No. 20-1373

In The
Supreme Court of the United States

WANZA COLE,

Petitioner,

v.

WAKE COUNTY BOARD OF EDUCATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OBJECTION TO PETITIONER'S QUESTION PRESENTED

The proper issue before this Court is whether the Court of Appeals was correct when it affirmed, *per curiam*, the decision granting Respondent's Motion for Summary Judgment on the ground that a lateral transfer with no reduction in pay or benefits, no diminution in responsibility, and no material changes in the conditions of employment does not constitute an adverse employment action based solely on the subjective preferences of the employee.

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed.R.Civ.P. 7.1,

WAKE COUNTY BOARD OF EDUCATION, who is the Respondent, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

YES _____ NO __X__

2. Does party have any parent corporations?

YES _____ NO __X__

If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity?

YES _____ NO __X__

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Civil Rule 7.3 or Local Criminal Rule 12.3)?

YES _____ NO __X__

If yes, identify entity and nature of interest:

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION—Continued

5. Is party a trade association?

YES _____ NO __X__

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors' committee:

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The Wake County Board of Education respectfully opposes the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals. The judgment was issued February 4, 2021 and is reproduced in the appendix to the Petition at 1a-6a.

STATEMENT OF THE CASE

On May 17, 2011, Petitioner filed a lawsuit against the Board of Education, alleging that the decision to

remove her from a principal's position to a central office supervisory position was based on race and was retaliatory in violation of Title VII. The Honorable James C. Dever, III granted the Board's motion for summary judgment, and the Fourth Circuit affirmed *per curiam*. Petitioner filed the Petition for Writ of Certiorari on March 29, 2021.

REASONS FOR DENYING THE PETITION

The decisions of the lower courts in this case were correct and in accordance with well-established law. None of the issues raised by the Petition requires consideration by this Court.

The questions presented by Petitioners to this Court fail to identify any issues for review on the merits of the decision of the Fourth Circuit or of the District Court below.

Nothing in Petitioner's submission indicates that there is a circuit split on a relevant issue, that Judge Dever or the Fourth Circuit made a decision in conflict with this Court's precedent, or that the case presents an unsettled question of federal law.

FACTUAL STATEMENT

For approximately eight years, from 2007 until 2015, Petitioner Wanza Cole served as principal of West Cary Middle School ("WCMS"). CA4JA at 651.

After a thorough investigation into Ms. Cole's failures in management at the school level, Ms. Cole was reassigned to be the Director of Intervention Services in the school system's central office. CA4JA at 655. Despite serious substantiated concerns discovered during the investigation, the district elected not to take adverse action against Ms. Cole and instead opted to provide her a fresh start in a new role in central office. Ms. Cole was assigned to a Director-level position, which is a position often sought out by school building principals. CA4JA at 171-73. Following her reassignment, Ms. Cole utilized sick leave and did not report to her new position. CA4JA at 201-02; CA4JA at 242. Ms. Cole eventually exhausted her sick leave in October 2016 and remained out on unpaid leave until June 2017. CA4JA at 201-02. Ms. Cole's administrator contract expired at the end of the 2016-17 school year. CA4JA at 198-202; CA4JA at 73 ¶ 98.

Ms. Cole's performance issues surfaced when teachers at the school reported that they had been asked by Ms. Cole to fraudulently certify that they had been observed in the classroom as required by North Carolina State Board of Education Policy, when in fact they had not been. CA4JA at 177. When the human resources department received this report, Dr. Bryan Martin, Senior Director of Employee Relations, was asked to investigate the concerns regarding falsified evaluations. CA4JA at 176. Dr. Martin in turn asked Ms. Mary Swann, a senior administrator for employee relations and an African American female, to assist with the review and interview teachers at the school

regarding their evaluations. *Id*. CA4JA at 122-24, 176. Ms. Swann's interviews confirmed for her that there were serious concerns with the teacher evaluation process at WCMS. *Id*.

