No. 22-193

In The Supreme Court of the United States

JATONYA CLAYBORN MULDROW,

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AASA, THE SUPERINTENDENTS ASSOCIATION AND ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL AS *AMICI CURIAE* SUPPORTING RESPONDENTS

Jason P. Renzelmann
FROST BROWN TODD LLP
400 W. Market St.
32nd Fl.
Louisville, KY 40202

Charles B. Galvin
W. Joseph Scholler III
FROST BROWN TODD LLP
9277 Centre Point Dr.
Ste. 300
West Chester, OH 45069

Francisco M. Negrón, Jr.
Counsel of Record
Sonja H. Trainor
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke St.
2nd Fl.
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

Counsel for Amicus Curiae

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INTEREST OF *AMICI CURIAE*[1]

The National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virgin Islands. NSBA advocates for equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before federal and state courts and has participated as *amicus curiae* in numerous cases addressing federal employment law. Collectively, public schools are the largest employer in the United States.[2]

AASA, The School Superintendents Association (AASA) founded in 1865, is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA members are

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[1] No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae*, their members, or their counsel make a monetary contribution to the brief's preparation or submission.

[2] United States public school districts employ roughly 7 million people, *The 10 Biggest Industries by Employment in the US*, IBISWORLD, https://www.ibisworld.com/united-states/industry-trends/biggest-industries-by-employment/ (last visited October 15, 2023), while the federal government employs roughly 4 million, *Federal Workforce Statistics Sources: OPM and OMB*, CONGRESSIONAL RESEARCH SERVICE, https://sgp.fas.org/crs/misc/R43590.pdf (last updated June 28, 2022).

the chief education advocates for children. AASA members advance the goals of public education and champion children's causes in their districts and nationwide. As school system leaders, AASA members set the pace for academic achievement. They help shape policy, oversee its implementation, and represent school districts to the public at large.

The Association of School Business Officials International (ASBO) is a nonprofit association that provides programs, resources, services, and a global network to school business professionals. ASBO members are the finance and operations leaders of school systems who manage educational resources to support student learning. Among other aspects of education finance and administration, school business professionals are responsible for human resources management (*e.g.*, hiring, managing, and training staff; labor negotiations; payroll administration; and compliance).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge the Court not to abandon the longstanding and well-established requirement that plaintiffs asserting antidiscrimination claims under Title VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), must show they suffered a material, objective harm to be entitled to relief. The Court also should decline to adopt any categorical rule that "transfer" decisions are *per se* actionable under § 703(a)(1). The text of Title VII and this Court's precedents provide clear support for requiring a determination of material, objective harm. The requirement also plays a critical role in

ensuring that Title VII does not become "a general civility code" for the workplace. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

Requiring a determination of material, objective harm for § 703(a)(1) claims based on transfer and assignment decisions is particularly important in the context of public schools. *Amici* and its members are dedicated to the educational mission of America's public schools. To fulfill that mission, schools must be able to assign staff with appropriate experience and expertise where they are needed to serve the learning and safety needs of students. As each school year begins, and throughout the year, educational administrators must make myriad decisions concerning transfers and assignments of teachers and support staff, and other routine personnel management actions, to meet the needs of ever-shifting student populations. Public school employers already face considerable challenges in making these decisions, including compressed timelines imposed by the school calendar, staff shortages, limited budgetary resources, and the need to comply with requirements for staff transfers imposed by state statutes and, in some states, collective bargaining agreements. Schools therefore have a substantial interest in limiting the additional burdens associated with Title VII litigation over employment decisions to those instances that truly serve Title VII's remedial purpose of eliminating injurious discrimination in the workplace. Such a limitation is not only good for public schools, it is required by the words of Title VII.

I. Any exercise in statutory interpretation must begin with the text, and the text of § 703(a)(1) plainly limits employer liability to employment actions that cause material, objective harm.

A. The phrase "discriminate against" in 703(a)(1) connotes an action imposing a meaningful disadvantage or injury on one individual in comparison to others. That conclusion is supported by dictionary definitions, common usage, and this Court's precedent interpreting the identical phrase, "discriminate against," in Title VII's antiretaliation provision to require a showing that "a reasonable employee would have found the challenged action materially adverse." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Under the doctrine of *in pari materia*, the same words should be given the same meaning throughout the same statutory enactment.

B. Section 703(a)(1)'s imposition of liability on actions that "otherwise … discriminate" in the "terms, conditions, or privileges" is also limited to objectively material changes in a plaintiff's employment experience. Again, this is confirmed by contemporaneous dictionary definitions, which support the conclusion that the words "terms, conditions, or privileges" connote a fundamental or essential element of the employment relationship, as well as the principle of *ejusdem generis*, which requires these terms be read consistently with the provision's more specific reference to actions related to hiring, firing, and compensation. It is also compelled by this Court's precedent in *Oncale v. Sundowner*

Offshore Servs., Inc., 523 U.S. 75, 81 (1998), interpreting this same language to require an objectively significant injury in hostile workplace actions.

