No. 22-193

In The Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

CITY OF ST. LOUIS, STATE OF MISSOURI et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Founded in 1985, the National Employment Lawyers Association ("NELA") is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Since its founding in 1940, LDF has strived to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. Since its enactment, LDF has helped Americans vindicate their rights under Title VII of the Civil Rights Act of 1964 ("Title VII") to be free from workplace discrimination. LDF has represented

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[1] Pursuant to S. Ct. R. 37.6, *Amici Curiae* submit that no counsel for any party participated in any way in the authoring of this brief. In addition, no other person or entity, other than *Amici Curiae*, has made any monetary contribution to the preparation and/or submission of this brief.

plaintiffs in cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has a strong interest in the proper application of Title VII to combat workplace discrimination.

The National Women's Law Center ("NWLC") is a non-profit organization that fights for gender justice—in the courts, in public policy, and in our society—working across issues that are central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women. Since 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security for women and girls. As part of these efforts, the NWLC Fund administers the TIME'S UP Legal Defense Fund, which improves access to justice for those facing workplace sex harassment. NWLC has participated as counsel or *amicus curiae* in numerous cases to advocate for correct interpretations regarding workplace civil rights laws, including Title VII, and has extensive experience advocating on behalf of those facing discrimination based on sex and/or gender.

SUMMARY OF ARGUMENT

The Court has agreed to review the question: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?" The answer is "Yes." Requiring separate proof that a discriminatory transfer has created a "significant disadvantage" is contrary to the fundamental principles of the Civil Rights Act and of the Court's condemnation of the notorious "separate but equal" doctrine. Any such rule also exacerbates the economic impacts of ongoing occupational segregation, particularly that of women of color. Such a "significant disadvantage" standard is inconsistent with the text of Title VII. Nor is it consistent with this Court's jurisprudence addressing Title VII sexual harassment and retaliation claims. Further, Congress's efforts to enhance the remedies for violations of Title VII demonstrate that a significant harm requirement is misplaced and would deny victims of discrimination the remedies that Congress designed for their protection. The significant disadvantage requirement and comparable extra-statutory requirements by the lower courts have led to pernicious outcomes and are incapable of even-handed application. Finally, such a rule fails to recognize the significant harm caused by non-economic injuries in the workplace.

ARGUMENT

Title VII embodies a national commitment to end the blight of workplace discrimination. The "significant disadvantage" standard at issue here is at war with that commitment. It allows a company to transfer an employee for no reason other than their race, sex, or other protected characteristic, if the employee cannot convince a court that this workplace discrimination creates some "significant disadvantage" beyond the transfer itself. For at least four reasons the Court should reject this standard. First, it cannot be squared with the sweeping purpose of Title VII. Second, it cannot be squared with the text of Title VII or this Court's jurisprudence interpreting that text. Third, variations of this extra-textual requirement have been applied by lower courts to reach pernicious outcomes, and such standards have proved to be incapable of uniform application. Finally, such a requirement of proof of a "significant disadvantage" ignores the critical importance of non-economic aspects of the "terms, conditions, or privileges of employment" to American workers.

As illustrated below, the "significant disadvantage" standard fails to acknowledge that discrimination in the terms, conditions, or privileges of employment, such as the position one holds, in and of itself—and irrespective of any separate inquiry into the relative "advantages" of different positions—causes serious harm, which Title VII is designed to remedy.

I. THE "SIGNIFICANT DISADVANTAGE" STANDARD IS ANTITHETICAL TO THE PRINCIPLES EMBODIED IN THE CIVIL RIGHTS ACT OF 1964, THIS COURT'S PRECEDENT, AND ITS FOUNDATIONAL HOLDING IN *BROWN V. BOARD OF EDUCATION*.

In enacting the Civil Rights Act of 1964 ("the Act"), Congress recognized that discrimination causes serious dignitary harms, and created a federal remedy for those harms. As this Court has explained in addressing the public accommodations section of the statute (Title II), the vindication of personal dignity was Congress's "fundamental object." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Guaranteeing equal dignity was an animating purpose of the statute's other antidiscrimination protections as well. In his concurrence in *Heart of Atlanta*, Justice Goldberg described the Act's "primary purpose" as "the vindication of human dignity and not mere economics." *Id.* at 291–92 (Goldberg, J., concurring). Justice Goldberg underscored this point through his survey of the Act's legislative history, which explains that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." *Id*. (citing S. Rep. No. 872, 88th Cong., 2d Sess., 16).

