No. 22-2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LOUIS NAES,

Plaintiff-Appellant

v.

CITY OF ST. LOUIS, MISSOURI, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
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ADDRESSED HEREIN

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The Attorney General and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibility under Title VII. See 42 U.S.C. 2000e-5(a) and (f)(1).

This case presents an important question regarding the scope of actionable discrimination under Section 703(a)(1) of Title VII, an issue that the United States

addressed in briefs filed before the Supreme Court in *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily dismissed), and in *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (cert. denied).[1] In addition, the United States has recently filed amicus briefs discussing the scope of the prohibition on discrimination in the "terms, conditions, or privileges of employment" under Section 703(a)(1) throughout the courts of appeals. See U.S. Br. as Amicus Curiae, *Lyons* v. *City of Alexandria*, No. 20-1656 (4th Cir. Sept. 22, 2020); U.S. Br. as Amicus Curiae, *Harrison* v. *Brookhaven Sch. Dist.*, No. 21-60771 (5th Cir. Dec. 16, 2021); U.S. Br. as Amicus Curiae, *Hamilton* v. *Dallas Cnty.*, No. 21-10133 (5th Cir. May 21, 2021); U.S. Br. as Amicus Curiae, *Threat* v. *City of Cleveland*, No. 20-4165 (6th Cir. Jan. 4, 2021); U.S. Br. as Amicus Curiae, *Muldrow* v. *City of St. Louis*, No. 20-2975 (8th Cir. Dec. 10, 2020); U.S. Br. as Amicus Curiae, *Peccia* v. *California Dep't of Corr. and Rehab.*, No. 21-16962 (9th Cir. Apr. 25, 2022); U.S. En Banc Br. as Amicus Curiae, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir. July 7, 2021); see also *Neri* v. *Board of Educ. for Albuquerque Pub. Schs.*, No. 20-2088 (10th Cir. Nov. 16, 2020) (addressing the

[1] The United States' brief in *Peterson* can be found at https://www.justice.gov/sites/default/files/briefs/2020/03/23/18-1401_peterson_ac_pet.pdf, and the United States' brief in *Forgus* can be found at https://www.justice.gov/sites/default/files/briefs/2019/05/07/18-942_forgus_opp.pdf.

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same issue under Title I of the Americans with Disabilities Act, 42 U.S.C. 12112(a)).

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE AND APPOSITE CASES

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides, in relevant part, that:

> [i]t shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. 2000e-2(a)(1) (emphasis added).

At issue in this appeal is whether the denial or forced acceptance of a job transfer, allegedly made on the basis of the employee's sex, may constitute discrimination "with respect to * * * compensation, terms, conditions, or privileges of employment" under Section 703(a)(1), even where there is no change in benefits or salary.[2]

Muldrow v. *City of St. Louis*, 30 F.4th 680 (8th Cir. 2022)

Chambers v. *District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc)

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[2] The United States takes no position on the merits of plaintiff's claim or on any other issues presented in this appeal.

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Threat v. *City of Cleveland*, 6 F.4th 672 (6th Cir. 2021)

STATEMENT OF THE CASE

1. Plaintiff-Appellant Louis Naes, a heterosexual male, is employed by the City of St. Louis as a police officer. R. Doc. 59, at 3-8.[3] Naes alleges that, because of his sex (including his sexual orientation), he was involuntarily transferred from his position as an animal abuse investigator to a position as a patrol officer and was later denied the ability to transfer back to his previous position as an investigator. R. Doc. 59, at 3-10; R. Doc. 147, at 2. Naes sued, bringing Title VII discrimination and retaliation claims, Fourteenth Amendment equal protection claims, as well as claims under Missouri state law. R. Doc. 59, at 7-15.

2. As relevant here, in March 2022, the district court issued an order denying the City's motion for summary judgment on Naes's Title VII discrimination claims. The court found that there was a "genuine dispute over whether there was a materially significant difference between Plaintiff's position as an Animal Abuse Investigator and his position" as a patrol officer. R. Doc. 147, at 1. The court explained that "Plaintiff went from working as a detective to working as a patrol officer; from working weekdays, 7:00 AM to 3:30 PM, to

[3] "R. Doc. __" refers to the docket and page number of documents filed in the district court.

