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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. )

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:  
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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 -- that is correct  
25 with 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 in -- 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 -- the -- that  
20       person at 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  
3 is 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 --  
21 and I 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 are -- is -- are a limiting principle within the  
8 -- 703(a)(1), which is what the D.C. Circuit  
9 said in -- in the Chambers case. That's --  
10 that's the work that "terms, conditions, and  
11 privileges" are doing.

12 So the -- the statute --

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

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

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

24 And I'm just wondering whether the  
25 fact that we're in the context of terms and

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

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

8 JUSTICE JACKSON: -- Kagan is making.

9 MR. WOLFMAN: -- I do take the point,  
10 and I think that is -- that is a possibility.  
11 But I'm -- I'm putting it in a different frame,  
12 which is that "terms, conditions, and  
13 privileges" is a limiting principle within the  
14 statute, and that may indeed tell you what --  
15 what, in fact, is injurious in terms of  
16 703(a)(1). I'd agree --

17 JUSTICE KAGAN: But --

18 CHIEF JUSTICE ROBERTS: This is very  
19 --

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

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

1                   You each say that the other concedes  
2                   the point.

3                   (Laughter.)

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

13                  MR. WOLFMAN: Right.

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

17                  MR. WOLFMAN: Right. And --

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

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

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

1                   MR. WOLFMAN: That -- that -- that  
2 case --

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

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

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

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

24                   So, if, you know, pink pens and blue  
25 pens are distributed to all the employees on a

1 random basis, I think we can consider that  
2 trivial. But, if they're distributed on the  
3 basis of race, immediately that becomes  
4 nontrivial.

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

13 JUSTICE KAGAN: Well, sure.

14 JUSTICE BARRETT: Well, then wouldn't  
15 she --

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

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



1 MR. WOLFMAN: No.

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

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

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

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

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

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

5 Now what I do --

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

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

14 JUSTICE BARRETT: I understand that --

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

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

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

1 and Johnson.

2 And so there's a separate category of  
3 analysis for, you know --

4 JUSTICE BARRETT: Okay. Well, let me  
5 take the example --

6 MR. WOLFMAN: -- this grievant and  
7 affirmative action.

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

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

19 That's actionable?

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

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

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

2 JUSTICE BARRETT: -- employer agrees.

3 And it sounds to me like you were saying that  
4 was actionable discrimination.

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

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

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

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

1 requirement is that although disparate treatment  
2 based on one of these characteristics is wrong,  
3 there should be some sort of threshold before it  
4 gets into court, and that's where the de minimis  
5 idea comes from.

6 But you say there -- there shouldn't  
7 even be a de minimis exemption.

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

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

20 JUSTICE ALITO: Well -- well, I don't  
21 want to interrupt you, but, I mean, the issue is  
22 whether there should be some kind of threshold  
23 --

24 MR. WOLFMAN: Right.

25 JUSTICE ALITO: -- whether it's

1 de minimis, whether it's significant  
2 disadvantage, whether it's -- whether some other  
3 terminology is appropriate, some sort of  
4 threshold that has to be cleared before the  
5 matter gets into court.

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

12 Is that actionable?

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

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

25 JUSTICE KAVANAUGH: Isn't your point

1 that terms, conditions of employment could not  
2 cover certain things like what Justice Alito --

3 MR. WOLFMAN: The --

4 JUSTICE KAVANAUGH: -- just mentioned?

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

12 MR. WOLFMAN: That is --

13 JUSTICE KAVANAUGH: -- not terms,  
14 conditions of employment. That's the --

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

16 JUSTICE KAVANAUGH: -- analytical way  
17 to approach this.

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

23 JUSTICE ALITO: Well, then what is a  
24 --

25 CHIEF JUSTICE ROBERTS: I -- go ahead.

1 JUSTICE ALITO: Go ahead, Chief.

2 What is a requirement of the  
3 workplace? What is the definition --

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

5 JUSTICE ALITO: -- of a condition of  
6 employment?

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

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

15 JUSTICE ALITO: All right. They --  
16 they gave me an office with a view of the alley  
17 instead of an office with a view of a park.

18 MR. WOLFMAN: Your -- Your Honor --

19 JUSTICE ALITO: Is that a condition of  
20 employment?

21 MR. WOLFMAN: -- it -- it is a  
22 condition of employment, and I -- I must say, if  
23 that is meted out on the basis of race, all the  
24 employees of one race get a -- a -- a -- a -- a  
25 view of the alleyway and another set of



1 employees purely on the basis of race get a --  
2 deliberately get a view of the city, a beautiful  
3 view of the city, that is discrimination under  
4 Title VII.

5 JUSTICE ALITO: Well, your --

6 CHIEF JUSTICE ROBERTS: Thank you --

7 JUSTICE ALITO: I'm -- I'm sorry.

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

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

23 MR. WOLFMAN: Your --

24 CHIEF JUSTICE ROBERTS: So why is all  
25 that in your brief if your argument is we don't

1 need to show any of that?

2 MR. WOLFMAN: Your Honor, the reason  
3 that is in our brief is we -- we were laying out  
4 the harm that these rules like significant  
5 disadvantage have done in the circuits, and this  
6 goes back to Justice Alito's question.

7 Significant disadvantage, as this  
8 Court itself said in Groff, is nothing like de  
9 minimis.

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

17 MR. WOLFMAN: That -- that is correct,  
18 Your Honor.

19 CHIEF JUSTICE ROBERTS: Okay.

20 MR. WOLFMAN: No. But -- but I think  
21 this is --

22 CHIEF JUSTICE ROBERTS: So I should  
23 have skipped those pages?

24 MR. WOLFMAN: No, I -- I don't think  
25 that is -- that is right. What we were

1 attempting to do in our brief was to discuss the  
2 very things that have been coming up, the  
3 de minimis exception, coming up in all the lower  
4 court cases, and with the expectation that we  
5 would be asked these questions.

6 But if the Court -- the Court narrowed  
7 the question to transfers, and if the Court  
8 wishes to decide this case solely on the basis  
9 of transfers, my client is perfectly happy with  
10 that.

11 CHIEF JUSTICE ROBERTS: So we limited  
12 the question to transfers, and you gave us  
13 arguments talking about terms and conditions and  
14 the various ways in which there was actual  
15 injury?

16 MR. WOLFMAN: That is correct.

17 CHIEF JUSTICE ROBERTS: Okay.

18 Justice Thomas?

19 Justice Alito?

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

25 So suppose the only difference between

1 the two positions is one's a desk job and one's  
2 a job on the street, okay? And a particular  
3 employee says, they transferred me from the desk  
4 job, which is safe and interesting to -- to me,  
5 that's what I'm interested in, to the street  
6 job, which is more dangerous and not interesting  
7 to me. That would -- that would qualify, right?

8 MR. WOLFMAN: Absolutely.

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

15 MR. WOLFMAN: Absolutely.

16 JUSTICE ALITO: -- as well?

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

25 JUSTICE ALITO: No, I --

1 MR. WOLFMAN: That is Teamsters.

2 JUSTICE ALITO: -- I -- I mean,  
3 discrimination, I can't emphasize it too much,  
4 on any of these grounds is morally wrong. The  
5 question is whether it's the stuff of the  
6 district court case.

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

15 MR. WOLFMAN: Absolutely actionable.  
16 That's what -- that -- that's the -- the -- the  
17 Threat decision in the Sixth Circuit. That's  
18 the Hamilton decision in the Fifth Circuit.

19 JUSTICE ALITO: And what if it's the  
20 other --

21 MR. WOLFMAN: Shift changes --

22 JUSTICE ALITO: -- what if it's the  
23 other way around?

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

1 JUSTICE ALITO: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

4 Justice Kagan?

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

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

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

24 CHIEF JUSTICE ROBERTS: Justice  
25 Gorsuch?

1 JUSTICE GORSUCH: There was some  
2 suggestion in some of the amici -- we have so  
3 many amici -- that employers might respond to a  
4 decision in -- in your client's favor by  
5 redefining the terms, conditions, and privileges  
6 of employment so that you may be reassigned  
7 here, there, or wherever.

8 And I want your thoughts about that.

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

11 JUSTICE GORSUCH: So --

12 MR. WOLFMAN: -- with all respect.

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

22 MR. WOLFMAN: And, you know, the -- if  
23 the terms and conditions and privileges of  
24 employment --

25 JUSTICE GORSUCH: Can an employer

1 define its way around the problem, I guess?

2 MR. WOLFMAN: I think the answer is  
3 no. If that determination that you're  
4 suggesting was made in response to a charge or a  
5 suit or -- or --

6 JUSTICE GORSUCH: No, it would be made  
7 ex ante. So we hire all of our police officers  
8 and you can be subject to any of these things.  
9 That -- that -- that -- that is the suggestion  
10 of at least some of our --

11 MR. WOLFMAN: And --

12 JUSTICE GORSUCH: -- amici.

13 MR. WOLFMAN: -- and that --

14 JUSTICE GORSUCH: A decision in your  
15 favor --

16 MR. WOLFMAN: -- might be permissible,  
17 but I want to have two caveats.

18 JUSTICE GORSUCH: Mm-hmm.

19 MR. WOLFMAN: First, if there was  
20 evidence that that itself was done out of  
21 discriminatory intent, that would be unlawful.

22 Secondly, if any given change within  
23 that broader context, so six months later a  
24 change is made consistent with the literal terms  
25 of that but done with discriminatory intent,



1 that would be actionable under Title VII. That  
2 may be very difficult to prove, I understand,  
3 but that would still be actionable.

4 JUSTICE GORSUCH: And then I want to  
5 give you a chance to just flesh out your  
6 position, which I understand has been subject to  
7 some questioning this morning, that -- that in  
8 adopting the Civil Rights Act of 1964, Congress  
9 sought to root out discrimination, root and  
10 branch, and that all of it is impermissible, and  
11 presumptively injurious.