For instance, Kamilla Dancy, an African American female, should have received two observations by an administrator during the course of the school year and a summary evaluation at the end of the year. CA4JA at 119-21. Despite not being observed at all during the school year, Ms. Cole provided Ms. Dancy with a summary evaluation that indicated that she had been observed twice during the school year, which was false. *Id*. Ms. Dancy was concerned that the summary evaluation was inaccurate but feared that Ms. Cole would retaliate against her if she raised those concerns, so she signed the evaluation even though she knew it was inaccurate. *Id*.

Ms. Dancy states that under Ms. Cole, the atmosphere at WCMS among staff became very tense. Ms. Dancy felt that it was an environment where questioning decisions of administrators was not welcomed, and where voicing a dissenting opinion would lead to being publicly criticized or other retaliation. *Id*. Ms. Dancy shared these facts when interviewed by Ms. Swann in January 2015. *Id*. In addition, according to Ms. Dancy, several teachers reported to Ms. Swann that observations had not been done during the 2013-14 school year or, that if they were done, they were conducted during the last week of school, which is not reflective of the teacher's performance throughout the year. *Id*.

Another teacher informed Ms. Swann that she had only received one full administrator observation, when she should have received three. CA4JA at 123 ¶ 15. Yet another teacher also confirmed that she did not have any administrator observations during the year and that no summary evaluation meeting took place, but that nonetheless she was asked to sign off on the evaluation online indicating that she had been properly observed and that an evaluation meeting had taken place. CA4JA at 123 ¶ 13.

On February 11, 2015, a meeting was held between Ms. Cole, Dr. Martin, and her immediate supervisor, Area Superintendent Tim Locklair, to review the findings of the investigation. CA4JA at 128. During the February 11, 2015, meeting, Mr. Locklair reiterated to Ms. Cole the expectations of WCPSS regarding conducting teacher observations and evaluations and accurately recording information. Ms. Cole responded that she understood the expectations, and that she was going to improve and would get the necessary observations completed. *Id*. Ms. Cole did not, however, dispute the accuracy of the information shared with her during that meeting. *Id*.

Throughout the following months, Mr. Locklair continued to closely monitor information about observations from the state-wide evaluation system and continued to be in contact with Ms. Cole regarding the issue. Despite assuring Mr. Locklair that she understood the expectations and would work to improve, and her continued assurance that she was complying with expectations, Mr. Locklair did not see any indication of

improvements with the evaluation process. CA4JA at 128 ¶ 14. For example, on May 5, 2015, Dr. Martin sent Mr. Locklair an email stating the following: "WCMS has completed ONE of the 21 [summary evaluations for non-tenured teachers] that were supposed to be done by mid April. I had Mary [Swann] look at some surrounding schools to see if this was a trend. It's not." CA4JA at 185.

On April 6, 2015, Mr. Locklair sent a letter to Ms. Cole attaching a summary memorandum and clearly laying out the concerns that he had as her supervisor. He expressed in that letter that it was his expectation, and that of WCPSS, that she show significant improvement in her supervision and implementation of the teacher evaluation process. CA4JA at 149. On April 9, 2015, Mr. Locklair met with Ms. Cole for her mid-year review. CA4JA at 128 ¶ 16. On her mid-year review, Ms. Cole was rated as "not progressing" for one of her goals in the area of Human Resources Leadership, which related to teacher observations and end of year summaries. CA4JA at 128 ¶ 17. Despite Mr. Locklair's earlier communications with Ms. Cole regarding expectations, at the time of the mid-year review, Ms. Cole had only completed two observations and had one open observation. According to a calendar developed by WCMS administration, Ms. Cole should have had 47 observations completed by the end of March. In the review, Mr. Locklair again reiterated to Ms. Cole his expectations and that of the school system for the evaluation process. *Id*. Ms. Cole attempted to rebut Ms. Locklair's concerns by placing blame on the online

evaluation system. However, Dr. Martin and Ms. Swann continuously reviewed information provided by Ms. Cole and cross-referenced it with information in the system, and their review consistently showed ongoing concerns with Ms. Cole's implementation of the evaluation process and that there were not widespread errors within the online system. CA4JA at 110 ¶ 45.