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working a rotating day and night schedule that included weekends; and from a position that afforded him an office at headquarters," as well as "assignments from the Chief of Police, and local news coverage, to a position with none of the above." R. Doc. 147, at 2-3.

3. In April 2022, while Naes's case was still before the district court, this Court issued its opinion in *Muldrow* v. *City of St. Louis*, 30 F.4th 680 (8th Cir. 2022), a Title VII case also involving an allegedly discriminatory involuntary job transfer. In *Muldrow*, Sergeant Jatonya Muldrow sued the City of St. Louis for sex discrimination after she was involuntarily transferred from working as a detective in the Intelligence Division to a position in the Fifth District. *Id.* at 684-685. In her former position, Sergeant Muldrow had a weekday schedule and worked on matters relating to public corruption, human trafficking, and gun and gang violence, whereas in her new position, she worked a rotating schedule that included weekends and was responsible for administrative upkeep and supervising patrol officers. *Ibid.* This Court affirmed a grant of summary judgment to the City, concluding that her forced transfer (and the City's later refusal to transfer her back to her prior position) was not actionable. *Id.* at 688-690.

This Court began its analysis in *Muldrow* by stating that "[a]n adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." 30 F.4th at 688 (quoting *Clegg* v. *Arkansas*

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Dep't of Corr., 496 F.3d 922, 926 (8th Cir. 2007)). The Court emphasized that, "minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action." *Ibid.* (alteration omitted) (quoting *Jackman* v. *Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013)). Under this standard, the Court explained that it has "repeatedly found that an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action." *Id.* at 688 (citations omitted). This Court accordingly affirmed the rejection of Muldrow's claim, as she suffered no "diminution to her title, salary, or benefits" and could not show that "she suffered a significant change in working conditions or responsibilities." *Muldrow*, 30 F.4th at 688-689.

4. The day after this Court issued its decision in *Muldrow*, the City in this case filed a motion for reconsideration in the district court, arguing that *Muldrow* foreclosed Naes's Title VII discrimination claims. R. Doc. 141. The district court acknowledged *Muldrow*'s holding that "'absent proof of harm' resulting from an employee's reassignment, there is no adverse employment action." R. Doc. 147, at 3 (quoting *Muldrow*, 30 F.4th at 688). The district court found that, as a result of *Muldrow*, there was no longer a genuine dispute as to whether Naes's transfer constituted an adverse employment action. "Like Muldrow, Plaintiff's salary and

rank remained the same, and Plaintiff's altered responsibilities and work schedule are not, in themselves, materially significant disadvantages." R. Doc. 147, at 4 (internal citation omitted). The court accordingly granted the motion for reconsideration and entered judgment for the City. R. Docs. 147, 148.

Naes timely filed this appeal. R. Doc. 149.

SUMMARY OF ARGUMENT

This Court should join the D.C. Circuit and reconsider its precedent to hold that all discriminatory job transfers and denials of requested transfers are actionable under Section 703(a)(1) of Title VII because they affect an employee's "terms" and "conditions" of employment. 42 U.S.C. 2000e-2(a)(1). This conclusion is dictated by Section 703(a)(1)'s plain text. Title VII does not define the phrase "terms, conditions, or privileges of employment," and so that phrase is given its ordinary meaning. There is no more fundamental "term" or "condition" of employment than the employee's formal job position. As such, forcing or denying an employee's job transfer on the basis of a protected characteristic falls within the scope of discrimination prohibited by Section 703(a)(1).

