

Decisions of Interest to County Attorneys from the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit, and the New York State Court of Appeals

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Written Materials

1. *NYCLU v City of Rochester; NYCLU v City of Syracuse*
(NYCOA leave granted)
2. *Muldrow v City of St. Louis*
(SCOTUS)
3. *Antonyuk v James*
(2d Cir)

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

685

CA 21-01191

PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF NEW YORK CIVIL LIBERTIES UNION,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT J. HODGSON OF COUNSEL), AND SHEARMAN & STERLING LLP, WASHINGTON, DC, FOR PETITIONER-APPELLANT.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 10, 2021 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting those parts of the petition seeking disclosure of law enforcement disciplinary records dated on or before June 12, 2020 and seeking disclosure of law enforcement disciplinary records containing unsubstantiated claims or complaints, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Rochester (City) and Rochester Police Department (RPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. Petitioner appeals from a judgment that granted the petition in part and ordered the City and RPD to produce certain police disciplinary records under FOIL, but denied the petition with respect to the production of records from proceedings conducted on or before June 12, 2020 and with respect to records related to unsubstantiated claims or complaints.

Initially, we agree with petitioner that, as respondents correctly concede, respondents did not deny petitioner's FOIL request on the ground that the legislation repealing former Civil Rights Law § 50-a and amending FOIL concerning disciplinary records of law

enforcement agencies (see L 2020, ch 96, §§ 1-4 [effective June 12, 2020]) should not be applied retroactively, and thus Supreme Court erred in relying on that theory as a ground for denying the petition in part (see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]).

We conclude—for the reasons stated in *Matter of New York Civ. Liberties Union v City of Syracuse* (— AD3d —, — [Nov. 10, 2022] [4th Dept 2022] [decided herewith])—that the court erred in concluding that the personal privacy exemption under Public Officers Law § 87 (2) (b) creates a blanket exemption allowing respondents to categorically withhold the law enforcement disciplinary records at issue. Further, for the reasons stated in *New York Civ. Liberties Union* (— AD3d at —), we reject petitioner’s contention that it should be awarded attorneys’ fees and costs.

We therefore modify the judgment by granting those parts of the petition seeking law enforcement records dated on or before June 12, 2020 and seeking law enforcement disciplinary records concerning unsubstantiated claims of RPD officer misconduct, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2). Respondents are directed to review the requested law enforcement disciplinary records, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any records or portions thereof that are redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (see *Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219-1220 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

690

CA 21-00796

PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF NEW YORK CIVIL LIBERTIES UNION,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF SYRACUSE AND SYRACUSE POLICE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT HODGSON OF COUNSEL), AND LATHAM & WATKINS LLP, FOR PETITIONER-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 5, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and granting the petition to that extent, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Syracuse and Syracuse Police Department (SPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. As relevant here, petitioner seeks law enforcement disciplinary records concerning open complaints, i.e., those in which an investigation had commenced but the law enforcement disciplinary proceeding had not yet reached a final disposition, and law enforcement disciplinary records concerning closed but unsubstantiated complaints, i.e., those in which it was determined that the allegations of SPD officer misconduct were unfounded or without merit. In opposition, respondents moved to dismiss the petition on the basis that the records sought were categorically exempt from disclosure pursuant to the "personal privacy" exemption under Public Officers Law § 87 (2) (b). Petitioner now appeals from a judgment granting respondents' motion to

dismiss the petition. We agree with petitioner that Supreme Court erred in determining that the records sought are categorically exempt from disclosure and may be withheld in their entirety.

At the outset, we reject respondents' contention that petitioner failed to exhaust its administrative remedies with respect to its contentions on appeal (see *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 437 [1st Dept 2014]; *Council of Regulated Adult Liq. Licensees v City of N.Y. Police Dept.*, 300 AD2d 17, 18-19 [1st Dept 2002]).

It is well settled that, under FOIL, "[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; see *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 225 [2018], *rearg denied* 31 NY3d 1125 [2018]), that exemptions are to be " 'narrowly construed' " (*Gould*, 89 NY2d at 275; see *Matter of Hawley v Village of Penn Yan*, 35 AD3d 1270, 1271 [4th Dept 2006], *amended on rearg* 38 AD3d 1371 [4th Dept 2007]), that government agencies have the burden to demonstrate that " 'the material requested falls squarely within the ambit of [one] of the exemptions' " (*Abdur-Rashid*, 31 NY3d at 225; see *Matter of National Lawyers Guild, Buffalo Ch. v Erie County Sheriff's Off.*, 196 AD3d 1195, 1196 [4th Dept 2021]), and that those agencies "must articulate 'particularized and specific justification' for not disclosing requested documents" (*Gould*, 89 NY2d at 275; see *Matter of Nix v New York State Div. of Criminal Justice Servs.*, 167 AD3d 1524, 1525 [4th Dept 2018], *lv denied* 33 NY3d 908 [2019]).

Under Public Officers Law § 87 (2) (a), agencies shall disclose records unless they are "specifically exempted from disclosure by state or federal statute." For decades, law enforcement personnel records were wholly and categorically exempt from disclosure inasmuch as a state statute provided that such records "[were] considered confidential and not subject to inspection or review without the express written consent of such [law enforcement] officer . . . except as may be mandated by lawful court order" (former Civil Rights Law § 50-a [1]; see *Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 560 [2018]; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 29 [1988]). Effective June 12, 2020, the New York State Legislature fully repealed former Civil Rights Law § 50-a (see L 2020 ch 96, § 1). Thus, the statutory exemption under Public Officers Law § 87 (2) (a) no longer applies to law enforcement personnel records.

