No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYTON 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 FOR THE STATES OF ARKANSAS, ALABAMA, FLORIDA, IDAHO, INDIANA, IOWA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici are the States of Arkansas, Alabama, Florida, Idaho, Indiana, Iowa, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Utah. Amici States are committed to eliminating employment discrimination based on race, religion, sex, and national origin. But concluding—as Muldrow urges—that purely lateral, non-injurious transfers are actionable under Title VII doesn't advance that goal. To the contrary, Muldrow's preferred rule would mainly chill *non*-discriminatory transfers, including those essential to the operations of state and local government.

Amici States and other governmental employers often need to transfer employees to fill critical vacancies—whether it's an open teaching position in an understaffed school, an open position in a vital child support office, or, as here, an open position in an urban police department precinct with a violent crime problem. Subjecting purely lateral transfer decisions to the existing *McDonnell Douglas* framework for adjudicating Title VII claims would impair the government's ability to quickly deploy resources to better meet the public's needs and throttle the operations of state and local governments. Amici States therefore urge the Court to reject Muldrow's argument that non-injurious lateral transfers are actionable under Title VII and affirm the judgment below.

SUMMARY OF THE ARGUMENT

I. For more than two decades, almost every court of appeals has held that transfer decisions are not actionable under Title VII unless they significantly disadvantaged the plaintiff. Muldrow says all those circuits were playing "a children's game of telephone" with the statute, Pet. Br. 33, paraphrasing its terms until they all accidentally coalesced around a harm requirement that does not exist.

But Section 703(a)(1)'s language demonstrates otherwise. That provision only prohibits employment actions that "discriminate against" the plaintiff on the basis of protected characteristics. And—as this Court has long held—to "discriminate against" requires making "'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)). Thus, by definition, a purely lateral transfer does not discriminate against anyone.

II. Muldrow's proposed reading should also be rejected because—when paired with *McDonnell Douglas*'s burden-shifting framework—it would inevitably impose liability for totally innocuous transfer decisions. In an ordinary Title VII case, that framework makes sense because it presumes discrimination where an employer treated an employee worse than similar employees outside of her protected class. And an employer can rebut the presumption of discrimination by explaining that it decided to demote an employee or promote another employee based on the employee's individual merits. But in a lateral-transfer case, that same framework would require an employer to explain why it laterally transferred one capable employee among many into another position.

And in that situation, an employer may struggle (and fail) to articulate why it selected any particular employee for a transfer, and thus may be unable to rebut *McDonnell Douglas*'s presumption even when its motives are benign.

III. Muldrow's proposed approach will have real-world consequences for states and local governments. Because of the mismatch between *McDonnell Douglas* and lateral-transfer claims, Muldrow's rule would chill legitimate and vital lateral transfers and cripple state and local government. It would inhibit reassignments of teachers to understaffed schools, transfers of police from lower- to higher-crime areas, and paralyze the everyday reallocation of workers throughout government.

IV. The significant-disadvantage rule applied below and by most courts of appeals is the appropriate harm standard for transfer claims. First, Congress expressly required harm in Title VII, and that requirement should be given more meaning than the de minimis exception that courts read into any statute. Second, a de minimis standard would invite confusion that the significant-disadvantage test does not. Third, like the material-adversity standard this Court adopted for retaliation under Title VII, the significant-disadvantage test is objective, administrable, and fit to the purpose of "separat[ing] significant from trivial harms." *White*, 548 U.S. at 68.

ARGUMENT

I. Title VII's text precludes no-injury lateral-transfer claims.

Muldrow argues that all discriminatory transfer decisions violate Title VII regardless of harm. But Title VII doesn't simply make it unlawful to "discriminate" with respect to terms, conditions, or privileges of employment. Instead, it makes it unlawful to "discriminate *against* any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1) (emphasis added).

And though "discriminate" unmodified embraces any differential treatment, "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006). So the discriminatory transfer decisions that Title VII regulates are only those that make an employee worse off, not the same or better.

A. The nub of Muldrow's argument is that no "heightened-harm requirement can be derived from the word 'discriminate,' because it connotes any differential treatment." Pet. Br. 16. Used on its own, that is correct. Indeed, the term is sweeping—and without a modifier like "against," sweeps far more broadly than Title VII has ever been understood. When Title VII was enacted, "discriminate" meant what it means today: "[t]o make a difference in treatment or favor." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020) (quoting Webster's New International Dictionary 745 (2d ed. 1954)).

