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Dogma, Discrimination, and Doctrinal Disarray: A New Test to Define Harm Under Title VII

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Dogma, Discrimination, and Doctrinal Disarray

A NEW TEST TO DEFINE HARM UNDER TITLE VII

"*When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.*"[1]

"*The Court's opinion is like a pirate ship.*"[2]

INTRODUCTION

The spirit of Title VII is breathtakingly simple. Congress enacted the statute as part of the Civil Rights Act of 1964 to establish "a national policy against discrimination."[3] To enforce this policy, an individual who believes they have suffered workplace discrimination can seek redress against their employer in federal court via a cause of action for disparate treatment, disparate impact, retaliation, and/or hostile work environment.[4] While each cause of action has its own unique test, all four share the same purpose: to eliminate the systematic pattern of discrimination from the workplace.[5]

For many years, federal courts have harmoniously required Title VII plaintiffs to show a threshold level of injury resulting from the alleged discrimination.[6] The significance of

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[1] Bostock v. Clayton Cnty, 140 S. Ct 1731, 1737 (2020).

[2] *Id.* at 1755–56 (Alito, J., dissenting).

[3] 29 C.F.R. § 1608.1(b) (2024).

[4] *What You Need to Know About Title VII of the Civil Rights Act*, THOMSON REUTERS (May 10, 2022), https://legal.thomsonreuters.com/en/insights/articles/what-is-title-vii-civil-rights-act [https://perma.cc/FU2A-L69K].

[5] *See* 29 C.F.R. § 1608.1(b) (2024); *see also* Ricci v. DeStefano, 557 U.S. 557, 580 (2009) (explaining that the "important purpose of Title VII" is for "the workplace [to] be an environment free of discrimination").

[6] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006); Quiles-Quiles v. Henderson, 439 F.3d 1, 7 (1st Cir. 2006); McGullam v. Cedar Graphics, Inc., 609 F.3d 70, 77 (2d Cir. 2010); Perry v. Harvey, 332 F. App'x. 728, 730 (3d Cir. 2009); E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008); Lauderdale v. Tex. Dep't of Crim. Just., Institutional Div., 512 F.3d 157, 163 (5th Cir. 2007); Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999); Ford v. Minteq Shapes & Servs., Inc., 587 F.3d 845, 848 (7th Cir. 2009); Nitsche v. CEO of Osage Valley Elec. Co-op, 446 F.3d 841, 846 (8th Cir. 2006); Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir.

this harm requirement cannot be understated. For as the Supreme Court recently reiterated, a harm requirement is a necessary component of *any* federal statute.[7] Without it, the plaintiff lacks standing to sue.[8] "No concrete harm, no standing."[9] Applying this rule to Title VII, federal courts require plaintiffs to show that the complained of discriminatory acts culminated in an "adverse employment action."[10] The chain works as follows: a plaintiff who fails to make a showing of an adverse employment action fails to show concrete harm.[11] And a plaintiff who fails to show concrete harm lacks Article III standing to sue in federal court.[12]

This note argues that using the adverse employment action test to define harm in Title VII cases is fundamentally flawed. At the outset, the test is a judicially invented power grab found nowhere in the statutory language.[13] What is more, to assess whether the plaintiff has shown harm, the test largely ignores the acts of discrimination underlying a plaintiff's claim and instead focuses on whether there has been a tangible change to the plaintiff's working conditions.[14] This places an incredibly high bar on Title VII plaintiffs, inconsistent with the goals of the Civil Rights Act and the reality of the subtle ways in which discrimination pervades the modern day workplace.[15] Consequently, federal courts award summary judgment to employer-defendants at greater rates "than defendants in any

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2000); Morris v. City of Colorado Springs, 666 F.3d 654, 663 (10th Cir. 2012); Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1302 (11th Cir. 2007); Baird v. Gotbaum, 792 F.3d 166, 168 (D.C. Cir. 2015). Because various courts refer to the same test in slightly different terms, this note will defer to the weight of authority, using the phrase "adverse employment action."

[7] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).

[8] *See id.* ("Article III standing requires a concrete injury even in the context of a statutory violation.").

[9] *Id.* at 2200.

[10] *See supra* note 6 (collecting cases).

[11] *See White*, 548 U.S. at 68 (noting a requirement of material adversity "is important to separate significant from trivial harms" and that "petty slights, minor annoyances, and simple lack of good manners" do not suffice to meet the burden of material adversity).

[12] *TransUnion*, 141 S. Ct. at 2200.

[13] *See* 42 U.S.C. § 2000e-2 (omitting mention of an adverse employment action requirement); *see also* Esperanza N. Sanchez, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 CATH. U. L. REV. 575, 578 (2018).

[14] *See* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 347 (1999). The body of job-transfer cases, which forms the focus for this note's arguments regarding the problems of the adverse employment action test, however, best illustrates this principle. A job transfer involving a decrease in pay or benefits constitutes an adverse employment action, whereas a mere lateral job transfer does not, no matter the severity of the acts of discrimination underlying the transfer. *See* cases cited *infra* note 19.

[15] Nancy Gertner, *Losers' Rules*, 122 YALE L. J. 109, 110 (2012).

other substantive area of federal law."[16] Surely, this could not be what Congress intended when taking a statutory stand against workplace discrimination.[17]

To highlight the particular problems of the adverse employment action test, this note explores a recent circuit split over the applicability of the test to lateral job-transfers; that is, where an employer transfers an employee to a new position with equal pay or benefits or fails to transfer an employee despite the employee's request.[18] Historically, federal courts have used Title VII's adverse employment action test to preclude employer liability in these cases, finding that without reduced pay or benefits, there is no adverse employment action.[19] And for over twenty years, the Court of Appeals for the District of Columbia's

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[16] Sanchez, *supra* note 13, at 587.

[17] *See* 29 C.F.R. § 1608.1(b) (2024).

[18] *See, e.g.*, Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999) (providing a definition of a lateral transfer).

[19] *See* Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) (holding Title VII's provisions cover only those "employer actions that would have been materially adverse to a reasonable employee or job applicant"); Marrero v. Goya of P. R., Inc., 304 F.3d 7, 23 (1st Cir. 2002) ("[A] *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action.") (emphasis in original); Kessler v. Westchester Cnty. Dep't of Soc. Servs., 461 F.3d 199, 204–05 (2d Cir. 2006) ("A purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action."); Dilenno v. Goodwill Indus. of Mid-Eastern Pa., 162 F.3d 235, 236 (3d Cir. 1998) ("It is important to take a plaintiff's job-related attributes into account when determining whether a lateral transfer was an adverse employment action."); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376–77 (4th Cir. 2004) (holding that an employer's reassignment of a Black employee was not an "adverse employment action" because the employee "retained his position . . . and received the same pay, benefits, and other terms and conditions of employment"); Alvarado v. Tex. Rangers, 492 F.3d 605, 613–14 (5th Cir. 2007) ("[A] transfer to a different position can be 'adverse' [only] if it involves a reduction in pay, prestige, or responsibility. Whether the new position is worse is an objective inquiry."); Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885 (6th Cir. 1996) ("[R]eassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims."); Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002) ("[A] purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance . . . cannot rise to the level of a materially adverse employment action."); Muldrow v. City of St. Louis, 30 F.4th 680, 688 (8th Cir. 2022) ("[A]n employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action."); Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 n.6 (10th Cir. 1998) ("If a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer adverse employment action."); Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1450 (11th Cir. 1998) (""The clear trend of authority is to hold that' a purely lateral transfer is not an adverse employment action."). The Ninth Circuit seems to be the exception to this trend, ruling that a purely lateral job transfer may constitute an adverse employment action. *See* Ray v. Henderson, 217 F.3d 1234, 1241 (9th Cir. 2000).

decision in *Brown v. Brody* found the same.[20] Working from Title VII's general harm requirement, the *Brown* court formulated the bright-line rule that a plaintiff in a job-transfer case must show some form of "objectively tangible harm" resulting from the transfer or failure to transfer.[21] Without a showing of this "objectively tangible harm" (the court's substitute phrase for an adverse employment action),[22] a plaintiff has no Title VII claim, no matter how significant the evidence of discrimination against them may be.[23] Again, it is hard to see how this approach effectuates a national policy against discrimination.[24]

Since 1999, *Brown*'s bright-line rule played a crucial part in Title VII litigation before the DC Circuit. But all of that changed in June 2022, when the Circuit Court of Appeals for the District of Columbia decided *Chambers v. District of Columbia*.[25] There, in a 4-3 split, the DC Circuit held that "an employer that transfers an employee or denies an employee's transfer request because of the employee's race, color, religion, sex, or national origin violates Title VII," even if the employee makes no showing of any "objectively tangible harm."[26] In no uncertain terms, the court overruled its twenty-three year precedent in *Brown*, calling its "objectively tangible harm" rule—and thus the adverse employment action test—a mere "judicial gloss that lacks any textual support."[27] Moreover, the DC Circuit split from the Supreme Court and all but one other circuit court of appeals, which otherwise continue to adhere to *Brown* and the adverse employment action test or some like-variation.[28] Indeed, *Chambers* is a cut against the grain.

