SCHEDULED FOR ORAL ARGUMENT ON OCTOBER 26, 2021

No. 19-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY E. CHAMBERS,
APPELLANT,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EN BANC BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—The plaintiff below and appellant here is Mary E. Chambers. The defendant below and appellee here is the District of Columbia. The United States, the Metropolitan Washington Employment Lawyers Association, and the Constitutional Accountability Center have submitted briefs as amici curiae for appellant.

B. *Ruling under review*.—Chambers appeals from the district court's July 24, 2019 order (Walton, J.) granting the District's motion for summary judgment (ECF Nos. 61, 62).

C. *Related cases*.—On May 28, 2021, this Court issued an order holding *Townsend v. United States*, No. 19-5259, in abeyance pending disposition of this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Other

GLOSSARY

Br.	Chambers's en banc opening brief
DOJ	U.S. Department of Justice
EEOC	U.S. Equal Employment Opportunity Commission
JA	Joint Appendix
NLRA	National Labor Relations Act
Title VII	Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 because the complaint alleged violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal, filed on August 21, 2019, arises out of a final judgment of the district court on July 24, 2019, and is timely.

STATEMENT OF THE ISSUES

The Office of the Attorney General for the District of Columbia denied Mary Chambers's request for a lateral transfer from one unit of its Child Support Services Division to another. She sued the District, claiming that the transfer denial violated Title VII's prohibition on sex discrimination. The district court entered summary judgment in favor of the District, holding that Chambers had not demonstrated the objectively tangible harm required by *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999). She appealed, arguing that *Brown* is inconsistent with the plain language of Title VII. The panel affirmed, holding that it was bound by precedent, but recommended rehearing en banc to consider whether *Brown*'s objectively tangible harm standard should be overruled. This Court thereafter *sua sponte* granted rehearing en banc. This proceeding raises two issues:

1. Whether Title VII's antidiscrimination provision requires objectively tangible harm to make the denial or forced acceptance of a job transfer actionable

when such transfers already "discriminate" with respect to the "terms" of employment under the text of the statute. 42 U.S.C. § 2000e-2(a)(1).

2. Whether, as Chambers contends, Title VII's antidiscrimination provision covers all differential treatment in the workplace no matter how innocuous, where the key statutory term "discriminate" ordinarily entails at least some de minimis injury caused by disparate treatment.

STATEMENT OF THE CASE

1. The Federal Courts' Adoption Of Threshold Standards Of Injury Under Title VII.

Title VII's antidiscrimination provision, also referred to as its substantive provision, makes it unlawful for an employer 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" on the basis of a protected trait. 42 U.S.C. § 2000e-2(a)(1). This Court currently holds that lateral transfers are not covered in the absence of objectively tangible harm:

> [A] plaintiff who is made to undertake or who was denied a lateral transfer—that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that [she] has suffered objectively tangible harm.

Brown, 199 F.3d at 457. Instead, "an action must, to qualify, be 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with

significantly different responsibilities, or a . . . significant change in benefits.'" *Baird v. Gotbaum*, 662 F.3d 1246, 1248 (D.C. Cir. 2011) (quoting *Douglas v. Preston*, 559 F.3d 549, 552 (D.C. Cir. 2009)).

Every circuit to consider the question has held that Title VII's antidiscrimination prohibition applies only to actions that cause some degree of harm. Some courts hold that only ultimate employment decisions—like hiring, firing, or demotion—are actionable; others require that the action be serious or material; and still others instruct that the harm must be more than de minimis. *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. Washington 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) ("[u]ltimate employment decisions"); *Threat v. City of Cleveland*, No. 20-4165, 2021 WL 3140525, at *4 (6th Cir. July 26, 2021) (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").

The Supreme Court has not yet addressed whether a threshold standard of injury is appropriate for every type of action under Title VII, although it has adopted such standards for certain claims. For example, harassment claims brought under the antidiscrimination provision are actionable only if the offending conduct is "severe or pervasive." *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). And any claim brought under the antiretaliation provision must be "materially adverse." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

2. Chambers's Supervisor Denies Her Lateral Transfer Request And The Court Rejects Her Title VII Claims.

A. Chambers's supervisor denies her request for a lateral transfer.

Chambers works in the Office of the Attorney General's Child Support Services Division. Joint Appendix ("JA") 28. The Division helps custodial parents collect child support payments from their children's non-custodial parents through a broad range of services, such as locating the non-custodial parent, establishing parentage, obtaining support orders, and enforcing those orders. JA 63-64, 131-32. In 2005, Chambers was assigned to work as a support enforcement specialist in the

