No. 13-1516

In the Supreme Court of the United States

KALAMAZOO COUNTY ROAD COMMISSION, TRAVIS BARTHOLOMEW, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY, AND JOANNA JOHNSON, IN HER OFFICIAL CAPACITY AND INDIVIDUALLY,
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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The decision of the United States Court of Appeals for the Sixth Circuit, which is the subject of the

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[1] Pursuant to this Court's Rule 37.6, the *amicus* certifies that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus* and its counsel made any such monetary contribution to its preparation or submission. Furthermore, pursuant to this Court's rule 37.2(a) counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus*' intention to file this brief, and letters of consent to the filing of this brief, from all parties, have been submitted.

petition, establishes a rule and exacerbates a circuit split which allows for the nonsensical result that an employee who has requested an internal job transfer can maintain a discrimination action against his or her employer when the employer accedes to that request despite the fact that the employee alleged no conditions that forced his transfer nor any conditions in his new position that constitute intolerable circumstances equivalent to the circumstances that support a constructive discharge claim. Review and reversal of this decision and the articulation of a clear, workable standard will have beneficial effects for public—and private—employers. The Sixth Circuit's standard and the confusion among the Circuits is untenable and requires immediate review. Accordingly, this Court should grant certiorari to harmonize the law and establish a clear and workable standard.

SUMMARY OF ARGUMENT

This case involves a discrimination claim made in the context of an employee's job transfer. In particular, this case involves an employee who affirmatively sought out a job transfer that he later obtained. He then sued for discrimination claiming that the transfer which he had requested constituted an adverse employment action. A discrimination claim such as this, in and of itself, is unremarkable. What is remarkable, however, is the Sixth Circuit's holding. According to the Sixth Circuit, despite the fact that the employee actively sought the transfer he later obtained and that he alleged no pre-transfer work conditions that effectively coerced his transfer—nor objectively intolerable post-transfer work conditions—he can still maintain a discrimination claim based on the

allegation that the new position's conditions are less desirable than the pre-transfer position's conditions.

This decision, to put it mildly, turns discrimination law on its head, exacerbates a circuit split, and threatens employers, especially public-sector employers, with a flood of discrimination litigation from disgruntled employees whose requested transfers turn out to be less than they desired. But more than this, the various Courts of Appeals' decisions in the transfer-context are all over the map and, as such, require intervention of this Court to provide a clear, workable standard. The Court has established just such a clear, workable standard in the constructive discharge context. At the very least, such a standard should apply in the transfer context.

The Sixth Circuit's holding means that when an employer accedes to an employee's transfer request such an action can be deemed adverse. It is hard to imagine something more contrary to an adverse employment action than the granting of an employee's transfer request. Indeed, granting an employee's transfer request by definition cannot be "adverse" as it is not contrary to the employee's desires but rather the fulfillment of them. Furthermore, a discrimination claim requires a causal connection between the alleged adverse action and the employee's protected status. When an employee requests a job transfer and the employer grants it, the cause of the employment action is not any protected status but the employee's own action, i.e., the request itself. The Sixth Circuit's holding defies logic however by adopting those very principles.

More importantly, for purposes, of this petition, the Sixth Circuit's decision further exacerbates an already existing circuit split which requires resolution by this Court. The disarray in the approach of the various Courts of Appeals toward discrimination and retaliation claims in the transfer context gives employers—especially those with multi-jurisdictional operations—no clear and workable standard to follow.

In short, there are serious implications for employers given the lack of clarity in the law in this area. Because there is no single, clear, workable standard by which employers can know whether their transfer decisions will subject them to lawsuits, they face difficult and, at times, untenable choices. For instance, in the Sixth (and Second) Circuit, employers are, as Judge Sutton put it in his dissent, subject "to liability coming and going—whether after granting employee requests or denying them." App. 18a. This is an especially problematic issue for public-sector employers whose employees are often governed by collective bargaining agreements (CBAs) which frequently include provisions governing preferences to be given to current employees for transfers and when such transfers are to be granted. Public-sector employers may now see employees gaming the system to receive transfers only to turn around and sue for discrimination or retaliation because the conditions of their new positions are not as favorable as their previous positions.

Rather than allow the Sixth Circuit's illogical opinion to stand and the confusion in the circuits to persist, this Court should grant the petition and adopt a manageable standard akin to the "constructive

discharge" standard this Court adopted in *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004). That standard easily can be translated into the transfer context. Indeed, several circuits have attempted to do so. Accordingly, this Court's review of the decision below is necessary.

