No. 18-1401

IN THE

Supreme Court of the United States

DAVID D. PETERSON, *Petitioner*,

v.

LINEAR CONTROLS, INCORPORATED, *Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF BRIAN WOLFMAN, ADERSON B. FRANCOIS, AND ERIC SCHNAPPER AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amicus Brian Wolfman is Associate Professor of Law and Director of the Appellate Courts Immersion Clinic at Georgetown University Law Center (GULC). For five years, he directed a GULC clinic that represented Title VII plaintiffs and litigated the question presented here: what types of employer conduct and practices are prohibited employment discrimination under Title VII. Amicus Aderson B. Francois is Professor of Law and Director of GULC's Civil Rights Clinic. He litigates Title VII cases, and he has written extensively on topics of racial justice. Amicus Eric Schnapper is a Seattle attorney who regularly represents plaintiffs in Title VII actions in this Court and in the lower courts. He was counsel for respondent in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

Amici have a deep and abiding interest that Title VII be interpreted to eliminate employment discrimination in all of its forms, as demanded by the statute's text and purposes. Because the Fifth Circuit's decision below—which limits prohibited employment discrimination to "ultimate employment decisions" alone, Pet. App. 4a, such as those involving hiring, firing, and compensation—flouts the text and undermines Congress's purposes, this Court should grant review and reverse.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of amici's intention to file this brief. The parties have consented to this filing. No counsel for a party authored this brief in whole or in part, and no person other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. In Title VII disparate-treatment, employment-discrimination cases, the term "adverse employment action" developed as judicial shorthand for the statute's text. But what started as shorthand has taken on a life of its own and now improperly limits the statute's reach. The Fifth Circuit's version of the adverse-employment-action rule stands out as especially improper: Only an "ultimate employment decision"—a refusal to hire, a firing, a demotion, or the like—constitutes impermissible discrimination. This standard is inconsistent with Title VII's text and this Court's precedent construing the statute.

II. The Fifth Circuit's rule excludes many discriminatory employment practices that are unlawful (and, thus, actionable) in its sister circuits. The stories of discrimination victims from these other jurisdictions demonstrate that the Fifth Circuit's approach is wrong. These individuals suffered discrimination that Title VII prohibits, but the Fifth Circuit's standard would enable their employers to discriminate without consequence.

III. Consistent with Title VII's text and this Court's precedent, an unlawful employment action is any discrimination against the employee that can properly be attributed to the employer. As long as the employer's intentional, discriminatory conduct imposes meaningful harm on the employee, it is prohibited by, and may be remedied under, Title VII.

ARGUMENT

Title VII prohibits disparate treatment by employers on the basis of race, color, religion, sex, or national origin. As reflected in the decision below, the

Fifth Circuit's longstanding view is that Title VII disparate-treatment claims are actionable only when the employer's "adverse employment action" is an "ultimate employment decision," such as a refusal to hire or a firing. Pet. App. 4a.

But the statute prohibits a far wider range of employer practices affecting terms, conditions, or privileges of employment. Part I explains why that is so, based on the statute's text and this Court's Title VII precedents. Part II then shows, through a discussion of decisions from other jurisdictions, that the Fifth Circuit's rule undermines Title VII's broad anti-discrimination purposes. Part III explains that Title VII prohibits any intentional discriminatory action taken by an employer that results in meaningful harm to the employee.

I. Title VII prohibits a broad range of discriminatory employment practices.

A. The term "adverse employment action" started as useful shorthand for Title VII's text, but courts later gave the term an impermissibly restrictive meaning.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice 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 that individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). This provision describes a broad universe of prohibited employer practices commonly referred to as "disparate treatment."

Early on, lower courts used the term "adverse employment action" simply as shorthand for the wide range of employment practices prohibited by the statute. *See, e.g.*, *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032, 1034 (5th Cir. 1980); *Womack v. Munson*, 619 F.2d 1292, 1296, 1297 n.7 (8th Cir. 1980). *Leftwich v. U.S. Steel Corp.*, 470 F. Supp. 758, 764 (W.D. Pa. 1979).

Over the ensuing decades, however, the courts of appeals have allowed the term "adverse employment action"—which appears nowhere in the statute's text—to take on a life of its own, giving it various meanings that impermissibly limit Section 2000e-2(a)(1)'s broad prohibition on discriminatory employment practices. *See* Pet. 10-19 (describing conflicting approaches taken in the circuits). Most have added to the statutory language and held that Title VII's prohibition on disparate treatment protects only employees who have suffered some sort of economic harm. *See* Autumn George, Comment, *"Adverse Employment Action" How Much Harm Must be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 Mercer L. Rev. 1075, 1083-96 (2009) (surveying circuit-court decisions).