Most prototypically, that means discrimination *against* a class. But as it does today, the term also included "discriminat[ing] in favor of a certain class." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959). And it can also refer to differential treatment that is neither adverse nor favorable.

B. But the statute that Congress wrote does not capture all of those forms of discrimination. By modifying "discriminate" with "against," Congress indicated what kind of discrimination it meant to prohibit—and considerably narrowed the term's otherwise broad scope.[1] Indeed, as this Court explained in *Bostock*, while "discriminate" captures any "difference in treatment," the phrase "[t]o 'discriminate against' a person . . . mean[s] treating that individual *worse* than others who are similarly situated." 140 S. Ct. at 1740 (emphasis added). Favorable treatment, or differential treatment that is neither advantageous nor disadvantageous, does not qualify. For example, a sex-based promotion is obviously not discrimination "against" the employee who's promoted. And by the same logic, neither is a purely lateral transfer. If an employee ends up in as good a position as she was in before, the move may be discriminatory, but it is not "discrimination against."

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[1] Notably, Congress prohibited discrimination more broadly in other provisions of the Civil Rights Act of 1964, providing that all persons are entitled to the equal enjoyment of public accommodations "without discrimination" in Section 201, 42 U.S.C. 2000a(a), and that no person shall be "subjected to discrimination" in a federally funded program in Section 601, 42 U.S.C. 2000d. The use of more neutral language elsewhere in the same statute negates any suggestion that Congress merely used "against" to grammatically connect "discriminate" and "employee."

C. Some of Muldrow's amici explicitly, and Muldrow implicitly, attempt to give "discriminate against" a different meaning. Rather than reading it to mean treating an employee worse than others, they would read it to mean treating an employee differently out of "hostility." Br. of Suja Thomas 13; cf. Pet. Br. 48 (arguing all intentional discrimination is a "declaration of inferiority"). On this view, non-injurious transfers would still "discriminate against" an employee so long as they were motivated by animus.

It's true that "against" *can* connote hostility, though that is not its only or even primary meaning.[2] But that cannot be what it means in Title VII. If it did, then employers could openly discriminate in ways that harmed their employees so long as they did so on the basis of supposedly benign stereotypes. That is not the law; "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality). What makes discrimination "discrimination against" is harm, not attitudes.

D. Muldrow purports to accept that the phrase "discriminate against" requires her to show "she was treated worse than similarly situated colleagues." Pet. Br. 28. Yet she claims any discriminatory transfer decision satisfies that requirement. According to Muldrow, by definition, whenever an employee is "moved because of a protected characteristic"—or is denied a transfer because of one—"the employee has

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[2] *See, e.g.*, The Random House Dictionary of the English Language 26 (1966) (defining "against" to mean "adverse *or* hostile to") (emphasis added).

already been treated worse than her similarly situated colleagues," whether the transfer or non-transfer leaves her any worse off or not. *Id.*

That reads "against" out of the statute. Under the guise of honoring this Court's reading of "discriminate against," it simply defines "discriminate against" and "discriminate" to mean the same thing. But even if Muldrow could overcome that difficulty, the claim that every discriminatory transfer decision automatically treats its subject not just differently than others, but *worse*, fails on its own terms.

The far more commonsensical approach to determining whether a transfer treats an employee worse than others is to actually determine whether a transfer treats an employee worse than others—not just presume it. If an employee is "moved because of a protected characteristic" to a better job, Muldrow would say that she has been treated worse than her colleagues. But that obviously isn't right.

The same logic applies to transfers between equal jobs. If a police department fills a sergeant vacancy in one precinct by transferring a sergeant from another, the sergeant who is transferred is treated no worse than the sergeants who are not. At the end of the day, both are still sergeants. To be sure, if the basis for the selection is sex, the police department has discriminated, and other laws and constitutional provisions might prohibit that conduct. But Title VII only prohibits discrimination *against* employees, and in the case of a purely lateral transfer, neither the employee who is transferred nor the employee who isn't transferred is injured or treated worse than the other.

II. Under *McDonnell Douglas*, applying Title VII to purely lateral transfers would frequently result in liability for non-discriminatory transfers.

Muldrow's proposed reading of Title VII is also hard to square with *McDonnell Douglas*'s burden-shifting framework. Indeed, were that framework applied to lateral-transfer claims, employers would inevitably face liability for non-discriminatory transfer decisions.

