11-2023

Reply Brief for Petitioner, Muldrow v. City of St. Louis

Madeline H. Meth

Brian Wolfman

No. 22-193

IN THE

Supreme Court of the United States

JATONYA CLAYBORN MULDROW,
Petitioner,
v.
CITY OF ST. LOUIS, MISSOURI, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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

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

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulatory materials

INTRODUCTION

Section 703(a)(1) is straightforward: It prohibits all discrimination against an employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). The Department does not dispute that job transfers concern "terms and conditions" of employment. *See* Resp. Br. 1, 35. So, if the statute's words are honored, and Jatonya Muldrow can show that the Department's transfer decisions were imposed "because of" her sex, the Department is liable.

Yet the Department maintains that some discriminatory job transfers escape Title VII's reach. It relies nearly exclusively on the phrase "discriminate against" in Section 703(a)(1), which, the Department asserts, silently incorporates a material-harm requirement. But those words do no such thing. This Court has explained that to "discriminate against" an individual means to treat her worse compared to someone else who is similarly situated. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020). That is exactly how Muldrow maintains the Department treated her. The Department transferred her when it would not have transferred a similarly situated male colleague. Section 703(a)(1) requires nothing more than that.

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

ARGUMENT

I. Transferring an employee because of sex "discriminate[s] against" her.

The Department no longer disputes that job transfers affect the terms or conditions of employment covered by Section 703(a)(1). *Compare* Resp. Br. 1, 35, *with* BIO 25-26. The Department has also dropped its argument that some employees subjected to discriminatory transfer decisions are not "aggrieved" persons eligible to sue under Title VII. *See* BIO 25 (citing 42 U.S.C. § 2000e-5(f)(1)); Opening Br. 30-31. Its remaining argument hinges on Section 703(a)(1)'s command that employers may not "discriminate against" employees with respect to the incidents of their employment.

No one disputes that discriminating against an individual "mean[s] treating that individual worse than others who are similarly situated." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020). The Department goes further, however, reading "discriminate against" to require a plaintiff challenging a discriminatory transfer to show something more: what it calls "material, objective harm." *E.g.*, Resp. Br. 17. That's wrong. Title VII requires nothing more than worse treatment, and an employee subjected to a discriminatory transfer has necessarily been treated worse, as Muldrow maintains she was here.

A. Muldrow was treated worse than male colleagues because of her sex, which is all that "discriminate against" requires.

1. "'[D]iscriminate against' refers to 'distinctions or differences in treatment that injure protected

individuals.'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)). So "[t]o 'discriminate against' a person" "mean[s] treating that individual worse than others who are similarly situated." *Id.* at 1740. As the D.C. Circuit explains it: "Refusing an employee's request for a transfer while granting a similar request to a similarly situated employee is to treat the one employee worse than the other." *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc); *see* Nat'l Emp. L. Ass'n Br. 8. Muldrow maintains that a similarly situated male colleague would not have been transferred from the Intelligence Division. *See* Dist. Ct. Doc. 4 at 12 (Dec. 27, 2018); Pet. App. 39a; Opening Br. 28; U.S. Br. 18. Muldrow thus claims to have been treated worse than similarly situated male colleagues because she is female.

Title VII's text says nothing about *how much* worse that treatment must be. *See* U.S. Br. 18 (explaining that "worse treatment is not equivalent to treatment resulting in a significant disadvantage."). Yet the Department contends that not all discriminatory transfers, only those that impose "objectively meaningful harm," "discriminate against" employees. *See* Resp. Br. 39. In the Department's view, for example, assigning a law-firm associate to a case contrary to her preference does not impose the harm required to discriminate against her. Resp. Br. 34-35. If all associate assignments were meted out on a non-discriminatory basis, with all associates receiving some assignments they did not desire, that might be true.

But the salient hypothetical involves a female law-firm associate who, because of her sex, is assigned case A though she preferred case B *while a similarly situated male associate receives his preferred assignment*. In that case, the female associate has been treated worse than the male associate. And that conclusion has nothing to do with whether working on case B is objectively more beneficial or prestigious than working on case A—though keeping women off plum case assignments because of their sex "is exactly the sort of workplace discrimination Title VII aims to extinguish," *Chambers*, 35 F.4th at 878; *see also, e.g.*, *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209, 215 (5th Cir. 2023) (female construction workers not permitted to work at elevation because of their sex).