I. THE COURT OF APPEALS' DECISION EXACERBATES AN ONGOING CIRCUIT SPLIT AND IS BOTH ILLOGICAL AND UNWORKABLE

The Courts of Appeals are, to put it mildly, all over the map in their approaches to discrimination (or retaliation) claims in the transfer context. For instance, in the Fourth Circuit, for an employee to prevail on a discrimination claim based on a transfer decision, an employee must show that the transfer was "an adverse employment action, and that this action was motivated by discrimination." *Hooper* v. *State of Maryland*, 45 F.3d 426, 1995 WL 8043 at *4 (4th Cir. Jan. 10, 1995) (unpublished). The "acceptance of a *voluntary* request to transfer is *not* an adverse employment action." *Id*. at *5 (emphasis added). According to the Fourth Circuit, the only way a transfer request could constitute an adverse employment action would be for the employee to show that his transfer was the equivalent of a "constructive discharge." *Id*.

Likewise, in *Simpson* v. *Borg-Warner Auto., Inc.*, 196 F.3d 873 (7th Cir. 1999), the Seventh Circuit addressed circumstances where the employee had requested her reassignment. The employee argued that her reassignment was "essentially a constructive demotion" and therefore constituted an adverse

employment action. *Id*. at 876. The Seventh Circuit held that "a constructive demotion analysis should have the same structure as that for constructive discharge," namely, whether the "'working conditions were so intolerable that a reasonable person would have been compelled to resign'" and that the intolerable conditions were the result of discrimination. *Id*. at 876-877 (quoting *Rabinovitz* v. *Pena*, 89 F.3d 482, 489 (7th Cir. 1996)). Thus, a coerced transfer would require working conditions so intolerable that a reasonable person was forced to seek a transfer.

The Fifth Circuit has also adopted a similar approach. In *Sharp* v. *City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999), the Fifth Circuit rejected the employer's contention that because the employee had requested the transfer it could not be adverse. The court, instead, asked whether the transfer was a "constructive demotion, the involuntary result of conditions so intolerable that a reasonable person would feel compelled" to transfer. *Id*.

In contrast, the Eighth Circuit in the transfer context has applied a modified or less onerous constructive discharge standard. Rather, than asking whether the working conditions are "intolerable," it instead asks whether they are "'abusive'" and whether "'an objective person in [the employee's] position would have felt that he had to demote himself because of his discriminatory work conditions.'" *Tusing* v. *Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 521 (8th Cir. 2011) (quoting *Fenney* v. *Dakota, Minn. & E.R. Co.*, 327 F.3d 707, 717 (8th Cir. 2003)).

The Eleventh Circuit applies a slightly different standard as well. While a finding that a transfer was

"purely voluntary" would end the inquiry, ultimately whether the transfer is voluntary or involuntary "is not relevant to the question of whether [the transfer] was unlawfully adverse." *Doe* v. *Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1454 (11th Cir. 1998). Rather, the relevant inquiry is whether "a reasonable person . . . would have found [the] transfer [materially] adverse under all the facts and circumstances." *Id*. at 1453.

Finally, the Second Circuit has adopted a standard akin to that adopted here by the Sixth Circuit. *See Richardson* v. *New York State Dep't of Corr. Serv*., 180 F.3d 426, 444 (2d Cir. 1999), abrogated in part by *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53, 67–68 (2006) (holding that plaintiff had established a prima facie case of retaliation where she believed transfer, to which she consented, was made "in the hopes that she would quit" and to force her to leave employer). As the dissent noted in that case, under the Second Circuit's holding, employers were placed in a bind: "If offering a transfer to the only job available can support a finding of retaliation, then surely denying or ordering one can also support such a finding. An employee who files a discrimination claim and request for transfer, therefore, will have automatically established a prima facie case." *Id*. at 451 (Winter, C.J., dissenting). An employer faces liability under the Second Circuit's precedent whether it grants or denies an employee's transfer request. The same is now true in the Sixth Circuit.

This disarray in the circuits requires intervention of this Court to establish a uniform and workable standard.

