay v. United States*, 553 U.S. 137, 142-44 (2008).

The Solicitor General argues (at 19) that the canon has no meaningful effect here because the only "common denominator" between the specific and general terms is that they relate to the terms and conditions of employment. But if Congress had "meant the statute to be [so] all encompassing, it is hard to see why it would have needed to include the examples [of specific employment actions] at all." *Begay*, 553 U.S. at 142 (applying the *ejusdem generis* canon to unify a list beyond a general phrase's explicit terms). Congress identified specific actions that involve objectively material harm and paired them with a general reference to changes that "otherwise discriminate against" the employee. The clear implication is that offending employment actions must cause material,

objective harm. Punctuating the point, the Solicitor General's attempt to cast this common denominator aside cannot be squared with *Babb*, where this Court applied the canon to unify the general phrase "otherwise discriminate against" beyond the phrase's reference to the terms and conditions of employment. 140 S. Ct. at 1176 & n.4.

3. Section 703(a)(2)'s language further demonstrates that § 703(a)(1)'s "discriminate against" language requires material, objective harm.

The subsection following § 703(a)(1) further confirms the requirement of objectively meaningful harm. That subsection, § 703(a)(2), prohibits an employer from "limit[ing], segregat[ing], or classify[ing]" its "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 703(a)(2)'s "adversely affect" language requires material, objective harm. *See, e.g.*, Oxford Illustrated Dictionary 12 (1962) (defining "affect" as "to produce (material effect on)"); Webster's New Collegiate Dictionary 15 (7th ed. 1963) (defining "affect" as "to produce a material influence upon or alteration in").[3] Intrastatutory consistency and harmony across Title VII's causes of

[3] Notably, neither Petitioner nor the Solicitor General contends otherwise. *See* Pet. Br. 31; SG Br. 20-21. To the contrary, the Solicitor General states (at 13) that this language requires "a particular showing of harm for an employment-discrimination claim."

action favors reading § 703(a)(1)'s language to mandate the same showing of harm (in accord with how this Court has already interpreted § 704(a)'s identical harm-requiring language, *supra* 17-18). *See Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998) ("[T]he established canon of construction [is] that similar language contained within the same section of a statute must be accorded a consistent meaning.").

Unpacking § 703(a)(2)'s full language confirms that parallel construction. Congress in § 703(a)(2) did not repeat the harm-requiring phrase "discriminate against." That was for a reason: In that subsection, Congress used more neutral terms like "classify" and "limit" to describe differentiation based on a protected characteristic and paired that neutral terminology with a harm requirement via the phrase "adversely affect." Congress did not need to use the same "adversely affect" phrase in § 703(a)(1), by contrast, because that provision's "discriminate against" phrase already limits the provision's reach to objectively meaningful harm. *See supra* 17-19, 25-27. In other words, Congress's usage of "adversely affect" in § 703(a)(2) simply recognizes that, unlike "discriminating against" someone under § 703(a)(1) (and § 704(a), *see supra* 17-18), "limit[ing], segregat[ing], or classify[ing]" a person does not necessarily impart objectively meaningful harm upon an employee and thus is not always actionable.[4]

[4] Legislative history, to the extent relevant, supports this conclusion. Senators Clark and Case, who managed Title VII on the Senate floor, explained that Title VII makes it an "unlawful

Congress thus designed the Title VII prohibitions consistently, so that each requires material, objective harm. Under that reading, Title VII's causes of action operate as a "harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012);[5] *see also Harris v. Bell*, 254 U.S. 103, 112 (1920) (provisions of "the same act … should be construed" to "operate harmoniously"); A. Scalia & B. Garner, READING LAW, at 180 ("The imperative of harmony among provisions is more categorical than most other canons of construction.").

While the Solicitor General attempts (at 13) to parse the harm required by the subsections differently based on the notion that § 703(a)(1) lacks "similar qualifying language" to § 703(a)(2), as just explained, § 703(a)(1) contains similar qualifying language—namely, the statutory phrase "discriminate against" that Petitioner (at 27-28) and the Solicitor General (at 17) concede requires harm. *See infra* 34;

---

employment practice" "to refuse to hire or to discharge any individual or *otherwise to discriminate* against him with respect to compensation or terms or conditions of employment because of [a protected characteristic] *in such a way as to deprive them of employment opportunities or otherwise affect adversely their employment status*." EEOC, U.S. GPO, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, 3039 (1964) (hereinafter *EEOC Legislative History*) (emphases added). The Senators thus recognized that § 703(a)(1)'s harm-requiring language tracks § 703(a)(2)'s harm-requiring language.