In using *Brown* and *Chambers* to highlight the problems with the adverse employment action test, this note reaches the subsidiary conclusion that the DC Circuit wrongly decided *both* cases. It first argues the DC Circuit wrongly decided *Brown* because of the court's excessive reliance on what is already a

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[20] *See Brown*, 199 F.3d at 452 (requiring Title VII plaintiffs to show they suffered an adverse employment action regardless of whether they brought a claim for discrimination or retaliation).

[21] *See id*. at 457.

[22] While the court differs from the traditional "adverse employment action" language, using "objectively tangible harm" instead, the two phrases have the same meaning, requiring Title VII plaintiffs to show some form of "harm" resulting from the transfer. *See id*. at 452 (finding that Title VII plaintiffs must show "that they have been subjected to some sort of adverse personnel or employment action" under a subheading titled "The Need for an Adverse Personnel Action").

[23] *See id.*

[24] *See* 29 C.F.R. § 1608.1(b) (2024).

[25] Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2022).

[26] *Id*. at 872.

[27] *Id*. at 875.

[28] *See* cases cites *supra* note 19 and accompanying text.

fundamentally flawed adverse employment action test.[29] It then argues that *Chambers*, in claiming to remedy *Brown* and the shortcomings of the adverse employment action test,[30] created just as significant a problem, with the potential to eliminate the harm requirement out of Title VII altogether if followed.[31] This would create doctrinal disarray by violating the dogmatic "no concrete harm, no standing" rule.[32] Accordingly, to present a solution to this predicament, this note proposes a new test for federal courts to follow to bring the various Title VII claims into conformity while reconciling the concerns of both *Brown* and *Chambers*, promoting judicial economy, and effectuating the policy of Title VII. This solution is all the more timely in light of the Supreme Court recently granting certiorari to an Eighth Circuit lateral-job transfer case, *Muldrow v. City of St. Louis*.[33] Will the Supreme Court continue to apply the fundamentally flawed adverse employment action rule? Or will it finally devise an appropriate alternative?

The note proceeds in three major parts, each with three sections. Part I provides a framework to set up the arguments of Parts II and III by providing background on the legal principle supporting a general harm requirement in every federal statute and the *Brown* and *Chambers* decisions. Part II urges for a new test to define harm under Title VII by arguing that the Supreme Court and courts of appeals are primed to follow *Chambers*—a result that would throw Title VII into doctrinal disarray. Finally, Part III presents a new test to analyze harm under Title VII in line with the underlying congressional intent behind the Act to stamp out discrimination.[34]

A simple, common-sense approach to Title VII interpretation should not be beyond the purview of the judiciary.

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[29] *See* discussion *infra* Section II.C.

[30] *Chambers*, 35 F.4th at 874–75.

[31] *See* discussion *infra* Section II.C.

[32] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

[33] *See* Muldrow v. City of St. Louis, Missouri, 143 S. Ct. 2686 (2023) (Mem). Specifically, the Supreme Court granted certiorari on the question of: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?" *See id.* This is an interesting framing of the issue given that the phrase "significant disadvantage" seems to replace "adverse employment action," which was the standard the Eighth Circuit applied. *See* Muldrow v. City of St. Louis Missouri, 30 F.4th 680, 687–88 (8th Cir. 2022). The Supreme Court has not used the phrase "significant disadvantage" in any Title VII case, so however the Court comes out on the issue will create new Title VII terminology. In line with this note's arguments, hopefully the Court will answer the question, as phrased, in the affirmative, and create a new alternative.

[34] *See* 29 C.F.R. § 1608.1 (2024); *see also* Ricci v. DeStefano, 557 U.S. 557, 580 (2009).

I. BACKGROUND ON DE MINIMIS HARM, *BROWN*, AND *CHAMBERS*

Title VII is not interpreted in a vacuum. It is a federal statute and is interpreted as such. But to understand its meaning and to understand how it has been applied to *Brown* and *Chambers*, the dogmatic truth of de minimis harm underlying all federal statutes must first be explored.[35]

A. De Minimis Harm

Federal courts have read general harm requirements into statutes for hundreds of years.[36] In the 1796 case of *Ware v. Hylton*, the Supreme Court first employed the idea of *de minimis non curat lex*, calling it even then an "old law maxim."[37] The Latin phrase, hereinafter referred to as its common abbreviation, "de minimis harm," means the law "does not [] account [for] . . . matters of little or no value or importance,"[38] or, as the Supreme Court said nearly two hundred years later, "the law cares not for trifles."[39] Put another way, the maxim expresses the deeply fundamental rule that the law does not give recourse to every wrong—there must be *some* threshold injury.[40] It is a building block to many legal concepts, underpinning first-year law student theories in criminal and tort law.[41]

Since *Ware*, the Supreme Court has explicitly applied the de minimis principle to analyze a variety of federal statutes, including *inter alia* the Clean Air Act,[42] the Interstate Commerce

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[35] *See* Wisc. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ("[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') 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.").

[36] *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 268 (1796) (decided 228 years ago).

[37] *Id.*

[38] INC. COUNS. L. REPORTING, DE MINIMIS NON CURAT LEX (2022), https://www.iclr.co.uk/knowledge/glossary /de-minimis-non-curat-lex/ [https://perma.cc/NRQ5-QB6R]; *see also De Minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[39] *Wisc. Dep't of Revenue*, 505 U.S. at 231.

[40] *See* sources cited *supra* note 38.

[41] *See* MODEL PENAL CODE § 2.12 (AM. L. INST. 1962) ("The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct . . . *did not actually cause* or threaten the *harm* or evil sought to be prevented by the law defining the offense or did so only to an extent too *trivial* to warrant the condemnation of conviction.") (emphasis added); *see also* RESTATEMENT (SECOND) OF TORTS § 436(A) (AM. L. INST. 1965) (applying de minimis harm to torts resulting in emotional disturbance alone).

[42] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 332–33 (2014).

Tax Act,[43] and the Fair Labor Standards Act,[44] while reminding us that "the roots of the *de minimis* doctrine stretch to ancient soil."[45] In perhaps its strongest endorsement of the principle, the Supreme Court, in the 1992 decision of *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, stated "the venerable maxim *de minimis non curat lex* . . . 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."[46] Regardless of the exact articulation, the meaning is the same: no threshold injury, no legal recourse.[47] Or to use the Supreme Court's recent phrasing: "[n]o concrete harm, no standing."[48]

Title VII is no exception to the de minimis principle. Although the Supreme Court has never expressly used the words de minimis when analyzing Title VII, the Act *cannot* be exempted from the principle because, as the Supreme Court has held, no statute is exempt, unless otherwise stated.[49] The nexus between the de minimis principle and the adverse employment action test can be traced to the 1989 seminal decision of *Price Waterhouse v. Hopkins*. There, the Court first used the phrase "adverse employment decision" to describe the necessary threshold harm a plaintiff must show to prove a Title VII retaliation case.[50] Two months later, in *Wards Cove Packing Co., Inc. v. Atonio*, the Court tweaked the language to "adverse employment action," clarifying that the test similarly applied to disparate treatment cases as well.[51] As applied today, the test requires plaintiffs to show not only discrimination, but also some harm in the form of an adverse employment action, except in limited cases dealing with quid pro quo sexual advances by a supervisor.[52]

Since *Atonio*, the Supreme Court has implicitly clarified that the adverse employment action test derives from the same reasoning as the de minimis rule. The Court has noted the test is required to separate actionable Title VII conduct from "trivial harms" because Title VII "does not set forth 'a general civility

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[43] *Wisc. Dep't of Revenue*, 505 U.S. at 231.
[44] Sandifer v. U.S. Steel Corp., 571 U.S. 220, 233 (2014).
[45] *Id.*
[46] *Wisc. Dep't of Revenue*, 505 U.S. at 231.
[47] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).
[48] *Id.*
[49] *See supra* note 35 and accompanying text.
[50] Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).
[51] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989).
[52] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746–47 (1998).

