I. INTRODUCTION

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[1] An employer's choice to transfer or not transfer an employee to a different position falls under the "otherwise to discriminate" language in Title VII.[2] Such cases are known as "discriminatory transfer cases."[3] The purpose of this Note is to evaluate *Muldrow v. City of St. Louis*, in which the Supreme Court held that a plaintiff in a Title VII discriminatory transfer case must show that the transfer caused "some harm" with respect to a term or condition of employment, but need not show that the harm satisfies a significance test.[4] This Note will discuss the precedent relevant to the *Muldrow* decision, as well as the decision's reasoning and significance.

II. LEGAL BACKGROUND

In 2022, the D.C. Circuit held in *Chambers v. District of Columbia* that an employer's decision to transfer or not to transfer an employee, if it is made because of an employee's protected characteristic, is enough harm in itself for a plaintiff to carry their burden in a Title VII case.[5] *Chambers* was a landmark decision. In reaching its decision in *Chambers*, the D.C. Circuit overruled its 1999 *Brown v. Brody* decision that held that a job transfer is actionable under Title

[1] 42 U.S.C. §2000e-2(a)(1).

[2] Muldrow v. City of St. Louis, No. 22-193, slip op. at 1 (U.S. April 17, 2024).

[3] Caraballo-Caraballo v. Corr. Admin., 892 F.3d 53, 58 (1st Cir. 2018).

[4] *Muldrow*, slip op. at 1.

[5] *Id.*

VII only if the employee suffered an "objectively tangible harm" because of the transfer.[6] That is, more harm than the discriminatory decision to transfer or not to transfer an employee was required under *Brown* for a plaintiff to carry their burden in a Title VII discriminatory transfer case.[7] This "transfer plus" requirement was followed to some degree by all Circuits across the United States before *Chambers*.[8] Substantively, Circuits using the transfer plus standard essentially required that a Title VII plaintiff suffer an objectively detrimental change to their wages, job title, level of responsibility, or opportunity for promotion because of their employer's discriminatory transfer decision for the plaintiff's Title VII claim to be actionable.[9] *Chambers* created an eleven-to-one Circuit Split on the harm required for a plaintiff to carry their burden in a Title VII discriminatory transfer case.[10]

The arguments and value judgments in *Chambers* set the stage for *Muldrow*. The dissenting Judge in *Chambers*, unofficially representing the majority view across the Circuits, argued that the transfer plus standard functioned to screen out "cases involving objectively insubstantial injuries alleged to flow from garden-variety workplace assignment and interactions" so that Title VII did not become a "civility code" for the workplace.[11] In the dissent's eyes, the transfer plus standard ensured that Title VII discriminatory transfer litigation agreed with the legal maxim *de minimis non curat lex* ("the law cares not for trifles") that is part

[6] *Id.* (citing Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999)).

[7] *Id.* at 873.

[8] *Id.* at 895 (Katsas, J., dissenting).

[9] *Caraballo-Caraballo*, 892 F.3d at 61; Williams v. R.H. Donnelley Corp., 368 F.3d 123, 128 (2d Cir. 2004); James v. Booz-Allen & Hamilton, Inc. 368 F.3d 371, 376 (4th Cir. 2004); O'Neal v. City of Chicago, 392 F.3d 909, 913 (7th Cir. 2004).

[10] *Chambers*, 35 F. 4th at 900 (Katsas, J., dissenting).

[11] *Id.* at 900, 902.

of the "established background of legal principles against which all enactments are adopted."[12] But the Chambers majority viewed a discriminatory transfer decision, without any additional harm, as easily clearing the de minimus bar, and noted that the transfer plus standard has served to exclude far more than de minimis harms[13] Title VII, according to the Chambers majority, was enacted to prevent all workplace discrimination, and because all discriminatory transfer decisions are discrimination with respect to the workplace, the majority felt it improper to deny relief to plaintiffs who could not meet a heightened bar that was not in the text of Title VII.[14]

Less than two years later, the Supreme Court had an opportunity to settle the Circuit Split created by *Chambers* on the degree of harm required for a plaintiff to carry their burden in a Title VII discriminatory transfer case.[15]

III. THE *MULDROW V. CITY OF ST. LOUIS, MISSOURI* DECISION

A. Facts

From 2008 through 2017, Jatonya Muldrow worked as an officer in the St. Louis Police Department's specialized Intelligence Division.[16] In 2017, the new Intelligence Division commander asked to transfer Muldrow out of the unit so he could replace her with a male.[17] Against Muldrow's wishes, the commander's transfer request was approved.[18] Muldrow was

[12] *Id.* at 890.

[13] *Id.* at 875 (majority opinion).

[14] *Id.* at 877-78.

[15] *Muldrow*, slip op. at 1.

[16] *Id.*

[17] *Id.* at 2.

