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 REPLY BRIEF FOR APPELLANT MARY E. CHAMBERS

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Glossary

Equal Employment Opportunity Commision	EEOC
National Labor Relations Act	NLRA

Introduction and Summary of Argument

The starting point for every statutory-construction case is the statute's words, so it is telling that Amicus begins its analysis elsewhere. According to Amicus, if this Court has, for decades, misinterpreted Section 703(a)(1) of the Act, the en banc Court must not abandon the error first announced in *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999). But this Court, sitting en banc, need not adhere to a fundamentally flawed panel decision. If stare decisis is relevant here at all, it does not demand *Brown*'s retention because overruling *Brown* would not undermine the values stare decisis seeks to protect—most prominently reliance interests, which would not be impaired if *Brown* were repudiated.

Amicus's other arguments in favor of maintaining *Brown* do not survive scrutiny. Title VII bans all employment decisions based on sex (and other characteristics) that relate to any term, condition, or privilege of an individual's employment. The position an employee holds is a "term, condition, or privilege of employment" as those words are ordinarily understood—as underscored by the labor-law context from which those words emerged and by Supreme Court precedent. Because *Brown*'s objectively-tangible-harm rule has distorted Title VII's meaning so that an employer is free to transfer, or not to transfer, an employee on the basis of race, color, religion, sex, or national origin, it should be overruled.

Amicus makes no attempt to defend *Brown*'s atextual interpretation of Title VII's antiretaliation provision, even though Chambers' retaliation claim is pending before this Court and the district court rejected that claim solely on the basis of *Brown*. For the reasons provided in our opening brief, *Brown*'s approach to Section 704(a) retaliation claims cannot be reconciled with Title VII's text or Supreme Court precedent and should be overruled.

Argument

I. Denying a transfer request based on sex constitutes discrimination in the "terms, conditions, or privileges of employment."

A. Stare decisis does not save *Brown*'s objectively-tangible-harm requirement.

Amicus leads off its defense of *Brown* with the truism that overruling precedent is never a small matter and "*stare decisis* means sticking to some wrong decisions." Amicus Br. 21 (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015)). Besides suggesting that *Brown* is incorrect, Amicus's reliance on stare decisis is misplaced because en banc courts of appeal decide whether to adhere to past precedent based on considerations different from those animating the Supreme Court. Even assuming (incorrectly) that stare decisis is relevant, the point of sticking to wrong decisions is to respect primary-conduct reliance interests—interests that are not implicated by overruling *Brown*.

1.a. *Brown* should be overruled because it is fundamentally flawed. "[C]ourts of appeal, of course, play a different role in the federal system than

the Supreme Court, and this is reflected in certain differences in the manner in which the principle of *stare decisis* is applied to circuit precedent." *Critical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc). "Circuit courts do not establish the ultimate judicial precedent for the application of a federal statute," and "circuit precedent is generally established by the majority vote of just three circuit judges." *Id.* An *en banc* Court may therefore "set aside" a panel decision based not only on the traditional justifications for overruling precedent, but also "if, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed." *Id.* at 875-76.

Prior precedent is entitled to "*some* respect" in "a close *en banc* case" when both sides "express strong and well-reasoned arguments for their positions." *United States v. Burwell*, 690 F.3d 500, 517 (D.C. Cir. 2012) (en banc) (Sentelle, J., concurring) (quoting *United States v. Mills*, 964 F.2d 1186, 1194 (D.C. Cir. 1992) (en banc) (Silberman, J., concurring)) (emphasis added). Here, the parties *agree* that "*Brown's* interpretation of Title VII's antidiscrimination provision is divorced from the text of the statute" and should be overruled. D.C. Br. 17; *see also* Opening Br. 13-25. The disconnect between the objectively-tangible-harm rule and the "statutory text, Supreme Court precedent, and Title VII's objectives" is so glaring that both members of the two-judge panel urged the en banc Court to reexamine *Brown*. Panel Op. Concurrence 7. And they were not the first members of this Court to call for "the *en banc* court to join its sister circuits to make clear that transfers denied

because of race, color, religion, sex, or national origin are barred under Title VII." *Ortiz-Diaz v. United States Dep't of Hous. & Urb. Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Rogers, J., concurring) (citing Kavanaugh, J., concurring).

