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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

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

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

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 discrim ""ris

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*

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.

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*

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

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

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Retaining the material adversity requirement

school year begins. Students may move into, out of, or within a district. Students may enter or exit private

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,

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

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

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 empl

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 Tusedc3(.6s-4(ed12.a-)1(7)uyo-10T-)f-11.900W)10hTTc1-10T-)6*

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:*

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

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

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,

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