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 FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., RESTAURANT LAW CENTER, INC., AND NATIONAL RETAIL FEDERATION IN SUPPORT OF RESPONDENTS

TARA S. MORRISSEY
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

[additional counsel on inside cover]

JASON C. SCHWARTZ
LUCAS C. TOWNSEND
Counsel of Record
MOLLY T. SENGER
JESSICA L. WAGNER
BRIAN C. MCCARTY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
LTownsend@gibsondunn.com

Counsel for Amici Curiae

ADDITIONAL COUNSEL

ELIZABETH GAUDIO MILITO
PATRICK MORAN
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th Street, NW
Suite 1001
Washington, DC 20004
(202) 406-4443

Counsel for Amicus Curiae the NFIB Small Business Legal Center, Inc.

STEPHANIE MARTZ
General Counsel
NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW,
12th Floor
Washington, DC 20005

Counsel for Amicus Curiae the National Retail Foundation

ANGELO I. AMADOR
RESTAURANT LAW CENTER
2055 L Street, NW
Suite 700
Washington, DC 20036
(202) 331-5913
aamador@restaurant.org

Counsel for Amicus Curiae the Restaurant Law Center

QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964 prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food-service industry in

---

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing over 15 million people—approximately ten percent of the U.S. workforce, making it the second largest private-sector group of employers in the United States. Through regular participation in amicus briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues significantly impacting its members and highlights the potential impact of pending cases like this one.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail community on dozens of topics.

Amici's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII") and other laws prohibiting employment discrimination. Amici and their members firmly oppose discrimination in employment. But Petitioner's theory would threaten routine employee transfers necessary to ensure that business demands are efficiently met. Amici's members therefore have a significant interest in the issue raised in this case: whether a Title VII plaintiff alleging discrimination in a transfer decision must show that the transfer decision imposed a material injury. Amici submit this brief to bring to the Court's attention arguments and issues that are of concern to their members and that will aid the Court in deciding this case.

SUMMARY OF ARGUMENT

I. Title VII does not apply as a categorical matter to all allegedly discriminatory transfer decisions. Rather, it extends only to transfer decisions that alter an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). At the time of Title VII's enactment, the "terms" and "conditions" of employment, especially when used together, were understood to refer to the requirements that defined the nature and scope of an employment agreement, such as the duties an employee was hired to perform. "Privileges," in turn, meant the benefits an employee enjoyed as a consequence of the employment relationship, such as health insurance, pensions, and the like. Title VII accordingly does not apply to transfer decisions that do not alter the requirements or benefits of an employment relationship, such as a request for an employee to assist a short-staffed department temporarily.

Title VII provides that it is 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." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Where general words or phrases—like "otherwise to discriminate"—follow a number of specific words or phrases—like "fail or refuse to hire or to discharge"—the general words are construed so as to refer to things of the same kind as those expressly mentioned under the canon of *ejusdem generis*. For that reason, Title VII does not apply to transfers that cause only de minimis inconvenience or subjective annoyance. To be actionable under Title VII, any acts of "discrimination," including transfers, must be of similar significance and

ultimate consequence as the failure or refusal "to hire or to discharge." This Court has repeatedly emphasized that to "discriminate against" an employee under Title VII means to impose a difference in treatment that injures an employee. And Title VII also requires a plaintiff to be "aggrieved," which this Court has interpreted to require an injury that is at least sufficient to satisfy Article III. The standards for determining whether a transfer decision has injured a plaintiff are objective, not subjective. Title VII does not impose liability on employers who transfer an employee to an objectively equivalent or even more desirable position simply because the employee has a subjective preference for the former position.

II. Petitioner's erroneous and expansive interpretations of Title VII would create unnecessary litigation and liability risk for employers whenever they transfer employees. This risk would restrict employers' flexibility in organizing their workforce to meet competitive needs. Such flexibility is especially important now, when employers across the country are facing severe worker shortages and cannot find enough employees to fill all their vacant positions, prompting employers to transfer employees to short-staffed departments or facilities. This Court should not construe Title VII to hamstring employers' abilities to respond effectively to the worker shortage by making transfer decisions that are necessary for their businesses to operate efficiently in the current labor market.

III. The question presented is narrow, and the Court should be mindful of the issues that are not presented in this case and need not be decided. This Court need only assess the requirements for a prima facie case that a transfer decision violated Title VII.