The district court's conclusion that "'absent proof of harm' resulting from an employee's reassignment, there is no adverse employment action" (R. Doc. 147, at 3 (quoting *Muldrow*, 30 F.4th at 688)), reflects current circuit precedent that is wrong and should be reconsidered. As the D.C. Circuit recently held, the

requirement to prove harm above and beyond being subjected to a discriminatory transfer is unsupported by Section 703(a)(1)'s text, structure, and purpose. *Chambers* v. *District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc). Moreover, the Supreme Court has repeatedly stressed that the phrase "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), "is an expansive concept" with a broad sweep. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986) (citation omitted). It is unnecessary to import an atextual, additional harm requirement to ensure that Section 703(a)(1) is not stretched to cover ordinary workplace disputes. The text already limits Title VII discrimination claims by requiring that they be related to the workplace and be based on race, color, sex, religion, or national origin. This Court's "material employment disadvantage" standard departs from Section 703(a)(1)'s text and permits brazen acts of discrimination—including openly transferring employees based on their race or sex—so long as there is no proof of a tangibly worsened working environment, or economic harm. That result is at odds with Title VII's core purpose of "*eliminating* discrimination in employment." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977) (emphasis added).

The district court also erred by conflating the standard for proving a discrimination claim under Section 703(a)(1) of Title VII with the standard for proving a retaliation claim under Section 704(a). The district court erroneously

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cited *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53, 68 (2006), as supporting a requirement to prove a material disadvantage resulting from an allegedly discriminatory transfer. R. Doc. 147, at 4. But *Burlington Northern* concerns the standard for Title VII retaliation claims, not discrimination claims under Section 703(a)(1). 548 U.S. at 67-68. Under Section 703(a)(1), and absent affirmative defenses not at issue in this case, no amount of race, sex, religion, or national origin discrimination that affects the terms, conditions, or privileges of employment is lawful.

ARGUMENT

ALL DISCRIMINATORY JOB TRANSFERS ARE ACTIONABLE UNDER SECTION 703(a)(1) OF TITLE VII BECAUSE THEY AFFECT THE "TERMS" AND "CONDITIONS" OF EMPLOYMENT

Section 703(a)(1) 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 his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).[4] Naes does not allege that the City made a "hir[ing]" or "discharge" decision based on his sex, nor does he contend that sex played a role in

[4] Section 703(a)(1) applies to private employers as well as local public employers such as the City. A separate but related provision of Title VII provides that federal-sector "personnel actions * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a).

his "compensation." *Ibid.* Rather, the question in this appeal is whether forcing or refusing to grant a job transfer to a position that carries the same salary and level of responsibility may involve discrimination "with respect to * * * terms, conditions, or privileges of employment."

A. Because There Is No More Fundamental "Term" Or "Condition" Of Employment Than The Job Position Itself, All Discriminatory Job Transfers Fall Within The Scope Of Section 703(a)(1)

In interpreting Title VII, the starting point, as always, is "the language of" the statute. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986); see also *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President."). In interpreting Title VII's text, the "charge is to give effect to the law Congress enacted." *Lewis* v. *City of Chi.*, 560 U.S. 205, 217 (2010).

Congress did not define the phrase "terms, conditions, or privileges of employment" in Title VII. "When a term goes undefined in a statute," courts give "the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). This case involves formally transferring an employee from one position to another, which in turn involved a change in work responsibilities, a different shift schedule (from weekdays only to include nights and weekends), and an office location away from headquarters. R. Doc. 147, at 2-3. Under the

ordinary meaning of the controlling statutory language, such changes plainly implicate the "terms" and "conditions" of employment. 42 U.S.C. 2000e-2(a)(1).

Just as a "shift schedule is a term of employment," *Threat* v. *City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021), so too is the location where those shifts are to be worked and the formal position that the employee holds. The "when," "where," and "what" of a job—when the employee is assigned to work, at what location, the position they hold and particular work they are required to do—all fall squarely within the "terms" and "conditions" of employment. See *ibid.* ("If the words of Title VII are our compass, it is straightforward to say that a shift schedule * * * counts as a term of employment. * * * How could the *when* of employment not be a *term* of employment?"). A typical employee asked to describe his "terms" or "conditions * * * of employment," 42 U.S.C. 2000e-2(a)(1), would almost surely mention where he works and what he does. See also EEOC Compliance Manual § 15-VII(B)(1) (2006) ("Work assignments are part-and-parcel of employees' everyday terms and conditions of employment.").

