No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF MISSOURI AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of key federal statutes like Title VII of the Civil Rights Act and accordingly has an interest in this case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Missouri is one of the ACLU's statewide affiliates. Both organizations are committed to ensuring equal protection for all, and to fighting discrimination in employment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] 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). Notwithstanding this plain text, the court below held that Respondent City of St. Louis did not violate Title VII when it transferred

[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Petitioner Jatonya Clayborn Muldrow to a different job and denied her a requested transfer, allegedly because of her sex. *See* Pet. App. 15a. According to the court below, it was not sufficient that the transfer decisions affected the "conditions" of her employment. Instead, Muldrow also had to establish, in addition to the requirements set out in the text of the statute, that either her reassignment from the Intelligence Division to a position in the Fifth District or her denied request to transfer to an administrative aide position constituted an "adverse employment action," that is, "a tangible change in working conditions that produces a material employment disadvantage." *Id.* at 9a. This decision should not stand because Title VII's antidiscrimination provision contains no such requirement.

Congress drafted Title VII, and it is the responsibility of the courts to interpret and apply it—not to rewrite it by superimposing on it additional, atextual requirements. Under the statute's plain language, a plaintiff alleging discrimination under Title VII must show only that an employer discriminated against her "with respect to [her] compensation, terms, conditions, or privileges of employment" because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). The transfer of an employee because of her sex or the denial of an employee's transfer request because of her sex "plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev., Office of Inspector Gen.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (quoting 42 U.S.C. § 2000e-2(a))).

Title VII's text, which prohibits discriminatory job transfers regardless of whether those transfers produce adverse effects or a material employment disadvantage, is consistent with Congress's plan in passing

Title VII. Congress passed Title VII "to root out discrimination in employment," *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984), and "to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin," *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982). Indeed, this Court has previously found one particular Senate report discussing a precursor to the statute "relevant" for identifying which categories of employer actions Congress prohibited. *Hishon v. King & Spaulding*, 467 U.S. 69, 75 n.7 (1984). That report anticipated that the anti-discrimination provision's scope would be sweeping: it would cover all benefits that comprise the "incidents of employment." S. Rep. No. 88-867, at 11; *see also Hishon*, 467 U.S. at 75 (quoting the same). This is because only such a "broad approach" would fully give life to Congress's goal of eradicating discrimination in employment. S. Rep. No. 88-867, at 12.

Because the court below imposed requirements that are nowhere to be found in the text of the statute and that are at odds with Congress's plan in passing it, this Court should reverse. In doing so, it should hold that a discriminatory transfer violates Title VII by altering an employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), regardless of whether it constitutes a "demotion in form or substance" or causes a "materially significant disadvantage" for the employee, Pet. App. 9a.

ARGUMENT

I. Title VII's Plain Text Prohibits Transferring an Employee Because of Sex.

Section 703(a)(1) of Title VII prohibits an employer from "fail[ing] or refus[ing] to hire," "discharg[ing]," or

"otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex" or other protected characteristic. 42 U.S.C. § 2000e-2(a)(1). In considering whether this provision proscribes an employer from making employee transfer decisions based on sex, this Court's "task is clear[:] [It] must determine the ordinary public meaning of Title VII's command that it is 'unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). To discern that meaning, the Court must look "to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms." *Id.* at 1738-39.

Under the ordinary public meaning of its text at the time it was enacted, Title VII plainly prohibits transferring an employee from one position to another, or rejecting an employee's transfer request, because of sex or another protected characteristic. At the time of Title VII's passage, the ordinary meaning of "discriminate" was to "make a difference in treatment or favor (of one as compared with others)," *Webster's New International Dictionary* 745 (2d ed. 1959) [hereinafter *Webster's Second*], or to "make a difference in treatment or favor on a class or categorical basis in disregard of individual merit," *Webster's Third New International Dictionary* 648 (Philip Babcock Gove ed., 1961) [hereinafter *Webster's Third*].

Members of Congress repeatedly and explicitly referred to the ordinary meaning of "discrimination" in describing the bill. *See* 110 Cong. Rec. 7213 (Apr. 8,

1964) (Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Sens. Clark & Case, Floor Managers) ("To discriminate is to make a distinction, to make a difference in treatment or favor . . . ."); *id.* at 7218 (Apr. 8, 1964) (Sen. Clark Response to Dirksen Memorandum) ("To discriminate is to make distinctions or differences in the treatment of employees . . . ."). As Senator Tower explained, "[p]resumably, 'discriminate' would have its commonly accepted meaning which . . . is 'to make a distinction' or . . . 'to make a difference in treatment or favor . . . as to discriminate in favor of one's friends; to discriminate against a special class.'" *Id.* at 8177 (Apr. 16, 1964) (Sen. Tower reading Title VII Summary Prepared by National Association of Manufacturers); *id.* at 12617 (June 3, 1964) (statement of Sen. Muskie) ("Discrimination in this bill means just what it means anywhere: a distinction in treatment given to different individuals because of their [protected status].").