The ultimate issue of liability is not before the Court. If the Court were to reverse, Respondents would have an opportunity on remand to rebut Petitioner's prima facie case by offering a legitimate, nondiscriminatory reason for the challenged transfer. This case also does not implicate ordinary pleading standards, such as the requirement that a plaintiff must allege sufficient facts to state a plausible claim, or the propriety of dismissing a complaint when a plaintiff pleads himself out of court. Lastly, this case need not affect the requirements for other types of Title VII claims, including the requirement that a plaintiff raising a hostile-work-environment claim show that discriminatory harassment is severe or pervasive, or the requirement that a plaintiff raising a retaliation claim show that the retaliatory action is materially adverse.

ARGUMENT

I. TITLE VII DOES NOT APPLY TO ALL TRANSFER DECISIONS

Petitioner contends that Title VII applies to all "the day-to-day circumstances" in an employee's performance of her job and that, as a categorical matter, all "transfer decisions based on any of Section 703(a)(1)'s protected characteristics are unlawful." Pet. Br. 15, 17. That is incorrect. Title VII does not apply to every transfer decision that might occur in the course of employment, but only to those that alter the understood requirements and benefits of an employment relationship. Title VII also does not apply to transfer decisions that impose only de minimis or subjective harms. To be actionable, a transfer decision must not only be made on the basis of a protected characteristic, but also must impact the terms of an

employment relationship and result in real-world, objective harm to an employee.

A. Title VII Applies Only To Transfer Decisions That Alter The Requirements And Benefits Of An Employment Relationship

Title VII does not, as Petitioner maintains, extend categorically to any transfer decision that an employer might make in the course of an employment relationship. Rather, it applies only to discriminatory transfer decisions that alter an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

In the abstract, "terms," "conditions," and "privileges" each have multiple meanings, and it is thus necessary to determine in what sense Congress used these words when it enacted Title VII. Section 703(a)(1) employs these words together, which counsels in favor of giving them a similar meaning. Under the "familiar interpretative canon" of *noscitur a sociis*, "a word is known by the company it keeps." *Dubin* v. *United States*, 599 U.S. 110, 124 (2023) (quoting *McDonnell* v. *United States*, 579 U.S. 550, 568–69 (2016)). This canon of statutory construction "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* at 124–25 (quoting *McDonnell*, 579 U.S. at 569).

At the time of Title VII's enactment, the "terms, conditions, or privileges of employment" meant the relatively fixed requirements and benefits of an employment agreement—not any circumstance or decision that might occur in the workplace. Dictionary

definitions of these words, especially when they are used in connection with each other, make this clear.

Dictionaries from the time of Title VII's enactment define "terms" as "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." *Term*, Webster's Third New International Dictionary 2358 (1961); see also *Term*, The American Heritage Dictionary 1328 (1st ed. 1969) (defining "terms" as "[c]onditions or stipulations that define the nature and limits of an agreement"); *Term*, The Random House Dictionary of the English Language 1355 (College ed. 1968) (defining "terms" as "conditions with regard to payment, price, charge, rates, wages, etc."). In other words, "terms" frequently is synonymous with "conditions," as in the "[terms] of a sale" or the "[terms] of a will." *Term*, Webster's Third New International Dictionary, *supra* at 2358.

Dictionaries define "condition" as "a requisite action, circumstance, or quality on which rests the validity or effectiveness of an agreement, a plan, promise, attribution." *Condition*, Webster's Third New International Dictionary, *supra*, at 473; see also *Condition*, The American Heritage Dictionary, *supra*, at 277 (defining "condition" as "[s]omething indispensable to the appearance or occurrence of something else; a prerequisite"); *Condition*, The Random House Dictionary of the English Language, *supra*, at 280 (defining "condition" as "something demanded as an essential part of an agreement; provision; stipulation"). In this sense, an employee's duties to perform certain required tasks can be described as "conditions" of employment.

Moreover, when "term" is "used in the plural" synonymously with "condition," it "indicates conditions offered or agreed to in a contract, deal, or agreement." *Condition*, Webster's Third New International Dictionary, *supra*, at 473. "Terms" and "conditions" together therefore refer to the requirements of an employment agreement that determine the nature and scope of the employment relationship, as in the well-known reference to the "terms and conditions" of a contract.

Petitioner flouts this fundamental interpretive canon by arguing that "conditions" in Title VII refers not to the requirements of an employment agreement but broadly to all "attendant circumstances" of employment. Pet. Br. 17. "Conditions" certainly *can* have that meaning, as in "driving conditions," or "living conditions," just as "term" can mean "a limited or definite extent of time." *Term*, Webster's Third New International Dictionary, *supra*, at 2358. But when "terms" and "conditions" are used side-by-side, as they are in Section 703(a)(1), they mean something quite different. See *ibid*.

