No. 20-2088

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DANIELLE NERI,

Plaintiff-Appellant

v.

BOARD OF EDUCATION FOR ALBUQUERQUE PUBLIC SCHOOLS et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the meaning of the statutory phrase "terms, conditions, and privileges of employment" under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12112(a). The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibility under Title I, see 42 U.S.C. 12117(a), and the EEOC has Title I rulemaking authority, see 42 U.S.C. 12116 and 12205a. Accordingly,

the United States has a substantial interest in the proper resolution of the question raised in this appeal.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other *terms, conditions, and privileges of employment*." 42 U.S.C. 12112(a) (emphasis added). This case presents the question whether an involuntary job transfer made on the basis of disability constitutes actionable disparate treatment "in regard to * * * [the] terms, conditions, and privileges of employment" under Title I of the ADA, *ibid.*, even if the transfer at issue is a "purely lateral transfer," meaning that both jobs have the same salary and benefits.[1]

[1] The United States takes no position on the merits of plaintiff's claim or on any other issue presented in this appeal.

STATEMENT OF THE CASE

Plaintiff-appellant Danielle Neri, who claims to have post-traumatic stress and anxiety disorders, quit her employment from defendant-appellee Board of Education for Albuquerque Public Schools after the Board transferred her from her position as an individualized education plan (IEP) teacher to a position as a math teacher. Doc. 110, at 1; Doc. 119, at 1.[2] Neri sued the Board under Title I of the ADA and under state law. As relevant here, she complained that her involuntary transfer to a math teacher position discriminated against her on the basis of disability. Doc. 110, at 2; Doc. 119, at 1-2.

The magistrate judge reviewing the Board's motion for summary judgment recommended that the district court grant summary judgment to the Board. Doc. 110, at 11-27, 33. Specifically, the magistrate judge concluded that Neri's discrimination claim based on her transfer to the math teacher position should fail because she did not allege "an adverse employment action." Doc. 110, at 21-25. The magistrate judge did not analyze Title I's text but instead relied on *EEOC* v. *C.R. England, Inc.*, 644 F.3d 1028 (10th Cir. 2011) (a Title I case relying on Title VII principles), and *Sanchez* v. *Denver Pub. Schs.*, 164 F.3d 527 (10th Cir. 1998)

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[2] "Doc. __, at __" refers to the docket entry number and relevant pages of the district court filings in *Neri* v. *Board of Educ. for the Albuquerque Pub. Schs.*, No. 19-cv-8 (D.N.M.).

(a Title VII case). The magistrate judge stated that, "[i]n general, only acts that constitute 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 will rise to the level of adverse employment action." Doc. 110, at 22 (quoting *C.R. England*, 644 F.3d at 1040). Because Neri's transfer from an IEP teacher position to a math teacher position was "within the same school" and both positions "carried the same salary and medical benefits and were governed by the same terms and conditions of employment," the magistrate judge concluded that it did not constitute an adverse employment action. Doc. 110, at 23. The magistrate judge reasoned that "the fact that the employee views the [truly lateral] transfer either positively or negatively does not of itself render the denial or receipt of the transfer [an] adverse employment action." Doc. 110, at 24 (quoting *Sanchez*, 164 F.3d at 532 n.6).

The district court accepted the magistrate judge's recommendations and issued a written opinion granting summary judgment. Doc. 119, at 1-7, 10. As relevant here, the district court agreed with the magistrate judge that Neri's "transfer from the IEP teacher position to a math teacher position was not an adverse employment action because it was a purely lateral transfer within the same school and because both positions carried the same salary and medical benefits and were governed by the same terms and conditions of employment." Doc. 119, at 8.

The district court cited an unpublished Title VII decision for the proposition that such "lateral transfer[s]" are not actionable. See Doc. 119, at 8 (citing *Watson* v. *Norton*, 10 F. App'x 669, 678 (10th Cir. 2001)). Similar to the magistrate judge, the district court did not engage with Title I's text.

Neri timely appealed on June 25, 2020. Doc. 124.

SUMMARY OF ARGUMENT

The United States files this brief to inform the Court of its view that a discriminatory job transfer, on the basis of disability, is actionable under the plain language of Title I of the ADA when the plaintiff is pursuing a claim for disparate treatment. The United States recently explained its views on the scope of the statutory language "terms, conditions, or privileges of employment" in two certiorari-stage briefs to the Supreme Court in Title VII cases, first in a brief in opposition to certiorari in *Forgus* v. *Esper*, No. 18-942 (S. Ct.) (cert. denied), and then in an amicus brief in support of the petition for a writ of certiorari in *Peterson* v. *Linear Controls, Inc.*, No. 18-1401 (S. Ct.) (petition voluntarily dismissed).

