No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,

v.

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

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

BRIEF FOR PETITIONER

Madeline Meth
BOSTON UNIVERSITY
SCHOOL OF LAW
CIVIL LITIGATION AND
JUSTICE PROGRAM
765 Commonwealth Ave.
Suite 1304
Boston, MA 02215

Brian Wolfman
Counsel of Record
Natasha R. Khan
Regina Wang
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Suite 312
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Counsel for Petitioner

QUESTION PRESENTED

Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

PARTIES TO THE PROCEEDINGS

The parties are petitioner Jatonya Clayborn Muldrow and respondents the City of St. Louis, Missouri, and Police Captain Michael Deeba. In the district court, Muldrow pursued claims under Title VII of the Civil Rights Act of 1964 against the City alone and state-law claims against both the City and Deeba. Only the Title VII claims against the City are at issue in this Court.

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BRIEF FOR PETITIONER

Petitioner Jatonya Clayborn Muldrow respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, Pet. App. 1a, is available at 30 F.4th 680. The opinion of the United States District Court for the Eastern District of Missouri, Pet. App. 21a, is available at 2020 WL 5505113.

JURISDICTION

The Eighth Circuit entered judgment on April 4, 2022. Pet. App. 1a. Justice Kavanaugh extended the time to file the petition for a writ of certiorari to and including September 1, 2022. 21A835. The petition was filed on August 29, 2022, and granted on June 30, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

INTRODUCTION

Title VII prohibits an employer from discriminating against an employee because of her race, color, religion, sex, or national origin. Its core antidiscrimination provision, Section 703(a)(1), protects individuals not only from discriminatory hiring, firing, or compensation but also from discrimination with respect to their "terms, conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1). Petitioner Jatonya Clayborn Muldrow maintains that her employer, the City of St. Louis Police Department, discriminated against her in the terms, conditions, or privileges of her employment when, because of her sex, it transferred her out of the Department's Intelligence Division to an entirely different job, and again when it denied her request to transfer to a different position. The Eighth Circuit rejected her suit because, it believed, she could not show that these transfer decisions imposed a "significant disadvantage" sufficient to qualify as an "adverse employment action." Pet. App. 9a, 11a, 15a.

The Eighth Circuit's decision is at war with Section 703(a)(1)'s text. The text does not demand that an employee show a "significant disadvantage" or meet any other heightened-harm requirement. Rather, Section 703(a)(1) requires Muldrow to show three things and three things only: that her employer (1) discriminated against her (2) in the terms, conditions, or privileges of employment (3) because of sex. 42 U.S.C. § 2000e-2(a)(1). Put otherwise, "[o]nce it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the

analysis is complete." *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc). This straightforward understanding of Title VII's words dovetails with its purpose: to "eliminate" workplace discrimination. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

This Court should hold that Section 703(a)(1) means what it says and reverse.

STATEMENT OF THE CASE

I. Factual background

For many years, petitioner Jatonya Clayborn Muldrow was a sergeant with the St. Louis Police Department, where she was known as a "workhorse." Pet. App. 23a; J.A. 159. From 2008 through 2017, she worked in the Department's Intelligence Division on public-corruption and human-trafficking cases. Pet. App. 2a-3a; J.A. 140. She also headed the Gun Crimes Intelligence Unit and, at one time, oversaw the Gang Unit. Pet. App. 2a; J.A. 117, 166. Muldrow thus had experience policing violent crime. J.A. 166.[1]

A. Muldrow's forced transfer

This suit was precipitated by a transfer imposed on Muldrow by her supervisor, Intelligence Commander Michael Deeba. In the lead-up to the transfer, Muldrow noticed that Deeba referred to

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[1] Because this case was decided in the Department's favor on its motion for summary judgment, this Court "must assume the facts to be as alleged by petitioner." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

similarly situated male sergeants according to their rank but called Muldrow and the other female sergeant "Mrs. Clayborn" and "Mrs. L___," instead of Sergeant Muldrow and Sergeant L___, including in front of their colleagues. J.A. 115-16.[2]

Just before the transfer, Deeba told sergeants in the Intelligence Division that he did not believe in "blind transfers"—that is, forcing an employee to transfer jobs without prior discussion. J.A. 118. He promised that "if he had plans" to transfer "anyone," he would discuss the transfer with them first. *Id.* And, in any case, even absent Deeba's promise, someone with Muldrow's experience in the Department typically would be informed before she was transferred. J.A. 159-61.

Yet, without warning, Deeba transferred Muldrow from the Intelligence Division to the Department's Fifth District. J.A. 117-20. Muldrow learned of her transfer from a department-wide email. *Id.* Deeba transferred Muldrow purportedly because he viewed the role that Muldrow had been in for the last three years, in a division in which she had worked for about nine years, J.A. 83-84 (¶¶ 1, 3), as "dangerous," J.A. 139. Deeba did not do any research on her when he recommended her transfer out of that role, *id.*, and the prior Intelligence commander had told him that Muldrow was the one sergeant he could really rely on because of her experience, J.A. 159.

Deeba nonetheless replaced Muldrow with a male sergeant with whom he had previously worked. Pet.

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[2] Under an order entered in the district court that protected the names of certain Department employees, the name of Sergeant L___ is abbreviated. *See* D. Ct. Doc. 15 (Mar. 7, 2019).

App. 24a. Though some female Intelligence officers kept their positions, *see* BIO 1 n.1, Muldrow was the only officer with the rank of sergeant transferred out of the Intelligence Division, J.A. 124-25. All male Intelligence sergeants retained their positions. J.A. 124. Around the same time, while three female and two male officers were transferred out of Intelligence, four male and no female officers were transferred into Intelligence. Eighth Cir. Jt. App. 488-89, 493.

After the transfer, although Muldrow's regular pay remained the same, her schedule, responsibilities, supervisor, workplace environment, and other job conditions and benefits changed dramatically. Pet. App. 4a; J.A. 84 (¶¶ 4-9), 88-90, 104-09, 119-121.

Schedule. In Intelligence, Muldrow worked regular business hours Monday through Friday, with weekends off. Pet. App. 2a, 22a; J.A. 105. In the Fifth District, Muldrow was required to work a rotating schedule, with few weekends off. J.A. 120; Pet. App. 44a.

Responsibilities. In the Fifth District, Muldrow no longer performed her Intelligence duties. J.A. 120-21. All her human-trafficking investigations were reassigned. J.A. 121. She did only "routine" tasks like "patrolling and investigating crimes." *Id.* Her responsibilities shifted to "basic entry level" police work, *id.*, instead of the "more sensitive" and "important investigations" that make Intelligence "the premier bureau" in the Department, J.A. 104-05.

Workplace environment and related prestige. Intelligence is housed in police headquarters, which allows its officers to work directly for the Chief of Police and improves their networking opportunities

because of their proximity to commanders and high-profile individuals. J.A. 104-05, 107, 109; Pet. App. 40a. For example, while reporting directly to the Chief, Muldrow met the head of the Bureau of Alcohol, Tobacco, and Firearms regional office and the FBI director. J.A. 107. As a sergeant in the Fifth District, Muldrow had "no opportunities" to travel for work outside her area of St. Louis in the Fifth District. J.A. 88 (¶ 21). In the Intelligence Division, on the other hand, Muldrow could travel wherever an investigation took her, including out of state. J.A. 112-13.

Equipment, specialized clearance, unique overtime opportunities, and new supervision. Before her transfer, the Intelligence Division deputized Muldrow to the FBI as a Task Force Officer. Pet. App. 2a. With that credential, "Muldrow had the same privileges as an FBI agent," including access to FBI field offices and databases, an FBI identification badge, use of an unmarked and take-home FBI vehicle, and the opportunity to earn overtime pay for FBI assignments. Pet. App. 2a-3a, 22a-23a. After Muldrow became ineligible for the FBI overtime opportunities, she was not aware of any other compensable overtime opportunities for Fifth District sergeants. J.A. 126-28. Instead, Muldrow worked a second job to supplement the income she lost after being transferred from Intelligence. J.A. 132.