[5] Other language used in Title VII further supports this conclusion. For example, in creating a private right of action for Title VII claims, § 706(f)(1) limits that right to persons "aggrieved" by the challenged employment action. *See Chambers v. District of Columbia*, 35 F.4th 870, 889-90 (D.C. Cir. 2022) (en banc) (Katsas, J., dissenting).

cf. DePierre v. United States, 564 U.S. 70, 83 (2011) ("Congress sometimes uses slightly different language to convey the same message.").

Meanwhile, construing § 703(a)(1)'s usage of "discriminate against" not to require objectively meaningful harm would erase much of § 703(a)(2) and its harm requirement. If no proof of objectively material harm was required under § 703(a)(1), § 703(a)(2), would be virtually irrelevant where disparate treatment is alleged. For example, providing gender-specific uniforms or tracking race-based employment statistics could be actionable under § 703(a)(1) even though Congress excluded such conduct from violating § 703(a)(2) for lack of objectively meaningful harm. The same goes for providing identical male-, female-, and gender-neutral-designated bathrooms—someone taking umbrage with these designations could bypass § 703(a)(2) by suing under § 703(a)(1). The upshot would be a result generally to be avoided under ordinary statutory-interpretation principles: that § 703(a)(2) would be rendered "insignificant, if not wholly superfluous," in the disparate-treatment context. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

Indeed, Petitioner and the Solicitor General do not deny that their position would render § 703(a)(2)'s requirement of objectively meaningful harm toothless in the disparate-treatment context. They instead argue that, regardless, § 703(a)(2) would retain significance in the disparate-impact context, to which § 703(a)(1) does not extend. Pet. Br. 31; SG Br. 21. But that partial significance does not cure the problem that their interpretation would deprive

§ 703(a)(2) of substantial meaning. *See TRW*, 534 U.S. at 31; *Duncan*, 533 U.S. at 174.[6]

B. Statutory Context, And Its Application To State- And Local-Government Employers, Further Support The Requirement Of Material, Objective Harm.

Especially given that § 703(a)(1) extends to state- and local-government employers,[7] this Court should not lightly assume that Congress wanted to invite federal suits over every assignment and transfer in the workforce, even when there is no significant disadvantage in the form of material, objective harm to the employee. If Congress wanted to open federal courts to adjudicating employment claims against all private, state, and local employers without material harm to the employee or based on an employee's purely subjective sense of harm and personal

---

[6] Nor should this Court accept the Solicitor General's suggestion (at 20) that superfluity here does not matter because, whether or not § 703(a)(1) "requires a particular showing of harm," some redundancy is unavoidable. Even when it is impossible to "eliminate all superfluity," the least superfluous of otherwise equally sound readings is the better choice. *Lockhart v. United States*, 577 U.S. 347, 356-57 (2016) (applying the anti-superfluity canon to select a less-redundant interpretation); *accord Marinello v. United States*, 138 S. Ct. 1101, 1107-08 (2018) (adopting an interpretation implicating "[s]ome overlap," rather than one "that would create overlap and redundancy to [a much higher] degree").

[7] *See* 42 U.S.C. § 2000e(a), (b) (Title VII regulates and provides the right to sue state and local "governments, governmental agencies, [and] political subdivisions").

preferences, it could so provide. *See Washington*, 420 F.3d at 661; *accord Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021). In the context of Title VII, Congress has demonstrated no such desire—and certainly no sufficiently clear desire to do so such that this Court should step in to dictate such a result.

This Court has repeatedly stressed that, in the specific context of Title VII, "it is important to separate [objectively] significant from [objectively] trivial harms" because "Title VII … does not set forth 'a general civility code for the American workplace.'" *Burlington*, 548 U.S. at 68 (quoting *Oncale*, 523 U.S. at 80). In enacting Title VII, Congress did "not intend[] to diminish traditional management prerogatives." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 259 (1981); *see United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 206 (1979) (recognizing that Title VII balanced "resist[ance] [of] federal regulation of private business" by preserving employers' decisionmaking latitude "to the greatest extent possible"); *accord EEOC Legislative History* 2150 ("Internal affairs of employers … must not be interfered with except to the limited extent that correction is required in discrimination practices.").[8]

---

[8] Pointing in the same direction is the "venerable maxim *de minimis non curat lex* ('the law cares not for trifles')," which "is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992); *see Biden v. Nebraska*, 143 S. Ct. 2355, 2378-79 (2023) (Barrett, J., concurring) (recognizing "*de minimis non curat lex*" as a background contextual principle that "go[es] without saying … [in]

Every day, the average employer makes innumerable decisions and assignments that may implicate any given employee's terms and conditions of employment. Employers will necessarily feel more constrained in making these decisions if they could give rise to lengthy and burdensome litigation based on an employee's personal preferences, with no need to show any objectively meaningful harm. In enacting Title VII, Congress did not, however, "intend to turn courts into super-personnel departments that would be forced to adjudicate the propriety of every informal coaching conversation, cubicle assignment, or work-related task." District of Columbia & States Amicus Br. 20.