The bill repealing former Civil Rights Law § 50-a also made several amendments to FOIL concerning disciplinary records of law enforcement agencies (see L 2020, ch 96, §§ 2-4). Of particular relevance here, Public Officers Law § 86 was amended by adding subdivisions (6) and (7), defining " '[l]aw enforcement disciplinary records' " and a " '[l]aw enforcement disciplinary proceeding.' "

We agree with petitioner that the court erred in determining that the personal privacy exemption under Public Officers Law § 87 (2) (b) allows respondents to categorically withhold the law enforcement disciplinary records at issue. Public Officers Law § 87 (2) (b) provides that an "agency may deny access to records or portions thereof that . . . if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of [section 89 (2)]." The personal privacy exemption "allows agencies and their employees to protect sensitive matters in which there is little or no public interest, like personal information or unsubstantiated allegations, from public disclosure" (*Matter of New York Times Co. v City of New York Off. of the Mayor*, 194 AD3d 157, 165 [1st Dept 2021], *lv denied* 37 NY3d 913 [2021]). The personal privacy exemption "is qualified" by Public Officers Law § 89 (2) (c) (i) (*Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 160 [1st Dept 2010]; see e.g. *Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse*, 65 NY2d 294, 298 [1985]; *Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York*, 145 AD3d 1391, 1392-1393 [3d Dept 2016]; *Matter of Obiajulu v City of Rochester*, 213 AD2d 1055, 1056 [4th Dept 1995]), which provides that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted" (§ 89 [2] [c] [i]). An agency invoking the personal privacy exemption must "establish that the identifying details [of a record] could not be redacted so as to not constitute an unwarranted invasion of personal privacy" if the record was disclosed (*Matter of Aron Law, PLLC v New York City Fire Dept.*, 191 AD3d 664, 666 [2d Dept 2021]; see *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392-1393).

Contrary to respondents' contention, the personal privacy exemption "does not . . . categorically exempt . . . documents from disclosure" (*Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392; see *Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 497 [1st Dept 2013]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]; see generally *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011]), even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct (see e.g. *Matter of Western Suffolk Bd. of Coop. Educ. Servs. v Bay Shore Union Free School Dist.*, 250 AD2d 772, 772-773 [2d Dept 1998]; *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.*, 220 AD2d 424, 427 [2d Dept 1995]). In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD officer misconduct can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner (see *Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594, 594 [1st

Dept 2016]; see generally *Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc.*, 18 NY3d at 46; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007]).

Inasmuch as respondents withheld the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, we conclude that respondents did not meet their burden of establishing that the personal privacy exemption applies (see *Aron Law, PLLC*, 191 AD3d at 666; *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393; *Matter of Livson v Town of Greenburgh*, 141 AD3d 658, 661 [2d Dept 2016]). Respondents further failed to establish that "identifying details" in the law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct "could not be redacted so as to not constitute an unwarranted invasion of personal privacy" (*Aron Law, PLLC*, 191 AD3d at 666; see *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393). Thus, the court erred in granting that part of respondents' motion seeking to dismiss petitioner's request for law enforcement disciplinary records concerning open or unsubstantiated claims of SPD officer misconduct in reliance on the personal privacy exemption under Public Officers Law § 87 (2) (b).

Further, we agree with petitioner that, in the administrative proceeding, respondents did not invoke the exemption under Public Officers Law § 87 (2) (e), and we therefore conclude the court erred in relying on that subdivision in granting respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct (see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]; *Matter of McFadden v McDonald*, 204 AD3d 672, 675 [2d Dept 2022]). "[J]udicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (*Madeiros*, 30 NY3d at 74 [internal quotation marks omitted]). Consequently, the court erred in relying on Public Officers Law § 87 (2) (e) and we make no determination whether respondents may rely on section 87 (2) (e) to withhold law enforcement disciplinary records.

Although we reject petitioner's contention that in the administrative proceeding respondents failed to invoke the exemption under Public Officers Law § 87 (2) (g) (iii), which applies to inter-agency or intra-agency materials that are not final agency policy or determinations, inasmuch as respondents cited it multiple times in their denial of petitioner's administrative appeal, we nonetheless agree with petitioner that the court erred in relying on that exemption as a categorical basis to grant respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct. Respondents failed to meet their burden of establishing that the exemption applies inasmuch as they failed to establish whether law enforcement disciplinary records concerning open claims of SPD officer misconduct

"fall[] wholly or only partially within that exemption" (*Matter of Gedan v Town of Mamaroneck [N.Y.]*, 170 AD3d 833, 834 [2d Dept 2019]; see *Matter of New York 1 News v Office of President of Borough of Staten Is.*, 231 AD2d 524, 525 [2d Dept 1996]; cf. *Matter of Sawma v Collins*, 93 AD3d 1248, 1248-1249 [4th Dept 2012]; *Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 984 [3d Dept 2009], lv denied 12 NY3d 712 [2009]).

Further, we agree with petitioner that the court erred in relying upon the statute regarding the confidentiality of materials related to the conduct or discipline of attorneys (see Judiciary Law § 90 [10]) and case law regarding the confidentiality of investigations into judicial conduct or discipline (see *Matter of Nichols v Gamsco*, 35 NY2d 35, 38 [1974]). Those rules are not applicable to the interpretation of FOIL or its application to disclosure of law enforcement disciplinary records concerning complaints of SPD officer misconduct.

We reject petitioner's contention that the court erred in granting respondents' motion with respect to petitioner's request for attorneys' fees and costs. Inasmuch as this proceeding at this stage concerns a novel interpretation of legislation that both repealed a statute and enacted new provisions to a longstanding statutory scheme, it cannot be said that respondents "had no reasonable basis for denying access" to the records at issue (Public Officers Law § 89 [4] [c]; cf. *New York Times Co.*, 194 AD3d at 166; see generally *Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 491 [1st Dept 2021], lv denied 37 NY3d 906 [2021]).

