No. 26-10080

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Tim Gooden,
Plaintiff-Appellant,

v.

Lhoist North America of Texas, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

This appeal raises important questions concerning: (1) the proper standard for establishing an adverse employment action in employment-discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and, by extension, 42 U.S.C. § 1981; and (2) the proper standard for evaluating comparator evidence.

The Equal Employment Opportunity Commission (EEOC) administers and enforces Title VII and thus has a substantial interest in proper resolution of these questions. *See* 42 U.S.C. § 2000e-5(a), (f)(1). The EEOC files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Whether failing to assign an employee to a role that involves different responsibilities and work hours can constitute an adverse employment action under *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024).

2. Whether this Court should reconsider its "nearly identical" standard for evaluating comparator evidence.

[1] The EEOC takes no position on any other issues in this appeal.

STATEMENT OF THE CASE

A. Factual Background[2]

Tim Gooden, who is African American, began working as a truck driver at Lhoist North America of Texas, LLC in 2005. ROA.1260, 1298. Gooden worked out of the company's terminals in Texas and his work generally involved hauling and delivering mineral loads. ROA.1260, 1299-1300.

Over the years, Gooden sought opportunities for increased responsibility by proposing new roles for himself. In 2022, for instance, Gooden proposed a new "[F]leet [L]ead" or "Fleet Coordinator" role. ROA.1262, 1324. As Gooden envisioned it, the role would have provided him with more hours and entailed performing some of the same tasks as a supervisor: the Fleet Lead would arrive at work "first," ensure that trucks and equipment were "ready to go" for the day, and "basically do everything a fleet supervisor should do before the fleet supervisor got there." ROA.1324-1325.

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[2] Because this appeal arises from a grant of summary judgment, the record must be viewed in the light most favorable to Gooden and all reasonable inferences must be drawn in his favor. *See Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 399 (5th Cir. 2021).

According to Gooden, Lhoist created the Fleet Lead role but gave it to a White employee who had less experience and education. ROA.1262, 1286, 1327-1328. For its part, Lhoist maintains that the role was not a separate position or promotion, did not include an increased pay *rate*, was non-managerial, and carried no supervisory authority. ROA.652. The role would have nonetheless supplemented Gooden's existing driver position. ROA.651-652.

This was not the first time Lhoist had created a role Gooden had proposed and given it to a White employee. On two earlier occasions, Gooden had respectively proposed new "Dispatcher" and "Site Coordinator" roles.[3] ROA.1262. Like the Fleet Lead role, these roles would have provided Gooden with more hours or more responsibilities, including helping supervisors with their tasks or traveling to work sites to coordinate other drivers. ROA.1262, 1309-1311, 1318-1321.

[3] The district court referred to the Dispatcher role as the "2017 role," and the Site Coordinator role as the "2020 role." *See* ROA.2908-2909. Although the record does not show definitively when Gooden proposed these two roles, the parties agreed that they fell outside the statute of limitations for § 1981 claims. *See* ROA.672-673, 1710; Appellant Br. at 15 n.1. But Gooden argued that they remained relevant as "background evidence" to support his timely claim premised on the Fleet Lead role. ROA.1710.

Lhoist created both roles but gave them to White employees who had less seniority or experience than Gooden. ROA.1262, 1311-1312, 1323. When Gooden asked his supervisor why he did not get the Dispatcher role, the supervisor responded: "No black man is going to get this position. Any position in the office." ROA.1315. The supervisor also suggested this directive may have come from higher levels of management, stating: "I'm just a messenger." ROA.1315.

Lhoist's failure to assign Gooden to these roles may have diminished his prospects for advancement by depriving him of relevant work experience. In 2023, for instance, Gooden applied for a promotion to a manager position. ROA.664. Lhoist informed Gooden that it "was looking for a candidate that had held a similar, multi-site manager role in the past, with strong leadership and management experience." ROA.664. Believing that "Gooden lacked that experience, Lhoist did not move forward with his application." ROA.664; *see also* ROA.1511 ("We were looking for someone who had multisite management, leadership experience, and Mr. Gooden did not have that."); ROA.1450 ("[Gooden] does not have the Operations Leadership experience required for this role."). Instead, Lhoist gave the position to a White applicant. ROA.665, 1265, 1511.

