No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT CITY OF ST. LOUIS

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CERTIORARI IS UNWARRANTED

I. The Government Disregards The Broad Consensus In The Courts of Appeals.

Like the Eighth Circuit here, almost every court of appeals has held that "minor" or "trivial" personnel actions are not actionable—the rule being that the effect on an employee's working conditions must be "material." Pet. App. 9a-10a; *see* Opp. 6-7 (collecting cases from the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits articulating similar standards). Recommending review notwithstanding this broad consensus, the government (at 17-19) inaccurately portrays the Sixth Circuit's position, leans on a brand-new D.C. Circuit opinion that leaves decisive nuances unsettled, and points to a split with the Fifth Circuit that the Fifth Circuit is already poised to resolve.

A. The government suggests (at 17-18) that the Sixth Circuit requires no harm beyond an Article III injury, citing *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021). In actuality, the Sixth Circuit is part of the consensus requiring more than de minimis harm. *See* Opp. 12-13. In *Threat*, the Sixth Circuit explicitly acknowledged that a job alteration must be "adverse" and "material" to be actionable. 6 F.4th at 678. The court of appeals explained that the material-adversity requirement "ensures that a discrimination claim involves a meaningful difference in the terms of employment and one that injures the affected employee[] *[a]nd* … ensures that any claim under Title VII involves an Article III injury." *Id.* (emphasis added). The court further reasoned that the material-

adversity requirement "prevents the undefined word 'discrimination' from commanding judges to supervise the minutiae of personnel management." *Id.* (cleaned up). Consistent with the broad consensus, the Sixth Circuit's requirement thus "incorporate[s] a de minimis exception to Title VII" that goes beyond the requirement of an Article III injury. *Id.* at 679 (holding shift changes materially adverse because they "exceed[ed] any de minimis exception … *and* for that matter any Article III injury requirement" (emphasis added)). In accord, the "doctrine *de minimis curat lex*" that the court held is incorporated into Title VII means that "the law does not take account of trifles." *Id.* at 678. Article III injury is different: "[A]n identifiable trifle is enough for standing." *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 689 n.14 (1973).

The government's contention of conflict with *Threat* also elides important factual differences. Unlike this case, *Threat* did not involve a purely lateral transfer, let alone one that concededly did no harm to the employee's career. Rather, *Threat* concerned "[m]oving an employee from the day to the night shift over the employee's seniority-based objection." 6 F.4th at 678. The Sixth Circuit determined that the difference between an 8am and 8pm start time was "meaningful," including because it "diminished [the employee's] supervisory responsibilities" and "prohibited him from exercising his seniority rights." *Id.* The court also emphasized the fact-sensitive nature of its determination. It declined to adopt any "categorical rule," holding only that "*some* shift changes and reassignments may constitute" meaningful job alterations. *Id.* at 679-80 (emphasis added).

B. The government cites (at 17) the D.C. Circuit's recent ruling discarding its previous "objectively tangible harm" test and holding that a discriminatory "job transfer" (or denial of the same) is actionable. *Chambers v. District of Columbia*, 35 F.4th 870, 872, 874-75 (D.C. Cir. 2022) (en banc). But the daylight between the D.C. Circuit's position and that of other circuits remains to be seen. *See* Opp. 16-18.

First, *Chambers* merely shifts the locus of the material-adversity inquiry. *See* Opp. 17. Whereas most courts ask whether a transfer caused nontrivial harm, *Chambers* instructs lower courts to ascertain whether the alleged transfer or other personnel action was a substantial change in the "terms, conditions, or privileges of employment" (in which case the alleged discrimination would be actionable) or instead something less, such as a "mere formality" (in which case the alleged discrimination would not be actionable). 35 F.4th at 874-75. It remains to be seen how this inquiry works out in practice.