Following the transfer, Muldrow had to return her work vehicle because "it was standard policy for officers to return any equipment and for any specialized clearances to be made inactive following a transfer out of a specialized unit." Pet. App. 4a. A few days after the transfer, while Muldrow was on duty and her work vehicle was at her home, Deeba called

Muldrow to demand she return the vehicle "immediately." J.A. 122. She told him that she was at work without the vehicle but would return it before the end of the day. *Id.*

Before Muldrow could comply with Deeba's order to return her vehicle, Deeba contacted her new Fifth District supervisor about the car. J.A. 123. The new supervisor called Muldrow and told her to stop working and immediately return it. *Id.* Muldrow was mortified that her new supervisor's first impression was that she could not follow orders without close supervision. J.A. 123, 133.[3]

Other job requirements and privileges. In Intelligence, Muldrow could wear plainclothes on assignment. Pet. App. 2a-3a, 22a-23a; J.A. 114. This privilege was lost with the transfer. Pet. App. 4a; J.A. 89, 120. In the Fifth District, Muldrow was required to wear a uniform, duty belt, and vest, adding an extra fifteen to twenty-five pounds. J.A. 120. This change had a particular impact on Muldrow because she had suffered injuries years earlier that caused ongoing back and neck problems. *Id.*

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[3] The court of appeals did not consider whether the loss of the FBI credential constituted discrimination with respect to the terms, conditions, or privileges of Muldrow's employment, holding instead that the decision to revoke Muldrow's credential was attributable to the FBI alone. Pet. App. 11a-13a. Muldrow does not pursue a separate claim related to the loss of her FBI credential. *See* Pet. 8 n.2. We include facts about the revocation of Muldrow's FBI credential here, however, because they would not have occurred absent the transfer imposed by the Department and because they illustrate the type of changes to employment that may accompany a job transfer.

The transfer also affected Muldrow's reputation. J.A. 131-34. Colleagues asked her why she had been transferred—a question that was difficult to answer because the transfer had not been justified to her and left the implication that Muldrow had "done something wrong." J.A. 132.

B. Denial of requested transfer

Dissatisfied with her forced transfer, Muldrow sought a new position within the Department as Captain Angela Coonce's administrative aide. J.A. 125, 161-62. Coonce had been transferred recently to the Second District, a change that traditionally would have allowed her to choose her administrative aide. J.A. 151, 162. Based on her years of experience working with Muldrow, Coonce wanted Muldrow to be her aide. J.A. 162. But superior officers told Coonce that Muldrow's selection "wasn't going to happen" and "there's no way we're getting [Muldrow] here" because "they are not going to let you have her." J.A. 162-63; Pet. App. 31a.

Only sergeants can be administrative aides. J.A. 162. The job includes serving as a particular police district's liaison to City Hall and to federal and state agencies, making the position "high profile." Pet. App. 14a, 47a, 48a; J.A. 166-67. Aides collaborate closely with the captain they support, which also makes the position prestigious. J.A. 125, 166-67. They also work a consistent rather than rotating schedule and have weekends off. J.A. 125.

According to Coonce, the Department's refusal to hire Muldrow as Coonce's administrative aide caused damage to Muldrow's career because the position would have allowed Muldrow access to more contacts

and networking opportunities than she was exposed to as a District Five sergeant. J.A. 166-67. Administrative aides also have more "flexibility" in their schedules, and most "will get some extra bonuses." *Id.* Coonce also testified that many administrative aides receive personal computers or iPads to assist them with their work. J.A. 167.

II. Procedural background

A. After exhausting Title VII's administrative procedures, Muldrow sued the Department in Missouri state court under Title VII of the Civil Rights Act of 1964. Pet. App. 5a-6a. Section 703(a)(1) of the Act prohibits an employer from discriminating against its employees because of various characteristics, including sex, with respect to "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Muldrow claimed that the Department violated Section 703(a)(1) by reassigning her to the Fifth District and, later, by refusing to transfer her to the administrative-aide position because of her sex. Pet. App. 6a-7a, 10a, 13a.

The Department removed the case to the U.S. District Court for the Eastern District of Missouri, which then granted the Department's motion for summary judgment. Pet. App. 7a. The court held that Muldrow's sex-discrimination claim related to her transfer could not proceed to trial because she failed to prove "an adverse employment action," which, under Eighth Circuit precedent, must "produce[] a material employment disadvantage." Pet. App. 39a-41a. The court considered Muldrow's contention that her transfer was sufficiently adverse because she had been forced from a "high visibility" position with

"networking opportunities [that] could elevate her career prospects" to a position limited to administrative tasks and supervising officers on patrol. Pet. App. 40a-41a. The court rejected that claim, observing that Muldrow had not "explain[ed] why these responsibilities constituted a material deviation from the responsibilities she had in Intelligence." Pet. App. 43a.

The district court also held that the Department's refusal to transfer Muldrow to the administrative-aide position was not actionable. Pet. App. 47a-49a. Acknowledging that evidence supported Muldrow's contention that the aide position would have allowed her to be a liaison to governmental agencies, the court nevertheless concluded that "there [was] no testimony about why being denied these networking connections would 'significantly affect' her future career prospects." Pet. App. 48a (quoting *Wedow v. City of Kansas City*, 442 F.3d 661, 675 (8th Cir. 2006)).

B. The Eighth Circuit affirmed. Without considering whether Muldrow's forced transfer was discriminatory, the court of appeals held her claim nonactionable because the transfer had not caused Muldrow to suffer a "materially significant disadvantage." Pet. App. 9a (quoting *Jackman v. Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013)). The court found insufficient Muldrow's testimony that her "Fifth District work was more administrative and less prestigious than that of the Intelligence Division." Pet. App. 10a. The court observed that the transfer "did not result in a diminution to her title, salary, or benefits" or "a significant change in working conditions or responsibilities." Pet. App. 11a. Muldrow, the court

said, "express[ed] a mere preference for one position over the other." *Id.*

As for Muldrow's refusal-to-transfer claim, the court affirmed on the ground that Muldrow did "not demonstrate how the sought-after transfer would have resulted in a material, beneficial change to her employment." Pet. App. 13a. As with the forced transfer, the Eighth Circuit did not determine whether the transfer denial was discriminatory, instead holding that it was not an actionable "adverse employment action." Pet. App. 13a-15a.[4]

SUMMARY OF ARGUMENT

I. Congress enacted Title VII to eradicate workplace discrimination. In its core antidiscrimination provision, Section 703(a)(1), Congress spoke capaciously and unequivocally: employers may not "discriminate against" their employees with respect to "terms, conditions, or privileges of employment" because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII's words thus outlaw all disparate treatment in employment decisions relating to every

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[4] The court of appeals also pointed to what it viewed as alternative grounds for rejecting Muldrow's refusal-to-transfer claim. Pet. App. 15a; *see* U.S. Cert. Br. 22. Courts have recognized that answering the question whether a discriminatory transfer is actionable under Section 703(a)(1) also answers the refusal-to-transfer question. *See, e.g.*, *Chambers v. District of Columbia*, 35 F.4th 870, 872 (D.C. Cir. 2022) (en banc); *Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring). This Court's decision here therefore will guide resolution of future refusal-to-transfer claims regardless of whether or how it resolves Muldrow's particular refusal-to-transfer claim.

incident of employment, including transfer decisions. Section 703(a)(1) does not require an additional showing of a "significant disadvantage" or other heightened harm, and the Eighth Circuit's contrary, atextual view should be rejected.

This Court's precedent, Title VII's enactment history, the Act's structure and purpose, and the EEOC's longstanding views all confirm this straightforward understanding of Section 703(a)(1)'s text. That understanding is all that is necessary to resolve this case in Muldrow's favor.

II. The Eighth Circuit, like other courts of appeals, has nonetheless imposed a heightened-harm requirement that extends far beyond Section 703(a)(1)'s clear, unadorned text, impermissibly adding words that Congress did not include. The additional requirement that a plaintiff may challenge discriminatory transfer decisions only when they impose a "significant disadvantage" should therefore be rejected.

None of the purported justifications for a heightened-harm requirement withstands scrutiny. Any "adverse employment action" element of Section 703(a)(1)'s prima facie case derived from this Court's *McDonnell Douglas* decision, 411 U.S. 792 (1973), is legitimate only as a shorthand for the statutory requirement that the employer's challenged conduct relate to the terms, conditions, or privileges of employment. *McDonnell Douglas* does not create a heightened-harm requirement such as the Eighth Circuit's "significant disadvantage" rule.