We therefore modify the judgment by denying respondents' motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2) and granting the petition to that extent. Respondents are directed to review the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (see *Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219-1220 [4th Dept 2017], lv denied 31 NY3d 904 [2018]).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MULDROW *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 22–193. Argued December 6, 2023—Decided April 17, 2024

Sergeant Jatonya Clayborn Muldrow maintains that her employer, the St. Louis Police Department, transferred her from one job to another because she is a woman. From 2008 through 2017, Muldrow worked as a plainclothes officer in the Department’s specialized Intelligence Division. In 2017, the new Intelligence Division commander asked to transfer Muldrow out of the unit so he could replace her with a male police officer. Against Muldrow’s wishes, the Department approved the request and reassigned Muldrow to a uniformed job elsewhere in the Department. While Muldrow’s rank and pay remained the same in the new position, her responsibilities, perks, and schedule did not. After the transfer, Muldrow no longer worked with high-ranking officials on the departmental priorities lodged in the Intelligence Division, instead supervising the day-to-day activities of neighborhood patrol officers. She also lost access to an unmarked take-home vehicle and had a less regular schedule involving weekend shifts.

Muldrow brought this Title VII suit to challenge the transfer. She alleged that the City, in ousting her from the Intelligence Division, had “discriminate[d] against” her based on sex “with respect to” the “terms [or] conditions” of her employment. 42 U. S. C. §2000e–2(a)(1). The District Court granted the City summary judgment. The Eighth Circuit affirmed, holding that Muldrow had to—but could not—show that the transfer caused her a “materially significant disadvantage.” 30 F. 4th 680, 688. Muldrow’s lawsuit could not proceed, the court said, because the transfer “did not result in a diminution to her title, salary, or benefits” and had caused “only minor changes in working conditions.”

Held: An employee challenging a job transfer under Title VII must show

Syllabus

that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant. Pp. 5–11.

(a) Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” §2000e–2(a)(1). Both parties agree that Muldrow’s transfer implicated “terms” and “conditions” of Muldrow’s employment. The applicable statutory language thus prohibits “discriminat[ing] against” an individual “with respect to” the “terms [or] conditions” of employment because of that individual’s sex.

That language requires Muldrow to show that her transfer brought about some “disadvantageous” change in an employment term or condition. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80. The words “discriminate against,” the Court has explained, refer to “differences in treatment that injure” employees. *Bostock v. Clayton County*, 590 U. S. 644, 681. In the typical transfer case, that worse treatment must be “with respect to” employment “terms [or] conditions.” §2000e–2(a)(1). The “terms [or] conditions” phrase is not used “in the narrow contractual sense”; it covers more than the “economic or tangible.” *Oncale*, 523 U. S., at 78; *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, 64. Still, the phrase circumscribes the injuries that can give rise to a suit like this one. To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment.

What the transferee does not have to show is that the harm incurred was “significant” or otherwise exceeded some heightened bar. “Discriminate against” means treat worse, here based on sex. See, e.g., *Bostock*, 590 U. S., at 657. Neither that phrase nor any other establishes an elevated threshold of harm. To demand “significance” is to add words to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more than the law as written. That difference can make a real difference for complaining transferees. By asking whether the harm to the transferee is significant, appellate courts have disregarded varied kinds of disadvantage. Pp. 5–7.

(b) The City’s three main arguments—based on statutory text, precedent, and policy—do not justify the use of a “significance” standard.

The Court rejects the City’s textual claim, which invokes the *eiusdem generis* canon—the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind. Applying that canon to the text of Title VII’s anti-discrimination provision, the City claims that because refusing to hire

Syllabus

or discharging a person causes a significant disadvantage, the “otherwise to discriminate against” phrase can apply only to things causing an equal level of harm. But the statutory text itself provides a different shared trait: Each kind of prohibited discrimination occurs by way of an employment action—whether pertaining to hiring, or firing, or compensating, or (as here) altering terms or conditions through a transfer. That is a more than sufficient basis to unite the provision’s several parts and avoid *ejusdem generis* problems.

Contrary to the City’s view, there is also no reason to import a significant-harm requirement from this Court’s decision in *Burlington N. & S. F. R. Co. v. White*, 548 U. S. 53. The Court there held that Title VII’s anti-retaliation provision—which prohibits an employer from taking action against an employee for bringing or aiding a Title VII charge—applies only when the retaliatory action is “materially adverse,” meaning that it causes “significant” harm. *Id.*, at 68. *White* adopted that standard for reasons peculiar to the retaliation context. The test was meant to capture those employer actions serious enough to “dissuade[] a reasonable worker from making or supporting a charge of discrimination.” *Ibid.* An action causing less serious harm will not deter Title VII enforcement and so falls outside the purposes of the ban on retaliation. But that reasoning does not apply to the anti-discrimination provision, which flatly “prevent[s] injury to individuals based on” protected status, *id.*, at 63, without distinguishing between significant and less significant harms.

Finally, there is reason to doubt the City’s prediction that employees will flood courts with litigation in the absence of a significant-injury requirement. Courts retain multiple ways to dispose of meritless Title VII claims challenging transfer decisions. But even supposing the City’s worst predictions come true, that would be the result of the statute Congress drafted. This Court will not add words to the statute to achieve what the City thinks a desirable result. Pp. 8–10.

(c) The courts below applied the wrong standard to Muldrow’s suit. Muldrow need show only some injury respecting her employment terms or conditions. Her allegations, if properly preserved and supported, meet that test with room to spare. The Court recognizes, however, that the decisions below may have rested in part on issues of forfeiture and proof. The Court leaves such matters for the courts below to address on remand under the proper Title VII standard. Pp. 10–11.

30 F. 4th 680, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, GORSUCH, BARRETT, and JACKSON, JJ., joined. THOMAS, J., ALITO, J., and KAVANAUGH, J., each filed an opinion concurring in the judgment.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 22–193

JATONYA CLAYBORN MULDROW, PETITIONER *v.*
CITY OF ST. LOUIS, MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[April 17, 2024]

JUSTICE KAGAN delivered the opinion of the Court.