Whereas "terms" and "conditions" refer to the requirements or prerequisites of an employment agreement, "privileges" refers to the benefits of that agreement. Dictionaries define "privilege" as "a right or immunity granted as a peculiar *benefit*, advantage, or favor." *Privilege*, Webster's Third New International Dictionary, *supra*, at 1805 (emphasis added); see also *Privilege*, The American Heritage Dictionary, *supra*, at 1042 (defining "privilege" as "[a] special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste"); *Privilege*, The Random House Dictionary of the English Language, *supra*, at 1054 (defining "privilege" as "a right,

immunity, or benefit enjoyed by a particular person or a restricted group of persons").

In turn, in the employment context, a "benefit" has long been understood to mean things like salary, health insurance, or a pension provided in exchange for employment (provision of which is often set forth in an employment contract). See *Benefit*, Webster's Third New International Dictionary, *supra*, at 204 (defining "benefit" as a "payment," as in "a cash payment or service provided for under an annuity, pension plan, or insurance policy"); *Modzelewski* v. *Resolution Trust Corp.*, 14 F.3d 1374, 1377 (9th Cir. 1994) ("Pensions and other deferred compensation arrangements are benefits of employment—not all that different from salaries and other fringe benefits."); *Florida AFL-CIO* v. *State of Florida Department of Labor & Employment Security*, 676 F.2d 513, 515 (11th Cir. 1982) (referring to "wage rates" and "health and retirement benefits" as "benefits of employment"); *Hartley* v. *Dillard's, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002) (listing "vacation time, employee meal discounts, health insurance coverage, . . . stock options, and [reimbursed] travel expenses" as "benefits of employment"); *Love* v. *JP Cullen & Sons, Inc.*, 779 F.3d 697, 704–05 (7th Cir. 2015) (listing "wages," "insurance" and "vacation time" as "benefits of employment").

When construed together, in accordance with the canon of *noscitur a sociis*, these definitions indicate that the "terms, conditions, or privileges of employment" refer to the understood requirements and benefits of a job—such as an employee's duties, salary, health insurance, and the like.

This Court's hostile-work-environment jurisprudence further supports this interpretation. As Petitioner concedes, Pet. Br. 33–34, this Court has repeatedly held that discriminatory harassment must be "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'" in order to be actionable under Title VII. *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII" (citation omitted)). To implicate Title VII, the employer must effectively impose a "requirement that a man or woman run a gauntlet of . . . abuse in return for the privilege of being allowed to work and make a living." *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson* v. *Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)). Since "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII," *ibid.*, "terms, conditions, or privileges" refers to something more than the mere "circumstances" of employment.

Because the phrase "terms, conditions, or privileges" of employment refers to the agreed-upon requirements and benefits of a job, it does not encompass any and all transfer decisions that an employer might make. An employer might, for example, temporarily transfer an employee to help out an understaffed department for a short period. Such a temporary assignment would not alter the basic requirements and benefits of employment. See *Stewart* v. *Evans*, 275 F.3d 1126, 1135 (D.C. Cir. 2002) (denying a request for a temporary transfer does not alter the terms, conditions, or privileges of employment). In ad-

dition, an employer might hire employees on an understanding that they will work at multiple facilities in a particular geographic area, depending on where they are needed. If the employer then transfers an employee from one facility to another, it has not altered that employee's "terms, conditions, or privileges" of employment—working at multiple facilities was itself a requirement of the job. Certain industries and jobs also might entail routine transfers that are so pervasive and necessary that being transferred is itself a condition of employment. Substitute teachers, for example, work in a role in which transfers are an inherent feature of employment. In such situations, an employer has not changed an employee's terms, conditions, or privileges of employment, and Title VII therefore has no application.

B. Title VII Does Not Apply To Transfers That Cause Only De Minimis Harm, But Only To Those That Cause Objectively Concrete Harm

Title VII does not extend to transfer decisions that impose only de minimis harm or trivial inconveniences, as both the plain text of the statute and bedrock legal principles demonstrate.

First, Title VII makes it illegal 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" based on a protected trait. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Under the canon of *ejusdem generis*, "to discriminate" must be read in accordance with the preceding terms "to fail or refuse to hire or to discharge": "[W]here general words follow specific words in a statutory enumera-

tion, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates* v. *United States*, 574 U.S. 528, 545 (2015) (alterations in original) (quoting *Washington State Department of Social & Health Services* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)); see also *Paroline* v. *United States*, 572 U.S. 434, 447 (2014) ("It is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories *similar in type to those specifically enumerated*." (emphasis added) (quoting *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973))). That the adverb "otherwise" appears immediately before and modifies "to discriminate" only underscores the applicability of the *ejusdem generis* canon here. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012) (applying *ejusdem generis* to "broad catchall phrase"—"'*other* disposition'"—that followed a "list of specific items" in Fair Labor Standards Act (emphasis added)).

