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. 14-cv-02032, Judge Reggie B. Walton

AMICUS CURIAE BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT MARY E. CHAMBERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) *Parties and Amici*. All parties appearing before the District Court and in this Court are listed in the Appellant's Brief.

(B) *Rulings Under Review.* References to the rulings at issue appear in the Appellant's Brief.

(C) *Related Cases.* There are no related cases.

RULE 29(c) STATEMENT OF *AMICUS*

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of this *Amicus*.[1]

RULE 29(c)(3) STATEMENT OF INTEREST OF *AMICUS*

The Metropolitan Washington Employment Lawyers Association ("MWELA"), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 300 members, including an annual day-

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[1] In accordance with Fed. R. App. P. 29(a)(4)(E) and Local Rule 29.1, *Amicus* states that no party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than *Amicus* or its members—contributed money that was intended to fund preparing or submitting the brief.

long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice.

MWELA's members and their clients have an important interest in the proper interpretation of the meaning of an "adverse action" under Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the D.C. analogues of these federal statutes, as a substantial portion of MWELA members' practices are devoted to enforcing these statutes, and many MWELA members' clients are impacted by the protections these laws afford. The definition of an adverse action for a discrimination claim under Title VII is likely to arise, in one form or another, in many future cases brought by MWELA members, making it all the more important that the questions presented here be resolved clearly and correctly.

Amicus files this brief with the consent of the parties. Fed. R. App. P. 29(a)(2).

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

RULE 29(c) CORPORATE DISCLOSURE STATEMENT i

RULE 29(c)(3) STATEMENT OF INTEREST OF AMICUS i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

BACKGROUND AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. Title VII does not require proof of economic harm. 3

II. Cases imposing an economic "tangible harm" requirement illustrate its pernicious effects. 10

III. Social science research illustrates that non-economic factors are critically important to employees' satisfaction with their jobs. 16

A. The importance of non-pay factors to employees can be determined empirically now as never before. 16

B. Mounting evidence shows the destructive psychic effects of emotionally oppressive workplace behavior. 18

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases Page(s)

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 7

Alvarado v. Texas Rangers,
492 F.3d 605 (5th Cir. 2007) 12

Babb v. Wilkie,
140 S. Ct. 1168 (2020) 3

Bostock v. Clayton Cty., Georgia,
140 S. Ct. 1731 (2021) 3-4

Brown v. Brody,
199 F.3d 446 (D.C. Cir. 1999) 1, 2, 3, 13, 14, 16, 22

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 7-8, 11

Burlington N. and Santa Fe Ry. Co. v. White,
546 U.S. 53 (2006) 2, 3, 9

Click v. Copeland,
970 F.2d 106 (5th Cir. 1992) 13

Czekalski v. Peters,
2005 WL 975679 (D.D.C. Apr. 21, 2005) 14
475 F.3d 360, 364 (D.C. Cir. 2007) 14

Forsyth v. City of Dallas,
91 F.3d 769 (5th Cir. 1996) 12

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 4

Ginger v. District of Columbia,
527 F.3d 1340 (D.C. Cir. 2008)..4, 13

Harris v. Forklift Sys., Inc.,
510 U.S. 17 (1993) 15

Hishon v. King & Spalding,
467 U.S. 69 (1984) 4-5

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) 11-12

Jackson v. Birmingham Bd. of Ed.,
544 U.S. 167 (2005) 3

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 6-7

Los Angeles Dept. of Water and Power v. Manhart,
435 U.S. 702 (1978) 7

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 5

Meritor Savs. Bank, FSB v. Vinson,
477 U.S. 57 (1986) 4, 7

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 8

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 4

Ortiz-Diaz v. United States Department of Housing & Urban Development,
75 F. Supp. 3d 561 (D.D.C. 2014).. 14-15
867 F.3d 70 (D.C. Cir. 2017)... 14-15

