No. 22-___

IN THE

Supreme Court of the United States

ARTUR DAVIS,

Petitioner,

v.

LEGAL SERVICES ALABAMA ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Esthena L. Barlow
Brian Wolfman
Counsel of Record
Madeline Meth
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Suite 312
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

QUESTION PRESENTED

Title VII 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 with respect to" the person's "compensation, terms, conditions, or privileges of employment" on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Section 1981 of Title 42 provides "[a]ll persons" in the United States "the same right" "to make and enforce contracts" as is "enjoyed by white citizens," including "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a)-(b).

The Eleventh Circuit held below that these prohibitions do not bar an employer from suspending an employee with pay because of his race. In its view, an employer who suspends an employee because he is Black is liable only if the suspension results in a loss of pay or is "similarly significant."

The question presented is:

> Do Title VII and Section 1981 prohibit discrimination as to all "terms," "conditions," or "privileges" of employment, or are they limited to "significant" discriminatory employer actions only?

PARTIES TO THE PROCEEDINGS

The parties are petitioner Artur Davis and respondents Legal Services Alabama, Inc., LaVeeda Morgan Battle, and Alex Smith. In the district court, Davis pursued claims under Title VII of the Civil Rights Act of 1964, Section 1981, and Alabama state law. Only the Title VII race-discrimination claims against Legal Services Alabama and the Section 1981 race-discrimination claims against all respondents are at issue in this Court.

RELATED PROCEEDINGS

Davis v. Legal Services Alabama, No. 2:18-cv-26, 472 F. Supp. 3d 1123 (M.D. Ala. 2020).

Davis v. Legal Services Alabama, No. 20-12886, 19 F.4th 1261 (11th Cir. 2021).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Artur Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1a, is available at 19 F.4th 1261. The opinion of the United States District Court for the Middle District of Alabama, Pet. App. 20a, is available at 472 F. Supp. 3d 1123. The Eleventh Circuit's order denying panel rehearing and rehearing en banc, Pet. App. 49a, is unpublished.

JURISDICTION

The Eleventh Circuit entered judgment on December 2, 2021. Pet. App. 1a. A timely petition for rehearing en banc, which the Eleventh Circuit also treated as a petition for panel rehearing, was denied on April 14, 2022. Pet. App. 49a. On June 27, 2022, Justice Thomas extended the time to file this petition for a writ of certiorari to and including August 12, 2022, and then, on August 3, 2022, further extended the time to file the petition to and including September 9, 2022. *See* No. 21A863. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in relevant part:

> (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[.]

42 U.S.C. § 1981 provides in relevant part:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

INTRODUCTION

Federal anti-discrimination law forbids employers from discriminating with respect to employees' "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see also* 42 U.S.C. § 1981(a)-(b). On its face, this standard "tolerates no racial discrimination, subtle or

otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). But rather than applying the statutory text, the Eleventh Circuit held here that an employer who suspends an employee because he is Black is liable only if the suspension results in a loss of pay or is "similarly significant." Pet. App. 7a-11a.

The decision below implicates a longstanding, deepening circuit conflict over which discriminatory employment practices are actionable under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit and eight other courts of appeals require a plaintiff to prove an "adverse employment action," a judicially created prerequisite that conflicts with this Court's precedent and unjustifiably limits the scope of federal employment-discrimination law. By contrast, three courts of appeals interpret the statutory language consistent with its plain meaning and Congress's intent to "eliminate" those discriminatory employment practices that have "fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.*, 411 U.S. at 800.

Clarity in this area of the law is years overdue. *Peterson v. Linear Controls, Inc.*, No. 18-1401, presented this Court with a question nearly identical to the question presented here. This Court called for the views of the United States, 140 S. Ct. 387 (2019) (Mem.), and the Solicitor General recommended a grant of certiorari, Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020). He explained that interpreting Title VII to cover only "'significant and material' employment actions" is "atextual and mistaken." *Id.* But shortly thereafter, the parties apparently settled, *see* Jt. Mot. to Defer Consideration

of Pet. for a Writ of Cert., No. 18-1401 (May 28, 2020), preventing the Court from resolving the important question presented, *Peterson v. Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (Mem.).

The Court should do now what it did not have the opportunity to do in *Peterson*: grant review, resolve the circuit split, and reject the circuits' many atextual formulations of their adverse-employment-action doctrine. In doing so, it should reverse the Eleventh Circuit's application of that doctrine and hold that "[o]nce it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete." *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc).

STATEMENT OF THE CASE

I. Factual background

In 2016, petitioner Artur Davis applied to serve as the Executive Director of respondent Legal Services Alabama (LSA), a non-profit that provides civil legal services to low-income Alabamians. Pet. App. 3a. After his initial interviews, a member of the search committee, Karen Jones, called him to express concerns about the search process. Eleventh Circuit Joint Appendix (CA11JA) 76. She warned Davis that LSA had a history of "racial issues" and a pattern of failing to promote and of firing Black employees. CA11JA 77. According to Jones, Davis's candidacy divided the search committee. Black committee members favored Davis, who is Black. Pet. App. 3a; CA11JA 76. But some of the white members backed a

less credentialed white corporate attorney. CA11JA 76. Jones listed respondent Alex Smith as among the white members who opposed Davis's selection. *Id.* Ultimately, the LSA Board of Directors hired Davis. Pet. App. 3a.