Thus, "even if 'discriminating with respect to compensation, terms, conditions, or privileges of employment' could be read more broadly" standing alone, "the *ejusdem generis* canon would counsel a court to read that final phrase . . . like the prior terms" to refer to an ultimate and serious employment "decision." *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1176 n.4 (2020); see also *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53, 67 (2006) (noting view that Title VII's "antidiscrimination provision" deals with "so-called 'ultimate employment decisions'"). In other words, to be actionable, any "discriminat[ion]," including any transfer, must be of similar severity as failing to hire or terminating an employee. Cf. *Babb*, 140 S.

Ct. at 1176 (explaining that "all the verbs in [the identical language of the Age Discrimination in Employment Act]—failing or refusing to hire, discharging, or otherwise discriminating with respect to 'compensation, terms, conditions, or privileges of employment'—refer to end results"); *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998) (discussing "tangible employment action [that] constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). Plainly, a temporary transfer or reassignment is not equivalent to being hired or fired.

Second, Title VII requires an employer "to discriminate *against* any individual." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). "Against" means "in opposition or hostility to." *Against*, Webster's Third New International Dictionary, *supra*, at 39. Thus, as this Court has repeatedly explained, "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that *injure* protected individuals." *White*, 548 U.S. at 59 (emphasis added); see *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1740 (2020) ("To 'discriminate against' a person, then, would seem to mean treating that individual *worse* than others who are similarly situated." (emphasis added)); *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009) ("[d]isparate-treatment cases . . . occur where an employer has 'treated [a] particular person *less favorably* than others because of' a protected trait" (alteration in original) (emphasis added)). Contrary to Petitioner's assertion that Title VII's phrase "discriminate against" "connotes any differential treatment," Pet. Br. 16, under this Court's precedent, a plaintiff must

show that a challenged transfer decision imposed an actual injury.

This actual-injury requirement is grounded not only in the plain meaning of "discriminate against," but also in the separate textual condition that a Title VII plaintiff be an "aggrieved" person. 42 U.S.C. § 2000e-5(f)(1). The Court has rejected the argument that "the aggrievement referred to is nothing more than the minimal Article III standing," concluding "that the term 'aggrieved' must be construed *more narrowly* than the outer boundaries of Article III." *Thompson* v. *North American Stainless, LP*, 562 U.S. 170, 175–77 (2011) (emphasis added). So, at minimum, a Title VII plaintiff must demonstrate that a challenged transfer decision imposed an Article III injury—though even that is not necessarily sufficient. See *ibid.* And to show that she suffered an Article III injury—and thus potentially qualifies as an "aggrieved" person entitled to sue—a plaintiff must demonstrate that a challenged transfer decision caused her "an injury in fact that is concrete, particularized, and actual or imminent." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). These "Art[icle] III minima" require an injury to be "'distinct and palpable.'" *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). "[T]he psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not [an] injury sufficient to confer standing under Art. III." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982); see *Clay* v. *Fort Wayne Community Schools*, 76 F.3d 873, 877 n.4 (7th Cir. 1996) (recognizing that "amorphous psychological injuries" are "insufficient to confer standing").

Thus, to count as discrimination "against" an individual and to "aggrieve" that person, a transfer decision must cause real-world, actual injury to her. An employee's mere disagreement with—or dislike of—a transfer does not suffice.

Third, Title VII's "standard[s] for judging harm must be objective." *White*, 548 U.S. at 68. Petitioner suggests that courts should not scrutinize whether a challenged transfer decision has actually injured a plaintiff, contending that "[n]o further inquiry into whether the new position is objectively more desirable than the old is required—or permissible." Pet. Br. 40; see also *ibid.* (arguing that it "makes no difference . . . whether a 'reasonable' employee" would have viewed the job to which the plaintiff was transferred as "more desirable"). But Title VII does not leave the determination of whether an employer has injured an employee on the basis of a protected trait to the subjective, possibly idiosyncratic impressions or preferences of individual employees.

Instead, this Court has "emphasized the need for objective standards" for assessing harm because they are "judicially administrable" and "avoi[d] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *White*, 548 U.S. at 68–69. And the Court has applied "objective standards" in various "Title VII contexts," including retaliation claims, *id.* at 69, constructive-discharge doctrine, *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141 (2004), and hostile-work-environment doctrine, *Harris*, 510 U.S. at 21. Where a plaintiff's claim is grounded in psychological harm, the alleged harm must be sufficiently severe to rise to the level of objectively material harm, as in the case of extreme harassment. See Resp. Br.

41. Whether a transfer decision is injurious must therefore depend on an objective assessment, not the employee's subjective belief that she was treated less favorably.