Spees v. James Marine, Inc.,
617 F.3d 380 (6th Cir. 2010) 12

Spring v. Sheboygan Area School Dist.,
865 F.2d 883 (7th Cir. 1989) 10-11

Stewart v. Union Cty. Bd. of Educ.,
655 Fed. App'x. 151 (3d Cir. 2016) 11

Texas Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 5

Statutes

42 U.S.C. § 1981a(a)-(b) 6

42 U.S.C. § 1983 13

42 U.S.C. § 2000e-2(a)(1) 3, 4, 7

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Robert J. Bies and Thomas M. Tripp,
Two Faces of the Powerless: Coping with Tyranny,
in R. M. Kramer & M. A. Neale, eds.,
Power and Influence in Organizations 203-219 (Sage Pubs. 1998) 16

Michelle K. Duffy, Daniel C. Ganster, Jason D. Shawa,
Jonathan L. Johnson, and Milan Pagon,
The Social Context of Undermining Behavior at Work, ORGANIZATIONAL
BEHAVIOR AND HUMAN DECISION PROCESSES 101 (2006)............................ 20-21

Catherine L. Fisk, *Humiliation at Work*,
8 WM. & MARY J. WOMEN & L. 73 (2001)...21

Timothy A. Judge, Ronald F. Piccolo, Nathan P. Podsakoff, John C. Shaw,
and Bruce L. Rich,
The Relationship between Pay and Job Satisfaction:
A Meta-analysis of the Literature, 77 J. VOC. BEHAV. 157 (2010) 17

Loraleigh Keashly, V.G. Trott, and L.M. MacLean,
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9 VIOLENCE & VICTIMS 341 (1994) 16

Frederick P. Morgeson and Stephen E. Humphrey,
The Work Design Questionnaire (WDQ): Developing and Validating a Comprehensive Measure for Assessing Job Design and the Nature of Work,
91 J. APPL. PSYCHOL. 1321 (2006) 18

Richard M. Ryan and Edward L. Deci,
On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being,
52 ANN. REV. PSYCHOL. 141 (2001)... 17-18

Bennett J. Tepper,
Consequences of Abusive Supervision,
34 ACAD. MGT. J. 178 (2000) 18-20

Bennett J. Tepper, Lauren Simon, and Hee Man Park,
Abusive Supervision,
4 ANN. REV. ORG. PSYCHOL. & ORG. BEHAV. 123 (2017).................................19

U.S. Merit Systems Protection Board,
Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards (2012)
https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=780015&version=782964 17

Amy Wrzesniewski, Jane E. Dutton and Gelaye Debebe,
Interpersonal Sensemaking and the Meaning of Work,
25 RSCH. IN ORG. BEHAV. 93 (2003)..18

BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff-Appellant Mary Chambers repeatedly requested a lateral transfer to a different unit within the District of Columbia's Office of the Attorney General (OAG), and the OAG repeatedly denied her requests. She filed suit against the District under Title VII of the Civil Rights Act of 1964, alleging that those denials of her transfer requests constituted unlawful sex discrimination and unlawful retaliation for filing discrimination charges with the Equal Employment Opportunity Commission. The district court granted summary judgment to the District because under circuit precedent the denials of her "purely lateral transfer requests" did not cause any "materially adverse consequences" which it considered to be an essential element of her claims. JA289-90, 293-94 (citing *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999)). A panel of this Court affirmed on the same ground, Panel Op. 6, but two judges suggested in a concurring opinion that the Court should rehear the case en banc, *id.* at 7 (Tatel, J. and Ginsburg, J., concurring). The Court voted to rehear the case, vacated the panel opinion, and directed the parties to address the question whether "the court should retain the rule that the denial or forced acceptance of a job transfer is actionable under Title VII, 42 U.S.C. § 2000e-2(a)(1), only if there is 'objectively tangible harm.'" Order Granting Reh'g at 2 (citing *Brown,* 199 F.3d at 457).