In *Chambers* v. *District of Columbia*, the en banc court of appeals for the D.C. Circuit recently addressed the same question presented in this appeal—namely, whether all discriminatory job transfers are actionable under Section 703(a)(1), or whether job transfers, even if motivated by discriminatory animus, are only actionable if they result in "objectively tangible harm." 35 F.4th 870, 872

(D.C. Cir. 2022) (en banc) (citation omitted). The court overturned its prior precedent to hold that "the straightforward meaning of the statute * * * emphatic[ally]" prohibits all discriminatory transfers, even those that do not result in changes in benefits, salary, or worsened working conditions. *Id.* at 874.

The *Chambers* en banc court explained that "the transfer of an employee to a new role, unit, or location * * * undoubtedly" affects that employee's terms, condition, or privileges of employment. 35 F.4th at 874. It stressed, "it is difficult to imagine a more fundamental term or condition of employment than the position itself." *Ibid.* (quoting U.S. Br. for Resp't in Opp'n at 13, *Forgus* v. *Shanahan*, No. 18-942 (S. Ct. May 6, 2019)). *Chambers* agreed with what then-Judge Kavanaugh had previously explained: under the plain language of Section 703(a)(1), transferring or denying an employee's transfer, on the basis of a protected characteristic, "plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." *Ortiz-Diaz* v. *United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (citation omitted).

In granting judgment to the City on Naes's Title VII discrimination claim, the district court did not grapple with Section 703(a)(1)'s plain text, but instead applied the law of this circuit as set forth in *Muldrow* v. *City of St. Louis*, 30 F.4th 680 (2022). In *Muldrow*, this Court reiterated that an "employee's reassignment,

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absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action." *Id.* at 688. But as discussed further below, the requirement to prove harm above and beyond being subjected to a discriminatory transfer is a "judicial gloss that lacks any textual support" from Title VII. *Chambers*, 35 F.4th at 875. This case presents this Court with an opportunity to join the D.C. Circuit and return to Title VII's plain text in construing the scope of discriminatory conduct prohibited by Section 703(a)(1).

B. Section 703(a)(1) Does Not Require Plaintiffs To Make An Additional, Atextual Showing Of "Material" Or "Tangible" Harm

In *Muldrow* and other Title VII discrimination cases, this Court has required plaintiffs to prove an "adverse employment action," which the Court has defined not by reference to the statutory text, but instead according to an atextual standard under which the plaintiff must prove a "tangible change in working conditions that produces a material employment disadvantage." *Muldrow*, 30 F.4th at 688 (quoting *Clegg* v. *Arkansas Dep't of Corr.,* 496 F.3d 922, 926 (8th Cir. 2007)). But that standard is fundamentally flawed, as the "plain text of section 703(a)(1) contains no requirement that an employee alleging discrimination in the terms or conditions of employment make a separate showing of 'objectively tangible harm'" or other employment disadvantage. *Chambers*, 35 F.4th at 879-880. Indeed, requiring proof of tangible or material harm beyond the allegedly

discriminatory transfer decision is unsupported by Title VII's text, structure, and purpose.

The phrase "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), "is an expansive concept" with a broad sweep, *Meritor*, 477 U.S. at 66 (citation omitted). The phrase "evinces a congressional intent to strike at the entire spectrum of disparate treatment * * * in employment." *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation and internal quotation marks omitted). Moreover, the Supreme Court has "repeatedly made clear that * * * the scope of the prohibition" against discrimination in Section 703(a)(1) "is not limited to 'economic' or 'tangible' discrimination." *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Harris*, 510 U.S. at 21). Thus, contrary to the decision below, Naes's allegedly discriminatory job transfer is actionable under Section 703(a)(1), even though his "salary and rank remained the same." R. Doc. 147, at 4.

If Congress had intended that Section 703(a)(1) reach only discriminatory conduct that results in a certain level of harm, it could have said so. Indeed, the very next statutory paragraph—Section 703(a)(2)—makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect his status as an employee*,

because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2) (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (alteration in original; citation and brackets omitted).