The race-related issues continued after Davis began work. Some staff members complained that he did not hire enough senior-level Black staff and favored white employees over Black employees in internal disputes. CA11JA 114, 117-19. Gary Gilmore, a former LSA executive, described a climate that included some of Davis's subordinates acting "openly hostile to Davis, in a way [that Gilmore had] rarely seen in … [his] career." CA11JA 123. Gilmore recalled that an LSA employee would cut Davis off and that two employees would act "disrespectful" and "even refus[e] to look at him while he was talking." *Id.* Despite this treatment, Gilmore observed, Davis "was always a professional, always polite," and respectful when handling disagreement. *Id.*

On August 18, 2017, as Davis left work for the evening, Smith and respondent LaVeeda Morgan Battle, then the President of LSA's Board, intercepted Davis in the parking lot and informed him that the Board was suspending him with pay pending an internal investigation. Pet. App. 24a; CA11JA 120. The letter suspending Davis explained that the Board had reached its decision based in part on "confidential communications" from staff complaining of harassment and a hostile work environment. ECF No. 45-2 at 70.

The following Monday, LSA posted armed security guards in front of its building. Pet. App. 3a; CA11JA 105. Davis could not physically enter the office, and

LSA staff inferred he might pose a threat. CA11JA 105-06. The suspension also prevented Davis from attending a reception that LSA held days later for the president of the organization's primary funder. Pet. App. 10a; CA11JA 124; ECF No. 45-20 at 3. Battle instructed staff to explain Davis's absence to attendees by saying that it involved an "internal matter" that they "could not discuss." CA11JA 124. Staff felt that this "cryptic" response "impl[ied] that Davis had done something wrong or was in some trouble." *Id.* Indeed, rumors flew that he had committed sexual or financial misconduct. CA11JA 107.

On August 22, 2017, Davis resigned. Pet. App. 4a.

Throughout this ordeal, Davis's treatment diverged starkly from the way the Board had acted months earlier when it received hostile-work-environment complaints against one of LSA's white executives. CA11JA 114; ECF No. 45-11 at 1. The Board took no action against that executive. CA11JA 114.

II. Procedural background

Davis sued LSA, Battle, and Smith. CA11JA 22. He alleged, as relevant here, race discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. Pet. App. 4a.[1]

---

[1] Davis brought claims under both Section 703(a)(1) of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The courts of appeals apply the same standards of liability to both provisions, *see, e.g.*, *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1256-57 (11th Cir. 2012), so the discussion in this petition of Section 703(a)(1) applies as well to Section 1981.

The district court granted summary judgment to the defendants on Davis's race-discrimination claims. Pet. App. 48a. It held that his suspension did not rise to the level of an "adverse employment action" because the circumstances were not "materially adverse" to Davis. *Id.* at 30a, 35a. Because Davis had not been fired, denied a promotion, reassigned to significantly different responsibilities, or suffered a significant change in benefits, the court concluded, neither Title VII nor Section 1981 prohibited the discrimination. *Id.* at 30a-35a.

The Eleventh Circuit affirmed. The panel concluded that Title VII and Section 1981 do not prohibit a discriminatory "simple paid suspension." Pet. App. 6a-9a. It noted that, under circuit precedent, the statutes prohibit only discriminatory "adverse employment actions" that "affect continued employment or pay" or are "similarly significant standing alone." *Id.* at 7a-8a. And it maintained that neither the suspension itself nor the other exacerbating circumstances qualified as "significant." *Id.* at 9a-10a.

The Eleventh Circuit denied Davis's petition for rehearing en banc, which the court also treated as a petition for panel rehearing. Pet. App. 49a-50a.

REASONS FOR GRANTING THE WRIT

I. The question presented has deeply divided the circuits.

In Section 703(a)(1) of the Civil Rights Act of 1964, Title VII makes it unlawful for an employer to "discriminate against" an employee "with respect to" the "terms, conditions, or privileges" of the person's "employment" because of various characteristics,

including race. 42 U.S.C. § 2000e-2(a)(1). That prohibition consists of everyday words with straightforward definitions. And yet nine circuits have abandoned its plain meaning, splitting from the three circuits that honor Section 703(a)(1)'s text.

The Fifth and Third Circuits read the statute very narrowly and without any consideration of its text. In these courts, Section 703(a)(1) applies to only what the Fifth Circuit calls "ultimate employment decisions," like firings, refusals to hire, and demotions, but not to all terms, conditions, or privileges of employment.

The First, Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits view Section 703(a)(1) more expansively, but still fail to take its language at face value. They have recognized that some discriminatory practices aside from ultimate employment decisions can give rise to liability under Title VII. But they apply various atextual glosses of their own, requiring an employee to show not only that she suffered discrimination but that the discrimination was "significant," "serious," or "substantial."

