No. 22-193

In the Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENT LEGAL CENTER, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to provide education to local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC"), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* made any monetary contribution to its preparation or submission.

more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

Local governments are collectively among the largest employers in the country and regularly transfer employees laterally as a matter of operational necessity, to provide training, to fill critical service needs, to accommodate an employee's religious or disability needs, to investigate a claim of harassment, and to address staffing shortages. As a consequence, *Amici* have a significant interest in whether *all* lateral transfers, regardless of the harm caused by such a transfer, would satisfy a plaintiff's prima facie case under Title VII. To help the Court understand how the operations of various local governments would be impacted by this decision, *Amicus* IMLA conducted a survey of its members and followed up with phone calls to its members regarding the issues in this case. This brief contains information from that survey.

SUMMARY OF ARGUMENT

All divisions of local governments require flexibility, but that latitude is critical for paramilitary departments like police and fire where public safety could be seriously undermined if management is unable to laterally transfer employees without risking a deluge of Title VII lawsuits. Adopting Petitioner's

rule would profoundly impede the ability of local governments to assign police, fire, and EMS personnel where they are most needed, particularly given the staffing shortages currently faced by emergency personnel around the country. Petitioner's rule risks allowing federal courts to substitute their judgment for the managerial decisions of local government employers in routine matters. Important federalism considerations counsel against expanding Title VII in this way.

Petitioner's rule also risks disrupting decades of state court decisions that have adopted a materiality requirement consistent with Title VII federal case law. A contrary result would not only be disruptive to states and state courts but would cause significant and unnecessary litigation for local government employers, which would in turn divert scarce time, money, and resources from critical public services. This Court should not expand Title VII to subvert the Act's meaning and intended application when doing so would result in such serious consequences.

ARGUMENT

I. Both the Text of Title VII and This Court's Precedent Support a Materiality Requirement.

A. Title VII's Text Requires Materiality.

Materiality is an indispensable ingredient of a Title VII claim. That proposition flows directly from the text of the statute. Section 703(a) of Title VII makes it unlawful for an employer to "discriminate against" an employee based on various protected categories. *Webster's* defines "discriminate" as

"distinguish" or "differentiate,"[2] and "against" as "in opposition or hostility to."[3] Those words require some degree of adversity and discernable consequence.

Moreover, to understand the text's meaning at the time the statute was enacted, the words should be read together. As one textualist scholar explained:

> [T]he phrase "discriminate against . . . because of [some trait]" was a linguistic unit (a composite) by the time of Title VII's enactment, which makes the principle of compositionality relevant. And read as a composite, the phrase had more semantic content than one could glean from separately analyzing and then amalgamating its three parts ("discriminate," "against," and "sex"). While a "dissection" reading might suggest that Title VII covers *any* adverse treatment that even *adverts* to sex… a linguistically superior reading (taking compositionality into account) proves that the operative text refers only to adverse treatment that rests on *prejudice (or bias*).[4]

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[2] *Discriminate*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/discriminate.

[3] *Against*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/against.

[4] James C. Phillips, *The Overlooked Textual Evidence In The Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality,* May 11, 2020 (unpublished manuscript), archived at 17-1618-3.pdf (supremecourt.gov) (emphasis in

Given that definitional foundation, the assertion that Title VII is intended to remedy virtually any workplace change enacted by an employer, is both syntactically and logically incomprehensible. The interpretation proffered by Petitioner is that no materiality need be shown in a Title VII anti-discrimination claim - the absence of which is "immaterial," which *Webster's* tells us means "of no substantial consequence; unimportant."[5] But immaterial discrimination has no currency in this Court. *See Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80 (1998) (noting Title VII is not a general civility code). Trivial claims fail under the fundamental maxim of judicial construction: "*de minimis non curat lex*" (the law does not take account of trifles). As this Court has declared, the *de minimis* canon has been "part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

Accordingly, the only defensible reading of Title VII's anti-discrimination provision is that a plaintiff must show some form of detriment or injury, and the operative element is objective *substance, significance, importance*: in other words, *materiality*.

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original) (*cited in Bostock v. Clayton Cnty*. 140 S. Ct. 1731, 1769, n.22, (2020) (Alito J., dissenting)).

[5] *Immaterial*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/immaterial (last visited Oct. 3, 2023).

B. This Court's Title VII Precedent Requires Materiality.

This Court's reading of Title VII reflects the Act's textual moorings, unambiguously holding that "discriminate against" requires materiality. Construing Section 704(a) of Title VII, the Act's anti-retaliation provision, the Court held "that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 57 (2006).

The identical term, "discriminate against," is also found in the anti-discrimination section of the Act and is the keystone of that provision at issue in this case. Whether applying the doctrine of *in pari materia* or a more basic common-sense reading of an identical phrase in two adjacent statutory provisions, the materiality required in pleading an anti-retaliation claim under Section 704(a) applies equally to an anti-discrimination action under Section 703(a). This Court said as much in *Burlington Northern*: "We have emphasized the need for objective standards in other Title VII contexts." *Id*. at 69. More recently, this Court adopted a similar reading of the term and defined "discriminate against" as "distinctions or differences in treatment that injure…" *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020); *Burlington Northern,* 548 U.S. at 59–60.

Burlington Northern explains the rationale for requiring materiality in Title VII discrimination: "We speak of *material* adversity because we believe it is important to separate significant from trivial harms."