If a plaintiff were not required to demonstrate that a challenged employment decision imposed an objective injury, "absurd consequences would follow." *Thompson*, 562 U.S. at 176–77. A plaintiff would be able to challenge a transfer to an objectively more desirable position—*i.e.*, a promotion—simply because he holds a subjective preference for his former position. The text of Title VII does not compel such bizarre results. To show that he has been "discriminated against" and that he is "aggrieved" under Title VII, a plaintiff must demonstrate that a challenged transfer decision has imposed an objective injury sufficient to satisfy Article III.

Fourth, to the extent there was any doubt that a transfer must result in real-world injury, Title VII was enacted against the "venerable maxim" of "*de minimis non curat lex* ('the law cares not for trifles')." *Wisconsin Department of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). This caveat "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." *Ibid.* Contrary to Petitioner's argument, Pet. Br. 49–50, there is no indication that Title VII departed from this fundamental background legal principle.

* * *

In sum, as a matter of both text and established legal principles, Title VII is not concerned with transfers causing de minimis harms. This Court has time

and again recognized that "it is important to separate significant from trivial harms" in the Title VII context. *White*, 548 U.S. at 68. Title VII is not "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998); see also *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998) (Title VII's standards "will filter out complaints attacking 'the ordinary tribulations of the workplace'"); cf. *White*, 548 U.S. at 68 (imposing "material adversity" requirement on antiretaliation action under Title VII to address this). Lower courts also have recognized that Title VII does not extend to trivial harms. *Washington* v. *Illinois Department 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."); see also *Threat* v. *City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021) (Sutton, C.J.) (stating that it "[s]urely" is a "reasonable assumptio[n]" that "a discrimination claim involves a *meaningful* difference in the terms of employment and one that injures the affected employee" (emphasis added)). Petitioner is thus wrong that the Court "need not" (Pet. Br. 46) confirm the propriety of an exception for de minimis transfers.

Petitioner contends that there is no need for Title VII to have a de minimis exception because de minimis cases "do not tend to arise in the real world" and it is hard to identify de minimis violations "without resorting to unrealistic hypotheticals." Pet. Br. 46. That is factually incorrect. In reality, employees have not hesitated to bring challenges to transfer decisions that imposed de minimis injuries.

For example, in *Forkkio* v. *Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002), an employee challenged a transfer that "did not affect [his] pay or benefits" and did not reduce his "substantive responsibilities." Rather, the plaintiff objected to the transfer on the ground that "he no longer attended management meetings or received management-related e-mails and other communications." *Ibid.* The D.C. Circuit rejected the plaintiff's "'conclusory assertions'" that being left out of certain meetings and e-mails constituted an actionable "'loss of prestige.'" *Ibid.*

Similarly, in *Flaherty* v. *Gas Research Institute*, 31 F.3d 451, 457 (7th Cir. 1994), a plaintiff challenged his termination under the Age Discrimination in Employment Act ("ADEA") for refusing to accept "a lateral transfer that would not change his salary or benefits" and offered "greater growth potential" (the employer was "eliminating" his current position). The plaintiff objected to "largely semantic" features of the transfer: it "would have required that he report to a former subordinate who was merely a manager, whereas he previously had reported to a senior vice president," and his "title would have changed from principal scientist to senior project manager." *Ibid.* The Seventh Circuit acknowledged that "the reporting relationship may have bruised [the plaintiff's] ego" but explained that "a plaintiff's perception that a lateral transfer would be personally humiliating is insufficient." *Ibid.* In another case, the Seventh Circuit also rejected as insufficient a school principal's ADEA challenge to her transfer to "another principalship for more pay under a longer-term employment contract," where the plaintiff claimed that "the public perceived the transfer as a 'nudge towards retirement.'" *Spring*

v. *Sheboygan Area School District*, 865 F.2d 883, 886 (7th Cir. 1989).[2]

As these cases demonstrate, employee objections—and lawsuits—challenging transfer decisions imposing trivial harms therefore *do* "tend to arise in the real world." Pet. Br. 46. In each of the cases, plaintiffs challenged transfers that resulted in at most de minimis injuries—being left out of certain meetings or e-mails, having to report to a former subordinate, semantic changes in one's title, or a subjective perception that a transfer is humiliating. But whatever indignities the plaintiffs in these cases might have felt, they did not—and should not—rise to the level of Title VII actionability.

