En banc oral argument scheduled for October 26, 2021

No. 19-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mary E. Chambers,

Plaintiff-Appellant,

v.

District of Columbia,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia
Case No. 14-cv-02032, Judge Reggie B. Walton

EN BANC OPENING BRIEF FOR APPELLANT MARY E. CHAMBERS

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Certificate as to Parties, Rulings, and Related Cases

Parties. The parties on appeal are Plaintiff-Appellant Mary E. Chambers and Defendant-Appellee the District of Columbia. The United States filed an amicus brief before the panel that initially heard this appeal but did not participate in the district court proceedings. The en banc Court appointed Zachary C. Schauf as amicus curiae to defend the rule established by this Court in *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999).

Rulings under review. The district court's Memorandum Opinion granting summary judgment to the District of Columbia is under review. JA 275-295. The opinion is available at *Chambers v. District of Columbia*, 389 F. Supp. 3d 77 (D.D.C. 2019).

Related cases. This case was previously heard before a panel of this Court. *Chambers v. District of Columbia*, 988 F.3d 497 (D.C. Cir. 2021), *reh'g granted*, No. 19-7098, 2021 WL 1784792 (D.C. Cir. May 5, 2021). *Townsend v. United States*, No. 19-5259, pending before this Court on an initial petition for hearing en banc, presents an issue substantially similar to the issue presented here. On May 28, 2021, this Court held *Townsend* in abeyance pending the disposition of this appeal.

/s/Madeline Meth
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Table of Contents

Table of Authorities*

Cases **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Legislative Materials

Regulatory Materials

Other Authorities

Glossary

Equal Employment Opportunity Commision	EEOC
National Labor Relations Act	NLRA

Introduction

Appellant Mary Chambers maintains that Appellee District of Columbia violated Title VII's antidiscrimination and antiretaliation provisions when it denied her requests for a job transfer. Title VII forbids discrimination by an employer in hiring and firing and "with respect to" an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Rather than applying this statutory text as written, panel decisions of this Court hold that only *some* discriminatory conduct is unlawful: what the Court terms an "adverse employment action."

This adverse-employment-action doctrine has so distorted the meaning of "terms, conditions, or privileges of employment" that, under this Court's precedent, even when motivated by discrimination, a forced transfer or the denial of a transfer request is actionable only if it results in a "diminution in pay or benefits" or "the plaintiff has suffered objectively tangible harm." *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999). And although this Court generally views as meaningful the differences between the text of Title VII's antidiscrimination and antiretaliation provisions, the Court imposes this same, atextual objectively-tangible-harm requirement to cases involving lateral transfers (or denials of transfers) regardless of whether a plaintiff alleges discrimination or retaliation. Panel Op. 5-6 (quoting *Brown*, 199 F.3d at 457).

As explained below, this precedent is at war with Title VII's text and history. The Court should now "definitively establish" the "clear principle" that "transferring an employee because of the employee's [sex] (or denying an employee's requested transfer because of the employee's [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.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

Jurisdiction

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). That court's July 24, 2019 order granting summary judgment to the District of Columbia disposed of all claims of all parties. JA295. Chambers filed a timely notice of appeal on August 21, 2019. JA296. This Court has jurisdiction under 28 U.S.C. § 1291.

Statutory Provisions

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer—
>
> **(1)** 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; or
>
> **(2)** 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.
>
> * * *

Section 704(a) of the Act, 42 U.S.C. § 2000e-3(a), provides:

> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Issue Presented

Section 703(a)(1) of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" on the basis of sex "with respect to" "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Section 704(a) of the Act forbids an employer from

discriminating against an individual because she has engaged in Title VII protected activity. *Id.* § 2000e-3(a).

The en banc Court directed the parties to address whether a discriminatory denial or forced acceptance of a job transfer is actionable under Title VII only when it causes "objectively tangible harm." *See Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999); Order Granting Reh'g En Banc at 2, No. 19-7098, Doc. No. 1897464 (D.C. Cir. May 5, 2021).[1]

Statement of the Case

I. Factual background

The summary-judgment record contains the following facts, which, as the district court observed, must be viewed in the light most favorable to Plaintiff-Appellant Mary Chambers. JA278.

A. Chambers has worked for the District of Columbia's Office of the Attorney General since 1998. JA28. In 2000, she began working as an enforcement specialist in the Child Support Services Division. JA29-30. That

[1] The Court's order granting rehearing cites Section 703(a)(1), Title VII's substantive antidiscrimination provision, and does not cite Section 704(a), the statute's antiretaliation provision. The Court, however, ordered the parties to address whether it should retain *Brown*'s objectively-tangible-harm rule, *see* Order Granting Reh'g at 2, and that rule applies to transfer decisions challenged under both Title VII's antidiscrimination and antiretaliation provisions, Panel Op. 5-6 (quoting *Brown*, 199 F.3d at 457). Relying on *Brown*, the district court rejected Chambers' claims under both Section 703(a)(1) and Section 704(a). JA292-95. Therefore, this brief addresses the issue presented as to both Title VII's antidiscrimination and antiretaliation provisions.

division helps parents who rely on child support by locating non-custodial parents, establishing parentage, obtaining support orders, and collecting payments through enforcement. JA63-64. Chambers initially worked in the Interstate Unit, JA75-76, 82, which, until it was eliminated, coordinated with other states to ensure that child-support obligations were fulfilled when a non-custodial parent did not live in the District. In that unit, Chambers worked under the supervision of Walter Howell and Jamai Deuberry. *See* JA75-76.

In 2005, still in her role as an enforcement specialist in the Interstate Unit, Chambers began working on Reciprocal State Responding establishment cases, JA76, 171, helping parents who reside outside the District enforce child support orders against non-custodial parents living in the District. While working in the Interstate Unit, Chambers trained several junior employees and maintained a larger caseload than her coworkers. JA171, 181-82.

In 2008, Chambers requested a transfer out of the Interstate Unit and into the Intake Unit, which processes initial requests from parents seeking child support orders. JA40, 76. Deuberry denied the request purportedly because Chambers had been required to take on another co-worker's caseload while the co-worker was out of the office and because Chambers was the only person in the Interstate Unit working on Reciprocal State Responding establishment cases. JA76, 167.

B. In April 2010, Chambers began noticing ways in which the District was treating her differently from her male peers. JA35-36, 88-99, 137-140. Though Fernando Myrie, a male enforcement specialist who was consistently disrespectful to agency visitors, avoided significant discipline, JA35-36, the District suspended Chambers based on a relatively minor, disputed encounter instigated by a visitor. JA89. On April 6, 2010, Chambers was leaning on a trash can while off duty and waiting for an elevator when a client "came out of the office in a rage, walked behind her, dumped his food and drink in the trash can, and then said 'Move your fat ass off the trash can.'" JA95. Chambers and the client dispute what happened next, but Chambers maintains that when she pointed the client to another trash can, he told her, "If you say another [expletive] thing, I'm going to punch you in your face." *Id.* The client complained to a District employee about his encounter with Chambers, and that employee filed an incident report alleging that "an inappropriate verbal exchange ensued" between Chambers and the client. JA89.

Chambers had no prior disciplinary record. JA89. Yet, in response to the encounter, the District accused Chambers of improperly using government property (by leaning on a trash can), unreasonably failing to give assistance to the public, and using abusive or offensive language. JA96-97. The District suspended Chambers for four days and required her to complete four separate training programs. JA89-90. Chambers' union filed a grievance on her behalf, maintaining that the discipline was baseless. JA90. An arbitrator

sustained Chambers' grievance and ordered that "any mention of the incident, or discipline imposed as a result, shall be removed from her personnel file." JA99.