On this score, *Chambers* itself states that the "undefined … phrase 'terms, conditions, or privileges of employment'" is "not without limits" and that not everything framed as a job-transfer is actionable. 35 F.4th at 874; *see id.* at 877. But the opinion provides little guidance. Hence Judge Moss's appraisal just months ago: "[H]ow to interpret 'terms, conditions, and privileges of employment' in a post-*Chambers* world" is a "novel and important question." *Bain v. Off. of Att'y Gen.*, No. CV 21-1751 (RDM), 2022 WL 17904236, at *23 (D.D.C. Dec. 23, 2022); *accord Leach v. Yellen*, No. CV 18-3075 (JEB), 2023 WL 2496840, at *6 (D.D.C. Mar. 14, 2023) (Boasberg, J.) (same).

Preliminary indicators do not herald any substantial divergence from other courts' results. *See Black v. Guzman*, No. CV 22-1873 (BAH), 2023 WL 3055427, at *8 (D.D.C. Apr. 24, 2023) (rejecting discrimination claim where "plaintiff fail[ed] to provide any detail about any impact on her compensation, benefits, and promotion opportunities resulting from being 'pulled from' … two events").

Second, punctuating the need for percolation, *Chambers* expressly did not address whether de minimis harms are actionable. 35 F.4th at 875; *see* Opp. 18. This creates considerable doubt about the decision's reach. As Judge Walker's concurrence notes, the phrase "job transfer" could itself "incorporate[] a non-de minimis alteration of duties, location, or other terms and conditions of the job." 35 F.4th at 884-85.

Third, any substantive change in D.C. Circuit law may not implicate the question presented. The *Chambers* court was animated in part to overrule cases holding that "public humiliation or loss of reputation" was not actionable harm. 35 F.4th at 875. In so ruling, rather than creating a split, the D.C. Circuit joined the other circuits (including the Eighth Circuit) in recognizing that these kinds of intangible harms can give rise to a Title VII claim. Pet. App. 13a (change in "prestige" may be "adverse"); *see* Opp. 4, 15-16, 18.

Given the questions that *Chambers* left unanswered, more time is needed to see whether the D.C. Circuit's approach creates an actual split. As Judge Katsas's dissent notes, courts in the D.C. Circuit will now "have to build up either a new jurisprudence of what counts as terms or conditions of employment …

or a new jurisprudence firmly applying the de minimis canon in this context, or both" to maintain "manageable limits" on Title VII. *Chambers*, 35 F.4th at 887.

C. In claiming a conflict, the government also alludes (at 19) to the Fifth Circuit's unusually stringent approach. But that court granted en banc review and recently heard oral argument to reconsider its stricter standard. *See Hamilton v. Dallas Cnty.*, No. 21-10133 (5th Cir. argued Jan. 24, 2023); Gov't Br. 18 n.2; Opp. 8. From the argument, all signs are that the Fifth Circuit will join the broad circuit consensus. If it does not, this Court can review as appropriate a petition from the en banc Fifth Circuit decision.

II. The Government Elides Key Statutory Language And Would Open The Floodgates To Litigation Not Authorized By Congress.

The government argues that a "harm requirement" is "atextual." Gov't Br. 12, 16. But the statutory text, this Court's precedent, and common sense all support the lower-court consensus requiring more than de minimis harm.

A. The Government Fails To Give Meaning To The Statutory Phrase "Discriminate Against."

1. The government argues that "transferring an employee … *affect[s]* an employee's 'terms' or 'conditions' of employment." Gov't Br. 7 (emphasis added); *see id.* at 8-9, 21. But Title VII's antidiscrimination provision does not speak of actions that "affect" terms

or conditions. It prohibits "discriminat[ing] against" an individual in that regard. 42 U.S.C. § 2000e-2(a)(1). "[D]iscriminat[ing] against" someone requires an injury of objective substance. As this Court has explained in interpreting Title VII's antidiscrimination provision, "[t]o 'discriminate against' a person … mean[s] treating that individual *worse* than others who are similarly situated." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020) (emphasis added).

Far from acknowledging this Court's command that "discriminate against" requires consideration of whether differential treatment leaves someone in a "worse" condition, the government asserts (at 21) that "[t]he legal question in this case is not whether [a] transfer was to a worse job, but whether the job transfer implicate[s] [the] 'terms, conditions, or privileges' of employment at all." Whether "worse" treatment has occurred *is* the question, however, and answering it requires determining whether the plaintiff has suffered objective, material harm.