code for the American workplace.'"[53] Thus, even if not explicitly stated, Title VII necessarily imposes a de minimis harm threshold: any plaintiff who shows they suffered an adverse employment action has suffered sufficient harm.[54] Anyone else who does not meet this threshold has suffered de minimis harm, lacks Title VII standing, and is thus left without recourse in federal court.[55]

B. Brown *and its Endorsement of the de Minimis Harm Principle*

One year after the Supreme Court clarified that Title VII is not a "general civility code,"[56] the US Court of Appeals for the District of Columbia's decision in *Brown v. Brody* highlighted the consequences of a de minimis principle in Title VII cases.[57] There, the court faced the issue of whether a plaintiff had a valid Title VII claim for retaliation, sex discrimination, and racial discrimination based on her involuntary transfer to another position with the same pay and benefits—a "lateral transfer."[58] The plaintiff, Regina C. Brown, a fifty-year-old Black woman qualified by three different master's degrees, was a loan officer at the Export-Import Bank in Washington, DC.[59] In September of 1993, Ms. Brown's supervisor, a white male, reassigned her to a different division of the bank, which Ms. Brown objected to on the grounds that it was a "less prestigious" position.[60] The new position, however, included the exact same pay and benefits as Ms. Brown's old position.[61] Ms. Brown then repeatedly applied to a separate division, and the same superiors responsible for her original transfer continuously denied the requests.[62] Subsequently, Ms. Brown filed a formal discrimination complaint, alleging sex and racial discrimination.[63] In the following weeks, Ms. Brown's supervisors responded by giving Ms. Brown the lowest performance evaluations "she had ever received" on the job.[64] Additionally, Ms. Brown's supervisors sent

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[53] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

[54] *Atonio*, 490 U.S. at 660.

[55] *See id.*; *see also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

[56] *Oncale*, 523 U.S. at 80.

[57] Brown v. Brody, 199 F.3d 446 (D.C. Cir. 1999).

[58] *Id.* at 455.

[59] *Id.* at 448.

[60] *Id.* at 449.

[61] *Id.* at 455.

[62] *Id.* at 450.

[63] *Id.* at 449.

[64] *Id.*

her an admonishment letter citing a number of "separately memorialized conflicts" regarding Ms. Brown's complaints of her work position.[65] Ms. Brown then sued under Title VII for racial and sex discrimination. [66] The district court granted summary judgment to Ms. Brown's employer.[67]

On appeal, the Court of Appeals for the District of Columbia affirmed, finding the position Ms. Brown's supervisors transferred her to was not a "materially adverse employment action" because the transfer was not a demotion.[68] Instead, the transfer was purely lateral.[69] In so holding, the court articulated the following rule, strongly endorsing Title VII's adverse employment action test, and implicitly, the de minimis harm principle:[70]

> [A] plaintiff who is made to undertake or who is denied a lateral transfer—that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other *materially adverse consequences* affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.[71]

Today, *every* court of appeals—except the Ninth Circuit—has similarly followed the *Brown* rule or a like variation, declining to recognize harm in a purely lateral job-transfer case.[72] The chain of inferences works as follows: if there is no showing of reduced pay or benefits, there is no adverse employment action.[73] If there is no adverse employment action, the injury is trivial and assumed to be de minimis.[74] And de minimis harm is simply not enough to confer Article III standing.[75] The evidence Ms. Brown submitted of

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[65] *Id.* at 450.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 455–56.

[69] *Id.* at 456.

[70] Despite its use of slightly different language in framing its holding, the decision makes explicit attempts to ground its reasoning in the requirement that a plaintiff must show they suffered an adverse employment action. *See, e.g.*, *id.* at 453 ("A common element required for discrimination and retaliation claims against federal employers, and private employers, is thus some form of legally cognizable *adverse* action by the employer.") (emphasis added); *see also id.* at 455 ("In short, in Title VII cases such as Brown's, federal employees like their private counterparts must show that they have suffered an adverse personnel action in order to establish a prima facie case under the *McDonnell Douglas* framework.").

[71] *Id.* at 457 (emphasis added).

[72] *See* cases cited *supra* note 19 and accompanying text.

[73] *Brown*, 199 F.3d at 457.

[74] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

[75] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

discrimination—the targeting of her through poor performance evaluations and an admonishment letter—were irrelevant, with the court blanketly ruling that she did not have an actionable injury.[76]

C. Chambers *and the Erosion of the de Minimis Harm Principle Through Textualist Principles*

In June of 2022, nearly twenty-three years after *Brown*, the DC Circuit once again faced the issue of whether a plaintiff who undertakes or is denied a lateral job-transfer constitutes an adverse employment action in *Chambers v. District of Columbia*.[77] However, instead of reaffirming *Brown* and the adverse employment action rule, the court eliminated it, overruling *Brown* within the first two sentences of its opinion.[78] In doing so, the DC Circuit broke from every court of appeals that looked to *Brown* as persuasive authority in using the adverse employment action test to cut off employers from liability in lateral job-transfer cases.[79] The DC Circuit also created a conflict amongst the circuit courts in interpreting the text of Title VII, more colloquially known as a "circuit split."[80]

Unlike *Brown*, which dealt with an employee's forced lateral transfer, *Chambers* dealt with the denial of an employee's repeated requests for a lateral transfer.[81] The plaintiff, Mary Chambers, was a twenty-year tenured investigator for the District of Columbia Attorney General's office.[82] After complaining of an excessive caseload, Ms. Chambers sought multiple transfers to different units within the office, which her supervisor repeatedly denied.[83] Ms. Chambers then filed a complaint with the Equal Employment Opportunity Commission, the executive agency responsible for enforcing Title

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[76] *Brown*, 199 F.3d at 458.

[77] Chambers v. District of Columbia, 35 F.4th 870, 872 (D.C. Cir. 2022).

[78] *Id.*

[79] For a few cases from other circuits which cite *Brown*, see e.g., Serna v. City of San Antonio, 244 F.3d 479, 483 (5th Cir. 2001) (citing *Brown* for the proposition that "[a] plaintiff must establish that his transfer was equivalent to one of those actions to show that he has suffered an adverse personnel action"); Keeton v. Flying J, Inc., 429 F.3d 259, 273 (6th Cir. 2005) (Gilman, J., dissenting) (citing Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998), in further support for the proposition that "a truly lateral transfer cannot be adverse").

[80] *See* Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1403 (2020).

[81] *Chambers*, 35 F.4th at 873.

[82] *Id.*

[83] *Id.*

VII,[84] and subsequently brought a Title VII action for sex discrimination and retaliation.[85] Specifically, Ms. Chambers contended "that similarly situated male employees had been granted transfers they requested," and thus, by denying her requests, the Attorney General's office discriminated against her.[86] The district court, following *Brown*, granted summary judgment to the District of Columbia, reasoning that Ms. Chambers "had proffered no evidence that the denial of her transfer requests, even if motivated by discriminatory animus, caused her 'objectively tangible harm.'"[87]

Subsequently, the court of appeals, in a 4-3 reversal, employed a textualist reading of Title VII to lambast the very *Brown* rule it created itself twenty-three years prior.[88] Starting "by parsing the statute" and "giving undefined terms their 'ordinary meaning,'"[89] the majority called *Brown*'s harm requirement a mere "judicial gloss that lacks any textual support."[90] To the majority, the question of whether Title VII had a de minimis threshold was irrelevant.[91] Ms. Chambers submitted evidence that the District of Columbia denied Ms. Chambers's repeated requests due to a discriminatory motive which, in the majority's view, was sufficient to hold the District of Columbia liable.[92]

By contrast, the dissent fought to uphold *Brown*, arguing its objective harm requirement—like the adverse employment action test as a whole—was supported by "the bedrock principle that Title VII is not a 'general civility code' for the workplace."[93] The dissent explicitly emphasized the principle of de minimis harm, arguing that it precluded plaintiffs like Ms. Chambers from relief under Title VII because Ms. Chambers, like Ms. Brown, did not face any change to her employment terms or conditions resulting from the transfer/denied transfer.[94] Thus,

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[84] *Overview*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview [https://perma.cc/YB8B-WGWF].

[85] *Chambers*, 35 F.4th at 873.

[86] *Id.*

[87] *Id.*; *see also* Chambers v. District of Columbia, 389 F. Supp. 3d 77, 93 (D.D.C. 2019).

[88] Despite many debates about what textualism is and is not, textualism can be defined as a method of statutory interpretation that considers only the "'objective' meaning of the statutory text." *See* Caleb Nelson, *What Is Textualism*, 91 U. VA. L. REV. 347, 348 (2005).

