22-2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAUREEN M. BILLINGS,

Plaintiff-Appellant

v.

ROGER A. MURPHY, PAUL J. ARTUZ, DIANE CURRA, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Defendants-Appellees

(*see inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

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(*continuation of caption)*

v.

STATE OF NEW YORK,

Defendant

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INTEREST OF THE UNITED STATES

The United States has a direct and substantial interest in the proper interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The Attorney General and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibility under Title VII. See 42 U.S.C. 2000e-5(a) and (f)(1). This case presents the important question of what an employee must plead to state a claim under Section 703(a)(1) of Title VII based on an

employer's refusal to reasonably accommodate an employee's religious practice. The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Section 703(a)(1) of Title VII prohibits an employer from discriminating against an employee with respect to her "terms, conditions, or privileges of employment" because of the employee's religious observance or practice, unless the employer shows that it cannot reasonably accommodate the employee's religious observance or practice without an undue hardship. 42 U.S.C. 2000e-2(a)(1), 2000e(j).

Plaintiff Maureen Billings filed a Section 703(a)(1) religious discrimination claim against her employer, alleging that as part of a required safety demonstration, her male supervisor denied her request to remove her hijab in front of a female supervisor, and instead required her to remove it in front of him, in violation of her religious practice. JA 23-24.[1] As relevant here, the district court dismissed Billings's claim, concluding that it failed to allege that a "material adverse event" occurred "as a result of the denial of the accommodation." JA 87.

The United States addresses the following question only:

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[1] Citations to "JA __" are to the Joint Appendix, and citations to "Doc. __, at __" are to the district court docket in this case, *Billings* v. *New York State Dep't of Corr. and Comm. Supervision*, No. 7:19-cv-11796 (S.D.N.Y.).

Whether the district court erred in concluding that the denial of a religious accommodation is not actionable under Section 703(a)(1) unless the plaintiff pleads that a further "material adverse event" occurred as a result of the employer's refusal to grant a reasonable religious accommodation.[2]

STATEMENT OF THE CASE

1. Statutory Background

Section 703(a)(1) of Title VII makes it an unlawful employment practice 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 * * * religion." 42 U.S.C. 2000e-2(a)(1). Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

2. Procedural History

a. Plaintiff Maureen Billings is a practicing Muslim who works as a corrections officer for the New York State Department of Corrections (DOC).

[2] The United States takes no position on the ultimate merits of Billings's Title VII claims or on any other issue raised on appeal.

JA 79. In accordance with her religious practice, Billings wears a hijab in public. JA 79. Billings requested permission to wear a hijab at work. JA 79. The DOC's Office of Diversity Management Office sent a letter granting Billings's request to wear a hijab at work, subject to certain conditions, including: (1) the hijab must be tucked under her uniform shirt, (2) the hijab must be no larger than three feet by three feet, and (3) it must be worn in a way that it would immediately tear away should anyone grab it. JA 79. The letter also stated that before wearing a hijab at work, Billings would have to demonstrate to a supervisor that her hijab met these requirements. JA 79.

Following receipt of the letter, Billings was summoned to the office of a male supervisor, Captain Paul Artuz, to demonstrate that her hijab could be pulled off quickly and safely. JA 80. Billings stated that she could perform the required safety demonstration in front of a female supervisor, but that her religion prohibited her from removing the hijab in front of a man who is not a member of her family. JA 80. Artuz insisted that Billings remove her hijab in his presence, claiming that there were no female supervisors available, despite the fact that two female supervisors were on duty. JA 80. Artuz told Billings that she could either "(1) take the hijab off and go to work, (2) keep the hijab on, go home and 'deal with the consequences,' or (3) demonstrate that the hijab could be pulled off

quickly without choking her." JA 80. Billings thus removed her hijab in front of Artuz and retained her job. JA 80

b. Billings sued the DOC under Title VII. JA 36-39. As relevant here, Billings alleges that the DOC discriminated against her in violation of Section 703(a)(1) by denying her request to remove her hijab in the presence of a female supervisor. JA 23-24. The DOC moved to dismiss the complaint under Rule 12(b)(6), arguing that Billings did not sufficiently allege a Title VII religious discrimination claim. Doc. 47, at 9.