Thus, Title VII "make[s] it unlawful for an employer to make any distinction or any difference in treatment of employees because of [a protected characteristic]." *Id.* at 8177; *see also Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) ("'No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals.'" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006))).

Specifically, the statute prohibits "mak[ing] a difference in treatment or favor," *Webster's Second*, *supra*, at 745, "with respect to [an individual's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), on the basis of a protected characteristic. In 1964, much like today, "terms" meant "[p]ropositions, limitations, or provisions, stated or offered, as in contracts, for the

acceptance of another and determining the nature and scope of the agreement." *Webster's Second*, *supra*, at 2604. Similarly, the word "conditions" referred to "[a]ttendant circumstances [or an] existing state of affairs," and a "condition" meant "[s]omething established or agreed upon as a requisite to the doing or taking effect of something else." *Id.* at 556. And a "privilege" meant "[a] right or immunity granted as a peculiar benefit, advantage, or favor," *id.* at 1969, or "such right or immunity attaching specif[ically] to a position or an office," *Webster's Third*, *supra*, at 1805.

Under the ordinary public meaning of those words at the time they were enacted, Title VII prohibits an employer from transferring an employee from one position to another because of sex, even if the employee's compensation and other monetary benefits remain the same. Such a transfer necessarily changes the "terms" of an individual's employment (that is, its "nature and scope," *Webster's Second*, *supra*, at 2604) because the employee who initially agreed to fill one role will instead have a new role that differs in at least some way, whether it is with respect to location, responsibilities, title, colleagues, or some other job-related characteristic. Here, for example, Muldrow's transfer changed her work schedule from a traditional Monday-through-Friday schedule to a rotating schedule requiring her to work on weekends. Pet. App. 2a-4a; *see also Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) ("[I]t is straightforward to say that a shift schedule . . . counts as a term of employment.").

For the same reasons, a transfer also alters the "conditions" of an individual's employment by changing the "attendant circumstances" and "established or agreed upon" characteristics of her job. *See Webster's Second*, *supra*, at 556; *see also Chambers*, 35 F.4th at 874 ("[I]t is difficult to imagine a more fundamental

term or condition of employment than the position itself." (quoting United States' Br. for Resp't in Opp. at 13, *Forgus v. Shanahan*, 141 S. Ct. 234 (2020), 2019 WL 2006239 (May 6, 2019), at *13)). Indeed, in this case, the "existing state of affairs," *Webster's Second*, *supra*, at 556, with respect to Muldrow's job was upended as a result of her transfer to a position at a new location with altogether different responsibilities than her prior assignment, Pet. 5-6; Pet. App. 2a-4a.

Finally, when an employee changes positions at work, she necessarily receives different "right[s] or immunit[ies] attach[ed] specif[ically] to a position or an office." *See Webster's Third*, *supra*, at 1805. An officer in Muldrow's prior role, for instance, has specific rights and immunities—such as the right to work in plain clothes and to pursue investigations outside of a fixed geographical area—that an officer in her subsequent role in the Fifth District did not, and vice versa. *See* Pet. App. 2a-4a. An employee's "privileges" therefore also change according to her position.

Thus, an employer who reassigns an employee or refuses to approve a requested transfer because of sex violates Title VII, even if the employee receives the same monetary compensation and benefits in her new position and cannot demonstrate harm to her future career prospects. At minimum, an employer who makes such a transfer discriminates with respect to the "terms, conditions, *or* privileges of employment," as expressly prohibited by Section 703(a)(1). 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see United States v. Woods*, 571 U.S. 31, 45-46 (2013) (emphasizing that the "ordinary use" of the word "or" "is almost always disjunctive," so "the preceding items are alternatives").

