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IN THE SUPREME COURT OF THE UNITED STATES

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JATONYA CLAYBORN MULDROW, )

Petitioner, )

v. ) No. 22-193

CITY OF ST. LOUIS, MISSOURI, )

ET AL., )

Respondents. )

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Washington, D.C.

Wednesday, December 6, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

1 APPEARANCES:  
2 BRIAN WOLFMAN, ESQUIRE, Washington, D.C.; on behalf of  
3 the Petitioner.  
4 AIMEE W. BROWN, Assistant to the Solicitor General,  
5 Department of Justice, Washington, D.C.; for the  
6 United States, as amicus curiae, supporting the  
7 Petitioner.  
8 ROBERT M. LOEB, ESQUIRE, Washington, D.C.; on behalf  
9 of the Respondents.  
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-193, Muldrow versus the City of St. Louis.

Mr. Wolfman.

ORAL ARGUMENT OF BRIAN WOLFMAN

ON BEHALF OF THE PETITIONER

MR. WOLFMAN: Mr. Chief Justice, and may it please the Court:

Jatonya Muldrow maintains she was transferred from the Intelligence Division to a different job in the Fifth District because she's a woman. That's sex discrimination, and it's unlawful under the plain terms of Title VII.

Title VII bars an employer from discriminating against an employee with respect to the terms, conditions, or privileges of her employment because of the employee's sex. Respondent now concedes that a lateral transfer changes the terms, conditions, or privileges of employment. After all, a transferred employee cannot show up the next day and do her old job. Her job tasks have changed, and that's the most

1 basic term of employment.

2           So the only question left is whether  
3 transferring an employee because of sex is  
4 discrimination against that person. It is.  
5 "Discrimination against" by its ordinary meaning  
6 and under this Court's precedent means worse  
7 treatment because of a protected characteristic.

8           With that, statutory analysis is  
9 complete, which brings us to what 703(a)(1) does  
10 not do. It doesn't require that an employer's  
11 conduct cause significant disadvantage,  
12 objective material harm, objective tangible  
13 harm, or the like. And contrary to the Eighth  
14 Circuit's understanding, as this Court observed  
15 in *Teamsters*, Title VII provides for equal  
16 opportunity to compete for any job, whether it  
17 is thought better or worse than another. The  
18 statute prohibits discrimination, period.

19           If an employer transfers an employee  
20 because of a protected characteristic, that's  
21 discrimination, and it's prohibited by  
22 Title VII.

23           The Court should reverse and allow  
24 Ms. Muldrow to prove her case.

25           I welcome the Court's questions.

1 JUSTICE THOMAS: Counsel, you said  
2 that -- in -- in your opening remarks that worse  
3 treatment against a protect -- member of a  
4 protected class is a Title VII violation. What  
5 is the worse treatment here?

6 MR. WOLFMAN: The worse treatment here  
7 is the discrimination itself. So differential  
8 treatment and worse treatment are almost in very  
9 -- invariably coterminous. And, here, the worse  
10 treatment is she was treated differently than a  
11 male employee in the same circumstances, and we  
12 are prepared to prove that if we're given the  
13 opportunity.

14 JUSTICE THOMAS: So the -- it doesn't  
15 matter if her salary is the same, the work  
16 arrangements are the same. I know you -- your  
17 argument in the briefs is that her assignments  
18 changed, but her pay did not and her rank did  
19 not. But none of that is necessary for you  
20 under -- in your -- under your argument to make  
21 a claim.

22 MR. WOLFMAN: That is correct, Your  
23 Honor.

24 JUSTICE THOMAS: The mere transfer is  
25 enough?

1 MR. WOLFMAN: Well, the -- the  
2 transfer -- we wouldn't say "mere" in this  
3 particular case with respect, Your Honor, but --

4 JUSTICE THOMAS: Well, transfer alone.

5 MR. WOLFMAN: -- but the transfer  
6 itself makes the claim actionable if she was  
7 treated differently than a male employee would  
8 be under the same circumstances.

9 JUSTICE THOMAS: So what work does the  
10 preposition "against" provide?

11 MR. WOLFMAN: It -- it provides that  
12 the treatment has to be worse, and there may be  
13 circumstances which --

14 JUSTICE THOMAS: So how is it worse --

15 MR. WOLFMAN: -- limited circumstances  
16 --

17 JUSTICE THOMAS: -- though? I mean,  
18 you're saying two things. One, you say that the  
19 mere transfer is enough and "against" adds  
20 nothing, or it may -- or it requires that the  
21 treatment be worse. But I don't -- beyond the  
22 mere transfer, you don't argue that you need  
23 anything else.

24 MR. WOLFMAN: That is correct with  
25 respect to -- that is absolutely correct.



1 JUSTICE THOMAS: So what work does  
2 "against" do?

3 MR. WOLFMAN: The -- the word  
4 "against" is -- is indicating that the -- the  
5 operation of the conduct is against this  
6 particular employee. So that's the work that  
7 the -- the word "against" is doing.

8 It could be -- it could be that it's  
9 just for emphasis, and there may be limited  
10 circumstances, as this Court indicated in  
11 Bostock, where, you know, different treatment  
12 among men and women is not necessarily  
13 discrimination.

14 But, by and large, when a -- a male  
15 employee, if we're taking sex discrimination, is  
16 treated differently from a female employee in  
17 similar circumstances or would be treated  
18 differently, that's discrimination against, in  
19 this case, the female employee.

20 JUSTICE KAGAN: You refer --

21 CHIEF JUSTICE ROBERTS: Well --

22 JUSTICE KAGAN: -- to Bostock --

23 CHIEF JUSTICE ROBERTS: Go ahead.

24 JUSTICE KAGAN: You refer to Bostock,  
25 and Bostock says the term "discriminate against"

1 refers to distinctions or differences in  
2 treatment that injure protected individuals. So  
3 that formulation suggests that there are  
4 distinctions or differences in treatment that  
5 don't injure protected individuals, in other  
6 words, that -- that the injury is a added thing  
7 that one has to show in a discrimination suit.

8 Do you not read that statement that  
9 way?

10 MR. WOLFMAN: I do not. I think,  
11 generally speaking, the -- the injury is the  
12 discrimination itself. That's this Court's  
13 decision in Heckler versus Mathews.

14 JUSTICE KAGAN: I mean, it's a funny  
15 sentence to write if that's what we thought, and  
16 then we can talk about whether -- in fact, we  
17 can think about many kinds of distinctions and  
18 differences that don't injure anybody, but -- or  
19 that don't injure the -- the -- that person at  
20 least.

21 But it's a -- it's a funny sentence to  
22 write, distinctions or differences in treatment  
23 that injure protected individuals, if you think  
24 that all distinctions and differences injure  
25 protected individuals.

1           MR. WOLFMAN: Well, not necessarily  
2 all distinctions, but the way I would put it is  
3 that in the vast majority of circumstances,  
4 differential treatment and worse treatment are  
5 going to be the same thing, and that is that --  
6 that injury is going to occur in the vast  
7 majority of circumstances when there is  
8 discrimination.

9           That's this Court's decision, I -- I  
10 believe, in Heckler versus Mathews. That's in a  
11 sense a premise of the Brown decision, that, you  
12 know, discrimination itself is injurious.

13           JUSTICE JACKSON: And isn't --

14           CHIEF JUSTICE ROBERTS: Well, that's  
15 --

16           JUSTICE JACKSON: -- isn't "terms and  
17 conditions of employment" doing some work as  
18 well? I mean, you -- you say that that's a  
19 conceded part of the statute, and I -- with  
20 respect to how they're interpreting it, and I  
21 understand that, but I would guess that  
22 differential treatment with respect to the terms  
23 and conditions of employment may be what you  
24 mean when you say that --

25           MR. WOLFMAN: Well --

1 JUSTICE JACKSON: -- discrimination is  
2 happening in and of itself.

3 MR. WOLFMAN: -- that -- that is  
4 correct in this sense. I -- I believe I -- I --  
5 I take the -- your understanding here, which is  
6 that "terms, conditions, and privileges" are --  
7 is -- are a limiting principle within 703(a)(1),  
8 which is what the D.C. Circuit said in -- in the  
9 Chambers case. That's -- that's the work that  
10 "terms, conditions, and privileges" are doing.

11 So the -- the statute --

12 JUSTICE JACKSON: But I guess I'm --  
13 I'm sort of --

14 MR. WOLFMAN: -- does not reach  
15 conduct outside the workplace.

16 JUSTICE JACKSON: I -- I -- I know,  
17 but I guess I'm inviting you to think about  
18 "discriminate against" as Justice Kagan was  
19 positing it. You know, she's -- she's  
20 highlighted a distinction between discrimination  
21 against someone that injures them versus  
22 discrimination that might not injure them.

23 And I'm just wondering whether the  
24 fact that we're in the context of terms and  
25 conditions of employment does any work with

1 respect to a -- a -- a determination that  
2 discrimination, differential treatment in this  
3 context, terms and conditions of employment, is  
4 inherently injurious from the -- the standpoint  
5 of the point that Justice --

6 MR. WOLFMAN: Yes, I -- I --

7 JUSTICE JACKSON: -- Kagan is making.

8 MR. WOLFMAN: -- I do take the point,  
9 and I think that is -- that is a possibility.  
10 But I'm -- I'm putting it in a different frame,  
11 which is that "terms, conditions, and  
12 privileges" is a limiting principle within the  
13 statute, and that may indeed tell you what --  
14 what, in fact, is injurious in terms of  
15 703(a)(1). I'd agree --

16 JUSTICE KAGAN: But --

17 CHIEF JUSTICE ROBERTS: This is very  
18 --

19 JUSTICE KAGAN: -- you don't --

20 CHIEF JUSTICE ROBERTS: -- I -- and  
21 I'm sorry if I'm just repeating questions, but  
22 it's -- it's a very obviously significant thing  
23 and I found it extremely confusing looking at  
24 the briefs.

25 You each say that the other concedes

1 the point.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: And I don't  
4 see that that can be -- be right. I -- I mean,  
5 I don't know what the hypothetical would be.  
6 Let's say, you know, the -- the transfer is from  
7 an office, you know, on this hall to an office  
8 on the next hall that are identical, the  
9 responsibilities are identical, everything is  
10 the same. You know, one is a different paint  
11 color.

12 MR. WOLFMAN: Right.

13 CHIEF JUSTICE ROBERTS: And yet the  
14 person says, I'm transferring you from this  
15 office to that office because you're a woman.

16 MR. WOLFMAN: Right. And --

17 CHIEF JUSTICE ROBERTS: Is that  
18 actionable? There is no injury apart from, as  
19 you say, the fact of discrimination?

20 MR. WOLFMAN: You know, our position  
21 is, Your Honor, that that is injurious, and let  
22 -- let me explain why.

23 CHIEF JUSTICE ROBERTS: When you say  
24 that is injurious --

25 MR. WOLFMAN: That -- that -- that

1 case --

2 CHIEF JUSTICE ROBERTS: -- do you --  
3 I'm sorry. Let -- let me -- does that mean  
4 there is a separate -- no separate requirement  
5 of injury or that everything I've said,  
6 there's -- nothing is different other than that  
7 the person is moved and -- and the -- the  
8 manager says it's because you're a woman.  
9 Everything else is the same.

10 You say that there is injury there or  
11 that, I guess, you don't need injury?

12 MR. WOLFMAN: No, I -- I would say  
13 there is injury there because there's  
14 discrimination, but let -- let me explain why.

15 I -- I believe, you know, this -- that  
16 the questions here are revolving around, I  
17 believe, whether there's some, you know, de  
18 minimis type exception to the position that  
19 we're taking. And, you know, there are, of  
20 course, de minimis things that happen in the  
21 workplace, trivial things that happen in the  
22 workplace.

23 So, if, you know, pink pens and blue  
24 pens are distributed to all the employees on a  
25 random basis, I think we can consider that

1 trivial. But, if they're distributed on the  
2 basis of race, immediately that becomes  
3 nontrivial.

4 And I think most people understand  
5 that intuitively, that if those pens are  
6 distributed -- distributed on the basis of race,  
7 that could be stigmatizing. In a sense -- I  
8 realize that pens are not public education, but  
9 in sense -- in a sense, that is Brown because  
10 Brown said, look, we're going to hold constant  
11 the question of any tangible harm.

12 JUSTICE KAGAN: Well, sure.

13 JUSTICE BARRETT: Well, but unless you  
14 --

15 JUSTICE KAGAN: I mean, our  
16 discrimination law has recognized for many, many  
17 years that there are stigmatic injuries, right,  
18 where just the -- even if it's a very, very  
19 minor thing, you know, sending one set of people  
20 to one water fountain and another set of people  
21 to another water fountain is stigmatic injury.  
22 So -- so I accept that point.

23 But are you saying that all  
24 discrimination is stigmatic injury? Like --

25 MR. WOLFMAN: No.



1 JUSTICE KAGAN: -- I mean, because you  
2 started with, you know, you know, making people  
3 worse. I mean, there are differences and  
4 distinctions that people can make on the -- on  
5 the basis of protected characteristics that make  
6 people better off, right?

7 I mean, if -- if I decide one day  
8 that, you know, every woman in my workplace  
9 should get a raise, I mean, that makes women  
10 better off.