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

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 JUSTICE KAVANAUGH: The amicus brief

1 of the District of Columbia, joined by I think  
2 eight states, supports you but says that it  
3 would be helpful if in -- if we were to rule for  
4 you that we repeat something the D.C. Circuit  
5 said in its en banc opinion in Chambers, "...not  
6 everything that happens at the workplace affects  
7 an employee's 'terms, conditions, or privileges  
8 of employment.'"

9 Are you in agreement or at least  
10 tolerate a statement like that?

11 MR. WOLFMAN: -- I mean, I think that  
12 is true, that not everything that happens at the  
13 -- in the workplace alters one's terms,  
14 conditions of, and privileges of employment. I  
15 think that may be true of the hypo --

16 JUSTICE KAVANAUGH: And can a --

17 MR. WOLFMAN: -- one of the  
18 hypotheticals that Justice Alito posed.

19 JUSTICE KAVANAUGH: And on transfers,  
20 I think your point was in the brief at least  
21 that transfers are heartland terms, conditions,  
22 or privileges of employment --

23 MR. WOLFMAN: It's about the job  
24 itself, yes, Your Honor.

25 JUSTICE KAVANAUGH: -- and that we

1 don't need to resolve kind of the outermost  
2 reaches of what "terms, conditions, or  
3 privileges of employment" would cover. Is that  
4 correct as well?

5 MR. WOLFMAN: A -- a -- a transfer  
6 decision, to either withhold a transfer or to  
7 give a transfer, is the functional equivalent of  
8 a hiring decision or a discharge decision. If  
9 -- it is in the heartland of "terms, conditions,  
10 and privileges."

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

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

25 But it has to be understanding all the

1 facts and circumstances of, say, the young  
2 mother who wants the day shift so that her hours  
3 align with her children's hours or school and,  
4 you know, the supervisor says, I don't really  
5 want to work with women and I'm on the day  
6 shift, so I'm putting you on the night shift.

7 For her, understanding her facts and  
8 circumstances, an objective person in her  
9 situation would consider that injurious.

10 MR. WOLFMAN: I -- I -- I agree with  
11 that, but I -- I do want to offer a -- a caveat  
12 to that, which is -- so I -- I certainly agree  
13 that a person in those circumstances is likely  
14 to view that as injurious.

15 But you -- you are suggesting that  
16 there would be some sort of test that sort of  
17 marries subjective and objective, sort of  
18 objective but looking at it from the  
19 circumstances of the particular individual, and  
20 that worries me for two reasons.

21 First, the -- the -- the statute  
22 doesn't train on that. The track -- the -- the  
23 statute only asks questions about the employer's  
24 conduct.

25 JUSTICE BARRETT: Well, I -- I don't

1 think it is -- let's see -- I'm sorry to  
2 interrupt you, but I don't think the premise of  
3 your response is quite capturing what I think.

4 I don't see it as a blending of  
5 objective and subjective because we do that all  
6 the time like, say, in -- in torts. It's the  
7 reasonable man. I mean, so we're trying to  
8 avoid the eggshell Title VII plaintiff, right?

9 We're saying a reasonable person in  
10 the circumstance of the plaintiff would  
11 experience this as an injury, and I don't think  
12 that's a subjective inquiry. It's putting an  
13 objective inquiry but just familiar with the  
14 facts and circumstances.

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

25 And my concern is also a practical

1 one. I started reciting the pages of our brief  
2 and the amicus briefs. You see case after case  
3 after case under the so-called objective  
4 standards, the one that used to exist in the  
5 D.C. Circuit, the one that exists in the Eighth  
6 Circuit, where things, you know, wildly  
7 different than what anyone would view as  
8 de minimis are being thrown out of court.

9 And I -- I'll -- I'll end with this,  
10 which is that the Fifth Circuit in its recent  
11 en banc decision, 14 members of the court said  
12 these doctrines are thwarting legitimate claims  
13 of workplace bias.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Jackson?

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

25 So the statute begins, "It shall be an

1 unlawful employment practice for an employer,"  
2 and then we skip down, "to discriminate against  
3 any individual with respect to the terms and  
4 conditions," et cetera, of its employment  
5 because of these protected characteristics.

6 So, to the extent that we are  
7 identifying sort of what is morally  
8 reprehensible, what is unlawful, I suppose we're  
9 just saying when someone discriminates with  
10 respect to these terms and conditions.

11 So then the question, I guess, is what  
12 does it mean to discriminate, and I don't know  
13 that that necessarily means that there has to be  
14 some sort of injury.

15 As I look at Bostock, you know, we  
16 have a -- a definition in Bostock that  
17 "discriminate" means roughly the same as it  
18 meant in 1964, "to make a difference in  
19 treatment or favor of one as compared to  
20 others."

21 MR. WOLFMAN: Right.

22 JUSTICE JACKSON: That doesn't  
23 necessarily mean injury.

24 And I am thinking of a scenario in  
25 which a person is fired or not hired or

1 transferred because of their race, and it's not  
2 injurious. Let's say it's the best thing that  
3 ever happened to them because it was a terrible  
4 job, and they're fired and, you know, they go on  
5 to do great things in another area, and the  
6 defendant is going to say that, you weren't  
7 injured by my discriminatory firing.

8 So I don't understand why injury is  
9 doing work in this analysis.

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

14 What I am saying is that if there's an  
15 injury requirement, and there is some injury  
16 requirement to get over Article III, the -- the  
17 injury is --

18 JUSTICE JACKSON: That's a different  
19 thing, though. But, can I --

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

22 JUSTICE JACKSON: Right. But I'm  
23 sorry.

24 MR. WOLFMAN: The injury is --

25 JUSTICE JACKSON: Can we just --



1                   MR. WOLFMAN:  -- the discrimination  
2                   itself.

3                   JUSTICE JACKSON:  -- can we just  
4                   clarify, because, to the extent you're talking  
5                   about that injury, you're talking about standing  
6                   injury, right?

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

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

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

1                   MR. WOLFMAN: Well, what -- what I  
2 would say is that they have to prove no injury  
3 other than the discrimination itself. There's  
4 no heightened harm requirement.

5                   JUSTICE JACKSON: All right. And let  
6 me just ask you one --

7                   MR. WOLFMAN: There's no additional  
8 harm requirement.

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

22                   Am I thinking about that correctly?

23                   MR. WOLFMAN: That -- that is -- that  
24 is correct, and we make this point at -- at some  
25 length in our opening brief and we reiterate in

1 our reply brief that the idea that, you know,  
2 frivolous claims or marginal claims are going to  
3 come through is very unlikely. One -- one needs  
4 to have damages to have, you know, a sensibly  
5 viable case to bring in federal court.

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

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

22 MR. WOLFMAN: Absolutely correct.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Ms. Brown.

2 ORAL ARGUMENT OF AIMEE W. BROWN  
3 FOR THE UNITED STATES, AS AMICUS CURIAE,  
4 SUPPORTING THE PETITIONER

5 MS. BROWN: Thank you, Mr. Chief  
6 Justice, and may it please the Court:

7 Forcing an employee to transfer  
8 because she is a woman is discriminating against  
9 her with respect to the terms and conditions of  
10 employment under Title VII regardless of whether  
11 one position is significantly worse than the  
12 other.

13 That's the plain meaning of the text,  
14 and it's consistent with this Court's  
15 longstanding precedents, which recognize that  
16 the statute strikes at the entire spectrum of  
17 disparate treatment in employment.

18 The City fights against the clear text  
19 principally by claiming that the phrase  
20 "discriminate against" incorporates a  
21 significant disadvantage requirement. But to  
22 "discriminate against" simply means drawing  
23 distinctions that injure protected individuals.

24 And this Court has repeatedly  
25 recognized that being denied equal treatment

1 because of a protected characteristic gives rise  
2 to an actionable harm. That's all the statute  
3 requires.

4 The City's contrary reading would  
5 permit employers to designate a predominantly  
6 Hispanic store, as in the Seventh Circuit's  
7 AutoZone decision, to give only men their shift  
8 preferences, to pay Black employees \$1 less, or  
9 to relegate Muslim employees to the back of a  
10 store. Those results are inconsistent with the  
11 statute Congress enacted. The Court should  
12 reverse and instruct the lower courts to apply  
13 the text as written.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Can you have  
16 discrimination that is perceived by someone who  
17 is, say, you say that this is law enforcement  
18 and we need in this particular precinct more  
19 black or Hispanic officers, and so you are moved  
20 or transferred because of race?

21 MS. BROWN: So there is a -- I -- I  
22 think that that is a discrimination claim and  
23 that would be actionable, and -- and that would  
24 qualify. There is a bona fide occupational  
25 qualification exception --

1 JUSTICE THOMAS: So doesn't --

2 MS. BROWN: -- which does not apply to  
3 race.

4 JUSTICE THOMAS: But won't that run  
5 headlong into the focus on diversifying the  
6 workforce in certain situations?

7 MS. BROWN: So we think that there is  
8 adequate room within the bounds of Title VII to  
9 create opportunities for diversity and to ensure  
10 that diverse -- that -- that there is a diverse  
11 workforce through recruiting, through  
12 mentorship, through programs that -- that --

13 JUSTICE THOMAS: No, I'm talking  
14 solely about transfers now, that you need more  
15 black police officers in certain neighborhoods,  
16 say, in St. Louis in -- and in the Sarah -- or,  
17 I'm sorry, the Page, West Page, or Cook area.

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

22 Congress has this bona fide  
23 occupational qualification standard if there is  
24 a business necessity, but Congress expressly did  
25 not include race in that context. So Congress

1 made the judgment that there is no situation in  
2 which it's -- it's permitted or there is a  
3 business necessity or -- or Congress thinks that  
4 that could be justified within the context of  
5 race.