Burlington Northern, 548 U.S. at 68 (emphasis in original); *see also Id.* at 75 (Alito J., concurring) (explaining "[t]here is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment"). And the standard for judging injury must be "objective," viewed from the perspective of a "reasonable employee." *Id.* at 69. That standard prevents common workplace management practices and individual grievances from becoming the subject of employee lawsuits. As the Court explained in the retaliation context: "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* at 68; *see also Oncale,* 523 U.S. at 81; *Faragher v. Boca Raton*, 524 U.S. 775, 786-88 (1998).

Circuit courts have echoed the requirement for materiality: "When Congress enacted Title VII, the National Legislature provided no indication that it sought to . . . use the word 'discriminate' to cover *any* difference in personnel matters." *Threat v. City of Cleveland*, 6 F.4th. 672, 678 (6th Cir. 2021) (emphasis in original). Rather, a materiality threshold is implicit to avoid burdening our judicial system with workplace oversight: "It prevents 'the undefined word "discrimination"' from 'command[ing] judges to supervise the minutiae of personnel management.'"[6] *Id.*

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[6] *Amici* agree with the Sixth Circuit's analysis in *Threat* that the judiciary should not be burdened with trivial Title VII claims, but as discussed below, *Amici* do not believe that all changes to

Against this long-standing precedent - a precedent which specifies materiality as the *sine qua non* of a Title VII claim, which dismisses "trivial" complaints, and which has guided Title VII decisions in Circuit Courts of Appeal nationwide[7] - the argument that an employee merely needs to show any "change" in conditions or privileges to sustain a Title VII claim, cannot survive. Whether the pleading threshold for an anti-discrimination action is "significant disadvantage," or other comparable variant, the essential element in actionable Title VII injury or detriment, according to this Court, is materiality.

II. Petitioner's Arguments, if Adopted, Would Undermine Public Safety.

A. To Ensure Public Safety, Fire and Police Chiefs Must be Able to Assign Emergency Personnel as Needed.

Local governments need flexibility to assure delivery of vital services to their constituents as they respond to constantly changing environments. That flexibility includes the ability to laterally transfer and reassign employees without risking a Title VII lawsuit. While all local government employers engage

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employee's schedules should be actionable under the Act, particularly for paramilitary employees like police officers.

[7] *See Hamilton v. Dallas Cnty.,* 79 F.4th 494, 504 (5th Cir. 2023) (noting "nearly every circuit seems to have adopted" a materiality requirement and collecting cases). The court in *Hamilton* rejected the circuit's previous requirement that the adverse action be an "ultimate employment decision," but the court did not decide what level of materiality was necessary to plead a Title VII violation.

in lateral transfers, that ability is critical within paramilitary organizations like police and fire departments to ensure they can respond to changing circumstances and address emergencies.

Lateral transfers of police and fire employees are commonplace throughout the country: whether contained in a general order,[8] collective bargaining agreement,[9] policy,[10] or regulation.[11] Local

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[8] DURHAM POLICE DEPARTMENT GENERAL ORDER 2014 R-12, Assignments & Transfers of Sworn Personnel (Jan. 17, 2023) (setting forth process for employee transfers: "[t]his General Order does not restrict the Chief of Police from assigning personnel temporarily or permanently to any unit as operationally required without advertising the vacancy.")

[9] Memorandum of Understanding Between the Cty. of Monterey and The Deputy Sheriffs' Ass'n of Monterey Cty. Units A and B, Art. 27 Cty. Rights, CO. OF MONTEREY, CAL. (July 1, 2019), (noting management reserves the right to "determine the methods, means and personnel by which the Sheriff's Office and the District Attorney's Office operations are to be conducted" and "exercise complete control and discretion over its organization…")

[10] *See* CITY OF PLANO, TEX. POLICE DEPARTMENT ADMIN. DIRECTIVE – Sec. 101.018, *Job Rotation*, (Mar. 14, 2023), providing:

> [t]he chief of police or designee reserves the authority to transfer personnel to other assignments whenever it is deemed necessary. While good performance is certainly a major factor in judging the duration of an assignment, other factors such as career development, needs of the department and job enrichment will also be weighed on an individual basis.

[11] *See* Fairfax Cty., Va. Personnel Regulations, *Grievance Procedure*, ¶17.4.f (July 1, 2021),

governments ensure that police and fire leadership retain authority to transfer employees and make personnel assignments so that they can best serve the public and respond to emergencies.[12]

There are many reasons why an involuntary transfer may be necessary in a police or fire department, including budgetary limitations; staffing shortages; ADA and religious accommodations; familiarizing employees with other units of a department; filling vacancies; preventing burnout; and avoiding ongoing harassment.[13] Transfers may be

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https://www.fairfaxcounty.gov/hr/sites/hr/files/assets/documents/hr/chap17.pdf. (noting job transfers are not grievable to the civil service commission).

[12] *See supra* notes 8-11; *see also* HOUSTON, TEX., FIRE DEPARTMENT, *Transfers*, Vol. 1 Ref. I-05 Sec. 6.01 (May 27, 2020); PLANO, TEX., FIRE-RESCUE, *Personnel Assignments,* SOP 428.0, (Apr. 1, 2023) ("The Fire Chief has the complete authority to assign and/or reassign members so that the personnel resources of PFR will be utilized to the fullest extent in meeting the [m]ission of the organization."); JUNEAU, ALASKA, CODE § 44.10.130 (1974) (reserving management rights to transfer employees and direct city work force); PHOENIX, ARIZ., FIRE DEPARTMENT, MANUAL PROCEDURES 104.02 (Mar. 2023), https://www.phoenix.gov/firesite/Documents/10402.pdf (providing "[t]he Fire Department reserves the right to assign personnel to any assignment considered to be in the best interest of the organization in terms of training, education, personal growth, career development, organizational need and compliance with the requirements of the Americans with Disabilities Act").