Indeed, the racial caste system that Title VII sought to dismantle was grounded, in part, on the use

of segregation and other tools to deny Black people personal dignity in the workplace, thereby relegating them to second-class citizenship, irrespective of whether that resulted in a quantifiable economic deprivation. Codes of segregation in the aftermath of the Civil War "lent the sanction of law to a racial ostracism" that extended to employment. C. Vann Woodward, *The Strange Career of Jim Crow* 7 (Oxford Univ. Press, 1955); *see also, e.g.*, John Hope Franklin, *Hist. of Racial Segregation in the United States*, 304 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCIENCE 1, 7–8 (1956) (describing a 1915 South Carolina statute that "forbade textile factories to permit employees of different races to work together in the same room"). Women similarly suffered extraordinary discrimination in the workplace and were often limited to performing certain narrow roles, and excluded from a wide range of alternative employment opportunities based on sexist stereotypes that they were not capable of performing such jobs. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a state law preventing women from working as bartenders unless their husband or father owned the bar, because their "oversight . . . minimizes hazards that may confront a barmaid without such protecting oversight.").

A. A "significant disadvantage" standard disregards and trivializes the serious dignitary harms that result from discriminatory treatment.

This Court has repeatedly recognized the serious harms that occur from the act of discrimination itself which, by its very nature, "deprives persons of their individual dignity." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). "[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions,' treats those it targets "as 'innately inferior' and therefore as less worthy participants in the political community." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Indeed, as this Court has recognized in the context of racial discrimination by government actors, the "stigmatizing injury . . . caused by racial discrimination . . . is one of the most serious consequences of discriminatory government action." *Allen v. Wright*, 468 U.S. 737, 755 (1984); *see also Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005) (explaining that "racial minorities are harmed more generally" by racial discrimination in the jury selection process, "for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.") (citations and quotations omitted). This Court has similarly emphasized that sex-based discrimination causes "stigmatizing injury." *Jaycees*, 468 U.S. at 625; *see also United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (applying heightened review to state mandated sex discrimination

because differences between men and women cannot be a basis "for denigration of the members of either sex or for artificial constraints on an individual's opportunity" or used "to create or perpetuate the legal, social, and economic inferiority of women"); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 142 (1994) (explaining that gender discrimination in jury selection "denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation").

Permitting employers to discriminatorily transfer employees perpetuates these serious dignitary harms by treating people differently based on a protected characteristic, even if the transfer does not result in a "significant disadvantage," such as a reduction in responsibility or pay. As the D.C. Circuit explained, "[r]efusing an employee's request for a transfer while granting a similar request to a similarly situated employee is to treat the one employee worse than the other." *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (*en banc)*. And so, as discussed below, neither Title VII nor the Civil Rights Act of 1964 as a whole permit discriminatory conduct, regardless of the form it takes or the resulting disadvantages it produces.

B. A "significant disadvantage" standard permits employers to maintain segregated workplaces and violates the principles set forth in *Brown*.

Adding a "significant disadvantage" requirement to Title VII would essentially restore the separate but equal doctrine this Court unanimously repudiated in its seminal decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). The question at issue in *Brown* was whether Black students experienced unconstitutional harm from segregated education, even when "'tangible' factors" such as curricula, facilities, and teacher qualifications were supposedly "equalized" for white and Black students. *See id*. at 492–93. This Court's answer was a resounding *yes*. Segregated education had a "detrimental effect" on Black children because it sent a message asserting "the inferiority of" Black people. *Id*. at 494. That injury—though "intangible," *see id*. at 493—is among the most profound and significant harms that federal courts have ever been charged with remedying. *See Allen*, 468 U.S. at 755.

So too here. Employees who are transferred (or denied transfers) because of their protected characteristic have endured serious dignitary harms. In enacting Title VII, Congress sought to eradicate the harms caused by racial discrimination from our nation's workplaces, and it would be inconsistent with the basic purposes of the Civil Rights Act to permit employers to segregate their employees based on race. Likewise, "[s]eparate but equal treatment on the basis of sex is as self-contradictory as separate but equal on the basis

of race." *N.L.R.B. v. Loc. No. 106, Glass Bottle Blowers Ass'n*, 520 F.2d 693, 695 (6th Cir. 1975). Title VII prohibits sex-based job classifications unless an employer can prove that sex is a "bona fide qualification." 42 U.S.C. § 2000e-2(e); *UAW v. Johnson Controls*, 499 U.S. 187 (1991). The dignitary harms created by workplace discrimination based on race, sex, and other protected characteristics cannot be overstated. Discrimination in the workplace conveys that members of disfavored groups are less qualified, less valued, and less desirable employees and people.