The Department's problem is that it compares the wrong things. Determining whether someone has been treated worse is based on comparing the female employee with the male employee, not on comparing the preferred job assignment with the actual assignment. *See Bostock*, 140 S. Ct. at 1740. That basic understanding of what it means to treat someone worse is confirmed by the statute's text, which makes the "individual," not the term or condition of employment, the direct object of "discriminate against." *See* 42 U.S.C. § 2000e-2(a)(1); *Bostock*, 140 S. Ct. at 1741 (noting Section 703(a)(1)'s "focus on individuals").

2. The Department's repeated references to an employee's personal or subjective preferences are thus red herrings. *See* Resp. Br. 2, 3, 13, 15, 19, 31-32, 33, 35, 38, 39, 45, 46, 52. The injury required by "discriminate against" does not depend on the

"personal preferences and subjective reactions and sensitivities of an individual employee." Resp. Br. 38. A female plaintiff always bears the burden of proving that she was treated worse because of her sex by being deprived of an employment opportunity that would have been available to a male colleague. So, contrary to the Department's characterization of our position, Resp. Br. 39, an employee's subjective belief that she has been discriminated against is never enough.

But when worse treatment is shown, the plaintiff has been discriminated against, regardless of how valuable most people might judge the employment opportunity. "Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 338 n.18 (1977). The Department resists that observation by noting that the line-driver position in *Teamsters* paid more than other jobs and was more desirable than other positions. Resp. Br. 40 n.10. This Court expressly recognized, however, that although it was "by no means clear that all employees … would prefer" the line-driver position, Title VII nevertheless protected the plaintiff's right to seek the job on a nondiscriminatory basis. *Teamsters*, 431 U.S. at 338 n.18.

3. The Department accuses Muldrow of conflating improper intent—that is, discrimination "because of" a protected characteristic—with the statute's requirement that discrimination be "against" an employee. Resp. Br. 40. That's not so. Muldrow recognizes that *whether* an employee was treated worse is distinct from *why* she was treated worse. A simple example illustrates this. An employee fired because she has red hair has been treated worse than

employees who don't have red hair and are retained. The employee has thus been "discriminated against." But she cannot show that the discrimination is "because of" a protected characteristic because hair color is not protected under Section 703(a)(1). Muldrow's position thus preserves two independent requirements: worse treatment and improper intent based on a protected characteristic.

4. At bottom, the Department maintains that an employer may deny an employee her desired job position, location, work assignment, office, *see* Resp. Br. 1, 35, training, or shift schedule, Opening Br. 42, keep her from client meetings, *see* Resp. Br. 49, or deprive her of lucrative employment awards, air conditioning, or heating, Opening Br. 42-43, and, in each case, lawfully tell the employee, "You cannot have that because you are a woman."

Recognizing that its position would authorize blatant, undisguised workplace bias, the Department suggests that *some* instances of overt discrimination may impose actionable "psychic harm" or give rise to a hostile-work-environment claim, Resp. Br. 40-41. That may or may not be so, but those theories of liability would not be available to a plaintiff when the employer conceals its discriminatory intent. And "no logical or textual basis" exists for rewarding employers savvy enough not to say the quiet part out loud. U.S. Br. 28. Title VII bars all discrimination in employment, covert as well as overt. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (Title VII bars all employment discrimination, "subtle or otherwise.").