Such a workable standard clearly is not the one established by the Second and Sixth Circuits. Indeed, the decision of the Court of Appeals, here, is utterly illogical. As this Court well knows, to succeed on a discrimination claim under Title VII, "a plaintiff must establish, by a preponderance of the evidence: (1) a discriminatory animus towards him (i.e., an attitude towards the plaintiff held because of one of the listed characteristics), (2) an alteration in the terms and conditions of his employment by the employer, and (3) a *causal link* between the two." *Llampallas* v. *Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1245-46 (11th Cir. 1998) (emphasis added); *see also McGowan* v. *City of Eufala*, 472 F.3d 736, 741 (10th Cir. 2006) (explaining that in the retaliatory discrimination context to "establish a prima facie claim . . . a plaintiff must establish three elements: (1) she engaged in protected opposition to discrimination; (2) a reasonable employee would have found the challenged action materially adverse; and (3) a *causal connection* exists between the protected activity and the materially adverse action.") (emphasis added). Or, as the Eighth Circuit has articulated, to establish a prima facie case of employment discrimination a plaintiff must "show (1) he is a member of a protected class, (2) he met his employer's legitimate expectations, (3) he suffered an *adverse employment action*, and (4) the circumstances give rise to an inference of discrimination." *Lake* v. *Yellow Transp., Inc.*, 596 F.3d 871, 874 (8th Cir. 2010) (emphasis added).

The Court of Appeals' decision turns these standard principles on their head in two ways. First, the Court of Appeals' decision does violence to the whole notion of "adverse" by concluding that a transfer, sought not to

escape intolerable conditions but out of a desire for a new position, can be adverse. The plain meaning of adverse is "1. Against; opposed (to). 2. Having an opposing or contrary interest, concern, or position. 3. Contrary (to) or in opposition (to). 4. hostile." *Black's Law Dictionary* 62 (9th ed. 2009). Where an employee requests a transfer freely—i.e., where the employee was not coerced into the transfer or where the employee did not face working conditions so intolerable that a reasonable person would have felt compelled to request a transfer—the granting of the transfer *cannot be* an adverse employment action. There is nothing "hostile" or "opposed to" or even "contrary" to the employee's interest in granting the transfer. The Court of Appeals' decision quite literally contradicts the plain meaning of adverse and allows post-transfer conditions and perceptions to change the nature of a transfer post-facto.

Furthermore, the Court of Appeals' decision also eviscerates the need for a causal connection between the employment action and the employee's membership in a protected class. Under the Court of Appeals' decision, if an employee, who is a member of a protected class, requests a transfer, again free of any coercion, receives the transfer, but finds that the conditions are intolerable, he or she can establish a discrimination claim despite that the cause of his or her "adverse" employment action had nothing to do with membership in a protected class and *everything* to do with the actual transfer request. It is hard to see how a decision could do more to distort traditional discrimination law principles than this one. It also exacerbates the nationwide problem of inconsistent standards for employers to follow.

II. THE CIRCUIT SPLIT AND THE COURT OF APPEALS' DECISION HAVE NEGATIVE IMPLICATIONS FOR EMPLOYERS AND A WORKABLE STANDARD IS NEEDED

A. The Current Confusion and the Court of Appeals' Decision Are Unworkable For Employers

The lack of a clear, workable standard has serious implications for employers, and the standard embraced by the Court of Appeals presents profound difficulties for employers—especially public-sector employers of whom IMLA is a representative voice.

The lack of a uniform standard subjects employers with multi-state operations to difficult decisions and questions. How a hypothetical employer with operations in the Sixth and Seventh Circuits, for instance, deals with transfer requests could well vary depending on where the transfer request originates. In the Seventh Circuit, a transfer request from an employee without more could simply be granted. An employer would know that a voluntary transfer could not subject it to discrimination liability. If there were any concern that an employee were feeling coerced to seek the transfer, an employer could investigate to make sure the employee was not being coerced into the transfer or feeling compelled to request it based on conditions caused by discrimination. Where any question or concern existed that an employee was not freely seeking a transfer, an employer would have an incentive to investigate the employee's work conditions before granting a transfer to ensure that the employee was not suffering any discrimination. This sort of incentive makes sense. It ensures that employers are

attempting to root out discrimination and prevent employees from feeling coerced into seeking transfers.

In the Sixth Circuit, however, an employer would face very different pressures. It could investigate to ensure that an employee is not being coerced to seek a transfer, find out that the employee is not, accede to the transfer request and still face potential discrimination or retaliation liability because the employee finds the *post*-transfer conditions intolerable. Simply illustrating this difference shows how unworkable the Sixth Circuit's standard is for employers. In the Sixth Circuit, an employer can diligently work to ensure an employee is not facing discrimination or being forced to transfer jobs by intolerable conditions and still face liability because the employee decides that the new position is intolerable.