Interstate Unit, JA 29-30, 76, 171, helping out-of-state custodial parents enforce child support orders against District residents.[1]

In 2010, Chambers sent an email to her supervisor asking for a transfer to the Intake Unit, which processes initial requests from parents seeking orders for child support. JA 40, 76. The record does not reflect whether she made this request because she wanted to leave the Interstate Unit or because she wanted to work in the Intake Unit. *See* JA 40, 76, 167. She offered no evidence that the Intake Unit offered its employees preferable hours, greater prestige, more opportunity for awards or advancement, or any other perks unavailable to employees in the Interstate Unit. Her supervisor denied the request. JA 75.[2]

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[1] *See General Interstate Establishment Policy*, CSSD Policy No. 2012-5, https://bit.ly/3j7RttE.

[2] Chambers's en banc opening brief ("Br.") also describes discrimination claims dismissed for failure to exhaust administrative remedies (and abandoned on appeal), *see* JA 282-88; Br. 5 (2008 transfer denial), 6-7 (2010 discipline); retaliation claims lacking the threshold injury required by *White*, 548 U.S. at 68, *see* Br. 8 (2011 transfer denial), 9 (workload); and refuted evidence of discriminatory motive, *compare* Br. 8 (claiming that male comparators "received transfers"), *with* D.C. Panel Br. 8-11 (distinguishing comparators and noting that more *female* colleagues received transfers). The District will not address these matters here because the Court has limited briefing to whether "the denial or forced acceptance of a job transfer is actionable." *Chambers v. District of Columbia*, No. 19-7098, 2021 WL 1784792, at *1 (D.C. Cir. May 5, 2021). Nonetheless, the District maintains that it is entitled to prevail on the single discrimination claim that remains at issue on the alternative ground that the transfer denial was not motivated by discriminatory intent. D.C. Panel Br. 8-11.

B. The district court and a panel of this Court reject Chambers's Title VII claims, and the en banc Court orders rehearing.

In 2014, Chambers filed suit against the District, alleging, among other things, that the 2010 transfer denial was based on her sex and therefore violated Title VII's antidiscrimination provision. JA 13-23. The District moved for summary judgment, arguing that the denial of her purely lateral transfer was not actionable under *Brown* and, alternatively, that she failed to offer evidence of discriminatory motive. Regarding motive, the District contended that Chambers's male comparators were not similarly situated and produced evidence that more women than men in the Division received lateral transfers between units. *See, e.g.*, JA 157-58; D.C. Panel Br. 8-11. The district court granted the District's motion without opining on discriminatory motive because transfer denials that "'involve[e] no diminution in pay and benefits' . . . do[] not rise to the level of an adverse action 'unless there are some other materially adverse consequences . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.'" JA 293 (quoting *Brown*, 199 F.3d at 457).

Chambers appealed. She acknowledged on appeal that this Court's precedent compelled the district court's ruling, but she urged the panel to reconsider that precedent, pointing to recent U.S. Department of Justice ("DOJ") briefs advocating for abandonment of the "objectively tangible harm" rule for transfers and transfer denials. Chambers Panel Br. 12-14. In supplemental briefing, the District agreed

that Title VII extends to purely lateral transfers but urged the panel to affirm on other grounds—namely, Chambers's complete failure to offer any evidence of discriminatory intent. D.C. Supp. Br. 1-2.

The panel affirmed, holding that "no reasonable jury could find that the District's refusal to transfer her resulted in lost awards or career opportunities." *Chambers v. District of Columbia*, 988 F.3d 497, 502 (D.C. Cir. 2021), *vacated*, 2021 WL 1784792 (D.C. Cir. May 5, 2021). The judges wrote a separate concurrence, however, urging this Court to review en banc whether to retain the "objectively tangible harm" rule for purely lateral transfers. *Id.* at 506. In their view, "statutory text, Supreme Court precedent, and Title VII's objectives make clear that employers should never be permitted to transfer an employee or deny an employee's transfer request merely because of that employee's race, color, religion, sex, or national origin." *Id.* On May 5, 2021, the full court *sua sponte* ordered that the case be reheard en banc and vacated the panel's opinion. *Chambers v. District of Columbia*, No. 19-7098, 2021 WL 1784792, at *1 (D.C. Cir. May 5, 2021).

STANDARD OF REVIEW

Whether the denial or forced acceptance of a lateral job transfer is actionable under Title VII's antidiscrimination provision is a purely legal question of statutory interpretation that this Court reviews de novo. *All. of Artists & Recording Cos. v. DENSO Int'l Am., Inc.*, 947 F.3d 849, 860 (D.C. Cir. 2020).