Contrary to this Court's stated concern that without a material or tangible harm requirement, "every trivial personnel action that an irritable . . . employee did not like would form the basis of a discrimination suit," *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (alteration in original; citation omitted), such a requirement is unnecessary to ensure that Section 703(a)(1) is not stretched to cover ordinary workplace disputes.

Section 703(a)(1)'s limits come from its statutory text, not from "add[ing] words to the law to produce what is thought to be a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). And Section 703(a)(1)'s text already limits its scope in two important ways. First, the phrase "with respect to * * * compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), makes clear that Section 703(a)(1) "protects an individual only from *employment-related* discrimination." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006) (emphasis added).

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Second, Section 703(a)(1) requires proof that an employer "discriminate[d] * * * *because of*" a protected trait. 42 U.S.C. 2000e-2(a)(1) (emphasis added); see also 42 U.S.C. 2000e-2(m) (providing that a violation also may be established where a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor"). Thus, a plaintiff must prove that her employer intentionally treated her "worse than others who are similarly situated" on the basis of a prohibited characteristic. *Bostock*, 140 S. Ct. at 1740. Taken together, these requirements ensure that a plaintiff must do more than simply allege unfavorable treatment to have an actionable claim. See *Threat*, 6 F.4th at 680 (concluding that it is unnecessary to require proof of material adversity to ensure that Section 703(a)(1) is not turned "into a 'general civility code' that federal courts will use to police the pettiest forms of workplace conduct" (citation omitted)).

Muldrow's "material employment disadvantage" standard allows for untenable results. Under this standard, an employer would be free to engage in brazen acts of discrimination—openly transferring employees on the basis of race or sex—so long as there is no further showing of worsened working conditions, promotion prospects, or other "tangible" or "material" harm. But that result is contrary to Title VII's core purposes. By prohibiting discrimination relating to the terms, conditions, or privileges of employment, "Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due

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to discrimination." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). "The emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977) (emphasis added).

This Court should join other circuits that have recently revisited the meaning of "terms, conditions, or privileges of employment" and reconsider its "material employment disadvantage" standard. Indeed, the en banc D.C. Circuit recently overturned a similar, atextual "objectively tangible harm" requirement for Section 703(a)(1) claims. See *Chambers*, 35 F.4th at 872 (overruling *Brown* v. *Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)). The panel that originally heard *Chambers* issued a separate concurrence stating that "statutory text, Supreme Court precedent, and Title VII's objectives make clear that employers should never be permitted to transfer an employee or deny an employee's transfer request merely because of that employee's race, color, religion, sex, or national origin." *Chambers* v. *District of Columbia*, 988 F.3d 497, 506 (D.C. Cir. 2021) (Tatel and Ginsburg, JJ., concurring). That concurrence urged the court to rehear the case en banc "to correct this clear legal error" that allowed employers to make such transfers "so long as the employee suffers no 'tangible harm.'" *Ibid.* And in *Threat*, Judge Sutton instructed that Sixth Circuit precedent construing Title VII discrimination claims to cover only "materially adverse employment actions" be understood only

as a shorthand for the statutory text and as incorporating a *de minimis*/Article III injury requirement. 6 F.4th at 678-679, 682. Finally, in *Hamilton* v. *Dallas County*, No. 21-10133, 2022 U.S. App. LEXIS 21502 (5th Cir. Aug. 3, 2022), a Fifth Circuit panel in a Title VII case challenging a policy denying weekends off only to women, but not to men, highlighted the need for en banc review to "harmonize our case law with our sister circuits," including the D.C. and Sixth Circuits, "to achieve fidelity to the text of Title VII." *Id.* at *13. The United States respectfully urges this Court to join these other courts of appeals and bring its precedent in line with the dictates of Section 703(a)(1)'s text.[5]

C. The Requirement To Show Material Adversity For A Section 704(a) Retaliation Claim Does Not Support A Heightened Showing Of Harm For A Section 703(a)(1) Discrimination Claim

