No. 13-1516

In the Supreme Court of the United States

KALAMAZOO COUNTY ROAD COMMISSION, *et al.*,
Petitioners,

v.

ROBERT DELEON AND MAE DELEON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the court of appeals correct in holding that an employee's involuntary transfer to a new position may constitute an adverse employment action for the purpose of discrimination claims under Title VII, the Age Discrimination in Employment Act, and the Equal Protection Clause, where a reasonable jury could conclude that the transfer effected a material change in the employee's terms or conditions of work?

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INTRODUCTION

This case involves race, national origin, and age discrimination claims that hinge on an employer's decision to transfer an employee to a position involuntarily. In the decision below, the Sixth Circuit held that the employee's involuntary transfer could constitute an adverse employment action sufficient to support the employee's claims, where there was evidence that the employee was set up to fail by the transfer and was exposed to workplace hazards in his new position that could be deemed objectively intolerable to a reasonable employee. Despite the court's holding that there was evidentiary support for the employee's claim that his transfer was involuntary and that the transfer was not based on the employee's earlier request for a transfer, the Kalamazoo County Road Commission and two of its supervisors (collectively, the Commission), seek review of the question whether, and under what circumstances, an employer's grant of an employee's request for a transfer may constitute an adverse action sufficient to support a federal discrimination or retaliation claim.

The petition for a writ of certiorari should be denied for three reasons. First, the question on which the Commission seeks review is not presented because the court of appeals concluded that the transfer here was not based on the employee's request (which, together with the employee's accompanying salary and other demands, had earlier been denied), but was instead involuntary. Nor does this case involve a retaliation claim, despite the Commission's inclusion of such claims in the question it presents for review. Second, even if the question raised by the Commission were properly presented, there is no conflict among the circuits that would justify granting

the petition. Third, this case would be a poor vehicle for addressing the circumstances under which a requested transfer could constitute an adverse action because the case comes to this Court following a court of appeals' ruling that material disputes of fact should have precluded summary judgment. Accordingly, there has been no definitive determination of whether the employee suffered an adverse action. Until the disputed factual questions surrounding that issue are resolved, attempting to determine whether, as a matter of law, the facts support a finding of an adverse action would be premature.

STATEMENT

I. Factual Background

Respondent Robert Deleon, a fifty-three-year-old Hispanic man of Mexican descent, worked for the Kalamazoo County Road Commission for twenty-eight years until his termination in 2011. Pet. App. at 3a, 5a. Beginning in 1995, Mr. Deleon worked as an Area Superintendent for the Commission, a position in which he was responsible for supervising road crews that performed repairs and maintenance. *Id.* at 3a. He received positive reviews for his work. *Id.*

In 2008, Mr. Deleon applied for an Equipment and Facilities Superintendent position with the Commission. *Id.* He sought a higher salary to compensate him for the the increased hazards associated with the position, which involved work in primarily enclosed spaces with exposure to loud noise and diesel fumes. *Id.* at 3a, 4a. Mr. Deleon also indicated to the Commission that he wanted an additional employee assigned to work for him if he took the new position. Dep. of Travis D. Bartholomew, Dist. Ct. Doc. 64-1 at 13.

The Commission denied Mr. Deleon's application after an interview. Pet. App. at 3a. Mr. Deleon was told that his computer skills were insufficient for the job. *See* Dep. of Robert K. Deleon, Dist. Ct. Doc. 64 at 12; *see also* Dep. of Travis D. Bartholomew, Dist. Ct. Doc. 64-1 at 18.

The Commission hired another person for the Equipment and Facilities Superintendent position, but that person resigned quickly. Pet. App. at 3a. It then offered the position to yet another candidate, who declined. *Id.* at 3a-4a. While the position was vacant, Bill DeYoung, another Commission employee, assisted with some of its responsibilities. Dep. of Travis D. Bartholomew, Dist. Ct. Doc. 64-1 at 9-10; Dep. of William J. DeYoung, Dist. Ct. Doc. 64-4 at 5. Mr. DeYoung did not like the work and did not want to continue doing it. Dep. of William J. DeYoung, Dist. Ct. Doc. 64-4 at 6.

The following year, the Commission transferred Mr. Deleon to the Equipment and Facilities Superintendent position. Pet. App. at 4a. Mr. Deleon "had no choice but to accept the transfer." *Id.* at 5a; *see also id.* at 4a n.1. He did not receive a salary increase or the additional staff person that he had sought. *Id.* at 12a-13a; Dep. of Travis D. Bartholomew, Dist. Ct. Doc. 64-1 at 18. Mr. Deleon's supervisors gave his old position to Mr. DeYoung, who was a younger, white man, despite Mr. DeYoung's lack of experience as a full-time Area Superintendent. Dep. of Travis D. Bartholomew, Dist. Ct. Doc. 64-1 at 19-20; Dep. of Robert K. Deleon, Dist. Ct. Doc. 64 at 16, 35.