II. Retaining the material, objective harm requirement for § 703(a)(1) actions not only is compelled by the text of Title VII, it is also vital to the ability of *Amici*'s members to efficiently and effectively deliver high-quality education to America's public-school students.

A. Elimination of the material, objective harm requirement would greatly expand the scope of educational administration and workforce management decisions subject to litigation under Title VII, and constrain schools' ability to use transfers and staff assignment practices to match teachers and other educational staff to student need. The material, objective harm requirement has served as an effective means to screen insubstantial claims through early adjudication, as evidenced by cases applying the requirement in the public school context. Eliminating this requirement would result in more cases being filed against school employers and more cases proceeding past the pleadings and summary judgment stages to trial. The resulting burdens would significantly impair schools' ability to assign teachers and staff efficiently to meet the needs of constantly shifting student populations, which is critical to student performance, student safety, and educational equity. It also promises to increase dramatically the financial burdens of litigation on cash-strapped school

districts, diverting resources from serving the needs of their students.

B. The Court also should decline to establish any categorical rule that all "transfers" are *per se* actionable under § 703(a)(1). Such a rule is untethered to the text of Title VII. It is also impracticable to apply, as "transfers" are not a textually or factually distinct category of employment actions. A teacher may be assigned to a different school, or asked to cover a class temporarily, teach an online class, change classrooms or grades, or change informal teaching teams. Each of these could be described as a "transfer," but they cover a broad range of factual circumstances that should be analyzed differently under Title VII. The material, objective harm requirement is sensitive to these important factual and contextual distinctions. A categorical rule is not.

C. Abandoning the material, objective harm standard is not necessary to Title VII's remedial purpose. The standard has been employed by every federal circuit for decades, and experience does not bear out assertions that it has systematically excluded meritorious claims or improperly immunized whole categories of employment decisions. No circuit follows a rule that forecloses claims for all lateral transfers, regardless of the circumstances. The material, objective harm standard simply requires courts to look past labels and determine if the challenged action has imposed a genuine hardship or injury on the plaintiff. To the extent that some cases have applied the

standard too strictly in specific cases, the solution is to clarify the standard, not abandon it.

ARGUMENT

I. THE TEXT OF TITLE VII AND THIS COURT'S PRECEDENTS MAKE CLEAR THAT § 703(A)(1) IS LIMITED TO EMPLOYMENT ACTIONS THAT CAUSE MATERIAL, OBJECTIVE HARM.

"As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute." *Jiminez v. Quarterman*, 555 U.S. 113, 118 (2009). The text of § 703(a)(1) states that it shall be unlawful "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," based on a prohibited consideration. 42 U.S.C. § 2000e-2(a)(1). The plain meaning of this language, and this Court's precedents interpreting the same operative words in § 703(a)(1) and other parts of Title VII, firmly supports the conclusion that to sustain a claim under § 703(a)(1), a plaintiff must demonstrate that they suffered a material, objective harm. Abandonment of this requirement would necessarily transform Title VII into something this Court has insisted it is not: "a general civility code" for the American workplace. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

A. The Phrase "Discriminate Against" Connotes Objective, Material Harm.

The plain meaning of the phrase "discriminate against" in 703(a)(1) connotes an action imposing a meaningful disadvantage or injury on one individual in comparison to others. Indeed, interpreting the identical phrase "discriminate against" in Title VII's anti-retaliation provision in § 704(a), 42 U.S. § 2000e-3(a), this Court squarely held that "a plaintiff must show that a reasonable employee would have found the challenged action *materially adverse*." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (emphasis added). Title VII's prohibition on "discriminat[ing] against" an employee does not provide redress for "those petty slights or minor annoyances that often take place at work and that all employees experience." *Id*.

Dictionaries confirm that when Title VII was enacted, "'discriminate' meant … roughly what it means today: 'To make a difference in treatment or favor (of one as compared with others)." *Bostock v. Clayton Cnty., GA*, 140 S.Ct. 1731, 1740 (2020) (quoting *Webster's New International Dictionary* 745 (2d ed. 1954)). Contemporary definitions similarly define "discriminate" to mean "[t]o treat a person or group in an *unjust* or *prejudicial* manner" or "to treat a person or group more favorably than others." *Oxford Eng. Dictionary Online*, https://www.oed.com/ (emphasis added).

Importantly, the statutory prohibition is not against actions that merely "discriminate," but refers to actions that discriminate "against" the employee.

The language requires not only differential treatment, but differential treatment that harms the individual. *Webster's Third New Int'l Dictionary* 39 (1961) (defining "against" as "in opposition or hostility to"). This Court said as much: "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that *injure* protected individuals." *Burlington*, 548 U.S. at 59 (emphasis added).