[89] *Chambers*, 35 F.4th at 874.

[90] *Id.* at 875.

[91] *Id.* ("[W]e need not decide today whether Title VII includes a de minimis exception.").

[92] *Id.* at 873–74.

[93] *Id.* at 886 (Katsas, J., dissenting) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)).

[94] *Id.* at 903–04 (Katsas, J., dissenting).

Ms. Chambers, again, like Ms. Brown, suffered only de minimis harm.[95] Finally, the dissent reasoned that the majority's view that proving discrimination alone was sufficient to confer Title VII standing without any further showing of harm would expand Title VII to support litigation for any "petty slight[]" or "minor annoyance[]" at work.[96] "Why throw the law into such disarray?" the dissenting judges asked the majority.[97]

In sum, the *Chambers* majority purportedly used textualism to read the adverse employment action in job-transfer cases right out of the statute and overrule *Brown*, finding that the denial of Ms. Chambers's requests for transfers met the threshold for Title VII standing.[98] Yet, to be explored in the next part, it also opened the door for the erosion of the adverse employment action test altogether and proposed no new standard to define harm in lateral job-transfer cases, much less define harm in general under Title VII.[99] Conversely, the dissent found the District of Columbia's actions did not sufficiently constitute material harm, and thus, Ms. Chambers suffered merely a de minimis injury insufficient to be awarded relief under Title VII.[100] And with that, an overrule of precedent created a circuit split.

II. *CHAMBERS'S* SLIPPERY SLOPE: HOW *CHAMBERS* HAS THE ABILITY TO THROW TITLE VII INTO DOCTRINAL DISARRAY

Chambers opens the door to an enormous range of potential consequences if followed by other courts. This part explains how these potential consequences could come to fruition through new Supreme Court and circuit court doctrine and concludes by arguing how such consequences stand to justify the need for a new test.[101]

A. How the Supreme Court is Primed to Follow Chambers

The Supreme Court is the first likely candidate to follow *Chambers*. Given that *Chambers* created a circuit split with respect to job-transfer cases, the case is ripe for Supreme Court

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95 *Id.* at 904.
96 *Id.* at 902.
97 *Id.* at 887.
98 *Id.* at 875 (majority opinion).
99 *Id.*
100 *Id.* at 903–04 (Katsas, J., dissenting).
101 *See infra* part III.

review.[102] Upon review—whether by direct appeal or by deciding an analogous case, such as *Muldrow*[103]—it is not difficult to imagine a scenario where the Supreme Court endorses the reasoning of *Chambers*, and, in turn, dramatically changes Title VII law by overruling the applicability of the adverse employment test to job-transfer cases or the test altogether. This is because *Chambers* mimics the same textualist reasoning familiar to the Supreme Court. In its most recent Title VII landmark decision, *Bostock v. Clayton County*,[104] the Supreme Court purportedly applied textualist principles to the statute, continuously referring to the "ordinary public meaning" of the text, while refusing to draw from extratextual sources.[105] However, instead of using textualism to take a narrow, conservative reading,[106] the Court extended Title VII's prohibition on sex discrimination to protect against discrimination on the basis of LGBTQ status—a distinction that was not previously recognized.[107] Thus, the Court applied a traditionally conservative approach to a progressive end.

The popularity of *Bostock* and its similarity to *Chambers* makes it more probable that the Supreme Court will use the former's textualist reasoning to affirm the latter.[108] Since *Bostock*, every court of appeals has cited the decision, giving positive treatment to not only its disposition in Title VII cases, but also its purported textualist approach to statutory

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[102] *See* Sassman, *supra* note 80, at 1403 (explaining that the Supreme Court often resolves "conflicts among the courts of appeals" created by circuit splits).

[103] *See supra* note 33 and accompanying text.

[104] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[105] *See id.* at 1738. In summation, Justice Gorsuch concludes: "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Id.* at 1754. However, whether the reasoning conformed to "true" principles of textualism would be one up for debate by the experts of their own method of statutory interpretation. Justice Alito, dissenting, lamented Justice Gorsuch's approach, arguing "[t]he Court attempts to pass of its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society." *See id.* at 1755–56 (Alito, J., dissenting).

[106] *See, e.g.*, Paul Killbrew, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U L. REV. 1895, 1898 (2007) (noting that "many commentators have noted that those most closely identified with textualism are politically conservative" and that "empirical evidence also suggests that, aside from the fact that textualist judges are generally conservative, the use of textualist methods is disproportionately associated with conservative outcomes in certain cases").

[107] *See Bostock*, 140 S. Ct. at 1742.

[108] This is true because the Supreme Court would simply follow its own reasoning to affirm *Chambers* and *Bostock* at the same time.

interpretation.[109] Similarly, *Chambers* followed the trend, citing *Bostock* and endorsing its means: using textualism to expand Title VII's protections based on a purported textualist reading of the Act, effectuating the "ordinary meaning" of its terms.[110]

Because of the similarity of *Bostock* and *Chambers* and because *Chambers* created a circuit split regarding its approach to the adverse employment action rule,[111] it is not difficult to imagine the Supreme Court following *Chambers* to some degree. If the Supreme Court does so, the least disruptive scenario would be that a Title VII plaintiff would no longer need to show an adverse employment action in a lateral job-transfer case.[112] Yet still, this would overturn the law of every other court of appeals, less the Ninth and DC Circuit.[113] On the other hand, the most disruptive scenario would be Supreme Court taking a broad reading of *Chambers* and using its similar textualist reading of Title VII to read the adverse employment action requirement right out of the statute.[114] While this would cure the shortcomings of the adverse employment action test, it would eliminate the harm requirement from Title VII cases and violate the bedrock de minimis "[n]o concrete harm, no standing" rule.[115] This would leave the Supreme Court in a pickle. Unless the Court provides an alternative test, a conservative principle of statutory interpretation would radically change Title VII, expanding its scope to practically unlimited ends. The result would be the *Chambers* dissenting justices' worst nightmare: that Title VII would, in fact, become a "general civility code," opening the federal court floodgates to Title VII actions predicated on mere de minimis injuries.[116]

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[109] *See, e.g.*, Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 271 (1st Cir. 2022); A.R. v. Conn. State Bd. of Educ., 5 F.4th 155, 166 (2d Cir. 2021); United States v. Jabeth, 974 F.3d 281, 292 (3d Cir. 2020); Grimm v. Glouchester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020); Olivarez v. T-mobile USA, Inc., 997 F.3d 595, 598 (5th Cir. 2021); Doe v. City of Detroit, 3 F.4th 294, 300 n.1 (6th Cir. 2021); White v. United Airlines, Inc., 987 F.3d 616, 624 (7th Cir. 2021); School of the Ozarks, Inc. v. Biden, 41 F.4th 992, 995–96 (8th Cir. 2022); Doe v. Snyder, 28 F.4th 103, 113–14 (9th Cir. 2022); Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1028 (10th Cir. 2021); Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, 46 F.4th 1268, 1275 (11th Cir. 2022); Chambers v. District of Columbia, 35 F.4th 870, 874 (D.C. Cir. 2022); Gibson v. Off. of Personnel Mgmt., 825 Fed. Appx. 890, 891 (Fed. Cir. 2020).

[110] *See Bostock*, 140 S. Ct. at 1750; *Chambers*, 35 F.4th at 874.

[111] *See* discussion *infra* section I-0.

[112] *See Chambers* general holding. *Chambers*, 35 F.4th at 872.

[113] *See* cases cited *supra* note 19.

[114] Such reasoning would follow *Chambers*, arguing that proof of discrimination is enough and "[a]ny additional requirement, such as *Brown*'s demand for 'objectively tangible harm,' is a judicial gloss that lacks any textual support." *Chambers*, 35 F.4th at 875.

[115] TransUnion LLC v. Ramirez, 141 S. Ct 2190, 2200 (2021).

[116] *See Chambers*, 35 F.4th at 886 (Katsas, J., dissenting).

B. How the Courts of Appeals are Primed to Follow Chambers

The second most likely candidate to follow *Chambers* would be any of the other courts of appeals, particularly depending on how narrow or broad the Supreme Court's ruling in *Muldrow* will be.[117] This is because while the majority in *Chambers* applied their reasoning to only transfers, they explicitly dodged the question of whether Title VII as a whole has a de minimis harm requirement, leaving it an open question for other circuit courts to answer.[118] The *Chambers* reasoning thus purported to effectuate the ordinary meaning and plain text of the statute while deliberately ignoring the most fundamental part of any statute—that the principle of de minimis harm, "assumed to be incorporated in every statute," requires at least some objective harm in order to support a cause of action.[119] Accordingly, the majority invites other courts not only to adopt its apparent "*per se* rule" eliminating the harm requirement for Title VII discriminatory job-transfer cases but also, perhaps, to eliminate the harm requirement from Title VII altogether.[120] Once again, following this approach would violate the de minimis "[n]o concrete harm, no standing" rule.[121] And even if a circuit chooses not to eliminate the harm requirement from Title VII cases, there is the risk of circuit courts applying *Chambers* piecemeal to certain types of employment actions one by one, creating an unpredictable set of rules that vary by circuit.