As this case illustrates, this kind of judicial micromanagement of employer decisionmaking would fall especially hard on state and local employers, like police departments, who must regularly transfer or "reassign people from one department to another" "or one assignment to another." J.A. 103; J.A. 32. These reassignments are often necessary to address evolving crime conditions in different areas of the City, "dire" police personnel shortages in certain precincts, and other needs of the community or the department. *E.g.*, J.A. 65, 95. Petitioner and the Solicitor General's proposal that Title VII actions can be brought without proof of any objectively material harm threatens to

---

legislation"). Petitioner (at 49-50) and the Solicitor General (at 22) attempt to deny force to this contextual principle by simply assuming that any change to a term or condition of employment based on improper motive automatically imposes objectively meaningful harm, but for the reasons explained below (at 35-38), that is both legally and factually incorrect.

seriously hamstring the ability of state and local governments to function effectively.[9]

Thus, even if "discriminate against" could be read more broadly in other contexts, where Title VII is concerned, "it is important to separate significant from trivial harms." *Burlington*, 548 U.S. at 68. "Absent a clear indication" that Congress intended a "sweeping" and management-prerogative-defeating scope—including with respect to state- and local-government employers—Congress's words should not be interpreted "to effect that result." *Stafford v. Briggs*, 444 U.S. 527, 545 (1980).

II. Petitioner And The Solicitor General Admit That § 703(a)(1)'s "Discriminate Against" Language Requires Harm But Seek An Atextual And Baseless Per Se Rule.

Petitioner (at 27-28) and the Solicitor General (at 17) now expressly concede that § 703(a)(1)'s usage of "discriminate against" requires a plaintiff to show injury. To address that requirement, however, they advocate for an extratextual per se rule that any job-transfer or reassignment decision (or other change to a term or condition of employment) that a plaintiff does not desire is automatically sufficient to sustain the harm component of a Title VII claim. *See, e.g.*, Pet. Br. 28-29, 40; SG Br. 17-18. There is, however, no

[9] Such a vast expansion of Title VII's scope should not be lightly assumed, particularly when, as detailed below, *infra* 46-47, employment-discrimination actions are already extremely burdensome, both in terms of cost and volume (more than 12,000 employment-discrimination lawsuits just last year).

proper basis to engraft such a judicially crafted per se rule onto the statute.

A. Petitioner And The Solicitor General Are Incorrect That Changes To The Terms Or Conditions Of Employment Automatically Inflict Objectively Meaningful Harm.

Changes to the terms and conditions of employment, including transfers and reassignments, can occur in various ways. Many such changes can easily be shown to inflict objectively meaningful harm. For example, a demotion or a lateral assignment that imposes significant additional costs on the employee clearly imposes objectively material harm. Others typically will not implicate such harm. For instance, relocation to an otherwise-identical office down the hall, or assigning a judicial law clerk or law-firm associate case A instead of case B, even if the individual had a personal preference for B. The mere fact the employee did not get their preferred assignment, however, does not by itself "show that a reasonable employee would have found the challenged action materially adverse." *Burlington*, 548 U.S. at 68. *See also Oncale*, 523 U.S. at 81 ("Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person.").

Yet Petitioner (at 38-40) and the Solicitor General (at 25-27) insist that no context-specific inquiry into harm is required for a § 703(a)(1) claim because that provision is limited to conduct bearing on the terms or conditions of employment. That contention

improperly attempts to circumvent § 703(a)(1)'s concededly harm-requiring "discriminate against" language, disregarding both this Court's precedent and common sense.

1. Nothing about the words "terms" or "conditions"—inside or outside the employment context—conveys that altering terms or conditions automatically inflicts objectively meaningful harm. Petitioner and the Solicitor General cite dictionary definitions of these words, but no definition says anything about necessary harm. *See* Pet. Br. 16-19; SG Br. 10-11. A mere change in a term or condition is insufficient to meet the harm requirement imposed by the statutory language "discriminated against"; instead, to pass the hurdle, the change must also be objectively and materially harmful to the plaintiff. *See Burlington*, 548 U.S. at 68-69; *see also Oncale*, 523 U.S. at 80 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to *disadvantageous* terms or conditions of employment." (emphasis added)).