As our opening brief explains (at 36-43), the en banc Court should set aside *Brown*'s rule because it is fundamentally flawed. *Brown* derived the objectively-tangible-harm requirement not from Section 703(a)(1)'s text, purpose, or history (indeed, Section 717 of the Act, not Section 703(a)(1), was at issue in *Brown*), and not from a proper reading of Supreme Court precedent or EEOC policy and rulings, but from what it labeled a "clear trend" in sister-circuit authority—precedent that, upon scrutiny, is at odds with Title VII's text and purpose, in conflict with Supreme Court decisions, and unworkable. *See* Opening Br. 37, 38-43; *see also* D.C. Br. 17-18; Panel Op. Concurrence 7.

b. Confusion among and within the circuits makes stare decisis inapplicable. Stare decisis "rests on the idea … that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" *Kimble*, 576 U.S. at 455 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). But when an issue has not been resolved by the Supreme Court, different interpretations of the same statute often exist despite stare decisis principles, simply because there are thirteen circuit courts. *Critical Mass*, 975 F.2d at 876. That is the situation here.

Because there is a longstanding circuit conflict over what kinds of discriminatory conduct violate Title VII, or, to use the judicially created

parlance, what constitutes an "adverse employment action," overruling *Brown* will not undermine the values stare decisis protects. *See also* 1 Merrick T. Rossein, Emp. Discrimination Law and Litig. § 2.6 (Dec. 2020) (recounting circuit split); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (acknowledging but leaving unresolved the inconsistencies among the circuits about the level of harm required to prove a "substantive discrimination offense" under Section 703(a)(1)); Pet. for Cert., *Peterson v. Linear Controls, Inc.*, 2019 WL 2024844 at *10-*20 (U.S.), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.) (detailing circuit conflict).[1]

In the Sixth Circuit, for instance, the adverse-employment-action doctrine excludes only de minimis harms, narrowly understood, *see Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021) (Sutton, J.), which cannot be squared with *Brown* and its progeny. Because in that circuit an employment decision about *when* one works is a "term" or "condition" of employment, the *Brown* rule—about *where* one works and in *what* position—surely would involve

[1] In *Peterson v. Linear Controls, Inc.*, No. 18-1401, the Supreme Court was asked to consider the validity of the adverse-employment-action doctrine. The Court called for the views of the United States. 140 S. Ct. 387 (2019) (Mem.); *see* U.S. Br. 2, 8. The Solicitor General explained that the circuits are split over which discriminatory practices can form the basis of a Section 703(a) claim and that interpreting Title VII to cover only "'significant and material' employment actions" is "atextual and mistaken" and recommended a grant of certiorari. Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, 2020 WL 1433451 (Mar. 20, 2020). Shortly thereafter, *Peterson* settled, *see* U.S. Br. 8, rendering the Court unable to resolve the circuit split. *See* 140 S. Ct. 2841 (2020) (Mem.).

one too. *See id.* at 677. The Fifth Circuit's precedent, in contrast, stands out as especially restrictive. There, only an "adverse employment action" that is an "ultimate employment decision"—including a refusal to hire, a firing, a demotion, or the like—constitutes impermissible discrimination under Section 703(a)(1). *McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007). This Court flip-flops between its sister circuits' varying approaches. For example, it has held that the "inconvenience" associated with "a less favorable schedule" may be actionable under Title VII, *see Ginger v. D.C.*, 527 F.3d 1340, 1344 (D.C. Cir. 2008), but it has also held that denying a transfer request to a more desirable position on the basis of sex is permissible under Title VII, Panel Op. 3. As discussed in more detail below (at 14-15), these arguably inconsistent decisions show why *Brown* is especially in need of reexamination.

The confusion among the circuits (and within this Circuit) also undermines Amicus's assertion that Congress is the only forum that may rectify *Brown's* cramped reading of Title VII. Amicus Br. 19-20. Whatever the force of that argument in the Supreme Court, when the circuits are divided and intra-circuit conflicts remain, it is unrealistic to expect Congress to act to overrule circuit precedent. *See Critical Mass*, 975 F.2d at 876; *id.* at 881 (Randolph, J., concurring).

Congress, of course, has the power to overrule a mistaken panel decision of this Court on a question of statutory (mis)interpretation. But, tellingly, Amicus offers no suggestion about how Congress might change Section

703(a)(1)'s ordinary, easily understood English words to make it any clearer that Title VII means what it says and, thus, *really* prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

2. Overruling *Brown* will not undermine any reliance interests. Amicus acknowledges that "reliance on judicial decisions," Amicus Br. 16 (quoting *Kimble*, 576 U.S. at 455), is the point of stare decisis and then ominously refers to the "destabilizing consequences that abandoning stare decisis threatens" here, *id.* at 21. But, revealingly, Amicus does not explain (or even hint at) what instability would result from correcting *Brown*'s error.