Without a de minimis exception, "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial." *Williams* v. *Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). Title VII's exception for de minimis harms, grounded in its text and in the

---

[2] It is not difficult to imagine many other realistic hypotheticals that routinely arise in the modern workplace. An employer who asks an employee to help out in a short-staffed department, to work at another facility for a week, or to cover for a co-worker who is on leave could be characterized as "transferring" the employee, albeit to a temporary assignment. Yet, Congress never intended for Title VII to expose employers to liability for such routine discretionary employment decisions. In reality, the issue of de minimis workplace harms arises far more frequently than Petitioner's unrealistic hypothetical suggests. Pet. Br. 46–47.

background legal principles against which it was enacted, ensures that challenges to temporary transfers or transfer decisions resulting in trivial harms do not flood both the Equal Employment Opportunity Commission and courts. The Court should reject Petitioner's argument that Title VII does not have a de minimis exception.

II. EMPLOYERS REQUIRE FLEXIBILITY TO TRANSFER EMPLOYEES AS NEEDED, ESPECIALLY GIVEN THE PRESENT LABOR SHORTAGE

If adopted, Petitioner's erroneous interpretation of Title VII could seriously undermine employers' abilities to operate their businesses efficiently and effectively. Employers require broad discretion to transfer employees to meet business and staffing needs. Employers also require broad discretion not to transfer employees whenever they seek it. But employers making necessary transfer decisions will face a significantly increased risk of liability if this Court adopts Petitioner's contentions that (1) Title VII applies as a categorical matter to *all* transfer decisions; (2) the determination of whether an employee has been harmed depends not on an objective comparison of the two positions but on the employee's subjective preference for one of the positions; and (3) Title VII has no de minimis exception. It is crucial that this Court reject these contentions to ensure that employers are able to make necessary transfer decisions without risking liability whenever an employee subjectively believes that a transfer is injurious or objects to a transfer that does not alter the requirements or benefits of his job.

The general shortage of workers makes this discretion imperative. For example, the Chamber "hear[s] every day from our member companies—of every size

and industry, across nearly every state—they're facing unprecedented challenges trying to find enough workers to fill open jobs." Stephanie Ferguson, *Understanding America's Labor Shortage*, U.S. Chamber of Commerce (Oct. 16, 2023), https://tinyurl.com/mu8wmh2h. The latest data reveal that there are 9.6 million job openings in the United States but only 6.4 million unemployed workers, meaning that even if every unemployed person found a job, there would still be about 3.2 million open positions. *Ibid.*

The labor shortage has been caused by several factors: the COVID-19 pandemic "drove more than 3 million adults into early retirement," net immigration into the United States is at its lowest level in decades, and many parents continue to struggle with a "lack of access to high quality, affordable childcare." *Ibid.* In addition, in what has come to be known as "The Great Reshuffle," employers are facing a "slew of resignations" as employees come to demand "[p]erks like remote work, flexibility and four-day workweeks"—changes that have prompted many employers to say "they haven't seen anything like this in all their years of hiring." Michelle Fox, *The Great Reshuffle: Companies Are Reinventing Rules as Employees Seek Remote Work, Flexible Hours and Life Beyond Work*, CNBC (Feb. 4, 2022), https://cnb.cx/3tGbIY0. The problem is not a temporary one. It is "a storm that has been brewing for decades" and is now "turning into a long-term labor crisis." Lauren Weber & Alana Pipe, *Why America Has a Long-Term Labor Crisis, in Six Charts*, Wall St. J. (Sept. 25, 2023, 5:30 AM), https://tinyurl.com/2bnzkcd5.

The labor shortage is posing significant difficulties for employers in various industries. In the hospitality industry, a recent survey found that "79 percent of

U.S. hotels are experiencing staffing shortages, with 22 percent saying severely so." Angelique Platas, *Persistent Hotel Staffing Shortages 'Alarming' But Offer Opportunity*, Business Travel News (Mar. 24, 2023), https://tinyurl.com/2459637x. Three years after the pandemic, "restaurants, bars, hotels and casinos remain short-staffed, with nearly 2 million unfilled openings." Abha Bhattarai & Maggie Penman, *Restaurants Can't Find Workers Because They've Found Better Jobs*, Wash. Post (Feb. 3, 2023), https://tinyurl.com/mszpzn4f.