ARGUMENT

DISCRIMINATORY JOB TRANSFERS ARE ACTIONABLE WHEN A PLAINTIFF BRINGS A CLAIM FOR DISPARATE TREATMENT UNDER TITLE I OF THE ADA

In *Forgus* v. *Esper*, No. 18-942 (S. Ct.), and *Peterson* v. *Linear Controls, Inc.*, No. 18-1401 (S. Ct.), the United States addressed the scope of "terms,

conditions, or privileges of employment" under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). In these cases, the United States explained its view that Section 703(a)(1) is not limited to "ultimate employment decisions" or other employment actions having "a significant detrimental effect." See Br. in Opp. at 12-16, *Forgus* v. *Esper*, No. 18-942 (May 6, 2019); U.S. Brief at 7-17, *Peterson* v. *Linear Controls, Inc.*, No. 18-1401 (Mar. 20, 2020). Accordingly, the United States explained that a "purely lateral" transfer is actionable under Section 703(a)(1) of Title VII, because such a transfer involves the "terms" or "conditions" of employment. See Br. in Opp. at 13, *Forgus* v. *Esper*, No. 18-942 (May 6, 2019) ("Under the ordinary meaning of the statutory language, formally transferring an employee from one job to another involves the 'terms' or 'conditions' of employment. * * * Indeed, it is difficult to imagine a more fundamental 'term[]' or 'condition[]' of employment than the position itself."); accord U.S. Brief at 15, *Peterson* v. *Linear Controls, Inc.*, No. 18-1401 (Mar. 20, 2020).

The relevant statutory language in Title I, which prohibits discrimination in the "terms, conditions, and privileges of employment," 42 U.S.C. 12112(a), is materially identical to the language in Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2(a)(1); see also 29 C.F.R. 1630.4(a)(1)(ii) (providing that it is unlawful to discriminate against a qualified individual on the basis of disability in regard to a

"transfer"). This Court recently explained that the phrase "terms, conditions, and privileges" in Title I, as in Title VII, is not limited only to discriminatory actions that result in a "significant change in employment status." *Exby-Stolley* v. *Board of Cnty. Comm'rs*, No. 16-1412, 2020 WL 6304349, at 22-23 (10th Cir. Oct. 28, 2020) (en banc); see also *id*., at 39-41 (McHugh, J., dissenting) (agreeing that a "plaintiff can make out an ADA discrimination claim * * * by showing an express [or constructive] change or disparity in the terms or conditions of employment" and noting that prior decisions have too narrowly construed what constitutes an adverse employment action). Consistent with Title I's plain language and this Court's reasoning in *Exby-Stolley*, a discriminatory lateral transfer is actionable when a plaintiff brings a claim for disparate treatment under Title I because such discrimination plainly involved the "terms" and "conditions" of employment.[3]

[3] The position taken here does not implicate the distinct question of whether an employer has reasonably accommodated an employee with a disability by transferring that employee to another position. See 42 U.S.C. 12112(b)(5)(A) (requiring employers to provide reasonable accommodations in certain circumstances); see also 42 U.S.C. 12111(9)(A) and (B) (defining reasonable accommodation to include "reassignment to a vacant position"). In this case, Neri did not request the transfer as a reasonable accommodation for an asserted disability, and the Board has not defended it on the ground that it was an accommodation permitted under the statute.

The United States' briefs in *Forgus* (Attachment 1) and *Peterson* (Attachment 2) are attached for this Court's consideration.

CONCLUSION

The United States respectfully urges this Court to reconsider and reject, consistent with the text of Title I and the recent en banc decision in *Exby-Stolley*, any circuit precedent under Title I of the ADA or Section 703(a)(1) of Title VII that would have previously required the district court to hold that discriminatory lateral job transfers are not actionable in the context of a claim for unlawful disparate treatment.[4]

Respectfully submitted,

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[4] Title VII's federal-sector provision, 42 U.S.C. 2000e-16(a), is the provision applicable to claims against the federal government. That provision contains different statutory language than Section 703(a)(1), and the United States does not with this filing urge this Court to reconsider any of its precedent interpreting Section 2000e-16(a).

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 29 and with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 1587 words according to the word processing program used to prepare the brief.

