No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

CITY OF ST. LOUIS, STATE OF MISSOURI ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent St. Louis Police Department maintains that review should be denied because, in its view, all circuits outside the Fifth agree with the Eighth Circuit that an employee must suffer a so-called "adverse employment action" to have an actionable Title VII claim. This effort to paper over the entrenched circuit split—which has deepened in recent years as the Sixth and D.C. Circuits have tethered their precedent to Title VII's text—should be rejected. The same goes for the Department's invented vehicle arguments and attempt to paint discriminatory job-transfer decisions as de minimis harms unworthy of Title VII's protection. This Court should grant review.

ARGUMENT

I. The circuits are split.

The Department seeks to undermine the circuit split over what constitutes an actionable Title VII claim by concentrating largely on job-transfer decisions. *See* Opp. 10-12, 14-18. But whether the focus is on transfers and transfer-denials or on the circuits' rules more generally, courts rely on disparate adverse-employment-action requirements to reach different outcomes in materially identical circumstances. That deep split warrants this Court's immediate attention.

A. Job transfers

Despite the Department's contrary protests, in the D.C., Sixth, and Ninth Circuits, a discriminatory transfer alone violates Title VII, whereas the other circuits require more.

1. In *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022), the en banc D.C. Circuit couldn't have been clearer: "We hold that an employer that transfers an employee or denies an employee's transfer request because of the employee's race, color, religion, sex, or national origin violates Title VII by discriminating against the employee with respect to the terms, conditions, or privileges of employment." *Id.* at 872. Full stop. So, if Muldrow's claim arose in the D.C. Circuit, it would be actionable. The Department's lengthy speculations (Opp. 16-18) that the D.C. Circuit might someday create a *de minimis* exception encompassing Muldrow's job-transfer claims was expressly rejected in *Chambers*: "we need not decide today whether Title VII includes a de minimis exception because the discriminatory denial of a job transfer request … easily surmounts this bar." *Id.* at 875.

The Sixth Circuit held, in *Threat v. City of Cleveland*, 6 F.4th 672, 678-79 (6th Cir. 2021), that a discriminatory forced shift transfer—not even a full job transfer but a scheduling transfer without impact on job responsibilities—is actionable. And, like *Chambers*, *Threat* "concluded that a job transfer surmounted [any de minimis] bar when the only change in the employee's job was not receiving a shift on his 'preferred day' of the week." *Chambers*, 35 F.4th at 881 (discussing *Threat*). A job transfer, then, that results in a change of responsibilities, schedule, and networking opportunities—like the one Muldrow experienced, Pet. 4-6—would certainly be actionable in the Sixth Circuit.

The Ninth Circuit, too, has held—repeatedly—that discriminatory "lateral transfers" are per se actionable. *See, e.g.*, *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000) (citing three precedential decisions to the same effect); *see also* Pet. 12. The Department says that *Campbell v. Hawaii Department of Education*, 892 F.3d 1005 (9th Cir. 2018), stands for the proposition that discriminatory lateral transfers are not "categorically" actionable in the Ninth Circuit. That's wrong. The claim there failed factually—because "the record contain[ed] no evidence that the classes Campbell preferred to teach were even available during" the school year, *id.* at 1014-15—and, alternatively, because the plaintiff lacked evidence of discrimination, *id.* at 1015-16, the very issue the Eighth Circuit elided.

2. The remainder of the other circuits, in contrast, ignore Section 703(a)(1)'s text and license discriminatory transfers. *See Chambers*, 35 F.4th at 880-81 (describing the circuit split). As illustrated by the decision below, the Eighth Circuit effectively blesses discriminatory transfers when, in its view, the employee hasn't shown a "materially significant disadvantage." Pet. 9a. The Department makes the point for us, explaining that circuit precedent renders discriminatory transfers nonactionable unless courts divine that they meet various atextual standards. *See, e.g.*, Opp. 9-10 (CA1: discriminatory transfers are actionable only if jobs involve "significantly different responsibilities"); Opp. 10-11 (CA2: "material" or "significant" job changes); Opp. 12 (CA4: new position must have "significant detrimental effect"); Opp. 15

(CA10: "'substantia[l] differen[ces]' in the job") (alterations in original).