Take *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). There, this Court held that the same statutory phrase—"discriminate against"—as recited in Title VII's antiretaliation provision requires "injur[y]," citing precedent interpreting the antidiscrimination provision. *Id.* at 59. This Court further held that the injury must be "significant" rather than "trivial" and that the "standard for judging harm must be objective," applied from the perspective of a "reasonable employee." *Id.* at 68-69. The Court framed these holdings in broad terms. *See, e.g.*, *id.* at 68 ("[I]t is important to separate significant from trivial harms. *Title VII, we have said, does not*

set forth 'a general civility code for the American workplace.'" (emphasis added; quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998))); *id.* at 68-69 ("An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. *We have emphasized the need for objective standards in other Title VII contexts*." (emphasis added)).

The government nevertheless tries (at 12-13) to limit *White*'s understanding of injury to the antiretaliation context. The government notes that the antidiscrimination provision, unlike the antiretaliation provision, refers to the "terms, conditions, or privileges of employment." According to the government (at 13), this makes the injury inquiry "unnecessary" as a "further, court-created limiting principle." But the injury inquiry is not a "court-created limiting principle." It derives from the statutory phrase "discriminate against" recited in both provisions. *White*, 548 U.S. at 59. "[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted). *White* itself states that both provisions "seek[] to prevent injury" or "harm." 548 U.S. at 63.[1]

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[1] Nor can the government nullify the antidiscrimination provision's injury requirement by suggesting that actionable injury is shown merely by demonstrating an effect on the "terms, conditions, or privileges of employment." *See* Gov't Br. 11. Proving "discriminatory treatment" requires showing "meaningful

2. The government's failure to grapple with the statutory phrase "discriminate against" allows it to bypass the *ejusdem generis* canon—a canon that confirms the requirement of objective, nontrivial injury. *See* Opp. 23-24. The antidiscrimination provision lists several unlawful employment actions: "to fail ... to hire," to "refuse to hire," "to discharge," or "otherwise to discriminate against any individual." 42 U.S.C. § 2000e-2(a)(1). The specifically enumerated things are employment actions causing objective, nontrivial harm. Thus, the more general phrase "otherwise to discriminate against" is properly read to encompass other employment actions causing objective, nontrivial harm.

3. The subsection following the antidiscrimination provision underscores the universal requirement of objective, nontrivial harm for actionability under Title VII. *See* Opp. 24-25 & n.9. It prohibits an employer from "limit[ing], segregat[ing], or classify[ing]" someone "because of" that person's protected characteristics, if doing so would "adversely affect" the individual as an employee. 42 U.S.C. § 2000e-2(a)(2).

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injury," not simply showing differential treatment in "the terms, conditions, or privileges of employment" and calling it "discrimination." *Contra id.* Differential in-the-workplace treatment may be quite trivial (a male associate who misses out on working a case he subjectively prefers to a female colleague could claim discrimination with respect to a "privilege" of employment). Meanwhile, outside-of-the-workplace retaliation may be quite serious (an employer may file false criminal charges against an employee in retaliation for her filing an EEOC complaint). The lack of any inherent scaling in injury when the "terms, conditions, or privileges of employment" are at issue undermines the government's attempt to cast aside *White*.

Notably, Congress did not repeat the phrase "discriminate against" in this subsection. Instead, Congress used more neutral terms like "classify" and "limit" to describe differentiation based on a protected characteristic and paired that neutral terminology with an adversity requirement. Congress did not need to use the same "adversely affect" language in the antidiscrimination provision because that provision's "discriminate against" language already limited the provision's reach to *harmful* treatment.

