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 Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE DISTRICT OF COLUMBIA, CONNECTICUT, HAWAII, MAINE, MINNESOTA, OREGON, PENNSYLVANIA, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

BRIAN L. SCHWALB
Attorney General for the District of Columbia
CAROLINE S. VAN ZILE*
Solicitor General
ASHWIN P. PHATAK
Principal Deputy Solicitor General
HOLLY M. JOHNSON
Senior Assistant Attorney General
Office of the Attorney General
400 6th St., NW, Suite 8100
Washington, D.C. 20001
(202) 724-6609
caroline.vanzile@dc.gov

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of Connecticut, Hawaii, Maine, Minnesota, Oregon, Pennsylvania, and Vermont (collectively, "*Amici* States") file this brief as *amici curiae* in support of neither party. *Amici* States have a dual interest in the question presented. First, *Amici* States have an interest in protecting their citizens' right to equal opportunity in employment. Most states have laws prohibiting employment discrimination based on protected traits. Title VII serves as an important complement to those state laws, providing a nationwide baseline to safeguard workers. Employment discrimination harms the residents and economies of *Amici* States, and states thus have a vested interest in eradicating barriers to equity. That interest is advanced by an interpretation of Title VII's antidiscrimination provision that would make discriminatory transfer decisions actionable and eliminate additional, atextual requirements for relief.

Second, *Amici* States also have an interest in protecting businesses and local governments from becoming overwhelmed by litigation involving trivial, day-to-day operative decisions. These claims are costly to defend and can result in liability—even in the absence of discrimination—simply because no one can remember the legitimate, nondiscriminatory reasons for such inconsequential choices. As large employers, states have an interest in promoting a balanced approach that targets discrimination regarding the terms, conditions, and privileges of employment without turning Title VII into a general civility code. A careful reading of Title VII's text, structure, and drafting history reveals that the

statute does not cover *every* workplace incident or managerial decision. This Court should confirm as much.

SUMMARY OF ARGUMENT

1. The Court should hold that lateral transfer decisions are actionable under Title VII's antidiscrimination provision. States have an undeniable interest in preventing employment discrimination within their borders. Discrimination against employees can harm state residents economically and psychologically. As a result, many states have passed their own antidiscrimination laws covering employment. Still, Title VII serves as a vital national baseline in preventing discrimination that crosses borders or otherwise evades state enforcement.

The text of Title VII plainly covers discriminatory transfer decisions. Transferring an employee to a new role—even at the same salary—alters the "terms" or "conditions" of employment. And if done based on a protected trait, that action "discriminates" against the disfavored employee.

Consider the words "terms" and "conditions." The "terms" of employment are the essential elements of any employment agreement, whether written or unwritten, express or implied. And "conditions" are the "[a]ttendant circumstances" of a job. Transfer to a different position—even in the absence of diminution of pay or status—will always affect the "terms" or "conditions" of employment. After all, it is difficult to imagine a term or condition of employment more fundamental than the position itself.

To "discriminate," in turn, means to engage in differential treatment that injures protected individuals by treating one person or group more favorably than another. Forced transfers injure employees by either altering a fundamental aspect of their employment contract or depriving them of opportunities that are open to others. This harm is necessarily meaningful, constituting discrimination.

2. At the same time, enforcing these textual limits could disturb precedent that has developed in many federal courts to protect employers under Title VII. *Amici* States have an interest in ensuring that the careful balance Title VII creates between employers' and employees' rights is preserved.

Amici States therefore urge the Court to make clear that Title VII's antidiscrimination provision does not cover *all* differential treatment in the workplace, including trivial or temporary employment decisions. Title VII may be broad, but as the text, precedent, and legislative history make clear, it is not unlimited. To begin, the plain meaning of "discriminate" encompasses only differences that injure employees. And the words "compensation, terms, conditions, or privileges" each have distinct and independent meanings. Although they collectively cover many aspects of employment, they do not encompass everything that happens in the workplace. Indeed, this Court has already held that the word "conditions" excludes at least *some* conduct: harassment that is not severe or pervasive. The legislative history also reflects a focus on creating equal employment opportunity while leaving at least some decisions to management's prerogative.