The Department says that the widely different outcomes can be rationalized by factual differences among cases. *See* Opp. 6. That is simply wrong, as the irreconcilable outcomes discussed in the petition show. *E.g.*, Pet. 22. For example, the Department cannot explain why a principal who is transferred to an administrative position that she views as less desirable but that the school district bills as a promotion has an actionable discrimination claim in the Eleventh Circuit, *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000), but a principal who experiences almost identical treatment in the Fourth Circuit does not, *Cole v. Wake Cnty. Bd. of Educ.*, 834 F. App'x 820, 821 (4th Cir. 2021), *cert. denied*, 141 S. Ct. 2746 (2021). These irreconcilable results arise because rules based on "materiality," "significance," and "objectively tangible harm" are "so amorphous as to accommodate inconsistent outcomes in like cases," *Chambers*, 35 F.4th at 881, leaving courts "adrift with a line-drawing exercise unmoored from the statutory text." *Id.* at 882. A proper resolution of the split over which discriminatory job transfers are actionable thus would not only provide guidance to employers, employees, and courts, but anchor Title VII to its text.

B. The meaning of "terms, conditions, or privileges" under Section 703(a)(1)

The Department also does little to counter the petition's broader point—made for years now by courts, the Government, and commentators—that the

circuits have taken starkly differing approaches to the statutory phrase "terms, conditions, or privileges" of employment. *See, e.g.*, *Chambers*, 35 F.4th at 880-81; *Ray*, 217 F.3d at 1241-42; Br. for U.S. as Amicus Curiae, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451, at *18-20 (Mar. 20, 2020); 1 Merrick T. Rossein, *Emp. Discrimination Law and Litig.* § 2.6 (Dec. 2020).

1. The Department overlooks that in the Sixth and D.C. Circuits, "[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" because "[t]he plain text of Title VII requires no more." *Chambers*; 35 F.4th at 874-75. "The unadorned wording of [Title VII] admits of no distinction between 'economic' and 'non-economic' discrimination or 'tangible' and 'intangible' discrimination," "[n]or does [it] distinguish between 'subtle' or 'overt' discrimination." *Id.* at 874; *see Threat*, 6 F.4th at 679 (explaining adversity requirements as judicial "innovations" that are legitimate only if "shorthand" for the statute's words). Though the Ninth Circuit has not engaged in the same textual analysis, it has, as just explained (at 3), interpreted Section 703(a)(1) to cover a wide range of employment decisions. *See* Pet. 12.

2. The Department acknowledges an "especially restrictive" circuit-court understanding of Section 703(a)(1), limiting coverage to only "ultimate employment actions," such as hiring, firing, promoting, and compensating, *see* Opp. 8. It fairly notes that the Fifth Circuit is currently reconsidering

that position, *see id.*—though a change to Fifth Circuit precedent could only have the effect of deepening the circuit split, *see* Pet. 14 n.4.

In any case, although the Third Circuit sometimes maintains that discrimination is actionable when "serious and tangible enough," it has *effectively* taken the same position as the Fifth. *See* Pet. 15. How else to explain, for instance, the shocking outcome in *Harris v. Attorney General United States*, 687 F. App'x 167 (3d Cir. 2017)? There, the plaintiff alleged he was required to work in 100-degree heat while similarly situated white employees were not, but he lost because he failed to cite "any authority suggesting that the events in question amounted to an adverse employment action." *Id.* at 169. Like the Fifth Circuit's decision involving similar (and equally startling) facts, *see Peterson v. Linear Controls, Inc.*, 757 F. App'x 370 (5th Cir. 2019), *petition dismissed*, 140 S. Ct. 2841 (2020), Harris's case was rejected because his miserable conditions did not alter his "compensation" or "reduce his opportunities for promotion or professional growth," but involved only "one of his regular job duties," 687 F. App'x at 169. That is functionally indistinguishable from the ultimate-employment-decision standard, *see Peterson*, 757 F. App'x at 373. The Department doesn't disagree but says that the *Harris* plaintiff lost because the Third Circuit found no "differential treatment," Opp. 11-12 n.4. That is not accurate. The court did "not doubt" Harris's allegations or the "seriousness" of his "injury," but rejected his claim because he had not "show[n] an adverse employment action." 687 F. App'x at 169.