11 MR. WOLFMAN: That is correct, and --  
12 and -- and that -- if that is publicly known,  
13 that could be stigmatizing, in effect, both to  
14 the women and to the men. And can I explain  
15 why?

16 To -- to the women, it might be that  
17 if we're doing this solely on the basis of sex,  
18 the person might say to themselves, well, I earned  
19 this, I earned this raise, and now it's being  
20 meted out on the basis of my sex or race or  
21 national origin.

22 Now, of course, in your circumstance,  
23 the men might have a cause of action as well,  
24 but the point is is that's stigmatizing if it's  
25 done publicly. If it's done privately, it's

1 still denigrating and demeaning even if it is  
2 not stigmatizing. And, you know, that's what  
3 this statute is -- is going at.

4 Now what I do --

5 JUSTICE BARRETT: But are you saying  
6 then, if the employer wants to increase  
7 diversity in the workplace and so promotes, say,  
8 some black employees and they get better jobs,  
9 then that's discrimination?

10 MR. WOLFMAN: That poses -- I want to  
11 answer that question, but I -- I also want to  
12 say that that is -- is not posed by this case.

13 JUSTICE BARRETT: I understand that --

14 MR. WOLFMAN: Of course, I know you  
15 know -- I --

16 JUSTICE BARRETT: -- but it seems to  
17 me the answer you just gave Justice Kagan would  
18 logically apply to that situation.

19 MR. WOLFMAN: Well, it -- it -- it's a  
20 difficult question because, if -- if a employer  
21 has an affirmative action plan, that calls up  
22 this Court's decision in Weber and Johnson, and  
23 it would have to be evaluated in terms of the --  
24 the guidelines set out in Weber and Johnson.

25 And so there's a separate category of

1 analysis for, you know --

2 JUSTICE BARRETT: Okay. Well, let me  
3 take the example --

4 MR. WOLFMAN: -- this grievant and  
5 affirmative action.

6 JUSTICE BARRETT: -- you just gave,  
7 then I'll put race to one side.

8 The example you just gave, you said it  
9 would be actionable under Justice Kagan's  
10 hypothetical of all women promoted. What if  
11 it's we want to have a, you know, face first, we  
12 want women out there, we want to promote women,  
13 we want to show that we are friendly to women,  
14 let's say it's a law firm and there's -- you  
15 know, the numbers of female partners are low and  
16 so they want to bring that up.

17 That's actionable?

18 MR. WOLFMAN: I'm -- I'm not sure.  
19 This is -- is this some sort of requirement? I  
20 -- it's hard to answer.

21 JUSTICE BARRETT: Well, I'm just  
22 asking you on Justice Kagan's hypothetical if  
23 the --

24 MR. WOLFMAN: Yes. I think that it --

25 JUSTICE BARRETT: -- employer agrees.

1 And it sounds to me like you were saying that  
2 was actionable discrimination.

3 MR. WOLFMAN: -- if there is a  
4 privilege of employment that is meted out on the  
5 basis of sex, that is actionable. And I think,  
6 you know, I can turn back to Justice Kagan's  
7 hypothetical and, again, if -- if women are  
8 being given raises just because they're women,  
9 then that is actionable and also, as I say,  
10 potentially stigmatizing to the women.

11 And -- and if it's being given out not  
12 to the men simply on the basis of race, of  
13 course, they have a claim as well.

14 JUSTICE ALITO: I don't think the --  
15 the problem that's presented by this case -- and  
16 it's a -- it's a difficult problem -- is whether  
17 there are forms of disparate treatment that are  
18 benign.

19 I would say that all disparate  
20 treatment based on race, sex, et cetera, is  
21 wrong, but I think the insight, right -- right  
22 or wrong, of the courts that have imposed  
23 something like a significant disadvantage  
24 requirement is that although disparate treatment  
25 based on one of these characteristics is wrong,

1 there should be some sort of threshold before it  
2 gets into court, and that's where the de minimis  
3 idea comes from.

4 But you say there -- there shouldn't  
5 even be a de minimis exemption.

6 MR. WOLFMAN: Well, that is our  
7 position, but I want to take your question in a  
8 couple stages if I may.

9 The first is a significant  
10 disadvantage rule and these -- the others that  
11 are similar, objective tangible harm, objective  
12 harm and so forth that you see in the circuits,  
13 have not been applied in anything like a de  
14 minimis way, and you see that in the -- in --  
15 in, as we cited in our briefs, in the brief of  
16 the New York Legal Aid Society at pages 27 -- 24  
17 to 27 of the LDF brief, this is --

18 JUSTICE ALITO: Well, I don't want to  
19 interrupt you, but, I mean, the issue is whether  
20 there should be some kind of threshold --

21 MR. WOLFMAN: Right.

22 JUSTICE ALITO: -- whether it's  
23 de minimis, whether it's significant  
24 disadvantage, whether it's -- whether some other  
25 terminology is appropriate, some sort of

1 threshold that has to be cleared before the  
2 matter gets into court.

3 I mean, the -- the employer says --  
4 the employee says, on Monday morning, the -- my  
5 supervisor always asks my similarly situated  
6 coworker whether he or she had a good weekend,  
7 but the supervisor never says that to me.

8 Is that actionable?

9 MR. WOLFMAN: That -- that may not be  
10 a term, condition, or privilege of employment if  
11 this is not a requirement of the job. That --  
12 that -- that may be separately, you know,  
13 analyzed under the hostile work environment  
14 type. But I -- but I don't want to evade the --  
15 the question.

16 And so, again, if -- our position is  
17 that you don't have to get to the de minimis  
18 question because discrimination itself gets over  
19 the de -- de minimis hurdle, but I do want to go  
20 back to my first --

21 JUSTICE KAVANAUGH: Isn't your point  
22 that terms, conditions of employment could not  
23 cover certain things like what Justice Alito --

24 MR. WOLFMAN: The --

25 JUSTICE KAVANAUGH: -- just mentioned?

1           It would still be, if you're treating  
2 someone differently on the basis of race, that's  
3 discrimination. Then the separate question is,  
4 is it a term or condition of employment. And  
5 some, you know, after-hours things or random  
6 things in the office that are more social than  
7 related to work are maybe --

8           MR. WOLFMAN: That is --

9           JUSTICE KAVANAUGH: -- not terms,  
10 conditions of employment. That's the --

11          MR. WOLFMAN: That -- that is correct.

12          JUSTICE KAVANAUGH: -- analytical way  
13 to approach it.

14          MR. WOLFMAN: That is one way to go  
15 about it, Justice Kavanaugh, and that's why in  
16 my -- my first-line response to Justice Alito  
17 was that might not have been a requirement of  
18 the workplace. But --

19          JUSTICE ALITO: Well, then what is a  
20 --

21          CHIEF JUSTICE ROBERTS: I -- go ahead.

22          JUSTICE ALITO: Go ahead, Chief.

23          What is a requirement of the  
24 workplace? What is the definition --

25          MR. WOLFMAN: It -- it is --

1 JUSTICE ALITO: -- of a condition of  
2 employment?

3 MR. WOLFMAN: Terms, conditions, and  
4 privileges of employment are any requirement or  
5 benefit imposed upon or withheld from or denied  
6 an employee. That's what a term, condition, or  
7 privilege of employment is.

8 So, if it's just a statement made in  
9 the workplace, I just don't think that is  
10 necessarily a term, condition, or privilege.

11 JUSTICE ALITO: All right. They --  
12 they gave me an office with a view of the alley  
13 instead of an office with a view of a park.

14 MR. WOLFMAN: Your -- Your Honor --

15 JUSTICE ALITO: Is that a condition of  
16 employment?

17 MR. WOLFMAN: -- it -- it is a  
18 condition of employment, and I -- I must say, if  
19 that is meted out on the basis of race, all the  
20 employees of one race get a -- a -- a -- a -- a  
21 view of the alleyway and another set of  
22 employees purely on the basis of race get a --  
23 deliberately get a view of the city, a beautiful  
24 view of the city, that is discrimination under  
25 Title VII.



1 JUSTICE ALITO: Well, your --

2 CHIEF JUSTICE ROBERTS: Thank you --

3 JUSTICE ALITO: I'm sorry.

4 CHIEF JUSTICE ROBERTS: Yeah. Thank  
5 you, counsel. If this is your position, I don't  
6 understand the bulk of your brief. The bulk of  
7 your brief talks about different, you know,  
8 locations, different facilities, she has to wear  
9 a uniform, different hours, no weekend,  
10 different access to, you know, superiors.

11 Under your theory, all of that is  
12 completely irrelevant. And as far as the terms  
13 and conditions of employment, that was not your  
14 argument in the brief. The argument in your  
15 brief was there's no requirement. And then you  
16 go on and list all these things that would count  
17 under normal circumstances, I would think, as  
18 adverse consequences.

19 MR. WOLFMAN: Your --

20 CHIEF JUSTICE ROBERTS: So why is all  
21 that in your brief if your argument is we don't  
22 need to show any of that?

23 MR. WOLFMAN: Your Honor, the reason  
24 that is in our brief is we -- we were laying out  
25 the harm that these rules like significant

1 disadvantage have done in the circuits, and this  
2 goes back to Justice Alito's question.

3 Significant disadvantage, as this  
4 Court itself said in Groff, is nothing like de  
5 minimis.

6 CHIEF JUSTICE ROBERTS: Well, but,  
7 just to be clear, if none of that was in your  
8 brief, your argument would be the same? No --  
9 as far as we know, hours were the same. She did  
10 not have to wear a uniform. Access to superiors  
11 would be, you know, absolutely the same.  
12 Everything is the same except --

13 MR. WOLFMAN: That is correct, Your  
14 Honor.

15 CHIEF JUSTICE ROBERTS: Okay.

16 MR. WOLFMAN: No. But -- but I think  
17 this is --

18 CHIEF JUSTICE ROBERTS: So I should  
19 have skipped those pages?

20 MR. WOLFMAN: No, I -- I don't think  
21 that is -- that is right. What we were  
22 attempting to do in our brief was to discuss the  
23 very things that have been coming up, the  
24 de minimis exception, coming up in all the lower  
25 court cases, and with the expectation that we

1 would be asked these questions.

2 But if the Court -- the Court narrowed  
3 the question to transfers, and if the Court  
4 wishes to decide this case solely on the basis  
5 of transfers, my client is perfectly happy with  
6 that.

7 CHIEF JUSTICE ROBERTS: So we limited  
8 the question to transfers, and you gave us  
9 arguments talking about terms and conditions and  
10 the various ways in which there was actual  
11 injury?

12 MR. WOLFMAN: That is correct.

13 CHIEF JUSTICE ROBERTS: Okay.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE ALITO: There -- there are a  
17 number of significant differences between the  
18 two positions here, no question about it, but  
19 just to -- to give you a hypothetical that's  
20 different but in -- is perhaps related.

21 So suppose the only difference between  
22 the two positions is one's a desk job and one's  
23 a job on the street, okay? And a particular  
24 employee says, they transferred me from the desk  
25 job, which is safe and interesting to -- to me,

1 that's what I'm interested in, to the street  
2 job, which is more dangerous and not interesting  
3 to me. That would -- that would qualify, right?

4 MR. WOLFMAN: Absolutely.

5 JUSTICE ALITO: What if it was the  
6 opposite way around and the employee -- this  
7 particular employee said, I don't want to sit at  
8 a desk all day, I want to be out there where --  
9 in the real world? That would be -- that would  
10 qualify --

11 MR. WOLFMAN: Absolutely.

12 JUSTICE ALITO: -- as well?

13 MR. WOLFMAN: With -- Justice Alito,  
14 absolutely. That is -- that is the Teamsters  
15 case. The Court says in Teamsters that some  
16 people might prefer the line driving position  
17 and some people might prefer the local position.  
18 And Title VII protects either of those choices  
19 against a determination by the employer of  
20 discriminatory intent.

21 JUSTICE ALITO: No, I --

22 MR. WOLFMAN: That is Teamsters.

23 JUSTICE ALITO: -- I mean,  
24 discrimination, I can't emphasize it too much,  
25 on any of these grounds is morally wrong. The

1 question is whether it's the stuff of the  
2 district court case.

3 One more question. Some of our  
4 Supreme Court police officers prefer to work the  
5 day shift and some prefer to work the night  
6 shift. So, if someone is transferred from the  
7 night shift, which a lot of people wouldn't  
8 like, to the day shift, that may be viewed as an  
9 injury by that particular officer, right, and  
10 that would be enough?

11 MR. WOLFMAN: Absolutely actionable.  
12 That's what -- that -- that's the -- the -- the  
13 Threat decision in the Sixth Circuit. That's  
14 the Hamilton decision in the Fifth Circuit.

15 JUSTICE ALITO: And what if it's the  
16 other --

17 MR. WOLFMAN: Shift changes --

18 JUSTICE ALITO: -- what if it's the  
19 other way around?

20 MR. WOLFMAN: -- shift changes on the  
21 basis of race or sex are unlawful.

22 JUSTICE ALITO: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor?

25 Justice Kagan?

1 JUSTICE KAGAN: I mean, just to make  
2 clear I understand what you're saying, you're  
3 saying that there is an injury requirement but  
4 that the fact of discrimination satisfies the  
5 injury requirement in all but the most  
6 extraordinary case?