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

s/ Anna M. Baldwin
ANNA M. BALDWIN
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Date: November 16, 2020

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY, prepared for submission via ECF, complies with the following requirements:

(1) All required privacy redactions have been made under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5;

(2) With the exception of any redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the clerk; and

(3) The ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Dated: November 16, 2020

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY with the United States Court of Appeals for the Tenth Circuit via this Court's CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users. Pursuant to this Court's General Order dated October 26, 2020, and Tenth Circuit Rule 31.5, the United States will mail seven (7) paper copies of this filing within five business days following receipt of notice that the electronic filing is compliant.

s/ Anna M. Baldwin
ANNA M. BALDWIN
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ATTACHMENT 1

No. 18-942

In the Supreme Court of the United States

ASHIDDA FORGUS, PETITIONER

v.

PATRICK M. SHANAHAN, ACTING SECRETARY OF DEFENSE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly dismissed petitioner's employment discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, where petitioner did not apply for the job transfer that forms the basis of her claims in the manner that her federal employer required.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the Federal Reporter but is reprinted at 753 Fed. Appx. 150. The opinion of the district court (Pet. App. 11-20) is not published in the Federal Supplement but is available at 2017 WL 6343791.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2018. The petition for a writ of certiorari was filed on January 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an employee at the Defense Logistics Agency (DLA) of the Department of Defense, verbally requested a transfer from one DLA branch to another.

When the DLA did not grant the transfer, petitioner alleged discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* After filing a complaint with the DLA Equal Employment Opportunity Office (EEOO) and obtaining review by the Equal Employment Opportunity Commission (EEOC), petitioner filed suit in district court. The district court dismissed her complaint for failure to state a claim. Pet. App. 11-20. The court of appeals affirmed. *Id.* at 1-7.

1. Title VII broadly prohibits employment discrimination by private-sector and federal-sector employers, respectively.[1]

a. Title VII's private-sector provision makes it an "unlawful employment practice" for an employer to take certain enumerated actions against an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Specifically, an employer may not "fail or refuse to hire," "discharge," or "otherwise * * * discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of the protected characteristics. *Ibid.*

In addition to that "substantive antidiscrimination provision," Title VII's private-sector provision prohibits retaliation by employers. *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). As relevant here, an employer may not "discriminate" against an individual "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. 2000e-3(a).

---

[1] Title VII's private-sector provision applies to state- and local-government employers. 42 U.S.C. 2000e(b).

b. Title VII's federal-sector provision also includes a substantive antidiscrimination provision. 42 U.S.C. 2000e-16(a). Unlike its private-sector counterpart, the federal-sector antidiscrimination provision "contains a broad prohibition of 'discrimination,' rather than a list of specific prohibited practices." *Gomez-Perez* v. *Potter*, 553 U.S. 474, 487 (2008). Specifically, the federal-sector antidiscrimination provision states that "[a]ll personnel actions" affecting employees or applicants "shall be made free from any discrimination based on" the same protected characteristics listed in the private-sector provision. 42 U.S.C. 2000e-16(a).

Unlike Title VII's private-sector provision, the federal-sector provision does not expressly prohibit employer retaliation. See *Gomez-Perez*, 553 U.S. at 487-488. This Court, however, has determined that the federal-sector provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a, which is "patterned 'directly after' Title VII's federal-sector discrimination ban," authorizes a retaliation claim, *Gomez-Perez*, 553 U.S. at 487 (citation omitted). The Court has subsequently "assume[d] without deciding" that a federal employee can bring a retaliation claim under Title VII. *Green* v. *Brennan*, 136 S. Ct. 1769, 1774 n.1 (2016).

2. Petitioner, an African-American woman, works at the DLA. Pet. App. 11-12. The DLA "consists of several directorates, including the Business Process Support Directorate, which includes the Order Fulfillment Division." *Id.* at 12. The Order Fulfillment Division "has two branches: Order Management and Inventory Management." *Ibid.* Petitioner "works as a Business Process Analyst, a position which exists in both * * * branches." *Ibid.* Petitioner "works exclusively within the Order Management branch." *Ibid.*

After starting at her current position in 2009, petitioner "made complaints or requests" about several aspects of her employment, including seating arrangements, the absence of an assigned employee to serve as her backup, access to training opportunities, the conduct of informal office meetings, her workload, and particular assignments. Pet. App. 13; see C.A. App. 44, 53-57. In some cases, the DLA "acquiesced," but petitioner "ma[d]e more complaints or requests." Pet. App. 13.

In January 2011, the DLA announced a "few vacancies" for business process analyst positions. C.A. App. 68; see Pet. App. 13. The announcement did not specify which branch (or branches) would ultimately employ the analysts. Petitioner submitted an application but was informed that the vacancy announcement described her current position and that she would have to submit a written transfer request if she wanted to transfer to a different branch. Pet. App. 13; see C.A. App. 116.