On May 28, 2015, Mr. Locklair conducted Ms. Cole's year-end summative evaluation. In that evaluation, Ms. Cole was rated as "Developing" on Standard IV-Human Resource Leadership, which is below the school system's expectation. CA4JA at 130 ¶ 22. Following her year-end review, the decision was made that Ms. Cole should be reassigned to a central office position as Director of Intervention Services, where she would not be responsible for evaluating or supervising the evaluation process for a school building of classroom teachers. Mr. Locklair believed that this new position would offer Ms. Cole an opportunity for professional growth, and he did not consider it a demotion. He notes that many school building principals seek out opportunities to serve in director level positions in central office. CA4JA at 130 ¶ 23.

Ms. Cole filed a grievance dated July 14, 2015, in which she grieved her reassignment. CA4JA at 159. In a written response upholding Ms. Cole's transfer, Doug Thilman, Assistant Superintendent for Human Resources, stated in part:

> At our meeting, I explained that the Intervention Services Director position was a good

> leadership position and afforded an opportunity to gain valuable Central Services administrative experience. As the Intervention Services Director you are responsible for providing leadership over critical district wide programs such as PBIS, budget responsibility, as well as developing district policies, regulations, and procedures, and supervising and evaluating program staff. A transfer to Central Services does not preclude future opportunities at a school setting within WCPSS, and, as I shared, may even make you a better school leader in the future.

Id.

Ms. Cole's new position provided leadership to Positive Behavior Support Coaches and Coordinating Teachers focusing on behavior to support schools. CA4JA at 157. In this role, Ms. Cole would have supervised six (6) coaches and seven (7) coordinating teachers. This role would have also involved budgetary oversight and responsibility. The position required "[e]ight years of experience in an educational setting of which three years were as a school administrator." *Id*. Ms. Cole's salary and the other terms and conditions of her contract were unchanged as a result of her transfer. CA4JA at 241.

OPINIONS BELOW

In granting the Board's Motion for Summary Judgment, the district court found that (1) Ms. Cole's

transfer was not an adverse employment action, (2) that she was not meeting the Board's legitimate employment expectations at the time of the transfer or nonrenewal, (3) that her nonrenewal was not retaliatory, and (4) that the Board's explanations for the transfer and nonrenewal were not pretexts for illegal discrimination. CA4JA at 658-65.

In ruling that Ms. Cole's transfer was not an adverse employment action, the district court noted that "an employee's perception of the new position as a demotion is close to irrelevant." CA4JA at 659. Regarding Ms. Cole's argument that the transfer hurt her chances for promotion, the Court noted that Ms. Cole "asks the court to assume her career trajectory for a job in which she failed to report to work, and to speculate that if she had reported to work as DIS, then she would not have received a promotion. Cole's speculation about her future prospects for promotion do not suffice." Ms. Cole's argument regarding the central office position ignore the fact that all of the Board's highest-ranking officials, including the Superintendent, work in central office. Uncontradicted testimony by current and former WCPSS administrators established that many educators view a move to central office as a promotion, not a demotion, and in fact several had themselves sought out such moves to advance their own careers. CA4JA at 130 ¶ 23; CA4JA at 171-73; CA4JA at 197. Further, Petitioner ignores the fact that she *never came to work* as the Director of Intervention Services. While Petitioner may have derisively (and inaccurately) thought of the position as simply "working with every reject,

including faculty and students that had problems," CA4JA at 239, the undisputed evidence shows that it was a valuable and critical position for the school system, and one which district administrators believed would be well suited for Petitioner's abilities, while not requiring her to be responsible for evaluating teachers.

