SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JATONYA CLAYBORN MULDROW,   )

            Petitioner,   )

         v.   ) No. 22-193

CITY OF ST. LOUIS, MISSOURI,   )

ET AL.,   )

            Respondents.   )

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Pages: 1 through 107

Place: Washington, D.C.

Date: December 6, 2023

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8   Respondents.   )

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11   Washington, D.C.

12   Wednesday, December 6, 2023

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14   The above-entitled matter came on for

15   oral argument before the Supreme Court of the

16   United States at 10:05 a.m.

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1   APPEARANCES:

2   BRIAN WOLFMAN, ESQUIRE, Washington, D.C.; on behalf of

3   the Petitioner.

4   AIMEE W. BROWN, Assistant to the Solicitor General,

5   Department of Justice, Washington, D.C.; for the

6   United States, as amicus curiae, supporting the

7   Petitioner.

8   ROBERT M. LOEB, ESQUIRE, Washington, D.C.; on behalf

9   of the Respondents.

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 1                   P R O C E E D I N G S

 2                                    (10:05 a.m.)

 3             CHIEF JUSTICE ROBERTS:  We'll hear

 4   argument this morning in Case 22-193, Muldrow

 5   versus the City of St. Louis.

 6             Mr. Wolfman.

 7               ORAL ARGUMENT OF BRIAN WOLFMAN

 8                 ON BEHALF OF THE PETITIONER

 9             MR. WOLFMAN:  Mr. Chief Justice, and

10   may it please the Court:

11             Jatonya Muldrow maintains she was

12   transferred from the Intelligence Division to a

13   different job in the Fifth District because

14   she's a woman.  That's sex discrimination, and

15   it's unlawful under the plain terms of

16   Title VII.

17             Title VII bars an employer from

18   discriminating against an employee with respect

19   to the terms, conditions, or privileges of her

20   employment because of the employee's sex.

21   Respondent now concedes that a lateral transfer

22   changes the terms, conditions, or privileges of

23   employment.  After all, a transferred employee

24   cannot show up the next day and do her old job.

25   Her job tasks have changed, and that's the most
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        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.

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 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?
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1   MR. WOLFMAN: Well, the -- the

2   transfer -- we wouldn't say "mere" in this

3   particular case with respect, Your Honor, but --

4   JUSTICE THOMAS: Well, transfer alone.

5   MR. WOLFMAN: -- but the transfer

6   itself makes the claim actionable if she was

7   treated differently than a male employee would

8   be under the same circumstances.

9   JUSTICE THOMAS: So what work does the

10   preposition "against" provide?

11   MR. WOLFMAN: It -- it provides that

12   the treatment has to be worse, and there may be

13   circumstances which --

14   JUSTICE THOMAS: So how is it worse --

15   MR. WOLFMAN: -- limited circumstances

16   --

17   JUSTICE THOMAS: -- though? I mean,

18   you're saying two things. One, you say that the

19   mere transfer is enough and "against" adds

20   nothing, or it may -- or it requires that the

21   treatment be worse. But I don't -- beyond the

22   mere transfer, you don't argue that you need

23   anything else.

24   MR. WOLFMAN: That is correct with

25   respect to -- that is absolutely correct.

1   JUSTICE THOMAS: So what work does

2   "against" do?

3   MR. WOLFMAN: The -- the word

4   "against" is -- is indicating that the -- the

5   operation of the conduct is against this

6   particular employee. So that's the work that

7   the -- the word "against" is doing.

8   It could be -- it could be that it's

9   just for emphasis, and there may be limited

10   circumstances, as this Court indicated in

11   Bostock, where, you know, different treatment

12   among men and women is not necessarily

13   discrimination.

14   But, by and large, when a -- a male

15   employee, if we're taking sex discrimination, is

16   treated differently from a female employee in

17   similar circumstances or would be treated

18   differently, that's discrimination against, in

19   this case, the female employee.

20   JUSTICE KAGAN: You refer --

21   CHIEF JUSTICE ROBERTS: Well --

22   JUSTICE KAGAN: -- to Bostock --

23   CHIEF JUSTICE ROBERTS: Go ahead.

24   JUSTICE KAGAN: You refer to Bostock,

25   and Bostock says the term "discriminate against"

1   refers to distinctions or differences in

2   treatment that injure protected individuals. So

3   that formulation suggests that there are

4   distinctions or differences in treatment that

5   don't injure protected individuals, in other

6   words, that -- that the injury is a added thing

7   that one has to show in a discrimination suit.

8   Do you not read that statement that

9   way?

10   MR. WOLFMAN: I do not. I think,

11   generally speaking, the -- the injury is the

12   discrimination itself. That's this Court's

13   decision in Heckler versus Mathews.

14   JUSTICE KAGAN: I mean, it's a funny

15   sentence to write if that's what we thought, and

16   then we can talk about whether -- in fact, we

17   can think about many kinds of distinctions and

18   differences that don't injure anybody, but -- or

19   that don't injure the -- the -- that person at

20   least.

21   But it's a -- it's a funny sentence to

22   write, distinctions or differences in treatment

23   that injure protected individuals, if you think

24   that all distinctions and differences injure

25   protected individuals.

            1   MR. WOLFMAN: Well, not necessarily

            2   all distinctions, but the way I would put it is

            3   that in the vast majority of circumstances,

            4   differential treatment and worse treatment are

            5   going to be the same thing, and that is that --

            6   that injury is going to occur in the vast

            7   majority of circumstances when there is

            8   discrimination.

            9   That's this Court's decision, I -- I

           10   believe, in Heckler versus Mathews. That's in a

           11   sense a premise of the Brown decision, that, you

           12   know, discrimination itself is injurious.

           13   JUSTICE JACKSON: And isn't --

           14   CHIEF JUSTICE ROBERTS: Well, that's

           15   --

           16   JUSTICE JACKSON: -- isn't "terms and

           17   conditions of employment" doing some work as

           18   well? I mean, you -- you say that that's a

           19   conceded part of the statute, and I -- with

           20   respect to how they're interpreting it, and I

           21   understand that, but I would guess that

           22   differential treatment with respect to the terms

           23   and conditions of employment may be what you

           24   mean when you say that --

           25   MR. WOLFMAN: Well --

1   JUSTICE JACKSON: -- discrimination is

2   happening in and of itself.

3   MR. WOLFMAN: -- that -- that is

4   correct in this sense. I -- I believe I -- I --

5   I take the -- your understanding here, which is

6   that "terms, conditions, and privileges" are --

7   is -- are a limiting principle within 703(a)(1),

8   which is what the D.C. Circuit said in -- in the

9   Chambers case. That's -- that's the work that

10   "terms, conditions, and privileges" are doing.

11   So the -- the statute --

12   JUSTICE JACKSON: But I guess I'm --

13   I'm sort of --

14   MR. WOLFMAN: -- does not reach

15   conduct outside the workplace.

16   JUSTICE JACKSON: I -- I -- I know,

17   but I guess I'm inviting you to think about

18   "discriminate against" as Justice Kagan was

19   positing it. You know, she's -- she's

20   highlighted a distinction between discrimination

21   against someone that injures them versus

22   discrimination that might not injure them.

23   And I'm just wondering whether the

24   fact that we're in the context of terms and

25   conditions of employment does any work with

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1    respect to a -- a -- a determination that

2    discrimination, differential treatment in this

3    context, terms and conditions of employment, is

4    inherently injurious from the -- the standpoint

5    of the point that Justice --

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

7             JUSTICE JACKSON:   -- Kagan is making.

8             MR. WOLFMAN:   -- I do take the point,

9    and I think that is -- that is a possibility.

10   But I'm -- I'm putting it in a different frame,

11   which is that "terms, conditions, and

12   privileges" is a limiting principle within the

13   statute, and that may indeed tell you what --

14   what, in fact, is injurious in terms of

15   703(a)(1).  I'd agree --

16            JUSTICE KAGAN:  But --

17            CHIEF JUSTICE ROBERTS:  This is very

18   --

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

20            CHIEF JUSTICE ROBERTS:   -- I -- and

21   I'm sorry if I'm just repeating questions, but

22   it's -- it's a very obviously significant thing

23   and I found it extremely confusing looking at

24   the briefs.

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

2   (Laughter.)

3   CHIEF JUSTICE ROBERTS: And I don't

4   see that that can be -- be right. I -- I mean,

5   I don't know what the hypothetical would be.

6   Let's say, you know, the -- the transfer is from

7   an office, you know, on this hall to an office

8   on the next hall that are identical, the

9   responsibilities are identical, everything is

10   the same. You know, one is a different paint

11   color.

12   MR. WOLFMAN: Right.

13   CHIEF JUSTICE ROBERTS: And yet the

14   person says, I'm transferring you from this

15   office to that office because you're a woman.

16   MR. WOLFMAN: Right. And --

17   CHIEF JUSTICE ROBERTS: Is that

18   actionable? There is no injury apart from, as

19   you say, the fact of discrimination?

20   MR. WOLFMAN: You know, our position

21   is, Your Honor, that that is injurious, and let

22   -- let me explain why.

23   CHIEF JUSTICE ROBERTS: When you say

24   that is injurious --

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

1   case --

2   CHIEF JUSTICE ROBERTS: -- do you --

3   I'm sorry. Let -- let me -- does that mean

4   there is a separate -- no separate requirement

5   of injury or that everything I've said,

6   there's -- nothing is different other than that

7   the person is moved and -- and the -- the

8   manager says it's because you're a woman.

9   Everything else is the same.

10   You say that there is injury there or

11   that, I guess, you don't need injury?

12   MR. WOLFMAN: No, I -- I would say

13   there is injury there because there's

14   discrimination, but let -- let me explain why.

15   I -- I believe, you know, this -- that

16   the questions here are revolving around, I

17   believe, whether there's some, you know, de

18   minimus type exception to the position that

19   we're taking. And, you know, there are, of

20   course, de minimis things that happen in the

21   workplace, trivial things that happen in the

22   workplace.

23   So, if, you know, pink pens and blue

24   pens are distributed to all the employees on a

25   random basis, I think we can consider that

1   trivial. But, if they're distributed on the

2   basis of race, immediately that becomes

3   nontrivial.

4   And I think most people understand

5   that intuitively, that if those pens are

6   distributed -- distributed on the basis of race,

7   that could be stigmatizing. In a sense -- I

8   realize that pens are not public education, but

9   in sense -- in a sense, that is Brown because

10   Brown said, look, we're going to hold constant

11   the question of any tangible harm.

12   JUSTICE KAGAN: Well, sure.

13   JUSTICE BARRETT: Well, but unless you

14   --

15   JUSTICE KAGAN: I mean, our

16   discrimination law has recognized for many, many

17   years that there are stigmatic injuries, right,

18   where just the -- even if it's a very, very

19   minor thing, you know, sending one set of people

20   to one water fountain and another set of people

21   to another water fountain is stigmatic injury.

22   So -- so I accept that point.

23   But are you saying that all

24   discrimination is stigmatic injury? Like --

25   MR. WOLFMAN: No.

1   JUSTICE KAGAN: -- I mean, because you

2   started with, you know, you know, making people

3   worse. I mean, there are differences and

4   distinctions that people can make on the -- on

5   the basis of protected characteristics that make

6   people better off, right?

7   I mean, if -- if I decide one day

8   that, you know, every woman in my workplace

9   should get a raise, I mean, that makes women

10   better off.

11   MR. WOLFMAN: That is correct, and --

12   and -- and that -- if that is publicly known,

13   that could be stigmatizing, in effect, both to

14   the women and to the men. And can I explain

15   why?

16   To -- to the women, it might be that

17   if we're doing this solely on the basis of sex,

18   the person might say to themselves, well, I earned

19   this, I earned this raise, and now it's being

20   meted out on the basis of my sex or race or

21   national origin.

22   Now, of course, in your circumstance,

23   the men might have a cause of action as well,

24   but the point is is that's stigmatizing if it's

25   done publicly. If it's done privately, it's

1   still denigrating and demeaning even if it is

2   not stigmatizing. And, you know, that's what

3   this statute is -- is going at.

4   Now what I do --

5   JUSTICE BARRETT: But are you saying

6   then, if the employer wants to increase

7   diversity in the workplace and so promotes, say,

8   some black employees and they get better jobs,

9   then that's discrimination?

10   MR. WOLFMAN: That poses -- I want to

11   answer that question, but I -- I also want to

12   say that that is -- is not posed by this case.

13   JUSTICE BARRETT: I understand that --

14   MR. WOLFMAN: Of course, I know you

15   know -- I --

16   JUSTICE BARRETT: -- but it seems to

17   me the answer you just gave Justice Kagan would

18   logically apply to that situation.

19   MR. WOLFMAN: Well, it -- it -- it's a

20   difficult question because, if -- if a employer

21   has an affirmative action plan, that calls up

22   this Court's decision in Weber and Johnson, and

23   it would have to be evaluated in terms of the --

24   the guidelines set out in Weber and Johnson.

