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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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).

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[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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