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 *AMICUS CURIAE* THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

As the voice of all things work, workers, and the workplace, SHRM is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With nearly 325,000 members in 165 countries, SHRM impacts the lives of more than 235 million workers and families globally. SHRM is the voice of the human resources profession on sound and ethical management practices. SHRM offers this *amicus* brief because the issues raised in this matter are of immense importance to both SHRM's members and the business community at large.[1] The Petitioner and her amici posit that discriminatory personnel actions lacking any material job consequence can be subject to private Title VII lawsuits. That position, if adopted, would jeopardize organizational efficiency by discouraging HR-guided progressive counseling and resolution of minor job disputes.

SUMMARY OF ARGUMENT

1. Human resources professionals and their business colleagues make the day-to-day decisions essential for any organization to function effectively. Many such decisions—such as whom to hire, whether to fire, and how much to pay—create objective proof of material impacts on the affected employees. Decisions of that type are not at issue here.

Other personnel actions, equally vital to an organization, are far more numerous and often cause

[1] Pursuant to S. Ct. R. 37.6, *amicus* confirms that no party to this case authored any part of this brief. No entity other than *amicus* or its counsel financed this brief's preparation or submission.

no material harm to employees while nonetheless causing the subjectively perceived harm that one can experience when one's personal preferences are denied. Examples abound. They include unfavorable performance evaluations, performance improvement plans and other job criticisms that do not result in adverse actions, employee monitoring, unfair accusations, preliminary or promptly rescinded disciplinary actions, unsatisfactory work assignments, minor job restructuring, inconvenient work schedules, annoying dress codes, and even aggravating office, work-space, and furniture assignments, to name but a few. Permitting employees to make a federal case out of every such decision would wreak havoc on personnel administration and encourage employees to bypass the internal resolution procedures that HR professionals are adapted to expertly administer.

Alert to these realities, courts traditionally have approached Title VII decisions by requiring plaintiffs to show objective proof of material harm to challenge personnel actions or to seek recovery for non-tangible conditions of employment. Many examples of this traditional approach appear in Section I of this brief.

SHRM endorses this traditional judicial approach to Title VII, which requires private plaintiffs to show objective proof of material harm in order to challenge personnel actions in court. The Petitioner's approach, by contrast, would unduly hinder discretionary managerial judgments and subject organizations to costly litigation over decisions that have caused no appreciable injury but rather simply have offended individual personal preferences. Those offenses are best addressed

internally—through HR mediation and otherwise—without resort to private lawsuits that would congest already overburdened federal courts.

2. The traditional approach to Title VII—requiring objective proof of material harm from a workplace situation—fully comports with the statutory text and this Court's interpretation of it. The statutory language—"discriminate against," "person aggrieved," "hire" and "discharge," "compensation, terms, conditions, and privileges of employment"—together create a requirement of materiality that some mechanical parsing of the statutory language could obscure. This Court's harassment and retaliation cases confirm that this language works to confine Title VII's scope to adverse employment actions that are material rather than trivial in nature.

3. Further supporting the traditional approach—requiring objective proof of material harm from a workplace situation—is the doctrine of constitutional avoidance. The traditional approach obviates the need to determine whether a Title VII plaintiff suffering no material harm presents a case or controversy under Article III of the Constitution. Conduct inconsistent with the antidiscrimination mandate of Title VII is insufficient, absent concrete harm, to justify a federal lawsuit by an employee. Instances of discrimination unreachable due to Article III constraints can adequately be addressed by the law enforcement agencies empowered to root out discriminatory conduct.

ARGUMENT

I. The traditional approach to Title VII—denying recourse for mere personal preferences—avoids enmeshing courts in non-material personnel actions best addressed by HR officials.

A. Most employment disputes are best handled internally.

Many personnel actions materially affect employees. Consider a law firm's decision about whom to hire as an associate, how much to pay, and what benefits to provide. All parties agree that discrimination in such decisions because of a characteristic protected by Title VII would subject the employer to liability.