c. The district court granted the motion to dismiss. JA 78, 84-87. The court began its analysis by stating that, under Title VII, "[a]n employer discriminates against an employee 'by taking an adverse employment action against him.'" JA 85 (quoting *Vega* v. *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015)). The court explained that an "adverse employment action" is defined under circuit precedent as a "materially adverse change in the terms and conditions of employment" that "is more disruptive than a mere inconvenience or an alteration of job responsibilities." JA 85 (quoting *Vega*, 801 F.3d at 85). While the court acknowledged that the "[d]enial of an accommodation may be considered an adverse action," and while it seemingly accepted Billings's allegation that she was denied an accommodation, it also stated that an employee "must still allege a material adverse event as a result of the denial of the accommodation." JA 86-87

(citations omitted). The court accordingly dismissed Billings's discrimination claim for failure "to allege any material adverse change to her employment in connection with her request to have a female supervisor conduct her hijab demonstration," explaining that Billings "complied with Defendant Artuz's instructions and the conditions for her to wear the hijab were deemed satisfied." JA 87.

d. Billings filed a timely notice of appeal. JA 55.

SUMMARY OF ARGUMENT

The denial of a reasonable religious accommodation, absent undue hardship on the employer, constitutes religious discrimination with respect to the "terms" or "conditions" of employment under Section 703(a)(1) of Title VII. 42 U.S.C. 2000e-(2)(a)(1), 2000e(j). The district court held that, to state a claim for religious discrimination under Section 703(a)(1), Billings was required to plead that she suffered a "material adverse event" beyond the denial of a requested accommodation. This Court should correct that error.

The requirement that Billings allege a "material adverse event" beyond the denial of a reasonable religious accommodation conflicts with Title VII's statutory text and purpose and with Supreme Court precedent. In *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), the Supreme Court explained that claims brought under Section 703(a)(1) for failure to grant a religious accommodation,

like any other disparate treatment claims brought under Section 703(a)(1), have only three elements. *Abercrombie*, 575 U.S. at 772. To state a claim, a plaintiff is required to plead: (1) discrimination in the "terms, conditions, or privileges of employment" (2) "because of" (3) religion including religious practice. See *ibid.* Thus, under Section 703(a)(1)'s plain text, Billings was only required to allege religious discrimination with respect to her "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). Read according to its plain meaning, this language reflects "an expansive concept," *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986), that "strike[s] at the full spectrum" of prohibited disparate treatment, *id.* at 64. Requiring an employee to submit, without accommodation, to a work rule that conflicts with her religious practice necessarily alters the terms or conditions of employment. As then-Judge Alito explained, "[i]ntentionally pressuring a person to choose between faith and career * * * has a * * * direct effect on the conditions of employment." *Abramson* v. *William Patterson Coll.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring). This is all that Section 703(a)(1) requires.

Even assuming that Section 703(a)(1) requires some showing of material adversity, but see *Chambers* v. *District of Columbia*, 35 F.4th 870, 874-875 (D.C. Cir. 2022) (en banc), this Court has described a "materially adverse change in the terms and conditions of employment" as one that is "more disruptive than a mere

inconvenience or an alteration of job responsibilities." *Vega* v. *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (internal quotation marks and citation omitted). Forcing an employee to choose between the requirements of their job and the requirements of their faith is inherently "more disruptive than a mere inconvenience." *Id.* at 640. Accordingly, the district court erred in dismissing Billings's claim.

Finally, because Billings's claim satisfies this Court's "adverse employment action" standard under Section 703(a), it need not resolve in this case whether that standard aligns with Title VII's text, purpose, and Supreme Court precedent. The United States would urge this Court, however, to join other circuits in reconsidering its interpretation of Section 703(a)(1)'s "terms, conditions, or privileges of employment" element at an appropriate time.