Federal courts have captured this balance in various ways, with some drawing a materiality requirement from the text of Title VII and others exempting de minimis harms. Whether the Court articulates a single threshold requirement under Title VII or not, it should state clearly that not all workplace conduct rises to the level of "terms, conditions, or privileges" of employment.

ARGUMENT

I. The Court Should Hold That Lateral Transfers Are Actionable Under Title VII's Antidiscrimination Provision.

A. *Amici* States have a strong interest in an interpretation of Title VII that precludes discrimination in meaningful aspects of employment.

The States have a "profound state interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin." *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) (citation and internal quotation marks omitted); *see also EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("Congress' purpose to end employment discrimination is . . . compelling."); *EEOC v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination.").

This interest is grounded in the significant harms such discrimination creates. *See United States v. Burke*, 504 U.S. 229, 238 (1992) ("[D]iscrimination in employment . . . causes grave harm to its victims."). At the individual level, employment discrimination

"depriv[es] [the victim] of her livelihood and harm[s] her sense of self-worth." *EEOC v. R.G.*, 884 F.3d 560, 592 (6th Cir. 2018). As Congress recognized when it amended Title VII in the Civil Rights Act of 1991, employment discrimination can lead to "humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries." H.R. Rep. 102-40, pt. 1, at 65 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 603; *see also Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 742 (1983) (recognizing "the substantial State interest in protecting the health and well-being of its citizens" (internal quotation marks omitted)); *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.").

Notably, Title VII serves "societal as well as personal interests." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Left unchecked, racially discriminatory employment practices "foster[] racially stratified job environments to the disadvantage of minority citizens." *Id.* at 800. The same is of course true of discrimination on the basis of sex and other protected traits.

To that end, many *Amici* States have adopted their own antidiscrimination laws, which have benefited their residents, economies, and fiscs. *See* Iris Hentze & Rebecca Tyus, *Discrimination in the Workplace*, Nat'l Conf. of State Legislatures (updated Aug. 12, 2021), https://bit.ly/3P5n0O2 (listing workplace discrimination laws in each state). But state-level

protections alone may not ensure effective enforcement in every instance. Indeed, "workplace discrimination remains a pervasive problem." Desta Fekedulegn et al., *Prevalence of Workplace Discrimination and Mistreatment in a National Sample of Older U.S. Workers: The REGARDS Cohort Study*, 8 SSM – Population Health 1, 1 (2019), https://bit.ly/45gCHHw. Over 60% of American workers report that they have experienced or witnessed discrimination in the workplace based on race, age, gender, or LGBTQ+ status. *New Study: 3 in 5 U.S. Employees Have Witnessed or Experienced Discrimination*, Glassdoor, https://bit.ly/3srvyWg (updated July 22, 2020). And Black workers consistently experience higher unemployment and underemployment rates than white workers across education levels, which "strongly suggests that racial discrimination remains a major failure of an otherwise tight labor market." Jhacova Williams & Valerie Wilson, *Black Workers Endure Persistent Racial Disparities in Employment Outcomes*, Economic Policy Institute Report (Aug. 27, 2019), https://bit.ly/3E224RF.

Title VII thus remains an essential safeguard in the States' antidiscrimination efforts. It supplies additional enforcers—the Equal Employment Opportunity Commission ("EEOC") and the federal courts—to root out invidious discrimination in employment. *See, e.g.*, *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017-2021*, EEOC, https://bit.ly/3siYMH3 (last visited Sept. 1, 2023) (outlining EEOC enforcement priorities and resources). And it protects residents of the *Amici*

States who are not covered by local antidiscrimination laws, such as federal employees or residents who work in other States.

B. Transfer decisions made on the basis of a protected trait discriminate with respect to "terms" or "conditions" of employment.

Title VII's text plainly prohibits discrimination in transfer decisions. The statute's antidiscrimination provision makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). In cases involving statutory interpretation, the "starting point" is "a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *see Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). Here, the Court need only address the meaning of two key phrases—"terms [or] conditions" and "discriminate"—to conclude that the statute covers lateral transfers.