In contrast to Chambers' experience, Myrie was "written up for being rude" on a "daily basis" to "customers and others" yet was never suspended. JA35-36. Similarly, another male employee who used a government vehicle for an improper purpose was never disciplined. *See* JA53, 96.

C. Chambers filed an initial charge of discrimination with the EEOC in August 2010. *See* JA101. A month later, as the Child Support Enforcement Division was restructuring, Chambers again requested a transfer to the Intake Unit where she would have worked under the supervision of Patricia Williams. JA76, 103, 173. Based on the planned restructuring, the Interstate Unit would be eliminated, and Chambers' position would be moved to the Enforcement Unit. JA83; *see* JA101. Chambers would no longer be working on Reciprocal State Responding establishment cases, rendering the District's previously asserted basis for denying her transfer request irrelevant. Indeed, the work that was previously done by the Interstate Unit was transferred to the Intake Unit, the unit to which Chambers sought reassignment. JA76, 83-84.

The District, however, still denied Chambers' renewed transfer request, maintaining that reassigning her did "not fit into management's immediate plans for the Interstate Unit." JA75-76. Chambers knew, however, that

similarly situated male colleagues had received transfers. JA101, 137, 148. For example, Myrie was transferred to the Intake Unit and was later granted a requested transfer to another unit. JA137, 177-78, 192. Another male employee was transferred despite "significant personnel issues." JA196-98; JA256-58. And the District moved the workspace of a different male colleague because he preferred to avoid a noisy colleague. JA138. After the District denied Chambers' renewed transfer request, Chambers filed a new charge with the EEOC, maintaining that she had suffered sex discrimination and retaliation. JA101.

Six months later, Chambers and a colleague assigned to the Intake Unit, Juana Wright-Massie, requested to switch positions. JA103. In proposing this switch, Chambers explained that it was likely that the Intake Unit would be handling more "establishment cases," an area within Chambers' expertise. *Id.* Chambers noted that she and Wright-Massie both believed they would be "more of an asset to" each other's units. *Id.* "The fact is," Chambers explained, "we both have strengths in different area[s] and my area is processing establishment cases while Juana's is processing enforcement cases." *Id.*

Chambers requested the transfer because she wanted to put the skills that she had developed working on Reciprocal State Responding establishment cases to use, and this "interstate work" had been transferred to the Intake Unit. JA83-84. She had also trained the individuals now working in the Intake Unit and had seniority over them. JA169. Chambers spoke to Patricia

Williams, the Intake Unit's manager, about her interest in transferring, and Williams said that Chambers "would be welcomed" to the unit. JA173. But the District again denied Chambers' transfer request, claiming that Williams "did not need Ms. Chambers." JA65-66.

Around the time that this transfer request was denied, Chambers served as "the senior member" of her team and was assigned a "caseload of non-routine, highly complex cases." JA130. Her job duties included conducting interviews to establish and enforce child-support obligations, reviewing data to determine the type of legal action to be initiated, compiling court-ready documentation for prosecutions, and reporting to the court on findings. JA130-31.

II. Procedural background

A. In her March 2011EEOC charge, Chambers alleged discrimination based on sex and retaliation. JA101. She maintained that after she had filed her initial EEOC discrimination charge in August 2010, she had been denied transfer requests and "became aware that a male co-worker was granted transfer to another department" despite his performance problems. *Id.*

Chambers then sued the District, alleging that it violated Title VII by, as relevant here, denying her transfer requests because of her sex and retaliating against her for exercising her Title VII-protected rights. JA 13, 15.

While the case was before the district court, Chambers suffered a stroke and took medical leave. JA31. She requested that upon her return she be

transferred to a less stressful position. JA244-45. The District identified three units with "less stressful work than the unit that Ms. Chambers was assigned to" and ultimately transferred Chambers to the Locate Unit. JA245, 134. Her supervisor, job duties, title, coworkers, and workspace all changed. JA134, 250. Her new duties involved locating non-custodial parents. JA263. Although this transfer is not a part of Chambers' suit, its circumstances are set out here because they illustrate that a transfer necessarily alters the terms, conditions, or privileges of one's employment. *See infra* at 23.

The district court then granted summary judgment to the District. JA295. It reasoned that Chambers' discrimination and retaliation claims arising from the denials of her transfer requests are not actionable under this Circuit's law because Chambers had not suffered a so-called adverse employment action, which it viewed as an element of Chambers' claims. JA289-90, 293 (citing *Brown v. Brody*, 199 F.3d 446, 452, 457 (D.C. Cir. 1999)).

B. Chambers appealed to this Court, arguing that a discriminatory denial of a transfer request constitutes discrimination in the "terms, conditions, or privileges of employment." Appellant's Br. 14-15. The United States made the same point, explaining that denying an employee's requested transfer because of the employee's sex constitutes discrimination with respect to "terms, conditions, or privileges of employment" and thus violates Title VII. Br. for United States as Amicus Curiae 5. The District of Columbia eventually took the same position. Appellee's Resp. to Order 3.

The panel nonetheless affirmed, relying on longstanding circuit precedent. The panel explained that "[t]he threshold question" relevant to both Chambers' discrimination and retaliation claims is "whether Chambers established that she suffered an adverse employment action." Panel Op. 5. The panel noted that although "generally" the standards for what is actionable under Title VII's antidiscrimination and antiretaliation provisions differ, this Court "applies the same [objectively-tangible-harm] standard under Title VII's antidiscrimination and antiretaliation provisions" to determine "whether a lateral transfer—or a denial thereof—without diminution in pay or benefits" is actionable. *Id.* The panel explained that, in *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999), the Court "held that for cases involving purely lateral transfers, 'a plaintiff . . . does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.'" Panel Op. 5-6 (quoting *Brown*, 199 F.3d at 457).

In a concurring opinion, both members of the two-judge panel urged the en banc Court to reexamine this precedent because the "statutory text, Supreme Court precedent, and Title VII's objectives make clear that employers should never be permitted to transfer an employee or deny an employee's transfer merely because of that employee's race, color, religion, sex, or national origin." Panel Op. Concurrence 7.

A majority of judges eligible to participate then voted to rehear the case en banc. Order Granting Reh'g at 1.

Summary of Argument

Section 703(a)(1) of the Civil Rights Act of 1964 forbids sex discrimination by an employer "with respect to" an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The statutory text is not limited to what this Court calls "adverse employment actions" or to decisions that cause "objectively tangible harm." Instead, it bans all employment decisions based on sex that relate to any term, condition, or privilege of an individual's employment. Viewing the facts in the light most favorable to Chambers and applying the statutory text, the District's discriminatory denials of Chambers' repeated requests for a job transfer constituted discrimination with respect to the terms, conditions, or privileges of her employment and thus violated Title VII.

Section 704 of the Act prohibits an employer from retaliating against an employee for engaging in Title VII protected activity. The antiretaliation provision reaches any employment decision that could dissuade a reasonable employee in the plaintiff's shoes from engaging in Title VII protected conduct. Viewing the facts in Chambers' favor, a reasonable jury could conclude that after Chambers complained to the EEOC about disparate treatment, the District retaliated against her by denying her requests for a new job assignment. Because a reasonable employee in

Chambers' position might well have been deterred from reporting Title VII violations if she knew that her employer would respond by denying several job-transfer requests, the denials constituted actionable retaliation under Title VII.

Standard of Review

This Court reviews a district court's grant of summary judgment de novo. *Minter v. District of Columbia*, 809 F.3d 66, 68 (D.C. Cir. 2015).