The Fifth Circuit has gone even further in restricting Title VII's scope. It recognizes as prohibited only what it terms "ultimate employment decisions": "hiring, firing, demoting, promoting, granting leave, and compensating." *Thompson v. City of Waco*, 764 F.3d 500, 503-04 (5th Cir. 2014) (citing *McCoy v. City of Shreveport*, 492 F.3d 551, 560 (5th Cir. 2007)). As we next show, that court's strict limit on actionable employment practices is inconsistent with Title VII's text and this Court's precedent.

B. Title VII's text and this Court's precedent demonstrate that the Act prohibits a broad range of discriminatory employment practices.

1. To understand the scope of Title VII's prohibition on discrimination, we start, as we must, with the statute's text. *Artis v. D.C.*, 138 S. Ct. 594, 603 (2018). Nowhere does Title VII use the word "ultimate" to describe prohibited employment practices. Nor does the statute otherwise narrow the broad terms that Congress used to designate the conduct that it proscribes and the harms it seeks to redress. By construing the statute so narrowly, the Fifth Circuit has effectively "rewrit[ten] the statute that Congress has enacted." *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018).

a. As noted above, Title VII's prohibition on disparate treatment makes it unlawful to "discriminate against" any individual in the "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). By these words, the statute limits the prohibited conduct to discrimination based on certain expressly enumerated characteristics of the individual (for instance, race and sex), but its reach is not limited to any particular type of discriminatory employer conduct.

The operative verb is "discriminate." To discriminate is simply "[t]o make or recognize a distinction; to distinguish among or between;" or "[t]o treat a person or group in an unjust or prejudicial

manner." Discriminate, Oxford English Dictionary.[2] The statute thus encompasses "failure[s] to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." Discrimination, Black's Law Dictionary (10th ed. 2014).

Consistent with the breadth of the statutory term "discriminate," the statute's drafters did not seek to limit it to certain "ultimate" employer actions. Quite the contrary. Senators Case and Clark, the managers of the Senate bill that became Title VII, explained that the statute "is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or [to] favor … ." Title VII, U.S. Equal Emp't Opportunity Comm'n, Legislative History of Titles VII and IX of Civil Rights Act of 1964, at 3040 (1968) (CRA Hist.). Congress viewed "discrimination in employment" as insidious and thus designed the statute to secure "the opportunity for employment *without discrimination*," and to "protect the right of persons *to be free from* such discrimination." H.R. Rep. No. 88-914, at 26 (1963) (emphases added). If Title VII prohibited only ultimate employment decisions, it could not fulfill these purposes.

In sum, Title VII prohibits any differential treatment by an employer against an employee concerning what the statute calls "terms, conditions, or privileges of employment." We now turn to that phrase.

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[2] http://www.oed.com/view/Entry/54058?rskey=MoSQ9H&result=2&isAdvanced=false#eid

b. The statute's ban on discrimination in "terms, conditions, or privileges of employment" further demonstrates that Section 2000e-2(a)(1) captures a wide range of discriminatory employment practices, not just those that result in "ultimate" employment harms.

Start with "terms." In light of the "specific context" in which the word is used, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018), "terms" means "[p]rovisions that define an [employment] agreement's scope [or its] conditions or stipulations." Term, Black's Law Dictionary (10th ed. 2014). In other words, "terms" are employment "[c]ondition[s] under which something may be done, settled, agreed, or granted." Terms, Oxford English Dictionary.[3]

Next, "conditions" means "[t]he circumstances or factors affecting the way in which people live or work, especially with regard to their well-being," Condition, Oxford Living Dictionary,[4] or "[t]he whole affecting circumstances under which a being exists," Condition, Oxford English Dictionary.[5]

And "privileges" means "right[s], advantage[s], or immunit[ies] granted to or enjoyed by an individual, … beyond the usual rights or advantages of others; … exemption[s] from a normal duty,

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[3] http://www.oed.com/view/Entry/199409?rskey=thMbUI&result=1&isAdvanced=false#eid

[4] https://en.oxforddictionaries.com/definition/condition

[5] http://www.oed.com/view/Entry/38550?rskey=0dQTWu&result=1&isAdvanced=false#eid

liability, etc.; [or] enjoyment of some benefit … above the average or that deemed usual or necessary for a particular group." Privilege, Oxford English Dictionary.[6]

Taken together, then, "terms, conditions, or privileges of employment" include, at a minimum, any characteristic of the employer-employee relationship attributable to an employer's conduct. Put another way, the statutory phrase "terms, conditions, or privileges" serves as a catchall for all of the daily incidents of an employment relationship. After all, "[w]hat more could be asked for in the way of [statutory] guidelines, short of a complete itemization of every [employment] practice which could conceivably be a violation?" *See* CRA Hist. at 3096 (statement of Sen. Muskie). The Fifth Circuit's ultimate-employment-decision standard cannot be squared with the statute's expansive, unrestricted language.