Petitioner and the Solicitor General also cite this Court's statement that the words "terms" and "conditions" evince "a congressional intent to strike at the entire spectrum of disparate treatment … in employment." Pet. Br. 19 (quoting *Oncale*, 523 U.S. at 78); SG Br. 12 (same). Whatever breadth that statement gives to the words "terms" and "conditions," the statement still recognizes that disparate treatment must be proven, which includes—per § 703(a)(1)'s harm-requiring "discriminate against" language—proving objectively meaningful harm. In all events, there is no textual basis to escape the statutory harm

requirement based on § 703(a)(1)'s further requirement that actionable conduct relate to the terms or conditions of employment. *See Kalamazoo Cnty. Rd. Comm'n v. Deleon*, 135 S. Ct. 783, 784 & n.2 (2015) (Alito, J., dissenting from denial of certiorari) (noting that, "since respondent cannot satisfy the antiretaliation standard, it follows *a fortiori* that he cannot satisfy the discrimination standard," as "Title VII's antiretaliation … standard is broader than the ordinary discrimination standard").

2. Petitioner and the Solicitor General's reading of § 703(a)(1) likewise runs afoul of this Court's precedents. As explained above (at 17-19), this Court's §§ 703(a)(1) and 704(a) precedents recognize that changes to the terms and conditions of employment must be assessed on a case-by-case basis for material, objective harm.

As to transfers and reassignments, such as the assignment here (moving a sergeant to a district which was short on sergeants and where extra police resources were needed), whether such an assignment would impose objectively meaningful harm requires looking at the facts of the case. As the Court explained in *Burlington*, a "reassignment of job duties is not automatically actionable" because "[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case." 548 U.S. at 71; *accord Chambers*, 35 F.4th at 884 (Walker, J., concurring in the judgment in part, dissenting in part) ("An all-job-transfers-are-actionable rule disregards the reality that the harm from some job transfers is de minimis. For example, a city that is restructuring its police department could change an employee's title

from 'head detective' to 'chief investigator' without altering the role.").

And material harm cannot simply be based on personal preferences and subjective reactions and sensitivities of an individual employee. As *Burlington* held—citing § 703(a)(1) precedent—the inquiry as to whether an employee has been "discriminated against" requires a showing of harm and that "harm must be objective." 548 U.S. at 68. The focus is "on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position." *Id*. at 69-70; *see also id*. at 68-69 (a reasonable person standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings").

Indeed, to ask the question of harm from any other perspective would neither make sense nor be workable. As this Court has framed the harm requirement for purposes of § 703(a)(1), the plaintiff must have been treated "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. Whether someone has been treated worse than someone else depends on an objective comparison. As this Court held in *Burlington*, the viability of a claim should not depend on the particular sensitivities or subjective feelings of an employee. 548 U.S. at 68-69; *see also Harris*, 510 U.S. at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

B. Petitioner And The Solicitor General Are Mistaken That § 703(a)(1)'s Requirement Of Improper Intent Obviates The Objectively-Meaningful-Harm Requirement.

Seeking to defend their proposed per se rule under which harm can simply be assumed, Petitioner and the Solicitor General also posit that a § 703(a)(1) cause of action, predicated on a contention that the employer acted with an improper motivation, inherently involves the requisite harm. Pet. Br. 27-29; SG Br. 17-18, 22, 27-29. They argue that it is enough to allege and prove that the changed conditions were based on improper factors (such as sex or race), no matter how objectively slight or inconsequential the change may be. They say that is so because the improper intent automatically always furnishes the required harm. Pet. Br. 48-49. That argument, too, is incorrect. While often a change of conditions taken with such improper motives will cause objectively meaningful harm, that will not always be the case.

First, as discussed, the harm required to support a cause of action under Title VII must be objective, based on a reasonable-person standard. For example, an employee may be of the subjective mindset that every change of conditions they experience is based on sex or race, or that every failure to accede to their personal preferences must be based on such improper motives. Such beliefs, even if fully sincere, are insufficient to establish the requisite objective harm. Just as this Court held in *Burlington* that allegations and proof of retaliatory intent were not sufficient absent proof of objectively material harm, so too under

§ 703(a)(1)—regardless of the employer's purported intent, a contextual, fact-dependent analysis of objectively meaningful harm is required. *See* 548 U.S. at 67-70.

To the extent that Petitioner (at 40) and the Solicitor General (at 28) attempt to suggest otherwise based on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), their reliance is misplaced. *Teamsters* recognizes that "[d]isparate treatment" means "treat[ing] some people *less favorably* than others *because of" who they are*, which separates out the question of harm from the question of intent. *Id.* at 335 n.15 (emphases added). That separation is both logically and textually sound; harm and intent are two different elements, as the statutory text recognizes (in requiring harm via its phrase "discriminate against" and separately requiring improper intent via its phrase "because of such individual's race, color, religion, sex, or national origin").[10]

The argument by Petitioner and the Solicitor General that perceived improper intent always creates objectively meaningful harm conflates different elements and defies common sense. Of course, the harm from a change of conditions can be augmented by evidence of improper intent. Indeed, some expressions of improper intent might in and of themselves be "tantamount to a declaration of inferiority" (Pet.