Because discrimination is inherently harmful, separate but equal arrangements are impermissible under Title VII regardless of whether an affected employee suffered so-called "tangible" harm. *See, e.g.*, *U.S. Equal Emp. Opportunity Comm'n v. AutoZone, Inc.*, 875 F.3d 860, 861 (7th Cir. 2017) (Wood, C.J., dissenting) (reasoning that employer's maintenance of racially segregated facilities violates Title VII and is contrary to *Brown* and analogous equal protection cases); *Moranski v. Gen. Motors Corp.*, No. 1-04-CV-0650, 2005 WL 552419, at *4 (S.D. Ind. Feb. 24, 2005), *aff'd*, 433 F.3d 537 (7th Cir. 2005) (recognizing "it would violate Title VII if it required black and white employees to eat in separate but equal lunchrooms"); *Santamaria v. Dallas Indep. Sch. Dist.*, No. 3:06-CV-692-L, 2007 WL 1073850, at *6 (N.D. Tex. Apr. 10, 2007) ("Post-*Brown*, . . . [d]efendants' 'no harm, no foul' argument [that "non-LEP minority students were receiving an equal education as their Anglo counterparts, just in a separate classroom"] . . . has no place in

constitutional jurisprudence."). Accordingly, this Court should reject the "significant disadvantage" standard—or any other requirement of tangible harm flowing from discrimination. Dignitary harms are intrinsic to discrimination, and, as explained further below, all such harms constitute actionable causes of action under Title VII.

C. Discriminatory transfers in the workplace will exacerbate the already devasting economic impacts of occupational segregation for all women, but especially women of color.

The dignitary harms caused by discrimination and segregation are sufficient to establish actionable injury, so the Court does not need to embrace an additional "significant disadvantage" burden. *Amici* note, however, that there is a clear connection between dignitary harms and the disadvantage of economic consequences over time, whether or not an individual plaintiff can convince a court that any specific discriminatory transfer imposes an immediate "significant disadvantage" on them beyond the discrimination itself. The stigma from discrimination and segregation impedes opportunities, with potential effects ranging from deterring employees who endure discrimination from seeking promotions to driving them off the job altogether.[2]

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[2] *See*, *e.g.*, Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 Denv. Univ. L. Rev. 995, 1106 & n.581 (2015),

By allowing some forms of workplace segregation and affirming the permissibility of workplace decisions based solely on employees' race, sex, or other protected characteristics, the significant disadvantage standard will intensify these consequences. Workplaces in the United States remain highly segregated today, and "jobs that pay higher wages disproportionately employ white men, while lower paid jobs disproportionately employ women, particularly women of color."[3] People with disabilities are also concentrated in "hourly, contingent and lower wage employment."[4]

As discussed by the Department of Labor in a 2022 report, "gender stereotypes about skills and abilities, such as the belief that women are better suited to do care or household work and men are better at dangerous or physically demanding work" drive segregation in the workforce, and women who work in male-dominated industries "tend to be concentrated in lower-paying, undervalued jobs such as administrative or support positions."[5] Indeed, the facts of the case at

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https://www.law.du.edu/documents/denver-university-law-review/Vol91_Issue5_Schultz_10_04_2015_FINAL_PRINT.pdf ("Once . . . discriminatory practices are in place, they interact dynamically with the underlying stereotypes to set in motion self-perpetuating and self-justifying cycles.").

[3] Marina Zhavoronkove et al., *Occupational Segregation in America*, Ctr. for Am. Progress, Mar. 29, 2022, https://www.americanprogress.org/article/occupational-segregation-in-america/.

[4] *Bearing the Cost: How Overrepresentation in Undervalued Jobs Disadvantaged Women During the Pandemic*, U.S. Dep't of Lab. 11 (Mar. 15, 2022), https://www.dol.gov/sites/dolgov/files/WB/media/BearingTheCostReport.pdf].

[5] *Id*. at 13.

bar illustrate these dynamics, where the Petitioner alleges she was transferred because her supervisor deemed street work "too dangerous" for a woman to perform, yet retained two women in the department to perform administrative work. Pet. 4 (citing CA8JA 479); *Muldrow v. City of St. Louis*, No. 4:18-CV-02150-AGF, 2020 WL 5505113, at *2 (E.D. Mo. Sept. 11, 2020).