Argument

This Court's "objectively tangible harm" requirement is at odds with Title VII's text, Supreme Court precedent, EEOC policy and rulings, and Congress's plan in passing Title VII.

I. Denying a transfer request based on sex constitutes discrimination in the "terms, conditions, or privileges of employment," violating Title VII's antidiscrimination provision.

This Court need look no further than Title VII's text to understand why the objectively-tangible-harm requirement is mistaken. Supreme Court precedent, the statute's history, and EEOC interpretations confirm what is clear from the text: a discriminatory denial of a transfer request constitutes discrimination with respect to terms, conditions, or privileges of employment.

A. The ordinary meaning of "discriminate" and "terms, conditions, or privileges" encompasses all attributes of the employer-employee relationship.

The objectively-tangible-harm standard cannot be reconciled with Title VII's text. The statute makes it unlawful, without exception, 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." 42 U.S.C. § 2000e-2(a)(1).[2]

This text contains ordinary, easily understood English words. No judicial gloss—such as "adverse employment action" or "objectively tangible

[2] Title VII's federal-sector provision, Section 717 of the Act, requires "[a]ll personnel actions" to be "made free from discrimination," and it applies to employees "in those units of the Government of the District of Columbia having positions *in the competitive service*." 42 U.S.C. § 2000e-16(a) (emphasis added). The Civil Service Act defines competitive service as consisting of "positions in the government of the District of Columbia which are specifically included in the competitive service by statute." 5 U.S.C. § 2102. Chambers is not aware of any statute that designates Child Support Services Division employees as holding positions "in the competitive service," and the District has never maintained in this litigation that Chambers held a competitive-service position. *See* Dist. Ct. Dkt., ECF 51-1, Mot. for Summ. J. 12-13 (September 25, 2018). We therefore focus here on the meaning of Section 703(a)(1) of the Act, which covers District of Columbia employees not "subject by statute to procedures of the competitive service." 42 U.S.C. § 2000e(b); *see Bethel v. Jefferson*, 589 F.2d 631, 640 (D.C. Cir. 1978) (concluding that District of Columbia Metropolitan Police officers did not occupy positions in the competitive service and were thus subject to Title VII's private-sector requirements, which include Section 703(a)(1)).

harm"—is needed when, as here, the statutory text is "unambiguous." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018). The "inquiry" here thus "begins with the statutory text, and ends there as well." *Id.*

1. "Discriminate." When Title VII was enacted, "discriminate" meant "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third Dictionary 647-48 (1961); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979) (instructing courts to consider "ordinary, contemporary, common meaning" in the absence of a statute-specific definition). Today, too, of course, the "normal definition of discrimination" is any "differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J. concurring); *see also Discrimination*, Black's Law Dictionary (11th ed. 2019) (defining "discrimination" as "differential treatment"). Put otherwise, to discriminate is simply "to make a difference in treatment or favor on a basis other than individual merit." *Discriminate*, Merriam-Webster's Online Dictionary (last accessed June 29, 2021).[3]

"As used in Title VII, the term 'discriminate against'" thus "refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)). And whenever an employee

[3] https://www.merriam-webster.com/dictionary/discriminate.

demonstrates that an employer's action is taken "because of the employee's race [or sex]" that action "plainly constitutes discrimination." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

Decisions that treat the word "discriminate" in Section 703(a)(1) as demanding proof of a so-called "adverse employment action," *see Connell v. Bank of Boston*, 924 F.2d 1169, 1179 (1st Cir.1991), are therefore wrong. No adverse-employment-action or objectively-tangible-harm requirement can be derived from the word "discriminate" because, as just explained, it connotes any differential treatment. That is true even though proof that an employee has suffered a serious harm—whether viewed as "objectively tangible" or not—will often strengthen a plaintiff's case.

Indeed, absent direct evidence of discrimination, a Title VII plaintiff frequently will rely on evidence that her employer treated her worse than colleagues outside of her protected class to demonstrate that the employer acted with discriminatory intent. Put the other way around, when an employer can show that a decision did not cause the plaintiff serious harm, the employer will argue that because most people would not find the employer's decision particularly harmful, it is likely that the employer did not take the action for discriminatory reasons. 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, 368 (1999). But litigants' reliance

on evidence that they experienced a serious harm to prove discriminatory intent does not mean that a disparate-treatment plaintiff must have suffered any particular level of harm to recover under Section 703(a)(1).

2. "Terms, Conditions, or Privileges." Beyond prohibiting employers from refusing to hire or firing individuals because of their race, color, religion, sex, or national origin, Title VII bars an employer from discriminating "with respect to" an individual's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). "With respect to" simply means "regarding" or "concerning." *Regarding*, Merriam-Webster's Online Dictionary (last accessed June 29, 2021) (defining "regarding" as meaning "with respect to").[4]

"Compensation" means "payment for value received or service rendered." *Compensation*, Webster's Third Dictionary 463 (1961); *see also Compensation*, Black's Law Dictionary (11th ed. 2019) (similar).

"Terms, conditions, or privileges," on the other hand, encompass all attributes of the employer-employee relationship. Start with the word "terms," which means "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third Dictionary 2358 (1961). In light of the "specific context" in which the word is used in Title VII, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892-93 (2018),

[4] https://www.merriam-webster.com/dictionary/regarding.

then, "terms" includes "[p]rovisions that define an [employment] agreement's scope [or its] conditions or stipulations." *Term*, Black's Law Dictionary (11th ed. 2019). In other words, "terms" are employment "[c]ondition[s] under which something may be done, settled, agreed, or granted." *Term*, Oxford English Dictionary (last accessed June 29, 2021).[5]

Ask any employee to describe the "terms" of her employment, and she will point not just to her salary and benefits, but to various requirements set out by her employer, including when, where, and with whom she is required to work, and her title, tasks, and other job-related circumstances. *See* Terms, Merriam-Webster's Online Dictionary (last accessed June 29, 2021) ("provisions that determine the nature and scope of an agreement"; "a word, phrase, or provision of import especially in determining the nature and scope of an agreement").[6]

Turn next to "condition," which is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third Dictionary 473 (1961); *Condition*, Merriam-Webster's Online Dictionary (last accessed June 29, 2021) ("something agreed upon or necessary if some other thing is to take place").[7] And beyond this "narrow contractual" definition, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75,

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

[6] https://www.merriam-webster.com/dictionary/terms.

[7] https://www.merriam-webster.com/dictionary/condition.

78 (1998), "conditions" means "[t]he circumstances or factors affecting the way in which people live or work, especially with regard to their wellbeing," *Condition*, Oxford Living Dictionary (last accessed June 29, 2021),[8] or "[t]he whole affecting circumstances under which a being exists," *Condition*, Oxford English Dictionary (last accessed June 29, 2021).[9]

Consistent with these dictionary definitions, the Supreme Court has described "conditions of employment" to include a range of circumstances in which employees perform their jobs. Thus, the Court has referred to "conditions [that] constituted an unsafe and dangerous working place," *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), and to an employer whose "exacting and unconventional conditions" included working "Saturdays and Sundays and at other times outside the working day." *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 363-64 (1965) (per curiam).

Finally, providing a "privilege" means to "invest with a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third Dictionary 1805 (1961); *see also Privilege*, Merriam-Webster's Online Dictionary (last accessed June 29, 2021) ("a right or immunity granted as a peculiar benefit, advantage, or favor: prerogative").[10] Even benefits that an employer "is under no obligation to furnish by any express or implied

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

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

[10] https://www.merriam-webster.com/dictionary/privilege.

contract … may qualify as a 'privileg[e]' of employment under Title VII." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

These three broadly understood words—"terms," "conditions," and "privileges"—taken together refer in Title VII to "the entire spectrum of [potential] disparate treatment," covering the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted). Title VII covers these job features as "'terms' and 'conditions'" of employment beyond "the narrow contractual sense," whether they are part of a formal understanding between employer and employee or not. *Oncale*, 523 U.S. at 78. Thus, an employment benefit "may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon*, 467 U.S. at 75.