C. The Need for a Harm Requirement in Title VII and for a New Approach

The high probability that the Supreme Court and/or other courts of appeals will follow *Chambers* in some form poses a significant threat to the doctrinal stability of Title VII. Any following of *Chambers* by a different court of appeals would further the circuit split. Any following by the Supreme Court would affirmatively change how courts are required to interpret

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[117] *See supra* note 33 and accompanying text.

[118] *Id.* at 875 (stating "we need not decide today whether Title VII includes a de minimis exception").

[119] *Id.*; *see also* Wisc. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).

[120] Jonathan A. Segal, *Worker Bias Claims in the D.C. Circuit—No Harm, But a Foul?*, BLOOMBERG L. (July 8, 2022, 4:00 AM), https://news.bloomberglaw.com/daily-labor-report/worker-bias-claims-in-the-d-c-circuit-no-harm-but-a-foul [https://perma.cc/WG35-V5BZ].

[121] TransUnion LLC v. Ramirez, 141 S. Ct 2190, 2200 (2021).

harm in Title VII cases.[122] In either scenario, there is truly no end to how much Title VII litigation would ensue in a world where aggrieved individuals file tens of thousands of discrimination complaints each year.[123] Courts would be left scrambling to determine what *exactly* Title VII means. Doctrinal disarray would ensue.

For the sake of judicial economy, to preserve doctrinal stability, and with due regard to the principle of de minimis harm, this note finds that there must be *some* harm requirement in Title VII. Dogmatic, centuries-old doctrine demands it.[124] And outside the DC Circuit, all the other circuits impose a harm requirement by asking whether there was an adverse employment action.[125] Thus, the most sensible approach would be for federal courts to reject the reasoning of *Chambers* as ignoring the principle of de minimis harm and to continue assessing harm under the adverse employment action test. After all, such an approach would keep *Chambers* as nothing but a cut against the grain and let the other various circuits continue imposing an adverse employment action test.

However, sometimes the most sensible choice is not the right one. Courts *should not* continue applying the adverse employment action test—whether to job-transfer cases or in general—because the adverse employment action test is fundamentally flawed. To that end, *Chambers* was right in spirit when it advocated that the adverse employment action ("objectively tangible harm") test had no purpose.[126] Where *Chambers* went wrong, however, was in failing to replace the test with a new one, by instead hinting that Title VII may not have a harm requirement at all.[127] In this regard, this note seeks to correct *Chambers*'s mistakes before it sends Title VII into limbo.[128]

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[122] This is because the Supreme Court is the arbiter of federal law.

[123] EQUAL EMP. OPPORTUNITY COMM'N, CHARGE STATISTICS (CHARGES FILED WITH THE EEOC) FY 1997 THROUGH FY 2021 (2021), https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 [https://perma.cc/Q3T6-W936].

[124] Referring to the de minimis principle. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 268 (1796) (calling the doctrine of de minimis harm, even in 1796, an "old law maxim").

[125] *See* cases cited *supra* note 6.

[126] Chambers v. District of Columbia, 35 F.4th 870, 875 (D.C. Cir. 2022) (reasoning the "objectively tangible harm" requirement of *Brown* was not implied from the plain reading of Title VII).

[127] *See id.* at 879–80 ("The plain text . . . contains no requirement that an employee alleging discrimination in the terms or conditions of employment make a separate showing of 'objectively tangible harm.'").

[128] *See* discussion *infra* sections II–0 and II–0.

The problem with the adverse employment action test in disparate treatment, impact, and retaliation claims is that it ignores the congressional intent behind Title VII: to stamp out workplace discrimination on its face.[129] As its implementing regulations suggest, Congress passed Title VII to establish "a national policy against discrimination" and to eliminate the systematic "pattern of restriction, exclusion, discrimination, segregation, and inferior treatment" in the workplace.[130] Supreme Court precedent has repeatedly affirmed these broad goals, noting that in passing the statute, Congress sought to create "a comprehensive solution for the problem of invidious discrimination in employment,"[131] "strike at the entire spectrum of disparate treatment" in work environments,[132] and "eliminate the discriminatory effects of the past."[133] The Court has further cited to the congressional record of the statute for its authority, noting the underlying purpose of the Act is to prevent employers from "mak[ing] a distinction" or a "difference in treatment or favor."[134] It is thus apparent that whatever purpose Title VII had on creating better tangible conditions for the workplace came incidentally to Congress's broad general purpose of eliminating *discrimination* itself from the workplace.[135] After all, Title VII is a part of the Civil Rights Act, and not Congress's set of labor laws.[136]

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[129] *See e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (explaining the text of Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment") (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

[130] 29 C.F.R. § 1608.1 (2024).

[131] Johnson v. Ry. Exp. Agency, Inc., 421 U.S. 454, 459 (1975).

[132] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

[133] Int'l Bhd. of Teamsters v. United States., 431 U.S. 324, 367 (1977).

[134] *Hopkins*, 490 U.S. at 243–44 (1989) (citing an "interpretive memorandum entered into the Congressional Record by Senators Case and Clark, comanagers of the bill in the Senate").

[135] *See id.*

[136] Scholarship has emphasized Title VII's broad general policy of combating discrimination on its face as opposed to affecting working conditions by comparing it to specific labor statutes that address such employment conditions directly. *See* Judge Debra H. Goldstein, *Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII, or Both*, 56 ALA. LAW. 294, 294 (1995) (comparing generally the broad antidiscriminatory policy of Title VII to the Equal Pay Act, which is specifically concerned with disparate treatment in compensation); *see also* Anne Thibadeau, *Pennsylvania Employees Protected Abroad: Extraterritorial Application of State Labor Law in* Truman v. DeWolff, Boberg, & Associates, Inc., *and the Fair Labor Standards Act Foreign Work Exemption*, 73 U. PITT. L. REV. 193, 201 (2011) (comparing generally the broad antidiscriminatory policy of Title VII to various laws affecting the workplace, such as The American with Disabilities Act, which is concerned in part with providing equal opportunities for disabled persons at work).

The adverse employment action test, by contrast, turns everything inside out. It requires plaintiffs to show evidence of discrimination as the threshold to bringing a Title VII action;[137] then it ignores the discriminatory acts to focus on the tangible changes to the plaintiff's employment to determine whether they have suffered material harm.[138] However, nothing in Title VII's provisions limits remedies to adverse or materially adverse discriminatory acts.[139] The only language remotely close to hinting at such a requirement is Section 703(a)(2)'s provision, prohibiting an employer from "adversely affect[ing]" an employee's status because of their "race, color, religion, sex, or national origin."[140] But even this prohibition is listed in the disjunctive, providing one theory of recovery under Title VII—not imposing a substantive requirement:[141]

> It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.[142]

The plain text of Title VII thus makes evident that even if a plaintiff does not show their employer adversely affected their status, the employer still can be held liable by discriminating against them in a way that did or would *tend* to deprive the plaintiff of employment opportunities.[143] Indeed, Title VII "does not require *any* change in working conditions."[144] And to the extent a plaintiff claims their employer did adversely affect their employment status due to a discriminatory motive and change their working conditions, nothing in the text states the employer must have done so in a "material" way.[145] In imposing such a requirement, wrapped up in the rhetoric of an adverse employment action test, the courts have effectively "rewritten the statute."[146]

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137 *See* McDonell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

138 *See, e.g.*, cases cited *supra* note 19.

139 42 U.S.C. § 2000e-2(a)(1)–(2); *see also* Lidge, *supra* note 14, at 373.

140 42 U.S.C. § 2000e-2(a)(2).

141 *See* sources cited *supra* note 139.

142 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

143 *Id.*

144 Kenneth R. Davis, *The "Severe and Pervers-ive" Standard of Hostile Work Environment Law: Behold the Motivating Factor Test*, 72 RUTGERS U. L. REV 401, 424 (2020).

145 *See* 42 U.S.C. § 2000e-2(a)(2). The lack of any language indicating a materiality requirement stands to reason it is a judicially-invented test.