In his new position, Mr. Deleon was exposed to heightened health risks to which other superintendents were not subjected. Mr. Deleon had to wipe diesel soot from his office every week and would blow black soot from his nose. Pet. App. at 4a-5a, 11a. He developed bronchitis, a cough, and sinus headaches due to diesel

fumes. *Id.* at 11a. Mr. Deleon also received a review in his new position indicating that his work in some areas was insufficiently satisfactory, *id.* at 5a, and he testified that he was unqualified for the responsibilities of his new position, Dep. of Robert K. Deleon, Dist. Ct. Doc. 64 at 36-37. Following a hospitalization and medical leave of absence resulting from job-related stress, the Commission terminated Mr. Deleon. Pet. App. at 5a.

II. Proceedings Below

In May 2011, Mr. Deleon filed suit against the Commission and his supervisors in federal district court. He asserted a claim under 42 U.S.C. § 1983 based on a violation of the Equal Protection Clause of the Fourteenth Amendment, race and national origin discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and an age discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Pet. App. at 6a. As relevant here, Mr. Deleon based his claims on his transfer to the Equipment and Facilities Superintendent position. He alleged that the transfer was a discriminatory adverse employment action because he had been set up to fail in the new position and because of the health hazards that the new position posed. *See generally* Compl., Dist. Ct. Doc. 1.

The district court granted summary judgment to the defendants on all claims. It held that Mr. Deleon's transfer did not constitute an adverse employment action because Mr. Deleon had previously applied for the position. Pet. App. at 41a, 46a.

The Sixth Circuit reversed and remanded for further proceedings. It recognized that all of Mr. Deleon's discrimination claims required a "materially adverse change in the terms and conditions of a plaintiff's

employment." *Id.* at 8a (internal quotation marks omitted). It acknowledged that this standard could be met, for example, by a reduction in salary or work hour changes or where the circumstances of a new position are "objectively intolerable to a reasonable person." *Id.* at 9a (internal quotation marks omitted). Focusing on the workplace hazards to which Mr. Deleon was exposed in his new position, the court explained that the "testimony present[ed] sufficient indication that the work environment was objectively intolerable." *Id.* at 11a. In light of the work hazards and the fact that Mr. Deleon had no choice but to take the new position, the court concluded that a reasonable jury could determine that Mr. Deleon's transfer was an adverse employment action. *See id.* at 4a n.1, 11a.

The Sixth Circuit rejected the Commission's contention that the transfer could not be adverse because Mr. Deleon had once applied for—and thus supposedly still coveted—the position to which he was transferred. *Id.* at 11a. The Court noted in dicta that its "sister circuits ha[d] held that the request of a transfer, and accession to [a] new position," need not "categorically bar a finding of an adverse employment action." *Id.* It then found that Mr. Deleon's ultimate transfer was not requested, but involuntary. The court reasoned that Mr. Deleon's "request for 'hazard pay,' which was never provided, tilt[ed] the issue as to whether [Mr.] Deleon really requested or wanted the position in his favor." *Id.* at 13a. It also emphasized record evidence that Mr. Deleon had no choice but to transfer when he did. *Id.* at 4a n.1. On these facts, the court held that Mr. Deleon had been "involuntarily transferred." *Id.* at 13a; *see also id.* at 4a n.1 (concluding that "the facts here do not present a voluntary application, but rather an involuntary transfer" (internal quotation marks omitted)). The court

then reiterated that summary judgment was inappropriate because an issue of material fact existed as to "whether the 'conditions of the transfer' would have been 'objectively intolerable to a reasonable person,'" thus amounting to an adverse employment action. *Id.* at 13a (quoting *Strouss v. Mich. Dep't of Corr.*, 250 F.3d 336, 343 (6th Cir. 2001)).

Judge Sutton dissented. He disputed the majority's conclusion that Mr. Deleon "somehow did not seek out the job." *Id.* at 15a. He also took issue with the majority's conclusion that Mr. Deleon's transfer was "involuntary." *Id.* at 16a (internal quotation marks omitted). In Judge Sutton's view, "[t]he record ma[de] clear that [Mr.] Deleon never complained about the transfer—he sought it out—and his supervisors never told him that he had no choice in the matter." *Id.* On this version of the facts, Judge Sutton would have granted summary judgment to the Commission on the ground that "[w]hen an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action." *Id.* at 17a.