Less than a year later, Lhoist fired Gooden. ROA.668. Lhoist maintains that it investigated, disciplined, and ultimately fired Gooden for alleged misconduct. *See generally* ROA.657-668. Gooden maintains that Lhoist did so because he had complained about racial discrimination and retaliation. *See generally* ROA.1263-1267.

B. District Court Decision

Gooden filed this action, asserting claims for race discrimination and retaliation under 42 U.S.C. § 1981. ROA.18-19, 45-46, 274, 280-281. Gooden contended, among other things, that Lhoist had discriminated against him by failing to assign him to the Fleet Lead role (referring to it as the "Fleet Coordinator" role). ROA.1709-1710. Invoking the Supreme Court's recent decision in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), which held that a Title VII plaintiff need only show "some harm" with respect to an identifiable term or condition of employment, Gooden argued that this failure was an adverse employment action. ROA.1710. Gooden cited as background evidence Lhoist's earlier failures to assign him to the Dispatcher and Site Coordinator roles, but he made clear that he was not separately pursuing discrimination claims premised on these roles because they fell outside the statute of limitations for § 1981 claims. ROA.1710;

Appellant Br. at 15 n.1. Apart from his failure-to-assign claim, Gooden also pursued discrimination and retaliation claims premised on various other employment actions. ROA.1709, 1713.

The district court granted summary judgment to Lhoist. ROA.2916-2917. As relevant, the court rejected Gooden's discrimination claim related to the Fleet Lead role on the sole ground that the failure-to-assign was not an adverse employment action. ROA.2909-2910. Although the court initially recited *Muldrow*'s "some harm" language, it went on to say that "the challenged action must *meaningfully* alter the terms of employment and injure the employee." ROA.2909 (emphasis added) (citation omitted).

The court reasoned that Lhoist's failure to assign Gooden to the Fleet Lead role did not meaningfully alter his employment or cause him injury because the role "involved additional responsibilities rather than a separate job or promotion," and "[t]he employee assigned these duties received no pay increase, held no managerial title, and exercised no supervisory authority." ROA.2909. And despite Gooden's express disavowal of claims premised on Lhoist's earlier failures to assign him to the Dispatcher or Site Coordinator roles, the district court appeared to believe that Gooden was pursuing such claims and rejected them on the grounds that they were

untimely or, alternatively, not adverse employment actions. ROA.2908-2909.

In assessing Gooden's discrimination claims premised on other employment actions, the court also required Gooden to show that his proffered comparator was "similarly situated" to himself, which it defined to mean "nearly identical." ROA.2911 (citation omitted). The court then determined that Gooden could not make out a prima facie case of discrimination because his proposed comparator was not nearly identical. ROA.2911-2912.

This appeal followed. ROA.2918-2919.

SUMMARY OF ARGUMENT

Contrary to the district court's reasoning, failing to assign an employee to a role that would have involved different responsibilities and work hours can constitute an adverse employment action even when it does not affect rank or pay. Under *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), an employer's action is sufficiently adverse if it regards one's terms or conditions of employment and causes "some harm." Here, a reasonable jury could find that Lhoist's failure to assign Gooden to the Fleet Lead role both affected his terms or conditions of employment and caused him

harm—all that *Muldrow* requires. The district court applied an incorrect legal standard by requiring Gooden to show that Lhoist's actions "meaningfully altered" his employment. Accordingly, the grant of summary judgment on Gooden's failure-to-assign claim should be reversed.

Additionally, the district court applied a "nearly identical" standard for assessing comparator evidence that, while compelled by binding precedent, is legally flawed. The nearly-identical standard—which requires a plaintiff to show that he and his proposed comparator are, in relevant respects, nearly identical or engaged in nearly identical misconduct—cannot be squared with the plaintiff's ultimate burden in a disparate-treatment case or, more generally, with summary-judgment tenets; it directly conflicts with Supreme Court precedent, which requires only comparably serious misconduct; and it finds no support in statutory text. Accordingly, the EEOC encourages this Court to reconsider its nearly-identical standard at an appropriate time.

ARGUMENT

I. Failing to assign an employee to a role that involves different responsibilities and work hours can constitute an adverse employment action.

Under *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), an adverse employment action is one that causes "some harm" with respect to the terms or conditions of employment. Here, a reasonable jury could find that Lhoist's failure to assign Gooden to the Fleet Lead role both regarded his terms or conditions of employment and caused him harm.