Sergeant Jatonya Clayborn Muldrow maintains that her employer, the St. Louis Police Department, transferred her from one job to another because she is a woman. She sued the City of St. Louis under Title VII, alleging that she had suffered sex discrimination with respect to the “terms [or] conditions” of her employment. 42 U. S. C. §2000e–2(a)(1). The courts below rejected the claim on the ground that the transfer did not cause Muldrow a “significant” employment disadvantage. Other courts have used similar standards in addressing Title VII suits arising from job transfers.

Today, we disapprove that approach. Although an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test. Title VII’s text nowhere establishes that high bar.

I

From 2008 through 2017, Sergeant Muldrow worked as a plainclothes officer in the St. Louis Police Department’s specialized Intelligence Division. During her tenure there, she investigated public corruption and human trafficking

Opinion of the Court

cases, oversaw the Gang Unit, and served as head of the Gun Crimes Unit. By virtue of her Division position, Muldrow was also deputized as a Task Force Officer with the Federal Bureau of Investigation—a status granting her, among other things, FBI credentials, an unmarked take-home vehicle, and the authority to pursue investigations outside St. Louis. In 2017, the outgoing commander of the Intelligence Division told her newly appointed successor that Muldrow was a “workhorse”—still more, that “if there was one sergeant he could count on in the Division,” it was Muldrow. 2020 WL 5505113, *1 (ED Mo., Sept. 11, 2020).

But the new Intelligence Division commander, Captain Michael Deeba, instead asked the Department to transfer Muldrow out of the unit. Deeba wanted to replace Muldrow—whom he sometimes called “Mrs.” rather than the customary “Sergeant”—with a male police officer. See *id.*, at *1–*2. That officer, Deeba later testified, seemed a better fit for the Division’s “very dangerous” work. *Id.*, at *2; App. 139. The Department approved the transfer against Muldrow’s wishes. It reassigned her to a uniformed job in the Department’s Fifth District.

While Muldrow’s rank and pay remained the same in the new position, her responsibilities, perks, and schedule did not. Instead of working with high-ranking officials on the departmental priorities lodged in the Intelligence Division, Muldrow now supervised the day-to-day activities of neighborhood patrol officers. Her new duties included approving their arrests, reviewing their reports, and handling other administrative matters; she also did some patrol work herself. Because she no longer served in the Intelligence Division, she lost her FBI status and the car that came with it. And the change of jobs made Muldrow’s workweek less regular. She had worked a traditional Monday-through-Friday week in the Intelligence Division. Now she was placed on a “rotating schedule” that often involved weekend shifts. 2020 WL 5505113, *2.

Opinion of the Court

Muldrow brought this Title VII suit to challenge the transfer. Her complaint alleged that the City, in ousting her from the Intelligence Division, had “discriminate[d] against” her based on sex “with respect to” the “terms [or] conditions” of her employment. §2000e–2(a)(1). In later deposition testimony, Muldrow set out her view of what the transfer had cost her. She had been moved out of a “premier position [in] the Police Department” into a less “prestigious” and more “administrative” uniformed role. App. 105, 114, 120. She had fewer “opportunities” to work on “important investigations,” as well as to “network” with commanding officers. *Id.*, at 104. And she lost material benefits—her weekday work schedule and take-home car. Or as she summarized the situation: “I went from straight days, weekends off with a take-home car and more visibility and responsibility within the Department to a rotating schedule with few weekends off, assigned to . . . uniformed patrol,” with “responsibilities being limited to that of administrative work” and “supervising officers on patrol.” *Id.*, at 120. Title VII, Muldrow asserted in her suit, prevented the City from making those changes to her employment because of her sex.

The District Court, viewing the matter differently, granted the City summary judgment. Under Circuit precedent, the court explained, Muldrow needed to show that her transfer effected a “significant” change in working conditions producing “material employment disadvantage.” 2020 WL 5505113, *8–*9. And Muldrow, the court held, could not meet that heightened-injury standard. “[S]he experienced no change in salary or rank.” *Id.*, at *9. Her loss of “the networking [opportunities] available in Intelligence” was immaterial because she had not provided evidence that it had harmed her “career prospects.” *Id.*, at *8. And given her continued “supervisory role,” she had not “suffered a significant alteration to her work responsibilities.” *Id.*, at *9. Finally, the District Court concluded that the switch to

Opinion of the Court

a rotating schedule (including weekend work) and the loss of a take-home vehicle could not fill the gap. Although mentioning those changes “in her statement of facts,” Muldrow had not relied on them in “her argument against summary judgment.” *Ibid.*, n. 20. And anyway, the court stated, they “appear to be minor alterations of employment, rather than material harms.” *Ibid.*

The Court of Appeals for the Eighth Circuit affirmed. It agreed that Muldrow had to—but could not—show that the transfer caused a “materially significant disadvantage.” 30 F. 4th 680, 688 (2022). Like the District Court, the Eighth Circuit emphasized that the transfer “did not result in a diminution to her title, salary, or benefits.” *Id.*, at 688–689. And the Circuit, too, maintained that the change in her job responsibilities was “insufficient” to support a Title VII claim. *Id.*, at 689. In the Fifth District, the court reasoned, Muldrow still had a “supervisory role” and participated in investigating serious crimes. *Id.*, at 688. So the court thought Muldrow’s view of the new job—“more administrative and less prestigious”—was unsupported by record evidence and not “persuasive.” *Ibid.* The court did not address Muldrow’s new schedule or her loss of a car, apparently thinking those matters either forfeited or too slight to mention. Overall, the court held, Muldrow’s claim could not proceed because she had experienced “only minor changes in working conditions.” *Ibid.*

We granted certiorari, 600 U. S. ___ (2023), to resolve a Circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm—be it dubbed significant, serious, or something similar.¹ We now vacate the judgment below because the text

¹ Compare, *e.g.*, 30 F. 4th 680, 688 (CA8 2022) (case below) (“materially significant disadvantage”); *Caraballo-Caraballo v. Correctional Admin.*, 892 F. 3d 53, 61 (CA1 2018) (“materially changes” employment conditions in a manner “more disruptive than a mere inconvenience or an alteration of job responsibilities”); *Williams v. R. H. Donnelley, Corp.*, 368

Opinion of the Court

of Title VII imposes no such requirement.