The dissent did not, as the Commission asserts, "[a]cknowledg[e] the panel majority's split from other circuits." Pet. at 12. Rather, the dissent discussed out-of-circuit case law to support its statement that "[n]o case to [the dissent's] knowledge holds that granting a sought-after transfer *by itself* amounts to an adverse employment action"—a proposition that the majority did not assert. Pet. App. at 17a (Sutton, J., dissenting) (emphasis added). Indeed, because the majority opinion did not view Mr. Deleon's transfer as voluntary, it had (in dicta) cited with approval some of the same cases referred to by the dissent. *See id.* at 11a-12a.

The panel denied rehearing, and the court denied rehearing en banc, with no judge requesting a vote on the petition. *Id.* at 49a.

REASONS FOR DENYING THE WRIT

I. The Commission Seeks Review on a Question Not Presented by This Case.

The Commission seeks review on the question whether an employer's "grant[] [of] an employee's request for a job transfer" constitutes "an adverse employment action for a discrimination claim, or a materially adverse action for a retaliation claim." Pet. at *i* (internal quotation marks omitted). This case does not present that question; accordingly, it is not a suitable vehicle for the Court's review.

First, the Sixth Circuit concluded that the Commission did *not* grant Mr. Deleon the transfer that he requested. The court determined that Mr. Deleon's "request for 'hazard pay,' which was never provided, tilt[ed] the issue as to whether [Mr.] Deleon really requested or wanted the position [to which he was transferred] in his favor." Pet. App. at 13a. That fact, as well as evidence that, having told Mr. Deleon he was not qualified for the position, the Commission subsequently gave him no choice but to accept a transfer to it, was key to the Court's determination that Mr. Deleon was "involuntarily transferred." *Id.*; *see also id.* at 4a n.1. Contrary to the Commission's contention, *see* Pet. at 20, whether Mr. Deleon requested the position on the terms that he received was disputed among the parties and the panel below. Accordingly, answering the question on which the Commission seeks review and adopting the rule urged by the Commission, *see* Pet. at *i*, 4, would have no effect on the outcome of this case unless the

Court were first to resolve a disputed fact concerning the nature of the transfer.

To the extent the Commission seeks to revisit the Sixth Circuit's assessment of the summary judgment record, the petition does not present a compelling reason for granting certiorari. As this Court's rules make clear, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S. Ct. R. 10.

Second, the Commission seeks certiorari in part on the question whether an employer's grant of a transfer request may constitute a "materially adverse action for a retaliation claim." Pet. at *i* (internal quotation marks omitted). However, Mr. Deleon has never asserted a retaliation claim, nor does the Sixth Circuit's opinion purport to address such a claim. *See* Compl., Dist. Ct. Doc. 1; Pet. App. at 6a-7a. To be sure, the Sixth Circuit dissent—on which the Commission's petition heavily relies—characterizes Mr. Deleon's claims as ones based on retaliatory conduct. *See* Pet. App. at 15a (Sutton, J., dissenting) (stating that the Commission's decision "did not amount to an adverse employment action, much less a retaliatory one"); *id.* (stating that it was "difficult to fathom how [Mr. Deleon] could premise a claim of retaliation on the transfer alone"); *id.* at 18a (taking issue with the majority opinion's "interpretation of the retaliation laws"). But the dissent's characterization is at odds with the record and evinces a fundamental misunderstanding of the case. Because Mr. Deleon has never asserted a retaliation claim, and because the standards for identifying adverse actions for retaliation and substantive discrimination claims may well be different, *see Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67 (2006) (so holding under Title VII),

the question on which the Commission seeks review is not presented by this case.

II. There Is No Conflict Among the Circuits on the Question Presented by the Commission.

The Commission contends that this Court's review is warranted to resolve a circuit split regarding whether an employer's grant of a requested job transfer may constitute an adverse action under federal discrimination or retaliation laws. Pet. at 17. Although the Commission concedes that "a number of the[] circuit precedents overlap in some way," it contends that the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits look to pre-transfer working conditions to answer the question, whereas the Second and Sixth Circuits analyze post-transfer working conditions. *Id.* at 18. In reality, the cases to which the Commission points are easily reconcilable on their facts. Thus, even if this case presented an issue concerning the circumstances under which a voluntary, requested transfer is actionable, there is no conflict among the circuits over that issue to resolve.