25   And so there's a separate category of

1   analysis for, you know --

2   JUSTICE BARRETT: Okay. Well, let me

3   take the example --

4   MR. WOLFMAN: -- this grievant and

5   affirmative action.

6   JUSTICE BARRETT: -- you just gave,

7   then I'll put race to one side.

8   The example you just gave, you said it

9   would be actionable under Justice Kagan's

10   hypothetical of all women promoted. What if

11   it's we want to have a, you know, face first, we

12   want women out there, we want to promote women,

13   we want to show that we are friendly to women,

14   let's say it's a law firm and there's -- you

15   know, the numbers of female partners are low and

16   so they want to bring that up.

17   That's actionable?

18   MR. WOLFMAN: I'm -- I'm not sure.

19   This is -- is this some sort of requirement? I

20   -- it's hard to answer.

21   JUSTICE BARRETT: Well, I'm just

22   asking you on Justice Kagan's hypothetical if

23   the --

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

25   JUSTICE BARRETT: -- employer agrees.

1   And it sounds to me like you were saying that

2   was actionable discrimination.

3   MR. WOLFMAN: -- if there is a

4   privilege of employment that is meted out on the

5   basis of sex, that is actionable. And I think,

6   you know, I can turn back to Justice Kagan's

7   hypothetical and, again, if -- if women are

8   being given raises just because they're women,

9   then that is actionable and also, as I say,

10   potentially stigmatizing to the women.

11   And -- and if it's being given out not

12   to the men simply on the basis of race, of

13   course, they have a claim as well.

14   JUSTICE ALITO: I don't think the --

15   the problem that's presented by this case -- and

16   it's a -- it's a difficult problem -- is whether

17   there are forms of disparate treatment that are

18   benign.

19   I would say that all disparate

20   treatment based on race, sex, et cetera, is

21   wrong, but I think the insight, right -- right

22   or wrong, of the courts that have imposed

23   something like a significant disadvantage

24   requirement is that although disparate treatment

25   based on one of these characteristics is wrong,

1   there should be some sort of threshold before it

2   gets into court, and that's where the de minimis

3   idea comes from.

4   But you say there -- there shouldn't

5   even be a de minimis exemption.

6   MR. WOLFMAN: Well, that is our

7   position, but I want to take your question in a

8   couple stages if I may.

9   The first is a significant

10   disadvantage rule and these -- the others that

11   are similar, objective tangible harm, objective

12   harm and so forth that you see in the circuits,

13   have not been applied in anything like a de

14   minimis way, and you see that in the -- in --

15   in, as we cited in our briefs, in the brief of

16   the New York Legal Aid Society at pages 27 -- 24

17   to 27 of the LDF brief, this is --

18   JUSTICE ALITO: Well, I don't want to

19   interrupt you, but, I mean, the issue is whether

20   there should be some kind of threshold --

21   MR. WOLFMAN: Right.

22   JUSTICE ALITO: -- whether it's

23   de minimis, whether it's significant

24   disadvantage, whether it's -- whether some other

25   terminology is appropriate, some sort of

1   threshold that has to be cleared before the

2   matter gets into court.

3   I mean, the -- the employer says --

4   the employee says, on Monday morning, the -- my

5   supervisor always asks my similarly situated

6   coworker whether he or she had a good weekend,

7   but the supervisor never says that to me.

8   Is that actionable?

9   MR. WOLFMAN: That -- that may not be

10   a term, condition, or privilege of employment if

11   this is not a requirement of the job. That --

12   that -- that may be separately, you know,

13   analyzed under the hostile work environment

14   type. But I -- but I don't want to evade the --

15   the question.

16   And so, again, if -- our position is

17   that you don't have to get to the de minimis

18   question because discrimination itself gets over

19   the de -- de minimis hurdle, but I do want to go

20   back to my first --

21   JUSTICE KAVANAUGH: Isn't your point

22   that terms, conditions of employment could not

23   cover certain things like what Justice Alito --

24   MR. WOLFMAN: The --

25   JUSTICE KAVANAUGH: -- just mentioned?

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 1                    It would still be, if you're treating
 2       someone differently on the basis of race, that's
 3       discrimination.  Then the separate question is,
 4       is it a term or condition of employment.  And
 5       some, you know, after-hours things or random
 6       things in the office that are more social than
 7       related to work are maybe --
 8                    MR. WOLFMAN:  That is --
 9                    JUSTICE KAVANAUGH:  -- not terms,
10       conditions of employment.  That's the --
11                    MR. WOLFMAN:  That -- that is correct.
12                    JUSTICE KAVANAUGH:  -- analytical way
13       to approach it.
14                    MR. WOLFMAN:  That is one way to go
15       about it, Justice Kavanaugh, and that's why in
16       my -- my first-line response to Justice Alito
17       was that might not have been a requirement of
18       the workplace.  But --
19                    JUSTICE ALITO:  Well, then what is a
20       --
21                    CHIEF JUSTICE ROBERTS:  I -- go ahead.
22                    JUSTICE ALITO:  Go ahead, Chief.
23                    What is a requirement of the
24       workplace?  What is the definition --
25                    MR. WOLFMAN:  It -- it is --
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1   JUSTICE ALITO: -- of a condition of

2   employment?

3   MR. WOLFMAN: Terms, conditions, and

4   privileges of employment are any requirement or

5   benefit imposed upon or withheld from or denied

6   an employee. That's what a term, condition, or

7   privilege of employment is.

8   So, if it's just a statement made in

9   the workplace, I just don't think that is

10   necessarily a term, condition, or privilege.

11   JUSTICE ALITO: All right. They --

12   they gave me an office with a view of the alley

13   instead of an office with a view of a park.

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

15   JUSTICE ALITO: Is that a condition of

16   employment?

17   MR. WOLFMAN: -- it -- it is a

18   condition of employment, and I -- I must say, if

19   that is meted out on the basis of race, all the

20   employees of one race get a -- a -- a -- a -- a

21   view of the alleyway and another set of

22   employees purely on the basis of race get a --

23   deliberately get a view of the city, a beautiful

24   view of the city, that is discrimination under

25   Title VII.

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 1                JUSTICE ALITO:  Well, your --

 2                CHIEF JUSTICE ROBERTS:  Thank you --

 3                JUSTICE ALITO:  I'm sorry.

 4                CHIEF JUSTICE ROBERTS:  Yeah.  Thank

 5     you, counsel.  If this is your position, I don't

 6     understand the bulk of your brief.  The bulk of

 7     your brief talks about different, you know,

 8     locations, different facilities, she has to wear

 9     a uniform, different hours, no weekend,

10     different access to, you know, superiors.

11                Under your theory, all of that is

12     completely irrelevant.  And as far as the terms

13     and conditions of employment, that was not your

14     argument in the brief.  The argument in your

15     brief was there's no requirement.  And then you

16     go on and list all these things that would count

17     under normal circumstances, I would think, as

18     adverse consequences.

19                MR. WOLFMAN:  Your --

20                CHIEF JUSTICE ROBERTS:  So why is all

21     that in your brief if your argument is we don't

22     need to show any of that?

23                MR. WOLFMAN:  Your Honor, the reason

24     that is in our brief is we -- we were laying out

25     the harm that these rules like significant
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1   disadvantage have done in the circuits, and this

2   goes back to Justice Alito's question.

3   Significant disadvantage, as this

4   Court itself said in Groff, is nothing like de

5   minimis.

6   CHIEF JUSTICE ROBERTS: Well, but,

7   just to be clear, if none of that was in your

8   brief, your argument would be the same? No --

9   as far as we know, hours were the same. She did

10   not have to wear a uniform. Access to superiors

11   would be, you know, absolutely the same.

12   Everything is the same except --

13   MR. WOLFMAN: That is correct, Your

14   Honor.

15   CHIEF JUSTICE ROBERTS: Okay.

16   MR. WOLFMAN: No. But -- but I think

17   this is --

18   CHIEF JUSTICE ROBERTS: So I should

19   have skipped those pages?

20   MR. WOLFMAN: No, I -- I don't think

21   that is -- that is right. What we were

22   attempting to do in our brief was to discuss the

23   very things that have been coming up, the

24   de minimis exception, coming up in all the lower

25   court cases, and with the expectation that we

1   would be asked these questions.

2   But if the Court -- the Court narrowed

3   the question to transfers, and if the Court

4   wishes to decide this case solely on the basis

5   of transfers, my client is perfectly happy with

6   that.

7   CHIEF JUSTICE ROBERTS: So we limited

8   the question to transfers, and you gave us

9   arguments talking about terms and conditions and

10   the various ways in which there was actual

11   injury?

12   MR. WOLFMAN: That is correct.

13   CHIEF JUSTICE ROBERTS: Okay.

14   Justice Thomas?

15   Justice Alito?

16   JUSTICE ALITO: There -- there are a

17   number of significant differences between the

18   two positions here, no question about it, but

19   just to -- to give you a hypothetical that's

20   different but in -- is perhaps related.

21   So suppose the only difference between

22   the two positions is one's a desk job and one's

23   a job on the street, okay? And a particular

24   employee says, they transferred me from the desk

25   job, which is safe and interesting to -- to me,

     1   that's what I'm interested in, to the street

     2   job, which is more dangerous and not interesting

     3   to me. That would -- that would qualify, right?

     4   MR. WOLFMAN: Absolutely.

     5   JUSTICE ALITO: What if it was the

     6   opposite way around and the employee -- this

     7   particular employee said, I don't want to sit at

     8   a desk all day, I want to be out there where --

     9   in the real world? That would be -- that would

    10   qualify --

    11   MR. WOLFMAN: Absolutely.

    12   JUSTICE ALITO: -- as well?

    13   MR. WOLFMAN: With -- Justice Alito,

    14   absolutely. That is -- that is the Teamsters

    15   case. The Court says in Teamsters that some

    16   people might prefer the line driving position

    17   and some people might prefer the local position.

    18   And Title VII protects either of those choices

    19   against a determination by the employer of

    20   discriminatory intent.

    21   JUSTICE ALITO: No, I --

    22   MR. WOLFMAN: That is Teamsters.

    23   JUSTICE ALITO: -- I mean,

    24   discrimination, I can't emphasize it too much,

    25   on any of these grounds is morally wrong. The

1   question is whether it's the stuff of the

2   district court case.

3   One more question. Some of our

4   Supreme Court police officers prefer to work the

5   day shift and some prefer to work the night

6   shift. So, if someone is transferred from the

7   night shift, which a lot of people wouldn't

8   like, to the day shift, that may be viewed as an

9   injury by that particular officer, right, and

10   that would be enough?

11   MR. WOLFMAN: Absolutely actionable.

12   That's what -- that -- that's the -- the -- the

13   Threat decision in the Sixth Circuit. That's

14   the Hamilton decision in the Fifth Circuit.

15   JUSTICE ALITO: And what if it's the

16   other --

17   MR. WOLFMAN: Shift changes --

18   JUSTICE ALITO: -- what if it's the

19   other way around?

20   MR. WOLFMAN: -- shift changes on the

21   basis of race or sex are unlawful.

22   JUSTICE ALITO: Okay. Thank you.

23   CHIEF JUSTICE ROBERTS: Justice

24   Sotomayor?

25   Justice Kagan?

1   JUSTICE KAGAN: I mean, just to make

2   clear I understand what you're saying, you're

3   saying that there is an injury requirement but

4   that the fact of discrimination satisfies the

5   injury requirement in all but the most

6   extraordinary case?

7   MR. WOLFMAN: Well, yes, I mean, and

8   the -- you know, I -- I don't want to put my

9   toes in too deep, but this was what was reserved

10   in Bostock and clearly does not have to be dealt

11   with here, which is, you know, there -- there

12   may be deep-seated understandings and -- that

13   people never think of sex-segregated bathrooms

14   as discrimination. That's correct.

15   What -- this goes back to the point I

16   made earlier, Your Honor, which is that

17   differential treatment is almost invariably

18   worse treatment if it's done on a basis of a

19   protected characteristic.

20   CHIEF JUSTICE ROBERTS: Justice

21   Gorsuch?

22   JUSTICE GORSUCH: There was some

23   suggestion in some of the amici -- we have so

24   many amici -- that employers might respond to a

25   decision in -- in your client's favor by

1   redefining the terms, conditions, and privileges

2   of employment so that you may be reassigned

3   here, there, or wherever.

4   And I want your thoughts about that.

5   MR. WOLFMAN: And I'm not sure I

6   understand the question, Your Honor --

7   JUSTICE GORSUCH: So --

8   MR. WOLFMAN: -- with all respect.

9   JUSTICE GORSUCH: No, no, fair enough.

10   That's my fault. So what if an employer says,

11   your job isn't defined as sitting at a desk or

12   walking the rounds around the building or

13   whatever it may be or being on the beat, but it

14   is defined as any of those things so that there

15   is -- it isn't a term or condition of employment

16   that you are a desk job or on the beat?

