No. 22-231

IN THE

Supreme Court of the United States

ARTUR DAVIS,
Petitioner,
v.
LEGAL SERVICES ALABAMA, INC., ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents a simple question: Does Title VII of the Civil Rights Act of 1964 prohibit discrimination as to all "terms, conditions, or privileges of employment," or is it limited to significant employer actions? Respondent Legal Services Alabama (LSA) does not engage on that straightforward issue. Nor does it contest the question's importance. Instead, it argues that no circuit split exists within a misleadingly narrow sliver of cases and that a line of authority that has no bearing on the merits supports the decision below.

Neither tactic succeeds. An entrenched circuit split exists on the question actually before this Court. LSA's attempt to reframe the issue as involving only paid suspensions should be rejected.

And the Eleventh Circuit's decision is wrong. When a plaintiff shows that his employer has discriminatorily changed the terms of the employer-employee relationship, Title VII does not require that he show some further adverse employment action. LSA's invocation of hostile-environment caselaw to argue otherwise overlooks key differences between hostile-environment and discrete-discrimination claims such as Davis's. It also betrays fundamental confusion over the duties that Title VII imposes on employers, confusion that only this Court can correct. This Court should grant review and reverse.

I. The circuits are intransigently split over which discriminatory employer actions violate Title VII. Section 703(a)(1) of the Civil Rights Act of 1964 prohibits discrimination with respect to the "terms, conditions, or privileges of employment." 42 U.S.C.

§ 2000e-2(a)(1).[1] At one extreme, the Fifth and Third Circuits interpret the provision restrictively and atextually, limiting its reach to "ultimate employment decisions" like firing, hiring, and demoting. By contrast, the Sixth, D.C., and Ninth Circuits apply the statute to all terms, conditions, or privileges of employment, consistent with its text. The Eleventh Circuit, in the decision below, falls in the middle. Together with the First, Second, Fourth, Seventh, Eighth, and Tenth Circuits, it requires an employee to do more than what Title VII's text demands and show an "adverse employment action" that causes "significant," "serious," or "substantial" harm. As a whole, then, the circuits are sharply divided on whether Section 703(a)(1) means what it says or is limited to only those employment practices that courts view as especially harmful. And with the D.C. and Sixth Circuits' decisions in *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc), and *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021), these fractures have only widened since the Court last considered review, *Cole v. Wake Cnty. Bd. of Educ.*, 141 S. Ct. 2746 (2021), and since the Government last stressed to this Court that the question presented is the subject of a circuit conflict worthy 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).

This case directly implicates that split. Below, the Eleventh Circuit explained that Section 703(a)(1) prohibits discrimination only with respect to

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[1] The discussion of Section 703(a)(1) in this brief applies equally to 42 U.S.C. § 1981. *See* Pet. 6 n.1.

employment actions that "affect continued employment or pay" or are "similarly significant standing alone." Pet. App. 8a (citation omitted). Applying that rule, the panel found that Davis's race-based suspension with pay did not qualify as an "adverse employment action" and thus is not actionable. Pet. App. 8a-11a. That ruling directly conflicts with *Chambers*, where the D.C. Circuit rejected an adverse-employment-action requirement as "a judicial gloss that lacks any textual support." 35 F.4th at 875. And it cannot be reconciled with *Threat*, where the Sixth Circuit explained that atextual "innovations" such as a standalone adverse-employment-action rule "stray" from Section 703(a)(1) unless they are simply "shorthand" for its plain language. 6 F.4th at 678-79.

LSA does not dispute that the circuits' rules squarely conflict. Nor does it argue that *Chambers* or *Threat* is consistent with the decision below. Instead, it stresses only that the cases on the other side of the split do not involve discriminatory paid suspensions. Opp. 7-9.

But the observation that no circuit has expressly and specifically stated that Section 703(a)(1) prohibits discriminatory paid suspensions is irrelevant. The lack of a case applying the statute's text to these precise factual circumstances does not defuse the split. Whether Section 703(a)(1) requires an "adverse employment action" beyond the fact of discrimination is a threshold question. The courts that insist that the requirement exists do so in every case. It makes no sense to assess the split through the narrow lens of paid suspensions when the circuits' erroneous rules operate regardless of the employer practice at issue.

LSA's attempt to sidestep the split by changing the level of generality is as untenable as it is illogical. By advocating for an employment-practice-specific approach, LSA implies that the question presented might come out differently for any given discriminatory employer action. And yet neither Title VII's text, the circuits' decisions, nor LSA's brief in opposition provides any reason to think that this should be true.