The Sixth and D.C. Circuits, by contrast, apply the statute as written. They recognize that Section 703(a)(1)'s text contemplates neither an ultimate-employment-decision requirement nor a showing of harm beyond the fact of discrimination. These courts thus join the Ninth Circuit in condemning as unlawful more discriminatory employer conduct than the other courts of appeals.

A. Two circuits require an ultimate employment decision. The Fifth and Third Circuits apply Section 703(a)(1) in a particularly restrictive and particularly atextual manner. These circuits

police only employment actions that result in tangible, pocketbook harms.

The Fifth Circuit has adopted a "strict interpretation" of Title VII. *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004). It refuses to recognize a Section 703(a)(1) claim unless the challenged employment action "affect[s] job duties, compensation, or benefits." *Id.* (citation omitted). That restrictive reading leaves a Louisiana employer free to demand that Black employees work outdoors in the summer without access to water while white employees remain in an air-conditioned building and receive water breaks. *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 372-73 (5th Cir. 2019), *petition for cert. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). It authorizes an employer in Texas to administer drug tests to Black job applicants and not white applicants. *Johnson v. Manpower Pro. Servs., Inc.*, 442 F. App'x 977, 983 (5th Cir. 2011). It insulates an employer's decision to grant white employees work-from-home privileges while denying Black employees the same benefit. *Stone v. La. Dep't of Revenue*, 590 F. App'x 332, 339-40 (5th Cir. 2014). And it would permit an employer to give white employees weekends off while scheduling Black employees to work weekends. *See Hamilton v. Dallas County*, 42 F.4th 550, 552-53, 555-56 (5th Cir. 2022), *petition for reh'g en banc filed* (Aug. 16, 2022).[2]

---

[2] In *Hamilton*, female detention officers alleged that their employer had subjected them to an expressly sex-based scheduling policy, which permitted male officers to take weekend days off but required female officers to invariably work weekends.

The Third Circuit adheres to a similarly atextual and restrictive rule. Like the Fifth Circuit, it has held that an employment practice is actionable only when it includes "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." *Stewart v. Union Cnty. Bd. of Educ.*, 655 F. App'x 151, 155 (3d Cir. 2016) (citation omitted). That preset list excludes a school district's decision to post a security guard outdoors in the winter. *Id.* It excludes a hospital's decision to regularly assign a nurse to a unit where she must "do the work of five people." *Betts v. Summit Oaks Hosp.*, 687 F. App'x 206, 207-08 (3d Cir. 2017). And it excludes an organization's decision to assign an employee to a "noisy, moldy office without windows" and "confiscate[] a space heater from his office." *Ugorji v. N.J. Env't Infrastructure Tr.*, 529 F. App'x 145, 151 n.4 (3d Cir. 2013). Accordingly, in the Third Circuit, employers can make all these decisions on the basis of race, or any other protected characteristic, without running afoul of Title VII.

B. Seven circuits require a heightened showing of harm. The First, Second, Fourth, Seventh, Eighth,

---

42 F.4th at 552. The Fifth Circuit explained that "[t]he conduct complained of … fits squarely within the ambit of Title VII's proscribed conduct." *Id.* at 555. The panel felt constrained to affirm the district court's grant of the employer's motion to dismiss under the circuit's "ultimate employment decision" precedent but noted that the case was a strong candidate for en banc review. *Id.* at 555, 557. Even if the en banc Fifth Circuit were to apply the text as written, *see infra* at 17-19 (discussing views of Sixth and D.C. Circuits), that would only slightly reconfigure, not eliminate, the circuit split.

Tenth, and Eleventh Circuits have recognized (or at least stated) that Title VII extends beyond "ultimate employment decisions," but still fail to read the statute according to its text. In this intermediate category, a court will dismiss a claim that an employer has discriminated against an employee with respect to terms, conditions, or privileges of employment unless the employee can show that the discrimination was, in the court's view, serious enough. This causes confusion over what degree of discrimination qualifies. And it regularly leads courts to dismiss claims unless the plaintiff can allege a pocketbook injury—a requirement that lacks an anchor in Section 703(a)(1)'s words.

First Circuit. The First Circuit "typically" requires an ultimate employment decision before it will find that an employment practice is serious enough to be actionable under Title VII. *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94 (1st Cir. 2012) (citation omitted). Accordingly, it has held that refusing to assign an employee to holiday shifts because of his race "simply does not rise to the level of an adverse employment action." *Id.* at 94-95. The court has applied similar reasoning to an employee's job duties. In *Morales-Vallellanes v. Potter*, 605 F.3d 27 (1st Cir. 2010), the court noted that, under circuit precedent, a "permanent, lateral reassignment" to work in the same role for a new boss did not qualify as an adverse employment action if the job description and salary remained the same, even if the transfer required the employee to "do more work," be "subject to extreme supervision," and "undergo a period of probation." *Id.* at 38 (quoting *Marrero v. Goya of P.R.*, 304 F.3d 7, 23 (1st Cir. 2002)). And it held that

imposing "inconvenience[s]" on an employee, like assigning him to less-desirable tasks because of his sex, is not "materially adverse" to him and thus does not violate Title VII in the First Circuit. *Id.* at 35, 37-39.