[13] One essential reason for transfers within a local government department arises from the need to prevent ongoing harassment in the workplace. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (providing employers can avoid liability for harassment by providing prompt, effective, remedial action). Guidance from the Equal Employment Opportunity

necessary for officer development so that the officer can rotate through different aspects of the job before being promoted. Transfers may also be needed to ensure officer well-being, as police can experience burnout when assigned to certain units such as special victims, organized crime, or gangs. Alternatively, a police chief may determine "… an employee is not capable of performing the duties of a particular assignment due to injury, illness, or other disabling condition . . ."[14] The chief may also "transfer an employee on a temporary basis for the balance of the annual shift bid, or for purposes of an ongoing criminal investigation."[15] Lateral transfers also occur when

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Commission (EEOC) confirms that to prevent ongoing harassment pending an investigation employers may need to consider the following: "scheduling changes so as to avoid contact between the parties; **transferring the alleged harasser**; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation." *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1999-2, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors (emphasis added). As a result of this guidance and to mitigate against any further harassment in the workplace, while an investigation of harassment is ongoing, many employers transfer the alleged harasser to a different lateral position to ensure the employees are separated pending the outcome of the investigation.

[14] Boulder, Colo. and Boulder Police Officers Association 2022-23 Collective Bargaining Agreement Art. 15 D.1 (2022), https://bouldercolorado.gov/media/9936/download?inline.

[15] *Id.*

the police chief creates specialized units to combat new criminal elements.[16]

One of the most important reasons a chief may need to transfer an employee is to satisfy staffing demands. Police departments across the country are facing significant personnel shortages caused by a spike in retirement, resignations, and insufficient recruitments.[17] The deficits are profound: For example, Baltimore is short 532 police officers, Portland, Oregon is down 100 officers, Dallas is facing a 550-officer shortage, and Washington D.C. is 800 officers below full strength.[18] Public safety requires

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[16] For example, Durham, North Carolina recently formed a task force to address illegal dirt bike operations on public streets after complaints from residents. *See* Mariah Ellis, *Durham Police Cracking Down on Illegal Dirt Bike, ATV Activity*, CBS17.com (July 14, 2023), https://www.cbs17.com/news/local-news/durham-county-news/durham-police-cracking-down-on-illegal-dirt-bike-atv-activity/?ipid=promo-link-block3. The officers will revert to their previous positions once the issue has been sufficiently addressed or if other needs arise.

[17] Ivana Saric, *Police Departments Struggle with Staffing Shortages*, AXIOS.COM (Aug. 8, 2022) (hereinafter "*Staffing Shortages*"), https://www.axios.com/2022/08/08/police-department-staff-shortage.

[18] Ryan Young, *et al.*, *'We Need Them Desperately': US Police Departments Struggle with Critical Staffing Shortages*, CABLE NEWS NETWORK (July 20, 2022), https://www.cnn.com/2022/07/19/us/police-staffing-shortages-recruitment/index.html; Rebecca Pryor, *Baltimore Police Turn to 'Drastic Measures' Amid Severe Staffing Shortages*, WPBN FCC (Aug. 2, 2023) (hereinafter "*Baltimore Police*"), https://upnorthlive.com/news/nation-world/baltimore-police-turn-to-drastic-measures-amid-severe-staffing-shortages-high-crime-rates-patrol-officers-baltimore-city-police-department-understaffed-districts-gun-violence-juvenile-crime; Megan

the proper personnel in the proper places. Chiefs need to reallocate resources to maintain experience levels among shifts and crews. They may also need to disband a specialized unit to refocus on emergency response. For example, the Boston Police Department recently needed to transfer officers from specialized units like drugs and gangs to districts, where they will be stationed in neighborhoods to address staffing shortages.[19] Los Angeles, facing a 650-officer shortfall, has downsized specialized units like those combatting narcotics and human trafficking and closed its animal cruelty unit, which results in the transfer of officers.[20]

Staffing shortages have real world ramifications that police chiefs and Sheriffs must address, balancing officer development and interests while also attending to urgent public safety needs. For example, in 2022, Alexandria, Virginia, facing a 10% reduction in its force, indicated it would no longer send officers to a

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Cloherty, *DC's Police Chief Says Recruiting Officers is Harder Due to New Laws*, WBFF STAFF (Feb. 24, 2023), https://wtop.com/dc/2023/02/dc-police-chief-blames-recruiting-struggles-on-new-laws/#:~:text=Standing%20at%203%2C400%20officers%2C%20D.C.,policies%20that%20increase%20officer%20accountability.

[19] John Monahan, *Boston Police Department Reassigning Officers from Specialized Units Amid Staffing Shortages*, Boston 25 News (Aug. 14, 2023), https://www.boston25news.com/news/local/boston-police-department-reassigning-officers-specialized-units-amid-staffing-shortages/5XM66AL3VRGEDEWSDVV6X6ROVU/.

