No. 22-231

In the Supreme Court of the United States

ARTUR DAVIS, PETITIONER

v.

LEGAL SERVICES ALABAMA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., makes it unlawful for a private employer or a state or local government "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). 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) and (b).

The question presented is whether those provisions prohibit discrimination as to all "terms," "conditions," or "privileges" of employment, or whether they are limited to "significant" discriminatory employer actions.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, but the question presented should be limited to petitioner's claim under Title VII.

STATEMENT

Petitioner worked as the Executive Director of respondent Legal Services Alabama, Inc. and alleges that he was placed on paid suspension because of his race. Pet. App. 2a-4a. Petitioner filed a suit alleging that he had suffered discrimination with respect to his "terms," "conditions," or "privileges" of employment, 42 U.S.C. 2000e-2(a)(1); 42 U.S.C. 1981. The district court granted summary judgment to respondents, reasoning that pe-

titioner had not experienced an adverse employment action because his suspension without pay did not constitute a serious and material change to his employment conditions. Pet. App. 20a-48a. The court of appeals affirmed. *Id.* at 1a-19a.

A. Statutory Background

1. Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to "assure equality of employment opportunities and to eliminate * * * discriminatory practices and devices" in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). This case involves the meaning of Section 2000e-2(a)(1), "Title VII's core antidiscrimination provision." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). Section 2000e-2(a)(1) makes it unlawful for a private employer or a state or local government "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).

Title VII includes several other related provisions. Section 2000e-2(a)(2) makes it unlawful for a private employer or a state or local government "to limit, segregate, or classify * * * 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). Section 2000e-3(a) prohibits retaliation by a private employer or a state or local government against employees or applicants for engaging in conduct protected by Title VII.

And Section 2000e-16(a) 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).

2. Section 1981 is one of the Nation's oldest civil rights laws. It provides "all persons" in the United States "the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens." 42 U.S.C. 1981(a). In interpreting that language, this Court originally held that Section 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through the legal process" without reaching "incidents relating to the conditions of employment." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 179-180 (1989). In response, Congress amended the statute "to supersede *Patterson*." *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442, 450 (2008). As amended, Section 1981 defines "make and enforce contracts" to "include[] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. 1981(b).

B. The Present Controversy

1. Petitioner was hired in December 2016 to serve as Executive Director of respondent Legal Services Alabama, Inc. (LSA), a nonprofit legal-services organization. Pet. App. 3a, 20a. During his time as Executive Director, petitioner experienced problems with some of his colleagues, several of whom lodged complaints about him with LSA's Board of Directors. *Id.* at 3a, 20a, 23a, 38a. Those employees, who are Black, alleged that petitioner, who is also Black, was giving preferential treatment to newly hired white employees and creating a

hostile work environment. *Id.* at 20a, 38a. On August 18, 2017, citing those complaints and other unrelated concerns, LSA's Board suspended petitioner with pay pending an investigation. *Id.* at 23a-24a. To enforce the suspension, LSA posted a security guard in front of the building; it also hired a political consultant to deal with any public-relations fallout. *Id.* at 3a. Four days after the suspension, petitioner resigned from his position as Executive Director, effective September 23, 2017. *Id.* at 4a.

2. Petitioner sued LSA and two of its Board members. Pet. App. 4a. As relevant here, he alleged that LSA violated Title VII by suspending him because of his race and that all respondents violated Section 1981 by suspending him because of his race. *Ibid.* In particular, petitioner claimed that high-ranking white LSA employees previously accused of misconduct, including creating a hostile work environment, were not suspended. *Ibid.*

The district court granted respondents' motion for summary judgment. Pet. App. 20a-48a. Because "the Eleventh Circuit 'has routinely and systematically grouped Title VII and § 1981 claims for analytic purposes,'" the court evaluated petitioner's race discrimination claims together. *Id.* at 29a (quoting *Jimenez* v. *Wellstar Health Sys.*, 596 F.3d 1304, 1312 (11th Cir. 2010)). The court held that both claims failed because petitioner could not prove that his paid suspension constituted an adverse employment action. *Id.* at 30a-35a. The court explained that this conclusion followed "numerous [district court] decisions in the Eleventh Circuit * * * h[olding] that suspensions with pay during an investigation do not constitute an adverse action because they do not constitute a *serious and material change* in

the terms, conditions or privileges of employment." *Id.* at 34a. The court also cited decisions from other courts of appeals reaching the same conclusion. *Id.* at 31a.