Second Circuit. The Second Circuit recognizes that discriminatory employment practices that are not ultimate employment decisions can support a Title VII claim. *See, e.g.*, *de la Cruz v. N.Y.C. Hum. Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 88 (2d Cir. 2015). But the court still requires a plaintiff to show, under the facts of the case, that the "challenged employment action is sufficiently significant." *Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015). It has thus dismissed a complaint alleging that a school district assigned a teacher to an "excessively noisy media center" and barred him from accessing tools to do his job because of his race. *Vega*, 801 F.3d at 89. And it has similarly found an employee who alleged she was involuntarily transferred from her preferred division based on her race could not pursue a Title VII claim because the transfer did not "result[] in a setback to her career." *De Jesus-Hall v. N.Y. Unified Ct. Sys.*, 856 F. App'x 328, 330 (2d Cir. 2021).

Fourth Circuit. The Fourth Circuit occupies the same middle lane. It too rejects an ultimate-employment-decision approach to Section 703(a)(1). *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375-76 (4th Cir. 2004). But it requires more than Title VII's text allows, demanding a showing that an employer's practices "had some significant detrimental effect" on the employee. *Cole v. Wake*

Cnty. Bd. of Educ., 834 F. App'x 820, 821 (4th Cir. 2021) (citation omitted).

Applying that heightened standard, the Fourth Circuit has held that forced reassignment to a more stressful position does not give rise to a Title VII claim, at least without "evidence that [the] new position is *significantly* more stressful than the last." *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (emphasis added). And it rejected a school principal's claim that she was transferred out of her principal's role to a position with less supervisory responsibility because it concluded this change had no "significant detrimental effect." *Cole*, 834 F. App'x at 821 (citation omitted). Outside the reassignment context, the same pattern holds. The Fourth Circuit has overlooked allegations of discriminatory scheduling changes and placement on a performance improvement plan, *Melendez v. Bd. of Educ. for Montgomery Cnty.*, 711 F. App'x 685, 688 (4th Cir. 2017), race-based disciplinary reprimands, *Prince-Garrison v. Md. Dep't of Health & Mental Hygiene*, 317 F. App'x 351, 353 (4th Cir. 2009), and discriminatory refusals to nominate an employee for an award, *Cottman v. Rubin*, 35 F. App'x 53, 55 (4th Cir. 2002), to name a few, all because the court has concluded that Title VII countenances discrimination so long as it is not, in the court's view, too detrimental.

Seventh Circuit. The Seventh Circuit professes to understand the problem running through the decisions discussed above—that interpreting Section 703(a)(1) "so narrowly" gives employers "license to discriminate." *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007) (citation omitted). Some of its decisions endeavor to close this "loophole for discriminatory actions by employers." *Id.*; *see*

Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002) (interpreting Section 703(a)(1) to encompass employer conduct that subjects an employee to "humiliating, degrading, unsafe," or "unhealthful" conditions, even if the employee's salary and benefits remain constant).

But like many of its sister circuits, the Seventh Circuit has deviated from that commitment. Before the court will recognize a disparate-treatment claim, the change an employee suffers "needs to be significant." *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 649 (7th Cir. 2011). The court has thus held nonactionable an employer's issuance of discriminatory reprimands under a progressive discipline policy, each of which brought the employee closer to termination. *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 613 (7th Cir. 2001), *overruled on other grounds by Ortiz v. Werner Enters.*, 834 F.3d 760 (7th Cir. 2016). It has dismissed a claim against an employer who discriminatorily limited an employee's duties because "she was not terminated, demoted, or disciplined" and her salary, title, and official job description remained unchanged. *Traylor v. Brown*, 295 F.3d 783, 789 (7th Cir. 2002). And it held that an employer who "told the male night custodians not to help the female custodians" and gave a female custodian "additional responsibilities above what was expected of the male custodians and above that which she should have reasonably … been given" did not carry out an adverse employment action because these actions were not "materially adverse" to the female employee. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 691-92 (7th Cir. 2001). In other words, if the Seventh Circuit concludes that the impact on the

employee is not material enough, the "loophole for discriminatory actions by employers," *Lewis*, 496 F.3d at 654, remains open.

Eighth Circuit. So too in the Eighth Circuit. A Section 703(a)(1) claim requires an employee to show a "material employment disadvantage." *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022) (citation omitted), *petition for cert. filed*, No. 22-193 (Aug. 29, 2022). "[T]ermination, cuts in pay or benefits, and changes that affect an employee's future career prospects" count as material disadvantages. *Jackman v. Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013). But forcing an employee to deplete her sick leave, *id.* at 805, giving an employee a poor performance evaluation that requires her to complete additional training, *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 927-28 (8th Cir. 2007), and transferring or denying a request to transfer, *Muldrow*, 30 F.4th at 689-90, do not.