7 MR. WOLFMAN: Well, yes, I mean, and  
8 the -- you know, I -- I don't want to put my  
9 toes in too deep, but this was what was reserved  
10 in Bostock and clearly does not have to be dealt  
11 with here, which is, you know, there -- there  
12 may be deep-seated understandings and -- that  
13 people never think of sex-segregated bathrooms  
14 as discrimination. That's correct.

15 What -- this goes back to the point I  
16 made earlier, Your Honor, which is that  
17 differential treatment is almost invariably  
18 worse treatment if it's done on a basis of a  
19 protected characteristic.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch?

22 JUSTICE GORSUCH: There was some  
23 suggestion in some of the amici -- we have so  
24 many amici -- that employers might respond to a  
25 decision in -- in your client's favor by

1 redefining the terms, conditions, and privileges  
2 of employment so that you may be reassigned  
3 here, there, or wherever.

4 And I want your thoughts about that.

5 MR. WOLFMAN: And I'm not sure I  
6 understand the question, Your Honor --

7 JUSTICE GORSUCH: So --

8 MR. WOLFMAN: -- with all respect.

9 JUSTICE GORSUCH: No, no, fair enough.  
10 That's my fault. So what if an employer says,  
11 your job isn't defined as sitting at a desk or  
12 walking the rounds around the building or  
13 whatever it may be or being on the beat, but it  
14 is defined as any of those things so that there  
15 is -- it isn't a term or condition of employment  
16 that you are a desk job or on the beat?

17 MR. WOLFMAN: And, you know, the -- if  
18 the terms and conditions and privileges of  
19 employment --

20 JUSTICE GORSUCH: Can an employer  
21 define its way around the problem, I guess?

22 MR. WOLFMAN: I think the answer is  
23 no. If that determination that you're  
24 suggesting was made in response to a charge or a  
25 suit or -- or --

1 JUSTICE GORSUCH: No, it would be made  
2 ex ante. So we hire all of our police officers  
3 and you can be subject to any of these things.  
4 That -- that -- that -- that is the suggestion  
5 of at least some of our --

6 MR. WOLFMAN: And --

7 JUSTICE GORSUCH: -- amici.

8 MR. WOLFMAN: -- and that --

9 JUSTICE GORSUCH: A decision in your  
10 favor.

11 MR. WOLFMAN: -- might be permissible,  
12 but I want to add two caveats.

13 JUSTICE GORSUCH: Mm-hmm.

14 MR. WOLFMAN: First, if there was  
15 evidence that that itself was done out of  
16 discriminatory intent, that would be unlawful.

17 Secondly, if any given change within  
18 that broader context, so six months later a  
19 change is made consistent with the literal terms  
20 of that but done with discriminatory intent,  
21 that would be actionable under Title VII. That  
22 may be very difficult to prove, I understand,  
23 but that would still be actionable.

24 JUSTICE GORSUCH: And then I want to  
25 give you a chance to just flesh out your



1 position, which I understand has been subject to  
2 some questioning this morning, that -- that in  
3 adopting the Civil Rights Act of 1964, Congress  
4 sought to root out discrimination, root and  
5 branch, and that all of it is impermissible,  
6 presumptively injurious.

7 MR. WOLFMAN: That is our position,  
8 and if I could take you to the words of the  
9 statute as to why we know that's so. The  
10 statute prohibits discriminatory hiring and  
11 discharging, and the purpose of "terms,  
12 conditions, and privileges" is to catch  
13 everything else between those two endpoints, and  
14 that's how we know that it's meant to eradicate  
15 discrimination in the workplace. It doesn't do  
16 it perfectly, but that's the intent.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: The amicus brief  
21 of the District of Columbia, joined by I think  
22 eight states, supports you but says that it  
23 would be helpful if in -- if we were to rule for  
24 you that we repeat something the D.C. Circuit  
25 said in its en banc opinion in Chambers, "Not

1 everything that happens at the workplace affects  
2 an employee's terms, conditions, or privileges  
3 of employment."

4 Are you in agreement or at least  
5 tolerate a statement like that?

6 MR. WOLFMAN: I mean, I think that is  
7 true, that not everything that happens at the --  
8 in the workplace alters one's terms, conditions,  
9 and privileges of employment. I think that may  
10 be true of the hypo --

11 JUSTICE KAVANAUGH: And can a --

12 MR. WOLFMAN: -- one of the  
13 hypotheticals that Justice Alito posed.

14 JUSTICE KAVANAUGH: And on transfers,  
15 I think your point was in the brief at least  
16 that transfers are heartland terms, conditions,  
17 or privileges of employment --

18 MR. WOLFMAN: It's about the job  
19 itself, yes, Your Honor.

20 JUSTICE KAVANAUGH: -- and that we  
21 don't need to resolve kind of the outermost  
22 reaches of what "terms, conditions, or  
23 privileges of employment" would cover. Is that  
24 correct as well?

25 MR. WOLFMAN: A -- a transfer

1 decision, to either withhold a transfer or to  
2 give a transfer, is the functional equivalent of  
3 a hiring decision or a discharge decision. It  
4 is in the heartland of "terms, conditions, and  
5 privileges."

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

9 JUSTICE BARRETT: So let's say that I  
10 think the phrase "discriminate against" carries  
11 with it, scoops in with it, some sort of injury,  
12 but I also think -- you know, the QP was  
13 restricted to transfers, but I also think that  
14 you can look at a transfer -- it must be looked  
15 at objectively, but yet, in the eyes -- because  
16 transfers can change depending on the eye of the  
17 beholder, right? You had some questions like  
18 that. I prefer the day shift, you prefer the  
19 night shift.

20 But it has to be understanding all the  
21 facts and circumstances of, say, the young  
22 mother who wants the day shift so that her hours  
23 align with her children's hours or school and,  
24 you know, the supervisor says, I don't really  
25 want to work with women and I'm on the day

1 shift, so I'm putting you on the night shift.

2 For her, understanding her facts and  
3 circumstances, an objective person in her  
4 situation would consider that injurious.

5 MR. WOLFMAN: I -- I agree with that,  
6 but I -- I do want to offer a -- a caveat to  
7 that, which is -- so I -- I certainly agree that  
8 a person in those circumstances is likely to  
9 view that as injurious.

10 But you are suggesting that there  
11 would be some sort of test that sort of marries  
12 subjective and objective, sort of objective but  
13 looking at it from the circumstances of the  
14 particular individual, and that worries me for  
15 two reasons.

16 First, the -- the -- the statute  
17 doesn't train on that. The track -- the -- the  
18 statute only asks questions about the employer's  
19 conduct.

20 JUSTICE BARRETT: Well, I -- I don't  
21 think it is -- let's see -- I'm sorry to  
22 interrupt you, but I don't think the premise of  
23 your response is quite capturing what I think.

24 I don't see it as a blending of  
25 objective and subjective because we do that all

1 the time like, say, in -- in torts. It's the  
2 reasonable man. I mean, so we're trying to  
3 avoid the eggshell Title VII plaintiff, right?

4 We're saying a reasonable person in  
5 the circumstance of the plaintiff would  
6 experience this as an injury, and I don't think  
7 that's a subjective inquiry. It's putting an  
8 objective inquiry but just familiar with the  
9 facts and circumstances.

10 MR. WOLFMAN: Okay. I -- I -- I  
11 accept that, that it's objective under -- under  
12 your description of it, but I -- I think that is  
13 not what the words of the statute call for.  
14 The -- the statute asks three questions about  
15 the employer's conduct, is it a term or  
16 condition, is -- is it with respect to a  
17 protected characteristic, and did the employer  
18 act with discriminatory intent. That's what the  
19 statute calls for.

20 And my concern is also a practical  
21 one. I started reciting the pages of our brief  
22 and the amicus briefs. You see case after case  
23 after case under the so-called objective  
24 standards, the one that used to exist in the  
25 D.C. Circuit, the one that exists in the Eighth

1 Circuit, where things, you know, wildly  
2 different than what anyone would view as  
3 de minimis are being thrown out of court.

4 And I -- I'll -- I'll end with this,  
5 which is that the Fifth Circuit in its recent  
6 en banc decision, 14 members of the court said  
7 these doctrines are thwarting legitimate claims  
8 of workplace bias.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: So I guess I'm  
13 really confused and a little bit worried about  
14 your concession to Justice Kagan that there is  
15 some sort of injury requirement here. I -- I  
16 look at the text of the statute, and it seems to  
17 be doing what you said at the end with respect  
18 to Justice Barrett, which is identifying when  
19 there are unlawful employment practices.

20 So the statute begins, "It shall be an  
21 unlawful employment practice for an employer,"  
22 and then we skip down, "to discriminate against  
23 any individual with respect to the terms and  
24 conditions," et cetera, "of its employment  
25 because of these protected characteristics."

1                   So, to the extent that we are  
2 identifying sort of what is morally  
3 reprehensible, what is unlawful, I suppose we're  
4 just saying when someone discriminates with  
5 respect to these terms and conditions.

6                   So then the question, I guess, is what  
7 does it mean to discriminate, and I don't know  
8 that that necessarily means that there has to be  
9 some sort of injury.

10                  As I look at Bostock, you know, we  
11 have a -- a definition in Bostock that  
12 "discriminate" means roughly the same as it  
13 meant in 1964, "to make a difference in  
14 treatment or favor of one as compared to  
15 others."

16                  MR. WOLFMAN: Right.

17                  JUSTICE JACKSON: That doesn't  
18 necessarily mean injury.

19                  And I am thinking of a scenario in  
20 which a person is fired or not hired or  
21 transferred because of their race, and it's not  
22 injurious. Let's say it's the best thing that  
23 ever happened to them because it was a terrible  
24 job, and they're fired and, you know, they go on  
25 to do great things in another area, and the

1 defendant is going to say that, you weren't  
2 injured by my discriminatory firing.

3 So I don't understand why injury is  
4 doing work in this analysis.

5 MR. WOLFMAN: Well, I -- I don't  
6 disagree with anything you said, and I -- if I  
7 made a concession, I certainly -- of the type  
8 you're suggesting, I didn't mean to do that.

9 What I am saying is that if there's an  
10 injury requirement, and there is some injury  
11 requirement to get over Article III, the -- the  
12 injury is --

13 JUSTICE JACKSON: That's a different  
14 thing, though. But, to my --

15 MR. WOLFMAN: -- the discrimination  
16 itself.

17 JUSTICE JACKSON: Right. But I'm  
18 sorry.

19 MR. WOLFMAN: The injury is --

20 JUSTICE JACKSON: Can we just --

21 MR. WOLFMAN: -- the discrimination  
22 itself.

23 JUSTICE JACKSON: -- can we just  
24 clarify, because, to the extent you're talking  
25 about that injury, you're talking about standing



1 injury, right?

2 MR. WOLFMAN: Well, I'm talking about  
3 discrimination being an injury unto itself in  
4 all but the most unusual cases. That was my  
5 back-and-forth with Justice Kagan.

6 JUSTICE JACKSON: But that's just when  
7 it happens. I mean, Congress is just saying, if  
8 this -- if discrimination happens, we have an  
9 unlawful thing, and so then the question is what  
10 does it mean to discriminate. I thought we said  
11 in Bostock to treat someone differently because  
12 of this characteristic.

13 Whether or not the person can go on to  
14 establish or has to establish that they were  
15 actually injured by that, I'm worried, and I  
16 thought that's what the issue was in this case.  
17 Do we have a separate element that a person who  
18 has been treated differently on the basis of  
19 race or -- or sex or whatever has to also prove  
20 that that differential treatment injured them?

21 MR. WOLFMAN: Well, what -- what I  
22 would say is that they have to prove no injury  
23 other than the discrimination itself. There's  
24 no heightened harm requirement.

25 JUSTICE JACKSON: All right. And let

1 me just ask you one --

2 MR. WOLFMAN: There's no additional  
3 harm requirement.

4 JUSTICE JACKSON: -- one last question  
5 about that. To the extent that we're worried  
6 that people who have not suffered any actual  
7 concrete harm as a result of this discrimination  
8 are bringing these lawsuits, I'm wondering  
9 whether or not that's not taken care of in  
10 damages because, at the end of the day, you  
11 bring your lawsuit, and if you've been  
12 transferred to exactly the same position, you  
13 say that to a jury, and they say, fine, you  
14 might have been discriminated against, but your  
15 damages are zero because you haven't shown any  
16 harm for which you need to be compensated.

17 Am I thinking about that correctly?

18 MR. WOLFMAN: That -- that is -- that  
19 is correct, and we make this point at -- at some  
20 length in our opening brief and we reiterate in  
21 our reply brief that the idea that, you know,  
22 frivolous claims or marginal claims are going to  
23 come through is very unlikely. One -- one needs  
24 to have damages to have, you know, a sensibly  
25 viable case to bring in federal court.

1                   And one of the reasons that we and  
2 amici talk about the kinds of cases that are  
3 being brought in the federal courts and being  
4 thwarted is they're all in the heartland. I  
5 mean, the transfers may be most in the  
6 heartland, but we see cases about denials of  
7 training on the basis of race.

8                   JUSTICE JACKSON: So, indeed, that  
9 is -- that is the work of the stuff that the  
10 Chief Justice is talking about in this case,  
11 right? You want to show that this person  
12 actually was harmed in the sense that she could  
13 bring a case and get damages from the jury  
14 because something, you know, happened to her,  
15 but it's not an element of making the claim,  
16 correct?