Amicus's silence about whether *Brown*'s "rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), is understandable, because no employer maintains that it relies on the right to discriminate in employment, whether as to lateral transfers or anything else. Indeed, Amicus himself asserts that there are no "real-world" employers "declaring (for example) that they are denying a lateral transfer because an employee is Black." Amicus Br. 40. And not a single organization that typically advances the employment concerns of business—not the Chamber of Commerce, the Equal Employment Advisory Counsel, or the Association of Defense Counsel, to name a few—has filed a brief supporting *Brown*'s retention.

Whereas abandoning *Brown* will not harm employers, *see* Opening Br. 43-45, retaining it will countenance discrimination that harms employees. *Id.* at 35-36; *infra* at 18-21. Amicus inexplicably asserts that "[f]or decades this Court has applied *Brown* without incident." Amicus Br. 21. Without incident for whom? Mary Chambers, Regina Brown, Samuel Forkkio, and Mark Townsend, among others, no doubt disagree. *See* Panel Op. 3; *Brown v. Brody*, 199 F.3d 446, 449 (D.C. Cir. 1999); *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002); *Townsend v. United States*, 2019 WL 4060318, at *15 n.19 (D.D.C. Aug. 27, 2019), *appeal pending*, No. 19-5259 (D.C. Cir.).

3. Nor will overruling *Brown* lead to the unraveling of Title VII jurisprudence. Amicus's observation that *McDonnell Douglas*'s burden-shifting framework has been criticized as inconsistent with Title VII's text is irrelevant. *See* Amicus Br. 21. That is because of the critical differences between the statutory words that *McDonnell Douglas* construes ("because of") and the language at issue in *Brown* ("terms, conditions, or privileges"). The phrase "because of such individual's race, color, religion, sex, or national origin" leaves unanswered what standard of proof applies to demonstrate an employer's intent, and *McDonnell Douglas* simply provides an evidentiary framework to determine whether an employer's conduct was motivated by discrimination. In contrast, to understand the words "terms, conditions, or privileges of employment"—language denoting which discriminatory practices Section 703(a)(1) prohibits—"[i]t's not even clear that we need dictionaries to confirm what fluent speakers of English know." *Threat*, 6 F.4th

at 677. Thus, although "because of" arguably demands a judicial gloss, "terms, conditions, or privileges" do not.

A judicial gloss may be an appropriate tool of statutory interpretation when the statute's words are "otherwise uncertain." *See Skilling v. United States*, 561 U.S. 358, 412 (2010) (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)). But when the text is easy to understand, "[i]t is important to avoid 'engrafting upon the statut[e] … a judicial gloss so protean, elusive, or arbitrary" as to prevent parties from knowing what conduct is covered. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 363 (1995) (quoting *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1075 (5th Cir. 1986) (en banc)). The objectively-tangible-harm gloss on the phrase "adverse employment action," which itself is an impermissible "judicial gloss" on the statutory text, *see Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006), distorts and impermissibly narrows, rather than implements, Title VII's language.

Amicus's suggestion that overruling *Brown* will conflict with Supreme Court decisions considering the lawfulness of affirmative-action plans is puzzling. Amicus Br. 22-23 (citing *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), and *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 292 (1987) (White, J., dissenting)). First, the Supreme Court's affirmative-action precedent is emphatically "narrow," *Weber*, 443 U.S. at 200, and no affirmative-action plan was at issue in *Brown*, nor is Chambers challenging an affirmative-action plan here. Second, Chambers has never suggested, as Amicus implies, that this Court must adopt "a literal

construction" of Section 703(a)(1) in tension with Title VII's "purpose" and "context." Amicus Br. 22-23. Instead, unlike in *Weber*, where "reliance upon a literal construction" of Section 703(a) to challenge a policy adopted "to eliminate traditional patterns of racial segregation" was misplaced, the propriety of applying Section 703(a)(1) according to its ordinary meaning is confirmed by every other traditional source of statutory interpretation. *Weber*, 443 U.S. at 201–02; *see* Opening Br. 13-36. In other words, although 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 all reinforce what is clear from the text: *all* discriminatory transfers (and discriminatory denials of requested transfers) are prohibited.

* * *

In sum, though stare decisis explains why *Brown* has remained this Circuit's law for decades, it should not prevent the Court from correcting *Brown's* grave error.