First, Title VII's reference to the "terms . . . of employment" encompasses the terms of an employment contract, whether "written or oral, formal or informal," express or implied. *Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984).[1] In 1964,

[1] For example, public-sector employment "does not . . . give rise to a contractual relationship in the conventional sense," and the terms of employment may be woven into various statutes and regulations. *Urbina v. United States*, 428 F.2d

when Congress enacted the statute, "terms" meant "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Webster's Third New International Dictionary* 2358 (1961). It carries the same meaning today. *Black's Law Dictionary* 1772 (11th ed. 2019) (defining "term" as "[a] contractual stipulation"). As such, "terms" of employment are the contractual stipulations explicitly bargained for in an individual employment contract or typically resolved when an employee accepts a job offer. *See, e.g.*, *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (holding that a "shift schedule is a term of employment" because "[h]ow could the *when* of employment not be a *term* of employment?").

In 1964, as now, "conditions" encompassed the "[a]ttendant circumstances" of a job. *Webster's New International Dictionary of the English Language* 556

1280, 1284 (Ct. Cl. 1970); *see Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985) (explaining that federal employees' rights are "determined by reference to . . . statute[s] and regulations . . . rather than to ordinary contract principles"). Still other agreements are never reduced to writing—"an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace." *Hishon*, 467 U.S. at 74. Nevertheless, even implied or verbal agreements contain "terms." *Cf.* Restatement of Employment Law § 2.03 cmt. a (Am. L. Inst. 2015) (treating broadly the scope of terms that may be established in an employment relationship, including "[o]ral and written agreements, agreements for a definite or indefinite term, agreements contemplating acceptance by performance followed by such performance, and agreements not imposing reciprocal obligations on the employee").

(2d ed. 1957); *see also Conditions*, Merriam-Webster.com Dictionary, https://bitly.ws/TC4m (last visited Sept. 1, 2023) (defining "conditions" as "attendant circumstances," as in "living conditions" or "working conditions"). Collectively, terms and conditions are an "expansive concept." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). At a minimum, they typically cover the nature of the job, its core duties, the hours of work, and the physical location of the workplace—in other words, the *what*, *when*, and *where* of employment.

A lateral transfer plainly alters a "term" or "condition" of employment. Few circumstances are more essential to an employment contract than the position to which the employee is hired. The position usually dictates the type of work the employee performs and where she reports to work—both of which can affect her psychological and physical wellbeing. *See* U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* 30 (2012), https://bit.ly/44gCoLQ (finding that more Federal employees rated "nonmonetary rewards"—such as "personal satisfaction," "interesting work," and "serv[ing] the public"—as "important" than "awards and bonuses"). Consider, for example, a person describing her dream job. She would surely lead with, or at least mention, the type of work she would perform and the city or region where the job would be located. Similarly, although "an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace," *Hishon*, 467 U.S. at 74, the terms of that contract would decidedly change if the employer

suddenly swapped the shovel and worksite for a desk and computer. At a minimum, that would be a profound change to the attendant circumstances of employment.

Second, in 1964, "discriminate" meant "[t]o make a difference in treatment or favor (of one as compared with others)." *Webster's New International Dictionary* 745 (2d ed. 1954), *quoted in Bostock*, 140 S. Ct. at 1740. Today's definition is similar, including "[t]o treat a person or group in an unjust or prejudicial manner" or "to treat a person or group more favorably than others." *Discriminate*, Oxford Eng. Dictionary Online, bit.ly/2THhLtQ (last visited Sept. 1, 2023) (spelling altered to American English). "[D]iscriminate against" in Title VII accordingly "refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006).

Because a forcible transfer fundamentally changes terms or conditions of employment, doing so on the basis of a protected trait like race or sex necessarily causes sufficient injury to constitute discrimination. As the D.C. Circuit aptly observed, "[r]efusing an employee's request for a transfer while granting a similar request to a similarly situated employee is to treat the one employee worse than the other." *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022).

In other, future cases, deciding what constitutes a "term," "condition," or even a "privilege" of employment may be difficult and context-dependent. As noted below, Title VII does not cover every workplace interaction, and each word in the statute

should be given its own independent meaning. *See infra*, Part II.B. But where a change in the *position itself* is at issue, the analysis is easy: lateral transfers affect the terms or conditions of employment.[2] And a decision regarding something that fundamental, when made on the basis of a protected trait, will always cause injury rising to the level of discrimination.