Nor does this Court's requirement in Title VII hostile-work-environment cases that a plaintiff suffer

"severe" or "pervasive" harassment support a heightened-harm requirement for straightforward disparate-treatment claims like Muldrow's. This Court uses the severity inquiry in harassment cases to determine whether alleged harassment altered an employee's terms, conditions, or privileges of employment. That question is already answered when a plaintiff like Muldrow alleges that her employer directly changed a term, condition, or privilege of employment because of a protected characteristic. To the extent that this Court's hostile-work-environment precedent bears on the question presented, it supports Muldrow because it confirms that a Section 703(a)(1) plaintiff may establish liability without showing tangible or economic harm.

This Court's decision in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), does not support a heightened-harm requirement either. The framework set forth there governs only when an employer can be held vicariously liable for a hostile-work-environment claim and does not bear on the affirmative elements of an ordinary Title VII disparate-treatment claim.

Nor does the material-adversity requirement necessary to establish liability under Title VII's antiretaliation provision, *see Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), require a heightened-harm showing for disparate-treatment discrimination claims such as Muldrow's. Important differences between the text and purpose of Title VII's antiretaliation and antidiscrimination provisions make the materiality standard for retaliation claims inapplicable to discrimination claims. The antiretaliation provision safeguards the enforcement of the Act's substantive guarantee and has no role to

play when a challenged action is not materially adverse—that is, when a reasonable employee would not be dissuaded from reporting discrimination. The antidiscrimination provision, on the other hand, prohibits discriminatory conduct not to control its secondary effects, but because that conduct is a harm in itself.

This Court need not decide whether Title VII silently incorporates a de minimis exception for trivial violations because even if it does, intentional discrimination—and certainly a discriminatory job-transfer decision—will always clear any de minimis threshold.

The Court can honor Title VII's text and reject a heightened-harm requirement without opening the floodgates to Title VII claims based on ordinary workplace slights. Plaintiffs continue to carry the substantial burden of proving intentional discrimination. Relatively short statutes of limitations and circumscribed monetary remedies also establish significant limits.

This Court should apply Section 703(a)(1) as written and reverse.

ARGUMENT

I. An employer's job-transfer decision based on sex violates Title VII.

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of various characteristics, including sex. 42 U.S.C. § 2000e-2(a)(1). This Court's precedent, the statute's history, and the EEOC's views

confirm what is clear from Section 703(a)(1)'s text: an employer's discriminatory transfer decision constitutes unlawful discrimination against the transferred employee with respect to the terms, conditions, or privileges of her employment.

A. Section 703(a)(1)'s text prohibits discriminatory transfer decisions.

"[S]tatutory interpretation must 'begi[n] with,' and ultimately heed, what a statute actually says." *Groff v. DeJoy*, 143 S. Ct. 2279, 2294 (2023) (citation omitted). Section 703(a)(1) is unequivocal: an employer may not "discriminate" against an employee with respect to the employee's "terms," "conditions," or "privileges" of employment. 42 U.S.C. § 2000e-2(a)(1). So, "[i]t's not even clear that we need dictionaries to confirm what fluent speakers of English know" about the meaning of Section 703(a)(1)'s ordinary English words. *See Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (Sutton, J.). We don't need to consult a dictionary to understand that if Muldrow was transferred because she is a woman, she was discriminated against in the terms, conditions, or privileges of her employment because of her sex.

In any case, the definitions of the words "discriminate," "terms," "conditions," and "privileges" contemporaneous with Title VII's enactment make clear that transfer decisions based on any of Section 703(a)(1)'s protected characteristics are unlawful.

1. "Discriminate." "What did 'discriminate' mean in 1964? As it turns out, it meant then roughly what it means today: 'To make a difference in treatment or favor (of one as compared with others).'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020) (quoting

Webster's New Int'l Dictionary 745 (2d ed. 1954)). Put otherwise, the "normal definition of discrimination" is any "differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring in the judgment). No "significant disadvantage" or other heightened-harm requirement can be derived from the word "discriminate," because it connotes any differential treatment.

Thus, "transferring an employee because of the employee's [sex] (or denying an employee's requested transfer because of the employee's [sex]) plainly constitutes discrimination." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring). That is precisely what Muldrow maintains occurred here.

2. "Terms, conditions, or privileges." Beyond prohibiting discrimination in hiring, firing, and compensation, Title VII bars an employer from discriminating with respect to an individual's "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

When Title VII was enacted, "terms" were defined as "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third New Int'l Dictionary 2358 (1961). Ask any employee to describe the "terms" of her employment, and she will point to not only her salary and benefits, but also various requirements set by her employer, including when, where, and with whom she is required to work, and her title, tasks, and other job-related circumstances. *See Terms*, Merriam-Webster's Online Dictionary

(last accessed Aug. 24, 2023) (defining "terms" as "provisions that determine the nature and scope of an agreement;" "a word, phrase, or provision of import especially in determining the nature and scope of an agreement").[5]

At the time of Title VII's enactment, an employee's "conditions" of employment included the day-to-day circumstances in which that employee worked. Those circumstances included the kind of work an employee did and the manner in which she did it. Contemporaneous dictionaries defined "conditions" to mean "attendant circumstances." *Condition*, Webster's New International Dictionary 556 (2d ed. 1958) ("[a]ttendant circumstances … as [in], living *conditions*; playing *conditions*"); *see also Condition*, The Random House Dictionary of the English Language (1966) ("situation with respect to circumstances").

Consistent with these definitions, this Court has described "conditions of employment" to include a range of circumstances in which employees perform their jobs. Thus, "conditions [may] constitute[] an unsafe and dangerous working place." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). The "exacting and unconventional conditions" of employment may also include work on "Saturdays and Sundays and at other times outside the working day." *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 363 (1965) (per curiam).

At Title VII's enactment, "terms" and "conditions" were used "in common parlance," *Groff*, 143 S. Ct. at

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[5] https://www.merriam-webster.com/dictionary/terms.

2294, to describe the day-to-day circumstances in which an employee performs her job. For example, when musicians demanded that their employers specify their schedules in a contract, these "working conditions" were described separately from "the money package" being negotiated. Theodore Strongin, *Work Conditions Believed Key Issue in Met Pact*, N.Y. Times, Oct. 9, 1964, at 31. Around the same time, labor unions signed pledges "to eliminate discrimination" within the labor movement including by "try[ing] to write into 'all collective bargaining contracts nondiscrimination clauses covering hire, tenure, terms, conditions of employment, work assignment and advancement.'" Hedrick Smith, *Unions Join Drive on Job Prejudice*, N.Y. Times, Nov. 16, 1962, at 1, 19.

Turning to "privilege," in 1964, that meant "a right or immunity granted as a peculiar benefit, advantage, or favor" and "such right or immunity attaching specif[ically] to a position or an office." *Privilege*, Webster's Third New Int'l Dictionary 1805 (1961); *see Privilege*, Black's Law Dictionary 1359 (4th ed. 1951) ("[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens"). Thus, a benefit that an employer "is under no obligation to furnish by any express or implied contract … may qualify as a 'privileg[e]' of employment under Title VII." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

Taken together, these three capacious words—"terms," "conditions," and "privileges"—cover the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. And Title VII not only covers

"'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

* * *

In sum, the transfer decisions imposed on Muldrow constituted discrimination with respect to the terms, conditions, and privileges of her employment.

Muldrow maintains that these decisions were taken because of her sex. And "formally transferring an employee from one job to another falls within the heartland of employer actions that affect an employee's 'terms' or 'conditions' of employment as those words are ordinarily understood." U.S. Cert. Br. 7. The same is true for the denial of Muldrow's transfer request—"the functional equivalent of 'refus[ing] to hire' an employee for a particular position," *see Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc)—which also plainly related to the terms, conditions, or privileges of Muldrow's employment.

B. Other potential sources of statutory meaning confirm that Section 703(a)(1) prohibits all discriminatory job-transfer decisions.

Other sources reinforce the statute's clear meaning, further demonstrating that Section 703(a)(1) prohibits discrimination in all incidents of employment, including in all job-transfer decisions.

1. Title VII's pedigree in federal labor law. When Congress enacted Title VII, it did not restrict the statute's coverage to injuries that cause a significant disadvantage (or some other form of heightened harm). Instead, Congress borrowed sweeping language from the National Labor Relations Act. *Compare* 29 U.S.C. § 158(d) *and* 29 U.S.C. § 158(a)(3), *with* 42 U.S.C. § 2000e-2(a)(1). This Court has therefore "drawn analogies" between the NLRA and Title VII. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66 (2006) (citation omitted).