Although Title VII requires no showing of tangible harm—economic or otherwise—workplace segregation nonetheless produces serious negative long-term economic consequences in the aggregate. While women of every race are overrepresented in low-paid jobs compared to their share of the overall workforce, the economic effects of workplace segregation are especially stark for women of color and immigrant women. For example, the shares of Latinas and Native women in the low-paid workforce are roughly double their respective shares in the workforce overall, and Black women's share of the low-paid workforce is nearly 1.5 times larger than their share of the overall workforce.[6] This causes long-term economic harm, as women in low-paid jobs and their families face a high risk of falling below or near the poverty line.[7] Among women working full time in low-paid jobs, 38.8% of all women of color lived in or near poverty in 2021, compared to 30.0% of white, non-Hispanic women. Nearly four in ten Latinas (38.9%), and more than four in ten Native

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[6] *Hard Work Is Not Enough: Women in Low-Paid Jobs* 7, NWLC, July 20, 2023, https://nwlc.org/wp-content/uploads/2020/04/%C6%92.NWLC_Reports_HardWorkNotEnough_LowPaid_2023.pdf.

[7] *Id.* at 14.

women (42.3%) and Black women (45.1%), working full time in low-paid jobs had household incomes below twice the poverty line.[8]

Ultimately, permitting employers to discriminatorily transfer employees worsens the effects of occupational segregation among women of color by, for example, allowing employers to push employees into jobs with limited opportunities for advancement, creating difficult to prove but real economic consequences for those affected. The "significant disadvantage" standard creates barriers to viable claims and disproportionately impacts the very groups Title VII was designed to protect.

II. ANY CATEGORICAL LIMITATION ON ACTIONABLE DISCRIMINATION IS INCONSISTENT WITH TITLE VII'S STATUTORY TEXT AND THIS COURT'S JURISPRUDENCE.[9]

In addition to running afoul of the fundamental principles of the Civil Rights Act and reinstituting the "separate but equal" doctrine in workplaces, the "significant disadvantage" standard must be rejected

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[8] *Id.*

[9] Nothing in this case implicates the standard to be applied in reviewing the permissibility of affirmative action measures designed to redress historic discrimination under Title VII, as set out in, *e.g.*, *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616 (1987).

because it cannot be squared with the text of Title VII or this Court's precedent interpreting the statute.

A. The text of Title VII does not support a "significant disadvantage" requirement.

Section 703(a)(1) of Title VII bars "discriminat[ion]" based on protected characteristics "with respect to [an individual's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). To discriminate against an individual means "treating that individual worse than others who are similarly situated." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020); *see also Burlington N. & Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 59 (2006) ("[a]s used in Title VII, the term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals'"); *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020) (discrimination carries its "'normal definition,'" which is "'differential treatment'" (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005))). In *Bostock*, the Court held that the touchstone inquiry under Title VII is whether a woman was treated "worse" than men in the same job, 140 S. Ct. at 1740, not whether she suffered a separately provable significant disadvantage.

Congress intended the prohibition on discrimination in the "terms, conditions, or privileges" of employment "to strike at the entire spectrum of disparate treatment," not merely "economic or tangible discrimination." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57,

64 (1986) (internal quotation marks and citation omitted). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (noting that Title VII's prohibition on discrimination extends beyond " 'terms' and 'conditions' in the narrow contractual sense" (quoting 42 U.S.C. § 2000e-2(a)(1))); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination").

As this Court put it in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), "terms, conditions, or privileges" of employment under Title VII include any and all benefits that are "part and parcel of the employment relationship," that are "incidents of employment," or that "form an aspect of the relationship between the employer and employees" and they may "not be doled out in a discriminatory fashion, even if the employer would be free . . . simply not to provide the benefit at all." *Id.* at 74–75 (cleaned up). To obtain or keep the position one desires is clearly a fundamental term or condition of employment, in the transfer context as much as in the hiring context, and thus, a discriminatory transfer or the discriminatory denial of a transfer request is actionable just as a discriminatory failure to hire is actionable. *See Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (*en banc*) ("The unadorned wording of the statute admits of no distinction between 'economic' and 'non-economic' discrimination or 'tangible' and 'intangible' discrimination. . . . Rather, Title VII prohibits all discrimination with respect

to terms and conditions of employment." (citation omitted)).