Many other personnel actions, however, have no material impact on the affected employees. Management and human resources professionals make daily decisions that result in no appreciable harm yet conflict with the subjective, personal preferences of individual employees. Suppose a law partner assigns one associate to research interesting IRS regulation X while assigning another associate to research IRS regulation Y, a regulation that both associates find boring. Service to the client within the time available requires that two associates separately research one regulation or the other. Would a discriminatory assignment in this context, disappointing the personal preference of the associate assigned to regulation Y, create a federal case?

Petitioner would say Yes. She reads Title VII to permit private suits over any discrimination in terms, conditions, or privileges of employment, regardless of

whether there has been material harm. Pet. Br. 12-13, 28. That approach could make a federal case out of virtually every workplace decision affecting employment, thereby unduly hampering the ability of organizations to mediate and amicably resolve minor employee conflicts.

Consider, as potential further examples, assignments of workspaces and office furniture, daily work schedules, restated job titles, and determining the order of one's name in a list of authors on an academic paper. These matters and their ilk do not belong in federal court. Nor do performance improvement plans, in which management, often with HR guidance, spells out inadequate work performance and means by which to improve it. HR professionals traditionally have played a key role in addressing such matters, long before minor conflicts ripen into litigation.

Courts have recognized that business leaders, rather than courts, are best equipped to address business issues: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 578 (1978). Permitting litigants to make a federal case out of routine business decisions would not only overburden federal courts; it would wreak havoc with the personnel administration of all employers subject to Title VII. If any employment decision can give rise to potential liability if it fails to satisfy an employee's personal preference, management and HR officials would be hamstrung in their ability to make necessary operational decisions.

A vital role of HR departments is to mediate and resolve employee conflicts amicably, to avoid escalation into legal disputes. Hirsch, *Alternative Complaint Systems for Harassment and Discrimination Disputes*, Soc'y for Human Resource Management (Feb. 2, 2022), https://bit.ly/3S0aIIn. Academic researchers have found that "complaint systems can play a crucial role in reducing retaliation and providing fuel for organizational change." *Id.* HR professionals can provide collaborative approaches that lead to better resolutions than litigation.

A change in Title VII law that would lower the bar for federal lawsuits would necessarily diminish reliance on HR-mediated approaches to unsatisfactory job performance and minor workplace disputes. While this case involves a job transfer, upsetting the law of Title VII in the transfer context would disrupt the general delimiting approach courts traditionally have taken in applying Title VII. The result would be to throw employers and employees alike into a state of confounding disarray with respect to a wide array of personnel actions and workplace situations, including performance evaluations, preliminary discipline, rescinded discipline, performance improvement plans, job assignments, and dress codes, as well as lateral, non-material transfers.

B. The traditional judicial approach to Title VII requires objective proof of material harm.

This approach, followed by most courts over several decades, (a) recognizes that not every petty annoyance rises to the level of actionable discrimination and thus (b) requires an objective

showing of material harm. Among the leading decisions stating this general principle are *Threat v. City of Cleveland, Ohio,* 6 F.4th 672, 678 (6th Cir. 2021) (Sutton, J.) ("To 'discriminate' reasonably sweeps in some form of an adversity and a materiality threshold."); *Washington v. Illinois Dep't of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005) (Easterbrook, J.) ("Congress could make any identifiable trifle actionable, but the undefined word 'discrimination' does not itself command judges to supervise the minutiae of personnel management."), and *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996) (Posner, J.) ("While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.") (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)).

The vast majority of courts have followed this traditional approach when examining personnel actions and workplace situations such as the following:

- *unfavorable performance evaluations that do not result in any appreciable job detriment, e.g.*, *Brodetski v. Duffey*, 141 F. Supp. 2d 35, 47 (D.D.C. 2001) ("Criticism of an employee's performance unaccompanied by a change in position or status does not constitute adverse employment action.");
- *job criticisms not culminating in adverse action, e.g., Broderick v. Donaldson*, 437 F.3d

1226, 1234 n.2 (D.C. Cir. 2006) ("disciplinary memo" was not an adverse action when it did not affect plaintiff's "grade, salary, duties or responsibilities");