This problem is all the more acute when one considers that a large percentage of public-sector jobs are unionized and thus governed by collective bargaining agreements (CBAs). According to the Department of Labor, in 2013 public sector employees had a union membership of 35.3 percent which was more than five times the rate of private-sector workers.[2] Indeed, of public-sector workers nearly 40% (38.7%) were represented by unions in 2013.[3] The CBAs, which govern these unionized workers, frequently have bidding and seniority provisions that

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[2] Department of Labor, Bureau of Labor Statistics, Union Members – 2013, Table 3 (January 24, 2014), http://www.bls.gov/news.release/pdf/union2.pdf (hereinafter "Union Members – 2013").

[3] *Id*.

apply to posting for open positions and transfers. These provisions often limit an employer's discretion in choosing an employee with whom to fill a transfer.

A few examples from the database of private- and public-sector CBAs managed by the Department of Labor suffices to demonstrate this. *See* United States Department of Labor, Office of Labor-Management Standards, Collective Bargaining Agreements File: Online Listings of Private and Public Sector Agreements, http://www.dol.gov/olms/regs/compliance/cba/index.htm. For instance, a CBA governing maintenance, clerical, and professional employees of the San Francisco-area Bay Area Rapid Transit (BART) System in effect between 2001 and 2005, has a number of provisions dealing with transfers and bidding for positions. The BART CBA states that "[a]ll employees are eligible to bid on open positions."[4] The transfer and bidding provisions then state the following:

> [I]f the open position is within the Maintenance Subunit, employees in that subunit shall be afforded the first opportunity to be selected for the job opening based on qualifications and District *date-of-hire seniority*. If unable to fill the open position within the Maintenance Subunit, priority of selection to said job opening(s) shall be given to employee(s) within the Clerical Subunit, then to all other District employees

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[4] CBA of the Bay Area Rapid Transit (BART) and Service Employees International Union (SEIU), AFL-CIO, Local 790, 10 (2001), http://www.dol.gov/olms/regs/compliance/cba/olms/public/840088.pdf.

> based on qualifications and District *date-of-hire seniority*.[5]

BART is required to make its selection, in part, based on seniority. Its discretion is limited.

The CBA between the City of Cincinnati and the Cincinnati Fire Fighters Union Local 48, which was in effect between 2005 and 2007, also demonstrates the limitations placed on public-sector employers when an employee requests a transfer. In the section dealing with transfers, it states:

> When a transfer of a member to a fire suppression position is to be accomplished and when such is consistent with the effective and efficient operation of the Fire Department, the transfer to the position to be filled will be made from those personnel who requested it in writing. Such transfer *shall be based upon seniority in grade*, ability, performance and experience.[6]

Again this demonstrates the limitations placed on the employer's discretion. The employer *must* take into account the employee's seniority in making a transfer decision. Its hands are tied. The employer may not have the option to deny a requested transfer.

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[5] *Id*. at 11 (emphasis added).

[6] Labor-Management Agreement By and Between City of Cincinnati and the Cincinnati Fire Fighters Union Local 48, 27 (2005), http://www.dol.gov/olms/regs/compliance/cba/pdf/cbrp0468.pdf.

Indeed, the arbitration reports are replete with examples of employers violating CBAs where they place a more junior employee into a vacant position over a senior employee. For instance, in *Kroger Co.*, 117 Lab. Arb. Rep. (BNA) 737 (2002) (Abrams, Arb.), a promotion case, the arbitrator noted that the CBA made "seniority very important." There the arbitrator stated that the "record in this case might well have supported the conclusion" that the more junior candidate was the "best qualified" for the vacant position. *Id*. at 739. Nevertheless, the arbitrator stated that the "one problem, of course, is under the [CBA] management does *not* retain complete and unfettered discretion to decide who receives a promotion. It does not have the right to select whomever it feels is the best-qualified applicant." *Id*. (emphasis in original). *See also Krise Bus Serv.*, 119 Lab. Arb. Rep. (BNA) 296 (2003) (Grupp, Arb.) (holding that employer violated the CBA when it denied grievant opportunity to bid on an open bus route and gave position to less senior employee); *Dillon Stores*, 114 Lab. Arb. Rep. (BNA) 891 (2000) (Wang, Arb.) (holding that employer violated CBA, which stated that "vacancies shall be posted for bid and awarded by qualified seniority," when it awarded position to less senior employee over more senior employee who served in the same position in another store).