17   MR. WOLFMAN: And, you know, the -- if

18   the terms and conditions and privileges of

19   employment --

20   JUSTICE GORSUCH: Can an employer

21   define its way around the problem, I guess?

22   MR. WOLFMAN: I think the answer is

23   no. If that determination that you're

24   suggesting was made in response to a charge or a

25   suit or -- or --

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 1                 JUSTICE GORSUCH:  No, it would be made

 2      ex ante.  So we hire all of our police officers

 3      and you can be subject to any of these things.

 4      That -- that -- that -- that is the suggestion

 5      of at least some of our --

 6                 MR. WOLFMAN:  And --

 7                 JUSTICE GORSUCH:  -- amici.

 8                 MR. WOLFMAN:  -- and that --

 9                 JUSTICE GORSUCH:  A decision in your

10      favor.

11                 MR. WOLFMAN:  -- might be permissible,

12      but I want to add two caveats.

13                 JUSTICE GORSUCH:  Mm-hmm.

14                 MR. WOLFMAN:  First, if there was

15      evidence that that itself was done out of

16      discriminatory intent, that would be unlawful.

17                 Secondly, if any given change within

18      that broader context, so six months later a

19      change is made consistent with the literal terms

20      of that but done with discriminatory intent,

21      that would be actionable under Title VII.  That

22      may be very difficult to prove, I understand,

23      but that would still be actionable.

24                 JUSTICE GORSUCH:  And then I want to

25      give you a chance to just flesh out your
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 1   position, which I understand has been subject to

 2   some questioning this morning, that -- that in

 3   adopting the Civil Rights Act of 1964, Congress

 4   sought to root out discrimination, root and

 5   branch, and that all of it is impermissible,

 6   presumptively injurious.

 7   MR. WOLFMAN: That is our position,

 8   and if I could take you to the words of the

 9   statute as to why we know that's so. The

10   statute prohibits discriminatory hiring and

11   discharging, and the purpose of "terms,

12   conditions, and privileges" is to catch

13   everything else between those two endpoints, and

14   that's how we know that it's meant to eradicate

15   discrimination in the workplace. It doesn't do

16   it perfectly, but that's the intent.

17   JUSTICE GORSUCH: Thank you.

18   CHIEF JUSTICE ROBERTS: Justice

19   Kavanaugh?

20   JUSTICE KAVANAUGH: The amicus brief

21   of the District of Columbia, joined by I think

22   eight states, supports you but says that it

23   would be helpful if in -- if we were to rule for

24   you that we repeat something the D.C. Circuit

25   said in its en banc opinion in Chambers, "Not

1 everything that happens at the workplace affects

2 an employee's terms, conditions, or privileges

3 of employment."

4   Are you in agreement or at least

5 tolerate a statement like that?

6   MR. WOLFMAN: I mean, I think that is

7 true, that not everything that happens at the --

8 in the workplace alters one's terms, conditions,

9 and privileges of employment. I think that may

10 be true of the hypo --

11   JUSTICE KAVANAUGH: And can a --

12   MR. WOLFMAN: -- one of the

13 hypotheticals that Justice Alito posed.

14   JUSTICE KAVANAUGH: And on transfers,

15 I think your point was in the brief at least

16 that transfers are heartland terms, conditions,

17 or privileges of employment --

18   MR. WOLFMAN: It's about the job

19 itself, yes, Your Honor.

20   JUSTICE KAVANAUGH: -- and that we

21 don't need to resolve kind of the outermost

22 reaches of what "terms, conditions, or

23 privileges of employment" would cover. Is that

24 correct as well?

25   MR. WOLFMAN: A -- a transfer

1   decision, to either withhold a transfer or to

2   give a transfer, is the functional equivalent of

3   a hiring decision or a discharge decision. It

4   is in the heartland of "terms, conditions, and

5   privileges."

6   JUSTICE KAVANAUGH: Thank you.

7   CHIEF JUSTICE ROBERTS: Justice

8   Barrett?

9   JUSTICE BARRETT: So let's say that I

10 think the phrase "discriminate against" carries

11 with it, scoops in with it, some sort of injury,

12 but I also think -- you know, the QP was

13 restricted to transfers, but I also think that

14 you can look at a transfer -- it must be looked

15 at objectively, but yet, in the eyes -- because

16 transfers can change depending on the eye of the

17 beholder, right? You had some questions like

18 that. I prefer the day shift, you prefer the

19 night shift.

20   But it has to be understanding all the

21 facts and circumstances of, say, the young

22 mother who wants the day shift so that her hours

23 align with her children's hours or school and,

24 you know, the supervisor says, I don't really

25 want to work with women and I'm on the day

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

2   For her, understanding her facts and

3   circumstances, an objective person in her

4   situation would consider that injurious.

5   MR. WOLFMAN: I -- I agree with that,

6   but I -- I do want to offer a -- a caveat to

7   that, which is -- so I -- I certainly agree that

8   a person in those circumstances is likely to

9   view that as injurious.

10   But you are suggesting that there

11   would be some sort of test that sort of marries

12   subjective and objective, sort of objective but

13   looking at it from the circumstances of the

14   particular individual, and that worries me for

15   two reasons.

16   First, the -- the -- the statute

17   doesn't train on that. The track -- the -- the

18   statute only asks questions about the employer's

19   conduct.

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

21   think it is -- let's see -- I'm sorry to

22   interrupt you, but I don't think the premise of

23   your response is quite capturing what I think.

24   I don't see it as a blending of

25   objective and subjective because we do that all

1   the time like, say, in -- in torts. It's the

2   reasonable man. I mean, so we're trying to

3   avoid the eggshell Title VII plaintiff, right?

4   We're saying a reasonable person in

5   the circumstance of the plaintiff would

6   experience this as an injury, and I don't think

7   that's a subjective inquiry. It's putting an

8   objective inquiry but just familiar with the

9   facts and circumstances.

10   MR. WOLFMAN: Okay. I -- I -- I

11   accept that, that it's objective under -- under

12   your description of it, but I -- I think that is

13   not what the words of the statute call for.

14   The -- the statute asks three questions about

15   the employer's conduct, is it a term or

16   condition, is -- is it with respect to a

17   protected characteristic, and did the employer

18   act with discriminatory intent. That's what the

19   statute calls for.

20   And my concern is also a practical

21   one. I started reciting the pages of our brief

22   and the amicus briefs. You see case after case

23   after case under the so-called objective

24   standards, the one that used to exist in the

25   D.C. Circuit, the one that exists in the Eighth

1   Circuit, where things, you know, wildly

2   different than what anyone would view as

3   de minimis are being thrown out of court.

4   And I -- I'll -- I'll end with this,

5   which is that the Fifth Circuit in its recent

6   en banc decision, 14 members of the court said

7   these doctrines are thwarting legitimate claims

8   of workplace bias.

9   JUSTICE BARRETT: Thank you.

10   CHIEF JUSTICE ROBERTS: Justice

11   Jackson?

12   JUSTICE JACKSON: So I guess I'm

13   really confused and a little bit worried about

14   your concession to Justice Kagan that there is

15   some sort of injury requirement here. I -- I

16   look at the text of the statute, and it seems to

17   be doing what you said at the end with respect

18   to Justice Barrett, which is identifying when

19   there are unlawful employment practices.

20   So the statute begins, "It shall be an

21   unlawful employment practice for an employer,"

22   and then we skip down, "to discriminate against

23   any individual with respect to the terms and

24   conditions," et cetera, "of its employment

25   because of these protected characteristics."

1   So, to the extent that we are

2   identifying sort of what is morally

3   reprehensible, what is unlawful, I suppose we're

4   just saying when someone discriminates with

5   respect to these terms and conditions.

6   So then the question, I guess, is what

7   does it mean to discriminate, and I don't know

8   that that necessarily means that there has to be

9   some sort of injury.

10   As I look at Bostock, you know, we

11   have a -- a definition in Bostock that

12   "discriminate" means roughly the same as it

13   meant in 1964, "to make a difference in

14   treatment or favor of one as compared to

15   others."

16   MR. WOLFMAN: Right.

17   JUSTICE JACKSON: That doesn't

18   necessarily mean injury.

19   And I am thinking of a scenario in

20   which a person is fired or not hired or

21   transferred because of their race, and it's not

22   injurious. Let's say it's the best thing that

23   ever happened to them because it was a terrible

24   job, and they're fired and, you know, they go on

25   to do great things in another area, and the

1   defendant is going to say that, you weren't

2   injured by my discriminatory firing.

3   So I don't understand why injury is

4   doing work in this analysis.

5   MR. WOLFMAN: Well, I -- I don't

6   disagree with anything you said, and I -- if I

7   made a concession, I certainly -- of the type

8   you're suggesting, I didn't mean to do that.

9   What I am saying is that if there's an

10   injury requirement, and there is some injury

11   requirement to get over Article III, the -- the

12   injury is --

13   JUSTICE JACKSON: That's a different

14   thing, though. But, to my --

15   MR. WOLFMAN: -- the discrimination

16   itself.

17   JUSTICE JACKSON: Right. But I'm

18   sorry.

19   MR. WOLFMAN: The injury is --

20   JUSTICE JACKSON: Can we just --

21   MR. WOLFMAN: -- the discrimination

22   itself.

23   JUSTICE JACKSON: -- can we just

24   clarify, because, to the extent you're talking

25   about that injury, you're talking about standing

1   injury, right?

2   MR. WOLFMAN: Well, I'm talking about

3   discrimination being an injury unto itself in

4   all but the most unusual cases. That was my

5   back-and-forth with Justice Kagan.

6   JUSTICE JACKSON: But that's just when

7   it happens. I mean, Congress is just saying, if

8   this -- if discrimination happens, we have an

9   unlawful thing, and so then the question is what

10   does it mean to discriminate. I thought we said

11   in Bostock to treat someone differently because

12   of this characteristic.

13   Whether or not the person can go on to

14   establish or has to establish that they were

15   actually injured by that, I'm worried, and I

16   thought that's what the issue was in this case.

17   Do we have a separate element that a person who

18   has been treated differently on the basis of

19   race or -- or sex or whatever has to also prove

20   that that differential treatment injured them?

21   MR. WOLFMAN: Well, what -- what I

22   would say is that they have to prove no injury

23   other than the discrimination itself. There's

24   no heightened harm requirement.

25   JUSTICE JACKSON: All right. And let

1   me just ask you one --

2   MR. WOLFMAN: There's no additional

3   harm requirement.

4   JUSTICE JACKSON: -- one last question

5   about that. To the extent that we're worried

6   that people who have not suffered any actual

7   concrete harm as a result of this discrimination

8   are bringing these lawsuits, I'm wondering

9   whether or not that's not taken care of in

10   damages because, at the end of the day, you

11   bring your lawsuit, and if you've been

12   transferred to exactly the same position, you

13   say that to a jury, and they say, fine, you

14   might have been discriminated against, but your

15   damages are zero because you haven't shown any

16   harm for which you need to be compensated.

17   Am I thinking about that correctly?

18   MR. WOLFMAN: That -- that is -- that

19   is correct, and we make this point at -- at some

20   length in our opening brief and we reiterate in

21   our reply brief that the idea that, you know,

22   frivolous claims or marginal claims are going to

23   come through is very unlikely. One -- one needs

24   to have damages to have, you know, a sensibly

25   viable case to bring in federal court.

1   And one of the reasons that we and

2   amici talk about the kinds of cases that are

3   being brought in the federal courts and being

4   thwarted is they're all in the heartland. I

5   mean, the transfers may be most in the

6   heartland, but we see cases about denials of

7   training on the basis of race.

8   JUSTICE JACKSON: So, indeed, that

9   is -- that is the work of the stuff that the

10   Chief Justice is talking about in this case,

11   right? You want to show that this person

12   actually was harmed in the sense that she could

13   bring a case and get damages from the jury

14   because something, you know, happened to her,

15   but it's not an element of making the claim,

16   correct?

17   MR. WOLFMAN: Absolutely correct.

18   JUSTICE JACKSON: Thank you.

19   CHIEF JUSTICE ROBERTS: Thank you,

20   counsel.

21   Ms. Brown.

22   ORAL ARGUMENT OF AIMEE W. BROWN

23   FOR THE UNITED STATES, AS AMICUS CURIAE,

24   SUPPORTING THE PETITIONER

25   MS. BROWN: Thank you, Mr. Chief

1   Justice, and may it please the Court:

2   Forcing an employee to transfer

3   because she is a woman is discriminating against

4   her with respect to the terms and conditions of

5   employment under Title VII regardless of whether

6   one position is significantly worse than the

7   other.

8   That's the plain meaning of the text,

9   and it's consistent with this Court's

10   longstanding precedents, which recognize that

11   the statute strikes at the entire spectrum of

12   disparate treatment in employment.