II

A

Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” §2000e–2(a)(1). Muldrow’s suit, as described above, alleges that she was transferred to a lesser position because she is a woman. That transfer, as both parties agree, implicated “terms” and “conditions” of Muldrow’s employment, changing nothing less than the what, where, and when of her police work. See Brief for Muldrow 19; Brief for City 1, 45–46. So the statutory language applicable to this case prohibits “discriminat[ing] against” an individual “with respect to” the “terms [or] conditions” of employment because of that individual’s sex.

That language requires Muldrow to show that the transfer brought about some “disadvantageous” change in an employment term or condition. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998). The words “discriminate against,” we have explained, refer to “differences in treatment that injure” employees. *Bostock v. Clayton County*, 590 U. S. 644, 681 (2020). Or otherwise said, the

F. 3d 123, 128 (CA2 2004) (“materially significant disadvantage”); *James v. Booz-Allen & Hamilton, Inc.*, 368 F. 3d 371, 376 (CA4 2004) (“significant detrimental effect”); *O’Neal v. Chicago*, 392 F. 3d 909, 911 (CA7 2004) (“materially adverse”); *Sanchez v. Denver Public Schools*, 164 F. 3d 527, 532 (CA10 1998) (“significant change”); and *Webb-Edwards v. Orange Cty. Sheriff’s Office*, 525 F. 3d 1013, 1033 (CA11 2008) (“serious and material change”), with *Chambers v. District of Columbia*, 35 F. 4th 870, 872, 876–877 (CADC 2022) (en banc) (overruling precedent that demanded an “objectively tangible harm” and rejecting a “material adversity” requirement).

Opinion of the Court

statute targets practices that “treat[] a person worse” because of sex or other protected trait. *Id.*, at 658. And in the typical transfer case, that “worse” treatment must pertain to—must be “with respect to”—employment “terms [or] conditions.” §2000e–2(a)(1). The “terms [or] conditions” phrase, we have made clear, is not used “in the narrow contractual sense”; it covers more than the “economic or tangible.” *Oncale*, 523 U. S., at 78; *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, 64 (1986). Still, the phrase circumscribes the injuries that can give rise to a suit like this one. To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment.

What the transferee does not have to show, according to the relevant text, is that the harm incurred was “significant.” 30 F. 4th, at 688. Or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar. See *supra*, at 4, and 4–5, n. 1. “Discriminate against” means treat worse, here based on sex. See, e.g., *Bostock*, 590 U. S., at 657–658, 681. But neither that phrase nor any other says anything about how much worse. There is nothing in the provision to distinguish, as the courts below did, between transfers causing significant disadvantages and transfers causing not-so-significant ones. And there is nothing to otherwise establish an elevated threshold of harm. To demand “significance” is to add words—and significant words, as it were—to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written.

And that difference can make a real difference for complaining transferees. Many forced transfers leave workers worse off respecting employment terms or conditions. (After all, a transfer is not usually forced when it leaves the employee better off.) But now add another question—

Opinion of the Court

whether the harm is significant. As appellate decisions reveal, the answers can lie in the eye of the beholder—and can disregard varied kinds of disadvantage. Take just a few examples from the caselaw. An engineering technician is assigned to work at a new job site—specifically, a 14-by-22-foot wind tunnel; a court rules that the transfer does not have a “significant detrimental effect.” *Boone v. Goldin*, 178 F. 3d 253, 256 (CA4 1999). A shipping worker is required to take a position involving only nighttime work; a court decides that the assignment does not “constitute a significant change in employment.” *Daniels v. United Parcel Serv., Inc.*, 701 F. 3d 620, 635 (CA10 2012). And a school principal is forced into a non-school-based administrative role supervising fewer employees; a court again finds the change in job duties not “significant.” *Cole v. Wake Cty. Bd. of Educ.*, 834 Fed. Appx. 820, 821 (CA4 2021) (*per curiam*). All those employees suffered some injury in employment terms or conditions (allegedly because of race or sex). Their claims were rejected solely because courts rewrote Title VII, compelling workers to make a showing that the statutory text does not require.²

²JUSTICE THOMAS’s concurring opinion appears to disagree in two respects. He initially disputes that courts have applied a heightened-harm requirement in demanding that a plaintiff show something like “materially significant disadvantage.” See *post*, at 1 (opinion concurring in judgment). And as a corollary, he denies that courts will have to change their treatment of Title VII claims once they start to apply the simple injury standard set out in this opinion. See *post*, at 2–3. In light of those views, we underscore two points. First, this decision changes the legal standard used in any circuit that has previously required “significant,” “material,” or “serious” injury. It lowers the bar Title VII plaintiffs must meet. Second, because it does so, many cases will come out differently. The decisions described above are examples, intended to illustrate how claims that failed under a significance standard should now succeed. And as we will discuss, the decision below is another such example, putting to one side case-specific issues of forfeiture and proof. See *infra*, at 10–11.

Opinion of the Court

B

The City, in defense of that added requirement, makes three main arguments—one about the text, one about our precedent, and one about policy. None justifies the use of a “significance” standard.