146 Lidge, *supra* note 14, at 372–73.

Even *if* there were a substantive requirement for a plaintiff to show an adverse employment action, the test is flawed in application. It fails to protect plaintiffs like Ms. Brown and Ms. Chambers, who may set forth evidence of a pattern of discriminatory acts, yet who are barred from recovery under Title VII because there is no showing of a materially adverse change to their employment terms or conditions.[147] Followed to its logical extreme, the *Brown* test bars even the most severely discriminated against plaintiffs from ordinary Title VII recovery if they cannot show a materially adverse change to their employment terms or conditions.[148] This fails to respect the underlying congressional intent of the statute in striking out discrimination in the workplace on its face.[149] However, *Chambers* being followed to its logical extreme could allow Title VII standing based on *any* evidence of discrimination at all.[150] This would violate the fundamental principle of de minimis harm. Surely, there must be a middle ground between the two extremes.

III. THE MIDDLE GROUND: A NEW TEST TO DEFINE HARM UNDER TITLE VII

This note provides the middle ground between the two extremes in proposing a new, yet familiar test to define harm under Title VII. The test is aimed to provide a workable standard for courts to easily apply that stays true to the congressional intent and policy behind the statute, its plain text, and principle of de minimis harm, all while promoting judicial economy, reducing litigation, and curing the circuit split. The test presents a modified version of the test federal courts already use for hostile work environment claims. To that end, the courts would apply one uniform test to all Title VII claims that focuses

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[147] *See* Brown v. Brody, 199 F.3d 446, 449–50 (D.C. Cir. 1999) (finding that discriminatory acts include the reassignment, continuous denial of applications, low performance evaluations, and admonishment letter); *id.* at 456 (holding that Ms. Brown did not suffer a "materially adverse employment action"); *see also* Chambers v. District of Columbia, 35 F.4th 870, 873 (D.C. Cir. 2022) (holding that discriminatory acts included both excessive caseloads, which similarly situated employees were not receiving, and the continuous denial of multiple requests to be transferred, which other similarly situated employees were granted). However, obviously Ms. Chambers was not barred from recovery by the same reasoning of *Brown*, as *Chambers* explicitly overruled *Brown*. *See id.* at 872.

[148] This, after all, is the essence of the *Brown* rule, in requiring plaintiffs to show "material adverse consequences . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm." *Brown*, 199 F.3d at 457.

[149] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

[150] *See Chambers*, 35 F.4th at 902–03.

closely on the individual acts of discrimination in determining whether a plaintiff has suffered harm. Accordingly, this part first overviews the hostile work environment test and discusses how to adapt a modified version of it to all Title VII claims, how to apply the test to difficult cases such as *Brown* and *Chambers*, and concludes by addressing potential counterarguments.

A. Modified Hostile Work Environment Framework

To understand how a modified version of the hostile work environment test can set the new standard to define harm under all Title VII claims, the hostile work environment test, as is, must first be understood.

1. Hostile Work Environment Test Explained

The Supreme Court set out the prevailing standard for hostile work environment claims in the 1993 case of *Harris v. Forklift Systems*.[151] In order to prove sufficient harm for a hostile work environment claim, the plaintiff must show the discriminatory conduct was "severe or pervasive enough to create an objectively hostile or abusive work environment."[152] The test requires both an objective and subjective inquiry: the plaintiff must show the conduct was so severe or pervasive that it would create an environment which a "reasonable person would find hostile or abusive,"[153] and the plaintiff themselves must subjectively perceive the conduct as creating a hostile or abusive environment.[154] The plaintiff, however, need not show the conduct was *both* severe and pervasive—only that it was one *or* the other.[155]

In examining whether the conduct is severe or pervasive, courts examine the totality of circumstances.[156] While the Supreme Court has clarified that there is no "mathematically precise test" to determine whether conduct is severe or pervasive enough to create an actionable claim under Title VII, it has encouraged courts to examine "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

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[151] Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

[152] *Id.* at 21.

[153] *Id.* at 24 (Scalia, J., concurring).

[154] *Id.* at 21–22.

[155] *See, e.g.*, Pucino v. Verizon Wireless Commc'ns, 618 F.3d 112, 119 (2d Cir. 2010).

[156] *Harris*, 510 U.S. at 23; Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002).

utterance; and whether it unreasonably interferes with an employee's work performance."[157]

2. Why Courts Should Utilize the Hostile Work Environment Test to the Exclusion of the Adverse Employment Action Test

The hostile work environment test far better achieves Congress's intent in enacting Title VII—to "strike at the entire spectrum of disparate treatment" in work environments[158]—than the adverse employment action test. Unlike the adverse employment action test, which focuses on the materially adverse alterations of working conditions to define harm—even though Title VII "does not require *any* change in working conditions"[159]—the hostile work environment test focuses on the individual discriminatory acts and analyzes them in their entirety to determine whether there is harm.[160]

Moreover, a de minimis harm requirement is implicit in the severe or pervasive test: if the plaintiff cannot show they subjectively found their working environment hostile or abusive, or if the jury does not find that the working environment was objectively hostile or abusive, the plaintiff is presumed to have suffered a de minimis injury.[161] The test thus naturally strikes a balance between *Brown*'s desire for an objective harm requirement to overcome the de minimis threshold and *Chambers*'s desire to eliminate a harm test that focuses on material changes to employment terms and conditions with no support in the plain text of Title VII.[162]

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[157] *Harris*, 510 U.S. at 22–23 (explaining the policy of Title VII).

[158] *Id.* at 21.

[159] Davis, *supra* note 144, at 424.

[160] *See Harris*, 510 U.S. at 23 (explaining courts should examine "all the circumstances" to determine whether a work environment is sufficiently severe or pervasive).

[161] *See id.* at 21–22 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

[162] *See* Lidge, *supra* note 14, at 372.; *see also* Chambers v. District of Columbia, 35 F.4th 870, 875 (D.C. Cir. 2022) (calling the *Brown* rule and the tangible harm requirement a "judicial gloss that lacks any textual support").

3. How the Severe or Pervasive Framework Applies to Disparate Treatment, Disparate Impact, and Retaliation Actions

Using the hostile work environment test in disparate treatment, disparate impact, and retaliation cases would create one uniform Title VII cause of action rather than multiple distinct ones.[163] The test, unlike the current approach to disparate treatment, impact, and retaliation claims, provides a sensible approach that asks courts to stop focusing on materially adverse changes to the plaintiff's employment terms and conditions resulting from a discriminatory act,[164] and instead requires inquiry as to how severe or pervasive the discriminatory acts were themselves.

In practice, applying the test would require the plaintiff to first set forth evidence of a discriminatory act or acts to bring their cause of action under Title VII's scope, and meet the standing requirement, as plaintiffs are already required to do under the existing framework.[165] Then, without necessarily focusing on any tangible change to the employee's employment terms and conditions, the court would be tasked with a simple question: is the evidence of the discriminatory acts that the plaintiff set forth objectively severe *or* pervasive? If the plaintiff makes this showing, then it can be presumed that the discriminatory acts have harmed them and thus the plaintiff has shown sufficient harm under Title VII. A tangible or material change to their employment terms and conditions could be probative in determining how severe or pervasive the discriminatory acts themselves are, but it would not be the primary focus.

Conversely, if the plaintiff cannot make the showing of severe or pervasive discrimination, then, recognizing that Title VII does not provide relief for "petty slights,"[166] the plaintiff is presumed to have suffered a de minimis injury and thus has no cause of action under Title VII. The test views the discriminatory acts as not just a mechanism to bring the cause of action under Title VII's scope only to then forget about them and focus on the tangible changes to the plaintiff's environment; rather, it

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[163] *See What You Need to Know About Title VII of the Civil Rights Act*, *supra* note 4.

[164] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746–47 (1998).

[165] *See* McDonell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). That is, a plaintiff must already show someone took the act *because of* the plaintiff's protected characteristic (e.g., race, ethnicity, sex, gender, religion, etc.).

[166] *Chambers*, 35 F.4th at 902 (Katsas, J., dissenting).

analyzes the discriminatory acts all the way through to answer the harm inquiry. This better promotes Title VII's policy of combating discrimination—not creating better tangible working conditions, which are sufficiently covered under a whole separate statutory scheme.[167]

4. How to Determine Whether Discrimination is Objectively Severe or Pervasive

Asking courts to determine whether acts of discrimination are sufficiently severe or pervasive to constitute harm will surely amount to line drawing at some point because the question is fact specific and, ultimately, one of degree. There will be no "mathematically precise test."[168] Circumstances that some may consider to rise to severe or pervasive discrimination, and thus sufficient harm, others may determine to be merely a series of mere slights and nothing more than de minimis harm. However, the rigidity that comes with line drawing does far more harm than good, as the severe and pervasive inquiry is a more flexible standard to further promote the spirit of Title VII as opposed to the artificial, judicially-created adverse employment action rule.