Accordingly, the term "[t]o 'discriminate' reasonably sweeps in some form of an adversity and materiality threshold," and "ensures that a discrimination claim involves a *meaningful* difference in the terms of employment *and* one that *injures* the affected employee." *Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021) (emphasis added). Petitioner's expansive contention that "discriminate" "connotes *any* differential treatment" ignores the word "against," and conflates prohibited discrimination "against" a protected employee with any discrimination "between" or "among" employees. Pet.'r Br. 16 (emphasis added).

Common usage confirms this interpretation. A speaker of conventional English likely would not say a teacher assigned a different classroom or teaching team, or asked to teach an online class, or a bus driver asked to change routes, or a custodial employee asked to change schools, had been "discriminated against" with respect to the "terms, conditions, or privileges" of their employment in any commonly understood sense of the word – at least not without further contextual facts demonstrating the change amounted to a

genuine hardship. But the view that "any differential treatment" qualifies as actionable employment discrimination would sweep all of these actions into Title VII's reach, irrespective of any showing of hardship.

Burlington's material, objective harm requirement cannot be cabined to apply only to the phrase "discriminate against" in Title VII's anti-retaliation provision, § 704(a), but not to the identical phrase in § 703(a)(1). The doctrine of *in pari materia* directs that identical words in the same enactment should be interpreted consistently. *E.g., Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005). Thus, insofar as *Burlington* held that the phrase "discriminate against" in § 704(a) imposed a material adversity requirement, the identical language in § 703(a)(1) should be given the same construction. To construe "discriminate against" to have a different meaning in § 703(a)(1) than in § 704(a) based on asserted differences in the *purposes* behind 703(a)(1) and 704(a) – such as the need in § 704(a) to focus on retaliatory conduct that would be likely to deter reporting – reaches beyond the statutory text.

Nor should the Court give a broader construction to "discriminate against" in § 703(a)(1) than § 704(a) simply because the former is already limited by the requirement that prohibited discrimination must relate to the "terms, conditions, and privileges of employment." *Cf.* Pet.'r Br. 39. The same words cannot be given different meanings within the same statute simply because there is a greater *practical* need to limit the scope of one provision as

opposed to another. That kind of justification reaches beyond the text. Moreover, the argument crumbles if one also accepts the expansive view that "terms, conditions, and privileges" encompasses *any* action that affects the day-to-day work experience of employees to any degree. Pet.'r Br. 16.

B. Section 703(a)(1)'s Imposition of Liability for Actions that "Otherwise … Discriminate" in the "Terms, Conditions, or Privileges" is Necessarily Limited to Material Changes in Employment Status.

Section 703(a)(1)'s textual reference to "terms, conditions, or privileges" of employment provides further textual support that prohibited discrimination must relate to some objectively material or substantial aspect of one's employment relationship. While the Court has not limited the language to "'terms' and 'conditions' in the narrow contractual sense," the Court has clearly instructed that this language does not extend to every detail of one's workplace experience, and specifically does not extend to "innocuous differences" in treatment of employees the workplace. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, 81 (1998).

That is consistent with dictionary definitions from the time of Title VII's enactment, which indicate that the word "terms" connotes a fundamental aspect of an employment relationship or agreement. *Webster's Third New International Dictionary* 2358 (1961) (defining "terms" as "propositions, limitations, or provisions stated or offered for the acceptance of

another and determining (as in a contract) the nature and scope of the agreement"). "Privileges," similarly, suggests a definite entitlement or enforceable benefit. *Id*. at 1805 (defining "privilege" as "a right or immunity granted as a peculiar benefit, advantage, or favor"). And while "condition" has a broader range of definitions, it also suggests some quality that is essential to the nature of one's employment. *Id*. at 473 ("something established or agreed upon as a requisite to the doing or taking effect of something else" …. "something that limits or modifies the existence or character of something else" …. "a mode or state of being"); *Black's Law Dictionary* 1359 (4th ed. 1968) ("Mode or state of being; state or situation; *essential quality*; property; attribute") (emphasis added).

The material, objective harm requirement finds further support in the principle of *ejusdem generis*, "which limits general terms that follow specific ones to matters similar to those specified." *CSX Transp., Inc. v. Ala. Dep't of Rev*., 562 U.S. 277, 294 (2011) (cleaned up); *see also Babb v. Wilkie*, 140 S. Ct. 1168, 1176 & n.4 (2020) (applying *ejusdem generis* to nearly identical wording in Age Discrimination in Employment Act). Applying this canon, the words "terms, conditions, or privileges of employment" in § 703(a)(1) should be considered to address matters of comparable significance to the other, more specific, referenced actions: failure to hire, discharge, discrimination in compensation, and not to encompass *any* aspect of a person's work experience whatsoever, no matter how insubstantial.