The Court should jettison the requirement of "objectively tangible harm" articulated in *Brown* because it has no textual support, conflicts with Supreme Court precedent defining actionable discrimination and retaliation under Title VII, denies to victims of discrimination remedies that Congress designed for their protection, leads to inconsistent results, and fails to recognize the significant effects of non-economic injuries in the workplace.[2]

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[2] Although the Court asked the parties to limit their briefs to the question whether "objectively tangible harm" is an element of a discrimination claim under Section 703, we note that a similar question arises for retaliation claims under Section 704. Under the standard the Supreme Court has adopted for Title VII retaliation claims, a plaintiff must demonstrate that she experienced a "materially adverse action," which in the retaliation context means it might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citations and internal quotation marks omitted). It seems indisputable that an employee would be dissuaded from complaining to the EEOC if she knew she would be denied a desirable job transfer as a result. The district court acknowledged that the retaliation and discrimination provisions of Title VII differ, but it applied the same "adverse action" requirement to both, and held that denial of a lateral transfer does not create a cognizable injury for retaliation purposes because it does not produce "objectively tangible harm" as described in *Brown.* JA 293. The panel affirmed, considering its decision controlled by *Brown* as to Section 704 retaliation as well as Section 703 discrimination. Panel Op. at 5-6. The full Court has not expressly requested argument on this issue, but this result cannot be squared with the retaliation standard announced in *White,* and should be reversed for the same reason the Court should abandon the "objectively tangible harm" requirement in discrimination cases.

ARGUMENT

I. Title VII does not require proof of economic harm.

The question now before the Court, En Banc Order at 2, is whether to abrogate the rule announced in *Brown*, 199 F.3d at 457, that

> a plaintiff who is made to undertake or who is denied a lateral transfer—that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.

Amicus believes, as do both parties in this case, that *Brown*'s requirement of "objectively tangible harm" should be abrogated.

Section 703(a)(1) of Title VII bars "discriminat[ion]" based on protected characteristics "with respect to [an individual's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Discrimination simply means differential treatment, or, as the Supreme Court has explained, "[a]s used in Title VII, the term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1740 (2020) (quoting *Burlington Northern*, 548 U.S. at 59); *see also Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020) (discrimination carries its "'normal definition,'" which is "'differential treatment'" (quoting *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 174 (2005))). In *Bostock*, the Court held that

the touchstone inquiry under Title VII is not whether an employee suffered economic harm, but whether she was treated "worse" than men in the same job. *Bostock*, 140 S. Ct. at 1740.

Congress intended the prohibition on discrimination in the "terms, conditions, or privileges" of employment "to strike at the entire spectrum of disparate treatment," not merely "economic or tangible discrimination." *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (internal quotation marks and citation omitted). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (noting that Title VII's prohibition on discrimination extends beyond "'terms' and 'conditions' in the narrow contractual sense" (quoting 42 U.S.C. § 2000e-2(a)(1))); *Franks v. Bowman Transp. Co*., 424 U.S. 747, 763 (1976) ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination"); *Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008) ("terms and conditions of employment" include job reassignments caused by a reorganization even without a substantial change in benefits).

As the Court put it in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), "terms, conditions, or privileges" of employment under Title VII include any and all benefits that are "part and parcel of the employment relationship," that are "'incidents of employment,'" or that "'form an aspect of the relationship between

the employer and employees[,]'" and they may "not be doled out in a discriminatory fashion, even if the employer would be free . . . simply not to provide the benefit at all." *Id*. at 74-75 (citations omitted). To obtain the position one seeks is clearly a fundamental term or condition of employment, in the transfer context as much as in the hiring context, and thus the discriminatory denial of a transfer request should be actionable just as a discriminatory failure to hire is actionable.

It should be noted that the term "adverse employment action" itself is a judicial gloss on Title VII, not a part of the statutory text. The concept of "adverse action" arose out of the original articulation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), of a *prima facie* evidentiary burden on plaintiffs as part of an "order and allocation of proof" in Title VII cases. *Id.* at 800. The Court specified, in the failure-to-hire context of its decision, that as part of the *prima facie* showing a plaintiff had to show "that, despite his qualifications, he was rejected." *Id*. at 802. As the Court later explained, this production burden was designed to eliminate the two most likely legitimate explanations for the employment action—lack of qualifications, and absence of a job opening (the latter specifically for failure-to-hire cases like *McDonnell Douglas* itself). *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (explaining the evidentiary purpose of this showing).