SUMMARY OF ARGUMENT

1. The Court should overrule *Brown*'s "objectively tangible harm" requirement for antidiscrimination claims and conclude that the denial or forced acceptance of a lateral transfer on a discriminatory basis is actionable. To reach this conclusion, the Court need only examine two key words in Title VII's text: "terms" and "discriminate." The "terms" of employment are the provisions of any employment agreement, whether written or unwritten, express or implied. To "discriminate" means to engage in differential treatment that injures protected individuals by treating one person or group more favorably than another.

Denial or forced acceptance of a lateral transfer on the basis of a protected trait affects the terms of employment and constitutes discrimination. It is difficult to imagine a term of employment more fundamental than the position itself. No reasonable person would agree to an employment contract without specifying the nature of the job. If an employee is transferred to a new position, then, the employer has altered the terms of her employment. And if an existing employee is denied new terms of employment because her transfer request is refused, that too falls within the bounds of the statutory text. Forced transfers and transfer denials also 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 more than de minimis, constituting discrimination.

This plain reading of the statutory text makes one thing clear: *Brown*'s "objectively tangible harm" test cannot stand. *Brown* erroneously imported the "objectively tangible harm" standard from Supreme Court cases addressing whether an employer can be held vicariously liable for its employees' discrimination. That standard captures a subset of cases where employers discriminate and may be held liable, but not the full spectrum. Similarly, "materially adverse" is a term of art used in retaliation cases to encompass conduct that would dissuade a reasonable worker from making or supporting a charge of discrimination. Its definition is pegged to the context of retaliation and does not map easily onto the distinct text of the antidiscrimination provision. Accordingly, *Brown* should be overruled.

2. While *Brown* cannot stand, that does not mean that Title VII's antidiscrimination provision covers *all* work-related conduct, no matter how innocuous or harmless. The antidiscrimination provision may be broad, but as the text, precedent, and legislative purpose make clear, it is not unlimited. To begin, the plain meaning of "discriminate" encompasses only differences that injure employees and are more than de minimis. Moreover, the four 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. If they did, other provisions of Title VII would be rendered superfluous. In fact, the Supreme Court has held that the word

"conditions" excludes at least *some* conduct: specifically, 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.

For these reasons, the Court should decline Chambers's invitation to hold that Title VII's antidiscrimination provision covers any differential treatment in the workplace, including actions that are de minimis or harmless. But the Court need not go so far to resolve this case. Instead, the Court can simply hold that the "objectively tangible harm" standard is erroneous and that sex-based lateral transfers and transfer denials "discriminate" with respect to the "terms" of employment. It can leave for another day the question of whether harm *vel non* is necessary to discriminate and what might constitute the outer bounds of a "condition" or "privilege" of employment. Indeed, the Court should not issue a sweeping ruling when a narrow one will do. Overturning *Brown* as to lateral transfers will significantly alter the landscape of Title VII and numerous other antidiscrimination statutes. Eliminating the "objectively tangible harm" test altogether will bring even more expansive change. Beyond those changes, the Court should proceed incrementally to avoid opening the floodgates to ceaseless Title VII litigation.

ARGUMENT

I. Lateral Transfers Are Actionable Under Title VII's Antidiscrimination Provision.

A. Forced lateral transfers and denials of transfer requests on the basis of a protected trait constitute discrimination with respect to the terms of employment.

Title VII'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 lies in 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 words—"terms" and "discriminate"—to conclude that the statute covers lateral transfers based on a protected trait.

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).[3] In 1964, 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). More succinctly, it referred to "[a] portion of an agreement relating to a particular matter." *Ballentine's Law Dictionary* 1266 (3d ed. 1969). Prominent legal scholars of the era also used "terms" to describe contractual stipulations. *See, e.g.*, Benjamin Aaron, *The Individual's Legal Rights as an Employee*, 86 Monthly Lab. Rev. 666, 668 (1963) ("[T]he terms of employment are determined by agreement between the employer and the individual employees."); Clyde W. Summers, *Collective Agreements and the Law of Contracts*,

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[3] 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 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 Emp. Law § 2.03 cmt. a (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").