ARGUMENT

THE DENIAL OF A REASONABLE RELIGIOUS ACCOMMODATION CONSTITUTES DISCRIMINATION WITH RESPECT TO THE "TERMS" OR "CONDITIONS" OF EMPLOYMENT ABSENT A SHOWING OF UNDUE HARDSHIP

A. Section 703(a)(1) Of Title VII Requires Employers To Make Reasonable Accommodations For Religious Practice Absent A Showing Of Undue Hardship

Section 703(a)(1) of Title VII makes it an "unlawful employment practice" for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" based on certain

protected characteristics, including religion. 42 U.S.C. 2000e-2(a)(1).[3] Under Title VII, religion is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

As the Supreme Court has explained, Title VII does not limit religious discrimination claims "to only those employer policies that treat religious practices less favorably than similar secular practices." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). Rather, "the intent and effect" of Title VII's statutory definition of religion is "to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airways* v. *Hardison*, 432 U.S. 63, 74 (1977); see also *id.* at 75 (stating that "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear"). Accordingly, an

[3] A separate provision of Title VII applies to federal employees, and provides that federal "personnel actions * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). The United States takes no position in this appeal on the proper scope of 42 U.S.C. 2000e-16(a), which is not at issue.

"employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.'" *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 68 (1980) (alterations in original) (quoting 42 U.S.C. 2000e(j)); see also *Knight* v. *State Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) ("Employers are required to reasonably accommodate an employee's religion unless doing so would constitute an undue hardship.").

B. Title VII's Text, Purpose, And Precedent Make Clear That An Employee Need Not Allege A "Material Adverse Event" Beyond The Denial Of A Reasonable Religious Accommodation To State A Claim Under Section 703(a)(1)

In *Abercrombie*, the Supreme Court explained that claims brought under Section 703(a)(1) for failure to grant a religious accommodation, like any other disparate treatment claims brought under Section 703(a)(1), have just three elements. 575 U.S at 772. Section 703(a)(1) forbids employers to: (1) discriminate in the terms, conditions or privileges of employment "(2) 'because of' (3) 'such individual's . . . religion' (which includes his religious practice)." *Ibid.* (alteration in original). The district court effectively imposed a fourth element, requiring Billings to plead "a material adverse event as a result of the denial of the accommodation." JA 87. But "Title VII contains no such limitation." *Abercrombie*, 575 U.S. at 773; see *ibid.* (declining to read an unstated requirement into Title VII).

Thus, to state a claim under Section 703(a)(1), Billings only needed to allege that her employer's actions discriminated against her on the basis of religion with respect to her "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). Congress did not define the phrase "terms, conditions, or privileges of employment" in Title VII. "When a term goes undefined in a statute," courts give "the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Read according to its plain meaning, the key statutory phrase—"terms, conditions, or privileges of employment"—"is an expansive concept" with a broad sweep. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986) (citation omitted). Indeed, the Supreme Court has explained that the statutory phrase "terms, conditions, or privileges of employment" evinces Congress's intent "to strike at the entire spectrum" of prohibited disparate treatment. *Id.* at 64 (citation omitted). Accordingly, for example, "the language of Title VII is not limited to 'economic' or 'tangible' discrimination." *Ibid.*; see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (confirming that the statutory phrase "terms, conditions, or privileges" is not limited to "the narrow contractual sense") (citation omitted).

Section 703(a)(1)'s requirement that an employee plead discrimination with respect to her "terms, conditions, or privileges of employment" will be satisfied in practically all cases where an employer either denies outright a requested

reasonable religious accommodation or instead requires an employee to accept only a partial accommodation. This is because the very purpose of a requested religious accommodation is to alter the terms or conditions of employment to eliminate conflict with an employee's religious practice. As then-Judge Alito explained, "[i]ntentionally pressuring a person to choose between faith and career * * * has a * * * direct effect on the conditions of employment." *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring). Thus, "Title VII does not permit an employer to manipulate job requirements for the purpose of putting an employee to the 'cruel choice' between religion and employment." *Ibid.* (citation omitted); see also EEOC Compliance Manual on Religious Discrimination § 12-IV(A) text surrounding nn. 210-212 (Jan. 15, 2021) (explaining that requiring an employee to submit, without accommodation, to "a work rule [that] conflicts with [one's] religious beliefs necessarily alters the terms and conditions of * * * employment").[4]