B. The objectively-tangible-harm requirement disregards the statutory text and flouts the background principles on which Amicus purports to rely.

1. Unlike the objectively-tangible-harm rule, Title VII creates no minimum level of actionable harm.

Unable to confront the everyday meaning of Section 703(a)(1)'s words—"discriminate," "with respect to," and "terms, conditions, or privileges of employment"—Amicus turns to background principles found outside the

statute. One need not go beyond the statute's words, but these principles, too, support abrogating the objectively-tangible-harm rule.

a. Section 703(a)(1) includes no de minimis exception. In reminding the Court that "the law does not take account of trifles," Amicus Br. 29, Amicus ignores that "a de minimis exemption cannot stand if it is contrary to the express terms of the statute." *Env't Def. Fund, Inc. v. E.P.A.*, 82 F.3d 451, 466 (D.C. Cir. 1996) (per curium) (citing *Public Citizen v. Young*, 831 F.2d 1108, 1122 (D.C. Cir. 1987) (holding that a statute barring the listing of chemicals causing cancer "in man or animal" contained no de minimis exemption for certain chemicals that caused cancer in animals but posed only minuscule risk to humans). And "[w]hether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard." *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 232 (1992). Here, as our opening brief details (at 20), "[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* Constitutional Accountability Center Br. 14. So, reading any de minimis exception into Section 703(a)(1)—that is, beyond anything imposed by Article III—is improper.

It's true that "[n]o one doubts that the term 'discriminate against' refers to distinctions ... in treatment that injure protected individuals." Amicus Br. 26 (quoting *Burlington N.*, 548 U.S. at 59). But that is beyond doubt not

because the statutory text creates a minimum level of actionable harm, *see* Opening Br. 14-21, but because any federal-court plaintiff must suffer some injury-in-fact attributable to the defendant's conduct, *id.* at 44.

b. Lateral-transfer decisions invariably involve more than de minimis harm. In any case, the objectively-tangible-harm rule narrows the words "discriminate" and "terms, conditions, or privileges" far beyond "the 'ancient' doctrine of 'de minimis non curate lex.'" Amicus Br. 29.

If the objectively-tangible-harm rule that this Court read into Title VII in *Brown* were "just a run-of-the mill materiality requirement," Amicus Br. 9, akin to the *Burlington* standard of harm for Section 704 retaliation claims, 548 U.S. at 69, or the law in the Sixth Circuit, *see* Amicus Br. 3, 28-30, 39 (citing *Threat*, 6 F.4th at 677), then it would *cover* (not exclude) every discriminatory transfer. That is because, although reassignments made for legitimate business reasons are not actionable, every reassignment based on race, sex, or another protected characteristic harms an individual in the Article III sense and then some. *See* Opening Br. 22, 47 n.13 (citing *Burlington N.*, 548 U.S. at 79 (Alito, J., concurring)); D.C. Br. 8; U.S. Br. 13. As the District of Columbia puts it, "[f]orced transfers and transfer denials" inevitably "injure employees by either altering a fundamental aspect of their employment contract or depriving them of opportunities that are open to others," and "[t]his harm is necessarily more than de minimis, constituting discrimination." D.C. Br. 8. That describes what happened to Chambers: although similarly situated male colleagues received desired transfers,

Chambers was deprived of the opportunity to transfer to a unit that was a better fit given her expertise and interests. Opening Br. 8.

Brown's application in *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002), also undermines Amicus's characterization of this Court's adverse-employment-action doctrine as "not burdensome." Amicus Br. 9. In *Forkkio*, the Court held that the plaintiff could not meet the objectively-tangible-harm requirement even though "the reassignment deprived him of prestige," he was "given additional" work, and "he no longer attended management meetings or received management-related e-mails and other communications." 306 F.3d at 1131. Those harms go well beyond anything that sensibly could be described as de minimis.

Likewise, in *Townsend v. United States*, 2019 WL 4060318 (D.D.C. Aug. 27, 2019), *appeal pending*, No. 19-5259 (D.C. Cir.), an age-discrimination case, defendants increased Townsend's workload and assigned him to a different workplace. *See id.* at *15 n.19. His new office space lacked the old one's benefits: he could no longer host meetings with staff or work in privacy because his reassigned office was smaller, lacked a door, and was shared with a former subordinate. *Id.* Colleagues asked why he was "demoted," indicating that his unhappiness with the transfer was not purely subjective (not that that should matter, *see* Opening Br. 28-31). Yet, the court concluded that these facts did not "give rise to a reasonable finding of adverse action since they only represent 'dissatisfaction with a reassignment, public humiliation, or loss of reputation.'" *Id.* (quoting *Holcomb v. Powell*, 433 F.3d

889, 902 (D.C. Cir. 2006)). The court emphasized that the job reassignment lasted only four days. *Id.* at *14. Although no one would suggest that an employer's refusal to pay its older employees for four days, while fully paying its younger employees, had not inflicted a harm, the court imposed a more burdensome requirement in Townsend's case, holding that a four-day reassignment was insufficient to meet the atextual objectively-tangible-harm bar.