A. An adverse employment action is one that regards the terms or conditions of employment and causes "some harm" or "simple injury."

Race-based employment discrimination claims under Title VII and § 1981 share "identical" elements. *Pratt v. City of Houston*, 247 F.3d 601, 606 n.1 (5th Cir. 2001). This Court thus analyzes claims under both statutes using the same standards. *See Ayorinde v. Team Indus. Servs. Inc.*, 121 F.4th 500, 506 (5th Cir. 2024). To make out a prima facie case of disparate treatment under either statute, a plaintiff must show, among other things, that he suffered an "adverse employment action." *See Yarbrough v. SlashSupport, Inc.*, 152 F.4th 658, 664 (5th Cir. 2025) (§ 1981); *Woods v. STS Servs., L.L.C.*, 164 F.4th 394, 397 (5th Cir. 2026) (Title VII). *Muldrow* therefore

governs in both contexts. *See Dike v. Columbia Hosp. Corp. of Bay Area*, No. 24-40058, 2025 WL 315126, at *4 & n.16 (5th Cir. Jan. 28, 2025) (applying *Muldrow* to claims under Title VII and § 1981).

In *Muldrow*, the Supreme Court clarified that to establish an adverse employment action under Title VII, a plaintiff must show that his employer took an action that caused "some harm respecting an identifiable term or condition of employment." 601 U.S. at 354-55; *see also id.* at 359 (plaintiff "need show only some injury respecting her employment terms or conditions"). Under this "simple injury standard," the Court explained, a plaintiff "does not have to show … that the harm incurred was 'significant' … [o]r serious, or substantial, *or any similar adjective* suggesting that the disadvantage to the employee must exceed a heightened bar." *Id.* at 355-56 & n.2 (emphasis added) (citation omitted). Applying that standard, the Court concluded that a forced transfer that changed a plaintiff's "responsibilities, perks, and schedule" could be an adverse employment action even when the plaintiff's "rank and pay remained the same." *Id.* at 351, 359.

Three aspects of *Muldrow* are important here. First, in adopting a "some harm" standard, *Muldrow* abrogated circuit precedents that imposed

anything more demanding. As the Court stated, "this decision changes the legal standard used in any circuit that has previously required 'significant,' 'material,' or 'serious' injury," and "[i]t lowers the bar Title VII plaintiffs must meet." *Id.* at 356 n.2. Given this lower bar, the Court explained, "many cases will come out differently." *Id.*

Second, *Muldrow*'s "some harm" standard encompasses even intangible consequences. The Court reiterated that "[t]he 'terms [or] conditions' phrase" in Title VII "is not used 'in the narrow contractual sense'" and "it covers more than the 'economic or tangible.'" *Id.* at 354 (first alteration added) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998), and *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

Finally, although *Muldrow* addressed a forced transfer, nothing in Court's reasoning suggests its holding is limited to such actions. To the contrary, the Court "made clear that its interpretation stemmed from Title VII's generally applicable statutory language, … which contains no language requiring plaintiffs to show a high level of harm." *McNeal v. City of Blue Ash*, 117 F.4th 887, 900 (6th Cir. 2024). Accordingly, *Muldrow*'s holding naturally extends to other employment actions as well. *See, e.g.*, *Yates v. Spring Indep. Sch. Dist.*, 115 F.4th 414, 420 (5th Cir. 2024)

(recognizing that reassignments and administrative leave may "constitute adverse employment actions").

B. Failing to assign an employee to a work-related role inherently regards the terms or conditions of employment and often causes harm.

Under *Muldrow*'s "some harm" standard, failing to assign an employee to a role that would have involved different responsibilities and work hours can constitute an adverse employment action even when the assignment would not have affected the employee's rank or pay.

To start, such assignments inherently regard the "terms" or "conditions" of employment because they affect which work-related tasks an employee must perform and when the employee must perform them. *See Muldrow*, 601 U.S. at 351, 359 (transfer implicated terms and conditions of employment where it changed employee's "responsibilities" and "schedule"); *see also id.* at 364 n.1 (Kavanaugh, J., concurring in judgment) (explaining that "a change in an employee's … responsibilities readily qualifies" as a change in the employee's terms or conditions of employment).