2. This Court's precedent also shows that the scope of the statutory prohibition—Title VII's ban on discrimination in the terms, conditions, or privileges of employment—is not limited to ultimate employment decisions.

a. This Court's early Title VII decisions understood that the section of the statute at issue here, 42 U.S.C. § 2000e-2(a)(1), "generally prohibits racial discrimination in *any* employment decision." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973) (emphasis added). The statute's primary

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[6] http://www.oed.com/view/Entry/151624?rskey=WnLHFw&result=1&isAdvanced=false#eid

purpose, this Court said, was to ensure "equality of employment opportunities and to *eliminate* those discriminatory practices and devices which have … disadvantage[d] minority citizens." *Id.* at 800 (emphasis added). Thus, "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit *all* practices *in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). The statute was not limited to narrow categories of discrimination, this Court observed, but rather was designed "to strike at the *entire spectrum* of disparate treatment" in employment. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (emphasis added) (citation omitted). That is, "[t]he emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (emphasis added); *see also McDonnell Douglas*, 411 U.S. at 796 ("[I]t is abundantly clear that Title VII tolerates no racial discrimination.").

b. This Court's later sex-discrimination decisions are to the same effect. *Hishon v. King & Spalding*, 467 U.S. 69 (1984), explained that "terms, conditions, [and] privileges" of employment include any benefit that is "part and parcel of the employment relationship," is an "incident[] of employment," or "form[s] an aspect of the relationship between the employer and employees," and may "not be doled out in a discriminatory fashion, even if the employer would be free … simply not to provide the benefit at

all." *Id.* at 74-75 (citations omitted); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (confirming that the phrase "terms, conditions, or privileges" is not limited in "the narrow contractual sense"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) ("the language of Title VII is not limited to 'economic' or 'tangible' discrimination"). These broad constructions of Title VII demonstrate that the Act's disparate-treatment prohibition cannot be limited to ultimate employment decisions.

c. This Court also has recognized that severe or pervasive sexual harassment, without more, affects the terms and conditions of employment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor*, 477 U.S. at 73. So too with an employer's failure to provide religious accommodations. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033-34 (2015). An employer's refusal to allow a Muslim woman to wear a headscarf, for example, is, without more, discrimination under Title VII even when it is unaccompanied by an ultimate employment action such as a refusal to hire or a firing. *See id.* The reasoning of these decisions also shows that Title VII proscribes far more than ultimate employment decisions.

II. The Fifth Circuit's impermissibly narrow ultimate-employment-decision standard authorizes discrimination that other circuits rightly find actionable.

As the petition demonstrates, the circuits are intractably fractured on what kind of employer actions constitute impermissible discrimination under Title VII. Pet. 10-17. Some require an ultimate employment decision, *see id.* at 10-11, some do not, *see id.* at 12-14,

and some ping-pong between the two rules, *see id.* at 16-17. Whatever the exact configuration of the (undeniable) circuit split—which includes varying formulations even among the circuits which reject the Fifth Circuit's approach, *see id.* at 12-16—one thing is clear: Many courts of appeals condemn as discriminatory under Title VII conduct that the Fifth Circuit views as permissible.

The stories that follow are collected from published decisions outside the Fifth Circuit. In each, the court accepted the facts presented as true and then determined, correctly in amici's view, that the plaintiff had suffered a form of discrimination prohibited by Title VII even though she did not experience what the Fifth Circuit views as an ultimate employment decision.

A. Office settings and working conditions

The Fifth Circuit's standard allows employers to discriminate among their employees regarding working conditions—even when they put employees at risk of serious harm or render them unable to do their jobs effectively. By contrast, in other circuits, this type of discrimination is prohibited by Title VII.