Thus, this Court in *Oncale* held that harassing conduct by co-workers could not be said to constitute a "condition" of employment under § 703(a)(1) unless the conduct is sufficiently "severe or pervasive enough to create … an environment that a reasonable person would find hostile or abusive." 523 U.S. at 81 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Justice Scalia's opinion for the Court was clear that this limitation was rooted solidly in the plain meaning of the term "condition": "The prohibition of harassment" in § 703(a)(1) "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Id.*

Oncale's holding cannot be squared with the claim that § 703(a)(1) prohibits "any differential treatment" with respect to any of the "day to day circumstances in which an employee performs her job." Pet.'r Br. 16, 21. The conduct and statements of co-workers are undoubtedly part of an employee's day-to-day circumstances, but *Oncale* instructs that these do not rise to the level of "conditions" of employment within the statutory text until they reach a level of objective offense or hardship.

Attempts to limit *Oncale's* reasoning to constructive, as opposed to explicit, conditions of employment, or to the specific context of harassment litigation, are unavailing. *Cf.* Pet.'r Br. 34. *Oncale* itself does not make this distinction; it bases its rationale on the text of § 703(a)(1). Reliance on a distinction between constructive and explicit conditions also is in conflict with the view that "conditions" are not limited to explicit contractual

terms, but include anything affecting the day-to-day work experience of an employee.

Limiting *Oncale's* holding to "constructive," as opposed to "explicit," conditions in disparate-treatment claims would also require an analytic framework to distinguish the two that does not currently exist, and which Petitioner does not attempt to offer. Rather, to the extent courts have disposed of claims based on informal slights or other non-"explicit" "conditions" in Title VII disparate treatment cases, they have done so on the basis of the material, objective harm requirement, not any supposed distinction between constructive and explicit changes in conditions. *E.g.*, *Baird v. Gotbaum*, 662 F.3d 1246, 1248-1249 (D.C. Cir. 2011) (critical comments and shouting); *Patterson v. Johnson*, 505 F.3d 1296, 1298 (D.C. Cir. 2007) (employee subjectively felt undermined). This framework has the advantage of being both grounded in the text of Title VII and, as discussed below, having a decades-long track record of providing workable standards for distinguishing claims based insubstantial workplace actions from those based on the kind of genuine discriminatory injuries that Title VII was enacted to redress.

II. ADHERENCE TO THE MATERIAL, OBJECTIVE HARM REQUIREMENT, AS EXPRESSED IN TITLE VII'S TEXT, IS CRITICAL TO PROVIDING ADMINISTRATIVELY FEASIBLE RULES FOR *AMICI* TO APPLY, WHILE ALSO SERVING TITLE VII'S CORE PURPOSES.

Retaining the material adversity requirement for 703(a)(1) actions not only is compelled by the text of Title VII, but also is vital to *Amici's* ability to efficiently and effectively deliver high-quality education to America's public-school students.

Collectively, public school districts are the largest employer in the country.[3] Educational administrators, particularly in large urban school districts, regularly must make a wide range of teacher and support staff assignments and other personnel management decisions to meet the needs of constantly changing student populations. These decisions often must be made on compressed timelines to ensure the appropriate educational resources are in place when students arrive in schools, or to address unanticipated changes in student populations and needs.

Every year, educational administrators must solve a complex puzzle of meeting student-teacher ratio requirements, ensuring all classes and facilities are covered, and avoiding schedule overlaps while balancing the needs and desires of students, parents, and teachers. School districts may not know with certainty how student populations will be distributed within a district until shortly before, or even after, the

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[3] United States public school districts employ roughly 7 million people, *The 10 Biggest Industries by Employment in the US*, IBISWORLD, https://www.ibisworld.com/united-states/industry-trends/biggest-industries-by-employment/ (last visited October 15, 2023), while the federal government employs roughly 4 million,*Federal Workforce Statistics Sources: OPM and OMB*, CONGRESSIONAL RESEARCH SERVICE, https://sgp.fas.org/crs/misc/R43590.pdf (last updated June 28, 2022) .

school year begins. Students may move into, out of, or within a district. Students may enter or exit private or charter schools. Teachers, drivers, and other staff may retire, resign, or become ill on short notice. Changes in populations of students with specialized learning, language, or other needs can be particularly challenging, as districts may have a limited number of staff qualified to address those needs, and lower staff-to-student ratios may be required. To meet these challenges, schools sometimes must reassign teachers and other staff quickly to ensure that classrooms are covered, sufficient staff is in place to monitor playgrounds and cafeterias, and transportation needs are met. Such actions are necessary not only to ensure students receive the highest quality education, but also to meet schools' paramount obligation to student safety.

Eliminating the material, objective harm requirement would vastly expand the scope of transfer and other employment decisions that might be subject to litigation, and the number of claims that survive early adjudication. The result would be to significantly increase litigation burdens on already resource-strapped school districts, and to constrain needed flexibility for school leaders to meet the challenges of providing high-quality education to their students. Such a result would deal a heavy blow to the delivery of quality education in America's public schools.