Petitioner never submitted a written request to transfer. Pet. App. 13-14. Instead, she wrote in an email to her supervisor that she had "an interest to work in both [the Order Management] and [Inventory Management] branches" and that she "would like to broaden [her] scope of experience in [Order Management] with other duties outside of those already assigned." C.A. App. 149. Petitioner also verbally informed her supervisors during in-person meetings that she wanted to transfer to Inventory Management. Pet. App. 13. After being informed again that a transfer required a written request, petitioner still did not submit a written request. See C.A. App. 76. Rather, she told her supervisor that the DLA should treat her application as a transfer request. Pet. App. 13-14; see C.A. App. 75.

The DLA did not transfer petitioner. Instead, petitioner's supervisor assigned her to projects in which she would receive experience "in Inventory Management, the department to which she desired a transfer." Pet. App. 17. The DLA ultimately hired two African-American men from outside petitioner's division for the business process analyst positions. *Id.* at 14, 16. One was assigned to Order Management; the other was assigned to Inventory Management. *Id.* at 14.

3. Petitioner filed a complaint with the DLA's EEOO. As relevant here, she alleged that the DLA's decision not to transfer her constituted racial or gender discrimination and retaliation for her earlier complaints about her working conditions. Pet. App. 14; see C.A. App. 60-61. An EEOC administrative judge determined that petitioner had not established that the DLA's "alleged conduct was related to her race or sex" but instead "concern[ed] management decisions about typical work-related issues." C.A. App. 58. The judge likewise rejected petitioner's retaliation claim, concluding that the DLA's "legitimate nonretaliatory reasons" were not "pretext for retaliation." *Id.* at 61. The EEOC Office of Federal Operations affirmed. *Id.* at 47.

4. Petitioner brought this action in federal district court, asserting discrimination and retaliation claims under the federal-sector provision of Title VII. The court dismissed the complaint for failure to state a claim. Pet. App. 11-20.

In dismissing petitioner's discrimination claim, the district court explained that petitioner's "supervisor told her she needed to submit a written request to receive a transfer, but [petitioner] claims she orally requested a transfer in several meetings." Pet. App. 16. The court added that petitioner had requested "changes

in her workload," and that her supervisor "assigned her to a new project in which she received both an increased workload and experience in Inventory Management, the department to which she desired a transfer." *Id.* at 17. Based on those aspects of the record, the court concluded that petitioner had pleaded "insufficient facts to show an adverse action with regard to her transfer requests." *Ibid.* The court observed that "[a]n employee cannot expect to receive everything she requests from her employer," and petitioner had "not shown any 'significant detrimental effect' because she has not received a transfer," particularly given that "her supervisor made efforts to give [her] experience in the Inventory Management branch." *Ibid.* (quoting *Holland* v. *Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007), cert. denied, 552 U.S. 1102 (2008)).

The district court also dismissed petitioner's retaliation claim. Pet. App. 17-18. The court explained that a plaintiff "bringing a retaliation claim must allege that (1) she engaged in protected activity, (2) the employer took adverse action against her, and (3) a causal relationship existed between the protected activity and the adverse employment action." *Id.* at 17. The court explained that petitioner had "failed to show that any" DLA conduct, including the alleged denial of her transfer request, amounted to an "adverse action" sufficient for a retaliation claim, because none of the cited conduct would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 18 (quoting *White*, 548 U.S. at 68).[2]

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[2] The parties and the court assumed, without directly addressing the issue, that petitioner could bring a retaliation claim under Title VII's federal-sector provision, even though the provision does not expressly authorize such a claim. See p. 3, *supra*.

5. The court of appeals affirmed in an unpublished decision. Pet. App. 1-7. After reciting the pleading standards articulated by this Court in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), the court of appeals concluded that the "allegations in [petitioner's] complaint consisted of 'labels and conclusions' that were insufficient to withstand a motion to dismiss, or complained of actions that were not 'adverse.'" Pet. App. 5. The court stated that a plaintiff alleging "an 'adverse employment action' for purposes of a Title VII disparate treatment claim," *ibid.*, "must show 'some significant detrimental effect,'" *ibid.* (quoting *Holland*, 487 F.3d at 219). The court also cited precedents from other circuits indicating that the "mere denial of a reassignment to a purely lateral position * * * is typically not a materially adverse action." *Ibid.* (citation omitted); see *id.* at 5-6.