Under the *McDonnell Douglas* framework, courts presume discriminatory intent in cases of unexplained differential treatment. That presumption makes sense when an employer treats an employee *worse* than those of other groups—shifting the burden to the employer and giving it an opportunity to explain why it acted with respect to a particular employee. But such a presumption doesn't make sense in lateral-transfer cases where an employee hasn't been treated worse, but the same. And employers will often struggle to explain why they chose any particular employee to fill a lateral transfer.

Thus, if Muldrow's position prevails, *McDonnell Douglas*'s presumption would go unrebutted in many cases where it shouldn't even apply, and employers will frequently be held liable for transfers that reflect nothing more than a random selection among equally qualified employees.

A. In *McDonnell Douglas*, this Court "set forth the basic allocation of burdens . . . in a Title VII case alleging discriminatory treatment." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 252 (1981). The plaintiff has the burden of establishing a prima facie case of discrimination. *Id.* at 252-53. If the plaintiff meets that burden, the burden shifts to the employer

to offer a "legitimate, nondiscriminatory reason" for the "adverse employment actions" it took. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). If it fails to give such a reason, "the court must enter judgment for the plaintiff." *Burdine*, 450 U.S. at 254.

In *McDonnell Douglas* itself, the Court announced a prima facie standard that was tailored to failure-to-hire claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). But as the Court applied *McDonnell Douglas* to a range of adverse employment actions, it broadened the framework. Today, a plaintiff makes out a prima facie case if she is a member of a protected class, suffers an adverse employment action, and similarly situated or qualified individuals outside the protected class do not suffer the same action. *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228-29 (2015); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000).

Critically, the Court has explained that this framework is justified because the prima facie case "raises an inference of discrimination." *Burdine*, 450 U.S. at 254. By "eliminat[ing] the most common nondiscriminatory reasons" for an adverse employment action, it "creates a presumption" that the employer's differential treatment of the plaintiff and others was discriminatory. *Id.*

Applying this logic to transfer cases, the courts of appeals have coalesced around an essentially uniform standard for the prima facie case required to challenge a transfer decision. So long as a transfer decision is deemed actionable, the lower courts hold a plaintiff challenging a transfer decision makes out a prima facie case of discrimination if she proves three facts: that she is a member of a protected class; that she was qualified for the position she was transferred from or

denied a transfer to; and that a similarly qualified employee outside her protected class now holds that position. *See, e.g.*, *Caraballo-Caraballo v. Corr. Admin.*, 892 F.3d 53, 58-61 (1st Cir. 2018); *Hinson v. Clinch Cnty. Bd. of Educ.*, 231 F.3d 821, 828 (11th Cir. 2000); *de la Cruz v. N.Y.C. Hum. Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 20 (2d Cir. 1996). For example, the Second Circuit held that a Puerto Rican plaintiff made out a prima facie case of discrimination where he was qualified for the position he held, transferred from that position, and "replaced by a black female." *Id.* It is this test that would control were the Court to hold that Title VII regulates purely lateral transfers.

B. When courts apply that test to disadvantageous transfers, that test makes sense. It is logical to presume—absent any other explanation—discriminatory motive when an employer treats a qualified employee *worse* than similar employees outside her protected class. But applied to purely lateral transfers, that inference does not make sense. For a court cannot logically infer discriminatory intent when an employer treats an employee *as well* as employees outside her protected class.

Indeed, if anything the inference from equal treatment should be the opposite. If a female employee is transferred to a position of equal rank while her male colleague is not, it is just as logical to infer that her supervisors discriminated in her favor as it is to assume that her supervisors discriminated against her. And given the purely lateral nature of the transfer, it is still more logical to assume a nondiscriminatory choice between potential transferees for a position of need. Inferring discrimination because someone is transferred (or not) from Division A to Division B makes as much sense as inferring discrimination

because they were originally assigned to Division A instead of Division B—none whatsoever. Thus, unless lateral-transfer claims were carved out of *McDonnell Douglas*, allowing purely lateral-transfer claims would entitle plaintiffs to judgment on facts that do not suggest discrimination.