However, the *McDonnell Douglas* Court did not hold, and Title VII itself does not provide, that the only cognizable "adverse actions" are those with direct monetary consequences to the employee. This Court, and others that have required a showing of additional "materially adverse consequences" causing "objectively tangible harm," by which they mean economic harm, have embroidered the statutory language in a manner that totally obscures the simple command of Title VII that there be no discrimination in any term, condition, or privilege of employment.

People are injured by discriminatory treatment that does not necessarily have an economic dimension. That is precisely why Congress amended Title VII in 1991 to add compensatory and punitive damages to the available remedies under the statute. Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a(a)-(b). As the Supreme Court explained in discussing the damages provisions of the 1991 Act, Title VII now "allows monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief under Title VII" because monetary relief was unavailable absent "some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994) (emphasis in original). The *Landgraf* Court further clarified that Title VII now "allows a plaintiff to recover in circumstances in which there has been unlawful

discrimination in the ‘terms, conditions or privileges of employment,’ 42 U.S.C. § 2000e-2(a)(1), even though the discrimination did not involve a discharge or a loss of pay.” *Id.* This “major expansion in the relief available to victims of employment discrimination,” the Court recognized, was designed to further Title VII’s “‘central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.’” *Id.* at 254-55 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

Moreover, the development of harassment jurisprudence over the past four decades is rooted in the premise that Title VII reaches far beyond “‘economic or tangible discrimination’” and extends to the “‘entire spectrum of disparate treatment.’” *Vinson*, 477 U.S. at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The Supreme Court’s explication of the liability standards applicable to supervisory harassment confirms that employment actions like the denial of transfer requests in this case constitute “tangible employment actions,” and if they occurred in the context of other harassing conduct would render the employer vicariously liable. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). Although the Court in *Ellerth* expressed the expectation that a tangible employment action “in most cases inflicts direct economic harm,” resulting from events “such as hiring, failing to promote,

reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," *id.* at 762, the decision did not require proof of economic harm to prove an action was "tangible." Rather, the Court was distinguishing between supervisory actions that alter the work environment that are not employment actions, such as verbal threats and propositions (which are actionable under a hostile environment theory when they are severe or pervasive, but for which the employer has an affirmative defense to liability), and employment actions that are the official acts of the enterprise, such as the denial of a transfer (for which there is no such affirmative defense). *Id.*

The Supreme Court further reinforced the principle that Title VII prohibits more than economic forms of discrimination when it articulated a rule for the limitations period applicable to hostile work environment cases in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). There the Court distinguished hostile environment harassment cases in which the unlawful employment practice does not occur on any particular day, but takes place over a series of days, from discrete acts which constitute separate actionable employment practices. *Morgan* specifically identified discrete acts "such as termination, failure to promote, denial of transfer, or refusal to hire" which are easily identifiable and are each separately actionable. *Id.* The Court's inclusion of denial of transfers as one of the discrete, identifiable, actionable practices under Title VII further

confirms that claims of discriminatory transfer (or discriminatory denial of a transfer) should be treated no differently from claims of bias-based termination, refusal to hire, or failure to promote.

The Supreme Court's treatment of retaliation claims demonstrates the same recognition of Title VII's sweeping scope. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). In *White*, the Court held that the anti-retaliation provision of Title VII prohibits materially adverse actions*,* which means, in the retaliation context, that they are sufficiently detrimental to dissuade a reasonable worker from pursuing a discrimination complaint. *Id.* at 68. As indicated above, *Amicus* believes the denial of Ms. Chambers' transfer requests meets that standard, but the prohibition on discrimination in the terms and conditions of employment does not require proof of any particular level of harm, or of any economic consequences.