II. The Court Should Also Clarify That Title VII Does Not Make All Workplace-Related Conduct Actionable.

Although the textual analysis in this case is straightforward, reversing the Eighth Circuit's decision could affect swaths of precedent developed in federal courts to protect employers. *Amici* States, as large employers and guardians of local economies, have an interest in a balanced interpretation of Title VII. While some lower court decisions may have gone astray, others have adopted an evenhanded approach rooted in the text of Title VII. At a minimum, this Court should make clear that Title VII does not cover every workplace encounter, no matter how trivial. And it could go further, adopting one of the text-based proxies for "terms, conditions, or privileges" articulated by federal courts of appeals.

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[2] Of course, not every change to a position is a transfer. For example, a company reorganization that changes the name of a position but not any of the substantive work is not a transfer.

A. *Amici* States have an interest in a balanced reading of Title VII that protects employers from liability for trivial or temporary employment decisions that cause no meaningful harm.

Absent some indication by the Court that the phrase "terms, conditions, or privileges of employment" is not limitless, private- and public-sector employers could soon see a flood of litigation over fleeting or otherwise insubstantial workplace disputes. The *Amici* States have an interest in protecting the businesses in their jurisdiction, as well as their own state and local governmental entities, from these disproportionate and textually unwarranted economic burdens.

These concerns are substantial. Courts of appeal have long worried that making *any* workplace conduct actionable would transform federal courts into "super-personnel department[s]." *Stewart v. Ashcroft*, 352 F.3d 422, 429 (D.C. Cir. 2003) (brackets in original) (quoting *Dale v. Chi. Trib. Co.*, 797 F.2d 458, 464 (7th Cir. 1986)). As petitioners acknowledge, most courts have articulated a baseline threshold for an incident to constitute an "adverse action" under Title VII.[3] The current standards of harm have

[3] *See, e.g.*, *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010) (requiring an action to be "materially 'adverse,'" "gauged by an objective standard"); *Kairam v. W. Side GI, LLC*, 793 F. App'x 23, 27 (2d Cir. 2019) ("materially adverse"); *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015) ("serious and tangible"); *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) ("some significant detrimental effect"); *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007)

precluded a broad array of claims that could be actionable in the absence of some threshold-injury standard. *See, e.g.*, *Hoko v. Huish Detergents, Inc.*, 453 F. App'x 799, 802-03 (10th Cir. 2011) (claiming discrimination from being given "broader internet access," thereby enabling abuse of that privilege); *Taylor v. Small*, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003) (untimely performance appraisals); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) ("quickly reversed" denial of promotion); *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (mention of "possibility of transfer or discharge" by supervisor lacking such authority); *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 896 (10th Cir. 1994) (performance ratings of "meets expectations" and "exceeds expectations").

These concerns are not alleviated by the need for plaintiffs to prove intentional discrimination. Plaintiffs can often survive a motion to dismiss by simply alleging that a coworker of another sex, race, or national origin received different treatment—even if it later becomes clear that the treatment was based on a neutral, nondiscriminatory reason. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002)

("ultimate employment decisions"); *Threat*, 6 F.4th at 678 (employing "a de minimis exception"); *Terry v. Gary Cmty. Sch. Corp.*, 910 F.3d 1000, 1005 (7th Cir. 2018) ("materially adverse"); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) ("materially significant"); *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1126 (9th Cir. 2000) ("materially affect[s] the compensation, terms, conditions, or privileges of . . . employment"); *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007) ("significant"); *Webb-Edwards v. Orange Cnty. Sheriff's Off.*, 525 F.3d 1013, 1031 (11th Cir. 2008) ("serious and material").

(permitting a complaint to move forward where an employee of a different age and national origin was promoted instead of plaintiff). And litigation itself imposes significant burdens on employers, administrative agencies, and the judiciary, particularly when a case progresses to discovery.