78 Yale L.J. 525, 531 (1969) ("The substantive terms are those negotiated and agreed to by the parties in a bargained exchange."). "Term" carries the same meaning today. *Black's Law Dictionary* 1772 (11th ed. 2019) (defining "term" as "[a] contractual stipulation"). As such, "terms" of employment, in either the private or public sector, are the contractual stipulations explicitly bargained for in an individual employment contract or typically resolved when an employee agrees to accept a job offer. *See, e.g.*, *Threat*, 2021 WL 3140525, at *2 (holding that a "shift schedule is a term of employment" because "[h]ow could the *when* of employment not be a *term* 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 (spelling altered to American English). "[D]iscriminate against" in Title VII accordingly "refers to distinctions or differences in treatment that *injure* protected individuals." *White*, 548 U.S. at 59 (emphasis added). That injury need not be objectively tangible or serious, but for a difference in treatment to amount to discrimination it must be more than de minimis. *See Threat*, 2021 WL 3140525, at *3-4. That is so not only because of the term's

ordinary meaning, which is weighty, but also because a de minimis exception is "part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

Thus, a denial or forced acceptance of a lateral transfer on the basis of an individual's sex discriminates with respect to the terms of employment. To begin, a denial or forced acceptance of a lateral transfer plainly alters a term of employment. Few matters are more essential to the employment contract than the position to which the employee is hired. *See* DOJ Br. 13. An employee's position usually dictates the type of work she performs and where she reports to work—both of which can affect her psychological and physical wellbeing. *See* Metropolitan Washington Employment Lawyers Association Br. 16-17 (describing studies demonstrating the importance of non-economic factors on employees' "sense of self-worth, job satisfaction and productivity"). 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. These matters are core "terms" of the employment agreement, which create a settled expectation on which an employee can rely. *See* Restatement of Emp. Law § 2.03 cmt. d (Am. L. Inst. 2015) ("An employee's promise to work for the employer at stated terms is ordinarily sufficient to support a number of promises by the employer, including, for example, a promise to provide the employment on the stated terms . . . .").

Next, because a forcible transfer is a change in the terms of employment, doing so on the basis of sex necessarily results in sufficient injury to constitute discrimination. *Cf. White*, 548 U.S. at 59 (interpreting "discriminate against" as requiring some degree of injury or harm); *Threat*, 2021 WL 3140525, at *3 ("To 'discriminate' reasonably sweeps in some form of an adversity . . . threshold."). Under the common law of contracts, "terms" are inherently significant "because the parties are thought to be better able than others to evaluate the circumstances of particular transactions." Restatement (Second) of Conts. § 79 (Am. L. Inst. 1981); *see* 4 Corbin on Contracts § 5.14 (2d ed. 1995) ("[T]he contracting parties . . . fix their own values."). Such a significant change, particularly when made on the basis of a protected trait, necessarily injures an employee and is not de minimis. *Cf.* Restatement (Second) of Conts. § 71 cmt. d ("[E]ither the offeror or the offeree may request as consideration the creation, modification or destruction of a purely

intangible legal relation."). Put simply, a change in the "terms" of employment based on a protected trait will always be discrimination.

Although the *denial* of a transfer request will not ordinarily upset settled expectations, such decisions are still covered under the antidiscrimination provision because they are made "with respect to" terms of employment. 42 U.S.C. § 2000e-2(a)(1). Denying a transfer deprives the applicant of the opportunity to have new terms of employment. It is not so different from failing to hire an applicant for a new job, and it would be odd for Title VII to cover a failure to hire external applicants for a new position but deny redress to internal prospects who also apply. *See, e.g.*, *Brown*, 199 F.3d at 450 ("Brown applied for a transfer to one of those positions, but she was not selected during the interviews."). And the denial of a lateral transfer often works other harm, even if that harm is less tangible. *See, e.g.*, *Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008) (inconvenience caused by rotating shifts); *Momah v. Dominguez*, 239 F. App'x 114, 123 (6th Cir. 2007) (opportunity to be closer to family); *Fallon v. Meissner*, 66 F. App'x 348, 352 (3d Cir. 2003) (significantly shorter commute).

In other, future cases, deciding what constitutes a "term" of employment may be difficult and context-dependent, particularly where there is no written contract. *Cf. White*, 548 U.S. at 69 (phrasing the threshold standard "in general terms because the significance of any given act of retaliation will often depend upon the particular

circumstances"). After all, the terms of employment for a receptionist will usually specify the location of her work, but this might not be so if her employer is a temp agency. And the terms of employment for a medical provider will usually specify daytime work, but this might not be so for a job in an emergency room. But here, where a change in the *position itself* is at issue, the analysis is easy: lateral transfers alter the terms of employment.[4] And, as noted, a change to something as fundamental as a term of employment on the basis of a protected trait will *always* work enough harm to cause injury rising to the level of discrimination.