17                   MR. WOLFMAN: Absolutely correct.

18                   JUSTICE JACKSON: Thank you.

19                   CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21                   Ms. Brown.

22                   ORAL ARGUMENT OF AIMEE W. BROWN  
23 FOR THE UNITED STATES, AS AMICUS CURIAE,  
24 SUPPORTING THE PETITIONER

25                   MS. BROWN: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 Forcing an employee to transfer  
3 because she is a woman is discriminating against  
4 her with respect to the terms and conditions of  
5 employment under Title VII regardless of whether  
6 one position is significantly worse than the  
7 other.

8 That's the plain meaning of the text,  
9 and it's consistent with this Court's  
10 longstanding precedents, which recognize that  
11 the statute strikes at the entire spectrum of  
12 disparate treatment in employment.

13 The City fights against the clear text  
14 principally by claiming that the phrase  
15 "discriminate against" incorporates a  
16 significant disadvantage requirement. But to  
17 "discriminate against" simply means drawing  
18 distinctions that injure protected individuals.

19 And this Court has repeatedly  
20 recognized that being denied equal treatment  
21 because of a protected characteristic gives rise  
22 to an actionable harm. That's all the statute  
23 requires.

24 The City's contrary reading would  
25 permit employers to designate a predominantly

1 Hispanic store, as in the Seventh Circuit's  
2 AutoZone decision, to give only men their shift  
3 preferences, to pay Black employees \$1 less, or  
4 to relegate Muslim employees to the back of a  
5 store. Those results are inconsistent with the  
6 statute Congress enacted. The Court should  
7 reverse and instruct the lower courts to apply  
8 the text as written.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Can you have  
11 discrimination that is perceived by someone who  
12 is, say, you say that this is law enforcement  
13 and we need in this particular precinct more  
14 black or Hispanic officers, and so you are moved  
15 or transferred because of race?

16 MS. BROWN: So there is a -- I -- I  
17 think that that is a discrimination claim and  
18 that would be actionable, and -- and that would  
19 qualify. There is a bona fide occupational  
20 qualification exception --

21 JUSTICE THOMAS: So doesn't --

22 MS. BROWN: -- which does not apply to  
23 race.

24 JUSTICE THOMAS: But won't that run  
25 headlong into the focus on diversifying the

1 workforce in certain situations?

2 MS. BROWN: So we think that there is  
3 adequate room within the bounds of Title VII to  
4 create opportunities for diversity and to ensure  
5 that diverse -- that -- that there is a diverse  
6 workforce through recruiting, through  
7 mentorship, through programs that -- that --

8 JUSTICE THOMAS: No, I'm talking  
9 solely about transfers now, that you need more  
10 black police officers in certain neighborhoods,  
11 say, in St. Louis in -- and in the Sarah -- or,  
12 I'm sorry, the Page, West Page, or Cook area.

13 MS. BROWN: So, no, I don't think that  
14 you can make a transfer on the basis of race,  
15 and I think that's the clear text of the  
16 statute, and that's -- that's what it requires.

17 Congress has this bona fide  
18 occupational qualification standard if there is  
19 a business necessity, but Congress expressly did  
20 not include race in that context. So Congress  
21 made the judgment that there is no situation in  
22 which it's -- it's permitted or there is a  
23 business necessity or -- or Congress thinks that  
24 that could be justified within the context of  
25 race.

1 JUSTICE THOMAS: So simply making the  
2 selection or the transfer based on race or sex  
3 in and of itself becomes actionable?

4 MS. BROWN: That is our position.

5 JUSTICE THOMAS: Nothing more?

6 MS. BROWN: Yes, that's our position.  
7 We do think that when a transfer -- when an  
8 employment decision is made on the basis of a  
9 protected characteristic, that is the denial of  
10 equal treatment, and that's a harm that this  
11 Court has recognized in many cases, including  
12 Heckler versus Mathews, as my -- as my friend  
13 said. You know, Allen versus Wright makes the  
14 same point. There are other cases as well, but  
15 that we think is the only harm that the statute  
16 addresses.

17 JUSTICE SOTOMAYOR: Can we go --

18 CHIEF JUSTICE ROBERTS: Counsel, is  
19 there -- is there anything that Mr. Wolfman said  
20 with which you disagree?

21 MS. BROWN: So I think that he -- in a  
22 colloquy with Justice Gorsuch, he was talking  
23 about whether someone could change the  
24 definition of the conditions of employment or  
25 the -- of the -- what -- the way the work or

1 your -- your job was defined. I think our  
2 position is that any kind of job assignment will  
3 necessarily qualify as a term, condition, or  
4 privilege of employment. It doesn't have to be  
5 set out in the way that the job description is  
6 written.

7 And so I think that -- that -- that we  
8 think that, you know, those -- it doesn't matter  
9 if the job assignment description is -- is  
10 altered because of discriminatory reasons. What  
11 matters is whether this particular person was  
12 assigned new responsibilities based on a  
13 discriminatory basis.

14 JUSTICE SOTOMAYOR: Can you see any  
15 transfer that wouldn't qualify as  
16 discriminatory, assuming that it was based --  
17 the Chief posited one where you're going to be  
18 moved from one end to -- to the other end of the  
19 floor, let's say. I find it hard to posit that  
20 the only difference would be the color of the  
21 wall, but it could be, as the other -- as your  
22 colleague said, because one has a nice window  
23 and the other one doesn't, and I may think of  
24 that as de minimis.

25 MS. BROWN: Sure.



1 JUSTICE SOTOMAYOR: All right? And  
2 some others might. So can you think of how we  
3 approach those situations? The situations that  
4 intuit -- not the significant disadvantage one  
5 because I -- I have a very hard time  
6 understanding how courts are thinking that  
7 switching somebody from a day to a night job or  
8 a Monday-through-Friday job to a rotating  
9 week-long job where you're not getting any  
10 weekends off anymore is not a significant  
11 disadvantage, but we'll put aside the facts of  
12 this case.

13 MS. BROWN: Sure.

14 JUSTICE SOTOMAYOR: How do we look at  
15 those sorts of things?

16 MS. BROWN: So I think that, by  
17 definition, if you are transferring somebody, if  
18 you're changing their office location, if you  
19 are, you know, altering their shift or -- or  
20 anything like that on the basis of a protected  
21 characteristic, that is inherently harmful.  
22 That is -- that is discrimination against them  
23 in the terms, conditions, and privileges of  
24 employment, and I think that that is actionable.

25 I understand that there might be cases

1 where the specific employment action itself  
2 seems minor. I think that those cases are  
3 perhaps a lot less likely to be brought, in part  
4 because of the -- the damages concerns that  
5 Justice Jackson was -- was pointing to.

6 I think also in those cases, it's  
7 going to be harder for -- as an evidentiary  
8 matter often for the employee to put forth  
9 sufficient evidence to show that there is a  
10 plausible inference that -- that the office  
11 assignment was made based on a protected  
12 characteristic, and so that is going to help,  
13 you know, get rid of a lot of these -- these  
14 kinds of claims on that basis as well.

15 But what we think the inquiry should  
16 be focused on and what the statute certainly  
17 focuses the inquiry on is whether there is  
18 intentional discrimination, not on whether the  
19 particular employment action, so long as it fits  
20 within terms, conditions, and privileges, is of  
21 a sufficient degree to be actionable.

22 JUSTICE KAVANAUGH: But some things --

23 JUSTICE KAGAN: So just to --

24 JUSTICE KAVANAUGH: Go ahead.

25 JUSTICE KAGAN: I mean, just to

1 clarify your position just so I understand it,  
2 even in your opening, you did use words like  
3 "injury" or "harm" or "worse off," I'm not  
4 exactly sure which ones you used, but those  
5 sorts of words, and we've used those sorts of  
6 words in several -- many of our opinions, but  
7 what you're saying is that those words do not  
8 have sort of any independent consequence, that  
9 once you can show the discrimination, you've  
10 shown the injury, you've shown the harm, you've  
11 shown the being worse off, that there's no extra  
12 thing. Is that -- am I reading you right?

13 MS. BROWN: Yes, again, in -- in  
14 almost every situation. Of course, we do  
15 recognize that there are some kind of  
16 distinctions that don't give rise -- that are  
17 generally viewed as innocuous, and so I would  
18 set those aside. But, in the mine run case,  
19 when you are treating somebody differently based  
20 on a protected characteristic, that is the  
21 injury.

22 JUSTICE KAGAN: And what are you  
23 setting aside?

24 MS. BROWN: Bathrooms, there are some  
25 kinds of dress codes that, you know, are

1 generally viewed as equal, but they recognize  
2 that men and women wear different clothes,  
3 things like that.

4 JUSTICE ALITO: What is your  
5 definition of a transfer?

6 MS. BROWN: So we don't have a  
7 definition of a transfer. The Court, you know,  
8 reformulated the -- the question presented to --  
9 to focus specifically on transfers. Nothing in  
10 our position changes based on how you view a  
11 transfer. I think, you know, most courts or --  
12 the kinds of transfers that -- that are  
13 generally addressed are, you know, a change in  
14 location, in responsibilities, in supervisors,  
15 things like that.

16 JUSTICE ALITO: You want us to hold  
17 that it's always sufficient if it is alleged  
18 that there was a transfer on the basis of a  
19 prohibited characteristic, but you -- you don't  
20 want to tell us what a transfer is?

21 MS. BROWN: Again, I think that was a  
22 term that was introduced by the Court. It's not  
23 a statutory term. But I think you could say,  
24 when there are -- and the D.C. Circuit doesn't  
25 --

1 JUSTICE ALITO: I'm sorry to  
2 interrupt. How can we decide the case on that  
3 basis? Maybe it was unwise for the Court to  
4 phrase the question that way, but the -- the  
5 question is whether all transfers qualify. So  
6 don't you have to provide a definition of a  
7 transfer?

8 MS. BROWN: So I would say that it is  
9 something like what I was suggesting. It's  
10 where the -- the employee's responsibilities,  
11 job location, or supervisor have changed. I  
12 don't think it needs to be all three.

13 So, for example, there's the Seventh  
14 Circuit's decision in -- in AutoZone, where an  
15 employee was transferred from one store to  
16 another on the basis of race. The allegation  
17 there was that the employer wanted to maintain a  
18 predominantly Hispanic store, and so they moved  
19 an employee over to another store to maintain  
20 that.

21 The Seventh Circuit there held that  
22 that was insufficient under either Section  
23 703(a)(2) or (a)(1). We think that's incorrect.  
24 We think that kind of a transfer would certainly  
25 qualify.

1                   CHIEF JUSTICE ROBERTS: So now -- so  
2     you're saying a transfer is covered because  
3     there will always be changes in conditions or  
4     terms. Well, then a transfer itself is not  
5     enough. You have to look at the conditions and  
6     terms. If it is from one place to another, it's  
7     a transfer, and if everything's the same, then,  
8     under your position, it wouldn't be covered,  
9     because you look at -- there must be new  
10    conditions, there must be terms. And,  
11    certainly, if there -- there are changes in  
12    conditions and terms, and that's -- many were  
13    documented or at least at the summary judgment  
14    stage in the Petitioner's brief. And that's a  
15    familiar inquiry and easy.

16                   But if you're -- you're saying that --  
17    well, if you're saying that there always has to  
18    be a change in conditions and terms, that's one  
19    thing. Saying it doesn't matter whether there  
20    is or is not so long as there's discrimination,  
21    it seems to me that's something different.

22                   MS. BROWN: So there certainly does  
23    have to be a change in terms and conditions of  
24    employment. We think that anytime there's a  
25    transfer, there will necessarily be a change in

1 terms and conditions of employment because I  
2 take a transfer to mean at least a change in  
3 location, and -- and we think the location is a  
4 part of your attendant -- the attendant  
5 circumstances that surround your employment.  
6 That's a part of your -- your working  
7 conditions.

8 The Court has recognized in, you know,  
9 Meritor and Oncale and -- and Harris that  
10 working conditions are a part of what -- of what  
11 is encompassed within terms and conditions of  
12 employment. So I -- I think that, by necessity,  
13 a transfer is going to fall into -- into those  
14 categories.

15 CHIEF JUSTICE ROBERTS: Okay. Thank  
16 you, counsel.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: Do you think it's  
20 helpful to say, "Not everything that happens in  
21 the workplace falls within Title VII"?

22 MS. BROWN: Yes, I think that would be  
23 helpful, and it would be appropriate. I agree  
24 with what the District of Columbia's brief said,  
25 that that phrasing has helped the -- the lower

1 courts, the district courts, there have  
2 sufficient leeway to continue to dismiss claims  
3 that are not actionable, that maintains the kind  
4 of, you know --

5 JUSTICE ALITO: Okay. So then --

6 MS. BROWN: -- personal facts.

7 JUSTICE ALITO: -- what things that  
8 happen in the workplace don't qualify?

9 MS. BROWN: So I think that that  
10 phrasing refers to things like informal  
11 workplace interactions, isolated incidents. The  
12 Court in, you know, Harris, Oncale, Meritor has  
13 referred to things like offensive and  
14 distasteful jokes even if they are kind of, you  
15 know, sex discriminatory or racist in some ways,  
16 single, you know, one-off interactions like  
17 that, for example.