6 JUSTICE THOMAS: So simply making the  
7 selection or the transfer based on race or sex  
8 in and of itself becomes actionable?

9 MS. BROWN: That is our position.

10 JUSTICE THOMAS: Nothing more?

11 MS. BROWN: Yes, that's our position.

12 We do think that when a transfer -- when an  
13 employment decision is made on the basis of a  
14 protected characteristic, that is the denial of  
15 equal treatment, and that's a harm that this  
16 Court has recognized in many cases, including  
17 Heckler versus Mathews, as my -- as my friend  
18 said. You know, Allen versus Wright makes the  
19 same point. There are other cases as well, but  
20 that we think is the only harm that the statute  
21 addresses.

22 JUSTICE SOTOMAYOR: Can we go --

23 CHIEF JUSTICE ROBERTS: Counsel, is  
24 there -- is there anything that Mr. Wolfman said  
25 with which you disagree?

1           MS. BROWN: So I think that he -- in a  
2 colloquy with -- with Justice Gorsuch, he was  
3 talking about whether someone could change the  
4 definition of the conditions of employment or  
5 the -- of the -- what -- the way the work or  
6 your -- your job was defined. I think our  
7 position is that any kind of job assignment will  
8 necessarily qualify as a term, condition, or  
9 privilege of employment. It doesn't have to be  
10 set out in the way that the job description is  
11 written.

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

19           JUSTICE SOTOMAYOR: Can -- can you see  
20 any transfer that wouldn't qualify --

21           MR. BROWN: If it's --

22           JUSTICE SOTOMAYOR: -- as  
23 discriminatory, assuming that it was based --  
24 the Chief posited one where you're going to be  
25 moved from one end to -- to the other end of the



1 floor, let's say. I find it hard to posit that  
2 the only difference would be the color of the  
3 wall, but it could be, as the other -- as your  
4 colleague said, because one has a nice window  
5 and the other one doesn't, and I may think of  
6 that as de minimis.

7 MS. BROWN: Sure.

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

20 MS. BROWN: Sure.

21 JUSTICE SOTOMAYOR: How do we look at  
22 those sorts of things?

23 MS. BROWN: So I think that, by  
24 definition, if you are transferring somebody, if  
25 you're changing their office location, if you

1 are, you know, altering their shift or -- or  
2 anything like that on the basis of a protected  
3 characteristic, that is inherently harmful.  
4 That is -- that is discrimination against them  
5 in the terms, conditions, and privileges of  
6 employment, and I think that that is actionable.

7 I understand that there might be cases  
8 where the specific employment action itself  
9 seems minor. I think that those cases are  
10 perhaps a lot less likely to be brought, in part  
11 because of the -- the damages concerns that  
12 Justice Jackson was -- was pointing to.

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

22 But what we think the inquiry should  
23 be focused on and what the statute certainly  
24 focuses the inquiry on is whether there is  
25 intentional discrimination, not on whether the

1 particular employment action, so long as it fits  
2 within terms, conditions, and privileges, is of  
3 a sufficient degree to be actionable.

4 JUSTICE KAVANAUGH: But some things --

5 JUSTICE KAGAN: So just to --

6 JUSTICE KAVANAUGH: Go ahead.

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

20 MS. BROWN: Yes, again, in -- in  
21 almost every situation. Of course, we do  
22 recognize that there are some kind of  
23 distinctions that don't give rise -- that --  
24 that they are generally viewed as innocuous, and  
25 so I would set those aside. But, in the mine

1 run case, when you are treating somebody  
2 differently based on a protected characteristic,  
3 that is the injury.

4 JUSTICE KAGAN: And what are you  
5 setting aside?

6 MS. BROWN: Bathrooms, there are some  
7 kinds of dress codes that, you know, are  
8 generally viewed as equal, but they recognize  
9 that men and women wear different clothes,  
10 things like that.

11 JUSTICE ALITO: What is your  
12 definition of a transfer?

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

23 JUSTICE ALITO: You want us to hold  
24 that it's always sufficient if it is alleged  
25 that there was a transfer on the basis of a

1 prohibited characteristic, but you -- you don't  
2 want to tell us what a transfer is?

3 MS. BROWN: Again, I think that was a  
4 term that was introduced by the Court. It's not  
5 a statutory term. But I think you could say,  
6 when there are -- and the D.C. Circuit doesn't  
7 --

8 JUSTICE ALITO: I'm sorry to  
9 interrupt. How can we decide the case on that  
10 basis? Maybe it was unwise for the Court to  
11 phrase the question that way, but the -- the  
12 question is whether all transfers qualify. So  
13 don't you have to provide a definition of a  
14 transfer?

15 MS. BROWN: So I would say that it is  
16 something like what I was suggesting. It's  
17 where the -- the employee's responsibilities,  
18 job location, or supervisor have changed. I  
19 don't think it needs to be all three.

20 So, for example, there's the Seventh  
21 Circuit's decision in -- in AutoZone, where an  
22 employee was transferred from one store to  
23 another on the basis of race. The allegation  
24 there was that the employer wanted to maintain a  
25 predominantly Hispanic store, and so they moved

1 an employee over to another store to maintain  
2 that.

3 The Seventh Circuit there held that  
4 that was insufficient under either Section  
5 703(a)(2) or (a)(1). We think that's incorrect.  
6 We think that kind of a transfer would certainly  
7 qualify.

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

23 But if you're -- you're saying that --  
24 well, if you're saying that there always has to  
25 be a change in conditions and terms, that's one

1 thing. Saying it doesn't matter whether there  
2 is or is not so long as there's discrimination,  
3 it seems to me that's something different.

4 MS. BROWN: So I -- there certainly  
5 does have to be a change in terms and conditions  
6 of employment. We think that anytime there's a  
7 transfer, there will necessarily be a change in  
8 terms and conditions of employment because I  
9 take a transfer to mean at least a change in  
10 location, and -- and we think the location is a  
11 part of your attendant -- the attendant  
12 circumstances that surround your employment.  
13 That's a part of your -- your working  
14 conditions.

15 The Court has recognized in, you know,  
16 Meritor and Oncale and -- and Harris that  
17 working conditions are a part of what -- of --  
18 of what is encompassed within terms and  
19 conditions of employment. So I -- I think that,  
20 by necessity, a transfer is going to fall into  
21 -- into those categories.

22 CHIEF JUSTICE ROBERTS: Okay. Thank  
23 you, counsel.

24 Justice Thomas?

25 Justice Alito?

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

4 MS. BROWN: Yes, I think that would be  
5 helpful, and it would be appropriate. I agree  
6 with what the District of Columbia's brief said,  
7 that that phrasing has helped the -- the lower  
8 courts, the district courts, there have  
9 sufficient leeway to continue to dismiss claims  
10 that are not actionable, that maintains the kind  
11 of, you know --

12 JUSTICE ALITO: Okay. So then --

13 MS. BROWN: -- social interactions.

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

16 MS. BROWN: So I think that that  
17 phrasing refers to things like informal  
18 workplace interactions, isolated incidents. The  
19 Court in, you know, Harris, Oncale, Meritor has  
20 referred to things like offensive and  
21 distasteful jokes even if they are kind of, you  
22 know, sex discriminatory or racist in some ways,  
23 single, you know, one-off interactions like  
24 that, for example.

25 JUSTICE ALITO: Well, you talk about



1 one-offs in your -- in a footnote in your brief,  
2 but, when you -- when you talk about harassment,  
3 are you trying to -- you don't want us to import  
4 that statement here -- I mean that standard  
5 here. It has to be severe and pervasive?

6 MS. BROWN: No. No, that's not what  
7 we're suggesting. In the footnote in our brief,  
8 we suggested that -- or we -- we were explaining  
9 that I think one-off incidents in those cases,  
10 they're -- it's less likely that those are going  
11 to -- end up to be actionable -- being  
12 actionable, even if it is a one-off situation  
13 that affects your terms and conditions of  
14 employment, simply because, in those instances,  
15 it's going to be harder as an evidentiary matter  
16 to put forth sufficient evidence to show that  
17 there was intentional discrimination.

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

21 MS. BROWN: That I think would be  
22 analyzed under the hostile work environment  
23 cases, and it would depend on whether the -- the  
24 nasty treatment was severe and pervasive.

25 JUSTICE ALITO: Well, why does that

1 have to be severe and pervasive, but there's no  
2 threshold requirement for any other form of  
3 workplace discrimination?

4 MS. BROWN: So the Court has explained  
5 that in the hostile work environment context,  
6 the question is whether there is a constructive  
7 alteration of the terms and conditions of  
8 employment, and so the -- the question is  
9 essentially whether the employer has effectively  
10 required you to submit to that harassing  
11 treatment as part of the working environment  
12 that you're in.

13 And I think, you know, a background  
14 kind of lurking factor in those cases is also  
15 whether the conduct that you're speaking about  
16 there is attributable to the employer as an  
17 employer, and, you know, the employer is not  
18 always going to be responsible for everything  
19 that the -- the supervisor says.

20 JUSTICE ALITO: Okay. One last  
21 question.

22 Suppose you're talking to a district  
23 court judge and the district court judge says,  
24 look, every year I'm getting 500 new civil  
25 cases, and you're telling me that I cannot

1 dismiss for failure to state a claim a case that  
2 alleges only really trivial disparate treatment.

3 And you say, well, don't worry about  
4 that because, after discovery, you may be able  
5 -- I may be able to grant summary judgment or,  
6 after trial, the -- the damages aren't being --  
7 aren't going to be significant.

8 And, really, that's not an answer to  
9 my problem. It's really helpful to me and  
10 consistent with what I think belongs in federal  
11 court, not what's moral and immoral but what  
12 belongs in federal court, to be able to dismiss  
13 these trivial cases at the outset as soon as I  
14 see the complaint.