Tenth Circuit. The Tenth Circuit's attempts to define just how "significant" discrimination must be for Section 703(a)(1) to cover it have been inconsistent. The court has held that assigning employees to particular shifts based on sex is not actionable but assigning employees to particular facilities based on sex is actionable. *Piercy v. Maketa*, 480 F.3d 1192, 1203-05 (10th Cir. 2007). Requiring an employee to report to work at certain times based on her sex did not discriminate with respect to the terms, conditions, or privileges of her employment, the court explained, because it was a "mere inconvenience." *Id.* at 1204. But requiring an employee to report to a certain facility based on her sex *did* discriminate with respect to the terms, conditions, or privileges of her employment

because the differences in stress and job difficulty and flexibility were "sufficiently substantial." *Id.* at 1205. This attempt to draw a line between significant and insignificant discriminatory employment practices illustrates just how far the courts have strayed from Section 703(a)(1)'s text. After all, *when* an employee works is just as much a "term" or "condition" of employment as is *where* an employee works. *See Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021).

Eleventh Circuit. The decision below demonstrates that the Eleventh Circuit has also strayed from Section 703(a)(1)'s text. The panel relied on circuit precedent holding that "adverse employment actions" are those that "affect continued employment or pay" or are "similarly significant standing alone." Pet. App. 7a-8a (citation omitted). That court requires an employee to "show a *serious and material* change," *Webb-Edwards v. Orange Cnty. Sheriff's Off.*, 525 F.3d 1013, 1031 (11th Cir. 2008) (citation omitted), which does not encompass discriminatory conduct like reassigning an associate from working a desk job to being a delivery driver, *McCone v. Pitney Bowes, Inc.*, 582 F. App'x 798, 799-801 (11th Cir. 2014), increasing an employee's workload, *Grimsley v. Marshalls of MA, Inc.*, 284 F. App'x 604, 606, 609 (11th Cir. 2008), or, as in Davis's case, suspending an employee with pay pending an investigation in a humiliating, public, professionally harmful manner, Pet. App. 8a-11a. In short, in the Eleventh Circuit, what the court terms "unfair treatment does not … support a disparate treatment claim." *Grimsley*, 284 F. App'x at 609 (citation omitted).

Thus, the Eleventh Circuit tracks the path taken by the First, Second, Fourth, Seventh, Eighth, and Tenth Circuits. These courts insist that a Section 703(a)(1) claim does not strictly require "evidence of 'direct economic consequences.'" *Grimsley*, 284 F. App'x at 608 (quoting *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001)). And yet, across the board, an ultimate employment decision remains the primary means by which an employee can show that an employer's discriminatory conduct meets the necessary "threshold level of substantiality." *Id.* (citation omitted). True, these courts purport to apply less stingy standards than the ultimate-employment-decision test, but they nevertheless authorize countless discriminatory employment practices that Section 703(a)(1)'s text prohibits.

C. Three circuits interpret the statute according to its text. The D.C. Circuit and the Sixth Circuit hew to Section 703(a)(1)'s language. Earlier this year, the en banc D.C. Circuit held that after an employee has "established that an employer has discriminated against [him] with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete." *Chambers v. District of Columbia*, 35 F.4th 870, 874-45 (D.C. Cir. 2022). The court thus rejected "[a]ny additional requirement" that demands "objectively tangible harm" as "a judicial gloss that lacks any textual support." *Id.* at 875. The court therefore found that the discriminatory denial of a request to transfer violates Title VII, *id.* at 872, even when the denial does not affect an employee's "pay, hours, advancement opportunity,

prestige, or other benefits," *id.* at 889 (Katsas, J., dissenting).

The D.C. Circuit thus joined the Sixth Circuit, which rejects the notion that an adverse employment action requires harm greater than that inherent in the statutory term "discriminate." *Threat*, 6 F.4th at 678-79. In *Threat*, the City of Cleveland admittedly reassigned a captain of the Emergency Medical Service division from his preferred shift to a different timeslot because he is Black. *Id.* at 675-76. The Sixth Circuit held that the city "discriminated against [the captain] based on race with respect to his terms and privileges of employment" when it "decided when [he] had to work based on his race." *Id.* at 678. And because Section 703(a)(1) "means what it says," that was enough for the Sixth Circuit. *Id.* at 680.

The panel in *Threat* did observe a measure of tension between its own textualist approach and circuit precedent construing Section 703(a)(1) to cover "only a materially adverse employment action." 6 F.4th at 678 (citation omitted). But Chief Judge Sutton explained that, taking "the words of Title VII as our compass," as courts must, the so-called adverse-employment-action requirement fulfills a pedestrian purpose: ensuring that an employee suffers differential treatment that "involves an Article III injury," rather than, "for example, differential treatment that helps the employee or perhaps even was requested by the employee." *Id.* at 677-78. Sixth Circuit case law today cannot be read to require a showing of harm that exceeds that minimal threshold. In any event, even if the circuit's decisions admit a degree of confusion, that does not soften the divisions

among the other courts of appeals. It only heightens the need for this Court's intervention.