A. As the Commission explains, courts considering cases involving a grant of an employee's request for a transfer often ask whether the employee was forced to request the transfer to determine whether the tangible employment action was actually adverse to the employee. The general principle animating these cases is that an employee's transfer may constitute an adverse action where it is not truly voluntary, and that circumstances surrounding the grant of a requested transfer, including job conditions to which the employee is subjected in the

position from which he seeks to transfer, may render a transfer effectively involuntary.[1]

Some cases cited by the Commission in this category focus on whether an employee's pre-transfer working conditions were so objectively intolerable that the employee had no choice but to transfer—that is, whether the employee was constructively discharged from his earlier position or constructively demoted. *See*, *e.g.*, *Sharp v. City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999); *Simpson v. Borg-Warner Auto.*, 196 F.3d 873, 876-78 (7th Cir. 1999); *Hooper v. State of Maryland*, 45 F.3d 426, at *5 (4th Cir. 1995) (per curiam) (unpublished). The Eighth Circuit decision cited by the Commission similarly concerns allegations of employer coercion that would render a transfer request effectively involuntary. In *Tusing v. Des Moines Independent Community School District*, 639 F.3d 507 (8th Cir. 2011), although the Eighth Circuit recognized that an employee may demonstrate that a transfer is involuntary by showing a constructive demotion, *id.* at 521, it rejected the plaintiff's discrimination claims, which hinged on a transfer to a lower-paying job, because of a lack of evidence that she transferred "under duress" or was "strongly persuaded" to transfer, *id.* at 521-22 (internal quotation marks omitted). Although the Commission attempts to find conflict among these cases, *see* Pet. at 17, the standards applied by the courts of appeals differ only in verbiage, as evidenced by the Commission's

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[1] It is possible that an employee could also assert a successful claim of adverse action following a requested transfer if the evidence showed that post-transfer conditions reflected the employer's unanticipated subjection of the employee to intolerable working conditions for prohibited reasons. None of the cases cited by the Commission addresses this factual scenario or rules out the possibility of a claim under such circumstances.

inability to identify any instance in which the superficial distinctions it cites could affect the outcome of this case.

Another case cited by the Commission as one that focuses on pre-transfer conditions to determine the voluntariness of a transfer request, *see id.* at 18, concerns other issues entirely and in any event does not conflict with other decisions that the Commission cites. According to the Commission, *Doe v. Dekalb County School District*, 145 F.3d 1441 (11th Cir. 1998), stands for the proposition that a "requested job transfer" may constitute an adverse employment action where "the transfer request is involuntary and the transfer is objectively materially adverse to the employee." Pet. at 17 (internal quotation marks omitted). The Commission fundamentally mischaracterizes *Doe*. The plaintiff in that case never requested a transfer, so there was no question whether the transfer was voluntary or involuntary. The court of appeals merely recognized that the "fact that Doe's transfer was involuntary" did not "establish that it was legally adverse." 145 F.3d at 1454. To prevail, Doe still had to "demonstrate that a reasonable person in his position would have found his transfer to be adverse under all the facts and circumstances." *Id.* at 1453. None of the cases relied on by the Commission holds otherwise, nor does the decision below.

The Commission nevertheless contends that under *Doe*, if "an employee voluntarily requests a transfer," it "negates as a matter of law the contention that the employee has suffered an adverse employment action." Pet. at 16. The Commission overlooks that the portion of *Doe* on which it relies is plainly dicta. *See* 145 F.3d at 1454. In any event, *Doe*'s discussion in this regard rested on the assumption that a transfer would be "purely voluntary" and that an employee's request would be

indicative of the transfer's voluntary nature. *Id. Doe* did not hold, or even state, that an employee's request for a transfer—where prompted by employer coercion or intolerable pre-transfer working conditions—would always be "purely voluntary."

B. Although Mr. Deleon does not dispute the Commission's observation that some circuits have focused on pre-transfer working conditions when assessing the adversity of an employer's action, he parts ways with the Commission over its assertion that this line of cases is in conflict with case law in the Sixth and Second Circuits. *See* Pet. at 18. As discussed above, the court of appeals in this case determined that Mr. Deleon's ultimate transfer was not requested; he had no choice but to take it. As the court concluded, there was sufficient evidence to support Mr. Deleon's claim that his transfer under these circumstances was involuntary. Therefore, the court had no need to determine whether additional indicia—such as employer coercion or pre-transfer working conditions—might have rendered a seemingly voluntary transfer request effectively involuntary. The court's analysis of Mr. Deleon's post-transfer working conditions was not undertaken to determine the voluntary or involuntary nature of the transfer, but to determine whether the involuntary transfer was adverse in material ways affecting Mr. Deleon's terms or conditions of employment. *See* Pet. App. at 10a-11a, 13a.