Of course, a discrimination plaintiff has to prove some harm to be entitled to equitable or monetary relief, but that is the only constraint needed to "separate significant from trivial harms" in discrimination cases. *See id.* The humiliation and distress caused by being differently treated in a term, condition, or privilege of employment because of one's sex or race is the injury Title VII is designed to redress, and to create an extra hurdle to obtaining that relief by requiring that the

challenged employment action have an economic dimension intolerably subverts the purpose of the statute.

II. Cases imposing an economic "tangible harm" requirement illustrate its pernicious effects.

Courts that require a showing of a "materially adverse action" often leave employees with no remedy for egregious discrimination except to quit their jobs and hope a court will understand they suffered a constructive discharge. For example, in *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989), a well-regarded elementary school principal, after being asked twice whether she planned to retire, was transferred to become principal of two other elementary schools within the same school district, based in part on the employer's perception of management problems at her former school. Rather than accept the transfer, Ms. Spring resigned because she believed her employer "wished her gone," and because "her new assignment was a public humiliation." *Id.* at 885. She filed a federal age discrimination suit, in which the district court granted summary judgment to the school district.

The Seventh Circuit affirmed, holding that an ADEA plaintiff (like a Title VII plaintiff) must prove she suffered a "materially adverse" change in the terms or conditions of her employment because of the challenged conduct. *Id*. Ms. Spring's new contract was for a longer term and she would have received a pay increase, but the panel opinion also cited facts including that Ms. Spring would

have been transferring from a school with students of diverse backgrounds to the principalship of two schools with students of upper middle class backgrounds, and from a school with a program for emotionally disturbed children to schools with no special programs, implying that the conditions of the new assignment were the opposite of materially adverse. Thus the court not only discounted the plaintiff's evidence of adverse consequences, but also substituted its own racially insensitive view of the circumstances to support its conclusion that her transfer was not materially adverse. *Id.* at 886.

In a similar case, the Third Circuit said a Black school security guard could not establish a materially adverse action based on his transfer from his position at a high school to a middle school, which he alleged was a less prestigious position. *Stewart v. Union Cty. Bd. of Educ.*, 655 Fed. App'x. 151, 157 (3d Cir. 2016). The plaintiff in *Stewart* also alleged that the racially discriminatory transfer ignored the satisfaction he derived from being valued and needed at the high school. *Id*. The Third Circuit held that because job transfers were not listed as potentially actionable tangible actions in *Ellerth*, 524 U.S. at 761, Stewart could not base a claim on his transfer. *Stewart*, 655 Fed. App'x. at 155.

The results in these cases should have been foreclosed by the Supreme Court's analysis in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), in which a class of city truck drivers claimed that they were

denied the opportunity to work as over-the-road, long-distance line drivers because of their race. The Court noted that the issue was whether they were being treated less favorably in any respect, and rejected the notion of a "materially adverse" standard, holding that "Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another." *Id.* at 338 n.18. In making that simple, powerful statement, the Court embraced the definition of discrimination as meaning differential treatment without the need for an added showing that the treatment was worse, either in compensation or otherwise. *Id.*

Other courts that purport to apply a "materially adverse" requirement to the plaintiff's *prima facie* case occasionally find that the standard is met even without proof that the transfer had economic consequences. In *Spees v. James Marine, Inc.*, 617 F.3d 380 (6th Cir. 2010), for instance, the court held that the transfer of a female welder to a night shift job in the tool room constituted an adverse action, even though there was no change in pay, because, among other things, work on that shift "adversely affected her ability to raise her daughter as a single mother." *Id.* at 392; *see also Alvarado v. Texas Rangers*, 492 F.3d 605, 615 (5th Cir. 2007) (woman who was repeatedly denied transfer from state trooper to Texas Ranger stated claim of adverse employment action even though pay was the same, because of the Rangers' prestige as "an elite unit"); *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996) (transfers of police officers from intelligence unit to night

uniformed patrol positions constituted adverse actions in a section 1983 suit, 42 U.S.C. § 1983, where the positions afforded less prestige, less interesting work, and less favorable working hours); *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992) (noting that "[m]oney alone does not buy happiness" and holding that transfers of deputy sheriffs from law enforcement division to jail guard positions could be considered demotions even without a change in pay because guard jobs were less interesting and prestigious, and because "everybody" viewed a transfer from detention to law enforcement as a promotion).