[10] As for *Teamsters*' passing remark that Title VII protects the opportunity to compete for jobs "thought …worse than another," the sought-after position there "pai[d] more than other jobs" and was objectively "the most desirable" of the available positions. *Id.* at 338 n.18.

Br. 48-49)—such as hypotheticals of workplace conditions where an employer displays signs on chairs, or in offices or breakrooms, separating out some places as "blacks only" and "whites only." In such a case, a reasonable employee could experience a substantial psychic harm. As this Court has recognized, the required harm from changed conditions under Title VII can be satisfied by psychic and emotional harms, but only if the perceived harms are objectively reasonable. *See, e.g., Harris*, 510 U.S. at 22 (Title VII covers conduct that "would seriously affect a reasonable person's psychological well-being" as well as conduct that could "reasonably be perceived, and is perceived, as hostile or abusive"). Moreover, employees facing these types of changed conditions could likely also make out hostile-work-environment claims. *See id.*; *Meritor*, 477 U.S. at 66-67. But just because some § 703(a)(1) claims regarding improperly-motivated changed conditions will easily satisfy the objective, material harm requirement does not mean that this Court should adopt a per se rule simply assuming the harm prerequisite is met in all cases.

The Solicitor General suggests (at 28) that there is "no logical or textual basis for drawing … a distinction between overt and subtle discrimination." But the question is not about overt versus subtle discrimination, it is about whether a reasonable employee would suffer objectively material harm from a changed term or condition. As *Burlington* held, that needs to be decided on a case-by-case, context-specific basis, and not based on a per se rule. 548 U.S. at 69 (explaining that the "significance" of the claimed harm will "often depend upon the particular circumstances"; "[c]ontext matters").

C. Petitioner's And The Solicitor General's Resort To Legislative History, NLRA Interpretations, And EEOC Material Is Unavailing.

Legislative history. Petitioner musters (at 22-23) isolated remarks by individual senators. Generally speaking, this Court has "eschewed reliance on the passing comments of one Member and casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citation omitted). Rather, committee reports—like the one militating against Petitioner's position cited above (at 32)—"are 'more authoritative' than comments from the floor." *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 385 (1968)); *accord id.* at 78 ("Isolated statements … are not impressive legislative history."); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."). Moreover, Petitioner ignores (at 22) the more specific and relevant statements by Senators Clark and Case, which support a requirement of objectively meaningful harm. *See supra* 28-29 n.4.

Petitioner also points (at 23-24) to the legislative history of amendments to another statute, 42 U.S.C. § 1981, to suggest that a subsequent Congress has "reconfirmed that the phrase 'terms, conditions, or privileges' of employment covers workplace practices of all stripes." Even assuming that is true, it is irrelevant. The history that Petitioner relies upon sheds no light on the question here: whether the statutory phrase "discriminate against" as used in Title VII requires objectively meaningful harm. Moreover, in

citing statements by a subsequent Congress regarding an amendment to a different statute, Petitioner fails to heed this Court's "oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).[11]

NLRA interpretations. Petitioner and the Solicitor General also invoke (Pet. Br. 20-21; SG Br. 12-13) judicial interpretations of the NLRA, contending that the NLRA and Title VII have similar language and that Title VII should therefore be interpreted in parallel. As amici the District of Columbia and seven states explain, however, notwithstanding any superficial similarities between the statutes, this Court has "recently rejected the assumption that words in those statutes should be interpreted identically." District of Columbia & States Amicus Br. 23 (citing *Vance v. Ball State Univ.*, 570 U.S. 421, 434 n.7 (2013)). Specifically, the NLRA may sweep "more broadly" than Title VII, even with respect to identical concepts. *Vance*, 570 U.S. at 434 n.7.

---

[11] To the extent it is appropriate to look at post-enactment action or inaction here, the only salient inference would be from the inaction of Congress in the face of *Burlington* and the longstanding prevailing circuit-court reading of § 703(a)(1) as embodying a requirement of objectively meaningful harm. While there is perhaps not the type of "overwhelming evidence of acquiescence" as in *Bob Jones Univ. v. United States*, 461 U.S. 574, 595, 602 n.27 (1983), it is still nonetheless notable that Congress has not stepped in to reject *Burlington* or the broad circuit consensus on the question presented.