The textual claim invokes the *ejusdem generis* canon—the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind. Recall the prohibition at issue here: An employer may not, based on sex, “fail or refuse to hire” or “discharge” any person or “otherwise . . . discriminate against [her] with respect to [her] compensation, terms, conditions, or privileges of employment.” §2000e–2(a)(1); see *supra*, at 5. Refusing to hire or discharging a person, the City notes, causes a significant disadvantage; so the subsequent “otherwise” phrase, the City claims, can apply only to things causing an equal level of harm. See Brief for City 16, 25–27. But the City fails to explain why the presence of significant disadvantage must be part of the list’s common denominator. The text itself provides a different shared trait. Each kind of prohibited discrimination occurs by way of an employment action—whether pertaining to hiring, or firing, or compensating, or (as here) altering terms or conditions through a transfer. That is a more than sufficient basis to unite the provision’s several parts and avoid *ejusdem generis* problems. There is no need for courts to introduce a significant-harm requirement.

The City’s argument from precedent fares no better. It relies on *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U. S. 53 (2006), which addressed Title VII’s separate anti-retaliation provision. Under that section, an employer may not take action against an employee for bringing or aiding a Title VII charge. See §2000e–3(a). The Court held that the provision applies only when the retaliatory action is “materially adverse,” meaning that it causes “sig-

Opinion of the Court

nificant” harm. *Id.*, at 68. The City thinks we should import the same standard into the anti-discrimination provision at issue. See Brief for City 18–19. But that would create a mismatch. *White* adopted the standard for reasons peculiar to the retaliation context. The test was meant to capture those (and only those) employer actions serious enough to “dissuade[] a reasonable worker from making or supporting a charge of discrimination.” 548 U. S., at 68. If an action causes less serious harm, the Court reasoned, it will not deter Title VII enforcement; and if it will not deter Title VII enforcement, it falls outside the purposes of the ban on retaliation. See *id.*, at 63, 68. But no such (frankly extra-textual) reasoning is applicable to the discrimination bar. Whether an action causes significant enough harm to deter any employee conduct is there beside the point. *White* itself noted the difference: The anti-discrimination provision, we explained, simply “seeks a workplace where individuals are not discriminated against” because of traits like race and sex. *Id.*, at 63. The provision thus flatly “prevent[s] injury to individuals based on” status, *ibid.*, without distinguishing between significant and less significant harms.

Finally, the City’s policy objections cannot override Title VII’s text. In the City’s view, a significant-injury requirement is needed to prevent transferred employees from “swamp[ing] courts and employers” with insubstantial lawsuits requiring “burdensome discovery and trials.” Brief for City 45, 49 (capitalization and boldface omitted). But there is reason to doubt that the floodgates will open in the way feared. As we have explained, the anti-discrimination provision at issue requires that the employee show some injury. See *supra*, at 5–6. It requires that the injury asserted concern the terms or conditions of her employment. See *ibid.* Perhaps most notably, it requires that the employer have acted for discriminatory reasons—“because of” sex or

Opinion of the Court

race or other protected trait. §2000e–2(a)(1). And in addressing that issue, a court may consider whether a less harmful act is, in a given context, less suggestive of intentional discrimination. So courts retain multiple ways to dispose of meritless Title VII claims challenging transfer decisions. But even supposing the City’s worst predictions come true, that would be the result of the statute Congress drafted. As we noted in another Title VII decision, we will not “add words to the law” to achieve what some employers might think “a desirable result.” *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768, 774 (2015). Had Congress wanted to limit liability for job transfers to those causing a significant disadvantage, it could have done so. By contrast, this Court does not get to make that judgment.

III

In light of everything said above, the Court of Appeals’ treatment of Muldrow’s suit cannot survive. The court required Muldrow to show that the allegedly discriminatory transfer out of the Intelligence Division produced a significant employment disadvantage. See *supra*, at 4. As we have explained, that is the wrong standard. Muldrow need show only some injury respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so. And Muldrow’s allegations, if properly preserved and supported, meet that test with room to spare. Recall her principal allegations. She was moved from a plainclothes job in a prestigious specialized division giving her substantial responsibility over priority investigations and frequent opportunity to work with police commanders. She was moved to a uniformed job supervising one district’s patrol officers, in which she was less involved in high-visibility matters and primarily performed administrative work. Her schedule became less regular, often requiring her to work weekends; and she lost her take-home car. If those allegations are proved, she was left

Opinion of the Court

worse off several times over. It does not matter, as the courts below thought (and JUSTICE THOMAS echoes), that her rank and pay remained the same, or that she still could advance to other jobs. See *supra*, at 3–4; *post*, at 2. Title VII prohibits making a transfer, based on sex, with the consequences Muldrow described.

We recognize, however, that the decisions below may have rested in part on issues of forfeiture and proof. The District Court noted, for example, that Muldrow had failed to discuss in her argument against summary judgment the changes in her work schedule and vehicle access; and perhaps following that lead, the Court of Appeals did not address those harms. See *supra*, at 3–4. In addition, both courts suggested that some of the allegations Muldrow made about the nature of the work she did in her old and new jobs lacked adequate evidentiary support. See *ibid.* We leave such matters for the courts below to address. All we require is that they use the proper Title VII standard, and not demand that Muldrow demonstrate her transfer caused “significant” harm.

We accordingly vacate the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

THOMAS, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 22–193

JATONYA CLAYBORN MULDROW, PETITIONER *v.*
CITY OF ST. LOUIS, MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[April 17, 2024]

JUSTICE THOMAS, concurring in the judgment.

I agree with JUSTICE ALITO that the Courts of Appeals all appear to articulate the same principle, but with slightly varying verbal formulations: A plaintiff bringing a claim under 42 U. S. C. §2000e–2(a)(1) must show harm that is more than trifling. *Post*, at 1–2 (opinion concurring in judgment). And, there is little practical difference between that principle and the Court’s holding. *Ante*, at 1 (holding that an employee “must show some harm”).