The Ninth Circuit, while less focused on the statutory text than the Sixth and D.C. Circuits, ends up in a similar place. It describes Section 703(a)(1) as requiring an "adverse employment action," but defines that term "broadly." *Fonseca v. Sysco Food Servs. of Ariz.*, 374 F.3d 840, 847 (9th Cir. 2004). Accordingly, the court has explained that "a wide array of disadvantageous changes in the workplace constitute adverse employment actions." *Dimitrov v. Seattle Times Co.*, No. 98-36156, 2000 WL 1228995, at *2 (9th Cir. 2000) (citation omitted). And its case law reflects that principle, finding that an employer discriminates with respect to the terms, conditions, or privileges of a person's employment by assigning the employee to more-strenuous tasks, giving the employee less varied assignments, banning her from important areas of the workplace, *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090 (9th Cir. 2008), passing him over for overtime, or issuing him a warning letter that is publicized to all employees, *Fonseca*, 374 F.3d at 847-48. And, especially salient here, Ninth Circuit precedent "suggests that involuntary leave with pay" qualifies as an adverse employment action. *See Campbell v. Dep't of Hum. Servs.*, 384 F. Supp. 3d 1209, 1222 (D. Haw. 2019) (citing *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1014 (9th Cir. 2018)).

* * *

In sum, the regional courts of appeals have all addressed the question presented, and they divide into three camps. The majority of courts have departed markedly from Section 703(a)(1)'s plain meaning. "Title VII's core antidiscrimination provision,"

Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 61 (2006), deserves better. This Court should grant review and apply the statute's text.

II. The question presented is important and recurring.

A. The courts of appeals' various atextual adverse-employment-action rules have far-reaching consequences. The discussion above shows that, consistent with circuit precedent, employers may dictate when employees work, where they work, how much they work, and the arduousness of their work, on the basis of race, color, religion, sex, or national origin, without fear of liability under Section 703(a)(1). This disparate treatment does not immediately affect pay, title, or benefits. But it surely qualifies as imposing "terms, conditions, or privileges of employment." *See, e.g.*, *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021); *Hamilton v. Dallas County*, 42 F.4th 550, 555 (5th Cir. 2022), *petition for reh'g en banc filed* (Aug. 16, 2022). Nonenforcement of Section 703(a)(1) in this large category of circumstances thwarts Congress's intent "to strike at the entire spectrum of disparate treatment" in employment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (citation omitted).

These erroneous circuit precedents do more than prevent employees from recovering damages when they suffer from idiosyncratic discriminatory acts. The case law also effectively blesses prospective discriminatory policies. Under the Fifth Circuit's approach, for instance, an employer may lawfully adopt the following prospective policy: "Pay, titles, and job descriptions are based on merit without regard to

race, but we require Black employees to work outside in the heat because they are Black while white employees may work inside with air conditioning." *See Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019), *petition for cert. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). And we know from the precedential decision below that, in the Eleventh Circuit, a district court would be powerless to enjoin a company policy stating that it suspends Black employees with pay while they are under investigation but allows white employees to continue to work. *See* Pet. App. 9a-10a.

B. The question presented concerns the breadth of the workplace-discrimination bans in Title VII and Section 1981. But it implicates the interests of employers and employees under other statutes as well. The Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act, like Title VII and Section 1981, prohibit discrimination with respect to "terms," "conditions," or "privileges" of employment. *See* 42 U.S.C. § 12112(a); 29 U.S.C. § 623(a)(1); 42 U.S.C. § 2000ff-1(a)(1). And these other statutes likewise do not use the phrase "adverse employment action" (nor various circuit-court offshoots, such as "ultimate employment decision" or "significant detrimental effect"). Yet, current doctrine requires a plaintiff alleging disparate treatment under these statutes to plead and prove one.[3]

---

[3] *See, e.g.*, *EEOC v. LHC Grp.*, 773 F.3d 688, 695, 700 (5th Cir. 2014) (requiring a plaintiff alleging ADA discrimination to prove she suffered an adverse employment action); *Kessler v.*

C. The United States has acknowledged the significance of the question presented. It has stressed that the scope of Section 703(a)(1) is "undeniably important" and urged the Court to grant review. Br. for United States as Amicus Curiae at 20, *Peterson v. Linear Controls, Inc.*, No. 18-1401, *petition for cert. dismissed*, 140 S. Ct. 2841 (2020) (Mem.), 2020 WL 1433451 (Mar. 20, 2020). Taking aim at the Fifth Circuit's rule, the United States explained that the ultimate-employment-decision doctrine has "no foundation" in Title VII's language and conflicts with this Court's precedent. *Id.* at 6, 13. And in arguing elsewhere against the atextual heightened-harm approach taken by seven courts of appeals, the United States described the "significant-detrimental-effect" formulation employed by the Fourth Circuit as "misguided" and "irreconcilable with the statutory text." Br. in Opp'n at 13-15, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019).

The United States is a frequent defendant in employment-discrimination litigation infected by the atextual adverse-employment-action gloss, *see* 42 U.S.C. § 2000e-16, and the Equal Employment Opportunity Commission rules on thousands of employment discrimination charges annually.[4] So the United States' contention that the requirements to prove an ultimate employment decision or show harm

---

Westchester Cnty. Dep't of Soc. Servs., 461 F.3d 199, 204 (2d Cir. 2006) (analyzing whether a plaintiff pursuing Title VII and ADEA claims had suffered an "adverse employment action").

[4] *See* EEOC, All Statutes (Charges filed with EEOC) FY 1997-FY 2021, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2021.

beyond being subjected to discrimination are mistaken judicial innovations carries extra weight. For these reasons as well, the question presented is important and ripe for this Court's resolution.