Moreover, the NLRA cannot be more relevant than Title VII itself. Accordingly, in *Burlington*, this Court read § 704(a) to require objectively meaningful harm without any reference to the NLRA but with plenty of reliance on Title VII, including the harm-requiring phrase "discriminate against" that § 704(a) shares with § 703(a)(1), as well as § 703(a)(1) precedent. 548 U.S. at 59, 67-69. That is controlling here.

EEOC material. Finally, Petitioner and the Solicitor General point to (Pet. Br. 24-25; SG Br. 13-14) material from the EEOC. The cited EEOC guidance is irrelevant because it bears only on the meaning of the phrase "terms, conditions, and privileges of employment" without addressing the question of the harm required under the statute. *See* Pet. Br. 24-25; SG Br. 13-14. As for the two stray EEOC decisions that the Solicitor General also cites (at 13-14), they are makeweight at best. Contrary to the Solicitor General's suggestion (at 13), the decisions do not "interpret[] Title's VII scope." Rather, they find facts regarding employee complaints in ways that could well be consistent with a requirement of objectively material harm. *See, e.g.*, EEOC Dec. No. 79-59, 1979 WL 6935, *3 (May 3, 1979) (relying on the employee's allegations that the transfer was "detrimental to her job security and career development" and explaining that an employer's alleged "intent to benefit … females" could not override such harm).

III. The Proposed Per Se Rule Would Swamp Courts And Employers With Litigation Over Employment Minutiae.

1. Adopting Petitioner and the Solicitor General's per se rule would allow Title VII claims against private, state-, and local-government employers for workplace changes and assignments based on an employee's personal preferences, without any proof of objectively material harm. As the courts of appeals have warned, such a per se rule would allow "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like" to "form the basis of a discrimination suit," leaving courts and employers—"already staggering under an avalanche of filings"—"crushed, [with] serious complaints … lost among the trivial." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).[12]

Take the context of police departments. If, as Petitioner argues, a change in terms and conditions were sufficient to support a § 703(a)(1) claim without any showing of objectively meaningful harm, then every time a police commissioner or precinct head transferred or reassigned limited police personnel

[12] Notably, eliminating § 703(a)(1)'s requirement of objectively meaningful harm would also suggest that claims based on objectively minor slights would be actionable under many other similarly worded federal antidiscrimination statutes. *See, e.g.*, 29 U.S.C. § 623 (age discrimination in employment); 42 U.S.C. § 12112 (disability discrimination in employment); 42 U.S.C. § 12182 (disability discrimination in public accommodations); 8 U.S.C. § 1324b (national-origin discrimination in employment); 42 U.S.C. § 3604(b) (discrimination in sale and rental of housing).

based on a city's safety needs or staffing constraints, it would potentially set off a wave of Title VII claims that the changes were made on an improper basis. Here, for example, Petitioner's per se approach would have supported Title VII claims by all 21 other male and female officers who were reassigned by the City Police Commissioner at the same time as Petitioner (Pet. App. 3a), even without any showing of harm, other than a denied personal preference for the prior assignment.

The practical consequences that would flow from engrafting such a rule onto the statute strongly counsel against doing so, particularly when Title VII litigation is already very burdensome for courts and employers. Each year, American workers bring thousands of employment-discrimination suits; over 12,000 such lawsuits were filed in FY 2022 alone.[13] Although these cases have lower success rates than many other types of federal civil cases,[14] they are more likely to go to trial and are extremely time consuming.[15] They are also costly. Employers pay an average of $111,000 in attorneys' fees for employment

---

[13] *U.S. District Courts—Civil Cases Filed, by Nature of Suit, During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2022*, Admin. Office of the U.S. Courts, https://tinyurl.com/54ve43zx.

[14] *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 127-30 (2009).

[15] *See U.S. District Courts–Civil Federal Judicial Caseload Statistics (March 31, 2023)*, Admin. Office of the U.S. Courts, https://tinyurl.com/4ymeubry; Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. Sch. L. Rev. 671, 676 (2013).

discrimination cases ending in summary judgment and $237,000 for cases that go to trial.[16] These fees—which can stagger a small business—are on the low end for many employers; often, attorneys' fees in employment discrimination cases "can range … to well over seven figures."[17]

As noted above (at 31-34), if Congress wants to expand the scope of the statute and impose even greater burdens on courts and employers (including state- and local-government employers) by adopting Petitioner and the Solicitor General's per se rule, that would be its prerogative. But, as this Court has repeatedly recognized, Congress did not mean "to burden the federal courts with claims involving relatively trivial differences in treatment," *Burlington*, 548 U.S. at 75 (Alito, J., concurring in the judgment), or claims based on unreasonable subjective perceptions, *Harris*, 510 U.S. at 21-22; *Burlington*, 548 U.S. at 68-69. Thus, this Court should not engraft such a per se rule without further guidance from the branch of government entrusted with the power to enact federal law.