In using the phrase "terms, conditions, or privileges" in Title VII, then, "Congress intended to prohibit all practices *in whatever form* which create inequality in employment opportunity due to discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). "The 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, 81 (1977) (emphasis added). Thus, "Title VII tolerates *no* racial [or sex] discrimination," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (emphasis added).

In sum, "terms, conditions, or privileges" is a catchall for all facets of an employment relationship. Title VII is not, as the adverse-employment-action doctrine would have it, limited to workplace discrimination that employers or courts view as particularly injurious. Quite the contrary, the Act establishes no minimum level of actionable harm. This Court's contrary panel decisions have effectively "rewrit[ten] the statute that Congress has enacted," *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 629, and should be abrogated. *See Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring).

a. Job assignments are "terms, conditions, or privileges" of employment. Applying this straightforward understanding of Section 703(a)(1)'s text to the issue presented here, an employer may not transfer an employee or deny a transfer to an employee because of her sex. As the Solicitor General has observed, "it is difficult to imagine a more fundamental 'term[]' or "condition[]' of employment than the position itself." Br. in Opp. at 13, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020) (citation omitted) (U.S. *Forgus* Br.). The EEOC thus agrees that "job assignments" are workplace "terms, conditions, or privileges of employment." EEOC Compliance Manual § 613.1(a), 2006 WL 4672701 (2006); *see also* EEOC Compliance Manual § 2-II, 2009 WL 2966754 (2009). In short, work assignments are terms, conditions, or privileges of employment because they determine the nature and scope of the employee's job, are agreed to between the employer and employee, and invest both parties with particular rights and obligations.

*Re*assignments, therefore, necessarily alter previously established workplace "terms, conditions, or privileges." And so, a discriminatory denial of a request for a reassignment is discrimination "with respect to" existing "terms, conditions, or privileges of employment."

In the District's Child Support Services Division, for example, reorganizations, like the one eliminating the Interstate Unit in 2010, affected job duties, titles, and employees' colleagues and supervisors. JA83; *see* JA101. Employees were required to report to their assigned managers, and if they failed to do so they would not have abided by the "terms" or "conditions" of their employment. Had employees not adapted to meet these new requirements, they would have violated their workplace terms or conditions (and no doubt could have been disciplined or fired as a result). Put differently, if a transfer does not change *some* term or condition of an employment relationship, it is not a transfer (and the employer would not have insisted on it or, as in Chambers' case, denied it).

Based on the 2010 restructuring, Chambers' work was nested under the Enforcement Unit rather than the Interstate Unit, and she was no longer responsible for Reciprocal State Responding establishment cases, prompting her to renew her request for a transfer. JA83. When the District denied that renewed request, the denial was "with respect to" the terms, conditions, or privileges of her employment because it determined who she was required to report to and her job duties and responsibilities. JA83, 75-76. That the District eventually accommodated Chambers upon her return from medical

leave by transferring her to a "less stressful" position in the Locate Unit forcefully underscores that conclusion. JA245, 134; *see supra* at 10.

A job assignment determines an employee's terms, conditions, or privileges whether it leaves the employee "unchallenged" and bored, *Spees v. James Marine, Inc.*, 617 F.3d 380, 392 (6th Cir. 2010), requires an experienced employee to take on "menial duties," *Burns v. Johnson*, 829 F.3d 1, 11 (1st Cir. 2016), removes an employee from a role demanding an advanced degree, *Rodriguez v. Bd. of Educ.*, 620 F.2d 362, 364, 366 (2d Cir. 1980), downgrades an employee's title or prestige, places an employee under new management, or otherwise impacts an employee's workplace experience, *see Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008). In *Rodriguez*, for example, the Second Circuit held that the transfer of an art teacher from a junior-high school to an elementary school based on sex violated Title VII. *Rodriguez*, 620 F.3d at 366. The court explained that "job discrimination may take many forms," and "Congress cast the prohibitions of Title VII broadly to include subtle distinctions in the terms and conditions of employment as well as gross salary differentials based on forbidden classifications." *Id.* at 364. Even though Rodriguez's salary, workload, and teaching subject did not change, the transfer was professionally dissatisfying because Rodriguez preferred teaching more advanced pupils and had graduate degrees in adolescent art

education. *Id.* at 364, 366. The transfer thus "interfere[d] with a condition or privilege of employment," violating Title VII. *Id.* at 366.[11]

b. Where an employee is required to work is a term, condition, or privilege of employment. If an employer discriminatorily changes the space in which an employee must work, the "*conditions* in which he works" have been unlawfully altered. *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002). Here, although the District accommodated a male employee's subjective preferences to change where he was required to report for work to a quieter environment, JA138, it refused Chambers' requests for transfer. Chambers could not show up to the Intake Unit expecting to work there when she was assigned to a different unit. The transfer denials thus

[11] *See also Greer v. St. Louis Regional Medical Center*, 258 F.3d 843, 845-46 (8th Cir. 2001) (employer discriminated with respect to job-related terms, conditions, or privileges by giving employee extra on-call duty); *Chavez v. New Mexico*, 397 F.3d 826, 838-39 (10th Cir. 2005) ("claims of additional duties or enhanced responsibilities without commensurate pay increases" may establish "an unlawful alteration of the 'compensation, terms, conditions, or privileges' of … employment."); *Vega v. Hempstead Union Free School Dist.*, 801 F.3d 72, 88 (2d Cir. 2015) (assigning a Hispanic high school math teacher more Spanish-speaking students imposed a heavier workload that was more than a "mere inconvenience" and holding that the discriminatory assignment affected the terms and conditions of his work, violating Title VII); *Pothen v. Stony Brook Univ.*, 211 F. Supp. 3d 486, 489-90, 494-95 (E.D.N.Y. 2016) (discriminating against a maintenance engineer of Indian descent by expecting him to do more work than other engineers violated Title VII).

determined where she had to report for work, imposing conditions on her employment.

B. Title VII reaches beyond employment actions with economic consequences.

Courts are required "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Yet, the effect of this Court's requirement that employees prove that they suffered "objectively tangible harm" is generally to limit Title VII to remedying injuries with economic consequences, which in turn renders the phrase "terms, conditions, or privileges" nearly meaningless given that the statute already remedies "compensation"-related harms. *See* 42 U.S.C. § 2000e-2(a)(1).

"[C]ompensation" is separate from other attributes of employment, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991), and thus Title VII "prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status." *Id.* For that reason, "Title VII is not limited to 'economic' or 'tangible' discrimination," *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), encompassing even hostile work environments that alter employment conditions, but do not impose immediate pocketbook harms. *Id.*

In devising the atextual "adverse employment action" requirement, some courts have noted their concern that, without this judicial gloss, "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol–Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1449 (11th Cir. 1998). But Congress knew when it passed Title VII that the word "discriminate" encompassed any "distinctions or differences in the treatment of employees" and decided that prohibiting discrimination based only on "five forbidden criteria (race, color, religion, sex or national origin)" was generally sufficient to limit the statute's reach. *See* Equal Employment Opportunity Commission; U.S. Gov't Printing Office, Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 3015 (1964). According to the Senators who managed the bill that became Title VII, 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 … ." *Id.* at 3042-43 (statement of Senators Case and Clark). Senator Edmund Muskie made the same point in analyzing the text in a debate a few weeks before Congress passed the Act: "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. 12,618 (June 3, 1964).