With respect to petitioner's retaliation claim, the court of appeals stated that petitioner had "failed to oppose" dismissal of her claim "in any meaningful way" in the district court, and that she had accordingly "waived appellate review over the district court's dismissal of" that claim. Pet. App. 6. The court added that such "unpreserved arguments may not be addressed on appeal unless plain error has occurred or exceptional circumstances exist," and petitioner did "not argue that" either of those criteria was satisfied. *Ibid.* In any event, the court of appeals "discern[ed] no error in the district court's rationale for dismissal," because "none of the actions about which [petitioner] complains on appeal constitute materially adverse employment actions sufficient to support her retaliation claim[]." *Id.* at 6-7.

ARGUMENT

Petitioner contends (Pet. 14-24) that she asserted actionable Title VII discrimination and retaliation claims based on the denial of her alleged transfer request. The court of appeals correctly rejected those claims on the threshold factual ground that petitioner failed to apply for a transfer through the procedures the DLA required—procedures she does not challenge as unlawful. That factual obstacle, along with multiple argument-preservation issues, makes this case an inappropriate vehicle for considering broader questions about when the denial of a transfer may form the basis of a Title VII discrimination or retaliation claim.

In the government's view, the court of appeals' position—*i.e.*, that a discriminatory denial of a transfer is not actionable under Title VII where there is "no reduction in pay and no more than a minor change in working conditions," Pet. App. 5 (citation omitted)—is incorrect. Under the plain meaning of the statutory text, the discriminatory denial of a job transfer is a "personnel action[]" cognizable under Title VII's federal-sector provision, 42 U.S.C. 2000e-16(a), even if no change in pay or working conditions results. Likewise, a discriminatory denial of a transfer is "discriminat[ion] * * * with respect to * * * terms, conditions, or privileges of employment" under Title VII's private-sector provision, 42 U.S.C. 2000e-2(a)(1), even if the transfer is "purely lateral," Pet. App. 5 (citation omitted). This Court's review of those questions may be warranted in a future case.

1. Title VII requires a federal employer to make "personnel actions * * * free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Petitioner contends (Pet. 2, 14-15) that the DLA's decision not to grant her alleged

transfer request constitutes a personnel action impermissibly based on race or sex. The court of appeals correctly determined that, based on the record presented here, petitioner failed to state a discrimination claim.

a. As a threshold matter, petitioner's claim required her to plausibly allege that she applied for the transfer that she contends was denied on the basis of race or sex. See, *e.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). Petitioner failed to make that showing. The district court found, and petitioner does not dispute, that her "supervisor told her she needed to submit a *written* request to receive a transfer," but she only "*orally* requested a transfer in several meetings." Pet. App. 16 (emphases added); see C.A. App. 76 (petitioner recognizing that she was required to submit a written transfer request); *id.* at 85-86 (email documenting petitioner's in-person rather than written request); *id.* at 142-143 (supervisor explaining that petitioner had "to put into writing her request"). Petitioner's only written request —an email—expressed "an interest to work in *both* * * * branches," not to transfer from one branch to the other. *Id.* at 149 (emphasis added). The DLA "made efforts" to satisfy that interest by assigning petitioner to projects in which she would receive "experience in Inventory Management, the department to which she desired a transfer." Pet. App. 18.

Petitioner does not contend that the DLA procedures requiring a written transfer request were themselves discriminatory. Nor does she suggest that she was treated differently than any other employee who failed to submit a written request for a transfer. The court of appeals therefore correctly determined that petitioner's "labels and conclusion" regarding the denial of her transfer request "were insufficient to withstand a motion to

dismiss." Pet. App. 5. That fact-bound assessment of the adequacy of the pleadings provides an independent basis to support the decision below and does not warrant this Court's review.

b. The court of appeals concluded in the alternative that petitioner's discrimination claim should be dismissed because the denial of a request for a transfer to a "purely lateral position" is not actionable. Pet. App. 5 (citation omitted). Although most courts of appeals have adopted a similar understanding, and although the government has defended such an understanding in the past, that reading of the statute is incorrect.

i. Title VII's federal-sector provision requires that all "personnel actions" be "free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Although Title VII does not define "personnel action[]," *ibid.*, a formal decision to transfer an employee from one job to another—or to deny a request for such a transfer—falls squarely within the ordinary meaning of the term. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, for example, defines "personnel action" to include "a detail, transfer, or reassignment." 5 U.S.C. 2302(a)(2)(A)(iv). This Court has described a "personnel action" as encompassing "promotion, salary, or work assignments." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 608 (2008). And federal employees receive an official notice of personnel action when, among other things, they undertake a "[p]osition [c]hange" or "[r]eassignment" that does not involve a change in pay grade. U.S. Office of Personnel Management, *The Guide to Processing Personnel Actions*, 14-3 to 14-4 (Mar. 2017).