By any measure—and certainly evaluated against Title VII's broad language and purpose to eradicate discrimination—the employment harms experienced by Chambers, Forkkio, and Townsend are not "trifles," and their effects on the "terms, conditions, or privileges" of the plaintiffs' employment cannot properly be labeled de minimis. *See* Metro. Wash. Employment Br. 16-17. Yet, under this Court's precedent they are "not sufficiently significant to amount to 'materially adverse consequences.'" *Forkkio*, 306 F.3d at 1131 (quoting *Brown*, 199 F.3d at 457). That cannot be right.

c. Title VII reaches beyond employment actions with economic consequences, a principle undermined by the rule announced in *Brown*. Amicus points out that, despite the objectively-tangible-harm rule, this Court has sometimes recognized that Section 703(a)(1) remedies injuries that cause no pocketbook harm. Amicus Br. 9, 35. For example, the Court has held that an employer's decision to relegate an employee to the night shift based on his religion may constitute discrimination "with respect to" the "terms,

conditions, or privileges of employment." *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001). It's true that this Court's approach to Section 703(a)(1) has at times ping-ponged between the more restrictive adverse-employment-action rules embraced by some circuits (like the Fifth and Third) and the more flexible approach taken by other circuits, which condemns as discriminatory a broader category of employment practices but still mistakenly restricts the meaning of "terms, conditions, or privileges." *See, e.g.*, *Rodriguez v. Bd. of Educ.*, 620 F.2d 362, 364, 366 (2d Cir. 1980) (holding that the transfer of an art teacher from a junior-high school to an elementary school interfered with a condition or privilege of employment). That the objectively-tangible-harm rule has led to arguably contradictory results, *compare Freedman*, 255 F.3d at 844, *with Forkkio*, 306 F.3d at 1131, only underscores the need for the en banc Court to clarify that Title VII applies to all discriminatory transfers, not just to those that cause economic or (what courts view as) tangible injuries.

2. The objectively-tangible-harm requirement is inconsistent with the statutory structure.

a. Chambers' claim arises under Section 703(a)(1), Title VII's disparate-treatment provision. Title VII's prohibition on employment practices that have a disparate impact, on the other hand, is located in Section 703(a)(2). *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 531 (2015).

To resist the conclusion that the phrase "discriminate against" reaches "any differential treatment," Amicus argues that because Section 703(a)(2) addresses more specific activities than those prohibited by Section 703(a)(1)—such as segregation, *see EEOC Compliance Manual*, § 618.1(b), 2006 WL 4672738—the words "otherwise discriminate against" in Section 703(a)(1) must not cover *all* discrimination. Amicus Br. 26-27. But Amicus gets it backwards. Because "§ 703(a)(1) is broader than § 703(a)(2)," an employer practice "which violates § 703(a)(2) can also violate § 703(a)(1)." EEOC Compliance Manual § 618.1(b), 2006 WL 4672738; *see also* Panel Op. Concurrence 3; Constitutional Accountability Center Br. 11.

Indeed, in many early EEOC proceedings involving segregated job assignments or working conditions, the EEOC repeatedly found that workplace segregation involved "discriminat[ion]," a word used in Section 703(a)(1) but not in Section 703(a)(2). *See, e.g.,* EEOC Decision No. 71-453, 3 Fair Empl. Prac. Cas. 384 (1970), at *2 (assigning workers to different "gangs" based on race involved both unlawful segregation and unlawful "discriminat[ion]"); EEOC Decision No. 71-32, 2 Fair Empl. Prac. Cas. 866 (1970), at *2 (finding that an employer's action of holding racially separate Christmas parties "discriminates against its Negro employees on the basis of race with respect [to] a condition or privilege of employment, because of their race").

b. Amicus next argues that the ejusdem generis canon applies, and because the more general phrase in Section 703(a)(1), "otherwise to

discriminate against," follows the specification that employers may not "fail or refuse to hire or to discharge any individual," the words "otherwise to discriminate against" presumptively apply only to objectively tangible harms. Amicus Br. 30. This argument is wrong.