[20] *Staffing Shortages, supra* note 17.

scene if there was no danger to the public.[21] In Kansas City, 200 fewer officers means longer wait times at 911 call centers.[22] Meanwhile, Seattle has 100 fewer detectives working on sexual assault investigations, though it plans to transfer more officers into that unit to help with the workload.[23] In Minneapolis, the police "department is frequently unable to meet minimum staffing goals for each shift, which often results in the decision to leave front desks vacant at local precincts."[24] And in Scott County, Kentucky, the Sheriff indicated deputies serving as school resource officers will need to be removed from the schools due to staffing shortages unless the County provides a significant budget increase, which is not likely to be forthcoming.[25]

Police and fire chiefs, who are responsible for ensuring public safety despite facing staffing

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[21] Nick Iannelli, *Alexandria Chief Talks about Officer Shortage, Reduced Service*, WTOP NEWS (June 3, 2022), https://wtop.com/alexandria/2022/06/alexandria-chief-on-officer-shortage-our-profession-has-changed.

[22] *Staffing Shortages, supra* note 17.

[23] *Id.*

[24] Liz Sawyer & Jeff Hargarten, *Minneapolis Police Staffing Levels Reach Historic Lows Amid Struggle for Recruitment, Retention*, Minn. Star Tribune (Sept. 16, 2023), https://www.startribune.com/minneapolis-police-staffing-levels-reach-historic-lows-amid-struggle-for-recruitment-retention/600305214/.

[25] Alexis Mathews, *Staffing crisis at Scott County Sheriff's Office could affect school resource officers,* WLKY News (Oct. 9, 2023), https://www.wlky.com/article/staffing-crisis-scott-co-sheriffs-office-affect-school-resource-officers/45488811#

shortages, need the flexibility to decide their department's priorities and organize their department to address changing public safety needs. Police and fire departments will not be able to react to changes in staffing, emerging criminal threats, or evolving demands for emergency services if the Court adopts the Petitioner's arguments that any such transfers could be actionable under Title VII. This Court should defer to leaders in public safety—those closest to the communities' and departments' evolving needs—in making swift decisions that meet those requirements.

B. Petitioner's Rule Defies Principles of Federalism and Would Place the Federal Judiciary in Charge of Routine Public Employment Decisions.

In deciding the question presented, this Court will determine who should be responsible for allocating scarce personnel resources to address public safety. Adopting the Petitioner's definition of Title VII's threshold will turn federal courts into the overseers of minute employment decisions made by local governments. This flies in the face of common sense and basic federalism principles. As numerous courts have explained, "Title VII… does not authorize a federal court to become a super-personnel department that reexamines an entity's business decision." *Barbour v. Browner,* 181 F.3d 1342, 1346 (D.C. Cir. 1999) (internal quotations omitted); *see also Banford v. Bd. of Regents of Univ. of Minnesota,* 43 F.4th 896, 900 (8th Cir. 2022); *Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001) *citing Elrod v. Sears, Roebuck & Co.,* 939 F.2d 1466, 1470 (11th Cir. 1991); *Argyropoulos v. City of Alton,* 539 F.3d 724, 736 (7th

Cir. 2008); *Mesnick v. Gen. Elec. Co.,* 950 F.2d 816, 825 (1st Cir. 1991).

Petitioner's proposed rule is problematic for all public employers, but as noted above, would be crippling for police and fire departments. Those entities "need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to [their] status as [] quasi-military entit[ies] different from other public employers." *Hansen v. Soldenwagner,* 19 F.3d 573, 577 (11th Cir. 1994) (citations omitted). Judicial deference to public employer management decisions is crucial in the context of these police and fire departments that rely on command structures. *See Tindle v. Caudell,* 56 F.3d 966, 971 (8th Cir. 1995) (citing *Crain v. Bd. of Police Comm'rs,* 920 F.2d 1402, 1409 (8th Cir. 1990) (explaining "[b]ecause police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer"); *Anderson v. Burke Cnty.,* 239 F.3d 1216, 1221–22 (11th Cir. 2001) (noting paramilitary nature of fire department which weighs heavily in favor of employer's interest in promoting "the efficiency of the public services it performs").

If police and fire chiefs are unable to make routine managerial decisions within their departments, including decisions about transfers, without triggering federal court oversight, emergency services will be significantly disrupted. Just a few examples illustrate the point. Should a police department

remove officers from FBI task forces[26] or pull detectives from investigations[27] because of staffing shortages so that they can respond to 911 calls and conduct day-to-day police work? Should a department involuntarily transfer officers to a night shift due to a staffing shortage, or leave the public without adequate police response?[28] Should officers be transferred to address a new and emerging criminal threat?[29] Can a firefighter be transferred to another station to ensure adequate coverage throughout the locality?[30] Only the leadership of the police or fire department can make these decisions, not a federal court sitting as a self-appointed employment czar.[31]

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[26] Aaron Leathley, *Bike Officers, Others Reassigned Amid Stockton Police Staff Shortages, Union Says,* THE STOCKTON RECORD (Mar. 30, 2023), https://www.recordnet.com/story/news/local/2023/03/30/stockton-police-department-facing-staffing-woes-union-says/70042359007/.

[27] *Baltimore Police, supra* note 18.

[28] *Id.*

[29] *Denver Police Announces New Investigation Team Created to Combat Fentanyl*, CBS COLORADO (Feb. 2, 2023, 11:52 PM), https://www.cbsnews.com/colorado/news/denver-police-announces-new-investigation-team-created-combat-fentanyl/.