Contrary to the position adopted by the decision below and other courts of appeals, none of those definitions of "personnel action" requires a "reduction in pay" or "more than a minor change in working conditions." Pet. App. 5 (citation omitted). To be sure, an employee might seek a transfer to obtain greater pay or better working conditions, and an employee might oppose a transfer that reduces pay or worsens working conditions. But the formal order or denial of a lateral transfer that does not involve changes in pay or working conditions is no less a "personnel action[]," 42 U.S.C. 2000e-16(a), under the ordinary meaning of the term. See *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). And nothing about the context of Title VII's federal-sector provision suggests a departure from that ordinary meaning. To the contrary, transferring employees between jobs (or rejecting requested transfers) because of race, sex, or other protected characteristics directly undermines "the important purpose of Title VII—that the workplace be an environment free of discrimination." *Ricci* v. *DeStefano*, 557 U.S. 557, 580 (2009).

ii. Petitioner did not argue the case under the federal-sector provision, 42 U.S.C. 2000e-16(a), and neither the government nor the court of appeals analyzed petitioner's discrimination claim under the text of that provision. The parties and the court instead relied on cases decided under Title VII's private-sector antidiscrimination provision, 42 U.S.C. 2000e-2(a)(1), which prohibits discrimination against an employee "with respect to his compensation, terms, conditions, or privileges of employment." Despite the difference in language, the court below and other courts of appeals have routinely reviewed

"claims brought by federal employees" under the "comparable" private-sector provision. *Baqir* v. *Principi*, 434 F.3d 733, 742 (4th Cir.), cert. denied, 549 U.S. 1051 (2006); see, *e.g.*, *Ponce* v. *Billington*, 679 F.3d 840, 844 (D.C. Cir. 2012) (stating that the provisions provide "essentially the same guarantees against" discrimination) (citation omitted); see also *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974) ("In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government."); Gov't C.A. Br. 18-27 (relying primarily on private-sector cases).

Although the government did not contest this issue below, the text of the private-sector antidiscrimination provision does not support the court of appeals' conclusion. The court stated that Section 2000e-2(a)(1) requires an "adverse employment action," which the court defined as an action that "'adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment.'" Pet. App. 5 (citation omitted). The court further stated that an adverse employment action must involve "some significant detrimental effect." *Ibid.* (quoting *Holland* v. *Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007), cert. denied, 552 U.S. 1102 (2008)). The court cited precedents from other circuits concluding that the "mere denial of a reassignment to a purely lateral position"—*i.e.*, a position involving "no reduction in pay and no more than a minor change in working conditions"—"is typically not a materially adverse action." *Ibid.* (quoting *Wheat* v. *Florida Parish Juvenile Justice Comm'n*, 811 F.3d 702, 709 (5th Cir. 2016)); see *id.* at 6 (citing *Brown* v. *Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1108 (7th Cir. 2012)); see also *Brown* v. *Brody*,

199 F.3d 446, 455-456 (D.C. Cir. 1999) (similar); *Williams* v. *Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (similar).

Despite its widespread acceptance by courts of appeals and its endorsement by the federal government in some cases, the view that a "purely lateral" transfer is not actionable under Section 2000e-2(a)(1), Pet. App. 5 (citation omitted), is incorrect. Under the ordinary meaning of the statutory language, formally transferring an employee from one job to another involves the "terms" or "conditions" of employment. 42 U.S.C. 2000e-2(a)(1). Indeed, it is difficult to imagine a more fundamental "term[]" or "condition[]" of employment than the position itself. *Ibid.* Thus, "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. *United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (quoting 42 U.S.C. 2000e-2(a)). Under that straightforward reading of the statutory text, "[a]ll discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII." *Ibid.*; accord *id.* at 80-81 (Rogers, J., concurring).

The government also did not contest below the court of appeals' closely related view that Section 2000e-2(a)(1) requires a showing of "some *significant* detrimental effect," Pet. App. 5 (quoting *Holland*, 487 F.3d at 219) (emphasis added). But that position is similarly misguided. Neither Section 2000e-2(a)(1) nor the federal-sector provision includes any such requirement in

its text.[3] And categorically applying a significant-detrimental-effect requirement would produce untenable results. For example, paying an employee one dollar less in annual salary based solely on that employee's race or sex likely would not be actionable under a significant-detrimental-effect standard, because a one-dollar difference in annual pay is not likely "significant." *Ibid.* (citation omitted). But such transparently disparate treatment with respect to a formal aspect of employment would be irreconcilable with the statutory text that covers the "compensation, terms, conditions or privileges of employment," 42 U.S.C. 2000e-2(a)(1), and its objective to make "the workplace be an environment free of discrimination," *Ricci*, 557 U.S. at 580.