B. *Brown*'s contrary holding should be overruled.

This Court should overrule *Brown*'s standard, which requires that an employee prove she has suffered "objectively tangible harm" in addition to the transfer itself. 199 F.3d at 457. *Brown*'s interpretation of Title VII's antidiscrimination provision is divorced from the text of the statute. Section 2000e-2(a)(1) makes no explicit reference to "objectively tangible harm," and that phrase does not interpret any word in the statute.

The Court in *Brown* erred by applying the "objectively tangible harm" test from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)—which exclusively addressed the proper standard for vicarious liability—to the substantive

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[4] 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.

antidiscrimination analysis. In *Ellerth*, an employee alleged that her supervisor had created a hostile work environment through "severe and pervasive" sexual harassment. 524 U.S. at 749. But "*Ellerth* did not discuss the scope of the general antidiscrimination provision," *White*, 548 U.S. at 65, instead applying agency-law principles to determine when "[a]n employer is subject to vicarious liability" for a "tangible employment action taken by [a] supervisor," *Ellerth*, 524 U.S. at 762, 765. This "objectively tangible harm" test has no bearing on the *substantive* scope of claims brought under the antidiscrimination provision. In fact, the *Ellerth* Court acknowledged that employers may still be liable for conduct that does *not* create tangible harm, albeit subject to an affirmative defense. *Id.* at 765 ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.").

Brown also applied a "materially adverse" standard, which parallels case law regarding *retaliation* claims under Title VII. *See* 42 U.S.C. § 2000e-3(a). Although this standard is not atextual, as Chambers suggests (at 37-39), its definition is keyed to the context of retaliation, making it an awkward fit for the antidiscrimination provision. The Supreme Court embraced the "materially adverse" standard for antiretaliation claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, which addressed two separate questions. *First*, the Court considered whether the antiretaliation "provision confine[s] actionable retaliation to activity that

affects the terms and conditions of employment." *Id.* at 57. The answer to this question was "no," based on textual differences between the antiretaliation and antidiscrimination provisions, including the omission of the phrase "terms, conditions, or privileges of employment" from the antiretaliation provision. *See id.* at 63.

Second, the Court addressed "how harmful . . . adverse actions [must] be to fall within [the antiretaliation provision's] scope," "particularly" focusing on "the reach of its phrase 'discriminate against.'" *Id.* at 57. The Court's answer to this question was that an action must be "materially adverse, which in [the antiretaliation] context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks omitted). Because both the antidiscrimination and antiretaliation provisions contain the word "discriminate," which reasonably sweeps in *some* standard of harm, *Brown*'s application of a material adversity threshold is not necessarily atextual. (Indeed, to conclude otherwise would mean that the majority in *White*, including Chief Justice Roberts, Justice Scalia, and Justice Thomas, imposed a wholly atextual limit on the antiretaliation portion of Title VII.) But of course, to the extent "materially adverse" means something that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," it would make little sense to apply in antidiscrimination cases. *Id.* at 68 (internal quotation marks

omitted). Some difference in the standard of harm between the two provisions is therefore required.[5] And a de minimis standard may fit the context of the antidiscrimination provision better than requiring material adversity.

Further, Chambers correctly observes (at 25-27) that an injury need not be economic to be actionable under Title VII. The Supreme Court has said as much, holding that the statute "is not limited to 'economic' or 'tangible' discrimination." *Meritor*, 477 U.S. at 64; *see Harris*, 510 U.S. at 21 (rejecting the requirement of "a tangible psychological injury"). And rejecting a requirement of tangible or economic harm makes sense in light of the statutory text, which, as Chambers explains, addresses both "compensation" and other "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see* Br. 25. Congress thus intended for the statute to cover more than pocketbook harms. To the extent *Brown* holds otherwise, it should be overruled.

II. Title VII Does Not Make All Workplace-Related Conduct Actionable.

Although Title VII does not require "objectively tangible harm" or economic injury, the Court should nevertheless decline Chambers's invitation to issue a broad ruling that Title VII's antidiscrimination provision covers *all* differential treatment

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[5] The Sixth Circuit in *Threat v. City of Cleveland*, for example, reasoned that the word "discriminate" requires material adversity, but went on to explain that, in the antidiscrimination context, an injury that is more than de minimis is materially adverse. 2021 WL 3140525, at *3-4.

in the workplace, Br. 16, no matter how innocuous, Br. 21. The statutory text, Supreme Court precedent, and legislative purpose countenance against such an all-encompassing reading of the statute. In any event, the Court need not address many of Chambers's contentions to resolve this case, such as pinning down the definition of "conditions" or "privileges" of employment or specifying a minimum level of actionable injury. Instead, it is enough in this case to hold that sex-based lateral transfers are actionable as changes to the terms of employment that discriminate (even without additional, tangible harm). This approach would allow the Court to proceed incrementally in defining the other contours of the antidiscrimination provision.