[30] Allison Bazzle, *Firefighters Union Sounds Alarm over Staffing Issues After Temporary Gap in Service in Virginia Beach*, WVEC FFC (May 10, 2023), https://www.13newsnow.com/article/news/local/mycity/virginia-beach/virginia-beach-firefighters-union-sounds-alarm-staffing-issues-temporary-gap-in-service/291-30f9895e-c882-4886-b390-c445ccfc252e.

[31] And while local governments would likely be able to demonstrate these decisions were made for legitimate

This Court recognizes the importance of judicial deference for public employers in the context of the First Amendment, and the same should be true under Title VII for non-material changes in employment conditions. *See Connick v. Myers,* 461 U.S. 138, 151–52 (1983) (explaining "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate"). Requiring materiality under Title VII strikes the appropriate balance between judicial deference to public employer managerial decisions and safeguarding employees' rights to a discrimination- free workplace while preserving the balance of state and federal power.

III. Allowing Title VII Claims to Proceed for Non-Material Employment Actions Would Reduce Essential Local Government Services.

A. Local Governments have Limited Revenue Sources and Must Balance Their Budgets.

State law often dictates that local governments must balance their budgets.[32] *See, e.g.*, COLO. REV.

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nondiscriminatory reasons, as disused more fully below, removing the materiality requirement will invite more trivial lawsuits, divert resources, and increase costs for local governments.

[32] According to the Government Finance Officers Association, "[m]ost state and local governments are subject to a requirement to pass a balanced budget." GFOA, *Achieving a Structurally Balanced Budget,* (Feb. 28, 2012), https://www.gfoa.org/materials/achieving-a-structurally-balanced-budget; *see also* Nat'l Ass'n of State Budget Officers,

STAT. § 29-1-103(2) (2021); GA. CODE ANN. § 36-81-3 (2000); KY. CONST. § 157B; N.C. GEN. STAT. § 159-8(a) (2021); OR. REV. STAT. § 294.388 (2011); TENN. CODE. ANN § 9-21-403 (2021); WASH. REV. CODE § 35.33.075 (1995). At the same time, states typically constrain local governments' ability to raise revenue.[33]

States also impose restrictions on how certain revenue may be used by local governments. For example, in Florida, counties are authorized to impose a real estate conveyance fee, but the revenue from the fee must be used toward the creation of low-income housing opportunities.[34] And in California, Mississippi, and North Carolina, local governments may levy a sales tax, but may only use the revenue

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Budget Processes in the States 61–65 (2021), https://www.nasbo.org/reports-data/budget-processes-in-the-states (Table 9 and notes describing balanced budget requirements of forty nine states).

[33] *See* THE PEW CHARITABLE TRUSTS, *Local Tax Limitations Can Hamper Fiscal Stability of Cities and Counties: 3 ways states can help localities improve budget flexibility and resiliency*, brief July 2021, (hereinafter "*Local Tax Limitations*"), https://www.pewtrusts.org/-/media/assets/2021/07/statetaxlimitations_brief.pdf. Colorado offers perhaps one of the strictest limits on revenue generation due to the State's constitutional limit on revenue growth, known as the Taxpayer's Bill of Rights or TABOR. COLO. CONST. art. X § 20.

[34] *See* Jonathan Harris, *Doing More with Less: State Revenue Limitations and Mandates on County Finances,* NATIONAL ASSOCIATION OF COUNTIES, (Nov. 14, 2016), (hereinafter "*Doing More with Less*") https://www.naco.org/resources/doing-more-less-state-revenue-limitations-and-mandates-county-finances#1

from the tax for infrastructure needs.[35] In addition to being constrained as to how they raise revenue and needing to balance their budgets, local governments are also often subject to unfunded mandates from both state and federal governments.[36]

These factors converge to require careful fiscal planning on the part of local governments, and underscore that they can ill afford large unbudgeted litigation expenses. Local governments of all sizes will feel the impact of a decision expanding Title VII liability, but smaller jurisdictions will be impacted disproportionately as they have the least give in their budgets. A significant increase in Title VII litigation means fewer teachers, fewer firefighters, less garbage collection service, less disaster preparedness, and fewer police officers.

B. Responding to Employee Complaints Under Title VII Strains Local Government Resources.

Title VII complaints are already a significant strain on local governments. In FY22, the Equal Employment Opportunity Commission received 73,485 new discrimination charges, representing a nearly 20% increase compared to the prior year.[37] Of those new discrimination charges, 53,666 were filed

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[35] *See* Local Tax Limitations, *supra* note 33.

[36] *Doing More with Less, supra* note 34.

[37] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *2022 Annual Performance Repor*t (March 2023), https://www.eeoc.gov/2022-annual-performance-report-apr#h_83434143737316783788956 62.

under Title VII.[38] Contrary to Petitioner's assertion and as discussed below, employees regularly file frivolous Title VII lawsuits that are costly to defend. But because most courts require plaintiffs to show material injury arising from the adverse action, these claims can be eliminated at earlier stages of litigation. As Justice Alito explained in his concurrence in *Burlington Northern* in the retaliation context, "an objective standard [like materiality] … permits insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees ..." *Burlington Northern,* 548 U.S. at 75.