On top of that, employers could struggle to articulate a legitimate, nondiscriminatory reason for each of the informal, ad hoc, and trivial decisions made on a daily basis in the workplace. Supervisors are constantly called upon to make decisions that favor one employee over another—who gets the first lunch break, the newer computer, the nicer customer, the prettier view. If claims can be brought for isolated decisions like these, random circumstances supporting an inference of discrimination could lead to liability if a supervisor cannot remember why she made a particular decision. *See McDonnell Douglas Corp.*, 411 U.S. at 802-03 (establishing burden-shifting scheme).

Moreover, for some types of employment practices, expanding the scope of Title VII exponentially could do more harm than good. For example, a holding that Title VII covers performance ratings—especially *positive* ratings, *e.g.*, *Brown v. Brody*, 199 F.3d 446, 458 (D.C. Cir. 1999), *overruled by Chambers*, 35 F.4th at 882; *Meredith*, 18 F.3d at 896—could induce employers to stop providing performance appraisals altogether. *Cf.* Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 Wash. & Lee L. Rev. 1381, 1383-84 (1996) (describing "disastrous" consequences from

employers' "increasing[] reluctan[ce] to discuss the qualifications of former employees with prospective employers for fear of . . . lawsuits"). Similarly, a holding that Title VII covers preliminary decisions that are never implemented or quickly overruled could lead to the abandonment of procedural steps that protect employees—such as internal investigations and notices of proposed adverse action. *Cf. Taylor*, 350 F.3d at 1293 (explaining that, if employers could not "correct workplace wrongs prior to litigation," "there would be absolutely no incentive for [them] to make adjustments for past conduct during the EEO process"). And, for some of these matters, the Court will also need to consider how its rulings will affect the longstanding presumption that Title VII "places the same restrictions on federal . . . agencies as it does on private employers." *Brown*, 199 F.3d at 452 (citing cases); *see* 29 C.F.R. § 1614.107(a)(5) (barring claims arising out of moot, proposed, or preliminary actions).

When the D.C. Circuit overturned its "objectively tangible harm" standard in *Chambers*, it prevented Title VII from becoming a "general civility code," 35 F.4th at 877, by clarifying that "not everything that happens at the workplace affects an employee's 'terms, conditions, or privileges of employment,'" *id.* at 874. This important assurance has given district courts sufficient leeway to continue weeding out insubstantial claims. *See, e.g.*, *Tango v. U.S. Capitol Police*, No. 22-cv-1777, 2023 WL 4174321, *6 (D.D.C. June 26, 2023) (dismissing claim based on temporary denial of a female police officer's request for new male-cut uniform pants because her employer had not "confiscated the male-designated [uniform] pants she

already possessed"); *Garza v. Blinken*, No. 21-cv-02770, 2023 WL 2239352, *5 (D.D.C. Feb. 27, 2023) (dismissing claim based on proposed letter of reprimand where plaintiff failed to allege "that it was ever issued or resulted in any professional consequences"); *Black v. Guzman*, No. 22-cv-1873, 2023 WL 3055427, *7 (D.D.C. Apr. 24, 2023) (dismissing claim based on removal from two work events "in a limited two-month period over an extensive work history"); *Bell v. Fudge*, No. 20-cv-2209, 2022 WL 4534603, *5-6 (D.D.C. Sept. 28, 2022) (dismissing claim based on supervisor's false accusation that plaintiff "exhibit[ed] hostility towards a coworker," "two separate occasions on which [the plaintiff] was required to attend inconvenient meetings," and "unnecessary 'gentle reminders' about already-completed work").

A similar assurance by this Court would ensure that, going forward, courts have this critically important discretion. It would also serve *Amici* States' interest in protecting themselves and their local businesses from expensive litigation based on inconsequential workplace disputes.

B. Based on statutory text, this Court's precedent, and legislative history, liability for workplace-related conduct under Title VII is not unlimited.

The conclusion that Title VII does not govern *every* workplace interaction accords with the statute's text, as well as this Court's precedent and the legislative history.