18 JUSTICE ALITO: Well, you talk about  
19 one-offs in your -- in a footnote in your brief,  
20 but, when you -- when you talk about harassment,  
21 are you trying to -- you don't want us to import  
22 that statement here -- I mean that standard  
23 here. It has to be severe and pervasive?

24 MS. BROWN: No. No, that's not what  
25 we're suggesting. In the footnote in our brief,



1 we suggested that -- or we -- we were explaining  
2 that I think one-off incidents in those cases,  
3 they're -- it's less likely that those are going  
4 to -- enough to be actionable -- being  
5 actionable, even if it is a one-off situation  
6 that affects your terms and conditions of  
7 employment, simply because, in those instances,  
8 it's going to be harder as an evidentiary matter  
9 to put forth sufficient evidence to show that  
10 there was intentional discrimination.

11 JUSTICE ALITO: Well, what if the  
12 supervisor is always nasty to me because of my  
13 sex? Always. Does that qualify?

14 MS. BROWN: That I think would be  
15 analyzed under the hostile work environment  
16 cases, and it would depend on whether the -- the  
17 nasty treatment was severe and pervasive.

18 JUSTICE ALITO: Well, why does that  
19 have to be severe and pervasive, but there's no  
20 threshold requirement for any other form of  
21 workplace discrimination?

22 MS. BROWN: So the Court has explained  
23 that in the hostile work environment context,  
24 the question is whether there is a constructive  
25 alteration of the terms and conditions of

1 employment, and so the -- the question is  
2 essentially whether the employer has effectively  
3 required you to submit to that harassing  
4 treatment as part of the working environment  
5 that you're in.

6 And I think, you know, a background  
7 kind of lurking factor in those cases is also  
8 whether the conduct that you're speaking about  
9 there is attributable to the employer as an  
10 employer, and, you know, the employer is not  
11 always going to be responsible for everything  
12 that the -- the supervisor says.

13 JUSTICE ALITO: Okay. One last  
14 question.

15 Suppose you're talking to a district  
16 court judge and the district court judge says,  
17 look, every year I'm getting 500 new civil  
18 cases, and you're telling me that I cannot  
19 dismiss for failure to state a claim a case that  
20 alleges only really trivial disparate treatment.

21 And you say, well, don't worry about  
22 that because, after discovery, you may be able  
23 -- I may be able to grant summary judgment or,  
24 after trial, the -- the damages aren't being --  
25 aren't going to be significant.

1           And, really, that's not an answer to  
2 my problem. It's really helpful to me and  
3 consistent with what I think belongs in federal  
4 court, not what's moral and immoral but what  
5 belongs in federal court, to be able to dismiss  
6 these trivial cases at the outset as soon as I  
7 see the complaint.

8           What do you say to that judge?

9           MS. BROWN: So, even after Chambers in  
10 the D.C. Circuit, there have been cases that  
11 have been able to be dismissed on a motion to  
12 dismiss when there are conclusory allegations,  
13 when the facts pled still do not give rise to an  
14 inference of discrimination. You know, you  
15 still do have to plead something that's going to  
16 help give rise to that inference of  
17 discrimination, whether that's a comparator in a  
18 -- in a similarly situated position or whether  
19 that's other conduct that suggests that these  
20 minor employment incidents are attributable to  
21 discrimination.

22           And so there are -- there are cases,  
23 we've cited some in our brief, I think the  
24 District of Columbia in its amicus brief cites  
25 additional cases from the district where those

1 cases have been able to be dismissed. And, of  
2 course, discovery can be limited, motions for  
3 summary judgment are often granted.

4 And I would also say that even in the  
5 transfer context now, when the courts have --  
6 have required this kind of significant  
7 disadvantage requirement, you're always getting  
8 through or almost always getting through to  
9 summary judgment because courts have recognized  
10 that -- that at least in some instances, the  
11 change in position is significant -- is  
12 sufficient, and so courts are -- are addressing  
13 those then too.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor?

16 Justice Kagan?

17 Justice Gorsuch?

18 JUSTICE GORSUCH: Ms. Brown, you -- in  
19 some of your discussions, a -- a lot of what you  
20 said tracks what the D.C. Circuit said in  
21 Chambers, and I just wonder, is there anything  
22 in that opinion with which you disagree?

23 MS. BROWN: No, I don't think that  
24 there is. I mean, I think they -- they set  
25 aside the question of whether there's a

1 de minimis exception. Of course, we think that  
2 the Court could -- could do the same here. Any  
3 transfer is necessarily going to be, we think,  
4 more than a de minimis injury.

5 In our view, we think that there  
6 probably is no real de minimis exception here  
7 because of the significance of the -- the injury  
8 based on a protected characteristic, that that  
9 discrimination in and of itself it seems hard to  
10 characterize as trifling or insignificant or  
11 hardly worthy of notice.

12 But -- but we think that, you know,  
13 the opinion by Judge Tatel and -- and Judge  
14 Ginsburg was a very good opinion and we -- we do  
15 agree with it.

16 JUSTICE GORSUCH: That's what I  
17 thought the answer would be.

18 (Laughter.)

19 JUSTICE GORSUCH: In -- in your  
20 colloquy with Justice Kagan, you briefly  
21 mentioned bathrooms and uniforms and suggested  
22 they might be okay, and I'm wondering how under  
23 your theory of the case.

24 MS. BROWN: So I -- I think that there  
25 is this kind of narrow set of circumstances that

1 I just referred to where there -- distinctions  
2 based on sex have kind of always been treated as  
3 innocuous, and I think those circumstances raise  
4 their own kind of special set of issues and  
5 there are cases that might arise within that  
6 context where you question whether the specific,  
7 you know, set of bathrooms or the grooming  
8 standards fall within that innocuous kind of  
9 characteristic and --

10 JUSTICE GORSUCH: Innocuous by --  
11 innocuous, do you mean non-injurious?

12 MS. BROWN: Yes, exactly.

13 JUSTICE GORSUCH: So you think there  
14 is an injury requirement here?

15 MS. BROWN: Yes. It's the injury that  
16 is inherent in unequal treatment in most  
17 circumstances. In almost any circumstance, when  
18 you're talking about protected characteristics,  
19 I think that there are some differences with sex  
20 and that this Court has recognized those. Other  
21 courts have recognized those. The Court hasn't  
22 really fully fleshed out I think, like, the  
23 theory behind that. If I had to guess, I think  
24 it would be --

25 JUSTICE GORSUCH: I'm not asking you

1 to guess, but I am --

2 MS. BROWN: Okay. I won't guess.

3 (Laughter.)

4 JUSTICE GORSUCH: -- but I am asking  
5 for your help, so keep going.

6 MS. BROWN: My sense is that -- that  
7 the intuition behind the distinctions in those  
8 cases is that in the mine run case, a  
9 gender-specific bathroom or a uniform is not  
10 going to give rise to the kinds of stigmatic or  
11 dignitary harms that we usually associate with  
12 unequal treatment on the basis of sex.

13 I think that there are obviously  
14 distinctions or -- or there are cases when that  
15 won't be the case. If the bathrooms are  
16 actually unequal, if the dress and grooming  
17 standards, you know, trade on sex stereotypes or  
18 are themselves, you know, more -- more difficult  
19 to comply with for one sex than the other, then  
20 I think that you would be maybe outside of that  
21 kind of innocuous area.

22 JUSTICE GORSUCH: You at least think  
23 that there are some circumstances in which those  
24 distinctions are permissible under Title VII?

25 MS. BROWN: Yes, we do.

1 JUSTICE GORSUCH: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh?

4 JUSTICE KAVANAUGH: On bathrooms,  
5 dress codes, and grooming standards, though, you  
6 couldn't have, of course, different standards  
7 based on race.

8 MS. BROWN: Of course not. And I  
9 think that kind of suggests that the question  
10 there is not -- or the issue there is not  
11 whether bathrooms or dress and grooming  
12 standards are conditions of employment and it's  
13 not whether distinctions with bathrooms and  
14 dress and grooming standards are too immaterial  
15 to be significant. It's just pulling out that  
16 we do think that sex is sometimes different.

17 JUSTICE KAVANAUGH: And then a couple  
18 times -- this is a little bit of a side point --  
19 but you said severe and pervasive when talking  
20 about harassment. My understanding, and this  
21 matters, and some cases have been on, it's  
22 severe or pervasive.

23 MS. BROWN: That is correct. I  
24 apologize if I -- if I misstated that.

25 JUSTICE KAVANAUGH: And then, third,



1 at summary judgment, a lot of these cases are  
2 resolved in my experience. Is that your  
3 understanding as well?

4 MS. BROWN: Yeah, that's consistent  
5 with what I've seen, and looking through the  
6 cases that were decided in the D.C. Circuit  
7 after Chambers, the majority of the cases where  
8 summary judgment was at issue, the -- the -- the  
9 employer prevailed in those cases even then, and  
10 that's based on whether there's sufficient  
11 evidence of -- of intentional discrimination at  
12 that point.

13 JUSTICE KAVANAUGH: And this is  
14 Justice Alito's question, but I -- I think it's  
15 always been pretty hard to dismiss a case on  
16 12(b)(6).

17 MS. BROWN: Yes, I think that's  
18 correct. You don't have to plead the prima  
19 facie case, as this Court has held. And so  
20 there are -- there are instances in which you  
21 can get -- where you can get dismissed on  
22 12(b)(6) if you -- if -- if the -- the facts  
23 there just aren't -- aren't there, but in the  
24 mine run of cases, I think you are getting to  
25 summary judgment even now.

1 JUSTICE KAVANAUGH: Thank you.

2 MS. BROWN: Mm-hmm.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett?

5 JUSTICE BARRETT: I just want to be  
6 sure that I understand the government's position  
7 here.

8 So the word "discriminate" can have no  
9 negative connotation. Like I might have a  
10 discriminating palate, right?

11 MS. BROWN: Mm-hmm.

12 JUSTICE BARRETT: But, because  
13 Title VII has the word "against" in it,  
14 discriminate against, it does carry some sort of  
15 injury, but the government's position -- and  
16 maybe this is why bathrooms and grooming  
17 standards for men and women are different -- the  
18 government's position is not that there is no  
19 injury but simply that mere discrimination is  
20 the injury, and with race, that basically exists  
21 all the time, but with sex, it does not always  
22 exist because not every distinction between men  
23 and women is injurious.

24 MS. BROWN: That's correct, yes.

25 JUSTICE BARRETT: Okay. Thank you.

1 MS. BROWN: Mm-hmm.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Jackson?

4 JUSTICE JACKSON: So just going back  
5 to Justice Alito's questions about trivial  
6 disparate treatment, I guess I didn't see those  
7 in the QP, and maybe I'm not looking at it  
8 correctly.

9 I thought we had isolated the transfer  
10 determination in order to avoid having to say  
11 anything about whether or not there would be an  
12 injury requirement in a whole host of other  
13 situations, to include the trivial or, you know,  
14 allegedly trivial scenario.

15 Am -- am I -- am I looking -- so I  
16 thought our opinion could say whatever injury  
17 requirement might exist with respect to certain  
18 kinds of other kinds of employment  
19 determinations, we took this case to focus on  
20 transfers, and with respect to transfers, we  
21 hold, and I guess you would have us hold, that  
22 it's enough under the statute that a person is  
23 transferred because of these protected  
24 characteristics.

25 They do not have to separately prove

1 that that transfer, because of the protected  
2 characteristics, injured them or significantly  
3 injured them or whatever the -- the --- the  
4 court of appeals held here about the degree of  
5 injury.

6 MS. BROWN: That's correct. And --  
7 and we have a -- you know, a footnote in our  
8 brief there as well that kind of sets aside  
9 these cases and says, you know, the -- the  
10 Respondent here, the City here, has brought up a  
11 host of hypotheticals. And, of course, the  
12 Court has narrowed the question presented and  
13 doesn't need to address any of those.

14 I took some of Justice Alito's  
15 questions to be about whether a transfer could  
16 in some situations seem relatively minor if  
17 it -- if you think that a transfer would  
18 incorporate, you know, a move from one office to  
19 another.

20 JUSTICE JACKSON: All right. So let's  
21 take -- Justice Sotomayor had that scenario as  
22 well.

23 MS. BROWN: Mm-hmm.

24 JUSTICE JACKSON: Let's take that.  
25 You have the office, and one is red and one is

1 blue. They're otherwise identical. And the  
2 person, the boss, says, I think women should be  
3 in red offices. So, I'm sorry, I know you  
4 picked the blue office in the -- as we went  
5 through, but I'm requiring that you sit in the  
6 red office because you're a woman.

7 Is it the government's position that  
8 the woman would have to, in that scenario, not  
9 only prove that she was selected for this  
10 treatment because she was a woman but also that  
11 working in a red office significantly injured  
12 her?

13 MS. BROWN: No. Our position is that  
14 the discrimination based on a protected  
15 characteristic is sufficient to show the harm  
16 that's required under the statute.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Loeb.

21 ORAL ARGUMENT OF ROBERT M. LOEB

22 ON BEHALF OF THE RESPONDENTS

23 MR. LOEB: Thank you, Mr. Chief  
24 Justice, and may it please the Court:

25 The language used in the statute

1 doesn't say "discriminate between" or  
2 "discriminate with respect to." It says  
3 "discriminate against," and that language, as  
4 used in Title VII, requires not just  
5 differential treatment but a difference that  
6 injure the employee, specifically significant  
7 material objective harm.