If Muldrow's discriminatory transfer is lawful, then so must be, on the Department's logic, a purely

lateral, no-reduction-in-pay shift change "based on the color of the [employee's] skin," *Threat v. City of Cleveland*, 6 F.4th 672, 675 (6th Cir. 2021). Similarly, the Department necessarily must side with the stunning decision in *EEOC v. AutoZone, Inc.*, 860 F.3d 564 (7th Cir. 2017), where a Black employee's supervisor told him that he was being transferred because his employer wanted to keep the store at which he worked "predominantly Hispanic," *id.* at 567. That "purely lateral job transfer" was lawful, after all, not because it wasn't discriminatory but because, in the court's view, it "d[id] not constitute a materially adverse employment action." *Id.* at 569; *see* Nat'l Emp. L. Ass'n Br. 9-11 (explaining that the Department's position would permit employers to maintain segregated workplaces). Other real-world examples abound—situations in which the Department's "material, objective harm" rule, Resp. Br. 16, or a similar heightened-harm requirement, allows discrimination to go unremedied. *See, e.g.*, *Hamilton v. Dallas Cnty.*, 79 F.4th 494, 497 (5th Cir. 2023) (en banc); Legal Aid Soc'y Br. 5-15; Opening Br. 41-43. Nearly sixty years after Title VII's enactment, that cannot be right.

B. This Court's hostile-work-environment precedent does not support a heightened-harm requirement.

The harm required to establish a Title VII hostile-work-environment claim does not, as the Department maintains, apply to standard disparate-treatment claims like Muldrow's.

In the hostile-work-environment context, Title VII forbids only conduct "sufficiently severe or

pervasive 'to alter the conditions of [the victim's] employment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citation omitted) (alteration in original). That showing is irrelevant in the non-hostile-work-environment context, where, as here, the plaintiff maintains that the challenged conduct itself directly altered a term or condition of employment. *See* Opening Br. 33-35. Thus, when an employer transfers or suspends an employee, imposes a shift change, or reassigns work, we don't ask whether the conduct in question is severe or pervasive enough to alter a term or condition of employment because the employer has *already* altered the employee's "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see* Opening Br. 33-35; U.S. Br. 29. The severe-or-pervasive standard thus "ha[s] no bearing on a case in which an employer discriminates against an employee with respect to the *actual* terms or conditions of employment." *Chambers v. District of Columbia*, 35 F.4th 870, 878 (D.C. Cir. 2022) (en banc).

Respondent makes much of this Court's observation that Title VII prohibits only "disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)); *see* Resp. Br. 20. But this statement dovetails exactly with Muldrow's position that a plaintiff must show that she was treated disadvantageously—that is, that she was subjected to terms or conditions to which similarly situated colleagues were not.

True, in determining whether the severe-or-pervasive standard has been met, a court may rely on

hostile conduct that "interferes with an employee's work performance." *Harris*, 510 U.S. at 23; *see* Resp. Br. 20-21. But that means only that consideration of the effects of a hostile work environment on an employee's work performance aids in determining whether the employee's "*working conditions* have been discriminatorily altered." *Harris*, 510 U.S. at 25 (Scalia, J., concurring) (emphasis added); *accord Oncale*, 523 U.S. at 81 (explaining that Title VII prohibits harassment "so objectively offensive as to alter the 'conditions' of the victim's employment"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

The Department mischaracterizes this Court's hostile-work-environment precedent as suggesting that not all discriminatory alterations to employment conditions are actionable. Resp. Br. 21 n.2. That assertion stems from the Court's description of a lower court's holding that the "'mere utterance of an ethnic or racial epithet' … would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Meritor*, 477 U.S. at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). But this Court cited *Rogers* for the very point we're making: "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Id.*

The Department concedes (at 51-53) that Muldrow's transfer changed the terms of her employment, meaning that the severe-and-pervasive standard applicable to hostile-work-environment claims has no work to do here (or in the assessment of any non-hostile-work-environment Section 703(a)(1)

claim). And, it bears repeating, *see* Opening Br. 33-35, that if this Court's hostile-work-environment decisions are relevant at all, they support Muldrow's position because they expressly reject the proposition that Section 703(a)(1) requires a showing of tangible or economic harm. *See, e.g.*, *Meritor*, 477 U.S. at 64.

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

The Department is wrong that this Court's decision in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), supports grafting a heightened-harm requirement onto Section 703(a)(1)'s straightforward text. *See* Resp. Br. 18-19, 21-24.

White involved Title VII's antiretaliation provision, Section 704(a). To prove a claim under that Section, a plaintiff must show that the challenged employer conduct was "materially adverse"—that is, that the conduct would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 68 (citation omitted).