NLRA Section 8(a)(3) bars employers from encouraging or discouraging union membership through "discrimination in regard to … any term or condition of employment." 29 U.S.C. § 158(a)(3). An employer can violate this provision by engaging in a wide range of practices, even ones that result in only "comparatively slight" changes for employees. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The circuits have thus found Section 8(a)(3) violations based on a wide range of employer conduct.[6]

NLRA Section 8(d) also uses the phrase "terms and conditions" to describe the subjects about which employers and unions must collectively bargain. 29 U.S.C. § 158(d). Those subjects include nearly every aspect of the employment relationship, including work hours, *Loc. Union No. 189, Amalgamated Meat*

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[6] *See, e.g.*, *N.L.R.B. v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 839-41 (5th Cir. 1978) (assigning employees to work during particular shifts); *N.L.R.B. v. Buddy Schoellkopf Prods., Inc.*, 410 F.2d 82, 84, 88-89 (5th Cir. 1969) (withholding the "privilege of purchasing goods from the company"); *N.L.R.B. v. Almet, Inc.*, 987 F.2d 445, 448, 451 (7th Cir. 1993) (requiring an employee to take a drug test with its associated inconveniences).

Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 685-86, 691 (1965), and the availability and prices of workplace food and beverages, *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 493-94, 498 (1979).

Given Section 703(a)(1)'s ancestry, the NLRA's "analogous language sheds light" on Section 703(a)(1)'s meaning. *Hishon v. King & Spalding*, 467 U.S. 69, 76 n.8 (1984). Relying on that analogy, this Court has concluded that Section 703(a)(1) reaches the "benefits that comprise the 'incidents of employment,' … or that form 'an aspect of the relationship between the employer and employees.'" *Id.* at 75 (citation omitted). It should go without saying that a job transfer (or the refusal of one)—that is, an employer's decision about what the employee does at work and where she does it—forms "an aspect" of the employer-employee relationship and comprises an "incident[] of employment." *See also* Const. Accountability Ctr. Cert. Br. 18-19.

2. Section 703(a)(1)'s enactment history. Congress enacted Title VII to "assure equality of employment opportunities and to eliminate … discriminatory practices and devices" in the workplace. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *see also Ricci v. DeStefano*, 557 U.S. 557, 580 (2009) (relying on "the important purpose of Title VII—that the workplace be an environment free of discrimination"). Congress's desire to eliminate discriminatory workplace practices is particularly salient in this case, which involves the meaning of Section 703(a), "Title VII's core antidiscrimination provision," *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006).

Title VII's authors understood Section 703(a)(1)'s expansive reach. Senators Joseph Clark and Clifford Case, the floor managers of the bill that became Title VII, explained in a 1964 interpretive memorandum that "the concept of discrimination … is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor[.]" U.S. Equal Emp. Opportunity Comm'n, Legislative History of Titles VII and IX of Civil Rights Act of 1964, at 3040 (1968). It was well recognized that Section 703(a)(1) would prohibit employers from engaging in all forms of discriminatory workplace conduct. In floor debate on the bill that became Title VII, Senator Edmund Muskie read aloud Section 703(a)(1)'s prohibition against employer practices that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" and inquired: "What more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation?" 110 Cong. Rec. 12618 (June 3, 1964).

Indeed, some senators opposed Title VII *because of* its broad reach, expressing particular concerns that the law would ban discriminatory transfer decisions and job assignments. Senator J. Lister Hill observed that Title VII "would control and regiment compensation, terms, conditions, and privileges of employment including but not restricted to: Hiring, promotion, [and] *transfer*[.]" 110 Cong. Rec. 7763 (Apr. 13, 1964) (emphasis added). Similarly, Senator John Tower complained that because the bill provided that "[a]ll compensation, terms, conditions, or privileges of employment must be free from any discrimination,"

"[e]very promotion, every assignment of duty, [and] every privilege granted an employee … could be subject to review by the Federal commission on complaint that there was unlawful discrimination against some other employee." *Id.* at 7778 (Apr. 13, 1964). He also worried that the bill could "regulate the use of tests by employers," so he proposed an amendment that would allow employers to give any professionally developed ability test to "any individual seeking employment or being considered for promotion or *transfer*." *Id.* at 11251 (May 19, 1964) (emphasis added).

3. Subsequent congressional reaffirmation. A 1991 amendment to 42 U.S.C. § 1981—spurred by this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)—reconfirmed that the phrase "terms, conditions, or privileges" of employment covers workplace practices of all stripes. In *Patterson*, a bank hired a Black woman to work as a teller and file coordinator but then relegated her to "sweeping and dusting." *Id.* at 169, 178. It did not impose those duties on her White colleagues. *Id.* at 178. She sued under Section 1981, which at that time prohibited racial discrimination in only "the making and enforcement of private contracts." *Id.* at 171.

This Court rejected Patterson's suit, holding that Section 1981 did not extend to discrimination after a contract's formation. *Patterson*, 491 U.S. at 179. The Court noted that the employer's conduct would have been "actionable under the more expansive reach" of Title VII's prohibition on discrimination in an employee's "terms, conditions, or privileges of employment." *Id.* at 180. But, it held, Section 1981 did

not by its text regulate "working conditions." *Id.* at 176-77.

In response to *Patterson*, Congress "promptly" fixed Section 1981's deficiency by extending it to cover the "terms," "conditions," and "privileges" of the employer-employee relationship. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1020-21 (2020) (Ginsburg, J., concurring in part and concurring in the judgment) (citation omitted); 42 U.S.C. § 1981(b). In other words, to ensure that Section 1981 covered "all phases" of employment, Congress added to Section 1981 the words that Section 703(a)(1) already contained. H.R. Rep. No. 102-40, pt. 1, at 92 (1991); *compare* 42 U.S.C. § 1981(b), *with* 42 U.S.C. § 2000e-2(a)(1). In doing so, legislators expected that the statute would now ban discriminatory "harassment, discharge, demotion, promotion, *transfer*, retaliation, and hiring" though it would "not be limited to" those enumerated actions. H.R. Rep. No. 102-40, pt. 1, at 92 (emphasis added).

Congress's mechanism for expanding Section 1981 to cover discriminatory work assignments was to add to the statute the words at issue here: "terms," "conditions," and "privileges." Thus, Congress agreed that Title VII's "terms, conditions, or privileges of employment" would have covered Patterson's claim, which was "plain[ly]" a challenge to her discriminatory work assignments that this Court viewed as "conditions of her employment," *Patterson*, 491 U.S. at 179, 180.

4. EEOC guidance and decisions. Under longstanding Equal Employment Opportunity Commission guidance, "job assignments" are embodied in Title VII's "terms, conditions, or

privileges of employment." EEOC Compl. Man. § 613.1(a), 2006 WL 4672701. The agency's Compliance Manual—which reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 276 (2008) (citation omitted)—explains that Section 703(a)(1) "is to be read in the broadest possible terms," and that "'terms, conditions, and privileges' … include a wide range of activities or practices which occur in the work place." EEOC Compl. Man. § 613.1(a), 2006 WL 4672701; *see also id.* § 15-VII(B)(1), 2006 WL 4673430 ("Work assignments are part-and-parcel of employees' everyday terms and conditions of employment[.]"). Thus, a "request for a temporary change of scheduled days off falls within this language." *Robert L. Weaver, Appellant*, EEOC DOC 01883168, 1988 WL 920346, at *1 (Nov. 16, 1988). Likewise, a discriminatory shift transfer alone is unlawful. *Ralph J. Lehmann, Appellant*, EEOC DOC 01860673, 1989 WL 1008741, at *4 (Feb. 22, 1989).

* * *

Section 703(a)(1)'s ordinary meaning, as revealed through all applicable tools of construction, is clear: discriminatory transfer decisions—like those imposed on Muldrow here—violate Title VII. No separate court determination of significant disadvantage is required.

II. Section 703(a)(1) prohibits all discriminatory transfer decisions, not only those that impose a significant disadvantage.