3. The court of appeals affirmed. Pet. App. 1a-19a. Like the district court, the court of appeals applied the same standards to petitioner's Title VII and Section 1981 claims. *Id.* at 6a-7a. The court stated that under circuit precedent, both statutes require plaintiffs to show that their employer subjected them to an "adverse employment action." *Id.* at 7a (quoting *Quigg* v. *Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016)). The court then defined adverse employment actions as "tangible employment actions * * * that affect continued employment or pay—things like terminations, demotion, suspensions without pay, and pay raises or cuts" as well as "other things that are similarly significant standing alone." *Id.* at 7a-8a (quoting *Monaghan* v. *Worldpay US, Inc.*, 955 F.3d 855, 860 (11th Cir. 2020) (per curiam)). Applying that standard, the court held that petitioner's paid suspension did not "rise to the level of an adverse employment action." *Id.* at 11a.

DISCUSSION

The Court should grant the petition but limit the question presented to petitioner's Title VII claim. Interpreting Section 2000e-2(a)(1) to cover only "significant" or "material" employment actions is atextual and mistaken. See Gov't Br. in Opp. at 13-16, *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (No. 18-942); Gov't Amicus Br. at 15-17, *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (No. 18-1401); see also Gov't Amicus Br. at 2, *Naes* v. *City of St. Louis*, No. 22-2021 (8th Cir. filed Aug. 12, 2022) (citing other briefs). The Eleventh Circuit's rule limiting Section 2000e-2(a)(1) to employment

actions that are "similarly significant" to actions such as "terminations, demotion, suspensions without pay, and pay raises or cuts," Pet. App. 8a, has no foundation in Title VII's text, structure, or purpose. The scope of Title VII's prohibition on discrimination as to the terms, conditions, or privileges of employment is an important and frequently recurring question that has divided the courts of appeals and is suitable for resolution in this case. The petition for a writ of certiorari should therefore be granted with respect to petitioner's Title VII claim, along with the petition in *Muldrow* v. *City of St. Louis*, No. 22-193 (filed Aug. 29, 2022), a case presenting a similar question in which the United States is also filing a brief recommending that the Court grant review.

The Court should not, however, review petitioner's Section 1981 claim. The parties and the courts below did not separately analyze Section 1981, instead simply assuming that its coverage is coextensive with Title VII's. Nor has petitioner argued that the Section 1981 issue independently warrants this Court's review. To the extent that lower courts often look to Title VII to define the scope of Section 1981 in the employment context, a decision from this Court clarifying the scope of Title VII will inform their analysis. But given the parties' lack of briefing or meaningful independent analysis of the Section 1981 question, this Court should not take up that question directly.

A. The Court Of Appeals' Title VII Holding Is Incorrect

The court of appeals held that Section 2000e-2(a)(1) does not prohibit discriminatory paid suspensions because they do not "affect continued employment or pay" and are not "similarly significant standing alone." Pet. App. 8a (citation omitted). Those limits contradict Title

VII's text, structure, and purpose, and have no basis in this Court's precedents.

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). That approach reflects this Court's "charge * * * to give effect to the law Congress enacted." *Lewis* v. *City of Chicago*, 560 U.S. 205, 217 (2010).

As relevant here, Section 2000e-2(a)(1) makes it unlawful for a private employer or a state or local government "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). Petitioner does not allege that respondent made a "hir[ing]" or "discharge" decision based on his race, or that race played a role in his "compensation." *Ibid.*[1] This case accordingly turns on whether respondent "discriminate[d] against" petitioner "with respect to his * * * terms, conditions, or privileges of employment." *Ibid.*

Because Title VII does not define those terms, they should be given their "ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Placing an employee on a paid suspension—removing him from the workplace and prohibiting him from performing his regular work assignments—plainly affects the employee's "terms" or "conditions" of employment as those words are ordinarily understood. 42 U.S.C.