This Court's reasons for adopting that requirement do not apply to Section 703(a)(1) discrimination claims. As already described, *see* Opening Br. 37-40, Section 704(a) differs from Section 703(a)(1) in two important ways. First, Section 704(a) applies to conduct outside the workplace, imposing a material-adversity requirement to "separate significant from trivial harms." *White*, 548 U.S. at 68. Second, Section 704(a)'s purpose is to "prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). This purpose

supports a material-adversity requirement that prohibits only conduct likely to dissuade employees from reporting discrimination. *Id.* Because the antidiscrimination provision, on the other hand, is limited to workplace conduct and "seeks to prevent injury to individuals based on who they are, *i.e.*, their status," *id.* at 63, Section 704(a)'s material-adversity requirement does not apply to Section 703(a)(1) claims, *see* U.S. Br. 25-27; Const. Accountability Ctr. Br. 11-13; Nat'l Emp. L. Ass'n Br. 21-22.

The Department responds that the words "discriminate against" in Section 703(a)(1) and Section 704(a) should carry the same meaning. Resp. Br. 21-24. But, as explained, this Court in *White* premised Section 704(a)'s material-adversity requirement on that provision's purpose. As for the words "discriminate against," *White* simply noted their commonly understood meaning, *compare* 548 U.S. at 59, *with Bostock*, 140 S. Ct. at 1753 (quoting *White*, 548 U.S. at 59), and did not further address them. The Court justified its materiality requirement based on its understanding that Section 704(a) seeks to encourage oppositional employee conduct—that is, reporting of discrimination—both in the workplace and in the administrative process. *White*, 548 U.S. at 68. And because the statute is silent regarding the amount of oppositional conduct Congress wished to encourage and in what circumstances, this Court was required to "fill a gap in the text of the anti-retaliation provision." U.S. Br. 25. No gap-filling is needed for Section 703(a)(1), however, because a discrimination claim has nothing to do with an *employee's* conduct—let alone how much of it to encourage. Instead, that Section focuses entirely on the *employer's* actions. And

Section 703(a)(1)'s text specifies exactly what employer actions are prohibited—an employer may not discriminate in the terms, conditions, or privileges of employment because of an employee's specified characteristics. 42 U.S.C. § 2000e-2(a)(1).

The Department maintains that the difference in purpose between the antiretaliation and antidiscrimination provisions does not matter because "both provisions seek to prevent *harm*." Resp. Br. 23-24. True. But each provision seeks to prevent a *different* harm. Again, Section 704(a) seeks to protect individuals' ability to report discrimination, so the Court used "materially adverse" to describe one thing and one thing only: retaliatory actions that would dissuade an employee from filing a complaint about discrimination. *White*, 548 U.S. at 68. Section 703(a)(1), on the other hand, strikes at status-based discrimination itself. *Id.* at 63. Put differently, Section 703(a)(1) does not, like Section 704(a), aim to prevent the secondary effects of retaliatory conduct; it seeks to eliminate the relevant employer conduct directly. *See id.* Freighting Section 703(a)(1) with an atextual adversity requirement would undermine that goal.[1]

---

[1] *White* cited *Washington v. Illinois Department of Revenue*, 420 F.3d 658 (7th Cir. 2005), for its formulation of Section 704(a)'s material-adversity standard, not, as the Department implies (at 34), for that decision's (erroneous) suggestion that a similar adversity requirement exists under Section 703(a)(1). *See White*, 548 U.S. at 68.

II. Other statutory language confirms, rather than undermines, Muldrow's reading of Section 703(a)(1).

To repeat: No heightened-harm requirement exists in Section 703(a)(1)'s ban on "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's" protected characteristic. 42 U.S.C. § 2000e-2(a)(1). And, contrary to the Department's contentions, other language in Title VII confirms Section's 703(a)(1)'s ordinary meaning.

A. Ejusdem generis. The Department says that the *ejusdem generis* canon requires this Court to read the statutory phrase "otherwise to discriminate against" as limited to a class of employment practices similar to "fail or refuse to hire" or "discharge"—a class it, not Congress, describes as "employment actions that cause material, objective harm." Resp. Br. 25.