Indeed, the responsibilities associated with one's job are, almost tautologically, terms or conditions of one's employment. *See Walsh v. HNTB*

Corp., 169 F.4th 330, 342 (1st Cir. 2026) ("*Muldrow* makes clear that the loss of job duties can constitute an adverse action."); *see also Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc) ("[I]t is difficult to imagine a more fundamental term or condition of employment than the position itself." (citation omitted)). So too is one's work schedule. As this Court has recognized, "[t]he days and hours that one works are quintessential 'terms or conditions' of one's employment." *Hamilton v. Dallas Cnty.*, 79 F.4th 494, 503 (5th Cir. 2023) (en banc); *see also Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) ("How could the *when* of employment not be a *term* of employment?").

Furthermore, failing to assign an employee to a role that offers more responsibility or a different schedule can cause "some harm" even when it has no tangible effect on his employment. A wide range of intangible consequences can amount to "some harm" or "simple injury." *See Muldrow*, 601 U.S. at 354 (Title VII is not limited to "economic or tangible" harms (citation omitted)). As Justice Kavanaugh explained in his concurring opinion in *Muldrow*, employment actions that cause reductions in "prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or

the like" cause some harm and thus may be sufficiently adverse. *Id.* at 365 (Kavanaugh, J., concurring in judgment). In other contexts, the Supreme Court has long recognized similar forms of intangible harm as cognizable injuries. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (recognizing intangible harms as cognizable injuries for purposes of compensatory damages under 42 U.S.C. § 1983); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) ("Various intangible harms can also be concrete.").

When a failure-to-assign causes such harms, it satisfies *Muldrow*'s standard and thus constitutes an adverse employment action.

C. A reasonable jury could find that Lhoist's failure to assign Gooden to the Fleet Lead role caused him harm.

Construed in the light most favorable to Gooden, the facts here could allow a reasonable jury to find that Lhoist's failure to assign him to the Fleet Lead role both affected his terms or conditions of employment and caused him some harm—all that *Muldrow* requires.

As an initial matter, a jury could reasonably find that the responsibilities associated with the Fleet Lead role—some of which were the same tasks performed by supervisors—were more desirable or commanded more respect. *See* ROA.1324-1325. *Muldrow* itself suggests

actions that deprive an employee of more desirable or prestigious responsibilities may cause harm. *See* 601 U.S. at 351, 359 (discussing how transfer diminished plaintiff's duties and responsibilities); *Walsh*, 169 F.4th at 342 ("*Muldrow* makes clear that the loss of job duties can constitute an adverse action."); *see also Hamilton*, 79 F.4th at 509 (Ho, J., concurring) (noting Department of Justice's argument that "work assignments happening on the basis of race are likewise actionable under Title VII" (citation modified)); *Johnson-Lee v. Tex. A&M Univ.-Corpus Christi*, 729 F. Supp. 3d 709, 719 (S.D. Tex. 2024) (recognizing that "undesirable work assignments" may cause more than *de minimis* harm).

Aside from that, a jury could find that excluding Gooden from the Fleet Lead role diminished his prospects for advancement by depriving him of relevant work experience—consequences that were considered sufficiently adverse well before *Muldrow*. *See, e.g.*, *Alvarado v. Tex. Rangers*, 492 F.3d 605, 614 (5th Cir. 2007) (denial of transfer may be an adverse employment action when the position would have provided "greater responsibility or better job duties" or "greater opportunities for career advancement"), *abrogated by Hamilton*, 79 F.4th 494. These harms were not merely speculative. When Lhoist later denied Gooden a promotion to the

manager position he sought, the company expressly cited his lack of managerial and leadership experience—the same kind of experience that the Fleet Lead role could have offered. *See* ROA.664, 1450, 1511; *see also* ROA.1324-1325.

Finally, a jury could find that the failure-to-assign deprived Gooden of more work hours. By itself, a detrimental change (or denied change) to one's work schedule is actionable. *See Hamilton*, 79 F.4th at 503-05; *Threat*, 6 F.4th at 677-80. And although a plaintiff need not show that his employer's action affected his pay, a reduction in hours may have had such an effect here. Lhoist paid Gooden hourly wages, ROA.1320, so fewer hours necessarily meant less pay.