3. The Department agrees with our characterization of the other circuits as having adopted a grab-bag of differing adverse-employment-action formulations, requiring harm that is "serious and tangible," "material," "significant," or "substantial," among other things, *see* Opp. 6-7. As indicated above (at 4), the Department is wrong that factual differences, not differing standards, account for the cases' confounding results. There's no rational way, for instance, to explain the difference between a claim that sex-based shift assignments in the Tenth Circuit are not actionable, *Piercy v. Maketa*, 480 F.3d 1192, 1203-04 (10th Cir. 2007), but race-based shift assignments in the Sixth Circuit are, *Threat*, 6 F.4th at 677. *See Chambers*, 35 F.4th at 880-81 (making the same observation using an array of inter- and intra-circuit examples). But the more salient point is that even if we indulged the Department's extravagant assertion that these circuits' various tests are really the same and are applied with lapidary exactitude, that would only make starker the contrast between their tests and the positions taken by the circuits that apply Title VII's text.

II. The question presented is important.

The petition explains (at 24-28) that this case presents an important, recurring issue on which the Government has urged review—in large part because the lower courts have flouted Title VII's text. The Department counters that the adverse-employment-action doctrine's profound effects on employees and employers do not exist outside the Fifth Circuit and complains that we rely on "alarmist hypotheticals."

Opp. 18-19. Not so. Our examples are from real life, and they demonstrate the far-reaching consequences of the existing legal standards coast to coast. Pet. 24. As the petition notes, *id.*, outside the Fifth Circuit, courts have held that Section 703(a)(1)'s "terms, conditions, or privileges" do not cover paid suspensions, *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1267 (11th Cir. 2021), *petition pending*, No. 22-231 (U.S. Sept. 8, 2022), employee probation, *Thompson v. Liberty Mut. Ins.*, No. 18-6092, 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.*, No. 18-5201, 2021 WL 1853220, at *9 (N.D. Ill. May 10, 2021). One need look no further than recent applications of the decision below to see how existing precedent in the lower courts permits a range of discriminatory practices. *See, e.g.*, *Naes v. City of St. Louis*, No. 19-2132, 2022 WL 1125516, *2 (E.D. Mo. Apr. 15, 2022), *appeal pending* (although a jury could conclude that the Department's transfer decisions were discriminatory, "after *Muldrow*," the Department was entitled to judgment). In *Gilmore-Lee v. Vilsack*, No. 20-00408, 2022 WL 16838902, at *10 (W.D. Mo. Nov. 9, 2022), for example, a district court held that, under *Muldrow*, an employer may take away work projects, remove an employee's access to materials and meetings, refuse an employee an office, or monitor an employee more closely based on race, religion, sex, or other protected status. *Id.*

Moreover, as already shown (at 6), the Department is wrong that the Fifth Circuit is the only circuit to apply an especially restrictive interpretation of Section 703(a)(1). So, it is also wrong to suggest (*see*

Opp. 8-9 n.3) that the question presented here implicates a different circuit split and different effects on employees than the nearly identical question in *Peterson v. Linear Controls, Inc.*, No. 18-1401.

III. This case presents an excellent vehicle.

A. The Department acknowledges that the Eighth Circuit squarely resolved the question presented. Because the court of appeals held that Muldrow had not suffered an "adverse employment action," in the Department's words, it therefore "had no occasion to and did not address whether … the City had acted with discriminatory animus." Opp. 5. In other words, the Eighth Circuit effectively held that the Department could reassign Muldrow solely because she is a woman. There are no antecedent questions or other impediments that could prevent this Court from reaching the question presented, and the Department's self-serving view on the strength of Muldrow's discrimination evidence, *compare* Pet. 4-7, 33-34, *with* Opp. 21-22, therefore presents no barrier to review. *See* Pet. 28-29.