• Firefighters Anne Wedow and Kathleen Kline were issued "bunker gear," safety equipment that had to "fit properly to ensure that the body is protected from injury due to smoke, water, heat, gasoline, and chemicals and to ensure the mobility needed while fighting a fire." *Wedow v. City of Kansas City*, 442 F.3d 661, 666-67 (8th Cir. 2006). But the Fire Department issued them ill-fitting gear designed for men. *Id.* The fire stations had "restrooms [that] were located in the male locker rooms with the male shower

room, doors were not secure, males had the keys, and where female restrooms existed, they were unsanitary and often used as storage rooms." *Id.* at 667-68. The Eighth Circuit upheld a jury verdict because "[t]he record amply demonstrates that the terms and conditions of a female firefighter's employment are affected by a lack of adequate protective clothing and private, sanitary shower and restroom facilities, because these conditions jeopardize her ability to perform the core functions of her job in a safe and efficient manner." *Id.* at 671-72.

- Efrain Reynaga and his son were the only millwrights of Mexican descent at Roseburg Forest Products. *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 683 (9th Cir. 2017). The two shared a locker for their personal belongings, which they secured with a lock. *Id.* at 684. One day, the police brought in dogs to search for drugs. *Id.* Though Efrain offered to open his locker, the mill owner broke the lock. Nothing was found inside. *Id.* at 684. But when the dogs barked at a white co-worker's locker, the owner never opened it. *Id.* at 693. The Ninth Circuit recognized this disparate treatment as unlawful. *Id.* at 695.

* * *

The Fifth Circuit's ultimate-employment-decision standard would not recognize Ms. Wedow's, Ms. Kline's, and Mr. Reynaga's claims as actionable under Title VII because their employers did not terminate, refuse to compensate, or demote them. *See McCoy v. City of Shreveport,* 492 F.3d 551, 559-60 (5th Cir. 2007).

B. Transfers and changes in duties or shifts

The Fifth Circuit recognizes transfers or shift changes as ultimate employment decisions only when they would have the "effect of a demotion or denial of promotion" and the employee is placed in an "objectively worse" position. *Alvarado v. Texas Rangers*, 492 F.3d 605, 613-614 (5th Cir. 2007). But other circuits have recognized that discriminatory transfers and shift changes can significantly affect an employee's terms, conditions, and privileges of employment even when they are not ultimate employment decisions.

• Dr. Carmen Rodriguez, a female junior-high art teacher, was transferred to teach elementary school students because the school district "wouldn't have a male grade school art teacher," *id.* at 364, causing her "severe professional … trauma." *Rodriguez v. Bd. of Educ. of Eastchester Union Free Sch. Dist.*, 620 F.2d 362, 366 (2d Cir. 1980). The school district explained at the time that her transfer "does not and will not diminish her salary; does not and will not reduce her benefits, her seniority rights, or add any increased load to her work performance." *Id.* at 365. But the "radical change" in the nature of her work still "constitute[d] interference with a condition or privilege of employment adversely affecting her status" and was thus impermissible under Title VII. *Id.* at 366.

• Robert Supinger, a white man, and his Korean wife were the only couple against which the Virginia Department of Motor Vehicles enforced its anti-nepotism policy. *Supinger v. Virginia*, 167 F. Supp. 3d 795, 804 (W.D. Va. 2016). When Mr. Supinger was transferred as result of the policy, his daily commute

time increased six-fold to three hours. *Id.* at 807. "The inconvenience and expense caused by such a lengthy increase in commute time [was] sufficient to cause a significant detrimental effect on the terms and conditions of Supinger's employment." *Id.* at 807-08.

* * *

Because transfers and shift changes are actionable in the Fifth Circuit only when they are objectively equivalent to a demotion, Dr. Rodriguez's and Mr. Supinger's injuries would go unremedied if litigated there. *See Alvarado*, 492 F.3d at 613-614.

C. Actions with consequences for future employment

• Noel Abboud was "the only employee of Arab ancestry" at the Jamesville Correctional Facility. *Abboud v. Cty. of Onondaga*, 341 F. Supp. 3d 164, 168 (N.D.N.Y. 2018). Mr. Abboud maintained that, as a result of anti-Muslim bias, he was denied firearms training, which did not limit his ability to earn overtime, but made him ineligible for certain overtime shifts. *Id.* at 173. He was also disciplined more harshly than other employees for similar minor breaches of protocol. *Id.* at 174. These discriminatory decisions constituted unlawful employment actions under Title VII. *Id.* at 179.