Moreover, eliminating the requirement of material, objective harm is not necessary to serve Title VII's remedial goals. The case law demonstrates that

the requirement has not been used to systematically insulate serious acts of discrimination from redress. To the contrary, the standard has proved flexible and has allowed courts to consider claims related to all varieties of personnel decisions when the specific factual context has shown that a genuine discriminatory injury had occurred.

A. Eliminating the Material, Objective Harm Requirement for § 703(a)(1) Claims Would Place an Enormous Burden on Educational Administration.

1. There can be no doubt that elimination of the material, objective harm requirement would greatly expand the scope of educational administration and workforce management decisions subject to litigation under Title VII. The need to show "*material* adversity … is important to separate significant from trivial harms," and to ensure that Title VII does not become "'a general civility code for the American workplace.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (italics in original) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). To that end, the material, objective harm requirement has served as an effective means to screen insubstantial claims through early adjudication, and likely to prevent the initiation of litigation over others.

This is particularly true in the field of public education, which has been the backdrop for a significant volume of the case law applying the material, objective harm standard. These cases well

illustrate the array of employment decisions imposing no such harm that could become the subject of protracted litigation in the absence of an objective materiality threshold. *See, e.g., Dass v. Chicago Bd. of Educ.*, 675 F.3d 1060, 1070 (7th Cir. 2012) (subjective belief that seventh grade is harder to teach than third grade was insufficient); *Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 729-730 (7th Cir. 2009) (preference for twelfth-grade English over seventh-grade English); *Tedrow v. Franklin Twp. Cmty. Sch. Corp.*, No. 1:21-CV-453, 2023 WL 3602712, *10 (S.D. Ind. May 23, 2023) (fitness for duty evaluation); *Daniel v. Bibb Cnty. Sch. Dist.*, No. 5:18-CV-417, 2020 WL 2364596, *10 (M.D. Ga. May 11, 2020) (reassignment to sixth grade classroom from combined sixth-through-eighth not materially adverse); *Ellison v. Clarksville Montgomery Cnty. Sch. Sys.*, No. 3:17-cv-00729, 2019 WL 280982, at *6 (M.D. Tenn. 2019) (transfer initially requested by plaintiff, supervising same number of employees, with shorter commute to work and more flexible hours); *Perrea v. Cincinnati Pub. Sch.*, 709 F. Supp. 2d 628, 634 (S.D. Ohio 2010) (mere possibility of transfer through "surplussing"); *Gordon v. New York City Bd. of Educ.*, No. 01 Civ. 9265, 2003 WL 169800, at *1, *6-7 (S.D.N.Y. Jan. 23, 2003) (negative evaluation, denial of transfer request, lack of private classroom).

Indeed, even the education cases that Petitioner holds up as purportedly "egregious examples" of the operation of the material, objective harm requirement Pet.'r Br. 42, when viewed in fuller context, actually illustrate the requirement's effectiveness at screening out the kind of claims Title

VII was not intended to address. *Cole v. Wake Cnty. Bd. of Educ.* 494 F. Supp. 3d 338, 343, 346 (E.D.N.C. 2020), *aff'd*, 834 F. App'x 820 (4th Cir. 2021) (principal's subjective perception of transfer as a demotion and speculation about career trajectory "for a job in which she failed to report to work" were insufficient); *Creggett v. Jefferson Cnty. Bd. of Educ.*, 491 F. App'x 561, 567 (6th Cir. 2012) (allegedly discriminatory "denial of a supplemental training" involved requests to attend a conference in Germany and to replace a colleague at a conference in Utah, which were perks more than training, and principal proffered no evidence to suggest that failure to attend would result, or has resulted, in any demotion, loss of pay, loss of responsibility, or other materially adverse effect); S*pring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 885-86 (7th Cir. 1989) (in ADEA case, plaintiff's reassignment was not a materially adverse change, where it was to another principalship for more pay under a longer-term employment contract).

As these cases illustrate, elimination of the material, objective harm standard would greatly expand the litigation burdens on school districts and educational administrators and constrain their flexibility to make essential decisions about assignment of instructional and support staff that do not materially change working conditions. This would require administrators to devote more time and energy to documenting and evaluating legal risk when making what might otherwise be considered minor or insubstantial assignment decisions. It also would ensure that litigation related to such decisions will drag on much longer, past the pleading stage or

summary judgment. The result will be to siphon away more of public schools' already severely limited financial resources for legal expenses and require administrators to devote even more of their time and energy to litigation-related activities, as opposed to focusing on delivering quality education in safe learning environments to students.

Thus, the material, objective harm requirement is an essential means of resolving insubstantial discrimination claims early and minimizing their attendant burdens on administrators. That is particularly true because the *other* critical element of a 703(a)(1) claim – discriminatory intent – is distinctly *ill*-suited to early resolution and thus does not effectively serve to screen insubstantial claims. "Bad intent is easy to allege, and intent is much harder to assess early on than is the question whether an alleged injury is *objectively* material." *Chambers v. District of Columbia*, 35 F.4th 870, 903 (D.C. Cir. 2022) (Katsas, J., dissenting) (italics in original). A plaintiff need not even allege the elements of a *prima facie* case of discriminatory intent at the pleading stage, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002), so the objective materiality of the change may be the only meaningful way to screen insubstantial claims before costly discovery ensues.

Even after the pleading stage, the burden of establishing a *prima facie* case of discriminatory intent is "not onerous," and when met, shifts the burden to the employer to prove a nondiscriminatory intent. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "This framework is sensible enough

for assessing the intent behind significant actions such as hiring or firing, which employers can reasonably be expected to document with care." *Chambers*, 35 F.4th at 903 (Katsas, J., dissenting). But for minor actions, which would not pass the material adversity threshold, "this is highly unrealistic. Must an employer really document the reasons for every workplace interaction from temporary assignments to scheduling decisions?" *Id.*

Indeed, non-adverse, minor employment administration decisions may be the *most* burdensome to defend, because they are not routinely documented or vetted at the same level as major decisions, like suspensions and terminations, making it far more difficult to develop a factual defense as to non-discriminatory motives if the case cannot be resolved based on lack of material adversity.

Conversely, if administrators must proactively undertake a significantly higher level of documentation and legal risk evaluation for minor employment decisions, such decisions will become vastly more time-consuming and cumbersome, making it even more difficult for administrators to effectively perform their essential function of delivering safe, quality education to public school students.

2. The potential impact on public education of such an expansion of liability and litigation burdens, particularly with respect to teacher assignment decisions and lateral transfers, cannot be overstated. School leaders must be able to efficiently allocate educational and support resources to meet the

changing needs of ever-shifting student populations to deliver quality public education. Changes in student enrollment and demographics, school budgets, and programming needs require constant attention to matching educational resources to student needs. Kency Nittler & Nicole Gerber, *Teacher Transfers: Finding the Right Fit,* NAT'L COUNCIL ON TCHR. QUALITY (2018), https://www.nctq.org/blog/Teacher-transfers:-finding-the-right-fit. Administrators need to be nimble and flexible to keep up. *Id*.

Schools already face daunting challenges in matching instructional and other resources with student need, in light of the current chronic shortages of qualified teachers and other vital educational staff caused by budget cuts, teachers leaving the profession, and fewer new teachers entering the workforce. *E.g.,* Matthew A. Kraft & Joshua F. Bleiberg, *The Inequitable Effects of Teacher Layoffs: What We Know and Can Do*, 17 EDUC. FIN. & POL'Y 376 (2022); Tim Walker, *Teacher Shortage Is 'Real and Growing, and Worse than We Thought'*, neaToday (Apr. 3, 2019), https://www.nea.org/nea-today/all-news-articles/teacher-shortage-real-and-growing-and-worse-we-thought. In 2022, for example, 70% of public schools reported too few teacher candidates applying for open teaching positions, 44% reported at least one open teaching vacancy, and 40% at least one non-teaching vacancy. *School Pulse Panel, Staffing, 2022-2023 School Year*, INST. EDUC. SCIS., https://ies.ed.gov/schoolsurvey/spp/.

The task of matching resources to student need is further complicated in many states by requirements

and restrictions imposed by collective bargaining agreements ("CBAs"). *See* William S. Koski, *Teacher Collective Bargaining, Teacher Quality, and the Teacher Quality Gap: Toward a Policy Analytic Framework*, 6 HARV. L. & POL'Y REV. 67, 75 (2012). Teacher transfers are a mandatory subject to address in collective bargaining agreements in six states and a permissive subject to address in thirteen states. *Collective Bargaining Laws*, NAT'L COUNCIL ON TCHR. QUALITY (Jan. 2019), www.nctq.org/contract-database/collectiveBargaining#map-15. CBAs may restrict administrators' ability to transfer certain teachers and staff based on seniority, require mutual consent, and may contain other contractual restrictions.

State statutes also may impose restrictions on transfer decisions, further limiting the options available to a school for placing teachers and other staff to fill student educational and safety needs. *See, e.g.*, N.J. STAT. ANN. § 18A:25-1 (requiring vote of board of education); ALA. CODE § 16-24C-7(c) (limiting frequency of involuntary transfers for tenured teachers).

Expanding the scope of Title VII liability for non-adverse routine assignment and transfer decisions would further constrain schools' ability to meet these needs. In light of all of the other constraints on transfer decisions, a school district often will not be able to accommodate individual teachers' and other staff members' subjective preferences for one assignment over another. Indeed, there may be only one option that meets all the

relevant needs and constraints. (And where only one employee can meet the required need, proving differential treatment for purposes of a Title VII claim may be a low bar.) Adding substantial new litigation risks and expenses to these necessary decisions could create untenable situations, preventing needed transfers and leading to greater numbers of students whose needs go unmet.

The price, in terms of educational quality and performance, is likely to be significant. Strategic placement of teachers can be one of the most effective mechanisms to address both teacher and student performance. *See* Jason Grissom, Susanna Loeb & Nathaniel Nakashima, *Strategic Involuntary Teacher Transfers and Teacher Performance: Examining Equity and Efficiency* 1, Nat'l Bureau of Econ. Rsch., Working Paper No. 19108 (2013), https://cepa.stanford.edu/content/strategic-involuntary-teacher-transfers-and-teacher-performance-examining-equity-and-efficiency. Quality matching often can be improved, for example, by pairing a newer, or lower-performing, teacher with a more experienced teacher or one with a similar learning and/or teaching style. *See* Kency Nittler & Nicole Gerber*, Teacher Transfers: Finding the Right Fit,* NAT'L COUNCIL ON TCHR. QUALITY (2018), https://www.nctq.org/blog/Teacher-transfers:-finding-the-right-fit.

Moreover, teacher assignments can be an important tool to address inequities or lagging performance within schools and school districts. William S. Koski, *Teacher Collective Bargaining, Teacher Quality, and the Teacher Quality Gap:*

Toward a Policy Analytic Framework, 6 HARV. L. & POL'Y REV. 67, 74 (2012). Transfers can be a critical tool to equitably disseminate more effective and experienced teachers across all schools and classrooms. *See* Jason Grissom, Susanna Loeb & Nathaniel Nakashima, *Strategic Involuntary Teacher Transfers and Teacher Performance: Examining Equity and Efficiency* 1, Nat'l Bureau of Econ. Rsch., Working Paper No. 19108 (2013), https://cepa.stanford.edu/content/strategic-involuntary-teacher-transfers-and-teacher-performance-examining-equity-and-efficiency.

3. In addition to imposing additional burdens and constraints on teacher and staff assignments, eliminating the material adversity requirement threatens to drain schools' already scarce financial resources by expanding the costs of litigation. A necessary result of eliminating the material adversity requirement would be to reduce barriers to litigation by employees, and decrease the number of cases that can be resolved before discovery or trial. The obvious consequence is to increase the financial cost to public school employers related to defending litigation. For already financially-strapped schools, this could result in significant hardship and diversion of resources from the critical task of educating students.

Litigation and legal fees can be an enormous drain on districts' limited resources. One review of legal expense among Chicago-area public schools, for example, found that school districts spent nearly $30 million on private law firms in 2013 defending

employment and other litigation, and that in as many as 10% of surveyed districts, spending legal fees exceeded $100 per student. Angela Caputo, *Suburban School Legal Work: Big Demand, High Costs, Little Oversight*, CHI. TRIB. (last updated Apr. 6, 2015), https://www.chicagotribune.com/news/ct-school-district-legal-bills-met-20150405-story.html.

Defending individual Title VII litigation routinely results in legal fees of hundreds of thousands of dollars, even when the employer prevails before trial. As Respondent notes, Resp. Br. 46-47, the Equal Employment Opportunity Commission recently indicated that a "conservative estimate" of the average cost to employers for legal fees in employment discrimination cases is $111,000 for cases ending in summary judgment and $237,000 for cases ending after trial, although the Commission acknowledged "many employers will find these estimates to be low." *Update of Commission's Conciliation Procedures*, 86 Fed. Reg. 2974, 2984 (Jan. 14, 2021); *accord Russell v. Rapid City Area Schs.*, CIV. 18-5015-JLV, 2022 WL 103662 (D. S.D. Jan. 11, 2022) (noting defendants incurred total fees and costs of $165,030.27, before winning summary judgment); *Alexander v. Sch. Bd. of Palm Beach Cnty. Fla.*, No. 20-80336-CIV, 2021 WL 6339063 (S.D. Fla. Dec. 13, 2021) (defendant seeking $109,306.01 in attorneys' fees and costs after winning summary judgment), *adopted in part, rejected in part by Alexander v. Sch. Bd. of Palm Beach Cnty. Fla.*, No. 20-80336-CIV, 2022 WL 95929 (S.D. Fla. Jan. 10, 2022).

If the Court eliminates § 703(a)(1)'s requirement to show material, objective harm, public schools will face more lawsuits lasting longer and leading to more judgements than ever before. Such expenditures drain resources that could be used for educational programming and more direct student benefit. The plain language of Title VII does not require schools to bear such costs defending employment actions that do not impose any objective, material injury or hardship on the employee.

B. A Categorical Rule That All "Transfers" Are Actionable Is Untethered to Title VII's Text, and Impracticable for Either Courts or *Amici* to Apply.

Petitioner's plea for this Court to adopt a categorical rule that all "transfers" are actionable *per se* under 703(a)(1) is no less problematic than the request to eliminate the material adversity requirement. Pet.'r Br. 27. *Amici* urge the Court to decline this invitation.

"[T]here is no textual basis for categorically distinguishing between transfers and anything else covered by the phrase 'or otherwise to discriminate.'" *Chambers v. District of Columbia*, 35 F.4th 870, 901 (D.C. Cir. 2022) (Katsas, J., dissenting). That is because "job transfers are not a distinct category of employment actions, either legally or factually." *Id.* Certainly, Petitioner has not offered a workable definition of this category, much less one that can be grounded in the text of Title VII.

There are a host of employment actions that might be described, in one fashion or another, as "transfers," yet there are no objective criteria for defining the term. The majority in the D.C. Circuit's *en banc* decision in *Chambers*, for example, concluded that any "transfer of an employee to a new role, unit, or location" is actionable. *Chambers*, 35 F. 4th at 873-74. But these terms themselves invite challenging line-drawing exercises. Does a short-term, temporary assignment to cover a class in another school count as a "transfer"? Does assigning a teacher to a different classroom in the same building, or asking her to teach a class online, qualify as a change in "location"? Does asking a teacher to teach an additional subject qualify as a transfer in his "role"? If teachers are assigned to teams or clusters within a school, does a change to a new one constitute transfer to a new "unit"? None of these questions have clear answers, which demonstrates the infeasibility of Petitioner's proposed rule.

Indeed, the very notion of a categorical "transfer" rule is directly contrary to the Court's instruction in *Burlington* that, in determining whether an employment action is material, "context matters." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). Thus, "[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

C. The Material, Objective Harm Standard Fulfills Title VII's Purposes, and Has Not Unduly Restricted Title VII's Remedial Scope.

In addition to being unworkable and unduly burdensome, abandonment of the material, objective harm requirement is not needed to serve Title VII's remedial purposes. Critics of the requirement may hold up a handful of cases in which they believe (often based on the tersest description of the facts) that the requirement has blocked meritorious claims. But such isolated examples, even if decided in error on their specific facts, do not show the kind of systemic exclusion of valid claims that would justify wholesale abandonment of a standard that has been effectively employed by every circuit in the country for decades. A call to abandon the material, objective harm requirement is a solution in search of a problem.

Indeed, much of the criticism levied against the existing law is aimed at a rule that does not exist. That is, for the most part, the circuits have not followed any absolutist rule barring all § 703(a)(1) claims relating to lateral transfers as a category.

To the contrary, the material, objective harm requirement has been applied flexibly, and has allowed plaintiffs to proceed with claims based on lateral transfers when they can show genuine adversity, as when the transfer required more work, reduced the employee's independence, reduced the employee's responsibilities, carried less prestige, or forced the employee to incur more out-of-pocket

expenses. *E.g.*, *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 88 (2d Cir. 2015); *Redlin v. Grosse Pointe Public Sch. Sys.*, 921 F.3d 599, 608 (6th Cir. 2019); *Alamo v. Bliss*, 864 F.3d 541, 552-53 (7th Cir. 2017); *Crawford v. Carroll*, 529 F.3d 961, 973-74 (11th Cir. 2008). For example, the Eighth Circuit below recognized that a loss of prestige, independence, or supervisory authority could render Petitioner's transfer "materially adverse," but concluded she had presented no objective evidence to support such claims and thus could not survive summary judgment. *Muldrow v. City of St. Louis, MO*, 30 F.4th 680, 688 (8th Cir. 2022).

The existing legal framework, therefore, does not insulate transfers from liability as a category. It simply limits such claims to transfers that cause some objective material harm. That is fully consistent with Title VII's remedial goal.

The Fifth Circuit, until recently, employed the most restrictive formulation of the rule, limiting § 703(a)(1) liability to employer actions that amounted to "ultimate employment decisions such as hiring, granting leave, discharging, promoting or compensating." *Hamilton v. Dallas County*, 79 F. 4th 494, 501 (5th Cir. 2023) (internal quotation marks and citations omitted). "[N]o other court of appeals applie[d] so narrow a concept of an adverse employment action." *Id.* at 502 (internal quotation marks and citation omitted). But the Fifth Circuit recently vacated that standard, sitting *en banc*, leaving no circuit applying such a restrictive rule. *Id.*

Accordingly, there is no practical need to abandon the material adversity requirement, which is firmly grounded in the text of Title VII and has been followed by every circuit in the country for decades. To the extent that some cases have applied the standard too strictly in specific cases, or constrained the scope of § 703(a)(1) at the margins, the solution is to clarify the standard, not abandon it.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed.

Respectfully submitted,

Jason P. Renzelmann
FROST BROWN TODD LLP
400 W. Market St.
32nd Fl.
Louisville, KY 40202

Francisco M. Negrón, Jr.
Counsel of Record
Sonja H. Trainor
National SCHOOL BOARDS ASSOCIATION

Charles B. Galvin
W. Joseph Scholler III
FROST BROWN TODD LLP
9277 Centre Point Dr.
Ste. 300
West Chester, OH 45069

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