8           And reading Section 703(a)(1) to  
9 require harm is nothing new. For example, more  
10 than 25 years ago in *Oncale*, this Court held  
11 that a plaintiff needs to show both that they  
12 were subject to disadvantageous conditions,  
13 there harassing conditions, and that those  
14 adverse conditions were imposed based on a  
15 protected status. And this Court went on to say  
16 the severity and the negative impact of the  
17 conditions must be looked at through an  
18 objective lens, not based on personal  
19 sensitivities, not based on personal  
20 preferences.

21           That approach is fully consistent with  
22 that of the Eighth Circuit here and consistent  
23 with the approach adopted by pretty much all the  
24 circuits for the last at least 25 years.

25           And reading "discriminate against" as

1 requiring material objective harm is fully  
2 consistent with how this Court read that very  
3 same language in Section 704(a) in Burlington  
4 Northern as that Court looked to 7 -- 703(a)(1)  
5 precedent and the language of 703(a)(1).

6           Moreover, reading "discriminate  
7 against" as requiring significant material harm  
8 is a piece with the specific examples provided  
9 in the statute. Congress gave the initial  
10 examples of refusal to hire, firing an employee.  
11 Those are quintessential acts that are harmful  
12 to the plaintiff.

13           A contextual principle that is  
14 embraced by this Court for a long time is that  
15 the Congress does not legislate as to trifles.  
16 So it's no surprise that this Court has  
17 consistently read Title VII not to speak to  
18 minor slights or personal preferences of the  
19 employee or job actions with no significant  
20 harm. As Justice Scalia emphasized in Oncale  
21 and as this Court reiterated in Burlington  
22 Northern, Title VII is not a civility code.

23           Here, the Eighth Circuit properly held  
24 that the personal preferences for one assignment  
25 over another within the St. Louis police force,

1 without more, cannot support the harm  
2 requirement of Title VII, and this Court should  
3 affirm that judgment.

4 I welcome your questions.

5 JUSTICE THOMAS: You say there --  
6 there must be harm because of the addition of  
7 the preposition "against," "discriminate  
8 against." But how do we quantify that harm?  
9 And if you are correct or if you think it has to  
10 be a material harm, is there any difference  
11 between that and de minimis harm? Or is it one  
12 side of the same -- different sides of the same  
13 coin?

14 MR. LOEB: Yeah, the other side argues  
15 that it's unclear what the standard means. It  
16 makes arguments that it's not administrable.  
17 But the courts of appeals have been applying  
18 that standard for at least 30 years and have  
19 said that material harm means that there's  
20 something that is harming you as far as in the  
21 workforce. Your responsibilities, your chances  
22 for advancement. You know, it can be your hours  
23 of work. It can be a significant different --  
24 different functions of the job. It's not a high  
25 bar, but there needs to be something more than



1 mere personal preferences and -- and subjective  
2 sensitivities of the particular employee.

3 So it's a material objective harm.  
4 It's through the lens of an objective employee,  
5 not the frailties of a particular sensitive  
6 employee.

7 JUSTICE JACKSON: Can I ask you --

8 CHIEF JUSTICE ROBERTS: Why doesn't  
9 the -- down a hall, offices on both sides, the  
10 employer says, I want the women on the -- the  
11 east offices, I want the men on the -- the west.  
12 Everything else is identical.

13 Why -- why isn't that a sufficient  
14 harm in the same way any type of segregation on  
15 the basis of race or gender is itself harmful?  
16 You're not really sure what the consequences  
17 will be in terms of perception or -- or anything  
18 else, but it seems to be a certain violation of  
19 the statute.

20 MR. LOEB: Yeah, I think, once you add  
21 into your hypothetical the overt discrimination,  
22 then you get into a hypothetical like Justice  
23 Kagan's water fountain example where by a  
24 protected status you're going to allow one group  
25 and -- and not another. And it could be an

1 office.

2           And then you would look at it as Judge  
3 Katsas said in the -- in his dissent in the  
4 Chambers case. You'd look through the lens of  
5 the, you know, harassment, hostile workforce  
6 cases as to whether that statement by the  
7 employee that women -- you know, saying that  
8 they use -- need to use one bathroom or the  
9 other, that doesn't create stigma. But saying I  
10 want all women to be over here and I want all  
11 men over there in certain circumstances can be  
12 stigmatizing. For example, one of the  
13 hypotheticals, I'm going to give one protected  
14 status group just views of the alley and I'm  
15 going to give others not views of the alley.

16           CHIEF JUSTICE ROBERTS: Right. Now  
17 you're having the same difficulty the other way  
18 as we had or at least I had before. I'm just  
19 asking about no discernible harm. And your  
20 answer is, well, there's a view of the alley,  
21 there's a view of this.

22           MR. LOEB: No.

23           CHIEF JUSTICE ROBERTS: I mean --

24           MR. LOEB: Let me --

25           CHIEF JUSTICE ROBERTS: -- am I going

1 to have the same problem with you, only from a  
2 different perspective?

3 (Laughter.)

4 MR. LOEB: No, no, let me --

5 CHIEF JUSTICE ROBERTS: Because, I  
6 mean, you seem to be answering questions in  
7 which there's no harm apart from discrimination  
8 by saying, oh, there is harm.

9 Now, if the harm is the discrimination  
10 itself, that's one thing. Do you think that  
11 situation could arise?

12 MR. LOEB: No, that -- that -- their  
13 argument conflates the intent and the harm  
14 requirement. You don't just satisfy the  
15 requirement by saying: But I think it was done  
16 to me because of my protected status.

17 What I'm suggesting is there are some  
18 cases where what the employee is -- saying  
19 something overtly, as -- as -- as Justice Thomas  
20 said last -- last term, that if you have a -- a  
21 stigmatizing segregation in the workforce, it's  
22 inherently going to be injurious.

23 So it's the stigma in certain  
24 circumstances which are based on the statements  
25 being made by the -- the employer --

1 JUSTICE KAVANAUGH: Well, what if it's  
2 not --

3 CHIEF JUSTICE ROBERTS: Okay. No --

4 JUSTICE KAVANAUGH: -- what if it's  
5 not overt, though? So it's proved that that's  
6 what's happened, but it was never said. So the  
7 discrimination, after you go through discovery,  
8 is proved. This is what has happened. The  
9 women have to work in one place, the men in  
10 another. Or the black employees are assigned to  
11 different offices. It's never said, though, so  
12 you can't just funnel it into harassment.

13 MR. LOEB: I -- I -- I --

14 JUSTICE KAVANAUGH: Under your theory,  
15 that's fine.

16 MR. LOEB: Under our theory, it is the  
17 statement being made by the employer which is  
18 stigmatizing.

19 JUSTICE KAVANAUGH: It --

20 MR. LOEB: You're saying that I think  
21 it's based on my --

22 JUSTICE KAVANAUGH: Exactly, but if  
23 you have a policy, just never stated, of I'm  
24 assigning the black employees to work outside in  
25 the heat, as one of the cases you were --

1 MR. LOEB: Right.

2 JUSTICE KAVANAUGH: Yeah?

3 MR. LOEB: We think --

4 JUSTICE KAVANAUGH: But it's never  
5 said. So you can't just funnel it into  
6 harassment.

7 MR. LOEB: Well --

8 JUSTICE KAVANAUGH: You would be,  
9 like, that's fine, that's good to go.

10 MR. LOEB: First of all, we -- in that  
11 Fifth Circuit case, in that example, that would  
12 be certainly a -- a -- a -- a disadvantageous  
13 term or condition of employment. So that's --  
14 we don't have any -- any disagreement with --  
15 with -- with that. But --

16 JUSTICE KAVANAUGH: Well, that's why I  
17 think it's not a sufficient answer to just say  
18 harassment will cover this --

19 MR. LOEB: Well --

20 JUSTICE KAVANAUGH: -- because it  
21 won't cover it in the cases where it's not a  
22 stated policy, but it is nonetheless a --

23 MR. LOEB: So Congress --

24 JUSTICE KAVANAUGH: -- policy.

25 MR. LOEB: -- Congress addressed that

1 kind of categorical -- I'm going to categorize  
2 one protected group, they get to do certain  
3 things. Another protected group doesn't get to  
4 do certain things. Under (a)(2) of the statute,  
5 which talks about classification, which talks  
6 about categories, it talks about jobs,  
7 opportunities. I don't think (a) -- (a)(1)  
8 should be broken open and the harm requirement  
9 completely wiped out.

10 JUSTICE JACKSON: But wait.

11 JUSTICE BARRETT: Okay. But --

12 JUSTICE JACKSON: Isn't (a)(1) about  
13 the intentional discrimination? I mean, I  
14 thought the difference between (a)(1) and (a)(2)  
15 is (a)(2) is about the effect and (a)(1) is  
16 about the intent of the employer to make this  
17 classification, which is why I'm resisting your  
18 suggestion that there is any harm requirement,  
19 as opposed to suggesting there is and perhaps it  
20 is being automatically satisfied. I am reject  
21 -- sort of resisting that (a)(1) is asking  
22 anybody about whether or not the discrimination  
23 in this situation is causing someone's harm.

24 So can you -- can you do my  
25 hypothetical about women in red offices and men

1 in blue offices? The offices are otherwise  
2 identical, but we have a policy, whether orally  
3 stated or written or whatever, that women are in  
4 red offices. So, if there was a woman who said,  
5 you know, I, for whatever reason -- well, that's  
6 the policy, women in red, men in blue, all  
7 right?

8 Are you saying that in order to bring  
9 an actionable discrimination claim, a woman  
10 would have to say, I'm harmed by having worked  
11 in a -- a -- a -- a red office, and then it  
12 would have to be sort of material and objective  
13 and all of the other things that you bring into  
14 your harm standard?

15 MR. LOEB: I -- I would agree with  
16 that, that we'd say that they're not harmed  
17 unless they could show that the -- the -- the  
18 statement, the policy is stigmatizing them,  
19 saying that --

20 JUSTICE JACKSON: No, no, I  
21 understand. I'm just -- that assumes there's a  
22 harm requirement. You're -- you're sort of  
23 speaking to how you would go about establishing  
24 the harm requirement, and I'm trying to  
25 determine whether there is such a thing.

1           So you're saying, in a situation like  
2 the one I posited, if -- that -- that there is  
3 another element that the person has to show, and  
4 they have to show not just my boss said you're a  
5 woman, you're in the red office, no matter what,  
6 that's not enough, I would have to somehow  
7 marshal evidence that I'm being harmed by being  
8 put in the red office because of my gender.

9           Is that what you're saying?

10          MR. LOEB: I -- I -- that's correct,  
11 and I think that's actually fairly consistent  
12 with the position being taken by the other side  
13 here. That's how they get around the bathroom  
14 cases. They say, well, yeah, that's a  
15 distinction. You're not -- you're not being  
16 allowed in that bathroom, but you're allowed in  
17 that bathroom. But that doesn't --

18          JUSTICE KAGAN: Well, Mr. Loeb, I  
19 think that that's not quite fair. I mean,  
20 the -- the bathroom/grooming cases which first  
21 apply only in the cases of gender, but they're a  
22 really kind of discrete category.

23          And the position that this side of the  
24 podium is taking is both simple and easy to  
25 understand in terms of Title VII's language,



1 which is just to say that if there is  
2 discrimination, that counts as a harm. The  
3 discrimination is the harm save for these very  
4 few exceptional cases.

5 Now what you are saying is, no, there  
6 has to be an additional showing of harm. We  
7 recognize you say that harm doesn't really have  
8 to be material because you're including  
9 stigmatic harm in that.

10 So now a court is going to have to,  
11 like, wander around going, well, how big is this  
12 harm and is it really stigmatizing or is it only  
13 a little bit stigmatizing. And that sounds both  
14 like something that you don't want any court to  
15 do and also something that the statute does not  
16 suggest.

17 MR. LOEB: Well, it's the kind of  
18 analysis which is done all the time regarding  
19 conditions cases under (a)(1). The harassment  
20 cases are conditions cases, and the courts say  
21 not all conditions, even if based on a protected  
22 status, based on gender or race, even if it's  
23 based on that, the harassment is coming from --

24 JUSTICE SOTOMAYOR: But harassment is  
25 different and it's different because there

1 hasn't been a direct -- an actual change in  
2 terms, privileges, or conditions. You're doing  
3 the same job. You have the same supervisor.  
4 You have the same hours. You have the same  
5 everything.

6           What we have said is, however, that  
7 constructively -- and that's how you have to  
8 figure this out -- there is a change because  
9 you're being subjected to something that might  
10 force you out of the workplace.

11           Now that's a very different situation  
12 from -- from one where there's an actual change  
13 in terms and conditions.

14           MR. LOEB: I -- I -- I -- we disagree  
15 with that, Your Honor. I think if you read --

16           JUSTICE SOTOMAYOR: I know you want us  
17 to -- to disagree with it, but I don't see how  
18 you can get past the difference.

19           MR. LOEB: Well, let me -- let me --  
20 let me walk you through the -- our -- our  
21 reading of Oncale, which is, I think, clearly  
22 the correct one. So, if you -- this is Justice  
23 Scalia's unanimous opinion 25 years ago under  
24 703 elements. In responding to the argument  
25 that the Court's approach was too broad, too

1 liberal, at page 80, Justice Scalia holds that  
2 the challenged conduct must be because of a  
3 protected status.