13   The City fights against the clear text

14   principally by claiming that the phrase

15   "discriminate against" incorporates a

16   significant disadvantage requirement. But to

17   "discriminate against" simply means drawing

18   distinctions that injure protected individuals.

19   And this Court has repeatedly

20   recognized that being denied equal treatment

21   because of a protected characteristic gives rise

22   to an actionable harm. That's all the statute

23   requires.

24   The City's contrary reading would

25   permit employers to designate a predominantly

1   Hispanic store, as in the Seventh Circuit's

2   AutoZone decision, to give only men their shift

3   preferences, to pay Black employees $1 less, or

4   to relegate Muslim employees to the back of a

5   store. Those results are inconsistent with the

6   statute Congress enacted. The Court should

7   reverse and instruct the lower courts to apply

8   the text as written.

9   I welcome the Court's questions.

10   JUSTICE THOMAS: Can you have

11   discrimination that is perceived by someone who

12   is, say, you say that this is law enforcement

13   and we need in this particular precinct more

14   black or Hispanic officers, and so you are moved

15   or transferred because of race?

16   MS. BROWN: So there is a -- I -- I

17   think that that is a discrimination claim and

18   that would be actionable, and -- and that would

19   qualify. There is a bona fide occupational

20   qualification exception --

21   JUSTICE THOMAS: So doesn't --

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

23   race.

24   JUSTICE THOMAS: But won't that run

25   headlong into the focus on diversifying the

1   workforce in certain situations?

2   MS. BROWN: So we think that there is

3   adequate room within the bounds of Title VII to

4   create opportunities for diversity and to ensure

5   that diverse -- that -- that there is a diverse

6   workforce through recruiting, through

7   mentorship, through programs that -- that --

8   JUSTICE THOMAS: No, I'm talking

9   solely about transfers now, that you need more

10   black police officers in certain neighborhoods,

11   say, in St. Louis in -- and in the Sarah -- or,

12   I'm sorry, the Page, West Page, or Cook area.

13   MS. BROWN: So, no, I don't think that

14   you can make a transfer on the basis of race,

15   and I think that's the clear text of the

16   statute, and that's -- that's what it requires.

17   Congress has this bona fide

18   occupational qualification standard if there is

19   a business necessity, but Congress expressly did

20   not include race in that context. So Congress

21   made the judgment that there is no situation in

22   which it's -- it's permitted or there is a

23   business necessity or -- or Congress thinks that

24   that could be justified within the context of

25   race.

1   JUSTICE THOMAS: So simply making the

2   selection or the transfer based on race or sex

3   in and of itself becomes actionable?

4   MS. BROWN: That is our position.

5   JUSTICE THOMAS: Nothing more?

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

7   We do think that when a transfer -- when an

8   employment decision is made on the basis of a

9   protected characteristic, that is the denial of

10   equal treatment, and that's a harm that this

11   Court has recognized in many cases, including

12   Heckler versus Mathews, as my -- as my friend

13   said. You know, Allen versus Wright makes the

14   same point. There are other cases as well, but

15   that we think is the only harm that the statute

16   addresses.

17   JUSTICE SOTOMAYOR: Can we go --

18   CHIEF JUSTICE ROBERTS: Counsel, is

19   there -- is there anything that Mr. Wolfman said

20   with which you disagree?

21   MS. BROWN: So I think that he -- in a

22   colloquy with Justice Gorsuch, he was talking

23   about whether someone could change the

24   definition of the conditions of employment or

25   the -- of the -- what -- the way the work or

1   your -- your job was defined. I think our

2   position is that any kind of job assignment will

3   necessarily qualify as a term, condition, or

4   privilege of employment. It doesn't have to be

5   set out in the way that the job description is

6   written.

7   And so I think that -- that -- that we

8   think that, you know, those -- it doesn't matter

9   if the job assignment description is -- is

10   altered because of discriminatory reasons. What

11   matters is whether this particular person was

12   assigned new responsibilities based on a

13   discriminatory basis.

14   JUSTICE SOTOMAYOR: Can you see any

15   transfer that wouldn't qualify as

16   discriminatory, assuming that it was based --

17   the Chief posited one where you're going to be

18   moved from one end to -- to the other end of the

19   floor, let's say. I find it hard to posit that

20   the only difference would be the color of the

21   wall, but it could be, as the other -- as your

22   colleague said, because one has a nice window

23   and the other one doesn't, and I may think of

24   that as de minimis.

25   MS. BROWN: Sure.

1   JUSTICE SOTOMAYOR: All right? And

2   some others might. So can you think of how we

3   approach those situations? The situations that

4   intuit -- not the significant disadvantage one

5   because I -- I have a very hard time

6   understanding how courts are thinking that

7   switching somebody from a day to a night job or

8   a Monday-through-Friday job to a rotating

9   week-long job where you're not getting any

10   weekends off anymore is not a significant

11   disadvantage, but we'll put aside the facts of

12   this case.

13   MS. BROWN: Sure.

14   JUSTICE SOTOMAYOR: How do we look at

15   those sorts of things?

16   MS. BROWN: So I think that, by

17   definition, if you are transferring somebody, if

18   you're changing their office location, if you

19   are, you know, altering their shift or -- or

20   anything like that on the basis of a protected

21   characteristic, that is inherently harmful.

22   That is -- that is discrimination against them

23   in the terms, conditions, and privileges of

24   employment, and I think that that is actionable.

25   I understand that there might be cases

1   where the specific employment action itself

2   seems minor. I think that those cases are

3   perhaps a lot less likely to be brought, in part

4   because of the -- the damages concerns that

5   Justice Jackson was -- was pointing to.

6   I think also in those cases, it's

7   going to be harder for -- as an evidentiary

8   matter often for the employee to put forth

9   sufficient evidence to show that there is a

10   plausible inference that -- that the office

11   assignment was made based on a protected

12   characteristic, and so that is going to help,

13   you know, get rid of a lot of these -- these

14   kinds of claims on that basis as well.

15   But what we think the inquiry should

16   be focused on and what the statute certainly

17   focuses the inquiry on is whether there is

18   intentional discrimination, not on whether the

19   particular employment action, so long as it fits

20   within terms, conditions, and privileges, is of

21   a sufficient degree to be actionable.

22   JUSTICE KAVANAUGH: But some things --

23   JUSTICE KAGAN: So just to --

24   JUSTICE KAVANAUGH: Go ahead.

25   JUSTICE KAGAN: I mean, just to

1   clarify your position just so I understand it,

2   even in your opening, you did use words like

3   "injury" or "harm" or "worse off," I'm not

4   exactly sure which ones you used, but those

5   sorts of words, and we've used those sorts of

6   words in several -- many of our opinions, but

7   what you're saying is that those words do not

8   have sort of any independent consequence, that

9   once you can show the discrimination, you've

10   shown the injury, you've shown the harm, you've

11   shown the being worse off, that there's no extra

12   thing. Is that -- am I reading you right?

13   MS. BROWN: Yes, again, in -- in

14   almost every situation. Of course, we do

15   recognize that there are some kind of

16   distinctions that don't give rise -- that are

17   generally viewed as innocuous, and so I would

18   set those aside. But, in the mine run case,

19   when you are treating somebody differently based

20   on a protected characteristic, that is the

21   injury.

22   JUSTICE KAGAN: And what are you

23   setting aside?

24   MS. BROWN: Bathrooms, there are some

25   kinds of dress codes that, you know, are

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 1      generally viewed as equal, but they recognize

 2      that men and women wear different clothes,

 3      things like that.

 4                  JUSTICE ALITO:  What is your

 5      definition of a transfer?

 6                  MS. BROWN:  So we don't have a

 7      definition of a transfer.  The Court, you know,

 8      reformulated the -- the question presented to --

 9      to focus specifically on transfers.  Nothing in

10      our position changes based on how you view a

11      transfer.  I think, you know, most courts or --

12      the kinds of transfers that -- that are

13      generally addressed are, you know, a change in

14      location, in responsibilities, in supervisors,

15      things like that.

16                  JUSTICE ALITO:  You want us to hold

17      that it's always sufficient if it is alleged

18      that there was a transfer on the basis of a

19      prohibited characteristic, but you -- you don't

20      want to tell us what a transfer is?

21                  MS. BROWN:  Again, I think that was a

22      term that was introduced by the Court.  It's not

23      a statutory term.  But I think you could say,

24      when there are -- and the D.C. Circuit doesn't

25      --
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 1              JUSTICE ALITO:  I'm sorry to

 2    interrupt.  How can we decide the case on that

 3    basis?  Maybe it was unwise for the Court to

 4    phrase the question that way, but the -- the

 5    question is whether all transfers qualify.  So

 6    don't you have to provide a definition of a

 7    transfer?

 8              MS. BROWN:  So I would say that it is

 9    something like what I was suggesting.  It's

10    where the -- the employee's responsibilities,

11    job location, or supervisor have changed.  I

12    don't think it needs to be all three.

13              So, for example, there's the Seventh

14    Circuit's decision in -- in AutoZone, where an

15    employee was transferred from one store to

16    another on the basis of race.  The allegation

17    there was that the employer wanted to maintain a

18    predominantly Hispanic store, and so they moved

19    an employee over to another store to maintain

20    that.

21              The Seventh Circuit there held that

22    that was insufficient under either Section

23    703(a)(2) or (a)(1).  We think that's incorrect.

24    We think that kind of a transfer would certainly

25    qualify.
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1   CHIEF JUSTICE ROBERTS: So now -- so

2   you're saying a transfer is covered because

3   there will always be changes in conditions or

4   terms. Well, then a transfer itself is not

5   enough. You have to look at the conditions and

6   terms. If it is from one place to another, it's

7   a transfer, and if everything's the same, then,

8   under your position, it wouldn't be covered,

9   because you look at -- there must be new

10   conditions, there must be terms. And,

11   certainly, if there -- there are changes in

12   conditions and terms, and that's -- many were

13   documented or at least at the summary judgment

14   stage in the Petitioner's brief. And that's a

15   familiar inquiry and easy.

16   But if you're -- you're saying that --

17   well, if you're saying that there always has to

18   be a change in conditions and terms, that's one

19   thing. Saying it doesn't matter whether there

20   is or is not so long as there's discrimination,

21   it seems to me that's something different.

22   MS. BROWN: So there certainly does

23   have to be a change in terms and conditions of

24   employment. We think that anytime there's a

25   transfer, there will necessarily be a change in

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 1      terms and conditions of employment because I

 2      take a transfer to mean at least a change in

 3      location, and -- and we think the location is a

 4      part of your attendant -- the attendant

 5      circumstances that surround your employment.

 6      That's a part of your -- your working

 7      conditions.

 8              The Court has recognized in, you know,

 9      Meritor and Oncale and -- and Harris that

10      working conditions are a part of what -- of what

11      is encompassed within terms and conditions of

12      employment.  So I -- I think that, by necessity,

13      a transfer is going to fall into -- into those

14      categories.

15              CHIEF JUSTICE ROBERTS:  Okay.  Thank

16      you, counsel.

17              Justice Thomas?

18              Justice Alito?

19              JUSTICE ALITO:  Do you think it's

20      helpful to say, "Not everything that happens in

21      the workplace falls within Title VII"?

22              MS. BROWN:  Yes, I think that would be

23      helpful, and it would be appropriate.  I agree

24      with what the District of Columbia's brief said,

25      that that phrasing has helped the -- the lower
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1   courts, the district courts, there have

2   sufficient leeway to continue to dismiss claims

3   that are not actionable, that maintains the kind

4   of, you know --

5   JUSTICE ALITO: Okay. So then --

6   MS. BROWN: -- personal facts.

7   JUSTICE ALITO: -- what things that

8   happen in the workplace don't qualify?

9   MS. BROWN: So I think that that

10   phrasing refers to things like informal

11   workplace interactions, isolated incidents. The

12   Court in, you know, Harris, Oncale, Meritor has

13   referred to things like offensive and

14   distasteful jokes even if they are kind of, you

15   know, sex discriminatory or racist in some ways,

16   single, you know, one-off interactions like

17   that, for example.

18   JUSTICE ALITO: Well, you talk about

19   one-offs in your -- in a footnote in your brief,

20   but, when you -- when you talk about harassment,

21   are you trying to -- you don't want us to import

22   that statement here -- I mean that standard

23   here. It has to be severe and pervasive?

24   MS. BROWN: No. No, that's not what

25   we're suggesting. In the footnote in our brief,

1   we suggested that -- or we -- we were explaining

2   that I think one-off incidents in those cases,

3   they're -- it's less likely that those are going

4   to -- enough to be actionable -- being

5   actionable, even if it is a one-off situation

6   that affects your terms and conditions of

7   employment, simply because, in those instances,

8   it's going to be harder as an evidentiary matter

9   to put forth sufficient evidence to show that

10   there was intentional discrimination.