The labor shortage has hit the restaurant industry particularly hard. Of all industries, "the Accommodation and Food Services industry has had the highest quit rate since July 2021." Stephanie Ferguson, *Understanding America's Labor Shortage: The Most Impacted Industries*, U.S. Chamber of Commerce (Oct. 16, 2023), https://tinyurl.com/4sypbb94; see also Dylan Jeon, *NRF in Washington: Advocacy Update July 2022*, Nat'l Retail Fed'n (July 21, 2022), https://tinyurl.com/ykcxh8f6 ("Retailers and restaurants continue to face a severe labor shortage despite efforts to attract workers with higher pay, expanded benefits and increased worktime flexibility."). Sixty-two percent of restaurant operators "say their restaurant does not have enough employees to support its existing customer demand," and "8 in 10 restaurant operators say they currently have job openings that are difficult to fill." National Restaurant Association, *Restaurants Added Jobs in 24 Consecutive Months* (Jan. 6, 2023), https://tinyurl.com/456nx92u; see also Ian Krietzberg & Amelia Lucas, *Restaurants Are Short-Staffed, and That's Taking a Big Toll on Customers and Workers Alike*, CNBC (July 17, 2022, 8:00 AM), https://cnb.cx/3Q1oZSw ("For restaurants, staff-

ing challenges have put pressure on an industry already struggling with inflation and recovering lost sales from the pandemic.").

The retail sector is "among those hardest hit by the ongoing, unprecedented labor shortage." Surendra Agrawal et al., *Three Unconventional Strategies that Can Ease the Retail Labor Shortag*e, EY-Parthenon (July 22, 2022), https://tinyurl.com/mpun7hpx. A 2022 survey of retail executives revealed that 70% expected labor shortages to "hamper retail growth in 2022" and 74% expected "shortages in customer-facing positions" that year. Rod Sides & Lupine Skelly, *2022 Retail Industry Outlook: The Great Reset*, Wall St. J. (Mar. 10, 2022, 3:00 PM), https://tinyurl.com/ypbjfzb4. "One of the most effective strategies" a retailer can employ in responding to the labor shortage is to "include staff retention and relocation to other stores as part of the exercise." Surendra Agrawal et al., *supra*; see also *ibid.* (noting that one employer responded to the labor shortage by "[t]ransferr[ing] 600 trained employees to 200+ nearby stores").

The labor shortage imposes especially difficult challenges for small businesses, which "have less ammunition in the battle for talent, lacking access to the kind of cash flow, credit and economies of scale that larger corporations enjoy," which "makes it harder for them to offer things like competitive wages or sign-on bonuses." Martha C. White, *America's Small Businesses Are Running Out of Workers*, CNN (Aug. 19, 2022), https://tinyurl.com/36dcfzf6. In September 2023, 43% of small business owners "reported job openings they could not fill," and 93% of owners who were hiring or trying to hire "reported few or no qualified applicants," with 30% of all owners reporting few qualified applicants and 27% reporting none. NFIB,

NFIB Jobs Report: Unfilled Job Openings Increased in September, https://tinyurl.com/mt82pkhe; see William Dunkelberg, *The Small Business Labor Dilemma*, Forbes (July 25, 2022, 1:02 PM), https://tinyurl.com/yrr8w5er (noting that a sample of NFIB's "300,000 member firms has been reporting job openings at 48-year record levels"). In that same period, 23% of small business owners reported labor quality as their "top business operating problem" and 9% reported labor cost as their top problem. *NFIB Jobs Report: Unfilled Job Openings Increased in September*, *supra*.

A significant teacher shortage has caused some schools to fill "open teaching positions . . . with long-term substitute teachers" who "don't need teacher training or a college degree." Moriah Balingit, *Teacher Shortages Have Gotten Worse. Here's How Schools Are Coping*, Wash. Post (Aug. 24, 2023), https://tinyurl.com/5n7ctuk3. But even "[s]ubstitute teachers," who might frequently transfer from one school to another, "have been hard to come by, forcing "some schools to close . . . after outbreaks of [illness]." *Ibid.* School districts are further facing a "crisis level" shortage of school bus drivers, which is causing an increase in the number of students who miss at least 10% of the school year. Alia Wong, *Why Is There a Shortage of School Bus Drivers? Problem Worsened by COVID Reaches Crisis Level*, USA Today (Aug. 15, 2023, 5:03 AM), https://tinyurl.com/2hyfzzhh.

To respond to the challenges posed by the labor shortage, employers must have sufficient flexibility to transfer employees as needed. Because employers do not have enough employees to fill all their open positions (and are unlikely to have sufficient employees anytime soon), their existing employees may have to

perform some of the necessary tasks associated with vacant positions. Employers regularly ask their employees to temporarily help out a short-staffed department or facility to ensure that all business needs are met.

In this challenging environment, employers must have flexibility to move employees to where they are most needed without risking liability for transfer decisions that do not impose any objective nontrivial injury or alter the requirements or benefits of a job. The Court should reject Petitioner's erroneous interpretations of Title VII, which would needlessly restrict the ability of employers to confront the challenges created by the present labor shortage.