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[1] Petitioner previously argued that he had been constructively discharged, but both lower courts rejected that argument, see Pet. App. 11a-14a, 35a-38a, and petitioner does not press it here.

2000e-2(a)(1). See *Webster's New International Dictionary of the English Language* 556 (2d ed. 1957) (defining "*conditions*" to include "[a]ttendant circumstances * * * as [in], living *conditions*; playing *conditions*"); see also, *e.g.*, *The Random House Dictionary of the English Language* 306 (1966) (defining "condition" to include "situation with respect to circumstances") (emphasis omitted).

Indeed, whether paid or unpaid, a work suspension upends the most fundamental requirement of employment: that an employee report to the workplace to complete job-related tasks. The "when," "where," and "what" of a job—when the employee is required to work, at what location, and the position he is assigned and tasks he is required to perform with other employees—are all affected by a suspension and fall squarely within the "terms" and "conditions" of employment. Cf. *Threat* v. *City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021).

Consistent with that reading, the EEOC has advised that, although employers are unquestionably entitled to have policies and practices governing the use of paid leave when faced with allegations of misconduct, "rules and policies regarding discipline * * * must be enforced in an evenhanded manner, without regard to race." EEOC, *Compliance Manual* § 15-VII(B)(7) (2006). Under Section 2000e-2(a)(1), "[e]mployers cannot permit race bias to affect work assignments, performance measurements, pay, training, mentoring or networking, discipline, or any other term, condition, or privilege of employment." *Id.* § 15-VII(B).

This Court has already recognized that the key statutory 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). And this Court has rejected attempts to impose extratextual limits on the statute, like the "significance" threshold the court of appeals inserted here. Rather, this Court has explained that the statutory language evinces Congress's intent "to strike at the entire spectrum" of prohibited disparate treatment in employment. *Id.* at 64 (citation omitted). Accordingly, "the language of Title VII is not limited to economic or tangible discrimination," but naturally encompasses employment actions that—like paid suspensions—do not have immediate financial consequences. *Ibid.* (citations and internal quotation marks omitted); see *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (confirming that the statutory phrase "'terms, conditions, or privileges'" is not limited to "the narrow contractual sense") (citation omitted).

The lack of any textual requirement that discriminatory conduct with respect to an employee's terms, conditions, or privileges of employment must result in a certain level of harm is especially notable in light of the surrounding provisions. The very next subsection of Title VII—Section 2000e-2(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). That language shows that Congress knows how to require a particular showing of harm for an employment discrimination claim, and the absence of similar qualifying language in Section 2000e-2(a)(1) is thus notable. See *Keene Corp.* v.

United States, 508 U.S. 200, 208 (1993) ("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.") (brackets and citation omitted).

2. The court of appeals' "significant" standard also conflicts with the statute's objectives. "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to *eliminate* those discriminatory practices and devices" that operate in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973) (emphasis added). But under the court of appeals' standard, even brazen acts of workplace discrimination—*e.g.*, placing all Black employees on paid leave based explicitly on their race—cannot give rise to an actionable discrimination claim unless there is a further showing that the paid leave was accompanied by some other adverse consequences. See Pet. App. 10a-11a.

An atextual requirement to prove "significant" or "tangible" harm would produce other untenable results as well. For example, courts applying such a requirement have held that assigning employees to night shifts versus preferred day shifts based on their protected status is not "material" or "significant." See, *e.g.*, *Daniels* v. *United Parcel Serv., Inc.*, 701 F.3d 620, 635 (10th Cir. 2012). But 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 to discrimination." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). The limits that the court of appeals imposed are con-

trary to that purpose in permitting discriminatory practices so long as they do not rise above a threshold that is absent from the statute.

3. The test that the court of appeals applied below has no basis in this Court's prior Title VII decisions. In *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53 (2006), this Court held that *retaliation* claims under a different provision of Title VII, 42 U.S.C. 2000e-3(a), may be based only on actions "that a reasonable employee would have found * * * materially adverse," 548 U.S. at 68.[2] But *White*'s reasoning does not support applying a "materially significant harm" standard to Section 2000e-2(a)(1) *discrimination* claims.