- *preliminary or merely threatened adverse actions, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (unfulfilled threats to fire, reprimand, or give employee a "final warning" were not ultimate employment decisions), *abrogated by, Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006); *Cromwell v. Washington Metro. Area Transit Auth.*, No. CIV.A.97-2257 PLF, 2006 WL 2568009, at *7 (D.D.C. Sept. 5, 2006) (supervisor's threat to terminate plaintiff did not constitute adverse employment action); *Milburn v. West*, 854 F. Supp. 1, 9, 14 (D.D.C. 1994) (memorandum to plaintiff's file warning that next incident of insubordination would lead to termination was not an adverse employment action because it did not result in any demonstrable harm), *aff'd sub nom. Walker v. West*, No. 94-5228, 1995 WL 117983 (D.C. Cir. Feb. 7, 1995);

- *performance improvement plans, e.g., Reynolds v. Department of Army*, 439 Fed. Appx. 150, 153 (3d Cir. 2011) (ADEA) (performance improvement plan was not adverse employment action; "far from working a change in employment status, a PIP is a method of conveying [how] to … better perform the duties"); *Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1228 (10th Cir. 2006) (PIP was not adverse employment action under Title VII, ADEA, and ADA, absent demotion, change in

pay, or significant change in responsibilities; plaintiff "was presented with clear goals to achieve her continued employment"), *overruled on other grounds by Bertsch v. Overstock.com*, 684 F.3d 1023, 1029 (10th Cir. 2012);

- *employee monitoring, e.g., Runkle v. Gonzales*, 391 F. Supp. 2d 210, 226 (D.D.C. 2005) ("scrupulous monitoring" was not adverse action because "it is part of the employer's job to ensure that employees are safely and properly carrying out their jobs");

- *decisions rescinded before they become effective, e.g., Pennington v. Huntsville*, 261 F.3d 1262, 1267-68 (11th Cir. 2001) (decisions to reprimand or transfer are not adverse employment actions if they are "rescinded before the employee suffers a tangible harm"); *Brooks v. City of San Mateo*, 229 F.3d 917, 929-30 (9th Cir. 2000) (rescheduling employee to unfavorable shift and denying her vacation preference were not actionable because decisions were not "final" in that "city accommodated [plaintiff's] preferences by allowing her to switch shifts and vacation dates with other employees"); *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 712, 715 (8th Cir. 2000) (although supervisor "told [plaintiff] to pack her things and leave the building," plaintiff did not suffer adverse employment action because she was told the same day she was not fired; temporary "[e]mployment actions which do not result in changes in pay, benefits, seniority, or responsibility are insufficient to sustain a retaliation claim");

- *undesired job reassignments, e.g., Forkkio v. Powell*, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002) (plaintiff could not challenge discriminatory job reassignment merely because it diminished plaintiff's "prestige"; "Purely subjective injuries, such as dissatisfaction with a reassignment, ... or public humiliation or loss of reputation … are not adverse actions."); *Traylor v. Brown*, 295 F.3d 783, 789 (7th Cir. 2002) (refusing to let plaintiff do clerical and blacksmith work did not constitute adverse employment action where there was no effect on her pay, her job duties were not materially diminished, and there was only her conjecture that the duties she wanted to perform were important to achieve a higher position);
- *minor job restructuring, e.g., Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 766 (7th Cir. 2001) (loss of secretarial support and change in job title from Human Relations Manager to Human Relations Specialist did not involve the loss of pay or benefits and thus did not constitute adverse employment action);
- *delay in job transfer with associated non-actionable harassment, e.g., Amro v. Boeing Co.*, 232 F.3d 790, 797-98 (10th Cir. 2000) (mere delay in granting plaintiff's desired transfer was not an adverse employment action even though it meant working under allegedly harassing supervisor, because plaintiff failed to show any other negative effect of the delay);
- *employer dress and grooming policies with no effect on job opportunities, e.g., Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1092