Text. To start, the antidiscrimination provision's text does not cover all work-related conduct. Rather,

it makes it unlawful to "discriminate against any individual with respect to" four specific areas: "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

First, the word "discriminate" "reasonably sweeps in some form of an adversity . . . threshold," ensuring that the statute encompasses only "a meaningful difference in the terms of employment . . . that injures the affected employee." *Threat*, 6 F.4th at 678. To hold otherwise would conflict with the ordinary use of the word "discriminate," which involves not simply a difference in treatment but also a sense that one individual is being favored over another. *Bostock*, 140 S. Ct. at 1740 (defining "discriminate" as "[t]o make a difference in treatment or favor (of one as compared with others)" (quoting *Webster's New International Dictionary* 745 (2d ed. 1954))). "The critical issue, Title VII's text indicates, is whether members of one [protected class] are exposed to disadvantageous terms or conditions of employment to which members of the other [class] are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993)) (Ginsburg, J., concurring).

Second, Congress acted intentionally when it barred discrimination with respect to only "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). While Congress could have barred discrimination regarding "all work-related conduct" or "all actions in the workplace," it did not. Instead, it chose four specific (albeit broad) aspects of employment, and this Court should "give independent meaning to" each operative

word. *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (O'Connor, J., concurring).

A simple hypothetical illustrates the textual point. Imagine a workplace in which men are given yellow Post-It notes and women are given blue notes, which are otherwise identical. This practice might be silly, but no one would say that the employer has "discriminated" regarding "compensation, terms, conditions, or privileges of employment."[4] Minor aesthetic variations do not affect compensation or any term of the employment contract. Nor would such a trivial difference constitute a condition of employment. Just as no one would say that the brand of cereal in the cupboard alters a person's *living* conditions, not every variation in an office can alter *working* conditions. Then consider "privileges," which include "particular and peculiar benefit[s] or advantage[s]." *Black's Law Dictionary* 1359 (4th ed. 1951). The color of office supplies does not fit that bill either. Presumably, by using the specific terms it chose, Congress intended to exclude such inconsequential, de minimis differences.

Precedent. Precedent also dictates that Title VII's scope, while expansive, is not unlimited. For example, this Court has already considered the scope of the word "conditions" in the context of harassment and held that, because Congress could not have meant for Title VII to cover every workplace occurrence,

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[4] On the other hand, if the color-coding were part of a severe or pervasive *pattern* of differential treatment that degraded one gender, it might be sufficient to constitute a hostile work environment—but one minor aesthetic difference would not suffice on its own. *See, e.g.*, *Meritor*, 477 U.S. at 67.

harassment is covered only if it is "severe or pervasive." *Harris*, 510 U.S. at 21; *see Meritor*, 477 U.S. at 67; *see also Threat*, 6 F.4th at 678 ("When Congress enacted Title VII, [it] provided no indication that it sought to . . . use the word 'discriminate' to cover *any* difference in personnel matters."). Similarly, the Court has held that "Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting *Oncale*, 523 U.S. at 81). Nor does the statute establish a "general civility code." *Oncale*, 523 U.S. at 80.

To be sure, the antidiscrimination provision "covers more than '"terms" and "conditions" in the narrow contractual sense.'" *Faragher*, 524 U.S. at 786 (quoting *Oncale*, 523 U.S. at 78). And this Court has rightly observed that "Congress intended to prohibit all practices in whatever form which create inequality in employment *opportunity* due to discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). But not all differential treatment in the workplace creates inequality in employment opportunity. For example, many employers furnish sex-segregated bathrooms, which in most circumstances are not considered discriminatory as long as they are equally available. Again, Title VII's antidiscrimination provision may be broad, but it is not all-encompassing.

Legislative history. A reading of the statute that incorporates some limit to what constitutes "terms, conditions, or privileges" of employment also

comports with Congress's purpose in enacting Title VII. As this Court has observed, the statute was enacted "to assure equality of employment opportunities." *McDonnell Douglas Corp.*, 411 U.S. at 800; *see Franks*, 424 U.S. at 763 (focusing on "inequality in employment opportunity due to discrimination"). But it does not necessarily require each employee to be working on the same task at the same time. Nor did Congress intend to turn courts into super-personnel departments that would be forced to adjudicate the propriety of every informal coaching conversation, cubicle assignment, or work-related task. U.S. Equal Emp. Opportunity Comm'n, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2150 (1964) ("*EEOC Legislative History*") (additional statements of the bill's supporters) ("Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.").