I am not convinced, however, that the Court accurately characterizes the Eighth Circuit’s decision. I do not read the Eighth Circuit to have necessarily imposed a heightened-harm requirement in the form of a “significance” test. The Eighth Circuit defined an adverse employment action as “a tangible change in working conditions that produces a material employment disadvantage.” 30 F. 4th 680, 688 (2022) (internal quotation marks omitted). It further explained that “minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action.” *Ibid.* (alteration and internal quotation marks omitted). In other words, a plaintiff must have suffered an actual disadvantage as compared to minor changes—*i.e.*, more than a trifling harm. That standard aligns with the Court’s observation that a plaintiff must

THOMAS, J., concurring in judgment

show “some ‘disadvantageous’ change in an employment term or condition.” *Ante*, at 5 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998)).

The Court insists that the Eighth Circuit must have demanded more given the weight of Muldrow’s allegations. Specifically, the Court underscores Muldrow’s claims that the City of St. Louis “moved [her] from a plainclothes job in a prestigious specialized division” with a take-home car and a regular schedule, to a “uniformed job supervising one district’s patrol officers,” with no take-home car and an irregular schedule. *Ante*, at 10. But, most of those allegations are forfeited or attributable to a nonparty, the Federal Bureau of Investigation. See 2020 WL 5505113, *9, n. 20 (ED Mo., Sept. 11, 2020) (observing that Muldrow did not raise arguments based on “having to return her take-home [car],” “changes to her schedule, including having to work weekends,” or “having to work in plain clothes”); 30 F. 4th, at 689 (concluding that “the FBI had the sole authority to revoke” Muldrow’s plainclothes and take-home car privileges). Before the Eighth Circuit, Muldrow argued only that the City moved her to a job that was “more administrative and less prestigious.” *Id.*, at 688. Her “only evidence” in support of that argument was “her own deposition testimony,” which neither the District Court nor the Eighth Circuit found persuasive. *Ibid.* And, Muldrow’s testimony certainly did not establish any “proof of harm resulting from [her] reassignment.” *Ibid.* After the transfer, Muldrow’s “pay and rank remained the same, she was given a supervisory role, and she was responsible for investigating violent crimes, such as homicides and robberies.” *Ibid.* Muldrow even conceded that the transfer “did not harm her future career prospects.” *Ibid.* At most, then, Muldrow “expresse[d] a mere preference for one position over the other.” *Id.*, at 689.

Muldrow failed to prove that there was any nontrifling change in her job’s prestige—which was her lone theory of

THOMAS, J., concurring in judgment

harm. *Id.*, at 688–689. The Eighth Circuit rejected Muldrow’s adverse employment action claim accordingly. I fail to see how the Eighth Circuit’s reasoning—that a plaintiff must offer colorable evidence of harm—is equivalent to the heightened-harm requirement the Court concludes the Eighth Circuit applied. *Ante*, at 10 (agreeing that “[t]he transfer must have left [Muldrow] worse off”).

All that said, I recognize that the terms “material” and “significant” can (but do not always) imply a heightened-harm requirement. Although I find it unlikely, it is possible that the Eighth Circuit had such a stringent test in mind when it stated that a plaintiff must show a “‘materially significant disadvantage.’” 30 F. 4th, at 688. I thus agree to vacate and remand to the extent the Eighth Circuit’s analysis is inconsistent with a more-than-trifling-harm requirement.

ALITO, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

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APPEALS FOR THE EIGHTH CIRCUIT

[April 17, 2024]

JUSTICE ALITO, concurring in the judgment.

I agree with the judgment in this case. Assuming without deciding that all the facts mentioned by the Court are relevant and properly presented, petitioner’s transfer altered the “terms” or “conditions” of her employment, 42 U. S. C. §2000e–2(a)(1), and therefore she can prevail if she can prove that she was transferred because of her sex.

I do not join the Court’s unhelpful opinion. For decades, dozens of lower court judges, with a wealth of experience handling Title VII cases, have held that not every unwanted employment experience affects an employee’s “terms” or “conditions” of employment. The lower courts have used various verbal formulations to express this point, and the Court, dubious about the words they had selected, granted review to provide guidance. Now, after briefing and argument, that guidance is as follows: Title VII plaintiffs must show that the event they challenge constituted a “harm” or “injury,” but that the event need not be “significant” or “substantial.” See *ante*, at 10–11.

I have no idea what this means, and I can just imagine how this guidance will be greeted by lower court judges. The primary definition of “harm” is “physical or mental damage,” and an “injury” is defined as “an act that damages, harms, or hurts: an unjust or undeserved infliction of

ALITO, J., concurring in judgment

suffering or harm.” Webster’s Third International Dictionary 1034, 1164 (1976). These definitions incorporate at least some degree of significance or substantiality. We do not typically say that we were harmed or injured by every unwanted experience. What would we think if a friend said, “I was harmed because the supermarket had run out of my favorite brand of peanut butter,” or, “I was injured because I ran into three rather than the usual two red lights on the way home from work”?

I see little if any substantive difference between the terminology the Court approves and the terminology it doesn’t like. The predictable result of today’s decision is that careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years.

KAVANAUGH, J., concurring in judgment

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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[April 17, 2024]

JUSTICE KAVANAUGH, concurring in the judgment.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U. S. C. §2000e–2(a)(1). The question presented in this case is whether transferring an employee—for example, changing an employee’s job responsibilities or job location—on the basis of race, color, religion, sex, or national origin violates Title VII. The answer is yes.

I therefore agree with the straightforward opinion jointly authored by Judge Tatel and Judge Ginsburg for the en banc D. C. Circuit. See *Chambers v. District of Columbia*, 35 F. 4th 870 (2022). As that court explained, even when a transfer does not change an employee’s compensation, a transfer does change the employee’s terms, conditions, or privileges of employment. See *id.*, at 874–879. Therefore, a transfer made on the basis of the employee’s race, color, religion, sex, or national origin violates Title VII. See *id.*, at 874–875.