Contrary to the statutory text, the Eighth Circuit holds that Title VII prohibits discriminatory transfer decisions only when they impose a "materially

significant disadvantage" on the employee. *See, e.g.*, *Jackman v. Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013); Pet. App. 9a. Under this heightened-harm requirement, "a transfer that does not involve a demotion in form or substance[] cannot rise to the level of a materially adverse employment action." *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (citation omitted). Other courts of appeals apply similar or even more onerous heightened-harm requirements found nowhere in Section 703(a)(1). *See* Pet. 10-23. These requirements leave courts "adrift with a line-drawing exercise unmoored from the statutory text." *Chambers v. District of Columbia*, 35 F.4th 870, 881-82 (D.C. Cir. 2022) (en banc).

Applying its "significant disadvantage" requirement, the Eighth Circuit held that Muldrow's suit could not proceed because her transfer did not cause her to "suffer[] a significant change in working conditions or responsibilities." Pet. App. 11a. Emphasizing that Muldrow's transfer "did not result in a diminution to her title, salary, or benefits," the court concluded that "at most, [Muldrow] expresses a mere preference for one position over the other." *Id.* The court further held that Muldrow had not made the requisite showing of harm as to her denied transfer, explaining that she had not established that the denial of "a more 'high profile'" position in which she would have been "privy to more information" had disadvantaged her. Pet. App. 14a.

The Eighth Circuit's heightened-harm requirement has no basis in Section 703(a)(1), and this Court should reject it. Title VII does not authorize the judiciary to add words to the statute and limit its

reach in this way. Judges may not "add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). Title VII prohibits *all* discriminatory transfer decisions, not only those that impose what employers and courts think constitutes a significant disadvantage.

A. Congress did not limit Section 703(a)(1) to discrimination that imposes a significant disadvantage.

Title VII applies to workplace discrimination regardless of whether employers or courts believe the challenged conduct imposes a significant disadvantage on the employee. Attempts to divine a heightened-harm requirement from the statute or from this Court's precedent fail. Nor does Section 703(a)(1) impliedly tolerate discrimination against protected individuals that others might view as slight. The statute "tolerates no … discrimination" at all. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

1. Other textual indicators support, not undermine, Muldrow's position.

a. "Discriminate against." As already discussed (at 15-16), "discriminate" connotes any differential treatment. So, Section 703(a)(1) requires a plaintiff to demonstrate that her employer treated her differently because of a protected characteristic.

The Department contends, however, that the statutory phrase "discriminate against" supports application of a heightened-harm requirement. BIO 22-23. True, "discriminate *against*" in Section

703(a)(1) means "distinctions or differences in treatment that injure protected individuals." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (citation omitted) (emphasis added). But that just entails "treating [an] individual worse than others who are similarly situated" because of a protected characteristic. *Id.* at 1740. And "[r]efusing an employee's request for a transfer [or to not be transferred] while granting a similar request to a similarly situated employee is to treat the one employee worse than the other." *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc).

For example, Muldrow contends that she was transferred because of her sex. Pet. App. 39a. It follows that a male employee, otherwise similarly situated, would not have been transferred (and she was, in fact, replaced by a male sergeant, Pet. App. 24a). Muldrow thus maintains that she was treated worse than similarly situated colleagues because she is female and they are male. *See Bostock*, 140 S. Ct. at 1741. Title VII requires nothing more.

A requirement that a transfer impose a "significant disadvantage" on the employee, *see Jackman v. Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013), therefore extends far beyond the statutory text. Whether or not a transfer harms the employee's future job prospects, *id.*, is irrelevant. That is because the employee has been discriminated against at the moment of transfer. By being involuntarily moved because of a protected characteristic, the employee has *already* been treated worse than her similarly situated colleagues. Additional adverse consequences may exacerbate the

initial injury and require a more expansive remedy, but they are not required to bring the matter within Title VII's reach.

To be sure, the magnitude of the harm might be useful in determining whether the employer acted with discriminatory intent. An employee who can point to only a small difference between her working conditions and those of her male comparators may find it hard to persuade a court that the difference is the product of a discriminatory purpose. *See* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333, 368 (1999). But an employer who came right out and said "I assigned the larger office to your colleague and the smaller office to you because he's a man and you're a woman" has violated Section 703(a)(1). Put another way, the magnitude of the harm is not an element of the claim; it's a relevant piece of evidence in proving the claim.

b. "*Otherwise* to discriminate." The Department observes that the general phrase "otherwise to discriminate against"—which precedes "terms, conditions, or privileges"—follows the specification that employers may not "fail or refuse to hire or to discharge any individual." BIO 23. Invoking the *ejusdem generis* canon, it then asserts that "otherwise to discriminate against" applies only to employer conduct that imposes the same level of harm as hiring or firing. BIO 23-24. This argument is wrong.

The *ejusdem generis* canon does not apply because "otherwise" means "[i]n a different manner; in another way, or in other ways." *Otherwise*, Webster's New Int'l

Dictionary 1729 (2d ed. 1958); *see also, e.g.*, *Otherwise*, Black's Law Dictionary 1253 (rev. 4th ed. 1968) (same). The phrase "otherwise to discriminate," then, instructs employers that discriminatory conduct banned by Section 703(a)(1) extends to actions *other than* hiring and firing—that is, everything between two ends of an employer-employee relationship—because discriminatory hiring and firing are already expressly prohibited earlier in the provision.

c. "Aggrieved." The Department's effort to situate a heightened-harm requirement in Section 706(f)(1) of the Act is also misguided. *See* BIO 25. That Section provides a private cause of action to individuals "claiming to be aggrieved" by violations of Section 703(a). 42 U.S.C. § 2000e-5(f)(1). "Aggrieved" means "[h]aving suffered loss or injury." *Aggrieved*, Black's Law Dictionary 87 (4th ed. 1951).

This Court has held that "aggrieved" in Title VII "enable[s] suit by any plaintiff with an interest 'arguably [sought] to be protected by the statute.'" *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011) (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)). Put differently, the requirement that the plaintiff be aggrieved is nothing more than a requirement that the plaintiff have "statutory" standing to sue. *See id.*; *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-27 (1995) (explaining that "aggrieved" is a term of art used across statutes to designate those who have standing to challenge agency decisions). So that word adds nothing to the injury already required by the statutory phrase "discriminate against." As discussed (at 27-28), and as the Government observes,

an individual who shows that she has been discriminated against based on a protected characteristic has necessarily been injured. *See* U.S. Cert. Br. 11.

d. Section 703(a)(2). The Department maintains that reading Section 703(a)(1) broadly would "effectively erase" Section 703(a)(2). BIO 24. Section 703(a)(2) makes it unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(2). Even if our broad understanding of Section 703(a)(1) rendered Section 703(a)(2) largely redundant, that would be no reason to disregard Section 703(a)(1)'s plain and expansive words. But it does not. Section 703(a)(2) does independent work. While Section 703(a)(1) bars intentional discrimination alone, Section 703(a)(2)—Title VII's disparate-impact provision—prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 531 (2015) (citation omitted).

2. *McDonnell Douglas* does not support a heightened-harm requirement.

At times, the Eighth Circuit and other courts of appeals have attempted to ground their heightened-harm requirements in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007);

Brooks v. Firestone Polymers, L.L.C., 640 F. App'x 393, 396-97 (5th Cir. 2016). That, too, is mistaken.

In *McDonnell Douglas*, the plaintiff challenged the company's refusal to rehire him, and the question was whether that refusal was "because of" the employee's race. 411 U.S. at 796, 801; *see* 42 U.S.C. § 2000e-2(a)(1). That is, *McDonnell Douglas* is not about which employment actions are adverse or are covered by Title VII; it's about how a plaintiff proves that those actions are attributable to race, sex, or another protected characteristic.

In that context, the Court laid out a four-part burden-shifting framework for determining whether a plaintiff who relies on circumstantial evidence of discrimination has established a prima facie case. *McDonnell Douglas*, 411 U.S. at 802. The Court articulated the third element this way: the plaintiff had to show that "he was rejected." *Id.* Later decisions involving challenges to employment practices other than refusals to hire necessarily had to articulate that element differently. They did so by substituting the broad, catchall phrase "adverse employment action" for the more specific term "reject[ion]." *Id.*; *see, e.g.*, *Hase v. Mo. Div. of Emp. Sec.*, 972 F.2d 893, 896 (8th Cir. 1992).