11   JUSTICE ALITO: Well, what if the

12   supervisor is always nasty to me because of my

13   sex? Always. Does that qualify?

14   MS. BROWN: That I think would be

15   analyzed under the hostile work environment

16   cases, and it would depend on whether the -- the

17   nasty treatment was severe and pervasive.

18   JUSTICE ALITO: Well, why does that

19   have to be severe and pervasive, but there's no

20   threshold requirement for any other form of

21   workplace discrimination?

22   MS. BROWN: So the Court has explained

23   that in the hostile work environment context,

24   the question is whether there is a constructive

25   alteration of the terms and conditions of

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1      employment, and so the -- the question is
2      essentially whether the employer has effectively
3      required you to submit to that harassing
4      treatment as part of the working environment
5      that you're in.
6              And I think, you know, a background
7      kind of lurking factor in those cases is also
8      whether the conduct that you're speaking about
9      there is attributable to the employer as an
10     employer, and, you know, the employer is not
11     always going to be responsible for everything
12     that the -- the supervisor says.
13             JUSTICE ALITO:  Okay.  One last
14     question.
15             Suppose you're talking to a district
16     court judge and the district court judge says,
17     look, every year I'm getting 500 new civil
18     cases, and you're telling me that I cannot
19     dismiss for failure to state a claim a case that
20     alleges only really trivial disparate treatment.
21             And you say, well, don't worry about
22     that because, after discovery, you may be able
23     -- I may be able to grant summary judgment or,
24     after trial, the -- the damages aren't being --
25     aren't going to be significant.
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1   And, really, that's not an answer to

2   my problem. It's really helpful to me and

3   consistent with what I think belongs in federal

4   court, not what's moral and immoral but what

5   belongs in federal court, to be able to dismiss

6   these trivial cases at the outset as soon as I

7   see the complaint.

8   What do you say to that judge?

9   MS. BROWN: So, even after Chambers in

10   the D.C. Circuit, there have been cases that

11   have been able to be dismissed on a motion to

12   dismiss when there are conclusory allegations,

13   when the facts pled still do not give rise to an

14   inference of discrimination. You know, you

15   still do have to plead something that's going to

16   help give rise to that inference of

17   discrimination, whether that's a comparator in a

18   -- in a similarly situated position or whether

19   that's other conduct that suggests that these

20   minor employment incidents are attributable to

21   discrimination.

22   And so there are -- there are cases,

23   we've cited some in our brief, I think the

24   District of Columbia in its amicus brief cites

25   additional cases from the district where those

1   cases have been able to be dismissed. And, of

2   course, discovery can be limited, motions for

3   summary judgment are often granted.

4   And I would also say that even in the

5   transfer context now, when the courts have --

6   have required this kind of significant

7   disadvantage requirement, you're always getting

8   through or almost always getting through to

9   summary judgment because courts have recognized

10   that -- that at least in some instances, the

11   change in position is significant -- is

12   sufficient, and so courts are -- are addressing

13   those then too.

14   CHIEF JUSTICE ROBERTS: Justice

15   Sotomayor?

16   Justice Kagan?

17   Justice Gorsuch?

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

19   some of your discussions, a -- a lot of what you

20   said tracks what the D.C. Circuit said in

21   Chambers, and I just wonder, is there anything

22   in that opinion with which you disagree?

23   MS. BROWN: No, I don't think that

24   there is. I mean, I think they -- they set

25   aside the question of whether there's a

1   de minimis exception. Of course, we think that

2   the Court could -- could do the same here. Any

3   transfer is necessarily going to be, we think,

4   more than a de minimis injury.

5   In our view, we think that there

6   probably is no real de minimis exception here

7   because of the significance of the -- the injury

8   based on a protected characteristic, that that

9   discrimination in and of itself it seems hard to

10   characterize as trifling or insignificant or

11   hardly worthy of notice.

12   But -- but we think that, you know,

13   the opinion by Judge Tatel and -- and Judge

14   Ginsburg was a very good opinion and we -- we do

15   agree with it.

16   JUSTICE GORSUCH: That's what I

17   thought the answer would be.

18   (Laughter.)

19   JUSTICE GORSUCH: In -- in your

20   colloquy with Justice Kagan, you briefly

21   mentioned bathrooms and uniforms and suggested

22   they might be okay, and I'm wondering how under

23   your theory of the case.

24   MS. BROWN: So I -- I think that there

25   is this kind of narrow set of circumstances that

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 1       I just referred to where there -- distinctions

 2       based on sex have kind of always been treated as

 3       innocuous, and I think those circumstances raise

 4       their own kind of special set of issues and

 5       there are cases that might arise within that

 6       context where you question whether the specific,

 7       you know, set of bathrooms or the grooming

 8       standards fall within that innocuous kind of

 9       characteristic and --

10              JUSTICE GORSUCH:  Innocuous by --

11       innocuous, do you mean non-injurious?

12              MS. BROWN:  Yes, exactly.

13              JUSTICE GORSUCH:  So you think there

14       is an injury requirement here?

15              MS. BROWN:  Yes.  It's the injury that

16       is inherent in unequal treatment in most

17       circumstances.  In almost any circumstance, when

18       you're talking about protected characteristics,

19       I think that there are some differences with sex

20       and that this Court has recognized those.  Other

21       courts have recognized those.  The Court hasn't

22       really fully fleshed out I think, like, the

23       theory behind that.  If I had to guess, I think

24       it would be --

25              JUSTICE GORSUCH:  I'm not asking you
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 1     to guess, but I am --
 2              MS. BROWN:  Okay.  I won't guess.
 3              (Laughter.)
 4              JUSTICE GORSUCH:  -- but I am asking
 5     for your help, so keep going.
 6              MS. BROWN:  My sense is that -- that
 7     the intuition behind the distinctions in those
 8     cases is that in the mine run case, a
 9     gender-specific bathroom or a uniform is not
10     going to give rise to the kinds of stigmatic or
11     dignitary harms that we usually associate with
12     unequal treatment on the basis of sex.
13              I think that there are obviously
14     distinctions or -- or there are cases when that
15     won't be the case.  If the bathrooms are
16     actually unequal, if the dress and grooming
17     standards, you know, trade on sex stereotypes or
18     are themselves, you know, more -- more difficult
19     to comply with for one sex than the other, then
20     I think that you would be maybe outside of that
21     kind of innocuous area.
22              JUSTICE GORSUCH:  You at least think
23     that there are some circumstances in which those
24     distinctions are permissible under Title VII?
25              MS. BROWN:  Yes, we do.
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1   JUSTICE GORSUCH: Okay. Thank you.

2   CHIEF JUSTICE ROBERTS: Justice

3   Kavanaugh?

4   JUSTICE KAVANAUGH: On bathrooms,

5   dress codes, and grooming standards, though, you

6   couldn't have, of course, different standards

7   based on race.

8   MS. BROWN: Of course not. And I

9   think that kind of suggests that the question

10   there is not -- or the issue there is not

11   whether bathrooms or dress and grooming

12   standards are conditions of employment and it's

13   not whether distinctions with bathrooms and

14   dress and grooming standards are too immaterial

15   to be significant. It's just pulling out that

16   we do think that sex is sometimes different.

17   JUSTICE KAVANAUGH: And then a couple

18   times -- this is a little bit of a side point --

19   but you said severe and pervasive when talking

20   about harassment. My understanding, and this

21   matters, and some cases have been on, it's

22   severe or pervasive.

23   MS. BROWN: That is correct. I

24   apologize if I -- if I misstated that.

25   JUSTICE KAVANAUGH: And then, third,

1   at summary judgment, a lot of these cases are

2   resolved in my experience. Is that your

3   understanding as well?

4   MS. BROWN: Yeah, that's consistent

5   with what I've seen, and looking through the

6   cases that were decided in the D.C. Circuit

7   after Chambers, the majority of the cases where

8   summary judgment was at issue, the -- the -- the

9   employer prevailed in those cases even then, and

10   that's based on whether there's sufficient

11   evidence of -- of intentional discrimination at

12   that point.

13   JUSTICE KAVANAUGH: And this is

14   Justice Alito's question, but I -- I think it's

15   always been pretty hard to dismiss a case on

16   12(b)(6).

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

18   correct. You don't have to plead the prima

19   facie case, as this Court has held. And so

20   there are -- there are instances in which you

21   can get -- where you can get dismissed on

22   12(b)(6) if you -- if -- if the -- the facts

23   there just aren't -- aren't there, but in the

24   mine run of cases, I think you are getting to

25   summary judgment even now.

1   JUSTICE KAVANAUGH: Thank you.

2   MS. BROWN: Mm-hmm.

3   CHIEF JUSTICE ROBERTS: Justice

4   Barrett?

5   JUSTICE BARRETT: I just want to be

6   sure that I understand the government's position

7   here.

8   So the word "discriminate" can have no

9   negative connotation. Like I might have a

10   discriminating palate, right?

11   MS. BROWN: Mm-hmm.

12   JUSTICE BARRETT: But, because

13   Title VII has the word "against" in it,

14   discriminate against, it does carry some sort of

15   injury, but the government's position -- and

16   maybe this is why bathrooms and grooming

17   standards for men and women are different -- the

18   government's position is not that there is no

19   injury but simply that mere discrimination is

20   the injury, and with race, that basically exists

21   all the time, but with sex, it does not always

22   exist because not every distinction between men

23   and women is injurious.

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

25   JUSTICE BARRETT: Okay. Thank you.

1   MS. BROWN: Mm-hmm.

2   CHIEF JUSTICE ROBERTS: Justice

3   Jackson?

4   JUSTICE JACKSON: So just going back

5   to Justice Alito's questions about trivial

6   disparate treatment, I guess I didn't see those

7   in the QP, and maybe I'm not looking at it

8   correctly.

9   I thought we had isolated the transfer

10   determination in order to avoid having to say

11   anything about whether or not there would be an

12   injury requirement in a whole host of other

13   situations, to include the trivial or, you know,

14   allegedly trivial scenario.

15   Am -- am I -- am I looking -- so I

16   thought our opinion could say whatever injury

17   requirement might exist with respect to certain

18   kinds of other kinds of employment

19   determinations, we took this case to focus on

20   transfers, and with respect to transfers, we

21   hold, and I guess you would have us hold, that

22   it's enough under the statute that a person is

23   transferred because of these protected

24   characteristics.

25   They do not have to separately prove

1   that that transfer, because of the protected

2   characteristics, injured them or significantly

3   injured them or whatever the -- the --- the

4   court of appeals held here about the degree of

5   injury.

6   MS. BROWN: That's correct. And --

7   and we have a -- you know, a footnote in our

8   brief there as well that kind of sets aside

9   these cases and says, you know, the -- the

10   Respondent here, the City here, has brought up a

11   host of hypotheticals. And, of course, the

12   Court has narrowed the question presented and

13   doesn't need to address any of those.

14   I took some of Justice Alito's

15   questions to be about whether a transfer could

16   in some situations seem relatively minor if

17   it -- if you think that a transfer would

18   incorporate, you know, a move from one office to

19   another.

20   JUSTICE JACKSON: All right. So let's

21   take -- Justice Sotomayor had that scenario as

22   well.

23   MS. BROWN: Mm-hmm.

24   JUSTICE JACKSON: Let's take that.

25   You have the office, and one is red and one is

1   blue. They're otherwise identical. And the

2   person, the boss, says, I think women should be

3   in red offices. So, I'm sorry, I know you

4   picked the blue office in the -- as we went

5   through, but I'm requiring that you sit in the

6   red office because you're a woman.

7   Is it the government's position that

8   the woman would have to, in that scenario, not

9   only prove that she was selected for this

10   treatment because she was a woman but also that

11   working in a red office significantly injured

12   her?

13   MS. BROWN: No. Our position is that

14   the discrimination based on a protected

15   characteristic is sufficient to show the harm

16   that's required under the statute.

17   JUSTICE JACKSON: Thank you.

18   CHIEF JUSTICE ROBERTS: Thank you,

19   counsel.

20   Mr. Loeb.

21   ORAL ARGUMENT OF ROBERT M. LOEB

22   ON BEHALF OF THE RESPONDENTS

23   MR. LOEB: Thank you, Mr. Chief

24   Justice, and may it please the Court:

25   The language used in the statute

1   doesn't say "discriminate between" or

2   "discriminate with respect to." It says

3   "discriminate against," and that language, as

4   used in Title VII, requires not just

5   differential treatment but a difference that

6   injure the employee, specifically significant

7   material objective harm.

8   And reading Section 703(a)(1) to

9   require harm is nothing new. For example, more

10   than 25 years ago in Oncale, this Court held

11   that a plaintiff needs to show both that they

12   were subject to disadvantageous conditions,

13   there harassing conditions, and that those

14   adverse conditions were imposed based on a

15   protected status. And this Court went on to say

16   the severity and the negative impact of the

17   conditions must be looked at through an

18   objective lens, not based on personal

19   sensitivities, not based on personal

20   preferences.