[18] *Id.*

reassigned to a different job in the St. Louis Police Department.[19] Muldrow's rank and pay remained the same in her new position, but her responsibilities, perks, and schedule did not.[20] After the transfer, Muldrow no longer worked with high-ranking officials in the Intelligence Division.[21] Instead, Mulrow was limited to supervising the day-to-day activities of neighborhood patrol officers.[22] Muldrow also lost access to an unmarked take-home vehicle, had a less regular work schedule involving weekend shifts, and was required to wear a police uniform instead of the plain clothes she wore in her previous position.[23]

B. Procedural History

Muldrow filed a Title VII suit to challenge the transfer.[24] She alleged that the City of St. Louis discriminated against her based on her sex with respect to the "terms or conditions" of her employment by transferring her out of the Intelligence Division.[25] The District Court granted summary judgment, and the Eighth Circuit affirmed.[26] Because Muldrow's transfer "did not result in a diminution to her title, salary, or benefits" and had caused "only minor changes in working conditions," the Eighth Circuit held that Muldrow did not meet her prima facie burden of showing that the transfer caused her a "materially significant disadvantage."[27]

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 3.

[25] *Id.*

[26] *Id.* at 3-4.

[27] *Id.* at 4.

C. The Supreme Court's Decision

Supreme Court reversed the Eighth Circuit's judgment.[28] Justice Kagan wrote the majority opinion in which Chief Justice Roberts and Justices Sotomayor, Gorsuch, Barrett, and Jackson joined.[29] Justices Thomas, Alito, and Kavanaugh each filed an opinion concurring in the judgment.[30]

i. Majority Opinion

The Court held that a plaintiff in a Title VII discriminatory transfer case must show that the transfer caused "some harm" with respect to a term or condition of employment, but need not show that the harm satisfies a significance test.[31] The Court noted that because the language in Title VII requires that an employer's discrimination be with respect to the "terms [or] conditions" of employment, a plaintiff in a discriminatory transfer case must show that the transfer brought about some "disadvantageous" change in the "terms [or] conditions" of employment.[32] But the Court distinguished this "some harm" requirement from the test used by the Eighth Circuit.[33] Primary to the Court's reasoning was that the text of Title VII does not distinguish "between transfers causing significant disadvantages and transfers causing not-so-significant ones."[34] Requiring a significant showing of harm, or a "materially significant disadvantage," as the Eighth Circuit put it, would "impose a new requirement on a Title VII claimant, so that the law

[28] *Id.* at 11.

[29] *Id.* at 1.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 5.

[33] *Id.* at 6.

[34] *Id.*

as applied demands something more of her than the law as written."[35] The Court also noted that Muldrow's allegations, assuming they were properly preserved and supported, meet the Court's new "some harm" requirement "with room to spare."[36]

The City of St. Louis employed textual, precedent, and policy arguments to justify the use of a "significance" standard.[37] Relying on the *ejusdem generis* canon, the City argued that because the "fail or refuse to hire" and "discharge" constitute significant employment disadvantages, the "otherwise to discriminate" catch-all following these categories should likewise only include significant employment disadvantages.[38] The Court agreed that the *ejusdem generis* canon implied a common denominator should connect the categories, but it rejected the City's contention that a "significant disadvantage" was that common denominator.[39] Instead, the Court noted that each category involved an "employment action," which in the Court's view was "a more than sufficient basis to unite the provision's several parts and avoid *ejusdem generis* problems."[40]

The City further argued, citing *Burling Northern & Santa Fe Railroad Co. v. White,* that because Title VII's anti-retaliation provision requires that a retaliatory action be "materially adverse" to be actionable, Title VII's anti-discrimination provision should likewise require that a plaintiff's harm surpass a heightened standard.[41] The Court found the City's argument misplaced,

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[35] *Id.*

[36] *Id.* at 10.

[37] *Id.* at 8.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 8-9.

noting that the anti-retaliation standard set forth by the Court in *White* was peculiar to the anti-retaliation context and does not apply to all of Title VII.[42]

Finally, the City argued that a significance standard was necessary to prevent frivolous and insubstantial lawsuits from burdening courts and employers.[43] The Court rejected the City's floodgates argument by noting that other procedural mechanisms exist to weed out meritless Title VII discriminatory transfer claims.[44]

The Court vacated and remanded the judgment.[45]

ii. Justice Thomas's Concurrence

Justice Thomas did not join the majority opinion because he did not believe the Eighth Circuit's requirement that a plaintiff demonstrate a "materially significant disadvantage" was any different than saying that a plaintiff must show "more than a trifling harm."[46] Though Justice Thomas acknowledged that the words "material" and "significant" often signify a "heightened-harm requirement," he found it unlikely that the Eighth Circuit had such a test in mind. Justice Thomas did recognize that the Eighth Circuit may have used a more demanding test, so he agreed to vacate and remand.[47]

iii. Justice Alito's Concurrence

[42] *Id.* at 9.

[43] *Id.*

[44] *Id.* at 10.

[45] *Id.* at 11.

[46] *Id.* at 1, 3 (Thomas, J., concurring).

[47] *Id.* at 3.