If Congress had wanted Title VII to remedy only pocketbook or similar injuries it would have said so, as it has, for example, in the Equal Pay Act, which remedies only compensation-based injuries that flow from sex

discrimination. 29 U.S.C. § 206(d)(1). As indicated, Title VII itself does not remedy all workplace discrimination. It bans discrimination based on some characteristics, but not on others, such as weight or familial status, which are protected under other employment statutes, *see, e.g.*, Mich. Comp. Laws Ann. § 37.2102, and it does not apply, for instance, to certain religious entities or to employers with fewer than fifteen employees, 42 U.S.C. §§ 2000e-1(a), 2000e(b).

The objectively-tangible-harm requirement not only runs roughshod over the statute's text and history but conflicts with longstanding EEOC guidance. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (EEOC interpretations entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "The phrase 'terms, conditions, and privileges'," the agency has said, "include[s] a wide range of activities or practices which occur in the work place." EEOC Compliance Manual, § 613.1, 2006 WL 4672701 (2006). Thus, a "request for a temporary change of scheduled days off falls within this language." *Robert L. Weaver, Appellant*, EEOC DOC 01883168, 1988 WL 920346, at *1 (Nov. 16, 1988). Likewise, a shift transfer that does not result in any salary or work-hour changes is unlawful if discriminatory. *Ralph J. Lehmann, Appellant*, EEOC DOC 01860673, 1989 WL 1008741, at *4 (Feb. 22, 1989).

1. Title VII's expansive language is derived from federal labor law, under which "terms and conditions" include all facets of the workplace.

a. Rather than limiting Title VII to monetizable injuries, Congress borrowed sweeping language from the National Labor Relations Act's antidiscrimination provision. *See Hishon v. King & Spalding*, 467 U.S. 69, 76 n.8 (1984); Equal Employment Opportunity Commission; U.S. Gov't Printing Office, Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 3015 (1964) ("Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period.").

The NLRA makes it an unfair labor practice for an employer to encourage or discourage membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. § 158(a)(3). "The meaning of this analogous language sheds light on the Title VII provision at issue here." *Hishon*, 467 U.S. at 76 n.8. Employer practices may violate this provision when they cause only "comparatively slight" changes to employee "terms and conditions." *Randall, Div. of Textron, Inc. v. N.L.R.B.*, 687 F.2d 1240, 1249 (8th Cir. 1982) (failing to allow returning strikers to exercise shift preference based on seniority was an unfair labor practice).

For example, an employer may violate the NLRA's antidiscrimination provision by withholding from employees the "privilege of purchasing

goods from the company" *N.L.R.B. v. Buddy Schoellkopf Prod., Inc.*, 410 F.2d 82, 84, 88-89 (5th Cir. 1969), reprimanding an employee even when it does not lead to a reduction in pay, grade, or benefits, *Conolon Corp. v. N.L.R.B.*, 431 F.2d 324, 329 (9th Cir. 1970), requiring an employee to take a drug test, *N.L.R.B. v. Almet, Inc.*, 987 F.2d 445, 448 (7th Cir. 1993), or temporarily changing its practice of distributing "paychecks before lunchtime on Friday mornings" to "distributing the checks after lunch," *Speed Mail Serv.*, 251 N.L.R.B. 476, 477 (1980). As for lateral transfers, this Court has held that "there is little doubt" that even a one-day transfer with no loss of pay or benefits may qualify as discrimination with respect to a term or condition of employment under the NLRA. *Microimage Display Div. of Xidex Corp. v. N.L.R.B.*, 924 F.2d 245, 252 (D.C. Cir. 1991).[12]

b. The NLRA also uses the phrase "terms and conditions" to describe the subjects about which employers and unions collectively bargain. 29 U.S.C. § 158(d). In this context, "terms and conditions" extend broadly across the entire employer-employee relationship. Employers and unions collectively

[12] *See also Advertiser's Mfg. Co.*, 280 N.L.R.B. 1185, 1190-91 (1986), *enforced*, 823 F.2d 1086 (7th Cir. 1987) (removing telephone privileges violated NLRA's antidiscrimination provision); *Goodman Inv. Co.*, 292 N.L.R.B. 340, 349 (1989) (eliminating an employee's free parking space constituted unlawful discrimination); *Mid-South Bottling Co.*, 287 N.L.R.B. 1333, 1342-43 (1988), *enforced*, 876 F.2d 458 (5th Cir. 1989) (refusal to allow an employee to borrow a dolly for personal use was discrimination in the terms and conditions of employment); *F & R Meat Co.*, 296 N.L.R.B. 759, 767 (1989) (depriving employees of "the free coffee they had previously enjoyed" constituted unlawful discrimination).

bargain over nearly every aspect of the employment relationship, including work hours, *Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 685–86 (1965), insurance coverage, holidays, funeral leave, brief periods of time off to process grievances, uniforms, *Firch Baking Co.*, 199 N.L.R.B. 414, 418 (1972), *enforced*, 479 F.2d 732 (2d Cir. 1973), and the availability of workplace food and beverages, *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 493-94 (1979).

An employer fails to comply with its duty to bargain over workplace terms and conditions even when the altered terms might be preferred by some employees but not others. *See e.g.*, *N.L.R.B. v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1087-88 (8th Cir. 1969) (increasing the wages of a maintenance employee from $10.80 to $12.00 per day without first advising or negotiating with the union altered workplace terms and conditions in violation of the NLRA). For example, this Court has held that a temporary change to employees' lunch breaks from a "thirty-minute, unpaid break" to a "fifteen-minute, *paid* lunch break" without negotiating with the union violated the NLRA, even though the change lasted for only two days and some employees might have preferred the shorter, paid break. *Microimage Display Div. of Xidex Corp.*, 924 F.2d at 253.

c. Common use of "terms" and "conditions" indicate that those words reach far more than compensation-related harms and extend to the day-to-day circumstances in which an employee performs her job. For example, the *New York Times* described musicians' advocacy that their employer "spell

out in detail certain conditions of daily work—specifically that no rehearsal start before 10:30 A.M., and that if a performance the night before [went] beyond 11:30, the next morning's rehearsal [would] not start before 11"—as "working conditions" separate from "the money package" being negotiated. Theodore Strongin, *Work Conditions Believed Key Issue in Met Pact: Musicians Dissatisfied with Proposals They Consider Not Clearly Defined*, N.Y. Times, Oct. 9, 1964, at 31. Similarly, in a letter to the editor, an employee explained his frustration that despite a promise of an "automatic transfer" to a civil service position and after laboring under "conditions" like "pioneering in a new field" and "surviv[ing] a reduction of staff from 18,000 employees to 9,000," he learned that he would be "compelled to take an examination to test [his] fitness to hold [his] job." David M. Horn, *Bureau Workers Complain*, N.Y. Times, July 6, 1936, at 14. And an article about the labor movement's efforts to eliminate workplace race discrimination detailed how unions had agreed "[t]o try to write into 'all collective bargaining contracts nondiscrimination clauses covering hire, tenure, terms, conditions of employment, work assignment and advancement.'" Hendrick Smith, *Unions Join Drive on Job Prejudice*, N.Y. Times, Nov. 16, 1962, at 1, 19.