C. If employers could easily rebut such flimsy prima facie cases, that might be an only theoretical concern. But here too, *McDonnell Douglas* breaks down when applied to lateral-transfer claims. As applied to transfer decisions that cause a significant disadvantage, requiring employers to come forward with a reason for the decision is not a tall order. An employer will usually have a reason for demoting an employee or declining to promote them. But when an employer laterally transfers an employee to a position it needs to fill, it often will lack an articulable reason for transferring that particular employee. As a lateral transfer is neither a promotion nor demotion, any number of satisfactory employees will usually fit the bill. Yet absent some reason for transferring the plaintiff instead of others (or granting another employee's transfer request instead of the plaintiff's), the employer will suffer judgment.

For example, in this case, St. Louis said it "transferr[ed] [Muldrow] to the Fifth District for no other reason than the district was short a sergeant." Pet. App. 25a. That explains why *a* sergeant was transferred to the Fifth District. But if Muldrow were found to have made a prima facie case on remand, St. Louis could not avoid judgment without giving some reason for transferring *Muldrow* instead of a male sergeant. Yet it may have none.

And even when employers offer more particularized reasons for a lateral transfer, courts may still say they

are not particularized enough. For example, in a post-*Chambers* case in the District of Columbia, an agency that supervises D.C. probationers transferred a male treatment specialist from one location to another. *Woodberry v. Tischner*, No. 18-cv-3081, 2023 WL 5672625, at *1 (D.D.C. Sept. 1, 2023). On its account, it did so because the plaintiff's experience in the agency's Young Adult Initiative would help serve the younger probationers at the second location. *Id.* at *4 n.3. Judge Friedrich, however, deemed that explanation, though legitimate, pretextual, because the agency also employed a *female* with Young Adult Initiative experience at the first location whom it could have transferred instead. *Id.* at *5.

That may be an accurate application of *McDonnell Douglas*, but it only illustrates how ill-equipped *McDonnell Douglas* is to deal with lateral-transfer claims. When an employer seeks to fill a position with a lateral transfer, there will almost always be more than one employee who's qualified to fill the role—and usually, some of the qualified employees will be of a different race or sex than the employee who's ultimately transferred. Proving that someone else might have been transferred in the plaintiff's place doesn't prove discrimination; it merely shows the employer made an ordinary lateral-transfer decision.

Muldrow herself admits that the lack of harm from lateral transfers undermines any inference that they are made for discriminatory reasons. Pet. Br. 29 ("An employee who can point to only a small difference between her working conditions and those of her male comparators may find it hard to persuade a court that the difference is the product of a discriminatory purpose."). But though she vaguely suggests courts could adjust for that reality within the *McDonnell*

Douglas framework, she offers no solution to the problem.[3] As she notes a few pages later, *McDonnell Douglas*'s requirement of an "adverse employment action" is "nothing more than shorthand" for an actionable decision. Pet. Br. 33 (internal quotation marks omitted) (quoting *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021)). And the balance of the *McDonnell Douglas* framework doesn't turn on the kind of harm an employee suffers. Should this Court hold that lateral transfers are actionable, *McDonnell Douglas* will apply to them with full force until this Court intervenes. And that will mean employers will be held liable for run-of-the-mill, non-discriminatory lateral transfers.

III. Holding lateral transfers actionable would chill nondiscriminatory transfers and undermine the operations of state and local government.

A ruling that Title VII regulates purely lateral transfers would have disastrous consequences for state and local government. A government that cannot move its employees to meet its citizens' needs is not much of a government at all. Yet applying Title VII through the prism of *McDonnell Douglas* to lateral transfers would mean just that. Far from merely providing redress for truly discriminatory transfers, it would chill all lateral transfers, frustrating efforts to respond to violent crime, address the needs of students in understaffed schools, and generally carry out the business of government.

[3] Nor did the D.C. Circuit, which claimed that the ordinary application of *McDonnell Douglas* would "provide employers ample opportunity to terminate an unmeritorious" lateral-transfer claim. *Chambers v. Dist. of Columbia*, 35 F.4th 870, 879 (D.C. Cir. 2022) (en banc).

A. Few holdings this Court could announce have the potential to generate as much litigation as a holding that Title VII restricts purely lateral transfers. The D.C. Circuit's decision adopting that rule in *Chambers* is only a year old. Yet it has already been cited at least 60 times by D.C. district courts alone. That's more than most decisions of this Court from the same year have been cited nationwide.