This Court has recognized that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept," *Vance v. Ball State Univ.*,

570 U.S. 421, 427 (2013) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)), that "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 . . . in employment," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (emphasis added) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (explaining that the Court has "repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to economic or tangible discrimination'" (internal quotation marks omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993))). This Court has explained that "Title VII tolerates no . . . discrimination [on the basis of a protected characteristic], subtle or otherwise," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973), including with respect to any "benefits that comprise the 'incidents of employment' . . . or that form 'an aspect of the relationship between the employer and employees,'" *Hishon*, 467 U.S. at 75 (quoting S. Rep. No. 88-867, at 11, and *Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). Accordingly, decisions regarding employee transfers that are made on the basis of sex necessarily affect the terms, conditions, or privileges of employment and therefore violate Title VII.

II. The Court Below Imposed Additional Requirements with No Basis in the Statutory Text and That Undermine Congress's Plan in Passing the Law.

Despite Title VII's straightforward language, which plainly bars discriminatory job transfer decisions, the court below—like many circuit courts over

the years—imposed additional, judicially created requirements with no basis in Section 703(a)(1)'s text. Relying on circuit precedent, the court below stated that in order to make a prima facie showing of discrimination, a Title VII plaintiff needs to show more than a discriminatory denial of a "term[], condition[], or privilege[] of employment." She must also show that she experienced a "tangible change in working conditions that produces a material employment disadvantage." Pet. App. 9a (quoting *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007)). "A transfer that does not involve a demotion in form or substance," the court added, cannot constitute the required "materially adverse employment action" for liability. *Id.* (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)). It concluded that Muldrow failed to make that showing regarding her forced transfer, reasoning that her transfer "did not result in a diminution to her title, salary, or benefits" and noting that she offered "no evidence that she suffered a *significant* change in working conditions or responsibilities and, at most, expresses a mere preference for one position over the other." *Id.* at 11a (emphasis added). It also concluded that Muldrow's showing as to her denied transfer request fell short because she did not "demonstrate how the sought-after transfer would have resulted in a material, beneficial change to her employment." *Id.* at 13a. In imposing these requirements, the court below departed from the plain text of the law and undermined Congress's plan in passing it.

A. Plain Text

The court below imposed requirements to establish actionable discrimination that cannot be found anywhere in the text of the statute. Individuals "are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some

extratextual consideration." *Bostock*, 140 S. Ct. at 1749. Section 703(a)(1) of Title VII nowhere states that a plaintiff must show that she suffered an "adverse employment action" or any "material employment disadvantage"—let alone a "materially significant disadvantage" or that her transfer was a "demotion in form or substance." Pet. App. 9a; *see Chambers*, 35 F.4th at 875 (holding that "any additional requirement, such as . . . 'objectively tangible harm,' is a judicial gloss that lacks any textual support"). Rather, as explained above, a Title VII plaintiff must simply show that she was treated differently because of her sex (or another protected characteristic) with respect to the compensation, terms, conditions, or privileges of her employment. *See Bostock*, 140 S. Ct. at 1743 (explaining that an "employer violated Title VII because . . . it could not 'pass the simple test' asking whether an individual female employee would have been treated the same regardless of her sex" (quoting *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978))). Once this fact is established, "the analysis is complete." *Chambers*, 35 F.4th at 874-75.

Petitioner made this showing. Respondent City of St. Louis reassigned Muldrow, who had been serving in the Intelligence Division, to a position in the Fifth District, where she was "required to work a rotating schedule including weekends," lost the ability to work in plain clothes and in an unmarked vehicle, and had different responsibilities, allegedly because of sex. *See* Pet. App. 2a-4a, 6a. Under the plain terms of the statute, that is sufficient to establish actionable discrimination, without any need to satisfy the additional atextual requirement of showing material disadvantage that the court below imposed.

To be sure, Section 703(a)(2)—the subsequent subsection in Title VII—uses the phrase "adversely affect"

when it prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees . . . in any way which would 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); *see* Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1149-50 (1998) (explaining that Section 703(a)(2) has been interpreted to prohibit "disparate impact" as well as "disparate treatment" discrimination and that "[f]or impact claims, that adversity element makes sense"). But that provision is not at issue in this case, as Muldrow brought her discrimination claim under Section 703(a)(1) alone. Pet. 7-8.

More importantly, Congress's inclusion of the phrase "adversely affect" in Section 703(a)(2) while omitting it from Section 703(a)(1), weighs strongly against a court adding that requirement to Section 703(a)(1). Congress knew how to include such a requirement when it wanted to. It omitted that language from Section 703(a)(1), and the court below had no authority to import a similar requirement into this provision. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Moreover, although this Court has required a showing of "material adversity" for a claim under Title VII's *antiretaliation* provision in Section 704(a) (codified at 42 U.S.C. § 2000e-3(a)), that provision is "not coterminous" with Title VII's *antidiscrimination*

provision in Section 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)). *White*, 548 U.S. at 67-68 (emphasis omitted). Title VII's antiretaliation provision "prohibits an employer from 'discriminat[ing] against' an employee or job applicant because that individual 'opposed any practice' made unlawful by Title VII or 'made a charge, testified, assisted, or participated in' a Title VII proceeding or investigation." *Id.* at 56 (quoting 42 U.S.C. § 2000e-3(a)). Examining the two provisions' "linguistic differences," this Court has determined that, unlike the antidiscrimination provision, the antiretaliation provision "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 62-64.