15 What do you say to that judge?

16 MS. BROWN: So, even after Chambers in  
17 the D.C. Circuit, there have been cases that  
18 have been able to be dismissed on a motion to  
19 dismiss when there are conclusory allegations,  
20 when the facts pled still do not give rise to an  
21 inference of discrimination. You know, you  
22 still do have to plead something that's going to  
23 help give rise to that inference of  
24 discrimination, whether that's a comparator in a  
25 -- in a similarly situated position or whether

1 that's other conduct that suggests that these  
2 minor employment incidents are attributable to  
3 discrimination.

4 And so there are -- there are cases,  
5 we've cited some in our brief, I think the  
6 District of Columbia in its amicus brief cites  
7 additional cases from the district where those  
8 cases have been able to be dismissed. And, of  
9 course, discovery can be limited, motions for  
10 summary judgment are often granted.

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

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 JUSTICE GORSUCH: Ms. Brown, you -- in

1 some of your discussions, a -- a lot of what you  
2 said tracks what the D.C. Circuit said in  
3 Chambers, and I just wonder, is there anything  
4 in that opinion with which you disagree?

5 MS. BROWN: No, I don't think that  
6 there is. I -- I mean, I think they -- they set  
7 aside the question of whether there's a  
8 de minimis exception. Of course, we think that  
9 the Court could -- could do the same here. Any  
10 transfer is necessarily going to be, we think,  
11 more than a de minimis injury.

12 In our view, we think that there  
13 probably is no real de minimis exception here  
14 because of the significance of the -- the injury  
15 based on a protected characteristic, that that  
16 discrimination in and of itself it seems hard to  
17 characterize as trifling or insignificant or  
18 hardly worthy of notice.

19 But -- but we think that, you know,  
20 the opinion by Judge Tatel and -- and Judge  
21 Ginsburg was a very good opinion and we -- we do  
22 agree with it.

23 JUSTICE GORSUCH: That's what I  
24 thought the answer would be.

25 (Laughter.)

1 JUSTICE GORSUCH: In -- in your  
2 colloquy with Justice Kagan, you briefly  
3 mentioned bathrooms and uniforms and suggested  
4 they might be okay, and I'm wondering how under  
5 your theory of the case.

6 MS. BROWN: So I -- I think that there  
7 is this kind of narrow set of circumstances that  
8 I just referred to where there -- distinctions  
9 based on sex have kind of always been treated as  
10 innocuous, and I think those circumstances raise  
11 their own kind of special set of issues and  
12 there are cases that might arise within that  
13 context where you question whether the specific,  
14 you know, set of bathrooms or the grooming  
15 standards fall within that innocuous kind of  
16 characteristic and --

17 JUSTICE GORSUCH: Innocuous by --  
18 innocuous, do you mean non-injurious?

19 MS. BROWN: Yes, exactly.

20 JUSTICE GORSUCH: So you think there  
21 is an injury requirement here?

22 MS. BROWN: Yes. It's the injury that  
23 is inherent in unequal treatment in most  
24 circumstances. In almost any circumstance, when  
25 you're talking about protected characteristics,

1 I think that there are some differences with sex  
2 and that this Court has recognized those. Other  
3 courts have recognized those. The Court hasn't  
4 really fully fleshed out I think, like, the  
5 theory behind that. If I had to guess, I think  
6 it would be --

7 JUSTICE GORSUCH: I'm not asking you  
8 to guess, but I am --

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

10 (Laughter.)

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

13 MS. BROWN: My sense is that -- that  
14 -- that the intuition behind the distinctions in  
15 those cases is that in the mine-run case, a  
16 gender-specific bathroom or a uniform is not  
17 going to give rise to the kinds of stigmatic or  
18 dignitary harms that we usually associate with  
19 unequal treatment on the basis of sex.

20 I think that there are obviously  
21 distinctions or -- or there are cases when that  
22 won't be the case. If the bathrooms are  
23 actually unequal, if the dress and grooming  
24 standards, you know, trade on sex stereotypes or  
25 are themselves, you know, more -- more difficult

1 to comply with for one sex than the other, then  
2 I think that you would be maybe outside of that  
3 kind of innocuous area.

4 JUSTICE GORSUCH: But you at least  
5 think that there are some circumstances in which  
6 those distinctions are permissible under  
7 Title VII?

8 MS. BROWN: Yes, we do.

9 JUSTICE GORSUCH: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Kavanaugh?

12 JUSTICE KAVANAUGH: On bathrooms,  
13 dress codes, and grooming standards, though, you  
14 couldn't have, of course, different standards  
15 based on race.

16 MS. BROWN: Of course not. And I  
17 think that kind of suggests that the question  
18 there is not -- or the issue there is not  
19 whether bathrooms or dress and grooming  
20 standards are conditions of employment and it's  
21 not whether distinctions with bathrooms and  
22 dress and grooming standards are too immaterial  
23 to be significant. It's just pulling out that  
24 we do think that sex is sometimes different.

25 JUSTICE KAVANAUGH: And then a couple



1 times -- this is a little bit of a side point --  
2 but you said severe and pervasive when talking  
3 about harassment. My understanding, and this  
4 matters, and some cases have been on, it's  
5 severe or pervasive.

6 MS. BROWN: That is correct. I  
7 apologize if I -- if I misstated that.

8 JUSTICE KAVANAUGH: And then, third,  
9 at summary judgment, a lot of these cases are  
10 resolved in my experience. Is that your  
11 understanding as well?

12 MS. BROWN: Yeah, that's consistent  
13 with what I've seen, and looking through the  
14 cases that were decided in the D.C. Circuit  
15 after Chambers, the majority of the cases where  
16 summary judgment was at issue, the -- the -- the  
17 employer prevailed in those cases even then, and  
18 that's based on whether there's sufficient  
19 evidence of -- of intentional discrimination at  
20 that point.

21 JUSTICE KAVANAUGH: And this is  
22 Justice Alito's question, but I -- I think it's  
23 always been pretty hard to dismiss a case on  
24 12(b)(6).

25 MS. BROWN: Yes, I think that's

1 correct. You don't have to plead the prima  
2 facie case, as this Court has held. And so  
3 there are -- there are instances in which you  
4 can get -- where you can get dismissed on  
5 12(b)(6) if you -- if -- if the -- the facts  
6 there just aren't -- aren't there, but in the  
7 mine-run of cases, I think you are getting to  
8 summary judgment even now.

9 JUSTICE KAVANAUGH: Thank you.

10 MS. BROWN: Mm-hmm.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

13 JUSTICE BARRETT: I just want to be  
14 sure that I understand the government's position  
15 here.

16 So the word "discriminate" can have no  
17 negative connotation. Like I might have a  
18 discriminating palate, right?

19 MS. BROWN: Mm-hmm.

20 JUSTICE BARRETT: But, because  
21 Title VII has the word "against" in it,  
22 discriminate against, it does carry some sort of  
23 injury, but the government's position -- and  
24 maybe this is why bathrooms and grooming  
25 standards for men and women are different -- the

1 government's position is not that there is no  
2 injury but simply that mere discrimination is  
3 the injury, and with race, that's -- basically  
4 exists all the time, but with sex, it does not  
5 always exist because not every distinction  
6 between men and women is injurious.

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

8 JUSTICE BARRETT: Okay. Thank you.

9 MS. BROWN: Mm-hmm.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: So just going back  
13 to Justice Alito's questions about trivial  
14 disparate treatment, I guess I didn't see those  
15 in the QP, and maybe I'm not looking at it  
16 correctly.

17 I thought we had isolated the transfer  
18 determination in order to avoid having to say  
19 anything about whether or not there would be an  
20 injury requirement in a whole host of other  
21 situations, to include the trivial or, you know,  
22 allegedly trivial scenario.

23 Am -- am I -- am I looking -- so I  
24 thought our opinion could say whatever injury  
25 requirement might exist with respect to certain

1 kinds of -- other kinds of employment  
2 determinations, we took this case to focus on  
3 transfers, and with respect to transfers, we  
4 hold, and I guess you would have us hold, that  
5 it's enough under the statute that a person is  
6 transferred because of these protected  
7 characteristics.

8           They do not have to separately prove  
9 that that transfer, because of the protected  
10 characteristics, injured them or significantly  
11 injured them or whatever the -- the --- the  
12 court of appeals held here about the degree of  
13 injury.

14           MS. BROWN: That's correct. And --  
15 and we have a -- you know, a footnote in our  
16 brief there as well that kind of sets aside  
17 these cases and says, you know, the -- the  
18 Respondent here, the City here, has brought up a  
19 host of hypotheticals. And, of course, the  
20 Court has narrowed the question presented and  
21 doesn't need to address any of those.

22           I took some of Justice Alito's  
23 questions to be about whether a transfer could  
24 in some situations seem relatively minor if  
25 it -- if you think that a transfer would

1 incorporate, you know, a move from one office to  
2 another.

3 JUSTICE JACKSON: All right. So let's  
4 take -- Justice Sotomayor had that scenario as  
5 well.

6 MS. BROWN: Mm-hmm.

7 JUSTICE JACKSON: Let's take that.  
8 You have the office, and it's -- one is red and  
9 one is blue. They're otherwise identical. And  
10 the person, the boss, says, I think women should  
11 be in red offices. So, I'm sorry, I know you  
12 picked the blue office in the -- as we went  
13 through, but I'm requiring that you sit in the  
14 red office because you're a woman.

15 Is it the government's position that  
16 the woman would have to, in that scenario, not  
17 only prove that she was selected for this  
18 treatment because she was a woman but also that  
19 working in a red office significantly injured  
20 her?