Even with a materiality threshold, Title VII lawsuits are expensive to defend, and local governments expend significant resources to do so. This is true regardless of the merit of the charge or the size of the local government. For example, the City of Plano, Texas has 3,346 employees and a population of just under 300,000. The city utilizes outside counsel to handle employment discrimination litigation under the supervision of its in-house attorneys. The city typically spends $25,000-$30,000 on outside counsel legal fees through the EEOC phase of a given

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[38] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Data & Analytics Overview: Title VII of the Civil Rights Act of 1964 Charges* (Charges filed with EEOC) (includes concurrent charges with ADEA, ADA, EPA, and GINA) FY 1997 - FY 2022, https://www.eeoc.gov/data/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges-adea. These statistics do not include charges that were filed directly with state or local Fair Employment Practices Agencies. Thus, the number of discrimination complaints employers handle are significantly higher than this given that many are filed under parallel state or local laws and handled by state agencies.

litigation regardless of the merit of the underlying claim.[39] If the employee then sues in federal court after receiving a right to sue letter, the city typically expends another $25,000-$30,000 on outside counsel fees to get to the Rule 12 stage of litigation. If the city proceeds to summary judgment, it spends approximately $100,000 more on outside counsel fees. These costs do not account for city employees' own time in responding to the discrimination complaint, which can exceed hundreds of hours of staff and attorney time to gather documents, review emails, respond to interrogatories, and prepare and sit for depositions. Nor do they account for any settlements paid.

Unlike Plano, Monterey County, California, which has a population of 437,325 and 5,500 employees, handles all employment litigation in-house and tracks attorney hours for litigation. The county spends on average $300,000 defending employment discrimination suits through summary judgment, which takes approximately 200 hours of the in-house attorney's time.[40] These suits are not only expensive, but they distract from the public service mission of the department involved.

Smaller local governments are not immune from the high cost of employment discrimination litigation.

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[39] This phase includes investigating the complaint, gathering documents, interviewing employees, and drafting a position statement in response to the complaint of discrimination, as well as any EEOC mandated mediation.

[40] County employees and department heads also spend upwards of 100 hours responding to these complaints to gather documents, but that time is not accounted for in the $300,000 figure.

For example, Monroe County, Florida, which has just 550 government employees and a population of 82,170, spends on average of $5,000-$10,000 on outside counsel fees to litigate a case at the EEOC phase. And the County then typically spends an additional $20,000-$30,000 litigating in federal court through the Rule 12 stage.[41]

While *Amici* believe rooting out invidious discrimination is imperative, as discrimination in the workplace incurs its own significant costs, responding to Title VII lawsuits is nevertheless expensive and time-consuming. It requires not only significant sums of money, but hundreds of hours of employee time, diverting resources away from needed services to local governments' constituencies.

C. Allowing Title VII Suits to Proceed without a Materiality Requirement Will Result in a Reduction in Local Government Services as Costs to Defend Lawsuits Skyrocket.

A materiality requirement helps achieve the appropriate balance between preventing and eradicating discrimination in the workplace and avoiding expensive and frivolous suits. Under the current burden-shifting framework of Title VII, most trivial suits involving subjective feelings like embarrassment, frustration, or being scolded are dismissed at early stages of litigation because the

[41] While the costs to litigate employment discrimination lawsuits will vary throughout the country as attorneys charge different rates in different parts of the country, they are proportionally high for local governments regardless of where they are located.

plaintiff cannot make out a prima facie case under this Court's *McDonnell Douglas* framework.[42] Many Title VII suits that are resolved at the dismissal or summary judgment stage are resolved based on the lack of materiality. *See e.g., Campbell v. Haw. Dep't of Educ.,* 892 F.3d 1005, 1012-13 (9th Cir. 2018) (concluding employee suffered no adverse action on motion for summary judgment related to claim that school lost a performance evaluation and did not pay her during a voluntary two year unpaid leave she requested and was granted); *Cunningham v. N.Y. State Dep't of Lab.,* 326 F. App'x 617, 619 (2d Cir. 2009) (affirming summary judgment in favor of employer based on plaintiff's failure to prove a "materially adverse change in the terms or conditions of his employment"); *Rodriguez-Torres v. Gov't Dev. Bank of P.R.*, 704 F. Supp. 2d 81, 100 (D.P.R. 2010) (finding in favor of the employer on summary judgment based on a lack of an adverse employment action).

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[42] Under the *McDonnell Douglas* burden-shifting test, a plaintiff must first demonstrate a *prima facie* case of discrimination by showing: (1) that she belongs to a protected class; 2) that she was qualified for the job; 3) that despite those qualifications, she suffered an adverse employment action; and 4) the circumstances surrounding the employment action allow for an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Williams v. R.H. Donnelley, Corp.,* 368 F.3d 123, 126 (2d Cir. 2004). The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the action. *McDonnel Douglas Corp.,* 411 U.S. at 802. After the employer meets its burden, the burden then shifts back to the plaintiff to show that the employer's reasons are pretext for discrimination. *Id.* at 804.