• Officers Bernadette Baltzer, Tricia Markham, and Julie Rortvedt—Sun City's only full-time female police officers—saw special assignments given exclusively to male officers. *Baltzer v. City of Sun Prairie Police Dep't*, 725 F. Supp. 1008, 1011-14 (W.D. Wis. 1989). Though the court granted summary judgment to the City on these claims because the officers did not properly allege that they would have

taken the special assignments given the chance, the court never questioned that Sun City's treatment of the officers would be employment discrimination (and thus actionable) if properly supported in the record. *Id.* at 1026-28.

• Dr. Deepa Soni's employer interfered with her future job prospects. *Soni v. Wespiser*, 239 F. Supp. 3d 373, 378-81 (D. Mass. 2017). After suing her former employer for race and gender discrimination, Dr. Soni, an Indian neurosurgeon, twice sought employment at other hospitals. *Id.* Although both initially expressed interest in hiring her, neither did. *Id.* Her former employer gave unsolicited, unfavorable references to the other hospitals, suggesting that she would file meritless discrimination charges. *Id.* Dr. Soni maintained that her former employer's discrimination tarnished her reputation and deprived her of the two jobs. *See id.* at 380-81. The court held that job references are a privilege of employment that may not be given on a discriminatory basis. *Id.* at 383.

* * *

Employees' career prospects almost always depend on establishing a good track record in their current positions. But within the Fifth Circuit, employers may discriminate in job responsibilities, *Thompson v. City of Waco*, 764 F.3d 500, 504 (5th Cir. 2014), performance awards, and disciplinary write-ups, *see Puleo v. Texana MHMR Ctr.*, 187 F. Supp. 3d 769, 781-82 (S.D. Tex. 2016). *See also Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 885 (S.D. Tex. 2010) (same as to performance awards). In the Fifth Circuit, the Sun City police officers, Mr. Abboud, and Dr. Soni could not have pursued their Title VII disparate-

treatment claims because their employers did not discriminate against them in an ultimate employment decision. For Dr. Soni in particular, her former employer's discriminatory job references would fall short of the Fifth Circuit's inflexible ultimate-employment-decision standard because the employer who discriminated was not the employer who refused to hire her.

D. Employment prerequisites

Shortly after Dr. Sagun Tuli, a female spinal neurosurgeon, joined the hospital staff, a male colleague, Dr. Day, began belittling female doctors. *Tuli v. Brigham & Women's Hosp., Inc.*, 566 F. Supp. 2d 32, 38-39 (D. Mass. 2008), *aff'd*, 656 F.3d 33 (1st Cir. 2011). He questioned Dr. Tuli's skills and judgment. *Id.* This mistreatment continued until Dr. Tuli needed to be re-credentialed to continue working at the hospital. *Id.* at 36, 43. Dr. Day was selected to present Dr. Tuli's case to the Credentials Committee. *Id.* at 44. He said that Dr. Tuli should not be re-credentialed because her "mood swings" made her intolerable to work with. *Id.* at 45. Based on Dr. Day's presentation, the committee voted to re-credential Dr. Tuli but only if she received a psychiatric evaluation. *Id.* Requiring Dr. Tuli to receive an evaluation as a condition of being re-credentialed was sufficiently adverse to support her disparate-treatment claim. *Id.* at 36-38, 59.

Dr. Tuli was denied a prerequisite to her continued employment granted to other employees without incident. In the Fifth Circuit, her employer would have been able to delay, condition, or deny this prerequisite on a discriminatory basis because those

actions do not constitute ultimate employment decisions. *See McCoy*, 492 F.3d at 559-60.

E. Leaving the workplace

After returning to work from her honeymoon visibly pregnant, Alana Shultz's boss told her she would be fired. *Shultz v. Congregation Shearith Israel of City of New York*, 867 F.3d 298, 302 (2d Cir. 2017). She was offered a six-week severance package in exchange for "a complete waiver of her right to commence an action for pregnancy or gender discrimination." *Id.* Ms. Shultz refused. *Id.* Three weeks later, her employer reversed course, and she kept her job. *Id.* at 301-02. But she had already "experience[d] the dislocation of losing her employment at a particularly vulnerable time." *Id.* at 307. The court reasoned that Ms. Shultz's employer took an adverse employment action against her. *Id.* at 305. Because Ms. Schultz's employer didn't actually fire her, whether its actions would be considered an ultimate employment decision by the Fifth Circuit is uncertain at best.