Yet even more alarming than their sheer number are the types of claims *Chambers* has invited. It has been invoked to entertain lateral-transfer claims in cases ranging from a transfer from an office in Petworth to doing the same job in an office in Southeast D.C., *Woodberry*, 2023 WL 5672625, at *1, to a claim that the Consul General in South Africa discriminated against a foreign service officer by only letting her serve as Acting Consul General for a day instead of a week when the Consul General was out of town, *Cameron v. Blinken*, No. 22-cv-0031, 2023 WL 517368, at *2 (D.D.C. Mar. 22, 2023). It has been cited by the D.C. Circuit to remand a case where an EPA biologist complained he was reassigned for four days from his role as a supervisory biologist to a senior advisor biologist, though he continued to function as a supervisory biologist. *Townsend v. United States*, No. 15-1644, 2019 WL 4060318 (D.D.C. Aug. 27, 2019), *remanded*, No. 19-1529, 2022 WL 4769075 (D.C. Cir. Sept. 27, 2022). And in *Chambers* itself, the D.C. Circuit applied its new rule to entertain an attack on the denial of a transfer request from the interstate unit of the D.C. Attorney General's Office's child support division to that division's intake unit. *Chambers v. Dist. of Columbia*, 35 F.4th 870, 889 (D.C. Cir. 2022) (en banc) (Katsas, J., dissenting). Muldrow may assure the Court that plaintiffs won't sue over "minor

slights," Pet. Br. 51, but that is precisely what's happening in the D.C. Circuit.

Moreover, while lateral transfers have only been actionable for one year in the nation's smallest circuit, and one with a uniquely federal workforce, decisions in the regional circuits rejecting lateral-transfer claims underscore the onslaught of litigation against state and local government that Muldrow's rule would invite. For instance, previously rejected claims that would be actionable under Muldrow's rule include:

- A transfer from a position teaching typing in junior high school to a position teaching typing in high school. *Galbaya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000).
- A transfer from a position teaching fourth grade at a school with declining enrollment to one teaching second grade at a school with higher enrollment. *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 530 (10th Cir. 1998).
- A transfer of a clerk in a state trial court's criminal division to the same position in that court's foreclosure division. *De Jesus-Hall v. N.Y. Unified Ct. Sys.*, 856 F. App'x 328, 330 (2d Cir. 2021).
- An auditor's transfer from the investigations division of a municipal housing authority's inspector general's office to the office's auditing division. *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 743 (7th Cir. 2002).
- A transfer of an elementary school principal to a dual principalship of two elementary schools, accompanied with a pay increase. *Spring v.*

Sheboygan Area Sch. Dist., 865 F.2d 883, 884-85 (7th Cir. 1989).

Thus, as those examples illustrate, Muldrow's rule would invite actions challenging transfers ranging from the reassignment of police officers to higher-crime areas and teachers to understaffed schools, to the ordinary movement of employees in government.

B. Employment discrimination is never justified, and if that vast upswell in litigation only served to deter actually-discriminatory transfers, it might be worth it. But Muldrow's rule would reach much farther than merely deterring true discrimination.

Instead, it would chill entirely legitimate decisions. The reason is that under *McDonnell Douglas*, it will be extremely difficult to defend lateral-transfer claims. When employers laterally transfer someone to fill a vacancy, they are not looking for the most qualified employee, nor do they single out their least qualified employee. The goal is simply to identify someone who's capable of doing a job that's very similar to the one they're already doing—which describes most employees. But merely stating that an employee was qualified for a transfer will not answer the plaintiff's proof that there were other qualified employees of a different race or sex that the employer could have transferred instead. Nor will it rebut the inference of discrimination *McDonnell Douglas* draws from that proof. Rather, if anything, it will only confirm the plaintiff's claim that she was qualified to keep the job she already had.

Thus, holding lateral transfers are actionable would leave state and local governments in a Catch-22, unable without incurring a serious risk of liability to laterally transfer anyone. If a police department

laterally transfers a female officer to an understaffed precinct, that officer will be able to mount a serious Title VII claim merely by pointing out that the department could have transferred a similarly qualified man. If the police department instead transfers a male officer, that officer could make a serious Title VII claim merely by pointing out that the department could have transferred a similarly qualified woman. Perhaps savvy human resources departments would eventually respond by instituting and documenting a formal process of randomized selection among potential transferees. But it is fanciful to assume that thousands of tightly budgeted state agencies, police departments and school districts will take that step before incurring many painful lessons along the way.