This argument fails at every turn. To begin with, the Department has not explained why its heightened-harm requirement is the shared characteristic that unites those terms. Put another way, there's no reason to think that this concocted characteristic was one that Congress was focused on, rather than the commonality that Congress actually specified in Section 703(a)(1): employer actions "with respect to [an employee's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1); *see* U.S. Br. 19; Thomas-Wildermuth Br. 15-16. After all, Congress sought to "eliminate" discrimination in employment, period, not only discrimination that imposes what employers or courts view as material or

significant harms. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

Moreover, as our opening brief shows (at 29-30), a restrictive canon doesn't fit here because the capacious phrase "terms, conditions, or privileges" is preceded by "*otherwise* to discriminate," 42 U.S.C. § 2000e-2(a)(1), indicating that Congress sought to prohibit the full range of on-the-job discrimination between a discriminatory refusal to hire and a discriminatory firing. *See also* Opening Br. 22; Const. Accountability Ctr. Br. 14-17.[2]

Finally, even if *ejusdem generis* were applied here, it would only help Muldrow because transfer decisions are close parallels to hiring and discharge decisions. U.S. Br. 19-20. "[R]efusing a job transfer request [is] the functional equivalent of 'refus[ing] to hire' an employee for a particular position." *Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc). And transferring an employee from

---

[2] The Department's reliance on *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), to resist this conclusion is misplaced. Resp. Br. 25-27. *Babb* pointed out, in a passing dictum, that *ejusdem generis* helped explain why proof of age discrimination under 29 U.S.C. § 623(a)(1) requires a showing of but-for causation. *See Babb*, 140 S. Ct. at 1176 n.4. This Court observed that the list of employer actions prohibited by Section 623(a)(1) share a characteristic: they are final decisions, rather than actions that occur before a decision is made. *Id. Babb* provides no reason to conclude that Section 703(a)(1)'s shared characteristic is the atextual harm requirement invented by the Department. *See* Thomas-Wildermuth Br. 16. To the extent that *Babb* says anything relevant here, it is only that Section 703(a)(1)'s text "counsel[s] a court" to consider whether the challenged employment decision was final. 140 S. Ct. at 1176 n.4. No one disputes that Muldrow's transfer was a final employment decision.

her desired job, as happened to Muldrow, is akin to "discharg[ing]" an employee from the job she wanted to keep.

B. Section 703(a)(2). Section 703(a)(2) makes it unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(2). The Department says that unless Section 703(a)(1) is limited to employer conduct that imposes material harm, Section 703(a)(2) would be rendered largely superfluous. Resp. Br. 30-31. But concern over superfluity is not a reason to ignore Section 703(a)(1)'s plain, unadorned text. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The Department's argument is wrong in any event. The two provisions cover quite different ground. Unlike Section 703(a)(1), Section 703(a)(2)'s text "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005). Thus, in contrast to Section 703(a)(1), Title VII's "'disparate treatment' (or 'intentional discrimination') provision," Section 703(a)(2) functions as Title VII's "'disparate impact' provision." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015). A Section 703(a)(1) "plaintiff is required to prove that the defendant had a discriminatory intent or motive," *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988), while employment practices "adopted without discriminatory intent" can violate Section 703(a)(2),

id. at 990-91. Thus, in a critical way—in the difference between Section 703(a)'s two forms of action, disparate treatment and disparate impact—the two provisions operate independently.

To be sure, the provisions overlap in some respects. As the EEOC has explained, "[i]n accordance with Congressional intent," Section 703(a)(1)'s "language is to be read in the broadest possible terms." EEOC Compl. Man. § 613.1(a), 2006 WL 4672701. Because "§ 703(a)(1) is broader than § 703(a)(2)," "a practice which violates § 703(a)(2) can also violate § 703(a)(1)." EEOC Compl. Man. § 618.1(b), 2006 WL 4672738. Yet, even in this respect, the two subsections serve distinct purposes. Section 703(a)(1) "provides broad, general prohibitions against discrimination," while Section 703(a)(2) "is directed at more specific activities or practices; i.e., segregating, limiting, or classifying of employees or applicants." *Id.*