As I see it and as the D. C. Circuit saw it, the issue here is not complicated. Suppose that an employer says to an employee in the Columbus office: “We are transferring you

KAVANAUGH, J., concurring in judgment

to the Cincinnati office because you are black. But your compensation will not change.” Does that violate Title VII? Of course it does. To begin with, the employer has treated the employee differently because of race. To be sure, the fact that a transfer may not involve a change in compensation can affect the amount of any damages, as Muldrow’s attorney acknowledged. See Tr. of Oral Arg. 41–42. But a transfer changes the terms, conditions, or privileges of employment. Therefore, a discriminatory transfer violates the statute. “The plain text of Title VII requires no more.” *Chambers*, 35 F. 4th, at 875.¹

Unlike the D. C. Circuit, some Courts of Appeals have held that discriminatory transfers are not prohibited by Title VII unless the transfer also causes significant employment disadvantage. *Ante*, at 4–5, n. 1. Today, this Court definitively rejects those rulings. *Ante*, at 6, 7, n. 2. I fully agree with the Court on that point.

But the Court’s opinion then goes on to require that a plaintiff in a discriminatory-transfer case show at least “some harm” beyond the harm of being transferred on the basis of race, color, religion, sex, or national origin. *Ante*, at 6. I disagree with the Court’s new some-harm requirement. No court has adopted a some-harm requirement, and no party or *amicus* advocated that requirement to this Court. More to the point, the text of Title VII does not require a separate showing of some harm. The discrimination is harm. The only question then is whether the relevant employment action changes the

¹To be sure, the employment action in a transfer case must actually be a transfer (or denied transfer), which requires a change (or denied change) in the compensation, terms, conditions, or privileges of employment. See Brief for District of Columbia et al. as *Amici Curiae* 17–18. There may be edge cases about what qualifies as a transfer. But as the Solicitor General notes, a change in an employee’s job location or job responsibilities readily qualifies. See Brief for United States as *Amicus Curiae* 11, 22.

KAVANAUGH, J., concurring in judgment

compensation, terms, conditions, or privileges of employment. A transfer does so. Therefore, as the D. C. Circuit explained, a transfer on the basis of race, color, religion, sex, or national origin is actionable under Title VII. *Chambers*, 35 F. 4th, at 874–879.

All of that said, the Court’s new some-harm requirement appears to be a relatively low bar. Importantly, the Court emphasizes that “some harm” is less than significant harm, serious harm, or substantial harm. *Ante*, at 6. Therefore, anyone who has been transferred because of race, color, religion, sex, or national origin should easily be able to show some additional harm—whether in money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like. So even though I respectfully disagree with the Court’s new some-harm requirement, I expect that the Court’s approach and my preferred approach will land in the same place and lead to the same result in 99 out of 100 discriminatory-transfer cases, if not in all 100.


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New York state can enforce many gun restrictions, US appeals court rules

By Jonathan Stempel

October 24, 2024 4:16 PM EDT · Updated 11 days ago



[1/2] A sign informs about the "Gun Free Zone" in the Times Square area of New York City, U.S., March 15, 2024. REUTERS/Shannon Stapleton/File Photo [Purchase Licensing Rights](#) 



NEW YORK, Oct 24 (Reuters) - A federal appeals court upheld large portions of an expansive New York state gun control law on Thursday, saying the state can ban people from carrying weapons in "sensitive" locations such as schools, parks, theaters, bars and Times Square.

In a 246-page decision, the 2nd U.S. Circuit Court of Appeals in Manhattan also let licensing officials prevent people they consider dangerous from using guns in public, by requiring gun applicants to show they have "good moral character."

But the three-judge panel also rejected parts of the 2022 law, including a gun ban on private properties that are normally open to the public, such as gas stations and supermarkets.

The panel had ruled the same way in [December](#), but revisited the matter after the U.S. Supreme Court - in a different case - clarified the constitutional protections afforded to gun owners.

"The overall message of this case is that the careful, thoughtful, public safety driven law in New York is consistent with the 2nd Amendment," said David Pucino, legal director of the Giffords Law Center to Prevent Gun Violence, in an interview.

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Lawyers for gun owners who challenged the law had no immediate comment.

"This decision is another victory in our effort to protect all New Yorkers from the scourge of gun violence," New York Attorney General Letitia James, a Democrat, said in a statement. "Commonsense gun safety legislation helps protect New Yorkers."

Governor Kathy Hochul, a Democrat, signed the law passed by the state's Democratic-controlled legislature on July 1, 2022.

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The signing came one week after the Supreme Court struck down a different, more than century-old state law restricting the carrying of guns outside the home.

That decision, *New York State Rifle & Pistol Association v Bruen*, was a landmark that expanded Americans' 2nd Amendment rights to arm themselves in public. It also required courts to look for historical analogues to justify new gun restrictions.

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FRUSTRATION AND PRAISE

In June, however, the Supreme Court [limited the Bruen decision](#) by upholding a federal ban on gun ownership by people subject to restraining orders for domestic violence.

The Supreme Court then ordered the Manhattan appeals court to review the 2022 New York law in light of that decision, *U.S. v. Rahimi*.

In Thursday's decision, the appeals court said the Supreme Court analysis in the *Rahimi* case "supports our prior conclusions."

Erich Pratt, senior vice president at Gun Owners of America, whose California affiliate was involved in the case, in a statement called the decision "incredibly frustrating" and a "slap in the face" to the Supreme Court and New York gun owners.

"We will continue the fight against Governor Hochul and anti-gun legislators in Albany until New Yorkers can finally carry for self-defense without infringement," he said.

Eric Tirschwell, chief litigation counsel for Everytown for Gun Safety, in a statement said the decision confirms that gun rights' advocates' "reckless efforts to dismantle public safety measures" are inconsistent with Supreme Court precedents.

The appeals court returned the case to U.S. District Judge Glenn Suddaby in Syracuse, New York, who blocked much of the New York law in October 2022.

The case is *Antonyuk et al v James et al*, 2nd U.S. Circuit Court of Appeals, Nos. 22-2908, 22-2972.

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