2. Congressional action after Title VII's enactment shows that Section 703(a)(1) prohibits all discriminatory employment practices.

a. Congressional action in the decades since Title VII's 1964 enactment shows that the statute reaches beyond employment practices that cause

pocketbook harms. Consider Congress's response to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, a Black woman challenged "the conditions of her employment," *id.* at 179, under the then-existing version of 42 U.S.C. § 1981, which prohibited "racial discrimination in the making and enforcement of private contracts," *id.* at 171. She was hired as a teller and file coordinator but was assigned tasks like "sweeping and dusting," which her employer did not impose on her white colleagues. *Id.* at 178.

According to the Court, this discrimination was not actionable under Section 1981 only because it did not abridge Patterson's right to make or enforce contracts but rather involved "postformation conduct." 491 U.S. at 180. As relevant here, the Court concluded that although the employer's conduct would have been "actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964" because of its prohibition on discrimination in an employee's "terms, conditions, or privileges of employment," *id.* at 180, the employer was free, under Section 1981, to impose "discriminatory working conditions" during the performance of Patterson's contract, *id.* at 177, 180.

In response, "Congress promptly repudiated that interpretation" of Section 1981 in the Civil Rights Act of 1991. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1021 (2020) (Ginsburg, J., concurring). Because "the Court's interpretation … crippled the statute's deterrent value and left millions of workers without protection against employment

discrimination," H. R. Rep. No. 102-40, pt. 1, at 92 (1991), Congress amended Section 1981 to expressly parallel Section 703(a)(1). *Compare* 42 U.S.C. § 1981(b) *with* 42 U.S.C. § 2000e-2(a)(1). Section 1981 now prohibits discrimination not only in making and enforcing contracts but also in "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Put differently, Congress's mechanism for expanding Section 1981 to cover discriminatory work assignments was to add the words at issue here—"terms," "conditions," and "privileges"—to the statute. It is clear, then, that Congress agreed with the Supreme Court's view that Title VII's "expansive" "terms, conditions, or privileges of employment" would have covered Patterson's claim, which was "plain[ly]" a challenge to "the conditions of her employment," *Patterson*, 491 U.S. at 179, 180—conditions that did not cause "objectively tangible harm" under this Court's precedent.

b. Through the 1991 Civil Rights Act, Congress expanded the monetary relief available to disparate-treatment plaintiffs by amending Title VII to authorize compensatory and punitive damages. Whereas plaintiffs could previously recover only monetary relief for discriminatory workplace practices that were "also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination," *Landgraf v. USI Film Prod.*, 511 U.S. 244, 254 (1994), after 1991, a plaintiff could, regardless of whether she had suffered quantifiable compensation-related injury, recover compensatory awards for

"future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3).

"[T]he new compensatory damages provision" was "in addition to," and did "not replace or duplicate," the previously available remedies for backpay and lost fringe benefits like vacation pay and pension benefits or the other equitable remedies available for discrimination affecting terms, conditions, or privileges of employment. *See Landgraf*, 511 U.S. at 253. Today, a plaintiff can recover damages "in circumstances in which there has been unlawful discrimination in the 'terms, conditions, or privileges of employment' … even though the discrimination did not involve a discharge or a loss of pay." *Id.* at 254 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). In other words, the 1991 amendments made clear that plaintiffs may obtain retrospective relief even when they do not suffer what this Court has viewed as objectively tangible harm. *Id.*

Moreover, the 1991 Act made these changes without disturbing the statute's existing injunctive remedies for these same types of non-monetizable injuries, 42 U.S.C. § 2000e-5(g)(1) (empowering courts to grant "any other equitable relief as the court deems appropriate"), which had always covered situations involving the types of terms and conditions at issue here. For instance, if an employer had a policy of considering requests for transfers from white employees only, a district court would surely have had the power to enjoin that policy at the time of Title VII's enactment. *See*

e.g., *Bing v. Roadway Exp., Inc.*, 485 F.2d 441, 450 (5th Cir. 1973) (disparate-impact decision enjoining employer's no-transfer rule because it operated to Black employees' detriment and thus violated Title VII).

It was around the time that employees began seeking compensatory damages under Title VII, as Congress authorized in the 1991 Act, that courts conjured the adverse-employment-action requirement, which applies equally to claims for damages and injunctive relief. *See e.g.*, *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 135-36 (7th Cir. 1993); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382-83 (8th Cir. 1994); *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995); *Kocsis v. Multi–Care Management, Inc.*, 97 F.3d 876, 886-87 (6th Cir. 1996). Under this Court's adverse-employment-action rule, for example, a district court would be powerless to enjoin an employer's across-the-board policy "expressly" disqualifying Black employees from "competing for a lucrative employment award" because that disparate treatment does not involve a reduction in pay or other "objectively tangible harm." *See Douglas v. Donovan*, 559 F.3d 549, 556 (D.C. Cir. 2009) (Tatel, J., dissenting).

Because discrimination is permissible under this Court's objectively-tangible-harm rule so long as it does not reduce pay, grade, or benefits, or significantly diminish responsibilities, an employer could, without legal consequence under *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999), require all of its Black employees to work under white supervisors, women to stand in every meeting while male counterparts sit comfortably around a table,

and employees of certain national origins to wear standard business attire while allowing others to wear clothing associated with their native lands. Decades after Title VII's enactment, that cannot be right.

C. The history of the Court's "objectively tangible harm" requirement confirms that it lacks a foothold in Title VII's text.

1. The objectively-tangible-harm requirement first appeared in *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999). That case involved race-discrimination and retaliation claims against a federal employer based on two transfer-related decisions. First, the employer reassigned the plaintiff to a position that she "strongly objected to," a job in "a less prestigious 'back-shop' area" in a department in which "she had little to learn." *Id.* at 449. Later, the employer declined the plaintiff's request to transfer to a newly created, desirable position. *Id.* at 455.

Title VII's federal-sector provision, Section 717 of the Act, provides that "[a]ll personnel actions affecting employees or applicants for employment … shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Federal law provides a detailed definition of "personnel action," 5 U.S.C. § 2302(a)(2)(A), which, consistent with the ordinary meaning of the phrase, includes changes in "duties, responsibilities, or working conditions." *Id.* § 2302(a)(2)(A)(xii). Despite Section 717's broad language, covering "[a]ll personnel actions" without exception, and its lack of reference to "terms, conditions, or privileges of employment"—the words from which the "adverse

employment action" requirement is purportedly derived—this Court held that the plaintiff had to establish that she "suffered an *adverse* personnel action." *Brown*, 199 F.3d at 455 (emphasis added).

The Court drew this conclusion, not from the statutory text, but from one line of dicta in *McKenna v. Weinberger*, 729 F.2d 783, 789 (D.C. Cir. 1984). The Court there stated, without further explanation, that a disparate-treatment claim "requires proof that an adverse personnel action was taken and that it was motivated by discriminatory animus." *Id. McKenna*, however, did not address what categories of discriminatory employment decisions are actionable under Title VII because that issue was not before it. Instead, the Court considered only whether the plaintiff could show that the employer had, in fact, discriminated against her, and it affirmed the district court's conclusion that she could not. *Id.* That is, *McKenna* concerned whether the employer's actions were "because of" sex—not the scope of the phrase "terms, conditions, or privileges of employment"—under Section 703(a)(1). The plaintiff in *McKenna*, moreover, had been denied a promotion and then (allegedly) constructively discharged—compensation-related employment harms that are indisputably actionable under Title VII when made on a discriminatory basis.

Beyond relying on the off-point *McKenna* dicta, *Brown* also pointed to "the clear trend of authority" holding that purely lateral transfers do not "rise to the level of a materially adverse employment action.'" *Brown*, 199 F.3d at 455-56 (citations omitted). To summarize this "survey of the relevant case

law," the Court in *Brown* cited an article, *id.* at 456, which, ironically, extensively critiqued the courts of appeals' various atextual adverse-employment-action rules and the far-reaching consequences of "the judiciary's imposition of this nonstatutory requirement," 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, 336-38 & n.22 (1999)).