4 But then he goes on to say and  
5 separately hold that not all conditions imposed  
6 by a protected status will qualify, and he says  
7 that's because of Title VII's text referring to  
8 "discriminate against." He says that text  
9 indicates that the statute only covers  
10 disadvantageous terms and conditions.

11 So not all harassment that affects  
12 your conditions of employment and even minor  
13 harassment, you know, affects your conditions of  
14 employment. It needs to be disadvantageous.  
15 And, of course, then the Court went on to  
16 reaffirm the objective standard.

17 They argue there is no harm  
18 requirement, and subjective preferences,  
19 subjective sensitivities all will support an  
20 action, and that's not only contrary to Oncale,  
21 it's -- it's directly contrary to how this Court  
22 read the very same language of "discriminate  
23 against" in Burlington Northern, examining the  
24 Section 703 precedent and saying you need  
25 material objective harm. The same language and

1 the same statute by the -- passed by the same  
2 Congress needs to be read the same way.

3 JUSTICE KAVANAUGH: Do you --

4 JUSTICE BARRETT: Counsel --

5 JUSTICE KAVANAUGH: -- do you agree --

6 JUSTICE ALITO: Suppose there are two  
7 women associates in a law firm, and one says,  
8 the -- the partner to whom I'm assigned is  
9 always nasty to me, invariably nasty to me all  
10 the time, never friendly, always critical,  
11 making my life miserable by being nasty to me.

12 And the other one says that they  
13 assigned me to an office with a view where I  
14 don't get the afternoon sun, and they assigned a  
15 similarly situated man to an office where they  
16 get the -- which -- is there a reason to treat  
17 those two women differently?

18 MR. LOEB: I -- I -- I don't think so.  
19 Those kind of minor slights and grievances are  
20 what this Court in Burlington Northern warned,  
21 that if you open the door to those kind of  
22 lawsuits and had no meaningful threshold, the  
23 federal courts would become the super-personnel  
24 department not just for all private employers  
25 but for state governments and for local

1 governments.

2 JUSTICE ALITO: Well, I don't know  
3 that the woman who -- who says that the boss is  
4 invariably nasty is -- is alleging something  
5 trivial, but what I'm asking about is the  
6 suggestion that any transfer from one office to  
7 another qualifies, but if it has to do with  
8 unpleasantness in the workplace, then anything  
9 goes.

10 MR. LOEB: I mean, there are cases  
11 about transfer from one side of the -- of the  
12 office to the other, and the courts of appeals  
13 have all held and the district courts have held  
14 that that is not a material objective harm.

15 You know, if you gloss on some sort of  
16 express statement, I'm doing this because of  
17 race, I'm doing this because of protected  
18 status, then you can start looking at it under a  
19 stigmatic approach of injury, but you don't want  
20 to micromanage every personnel action.

21 The -- the scary thing about their  
22 position is and the SG's position -- I want to  
23 be very clear -- is that everything that happens  
24 in the workplace, every assignment, every --  
25 pens, giving out pens to employees are going to

1 trigger lawsuits based not just on --

2 JUSTICE BARRETT: Well, let me focus  
3 you on the facts of this case and not the pens  
4 or the red office and the blue office, and I  
5 want you to put aside any quibbles that you have  
6 with the other side about the facts and, you  
7 know -- and the summary judgment record.

8 This is different than the red office  
9 to the blue office, okay? So she was  
10 transferred, and let's imagine here that you  
11 have evidence that her supervisor said because  
12 he did replace her with a man, I just don't  
13 really like working with women, I want to work  
14 with a man, so I'm going to transfer you to this  
15 different district.

16 And an objectively reasonable person  
17 in her circumstances, even though the job title  
18 and the -- the money and all that didn't change,  
19 would view that as less interesting, the job  
20 responsibilities change, she lost access --  
21 putting aside the facts about, you know, the --  
22 the access to the unmarked car and the uniform  
23 changes and the FBI task force, putting all that  
24 aside, it was -- an objectively reasonable  
25 person would find that less desirable in -- in

1 her position because of the conditions of the  
2 employment. But you say not actionable.

3 MR. LOEB: No, Your Honor. So let me  
4 just talk -- there are two sort of parts to  
5 that. One is these change in the conditions  
6 about the car, about the hours, and all those  
7 things, which the district court --

8 JUSTICE BARRETT: I -- I want you --

9 MR. LOEB: I -- I know.

10 JUSTICE BARRETT: -- to put that  
11 aside.

12 MR. LOEB: But, if -- if she had --

13 JUSTICE BARRETT: Just go with my  
14 hypothetical.

15 MR. LOEB: -- if she had proven those  
16 things, so she alleged them --

17 JUSTICE BARRETT: Okay. But -- but I  
18 said just assume the facts as I told you.

19 MR. LOEB: Those could possibly --  
20 certainly support a -- a -- a objective material  
21 change. And Burlington Northern recognizes a  
22 change in hours, particularly when you have a --  
23 a person who's a parent, and you look at those  
24 -- like you said in your hypothetical, you look  
25 at the objective facts of the person and then

1       how a reasonable person would look at them, a  
2       change in hours can be. Having a car can be.

3                   JUSTICE BARRETT: A change of  
4       responsibility.

5                   MR. LOEB: Change of responsibilities  
6       can be. If there -- if there's such that  
7       they're not -- the district court was  
8       expressive. She alleged that it wasn't  
9       prestigious enough, but she didn't prove it.  
10      She -- and the district court said, if she had  
11      shown me any proof that there was --

12                   JUSTICE BARRETT: So, to you, this is  
13      just a dispute about the facts, this whole  
14      thing?

15                   MR. LOEB: Well, the -- the facts are  
16      that the Eighth Circuit and the district court  
17      ruled based on the fact that she didn't prove  
18      those things. She had waived those things by  
19      not briefing them at summary judgement. And  
20      then they have the -- the --

21                   JUSTICE BARRETT: If she'd proved  
22      them, she should win?

23                   MR. LOEB: She -- if she had -- if she  
24      had preserved it and proved them, then I think  
25      she -- she may have had a -- a -- a meritorious



1 case to get to a trial, but -- but she did not.

2           Instead, as the -- as the court of  
3 appeals said, once you eliminated all the other  
4 things that were either attributable to the FBI,  
5 which includes the car and the hours, and --  
6 and -- and you eliminate the things that she  
7 waived, all that's left here is her personal  
8 preference that she -- instead of being in the  
9 Intelligence Division, she -- she wanted to stay  
10 in the Intelligence Division over at Department  
11 5, she admits it's commonplace in the St. Louis  
12 work -- police department to move people around  
13 based on safety needs.

14           She herself has been moved several  
15 times in and out of the Intelligence Division.  
16 She admits when a new supervisor comes in that  
17 they commonly --

18           JUSTICE BARRETT: But it's her  
19 preference, and let's say the supervisor --  
20 so -- so let's say that she doesn't prove all of  
21 the other things that we're disputing and  
22 talking about here, like the FBI stuff.

23           She says, I really like this job  
24 better. This is my preference. And he says,  
25 sorry, I prefer working with men.

1           MR. LOEB: Then I think you would --  
2           that's the other half of your question, and  
3           thanks for going back to that -- is you would  
4           have to exam that through the stigmatic lens and  
5           look at whether the statement there labeling  
6           women as less than is creating a -- a -- a --  
7           a -- a workforce where people are unequal and  
8           it's -- it's harmful just to work in that  
9           environment.

10                 So it very could be that overt  
11           statement, whether stated to her or it's stated  
12           as a class matter, in which case she might have  
13           an (a)(2) claim, might in -- in some cases  
14           support the -- the requirement of objective  
15           material harm. But what you don't get to do is  
16           litigate about every assignment in the  
17           workplace, every little -- you know, whether you  
18           get this stapler or this pen and to say, well, I  
19           think it's all being done to me for this reason,  
20           and now you get to -- get to summary judgment  
21           and you get to go on to trial because, as this  
22           Court recognized in -- in Bostock, that a  
23           sorting out of true reasons for a job action is  
24           often hard to discern and is almost always going  
25           to go to trial.

1                   And so what you're going to be doing  
2                   is having federal courts inundated with these  
3                   claims with an inability to weed them out at an  
4                   earlier stage. Even if --

5                   JUSTICE KAVANAUGH: Are you aware of  
6                   cases about pens or colors of offices?

7                   MR. LOEB: There are cases about  
8                   moving from identical office from here to there  
9                   and the -- and -- and the personal preference --

10                  JUSTICE KAVANAUGH: About pens? I  
11                  mean, you know, I -- I don't think -- when  
12                  you're transferred from one office to another or  
13                  one branch to another, that -- that's a lot  
14                  different, it strikes me, than --

15                  MR. LOEB: Certainly, that could  
16                  satisfy that as a condition. The question is,  
17                  is it a disadvantageous --

18                  JUSTICE KAVANAUGH: But why, though?

19                  MR. LOEB: -- condition.

20                  JUSTICE KAVANAUGH: Why -- why would  
21                  it satisfy the terms and conditions if you're  
22                  transferred from one -- one branch to another or  
23                  one division to another if all the pay is the  
24                  same, the retirement is the same?

25                  MR. LOEB: If you move me from our

1 appellate group to our tax group, where I have  
2 no expertise --

3 (Laughter.)

4 MR. LOEB: -- you know, it's certainly  
5 going to be a -- a material change even though  
6 I'm not even changing offices. So you just have  
7 to look at the context of whether the  
8 responsibilities are different, whether the job  
9 change is disadvantageous to you viewed through  
10 an objective lens. That's the standard that the  
11 courts of appeals have applied for 30 years, let  
12 me give you an example, and it's a well-trying  
13 and -- and -- and tested standard.

14 Twenty-nine years ago, Justice  
15 Sotomayor, in the Williams versus R.H. Donnelley  
16 case, as a Second Circuit judge, rejected a  
17 transfer claim where the person said I prefer to  
18 work in the Las Vegas office as opposed to here.  
19 And the transfer wasn't granted. The person  
20 said, well, this was being done on the basis of  
21 a protected category.

22 JUSTICE JACKSON: Well, that's --  
23 that's -- that's it wasn't granted, so it's a  
24 little bit different than being forced to move  
25 there. But can I just ask you a question?

1                   You say whether it is the -- the --  
2                   the job change is objectively disadvantage --  
3                   disadvantageous, I think, is the standard that  
4                   you're imposing. I'm wondering whether or not  
5                   that same standard is -- exists across all of  
6                   the categories in sub 1.

7                   In other words, does a person who's  
8                   fired have to also demonstrate that that firing  
9                   was objectively disadvantageous, and could the  
10                  employer defend on the grounds that you went on  
11                  and you got a better job and, you know, it turns  
12                  out this didn't hurt you at all?

13                  Is that -- is that -- is that the sort  
14                  of logical thing that one could get into if we  
15                  start suggesting that there's another element  
16                  related to harm in this statute?

17                  MR. LOEB: I think there's an  
18                  ambiguity about whether the "discriminate  
19                  against" language applies to the first two  
20                  listed items --

21                  JUSTICE JACKSON: Mm-hmm.

22                  MR. LOEB: -- hiring and firing. Then  
23                  it says, you know, otherwise discriminate and as  
24                  to conditions or otherwise. I think it's more  
25                  naturally read to apply to it --

1 JUSTICE JACKSON: But I'm sorry, I  
2 thought we were reading the statute in the sort  
3 of way we do where all the things are similar.

4 MR. LOEB: Well, yeah.

5 JUSTICE JACKSON: So it's hard to say  
6 that "discriminate against" would be that  
7 different, right?

8 MR. LOEB: Yes, and I -- I think  
9 "discriminate against" is modifying those as  
10 well and -- and it should be read similarly.

11 JUSTICE JACKSON: So, if that's true,  
12 then we would expect the other two to work in  
13 the same way. So is it your position that we  
14 have a scenario in which a person who has  
15 actually been fired also has to demonstrate  
16 based on objective realities or whatnot that that  
17 firing was harmful to them?

18 MR. LOEB: I think, as this Court has  
19 -- as Justice O'Connor has said, that hirings  
20 and firings are quintessentially injurious.

21 JUSTICE JACKSON: And why isn't this  
22 the same, being treated differently -- being  
23 forced to move to a different set of  
24 circumstances --

25 MR. LOEB: Because --

1 JUSTICE JACKSON: -- which is how  
2 we're defining "transfer."

3 MR. LOEB: Because, as this Court said  
4 in Burlington Northern, while many transfers and  
5 reassignments will be injurious, not all will,  
6 and you need to look at the particular context.  
7 We're not -- and -- and so, in a case like this,  
8 where someone is moved on a regular basis  
9 between departments and where the only thing she  
10 can point to as far as -- not -- not less  
11 supervisory responsibilities, no -- not  
12 different -- no different pay, no different  
13 conditions, no different benefits, and she's  
14 waived all these other aspects, and all you're  
15 left with is "I just prefer one over the other,"  
16 that cannot be the basis of a federal lawsuit,  
17 Your Honor.