(5th Cir. 1975) (en banc) (alternative holding) (upholding refusal to hire man because of his hair length; "[D]istinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity in violation of Sec. 703(a). Congress sought only to give all persons equal access to the job market, not to limit an employer's right to exercise his informed judgment as to how best to run his shop."); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336-37 (D.C. Cir. 1973) (hair length) ("Some courts have analogized hair-length regulations to the requirement that men and women use separate toilet facilities or that men not wear dresses. Admittedly these are extreme examples, but they are important here because they are logically indistinguishable from hair-length regulations. … We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities.") (cleaned up);

- *unfair accusations, e.g., Stewart v. Evans*, 275 F.3d 1126, 1136 (D.C. Cir. 2002) (rejecting claim for being unfairly accused of violating court orders and obstructing justice; personnel actions actionable under Title VII "must have some negative consequence with respect to the plaintiff's employment"; "formal criticisms or reprimands, without additional disciplinary action such as a change in grade, salary, or other benefits, do not constitute adverse employment actions");

- *denying plaintiff's preferred reasonable accommodation for a disability, e.g., Noll v. Int'l Bus. Machines Corp.*, 787 F.3d 89, 95 (2d Cir. 2015) (ADA) (employer has "ultimate discretion" to choose between effective reasonable accommodations and need not provide "a perfect accommodation or the very accommodation most strongly preferred by the employee");
- *employee's subjective perception of a hostile environment that is not objectively hostile*, *e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (Title VII plaintiff alleging hostile work environment must show conditions of employment are not merely subjectively but also objectively abusive: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."); *Goryznski v. JetBlue Airways Corp.*, 596 F.3d 93, 102 (2d Cir. 2010) (Title VII plaintiff alleging hostile environment "must show not only that she subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive."); and
- *lateral transfers involving no material harm, e.g., Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (employee laterally transferred or

denied a lateral transfer, involving "no diminution in pay or benefits," suffers no "actionable injury" absent "objectively tangible harm;" "Mere idiosyncrasies of personal preference are not sufficient to state an injury."), *overruled by Chambers v. Dist. of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc); *Doe v. KeKalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1447, 1448 (11th Cir. 1998) (transfer of school employee to another classroom because of his disability did not violate ADA, as there was no "adverse employment action"; "[W]e have found no case, in this or any other circuit, in which a court explicitly relied on the subjective preferences of a plaintiff to hold that that plaintiff had suffered an adverse employment action.").

As indicated in the list above, altering the traditional approach would have predictably pernicious consequences in the context of performance improvement plans. A PIP by its nature serves the interests of employees by promoting improved performance of their job duties. *How to Establish a Performance Improvement Plan*, Soc'y for Human Resource Management, https://bit.ly/3FqTFHS (last visited October 13, 2023) ("a tool to give an employee with performance deficiencies the opportunity to succeed. It may be used to address failures to meet specific job goals or to ameliorate behavior-related concerns."). Under the Petitioner's approach, a PIP would necessarily implicate Title VII by changing a "term" or "condition" of employment. Making PIPs actionable would interfere with HR efforts to achieve workplace solutions before situations escalate into litigation. *See Reynolds,* 439 Fed. Appx. at 153 ("[A]

likely consequence of allowing suits to proceed on the basis of a PIP would be more naked claims of discrimination and greater frustration for employers seeking to improve employees' performance.");

II. The traditional approach to Title VII follows the statutory language.

The traditional approach—requiring objective proof of material harm for private Title VII suits—fully comports with the statutory text and with this Court's interpretation of it.