Moreover, contrary to the Petitioner's assertion and despite the materiality requirement in place in most circuits, employees still regularly file discrimination complaints over minor slights and trivial complaints. *See e.g., Wince v. CBRE, Inc.*, 66 F.4th 1033, 1042 (7th Cir. 2023) (concluding "[n]either requiring an employee to do his job nor scolding him amount to an adverse action"); *Gaines v. Balt. Police Dep't,* No. CV ELH-21-1211, 2023 WL 2185779, *14 (D. Md. Feb. 22, 2023) (rejecting the claim of a former employee who voluntarily left the police department to pursue another career and then was offered a position at a lower rank when she sought to be rehired); *Henry v. NYC Health & Hosp. Corp.*, 18 F. Supp. 3d 396, 405 (S.D.N.Y. 2014) (rejecting Title VII claim premised on police officer being removed from roll call and sent home on a single occasion as that allegation centered on "mere inconvenience and embarrassment"); *Rodriguez-Torres,* 704 F. Supp. at 100 (concluding plaintiff did not adequately plead an adverse employment action where she was not able to ride in a company car with her boss but it was undisputed that the company provided her with a separate company car and chauffeur and where she did not know the reason she was not invited to ride with her boss); *Bethel v. Porterfield*, 293 F. Supp. 2d 1307, 1332 (S.D. Ga. 2003) (finding the plaintiff failed to establish an adverse employment action based on her selection to take a physical exam that was a requirement of her job). Disgruntled employees sue over not being able to display Confederate symbols in

the workplace,[43] feeling humiliated,[44] feeling embarrassed about the timing of a suspension,[45] and not getting a preferred parking spot[46] or office.[47] While Title VII serves important remedial purposes and *Amici* believe all employers should seek to eradicate discrimination from the workplace, as this Court has stated, Title VII is not a general civility code. *See Oncale,* 523 U.S. at 80. However, adopting Petitioner's preferred standard risks turning it into one.

As demonstrated above, these suits are costly to defend even where employers achieve dismissal earlier in the litigation due to the materiality requirement. However, if Petitioner's rule is adopted by this Court and materiality is no longer a prerequisite to suit, more frivolous complaints will proceed past summary judgment. Employers will be forced to settle these suits or expend huge sums of money to defend them at trial. An undesirable office location, not getting a favored parking spot, or being scolded when someone else is not, may all technically

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[43] *Chaplin v. Du Pont Advance Fiber Sys.*, 293 F. Supp. 2d 622, 627 (E.D. Va. 2003).

[44] *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 826 (5th Cir. 2019), abrogated on other grounds by *Hamilton v. Dallas Cnty.,* No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023).

[45] *Davis v. Legal Servs. Alabama, Inc.*, 19 F.4th 1261, 1267 (11th Cir. 2021).

[46] *Hardin v. Wal-Mart Stores, Inc.*, 604 F. App'x 545, 547 (9th Cir. 2015).

[47] *Green v. Maricopa Cnty. Cmty. Coll. Sch. Dist.*, 265 F. Supp. 2d 1110, 1120–21 (D. Ariz. 2003).

be "any differential treatment" if that phrase is interpreted as the Petitioner urges. If that is the case, local governments can expect more Title VII suits to be filed by disgruntled employees and more suits to proceed past summary judgment. If each suit costs approximately $100,000-$125,000 to get to summary judgment, local governments will have no choice but to cut service to residents and reduce staff, which means fewer teachers, firefighters, sanitation workers, and police officers.

Because Respondent's textual reading of the statute is more sound, this Court should reject Petitioner's reading that would result in such problematic real-world applications.

IV. Allowing Trivial Claims to Proceed Under Title VII Will Upend Cooperative Federalism in Employment Discrimination Cases.

A. Title VII Requires Cooperative Federalism.

There is an intricate relationship between state and federal anti-discrimination laws that would be shattered by any change to Title VII's materiality requirement. Title VII's text has been largely replicated in state anti-discrimination statutes.[48] And

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[48] *See e.g.,* ALASKA STAT. ANN. § 18.80.220 (2023); HAW. REV. STAT. ANN. § 378-2 (2022); IDAHO CODE ANN. § 67-5909 (2020); KAN. STAT. ANN. § 44-1009 (2023); LA. STAT. ANN. § 23:332 (2022); MO. ANN. STAT. § 213.055 (2017); MONT. CODE ANN. § 49-2-303 (2023); NEB. REV. STAT. ANN. § 48-1104 (2015); NEV. REV. STAT. ANN. § 613.330 (2018); N.M. STAT. ANN. § 28-1-7 (2023); N.J. STAT. ANN. § 10:5-12 (2021); N.Y. EXEC. LAW § 296 (2022); OKLA. STAT. ANN. TIT. 25,

many state courts have interpreted their parallel state anti-discrimination laws in harmony with Title VII, including finding that state laws require a materiality element to find an adverse employment action. *See e.g., Bahr v. Capella Univ.,* 788 N.W.2d 76, 83 (Minn. 2010) (citing to Eighth Circuit precedent in reviewing the Minnesota Human Rights Act and concluding "[t]here must be some material employment disadvantage" to show an adverse employment action); *Paranthaman v. State Auto Prop. & Cas. Ins. Co.,* 2014 WL 5768699, *7-8 (Ohio Ct. App. 2014) (noting Ohio courts "look to the guidance of federal case law interpreting Title VII … to examine state employment discrimination claims" and citing to Sixth Circuit precedent concluding an adverse action "is a materially adverse change in the terms and conditions of the plaintiff's employment"); *King v. City of Bos.,* 883 N.E.2d 316, 323–24 (Mass. App. Ct. 2008) (accord); *Hoffelt v. Illinois Dep't of Hum. Rts.,* 867 N.E.2d 14, 17 (Ill. App. Ct. 2006), *as modified on denial of reh'g* (Oct. 20, 2006) (indicating Illinois courts adopted analytical framework of federal courts analyzing Title VII in interpreting the parallel Illinois Human Rights Act and requiring materiality for adverse employment actions); *Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n,* 672 N.W.2d 733, 742 (Iowa 2003) (requiring materiality in assessing adverse employment action under local anti-

§ 1302 (2011); S.C. CODE ANN. § 1-13-80 (2018); UTAH CODE ANN. § 34A-5-106 (2016); VA. CODE ANN. § 2.2-3905 (2023); W. VA. CODE ANN. § 5-11-9 (2016); WYO. STAT. ANN. § 27-9-105 (2007).

discrimination law and citing to Eighth Circuit Title VII case law).