21   That approach is fully consistent with

22   that of the Eighth Circuit here and consistent

23   with the approach adopted by pretty much all the

24   circuits for the last at least 25 years.

25   And reading "discriminate against" as

1   requiring material objective harm is fully

2   consistent with how this Court read that very

3   same language in Section 704(a) in Burlington

4   Northern as that Court looked to 7 -- 703(a)(1)

5   precedent and the language of 703(a)(1).

6   Moreover, reading "discriminate

7   against" as requiring significant material harm

8   is a piece with the specific examples provided

9   in the statute. Congress gave the initial

10   examples of refusal to hire, firing an employee.

11   Those are quintessential acts that are harmful

12   to the plaintiff.

13   A contextual principle that is

14   embraced by this Court for a long time is that

15   the Congress does not legislate as to trifles.

16   So it's no surprise that this Court has

17   consistently read Title VII not to speak to

18   minor slights or personal preferences of the

19   employee or job actions with no significant

20   harm. As Justice Scalia emphasized in Oncale

21   and as this Court reiterated in Burlington

22   Northern, Title VII is not a civility code.

23   Here, the Eighth Circuit properly held

24   that the personal preferences for one assignment

25   over another within the St. Louis police force,

      1   without more, cannot support the harm

      2   requirement of Title VII, and this Court should

      3   affirm that judgment.

      4   I welcome your questions.

      5   JUSTICE THOMAS: You say there --

      6   there must be harm because of the addition of

      7   the preposition "against," "discriminate

      8   against." But how do we quantify that harm?

      9   And if you are correct or if you think it has to

     10   be a material harm, is there any difference

     11   between that and de minimis harm? Or is it one

     12   side of the same -- different sides of the same

     13   coin?

     14   MR. LOEB: Yeah, the other side argues

     15   that it's unclear what the standard means. It

     16   makes arguments that it's not administrable.

     17   But the courts of appeals have been applying

     18   that standard for at least 30 years and have

     19   said that material harm means that there's

     20   something that is harming you as far as in the

     21   workforce. Your responsibilities, your chances

     22   for advancement. You know, it can be your hours

     23   of work. It can be a significant different --

     24   different functions of the job. It's not a high

     25   bar, but there needs to be something more than

        1   mere personal preferences and -- and subjective

        2   sensitivities of the particular employee.

        3   So it's a material objective harm.

        4   It's through the lens of an objective employee,

        5   not the frailties of a particular sensitive

        6   employee.

        7   JUSTICE JACKSON: Can I ask you --

        8   CHIEF JUSTICE ROBERTS: Why doesn't

        9   the -- down a hall, offices on both sides, the

       10   employer says, I want the women on the -- the

       11   east offices, I want the men on the -- the west.

       12   Everything else is identical.

       13   Why -- why isn't that a sufficient

       14   harm in the same way any type of segregation on

       15   the basis of race or gender is itself harmful?

       16   You're not really sure what the consequences

       17   will be in terms of perception or -- or anything

       18   else, but it seems to be a certain violation of

       19   the statute.

       20   MR. LOEB: Yeah, I think, once you add

       21   into your hypothetical the overt discrimination,

       22   then you get into a hypothetical like Justice

       23   Kagan's water fountain example where by a

       24   protected status you're going to allow one group

       25   and -- and not another. And it could be an

1   office.

2   And then you would look at it as Judge

3   Katsas said in the -- in his dissent in the

4   Chambers case. You'd look through the lens of

5   the, you know, harassment, hostile workforce

6   cases as to whether that statement by the

7   employee that women -- you know, saying that

8   they use -- need to use one bathroom or the

9   other, that doesn't create stigma. But saying I

10   want all women to be over here and I want all

11   men over there in certain circumstances can be

12   stigmatizing. For example, one of the

13   hypotheticals, I'm going to give one protected

14   status group just views of the alley and I'm

15   going to give others not views of the alley.

16   CHIEF JUSTICE ROBERTS: Right. Now

17   you're having the same difficulty the other way

18   as we had or at least I had before. I'm just

19   asking about no discernible harm. And your

20   answer is, well, there's a view of the alley,

21   there's a view of this.

22   MR. LOEB: No.

23   CHIEF JUSTICE ROBERTS: I mean --

24   MR. LOEB: Let me --

25   CHIEF JUSTICE ROBERTS: -- am I going

1   to have the same problem with you, only from a

2   different perspective?

3   (Laughter.)

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

5   CHIEF JUSTICE ROBERTS: Because, I

6   mean, you seem to be answering questions in

7   which there's no harm apart from discrimination

8   by saying, oh, there is harm.

9   Now, if the harm is the discrimination

10   itself, that's one thing. Do you think that

11   situation could arise?

12   MR. LOEB: No, that -- that -- their

13   argument conflates the intent and the harm

14   requirement. You don't just satisfy the

15   requirement by saying: But I think it was done

16   to me because of my protected status.

17   What I'm suggesting is there are some

18   cases where what the employee is -- saying

19   something overtly, as -- as -- as Justice Thomas

20   said last -- last term, that if you have a -- a

21   stigmatizing segregation in the workforce, it's

22   inherently going to be injurious.

23   So it's the stigma in certain

24   circumstances which are based on the statements

25   being made by the -- the employer --

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 1                   JUSTICE KAVANAUGH:  Well, what if it's
 2      not --
 3                   CHIEF JUSTICE ROBERTS:  Okay.  No --
 4                   JUSTICE KAVANAUGH:  -- what if it's
 5      not overt, though?  So it's proved that that's
 6      what's happened, but it was never said.  So the
 7      discrimination, after you go through discovery,
 8      is proved.  This is what has happened.  The
 9      women have to work in one place, the men in
10      another.  Or the black employees are assigned to
11      different offices.  It's never said, though, so
12      you can't just funnel it into harassment.
13                   MR. LOEB:  I -- I -- I --
14                   JUSTICE KAVANAUGH:  Under your theory,
15      that's fine.
16                   MR. LOEB:  Under our theory, it is the
17      statement being made by the employer which is
18      stigmatizing.
19                   JUSTICE KAVANAUGH:  It --
20                   MR. LOEB:  You're saying that I think
21      it's based on my --
22                   JUSTICE KAVANAUGH:  Exactly, but if
23      you have a policy, just never stated, of I'm
24      assigning the black employees to work outside in
25      the heat, as one of the cases you were --
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1   MR. LOEB: Right.

2   JUSTICE KAVANAUGH: Yeah?

3   MR. LOEB: We think --

4   JUSTICE KAVANAUGH: But it's never

5   said. So you can't just funnel it into

6   harassment.

7   MR. LOEB: Well --

8   JUSTICE KAVANAUGH: You would be,

9   like, that's fine, that's good to go.

10   MR. LOEB: First of all, we -- in that

11   Fifth Circuit case, in that example, that would

12   be certainly a -- a -- a -- a disadvantageous

13   term or condition of employment. So that's --

14   we don't have any -- any disagreement with --

15   with -- with that. But --

16   JUSTICE KAVANAUGH: Well, that's why I

17   think it's not a sufficient answer to just say

18   harassment will cover this --

19   MR. LOEB: Well --

20   JUSTICE KAVANAUGH: -- because it

21   won't cover it in the cases where it's not a

22   stated policy, but it is nonetheless a --

23   MR. LOEB: So Congress --

24   JUSTICE KAVANAUGH: -- policy.

25   MR. LOEB: -- Congress addressed that

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 1      kind of categorical -- I'm going to categorize

 2      one protected group, they get to do certain

 3      things.  Another protected group doesn't get to

 4      do certain things.  Under (a)(2) of the statute,

 5      which talks about classification, which talks

 6      about categories, it talks about jobs,

 7      opportunities.  I don't think (a) -- (a)(1)

 8      should be broken open and the harm requirement

 9      completely wiped out.

10              JUSTICE JACKSON:  But wait.

11              JUSTICE BARRETT:  Okay.  But --

12              JUSTICE JACKSON:  Isn't (a)(1) about

13      the intentional discrimination?  I mean, I

14      thought the difference between (a)(1) and (a)(2)

15      is (a)(2) is about the effect and (a)(1) is

16      about the intent of the employer to make this

17      classification, which is why I'm resisting your

18      suggestion that there is any harm requirement,

19      as opposed to suggesting there is and perhaps it

20      is being automatically satisfied.  I am reject

21      -- sort of resisting that (a)(1) is asking

22      anybody about whether or not the discrimination

23      in this situation is causing someone's harm.

24              So can you -- can you do my

25      hypothetical about women in red offices and men
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          1   in blue offices? The offices are otherwise

          2   identical, but we have a policy, whether orally

          3   stated or written or whatever, that women are in

          4   red offices. So, if there was a woman who said,

          5   you know, I, for whatever reason -- well, that's

          6   the policy, women in red, men in blue, all

          7   right?

          8   Are you saying that in order to bring

          9   an actionable discrimination claim, a woman

         10   would have to say, I'm harmed by having worked

         11   in a -- a -- a -- a red office, and then it

         12   would have to be sort of material and objective

         13   and all of the other things that you bring into

         14   your harm standard?

         15   MR. LOEB: I -- I would agree with

         16   that, that we'd say that they're not harmed

         17   unless they could show that the -- the -- the

         18   statement, the policy is stigmatizing them,

         19   saying that --

         20   JUSTICE JACKSON: No, no, I

         21   understand. I'm just -- that assumes there's a

         22   harm requirement. You're -- you're sort of

         23   speaking to how you would go about establishing

         24   the harm requirement, and I'm trying to

         25   determine whether there is such a thing.

 1   So you're saying, in a situation like

 2   the one I posited, if -- that -- that there is

 3   another element that the person has to show, and

 4   they have to show not just my boss said you're a

 5   woman, you're in the red office, no matter what,

 6   that's not enough, I would have to somehow

 7   marshal evidence that I'm being harmed by being

 8   put in the red office because of my gender.

 9   Is that what you're saying?

10   MR. LOEB: I -- I -- that's correct,

11   and I think that's actually fairly consistent

12   with the position being taken by the other side

13   here. That's how they get around the bathroom

14   cases. They say, well, yeah, that's a

15   distinction. You're not -- you're not being

16   allowed in that bathroom, but you're allowed in

17   that bathroom. But that doesn't --

18   JUSTICE KAGAN: Well, Mr. Loeb, I

19   think that that's not quite fair. I mean,

20   the -- the bathroom/grooming cases which first

21   apply only in the cases of gender, but they're a

22   really kind of discrete category.

23   And the position that this side of the

24   podium is taking is both simple and easy to

25   understand in terms of Title VII's language,

 1   which is just to say that if there is

 2   discrimination, that counts as a harm. The

 3   discrimination is the harm save for these very

 4   few exceptional cases.

 5   Now what you are saying is, no, there

 6   has to be an additional showing of harm. We

 7   recognize you say that harm doesn't really have

 8   to be material because you're including

 9   stigmatic harm in that.

10   So now a court is going to have to,

11   like, wander around going, well, how big is this

12   harm and is it really stigmatizing or is it only

13   a little bit stigmatizing. And that sounds both

14   like something that you don't want any court to

15   do and also something that the statute does not

16   suggest.

17   MR. LOEB: Well, it's the kind of

18   analysis which is done all the time regarding

19   conditions cases under (a)(1). The harassment

20   cases are conditions cases, and the courts say

21   not all conditions, even if based on a protected

22   status, based on gender or race, even if it's

23   based on that, the harassment is coming from --

24   JUSTICE SOTOMAYOR: But harassment is

25   different and it's different because there

1   hasn't been a direct -- an actual change in

2   terms, privileges, or conditions. You're doing

3   the same job. You have the same supervisor.

4   You have the same hours. You have the same

5   everything.

6   What we have said is, however, that

7   constructively -- and that's how you have to

8   figure this out -- there is a change because

9   you're being subjected to something that might

10   force you out of the workplace.

11   Now that's a very different situation

12   from -- from one where there's an actual change

13   in terms and conditions.

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

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

16   JUSTICE SOTOMAYOR: I know you want us

17   to -- to disagree with it, but I don't see how

18   you can get past the difference.

19   MR. LOEB: Well, let me -- let me --

20   let me walk you through the -- our -- our

21   reading of Oncale, which is, I think, clearly

22   the correct one. So, if you -- this is Justice

23   Scalia's unanimous opinion 25 years ago under

24   703 elements. In responding to the argument

25   that the Court's approach was too broad, too

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         1   liberal, at page 80, Justice Scalia holds that

         2   the challenged conduct must be because of a

         3   protected status.

         4   But then he goes on to say and

         5   separately hold that not all conditions imposed

         6   by a protected status will qualify, and he says

         7   that's because of Title VII's text referring to

         8   "discriminate against." He says that text

         9   indicates that the statute only covers

        10   disadvantageous terms and conditions.