A. The relevant language of Title VII

Section 703(a), 42 U.S.C. § 2000e-2(a)(1):

> **(a) EMPLOYER PRACTICES**
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

> employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 704(a), 42 U.S.C. § 2000e-3(a):

> (1) **DISCRIMINATION FOR MAKING CHARGES, TESTIFYING, ASSISTING, OR PARTICIPATING IN ENFORCEMENT PROCEEDINGS**
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment … because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5(f):

ENFORCEMENT PROVISIONS

(F) CIVIL ACTION BY COMMISSION, ATTORNEY GENERAL, OR PERSON AGGRIEVED …

> (1)… [T]he Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. … [After exhaustion of administrative remedies,] … a civil action may be brought against the respondent named in the

> charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. …
>
> (2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. …

Thus, Title VII forbids employers to "discriminate against any individual with respect to … [hiring, firing, and] compensation, terms, conditions, or privileges of employment" because of a prohibited consideration such as sex, 42 U.S.C. § 2000e-2(a)(1), and authorizes private suits only by those individuals "aggrieved" by such discrimination. *Id.* § 2000e-5(f)(1).

B. The traditional approach to Title VII—requiring objective proof of material harm for a private suit—is faithful to the statutory text.

Title VII's language communicates a standard of material harm. *First*, the phrase "discriminate against," appearing in both Sections 703 and 704, itself implies some injury to the employee, consistent with the traditional approach: "No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that *injure* protected individuals." *Burlington N. & Santa Fe Railway Co. v. White,* 548 U.S. 53, 59 (2006) (emphasis added). *Second*, the 42 U.S.C. § 2000e-5(f) language requires that private plaintiffs be "aggrieved" by the discrimination—"aggrieved" meaning "suffer[ing] loss or injury." BLACK'S LAW DICTIONARY 87 (4th ed. 1968). So both the substantive and the private-cause-of-action provisions of Title VII support the traditional approach requiring objective proof of material harm caused by employment discrimination.

Confirming the harmony of the traditional approach with the statutory text is the canon of *ejusdem generis,* "which limits general terms that follow specific ones to matters similar to those specified," *CSX Transp., Inc. v. Alabama Dep't of Rev.,* 562 U.S. 277, 294 (2011) (cleaned up); *see also Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."). Here, Section 703(a)(1)'s phrase "otherwise to discriminate against" follows its reference to specific adverse employment actions—"to fail ... to

hire," to "refuse to hire," and "to discharge." These verbs collectively denote employment actions causing objectively material harm, thereby excluding from the scope of Section 703(a)(1) workplace acts that do not rise to a similar level of materiality. Further supporting the traditional approach is Section 703(a)(1)'s phrase "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

This Court has interpreted that language to screen out claims of insubstantial harm. Justice Breyer, writing for the Court in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 62 (2006), observed:

> The … words in the substantive provision—"hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee"—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace.

White thus imposed—consistent with the traditional approach—an objectively material harm requirement for Title VII retaliation claims. *White* held that the anti-retaliation provision, Section 704(a), "protects an individual not from all retaliation, but [only] from retaliation that produces an injury or harm." 548 U.S. at 67. *White* then spelled out the requisite injury—the

plaintiff "must show that a reasonable employee would have found the challenged action *materially adverse,* which in this context means it well might have dissuaded a *reasonable* worker from making or supporting a charge of discrimination." *Id.* at 68 (cleaned up and emphases added). In justifying a "*material* adversity" standard, *White* "separate[d] significant from trivial harms," because Title VII "does not set forth 'a general civility code for the American workplace.'" *Id.* (quoting *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80 (1998)). Likewise, an employee's "decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* In justifying a "*reasonable* employee" standard, *White* stressed that the assessment of harm "must be *objective*" to avoid "unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings" and to conform to the "objective standards" used in other Title VII contexts such as constructive discharge and hostile work environment. *Id.* at 68-69 (second emphasis added).

White's reasoning, applicable to Section 704(a) retaliation claims, applies also to discrimination claims arising under Section 703(a)(1). As to materiality, the need "to separate significant from trivial harms," *Id.* at 68, applies to discrimination claims as well as to retaliation claims. After all, *White* grounded its "objective standard" of harm in the standards used "in other Title VII contexts" such as constructive discharge and hostile environment, both of which are actionable under Section 703(a)(1). *See id.* at 69.