III. This case provides an ideal vehicle for deciding the question presented.

This case involves one issue, and one issue alone: whether the courts below properly rejected Davis's race-discrimination claims for lack of a so-called adverse employment action. LSA moved for summary judgment on those claims on the ground that Davis did not suffer an adverse employment action. Pet. App. 28a; ECF No. 40 at 8-12. The district court agreed, granting summary judgment to the respondents for that reason. Pet. App. 35a, 39a. On appeal, Davis maintained that the district court "erred in its assessment of whether [his] suspension standing alone was an adverse action." Principal Br. of Pl.-Appellant/Cross-Appellee at 29, *Davis v. Legal Servs. Ala.*, 19 F.4th 1261 (11th Cir. 2021) (No. 20-12886). He also stressed that his suspension carried a stigma and "inevitably" led to public "suspicion of misconduct." *Id.* at 30-31. The Eleventh Circuit affirmed the district court, again addressing only the (purportedly essential) adverse-employment-action element of his claims. Pet. App. 14a & n.4; *see id.* 7a n.2. It held that a "simple paid suspension is not an adverse employment action" and that the surrounding circumstances did not "escalate[]" Davis's situation. *Id.* 9a-10a. This case squarely presents the question whether the Eleventh Circuit correctly applied Section 703(a)(1), and no antecedent or incidental issue muddies the water.

Davis's case concerns an alleged discriminatory suspension with pay, which directly poses the question whether the circuits' varying "adverse employment action" doctrines run afoul of Section 703(a)(1)'s simple, unadorned text. If considering a broader swath of employer conduct would aid this Court's review, it could grant certiorari here and in *Muldrow v. City of Saint Louis*, No. 22-193 (filed Aug. 29, 2022). *Muldrow* concerns a discriminatory transfer of an employee and a later refusal to grant that employee a transfer. *Muldrow v. City of Saint Louis*, 30 F.4th 680, 688-89 (8th Cir. 2022). Together the cases present an even fuller picture of the workplace "discriminatory practices and devices" that circuit precedent blesses. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

IV. The Eleventh Circuit's decision is wrong.

Title VII makes it unlawful for an employer to "discriminate against" an employee "with respect to" the "terms, conditions, or privileges" of his "employment." 42 U.S.C. § 2000e-2(a)(1); *see* 42 U.S.C. § 1981(a)-(b). That proscription does not contain the phrase "adverse employment action." Nor is it limited to discrimination that rises to a "substantial," "significant," or "serious" level. By reading extraneous terms into a statute where they do not appear, the Eleventh Circuit has imposed a judge-made, threshold requirement that keeps meritorious claims out of court at odds with Congress's will.

A. A suspension alters the terms and conditions of a person's employment. In fact, it alters the most fundamental of work requirements: that a person perform her job duties. A suspended employee goes

from active to idle. Without anything more, benching an employee unequivocally changes the terms and conditions that govern the employer-employee relationship.

To the extent that common sense does not settle the point, dictionary definitions do. *See Threat*, 6 F.4th at 677. "Terms" are "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 New Int'l Dictionary 2358 (1961) (Webster's Third). A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third 473. And a "privilege" is the enjoyment of "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third 1805. Together these words refer to "the entire spectrum of disparate treatment," covering the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted).

Davis's suspension easily falls under that mantle. His suspension rewrote the terms, conditions, and privileges of his employment. When the workday began on August 18, 2017, he was LSA's leader. His job required him to perform certain tasks. He had a voice in personnel decisions, strategy, operations, and day-to-day management. C11JA 81-82, 86, ECF No. 45-2 at 52-56; ECF No. 45-3 at 13. He was permitted to enter the building and to speak publicly about LSA. But his suspension changed everything. By the end of the workday, he was on administrative leave. He could

not act on LSA's behalf. ECF No. 45-20 at 3. He lost his authority to serve as its official spokesperson. ECF No. 45-19 at 1; ECF No. 45-20 at 3. He was prohibited from visiting "any LSA facility or LSA office, LSA function or LSC event." ECF No. 45-20 at 3. Just as the "*when* of employment" is a term, condition, or privilege, *Threat*, 6 F.4th at 677, the same must be true for the *whether*, the *where*, and the *what* of Davis's job.

Despite this inescapable logic, many courts of appeals have held otherwise. Decisions from the Eleventh Circuit and its fellow travelers are sparse on reasoning, largely drawing their doctrine from a common, flawed, starting point. The most thorough opinion of the bunch noted that "the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer's disciplinary policies in appropriate circumstances." *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006). In enforcing a policy that comprises a term of employment, the court explained, an employer does not alter the terms of employment. *See id.* at 92 n.1.

That view is untenable. True, both before and after an employee is suspended, one term of her employment is the possibility that she may have to endure a period of suspension. But, as just shown, the fact of the suspension still drastically alters the day-to-day terms, conditions, and privileges of the job.