This Court has occasionally applied the *Brown* rule more flexibly, and found transfers to be actionable even without an economic detriment. For example, in *Ginger v. District of Columbia,* this Court held that switching police officers to a rotating morning/afternoon/night shift from a permanent night shift was an adverse employment action in violation of Title VII because it "severely affected their sleep schedules and made it more difficult for them to work overtime and part-time day jobs." 527 F.3d at 1344. Significantly, the Court stressed that the inconveniences resulting from a less favorable schedule can render an employment action "adverse" even if the employee's responsibilities and wages are left unchanged. *Id.*

Indeed, district courts in this Circuit have sometimes applied the *Brown* rule strictly, only to have their opinions overturned on appeal. For example, the district

court in *Czekalski v. Peters,* 2005 WL 975679 (D.D.C. April 21, 2005), granted summary judgment for the employer in reliance on the rule in *Brown*, holding that the plaintiff failed to demonstrate adverse consequences because her reassignment did not affect her salary or work hours. *Id.* at *6-*10. This Court reversed and held that a lateral transfer that diminishes an employee's supervisory duties or programmatic responsibilities may constitute an adverse action, confirming that this Court has long been skeptical of the rigid application of the *Brown* rule. *Czekalski v. Peters*, 475 F.3d 360, 364-65 (D.C. Cir. 2007). Notably, this Court indicated that whether a reassignment constitutes an adverse action is generally a jury question. *Id.* at 365.

This Court's recent decision in *Ortiz-Diaz v. United States Department of Housing & Urban Development*, 867 F.3d 70 (D.C. Cir. 2017), illustrates the problems with administering a purported bright-line rule that discriminatory transfers without pecuniary harm are beyond the reach of Title VII. The district court in *Ortiz-Diaz* relied on *Brown* in holding the plaintiff's lateral transfer did not amount to an adverse employment action, and granted summary judgment for the employer. 75 F. Supp. 3d 561, 565 (D.D.C. 2014). On appeal, this Court cited the *Brown* rule that lateral transfers are ordinarily not changes in the terms, conditions, or privileges of employment, but then reversed summary judgment and held that the allegation that the plaintiff sought to move away from a biased supervisor to

avoid harm to his career advancement potential, rather than merely as a personal preference, was sufficient to state a claim, and in fact "falls within Title VII's heartland." 867 F.3d at 74, 75. In his concurrence, then-Judge Kavanaugh noted that the uncertainty involved in drawing the line between actionable and non-actionable transfers militated in favor of establishing the clear principle that "[a]ll discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII." *Id.* at 81 (Kavanaugh, J. concurring).

This line-drawing uncertainty leads courts to focus on egregious facts or "extraordinary circumstances," as the district court described them in *Ortiz-Diaz*, 75 F. Supp. 3d at 565, that might support finding that an unwanted transfer constitutes actionable discrimination. But as in other areas of the law, egregious facts do not "mark the boundary of what is actionable." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (noting that the appalling conduct alleged in *Vinson* and other egregious harassment cases did not set the standard for what is actionable, and that a worker's emotional and psychological stability need not be destroyed to state a claim).

So too here. Adherence to the straightforward language of the statute prohibiting discrimination because of sex in the terms, conditions, or privileges of employment will best serve the statutory purpose of eradicating employment discrimination. Plaintiffs in transfer cases, like all discrimination plaintiffs, will

still have the burden of proving that the challenged employment action was taken because of their membership in a protected class. Further, to obtain back pay or damages, plaintiffs in transfer cases, like all discrimination plaintiffs, will have to prove they suffered compensable harm. These burdens are sufficiently heavy to forestall any imagined flood of court challenges to employment decisions that are motivated by legitimate business purposes.

III. Social science research illustrates that non-economic factors are critically important to employees' satisfaction with their jobs.