III. THE COURT SHOULD BE MINDFUL OF ISSUES NOT PRESENTED IN THIS CASE

Because employers, employees, and courts will look to this Court's decision for the standards governing the adjudication of Title VII claims, this Court should appreciate that the issue of liability for employment transfers presented in this case, on this record, is narrow. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."); *PDK Lab'ys Inc.* v. *U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("the cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more"). Addressing related issues that fall outside the question presented and that have not been fully briefed could have profound and unanticipated effects on employers and employment-discrimination litigation.

There are multiple issues *not* presented in this case:

First, the question of an employer's ultimate liability is not presented by this case. The Eighth Circuit on a summary-judgment record affirmed the district court's holding that Muldrow had not established a prima facie case of sex discrimination under Title VII because she could not show that she suffered an adverse employment action. *Muldrow* v. *City of St. Louis*, 30 F.4th 680, 687 (8th Cir. 2022). If this Court were to reverse, that would not necessarily mean that the employer is liable under Title VII. If this Court concludes that Muldrow established a prima facie claim, under the *McDonnell Douglas* framework, the burden would shift to the employer to rebut the prima facie case by offering "some legitimate, nondiscriminatory reason" for the challenged actions. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). If the employer successfully rebuts Muldrow's prima facie case, then the burden would shift back to Muldrow to show that the employer's stated nondiscriminatory reason for acting was pretextual. *Id.* at 804. Neither the district court nor the Eighth Circuit considered the second or third steps of the *McDonnell Douglas* burden-shifting framework. So if this Court determines that Muldrow has shown a prima facie case, then the employer would have an opportunity to prove that its action was not discriminatory on remand.

Second, the Court's decision on whether a plaintiff must show materiality in a prima facie Title VII discrimination claim should not affect the application of ordinary pleading standards at the motion-to-dismiss stage. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). It is not enough to show "a sheer possibility that a defendant has acted unlawfully" by "plead[ing] facts that are 'merely consistent with' a defendant's liability." *Ibid.* The plaintiff must allege sufficient facts to allow a court "to draw the reasonable inference that the defendant is liable." *Ibid.* Accordingly, however this Court resolves this case, a complaint will not be able to survive a motion to dismiss if a plaintiff simply alleges in conclusory fashion that he was transferred based on a protected trait.

Similarly, a plaintiff "can plead himself out of court by pleading facts that show that he has no legal claim." *Atkins* v. *City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011); *Trudeau* v. *FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) (it "'is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible'"). So if a plaintiff pleads facts that contradict or refute his claim that a transfer decision violated Title VII, nothing in this Court's decision should cast doubt on the appropriateness of dismissing such a complaint.

Third, the disposition of this case should not impact the requirements for hostile-work-environment and retaliation claims, which are not at issue. As Petitioner correctly concedes, Pet. Br. 33–34, regardless of how this Court decides this case, plaintiffs alleging hostile-work-environment claims still will have to prove that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris*, 510 U.S. at 21 (citation omitted). Discriminatory conduct that is not "severe

or pervasive" is "beyond Title VII's purview" because it does not alter the terms, conditions, or privileges of employment. *Ibid.* The challenged conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment" and the plaintiff must "subjectively perceive the environment to be abusive"; otherwise, "the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id.* at 21–22. Petitioner also correctly concedes, Pet. Br. 37–39, that this case has no bearing on the requirement that a plaintiff bringing a retaliation claim under Title VII "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.'" *White*, 548 U.S. at 68 (quotation marks omitted).

CONCLUSION

For these reasons, the Court should confirm that to be actionable, a plaintiff alleging a discriminatory transfer under Title VII must show that the transfer altered the requirements or benefits of her job and imposed an objective and nontrivial injury, in addition to being made on the basis of a protected characteristic.

Respectfully submitted,

TARA S. MORRISSEY
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

ELIZABETH GAUDIO MILITO
PATRICK MORAN
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th Street, NW
Suite 1001
Washington, DC 20004
(202) 406-4443

Counsel for Amicus Curiae the NFIB Small Business Legal Center, Inc.

STEPHANIE MARTZ
GENERAL COUNSEL
NATIONAL RETAIL
FEDERATION
1101 New York Avenue, NW,
12th Floor
Washington, DC 20005

Counsel for Amicus Curiae the National Retail Foundation

JASON C. SCHWARTZ
LUCAS C. TOWNSEND
Counsel of Record
MOLLY T. SENGER
JESSICA L. WAGNER
BRIAN C. MCCARTY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
LTownsend@gibsondunn.com

Counsel for Amici Curiae

ANGELO I. AMADOR
RESTAURANT LAW CENTER
2055 L Street, NW
Suite 700
Washington, DC 20036
(202) 331-5913
aamador@restaurant.org

Counsel for Amicus Curiae the Restaurant Law Center

October 18, 2023