To be sure, "hundreds if not thousands of decisions" have reflexively held "that an 'adverse employment action' is essential to the plaintiff's prima facie case," even though the Supreme Court "has never adopted it as a legal requirement" or analyzed its scope, and the requirement lacks a basis in the statutory text. *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (Easterbrook, J.). But more than twenty years after this Court's decision in *Brown*, the circuits' various adverse-employment-action rules are no less wrong today than they were when *Brown* was decided. As the United States has explained to this Court and to the Supreme Court, "[d]espite its widespread acceptance by courts of appeals," the "view that a 'purely lateral' transfer is not actionable" discrimination "is incorrect." U.S. *Forgus* Br. 13. The panel concurrence in this case made much the same point. It acknowledged that other circuits take the same position as *Brown*, but emphasized that this precedent runs headlong into the "statutory text, Supreme Court precedent, and Title VII's objectives," which "make clear that employers should never be permitted to transfer an employee or deny

an employee's transfer request merely because of that employee's race, color, religion, sex, or national origin." Panel Op. Concurrence 7.

2. In layering the objectively-tangible-harm gloss on top of the already atextual adverse-employment-action requirement, *Brown* relied on *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). *Ellerth* does not bear on the issue here. That decision catalogued what it termed "tangible employment action[s]" relevant only to a class of hostile-work-environment cases raising questions of vicarious liability—that is, the circumstances under which discriminatory employee conduct may be ascribed to the employer. *See* Panel Op. Concurrence 4-5. *Ellerth* thus "did not discuss the scope of" Title VII's "general antidiscrimination provision." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65 (2006) (discussing *Ellerth*).

Ellerth involved in particular whether an employee whose supervisor threatens to alter her job-related terms or conditions, but does not act on those threats, may hold her employer vicariously liable for the hostile work environment created by the supervisor's unfulfilled threats. 524 U.S. at 754. Under those circumstances, *Ellerth* held, an employer has an affirmative defense if it has exercised reasonable care to prevent and promptly correct the harassment. *Id.* at 765. The employer does not have an affirmative defense, however, if the harassing supervisor has taken a "tangible employment action" against the subordinate that causes "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." *Id.* at 761, 765.

The United States agrees with Chambers that *Ellerth*'s reference to "tangible employment actions" does not limit Section 703(a)(1) to discrimination that results in objectively tangible harm. U.S. *Forgus* Br. 14-16; United States Resp. to Pet. for Hearing En Banc 9-10, *Townsend v. United States*, No. 19-5259, Doc. No. 1889250 (D.C. Cir. March 10, 2021); *see also* Panel Op. Concurrence 4-5. Indeed, *Ellerth* could not have limited actionable employment practices to those causing tangible harm because it expressly recognized that, even without any tangible employment action, employers are liable when they fail to exercise reasonable care to prevent or correct discriminatory harassment. 524 U.S. at 765.

3. Nor does *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), a case decided after this Court's decision in *Brown*, support imposing an objectively-tangible-harm requirement on disparate-treatment plaintiffs. *Burlington* held that the Act's antiretaliation provision, Section 704(a) of the Act—which does not refer to "terms, conditions, or privileges of employment"—reaches conduct *outside* the workplace. *See* 548 U.S. at 61-64; *compare* 42 U.S.C. § 2000e-2(a)(1) (prohibition against disparate treatment), *with* 42 U.S.C. § 2000e-3(a) (prohibition against retaliation). This conclusion tells us nothing about the meaning of the phrase "terms, conditions, or privileges of employment," the language at issue here, and, in

any event, the District's conduct here (denying Chambers' repeated requests for a transfer) occurred *in* the workplace.

It's true that, as discussed in more detail below, the antiretaliation "provision's standard for judging harm" is "objective," that is, based on "reactions of a *reasonable* employee." *Burlington N.*, 548 U.S. at 68. In the antidiscrimination context, however, to determine whether discrimination is "with respect to" a workplace "term, condition, or privilege," a court need not determine whether the affected terms, conditions, or privileges are objectively undesirable, whatever that might entail. Indeed, courts need not consider an employee's reaction to a lateral-transfer decision at all to determine its impact on workplace terms or conditions. *See* U.S. *Forgus* Br. 13 ("it is difficult to imagine a more fundamental 'term[]' or 'condition[]' of employment than the position itself."); *accord* Panel Op. Concurrence 2-3. Instead, courts must analyze only whether an employer has imposed or lifted a workplace requirement or obligation based on a protected characteristic.

For example, when the District accommodated a male employee's request to have his desk moved away from a noisy colleague based on his preference to work in a quieter space, JA138, that decision was "with respect to" the "terms, conditions, or privileges" of his employment regardless of whether other employees would have also preferred quiet or would have enjoyed a busier (and, thus, noisier) environment, one more likely to create opportunities to collaborate and network. Because Section 703(a)(1), unlike

Section 704(a), limits prohibited discrimination to practices that are with respect to terms, conditions, or privileges, to "avoid[] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings," *Burlington N.*, 548 U.S. at 68–69, courts need only apply Title VII's text as written.

One of the first decisions to impose an adverse-employment-action requirement—a case relied on by this Court in *Brown* and cited by many other courts—captures the administrability challenges that arise when courts stray from the statutory text to consider an employee's reaction to her employer's discrimination. *See Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883 (7th Cir. 1989). In *Spring*, the plaintiff alleged that her employer, a school district, discriminated against her in violation of the Age Discrimination in Employment Act, which is modeled on Title VII and, thus, bans age discrimination against any individual in hiring and firing and "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

Spring maintained that she was transferred from a principal position in one school to a dual principalship in two other schools because of her age. *Spring*, 865 F.2d at 885-86. The court did not address whether the transfer was motivated by age discrimination but nonetheless rejected Spring's claim because she had not, in the court's view, suffered a "materially adverse" employment action. *Id.* at 885. The court emphasized that her pay increased, that she was transferred from a diverse school to an environment with only

students from upper-middle-class backgrounds, and that the old school "had a program for emotionally disturbed children" while the new schools did not. *Id.* at 886.

The court in *Spring* apparently believed that no reasonable fact finder could find adverse the transfer from a diverse school to a heterogeneous school. But many principals may prefer to lead more diverse institutions. Likewise, *Spring* assumed, without explanation, that a reasonable employee in Spring's position would prefer to administer a school without a program for emotionally disturbed children. Had the court in *Spring* simply applied the statutory text, it would not have needed to consider what makes a school environment desirable to a principal.

D. Abrogating the objectively-tangible-harm doctrine will not impose any unreasonable obligations on employers.

Rejecting the objectively-tangible-harm doctrine would not impose any unreasonable obligations or litigation burdens on employers, but, rather, would apply Title VII as it was written and intended. Overruling *Brown* presents no risk of transforming Title VII into "a general civility code for the American workplace," *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998), because a "denial of a transfer" is a "discrete discriminatory act[]" distinct from employee-on-employee harassment that, over time, results in a hostile work environment. *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 114, 115 (2002). In any case, it bears repeating: The statutory phrase

"terms, conditions, or privileges" establishes no minimum level of actionable harm.