In granting judgment to the City, the district court improperly conflated the standard for proving a discrimination claim under Section 703(a)(1) with the

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[5] The United States filed amicus briefs in *Chambers*, *Threat*, and *Hamilton*, urging those courts to reconsider their precedent. The United States also filed an amicus brief in *Muldrow*, unsuccessfully urging this Court to reconsider its precedent on this issue. The *Muldrow* panel stated that it "d[id] not find [that brief] helpful" because the brief incorporated by reference filings in other cases; because it took a position the panel viewed as "clearly contravened by the Supreme Court's and this Court's precedent"; and because it was styled as supporting "neither party." 30 F.4th at 692 n.6. This brief responds to each of those concerns. It does not incorporate prior filings; it explains that the *Muldrow* panel misunderstood the relevant Supreme Court precedent and that other courts of appeals have been willing to reexamine their own precedents on this issue; and it is styled as a brief in support of appellant on the issue it addresses. Cf. Fed. R. App. P. 29(a)(6) (contemplating an amicus brief "that does not support either party").

standard for proving a retaliation claim under Section 704(a). In rejecting Naes's discrimination claim, the court quoted a passage of the *Muldrow* decision that addressed the standard for proving retaliation under Title VII and explained that "the mere fact that an employee was disallowed from maintaining [his] preferred schedule, without any indication that [he] suffered a material disadvantage as a result of the action, does not meet the significant harm standard set forth in *Burlington Northern*." R. Doc. 147, at 4 (quoting 30 F.4th at 692) (citing *Burlington Northern*, 548 U.S. at 68). But the *Burlington Northern* decision cited in *Muldrow* was interpreting Title VII's anti-retaliation provision in Section 704(a), not its anti-discrimination provision in Section 703(a)(1).

Section 704(a) makes it an "unlawful employment practice for an employer to discriminate against * * * any individual * * * because he has opposed any practice made an unlawful employment practice by this title." 42 U.S.C. 2000e-3(a). "Unlike the antidiscrimination provision, the antiretaliation provision is not expressly limited to actions affecting the terms, conditions, or privileges of employment." *Chambers*, 35 F.4th at 876. As such, the Supreme Court in *Burlington Northern* adopted a limiting principle for retaliation claims. Explaining that it is "important to separate significant from trivial harms," 548 U.S. at 68, only a retaliatory act that is "materially adverse" to the plaintiff is actionable under Section 704(a), *id.* at 67-68.

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Because Section 703(a)(1) already "tether[s] actionable behavior to that which affects an employee's 'terms, conditions, or privileges of employment,'" a further, court-created limiting principle is unnecessary. *Chambers*, 35 F.4th at 877. As already explained, Section 703(a)(1)'s language delineates the scope of prohibited conduct. Under that plain text, no amount of race, sex, religion, or national origin discrimination that affects the terms, conditions, or privileges of employment is lawful (absent affirmative defenses that are not at issue here). That is because unlike Section 704(a), which protects individuals based on their actions, Section 703(a)(1) works to "prevent injury to individuals based on who they are." *Burlington Northern*, 548 U.S. at 63. To hold otherwise, and conclude that Title VII prohibits only a subset of discriminatory transfers that cause a certain level of "material" or "tangible" harm, would undermine "the important purpose of Title VII—that the workplace be an environment free of discrimination." *Ricci* v. *DeStefano*, 557 U.S. 557, 580 (2009).

CONCLUSION

The United States respectfully urges this Court to reconsider its precedent limiting its interpretation of Section 703(a)(1) to only those actions that produce a "material employment disadvantage" and instead hold that all job transfers based on protected characteristics are actionable under Section 703(a)(1) of Title VII.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) this brief complies with Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 4621 words according to the word processing program used to prepare the brief.

(2) this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

(3) this brief complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version1.2.3412.0) and is virus-free according to that program.

s/ Anna M. Baldwin
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Date: August 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, I will transmit by Federal Express ten paper copies of the foregoing brief to the Clerk of the Court and one paper copy to the following counsel for each party pursuant to Local Rule 28A(d):

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