A. The importance of non-pay factors to employees can be determined empirically now as never before

When the decision in *Brown v. Brody* was rendered, social scientists had just begun examining conditions other than wages or salaries as factors in employees' sense of self-worth, motivation, job satisfaction and productivity. *See, e.g.,* Robert J. Bies and Thomas M. Tripp, *Two Faces of the Powerless: Coping with Tyranny*, *in* R. M. Kramer & M. A. Neale, eds., *Power and Influence in Organizations* 203-219 (Sage Pubs. 1998); Loraleigh Keashly, V.G. Trott, and L.M. MacLean, *Abusive Behavior in the Workplace: A Preliminary Investigation*, 9 VIOLENCE & VICTIMS 341 (1994).

In the two decades since *Brown*, survey research on these issues has convincingly demonstrated that non-monetary elements of work are critical to employees' job satisfaction and performance. A comprehensive 2010 review of the

social science literature on job satisfaction concluded that "in general[,] the findings [of the reviewed studies] suggested little relationship between level of pay and satisfaction with one's job or [with] one's pay. . . . For the employee, if the ultimate goal in a job is to find one that is satisfying, given a choice, individuals would be better off weighing other job attributes more heavily than pay." Timothy A. Judge, Ronald F. Piccolo, Nathan P. Podsakoff, John C. Shaw, and Bruce L. Rich, *The Relationship between Pay and Job Satisfaction: A Meta-analysis of the Literature*, 77 J. VOC. BEHAV. 157, 162-63 (2010). A 2012 report on federal employment concluded that "[j]ob characteristics such as autonomy, feedback, skill variety, task significance, and task identity" have as much influence on employee motivation as monetary rewards. U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* at 30 (2012), *available at* https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=780015&version=782964.

A 2001 study, not limited to employment, provided new evidence that "warm, trusting, and supportive interpersonal relationships" are essential for human well-being, both "hedonic" (measured by pleasure attainment and pain avoidance) and "eudaimonic" (focused on meaning, self-realization and full functioning). Richard M. Ryan and Edward L. Deci, *On Happiness and Human*

Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being, 52 ANN. REV. PSYCHOL. 141, 154 (2001). And a 2003 study of workplace dynamics found that "individuals seek meaning through a connection with others" in their work. Amy Wrzesniewski, Jane E. Dutton and Gelaye Debebe, *Interpersonal Sensemaking and the Meaning of Work*, 25 RSCH. IN ORG. BEHAV. 93, 135 (2003).

An important 2006 study of American workplaces, using a new 21-item job design and satisfaction survey scale developed by the authors, cited the Ryan and Wrzesniewski findings and confirmed that "[t]hese kinds of positive work relationships are likely to be just as effective at producing [feelings of job satisfaction] as are the more traditionally studied motivational work characteristics." Frederick P. Morgeson and Stephen E. Humphrey, *The Work Design Questionnaire (WDQ): Developing and Validating a Comprehensive Measure for Assessing Job Design and the Nature of Work*, 91 J. APPL. PSYCHOL. 1321, 1329 (2006).

B. Mounting evidence shows the destructive psychic effects of emotionally oppressive workplace behavior

A 2000 survey of several hundred randomly chosen U.S. workers by University of Kentucky organizational psychologist Bennett Tepper undertook to measure the harms of "abusive supervision," defined as "subordinates' perceptions of the extent to which supervisors engage in the sustained display of hostile verbal and nonverbal behaviors, excluding physical contact." Bennett J. Tepper,

Consequences of Abusive Supervision, 34 ACAD. MGT. J. 178 (2000); *see also* Bennett J. Tepper, Lauren Simon, and Hee Man Park, *Abusive Supervision*, 4 ANN. REV. ORG. PSYCHOL. & ORG. BEHAV. 123 (2017) (updating and reviewing the research on this topic). To isolate abusive supervision from supervision in general, Professor Tepper's 2000 survey asked respondents whether their supervisor:

- Ridicules me.
- Gives me the silent treatment.
- Puts me down in front of others.
- Reminds me of my past mistakes and failures.
- Doesn't give me credit for jobs requiring a lot of effort.
- Blames me to save himself/herself embarrassment.
- Is rude to me.
- Does not allow me to interact with my coworkers.
- Tells me I'm incompetent.
- Lies to me.