21 MS. BROWN: No. Our position is that  
22 the discrimination based on a protected  
23 characteristic is sufficient to show the harm  
24 that's required under the statute.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Loeb.

4 ORAL ARGUMENT OF ROBERT M. LOEB  
5 ON BEHALF OF THE RESPONDENTS

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

8 The language used in the statute  
9 doesn't say "discriminate between" or  
10 "discriminate with respect to." It says  
11 "discriminate against," and that language, as  
12 used in Title VII, requires not just  
13 differential treatment but difference that  
14 injure the employee, specifically significant  
15 material objective harm.

16 And reading Section 703(a)(1) to  
17 require harm is nothing new. For example, more  
18 than 25 years ago in Oncale, this Court held  
19 that a plaintiff needs to show both that they  
20 were subject to disadvantageous conditions, they  
21 are harassing conditions, and that those adverse  
22 conditions were imposed based on a protected  
23 status. And this Court went on to say the  
24 severity and the negative impact of the  
25 conditions must be looked at through an

1 objective lens, not based on personal  
2 sensitivities, not based on personal  
3 preferences.

4 That approach is fully consistent with  
5 that of the Eighth Circuit here and consistent  
6 with the approach adopted by pretty much all the  
7 circuits for the last at least 25 years.

8 And reading "discriminate against" as  
9 requiring material objective harm is fully  
10 consistent with how this Court read that very  
11 same language in Section 704(a) in Burlington  
12 Northern as that Court looked to 7 -- 703(a)(1)  
13 precedent and the language of 703(a)(1).

14 Moreover, reading "discriminate  
15 against" as requiring significant material harm  
16 is a piece with the specific examples provided  
17 in the statute. Congress gave the initial  
18 examples of refusal to hire, firing an employee.  
19 Those are quintessential acts that are harmful  
20 to the plaintiff.

21 A contextual principle that is  
22 embraced by this Court for a long time is that  
23 the Congress does not legislate as to trifles.  
24 So it's no surprise that this Court has  
25 consistently read Title VII not to speak to

1 minor slights or personal preferences of the  
2 employee or job actions with no significant  
3 harm. As Justice Scalia emphasized in *Oncale*  
4 and as this Court reiterated in *Burlington*  
5 *Northern*, Title VII is not a civility code.

6 Here, the Eighth Circuit properly held  
7 that the personal preferences for one assignment  
8 over another within the St. Louis police force,  
9 without more, cannot support the harm  
10 requirement of Title VII, and this Court should  
11 affirm that judgment.

12 I welcome your questions.

13 JUSTICE THOMAS: You say there --  
14 there must be harm because of the addition of  
15 the preposition "against," "discriminate  
16 against." But how do we quantify that harm?  
17 And if you are correct or if you think it's --  
18 has to be a material harm, is there any  
19 difference between that and de minimis harm? Or  
20 is it one side of the same -- different sides of  
21 the same coin?

22 MR. LOEB: Yeah, the other side argues  
23 that it's unclear what the standard means. It  
24 -- it makes arguments that it's not  
25 administrable. But the courts of appeals have



1     been applying that standard for at least 30  
2     years and have said that material harm means  
3     that there's something that is harming you as  
4     far as if -- in the workforce. Your  
5     responsibilities, your chances for advancement.  
6     You know, it can be your hours of work. It can  
7     be the -- a significant different -- different  
8     functions of the job. It's not a high bar, but  
9     there needs to be something more than mere  
10    personal preferences and -- and subjective  
11    sensitivities of the particular employee.

12                 So it's a material objective harm.  
13    It's through the lens of an objective employee,  
14    not the frailties of a particular sensitive  
15    employee.

16                 JUSTICE JACKSON: Can I ask you --

17                 CHIEF JUSTICE ROBERTS: Why doesn't  
18    the -- down a hall, offices on both sides, the  
19    employer says, I want the women on the -- the  
20    east offices, I want the men on the -- the west.  
21    Everything else is identical.

22                 Why -- why isn't that a sufficient  
23    harm in the same way any type of segregation on  
24    the basis of race or gender is itself harmful?  
25    You're not really sure what the consequences

1 will be in terms of perception or -- or anything  
2 else, but it seems to be a certain violation of  
3 the statute.

4 MR. LOEB: Yeah, I think, once you add  
5 into your hypothetical the overt discrimination,  
6 then you get into the hypothetical like Justice  
7 Kagan's water fountain example where by a  
8 protected status you're going to allow one group  
9 and -- and not another. And it could be an  
10 office.

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

25 CHIEF JUSTICE ROBERTS: Right. Now

1 you're having the same difficulty the other way  
2 as we had or at least I had before. I'm just  
3 asking about no discernible harm. And your  
4 answer is, well, there's a view of the alley,  
5 there's a view of this.

6 MR. LOEB: No.

7 CHIEF JUSTICE ROBERTS: I mean --

8 MR. LOEB: Let me --

9 CHIEF JUSTICE ROBERTS: -- am I going  
10 to have the same problem with you, only from the  
11 different perspective?

12 (Laughter.)

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

14 CHIEF JUSTICE ROBERTS: Because, I  
15 mean, you seem to be answering questions in  
16 which there's no harm apart from discrimination  
17 by saying, oh, there is harm.

18 Now, if the harm is the discrimination  
19 itself, that's one thing. Do you think that  
20 situation could arise?

21 MR. LOEB: No, that -- that -- their  
22 argument conflates the intent and the harm  
23 requirement. You don't just satisfy the harm  
24 requirement by saying: But I think it was done  
25 to me because of my protected status.

1                   What I'm suggesting is there are some  
2 cases where what the employee is -- saying  
3 something overtly, is -- as -- as -- as Justice  
4 Thomas said last -- in last term, that if you  
5 have a -- a stigmatizing segregation in the  
6 workforce, it's inherently going to be  
7 injurious.

8                   So it -- it's the stigma in certain  
9 circumstances which are based on the statements  
10 being made by the -- the employer --

11                   JUSTICE KAVANAUGH: Well, what if it's  
12 not --

13                   CHIEF JUSTICE ROBERTS: Okay. No --

14                   JUSTICE KAVANAUGH: -- what if it's  
15 not overt, though? So it's proved that that's  
16 what's happened, but it was never said. So the  
17 discrimination, after you go through discovery,  
18 is proved. This is what has happened. The  
19 women -- the -- have to work in one place, the  
20 men in another. Or the black employees are  
21 assigned to different offices. It's never said,  
22 though, so you can't just funnel it into  
23 harassment.

24                   MR. LOEB: I -- I -- I --

25                   JUSTICE KAVANAUGH: Under your theory,

1 that's fine.

2 MR. LOEB: Under our theory, it is the  
3 statement being made by the employer which is  
4 stigmatizing.

5 JUSTICE KAVANAUGH: It --

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

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

12 MR. LOEB: Right.

13 JUSTICE KAVANAUGH: Yeah?

14 MR. LOEB: We think --

15 JUSTICE KAVANAUGH: But it's never  
16 said. So you can't just funnel it into  
17 harassment.

18 MR. LOEB: Well --

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

21 MR. LOEB: First of all, we -- in that  
22 Fifth Circuit case, in that example, that would  
23 be certainly a -- a -- a -- a disadvantageous  
24 term or condition of employment. So that's --  
25 we don't have any -- any disagreement with --

1 with -- with that. But --

2 JUSTICE KAVANAUGH: But, that's why I  
3 think it's not a sufficient answer to just say  
4 harassment will cover this --

5 JUSTICE BARRETT: Well --

6 JUSTICE KAVANAUGH: -- because it  
7 won't cover it in the cases where it's not a  
8 stated policy, but it is nonetheless a --

9 MR. LOEB: So Congress --

10 JUSTICE KAVANAUGH: -- policy.

11 MR. LOEB: -- Congress addressed that  
12 kind of categorical -- I'm going to categorize  
13 one -- protected group, they get to do certain  
14 things. Another protected group doesn't get to  
15 do certain things. Under (a)(2) of the statute,  
16 which talks about classification, which talks  
17 about categories, it talks about jobs,  
18 opportunities. I don't think (a) -- (a)(1)  
19 should be broken open and the harm requirement  
20 completely wiped out.

21 JUSTICE JACKSON: But wait.

22 JUSTICE BARRETT: Okay. But --

23 JUSTICE JACKSON: Isn't (a)(1) about  
24 the intentional discrimination? I mean, I  
25 thought the difference between (a)(1) and (a)(2)

1 is (a)(2) is about the effect and (a)(1) is  
2 about the intent of the employer to make this  
3 classification, which is why I'm resisting your  
4 suggestion that there is any harm requirement,  
5 as opposed to suggesting there is and perhaps it  
6 is being automatically satisfied. I am reject  
7 -- sort of resisting that (a)(1) is asking  
8 anybody about whether or not the discrimination  
9 in this situation is causing someone's harm.

10 So can you -- can you do my  
11 hypothetical about women in red offices and men  
12 in blue offices? The offices are otherwise  
13 identical, but we have a policy, whether orally  
14 stated or written or whatever, that women are in  
15 red offices. So, if there was a woman who said,  
16 you know, I, for whatever reason -- well, that's  
17 the policy, women in red, men in blue, all  
18 right?

19 Are you saying that in order to bring  
20 an actionable discrimination claim, a woman  
21 would have to say, I'm harmed by having worked  
22 in a -- a -- a -- a red office, and then it  
23 would have to be sort of material and objective  
24 and all of the other things that you bring in --  
25 to your harm standard?

1                   MR. LOEB: I -- I would agree with  
2                   that, that we'd say that they're not harmed  
3                   unless they could show that the -- the -- the  
4                   statement, the policy is stigmatizing them,  
5                   saying that --

6                   JUSTICE JACKSON: No, no, I  
7                   understand. I'm just -- that assumes there's a  
8                   harm requirement. You're -- you're sort of  
9                   speaking to how you would go about establishing  
10                  the harm requirement, and I'm trying to  
11                  determine whether there is such a thing.