Justice Alito elected not to join the majority opinion for similar reasons to Justice Thomas's.[48] Justice Alito recognized that for decades lower court judges have used varying words to express that not every transfer is actionable under Title VII.[49] Justice Alito found the majority's opinion to be effectively a dispute about terminology, predicting that the practical result of the majority's decision would be that lower court judges would change the words that they use but "continue to do pretty much just what they have done for years."[50]

iv. Justice Kavanaugh's Concurrence

Justice Kavanaugh chose not to join the majority opinion because he held that Title VII does not require a separate showing of harm besides a discriminatory transfer.[51] Justice Kavanaugh adopted the view of the *Chambers* majority but noted that the *Muldrow* majority's "some harm" requirement appeared to be so low that the two standards would lead to the same result in "99 out of 100 discriminatory transfer cases, if not in all 100."[52]

IV. ANALYSIS OF THE *MULDROW* DECISION

Justice Kavanaugh's reasoning should have carried the day in *Muldrow v. City of St. Louis* because it is more faithful to the text of Title VII. Though the majority correctly notes that the text of Title VII does not distinguish between significant and insignificant harms to the terms or conditions of employment resulting from a discriminatory transfer, every employment transfer necessarily changes or *harms* the terms or conditions of employment.[53] A discriminatory transfer

[48] *Id.* at 1 (Alito, J., concurring).

[49] *Id.*

[50] *Id.* at 2.

[51] *Id.* at 2 (Kavanaugh, J., concurring).

[52] *Id.* at 3.

[53] *Id.* at 6 (majority opinion); *Id.* at 1 (Kavanaugh, J., concurring).

is by itself more than a de minimis harm to the terms or conditions of employment.[54] The majority, by adding an additional harm requirement, unnecessarily acts as a super-legislature. Justice Kavanaugh also points out that the majority's "some harm" requirement appears to be little more than a formality.[55] Although Justice Alito explicitly disputes and Justice Thomas implicitly disputes that the majority's "some harm" requirement will have much of a jurisprudential impact, this view seems misguided.[56] "Some harm" simply does not plainly mean the same thing as "materially significant impact" or its similar variants. Some harm appears to mean merely more than zero harm in this context. It will be very difficult to argue that a plaintiff did not suffer *any harm* because of a discriminatory transfer, making Justice Kavanaugh's view seem much more likely. If this is the case, it seems imprudent to ask litigants to meet an inconsequential burden that is not in the text of Title VII.

Nonetheless, *Muldrow* will likely make it easier for plaintiffs in Title VII discriminatory transfer cases involving ostensibly lateral transfers to meet their prima facie burden. For decades federal courts have required plaintiffs in Title VII discriminatory transfer cases to show, in addition to a discriminatory transfer, some "objectively tangible harm" or similarly worded standard for their claim to be actionable.[57] Under this requirement, plaintiffs were typically required to show an objectively detrimental change to their wages, job title, level of responsibility, or opportunity for promotion because of their employer's discriminatory transfer

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[54] *Id.* at 1 (Kavanaugh, J., concurring).

[55] *Id.* at 3.

[56] *Id.* at 2 (Alito, J., concurring); Id. at 1 (Thomas, J., concurring).

[57] Chambers v. District of Columbia, 35 F. 4th 870, 895 (D.C. Cir. 2022) (Katsas, J., dissenting).

decision to meet their prima facie burden.[58] This standard has been used to deny relief to plaintiffs in discriminatory transfer cases where the plaintiff's new position is an ostensibly lateral one of equal rank and pay but differing duties and perks.[59]

For instance, in *O'Neal v. City of Chicago*, the plaintiff could not meet her prima facie burden because her rank and pay were unchanged, even though she lost her flexible work schedule and was assigned different responsibilities.[60] Under the "some harm" standard set forth in *Muldrow*, it would have likely been much easier for the plaintiff in *O'Neal* to have met her burden. A less convenient work schedule and different job duties are textually a lot closer to "some harm" than to the "materially adverse change in employment conditions" that the Seventh Circuit required her to show.[61] Contrary to Justice Alito's view, it is hard to imagine that *Muldrow* will have no impact on these discriminatory transfer cases.[62]

V. CONCLUSION

Muldrow will not impact egregious Title VII discriminatory transfer cases, but it will likely make it easier for plaintiffs who have been transferred to ostensibly lateral positions to carry their prima facie burden. By lowering the prima facie bar for plaintiffs in Title VII discriminatory transfer cases, *Muldrow* also strengthens the incentives for employers to base their workplace decisions on merit and not identity politics. PLEDGE.

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[58] James v. Booz-Allen & Hamilton, Inc. 368 F.3d 371, 376 (4th Cir. 2004).

[59] O'Neal v. City of Chicago, 392 F.3d 909, 912-13 (7th Cir. 2004).

[60] *Id.* at 913.

[61] *Id.*

[62] *Muldrow*, slip op. at 2 (Alito, J., concurring).