In short, under the correct standard—*Muldrow*'s "some harm" standard"—a reasonable jury could find that Gooden suffered an adverse employment action.[4]

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[4] As noted above, the district court similarly determined that Lhoist's earlier failures to assign Gooden to the Dispatcher and Site Coordinator roles were not adverse employment actions. ROA.2909. Because Gooden did not pursue discrimination claims premised on those roles, however, there was no need for the court to assess whether these failures-to-assign were adverse employment actions. *See* ROA.1710; Appellant Br. at 15 n.1. Additionally, even if these actions fell outside the statute of limitations for § 1981 claims, they remained relevant as "background evidence" to

D. The district court did not properly apply *Muldrow*.

In reaching a contrary result, the district court misarticulated and misapplied *Muldrow*'s "some harm" standard.

Start with the court's articulation of the standard. Although the court initially recited *Muldrow*'s "some harm" language, it went on to say that "the challenged action must *meaningfully* alter the terms of employment and injure the employee." ROA.2909 (emphasis added) (citation omitted).

But that formulation just injects another "adjective [or adverb] suggesting that the disadvantage to the employee must exceed a heightened bar." *Muldrow*, 601 U.S. at 355. After all, "[t]he word 'meaningful' means 'significant,' or 'having a serious, important, or useful quality or purpose.'" *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 101 (D.C. Cir. 2015) (first quoting 9 Oxford English Dictionary 522 (2d ed. 1989) and then quoting New Oxford American Dictionary 1052 (2d ed. 2005)). The district court's "meaningfully alter" formulation is thus

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support his timely claim premised on the Fleet Lead role. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (Title VII does not "bar an employee from using … prior acts as background evidence in support of a timely claim"); *Everett v. Cent. Miss., Inc. Head Start Program*, 444 F. App'x 38, 45 (5th Cir. 2011) (similar).

inconsistent with *Muldrow*'s admonition that a plaintiff need not show a "serious" or "significant" change in employment. *See Strife v. Aldine Indep. Sch. Dist.*, 138 F.4th 237, 249 n.3 (5th Cir. 2025) (under *Muldrow*, "a plaintiff need only show some 'change' initiated by an employer (and not a 'significant change') to substantiate a discrimination claim").[5]

The district court's application of the standard confirms that it understood "meaningful" to mean something akin to serious, significant, or material. The court reasoned that Lhoist's failure to assign Gooden to the Fleet Lead role did not cause him injury because it "involved additional responsibilities rather than a separate job or promotion," and "[t]he employee assigned these duties received no pay increase, held no managerial title, and exercised no supervisory authority." ROA.2909. But

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[5] In *Strife*, this Court reasoned that an employer's delay in granting a request for reasonable accommodation could not sustain a disparate-treatment claim under the Americans with Disabilities Act where the employer ultimately granted the request and "made *no change* to [the plaintiff's] employment terms" while the request was pending. 138 F.4th at 249 & n.3. To be clear, however, the *denial* of a change to an employee's terms or conditions of employment may constitute an adverse employment action. *See Muldrow*, 601 U.S. at 364 n.1 (Kavanaugh, J., concurring in judgment) (Title VII "requires a change (or *denied change*) in the compensation, terms, conditions, or privileges of employment" (emphasis added)).

that logic simply harkens back to the heightened adversity standards that *Muldrow* abrogated. As explained above, under *Muldrow*, a change (or denied change) in job responsibilities can cause some harm even when it does not affect an employee's rank or pay.

This Court's decision in *Harrison v. Brookhaven School District*, 82 F.4th 427 (5th Cir. 2023), on which the district court indirectly relied,[6] does not support a "meaningfully alter" standard. As an initial matter, *Harrison* predated *Muldrow*. Thus, even if it had imposed such a standard, that part of its holding would no longer be good law. *See Thomas v. JBS Green Bay, Inc.*, 120 F.4th 1335, 1337 (7th Cir. 2024) ("Decisions requiring allegations of 'significant' or 'material' injury did not survive *Muldrow*.").