No problem so far. But after using the term "adverse employment action" simply to identify the challenged employer conduct, courts went further, allowing the phrase to take on a life of its own. Some demanded a "*materially* adverse employment action," *e.g.*, *Crady v. Liberty Nat'l Bank & Tr. Co. of Ind.*, 993 F.2d 132, 134 (7th Cir. 1993) (emphasis added), which the Eighth Circuit then transmogrified into the "materially significant disadvantage" rule, *Harlston v.*

McDonnell Douglas, 37 F.3d 379, 382 (8th Cir. 1994) (relying on *Crady*). Through a "children's game of telephone," then, the current heightened-harm requirement emerged—"something quite different" from what the statute requires. *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021) (citation omitted).

A plaintiff must (of course) identify some job-related decision before she can allege discrimination with respect to the "terms, conditions, or privileges of employment." The need for an employee to suffer an "adverse employment action," then, is nothing more than "shorthand for the operative words in the statute." *Threat*, 6 F.4th at 679. Courts therefore err when, like the Eighth Circuit, they turn a simple descriptive term into a prescriptive legal requirement. In sum, whatever work the term "adverse employment action" might do, it may not modify Section 703(a)(1)'s straightforward words or limit its substantive scope.

3. The Court's hostile-work-environment precedent supports Muldrow, not the Department.

This Court's hostile-work-environment decisions have sometimes been employed to justify a heightened-harm requirement. *See* BIO 25-26. But they no more create a heightened-harm requirement than does *McDonnell Douglas*. For hostile-work-environment claims, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Plaintiffs must show that the harassment was "sufficiently

severe or pervasive 'to alter the conditions of [the victim's] employment.'" *Id.* at 67 (citation omitted).

But that showing applies only in the hostile-work-environment context. "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and … *the latter* must be severe or pervasive." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998) (emphasis added). Put otherwise, to ask whether harassment is sufficiently severe or pervasive to alter the terms of employment requires further inquiry.

On the other hand, to establish a disparate-treatment claim of the sort at issue here—a claim not alleging a hostile work environment—Section 703(a)(1) requires the plaintiff to show only that the challenged practice directly altered the terms, conditions, or privileges of employment. Therefore, to ask the question whether *altering the terms of employment* is sufficiently severe to *alter the terms of employment* is to answer it—discriminatorily altering the terms of employment always violates the statute. That is, "[o]nce it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete." *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc).

Indeed, to the extent that this Court's hostile-work-environment precedent bears on the question presented, it supports Muldrow. Those decisions expressly reject any requirement that the harassment inflict "tangible effects" on the plaintiff. *Harris v. Forklift Sys., Inc.*, 510 U.S 17, 21-22 (1993). And far

from interpreting Title VII to prohibit only "economic" discrimination, this Court has recognized in its hostile-work-environment precedent that Section 703(a)(1) "'strike[s] at the entire spectrum of disparate treatment of men and women' in employment." *Meritor*, 477 U.S. at 64 (citation omitted). Under that standard, an employer's discriminatory transfer decision falls easily within the statute's coverage.

4. *Ellerth* provides no basis for a significant-disadvantage requirement or any other heightened-harm rule.

Some courts of appeals have grounded their heightened-harm requirements in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). *See* Pet. 13-16, 18. *Ellerth*, however, "did not discuss the scope of the general antidiscrimination provision," *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65 (2006), and provides no support for a heightened-harm requirement.

Ellerth, a sexual-harassment case, considered when an employer is vicariously liable for a supervisor's creation of a hostile work environment. 524 U.S. at 754. Applying agency-law principles, *Ellerth* held that an employer is always vicariously liable for a "tangible employment action" taken by a supervisor against a subordinate. *Id.* at 762-63. The Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Liability existed in these circumstances, the Court reasoned, because only a person "acting with the

authority of the company" can cause tangible employment actions, so those actions always "become[] for Title VII purposes the act of the employer." *Id.* at 762-63. When no tangible employment action is taken, however, an employer has an affirmative defense if it can show that it has exercised reasonable care to prevent and correct discriminatory behavior and that the employee has failed to take advantage of available preventive or corrective opportunities. *Id.* at 765.

As just explained, the Court defined a "tangible employment action" for purposes unrelated to what a plaintiff must show in proving a straightforward Section 703(a)(1) disparate-treatment claim. Some courts of appeals have nevertheless imported those categories to define the scope of the "adverse employment action" required to sustain a claim under Section 703(a)(1). *See, e.g.*, *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010). But those holdings take *Ellerth* out of context. *Ellerth*'s vicarious-liability standard for establishing an employer's defense (or not) has no bearing on the affirmative elements of a plaintiff's discrimination claim or the meaning of "terms, conditions, or privileges." Indeed, this Court in *Ellerth* expressly declined to endorse the decisions applying a tangible-employment-action standard to define the scope of a Section 703(a)(1) claim. 524 U.S. at 761.

If anything, *Ellerth* negates the proposition that a tangible employment action is necessarily required to maintain a Title VII claim. Even under the *Ellerth* standard, an employer remains liable for a supervisor's harassment absent a tangible employment action if it cannot make the showing required for the affirmative defense. *Id.* at 765; *see*

U.S. Cert. Br. 15. Moreover, the *Ellerth* framework applies only when a plaintiff attempts to hold an employer *vicariously* liable for an employee's conduct. If the plaintiff shows instead that an employer's own negligence created a hostile work environment, "[the] employer will always be liable." *Vance v. Ball State Univ.*, 570 U.S. 421, 446 (2013).

5. *White* does not support a heightened-harm requirement.

Another source sometimes cited for a heightened-harm requirement is *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). *See* Supp. BIO 6-7. There, the Court interpreted Section 704(a) of the Civil Rights Act of 1964, Title VII's antiretaliation provision. That Section makes it unlawful to "discriminate against" an employee "because he has opposed" an employment practice prohibited by Title VII or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" authorized under Title VII. 42 U.S.C. § 2000e-3(a).

Prior to *White*, the courts of appeals had taken differing views on whether prohibited retaliatory conduct must be employment-related, mirroring Section 703(a)(1)—which, by its terms, is limited to employment decisions—or may occur outside the workplace as well. *White*, 548 U.S. at 60-61. *White* held, first, that the antiretaliation provision extends beyond workplace-related conduct, noting that Section 704(a) lacks Section 703(a)(1)'s limitation to "terms, conditions, or privileges of employment." *Id.* at 62-67. The Court went on to hold that, under Section 704(a), a plaintiff must show that the challenged action was

"materially adverse," meaning that it could have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (citation omitted).

Neither of these holdings is relevant to Section 703(a)(1). First, as just noted, Section 703(a)(1) is limited to employment-related conduct. Second, *White* did not address, much less require, a heightened showing of harm under Section 703(a)(1). And important differences between the antiretaliation and antidiscrimination provisions demonstrate that this Court's material-adversity requirement was specific to Section 704(a) and does not bear on Section 703(a)(1)'s meaning.

The Court grounded Section 704(a)'s material-adversity requirement in the provision's purpose: "prevent[ing] employer interference with 'unfettered access'" to Title VII's processes for remedying discrimination. *White*, 548 U.S. at 68 (citation omitted). Like any antiretaliation provision, it seeks to protect "enforcement of" the Act's substantive guarantee. *See CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452 (2008) (emphasis omitted) (construing 42 U.S.C. § 1981). When no actual risk of interference with enforcement exists—because the employer's conduct would not "dissuade employees from complaining or assisting in complaints about discrimination"—the antiretaliation provision has no role to play. *White*, 548 U.S. at 70.

That reasoning is unique to the antiretaliation provision. It does not justify atextually limiting the reach of Section 703(a)(1), Title VII's principal substantive antidiscrimination provision. Section 703(a)(1) "seeks to prevent injury to individuals based

on who they are." *White*, 548 U.S. at 63. Discrimination reached by Section 703(a)(1) is thus not prohibited because of concerns over its secondary effects (which is Section 704(a)'s concern); as already explained (at 27-28), such discrimination is a harm in itself.

Other reasons that support a materiality requirement in Section 704(a) likewise do not apply to Section 703(a)(1). As noted, *White* held that Section 704(a) imposes a material-adversity requirement only after concluding that the provision covers even conduct occurring outside the workplace. 548 U.S. at 67-68. In the context of that expansive scope, it was "important to separate significant from trivial harms," so as not to permit retaliation claims for the "petty slights or minor annoyances" experienced by all employees. *Id.* at 68. But the antidiscrimination provision, in confining its scope to employment-related discrimination, "by its terms provides the necessary limiting principle." *Chambers*, 35 F.4th at 877.