"Unlike the antidiscrimination provision, the antiretaliation provision is not expressly limited to actions affecting the terms, conditions, or privileges of employment." *Chambers* v. *District of Columbia*, 35 F.4th 870, 876 (D.C. Cir. 2022) (en banc). As such, *White* adopted a limiting principle for retaliation claims. Explaining that it is "important to separate significant from trivial harms," 548 U.S. at 68, *White* held that only a retaliatory act that is "materially adverse" to the plaintiff is actionable under Section 2000e-3(a), *ibid.*; see *id.* at 67-68. Because Section 2000e-2(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 for Title VII's anti-discrimination provision is unnecessary. *Chambers*, 35 F.4th at 877.

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[2] The relevant provision 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 subchapter." 42 U.S.C. 2000e-3(a).

The court of appeals recognized that retaliation claims differ from discrimination claims, see Pet. App. 8a n.3, but failed to appreciate the significance of that difference. The court acknowledged that in the retaliation context it had held "that paid suspension may constitute an adverse employment action." *Ibid.* But the court went on to assert—with no explanation—that "[t]he standard to show an adverse employment decision in a retaliation case is more relaxed." *Ibid.* That is incorrect. Under Section 2000e-2(a)(1)'s 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 in this case, see 42 U.S.C. 2000e-2(e)). That is because, unlike Section 2000e-3(a), which protects individuals based on their actions, Section 2000e-2(a)(1) works to "prevent injury to individuals based on who they are." *White*, 548 U.S. at 63. To hold otherwise and conclude that Section 2000e-2(a)(1) prohibits only decisions that cause a certain level of adversity 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).

The Eleventh Circuit's error is not limited to this case. In earlier decisions, the court has incorrectly held that this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998) "suggested that some kind of *significantly adverse* employment action is necessary to prove an employer's Title VII liability" under Section 2000e-2(a)(1), *Davis* v. *Town of Lake Park*, 245

F.3d 1232, 1239 (11th Cir. 2001) (emphasis added).[3] But *Ellerth* "did not discuss the scope of" Section 2000e-2(a)(1), Title VII's "general antidiscrimination provision." *White*, 548 U.S. at 65. Instead, *Ellerth* involved a claim against an employer alleging that a supervisor had created a hostile work environment through "severe or pervasive" sexual harassment of an employee. 524 U.S. at 752.

The question in *Ellerth* concerned the circumstances in which "an employer has vicarious liability" for sexual harassment by a supervisor. 524 U.S. at 754. After reviewing agency-law principles, this Court explained that there are two paths to vicarious liability. First, vicarious liability exists, with no affirmative defense, "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* at 765. This Court explained that such a "tangible employment action" by a supervisor necessarily "requires an official act of the enterprise," and therefore supports automatic imputation of vicarious liability on the employer. *Id.* at 761-762. Second, *Ellerth* held that an employer is liable for a hostile work environment created by a supervisor even in the *absence* of any tangible employment action, unless the employer can establish the "affirmative defense" that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Id.* at 765.

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[3] Other courts have made the same error. See, *e.g.*, *Boone* v. *Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); see also Gov't Br. in Opp. at 14-16, *Forgus*, *supra* (No. 18-942); Gov't Amicus Br. at 16-17, *Peterson*, *supra* (No. 18-1401).

Ellerth's "tangible employment action" path for automatically imputing vicarious liability to an employer in cases involving supervisory harassment says nothing about the meaning or scope of the phrase "terms, conditions, or privileges of employment" in Section 2000e-2(a)(1). To the contrary, *Ellerth* makes clear that a tangible employment action is *not* a necessary ingredient of a Title VII discrimination claim. That is because *Ellerth* held that an employer is liable for a hostile work environment created by a supervisor even in the *absence* of any tangible employment action, where the employer cannot establish that it is entitled to an "affirmative defense" based on its prompt action to prevent and correct harassing behavior. 524 U.S. at 765. Indeed, this Court explicitly refused to endorse using a tangible-employment-action standard to define or limit the substantive scope of discrimination claims brought under Section 2000e-2(a)(1). See *id.* at 761 (observing that the concept of a "tangible employment action appears in numerous [discrimination] cases in the Courts of Appeals," and, "[w]ithout endorsing the specific results of those decisions," determining it "prudent to import the concept" only for "resolution of the vicarious liability issue").