White also sheds special light on the appropriate treatment of cases involving reassignments of job responsibilities. The employee in *White* had been reassigned from "forklift duty" to seemingly less attractive "standard track laborer tasks" (which involved janitorial functions like trash removal). *Id.* at 57, 70. *White* acknowledged that reassignments *often* impose objectively material harms, because "[a]lmost every job category involves some responsibilities and duties that are less desirable than others." *Id.* at 70. Yet *White* also made clear that the plaintiff must *prove* the harm in each case. *White* stressed that "reassignment of job duties is not automatically actionable." *Id.* at 71. And, building on this Court's harassment decisions, *White* explained that "[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.'" *Id.* (cleaned up).

Meanwhile, this Court has recognized the need for materiality in analyzing Title VII claims of workplace harassment. Directing harassing conduct at members of a protected category surely is to "discriminate against" "because of" that protected category, *see Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986), but not all discriminatory workplace harassment violates Title VII. Rather, harassment actionably alters the "terms, conditions, or privileges of employment" only if it is "severe or pervasive" enough to create "an abusive working environment." *Id.* at 67 (cleaned up). And this "severe or pervasive" requirement is assessed "objectively," in terms of how the harassment "would reasonably be

perceived" by someone in the employee's position. *Harris v. Forklift Sys.,* 510 U.S. 17, 21-22 (1993). The employee's mere subjective perception of a hostile environment is not enough. Thus, many acts of discriminatory workplace harassment do not "sufficiently affect the conditions of employment to implicate Title VII." *Id.* This materiality requirement in the context of workplace harassment, consistent with the traditional approach described above, "prevents Title VII from expanding into a general civility code." *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81 (1998).[2]

The traditional approach to Title VII interpretation thus closely follows the statutory text and this Court's precedents. The traditional approach harmonizes the "discriminate against" phrase with the other covered adverse actions; the traditional approach comports with *White*'s recognition of the limiting effect of such words as "hire," "discharge," "compensation," and "employment opportunities;" and the traditional approach tracks the harassment

[2] Consistent with this description is the EEOC's 2023 Proposed Enforcement Guidance on Harassment in the Workplace. *See PROPOSED Enforcement Guidance on Harassment in the Workplace*, EEOC, https://bit.ly/46yDeW9 (last visited October 15, 2023). Therein the EEOC acknowledges that not every discriminatory action or comment violates Title VII. *Id.* Rather, some discriminatory comments rise to the level of a violation of Title VII, while other discriminatory comments do not. *Id.* Whether a series of events together are sufficiently severe or pervasive to create a hostile work environment depends on the cumulative effect of various acts rather than the effect of an individual act itself. What matters is whether the conduct is isolated and minor (and thus not a violation of Title VII) or whether the conduct is consistently occurring or of great magnitude. *Id.*

cases' understanding of "terms, conditions, or privileges of employment."[3]

III. The traditional approach to Title VII serves the doctrine of constitutional avoidance.

To the extent possible, courts construe statutes so as to avoid constitutional questions. *See Ashwander v. Tennessee Valley Auth.,* 297 U.S. 288, 346 (1936) (Brandeis, J. concurring). This interpretive principle of constitutional avoidance, while emanating in part from the need to observe Article III standing, extends to the constitutional issue of standing itself: a plaintiff, to proceed with her case, must show that she has suffered concrete harm. A statute should not be read broadly to permit private lawsuits in the absence of concrete harm, for the Constitution bars such a suit. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) ("To have Article III standing to sue in federal court, plaintiffs must demonstrate … that they suffered a concrete harm. No concrete harm, no standing.").

The traditional approach—requiring objective proof of material harm to the private plaintiff—avoids the serious Article III questions presented by the Petitioner's broader reading of Title VII. Article III requires that litigants show they have suffered a particularized "injury in fact." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). This requirement "ensures that federal courts decide only 'the rights of individuals,'" and that federal courts

[3] An expansive version of these and the other points tethering the traditional approach to respect for the statutory text appears in a comprehensive dissent to *Chambers*, 35 F.4th at 886-904 (Katsas, J., dissenting).

exercise "their proper function in a limited and separated government." *TransUnion LLC*, 141 S. Ct. at 2203 (internal citations omitted).

"Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). Thus, although "Congress may 'elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law,'" *id.* at 341, "it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *TransUnion LLC*, 141 S. Ct. at 2204-05 (2021) (quoting *Hagy v. Demers & Adam*s, 882 F.3d 616, 622 (6th Cir. 2018)). Further, "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III[.]" *Id.* at 2205.

Thus, for Article III standing purposes, "an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law." *Id.* Put simply, "under Article III, an injury in law is not an injury in fact," and "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *Id.* (emphasis in original).

Courts assess concrete harm by examining "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."

Id. at 2204 (quoting *Spokeo,* 578 U.S. at 341). This question asks "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.*

Sadly, there was no common-law recourse for employment discrimination on a basis forbidden by Title VII. *See Romer v. Evans*, 517 U.S. 620, 627–28 (1996) ("The common-law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations. In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes." (citation omitted)).

The lack of a common-law analog to employment discrimination would not pose a problem for the constitutional standing of the typical Title VII plaintiff. She can establish standing for any Title VII claim challenging a situation that involves a loss of money for her or interference with her job performance or the creation of a hostile environment.[4]

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[4] See generally 29 C.F.R. § 1604.11(a) (sexual harassment): "Harassment on the basis of sex is a violation of section 703 of Title VII. 1 Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) *such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.*" (emphasis added).

The lack of a common-law analog does pose a serious constitutional issue, however, for a Title VII plaintiff who, like Petitioner, lacks objective proof of material harm. Such a plaintiff necessarily presents an issue of Article III standing.

That issue is a serious one. For example, one prominent scholar has worried that *Transunion* spells doom for Title VII private suits, unless "Perhaps the Court will draw a distinction and allow suits under statutes when there also is an alleged economic harm, which generally would be present in claims for employment discrimination." Chemerinsky, *What's Standing After Transunion LLC v. Ramirez*, 96 N.Y.U.L. REV. 269, 283-84 (2021).

In this case, the Court lacks current briefing on the constitutional issue posed by a Title VII private plaintiff proceeding without a showing of material harm. The Court will finesse that issue by adhering to the traditional approach to Title VII, which holds that the statute, properly read, cannot create liability to such a plaintiff.

The Court need not be concerned that examples of discrimination would be unaddressed if private plaintiffs were unable to sue over non-material disputes. *First*, discrimination, even in its most incipient forms, is well within the power of human resources professionals to control, and the more blatant the discrimination is, the more likely that decisive private remediation will occur. *Second*, any discriminatory conduct not actionable in itself can serve as powerful evidence of discrimination if it culminates in conduct that is actionable. *Third*, litigants may pursue Title VII claims in state courts, which are not subject to the constraints of Article III.

Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989). *Fourth,* conduct beyond the reach of Title VII—for Article III reasons or otherwise—remains subject to state civil rights laws. *Last*, and most fundamental, the EEOC and the DOJ maintain ample authority to enforce Title VII as to private employers and public employers, respectively. 42 U.S.C. § 2000e-5(a)(1), 2000e-5(f)(1). And these agencies may address not only violations of Section 703(a)(1) (discrimination because of a protected status with respect to terms, conditions, and privileges of employment) but also violations of Section 703(a)(2) (discriminatory segregation or classification because of a protected status).

CONCLUSION

Courts traditionally have read Title VII to require proof of material harm to the private plaintiff. Departing now from that judicial wisdom would disrupt sound human resources practices by removing important incentives for employees to resolve minor disputes internally. Myriad actions falling short of causing any material harm would now be the subject of potential federal cases. Filing those federal cases would lack support in the text of Title VII. That text, and the Supreme Court cases interpreting it, construct a materiality requirement that any private plaintiff must meet. Departing from the traditional approach—to permit private lawsuits wherever a parsed and mechanical reading of Title VII might allow—would raise constitutional standing issues that the traditional approach avoids. The doctrine of constitutional avoidance is thus an additional reason to adhere to the traditional approach. Accordingly, SHRM requests that this Court affirm the decision of the Eighth Circuit.

Respectfully submitted,

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