The consequences of the hardline adverse employment action rule are manifest through the overwhelming rate at which courts grant summary judgment to employers.[169] However, under this note's proposed test, all a responding plaintiff needs to do to defeat a summary judgment motion is create a triable issue of material fact by convincing the judge that a reasonable jury could plausibly conclude the totality of circumstances show severe or pervasive discrimination. This is a low bar for a plaintiff to meet given that reasonable minds can disagree over what rises to the level of severe or pervasive discrimination and given that "courts are required to view the facts and draw reasonable inferences in the 'light most favorable'" to the nonmovant on a summary judgment motion.[170] Thus, far from judges "line drawing in the dark"[171]—and permitting their bias

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[167] Title 29 of the US Code contains thirty-two chapters of labor laws, each tailored to actual tangible working conditions. *See, e.g.*, 29 U.S.C. §§ 201–219 (Fair Labor Standards Act); 29 U.S.C. §§ 2611–2654 (Family and Medical Leave Act); 29 U.S.C. §§ 651–678 (Occupational Safety and Health Act).

[168] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[169] *See* Sanchez, *supra* note 13, at 587; *see also* Gertner, *supra* note 15, at 110.

[170] Scott v. Harris, 550 U.S. 372, 378 (2007) (internal quotations omitted).

[171] Adam J. Kolber, *Line Drawing in the Dark*, 22 THEORETICAL INQUIRIES L. 111, 114 (2021).

to affect the decision[172]—a jury will be the one to decide where to draw the line in most cases. After all, the test is naturally a jury question.

Nor will juries be left in the dark either. Saving the severe or pervasive discrimination question for the jury allows them to render a decision based on contemporary standards of what discrimination is and is not. After all, what may not have been considered discrimination years ago, and in the mind of a possibly elderly judge, may now be unacceptable in a twenty-first century world, and a jury of the plaintiff's peers will be in a much better position to apply present-day considerations of what discrimination is.[173] Furthermore, all the jurisprudential guidance behind what constitutes severe or pervasive harassment in hostile work environment claims can be persuasive in helping the jury make their determination; that is, juries should be able to consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[174]

B. A Brief Application of the New Test to Brown *and* Chambers

In addition to the above reasons, the new test is needed for its applicability to the situation where a plaintiff has suffered significant acts of discrimination yet would be precluded from recovery under the adverse employment action test by way of not being able to show a material change to their employment. The test thus reconciles competing objectives. It endorses *Brown*'s concern of maintaining an objective harm requirement to weed out de minimis injuries along with *Chambers*'s liberal-textualist concern of applying the plain text of Title VII to promote its provisions in the broadest sense of combating discrimination without regard to whether an action was adverse or not.[175]

Reconciling the competing views of *Brown* and *Chambers* with this note's proposed new test would further protect the Ms. Browns and Ms. Chamberses of the world. Under this new standard, Ms. Brown would have had a much better shot at

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[172] *See* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 714–15 (2007) (arguing that "judicial decision making in gender cases illustrates the way in which current summary judgment practice permits subtle bias to go unchecked").

[173] *See id.*

[174] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993).

[175] *See* Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999); Chambers v. District of Columbia, 35 F.4th 870, 874–85 (D.C. Cir. 2022).

surviving summary judgment. Recall that in *Brown*, Ms. Brown's supervisor transferred her to a new position and then continuously denied her repeated requests for a transfer back to her original position.[176] Ms. Brown then filed a formal complaint.[177] In response, Ms. Brown's supervisors responded by lowering her scores on performance evaluations and by sending her an admonishment letter.[178] When applying this note's proposed test, these facts alone could lead to the circumstantial inference that the supervisors' actions may have been a form of discriminatory retaliation to Ms. Brown's filing of the formal complaint.[179] In accordance with the existing framework, even if one finds the supervisors' acts to be minor instances of discrimination, it is enough to bring them under Title VII's scope and have the inquiry proceed.[180]

The next step would be for the court, at the summary judgment stage, to weigh the totality of discriminatory acts and determine whether a reasonable jury could conclude they were severe or pervasive enough to constitute harm. If so, then Ms. Brown's case would survive summary judgment, and the court would then task the jury with rendering an affirmative answer to the severe or pervasive discrimination inquiry. If not, then the employer would win on summary judgment. In Ms. Brown's case, on one hand, the scales could tip in favor of the employer given that Ms. Brown adduced little to no evidence that similarly situated employees received preferential treatment, e.g., not being involuntarily transferred, not receiving admonishment letters, or not receiving lower evaluations, etc.[181] However, viewing the evidence "in the light most favorable to [Ms.] Brown,"[182] she could have just as well set out just enough evidence to defeat summary judgment due to the specific negative actions her supervisors took toward her immediately after she made complaints about discrimination—the admonishment letter and poor evaluations.[183] Given that reasonable minds could disagree, there would likely be enough under this note's proposed test for Ms. Brown to defeat summary judgment and reach the jury to answer the ultimate question of whether the employer's actions constituted severe or pervasive

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[176] *Brown*, 199 F.3d at 449.

[177] *Id.*

[178] *Id.* at 449–50.

[179] *See id.*

[180] *See* McDonell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that as a threshold matter, the plaintiff must raise an inference of discrimination).

[181] *Brown*, 199 F.3d at 451.

[182] *Id.*

[183] *See id.* at 449–50.

discrimination. In any case, the fact that Ms. Brown suffered no change to her pay or benefits, which the DC Circuit hung its hat on,[184] would be largely irrelevant to the inquiry since the focus would be on the supervisors' discriminatory actions, not on the issue of whether there was a materially adverse change to Ms. Brown's employment terms and conditions.

Similarly, this note's proposed new standard would reach the same disposition as the DC Circuit in *Chambers*, without, of course, throwing Title VII into doctrinal disarray by ignoring the backbone of every statute in de minimis harm.[185] Recall that in *Chambers*, Ms. Chambers's requests for transfers were repeatedly denied, but unlike Ms. Brown, Ms. Chambers adduced evidence "that similarly situated male employees had been granted transfers they requested."[186] Thus, when the court, upon summary judgment, would be faced with the question of whether the totality of discriminatory conduct could allow a reasonable jury to plausibly conclude it was severe or pervasive to constitute harm under Title VII, the inference would be stronger than it was in Brown. Accordingly, Ms. Chambers would likely survive summary judgment and reach the jury on the question of harm. Once again, the fact that Ms. Chambers suffered no change to her pay or benefits since she kept the same position all along, which was the decisive factor for the district court in applying *Brown*,[187] would be inconsequential to the inquiry since the focus would be on the discriminatory actions and not on the issue of whether there was a materially adverse change to Ms. Chambers's employment terms and conditions.

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[184] *See id.* at 457 (referring to the Court's hardline rule, "a plaintiff who is made to undertake or who is denied a lateral transfer—that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.").

[185] *See* Wisc. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ("[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') 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.").

[186] Chambers v. District of Columbia, 35 F.4th 870, 873 (D.C. Cir. 2022).

[187] *See* Chambers v. District of Columbia, 389 F. Supp. 3d 77, 93 (D.D.C. 2019) (citing *Brown* for the proposition that "[t]he denial of 'a transfer involving no diminution in pay and benefits,' i.e., a lateral transfer, does not rise to the level of an adverse action 'unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of [an employee's] employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.'").

C. Counterarguments and Responses

There are inevitably a number of counterarguments that come with any proposed change to the routine set of standards and principles that have long governed an act of Congress. These concerns primarily centralize around the prospect of a flood of litigation caused by a disruption to the status quo and are all generally easy to combat.[188]

The first counterargument is that an adverse employment action is necessary because without a materially adverse change to the plaintiff's employment terms or conditions, a Title VII plaintiff cannot prove damages. However, due to the bifurcated nature of trials,[189] damages are separate from the issue of liability, so any argument that the proposed new standard does not account for damages speaks very little to any issues it may have in establishing liability. Recognizing, though, the importance of establishing damages, it is true that a materially adverse change to the plaintiff's terms and conditions of employment likely makes it easier to prove damages, particularly in job-transfer cases. If Ms. Brown and Ms. Chambers were transferred to a position with less pay or benefits, then their damages could include the difference between such pay and benefits. And though Congress and Supreme Court precedent specifically authorize Title VII plaintiffs to recover compensatory and punitive damages in particular cases involving extreme intentional discrimination,[190] it is unclear whether Ms. Brown or Ms. Chambers would have been awarded them. With respect to other types of damages, the Supreme Court clarified thirty years ago that Title VII excludes plaintiffs from recovering damages for "pain and suffering, emotional distress, harm to reputation, or other consequential damages,"[191] though it has not addressed the question since. In the meantime, various circuits courts have left open the question on whether Title VII allows recovery for pain and suffering, not taking a stance one way or the other.[192] Finally, the recent trend

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[188] *Chambers*, 35 F.4th at 887 (Kastas, J., dissenting) (explaining how the majority's decision to overrule *Brown v. Brody* and its principles will cause "the floodgates" to open").