This "interpretation fully comports with the statute's overall structure and purpose." *Lawson* v. *Washington*, 319 F.3d 498, 501 (9th Cir. 2003) (Berzon, J., dissenting from denial of reh'g en banc). Title VII forbids employers not only from discharging or refusing to hire employees for discriminatory reasons, but also

[4] Available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

from "*otherwise * * * discriminat[ing]* against any individual with respect to his compensation, *terms, conditions*, *or privileges of employment*, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1) (emphasis added). By defining religious discrimination under Title VII to include failures to accommodate, see 42 U.S.C. 2000e(j), an employer who unreasonably fails to accommodate religious practice absent undue hardship discriminates on the basis of religion in setting the terms of employment. There is no textual basis for requiring an employee to be subjected to a further change in her terms or conditions of employment—such as by suffering a loss of wages, being subjected to less favorable working conditions, or facing discipline or termination—as a prerequisite to bringing a religious discrimination claim under Section 703(a)(1). Accordingly, the denial of a reasonable accommodation absent a showing of undue hardship is the prohibited employment action, and no further showing of an additional, material adverse event is required.

C. The District Court Erred In Dismissing Billings's Section 703(a)(1) Religious Discrimination Claim For Failure To Allege A "Material Adverse Event"

The district court therefore erred in dismissing Billings's Section 703(a)(1) claim. Billings alleges, and the district court appeared to accept, that the requirement to conduct the safety demonstration and remove her hijab in front of a male supervisor effectively made the violation of her religious practice a condition

of her employment, in that Billings alleges that she was forced to comply under threat of discipline. JA 86-87. The district court nonetheless dismissed Bilings's claim because she did not allege that a "material adverse event" occurred "as a result of the denial of the accommodation." JA 87. Under the court's reasoning, Billings does not have a Section 703(a)(1) claim because she submitted to the requirement to remove her hijab rather than face discipline or other potential adverse consequences. JA 87. But as explained, the denial of a reasonable religious accommodation absent a showing of undue hardship constitutes discrimination with respect to the "terms, conditions, or privileges of employment" under Title VII. That Billings complied with the requirement to remove her hijab, in violation of her religious practice, rather than potentially face discipline or other employment consequences does not mean that she did not suffer discrimination in her terms or conditions of employment. See *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988) ("An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy."), cert. denied, 489 U.S. 1077 (1989). Section 703(a)(1) does not require employees "to wait for *other* unfavorable employment actions before they can take steps to protect their interests." *Lawson*, 319 F.3d at 502 (Berzon, J., dissenting from denial of reh'g en banc).

In holding otherwise, the district court purported to apply this Court's requirement that an employee allege a "materially adverse change in the terms or conditions of employment." JA 85 (quoting *Vega* v. *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015)). But even assuming that this requirement comports with Title VII's text, purpose, and Supreme Court precedent, but see Section D, *infra*, dismissal of Billings's claim was not required under binding circuit law. As the district court acknowledged, this Court has explained that a "materially adverse change in the terms and conditions of employment" is one "which is more disruptive than a mere inconvenience or an alteration of job responsibilities." JA 85 (quoting *Vega*, 801 F.3d at 85); see also *Galabya* v. *New York City Bd. Of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (applying the same standard to claims under the Age Discrimination in Employment Act). When Congress amended Title VII in 1972 to add the definition of religion provided in Section 701(j), 42 U.S.C. 2000e(j), it did so to ensure that religious accommodations would be available to eliminate "conflict[s] between employment requirements and religious practices." *Ansonia*, 479 U.S. at 72. Being forced to work without a reasonable religious accommodation is therefore inherently "more

disruptive than a mere inconvenience." *Vega*, 801 F.3d at 85. Given this inherent harm, the district court erred in dismissing Billings's claim.