18 JUSTICE KAVANAUGH: But --

19 MR. LOEB: Otherwise, you're just  
20 opening the door to anything.

21 JUSTICE GORSUCH: Let me -- let me --

22 JUSTICE KAVANAUGH: -- the premise of  
23 your argument, I think, is that discrimination  
24 itself is not a harm.

25 MR. LOEB: You know, if -- if -- I

1 don't think it's impossible to read the statute  
2 in the very broad way they suggest. Let me  
3 explain to you a couple reasons why you should  
4 not.

5 First of all, it has been read that  
6 way, and it's been applied for 30 years in the  
7 courts of appeals. It's consistent with this  
8 Court's (a)(1) precedent saying there needs to  
9 be disadvantageous terms.

10 But also, under this Court's trifle  
11 doctrine, you don't -- you don't lightly assume  
12 that Congress is trying -- is legislating as to  
13 minor job actions, minor harms, personal  
14 preferences, and --

15 JUSTICE JACKSON: I'm sorry, I don't  
16 understand your answer to Justice Kavanaugh's  
17 question. So discrimination itself is or is not  
18 a harm?

19 MR. LOEB: Is not by itself a harm.  
20 There's two elements here. There's an element  
21 of disadvantageous terms and -- and -- and harm.  
22 And often there may be -- they will run  
23 together. In some cases, it'll be easy to show  
24 the harm. But you just don't get to presume it.  
25 They say you just presume the harm in every



1 case --

2 JUSTICE GORSUCH: Let me -- let me try  
3 it this way, Mr. Loeb. Good to see you.

4 I understand your point that Oncale  
5 and in Burlington Northern and elsewhere, we've  
6 said that "discriminate" means treat worse than,  
7 injure the plaintiff. Got it.

8 But I think we've also kind of  
9 indicated in our cases that when you treat  
10 someone worse than another person because of  
11 race or sex, that's kind of the end of it, and  
12 we -- there isn't a further inquiry into how bad  
13 you -- how badly you treated somebody worse. A  
14 -- a minor treating worse on the basis of sex or  
15 race is something Congress in 1964 in a very  
16 short and sweet statute, 28 pages long but  
17 profound, said that the law will no longer  
18 tolerate.

19 And once the courts get into the  
20 business of asking whether that injury is  
21 material or a reasonable person would be  
22 offended by it, that's a whole different extra  
23 textual layer that's going to weed out a bunch  
24 of claims based on a judge's sensibilities about  
25 how -- how bad is bad enough. Thoughts?

1           MR. LOEB: I, you know, just strongly  
2 disagree with that. As -- as Justice Scalia  
3 said, the language in the statute, the text  
4 itself, this is a textual argument, it says  
5 "discriminate against." That requires that --

6           JUSTICE GORSUCH: I'm spotting you all  
7 of that, right? I'm spotting you all of that.  
8 "Discriminate against" means treating somebody  
9 worse. That implies an injury. But Congress  
10 could say that anytime you treat somebody worse  
11 because of their race or their sex, you are --  
12 you have a claim --

13           MR. LOEB: I think that --

14           JUSTICE GORSUCH: -- and that layering  
15 on top of that, where do we get that in the  
16 statute, a material harm? How do -- or an  
17 objective person or a reasonable person or  
18 whatever construct we come up with that's  
19 artificial, right, is going to weed out claims  
20 that Congress in 1964 thought profoundly  
21 important to include.

22           MR. LOEB: You know, Congress also, as  
23 this Court has recognized repeatedly, was -- was  
24 trying to preserve management prerogatives and  
25 wasn't trying to open up the doors for every

1 little action in the workplace to be brought.  
2 So there was a -- it was a -- a balanced  
3 approach.

4 And this Court should not lightly  
5 presume, especially given the trifle principle,  
6 which Justice Katsas explained applies with full  
7 force here, should not lightly assume that  
8 Congress wanted to simply conflate the harm and  
9 the intent requirement where basically you're  
10 reading the language "discriminate against" out  
11 of the statute. You could just say --

12 JUSTICE KAGAN: But isn't the -- the  
13 -- the trifle principle just inconsistent with  
14 the idea that -- the idea of stigmatic injury?  
15 I mean, we've recognized over and over again  
16 that discrimination itself can profoundly injure  
17 people, just the -- the fact itself that you're  
18 being treated differently from somebody else  
19 based on your race, based on your sex,  
20 et cetera. I mean, so as to -- as to anything,  
21 as to pens, as to water fountains, as to  
22 anything.

23 MR. LOEB: Stigma flows from the -- -  
24 either the messaging from the employer saying I  
25 am going to give all people this protected

1 status, views of the alley, that's what they  
2 deserve. That's a stigma, right? We could --  
3 that's -- this Court has recognized in the  
4 harassment cases and outside of it that stigma  
5 is a -- is a material harm and it can be enough.  
6 You would look to it through an objective lens.  
7 And -- and that is completely consistent with  
8 our opinion. But that doesn't mean you just  
9 wipe away the harm requirement.

10 And, again, what --

11 JUSTICE KAVANAUGH: But doesn't -- oh,  
12 keep going. Sorry.

13 MR. LOEB: What work is the word -- is  
14 the words "discriminate against" doing if you  
15 take that view? The statute says because of  
16 protected status. It could say change of  
17 condition because of protected status. You  
18 don't need the words "discriminate against." If  
19 you listen to their arguments, they are  
20 basically admitting that language has no force  
21 and is superfluous and is redundant.

22 JUSTICE KAVANAUGH: Well, I thought it  
23 meant treat differently because of your race,  
24 let's say --

25 MR. LOEB: That's the latter --

1 JUSTICE KAVANAUGH: -- and -- and then  
2 to -- does it -- that itself is a harm I've  
3 always assumed. And then the question becomes,  
4 is -- does it relate to a term, condition, or  
5 privilege of employment? And not everything in  
6 the workplace will relate to a term, condition,  
7 or privilege of employment, but transfers, I  
8 think, clearly would. And then, when you get  
9 past that, there might be some circumstances of  
10 remedial programs or what have you that you  
11 nonetheless justify why you're treating people  
12 differently.

13 But the idea that you're treating  
14 people differently because of their race could  
15 not be a harm, not be discrimination, I don't --  
16 I don't really understand that.

17 MR. LOEB: Again, they could -- you --  
18 you could just read the statute to either  
19 eliminate those words or to say discriminate  
20 between or with respect and not say against, and  
21 that last part of the statute, because a  
22 protected status would be doing all the work and  
23 you would just presume harm because you did it  
24 because of that. And the first part of the  
25 statute, the text -- that part of the text is

1 just being ignored.

2 And, look, where Congress wants to be  
3 more sweeping and to really root and branch, I  
4 think was, Justice Gorsuch, your language, they  
5 know how to do it. If you look at (e)(16) in  
6 the statute requiring the federal government, as  
7 opposed to all private employers and state and  
8 local employers, they use broader language.

9 JUSTICE JACKSON: Can I ask you a  
10 question? Are you suggesting that Congress had  
11 to include a harm requirement here? I mean,  
12 are -- is it your position that it could not  
13 have focused in on the action, meaning make  
14 unlawful a circumstance in which the employer  
15 treats someone differently because of their race  
16 or gender? Let's just take out the word  
17 "discrimination" for a second.

18 Are you saying that there had to be,  
19 maybe as a matter of constitutional authority or  
20 something, a -- a -- a harm that Congress was  
21 capturing with this statute?

22 MR. LOEB: I -- we think Congress  
23 could do that. The question is did they do that  
24 here. Did they mean to open up for federal  
25 lawsuits for minor actions where there's no

1 significant harm --

2 JUSTICE JACKSON: No, no, no. I'm  
3 just asking. So, if Congress had a value set  
4 that is similar to what others are focused on  
5 here in -- in which they thought that we are  
6 worried about employers that are treating people  
7 differently on the basis of these  
8 characteristics, we think that's a problem.

9 Now whether or not they thought it was  
10 causing other harm in the workplace or whatnot,  
11 we think that's a problem.

12 So my question is, could they have  
13 legislated to address that particular problem?

14 MR. LOEB: Yeah, and I think that goes  
15 to what I was -- I was saying about the federal  
16 government provision. I think they did a much  
17 broader provision there which could be read that  
18 way.

19 So, there, it's -- it talks about any  
20 personnel action, which is then defined under  
21 Title V, Section 2302(b), to be discrimination  
22 for or against, and in (e)(16), they say not  
23 just a personnel action, but they make very  
24 clear they want to be sweeping. They say there  
25 shall be -- the -- the workforce shall be free

1 from any discrimination based on the  
2 characteristics, so the --

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: Just so I'm clear,  
9 in responding to Justice Barrett, you said it's  
10 all disputed issue. I didn't think it was  
11 disputed that in her intelligence work she  
12 worked essentially 9 to 5 Monday through Friday,  
13 correct?

14 MR. LOEB: Correct.

15 JUSTICE SOTOMAYOR: When she moved or  
16 was transferred, she didn't have a 9-to-5 job.  
17 It varied -- her hours varied during the week  
18 and on the weekends, correct?

19 MR. LOEB: Absolutely correct.

20 JUSTICE SOTOMAYOR: It's not disputed  
21 that she had a private car in the Intelligence  
22 Division that was taken away from her when she  
23 went to the other position, correct?

24 MR. LOEB: Correct.

25 JUSTICE SOTOMAYOR: And there is no



1 dispute that she had to wear a uniform where she  
2 wore plain clothes previously, correct?

3 MR. LOEB: Yeah. So --

4 JUSTICE SOTOMAYOR: Now -- now stop.

5 MR. LOEB: Okay.

6 JUSTICE SOTOMAYOR: Just answer my  
7 question.

8 MR. LOEB: She alleges all those  
9 things but didn't argue them at summary  
10 judgment.

11 JUSTICE SOTOMAYOR: Seems -- all  
12 right. Are they material?

13 MR. LOEB: They certainly could be.

14 JUSTICE SOTOMAYOR: Are -- what  
15 wouldn't make them material? What objective  
16 facts would not make them material?

17 MR. LOEB: You know, if --

18 JUSTICE SOTOMAYOR: I don't understand  
19 your test, is what I'm saying.

20 MR. LOEB: No, and -- and the role --

21 JUSTICE SOTOMAYOR: It's a change in  
22 the terms, conditions, and privileges of the two  
23 positions. You're saying we have to overlay  
24 that with some sort of objective test. Does  
25 that mean she has to prove that she has children

1 at home at night or that she has to take care of  
2 her parents on the weekend? Are we then  
3 individualizing the test to find out whether she  
4 was somehow injured more than in her personal  
5 preference? I don't understand what you're  
6 saying.

7 MR. LOEB: Well, in -- in Burlington  
8 Northern, this Court said you look at the -- the  
9 particular context of the individual and then  
10 see whether a reasonable objective person would  
11 have found so.

12 JUSTICE SOTOMAYOR: Okay. You've  
13 answered my question. We're -- we're --

14 CHIEF JUSTICE ROBERTS: Justice Kagan?  
15 Justice Kavanaugh?

16 Justice Barrett?

17 Justice Jackson?

18 Okay. Thank you, counsel.

19 Rebuttal, Mr. Wolfman?

20 REBUTTAL ARGUMENT OF BRIAN WOLFMAN

21 ON BEHALF OF THE PETITIONER

22 MR. WOLFMAN: Yes. Briefly,

23 Your Honor. The -- I want to pick up where the  
24 discussion just left off, because I think  
25 Justice Sotomayor's question and some of the

1 earlier questions on the topic of what one has  
2 to show under these material harm-type,  
3 objective tangible harm-type standards have been  
4 encapsulated by the D.C. Circuit's opinion in  
5 Chambers and I want to mention it.

6           These cases, meaning these types of  
7 cases, asking the question whether something is  
8 harmful enough have consumed enormous judicial  
9 resources seeking to answer a question far  
10 removed from the core Title VII inquiry whether  
11 an employer has discriminated against an  
12 employee based on a protected characteristic.

13           I would add to that far removed is an  
14 understatement. The -- the -- the -- the  
15 statute doesn't pose that question, and that's  
16 the problem. But the -- the use of judicial  
17 resources is an important point.

18           So opposing counsel has said the  
19 courts have been applying these standards for 30  
20 years. Some of the lower courts have, true, and  
21 the results are stunning.

22           AutoZone, mentioned by the Assistant  
23 Solicitor General, the Hamilton case, the Threat  
24 case, where there's a policy based on the color  
25 of the officer's skin to quote Judge Sutton. I

1 point the Court to the amicus briefs that go  
2 through these cases in quite a good bit of  
3 detail.

4 Just a few more points.

5 As Justice Kavanaugh's question posed,  
6 the -- if the policy is covert until discovery,  
7 then it doesn't impose a stigmatic harm. It  
8 imposes a purely dignitary harm. That too is  
9 actionable under Title VII. And it becomes  
10 stigmatic when it's uncloaked for all the world  
11 to see. But, in either case, this -- the policy  
12 violates the statute.

13 The gender cases that we've been  
14 discussing, the exceptions, the outlier cases do  
15 not help the City at all because every time you  
16 flip the scenario to race, religion, or national  
17 origin, the City loses. That shows those are  
18 outliers. The City's position is a  
19 cross-cutting position, and it is wrong.

20 Unless the Court has further  
21 questions?

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 11:42 a.m., the case  
25 was submitted.)

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