Consequences, 34 ACAD. MGT. J. at 189-190. Professor Tepper reported that, compared with the group of respondents as a whole, "subordinates who perceived their supervisors were more abusive were more likely to quit their jobs. For subordinates who remained with their jobs, abusive supervision was associated with lower job and life satisfaction, lower normative and affective commitment,

and higher . . . psychological distress." *Id.* at 178. Professor Tepper also found that "the effects [of abusive supervision] for job satisfaction, life satisfaction, family-to-work conflict, depression, and emotional exhaustion were more pronounced for subordinates who had less job mobility," *i.e.*, had fewer viable alternatives to the job they held. *Id.* at 186.

A 2006 study of antisocial workplace behavior focused specifically on "social undermining," defined as "behaviors that hinder another's ability to establish and maintain positive interpersonal relationships, work-related success, and favorable reputation . . . [such as] intentionally making someone feel incompetent, withholding important or required information, giving the silent treatment, talking behind someone's back, and spreading rumors about a particular individual . . . [behaviors that are] intentionally designed to weaken a target by degrees." Michelle K. Duffy, Daniel C. Ganster, Jason D. Shawa, Jonathan L. Johnson, and Milan Pagon, *The Social Context of Undermining Behavior at Work*, ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 101, ISSUE 1, pages 105-126 (2006), at 105.

Professors Duffy *et al.* gave particular attention to negative consequences for workers who were "singled out" for such maltreatment, based on evidence that "individuals do not experience social undermining in a vacuum[,] but rather form judgments, in part, based on the experiences of those around them." *Id.* at 105-106.

Most importantly for present purposes, the authors found that among victims of supervisor undermining, perceptions of injustice were far greater for employees who felt "singled out" than for those who perceived others in their group as suffering the same mistreatment. *Id.* at 123-125.[3]

Two key points emerge from the available social science. First, modern research strongly confirms that prosocial and antisocial behaviors in the workplace, and their constructive or destructive emotional consequences, are critically important to workers, often as or more so than wages or monetary benefits. Second, people value jobs for a variety of reasons, many of them intangible or values-based, and courts should not discount those reasons as mere personal preferences or discount to *de minimis* an employer's discriminatory attacks on them where employee compensation is not directly involved.

On both these grounds, it would fly in the face of available science not to deem these important non-pecuniary aspects of work life to be "terms and conditions of employment" within the meaning of Section 703(a) of Title VII. It is time for this Court to recognize that Title VII protects against employers' selective allocation of these and other non-monetary benefits and burdens based on race, sex, religion, or other unlawful criteria.

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[3] For a legal academic perspective on these questions, especially in the hostile work environment context, *see generally* Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001).

CONCLUSION

For all of the foregoing reasons, *Amicus* MWELA urges the abrogation of the "objectively tangible harm" rule of *Brown v. Brody,* and the reversal of the district court's order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

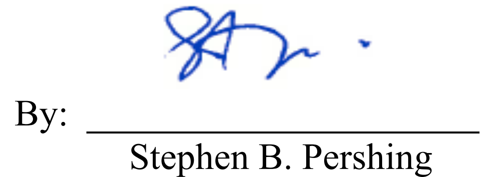
This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because this brief contains 4,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, Times New Roman 14-point.

Dated: July 6, 2021 By: /s/ Carolyn L. Wheeler
Carolyn L. Wheeler

CERTIFICATE OF SERVICE

I certify that on July 6, 2021, I filed a copy of the Brief of *Amicus Curiae*, Metropolitan Washington Employment Lawyers' Association, supporting Plaintiff-Appellant's appeal seeking reversal, *via* the Court's ECM/ECF filing system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.



Dated: July 6, 2021 By: ______________________
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