In addition, contrary to respondent's argument (Br. in Opp. 7), the court of appeals' restrictive adverse employment action standard is not supported by this Court's hostile work environment cases. Addressing such claims, this Court has explained 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. Thus, "merely offensive" conduct alone does not "alter[] the conditions of the victim's employment." *Harris* v. *Forklift Sys., Inc.*, 510

U.S. 17, 21-22 (1993). Instead, only when 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. *Meritor*, 477 U.S. at 66 (citation omitted). Thus, the question in hostile work environment cases is whether harassment is so severe or pervasive that the terms, conditions, or privileges of employment have been altered. *Ibid.* There is no similar predicate question in cases like this one, where petitioner alleges a discrete and direct employer action (a paid suspension) that itself affected his terms, conditions, and privileges of employment.

4. Finally, contrary to the Eleventh Circuit's suggestion in other opinions, see, *e.g.*, *Davis*, 245 F.3d at 1239, it is unnecessary to import an atextual requirement to ensure that Section 2000e-2(a)(1) does not become a "general civility code" for the workplace. *Oncale*, 523 U.S. at 81. The limits on Section 2000e-2(a)(1) come from the 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). By limiting actionable discrimination to discrimination "with respect to * * * compensation, terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), Title VII already makes clear that it "protects an individual only from *employment-related* discrimination." *White*, 548 U.S. at 61 (emphasis added).

Moreover, identifying an employer action that implicates the "terms, conditions, or privileges of employment" satisfies only one element of a Title VII claim. To establish a violation, an employee must also prove that

the employer "discriminate[d] * * * *because of*" a protected trait. 42 U.S.C. 2000e-2(a)(1) (emphasis added); see 42 U.S.C. 2000e-2(m). Thus, it is not enough for a plaintiff to allege simply that he has been given an unfavorable work assignment or been subjected to a disciplinary action. To state a claim under Section 2000e-2(a)(1), a plaintiff must plead facts that plausibly support an inference of discrimination on a statutorily-prohibited basis. See *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007); *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

Taken together, Section 2000e-2(a)(1)'s requirements, as enacted by Congress, impose appropriate limits for bringing a Title VII anti-discrimination claim. The other limits added by the court of appeals have no basis in the statutory text, structure, or purpose.

B. The Court Of Appeals' Title VII Holding Conflicts With The Decisions Of Other Courts Of Appeals

The Title VII holding below conflicts with the decisions of other courts of appeals. Most obviously, the D.C. Circuit, sitting en banc, recently overturned its prior "objectively tangible harm" standard for Section 2000e-2(a)(1) claims. See *Chambers*, 35 F.4th at 874 (overruling *Brown* v. *Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)). As Judges Ginsburg and Tatel explained for the en banc court, "[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." *Id.* at 874-875. The D.C. Circuit had previously held that a lateral job transfer was not actionable without an additional showing of "objectively tangible harm." *Id.* at 875. But *Chambers* rejected that requirement as a "judicial gloss that lacks any textual support." *Ibid.*

The Sixth Circuit has similarly sought to align its interpretation of Section 2000e-2(a)(1) with the statutory text. In *Threat* v. *City of Cleveland*, *supra*, Chief Judge Sutton explained for the court that circuit precedent construing Title VII to cover only "materially adverse employment actions" should be understood as no more than shorthand for the statutory text and a *de minimis*, Article III injury requirement. 6 F.4th at 678-679; see *id.* at 682. The court concluded that "employer-required shift changes from a preferred day to another day or from day shifts to night shifts exceed any de minimis exception" and, if discriminatory, "state a cognizable claim under Title VII"—even when they are not accompanied by a reduction in pay or benefits. *Id.* at 679.