The Department's superfluity concern is, charitably put, paradoxical. Even as the Department accuses Muldrow of erasing differences between the two provisions, it seeks to render them more alike by asking this Court to import the "adversely affect" language from Section 703(a)(2) to Section 703(a)(1), *which does not contain that language*. *Compare* 42 U.S.C. § 2000e-2(a)(1), *with* 42 U.S.C. § 2000e-2(a)(2). And when language is included in one provision but not a neighboring provision, Congress is presumed to have had a reason for doing so, underscoring here that Section 703(a)(1) does not silently impose an adversity requirement. *See* U.S. Br. 13 (citing *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)); Const. Accountability Ctr. Br. 11. Put somewhat differently, the canon against superfluity applies only when a

competing interpretation would avoid the (purported) redundancy. U.S. Br. 20; *see Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). Here, the Department's proposed interpretation would create a redundancy—one with no basis in Section 703(a)(1).

III. Discrimination can be remedied, as Section 703(a)(1)'s text demands, without creating undue burdens on employers and courts.

Courts must honor Title VII's text, and they may not shirk that duty because of policy concerns about the costs of litigation. *Contra* Resp. Br. 45-50. Our position fully accords with Congress's laudable policy goal of eliminating workplace discrimination. *See* Opening Br. 21-23, 41-43. But even if the Department's position would "[a]chiev[e] a better policy outcome," implementing it would be "a task for Congress, not the courts," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000). In any case, the Department's policy concerns are misguided.

A.1. Section 703(a)(1)'s requirement that the plaintiff show that the employer's action was taken "because of" a protected characteristic imposes a significant limit on the prosecution of employment-discrimination claims. *See* Opening Br. 50-51. Alleging and then proving *intentional* discrimination can be difficult. Plaintiffs generally cannot move past the pleading stage "by simply alleging that a coworker of another sex, race, or national origin received different treatment." Resp. Br. 48 (quoting D.C. et al. Br. 13). In many cases, the plaintiff must identify similarly situated comparators. *See* Ark. et al. Br. 10. That can pose a substantial burden. *See* Chamber of

Com. Br. 26 (observing that resolution of the question presented "should not affect the application of ordinary pleading standards at the motion-to-dismiss stage"). And when the plaintiff has sufficiently pleaded the elements of a Title VII claim, the suit will likely progress to the summary-judgment stage regardless, even if there is a material-harm requirement. That is because any material-harm question would itself create an evidentiary dispute unresolvable at the pleading stage, as occurred here. Indeed, that's the dispute the Department has submitted to this Court. Resp. Br. 50-53; *see infra* at 23-24.

The Department and its amici complain that, without a heightened-harm requirement, they will too often be saddled with providing nondiscriminatory reasons for their conduct. Resp. Br. 49; Ark. et al. Br. 11-12, 16. But if the plaintiff makes out her prima facie case, the burden "to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978). This "burden involves no credibility determination" and is "exceedingly light." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769-70 (11th Cir. 2005) (citations omitted). And after that burden is met, the plaintiff still "retains th[e] 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993) (citation omitted) (alterations in original).

2. Recent experience shows that rejection of an atextual heightened-harm requirement does not negate the ordinary burdens of proving a Title VII

case. After *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc), held that all discriminatory job-transfer decisions are actionable under Section 703(a)(1), plaintiffs continue to bear the significant burden of identifying fair comparators to prove that challenged employer conduct was because of a protected characteristic. *See, e.g.*, *Harris v. Mayorkas*, 2022 WL 3452316, at *6 (D.D.C. Aug. 18, 2022) (dismissing complaint because plaintiff failed to "describe any comparator employees, how [the comparators] were similarly situated, or how they were treated differently than Plaintiff"); *Keith v. U.S. Gov't Accountability Off.*, 2022 WL 3715776, at *4 (D.D.C. Aug. 29, 2022) (dismissing complaint where plaintiff supported her allegations that defendant "treated her differently from similarly situated employees … exclusively with conclusory statements").