To be sure, in *Bowles* v. *New York City Transit Authority*, 285 F. App'x 812 (2d Cir. 2008), this Court stated in a non-precedential opinion (see 2d Cir. Local Rule 32.1.1.), that the plaintiff, who did not receive a requested religious accommodation as to his work schedule for a number of months before his request ultimately was granted, failed to show that he suffered "any action adversely affecting []the terms and conditions" of his employment. *Id.* at 814. Before receiving his requested accommodation, one of Bowles's supervisors stated that "if he wanted weekends off," he should "seek a job in the private sector," which Bowles "construe[d] as a threat of termination." *Ibid.* (citation omitted). Given that Bowles ultimately received an accommodation, and this Court stated that his supervisor's comments did not "ripen[] into any further action," *ibid.*, *Bowles* is best read as deciding, on the facts of that case, that any delay in granting the plaintiff's reasonable accommodation did not actually affect his terms or conditions of employment. While the correctness of this decision may be debatable, this Court has never held in a published or unpublished decision that a plaintiff who has alleged that she was completely denied a reasonable accommodation has failed to state a religious discrimination claim under Section 703(a)(1).

In deciding this case, the Court should clarify that the alleged denial of any reasonable religious accommodation will necessarily involve more harm than a "mere inconvenience" and therefore will survive a motion to dismiss. *Vega*, 801 F.3d at 85. A plaintiff's burden in alleging such harm is particularly light at this stage, where a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face"—*i.e.*, "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); see also *Littlejohn* v. *City of New York*, 795 F.3d 297, 310-311 (2d Cir. 2015) (explaining *Iqbal*'s application to Title VII disparate treatment claims).

D. This Court Should Reconsider Its Precedent At An Appropriate Time

Although this Court need not revisit its "adverse employment action" standard for other types of Section 703(a)(1) claims to resolve this case, since an employee who has been forced to work without a reasonable religious accommodation will be able to satisfy this circuit's required showing of material adversity, it should do so at an appropriate time.

The United States has repeatedly argued that under Section 703(a)(1)'s plain text, any requirement to prove "material" or "tangible" harm beyond being

subjected to a discriminatory employment action is incorrect.[5] As Judges Ginsburg and Tatel recently explained for the D.C. Circuit sitting en banc, "[o]nce it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete." *Chambers* v. *District of Columbia*, 35 F.4th 870, 874-875 (D.C. Cir. 2022) (en banc). That is so because "Title VII tolerates no [prohibited] discrimination, subtle or otherwise." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973). By prohibiting discrimination relating to the terms, conditions, or privileges of employment, "Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). "The emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment." *Trans World Airlines*, 432 U.S. at 71 (emphasis added).

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[5] In briefs before the Supreme Court and throughout the courts of appeals, the United States has repeatedly urged that discriminatory "treatment with respect to a formal aspect of employment" is "irreconcilable" with Section 703(a)(1)'s text and objectives and that no heightened showing of harm is required. See Br. in Opp'n at 13-14, *Forgus* v. *Shanahan*, 141 S. Ct. 234 (2020) (No. 18-942) (denying certiorari); U.S. Br. as Amicus Curiae at 14, *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (No. 18-1401) (dismissing certiorari) (2020 WL 1433451); U.S. Br. as Amicus Curiae at 2-3, *Hamilton* v. *Dallas Cnty.*, 42 F.4th 550 (5th Cir. 2022) (No. 21-10133) (citing filings in court of appeals cases).

An employee who can satisfy Article III's standing requirements and show discriminatory treatment in her terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin has necessarily been subjected to meaningful harm under Title VII. As Judge Sutton explained in *Threat* v. *City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021), references to "adverse employment actions" and "materiality" in Section 703(a)(1) case law should be understood only as "shorthand for the operative words in the statute," requiring proof of discrimination in the plaintiff's terms, conditions, or privileges of employment that is sufficient to cause "an Article III injury." *Threat*, 6 F.4th at 678-679. This Court should, at an appropriate time, join the D.C. and Sixth Circuits in clarifying its precedent interpreting Section 703(a)(1)'s "terms, conditions, or privileges of employment" element.

CONCLUSION

The United States respectfully urges that this Court should reverse on the issue addressed above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4152 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Date: January 4, 2023

CERTIFICATE OF SERVICE

I certify that on January 4, 2023, I filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney