[EN BANC ORAL ARGUMENT SCHEDULED FOR OCTOBER 26, 2021]

No. 19-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY E. CHAMBERS,

Plaintiff-Appellant,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia,
Case No. 1:14-cv-02032, Judge Reggie B. Walton

EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Constitutional Accountability Center (CAC) represents that counsel for all parties have been sent notice of the filing of this brief and have consented to the filing.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. CAC is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC also works to ensure that courts remain faithful to the text and history of key federal statutes like Title VII of the Civil Rights Act. CAC is therefore familiar with Title VII—its text and its history—and is well situated to explain to the Court why the statute's text, its history, and Congress's plan in passing it all support the view that Title VII prohibits an employer from discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin, regardless of whether that disparate treatment produces adverse effects.

[1] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amicus* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Appellant, all parties and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellant.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellant.

Dated: July 7, 2021

By: /s/ Brianne J. Gorod
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INTEREST OF *AMICUS CURIAE*

CAC is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of key federal statutes like Title VII of the Civil Rights Act.

CAC has a strong interest in ensuring that Title VII is understood, in accordance with its text, its history, and Congress's plan in passing it, to prohibit an employer from discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin, regardless of whether that disparate treatment produces adverse effects. It therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] 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). Notwithstanding this plain text, this Court held in a case called *Brown v. Brody* that the denial or forced acceptance of a job transfer is actionable under Title VII's antidiscrimination provision only if there

is "objectively tangible harm." 199 F.3d 446, 457 (D.C. Cir. 1999). Applying that precedent in this case, the district court concluded that Defendant-Appellee District of Columbia did not violate Title VII when it allegedly denied Plaintiff-Appellant Mary Chambers's request to transfer to a different department within the District's Office of the Attorney General because of her sex. *See* J.A. 276. The district court reasoned that Chambers had failed to show that the denial of her transfer request caused any "materially adverse consequences" or "objectively tangible harm." J.A. 293. As Title VII's text and history make clear, however, Title VII's antidiscrimination provision contains no such requirements. This Court should therefore overrule *Brown* and reverse the decision of the district court.

Under the statute's plain language, a plaintiff alleging discrimination under Title VII must show that an employer discriminated against her "with respect to [her] compensation, terms, conditions, or privileges of employment" because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). An employee who shows that she was transferred or denied a transfer to a new job because of her sex easily satisfies this standard. *Cf. Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev., Off. of Inspector Gen.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) ("All discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII. As I see it, transferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race)

plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." (quoting 42 U.S.C. § 2000e-2(a))).

Title VII's text, which prohibits discriminatory job transfers and transfer denials regardless of whether they produce adverse effects, is consistent with Congress's plan in passing Title VII, as well as the law's history. Congress passed Title VII "to root out discrimination in employment," *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) [hereinafter *Shell Oil Co.*], and "to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin," *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982). Indeed, a bill that served as a precursor to the Civil Rights Act would have prohibited the denial of "equal employment opportunity to any individual because of race, color, religion, or national origin," and it specifically defined "[e]qual employment opportunity" to "include all the compensation, terms, conditions, and privileges of employment *including but not restricted to: hiring, promotion, [and] transfer*." S. Rep. No. 88-867, at 24 (1964) (emphasis added). In other words, it would have expressly barred discriminatory transfers and the discriminatory denial of transfer requests, regardless of whether a plaintiff-employee could show adverse effects.

Although the Civil Rights Act that Congress ultimately passed did not include this itemized list detailing what the phrase "compensation, terms, conditions, or privileges of employment" covers, the historical record makes clear that it was understood to operate in the same way. *See* 110 Cong. Rec. 7763 (Apr. 13, 1964) (statement of Sen. Hill) (explaining that Title VII "would control and regiment compensation, terms, conditions, and privileges of employment *including but not restricted to: Hiring, promotion, [and] transfer*" (emphasis added)); *id.* at 7778 (statement of Sen. Tower) (lamenting that under Title VII, "[a]ll compensation, terms, conditions, or privileges of employment must be free from any discrimination" and therefore "every assignment of duty . . . could be subject to review").

Because this Court's *Brown* ruling imposed requirements that are at odds with the text and history of the statute, the Court should overrule *Brown* and hold that a discriminatory transfer or denial of a requested transfer violates Title VII by altering an employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), regardless of whether it produces adverse effects. In doing so, it should reverse the district court's judgment in this case.

ARGUMENT

I. Title VII's Plain Text Prohibits Transferring an Employee or Declining to Transfer an Employee Because of a Protected Characteristic.

Section 703(a)(1) of Title VII prohibits an employer from "fail[ing] or refus[ing] to hire," "discharg[ing]," or "otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex" or another protected characteristic. 42 U.S.C. § 2000e-2(a)(1). In considering whether this provision proscribes an employer from reassigning an employee, or refusing to reassign an employee, from one position to another based on sex, this Court's "task is clear[:] [It] must determine the ordinary public meaning of Title VII's command that it is '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.'" *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). To discern that meaning, the Court must look "to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms." *Id.* at 1738-39.

Under the original public meaning of its text, Title VII plainly prohibits transferring an employee from one position to another or declining a requested transfer

because of sex. At the time of Title VII's passage, the ordinary meaning of "discriminate" was "to separate [or] distinguish between" or to "recognize as being different from others." *Webster's Third New International Dictionary* 648 (Philip Babcock Gove, ed., 1961); *see* 110 Cong. Rec. 7213 (Apr. 8, 1964) (Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Sens. Clark & Case, Floor Managers) ("To discriminate is to make a distinction, to make a difference in treatment or favor . . . ."); *id.* at 8177 (Apr. 16, 1964) (Minority Committee Report on S. 3368—Summary Statement) ("Presumably, 'discriminate' would have its commonly accepted meaning which, according to Webster's International Dictionary, is 'to make a distinction' or . . . 'to make a difference in treatment or favor . . . as to discriminate in favor of one's friends; to discriminate against a special class.'"). Thus, Title VII "make[s] it unlawful for an employer to make any distinction or any difference in treatment of employees because of race, color, religion, sex, or national origin." 110 Cong. Rec. 8177.

Specifically, the statute prohibits "any distinction or any difference in treatment," *id.*, based on a protected characteristic "with respect to [an individual's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1). In 1964, much like today, "terms" meant "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." *Webster's Third New International*

Dictionary, *supra*, at 2358. Similarly, the word "conditions" referred to "attendant circumstances [or an] existing state of affairs," and a "condition" meant "a mode or state of being," a "social estate: rank, position," or a "quality, attribute, [or] trait." *Id.* at 473. And a "privilege" meant "a right or immunity granted as a peculiar benefit, advantage, or favor" or "such right or immunity attaching specif[ically] to a position or an office." *Id.* at 1805.

Under the original public meaning of those words, Title VII prohibits an employer from transferring an employee from one position to another or denying a requested transfer because of sex, even if the employee's compensation and other monetary benefits remain unchanged. A job transfer or denied transfer request necessarily sets the "terms" of an individual's employment (that is, the employment's "nature and scope," *id.* at 2358) because it determines the location, responsibilities, title, colleagues, and other characteristics of the individual's employment. For the same reasons, a transfer or denied transfer request also affects the "conditions" of an individual's employment by determining the "circumstances," "qualit[ies]" "attribute[s]," or "trait[s]" of her job. *See id.* at 473. Finally, when an employee is transferred or denied a transfer, she necessarily receives different "right[s] or immunit[ies] attach[ed] specif[ically] to a position or an office" than she would have if her employer had acted differently. *See id.* at 1805.

Thus, an employer who transfers an employee or denies an employee's transfer request because of sex discriminates with respect to the employee's terms, conditions, and privileges of employment, regardless of whether the employee maintains the same monetary compensation and benefits or suffers any "objectively tangible harm," *Brown*, 199 F.3d at 457, as a result. At a minimum, such an employer discriminates with respect to the "terms, conditions, *or* privileges of employment," violating Title VII's express prohibition. 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see United States v. Woods*, 571 U.S. 31, 45-46 (2013) (emphasizing that the "ordinary use" of the word "or" "is almost always disjunctive," so "the preceding items are alternatives").

In fact, the Supreme Court has recognized that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept," *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)), that "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the *entire spectrum* of disparate treatment . . . in employment,'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (emphasis added) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). The Court has explained that "Title VII tolerates no . . . discrimination, subtle or otherwise," *McDonnell Douglas Corp. v. Green*, 411

U.S. 792, 801 (1973), including with respect to any "benefits that comprise the 'incidents of employment' . . . or that form 'an aspect of the relationship between the employer and employees,'" *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984) (quoting S. Rep. No. 88-867, at 11, and *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

In short, the Supreme Court has recognized that "Title VII prohibits 'discriminat[ion] . . . .' of any kind that meets the statutory requirements." *Oncale*, 523 U.S. at 79-80 (brackets in original). In fact, the Court has "repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is *not limited to economic or tangible discrimination*,'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (emphasis added) (internal quotation marks omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)), necessarily foreclosing this Court's "objectively tangible harm" requirement, *Brown*, 199 F.3d at 457.

II. This Court's Decision in *Brown v. Brody* Imposed Requirements with No Basis in the Statutory Text and Should Be Overruled.

Despite Title VII's straightforward statutory language, which plainly bars discriminatory job transfers and discriminatory denials of requested transfers, this Court's decision in *Brown* imposed requirements with no basis in Section 703(a)(1)'s text. Applying that precedent, the district court stated that a Title VII plaintiff must show that she suffered an "adverse employment action." J.A. 291

(quoting *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008)). The district court stated that a transfer or the denial of a transfer "'involving no diminution in pay and benefits' . . . does not rise to the level of an adverse action 'unless there are some other *materially adverse consequences* affecting the terms, conditions, or privileges of [an employee's] employment,'" J.A. 293 (brackets in original) (quoting *Brown*, 199 F.3d at 457), and "the plaintiff has suffered *objectively tangible harm*" as a result, J.A. 293 (emphasis added) (quoting *Brown*, 199 F.3d at 457). Although Chambers adduced evidence that the District of Columbia "permitt[ed] male employees to transfer to other departments . . . but denied [her] . . . the same opportunity to transfer" because of her sex, J.A. 276 (first alteration in original); *see, e.g.*, J.A. 75-76, 137, 196-98, the district court concluded that Chambers had failed to establish that she "suffered any harm, let alone any material adverse consequences" as a result of the discriminatory denial of her requested transfer, J.A. 294.

These requirements, however, do not exist anywhere in the operative text of the statute. Section 703(a)(1) of Title VII nowhere indicates that a plaintiff must show that she suffered any "adverse consequences"—let alone "*materially adverse consequences*"—or any "objectively tangible harm." J.A. 293 (emphasis added) (quoting *Brown*, 199 F.3d at 457). Rather, as explained above, a Title VII plaintiff must simply show that she was treated differently because of her sex (or another

protected characteristic) with respect to the compensation, terms, conditions, or privileges of her employment. *See City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (explaining that Title VII requires a "simple test" asking whether an employer treated an employee "in a manner which but for that person's sex would be different" (internal quotation marks omitted)); *Bostock*, 140 S. Ct. at 1743 (same). Chambers made this showing. *See* J.A. 276 (indicating that the District of Columbia denied Chambers the opportunity to transfer to another department because of her sex, even though it permitted male employees to transfer).

Notably, another provision of Title VII illustrates that Congress knew how to impose an adverse-effect requirement when that was its goal. Section 703(a)(2)—the subsequent subsection in Title VII—uses the phrase "adversely affect" when it prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees . . . in any way which would 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). Congress's inclusion of the phrase "adversely affect" in Section 703(a)(2) underscores that it intentionally omitted similar language from Section 703(a)(1) and that this Court in *Brown* was wrong to graft this language onto that provision. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *Chambers v. District of Columbia*, 988 F.3d 497, 504 (D.C. Cir. 2021) (Tatel & Ginsburg, JJ., concurring), *vacated by* Order Granting Reh'g En Banc 1.

Moreover, the only other context in which the Supreme Court has required a showing of "material adversity" under Title VII—for retaliation claims under Section 704(a) (codified at 42 U.S.C. § 2000e-3(a)), *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)—also underscores why such a requirement makes no sense in the context of Section 703(a)(1). Title VII's antiretaliation provision "prohibits an employer from 'discriminat[ing] against' an employee or job applicant because that individual 'opposed any practice' made unlawful by Title VII or 'made a charge, testified, assisted, or participated in' a Title VII proceeding or investigation." *Id.* at 56 (quoting 42 U.S.C. § 2000e-3(a)). The Supreme Court has concluded that under that provision, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks omitted) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). The Court has explained that the

"material adversity" requirement is necessary for retaliation claims because "the antiretaliation provision, unlike the substantive [antidiscrimination] provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64.

Significantly, the Supreme Court has recognized that Sections 703(a)(1) and 704(a) "differ not only in language but in purpose as well." *Id.* at 63. While the antiretaliation provision "seeks to prevent harm to individuals based on what they do," *id.*, "[t]he antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," *id.* The Court has recognized that "[t]o secure [this] objective, Congress did not need to prohibit anything other than employment-related discrimination." *Id.*[2] Thus, neither Title VII's text nor its purpose justifies imposing a requirement that a

[2] Moreover, although the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), "sp[oke] of a Title VII requirement that violations involve 'tangible employment action' such as . . . 'reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,'" *White*, 548 U.S. at 64 (quoting *Ellerth*, 524 U.S. at 761), that requirement has no bearing on this case. As the Supreme Court has made clear, it imposed that requirement "only to 'identify a class of . . . cases' in which an employer should be held vicariously liable . . . for the acts of supervisors." *Id.* (quoting *Ellerth*, 524 U.S. at 760); *see Ellerth*, 524 U.S. at 760, 763 (explaining that "agency principles constrain the imposition of vicarious liability in cases of supervisory harassment" and that under those principles, vicarious liability is appropriate when a "supervisor takes a tangible employment action against the subordinate").

plaintiff show "objectively tangible harm" for a discrimination claim under Section 703(a)(1).

III. Requiring a Plaintiff Alleging Disparate Treatment to Show Adverse Effects Is Contrary to Congress's Plan in Passing Title VII and the Statute's History.

In addition to ignoring the statute's text, the approach set out in *Brown v. Brody* compels outcomes that are flatly contrary to Congress's plan in passing Title VII. As the Supreme Court has stated time and again, and as the statutory text makes clear, "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977), and ensuring that "similarly situated employees are not . . . treated differently solely because they differ with respect to race, color, religion, sex, or national origin," *id.* at 71; *see Shell Oil Co.*, 466 U.S. at 77 ("The dominant purpose of [Title VII], of course, is to root out discrimination in employment."); *Kremer*, 456 U.S. at 468 ("Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin."); *McDonnell Douglas*, 411 U.S. at 801 ("[I]t is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise.").

Yet this Court's decision in *Brown* "patently contradicts Title VII's aim of equal employment opportunity" by adding atextual requirements. Esperanza N.

Sanchez, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 Cath. U. L. Rev. 575, 579 (2018). As discussed earlier, when an employee is transferred from one position to another or denied such a transfer, the nature of her employment and its terms, conditions, and privileges are necessarily affected, even if in subtle ways. But Congress carefully drafted the statute to make "abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise." *McDonnell Douglas*, 411 U.S. at 801. Thus, a sex-based transfer or a sex-based denial of a request to transfer is actionable under Title VII, regardless of whether a plaintiff can show that she suffered an "adverse employment action" that produced "objectively tangible harm," *Brown*, 199 F.3d at 457. *Cf. Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring) ("As I see it, transferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race) plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." (quoting 42 U.S.C. § 2000e-2(a))).

Title VII's history confirms that it bans sex-based job transfers or transfer denials that influence the terms, conditions, or privileges of an individual's employment, regardless of whether there are adverse effects. A Senate bill that served as a precursor to the Civil Rights Act would have prohibited the denial of "equal employment opportunity to any individual because of race, color, religion, or national

origin," and it explicitly stated that "[e]qual employment opportunity shall include all the compensation, terms, conditions, and privileges of employment *including but not restricted to*: hiring, promotion, *transfer*, and seniority; . . . referrals for employment; . . . equality of access to facilities and services provided in employment; and equality of participation and membership in employee organizations and labor organizations." S. Rep. No. 88-867, at 24 (emphases added). The Supreme Court has observed that that bill "contained language similar to that ultimately found in the Civil Rights Act" but that the Senate "postponed [the bill] indefinitely after it amended a House version of what ultimately became the Civil Rights Act of 1964." *Hishon*, 467 U.S. at 75 n.7.

Although the bill that became the Civil Rights Act (H.R. 7152) did not expressly define "terms, conditions, or privileges of employment," the historical record demonstrates that those terms should have the same meaning in H.R. 7152 and Title VII itself as in the previous Senate bill, which expressly prohibited discriminatory job transfers. Indeed, after the House of Representatives passed H.R. 7152, and it reached the Senate, Senator J. Lister Hill of Alabama, an opponent of the bill, lamented that "[t]he legislation would give the chairman of the Equal Employment Opportunity Commission almost a free hand to interfere with virtually every aspect of employer-employee relationships. It would control and regiment compensation,

terms, conditions, and privileges of employment *including but not restricted to*: Hiring, promotion, *transfer*, and seniority," echoing verbatim the broad list the Senate had included in its bill. *See* 110 Cong. Rec. 7763 (Apr. 13, 1964) (emphases added); *see also id.* at 7778 (statement of Sen. Tower) (criticizing H.R. 7152 and its declaration that "[a]ll compensation, terms, conditions, or privileges of employment must be free from any discrimination" because under the bill, "[e]very promotion, *every assignment of duty*, every privilege granted an employee . . . could be subject to review by the Federal commission" (emphasis added)).

Indeed, in a debate a few weeks before Congress passed the Civil Rights Act, Senator Edmund Muskie read aloud the text of H.R. 7152's Section 703(a)(1) banning "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment"—language that remained unchanged in the final Act—and demanded, "What more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation?" 110 Cong. Rec. 12,618 (June 3, 1964); *cf. First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981) ("Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' [in the National Labor Relations Act (NLRA)] without further definition, for it did not intend to deprive the [NLRB] of the power further to define those terms in light of specific industrial practices."); *see also Hishon*, 467 U.S. at 76 n.8 (explaining that "certain sections of

Title VII were expressly patterned after the NLRA"); Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333, 399 n.414 (1999) (making this comparison).

Thus, even though Title VII does not enumerate every action that could constitute discrimination with respect to an individual's "terms, conditions, or privileges of employment," it plainly prohibits discriminatory transfers and discriminatory denials of transfer requests, just as the Senate bill explicitly would have. Title VII's text and history, consistent with Congress's plan in passing the statute, make that clear. The statute requires no additional showing of adverse effects.

CONCLUSION

For the foregoing reasons, this Court should overrule *Brown v. Brody* and reverse the judgment of the district court.

Respectfully submitted,

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Dated: July 7, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,191 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 7th day of July, 2021.

/s/ Brianne J. Gorod
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on July 7, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 7th day of July, 2021.

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