But that is beside the point because *Harrison* did not endorse a "meaningful" or "material" threshold for adverse employment actions. Rather, it held that an adverse employment action requires only a showing of more than *de minimis* harm. *See Harrison*, 82 F.4th at 431-32. And

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[6] In support of its "meaningfully alter" formulation, the district court relied on *Fleming v. Methodist Healthcare System of San Antonio, Ltd.*, No. 21-cv-01234, 2024 WL 1055120, at *12 (W.D. Tex. Mar. 11, 2024), which in turn relied on *Harrison*, 82 F.4th at 431. *See* ROA.2909.

although *Harrison* noted that "[o]ther circuits have settled on some variation of a 'materiality' standard," it expressly took "no position … on whether 'material' and 'more than *de minimis*' are simply two sides of the same coin, or whether there is more room between those terms." *Id.* at 432 n.5 (citation modified) (quoting *Hamilton*, 79 F.4th at 505 n.64).[7]

II. This Court should reconsider its "nearly identical" standard for evaluating comparator evidence.

In assessing Gooden's discrimination claims premised on other employment actions, the court required Gooden to show that his proffered comparator was "similarly situated" to himself, which it defined to mean "nearly identical." ROA.2911-2912. That approach was compelled by this Court's precedents, which endorse a nearly-identical standard for evaluating comparator evidence. Nonetheless, that standard is legally flawed.

[7] This Court has not squarely addressed whether *Harrison*'s "more than *de minimis* harm" standard is equivalent to or compatible with *Muldrow*'s "some harm" standard. It need not do so here because a reasonable jury could find for Gooden under either standard.

A. The courts of appeals are divided over whether comparators must be nearly identical.

To prevail on a claim of disparate-treatment discrimination, a plaintiff generally must show that his employer took an adverse action against him "because of" a protected characteristic, such as race. *See, e.g.*, *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (the "ultimate question" is whether the employer "intentionally discriminated against [the plaintiff] because of his race" (citation modified)). Likewise, to prove retaliation, a plaintiff must ordinarily show a causal connection between his protected activity and an adverse action. *See, e.g.*, *Ayorinde*, 121 F.4th at 508. In § 1981 cases and most Title VII cases, a but-for causation standard applies. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 333 (2020); *see also Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) ("Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." (citation modified)).

It is well settled that a plaintiff in an employment discrimination or retaliation action may—but need not—rely on comparator evidence to establish that causal element. As this Court has recognized, "[d]isparate

treatment of similarly situated employees is *one way* to demonstrate unlawful discrimination and retaliation." *Bryant v. Compass Grp. USA Inc.*, 413 F.3d 471, 478 (5th Cir. 2005) (emphasis added). It is also largely settled in most circuits that to raise an inference of discrimination or retaliation, a plaintiff and his proposed comparator must be similarly situated in all "material" or "relevant" respects. *See, e.g.*, *Qin v. Vertex, Inc.*, 100 F.4th 458, 474 (3d Cir. 2024); *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006); *Graham v. Long Island R.R.*, 230 F.3d 34, 39-40 (2d Cir. 2000); *see also Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 858 (8th Cir. 2005) (Colloton, J., concurring in judgment) (explaining that most circuits use "similarly situated in all relevant respects" standard, "or its equivalent," and collecting cases), *abrogated by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (en banc).

The circuits are divided, however, over whether "similarly situated" means "nearly identical." At least three circuits—this Court along with the Sixth and D.C. Circuits—have imposed some version of a nearly-identical standard in published decisions. *See, e.g.*, *Perez v. Tex. Dep't of Crim. Just., Institutional Div.*, 395 F.3d 206, 213 (5th Cir. 2004); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994), *abrogated on other grounds by*

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995); *see also Sacchetti v. Optiv Sec., Inc.*, 819 F. App'x 251, 254 (5th Cir. 2020) ("To be 'similarly situated,' comparators must be 'nearly identical.'" (citation omitted)).

At least three others—the Eleventh, Seventh, and Federal Circuits—have rejected that standard. *See Lewis v. City of Union City*, 918 F.3d 1213, 1226 & n.10 (11th Cir. 2019) (en banc); *Coleman v. Donahoe*, 667 F.3d 835, 851-52 (7th Cir. 2012);[8] *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1373 (Fed. Cir. 2012) (Whistleblower Protection Act case); *see also Sousa v. Chipotle Servs., LLC*, 167 F.4th 1286, 1299 n.6 (10th Cir. 2026) (declining to resolve whether plaintiff asserting discrimination claim under state law was "required to show that his circumstances were 'nearly identical' to" those of his comparators).