12                  So you're saying, in a situation like  
13                  the one I posited, if -- that -- that there is  
14                  another element that the person has to show, and  
15                  they have to show not just my boss said you're a  
16                  woman, you're in the red office, no matter what,  
17                  that's not enough, I would have to somehow  
18                  marshal evidence that I'm being harmed by being  
19                  put in the red office because of my gender.

20                  Is that what you're saying?

21                  MR. LOEB: I -- I -- that's correct,  
22                  and I think that's actually fairly consistent  
23                  with the position being taken by the other side  
24                  here. That's how they get around the bathroom  
25                  cases. They say, well, yeah, that's a



1 distinction. You're not -- you're not being  
2 allowed in that bathroom, but you're allowed in  
3 that bathroom. But that doesn't --

4 JUSTICE KAGAN: Well, Mr. Loeb, I  
5 think that that's not quite fair. I mean,  
6 the -- the bathroom/grooming cases which first  
7 apply only in the cases of gender, but they're a  
8 really kind of discrete category.

9 And the position that this side of the  
10 podium is taking is both simple and easy to  
11 understand in terms of Title VII's language,  
12 which is just to say that if there is  
13 discrimination, that counts as a harm. The  
14 discrimination is the harm save for these very  
15 few exceptional cases.

16 Now what you are saying is, no, there  
17 has to be an additional showing of harm. We  
18 recognize you say that harm doesn't really have  
19 to be material because you're including  
20 stigmatic harm in that.

21 So now a court is going to have to,  
22 like, wander around going, well, how big is this  
23 harm and is it really stigmatizing or is it only  
24 a little bit stigmatizing. And that sounds both  
25 like something that you don't want any court to

1 do and also something that the statute does not  
2 suggest.

3 MR. LOEB: Well, it's the kind of  
4 analysis which is done all the time regarding  
5 conditions cases under (a)(1). The harassment  
6 cases are conditions cases, and the courts say  
7 not all conditions, even if based on a protected  
8 status, based on gender or race, even if it's  
9 based on that, the harassment is coming from --

10 JUSTICE SOTOMAYOR: But harassment is  
11 different and it's different because there  
12 hasn't been a direct -- an actual change in  
13 terms, privileges, or conditions. You're doing  
14 the same job. You have the same supervisor.  
15 You have the same hours. You have the same  
16 everything.

17 What we have said is, however, that  
18 constructively -- and that's how you have to  
19 figure this out -- there is a change because  
20 you're being subjected to something that might  
21 force you out of the workplace.

22 Now that's a very different situation  
23 from -- from one where there's an actual change  
24 in terms and conditions.

25 MR. LOEB: I -- I -- I -- we disagree

1 with that, Your Honor. I think if you read --

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

5 MR. LOEB: Well -- well, let me -- let  
6 me -- let me walk you through the -- our -- our  
7 reading of Oncale, which is, I think, clearly  
8 the correct one. So, if you -- this is Justice  
9 Scalia's unanimous opinion 25 years ago under  
10 703 elements. In responding to the argument  
11 that the Court's approach was too broad, too  
12 liberal, at page 80, Justice Scalia holds that  
13 the challenged conduct must be because of a  
14 protected status.

15 But then he goes on to say its  
16 separately hold that not all conditions imposed  
17 by a protected status will qualify, and he says  
18 that's because of Title VII's text referring to  
19 "discriminate against." He says that text  
20 indicates that the statute only covers  
21 disadvantageous terms and conditions.

22 So not all harassment that affects  
23 your conditions of employment and even minor  
24 harassment, you know, affects your conditions of  
25 employment. It needs to be disadvantageous.

1 And, of course, then the Court went on to  
2 reaffirm the objective standard.

3           They argued that there is no harm  
4 requirement, and subjective preferences,  
5 subjective sensitivities all will support an  
6 action, and that's not only contrary to Oncale,  
7 it's -- it's directly contrary to how this Court  
8 read the very same language "discriminate  
9 against" in Burlington Northern, examining the  
10 Section 703 precedent and saying you need  
11 material objective harm. The same language and  
12 the same statute by the -- passed by the same  
13 Congress needs to be read the same way.

14           JUSTICE KAVANAUGH: Do you --

15           JUSTICE BARRETT: Counsel --

16           JUSTICE KAVANAUGH: -- do you agree --

17           JUSTICE ALITO: Suppose there are two  
18 women associates in a law firm, and one says,  
19 the -- the partner to whom I'm assigned is  
20 always nasty to me, invariably nasty to me all  
21 the time, never friendly, always critical,  
22 making my life miserable by being nasty to me.

23           And the other one says that they  
24 assigned me to an office with a view where I  
25 don't get the afternoon sun, and they assigned a

1 similarly situated man to an office who -- where  
2 they get the -- which -- is there a reason to  
3 treat those two women differently?

4 MR. LOEB: I -- I -- I don't think so.  
5 Those kind of minor slights and grievances are  
6 what this Court in Burlington Northern warned,  
7 that if you open the door to those kind of  
8 lawsuits and had no meaningful threshold, the  
9 federal courts would become the super-personnel  
10 department not just for all private employers  
11 but for state governments and for local  
12 governments.

13 JUSTICE ALITO: Well, I don't know  
14 that the woman who -- who says that the boss is  
15 invariably nasty is -- is alleging something  
16 trivial, but what I'm asking about is the  
17 suggestion that any transfer from one office to  
18 another qualifies, but if it has to do with  
19 unpleasantness in the workplace, then anything  
20 goes.

21 MR. LOEB: I mean, there are cases  
22 about transfer from one side of the -- of the  
23 office to the other, and the courts of appeals  
24 have all held and the district courts have held  
25 that that is not a material objective harm.

1           You know, if -- if you gloss on some  
2           sort of express statement, I'm doing this  
3           because of race, I'm doing this because of  
4           protected status, then you can start looking at  
5           it under a stigmatic approach of injury, but the  
6           -- you don't want to micromanage every personnel  
7           action.

8           The -- the scary thing about their  
9           position is and -- and the SG's position -- I  
10          want to be very clear -- is that everything that  
11          happens in the workplace, every assignment,  
12          every -- pens, giving out pens to employees are  
13          going to trigger lawsuits based not just on --

14          JUSTICE BARRETT: Well, let me focus  
15          you on the facts of this case and not the pens  
16          or the red office and the blue office, and I  
17          want you to put aside any quibbles that you have  
18          with the other side about the facts and, you  
19          know -- and the summary judgment record.

20          This is different than the red office  
21          to the blue office, okay? So she was  
22          transferred, and let's imagine here that you  
23          have evidence that her supervisor said because  
24          he did replace her with a man, I just don't  
25          really like working with women, I want to work

1 with a man, so I'm going to transfer you to this  
2 different district.

3 And an objectively reasonable person  
4 in her circumstances, even though the job title  
5 and the -- the money and all that didn't change,  
6 would view that as less interesting, the job  
7 responsibilities change, she lost access --  
8 putting aside the facts about, you know, the --  
9 the access to the unmarked car and the uniform  
10 changes and the FBI task force, putting all that  
11 aside, it was -- an objectively reasonable  
12 person would find that less desirable in -- in  
13 her position because of the conditions of the  
14 employment. But you say not actionable.

15 MR. LOEB: No, Your Honor. So let me  
16 just talk -- there are two sort of parts to  
17 that. One is these change in the conditions  
18 about the car, about the hours, and all those  
19 things, which the district court --

20 JUSTICE BARRETT: I -- I want you --

21 MR. LOEB: I -- I know.

22 JUSTICE BARRETT: -- to put that  
23 aside.

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

25 JUSTICE BARRETT: Just go with my

1 hypothetical.

2 MR. LOEB: -- if she had proven those  
3 things, so she alleged them --

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

6 MR. LOEB: Those could possibly --  
7 certainly support a -- a -- a objective material  
8 change. And Burlington Northern recognizes a  
9 change in hours, particularly when you have a --  
10 a person who's a parent, and you look at those  
11 -- like you said in your hypothetical, you look  
12 at the objective facts of the person and then  
13 how a reasonable person would look at them, a  
14 change in hours can be. Having a car can be.

15 JUSTICE BARRETT: A change of  
16 responsibility.

17 MR. LOEB: Change of responsibilities  
18 can be. If there -- if there's such that  
19 they're not -- the district court was  
20 expressive. She alleged that it wasn't  
21 prestigious enough, but she didn't prove it.  
22 She -- and the district court said, if she had  
23 shown me any proof that there was --

24 JUSTICE BARRETT: So, to you, this is  
25 just a dispute about the facts, this whole



1 thing?

2 MR. LOEB: Well, the -- the facts are  
3 that the Eighth Circuit and the district court  
4 ruled based on the fact that she didn't prove  
5 those things. She had waived those things by  
6 not briefing them at summary judgement. And  
7 then they have the -- the --

8 JUSTICE BARRETT: If she'd proved  
9 them, she should win?

10 MR. LOEB: She -- if she had -- if she  
11 had preserved it and proved them, then I think  
12 she -- she may have had a -- a -- a meritorious  
13 case to get to a trial, but -- but she did not.

14 Instead, as the -- as the court of  
15 appeals said, once you eliminated all the other  
16 things that were either attributable to the FBI,  
17 which includes the car and the hours, and --  
18 and -- and you eliminate the things that she  
19 waived, all that's left here is her personal  
20 preference that she -- instead of being in the  
21 Intelligence Division, she -- she wanted to stay  
22 in the Intelligence Division over at Department  
23 5, she admits it's commonplace in the St. Louis  
24 work -- police department to move people around  
25 based on safety needs.

