No. 05-1065

In the Supreme Court of the United States

BRENDA A. BREWER, PETITIONER

v.

GORDON ENGLAND,
SECRETARY OF THE NAVY

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioner's lateral transfers qualified as material adverse employment actions sufficient to establish actionable retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

2. Whether petitioner may obtain judicial review under Title VII of the revocation of her security clearance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-3a) is not published in the *Federal Reporter*, but is *reprinted in* 157 F. App'x 590. The memorandum and order of the district court (Pet. App. 6a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2005 (Pet. App. 1a). The petition for a writ of certiorari was filed on February 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 12541.

STATEMENT

1. Petitioner is an African-American woman and a former GS-12 employee of the Department of the Navy.

Pet. App. 8a. While assigned to the Security Office of Naval Sea Systems Command (NAVSEA), petitioner filed several Equal Employment Opportunity (EEO) complaints. *Ibid.* In January 1995, the Navy and petitioner agreed to a settlement of her EEO complaints that included her reassignment to the NAVSEA Naval Reserve Office. *Ibid.* Several years later, the Naval Reserve Office was reorganized, and petitioner applied for a GS-12 Program Analyst position in the reorganized office. *Ibid.* The selecting official selected another African-American female for the position. *Ibid.* From November 1999 to July 2001, petitioner served temporary details in several different NAVSEA offices. *Ibid.* In July 2001, petitioner was permanently reassigned to NAVSEA's Office of Security and Law Enforcement (OSLE), the successor to the Security Office. *Ibid.* The Security Office was the site of some of petitioner's previous EEO complaints. *Ibid.*

In April 2002, the Navy notified petitioner of its intent to suspend her access to classified materials for failure to submit a completed upgraded security clearance form. Pet. App. 9a. The Navy denied petitioner's request for an extension to complete the form, and ultimately revoked her security clearance. *Ibid.* On September 9, 2002, the Navy removed petitioner from her position. *Ibid.*

2. On February 19, 2002, petitioner filed a civil action alleging retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). Pet. 11. Petitioner alleged that she had been unlawfully removed from the Naval Reserve Office as a reprisal for her prior protected activity. *Ibid.* On May 20, 2003, petitioner filed a second Title VII action, claiming that the government's revocation of her security clearance also consti-

tuted an act of retaliation. *Ibid.* The cases were consolidated. *Ibid.*

The district court entered summary judgment in favor of the government on all of petitioner's claims. Pet. App. 6a-19a. The court rejected petitioner's contention that her temporary placements constituted adverse employment actions sufficient to support a claim for retaliation. *Id.* at 14a. The court concluded that because petitioner "maintained the same grade and step level (GS-12-07), the same s[a]lary, and the same potential for promotion" petitioner had not suffered an "adverse employment action." *Ibid.* The court also rejected petitioner's claim based on the revocation of her security clearance on the ground that it did not "have authority to review [the government's] determination to revoke an employee's security clearance." *Id.* at 17a-18a.

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 2a-3a. The court explained that it was affirming "for the reasons stated by the district court." *Id.* at 3a.

ARGUMENT

1. Petitioner contends (Pet. 13-18) that review is warranted to resolve a conflict in the circuits on the showing that an employee must make to demonstrate an adverse employment action for purposes of a Title VII retaliation claim. In *Burlington Northern & Santa Fe Railway* v. *White*, cert. granted, No. 05-259 (Dec. 5, 2005) (oral argument scheduled for Apr. 17, 2006), the Court granted a petition for a writ of certiorari to resolve that conflict.

This case involves Title VII's application to a federal employer, rather than a private employer, as in *Burlington Northern*. Because of differences in the language

between Title VII's federal employer and private employer provisions, see 42 U.S.C. 2000e-3(a) (private employer), 2000e-16(a) (federal employer), the decision in *Burlington Northern* will not necessarily affect the proper disposition of the petition in this case. See U.S. Amicus Br. at 19 n.5, *Burlington Northern, supra* (No. 05-259). Nonetheless, because of the overlap in the basic issues presented, it would be appropriate to hold the present petition pending the Court's decision in *Burlington Northern*.

2. Petitioner also seeks review (Pet. 19-23) of the question whether a court may review a revocation of security clearance in the context of a Title VII claim. Review of that question is not warranted.

In *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), the Court held that the Merit Systems Protection Board does not have authority to review the Navy's security clearance determinations. The Court explained that security clearance determinations are "committed by law to the appropriate agency of the Executive Branch" *(id.* at 527) unless "Congress specifically has provided otherwise." *Id.* at 530. Consistent with *Egan*, the courts of appeals that have addressed the question have uniformly held that Title VII does not authorize a court to review the Executive Branch's security clearance determinations. *E.g.*, *Bennett* v. *Chertoff*, 425 F.3d 999, 1000 (D.C. Cir. 2005); *Becerra* v. *Dalton*, 94 F.3d 145, 148 (4th Cir. 1996); *Perez* v. *FBI*, 71 F.3d 513, 514 (5th Cir. 1995); *Brazil* v. *Department of Navy*, 66 F.3d 193, 195 (9th Cir. 1995).

Relying on *Webster* v. *Doe*, 486 U.S. 592 (1988), petitioner argues (Pet. 20-22) that she should be able to obtain review of the revocation of her security clearance under Title VII. But *Webster* involved a constitutional

claim and was based on the principle that "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Id.* at 603. That principle does not apply to statutory causes of action, such as Title VII. To the contrary, under *Eagen*, the presumption is that Congress does not intend statutory causes of action to provide a basis for challenging a security clearance determination. 484 U.S. at 527.

Petitioner contends (Pet. 21-22) that her Title VII claim encompasses a constitutional claim and that she should therefore be able to take advantage of the holding in *Webster*. That contention is without merit. Petitioner chose to proceed under Title VII, not under the Constitution. *Eagen*, rather than *Webster*, is therefore controlling. In any event, Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Brown* v. *GSA*, 425 U.S. 820, 835 (1976). Because petitioner has asserted a claim of discrimination in federal employment, she may not seek relief directly under the Constitution. Instead, the only relief she may seek is that available under Title VII. And as the courts of appeals have uniformly held, under *Eagen*, Title VII does not authorize a court to review a revocation of an employee's security clearance.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Burlington Northern & Santa Fe Railway* v. *White*, No. 05-259, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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