"[N]o legislation pursues its purposes at all costs." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)) (brackets in original). While taking aim at discrimination, Title VII's supporters also warned that "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible." *EEOC Legislative History* 2150 (additional statement of bill's supporters). Accordingly, the Court should be clear that Title VII's antidiscrimination provision does not govern everything that happens in the workplace.

C. This Court should preserve federal courts' ability to screen out lawsuits based on trivial conduct under Title VII.

While this Court should make clear that the text of Title VII does not sweep in *all* workplace conduct, it need not precisely delineate what is covered by the phrase "terms, conditions, or privileges" in this case. However, if the Court does weigh in on that broader debate, there are steps it could take to bring clarity to Title VII jurisprudence.

First, the Court could endorse the materiality standard used as part of many courts' Title VII test. After all, if an action is immaterial, it is unlikely to affect the "terms, conditions, or privileges" of employment. Retaining a materiality standard would preserve the vast body of case law identifying specific decisions or workplace environments as actionable. While litigants could no longer rely on decisions finding some injuries—like lateral transfers—insufficiently "tangible" or "substantial," decisions holding that certain harms *are* sufficiently material would retain their precedential value. In addition, this interpretation would—as *stare decisis* dictates—preserve the Court's requirement that offensive conduct be "severe or pervasive" to establish a hostile work environment.

Second, and in the alternative, the Court could adopt the "de minimis" exception described by the Sixth Circuit in *Threat*, 6 F.4th at 678. Like many jurisdictions, that Circuit interprets "terms, conditions, or privileges of employment" as covering only "materially adverse" harms. *Laster v. City of Kalamazoo*, 746 F.3d 714, 727 (6th Cir. 2014). But it

applies the standard broadly, requiring only "a meaningful difference in the terms of employment . . . that injures the affected employee." *Threat*, 6 F.4th at 678. That requirement was satisfied, for example, by an unwanted, year-long change of an employee's tour of duty from the day to the night shift. *Id.*

The Sixth Circuit found it important to maintain "some form of an adversity and a materiality threshold" to "prevent[] 'the undefined word "discrimination"' from 'command[ing] judges to supervise the minutiae of personnel management.'" *Id.* The standard, the court explained, also "ensures that any claim under Title VII involves an Article III injury—and not, for example, differential treatment that helps the employee or perhaps even was requested by the employee." *Id.* (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021)).

The court found support for this interpretation in the "de minimis exception that forms the backdrop of all laws," noting that "[t]he 'doctrine *de minimis non curat lex* (the law does not take account of trifles)' has 'roots [that] stretch to ancient soil.'" *Id.* (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 233 (2014)). "When Congress enacted Title VII," it "provided no indication that it sought to disregard these considerations or to use the word 'discriminate' to cover *any* difference in personnel matters." *Id.* As such, even though the words "adverse action" and "materially adverse" do not themselves appear in the antidiscrimination provision, the Sixth Circuit found them "to be shorthand for the operative words in the

statute and otherwise to incorporate a de minimis exception to Title VII." *Id.* at 679.

Finally, whatever standard this Court ultimately adopts for "terms" or "conditions" under Title VII, it should *not* be drawn from definitions arising out of the National Labor Relations Board's interpretation of "terms and conditions" under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d). Although decades-old dicta suggests that the words are "analogous" in the two statutes, *Hishon*, 467 U.S. at 76 n.8, the Court has more recently rejected the assumption that words in those statutes should be interpreted identically, explaining that the NLRA's "unique purpose"—"preserv[ing] the balance of power between labor and management"—is "inapposite in the context of Title VII, which focuses on eradicating discrimination," *Vance v. Ball State Univ.*, 570 U.S. 421, 434 n.7 (2013).

In addition to their differing purposes, there are three practical reasons to distinguish Title VII's "terms" or "conditions" from the NLRA's "terms and conditions." To begin, there is the textual difference. The NLRA's use of the conjunctive—"terms *and* conditions," 29 U.S.C. § 158(d) (emphasis added)—suggests that the words should be read together to form one cohesive concept, while Title VII's use of the disjunctive "or" suggests that each word has independent significance, 42 U.S.C. § 2000e-2(a)(1); *see Garcia v. United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive . . . be given separate meanings.").