White's justifications for adopting an objective standard for Section 704(a) claims likewise do not apply here. With a Section 703(a)(1) claim, there is no need—or textual license—for an objective assessment of how a reasonable employee will react to discrimination. The question is only whether an employee has been discriminated against with respect to the terms, conditions, or privileges of employment, "just as the statute says." *Hamilton v. Dallas Cnty.*, No. 21-10133, ___ F.4th ___, ___, 2023 WL 5316716, at *8 (5th Cir. Aug. 18, 2023) (en banc). Whether the challenged action relates to the statutory terms is "a purely objective inquiry." *Chambers*, 35 F.4th at 877. So is the question whether the challenged action

treated the employee less favorably than relevant comparators. For a woman subjected to an involuntary transfer, the court need ask only whether she maintains that a similarly situated man could have remained where he was. *See id.* at 874.

No further inquiry into whether the new position is objectively more desirable than the old is required—or permissible. "Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 338 n.18 (1977). It thus makes no difference here whether a "reasonable" employee would have viewed the job in Intelligence (or in the Fifth District) as more desirable; if the Department's transfer decisions were motivated by discrimination, they were unlawful regardless.

Applying Section 703(a)(1) is already judicially administrable. Indeed, it is *more* administrable than the "materially adverse" standard under Section 704, which requires the court to consider "a reasonable person in the plaintiff's position." *White*, 548 U.S. at 71. Rather than delving into the particulars of a *plaintiff*'s circumstances, a court considering a Section 703(a)(1) claim assesses only whether the *employer* took an action related to a term, condition, or privilege of employment because of a protected characteristic. *See Chambers*, 35 F.4th at 874-75.

B. Congress did not limit Section 703(a)(1) to a subset of employer decisions.

As already explained, a heightened-harm requirement runs headlong into the statutory text and finds no support in this Court's precedent. It conflicts as well with Title VII's design and purpose. Congress

prohibited all employment discrimination, in all its forms. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

1. A heightened-harm requirement conflicts with Congress's commitment to eradicating workplace discrimination.

Section 703(a)(1) "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (citation omitted). "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity." *Franks*, 424 U.S. at 763. The statute's "important purpose" is "that the workplace be an environment free of discrimination." *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009). That objective "would be achieved were all employment-related discrimination miraculously eliminated." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). In short, "eliminating racial [or sexual] discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161 (2023) (*SFFA*).

The Eighth Circuit's heightened-harm requirement conflicts with this unequivocal purpose. Under its significant-disadvantage rule, these discriminatory actions don't qualify as sufficiently adverse: keeping a "shadow file" on an employee and conducting a "whisper campaign of demeaning comments about her performance," *Higgins v. Gonzales*, 481 F.3d 578, 586 (8th Cir. 2007); a transfer imposing "loss of status and prestige," *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); a

transfer to a "more stressful" position, *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994); a denial of training, *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 928 (8th Cir. 2007); and negative performance reviews, *Zhuang v. Datacard Corp.*, 414 F.3d 849, 854 (8th Cir. 2005).

And in other circuits that apply (or until recently have applied) heightened-harm requirements, similar or more egregious examples surface. Forcing Black employees to work outside in the summer heat with no water while allowing White employees to work inside with air conditioning did not constitute actionable harm. *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373-74 (5th Cir. 2019); *Hamilton v. Dallas Cnty.*, No. 21-10133, ___ F.4th ___, ___, 2023 WL 5316716, at *4 (5th Cir. Aug. 18, 2023) (en banc) (condemning the "remarkable conclusion" reached in *Peterson*). Neither did moving White security guards indoors while requiring Black guards to work outdoors in winter, *Stewart v. Union Cnty. Bd. of Educ.*, 655 F. App'x 151, 155 (3d Cir. 2016); *see* Appellant's Informal Br. at 10, *Stewart v. Union Cnty. Bd. of Educ.*, No. 15-3970, 2016 WL 1104687 (3d Cir. Mar. 17, 2016). Courts reached the same result as to the loss of holiday shifts, *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94 (1st Cir. 2012); the transfer of a school principal to an administrative role, *Cole v. Wake Cnty. Bd. of Educ.*, 494 F. Supp. 3d 338, 343, 346 (E.D.N.C. 2020), *aff'd*, 834 F. App'x 820 (4th Cir. 2021); the denial of job training, *Creggett v. Jefferson Cnty. Bd. of Educ.*, 491 F. App'x 561, 567 (6th Cir. 2012); a transfer causing "public humiliation," *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 885-86 (7th Cir. 1989); a shift-assignment policy consigning women to less desirable

shifts, *Piercy v. Maketa*, 480 F.3d 1192, 1203-04 (10th Cir. 2007); a paid job suspension, *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1267 (11th Cir. 2021), petition for cert. filed, No. 22-231 (Sept. 8, 2022); and the denial of an option to "compet[e] for a lucrative employment award," *Douglas v. Donovan*, 559 F.3d 549, 556 (D.C. Cir. 2009) (Tatel, J., dissenting).

And with a heightened-harm requirement nothing at all prevents an employer from making explicit—to the employee and to everyone else—that each of these decisions is based on race, color, religion, sex, or national origin. *See Threat v. City of Cleveland*, 6 F.4th 672, 675 (6th Cir. 2021) (involving a city policy that expressly "determined night and day shifts based on the color of the officers' skin"); *Hamilton*, 2023 WL 5316716, at *1 (concerning an expressly gender-based scheduling policy). Far from eliminating discriminatory employment practices, the current standards tolerate workplaces suffused with discrimination, both overt and subtle, "thwart[ing] legitimate claims of workplace bias," *Hamilton*, 2023 WL 5316716, at *1.

2. Limiting Title VII to compensation-related harms defies its text and history.

a. The Eighth Circuit's heightened-harm requirement also carries the risk of unlawfully elevating compensation-related harms over all others. Plaintiffs tend to be able to show an "adverse employment action" when, for instance, they are constructively demoted to lower-paying positions, *see, e.g.*, *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 716-18 (8th Cir. 2003), while plaintiffs who can show no reduction in pay or benefits often find the

adversity showing more difficult, *see, e.g.*, *Davis v. KARK-TV, Inc.*, 421 F.3d 699, 706 (8th Cir. 2005).

That view cannot be squared with Section 703(a)(1), which prohibits discrimination "with respect to [] *compensation*, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). That list, read as a whole, indicates that the phrase "terms, conditions, or privileges" covers harms not already encompassed by "compensation." Reading the statute to effectively permit recovery for only pecuniary harms renders the phrase "terms, conditions, or privileges" nearly meaningless, *see Threat v. City of Cleveland*, 6 F.4th 672, 680 (6th Cir. 2021), running afoul of the instruction that statutory interpretation should "give effect, if possible, to every clause and word of a statute," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citation omitted); *see Hamilton*, 2023 WL 5316716, at *4 (a restrictive heightened-harm rule "renders the statute's catchall provision all but superfluous").

Congress, moreover, knows how to limit discrimination to monetary, wage-related harms when it chooses. *See* 29 U.S.C. § 206(d)(1) (prohibiting discrimination with respect to "paying wages" alone); 8 U.S.C. § 1324b (prohibiting discrimination based on national origin or citizenship status with respect to only hiring, recruitment or referral for a fee, or discharging). It did not do so in Section 703(a)(1).

b. In 1991, Congress amended Title VII to authorize compensatory and punitive damages. This amendment confirms that Section 703(a)(1) redresses injuries well beyond pocketbook harms.

Previously, monetary relief was limited primarily to back pay. *United States v. Burke*, 504 U.S. 229, 238-39 & n.9 (1992); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 252-53 (1994). With the amendment, plaintiffs now may recover compensatory damages—that is, awards for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). The amended Act thus permits recovery of damages "in circumstances where there has been unlawful discrimination in the 'terms, conditions, or privileges of employment' … even though the discrimination did not involve a discharge or a loss of pay." *Landgraf*, 511 U.S. at 254 (citation omitted). The 1991 change made clear that plaintiffs are entitled to relief for forms of discrimination that do not depend on a reduction in pay or benefits or on some other pecuniary loss. In providing these remedies without altering Section 703(a)(1)'s text, the 1991 amendment underscored that, from enactment, Section 703(a)(1) prohibited all forms of discriminatory employer conduct, including conduct that imposes nonpecuniary harm.[7]

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[7] To restate what is now obvious, Muldrow maintains that this Court must reject the Eighth Circuit's significant-disadvantage requirement and with it other atextual heightened-harm requirements. But if this Court were to authorize a heightened-harm requirement, it should still rule for Muldrow and clarify that all discriminatory transfer decisions would easily surpass that bar, as words like "significant disadvantage" are properly understood. A change in role, unit, or location significantly affects core aspects of an employee's day-to-day work, as the facts here demonstrate. *See supra* at 5-8.