        11   So not all harassment that affects

        12   your conditions of employment and even minor

        13   harassment, you know, affects your conditions of

        14   employment. It needs to be disadvantageous.

        15   And, of course, then the Court went on to

        16   reaffirm the objective standard.

        17   They argue there is no harm

        18   requirement, and subjective preferences,

        19   subjective sensitivities all will support an

        20   action, and that's not only contrary to Oncale,

        21   it's -- it's directly contrary to how this Court

        22   read the very same language of "discriminate

        23   against" in Burlington Northern, examining the

        24   Section 703 precedent and saying you need

        25   material objective harm. The same language and

1   the same statute by the -- passed by the same

2   Congress needs to be read the same way.

3   JUSTICE KAVANAUGH: Do you --

4   JUSTICE BARRETT: Counsel --

5   JUSTICE KAVANAUGH: -- do you agree --

6   JUSTICE ALITO: Suppose there are two

7   women associates in a law firm, and one says,

8   the -- the partner to whom I'm assigned is

9   always nasty to me, invariably nasty to me all

10   the time, never friendly, always critical,

11   making my life miserable by being nasty to me.

12   And the other one says that they

13   assigned me to an office with a view where I

14   don't get the afternoon sun, and they assigned a

15   similarly situated man to an office where they

16   get the -- which -- is there a reason to treat

17   those two women differently?

18   MR. LOEB: I -- I -- I don't think so.

19   Those kind of minor slights and grievances are

20   what this Court in Burlington Northern warned,

21   that if you open the door to those kind of

22   lawsuits and had no meaningful threshold, the

23   federal courts would become the super-personnel

24   department not just for all private employers

25   but for state governments and for local

1   governments.

2   JUSTICE ALITO: Well, I don't know

3   that the woman who -- who says that the boss is

4   invariably nasty is -- is alleging something

5   trivial, but what I'm asking about is the

6   suggestion that any transfer from one office to

7   another qualifies, but if it has to do with

8   unpleasantness in the workplace, then anything

9   goes.

10   MR. LOEB: I mean, there are cases

11   about transfer from one side of the -- of the

12   office to the other, and the courts of appeals

13   have all held and the district courts have held

14   that that is not a material objective harm.

15   You know, if you gloss on some sort of

16   express statement, I'm doing this because of

17   race, I'm doing this because of protected

18   status, then you can start looking at it under a

19   stigmatic approach of injury, but you don't want

20   to micromanage every personnel action.

21   The -- the scary thing about their

22   position is and the SG's position -- I want to

23   be very clear -- is that everything that happens

24   in the workplace, every assignment, every --

25   pens, giving out pens to employees are going to

1   trigger lawsuits based not just on --

2   JUSTICE BARRETT: Well, let me focus

3   you on the facts of this case and not the pens

4   or the red office and the blue office, and I

5   want you to put aside any quibbles that you have

6   with the other side about the facts and, you

7   know -- and the summary judgment record.

8   This is different than the red office

9   to the blue office, okay? So she was

10   transferred, and let's imagine here that you

11   have evidence that her supervisor said because

12   he did replace her with a man, I just don't

13   really like working with women, I want to work

14   with a man, so I'm going to transfer you to this

15   different district.

16   And an objectively reasonable person

17   in her circumstances, even though the job title

18   and the -- the money and all that didn't change,

19   would view that as less interesting, the job

20   responsibilities change, she lost access --

21   putting aside the facts about, you know, the --

22   the access to the unmarked car and the uniform

23   changes and the FBI task force, putting all that

24   aside, it was -- an objectively reasonable

25   person would find that less desirable in -- in

1   her position because of the conditions of the

2   employment. But you say not actionable.

3   MR. LOEB: No, Your Honor. So let me

4   just talk -- there are two sort of parts to

5   that. One is these change in the conditions

6   about the car, about the hours, and all those

7   things, which the district court --

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

9   MR. LOEB: I -- I know.

10   JUSTICE BARRETT: -- to put that

11   aside.

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

13   JUSTICE BARRETT: Just go with my

14   hypothetical.

15   MR. LOEB: -- if she had proven those

16   things, so she alleged them --

17   JUSTICE BARRETT: Okay. But -- but I

18   said just assume the facts as I told you.

19   MR. LOEB: Those could possibly --

20   certainly support a -- a -- a objective material

21   change. And Burlington Northern recognizes a

22   change in hours, particularly when you have a --

23   a person who's a parent, and you look at those

24   -- like you said in your hypothetical, you look

25   at the objective facts of the person and then

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 1      how a reasonable person would look at them, a
 2      change in hours can be.  Having a car can be.
 3                JUSTICE BARRETT:  A change of
 4      responsibility.
 5                MR. LOEB:  Change of responsibilities
 6      can be.  If there -- if there's such that
 7      they're not -- the district court was
 8      expressive.  She alleged that it wasn't
 9      prestigious enough, but she didn't prove it.
10      She -- and the district court said, if she had
11      shown me any proof that there was --
12                JUSTICE BARRETT:  So, to you, this is
13      just a dispute about the facts, this whole
14      thing?
15                MR. LOEB:  Well, the -- the facts are
16      that the Eighth Circuit and the district court
17      ruled based on the fact that she didn't prove
18      those things.  She had waived those things by
19      not briefing them at summary judgement.  And
20      then they have the -- the --
21                JUSTICE BARRETT:  If she'd proved
22      them, she should win?
23                MR. LOEB:  She -- if she had -- if she
24      had preserved it and proved them, then I think
25      she -- she may have had a -- a -- a meritorious
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1   case to get to a trial, but -- but she did not.

2   Instead, as the -- as the court of

3   appeals said, once you eliminated all the other

4   things that were either attributable to the FBI,

5   which includes the car and the hours, and --

6   and -- and you eliminate the things that she

7   waived, all that's left here is her personal

8   preference that she -- instead of being in the

9   Intelligence Division, she -- she wanted to stay

10   in the Intelligence Division over at Department

11   5, she admits it's commonplace in the St. Louis

12   work -- police department to move people around

13   based on safety needs.

14   She herself has been moved several

15   times in and out of the Intelligence Division.

16   She admits when a new supervisor comes in that

17   they commonly --

18   JUSTICE BARRETT: But it's her

19   preference, and let's say the supervisor --

20   so -- so let's say that she doesn't prove all of

21   the other things that we're disputing and

22   talking about here, like the FBI stuff.

23   She says, I really like this job

24   better. This is my preference. And he says,

25   sorry, I prefer working with men.

         1   MR. LOEB: Then I think you would --

         2   that's the other half of your question, and

         3   thanks for going back to that -- is you would

         4   have to exam that through the stigmatic lens and

         5   look at whether the statement there labeling

         6   women as less than is creating a -- a -- a --

         7   a -- a workforce where people are unequal and

         8   it's -- it's harmful just to work in that

         9   environment.

        10   So it very could be that overt

        11   statement, whether stated to her or it's stated

        12   as a class matter, in which case she might have

        13   an (a)(2) claim, might in -- in some cases

        14   support the -- the requirement of objective

        15   material harm. But what you don't get to do is

        16   litigate about every assignment in the

        17   workplace, every little -- you know, whether you

        18   get this stapler or this pen and to say, well, I

        19   think it's all being done to me for this reason,

        20   and now you get to -- get to summary judgment

        21   and you get to go on to trial because, as this

        22   Court recognized in -- in Bostock, that a

        23   sorting out of true reasons for a job action is

        24   often hard to discern and is almost always going

        25   to go to trial.

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1                    And so what you're going to be doing

2       is having federal courts inundated with these

3       claims with an inability to weed them out at an

4       earlier stage.  Even if --

5                    JUSTICE KAVANAUGH:  Are you aware of

6       cases about pens or colors of offices?

7                    MR. LOEB:  There are cases about

8       moving from identical office from here to there

9       and the -- and -- and the personal preference --

10                   JUSTICE KAVANAUGH:  About pens?  I

11      mean, you know, I -- I don't think -- when

12      you're transferred from one office to another or

13      one branch to another, that -- that's a lot

14      different, it strikes me, than --

15                   MR. LOEB:  Certainly, that could

16      satisfy that as a condition.  The question is,

17      is it a disadvantageous --

18                   JUSTICE KAVANAUGH:  But why, though?

19                   MR. LOEB:  -- condition.

20                   JUSTICE KAVANAUGH:  Why -- why would

21      it satisfy the terms and conditions if you're

22      transferred from one -- one branch to another or

23      one division to another if all the pay is the

24      same, the retirement is the same?

25                   MR. LOEB:  If you move me from our
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 1   appellate group to our tax group, where I have

 2   no expertise --

 3   (Laughter.)

 4   MR. LOEB: -- you know, it's certainly

 5   going to be a -- a material change even though

 6   I'm not even changing offices. So you just have

 7   to look at the context of whether the

 8   responsibilities are different, whether the job

 9   change is disadvantageous to you viewed through

10   an objective lens. That's the standard that the

11   courts of appeals have applied for 30 years, let

12   me give you an example, and it's a well-tried

13   and -- and -- and tested standard.

14   Twenty-nine years ago, Justice

15   Sotomayor, in the Williams versus R.H. Donnelley

16   case, as a Second Circuit judge, rejected a

17   transfer claim where the person said I prefer to

18   work in the Las Vegas office as opposed to here.

19   And the transfer wasn't granted. The person

20   said, well, this was being done on the basis of

21   a protected category.

22   JUSTICE JACKSON: Well, that's --

23   that's -- that's it wasn't granted, so it's a

24   little bit different than being forced to move

25   there. But can I just ask you a question?

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 1              You say whether it is the -- the --
 2    the job change is objectively disadvantage --
 3    disadvantageous, I think, is the standard that
 4    you're imposing.  I'm wondering whether or not
 5    that same standard is -- exists across all of
 6    the categories in sub 1.
 7              In other words, does a person who's
 8    fired have to also demonstrate that that firing
 9    was objectively disadvantageous, and could the
10    employer defend on the grounds that you went on
11    and you got a better job and, you know, it turns
12    out this didn't hurt you at all?
13              Is that -- is that -- is that the sort
14    of logical thing that one could get into if we
15    start suggesting that there's another element
16    related to harm in this statute?
17              MR. LOEB:  I think there's an
18    ambiguity about whether the "discriminate
19    against" language applies to the first two
20    listed items --
21              JUSTICE JACKSON:  Mm-hmm.
22              MR. LOEB:  -- hiring and firing.  Then
23    it says, you know, otherwise discriminate and as
24    to conditions or otherwise.  I think it's more
25    naturally read to apply to it --
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 1                    JUSTICE JACKSON:  But I'm sorry, I
 2      thought we were reading the statute in the sort
 3      of way we do where all the things are similar.
 4                    MR. LOEB:  Well, yeah.
 5                    JUSTICE JACKSON:  So it's hard to say
 6      that "discriminate against" would be that
 7      different, right?
 8                    MR. LOEB:  Yes, and I -- I think
 9      "discriminate against" is modifying those as
10      well and -- and it should be read similarly.
11                    JUSTICE JACKSON:  So, if that's true,
12      then we would expect the other two to work in
13      the same way.  So is it your position that we
14      have a scenario in which a person who has
15      actually been fired also has to demonstrate
16      based on objective realties or whatnot that that
17      firing was harmful to them?
18                    MR. LOEB:  I think, as this Court has
19      -- as Justice O'Connor has said, that hirings
20      and firings are quintessentially injurious.
21                    JUSTICE JACKSON:  And why isn't this
22      the same, being treated differently -- being
23      forced to move to a different set of
24      circumstances --
25                    MR. LOEB:  Because --
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1              JUSTICE JACKSON:  -- which is how
2    we're defining "transfer."
3              MR. LOEB:  Because, as this Court said
4    in Burlington Northern, while many transfers and
5    reassignments will be injurious, not all will,
6    and you need to look at the particular context.
7    We're not -- and -- and so, in a case like this,
8    where someone is moved on a regular basis
9    between departments and where the only thing she
10   can point to as far as -- not -- not less
11   supervisory responsibilities, no -- not
12   different -- no different pay, no different
13   conditions, no different benefits, and she's
14   waived all these other aspects, and all you're
15   left with is "I just prefer one over the other,"
16   that cannot be the basis of a federal lawsuit,
17   Your Honor.
18             JUSTICE KAVANAUGH:  But --
19             MR. LOEB:  Otherwise, you're just
20   opening the door to anything.
21             JUSTICE GORSUCH:  Let me -- let me --
22             JUSTICE KAVANAUGH:  -- the premise of
23   your argument, I think, is that discrimination
24   itself is not a harm.
25             MR. LOEB:  You know, if -- if -- I
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1   don't think it's impossible to read the statute

2   in the very broad way they suggest. Let me

3   explain to you a couple reasons why you should

4   not.