The government tries to draw the opposite inference, contending (at 9-10) that the "absence" of "adversely affect[s]" language in the antidiscrimination provision means that provision does not require harm. But again, the government fails to account for the antidiscrimination provision's phrase "discriminate against." Given that statutory phrase, the difference between the two subsections reflects that—unlike "discriminat[ing] against" someone—"limit[ing], segregat[ing], or classify[ing]" someone (such as by way of gender-specific uniforms or tracking race-based employment statistics) does not necessarily impart harm and thus is not always actionable. Put otherwise, only by requiring harm via its "adversely affect[s]" language does the subsection following the antidiscrimination provision "proscribe[]" discrimination, including "practices that are fair in form, but *discriminatory in operation*.'" Gov't Br. 11 (emphasis added; quoting *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 531 (2015)). That interpretation promotes intra-statutory harmony, giving effect to all statutory language while creating a consistent requirement of objective, material harm across Title VII's causes of

action. *Cf. Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) ("Where the text permits, congressional enactments should be construed to be consistent with one another."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) ("The imperative of harmony among provisions is more categorical than most other canons of construction.").

B. The Government Would Mire Courts In Quotidian Work Disputes.

The government is also incorrect (at 11) that a more-than-de-minimis-harm requirement "conflicts with Title VII's objectives." Title VII does not set forth "a general civility code for the American workplace." *Oncale*, 523 U.S. at 80. It "filter[s] out … the ordinary tribulations of the workplace." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotation marks omitted). Hence the importance of "separat[ing] significant from trivial harms," such as "petty slights or minor annoyances that often take place at work and that all employees experience." *White*, 548 U.S. at 68. The government provides no persuasive reason to jettison that overarching understanding of Title VII, particularly given the presumption that Title VII, like "all enactments," incorporates "the venerable maxim" that "'the law cares not for trifles.'" *Wisc. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

The government acknowledges that employer conduct cannot be actionable simply because it subjectively "offen[ds]" an employee. Gov't Br. 16 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22

(1993)). Yet the government invites that result, suggesting (at 11, 16) that any time an individual is singled out by their employer "because of" a protected characteristic in a workplace context, that automatically imposes "meaningful injury" making out a discrimination claim.

A male law-firm associate not invited to a firm-sponsored lunch for female associates could claim sex-based discrimination with respect to workplace "privileges." A white male employee delayed in clocking out from work by a conversation with his boss, while his black colleague left on time, could make out a race-based discrimination claim with respect to a "condition" of his employment. A straight employee not asked to attend the same client meeting as a gay colleague could sue for sex-based discrimination regarding a "privilege" or "condition" of work. And a Christian DOJ attorney could bring a discrimination claim because a Muslim colleague was assigned to a case that she preferred for herself, even though she was assigned to a different case that was just as prestigious and important. Congress did not authorize the flood of litigation invited by the government here.

Nor is the government correct that the more-than-de-minimis harm requirement gives discriminatory workplace conduct a pass. *See* Gov't Br. 11-12. The government suggests that it would allow "transferring all female, Black, Jewish, or Mexican employees from one position to another based explicitly on their race, sex, religion, color, or national origin … unless there is a showing of 'materially significant disadvantage,' such as a decrease in salary or reduced opportunities for career advancement." *Id.* But the

more-than-de-minimis harm standard can be satisfied by intangible and emotional harms if they are objectively reasonable. *See, e.g.,* Pet. App. 13a; *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 830 (11th Cir. 2000). And the type of blatant discrimination that the government hypothesizes about is objectively and inherently emotionally harmful. *See* Opp. 19. Moreover, employees facing the type of discriminatory actions posed by the government could likely also make out hostile-work-environment claims. *See id.* (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986)). Thus, the suggestion that the standard will open the door to discrimination is simply untrue.

In contrast, failing to require any objectively reasonable tangible or intangible harm, rising to the level of more than de minimis, will threaten to make every trivial action in the workplace the subject of Title VII litigation. *White*, 548 U.S. at 68. As the government acknowledged at the recent Fifth Circuit en banc oral argument, "Title VII isn't meant to police all … ordinary [workplace] interactions." En Banc Oral Arg. Rec. 23:00-24:00, *Hamilton*, No. 21-10133 (5th Cir. Jan. 24, 2023), tinyurl.com/v6h9but9. This Court should deny the government's invitation to disrupt the broad circuit consensus and to adopt an atextual reading of the statute that does just that.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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