C. This Court need not address whether Section 703(a)(1) includes a de minimis exception, but if it does, the Court should hold that no exception exists.

The D.C. Circuit recently posed, but did not answer, the question whether Section 703(a)(1) incorporates a harm requirement grounded in the principle *de minimis non curat lex*—that the law is not concerned with trifles. *Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc). As we now explain, this Court, too, need not address that question. But if the Court does, it should hold that no implied de minimis principle exists in Section 703(a)(1).

1. De minimis Title VII cases do not tend to arise in the real world. As already described (at 41-43), lower courts have applied a heightened-harm requirement to onerous employment conditions, denials of training opportunities, job transfers, placement on involuntary leave, discriminatory job reviews, and the like. Any employee will tell you that these job terms, conditions, and privileges are not trifles. Put differently, these cases are far removed from something "so 'very small or trifling' that that they are not even worth noticing." *Groff v. DeJoy*, 143 S. Ct. 2279, 2292 (2023) (quoting Black's Law Dictionary 388 (5th ed. 1979)).

For this reason, identifying purportedly de minimis Section 703(a)(1) violations—meaning violations supposedly undeserving of the provision's protection—is challenging without resorting to unrealistic hypotheticals. It is difficult to imagine, for example, an employer insisting that male employees use black staplers and women use gray staplers, *see*

Br. for District of Columbia 23-24, *Chambers v. District of Columbia*, No. 19-7098, 2021 WL 4234225 (D.C. Cir. Aug. 2021). And is it really plausible that an employer would insist on a meaningless title change from "'head detective' to 'chief investigator' without altering the role" *because of* discrimination? *See Chambers*, 35 F.4th at 884 (Walker, J., concurring in the judgment in part and dissenting in part). This Court need not decide whether these improbable instances of discrimination are actionable because they stray far afield from the mine-run of Title VII claims actually litigated.

2.a. This Court can answer the question presented without delving into the outermost reaches of Section 703(a)(1). This case is in that Section's heartland. Discriminatory job-transfer decisions invariably relate to the terms, conditions, or privileges of an individual's employment in a non-trivial manner. They determine what job the employee performs. That is, a job transfer is about the "position itself." *Chambers*, 35 F.4th at 874 (quoting U.S. Br. for Resp't in Opp. at 13, *Forgus v. Shanahan*, 141 S. Ct. 234 (2020) (No. 18-942), 2019 WL 2006239, at *13).

A transfer involves "a new role, unit, [] location," job assignment, or schedule, "as opposed to the mere formality of a change in title" or the like. *Chambers*, 35 F.4th at 874. So, if "de minimis means de minimis," *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021), then job-transfer decisions—which involve the *what*, *where*, and *when* of one's job—are not trivial. *See id.* (holding that shift changes from a preferred day to another day or from day to night "exceed any de minimis exception"); *Hamilton v. Dallas Cnty.*, No. 21-10133, ___ F.4th ___, ___, 2023 WL 5316716, at *8 (5th

Cir. Aug. 18, 2023) (en banc) (allegation that an employer requires female officers but not male officers to work weekends involves "far more than 'de minimis'" harm). A discriminatory transfer decision thus "easily surmounts" any "[de minimis] bar." *Chambers*, 35 F.4th at 875.

b. Further, whenever one employee alleges that she has been treated worse than another because of a protected characteristic like sex—an impermissible ground on which to prefer one employee over another—she has alleged an injury that is more than de minimis. Thus, even assuming (incorrectly) that a job-transfer decision could be viewed as trivial in the absence of discrimination, "it demeans the dignity and worth of a person," *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2170 (2023) (citation omitted), to be denied a privilege available to that person's colleagues on the basis of sex. The use of a distinction in that way is tantamount to a declaration of inferiority. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (noting the "serious non-economic injuries" suffered by those "personally denied equal treatment solely because of their membership in a disfavored group"); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954).

An example illustrates why Section 703(a)(1)'s requirement that an employee experience intentional discrimination means that a victorious plaintiff will always have suffered a more than de minimis injury. The denial of an employee's request for a 9-to-5 shift instead of a 9:30-to-5:30 shift might be deemed inconsequential when the denial is non-discriminatory. But if an employer denied the request because he thinks women (and not men) should be

dropping their children off at school, that discriminatory intent easily elevates the employer's decision beyond any de minimis threshold. That is because the employer's decision furthers "stereotypes that treat individuals as the product of their [sex]," which can only "cause[] continued hurt and injury," *SFFA*, 143 S. Ct. at 2170 (citation omitted); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 251 (1989).

3. In any case, Section 703(a)(1) contains no implied de minimis exception.

A de minimis exception cannot stand if it is contrary to a statute's express terms. *E.g.*, *Alabama v. Bozeman*, 533 U.S. 146, 153-54 (2001); *Env't Def. Fund, Inc. v. E.P.A.*, 82 F.3d 451, 466 (D.C. Cir. 1996) (per curiam) (citing *Public Citizen v. Young*, 831 F.2d 1108, 1122 (D.C. Cir. 1987)). In *Bozeman*, for example, the statute's text "militate[d] against" imposing an "implicit [de minimis] exception" because the statute was "absolute," making no distinction based on the substantiality of a violation. 533 U.S. at 153. Here too, the "*de minimis* doctrine does not fit comfortably within the statute at issue," *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 234 (2014), which unambiguously extends to all discrimination against an individual based on a protected characteristic relating to the terms, conditions, or privileges of employment.

Moreover, "[w]hether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 232 (1992). As already discussed (at 41), "[t]he emphasis of both" Section 703(a)(1)'s language and history "is on *eliminating*

discrimination in employment." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (emphasis added). Thus, workplace discrimination is never so unimportant as to avoid the statute's reach.

D. Applying Section 703(a)(1) as written will not impose unreasonable obligations on employers.

This Court can reject the Eighth Circuit's heightened-harm requirement and apply Title VII to all discriminatory terms, conditions, or privileges of employment, as its text demands, without opening the federal courts to claims arising from "the ordinary tribulations of the workplace." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted).

Title VII imposes important restrictions. It targets discrimination based on only five protected characteristics. 42 U.S.C. § 2000e-2(a)(1). That provides a significant limit compared to other antidiscrimination laws. *See, e.g.*, D.C. Code Ann. § 2-1401.01 (23 protected characteristics); Cal. Gov't. Code § 12940(a) (18 protected characteristics). And unlike the antiretaliation provision, Section 703(a)(1) prohibits only "employment-related discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

Most importantly, Section 703(a)(1) prohibits only intentional discrimination. *See, e.g.*, *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). It requires a plaintiff to show that her employer took the challenged action "because of" a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). That imposes a substantial burden. *See, e.g.*, *Burdine*, 450 U.S. at

253-54, *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

Pragmatic considerations further narrow Title VII's reach. The time and expense required by litigation deter many prospective plaintiffs (and their lawyers) from bringing claims over minor slights, which, in the real world, are hard to tether to intentional discrimination. *See supra* at 29.

Title VII's procedures and the limited remedies available to a prevailing plaintiff add to these practical constraints. The statute contains unusually short limitations periods. 42 U.S.C. § 2000e-5(e)(1), (f)(1); *see* 29 C.F.R. § 1614.105(a)(1) (limitation period for federal-sector Title VII complainants). And claims of most plaintiffs—those whose employers have 100 or fewer employees—are capped at $50,000 in compensatory and punitive damages combined. 42 U.S.C. § 1981a(b)(3)(A).

In sum, reversal will honor Title VII's text and purposes without opening the floodgates.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

Madeline Meth
BOSTON UNIVERSITY
SCHOOL OF LAW
CIVIL LITIGATION AND
JUSTICE PROGRAM
765 Commonwealth Ave.
Suite 1304
Boston, MA 02215

Brian Wolfman
Counsel of Record
Natasha R. Khan
Regina Wang
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Suite 312
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Counsel for Petitioner

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