This Court has already rejected any requirement of demonstrating a "significant disadvantage" in a transfer case in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In that case, a class of city truck drivers claimed that they were denied the opportunity to work as over-the-road, long-distance line drivers because of their race. The Court noted not all employees would find the line driver jobs to be preferable, but said the issue was whether the plaintiffs were being treated less favorably in any respect, holding that "Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another." *Id.* at 338 n.18. In making that powerful statement, the Court embraced the definition of discrimination as meaning differential treatment without the need for an added showing that the treatment was materially worse, or created a significant disadvantage, in compensation or otherwise. *Id.*[10]

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[10] Several circuits have recently reached the conclusion that the statutory text does not support a requirement of adverse consequences beyond the discriminatory decision itself. For example, in *Hamilton v. Dallas County*, ___ F.4th ___, 2023 WL 5316716 (5th Cir. Aug. 18, 2023) (*en banc*), the full Fifth Circuit repudiated its "ultimate employment action" standard and held that shift assignments made on the basis of sex in accordance with a facially discriminatory policy constituted actionable discrimination and that a plaintiff need do no more than plead discrimination because of sex in the " 'terms, conditions, or privileges of employment'—just as the statute says." Likewise in *Chambers v. District*

The term "adverse employment action" itself is a judicial gloss on Title VII, not a part of the statutory text. The concept of "adverse action" arose out of the original articulation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), of a *prima facie* evidentiary burden on plaintiffs as part of an "order and allocation of proof" in Title VII cases. *Id.* at 800. The Court specified, in the "failure-to-hire" context of its decision, that as part of the *prima facie* showing, a plaintiff had to show "that, despite his qualifications, he was rejected." *Id*. at 802. As the Court later explained, this production burden was designed to eliminate the two most likely legitimate explanations for the employment action—lack of qualifications, and absence of a job opening (the latter specifically for failure-to-hire cases like *McDonnell Douglas* itself). *See Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254 (1981) (explaining the evidentiary purpose of the *prima facie* showing).

In adapting the *prima facie* evidentiary burden to non-hiring cases, courts extrapolated from the third element a general requirement that plaintiffs must identify an "adverse action" to state a claim. However,

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of Columbia, 35 F.4th 870 (D.C. Cir. 2022) (*en banc)*, the court held that a discriminatory job transfer is actionable without any showing of "objectively tangible harm" which the court concluded was inconsistent with the statute, which prohibits "all discrimination in the terms and conditions of employment." *Id.* at 882. Similarly, the Sixth Circuit held in *Threat v. City of Cleveland*, 6 F.4th 672, 676 (6th Cir. 2021), that the assignment of work shifts based on race constituted discrimination in the terms, conditions, or privileges of employment without any attendant change in compensation.

the *McDonnell Douglas* Court did not hold, and Title VII itself does not provide, that the only cognizable "adverse actions" are those that confer a significant disadvantage to the employee. Thus, an additional requirement of "objectively tangible harm," which generally means economic harm, obscures the simple command of Title VII that there be no discrimination in terms, conditions, or privileges of employment.

B. The Court's harassment and retaliation jurisprudence demonstrates that discrimination in terms, conditions, or privileges of employment is actionable without proof of a significant disadvantage.

The development of harassment jurisprudence over the past four decades demonstrates the Court's recognition that discrimination in terms and conditions of employment is actionable without regard to proof of a significant disadvantage beyond the hostile working conditions themselves, because the prohibition is not limited to "economic" or "tangible" discrimination. *See Meritor*, 477 U.S. at 64. This Court's explication of the liability principles in harassment cases further reinforces that point. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). To implement standards that strike at the "entire spectrum of disparate treatment," *Meritor*, 477 U.S. at 64, the *Ellerth* Court adopted the rule that when sexual harassment culminates in a "tangible" employment action, employers will be liable under the same agency rules

that govern liability for any other discriminatory employment action. 524 U.S. at 761. The Court referred to "tangible" actions not to identify any particular type of harm caused by the action, but to differentiate employment actions from the creation of a hostile environment through other types of conduct, such as unwanted touching or verbal epithets. In the harassment context, a "tangible" action, such as the involuntary transfer in the current case, would lead to the employer's liability without separate proof of any other significant disadvantage. If no tangible action is taken in a harassment case, liability exists if the harassment sufficiently alters the working conditions to make it more difficult for the employee to do her job, without reference to any other disadvantage. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring). This liability rule does not purport to define the meaning of actionable discrimination in the terms, conditions, or privileges of employment.