Next, while courts interpret Title VII de novo, they give "considerable deference" to the Board's interpretation of the NLRA. *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (upholding Board rule "as long as it is rational and consistent with the Act"); *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (according "the greatest deference" to the Board's interpretation of the Act). Thus, while it is up to the courts to decide whether conduct "sufficiently affect[s] the conditions of employment to implicate Title VII," *Harris*, 510 U.S. at 21, this same determination is "primarily a task for the Board" under the NLRA, *Truck Drivers, Oil Drivers, Filling Station & Platform Workers Loc. No. 705 v. NLRB*, 509 F.2d 425, 428 (D.C. Cir. 1974) (per curiam). Indeed, the D.C. Circuit has criticized—even as it has often affirmed—the Board's willingness to entertain "infinitesimally small abstract grievances." *NLRB v. Columbia Typographical Union*, 470 F.2d 1274, 1275 (D.C. Cir. 1972) (quoting *Dallas Mailers Union, Loc. No. 143 v. NLRB*, 445 F.2d 730, 733 (D.C. Cir. 1971)).

Third, the Board's interpretation of the NLRA has evolved over time to keep pace with "current industrial practice" as workplaces change. *Ford Motor Co. (Chi. Stamping Plant) v. NLRB*, 441 U.S. 488, 500 (1979). Its modern interpretation of "terms and conditions" thus sheds no light on how Congress interpreted those words when it enacted Title VII in 1964. And the case law existing in 1964 did not suggest that "terms and conditions" under the NLRA included essentially all workplace conduct. Rather, in

1964, case law suggested that the NLRA covered issues that entailed more than de minimis injury. *See, e.g.*, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964) (holding that "contracting out of work" is a "condition of employment" because it would require the termination of bargaining-unit employees); *NLRB v. Katz*, 369 U.S. 736, 744 (1962) (reduction of paid sick-leave); *id.* at 745 (merit increases).[5] Today, by contrast, the Board has deemed the ability to borrow a dolly for personal use and the availability of coffee in the break room to be "terms and conditions" of employment. *See Mid-South Bottling Co.*, 287 N.L.R.B. 1333, 1342-43 (1988), *enforced*, 876 F.2d 458 (5th Cir. 1989) (refusing to allow an employee to borrow a dolly, among other things); *F & R Meat Co.*, 296 N.L.R.B. 759, 767 (1989) (depriving employees of "the free coffee they had previously enjoyed").

CONCLUSION

This Court should hold that forced transfers are actionable under Title VII's antidiscrimination provision while clarifying that not everything that happens in the workplace is actionable.

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[5] *See also NLRB v. S. Coach & Body Co.*, 336 F.2d 214, 216-19 (5th Cir. 1964) (wages and layoffs); *McLean v. NLRB*, 333 F.2d 84, 87 (6th Cir. 1964) (health insurance); *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 502-03 (5th Cir. 1964) (Christmas bonuses); *E. Bay Union of Machinists, Loc. 1304 v. NLRB*, 322 F.2d 411, 413-14 (D.C. Cir. 1963) (terminations); *cf. NLRB v. Detroit Resilient Floor Decorators Loc. Union No. 2265*, 317 F.2d 269, 270 (6th Cir. 1963) (citing Board decisions regarding pension plans, vacations, seniority, reimbursements, sick leave, stock repurchase plans, group insurance, and bonuses).

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the
District of Columbia

CAROLINE S. VAN ZILE
Solicitor General
Counsel of Record

ASHWIN P. PHATAK
Principal Deputy Solicitor
General

HOLLY M. JOHNSON
Senior Assistant Attorney
General

OFFICE OF THE ATTORNEY
GENERAL FOR THE
DISTRICT OF COLUMBIA
400 6th St., NW, Suite 8100
Washington, D.C. 20001
(202) 724-6609
caroline.vanzile@dc.gov

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On behalf of:

WILLIAM TONG
Attorney General
State of Connecticut

ANNE E. LOPEZ
Attorney General
State of Hawaii

AARON M. FREY
Attorney General
State of Maine

KEITH ELLISON
Attorney General
State of Minnesota

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania

CHARITY R. CLARK
Attorney General
State of Vermont