Principles of federalism and comity are inherent in Title VII's statutory scheme. Title VII's text contemplates deference to state anti-discrimination laws and state level expertise.[49] Section 706(c) of Title VII dictates that when an incident of alleged employment discrimination occurs in a state or locality prohibiting such discrimination, the EEOC must await 120 days or the completion of the state's remedial process before processing a discrimination charge. 42 U.S.C. § 2000e–5(c). Additionally, the EEOC must give "substantial weight" to final findings and orders made by state and local authorities in proceedings initiated under state or local law. 42 U.S.C. § 2000e–5(b). Section 706(c) thus recognizes the expertise of state authorities in addressing local matters and facilitates efficient resolution of discrimination claims.[50] *Id.*

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[49] 28 U.S.C. § 1738, which mandates that federal courts afford state court judgments the same preclusive effect they would receive in the respective state courts, provides further support for the balance needed between federal and state courts on employment discrimination matters. This principle, firmly rooted in the Full Faith and Credit Clause of the Constitution, underscores the pivotal role that state courts play in interpreting and enforcing state anti-discrimination laws that often closely align with Title VII.

[50] The legislative history of Title VII further supports that Congress did not intend to permit claimants to re-litigate in federal forums issues already resolved by state courts. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 473, 508, n.14 (1982) (noting "Senator Dirksen, the principal drafter of the Senate bill,

This Court's decision in *Kremer v. Chemical Const. Corp*. highlights the intended balance between state and federal anti-discrimination laws and agencies. In *Kremer,* the plaintiff initiated his discrimination claim by filing a charge with the EEOC. *Kremer*, 456 U.S. at 463-64. The EEOC subsequently referred the case to the New York State Division of Human Rights (NYHRD), the state agency responsible for enforcing New York's discrimination laws. *Id*. The NYHRD found no probable cause for the discrimination allegations, a determination upheld by the state courts on appeal. *Id* at 464. The plaintiff in *Kremer* then tried to sue in federal court, arguing that a New York state court judgment should not bar a Title VII action. *Id*. at 465.

This Court rejected the plaintiff's attempted end-run around res judicata, pointing to the similarity between federal and state anti-discrimination laws and the virtually identical elements of the employment discrimination claims, which made repetitive litigation unnecessary. *Id.* at 479. Emphasizing the importance of respecting federalism principles, the Court concluded that state proceedings needed only to meet the minimum procedural due process requirements of the Fourteenth Amendment. *Id* at 480-83. The Court ultimately upheld the usual rule that once a legal claim's merits are decided in a competent court, they are not subject to redetermination in another forum, unless Congress expressly states otherwise – which was not the case with Title VII. *Id*. 480-85 (explaining the

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stated in no uncertain terms his desire to avoid multiple suits arising out of the same discrimination").

discriminatory acts alleged were prohibited by both state and federal law and "the elements of a successful employment discrimination claim are virtually identical" and therefore concluding that the "petitioner could not succeed on a Title VII claim consistently with the judgment" of the state agency). This decision effectively balanced federalism concerns and avoided duplicative litigation while upholding the integrity of both state and federal anti-discrimination laws.

B. Jettisoning the Materiality Requirement for Title VII will have Profound Implications for State Anti-Discrimination Laws.

The proposed diminution of the well-established materiality requirement in Title VII introduces several potential ramifications which are directly contrary to the principles articulated in *Kremer*. First, such modification will cast doubt on the jurisdictional boundaries of federal courts when handling claims initiated in state courts and dismissed due to a lack of materiality. Established legal doctrines such as res judicata and collateral estoppel may no longer clearly apply, leading to jurisdictional ambiguities.

Second, abandoning the materiality requirement under Title VII will throw materiality-based state court decisions into doubt, requiring that state courts reconsider their interpretations or at least reaffirm that their long-standing interpretations are still correct. This will cause needless litigation over the interpretation of state statutes and could lead to divergent outcomes for the same conduct that previously would have been adjudicated in harmony

under state and federal law. Further complicating matters, state and local governments may find it necessary to amend their anti-discrimination statutes and ordinances to ensure that they satisfy the radically downsized Title VII standard proposed by the Petitioner or to reaffirm that materiality is required under state law.

It follows that modifying the materiality requirement of Title VII would pose a substantial burden on local governments. Most circuits require claimants to prove some level of materiality, aligning with the requirements of numerous state and local anti-discrimination laws and state court decisions that are in harmony with Title VII. A substantial alteration in the interpretation of Title VII, particularly one that results in the potential for dual litigation, will severely strain the already limited resources of local governments. Such budget adjustments divert resources from vital operations and will result in a reduction in local government services.

Because a revision to the materiality requirement under Title VII would have profound implications for federalism, this Court should reject Petitioner's arguments.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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