This Court further reinforced the principle that there is no "significant disadvantage" requirement in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In explaining that hostile environment cases involve an unlawful employment practice that takes place over a series of days or months, the Court distinguished such claims from other discriminatory actions it identified as "discrete" acts which occur on a particular day. The Court noted that each discrete act constitutes a separate actionable employment practice and must be challenged within the governing statute of limitations, and specifically identified discrete acts

"such as termination, failure to promote, denial of transfer, or refusal to hire" which are easily identifiable and are each separately actionable. *Id.* at 114. The Court's inclusion of denial of transfers as one of the discrete, identifiable, actionable practices under Title VII further confirms that claims of discriminatory transfer (or discriminatory denial of a transfer) should be treated no differently from claims of bias-based termination, refusal to hire, or failure to promote, and thus do not impose a requirement of proving an additional element that the decision caused a "significant disadvantage."

The Court's treatment of retaliation claims also demonstrates the same recognition of Title VII's sweeping scope and provides no basis for creating a significant disadvantage requirement in discrimination cases. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). In *White*, the Court held that the anti-retaliation provision of Title VII prohibits "materially adverse" actions, which means, in the retaliation context, that they are sufficiently detrimental to dissuade a reasonable worker from pursuing a discrimination complaint. *Id.* at 68. The Court considered that standard necessary to separate "significant from trivial harms," *id.*, given a provision that could apply to actions unrelated to employment or causing harm outside the workplace, *id.* at 63–64. That rationale does not support imposing a significant disadvantage standard in discrimination cases because the language of the discrimination provision already limits its scope

to actions affecting the terms, conditions, or privileges of employment.

C. Congress's addition of damages to the remedies for discrimination demonstrates that the statute does not require proof of a "significant disadvantage."

People are injured by discriminatory treatment that does not necessarily have any immediate economic consequences or cause materially significant disadvantages at the time of the employment decision. As demonstrated in Part I. above, the animating purpose of the Civil Rights Act was to provide redress for such injuries. The inadequacy of the statutory provisions for equitable relief in Title VII moved Congress to amend the statutory regime in 1991 to add compensatory and punitive damages to the available remedies under the statute. Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a(a)-(b). As the Court explained in discussing the compensatory and punitive damages provisions of the 1991 Act, Title VII now "allows monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief under Title VII" because monetary relief was unavailable absent "some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994) (emphasis in original). The *Landgraf* Court further clarified that Title VII now "allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the

'terms, conditions or privileges of employment,' 42 U.S.C. § 2000e-2(a)(1), even though the discrimination did not involve a discharge or a loss of pay." *Id.* This "major expansion in the relief available to victims of employment discrimination," the Court recognized, was designed to further Title VII's "'central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" *Id.* at 254–55 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

Of course, a discrimination plaintiff must prove *some* harm to be entitled to equitable or monetary relief, but that is the only constraint needed to "separate significant from trivial harms" in discrimination cases. *See White*, 548 U.S. at 68. As the Court said in *White*, the differential treatment in Title VII cases is treatment "that injure[s] protected individuals." *Id.* at 59 (citation omitted). This Court has observed in another context that victims of intentional discrimination "suffer[] a profound personal humiliation." *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (exclusion from jury service). The humiliation and distress caused by being treated differently in a term, condition, or privilege of employment because of one's sex or race is the injury Title VII is designed to redress. To create an additional, extratextual hurdle to obtaining that relief by requiring that the challenged employment action create a "significant disadvantage" such as an immediate economic injury subverts the purpose of the statute.

III. THE COURT SHOULD REJECT THE "SIGNIFICANT DISADVANTAGE" REQUIREMENT BECAUSE ITS PERNICIOUS EFFECTS ARE MANIFEST IN LOWER COURT DECISIONS REJECTING VIABLE CLAIMS ON THIS BASIS.

A. Decisions in the lower courts illustrate the unfairness of such extra-statutory rules.

Courts that require a showing of a "materially adverse action" or a "materially significant disadvantage" often leave employees with no remedy for egregious discrimination except to quit their jobs and hope a court will understand they suffered a constructive discharge. For example, in *Stewart v. Union Cnty. Bd. of Educ.*, 655 Fed. App'x 151, 157 (3d Cir. 2016), the Third Circuit said a Black school security guard could not establish a materially adverse action based on his transfer from his position at a high school to a middle school, which he alleged was a less prestigious position. The plaintiff in *Stewart* also alleged that the racially discriminatory transfer ignored the satisfaction he derived from being valued and needed at the high school. *Id*. The Third Circuit held that because job transfers were not listed as potentially actionable tangible actions in *Ellerth*, 524 U.S. at 761, Stewart could not base a claim on his transfer. *Stewart*, 655 Fed. App'x at 155.