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[8] In an earlier decision, the Seventh Circuit recited the "nearly identical" standard, but it did not discuss the propriety of doing so. *See Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 644 (7th Cir. 2006), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n.1 (7th Cir. 2013).

B. The nearly-identical standard is incorrect.

This Court's published decisions on this front remain binding precedent and the district court was thus compelled to apply a nearly-identical standard in assessing Gooden's comparator evidence. Nonetheless, the nearly-identical standard is incorrect for several reasons.

1. The nearly-identical standard is too strict.

At the most basic level, the nearly-identical standard is difficult to square either with the plaintiff's ultimate burden in a disparate-treatment case or, more generally, with summary-judgment tenets.

To prove disparate treatment under a but-for causation standard, the plaintiff's ultimate burden is simply to show that it was more likely than not that his employer took an adverse action against him because of his race or other protected trait. *See Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 564 (5th Cir. 2001) (plaintiff must prove intentional discrimination "by a preponderance of the evidence"). Furthermore, at summary judgment, the question is not whether the plaintiff has made such a showing, but instead whether the plaintiff has created a genuine issue of material fact. *See Caldwell v. KHOU-TV*, 850 F.3d 237, 242 (5th Cir. 2017).

Put together, all of this means that when a plaintiff relies solely on comparator evidence at summary judgment, the dispositive question is—or should be—whether a reasonable jury could find that the plaintiff and his comparator are, in relevant respects, similar enough that the employer's differing treatment of them is more likely than not attributable to the plaintiff's race. *See Crawford v. Ind. Harbor Belt R.R. Co.*, 461 F.3d 844, 846 (7th Cir. 2006) ("[T]he plaintiff should have to show only that the members of the comparison group are sufficiently comparable to her to suggest that she was singled out for worse treatment."). So understood, it is not unreasonable to suppose that a jury could infer discrimination based on similarities that fall short of "nearly identical." *See Whitmore*, 680 F.3d at 1373 (refusing to endorse "highly restrictive" nearly-identical standard because "[o]ne can always identify characteristics that differ between two persons to show that their positions are not 'nearly identical,' or to distinguish their conduct in some fashion").

Against this backdrop, the nearly-identical standard demands too much. As the en banc Eleventh Circuit concluded in *Lewis*, the nearly-identical standard "is too strict—or at least has the appearance of being too strict." 918 F.3d at 1226. Writing for the court, Judge Newsom explained

that although the Eleventh Circuit had previously applied a nearly-identical standard and warned that "'nearly identical' does not mean 'exactly identical,'" there was "a risk that litigants, commentators, and (worst of all) courts have come to believe that it requires something akin to doppelganger-like sameness." *Id.* (citation modified). Unwilling to "take the risk that the nearly-identical test is causing courts reflexively to dismiss potentially valid antidiscrimination cases," the court rejected the standard and clarified that a plaintiff need only "show that she and her comparators are 'similarly situated in all material respects.'" *Id.* at 1226 & nn.10-11.

Here too, although this Court has "emphasized that 'nearly identical' is not synonymous with 'identical,'" *Harville v. City of Houston*, 945 F.3d 870, 875 (5th Cir. 2019), the nearly-identical standard still asks for a closer similarity than necessary to raise an inference of discrimination—especially at summary judgment.

2. The nearly-identical standard conflicts with Supreme Court precedent.

When applied to misconduct, the nearly-identical standard also directly conflicts with Supreme Court precedent. The Court has long accepted that a plaintiff's evidence may raise an inference of discrimination

when it shows that his employer disciplined him for alleged misconduct but did not similarly discipline employees outside his protected class who engaged in misconduct of "*comparable* seriousness." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282-83 & n.11 (1976) (emphasis added) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)). But the nearly-identical standard requires more than comparably serious misconduct—it requires nearly identical misconduct. *See Perez*, 395 F.3d at 213; *see also Saketkoo v. Adm'rs of Tulane Educ. Fund*, 31 F.4th 990, 998 (5th Cir. 2022) (plaintiff must "show that the comparator's conduct is 'nearly identical'").

This Court has acknowledged the tension between its nearly-identical standard and the Supreme Court's comparable-seriousness standard, but it has not reconciled the two. In *Perez*, it simply treated *McDonald*'s "comparable seriousness" language as dicta. 395 F.3d at 212-13; *see also Taylor v. Peerless Indus. Inc.*, 322 F. App'x 355, 366 n.6 (5th Cir. 2009) (noting argument that "Supreme Court precedent mandates a 'comparable seriousness' standard rather than a 'nearly identical' standard," but stating that *Perez* "held that the latter is the appropriate standard").