1                   She herself has been moved several  
2 times in and out of the Intelligence Division.  
3 She admits when a new supervisor comes in that  
4 they commonly --

5                   JUSTICE BARRETT: But it's her  
6 preference, and let's say the supervisor --  
7 so -- so let's say that she doesn't prove all of  
8 the other things that we're disputing and  
9 talking about here, like the FBI stuff.

10                  She says, I really like this job  
11 better. This is my preference. And he says,  
12 sorry, I prefer working with men.

13                  MR. LOEB: Then I think you would --  
14 that's the other half of your question, and  
15 thanks for going back to that -- is you would  
16 have to exam that through the stigmatic lens and  
17 look at whether the statement there is labeling  
18 women as less than is creating a -- a -- a --  
19 a -- a workforce where people are unequal and  
20 it's -- it's harmful just to work in that  
21 environment.

22                  So it very could be that overt  
23 statement, whether stated to her or it's stated  
24 as a class matter, in which case she might have  
25 an (a)(2) claim, might in -- in some cases

1 support the -- the requirement of objective  
2 material harm. But what you don't get to do is  
3 litigate about every assignment in the  
4 workplace, every little -- you know, whether you  
5 get this stapler or this pen and to say, well, I  
6 think it's all being done to me for this reason,  
7 and now you get to -- get to summary judgment  
8 and you get to go on to trial because, as this  
9 Court recognized in -- in Bostock, that a  
10 sorting out of true reasons for a job action is  
11 often hard to discern and is almost always going  
12 to go to trial.

13 And so what you're going to be doing  
14 is having federal courts inundated with these  
15 claims with an inability to weed them out at an  
16 earlier stage. Even if it's --

17 JUSTICE KAVANAUGH: Are you aware of  
18 cases about pens or colors of offices?

19 MR. LOEB: There are cases about  
20 moving from identical office from here to there  
21 and the -- and -- and the personal preference --

22 JUSTICE KAVANAUGH: About pens? I  
23 mean, you know, I -- I don't think -- when  
24 you're transferred from one office to another or  
25 one's -- one branch to another, that -- that's a

1 lot different, it strikes me, than --

2 MR. LOEB: Certainly, that could  
3 satisfy that as a condition. The question is,  
4 is it a disadvantageous --

5 JUSTICE KAVANAUGH: But why, though?

6 MR. LOEB: -- condition.

7 JUSTICE KAVANAUGH: Why -- why would  
8 it satisfy the terms and conditions if you're  
9 transferred from one -- one branch to another or  
10 one division to another if all the pay is the  
11 same, the retirement is the same?

12 MR. LOEB: If you move me from our  
13 appellate group to our tax group, where I have  
14 no expertise --

15 (Laughter.)

16 MR. LOEB: -- you know, it's certainly  
17 going to be a -- a material change even though  
18 I'm not even changing offices. So you just have  
19 to look at the context of whether the  
20 responsibilities are different, whether the job  
21 change is disadvantageous to you viewed through  
22 an objective lens. That's the standard that the  
23 courts of appeals have applied for 30 years, let  
24 me give you an example, and it's a well-tried  
25 and -- and -- and tested standard.

1                   Twenty-nine years ago, Justice  
2 Sotomayor, in the Williams versus R.H. Donnelley  
3 case, as a Second Circuit judge, rejected a  
4 transfer claim where the person said I prefer to  
5 work in the Las Vegas office as opposed to here.  
6 And the transfer wasn't granted. The person  
7 said, well, this was being done on the basis of  
8 a protected category.

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

13                   You say whether it is the -- the --  
14 the job change is objectively disadvantage --  
15 disadvantageous, I think, is the standard that  
16 you're imposing. I'm wondering whether or not  
17 that same standard is -- exists across all of  
18 the categories in sub 1.

19                   In other words, does a person who's  
20 fired have to also demonstrate that that firing  
21 was objectively disadvantageous, and could the  
22 employer defend on the grounds that you went on  
23 and you got a better job and, you know, it turns  
24 out this didn't hurt you at all?

25                   Is that -- is that -- is that the sort

1 of logical thing that one could get into if we  
2 start suggesting that there's another element  
3 related to harm in this statute?

4 MR. LOEB: I think there's an  
5 ambiguity about whether the "discriminate  
6 against" language applies to the first two  
7 listed items --

8 JUSTICE JACKSON: Mm-hmm.

9 MR. LOEB: -- hiring and firing. Then  
10 it says, you know, otherwise discriminate and as  
11 to conditions or otherwise. I think it's more  
12 naturally read to apply to it --

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

16 MR. LOEB: Well, yeah -- yeah.

17 JUSTICE JACKSON: So it's hard to say  
18 that "discriminate against" would be that  
19 different, right?

20 MR. LOEB: Yeah -- yes, and I -- I  
21 think "discriminate against" is modifying those  
22 as well and -- and it should be read similarly.

23 JUSTICE JACKSON: So, if that's true,  
24 then we would expect the other two to work in  
25 the same way. So is it your position that we

1 have a scenario in which a person who has  
2 actually been fired also has to demonstrate  
3 based on objective realities or whatnot that  
4 that firing was harmful to them?

5 MR. LOEB: I -- I think, as this  
6 Court has -- as Justice O'Connor has said, that  
7 hirings and firings are quintessentially  
8 injurious.

9 JUSTICE JACKSON: And why isn't this  
10 the same, being treated differently -- being  
11 forced to move to a different set of  
12 circumstances --

13 MR. LOEB: Because --

14 JUSTICE JACKSON: -- which is how  
15 we're defining "transfer."

16 MR. LOEB: Because, as this Court said  
17 in Burlington Northern, while many transfers and  
18 reassignments will be injurious, not all will,  
19 and you need to look at the particular context.  
20 We're not -- and -- and so, in a case like this,  
21 where someone is moved on a regular basis  
22 between departments and where the only thing she  
23 can point to as far as she -- not -- not less  
24 supervisory responsibilities, no -- not  
25 different -- no different pay, no different

1 conditions, no different benefits, and she's  
2 waived all these other aspects, and all you're  
3 left with is "I just prefer one over the other,"  
4 that cannot be the basis of a federal lawsuit,  
5 Your Honor.

6 JUSTICE KAVANAUGH: But --

7 MR. LOEB: Otherwise, you're just  
8 opening the door to anything.

9 JUSTICE GORSUCH: Let me -- let me --

10 JUSTICE KAVANAUGH: -- the premise of  
11 your argument, I think, is that discrimination  
12 itself is not a harm.

13 MR. LOEB: You know, if -- if -- I  
14 don't think it's impossible to read the -- the  
15 statute in the very broad way they suggest. Let  
16 me explain to you a couple reasons why -- why  
17 you should not.

18 And first of all, it has been read  
19 that way, and it's been applied for 30 years in  
20 the courts of appeals. It's consistent with  
21 this Court's (a)(1) precedent saying there needs  
22 to be disadvantageous terms.

23 But also, under this Court's trifle  
24 doctrine, you don't -- you don't lightly assume  
25 that Congress is trying -- is legislating as to



1 minor job actions, minor harms, personal  
2 preferences, and --

3 JUSTICE JACKSON: I'm sorry, I don't  
4 understand your answer to Justice Kavanaugh's  
5 question. So discrimination itself is or is not  
6 a harm?

7 MR. LOEB: Is not by itself a harm.  
8 There's two elements here. There's an element  
9 of disadvantageous terms and -- and -- and harm.  
10 And often there may be -- they will run  
11 together. In some cases, it'll be easy to show  
12 the harm. But you just don't get to presume it.  
13 They say you just presume the harm in every  
14 case --

15 JUSTICE GORSUCH: Let me -- let me --  
16 let me try it this way, Mr. Loeb. Good to see  
17 you.

18 I understand your point that Oncale  
19 and in Burlington Northern and elsewhere, we've  
20 said that "discriminate" means treat worse than,  
21 injure the plaintiff. Got it.

22 But I think we've also kind of  
23 indicated in our cases that when you treat  
24 someone worse than another person because of  
25 race or sex, that's kind of the end of it, and

1 we -- there isn't a further inquiry into how bad  
2 you -- how badly you treated somebody worse. A  
3 -- a minor treating worse on the basis of sex or  
4 race is something Congress in 1964 in a very  
5 short and sweet statute, 28 pages long but  
6 profound, said that the law will no longer  
7 tolerate.

8           And once the courts get into the  
9 business of asking whether that injury is  
10 material or a reasonable person would be  
11 offended by it, that's a whole different extra  
12 textual layer that's going to weed out a bunch  
13 of claims based on a judge's sensibilities about  
14 how -- how bad is bad enough. Thoughts?

15           MR. LOEB: I -- I, you know, just  
16 strongly disagree with that. As -- as Justice  
17 Scalia said, the language in the statute, the  
18 text itself, this is a textual argument, it says  
19 "discriminate against." That requires that --

20           JUSTICE GORSUCH: I'm spotting you all  
21 of that, right? I'm -- I'm spotting you all of  
22 that. "Discriminate against" means treating  
23 somebody worse. That implies an injury. But  
24 Congress could say that anytime you treat  
25 somebody worse because of their race or their

1 sex, you are -- you have a claim --

2 MR. LOEB: I think that --

3 JUSTICE GORSUCH: -- and that layering  
4 on top of that, where do we get that in the  
5 statute, a material harm? How do -- or an  
6 objective person or a reasonable person or  
7 whatever construct we come up with that's  
8 artificial, right, is going to weed out claims  
9 that Congress in 1964 thought profoundly  
10 important to include.

11 MR. LOEB: You know, Congress also, as  
12 this Court has recognized repeatedly, was -- was  
13 trying to preserve management prerogatives and  
14 wasn't trying to open up the doors for every  
15 little action in the workplace to be brought.  
16 So there was a -- it was a -- a balanced  
17 approach.