5   First of all, it has been read that

6   way, and it's been applied for 30 years in the

7   courts of appeals. It's consistent with this

8   Court's (a)(1) precedent saying there needs to

9   be disadvantageous terms.

10   But also, under this Court's trifle

11   doctrine, you don't -- you don't lightly assume

12   that Congress is trying -- is legislating as to

13   minor job actions, minor harms, personal

14   preferences, and --

15   JUSTICE JACKSON: I'm sorry, I don't

16   understand your answer to Justice Kavanaugh's

17   question. So discrimination itself is or is not

18   a harm?

19   MR. LOEB: Is not by itself a harm.

20   There's two elements here. There's an element

21   of disadvantageous terms and -- and -- and harm.

22   And often there may be -- they will run

23   together. In some cases, it'll be easy to show

24   the harm. But you just don't get to presume it.

25   They say you just presume the harm in every

 1   case --

 2   JUSTICE GORSUCH: Let me -- let me try

 3   it this way, Mr. Loeb. Good to see you.

 4   I understand your point that Oncale

 5   and in Burlington Northern and elsewhere, we've

 6   said that "discriminate" means treat worse than,

 7   injure the plaintiff. Got it.

 8   But I think we've also kind of

 9   indicated in our cases that when you treat

10   someone worse than another person because of

11   race or sex, that's kind of the end of it, and

12   we -- there isn't a further inquiry into how bad

13   you -- how badly you treated somebody worse. A

14   -- a minor treating worse on the basis of sex or

15   race is something Congress in 1964 in a very

16   short and sweet statute, 28 pages long but

17   profound, said that the law will no longer

18   tolerate.

19   And once the courts get into the

20   business of asking whether that injury is

21   material or a reasonable person would be

22   offended by it, that's a whole different extra

23   textual layer that's going to weed out a bunch

24   of claims based on a judge's sensibilities about

25   how -- how bad is bad enough. Thoughts?

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 1                MR. LOEB:  I, you know, just strongly

 2      disagree with that.  As -- as Justice Scalia

 3      said, the language in the statute, the text

 4      itself, this is a textual argument, it says

 5      "discriminate against."  That requires that --

 6                JUSTICE GORSUCH:  I'm spotting you all

 7      of that, right?  I'm spotting you all of that.

 8      "Discriminate against" means treating somebody

 9      worse.  That implies an injury.  But Congress

10      could say that anytime you treat somebody worse

11      because of their race or their sex, you are --

12      you have a claim --

13                MR. LOEB:  I think that --

14                JUSTICE GORSUCH:   -- and that layering

15      on top of that, where do we get that in the

16      statute, a material harm?  How do -- or an

17      objective person or a reasonable person or

18      whatever construct we come up with that's

19      artificial, right, is going to weed out claims

20      that Congress in 1964 thought profoundly

21      important to include.

22                MR. LOEB:  You know, Congress also, as

23      this Court has recognized repeatedly, was -- was

24      trying to preserve management prerogatives and

25      wasn't trying to open up the doors for every
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1       little action in the workplace to be brought.

2       So there was a -- it was a -- a balanced

3       approach.

4               And this Court should not lightly

5       presume, especially given the trifle principle,

6       which Justice Katsas explained applies with full

7       force here, should not lightly assume that

8       Congress wanted to simply conflate the harm and

9       the intent requirement where basically you're

10      reading the language "discriminate against" out

11      of the statute.  You could just say --

12              JUSTICE KAGAN:  But isn't the -- the

13      -- the trifle principle just inconsistent with

14      the idea that -- the idea of stigmatic injury?

15      I mean, we've recognized over and over again

16      that discrimination itself can profoundly injure

17      people, just the -- the fact itself that you're

18      being treated differently from somebody else

19      based on your race, based on your sex,

20      et cetera.  I mean, so as to -- as to anything,

21      as to pens, as to water fountains, as to

22      anything.

23              MR. LOEB:  Stigma flows from the -- -

24      either the messaging from the employer saying I

25      am going to give all people this protected
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 1      status, views of the alley, that's what they
 2      deserve.  That's a stigma, right?  We could --
 3      that's -- this Court has recognized in the
 4      harassment cases and outside of it that stigma
 5      is a -- is a material harm and it can be enough.
 6      You would look to it through an objective lens.
 7      And -- and that is completely consistent with
 8      our opinion.  But that doesn't mean you just
 9      wipe away the harm requirement.
10              And, again, what --
11              JUSTICE KAVANAUGH:  But doesn't -- oh,
12      keep going.  Sorry.
13              MR. LOEB:  What work is the word -- is
14      the words "discriminate against" doing if you
15      take that view?  The statute says because of
16      protected status.  It could say change of
17      condition because of protected status.  You
18      don't need the words "discriminate against."  If
19      you listen to their arguments, they are
20      basically admitting that language has no force
21      and is superfluous and is redundant.
22              JUSTICE KAVANAUGH:  Well, I thought it
23      meant treat differently because of your race,
24      let's say --
25              MR. LOEB:  That's the latter --
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1                    JUSTICE KAVANAUGH:  -- and -- and then
2       to -- does it -- that itself is a harm I've
3       always assumed.  And then the question becomes,
4       is -- does it relate to a term, condition, or
5       privilege of employment?  And not everything in
6       the workplace will relate to a term, condition,
7       or privilege of employment, but transfers, I
8       think, clearly would.  And then, when you get
9       past that, there might be some circumstances of
10      remedial programs or what have you that you
11      nonetheless justify why you're treating people
12      differently.
13                   But the idea that you're treating
14      people differently because of their race could
15      not be a harm, not be discrimination, I don't --
16      I don't really understand that.
17                   MR. LOEB:  Again, they could -- you --
18      you could just read the statute to either
19      eliminate those words or to say discriminate
20      between or with respect and not say against, and
21      that last part of the statute, because a
22      protected status would be doing all the work and
23      you would just presume harm because you did it
24      because of that.  And the first part of the
25      statute, the text -- that part of the text is
```

 1   just being ignored.

 2   And, look, where Congress wants to be

 3   more sweeping and to really root and branch, I

 4   think was, Justice Gorsuch, your language, they

 5   know how to do it. If you look at (e)(16) in

 6   the statute requiring the federal government, as

 7   opposed to all private employers and state and

 8   local employers, they use broader language.

 9   JUSTICE JACKSON: Can I ask you a

10   question? Are you suggesting that Congress had

11   to include a harm requirement here? I mean,

12   are -- is it your position that it could not

13   have focused in on the action, meaning make

14   unlawful a circumstance in which the employer

15   treats someone differently because of their race

16   or gender? Let's just take out the word

17   "discrimination" for a second.

18   Are you saying that there had to be,

19   maybe as a matter of constitutional authority or

20   something, a -- a -- a harm that Congress was

21   capturing with this statute?

22   MR. LOEB: I -- we think Congress

23   could do that. The question is did they do that

24   here. Did they mean to open up for federal

25   lawsuits for minor actions where there's no

 1   significant harm --

 2   JUSTICE JACKSON: No, no, no. I'm

 3   just asking. So, if Congress had a value set

 4   that is similar to what others are focused on

 5   here in -- in which they thought that we are

 6   worried about employers that are treating people

 7   differently on the basis of these

 8   characteristics, we think that's a problem.

 9   Now whether or not they thought it was

10   causing other harm in the workplace or whatnot,

11   we think that's a problem.

12   So my question is, could they have

13   legislated to address that particular problem?

14   MR. LOEB: Yeah, and I think that goes

15   to what I was -- I was saying about the federal

16   government provision. I think they did a much

17   broader provision there which could be read that

18   way.

19   So, there, it's -- it talks about any

20   personnel action, which is then defined under

21   Title V, Section 2302(b), to be discrimination

22   for or against, and in (e)(16), they say not

23   just a personnel action, but they make very

24   clear they want to be sweeping. They say there

25   shall be -- the -- the workforce shall be free

1   from any discrimination based on the

2   characteristics, so the --

3   CHIEF JUSTICE ROBERTS: Thank you,

4   counsel.

5   Justice Thomas?

6   Justice Alito?

7   Justice Sotomayor?

8   JUSTICE SOTOMAYOR: Just so I'm clear,

9   in responding to Justice Barrett, you said it's

10   all disputed issue. I didn't think it was

11   disputed that in her intelligence work she

12   worked essentially 9 to 5 Monday through Friday,

13   correct?

14   MR. LOEB: Correct.

15   JUSTICE SOTOMAYOR: When she moved or

16   was transferred, she didn't have a 9-to-5 job.

17   It varied -- her hours varied during the week

18   and on the weekends, correct?

19   MR. LOEB: Absolutely correct.

20   JUSTICE SOTOMAYOR: It's not disputed

21   that she had a private car in the Intelligence

22   Division that was taken away from her when she

23   went to the other position, correct?

24   MR. LOEB: Correct.

25   JUSTICE SOTOMAYOR: And there is no

1   dispute that she had to wear a uniform where she

2   wore plain clothes previously, correct?

3   MR. LOEB: Yeah. So --

4   JUSTICE SOTOMAYOR: Now -- now stop.

5   MR. LOEB: Okay.

6   JUSTICE SOTOMAYOR: Just answer my

7   question.

8   MR. LOEB: She alleges all those

9   things but didn't argue them at summary

10   judgment.

11   JUSTICE SOTOMAYOR: Seems -- all

12   right. Are they material?

13   MR. LOEB: They certainly could be.

14   JUSTICE SOTOMAYOR: Are -- what

15   wouldn't make them material? What objective

16   facts would not make them material?

17   MR. LOEB: You know, if --

18   JUSTICE SOTOMAYOR: I don't understand

19   your test, is what I'm saying.

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

21   JUSTICE SOTOMAYOR: It's a change in

22   the terms, conditions, and privileges of the two

23   positions. You're saying we have to overlay

24   that with some sort of objective test. Does

25   that mean she has to prove that she has children

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1    at home at night or that she has to take care of

2    her parents on the weekend?  Are we then

3    individualizing the test to find out whether she

4    was somehow injured more than in her personal

5    preference?  I don't understand what you're

6    saying.

7                 MR. LOEB:  Well, in -- in Burlington

8    Northern, this Court said you look at the -- the

9    particular context of the individual and then

10   see whether a reasonable objective person would

11   have found so.

12                JUSTICE SOTOMAYOR:  Okay.  You've

13   answered my question.  We're -- we're --

14                CHIEF JUSTICE ROBERTS:  Justice Kagan?

15                Justice Kavanaugh?

16                Justice Barrett?

17                Justice Jackson?

18                Okay.  Thank you, counsel.

19                Rebuttal, Mr. Wolfman?

20           REBUTTAL ARGUMENT OF BRIAN WOLFMAN

21              ON BEHALF OF THE PETITIONER

22                MR. WOLFMAN:  Yes.  Briefly,

23   Your Honor.  The -- I want to pick up where the

24   discussion just left off, because I think

25   Justice Sotomayor's question and some of the
```

 1   earlier questions on the topic of what one has

 2   to show under these material harm-type,

 3   objective tangible harm-type standards have been

 4   encapsulated by the D.C. Circuit's opinion in

 5   Chambers and I want to mention it.

 6   These cases, meaning these types of

 7   cases, asking the question whether something is

 8   harmful enough have consumed enormous judicial

 9   resources seeking to answer a question far

10   removed from the core Title VII inquiry whether

11   an employer has discriminated against an

12   employee based on a protected characteristic.

13   I would add to that far removed is an

14   understatement. The -- the -- the -- the

15   statute doesn't pose that question, and that's

16   the problem. But the -- the use of judicial

17   resources is an important point.

18   So opposing counsel has said the

19   courts have been applying these standards for 30

20   years. Some of the lower courts have, true, and

21   the results are stunning.

22   AutoZone, mentioned by the Assistant

23   Solicitor General, the Hamilton case, the Threat

24   case, where there's a policy based on the color

25   of the officer's skin to quote Judge Sutton. I

 1   point the Court to the amicus briefs that go

 2   through these cases in quite a good bit of

 3   detail.

 4   Just a few more points.

 5   As Justice Kavanaugh's question posed,

 6   the -- if the policy is covert until discovery,

 7   then it doesn't impose a stigmatic harm. It

 8   imposes a purely dignitary harm. That too is

 9   actionable under Title VII. And it becomes

10   stigmatic when it's uncloaked for all the world

11   to see. But, in either case, this -- the policy

12   violates the statute.

13   The gender cases that we've been

14   discussing, the exceptions, the outlier cases do

15   not help the City at all because every time you

16   flip the scenario to race, religion, or national

17   origin, the City loses. That shows those are

18   outliers. The City's position is a

19   cross-cutting position, and it is wrong.

20   Unless the Court has further

21   questions?

22   CHIEF JUSTICE ROBERTS: Thank you,

23   counsel. The case is submitted.

24   (Whereupon, at 11:42 a.m., the case

25   was submitted.)

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