2. Petitioner and the Solicitor General cannot deny the reality that their per se rule would allow claims to proceed with no objectively material injury. Instead, they suggest that Title VII already contains adequate limitations that would avoid a flood of new litigation. But they would not be seeking the per se

---

[16] *Update of Commission's Conciliation Procedures*, 86 Fed. Reg. 2974, 2983-84 & n.16 (Jan. 14, 2021).

[17] Eric Bachman, *How Much Money Is An Employment Discrimination Case Worth?*, Forbes (Apr. 26, 2022), https://tinyurl.com/4uvy4w3e.

rule unless it would be expected to allow more cases to proceed, and their cited limitations are, in fact, not limiting at all.

For instance, Petitioner and the Solicitor General suggest (Pet. Br. 50-51; SG Br. 30-31) that this Court should not worry about eliminating the imperative of pleading and proving objectively material harm because plaintiffs must still show that the allegedly changed term or condition was based on an improper motive.

There is an obvious reason that Petitioner would elevate the intent requirement while giving plaintiffs a pass on having to provide evidence of objectively material harm: Absent any requirement to show objectively meaningful harm, many more trivial cases and cases premised on subjective perceptions of ordinary workplace assignments and interactions would survive dismissal and summary judgment. As this case demonstrates, it is much easier to assess objective harm early in a case than it is to delve into the mindset of the employer. "Sorting out the true reasons" for any workplace action "is often a hard business." *Bostock*, 140 S. Ct. at 1744. A plaintiff need only plausibly allege an improper intent to move past the pleading stage, which she can often do "by simply alleging that a coworker of another sex, race, or national origin received different treatment." District of Columbia & States Amicus Br. 13. And if a plaintiff establishes a prima facie case of disparate treatment under the *McDonnell Douglas* burden-shifting framework, then an employer will lose as a matter of law unless it provides a "legitimate, nondiscriminatory reason" for its

action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

In employment litigation months or years after the fact, it may not be possible for employers to produce documentation of the nondiscriminatory reasons motivating personnel actions, especially regarding actions that impose little if any adverse impact on any employee. The supervisor who asked a particular employee to attend a client meeting may not even remember the meeting, much less why she failed to invite another employee. Employers will thus likely face more Title VII actions and lengthy, burdensome discovery and trials over their alleged improper intent.

Petitioner and the Solicitor General also seize upon (Pet. Br. 50; SG Br. 29-30) § 703(a)(1)'s reference to the "terms, conditions, or privileges of employment" as mitigating the ramifications of their proposed per se rule. But in invoking this language, they try to have things both ways. Petitioner and the Solicitor General elsewhere reject that these words impose much of a hurdle. *See* Pet. Br. 18-19 (explaining that the words are "capacious" (citing *Oncale*, 523 U.S. at 78)); SG Br. 11-12 (explaining that they are "expansive" (quoting *Meritor*, 477 U.S. at 66)); *accord* Pet. Br. 25.[18]

Unable to identify any limitations in the text of Title VII that would stem the tide of litigation

[18] Likewise, that Title VII includes a statute of limitations and caps on damages (*see* Pet. Br. 51) does little to limit the thousands of employment discrimination lawsuits filed each year. *See supra* 46.

resulting from the per se rule, Petitioner speculates that litigation based on immaterial or subjective harms is uncommon in the "real world." Pet. Br. 46-47, 51. But, as this case shows, disgruntled employees regularly sue over slights and "mere preference[s]." Pet. App. 11a (finding that Petitioner "expresse[d] a mere preference for one position over the other"); *see also* District of Columbia & States Amicus Br. 13 (collecting cases based on petty grievances "that could be actionable in the absence of" an objective, material harm requirement).

Thus, there can be no meaningful dispute that adopting Petitioner and the Solicitor General's proposed per se rule would unleash a surge of Title VII claims and change the workplace landscape in private as well as state- and local-government employment settings.

IV. The Eighth Circuit Correctly Concluded That Petitioner Failed At Summary Judgment To Produce Sufficient Evidence That Would Allow A Finding Of Material, Objective Harm.

The Eighth Circuit properly affirmed the grant of summary judgment against Petitioner based on Petitioner's failure to produce evidence that would permit a reasonable jury could find a significant disadvantage in the form of objectively meaningful harm.