The ejusdem generis canon does not apply because "otherwise" means "in a different manner; in another way, or in other ways," or "in other respects." *Otherwise*, Webster's New International Dictionary of the English Language (2d ed. 1956); *see also, e.g. Otherwise*, Black's Law Dictionary (rev. 4th ed. 1968) (same). The phrase "otherwise to discriminate," then, instructs employers that discriminatory conduct banned by Section 703(a)(1) extends to actions *other than* hiring and firing—that is, everything between the two ends of an employer-employee relationship gone bad—because discriminatory hiring and firing are already expressly prohibited earlier in the passage.

c. Amicus's speculation, unadorned by citation, that "most U.S. workplaces" do not "lock in particular work assignments or supervisors," but rather require employees "to perform different assignments under different supervisors (or to maintain the same assignments and same supervisors) as part of their jobs," Amicus Br. 39, does not support a narrow interpretation of "terms, conditions, or privileges." Whether that generalization (which is inapplicable to Chambers' allegations) is accurate or not, applying Title VII properly will not mean interfering with at-will employment. Absent a contrary contract, an employer is free to require an

employee to "perform different assignments under different supervisors." But an employer may not, consistent with Title VII, design that requirement based on race, color, religion, sex, or national origin. *See* Constitutional Accountability Center Br. 14; Metro. Wash. Employment Br. 21.

The same reasoning applies to the District of Columbia's hypothetical, which it offers in an attempt to show that the words "discriminate" and "terms, conditions, or privileges" must be interpreted in a manner more limited than their ordinary definitions demand. D.C. Br. 23-24. According to the District, "no one would say" that an employer "discriminated" as to the "terms, conditions, or privileges" of employment by requiring men to use black staplers and women to use gray staplers. D.C. Br. 23-24. The District acknowledges that its example is "silly." D.C. Br. 23. True. It's hard to envision an employer insisting on sex-based, color-coded staplers, which is why there is no risk that reading "terms," "conditions," and "privileges" to cover the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee will impose any unreasonable obligations on employees. *See* Opening Br. 20, 43. The hypothetical is also not salient in the lateral-transfer context because, again, "it is difficult to imagine a more fundamental 'term[]' or 'condition[]' of employment than *the position itself*." U.S. Br. 13; *see also* D.C. Br. 8.

And we know that employer demands more realistic and rooted in the history of discrimination than the District's "silly" hypothetical—for example, that women take notes at every meeting, that people of certain

religions wear distinguishing patches on their clothing, or that people of certain races enter the premises only through particular entrances—are imposed as badges of inferiority or worse.

3. Straying from Section 703(a)(1)'s text causes unfair and unwarranted effects on employees.

Amicus belittles the examples Chambers described in her opening brief, which demonstrate the far-reaching consequences of the existing legal standard. *See* Amicus Br. 40. But limiting discrimination to employment decisions that cause objectively tangible harm effectively blesses an array of discriminatory practices beyond the denials of lateral-transfer requests at issue in this case.

By straying from Title VII's text and then grasping for clues about what discriminatory conduct it forbids in off-topic cases like *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *see* Opening Br. 39-40, courts have so distorted the meaning of "terms, conditions, or privileges" that, for example, an employer in the Fifth Circuit is free to demand that Black employees work outdoors in the Louisiana summer while white employees work indoors in air-conditioned comfort. *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). Discriminatory "negative performance evaluations" are not actionable. *See, e.g.*, *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 n.11 (5th Cir. 1998); *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003). And a plaintiff often has no remedy when she is denied training on a discriminatory basis.

See e.g., *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999); *Ford v. Cnty. of Hudson*, 729 F. App'x 188, 195 (3d Cir. 2018); *Morales v. Gotbaum*, 42 F. Supp. 3d 175, 202 (D.D.C. 2014).