This specific context, in which many public-sector employers operate, only heightens Judge Sutton's point in his dissent here that the Court of Appeals' decision "subjects employers to liability coming and going—whether after granting employee requests or denying them." App. 18a. Public-sector employers operating under a CBA that has provisions privileging

seniority in transfer decisions now face double-liability. If they elect not to transfer an employee with more seniority than the employee they ultimately transfer, they might violate the CBA.[7] On the other hand, if a public-sector employer receives a transfer request from an employee whose seniority mandates that the employer grant the request, the employer may face liability because the transferee finds the new position intolerable. The public-sector employer with seniority provisions governing transfers simply cannot win.[8] Moreover, in such situations employees could game the system and create discrimination and retaliation claims by putting in for a transfer and then complaining about the conditions of the new position. Under the Court of Appeals' standard such claims will not be weeded out at the summary judgment stage and, thus, employers will face even more costly litigation.[9]

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[7] In addition, there is nothing to stop the employee from claiming that the denial of the transfer was discriminatory or that discrimination was ongoing previous to the transfer request.

[8] Certainly, private-employers also face similar issues vis-à-vis CBA transfer and seniority provisions. Given IMLA's institutional interests and the higher proportion of public-sector employees in unions, IMLA has chosen to highlight this significant issue with the Court of Appeals' holding.

[9] This was the same point that then-Chief Judge Winter made in his dissent in *Richardson*. *See* 180 F.3d at 451 ("If offering a transfer to the only job available can support a finding of retaliation, then surely denying or ordering one can also support such a finding. An employee who files a discrimination claim and request for transfer, therefore, will have automatically established a prima facie case.") (Winter, C.J., dissenting).

The concerns about employers with CBAs that contain seniority and transfer provisions that limit their discretion on granting transfers are particularly acute given the fact that the Court of Appeals' decision parallels that of the Second Circuit. As the Department of Labor has noted more than "half of the 14.5 million union members in the U.S. [in 2013] lived in just seven states (California, 2.4 million; New York, 2.0 million; Illinois, 0.9 million; Pennsylvania, 0.7 million; and Michigan, New Jersey, and Ohio, 0.6 million each)."[10] Three of those seven states are in the Second or Sixth Circuit. Thus, the concerns highlighted here are not insignificant nor abstract. They have real-world implications for employers. They affect a significant number of public-sector (and private-sector) employers which is all the more reason for this Court to grant the petition.[11]

B. The Constructive Discharge Context Provides a Workable Standard For the Transfer Context

This Court's precedent in *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), offers a standard that can be applied in this context to give employers clarity and guidance. In *Suders*, this Court articulated the standard by which a constructive discharge allegation under Title VII is to be judged. The Court stated: "The

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[10] Union Members – 2013, 3.

[11] A further point that bears mentioning is that the Court of Appeals' decision also could incentivize hiring externally rather than internally. If employers face discrimination suits for granting an employee a transfer, they may well decide to focus their job searches externally so as to avoid such liability.

inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Id*. at 141. The test is an objective one that necessarily focuses on the *pre-resignation* working conditions of the employee. It would make absolutely no sense in the constructive discharge context for courts to focus on the working conditions of the employee's new job.[12]

Suders offers a workable standard for the transfer context—one that will ensure employees retain their protections under Federal discrimination and retaliation law while employers are not subject to liability "coming and going." In short, in examining whether a transfer, which was neither explicitly or implicitly mandated by the employer, constituted an adverse employment action courts should ask whether working conditions became so intolerable that a

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[12] This further indicates the illogical nature of the Court of Appeals' decision. Just as in the constructive discharge context, if an employee *voluntarily* chose to resign his or her position with an employer, secured a new job with a new employer, and then later brought a discrimination claim against the former employer, the employee could not argue, without stretching the law to the breaking point, that the conditions in the new position constituted an adverse employment action by his former employer. The employee hardly could use these new, intolerable conditions as the basis to allege that his *previous* employer had discriminated against him.

Here, Mr. DeLeon's allegations are the analog in the transfer context. He requested a transfer he desired—not because he faced intolerable work conditions in his previous position—and then after he found his requested position to be less than desirable brought a discrimination suit on that basis. This does not work in the voluntary resignation context and it should not work in the voluntary transfer context.

reasonable person in the employee's position would have felt compelled to seek a transfer. If the answer to that question is, "No," then an employee cannot have an actionable discrimination or retaliation claim as the employee has suffered no adverse employment action. Such a standard clearly puts employers on notice of their requirements while also allowing employees to vindicate their rights. It provides the workable standard that the Court of Appeals failed to give.

CONCLUSION

For these reasons, and the reasons set forth in the petition for certiorari, the Court should grant the petition.

Respectfully submitted,

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