To be sure, the Eleventh Circuit is not an outlier in limiting the scope of Section 2000e-2(a)(1) to "significant" employment actions. As both petitioner and respondent catalog (Pet. 7-17; Br. in Opp. 8-9), several of the circuits impose some kind of atextual material or significant harm requirement.[4]

That requirement has led multiple courts to reject claims alleging discriminatory paid suspensions. See *Jones* v. *Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 326-327 (3d Cir. 2015); *Joseph* v. *Leavitt*, 465 F.3d 87, 91

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[4] The Fifth Circuit currently applies an even stricter formulation, interpreting Section 2000e-2(a)(1) to prohibit discrimination only in "ultimate employment decisions," such as "'hiring, granting leave, discharging, promoting, or compensating,'" *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559-560 (2007) (per curiam) (citation omitted), or decisions that are tantamount to an ultimate employment decision, see, *e.g.*, *Thompson* v. *City of Waco*, 764 F.3d 500, 504-506 (2014). The en banc Fifth Circuit is currently reconsidering that standard, see *Hamilton* v. *Dallas Cnty.*, No. 21-10133 (argued Jan. 24, 2023), but the outcome of that case will not resolve the existing circuit split.

(2d Cir. 2006), cert. denied, 549 U.S. 1282 (2007); *Singletary* v. *Missouri Dep't of Corr.*, 423 F.3d 886, 891-892 (8th Cir. 2005). But respondent errs in asserting (Br. in Opp. 7-9) that the Court should not hear this case because there is no circuit split as to paid suspensions in particular. The relevant point is that the courts of appeals that have held that paid suspensions are not actionable have done so based on their precedent holding that Section 2000e-2(a)(1) reaches only discriminatory changes to the terms, conditions, or privileges of employment that meet an atextual material or significant harm requirement.

In any event, as the United States explained in March 2020, before the recent decisions by the D.C. and Sixth Circuits, the lower courts' widespread and entrenched misreading of a key provision of federal antidiscrimination law would warrant this Court's review even in the absence of a square circuit conflict. Gov't Amicus Br. at 20, *Peterson*, *supra* (No. 18-1401); cf. *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 108-109 (2002) (granting certiorari to review lower courts' "various approaches" to a Title VII question, and adopting a different interpretation based on "the text of the statute"). The parties in *Peterson* settled before this Court acted on the petition in that case. See *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (No. 18-1401) (dismissing the petition for a writ of certiorari). But developments in the intervening three years have only underscored the need for this Court's review.

C. The Question Presented With Respect To Title VII Warrants Review In This Case And In *Muldrow*

1. The question presented with respect to Title VII is undeniably important. Section 2000e-2(a)(1) is "Title

VII's core antidiscrimination provision," *White*, 548 U.S. at 61, and questions arise frequently about whether employer actions fall within the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1). In recent years, the EEOC has received between 13,000 and 19,000 Title VII administrative charges per year asserting discrimination in the "[t]erms [or] condition[s]" of employment. EEOC, *Statutes by Issue (Charges filed with EEOC) FY 2010 – FY 2021*, https://go.usa.gov/xdBBu. Those charges represent more than a quarter of all Title VII charges received by the EEOC in each fiscal year. See *ibid.*; EEOC, *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC) FY 1997 – FY 2021*, https://go.usa.gov/xdBK3. The "proper interpretation and implementation of" Section 2000e-2(a)(1) thus has "central importance to" employment-discrimination litigation. *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 358 (2013) (similarly noting the large number of EEOC charges filed under Title VII's anti-retaliation provision).