In just the last six months, courts have applied the adverse-employment-action rule to hold that, even when an employer's conduct is motivated by discrimination, Title VII's "terms, conditions, or privileges" do not cover "telework," *Kelso v. Perdue*, 2021 WL 3507683, at *5 (D.D.C. July 12, 2021), "overtime hours," *Armstead v. Union Pac. R.R.*, 2021 WL 4033328, at *4 (D. Neb. Sept. 3, 2021), employee probation, *Thompson v. Liberty Mut. Ins.*, 2021 WL 1712277, at *5 n.8 (D.N.J. Apr. 29, 2021), or delayed compensation for paid leave, *Alvares v. Bd. of Educ. of the City of Chic.*, 2021 WL 1853220, at *9 (N.D. Ill. May 10, 2021). Denying "requested roadside assistance" to a Black school bus driver while providing "roadside assistance to other white bus drivers" is (supposedly) lawful because "[t]he lack of assistance" does "not demote the Plaintiff, decrease her salary, or cause other significant changes to her employment status." *Thweat v. Prince George Cnty. School Bd.*, 2021 WL 4046404, at *3 (E.D. Va. Sept. 3, 2021). Amicus is thus wrong that there are no real-world examples of the harm that would result from *Brown*'s retention.

And, to reiterate, the objectively-tangible-harm requirement does more than fail to hold employers accountable for idiosyncratic discriminatory acts after they have occurred. *See* Opening Br. 35-36. Under *Brown*, employers may lawfully adopt the following prospective workplace policy: male employees may choose, based on their subjective preferences, whether to

work in quiet private offices or in open work spaces designed to promote collaboration, but female employees must work in cubicles regardless of whether they would benefit from quieter (or busier) work environments. Title VII demands otherwise.

C. The Supreme Court has never adopted *Brown*'s objectively-tangible-harm rule.

1. Amicus is wrong that overruling *Brown* would be inconsistent with *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). *See* Amicus Br. 3, 4, 33. We explained why in our opening brief: *Burlington* held that Title VII's antiretaliation provision—which does not use the phrase "terms, conditions, or privileges of employment"—reaches conduct *outside* the workplace and that plaintiffs alleging retaliation must plead that their employer's conduct might have "dissuade[d] a reasonable worker from making or supporting a charge of discrimination." *Id.* at 57; *see* Opening Br. 40-41. That does not answer the issue presented here about what harm an employee must suffer to meet Section 703(a)(1)'s terms. To the extent that *Burlington* is relevant at all, it supports Chambers. That is because, as discussed above (at 12), while *Burlington* at most reads a "run-of-the mill materiality requirement," *see* Amicus Br. 9, into the Act's anti-retaliation provision, *Brown*'s objectively-tangible-harm rule extends beyond simply "separat[ing] significant from trivial harms." *Burlington N.*, 548 U.S. at 68.

2. The Supreme Court's hostile-work-environment decisions cited by Amicus are also inapposite because they do not analyze standard Section

703(a)(1) claims involving discrete acts like forced transfers or denials of transfer requests. Our opening brief explains (at 43) that 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, 114-15 (2002). Without answering this point, Amicus relies heavily on *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)—decisions that do not involve discrete acts of discrimination by an employer, but harassment that permeates the work atmosphere and that may only be imputed to the employer based on certain agency principles. Amicus Br. 31-32, 36, 40-41, 60.

In *Meritor*, the Court expressly rejected the view that "in prohibiting discrimination with respect to 'compensation, terms, conditions, or privileges' of employment, Congress was concerned with" eliminating only discriminatory conduct that results in "tangible" harm. 477 U.S. at 64; U.S. Br. 12. Yet *Brown* imposes precisely that limitation. In response to this contradiction, Amicus offers only a footnote with an inaccurate description of *Brown*: *Brown*'s "objectively tangible harm" rule supposedly does not conflict with *Meritor*'s instruction that Title VII reaches beyond "tangible" discrimination because *Brown*'s rule is "best read" not to require a showing of tangible harm. Amicus Br. 36 n.7. As explained above (at 12-13), if that

were true, then any discriminatory job assignment like the one Chambers experienced here would be actionable under existing circuit precedent, and the concurring judges would have seen no need to call for en banc review. *See* Panel Op. Concurrence 7; Opening Br. 22; D.C. Br. 8.

As noted, the framework for hostile-work-environment claims is inapplicable when a discrete discriminatory act, like the denial of Chambers' transfer requests, is at issue. *See Morgan*, 536 U.S. at 115. But even if we assume (counterfactually) that plaintiffs bringing standard disparate-treatment claims have to prove that they suffered severe or pervasive discrimination, denials of job transfer requests or forced reassignments would always meet that threshold. To reiterate: "[i]t is difficult to imagine a more fundamental term or condition of employment than *the position itself*," U.S. Br. 13—that is, the denial or forced acceptance of a job transfer affects an employee's every moment in the workplace, and is, thus, by definition, the imposition of a *pervasive* harm. *Meritor*, 477 U.S. at 72. It is emphatically not "a mere offensive utterance," *Harris*, 510 U.S. at 23, or occasional employee-on-employee misconduct, *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), that can be difficult to impute to the employer.