More recently, this Court has walked back from that reading of *McDonald* and recognized that when comparing misconduct, "[t]he ultimate question is the comparable seriousness of the offenses." *Turner v. Kan. City S. Ry. Co.*, 675 F.3d 887, 899 (5th Cir. 2012) (citation modified). But even then, this Court has simultaneously applied a nearly-identical standard without explaining how the two are compatible. *Id.* at 893-900. In *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 261 n.25 (5th Cir. 2009), it noted a "perceive[d] tension in our case law between the 'nearly identical' standard in *Perez* and the 'comparable seriousness' standard explicated by the Supreme Court in *McDonald*[.]" But *Lee* neither grappled with that tension nor addressed how the two standards could be reconciled. Instead, it merely emphasized that the "'nearly identical' standard is not equivalent to 'identical.'" *Id.*

Simply put, this Court's nearly-identical standard is incompatible with the Supreme Court's comparable-seriousness standard. And even if one were to assume that *Perez*'s reading of *McDonald* was correct, "dicta from the Supreme Court is not something to be lightly cast aside." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (citation omitted); *see also United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980) ("We are not

bound by dicta, even of our own court. […] Dicta of the Supreme Court are, of course, another matter.”).

3. The nearly-identical standard has no basis in any statutory text.

Finally, the nearly-identical standard is not rooted in any statutory text. Rather, it is purely a judge-made standard.

This Court appears to have first used the standard in *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567 (5th Cir. Unit B 1982). Citing *McDonald*, the court initially stated that the plaintiff could prevail by showing her employer “retained a man who had engaged in conduct *similar* to that for which [she] was terminated.” *Id.* at 570 (emphasis added). But in the next breath, the court then said that the plaintiff had to show that “the misconduct for which she was discharged was *nearly identical* to that engaged in by a male employee whom [her employer] retained.” *Id.* (emphasis added). *Davin* neither acknowledged the shift from “similar” to “nearly identical” nor offered any justification for imposing a more demanding standard. *See id.*

Over time, panels went on to repeat *Davin*’s “nearly identical” formulation, but none questioned its origins nor offered a separate

justification. *See, e.g.*, *Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (5th Cir. 1990); *Little v. Republic Refin. Co.*, 924 F.2d 93, 97 (5th Cir. 1991); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995); *Perez*, 395 F.3d at 213. Notably, other circuits that have adopted a nearly-identical standard all derived the standard—directly or indirectly—from *Davin* as well. The Eleventh Circuit did so in *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1185 (11th Cir. 1984), which directly relied on *Davin*. The Sixth Circuit did so in *Pierce*, 40 F.3d at 802, which indirectly relied on *Nix*.[9] And the D.C. Circuit did so in *Neuren*, 43 F.3d at 1514, which directly relied on *Pierce*.

In short, the nearly-identical standard traces its lineage to an unexplained and unjustified linguistic choice. The standard's questionable origins militate against its continued use. *See W. Coal Traffic League v. United States*, 694 F.2d 378, 391 (5th Cir. 1982) ("Error is not to be perpetuated simply because it has been once made, and wisdom is not to be rejected

[9] *Pierce* took the "nearly identical" language from *Ruth v. Children's Med. Ctr.*, 940 F.2d 662, 1991 WL 151158, at *7 (6th Cir. 1991) (unpub. table dec.), which in turn took it from *Payne v. Ill. Cent. Gulf R.R.*, 665 F. Supp. 1308, 1333 (W.D. Tenn. 1987), which in turn took it from *Nix*, 738 F.2d at 1185.

merely because it comes late."), *opinion adopted in part and vacated in part*, 719 F.2d 772 (5th Cir. 1983) (en banc).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment on Gooden's failure-to-assign claim and remand for further proceedings. Additionally, we encourage this Court to reconsider its nearly-identical standard for evaluating comparator evidence at an appropriate time.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and Fifth Circuit Rules 29.2, 29.3, and 32.2, because it contains 6,042 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1, the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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CERTIFICATE OF SERVICE

I certify that on June 5, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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