"[O]nly after adopting this expansive interpretation of the antiretaliation provision" did this Court establish that provision's limiting principle. *Chambers*, 35 F.4th at 876-77. This Court held that the antiretaliation provision "prohibit[s] employer actions that are likely 'to deter victims of discrimination from complaining,'" *White*, 548 U.S. at 68 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)), in order to achieve the provision's "primary purpose" of "[m]aintaining *unfettered access* to [Title VII's] remedial mechanisms," *Robinson*, 519 U.S. at 346 (emphasis added). Thus, the antiretaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant," or actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 57.

Unlike the antiretaliation provision, Title VII's antidiscrimination provision (Section 703(a)(1)) should not be read to impose a heightened material adversity requirement. Indeed, this Court has recognized that

"the two provisions differ not only in language but in purpose as well." *Id.* at 63. While the antiretaliation provision "seeks to prevent harm to individuals based on what they do," *id.*, "[t]he antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," *id.* This Court has recognized that "[t]o secure [this] objective, Congress did not need to prohibit anything other than employment-related discrimination." *Id.*

Furthermore, although this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), "sp[oke] of a Title VII requirement that violations involve 'tangible employment action' such as . . . 'reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,'" *White*, 548 U.S. at 64 (quoting *Ellerth*, 524 U.S. at 761), that requirement has no bearing on this case. As this Court has made clear, it imposed that requirement "only to 'identify a class of . . . cases' in which an employer should be held vicariously liable . . . for the acts of supervisors." *Id.* (quoting *Ellerth*, 524 U.S. at 760); *see Ellerth*, 524 U.S. at 760, 762-63 (explaining that under principles of agency, vicarious liability is appropriate when a "supervisor takes a tangible employment action against a subordinate"). Additionally, *Ellerth* permits employers to use an affirmative defense to avoid liability when no tangible employment action occurred, implicitly demonstrating that "there are cases covered by Title VII that are *not* tangible employment actions." Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333, 384 (1999).

Thus, Title VII's text offers no basis for imposing an additional adversity requirement for a claim of discrimination under Section 703(a)(1).

B. Congress's Plan

Congress's plan in passing Title VII confirms that its text means exactly what it says. This Court rightly does not limit Title VII's textual reach based on assumptions about the "legislature's purposes" in passing the statute or "certain expectations about its operation" that lack footing in the text itself. *Bostock*, 140 S. Ct. at 1745; *cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . ."). Here, however, evidence of Congress's plan buttresses the plain meaning of the anti-discrimination provision's text.

As this Court has stated time and again, and as the statutory text itself makes clear, "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977), and ensuring that "similarly situated employees are not . . . treated differently solely because they differ with respect to race, color, religion, sex, or national origin," *id.* at 71; *see Shell Oil Co.*, 466 U.S. at 77 ("The dominant purpose of [Title VII], of course, is to root out discrimination in employment."); *Kremer*, 456 U.S. at 468 ("Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin."). In short, "it is abundantly clear that Title VII tolerates no . . . discrimination [on the basis of a protected characteristic], subtle or otherwise." *McDonnell Douglas*, 411 U.S. at 801.

Despite this broad mandate, "employment discrimination decisions by the federal courts," like the one below, "have created a body of law that patently contradicts Title VII's aim of equal employment opportunity" by adding atextual requirements. Esperanza N. Sanchez, Note, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 Cath. U. L. Rev. 575, 579 (2018). "In seeking to determine which employment actions are actionable, the lower federal courts have aggressively narrowed the scope of the 'terms, conditions, or privileges of employment' provision." *Id.* at 584. In fact, multiple circuits have held that a "purely lateral transfer" of an employee from one position to the same position elsewhere because of a protected characteristic is not actionable under federal employment discrimination laws because the employee cannot show that she suffered an adverse employment action, even though that requirement appears nowhere in Section 703(a)(1). *See, e.g.*, *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) ("Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action."); *Ledergerber*, 122 F.3d at 1144 (same); *Trujillo v. New Mexico Dep't of Corr.*, 182 F.3d 933 (table), 1999 WL 194151 at *3 (10th Cir. Apr. 8, 1999) (same); *see also* Pet. 10 (explaining that the circuits have adopted divergent approaches to determining what conduct is actionable under Section 703(a)(1)).