The unwarranted material adverse action requirement has denied relief in cases in which employers relied on protected characteristics to deny employees job training, *Shackleford v. Deloitte & Touche, LLP*, 190

F.3d 398, 407 (5th Cir. 1999) (race discrimination), *Ford v. Cnty. of Hudson*, 729 Fed. App'x 188, 195 (3d Cir. 2018) (gender discrimination), and the option of choosing to work remotely, *Kelso v. Perdue*, No. 19-cv-3864, 2021 WL 3507683, at *5 (D.D.C. July 12, 2021) (race, age, and disability discrimination). Additionally, courts have denied relief in cases in which employers, based on race or sex, gave an employee a negative performance review, *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 n.11 (5th Cir. 1998) (race discrimination), forced employees to work in harsh weather conditions, *Peterson v. Linear Controls, Inc.*, 757 Fed. App'x 370, 373 (5th Cir. 2019) (race discrimination), *pet. for cert. dismissed*, 140 S. Ct. 2841 (2020) (Mem.), or placed an employee on probation, *Thompson v. Liberty Mut. Ins.*, No. 18-6092, 2021 WL 1712277, at *5 n.8 (D.N.J. Apr. 29, 2021) (pregnancy discrimination). None of these outcomes can be squared with the text or purpose of Title VII.

B. Such extra-statutory rules are incapable of uniform application.

The D.C. Circuit recognized in *Ortiz-Diaz v. United States Department of Housing & Urban Development*, 867 F.3d 70 (D.C. Cir. 2017) that the administration of a purported bright-line rule that discriminatory transfers without economic harm are beyond the reach of Title VII is problematic. The district court in *Ortiz-Diaz* held the plaintiff's lateral transfer did not amount to an adverse employment action and granted summary judgment for the employer. 75 F. Supp. 3d

561, 565 (D.D.C. 2014). On appeal, the D.C. Circuit acknowledged that, under its then-extant precedent (which it later overruled in *Chambers*) lateral transfers are ordinarily not changes in the terms, conditions, or privileges of employment, but reversed summary judgment and held that the allegation that the plaintiff sought to move away from a biased supervisor to avoid harm to his career advancement potential, rather than merely as a personal preference, was sufficient to state a claim, and in fact "falls within Title VII's heartland." 867 F.3d at 74–75. In his concurrence, then-Judge Kavanaugh noted that the uncertainty involved in drawing the line between actionable and non-actionable transfers militated in favor of establishing the clear principle that "[a]ll discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII." *Id.* at 81 (Kavanaugh, J. concurring).

The uncertainty created by this line-drawing leads courts to focus on egregious facts or "extraordinary circumstances," as the district court described them in *Ortiz-Diaz*, 75 F. Supp. 3d at 565, that might support finding that an unwanted transfer constitutes actionable discrimination. But as in other areas of the law, egregious facts do not "mark the boundary of what is actionable." *Harris.*, 510 U.S. at 22 (noting that the appalling conduct alleged in *Vinson* and other egregious harassment cases did not set the standard for what is actionable, and that a worker's emotional and psychological stability need not be destroyed to state a claim).

The same can be said here. Adherence to the straightforward language of the statute prohibiting discrimination because of race, sex or other protected characteristics in the terms, conditions, or privileges of employment will best serve the statutory purpose of eradicating employment discrimination. Plaintiffs in transfer cases, like all discrimination plaintiffs, will still have the burden of proving that the challenged employment action was taken because of their membership in a protected class and that burden will continue to serve as a sufficient bulwark against a flood of court challenges to employment decisions that are motivated by legitimate business purposes.

IV. CONTEMPORARY SOCIAL SCIENCE RESEARCH DEMONSTRATES, AND THE NOTED CASES ILLUSTRATE, THAT NON-ECONOMIC ASPECTS OF TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT ARE AS CRITICAL TO EMPLOYEES AS WAGES OR SALARIES.

When the Eighth Circuit decided *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997), the precedent cited in *Muldrow*, *see* Pet. App. 9a, social scientists had just begun examining conditions other than wages or salaries as factors in employees' sense of self-worth, motivation, job satisfaction and productivity. *See, e.g.*, Robert J. Bies and Thomas M. Tripp, *Two Faces of the Powerless: Coping with Tyranny*, *in* R. M. Kramer & M. A. Neale, eds., *Power and Influence in Organizations* 203–219 (Sage Pubs. 1998); Loraleigh Keashly et al.,

Abusive Behavior in the Workplace: A Preliminary Investigation, 9 Violence & Victims 341 (1994).[11]