B. The Department is wrong to suggest that Muldrow forfeited reliance on facts about how her transfer imposed new workplace terms, conditions, or privileges. Opp. 20. That's clear from the Eighth Circuit's decision, which never references forfeiture. *See* Pet App. 1a-20a. And the Department did not argue below that Muldrow had forfeited reliance on scheduling changes, uniform, ability to work on investigations outside of St. Louis, or access to a take-home unmarked police car. Br. of Appellees at 12, *Muldrow v. City of St. Louis et al.*, No. 20-2975, 2021

WL 1044273 (8th Cir. Mar. 9, 2021). To the contrary, the Department acknowledged that Muldrow had raised these points, but argued they did not show that Muldrow suffered any harm. *Id.* at *12-13.

In any case, these facts do not, in our view, bear on a proper resolution of the question presented. It is undisputed that the Department transferred Muldrow to an entirely new position with different job responsibilities. Opp. 1-2, 20; Pet. App. 2a-4a. The parties also agree that the Eighth Circuit determined that Muldrow's transfer would not violate Title VII even if it had been motivated by unlawful discrimination. Opp. 5. So, whether Title VII prohibits discriminatory transfer decisions is before the Court even if this Court ignores the exacerbating factors that made her new job even less desirable.

C. Next, the Department maintains that an independent ground supports the lawfulness of its refusal to transfer Muldrow. Opp. 21. But the court of appeals applied the same reasoning to Muldrow's failure-to-transfer claim as it did when it determined that Muldrow's forced transfer was not actionable under Title VII. Pet. App. 13a-14a. In the Eighth Circuit's view, Muldrow did "not demonstrate how the sought-after transfer would have resulted in a material, beneficial change to her employment." *Id.*

Thus, although the court of appeals misunderstood the breadth of Title VII's coverage, it appeared to appreciate, as have other courts, that there is no meaningful difference between a discriminatory transfer and discriminatory transfer denial. *See Ortiz-Diaz v. U.S. Dep't of Hous. & Urb.*

Dev., 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring); *accord Chambers v. District of Columbia*, 35 F.4th 870, 872 (D.C. Cir. 2022) (en banc). So regardless of whether one views Muldrow's transfer-denial claim as somehow not presented here, Muldrow's forced-transfer claim would remain, and it squarely poses the legal issue central to both claims.

IV. The Eighth Circuit's ruling is wrong.

The simple answer to the Department's defense of the Eighth Circuit's ruling is that the parties' disagreement on that front is unsurprising, and, given the undeniable importance of the question presented and the entrenched division among the circuits, this Court should grant review. There will be time enough later for this Court to consider the parties' contrasting merits' positions in detail.

In short, the Department's arguments in favor of maintaining the Eighth Circuit's adverse-employment action doctrine do not survive scrutiny. For example, claiming reliance on *ejusdem generis*, the Department argues that 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. Opp. Br. 23. But "otherwise to discriminate" instructs employers that discriminatory conduct banned by Section 703(a)(1) extends to actions *other than* hiring and firing, *see Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc)—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.

There are also answers to the Department's insistence that the word "discriminate" creates a heightened-harm requirement, Opp. 22-23, its misunderstanding of the relationship between Sections 703(a)(1) and (a)(2), Opp. 24-25, and its misinterpretation of this Court's hostile-work-environment precedents, Opp. 25-26, some of which we previewed in the petition (at 13, 29-34); *see also* Reply Br. of Appellant at 11, 16, 21-22, *Chambers v. District of Columbia*, No. 19-7098, 2021 WL 4287284 (D.C. Cir. Sept. 20, 2021); Reply Br. of Petitioner at 6-7, *Davis v. Legal Servs. Ala., Inc.*, No. 22-231 (U.S. Dec. 20, 2022). As noted, if the Court grants review it will have time to consider these arguments.

At the end of the day, "if the words of Title VII are our compass," *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021), Section 703(a)(1) covers the gamut of the employee-employer relationship, including, as in Muldrow's case, the most fundamental "term" or "condition" of employment: the job itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

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