A. Based on the Act's text, Supreme Court precedent, and congressional purpose, liability for workplace-related conduct under Title VII is not unlimited.

1. Text and structure of the statute.

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) (emphasis added).

As Judge Sutton explained in a recent opinion for the Sixth Circuit, 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*, 2021 WL 3140525, at *3 (emphases added). 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))). Moreover, if the statute's use of "discriminate" covers non-injurious conduct, it would sweep more broadly than Article III allows—which would make little sense. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021); *Threat*, 2021 WL 3140525, at *3.

This conclusion is reinforced by the "de minimis exception that forms the backdrop of all laws." *Threat*, 2021 WL 3140525, at *3. That exception stretches back to ancient times and is "part of the established background of legal principles" that Congress is deemed to adopt when enacting statutes, absent contrary indication. *Wis. Dep't of Revenue*, 505 U.S. at 231. Interpreting "discriminate" to encompass only actions that involve more than de minimis injury comports with this core principle of statutory interpretation.

Similarly, Congress acted intentionally when it barred discrimination only with respect to "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).

Indeed, reading "compensation, terms, conditions, or privileges of employment" to cover *all* workplace activity would introduce unnecessary superfluity into the statute. It is a "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Id.* But interpreting Section 2000e-2(a)(1) to cover the waterfront would render the next operative provision of the statute meaningless. That provision makes it unlawful "to limit, segregate, or classify . . . 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." 42 U.S.C. § 2000e-2(a)(2). If the first subsection of the antidiscrimination provision truly covered *everything*, there would be no need for this separate anti-segregation provision.

A simple hypothetical illustrates the textual point. Imagine a workplace in which men are given black staplers, and women are given gray staplers, which are otherwise identical. This practice might be extraordinarily silly, but no one would

say that the employer has "discriminated" by color-coding staplers.[6] Nor would anyone ordinarily say that stapler aesthetics constitute "compensation, terms, conditions, or privileges of employment." Even under Section 2000e-2(a)(2), the difference would not be actionable because it would not "tend to deprive any individual of employment opportunities." Presumably, Congress intended to exclude such inconsequential, de minimis differences when it adopted the specific phrasing of the antidiscrimination provision.

To be clear: reading the text of Title VII to incorporate at least a de minimis standard of injury is not the same as requiring objectively tangible harm. As the Sixth Circuit has noted, "de minimis means de minimis." *Threat*, 2021 WL 3140525, at *4. Minor differences in office supplies may be de minimis and harmless, but a change in workplace location or shift usually is not. Incorporating such a modest threshold of harm honors the ordinary meaning of the text, including the weighty word "discriminate." But it would not resurrect the atextual standard set forth in *Brown.*

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

2. Precedent.

Precedent also dictates that Title VII's scope, while expansive, is not unlimited. For example, the Supreme 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, 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*, 2021 WL 3140525, at *4 ("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 v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)). 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). Indeed, the sweep of the words "terms, conditions, or privileges" is "expansive." *Meritor*, 477 U.S. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). And the Supreme 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 differences in the workplace create inequality in employment opportunity. As the United States has observed, for example, many employers furnish sex-segregated bathrooms, which in most circumstances are not considered discriminatory as long as they are equally available. Brief for the United States as Amicus Curiae at 10-11, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (U.S. Mar. 20, 2020) ("[M]aking distinctions between employees based on relevant differences in a way that does not create disadvantages does not violate Section 703(a)(1)."). Such commonplace differences do not create inequalities in "employment opportunities." Again, Title VII's antidiscrimination provision may be broad, but it is not all-encompassing.

To support her contrary argument, Chambers repeatedly cites cases stating that Title VII bars "discrimination." Br. 20; *see, e.g.*, *Franks*, 424 U.S. at 763 ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination."); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) ("The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment."); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination."). That is certainly true, but it does not answer the question whether "discrimination" is differential treatment of any stripe

or whether it requires at least a de minimis injury. And the Supreme Court has made clear that discrimination generally entails some form of injury, however modest. *Bostock*, 140 S. Ct. at 1753 (referring to differences "that injure protected individuals" (quoting *White*, 548 U.S. at 59)).