In the twenty-five years since the *Ledergerber* decision, survey research on these issues has convincingly demonstrated that non-monetary elements of work are critical to employees' job satisfaction and performance. A comprehensive 2010 review of the social science literature on job satisfaction concluded that "in general[,] the findings [of the reviewed studies] suggested little relationship between level of pay and satisfaction with one's job or [with] one's pay." Timothy A. Judge et al., *The Relationship between Pay and Job Satisfaction: A Meta-analysis of the Literature*, 77 J. Vocational Behav. 157, 162–63 (2010).[12] A 2012 report on federal employment concluded that "[j]ob characteristics such as autonomy, feedback, skill variety, task significance, and task identity" have as much influence on employee motivation as monetary rewards. U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* at 30 (2012).[13]

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[11] *available at* https://www.researchgate.net/publication/15620880_Abusive_Behavior_in_the_Workplace_A_Preliminary_Investigation.

[12] *available at* https://www.sciencedirect.com/science/article/abs/pii/S0001879110000722.

[13] *available at* https://www.mspb.gov/studies/studies/Federal_Employee_Engagement_The_Motivating_Potential_of_Job_Characteristics_and_Rewards_780015.pdf.

A 2001 study, not limited to employment, provided new evidence that "warm, trusting, and supportive interpersonal relationships" are essential for human well-being, both "hedonic" (measured by pleasure attainment and pain avoidance) and "eudaimonic" (focused on meaning, self-realization, and full functioning). Richard M. Ryan and Edward L. Deci, *On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being*, 52 Ann. Rev. Psych. 141, 154 (2001).[14] And a 2003 study of workplace dynamics found that "individuals seek meaning through a connection with others" in their work. Amy Wrzesniewski et al., *Interpersonal Sensemaking and the Meaning of Work*, 25 Rsch. Org. Behav. 93, 135 (2003).[15]

An important 2006 study of American workplaces, using a new 21-item job design and satisfaction survey scale developed by the authors, cited the Ryan and Wrzesniewski findings and confirmed that "[t]hese kinds of positive work relationships are likely to be just as effective at producing [feelings of job satisfaction] as are the more traditionally studied motivational work characteristics." Frederick P. Morgeson and Stephen E. Humphrey, *The Work Design*

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[14] *available at* https://www.researchgate.net/profile/Edward-Deci/publication/12181660_On_Happiness_and_Human_Potentials_A_Review_of_Research_on_Hedonic_and_Eudaimonic_Well-Being/links/0c960529b5f3138337000000/On-Happiness-and-Human-Potentials-A-Review-of-Research-on-Hedonic-and-Eudaimonic-Well-Being.pdf.

[15] *available at* https://www.sciencedirect.com/science/article/abs/pii/S0191308503250036.

Questionnaire (WDQ): Developing and Validating a Comprehensive Measure for Assessing Job Design and the Nature of Work, 91 J. Applied Psych. 1321, 1329 (2006).[16]

Two key points emerge from the available social science. First, modern research strongly confirms that prosocial and antisocial behaviors in the workplace, and their constructive or destructive emotional consequences, are critically important to workers, often as or more important than wages or monetary benefits. Second, people value jobs for a variety of reasons, many of them intangible or values-based, and courts should not discount those reasons as mere personal preferences or discount as *de minimis* an employer's discriminatory attacks on them where employee compensation is not directly involved. On both these grounds, it would fly in the face of available science not to deem these important non-pecuniary aspects of work life to be "terms and conditions of employment" within the meaning of Section 703(a) of Title VII.

Petitioner Muldrow's desire to remain in a position that was less administrative and more prestigious, despite the equivalent compensation in the two positions, underscores the validity of these observations from social science research. *See* Pet. App. 10a. Likewise, the experiences of the security guard in *Stewart*, 655 Fed. App'x at 157 exemplify the reality that values

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[16] *available at* https://www.researchgate.net/publication/6698030_The_Work_Design_Questionnaire_WDQ_Developing_and_Validating_A_Comprehensive_Measure_for_Assessing_Job_Design_and_the_Nature_of_Work.

other than money weigh heavily in employees' assessment of the adversity of employers' discriminatory decisions.

This Court now has the opportunity to reaffirm that Title VII was enacted to repudiate all forms of discrimination in the terms and conditions of employment that lead to dignitary harms without the additional burden of separately proving the unlawful treatment caused a "significant disadvantage" beyond the discrimination itself.

CONCLUSION

For all the foregoing reasons, *Amici* respectfully request that the Court reject the extra-textual "significant disadvantage" standard and reverse the judgment below.

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