IV. The correct harm standard is the significant-impact test.

The phrase "discriminate against" only proscribes discriminatory transfers "that injure protected individuals." *Bostock*, 140 S. Ct. at 1753. The only question, as this Court said in *White* in interpreting "discriminate against" in Section 704, is "how harmful that action must be." 548 U.S. at 60. The majority view in the courts of appeals, and the rule this Court granted certiorari to review, is that a significant disadvantage is required. The minority view, adopted by the Sixth Circuit and embraced at least as a floor by the Fifth, is that a transfer must cause more than de minimis harm. *See Threat v. City of Cleveland*, 6 F.4th 672, 678-79 (6th Cir. 2021); *Hamilton v. Dallas Cnty.*, 79 F.4th 494, 505 (5th Cir. 2023) (en banc).

A. Correctly applied, there is likely "little if any gap between a non-de-minimis injury standard" and a significant-disadvantage standard. *Chambers*, 35 F.4th at 883 (Walker, J., concurring in the judgment

in part and dissenting in part). As Judge Walker explained, harms aren't de minimis if they are "more than 'trifling' or 'negligible,'" *id.*, while this Court suggested in *White* that "significant" harms are those that aren't "trivial," *id.* at 884 n.18 (quoting *White*, 548 U.S. at 68). Those are essentially synonymous formulations. Granted, this Court recently concluded there's "a big difference" between costs that are de minimis and ones that are merely short of "substantial." *Groff v. DeJoy*, 600 U.S. 447, 464 (2023). But that's because of what "substantial" means, not because de minimis is a rung below insignificant.

B. But if the Court adopts a particular standard for harm, it should adopt the significant-disadvantage rule for several reasons. First, the statutory language suggests such a requirement. A de minimis exception "forms the backdrop of all laws," even those that do not expressly require injury. *Threat*, 6 F.4th at 678. Here, however, Congress expressly required it, and that express language should be given more meaning than mere silence.

Second, though a de minimis exception, if correctly applied, should produce essentially the same results as a significant-disadvantage requirement, it might well not be applied correctly. For example, the D.C. Circuit has opined that any sex-based transfer would satisfy a de minimis exception, *see Chambers*, 35 F.4th at 875, seemingly on the assumption that because "job-transfer decisions . . . are not trivial" matters, they necessarily cause non-trivial *harms*. Pet. Br. 47 (defending *Chambers*'s per se rule). That is not how a de minimis exception should be applied. But a de minimis standard is more susceptible to that kind of misunderstanding than a significant-disadvantage test. *Cf. Groff*, 600 U.S. at 466 & nn.12-13 (noting that

in practice a more-than-de-minimis test for undue hardship was satisfied by trivial burdens).

Third, for much the same reasons that this Court adopted a material adversity test in *White*, *see* 548 U.S. at 68, the significant-disadvantage test is appropriate here. It answers "the need for objective standards in . . . Title VII," and avoids the arbitrary results engendered by judicial inquiry into "a plaintiff's unusual subjective feelings." *Id.* It serves the "important" purpose of "separat[ing] significant from trivial harms" and preventing Title VII from collapsing into "a general civility code." *Id.* And it serves that purpose better than tracing the often-elusive line between de minimis and more than de minimis injury.

Finally, like the material adversity test in *White*, the significant-disadvantage test is "judicially administrable." *Id.* Though Muldrow's cert-stage briefing painted an exaggerated picture of intra-circuit conflict, courts applying the significant- or material-disadvantage tests long ago came to a consensus about which kinds of transfers were actionable: those that diminished an employee's compensation or benefits; those that diminished an employee's supervisory responsibilities, the prestige of their position, or otherwise hindered their career prospects; and those that caused a "significantly negative alteration in [an employee's] working environment." *Herrnreiter*, 315 F.3d at 744-45 (enumerating these "three groups"). Indeed, *White* itself applied virtually the same standard to transfers in the retaliation context, and this Court hasn't needed to clarify that standard in the two decades since.

By contrast, this Court's recent experience with more-than-de-minimis standards has not been as happy. And unlike the significant-disadvantage test,

which has been applied by many courts of appeals for decades, the more-than-de-minimis test was not used by any circuit until two years ago, and its administrability is comparably unproven. The Court should retain the circuit consensus and affirm the decision below.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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