If this Court grants review, it can interpret Section 703(a)(1) once and for all and fully resolve the circuit split. If any doubt remains regarding whether the requirements of Section 703(a)(1) vary with the particular way in which an employer has discriminatorily altered the terms, conditions, or privileges of employment, this Court could grant certiorari here and in *Muldrow v. City of Saint Louis* (No. 22-193). That would allow this Court to evaluate Davis's discriminatory paid suspension alongside the discriminatory transfer and refusal to transfer that gave rise to *Muldrow*. *See* 30 F.4th 680, 688-90 (8th Cir. 2022), *petition for cert. filed*, No. 22-193 (Aug. 29, 2022).

II. Section 703(a)(1) applies to *any* discriminatory employer practice that alters the "terms, conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1). The text does not contain an adverse-employment-action requirement. *See Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C Cir. 2022) (en banc). By requiring Davis to prove one anyway, the Eleventh Circuit disregarded the statutory text and Congress's desire that Title VII "strike at the entire spectrum of disparate treatment"

in employment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (citation omitted).

A. LSA does not address Section 703(a)(1)'s text or purpose. Instead, it insists that its position is compelled by *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), which it invokes for the proposition that employers have a "legal obligation under Title VII to promptly and effectively address allegations of a hostile environment." Opp. 11-12. LSA seems to contend that, under *Faragher*, because Davis stood accused of creating a hostile work environment for his employees (an allegation he strenuously denies), LSA should have been free to address that allegation however it saw fit, including by discriminating against Davis because of his race. One hardly needs to open the U.S. Reports to know that this policy-laden, atextual contention cannot be right.

Faragher addresses a different subject entirely. It recognizes that employers have an "affirmative obligation" to protect employees from harassment. *Faragher*, 524 U.S. at 806. And it holds that an employer may sometimes escape liability for a hostile work environment if it "exercised reasonable care to prevent and correct" that harassment "promptly." *Id.* at 807. But this Court has never come anywhere close to suggesting that an employer who attempts to address a hostile work environment gets a blank check to engage in separate discriminatory conduct.

LSA does not help its case by characterizing its *Faragher* argument as bearing on whether this case is a suitable vehicle for deciding the question presented. Its argument is wrong whatever the label. LSA offers no serious rejoinder to the petition's explanation (at 23-24) why this case provides an excellent vehicle.

B. LSA's confusion about Section 703(a)(1)'s meaning extends beyond *Faragher*. It argues that "this Court has repeatedly held that there is a threshold of substantiality above which an employment action must rise." Opp. 7. But it offers only hostile-work-environment cases as support. This case concerns Davis's suspension—a discrete act of discrimination. Hostile-work-environment cases are "different in kind." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

The differences between these two categories of cases confirm that the hostile-work-environment rules do not apply to discrete-discrimination claims like Davis's. Decisions in hostile-work-environment cases observe that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment." *Meritor*, 477 U.S. at 67. Only when the harassment is severe or pervasive does it transform the work environment into one "heavily charged" with discrimination, thereby changing the terms and conditions of employment. *Id.* at 66 (citation omitted). But the severe-or-pervasive requirement solves a problem in hostile-work-environment cases that does not exist in a discrete-discrimination case, such as Davis's, when the employer alters the terms, conditions, or privileges of employment directly. In that situation, it is immediately clear that the terms, conditions, or privileges of employment have been affected, regardless of whether the employer's behavior was severe or pervasive. Discriminatorily altering the terms, conditions, or privileges of employment always violates Section 703(a)(1) because "[t]he plain text of

Title VII requires no more." *Chambers*, 35 F.4th at 875.

Contrary to LSA's assertion, Opp. 7, this Court has never adopted a substantiality requirement in discrete-discrimination cases under Section 703(a)(1). To the contrary, it has repeatedly recognized the provision's breadth, stressing that Title VII "prohibits racial discrimination in *any* employment decision." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973) (emphasis added); *see also, e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (explaining that Section 703(a)(1) covers "[t]hose benefits that comprise the incidents of employment or that form an aspect of the relationship between the employer and employees" (citation omitted)); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) ("The emphasis of both the language and the legislative history of [Section 703(a)(1)] is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."); *McDonnell Douglas*, 411 U.S. at 801 ("Title VII tolerates no racial discrimination.").

Yet despite the unambiguous language of the statute and the unequivocal statements of this Court, confusion persists. The Eleventh Circuit reached the wrong result. And it refuses to correct this self-evident error on its own. Pet. App. 49a-50a (denying rehearing en banc). This Court's review is not only warranted; it is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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