These decisions have ignored that when an employee is transferred from one position to another, the nature of her employment and its terms, conditions, and privileges are necessarily altered, even if in subtle ways. Congress carefully drafted the statute to make "abundantly clear that Title VII tolerates no . . .

discrimination [on the basis of a protected characteristic], subtle or otherwise." *McDonnell Douglas*, 411 U.S. at 801. Thus, a transfer on the basis of sex or other protected characteristics is actionable under Title VII regardless of whether a plaintiff can show that she suffered an "adverse employment action" that produces "a material employment disadvantage," Pet. App. 9a; *see Chambers*, 35 F.4th at 872 (holding that "an employer that transfers an employee or denies an employee's transfer request because of the employee's . . . sex . . . violates Title VII"). As then-Judge Kavanaugh put it, "[a]s I see it, transferring an employee 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*, 867 F.3d at 81 (Kavanaugh, J., concurring) (quoting 42 U.S.C. § 2000e-2(a)).

Title VII's history confirms what its text makes clear: it bans sex-based job transfers that alter the terms, conditions, or privileges of an individual's employment, without requiring an additional showing of materially adverse effects. Indeed, this Court has previously found one particular Senate report discussing a precursor to the statute "relevant" for identifying which categories of employer actions Congress ultimately prohibited. *Hishon*, 467 U.S. at 75 n.7. That report anticipated that the anti-discrimination provision's scope would be sweeping: it would cover all benefits that comprise the "incidents of employment," S. Rep. No. 88-867, at 11; *see also Hishon*, 467 U.S. at 75 (quoting the same). This is because only such a "broad approach" would fully give life to Congress's goal of eradicating discrimination in employment. S. Rep. No. 88-867, at 12; *see also Washington Cnty. v. Gunther*, 452 U.S. 161, 178 (1981) (quoting the same). Thus, the report continued, "[e]qual employment

opportunity shall include all the compensation, terms, conditions, and privileges of employment *including but not restricted to*: hiring, promotion, *transfer*, and seniority; . . . referrals for employment; . . . equality of access to facilities and services provided in employment; and equality of participation and membership in employee organizations and labor organizations." S. Rep. No. 88-867, at 24 (emphases added).

Indeed, in a debate a few weeks before Congress passed the Civil Rights Act, Senator Edmund Muskie twice read aloud the text of H.R. 7152's Section 703(a)(1) banning "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment"—language that remained unchanged in the final Act—and queried, "What more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation?" 110 Cong. Rec. 12618 (June 3, 1964); *cf. First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981) ("Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' [in the National Labor Relations Act (NLRA)] without further definition, for it did not intend to deprive the [NLRB] of the power further to define those terms in light of specific industrial practices."); *see also Hishon*, 467 U.S. at 76 n.8 (explaining that "certain sections of Title VII were expressly patterned after the NLRA"); Lidge, *supra*, at 399 n.414, 403-04 (making this comparison and explaining the NLRA provision's comprehensive breadth).

* * *

In drafting the text of Title VII, Congress chose to prohibit *all* discriminatory alterations of the "terms, conditions, or privileges of employment." That decision makes sense. As this Court has repeatedly

recognized, a discriminatory act—by its very nature—"deprives persons of their individual dignity." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). It thus inflicts "serious non-economic injuries," including the furtherment of "archaic and stereotypic notions" and stigmatic harms. *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). While these intrinsic injuries may be difficult to quantify, they are indisputably grave. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("no doubt" that the "stigmatizing injury often caused by racial discrimination . . . is one of the most serious consequences of discriminatory government action"); *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 834 (7th Cir. 2019) (Barrett, J.) ("[S]tigmatic injury is 'one of the most serious consequences of' discrimination."). Indeed, only last Term this Court reiterated "that public accommodations laws 'vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *303 Creative v. Elenis,* 143 S. Ct. 2298, 2314 (2023) (quoting *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 250 (1964)).

It would thus be odd, to say the least, for this Court to impose a requirement on Title VII plaintiffs that has no basis in the text of the statute on the view that some types of discrimination do not impose sufficient harm to be actionable. In passing Title VII, Congress made it unlawful to "discriminat[e] 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." The statute requires no additional showing of a materially significant disadvantage, and this Court should not impose one.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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