In other circuits that have rejected a heightened-harm requirement, district courts are still capable of disposing of meritless claims. Consider, for instance, decisions issued after *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021), held that discriminatory shift transfers violate Section 703(a)(1). *See, e.g.*, *Freier-Heckler v. McDonough*, 2022 WL 597472, at *6 (N.D. Ohio Feb. 28, 2022), *aff'd*, 2023 WL 2378507 (6th Cir. Mar. 7, 2023) (granting summary judgment against plaintiff who failed to "show that any similarly situated male employee was treated differently"); *Kessling v. Ohio State Univ.*, 2022 WL 17092250, at *13 (S.D. Ohio Nov. 21, 2022) (granting summary judgment to defendants where plaintiff and her proposed comparator "were not similarly situated"). Decisions following the Fifth Circuit's holding in

Hamilton v. Dallas County, 79 F.4th 494 (5th Cir. 2023) (en banc), that discriminatory shift assignments violate Section 703(a)(1) follow the same pattern. *See, e.g.*, *Burchfield v. S. La. Med. Assocs.*, 2023 WL 5952183, at *6 (E.D. La. Sept. 13, 2023) (dismissing complaint where plaintiff failed to "plead circumstantial facts supporting the inference that she was 'similarly situated' to the[] male physicians" alleged to be comparators); *Dixon v. Plano Indep. Sch. Dist.*, 2023 WL 5434761, at *5 (E.D. Tex. Aug. 23, 2023) (similar).

B. Respecting Section 703(a)(1)'s text and rejecting a heightened-harm requirement would not transform courts into "super-personnel departments." *See* Resp. Br. 33 (quoting D.C. et al. Br. 20). If an employee maintains that a minor term or condition was imposed discriminatorily, intent may be difficult to allege and prove. *See* Opening Br. 29; *Leach v. Yellen*, 2023 WL 2496840, at *6 (D.D.C. Mar. 14, 2023). But if an employer imposes a term or condition—however minor it may seem to the employer—for discriminatory reasons, and the plaintiff can prove it, the employer is liable, as Congress intended.

It is the Department's proposed heightened-harm rule that demands workplace micromanagement—and a waste of judicial resources. After all, that rule requires judges to make difficult, potentially resource-intensive determinations about whether a particular action imposes "material, objective harm." Resp. Br. 16. This case is a textbook example. Muldrow believes that her transfer from the Intelligence Division to the Fifth District imposed a "significant disadvantage." *See infra* at 23-24. The Department believes

otherwise. Resp. Br. 50-53. The dispute over that question takes up dozens of pages in the summary-judgment record, *see, e.g.*, J.A. 13-15, 45, 48, 69-70, 75-76, and has been the subject of two lower-court opinions, Pet. App. 9a-13a, 39a-44a. The Department now asks *this Court* to resolve that dispute. Resp. Br. 50-53.

Consider, too, *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883 (7th Cir. 1989), cited with approval by the Department's amici. *See* Chamber of Com. Br. 18-19; Nat'l Sch. Bd. Ass'n Br. 19; Ark. et al. Br. 15-16. Perhaps more than any other decision, *Spring* captures the administrability challenges created when courts stray from Title VII's text and seek to assess the value of a job's various attributes.

Winifred Spring alleged that her employer transferred her because of her age from a principal position in one school to a dual principalship in two other schools. *Spring*, 865 F.2d at 884-85. The district court held that Spring failed to demonstrate that she suffered a "materially adverse" employment action because her pay increased, she was transferred from a diverse school to an environment with students from only upper-middle-class backgrounds, and the old school "had a program for emotionally disturbed children" while the new schools did not. *Id.* at 886. The Seventh Circuit affirmed because Spring's new position was "another principalship for more pay under a longer-term employment contract." *Id.* The district court apparently believed that no reasonable jury could find adverse the transfer from a diverse school to a more homogenous school. But many principals may prefer to lead more diverse institutions. Likewise, the district court assumed that

a reasonable employee in Spring's position would prefer to administer a school without a program for "emotionally disturbed" children. *Id.*

The easy way out of this morass is the path that hews to Section 703(a)(1)'s text, which doesn't ask federal judges to answer value-laden questions about which jobs are "better" than others. Not surprisingly, courts have struggled to make those (and similar) determinations about which alterations to terms, conditions, and privileges of employment are "objectively material," "tangible," "significantly disadvantageous," "significantly detrimental," or the like. *See* Pet. 10-23; *Chambers*, 35 F.4th at 881 (describing a heightened-harm requirement as "so amorphous as to accommodate inconsistent outcomes in like cases").