F. Disproportionately heavy workload

• Carlos Vega, a Hispanic high school math teacher, was regularly assigned classes with more Spanish-speaking students than were other teachers. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 88 (2d Cir. 2015). It was "twice as much work" to prepare for class. *Id.* at 76-77. The court found that this discriminatory assignment was "more disruptive than a mere inconvenience or an alteration of job responsibilities," affecting the terms and conditions of his work. *Id.* at 87.

• Stephen Pothen, a maintenance engineer of Indian descent, was also expected to do more work than his colleagues. *Pothen v. Stony Brook Univ.*, 211 F. Supp. 3d 486, 489-90 (E.D.N.Y. 2016). "[U]nlike other engineers, he was at times not provided with a utility assistant, requiring him to do the work of [an] engineer … and assistant at the same time." *Id.* at 494-95. The court viewed this disparate treatment as actionable because Mr. Pothen was given a disproportionately heavy workload compared to his similarly situated colleagues. *Id.*

• Christie Davis was the only female electrician at her workplace. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1085 (9th Cir. 2008). Unlike her male co-workers, she was often forced to work alone and assigned the most hazardous work. Her supervisor told her to do piping and ceiling work for weeks on end, causing extreme neck pain. She was given a "disproportionate number of jobs that entailed working with Monokote, a hazardous material." *Id.* Though Ms. Davis's onerous tasks were in her job description, she suffered actionable discrimination because "in the aggregate she was given a disproportionate amount of dangerous and strenuous work." *Id.* at 1090.

* * *

The outcome below, in petitioner Peterson's case, demonstrates that the Fifth Circuit would hold that the disparate treatment endured by Mr. Vega, Mr. Pothen, and Ms. Davis is not prohibited by Title VII. Mr. Peterson and other black employees maintain that, on account of their race, they were required by their employer to work outside in the heat, while white

employees worked inside in air-conditioned comfort. But according to the Fifth Circuit, "[t]aking this as true," they did not suffer discrimination under Title VII. Pet. App. 4a.

III. Title VII's disparate-treatment prohibition outlaws any discriminatory conduct or practice attributable to the employer that causes the employee meaningful harm.

As just shown, many courts view as discriminatory under Title VII various employer practices that would not be ultimate employment decisions (and thus not actionable) in the Fifth Circuit. But even circuits that have taken a broader view than the Fifth have nonetheless restricted the statutory prohibition against discrimination in a manner at odds with Title VII's text and purposes.

As discussed above (at 5), to discriminate means simply "to distinguish between or among" people or groups. *See* Discriminate, Oxford English Dictionary.[7] And the phrase "terms, conditions, and privileges of employment" includes myriad characteristics of the employer-employee relationship. *See supra* at 7-8. This Court should thus hold that Title VII means what it says: Employers may not discriminate against their employees with respect to any "terms, conditions, and privileges" of employment on the basis of race, color, religion, sex, or national origin, period.

Title VII prohibits "discriminat[ing] *against* any individual" on the basis of certain characteristics. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). So a Title VII

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[7] http://www.oed.com/view/Entry/54058?rskey=MoSQ9H&result=2&isAdvanced=false#eid

plaintiff must show that the employer's discrimination harmed her. But the statute does not demand a minimum level of actionable harm. Any discriminatory employer conduct that results in meaningful harm to an employee—that is, harm that a reasonable employee would view as negatively affecting any of the circumstances of her employment—is all that the statute requires. *Cf. Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (noting the traditional requirement, inferable from any enactment, that de minimis applications of a statute generally are excluded from coverage).

This requirement of meaningful harm should not be confused with a far greater requirement that the employee show immediate economic harm, much less the kinds of "ultimate" workplace harms that the Fifth Circuit demands. As shown above (at 5-10), Title VII's text and history, and an unbroken line of this Court's precedent, contemplate no such restrictions. And as the lower-court precedent reviewed in Part II illustrate (at 11-19), many discriminatory employer actions that have no immediate pocketbook impact nonetheless impose serious harms on employees, worsening their present-day workplace circumstances and their future employment prospects.

Rejecting the lower courts' atextual adverse-employment-action doctrine would not impose any unreasonable obligations or litigation burdens on employers, but, rather, would simply apply Title VII as it was written and intended. Importantly, liability for Title VII disparate-treatment discrimination will still be limited to only those situations where the plaintiff can prove that the employer intentionally

discriminated on the basis of race, color, religion, sex, or national origin. *See Tex. Dep't Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). That is a significant burden. *See id.* at 257-59; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-12 (1993). And the harm suffered by the employee must be attributable to the employer based on principles of agency law and this Court's precedent. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). In sum, the floodgates will not open, and the statute's text and purposes will be honored.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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