The Fourth Circuit affirmed *per curiam*, holding that the district court correctly determined that Petitioner failed to establish an adverse employment action. Pet. App. 3-4.

THE DECISION OF THE FOURTH CIRCUIT IN THIS CASE DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND WAS SUBSTANTIVELY CORRECT

Petitioner asserts that there is an "entrenched circuit split" over what employment practices are actionable under Title VII. Pet. 9. However, the Courts of Appeals have consistently held that the circumstances presented here—where there is a lateral transfer with no reduction in pay or benefits, no diminution in responsibility, and no material changes in the conditions of employment—are not actionable under Title VII. The question that Petitioner seeks to resolve is not squarely presented here because under *any* standard, Petitioner failed to meet her burden to establish that the transfer at issue was actionable. The Fourth Circuit did not lay down a bright-line rule that no lateral transfer could ever constitute an adverse employment

action; rather, the Court of Appeals correctly ruled that Petitioner put forth no evidence whatsoever to support the assertion that the lateral transfer *at issue here* constituted an adverse action. Pet. App. 4a.

The Court of Appeals—following the unremarkable proposition that whether a new job assignment is less subjectively appealing to an employee cannot by itself turn a lateral transfer into an adverse employment action—upheld the district court's determination that Petitioner's argument that she suffered an adverse employment action was premised solely on her personal preference. Pet. App. 4a. Further, Petitioner failed to ever report to the new position, which meant there was no evidence about the level of responsibility in the position based on actual experience, as opposed to mere speculation. *Id.* at 3-4. Finally, as the Court of Appeals specifically noted, Petitioner "did not provide any affidavits or deposition testimony from someone who occupied the position or who worked within the department that also could have addressed these issues [regarding level of responsibility]." *Id.* In short, Petitioner simply failed to put forth *any* evidence regarding the proposed position other than her own subjective preference to support the assertion that the transfer was an adverse employment action.

None of the cases cited by Petitioner support the proposition that subjective preference, standing alone, can form the basis of an adverse employment action. Petitioner asserts that the Second, Sixth, Seventh, Eight, Ninth, and Eleventh Circuits purportedly support a broader interpretation than that applied by the

Fourth Circuit in this case. Pet. 13. However, an examination of the cases proffered in support shows that under the standards applied by any of these courts, Petitioner's claim would fail.

In the Second Circuit, to qualify as an adverse employment action the employer's action must be "materially adverse with respect to the terms and conditions of employment . . . [and] must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Davis v. New York City Dept. of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015). "Examples include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Chung v. City Univ. of N.Y.*, 605 F. App'x 20, 22 (2d Cir. 2015). Similarly, in the Sixth Circuit transfers may be actionable if they involve "a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 886 (6th Cir. 1996). "[R]eassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Id.* at 885.

In this case, Petitioner put forth no evidence of decreased wages or benefits, a less distinguished title, or significantly diminished material responsibilities. Similar to the plaintiff in *Kocsis*, Petitioner "submitted

no evidence that she lost any prestige in her position because of her working conditions or her title change . . . [and] failed to make a real attempt to compare the two positions." *Id.* at 886-87. Petitioner cites the decision in *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980), as an example of a case where the Second Circuit held that the transfer of a teacher from a junior-high school to an elementary school constituted an adverse action even though the teacher's salary, workload, and teaching subject did not change. Pet. 14. However, in that case the "substantially uncontradicted evidence" demonstrated that the art programs at the elementary level were so "profoundly different" from junior high as to render "utterly useless" the teacher's twenty years of experience and study. *Rodriguez*, 620 F.2d at 366. No such evidence was provided by Petitioner here.

Similar to the Second and Sixth Circuits, the Eighth Circuit provides that "[a] transfer constitutes an adverse employment action when the transfer results in a significant change in working conditions or a diminution in the transferred employee's title, salary, or benefits." *Turner v. Gonzales*, 421 F.3d 688, 697 (8th Cir. 2005). In *Turner*, the plaintiff presented evidence sufficient to raise a genuine issue of material fact as to whether the work she was assigned after her transfer was a considerable downward shift from her prior responsibilities. *Id.* at 697. There is no similar evidence in this case because Petitioner never reported to her new position and she admitted she in fact knew nothing about the position, and therefore has no evidence

regarding her proposed new responsibilities in practice.