So, had the court in *Spring* simply applied Title VII's text, it would not have needed to consider what makes a school environment desirable to a principal, an inquiry that Section 703(a)(1) nowhere requires. And the court would not have been able to avoid the question that Section 703(a)(1) actually poses: whether the employer acted with discriminatory intent. In sum, if an employee is transferred because of a protected characteristic, it doesn't matter whether the new job is viewed by the plaintiff, the defendant, the court, or some hypothetical "reasonable" person as better or worse than the old one. If the transfer is discriminatory, it is unlawful.

IV. Muldrow suffered a significant disadvantage.

As explained, we believe that Section 703(a)(1)'s text and all appropriate sources of statutory meaning demand a simple answer to the question posed by this

Court: all discriminatory transfer decisions are actionable under Title VII. But if this Court decides that Title VII incorporates a significant-disadvantage barrier, Muldrow has easily surmounted it at summary judgment.

Though the Department suggests that Muldrow's Fifth District duties did not meaningfully diverge from her role in the Intelligence Division, Resp. Br. 5, 50-53, the record reflects otherwise. In Intelligence, Muldrow worked on "sensitive" and "important investigations," J.A. 104, including human-trafficking, public-corruption, and federal-agency investigations, J.A. 112-13, 117. After the transfer, her job was limited to "basic entry level," "routine police work," J.A. 121, and she no longer conducted important investigations, J.A. 104, 120. The Fifth District role also involved "no training" or "travel opportunities." J.A. 121. Most employees would view these differences as significant. That should end this (atextual) inquiry.

The Department responds that the lower courts found the changes to Muldrow's job duties insignificant. But the district court ignored the record evidence detailed above in concluding that Muldrow had not shown that her Fifth District responsibilities "constituted a material deviation from the responsibilities she had in Intelligence." Pet. App. 43a. And the Eighth Circuit discounted Muldrow's evidence largely because it was contained in "her own deposition testimony," Pet. App. 10a, though much of that testimony is uncontradicted.

The Department points out that Muldrow responded "no" to whether her eight-month stint in the Fifth District caused "long-term harm to [her]

career prospects." Resp. Br. 51; J.A. 129. But Muldrow stated that the transfer did not cause *long-term* harm to her career prospects, not that it didn't cause her harm in her day-to-day work. Moreover, Muldrow's statement does not account for what would have happened had she not been transferred back to the Intelligence Division after eight months.

Other evidence shows that the transfer did, in fact, harm Muldrow's long-term career prospects. In Intelligence, Muldrow reported directly to the Chief of Police, Opening Br. 6; J.A. 107, met high-profile individuals, J.A. 107, and had access to "networking opportunities" that would "help [her] secure more sought-after assignments within the Department," J.A. 109. And the transfer itself harmed Muldrow's reputation because colleagues assumed she had "done something wrong." J.A. 132; *see* Opening Br. 8.

* * *

More could be said about why, viewed from the objective perspective of a veteran police investigator with experience solving the most difficult crimes and with access to the top brass, the job in Intelligence would be more challenging and prestigious than the job in the Fifth District. *See* Opening Br. 5-8.

But what does any of this have to do with whether the Department discriminated against Muldrow because of her sex? Nothing. It only illustrates how far the Eighth Circuit's significant-disadvantage rule departs from Section 703(a)(1)'s text. Once a plaintiff establishes that she was transferred because of a protected characteristic, the statutory "analysis is complete." *Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc). Muldrow is

prepared to prove that's exactly what happened to her. The lower courts wouldn't allow her to. But for the reasons we have given, this Court should.

CONCLUSION

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

Respectfully submitted,

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

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

Counsel for Petitioner

November 2023