Although the issue is not presented by this case, it is likely that, as in other circuits, an employee in the Sixth Circuit may pursue a discrimination or retaliation claim based on a transfer that *is* requested and granted, where the employer coerces the transfer request or creates pre-transfer working conditions intolerable to a reasonable

employee. The decision below expressly acknowledged that other circuits had "held that the request of a transfer, and accession to the new position, does not categorically bar a finding of an adverse employment action," and it indicated that it agreed with that proposition. Pet. App. at 11a-12a. Moreover, in *Spees v. James Marine, Inc.*, 617 F.3d 380 (6th Cir. 2010), the Sixth Circuit concluded in a Title VII case that a reasonable jury could find that a transfer constituted an adverse employment action despite "the fact that [the plaintiff] 'requested' the night-shift position." *Id.* at 392. The court emphasized that the plaintiff had been told "to pursue the night-shift because it was the only option available that would allow her to retain her employment." *Id.* Thus, the Sixth Circuit recognizes—just like numerous court of appeals decisions on which the Commission relies—that an employer's grant of an employee's request for a transfer may support an adverse employment action where the circumstances giving rise to the request render the transfer effectively involuntary.

Nor is case law in the Second Circuit to the contrary. The Commission contends that in *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426 (2d Cir. 1999), *abrogated in part by Burlington N. & Santa Fe Ry.*, 548 U.S. 53, the Second Circuit focused on an employee's post-transfer working conditions to determine whether a requested transfer was an adverse action supporting a retaliation claim. Pet. at 13. But the circumstances in *Richardson* were analogous to those in the instant case, and the Commission again fails to demonstrate why *Richardson* is at odds with any of the other court of appeals cases identified in the petition. The plaintiff in *Richardson* requested a transfer of some kind, and thus did not base her claim on the mere fact of

a transfer. 180 F.3d at 444 n.4. Rather, she claimed that she was reassigned to the less desirable of two available positions for a transfer, one of which involved direct contact with inmates, and the court of appeals found sufficient evidence to support this assertion. *See id.*; *see also Pimentel v. City of New York*, 74 F. App'x 146, 148 (2d Cir. 2003) (citing *Richardson* for the proposition that "a forced transfer . . . may amount to an adverse employment action" where certain characteristics of the employee's work change in material ways). As in the instant case, the court of appeals looked to post-transfer working conditions, not to determine whether the transfer was voluntary, but to assess whether the employee's terms and conditions of employment had changed in material, adverse ways. 180 F.3d at 444 & n.4.

In sum, despite trying to manufacture a circuit split based on seven court of appeals cases, the Commission has failed to identify a single conflict among appellate decisions on the question it presents. That cases come to different conclusions on different sets of facts is no surprise. Such inevitable variation does not warrant this Court's review.

III. The Interlocutory Nature of the Sixth Circuit's Decision Warrants Denial of the Petition.

Even if the Commission had petitioned for review of an issue actually presented and had demonstrated a circuit split, this case would still be a poor vehicle to address the circumstances under which a requested transfer may constitute an adverse employment action because the lower courts have not yet resolved the question whether Mr. Deleon suffered such an action. The Sixth Circuit held only that summary judgment for the Commission was inappropriate because a genuine issue of material fact existed with respect to "whether

[Mr. Deleon's] transfer was materially adverse to a reasonable person." Pet. App. at 11a (internal quotation marks omitted). It thus remanded to the district court for further proceedings. *Id.* at 14a. The case, therefore, reaches this Court in an interlocutory posture.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (mem.) (Scalia, J., opinion respecting the denial of the petition for writ of certiorari); *accord* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, p. 224 (6th ed. 1986). Indeed, it has cautioned that its jurisdiction to review interlocutory decisions should "be exercised sparingly" and is reserved for "extraordinary cases." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

This case does not warrant deviation from the Court's ordinary practice of deferring review until final judgment. On remand, a jury will have to resolve any disputes of fact about the circumstances of the transfer; whether the transfer was, in fact, an adverse employment action; and whether Mr. Deleon otherwise established the elements of his discrimination claims. It thus remains possible that the Commission could prevail on Mr. Deleon's discrimination claims. Should a jury decide those claims in the Commission's favor on grounds separate from whether Mr. Deleon's transfer constituted an adverse action (such as whether the action was motivated by discriminatory animus), the final result would render "quite unimportant" the decision for which the Commission now seeks review. *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). This possibility strongly counsels in favor of denying the

petition. At a minimum, legal issues about the circumstances under which a transfer may constitute an adverse employment action would be better addressed in a case in which there were findings of fact providing a concrete setting for resolution of these issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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