Chambers also contends that an expansive definition of the words "terms" and "conditions" should be imported from labor law. Br. 28. But this Court should not tie Title VII's language inflexibly to 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 Supreme Court 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).[7]

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[7] *Hishon* did not involve a threshold standard of injury. Rather, the Court considered whether the denial of opportunity for partnership—which unquestionably caused objectively tangible harm—was sufficiently related to the plaintiff's "status as an employee" to be covered. 467 U.S. at 76. In that context, it made sense to ask how the National Labor Relations Board had construed "terms and conditions" for mandatory subjects of collective bargaining. *Id.* at 76 n.8 (citing *Franks*, 424 U.S. at 768-70 (applying NLRA decisions "dealing with the related

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." First, 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 this Court interprets Title VII de novo, it must give "a wide measure of discretion" to the Board's interpretation of the NLRA. *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991). 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, this Court has criticized—even as it has often affirmed—the Board's willingness to entertain "infinitesimally small

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'twin' areas of discriminatory hiring and discharges"); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975) (interpreting Title VII's backpay provision in accordance with the NLRA provision on which it was "expressly modeled")).

abstract grievances." *NLRB v. Columbia Typographical Union*, 470 F.2d 1274, 1275 (D.C. Cir. 1972) (quoting *Dall. Mailers Union, Loc. No. 143 v. NLRB*, 445 F.2d 730, 733 (D.C. Cir. 1971)).

Finally, 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 the type of minor workplace variations that would be encompassed by Chambers's definition here. 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).[8] Today, by contrast, the Board has deemed the ability to borrow a dolly

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[8] *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*

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"); *see also* Br. 29 n.12 (citing these cases with approval).

3. Purpose.

A reading of the statute that requires at least *some* injury that is more than de minimis also comports with Congress's purpose in enacting Title VII. As the Supreme Court has observed, the statute was enacted "to assure equal employment *opportunities*." *McDonnell Douglas Corp.*, 411 U.S. at 800 (emphasis added); *see Franks*, 424 U.S. at 763 (focusing on "inequality in employment opportunity due to discrimination"). The House Judiciary Committee Report, for example, characterized Title VII in part as "set[ting] forth a congressional declaration that all persons within the jurisdiction of the United States have a right to the *opportunity* for employment without discrimination on account of race, color, religion, or national origin." Equal Emp. Opportunity Comm'n, U.S. Gov't Printing Off., *Legislative History of Titles VII and XI of Civil Rights Act of 1964* at 2026 (1964)

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).

[hereinafter *EEOC Legislative History*] (emphasis added); *see id.* at 2150 (Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, & Hon. James E. Bromwell) (The statute's "primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.").

The sweep of the statute thus includes "equal opportunity to compete for any job, whether it is thought better or worse than another." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 338 n.18 (1977). 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. *EEOC Legislative History* 2150 (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."). Where those choices do not affect equality of opportunity or injure the employee, they lie outside Title VII's purview.

Chambers insists (at 28-30) that congressional intent supports her argument that Title VII's coverage within the workplace is unlimited. Not so. On one hand, Congress certainly aimed to facilitate "the opportunity for employment without discrimination." *EEOC Legislative History* 2026 (committee report). But on the other, "[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) (per curiam)). And, 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). Limiting the statute to discrimination (rather than mere differences) or to actions that affect employment opportunities strikes this balance.

Chambers (at 20) makes much of the Supreme Court's reference to Congress's intent "'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor*, 477 U.S. at 64 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). But she ignores the fact that, in *Meritor*, after using this language, the Court nonetheless *limited* the term "condition" of employment to reach workplace harassment only when it is "severe or pervasive." *Id.* at 67. Similarly, no one disputes that Title VII covers only certain, larger employers, or that it exempts some religious entities from coverage. *See* 42 U.S.C.

§ 2000e (limiting coverage to employers with "fifteen or more employees"); *id.* § 2000e-1 (exempting in some situations "a religious corporation, association, educational institution, or society"). Accordingly, references to "the entire spectrum of disparate treatment" are necessarily over-inclusive.

B. The Court need only address whether lateral transfers discriminate based on the "terms" of employment.

In the end, the Court need not address the exact contours of every phrase in Title VII's antidiscrimination provision. It does not have to determine whether the Act covers all "differential treatment," Br. 16, with "no minimum level of actionable harm," Br. 21. For purposes of this case, it would suffice to hold that a forced transfer or the denial of a lateral transfer based on a protected trait "discriminates" with respect to the "terms" of employment. The Court can leave broader questions—including what constitutes a "condition" or "privilege" of employment—for another day.