3. Amicus's answer to Congress's decision to repurpose sweeping language from the NLRA's antidiscrimination provision in Title VII is to assert (inaccurately) that the "Supreme Court has held" that the NLRA phrase "'terms and conditions of employment' defines 'a limited category of issues subject to compulsory bargaining.'" Amicus Br.

51-52 (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 220-21 (1964) (Stewart, J., concurring)). Amicus fails to mention that the language he quotes from *Fibreboard* comes from a concurrence, not the Court's opinion. *Id.* Amicus is otherwise silent about our key point: a vast array of workplace attributes are terms or conditions of employment under the NLRA's antidiscrimination and bargaining provisions, *see* Opening Br. 28-31 (reviewing decisions involving the gamut of the employee-employer relationship, including when and where employees work). Thus, Amicus offers no answer to the historical fact that Section 703(a)(1)'s expansive language is derived from federal labor law, under which "terms and conditions" include all facets of the working relationship.

D. This Court should not retain the objectively-tangible-harm rule in *McDonnell Douglas* cases.

Amicus's last-ditch effort to save the objectively-tangible-harm rule by limiting its application to Title VII cases litigated under the *McDonnell Douglas* regime should be rejected. *McDonnell Douglas* establishes a burden-shifting regime for proving Title VII claims when the plaintiff relies on circumstantial evidence (as opposed to direct evidence) of discrimination. *See Figueroa v. Pompeo*, 923 F.3d 1078, 1082, 1087 (D.C. Cir. 2019).

Section 703(a)(1) is the source of a plaintiff's discrimination claim regardless of the type of evidence that the plaintiff has at her disposal. And, for the reasons described above and in our opening brief, an "adverse employment action," or what this Court calls an "objectively tangible harm,"

is not an element of a Section 703(a)(1) disparate-treatment claim. Opening Br. 13-21. That is, whether a plaintiff has been discriminated against in a "term, condition, or privilege of employment" has nothing to do with the kind of evidence she will use to prove that discrimination.

It's true, as our opening brief explains (at 16), that a disparate-treatment plaintiff will often rely on evidence that her employer's decision caused her serious harm to help demonstrate that her employer acted with discriminatory intent. Demonstrating a significant injury—or one stemming from direct evidence of discrimination—may make it easier for a Title VII plaintiff to *prove* her Section 703(a)(1) claim and to establish entitlement to the full range of remedies for discrimination. But adversity, whether "objectively tangible" or not, is not an element of a discrimination claim. *See* Opening Br. 16-17 (citing 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)).

II. Chambers' retaliation claim remains pending and should be remanded because the denial of Chambers' transfer request could have deterred a reasonable worker from engaging in protected activity.

Although the en banc Court's order directing the parties to address *Brown*'s objectively-tangible-harm rule cites only Section 703(a)(1), not Section 704(a) (the statute's antiretaliation provision), the order also vacated the panel's judgment, which applied the objectively-tangible-harm rule to

both Chambers' discrimination and retaliation claims. Order Granting Reh'g En Banc at 2. We therefore addressed the objectively-tangible-harm requirement's application to retaliation claims in our opening brief (at 45-50), explaining that, in light of Section 704(a)'s text and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 64–65 (2006), *Brown* cannot stand in the retaliation context. On this point, Amicus abdicates, simply asserting that the en banc Court should not "revive" Chambers' Section 704(a) claim. Amicus Br. 62. But with the panel decision vacated, Chambers' retaliation claim remains pending before this Court.

The District of Columbia maintains that Chambers' retaliation claim would be unaffected by an en banc decision overruling *Brown*. D.C. Br. 37 n.10, 38 n.11. Not so. The panel explained that "[t]he threshold question" common to both Chambers' discrimination and retaliation claims is "whether Chambers established that she suffered an adverse employment action" under the standard established in *Brown*. Panel Op. 5.

As explained in our opening brief, 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. *See* Opening Br. 49-50. Chambers' retaliation claim should thus be remanded along with her discrimination claim.

Conclusion

This Court should reverse the district court's judgment as to Chambers' Title VII discrimination and retaliation claims and remand for further proceedings.

Respectfully submitted,

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Certificate of Service

I certify that, on September 20, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system. Thirty paper copies of this brief will also be filed with the Clerk of this Court.

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