To be sure, the term "adverse employment action" has a ring to it because a Title VII plaintiff, like any plaintiff, must suffer some "adverse" consequence, some Article III injury-in-fact attributable to the defendant's allegedly unlawful conduct. *See, e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021). But "there is no dispute" here—or in any of the decisions decided under the adverse-employment-action doctrine—that an employer's conduct dictating an employee's job assignment has imposed injury for Article III purposes when challenged in federal court. *Id.* (observing that "there is no dispute" that a plaintiff who seeks only nominal damages has alleged an injury in fact); *see also, e.g., Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees*, 466 U.S. 435, 442 (1984). And, without doubt, an employee who, like Chambers, alleges that she was denied an employment position on account of impermissible discrimination is "within the zone of interests protected by Title VII" and, thus, has statutory standing to sue. *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011).

These standing constraints are admittedly minimal, but liability for disparate-treatment discrimination is significantly limited in other ways. Most importantly, employment practices are only actionable when the plaintiff can prove that the employer intentionally discriminated on the basis of race, color, religion, sex, or national origin—that is, the employer's actions

must have been taken "because of" one of these protected characteristics. 42 U.S.C. § 2000e-2(a)(1); *see Tex. Dep't Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). That can be a substantial burden. *See Burdine*, 450 U.S. at 257-59; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-12 (1993); *see also* Panel Op. Concurrence 4. Moreover, the harm suffered by the employee must be attributable to the employer based on principles of agency law and relevant precedent. *See, e.g.*, *Ellerth*, 524 U.S. at 754.

In sum, if this Court corrects *Brown*'s "clear legal error," Panel Op. Concurrence 7, the floodgates would not open, and Title VII's text and purpose would be honored.

II. The denial of Chambers' transfer request could have deterred a reasonable worker from engaging in protected activity and thus violated Title VII's antiretaliation provision.

After Chambers filed a charge of discrimination with the EEOC in 2010, the District twice denied her renewed requests for transfers to the Intake Unit. JA75-76, 65-66. Because this Circuit applies the same (incorrect) objectively-tangible-harm requirement to retaliation claims involving lateral transfers that it uses to address discrimination claims, the district court granted summary judgment to the District on Chambers' retaliation claim, and the panel that initially heard this appeal affirmed. Panel Op. 5-6, 8. As we now explain, this approach cannot be reconciled with Section 704(a)'s text or the Supreme Court's decision in *Burlington Northern & Santa Fe*

Railway Co. v. White, 548 U.S. 53, 64–65 (2006), and Chambers should be permitted to pursue her retaliation claim.

In *Burlington*, "the Court expressly rejected" the view that a retaliation plaintiff must prove "a 'materially adverse change in the terms and conditions' of employment." *Steele v. Schafer*, 535 F.3d 689, 695 (D.C. Cir. 2008) (quoting *Burlington N.*, 548 U.S. at 60). That makes sense because the phrase "adverse employment action"—which appears nowhere in Title VII—is at best a shorthand (mis)interpretation of Section 703(a)(1) that has impermissibly construed the phrase "terms, conditions, or privileges of employment," and that phrase does not appear in Title VII's antiretaliation provision, Section 704(a).

Rather, Section 704(a) makes it unlawful "for an employer to discriminate against any of his employees" because an individual "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). *Burlington* thus held that "Title VII's substantive provision and its anti-retaliation provision are not coterminous" and that the "scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." *Burlington N.*, 548 U.S. at 67.

As for "how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope," *Burlington N.*, 548 U.S. at 61, the Court held that a plaintiff must show that the employer's decision "well might

have dissuaded a reasonable worker from engaging in Title VII protected activity." *Id.* at 54 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Because "the significance of any given act of retaliation will often depend on the particular circumstances," *id.* at 69, no category of employer conduct is insufficient as a matter of law to prove an actionable harm under *Burlington*.

In other words, "[c]ontext matters." *Burlington N.*, 548 U.S. at 69. Changing "an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." *Id.* And even a "supervisor's refusal to invite an employee to lunch"—though nonactionable as retaliatory under some circumstances—will be covered by Section 704(a) if, based on the particular facts, it "might well deter a reasonable employee from complaining about discrimination." *Id.* (citing 2 EEOC Compliance Manual § 8, pp. 8-13 (1998)). The Court thus declined to enumerate "specific prohibited acts," and instead announced the standard for what employment practices are actionable under Section 704(a) in "general terms." *Id.*[13]

Because the denial of a lateral transfer affects the day-to-day circumstances in which an employee does her job, when an employee is

[13] Justice Alito would have held that Section 704(a) reaches only those discriminatory practices covered by Section 703(a)(1). *Burlington N.*, 548 U.S. at 79 (Alito, J., concurring). But he nonetheless would have concluded that the employment practices at issue in *Burlington*—a change in job responsibilities and unpaid suspension—were actionable. *Id.*

denied the opportunity to transfer in retaliation for engaging in Title VII protected activity, it is an understatement to say that the decision might well deter a reasonable worker from making or supporting a charge of discrimination. *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 163 (D.C. Cir. 2015) (explaining that a reasonable person threatened with, among other things, diminished prospects for a transfer "might well be dissuaded from engaging in a protected activity.").

As previously explained, work assignments that do not affect pay or benefits still determine fundamental aspects of an employee's job: when and with whom the employee works, job title, prestige and reputation, workload and stress level, to name a few. "A reasonable employee might well be dissuaded from filing an EEO complaint if she thought her employer would retaliate by burying her in work" or by simply increasing her workload. *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166 (D.C. Cir. 2010) (citing *Mayers v. Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 369 (D.C. Cir. 2007) (per curium), *abrogated on other grounds by Green v. Brennan*, 136 S. Ct. 1769, 1775 (2016)). So too might a reasonable employee be deterred from engaging in Title VII protected activity if she feared she would not be selected for a position with greater supervisory authority or other opportunities for growth. *Stewart v. Ashcroft*, 352 F.3d 422, 427 (D.C. Cir. 2003).

Because "[a]lmost every job category involves some responsibilities and duties that are less desirable than others" the EEOC has "consistently found '[r]etaliatory work assignments' to be a classic and 'widely recognized'

example of 'forbidden retaliation.' *Burlington N.*, 548 U.S. at 70-71 (quoting 2 EEOC 1991 Manual § 614.7, pp. 614–31 to 614–32); *see also Pardo-Kronemann v. Donovan*, 601 F.3d 599, 607 (D.C. Cir. 2010) (describing why "[w]hether a particular reassignment of duties constitutes an adverse action ... is generally a jury question."). Given that employees' job assignments are fundamental to their workplace experience, U.S. *Forgus* Br. at 13, the denial of a lateral transfer cannot be equated with the "petty slights or minor annoyances that often take place at work," *Burlington N.*, 548 U.S. at 68, that are nonactionable under Section 704(a).

The record here shows that a reasonable employee in Chambers' position could have been dissuaded from engaging in protected activity based on the District's repeated rejection of her transfer requests. Consider, for example, the denial of Chambers' request that she and a colleague be allowed to switch units and positions. JA103. Viewing the facts in Chambers' favor, as the Court must at this stage, Chambers requested the transfer because she would be better able to put her skills and experience to use in the Intake Unit, and she believed she was entitled to the transfer based on her seniority. JA83-84, 169. After the Child Support Enforcement Division restructured in 2010, Chambers was stripped of her responsibilities working on Reciprocal State Responding establishment cases, and she sought the reassignment so that she might exercise her expertise in this area given that this interstate work had been assigned to the Intake Unit. JA83-84, 103.

In sum, a reasonable worker who believes her efforts opposing workplace discrimination will close doors for her at work might well be dissuaded from challenging discrimination in the first place.

Conclusion

This Court should reverse the district court's judgment in favor of the District as to Chambers' Title VII discrimination and retaliation claims and remand for trial.

Respectfully submitted,

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