As Petitioner conceded in the summary-judgment record before district court, reassignments within the City's police department are regular fare. J.A. 32, 39, 103, 157; *accord* Pet. App. 24a. Petitioner admitted

that her assignment to the Fifth District resulted in *no* change to her pay, rank, or supervisory role, and *did not harm* her career prospects in any way. Pet. App. 10a, 41a-42a. In her brief in this Court, Petitioner now tries to elide those critical concessions by alluding (at 5-7) to purported changes to her job responsibilities and conditions. As both the Eighth Circuit and district court found, Petitioner's arguments regarding lost prestige and increased administrative duties were "conclusory" and undercut by the summary-judgment record, including Petitioner's explicit admissions. Pet. App. 10a, 41a-43a.

Moreover, by failing to raise them as a basis for resisting summary judgment, Petitioner forfeited any arguments regarding claimed changes pertaining to her schedule, work attire, geographic scope of work, and work vehicle. *See* Pet. App. 44a n.20. Petitioner cannot now try to revive those unpreserved aspects of her case in her Supreme Court brief. Furthermore, these changes were associated with the FBI's revocation of Petitioner's TFO status, rather than the Department's transfer decision. *See* Pet. Br. 6-7 & n.3; Pet. App. 22a-23a; C.A. App. 11; J.A. 85, 113. These cannot supply the required material, objective harm because Petitioner has not challenged the Eighth Circuit's and district court's determinations that the Department was not responsible for the FBI's revocation of her TFO status. Pet. App. 11a-13a, 45a-47a. Indeed, Petitioner concedes that she is "not pursu[ing] a

separate claim related to the loss of her FBI credential." Pet. Br. 7 n.3.[19]

At bottom, Petitioner's only preserved assertion of harm from her transfer boils down to her "mere preference for one position over the other." Pet. App. 11a.; *see* Pet. Br. 28 (arguing Petitioner was "discriminated against" because she was "involuntarily moved because of a protected characteristic"). Yet, as Petitioner has admitted, it is completely "normal" for the Department, like other police departments and law enforcement agencies, to "periodically" "reassign people from one department to another or one assignment to another," as the need arises. J.A. 103; J.A. 32. Indeed, Petitioner has been repeatedly assigned to different positions throughout her career in the Department, and she was previously assigned out of and back into Intelligence on at least one other occasion. Pet. App. 22a & n.1; C.A. App. 554. And she was assigned back to her preferred intelligence assignment within a few months of her assignment to the Fifth District. Pet. App. 10a, 36a.

The harm required under Title VII is not satisfied by simply citing subjective personal preferences and subjective feelings. The employee's change of conditions must be such that "a *reasonable* employee" in Petitioner's position would have suffered some

---

[19] Before the Eighth Circuit, Petitioner sought to hold the Department liable for the FBI's revocation of her TFO status under the "cat's paw" theory of vicarious liability. The Eighth Circuit rejected Petitioner's argument because "the alleged decision maker (here, the FBI) was not a part of the organization sued for discrimination." Pet. App. 13a. Petitioner has not challenged that holding here. Pet. Br. 7 n.3; Cert. Pet. 8 n.2.

material harm (which could be tangible or emotional). *Burlington*, 548 U.S. at 68; *accord Oncale*, 523 U.S. at 81-82; *Harris*, 510 U.S. at 20-22. Petitioner simply failed to offer any evidence or argument that the transfer caused her objectively meaningful harm—that is, anything rising above the ordinary tribulations of the workplace and subjective disappointments in a job assignment she did not prefer. Thus, there is no basis to disturb the disposition below.[20]

CONCLUSION

This Court should affirm the judgment of the Eighth Circuit.

---

[20] Petitioner's denial-of-transfer claim (regarding seeking to become Captain Coonce's administrative aide, *see supra* 6-7) is not properly presented because Petitioner has not challenged the Eighth Circuit's alternative holding that there was no "denial for [the court] to review." Pet. App. 15a. Petitioner does not dispute that this is an independent ground for affirmance. *See* Pet. Br. 11 n.4; Cert. Reply 11; *accord* SG CVSG Br. 22. Thus, the Eighth Circuit's judgment on this point will stand regardless of how this Court resolves the question presented. In any event, the claim fails for the same basic reasons as the transfer claim. *See* Pet. App. 13a-15a, 47a-49a, 52a-53a.

Respectfully submitted,

Robert M. Loeb
Thomas M. Bondy
Robbie Manhas
James Anglin Flynn
Zachary J. Hennessee
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Sheena Hamilton
City Counselor
Counsel of Record
Alexis Silsbe
CITY OF ST. LOUIS
LAW DEPARTMENT
1200 Market Street
Room 314
St. Louis, MO 63103
(314) 622-4621
hamiltons@stlouis-mo.gov

October 11, 2023