Indeed, the Court should not "issue a sweeping ruling when a narrow one will do," *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (quoting *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017)), particularly when, as here, it would overrule "a long line of precedents" that would introduce "instability into . . . many areas of law, all in one blow," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). Overturning *Brown* regarding lateral transfers will significantly alter the landscape of Title VII

and numerous other antidiscrimination statutes.[9] Eliminating the "objectively tangible harm" test altogether will bring even more expansive change.

But this is just the tip of the iceberg. If the Court accepts Chambers's invitation and holds that *any* workplace conduct is actionable, it would transform federal courts into "super-personnel department[s]." *Stewart v. Ashcroft*, 352 F.3d 422, 429 (D.C. Cir. 2003) (alteration in original) (quoting *Dale v. Chi. Trib. Co.*, 797 F.2d 458, 464 (7th Cir. 1986)). The current threshold standards of harm have precluded a broad array of claims that would likely be actionable under Chambers's test. *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) (threat mentioning "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

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[9] These include statutes that use identical language, such as the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), the Americans With Disabilities Act, 42 U.S.C. § 12112(a), and the District of Columbia Human Rights Act, D.C. Code § 2-1402.11, as well as statutes that incorporate Title VII standards, such as the Rehabilitation Act, 29 U.S.C. § 794(d).

"exceeds expectations"). Preserving the *possibility* of at least a de minimis injury threshold would prevent these floodgates from opening.

Chambers argues that this concern is overblown because plaintiffs still must prove intentional discrimination. Br. 44. But it is often enough to survive a motion to dismiss to simply allege that a coworker of another sex, race, or national origin received different treatment. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (holding that a plaintiff need not "plead a prima facie case of discrimination in order to survive [a] motion to dismiss" and 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. Moreover, even at the summary judgment stage, employers may well 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).

To be sure, this Court may ultimately adopt a broad view of what constitutes discrimination regarding "conditions" or "privileges" of employment, or what constitutes actionable injury. But it should not make this decision in a contextual vacuum. "If bad facts make bad law," *Tharpe v. Sellers*, 138 S. Ct. 545, 547 (2018) (Thomas, J., dissenting), then "[n]o facts make worse law," *Emeldi v. Univ. of Or.*, 698 F.3d 715, 718 (9th Cir. 2012) (Kozinski, J., dissenting). And, 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*, 199 F.3d at 458; *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.

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).

As a result, the Court should proceed incrementally and address the limited question before it: whether Title VII precludes discrimination regarding lateral transfers. For the reasons stated in Part I, it does. The Court should therefore overrule *Brown* and eliminate the onerous "objectively tangible harm" standard. However, if the Court opts to proceed further, it should hold, in accordance with existing Supreme Court precedent, that Title VII does not reach *all* workplace conduct and contains (at the very least) a de minimis injury requirement.[10]

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[10] Chambers asks this Court to also overrule the "objectively tangible harm" test for retaliation claims and remand her retaliation claim for trial on the merits. Br. 45-50. This argument exceeds the scope of the en banc briefing order and, in any event, lacks merit. The Supreme Court has already adopted a threshold standard for such claims, requiring the plaintiff to show "*material* adversity" from the point of view of a "*reasonable* employee." *White*, 548 U.S. at 68. The district court faithfully applied this standard, rejecting Chambers's claim because "the record is completely devoid of evidence from which a reasonable juror could conclude that she suffered any harm, let alone any material adverse consequences." JA 294. The panel likewise rejected the only argument she made on appeal—that the District's knowledge of her desire to transfer made it "materially adverse"—because she "offered no evidence that reasonable employees in this context would find the denial of lateral transfer request to be materially adverse." *Chambers*, 988 F.3d at 502.

CONCLUSION

This Court should overrule *Brown*'s "objectively tangible harm" rule and remand to the panel to consider Chambers's single timely antidiscrimination claim.[11]

Respectfully submitted,

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[11] The panel should affirm the remaining claims, including the retaliation claim, which would not be affected by overruling *Brown*. Moreover, this Court need not remand to the district court for further proceedings on the antidiscrimination claim at issue here because Chambers's transfer was not denied on the basis of sex. This issue was fully briefed before the panel, the record is complete, and the panel can undertake a de novo review of Chambers's antidiscrimination claim. *See supra* n.2.

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 9,102 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14 point.

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