The Seventh Circuit has stated that transfers may constitute adverse employment actions where the employee's "compensation, fringe benefits, or other financial terms of employment are diminished," or where they "significantly reduce[] the employee's career prospects." *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002). There is no evidence in this case that Petitioner's career prospects were reduced by her proposed transfer. On the contrary, there are uncontroverted affidavits from district administrators that the transfer could have improved Ms. Cole's long-term prospects. Further, the Seventh Circuit made clear that what is not actionable "are cases of purely subjective preference for one position over another"—which was the case in *Herrnreiter*, and is the case here. *Id.* at 745.

While the cases from the Ninth Circuit cited by Petitioner indicate that lateral transfers *may* constitute adverse actions, *see*, *e.g.*, *Ray v. Henderson*, 217 F.3d 1234 (2000), none of the cited cases actually involved lateral transfers. When the Ninth Circuit has addressed a lateral transfer situation, post-*Ray*, it found that while "a lateral transfer *may* constitute an adverse employment action," a plaintiff who "presented no evidence that the position to which she was moved differed in any material way from the position she occupied prior to her complaints, either with respect to her responsibilities or the conditions under which she performed them" could not make out a prima facie case

of discrimination. *Sillars v. Nevada*, 385 F. App'x 669, 671 (9th Cir. 2010).

Petitioner points to the Eleventh Circuit decision in *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000), for the proposition that the Eleventh Circuit applies "an objective test, asking whether a reasonable person in [the plaintiff's] position would view the employment action in question as adverse." Pet. 16. Petitioner further asserts that *Hinson* "bears a close resemblance" to the instant case. Pet. 16. However, unlike in this case, the plaintiff in *Hinson* introduced evidence that the proposed transfer would involve a reduction in pay, which by itself would provide a basis for viewing the transfer as an adverse employment action. 231 F.3d at 829. Additionally, the plaintiff in *Hinson* put forth evidence showing that the tasks in the proposed new position had been previously performed by existing personnel, and that the Board never filled the position, suggesting that the position could be viewed as unimportant. *Id.* As established *supra*, in this case Petitioner introduced no such evidence, nor any other evidence regarding the Director of Intervention Services position to which she had been transferred.[1]

In sum, under any standard utilized by the Courts of Appeals, Petitioner failed to present evidence raising

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[1] Petitioner acknowledges that the First, Third, Fifth, Tenth, and D.C. Circuits employ either a similar or a more restrictive analysis than the Fourth Circuit did here. Pet. 10-13, 17-20.

a genuine issue of material fact as to whether she experienced an adverse employment action.

Petitioner devotes several pages to cataloguing a supposed parade of horribles that is allegedly permitted around the country under the standards applied by the Courts of Appeals. Pet. 10-13, 21-24. However, none of the alleged discriminatory actions are implicated in this actual case; this case is about a straightforward circumstance where an individual was given a lateral transfer, subjectively preferred her original position, and refused to appear for the new position. Lateral transfers occur thousands, if not tens of thousands, of times a day, around the country across a variety of industries. Permitting personal preference to stand as the only measure of whether a lateral transfer constitutes an adverse action—with no objective evidentiary support, no affidavits, no testimony from individuals within the new department, and no firsthand experience in the new position itself—would distort beyond recognition the meaning of "terms, conditions, or privileges of employment." As the Seventh Circuit stated in *Herrnreiter*, it would not be feasible to consider a transfer an adverse action where "[t]he two jobs were equivalent other than in idiosyncratic terms that do not justify trundling out the heavy artillery of federal antidiscrimination law. . . ." 315 F.3d at 745.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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