The court of appeals appears to have derived its significant-detrimental-effect standard—and its related position that purely lateral transfers are not actionable—in part from this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). See *Boone* v. *Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (citing *Ellerth*, 524 U.S. at 761). *Ellerth*, however, involved a claim against an employer for creating a hostile work environment through "severe or pervasive" sexual harassment—a theory of discrimination this Court has found actionable under Title VII. 524 U.S. at 754; see, *e.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S.

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[3] Title VII's following provision does make it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2) (emphasis added).

75, 81 (1998). The question in *Ellerth* was not the substantive standard that applies to such a claim, but rather under what circumstances "an employer has vicarious liability" based on sexual harassment by one of its agents ("a supervisor") against an employee. 524 U.S. at 754. After reviewing agency-law principles, the Court determined that vicarious liability exists "when the supervisor's harassment culminates in a *tangible employment action*, such as discharge, demotion, or undesirable reassignment." *Id.* at 765 (emphasis added); see *id.* at 761 (similarly defining "tangible employment action" as "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"). The Court reasoned that a "tangible employment action" necessarily "requires an official act of the enterprise," and therefore supports vicarious liability against the employer for the acts of the supervisor under traditional agency principles. *Id.* at 761-762. By contrast, when there is no "tangible employment action," an employer can avoid vicarious liability by raising an "affirmative defense"—that the supervisor was not actually acting with the aid of the company. *Id.* at 764-765.

Ellerth's discussion of "tangible employment actions" in determining when to impute vicarious liability to an employer does not resolve whether a discriminatory transfer (or discriminatory denial of a requested transfer) constitutes "discriminat[ion] * * * with respect to * * * compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). Indeed, this Court has expressly explained that *Ellerth* "did *not* discuss the scope of" Title VII's "general antidiscrimination provision," and invoked the concept of a "'tangible

employment action' * * * *only* to 'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 64-65 (2006) (quoting *Ellerth*, 524 U.S. at 760-761) (emphases added). *Ellerth* thus provides no support for the position that an employer's discriminatory act is cognizable under Title VII's antidiscrimination provision only if it amounts to a "tangible employment action." 524 U.S. at 761, 765.[4]

c. Given the significant and widespread misreading of Title VII embodied in the decision below, this Court's review would likely be appropriate in a properly presented case. But as discussed above, this case would be a poor vehicle for review, because the courts below dismissed petitioner's claim on the independent and case-specific ground that she did not apply for a transfer through the procedures that her employer required—procedures that she does not allege to be discriminatory or otherwise inappropriate. See pp. 9-10, *supra*. The Court may also wish to allow further percolation on the question presented in light of the recent calls for lower courts to reconsider their precedents, see *Ortiz-Diaz*,

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[4] *Ellerth* did state that it "import[ed] the concept of a tangible employment action" from circuit cases discussing the substantive scope of Title VII's antidiscrimination provisions. 524 U.S. at 761. But *Ellerth* made clear that it was "import[ing]" that concept only "for resolution of the vicarious liability issue" and "[w]ithout endorsing the specific results" of the decisions it cited. *Ibid.* To the extent that passage could have suggested that *Ellerth* tacitly considered a "tangible employment action" to be an element of a substantive discrimination claim, see U.S. Amicus Br. at 21-23, *White*, *supra* (No. 05-259), this Court's decision in *White* forecloses that understanding, see *White*, 548 U.S. at 64-65.

867 F.3d at 81 (Kavanaugh, J., concurring); *id.* at 80-81 (Rogers, J., concurring), and the position articulated by the government in this brief. And even assuming that the denial of petitioner's requested transfer was a sufficient basis for a Title VII claim, petitioner is unlikely to obtain any relief on the merits because she has not "establish[ed] that the alleged conduct was related to her race or sex." C.A. App. 58 (EEOC conclusion).

2. The court of appeals correctly affirmed the dismissal of petitioner's Title VII retaliation claim, Pet. App. 6-7, and no basis exists for this Court's review.