[189] District courts, in the interests of convenience, judicial efficiency, and to negate prejudice, generally have discretion to bifurcate trials such that liability and damages are tried separately. *See, e.g.*, Vichare v. AMBAC Inc., 106 F.3d 457, 466 (2d Cir. 1996).

[190] *See* 42 U.S.C. § 1981a(b)(1); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535–36 (1999).

[191] United States v. Burke, 504 U.S. 229, 239 (1992).

[192] *See, e.g.*, Cush-Crawford v. Adchem Corp., 271 F.3d 352, 359–60 (2d Cir. 2001) (acknowledging that the plaintiff was prevented from recovering damages for pain

of the Supreme Court seems to be more lenient, allowing plaintiffs to use intangible and emotional harms to show damages when suing under a federal statute.[193] Accordingly, if courts implement this note's test, they should consider allowing plaintiffs to recover damages for pain and suffering. The issue is ripe for reconsideration by the Supreme Court.

The second counterargument is that using the same test for all Title VII claims would allow a plaintiff to stack multiple claims (e.g., a combination of disparate treatment, disparate impact, retaliation, and hostile work environment) and if a plaintiff establishes liability on one claim, they can use offensive collateral estoppel to establish liability in a subsequent Title VII claim. However, using the same test eliminates the need for anything other than one single claim under Title VII. In other words, under this note's proposed test, there would be no disparate treatment, disparate impact, retaliation, and hostile work environment claims. There would merely be one uniform Title VII discrimination claim. To that end, a plaintiff would similarly not be able to assert offensive collateral estoppel since they would be alleging the same exact cause of action and would have to allege the same general discriminatory acts underlying both causes of action.[194]

A third counterargument is that the proposed new test is built on the faulty assumption that by applying a severe or pervasive discrimination inquiry, judges are more likely to send the case to the jury to decide rather than deciding it for themselves. But this test does not in any way suggest a judge could not simply steal the question of severe or pervasive discrimination away from the jury and decide the question as a matter of law as the DC Circuit did in *Brown* and as the district court did in *Chambers*.[195] The test merely hypothesizes that more cases will reach the jury because the severe or pervasive test is a low bar threshold to defeat summary judgment given the

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and suffering by way of a statutory cap on damages and not because Title VII prohibits such damages); Schexnayder v. Bonfiglio, 167 F. App'x 364, 367 (5th Cir. 2006) (declining to reverse the district court's grant of pain and suffering damages); Sheriff v. Midwest Health Partners, P.C., 619 F.3d 923, 932–33 (8th Cir. 2010) (declining to reverse the district court's grant of pain and suffering damages).

193 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (explaining that "[v]arious intangible harms can also be concrete").

194 *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979) ("The general rule should be that in cases where a plaintiff could easily have joined in the earlier action . . . a trial judge should not allow the use of offensive collateral estoppel.").

195 *See* Brown v. Brody, 199 F.3d 446, 460 (D.C. Cir. 1999) (affirming the district court's grant of summary judgment to the employer); *see also* Chambers v. District of Columbia, 389 F. Supp. 3d 77, 94 (D.D.C. 2019) (granting summary judgment to the employer).

flexibility of the test. By contrast, the adverse employment action test is a handy tool for courts to employ to rule on a case as a matter of law because it is easy to determine whether there has been a materially adverse change to the plaintiff's employment terms or conditions: has the plaintiff been fired? Demoted? Had their pay or benefits reduced? Etc. Whether there is sufficient evidence of severe or pervasive discrimination is a much more fact-intensive inquiry. Given that reasonable minds can easily disagree over what constitutes severe or pervasive discrimination, the question of whether there is sufficient harm under the severe or pervasive test should reach the jury far more often than the question of whether there is sufficient harm under the adverse employment action test.

The final counterargument is that the proposed new test is too plaintiff-friendly and would open the floodgates to Title VII litigation, which were the same concerns shared by the *Chambers* dissent.[196] However, this test was created to prevent such a scenario in redefining harm under Title VII, rather than implying there may be no need for the statute to have such a harm requirement.[197] Although the test will tip the scales more toward plaintiffs on summary judgment motions, overall, the test would create less Title VII litigation by creating one single Title VII cause of action for courts to adjudicate rather than numerous ones. Moreover, plaintiffs would still need to overcome the de minimis threshold. Plaintiffs who only set forth evidence of a de minimis injury will lose early in the litigation. And even if assuming *arguendo* the proposed new test *did* lead to more plaintiffs bringing Title VII claims, perhaps this would be a good thing because it would serve as a deterrent to discrimination. If employers want to avoid Title VII liability, then they should not discriminate. At all.

There are an endless number of counterarguments that one could formulate to any single proposed new legal standard, and this note does not purport that the proposed new test is perfect by any means. But it does contend that it is a preferrable method to analyze Title VII claims over the adverse employment action test. The proposed test provides courts an opportunity to abide by the no harm, no standing rule by using a familiar and already proven workable framework to analyze all Title VII claims; to expand the scope of Title VII to a progressive end

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[196] *See* Chambers v. District of Columbia, 35 F.4th 870, 886–904 (D.C. Cir. 2022) (Katsas, J., dissenting).

[197] *See id.* at 879–80 ("The plain text . . . contains no requirement that an employee alleging discrimination in the terms or conditions of employment make a separate showing of 'objectively tangible harm.'").

while relying on a textualist reading; and to promote judicial economy and recognize essentially one uniform Title VII cause of action. Most importantly, the test allows courts the opportunity to easily reconcile what may seem like two competing interests: *Brown*'s desire for specific harm requirements to overcome the de minimis threshold and *Chambers*'s desire to abandon the adverse employment test.[198]

CONCLUSION

Federal courts have violated the spirit of Title VII long enough. By imposing the adverse employment action test to define harm under Title VII cases, courts have failed to adequately consider the very discriminatory acts that Congress sought to prevent by passing Title VII.[199] The test further lacks textual support and only serves to rob litigants of having important and sensitive questions answered by a jury.[200] These consequences rear their ugly head the most in cases where there is no tangible change to a plaintiff's terms or conditions of employment, yet still evidence of discrimination, as in the DC Court of Appeals's decisions in *Brown v. Brody* and *Chambers v. District of Columbia*.[201] And although *Chambers* bravely sought to remedy the problem by eliminating the power-grab adverse employment action test, particularly in lateral job-transfer cases, its reasoning was dangerous. Not only did *Chambers* create a circuit split, but it created a high potential for doctrinal disarray by ignoring the fundamental principle of de minimis harm that forms the backbone of every statute.[202]

There is another way. An approach to define harm exists that can promote the de minimis principle, Article III standing requirements, and the plain text and policy of Title VII all in one go. The test would require courts to ask how severe or pervasive

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[198] *See Brown*, 199 F.3d at 456; *Chambers*, 35 F.4th at 874–75.

[199] *See* discussion *supra* Section II.C.

[200] *See* discussion *supra* Section II.C.

[201] *See Brown*, 199 F.3d at 449 (finding that discriminatory acts include reassignment, continuous denial of applications, low performance evaluations, and admonishment letter); *id.* at 456 (holding that Ms. Brown did not suffer a "materially adverse employment action"); *see also Chambers*, 35 F.4th at 873 (finding that discriminatory acts include excessive caseloads, which similarly situated employees were not receiving, and the continuous denial of multiple requests to be transferred, which other similarly situated employees were granted); *id.* at 874–75 (reasoning a tangible change to Ms. Chambers employment was unnecessary).

[202] *See* Wisc. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ("[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') 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.").

the acts of discrimination underlying the claim are rather than focusing on materially adverse changes to an employee's work. It is a sensible approach to combat the evil of workplace discrimination, and is as breathtakingly simple as the spirit of Title VII itself.

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