18 And this Court should not lightly  
19 presume, especially given the trifle principle,  
20 which Justice Katsas explained applies with full  
21 force here, should not lightly assume that  
22 Congress wanted to simply conflate the harm and  
23 the intent requirement where basically you're  
24 reading the language "discriminate against" out  
25 of the statute. It could just say --

1                   JUSTICE KAGAN: But isn't the -- the  
2 -- the trifle principle just inconsistent with  
3 the idea that -- the idea of stigmatic injury?  
4 I mean, we've recognized over and over again  
5 that discrimination itself can profoundly injure  
6 people, just the -- the fact itself that you're  
7 being treated differently from somebody else  
8 based on your race, based on your sex,  
9 et cetera. I mean, so as to -- as to anything,  
10 as to pens, as to water fountains, as to  
11 anything.

12                   MR. LOEB: Yeah. The stigma flows  
13 from the -- either the messaging from the  
14 employer saying I am going to give all people  
15 this protected status, views of the alley,  
16 that's what they deserve. That's a stigma,  
17 right? We could -- that's -- this Court has  
18 recognized in the harassment cases and outside  
19 of it that stigma is a -- is a material harm and  
20 it can be enough. You would look to it through  
21 an objective lens. And -- and that is  
22 completely consistent with our opinion. But  
23 that doesn't mean you just wipe away the harm  
24 requirement.

25                   And, again, what --

1 JUSTICE KAVANAUGH: But doesn't -- oh,  
2 keep going. Sorry.

3 MR. LOEB: What work is the word -- is  
4 the words "discriminate against" doing if you  
5 take that view? The statute says because of  
6 protected status. It could say change of  
7 condition because of protected status. You  
8 don't need the words "discriminate against." If  
9 -- if you listen to their arguments, they are  
10 basically admitting that language has no force  
11 and is superfluous and is redundant.

12 JUSTICE KAVANAUGH: Well, I thought it  
13 meant treat differently because of your race,  
14 let's say --

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

16 JUSTICE KAVANAUGH: -- and -- and then  
17 to -- does it -- that itself is a harm I've  
18 always assumed. And then the question becomes,  
19 is -- does it relate to a term, condition, or  
20 privilege of employment? And not everything in  
21 the workplace will relate to a term, condition,  
22 or privilege of employment, but transfers, I  
23 think, clearly would. And then, when you get  
24 past that, there might be some circumstances of  
25 remedial programs or what have you that you

1       nonetheless justify why you're treating people  
2       differently.

3                   But the idea that you're treating  
4       people differently because of their race could  
5       not be a harm, not be discrimination, I don't --  
6       I don't really understand that.

7                   MR. LOEB:  Again, they could -- you --  
8       you could just read the statute to either  
9       eliminate those words or to say discriminate  
10      between or with respect and not say against, and  
11      that last part of the statute, because a  
12      protected status would be doing all the work and  
13      you would just presume harm because you did it  
14      because of that.  And the first part of the  
15      statute, the text -- that part of the text is  
16      just being ignored.

17                   And, look, where Congress wants to be  
18      more sweeping and to really root and branch, I  
19      think was, Justice Gorsuch, your language, they  
20      know how to do it.  If you look at (e)(16) in  
21      the statute regarding the federal government, as  
22      opposed to all private employers and state and  
23      local employers, they use broader language.

24                   JUSTICE JACKSON:  Can I ask you a  
25      question?  Are you suggesting that Congress had

1 to include a harm requirement here? I mean,  
2 are -- is it your position that it could not  
3 have focused in on the action, meaning make  
4 unlawful a circumstance in which the employer  
5 treats someone differently because of their race  
6 or gender? Let's just take out the word  
7 "discrimination" for a second.

8 Are you saying that there had to be,  
9 maybe as a matter of constitutional authority or  
10 something, a -- a -- a harm that Congress was  
11 capturing with this statute?

12 MR. LOEB: I -- we think Congress  
13 could do that. The question is did they do that  
14 here. Did they mean to open up for federal  
15 lawsuits for minor actions where there's no  
16 significant harm --

17 JUSTICE JACKSON: No, no, no. I'm  
18 just asking. I -- so, if Congress had a value  
19 set that is similar to what others are focused  
20 on here in -- in which they thought that we are  
21 worried about employers that are treating people  
22 differently on the basis of these  
23 characteristics, we think that's a problem.

24 Now whether or not they thought it was  
25 causing other harm in the workplace or whatnot,

1 we think that's a problem.

2 So my question is, could they have  
3 legislated to address that particular problem?

4 MR. LOEB: Yeah, and I think that goes  
5 to what I was -- I was saying about the federal  
6 government provision. I think they did a much  
7 broader provision there which could be read that  
8 way.

9 So, there, it's -- it -- it talks  
10 about any personnel action, which is then  
11 defined under Title V, Section 2302(b), to be  
12 discrimination for or against, and in (e)(16),  
13 they say not just a personnel action, but they  
14 make very clear they want to be sweeping. They  
15 say there shall be -- the -- the workforce shall  
16 be free from any discrimination based on the  
17 characteristics, so the --

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Just so I'm clear,  
24 in responding to Justice Barrett, you said it's  
25 all disputed issue. I didn't think it was



1       disputed that in her intelligence work she  
2       worked essentially 9 to 5 Monday through Friday,  
3       correct?

4                 MR. LOEB:    Correct.

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

9                 MR. LOEB:    Absolutely correct.

10                JUSTICE SOTOMAYOR:   It's not disputed  
11       that she had a private car in the Intelligence  
12       Division that was taken away from her when she  
13       went to the other position, correct?

14                MR. LOEB:    Correct.

15                JUSTICE SOTOMAYOR:   And there is no  
16       dispute that she had to wear a uniform where she  
17       wore plain clothes previously, correct?

18                MR. LOEB:    Yeah.    So --

19                JUSTICE SOTOMAYOR:   Now -- now stop.

20                MR. LOEB:    Okay.

21                JUSTICE SOTOMAYOR:   Just answer my  
22       question.

23                MR. LOEB:    She alleges all those  
24       things but didn't argue them at summary  
25       judgment.

1 JUSTICE SOTOMAYOR: Seems -- all  
2 right. Are they material?

3 MR. LOEB: They certainly could be.

4 JUSTICE SOTOMAYOR: Are -- what  
5 wouldn't make them material? What objective  
6 facts would not make them material?

7 MR. LOEB: You know, if --

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

10 MR. LOEB: No, and -- and -- and the  
11 role --

12 JUSTICE SOTOMAYOR: It's a change in  
13 the terms, conditions, and privileges of the two  
14 positions. You're saying we have to overlay  
15 that with some sort of objective test. Does  
16 that mean she has to prove that she has children  
17 at home at night or that she has to take care of  
18 her parents on the weekend? Are we then  
19 individualizing the test to find out whether she  
20 was somehow injured more than in her personal  
21 preference? I don't understand what you're  
22 saying.

23 MR. LOEB: Well, in -- in Burlington  
24 Northern, this Court said you look at the -- the  
25 particular context of the individual and then

1 see whether a reasonable objective person would  
2 have found so.

3 JUSTICE SOTOMAYOR: Okay. You've  
4 answered my question. We're -- we're --

5 CHIEF JUSTICE ROBERTS: Justice Kagan?  
6 Justice Kavanaugh?

7 Justice Barrett?

8 Justice Jackson?

9 Okay. Thank you, counsel.

10 Rebuttal, Mr. Wolfman?

11 REBUTTAL ARGUMENT OF BRIAN WOLFMAN

12 ON BEHALF OF THE PETITIONER

13 MR. WOLFMAN: Yes. Briefly,  
14 Your Honor. The -- I want to pick up where the  
15 discussion just left off, because I think  
16 Justice Sotomayor's question and some of the  
17 earlier questions on the topic of what one has  
18 to show under these material harm-type,  
19 objective tangible harm-type standards have been  
20 encapsulated by the D.C. Circuit's opinion in  
21 Chambers and I want to mention it.

22 These cases, meaning these types of  
23 cases, asking the question whether something is  
24 harmful enough have consumed enormous judicial  
25 resources seeking to answer a question far

1 removed from the core Title VII inquiry whether  
2 an employer has discriminated against an  
3 employee based on a protected characteristic.

4 I would add to that far removed is an  
5 understatement. The -- the -- the -- the  
6 statute doesn't pose that question, and that's  
7 the problem. But the -- the use of judicial  
8 resources is an important point.

9 So opposing counsel has said the  
10 courts have been applying these standards for 30  
11 years. Some of the lower courts have, true, and  
12 the results are stunning.

13 AutoZone, mentioned by the Assistant  
14 Solicitor General, the Hamilton case, the Threat  
15 case, where there's a policy based on the color  
16 of the officer's skin to quote Judge Sutton. I  
17 point the Court to the amicus briefs that go  
18 through these cases in quite a good bit of  
19 detail.

20 Just a few more points.

21 As Justice Kavanaugh's question posed,  
22 the -- if the policy is covert until discovery,  
23 then it doesn't impose a stigmatic harm. It  
24 imposes a purely dignitary harm. That too is  
25 actionable under Title VII. And it becomes

1 stigmatic when it's uncloaked for all the world  
2 to see. But, in either case, this -- the policy  
3 violates the statute.

4 The gender cases that we've been  
5 discussing, the exceptions, the outlier cases do  
6 not help the City at all because every time you  
7 flip the scenario to race, religion, or national  
8 origin, the City loses. That shows those are  
9 outliers. The City's position is a  
10 cross-cutting position, and it is wrong.

11 Unless the Court has further  
12 questions?

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel. The case is submitted.

15 (Whereupon, at 11:42 a.m., the case  
16 was submitted.)

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