Clarifying the meaning of "terms, conditions, or privileges of employment" in Section 2000e-2(a)(1) would also have beneficial effects beyond Title VII. Other prominent anti-discrimination statutes, such as the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, include provisions prohibiting discrimination with respect to "terms, conditions, or privileges of employment," 29 U.S.C. 623(a)(1); see 42 U.S.C. 12112(a). Numerous whistleblower-protection statutes prohibit discrimination in the "terms" or "conditions" of employment because of an employee's protected conduct. See, *e.g.*, 18 U.S.C. 1514A(a); 21 U.S.C. 399d(a); 49 U.S.C. 42121(a) (Supp. III 2921). And the

Department of Labor enforces Executive Order No. 11,246, 3 C.F.R. 567 (1966), which incorporates Title VII principles in regulating federal contractors. See Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, *Federal Contract Compliance Manual* §§ 2E03, 2J, 2K (May 1, 2020). Resolving the question presented with respect to petitioner's Title VII claim would thus have broad significance for federal employment-discrimination law.[5]

2. Respondent argues (Br. in Opp. 11-12) that this case, involving a paid suspension, is not an appropriate vehicle for clarifying the scope of Title VII's prohibition of discrimination in the terms, conditions, or privileges of employment because employers have a "legal obligation under Title VII to promptly and effectively address allegations of a hostile environment." This Court has recognized that employers have an "affirmative obligation" to protect employees from harassment. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 806 (1998). And an employer may sometimes avoid liability for a hostile work environment if it "exercised reasonable care to prevent and correct" that harassment "promptly." *Id.* at 807. But the affirmative obligation to protect employees from harassment plainly does not allow employers to discriminate based on race in their investigations and discipline. See *McDonnell Douglas*, 411 U.S. at 801 ("Title VII tolerates no racial discrimination."). Accordingly, this case is a suitable vehicle for reviewing the question presented with respect to petitioner's Title VII claim.

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[5] As the courts below recognized, and as discussed *infra* pp. 22-23, courts frequently turn to Section 2000e-2(a)(1) when applying Section 1981 in the employment context.

3. Along with this brief, the government is filing a brief recommending that the Court grant the petition for a writ of certiorari in *Muldrow*, *supra* (No. 22-231), which likewise concerns the meaning of Title VII's "terms, conditions, or privileges" language. In the government's view, the Court would benefit from hearing the two cases together because they would provide an opportunity to consider the application of that language to a broader range of employment actions (a paid suspension in this case and a transfer in *Muldrow*).

D. The Question Presented With Respect To Petitioner's Section 1981 Claim Does Not Warrant Review At This Time

In addition to seeking review of the Title VII question that has divided the courts of appeals, petitioner also asks this Court to consider the meaning of Section 1981. But neither the court of appeals nor the parties have separately analyzed the question presented with respect to Section 1981. See Pet. App. 6a-7a; Pet. 6 n.1; Br. in Opp. 7-12. That makes this a poor vehicle for review of the Section 1981 issue. Nor has petitioner alleged a circuit split with respect to that statute's reach, or otherwise suggested that the meaning of Section 1981 independently warrants this Court's review. See Pet. 7-20 (addressing only Title VII).

To be sure, Section 1981's reference to the "benefits, privileges, terms, and conditions of the contractual relationship," 42 U.S.C. 1981(b), echoes Title VII's reference to the "terms, conditions, or privileges of employment." As a result, lower courts often treat the two statutes as coextensive in the employment context. See, *e.g.*, *Robinson* v. *Concentra Health Servs., Inc.*, 781 F.3d 42, 45 (2d Cir. 2015); *Brown* v. *J. KAZ, Inc.*, 581 F.3d 175, 181-182

(3d Cir. 2009); *White* v. *BFI Waste Servs., LLC*, 375 F.3d 288, 295 (4th Cir. 2004); *Davis* v. *Time Warner Cable of Se. Wisc., L.P.*, 651 F.3d 664, 671-672 (7th Cir. 2011). But that does not justify a grant of a writ of certiorari to review a separate statutory question that has received only perfunctory treatment throughout this litigation. This Court should instead limit its review to the Title VII question that has divided the courts of appeals and that has been the focus of the parties' briefing. To the extent that Section 1981 carries the same meaning, this Court's resolution of the Title VII question will resolve the Section 1981 issue as well. And to the extent that any differences in the text, context, or history of the two provisions may support an argument that Section 1981 should be interpreted differently, this Court should leave it to the lower courts to address those arguments in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (observing that this Court is "a court of review, not of first view").

CONCLUSION

The petition for a writ of certiorari should be granted as to petitioner's Title VII claim.

Respectfully submitted.

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