The parties and the courts below assumed that the retaliation standard specified in Title VII's private-sector provision, 42 U.S.C. 2000e-3(a), applies to a claim against a federal employer. Although the Court has "assume[d] without deciding" that a federal employee can bring a retaliation claim under Title VII, *Green* v. *Brennan*, 136 S. Ct. 1769, 1774 n.1 (2016), the Court has not definitively resolved the issue. Moreover, even if the federal-sector provision did support a retaliation claim, the text of the provision would limit such claims to acts of retaliation that are "personnel actions," 42 U.S.C. 2000e-16(a), unlike the private-sector provision, which does not include such a limitation and covers retaliation that "extends beyond workplace-related or employment-related retaliatory acts and harm," *White*, 548 U.S. at 67.[5] Although those unresolved issues may warrant review by this Court in an appropriate case, they are not properly presented here. Indeed, the court of appeals concluded that petitioner "failed to oppose"

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[5] As discussed above (see pp. 10-16, *supra*), the formal denial of a lateral transfer constitutes a "personnel action" for purposes of 42 U.S.C. 2000e-16(a), so petitioner's retaliation claim would satisfy that element of the standard.

dismissal of her retaliation claim "in any meaningful way" in the district court, and accordingly "waived appellate review over the district court's dismissal of" that claim. Pet. App. 6.

Even if petitioner had preserved her retaliation claim, and even if it were governed by the broader standard derived from the private-sector retaliation provision, 42 U.S.C. 2000e-3(a), her claim would still fail. As the court below concluded, the DLA did not take any action against petitioner "that a reasonable employee would have found * * * materially adverse"—that is, that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Pet. App. 7 (quoting *White*, 548 U.S. at 68).[6] The only allegedly adverse action petitioner cites in this Court is the denial of her transfer request. But as explained above, petitioner failed to submit her transfer request through the procedures that the DLA required (and that she does not contest as discriminatory). Petitioner

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[6] A material-adversity requirement is appropriate under 42 U.S.C. 2000e-3(a) because the text of that provision—unlike the private-sector antidiscrimination provision, 42 U.S.C. 2000e-2(a)(1)—broadly prohibits "discrimination" without specifying any particular forms of discrimination (*i.e.*, discrimination "with respect to * * * compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1)). As this Court explained in *White*, the "antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm," and a requirement of "*material* adversity" is necessary "to separate significant [harms] from trivial harms" that Congress did not make actionable. 548 U.S. at 68; see *ibid.* ("An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."). Any retaliation claim that exists under Title VII's federal-sector provision should have the same material-adversity requirement.

provides no basis to conclude that the DLA declined to grant the transfer as retaliation for protected conduct rather than for failure to comply with its required procedures. Indeed, far from retaliating against her, petitioner's supervisor at the DLA "made efforts to give [her] experience in the Inventory Management branch," the "department to which she desired a transfer." *Id.* at 17; see C.A. App. 61 (EEOC explaining that the DLA's decision was based on "legitimate nonretaliatory reasons" that were not "pretext for retaliation"). Petitioner's retaliation claim therefore lacks merit under any plausible standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ATTACHMENT 2

No. 18-1401

In the Supreme Court of the United States

DAVID D. PETERSON, PETITIONER

v.

LINEAR CONTROLS, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

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

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

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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

INTEREST OF THE UNITED STATES

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

STATEMENT

Petitioner, who worked for respondent on an offshore oil platform, alleges that he and other "black employees had to work outside and were not permitted water breaks, while the white employees worked inside with air conditioning and were given water breaks." Pet. App. 2a. Petitioner sued respondent for racial discrimination "with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The district court granted summary judgment to respondent. Pet. App. 11a-47a. The court of appeals affirmed. *Id.* at 1a-10a.

A. Statutory Background

Congress enacted Title VII of the Civil Rights Act of 1964 to "assure equality of employment opportunities and to eliminate * * * discriminatory practices and devices" in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). This case involves "Title VII's core antidiscrimination provision," Section 703(a)(1). *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). Section 703(a)(1) makes it unlawful for a private employer or a state or local government "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1); see 42 U.S.C. 2000e(a)-(b).

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

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

B. Proceedings Below

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

A. The Decision Below Is Incorrect

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

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

The key text in this case, Section 703(a)(1), makes it unlawful for a private employer or a state or local government "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Petitioner does not allege that respondent made a "hir[ing]" or "discharge" decision based on his race, nor that race played a role in his "compensation." *Ibid.* This case accordingly turns on whether respondent "discriminate[d] against" petitioner "with respect to his * * * terms, conditions, or privileges of employment." *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Question Presented Warrants Review In This Case

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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