Further, taken at its word, this slippery logic eviscerates Section 703(a)(1). The statute cannot permit race discrimination whenever some internal policy contemplates the employer's actions. If it did, a company could issue a policy providing that a supervisor may increase an employee's workload for

any reason. If the supervisor gave Black employees twice as much work, they would be unable to object that the change altered the terms, conditions, or privileges of their employment. That cannot be right. Congress did not pass Section 703(a)(1), "Title VII's core antidiscrimination provision," *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 61 (2006), for employers to promptly contract it out of existence.

The ultimate-employment-decision test is no better reasoned. The test is an invasive species—developed for a different environment and imported without regard for its knock-on effects. The Fifth Circuit originally took its list of ultimate employment decisions from the catalogue of "tangible employment action[s]" enumerated by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). *See Stewart v. Mo. Pac. R.R.*, 121 F. App'x 558, 561-62 (5th Cir. 2005). *Ellerth* was also a Title VII case, but it "did not discuss the scope of" Section 703(a)(1). *Burlington N.*, 548 U.S. at 65.

Instead, *Ellerth* concerned when a supervisor's workplace harassment of an employee can be attributed to the employer in a Title VII hostile-work-environment case. In some circumstances, this Court held, the employer has an affirmative defense to vicarious liability if it exercised reasonable care to prevent and promptly correct the harassment. *Ellerth*, 524 U.S. at 765. The employer loses the affirmative defense, however, if the harassing supervisor took a "tangible employment action" against the subordinate. *Id.* at 765. The Court elaborated that a "tangible employment action" is one 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.

Thus, courts that demand an ultimate employment decision to find liability under Section 703(a)(1) not only stray from the statute's text, they also invoke an off-topic case (*Ellerth*) for help in creating this atextual, additional requirement. Far better to let the statutory phrase "terms, conditions, or privileges of employment" be our "compass." *See Threat*, 6 F.4th at 677.

B. To state what should be clear, a suspension based on race is also discriminatory. To discriminate under Title VII is to make "distinctions or differences in treatment that injure protected individuals." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020) (citation omitted). An employer who suspends Black employees and does not suspend white employees treats these employees differently and harms the Black employees in the process. There is "little room for debate" that this qualifies as discrimination. *Threat*, 6 F.4th at 677.

Section 703(a)(1)'s text establishes no minimum level of actionable harm. "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 (1977). Section 703(a)(1) does not tolerate racial discrimination as long as it is not too significant or too serious—the statute "tolerates *no* racial discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (emphasis added).

Davis's suspension easily exceeds the minimally unfavorable treatment inherent in the word

"discriminate." His situation was intrinsically undesirable. It is hard to imagine any employee would react positively to the news that he has been suspended pending an investigation. Whether or not the discipline leads to termination, it heightens the risk of termination or some additional discipline (not to mention the employee's stress levels). Barring an employee from work also prevents him from participating in projects, exerting influence, meeting deadlines, and advancing his career. And reputational harms almost invariably accompany a suspension, especially for a highly visible public figure like Davis. Indeed, whether it is an officer who is suspended while the police department looks into an officer-involved shooting,[5] a football player suspended after the National Football League begins a domestic-violence investigation,[6] or a professor suspended while the university opens an inquiry into his "eccentric" teaching methods,[7] doing one's job is superior to being sidelined pending an investigation.

---

[5] *Nashville Disciplines Police Officer Who Fired Last in Fatal Highway Standoff*, The Guardian (Jan. 29, 2022, 07:23 AM) https://www.theguardian.com/us-news/2022/jan/29/nashville-disciplines-police-officer-highway-standoff-landon-eastep-box-cutter.

[6] *Josh Brown Placed on Commissioner Exempt List*, NFL.com (Oct. 21, 2016, 08:20 AM), https://www.nfl.com/news/josh-brown-placed-on-commissioner-exempt-list-0ap3000000725116.

[7] Eduardo Medina, *Professor Who Called Students 'Vectors of Disease' in Video Is Suspended*, N.Y. Times (Jan. 16, 2022) https://www.nytimes.com/2022/01/16/us/barry-mehler-coronavirus.html.

That LSA paid Davis does not change matters. The police officer, football player, and professor just described were paid while on leave. Simply put, being suspended, even with pay, imposed discriminatory disparate treatment on Davis because LSA prevented him from continuing to serve under circumstances in which it allowed a white executive to work. That meets the standard imposed by Section 703(a)(1). That LSA could have harmed Davis even more does not erase the damage the organization actually inflicted.

Finally, the panel's observation that a "paid suspension can be a useful tool for an employer," Pet. App. 9a-10a, fundamentally misunderstands Title VII's purpose. The statute does not insulate discriminatory discipline simply because employers benefit from it. A paid suspension can be useful to the employer, but the point remains that the same suspension harms the employee. Employers retain the ability to suspend employees accused of wrongdoing, so long as they do so for nondiscriminatory reasons. What employers cannot do is apply a disciplinary rule to a Black employee while ignoring similar allegations of misconduct against a white employee. A suspension on the basis of race alters the terms, conditions, or privileges of employment and therefore violates Section 703(a)(1). In requiring that employees show more, the Eleventh Circuit erred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Esthena L. Barlow
Brian Wolfman
Counsel of Record
Madeline Meth
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Suite 312
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

September 8, 2022