No. 21-10133

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FELESIA HAMILTON; TASHARA CALDWELL; BRENDA JOHNSON; ARRISHA KNIGHT, JAMESINA ROBINSON; DEBBIE STOXSTELL; FELICIA SMITH; TAMEKA ANDERSON-JACKSON; TAMMY ISLAND,

Plaintiffs-Appellants

v.

DALLAS COUNTY, doing business as DALLAS COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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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 an important question regarding the scope of

actionable discrimination under Section 703(a)(1) of Title VII, an issue that the United States addressed in *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily dismissed), and in *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (cert. denied).

Consistent with the United States' position in *Peterson* and *Forgus*, the United States filed an amicus brief and participated in oral argument before the panel that initially heard this case, urging this Court to reconsider its "ultimate employment decision" standard for Section 703(a)(1) claims. See U.S. Br. 8. The United States also participated in another, similar case before this Court, which is now being held in abeyance pending the en banc decision in this case. See U.S. Br. as Amicus Curiae, *Harrison* v. *Brookhaven Sch. Dist.*, No. 21-60771 (5th Cir. Dec. 16, 2021).

The United States also has filed amicus briefs addressing Section 703(a)(1)'s scope in numerous other courts of appeals. See U.S. Br. as Amicus Curiae, *Lyons* v. *City of Alexandria*, No. 20-1656 (4th Cir. Sept. 22, 2020); U.S. Br. as Amicus Curiae, *Threat* v. *City of Cleveland*, No. 20-4165 (6th Cir. Jan. 4, 2021); U.S. Br. as Amicus Curiae, *Muldrow* v. *City of St. Louis*, No. 20-2975 (8th Cir. Dec. 10, 2020); U.S. Br. as Amicus Curiae, *Naes* v. *City of St. Louis*, No. 22-2021 (8th Cir. Aug. 12, 2022); U.S. Br. as Amicus Curiae, *Peccia* v. *California Dep't of Corr. and Rehab.*, No. 21-16962 (9th Cir. Apr. 25, 2022); U.S. En Banc Br. as Amicus

Curiae, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir. July 7, 2021); see also U.S. Br. as Amicus Curiae, *Neri* v. *Board of Educ. for Albuquerque Pub. Schs.*, No. 20-2088 (10th Cir. Nov. 16, 2020) (addressing the same issue under Title I of the Americans with Disabilities Act, 42 U.S.C. 12112(a)).

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides, in relevant part, that:

> [i]t shall be 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 race, color, religion, sex, or national origin[.]

42 U.S.C. 2000e-2(a)(1) (emphasis added).

This case asks whether shift assignments, made on the basis of sex, may constitute actionable discrimination "with respect to * * * terms, conditions, or privileges of employment" under Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1), or whether the reach of Section 703(a)(1) is instead limited to prohibiting discrimination in "ultimate employment decisions," such as hiring, granting leave

to, discharging, promoting, or compensating individuals.[1]

STATEMENT OF THE CASE

1. Statutory Background

a. In 1964, Congress enacted Title VII to "assure equality of employment opportunities and to eliminate * * * discriminatory practices and devices" in the workplace. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). This case involves "Title VII's core antidiscrimination provision," Section 703(a)(1). *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). Section 703(a)(1) makes it unlawful for a private employer or a state or local government "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." 42 U.S.C. 2000e-2(a)(1); see 42 U.S.C. 2000e(a)-(b) (defining covered employers).

b. The Supreme Court has repeatedly held that Section 703(a)(1) of Title VII reaches and prohibits a broad range of discriminatory employment practices. In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the Court explained that the statutory phrase "terms, conditions, and privileges of

[1] The United States takes no position on the ultimate merits of plaintiffs' claims or on any other issues presented in this appeal.

employment" evinces Congress's intent "to strike at the entire spectrum" of prohibited disparate treatment. *Id.* at 64 (citation omitted). Likewise, in *McDonnell Douglas Corp.*, 411 U.S. 792, the Court explained that Section 703(a)(1) "generally prohibits racial discrimination in *any* employment decision." *Id.* at 796 (emphasis added).

c. In contrast, this Court has held that Section 703(a)(1)'s prohibition on discrimination reaches only "ultimate employment decisions." See, *e.g.*, *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559-560 (5th Cir. 2007) (per curiam); *Felton* v. *Polles*, 315 F.3d 470, 486 (5th Cir. 2002). This Court has explained that such decisions include "hiring, granting leave, discharging, promoting, or compensating." *McCoy*, 492 F.3d at 559 (quoting *Green* v. *Administrators of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)). This Court has also held that employer actions that are tantamount to an "ultimate employment decision" may be actionable. See, *e.g.*, *Thompson* v. *City of Waco*, 764 F.3d 500, 504-506 (5th Cir. 2014) (explaining that "strip[ping]" employee of "integral and material responsibilities" in a manner "equivalent [to] a demotion" is actionable); *Alvarado* v. *Texas Rangers*, 492 F.3d 605, 614-615 (5th Cir. 2007) (explaining that employer's denial of a desired transfer was "the objective equivalent of the denial of a promotion" and is actionable). Consistent with this circuit's general rule, such decisions require a showing of "significant and material" harm, *Thompson*, 764

F.3d at 504, that is "objective[ly] equivalent" to a recognized ultimate employment decision. *Alvarado*, 492 F.3d at 614. Where a claim does not challenge an ultimate employment decision or allege sufficient "adversity" through "a loss in compensation, duties, or benefits," this Court has held that the claim is not actionable. *Pegram* v. *Honeywell, Inc.*, 361 F.3d 272, 283 (5th Cir. 2004) (citation omitted).

Applying the ultimate-employment-decision rule, this Court has held that a wide range of allegedly disparate treatment does not violate Section 703(a)(1)'s prohibition on discrimination. See, *e.g.*, *Peterson* v. *Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019) (requiring only "black team members * * * to work outside without access to water, while * * * white team members worked inside with air conditioning" does not involve an actionable ultimate employment decision), cert. dismissed, 140 S. Ct. 2841 (2020); *Ellis* v. *Compass Grp. USA, Inc.*, 426 F. App'x 292, 296 (5th Cir. 2011) (assigning a "heavier workload" on the basis of race does not involve an actionable ultimate employment decision); *Johnson* v. *Manpower Pro. Servs., Inc.*, 442 F. App'x 977, 983 (5th Cir. 2011) (requiring a drug test of a job applicant on the basis of race does not involve an actionable ultimate employment decision). Indeed, this Court has held that numerous employer actions do not constitute ultimate employment decisions, including lateral job transfers (*i.e.*, job transfers without a loss of salary or

benefits), shift assignments, and denials of training. See *Alvarado*, 492 F.3d at 612; *Shackleford* v. *DeLoitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999); *Hernandez* v. *Sikorsky Support Servs.*, 495 F. App'x 435, 438 (5th Cir. 2012).

2. Procedural History

a. Plaintiffs-appellants are women who are employed by the Dallas County Sheriff's Department and who work as Detention Service Officers (DSOs) at the Dallas County jail. ROA.11-13.[2] They allege as follows: All DSOs are given two days off per week. Before April 2019, shift assignments and days off for DSOs were determined by seniority. After April 2019, shift assignments were determined based on sex. Specifically, only male DSOs were allowed to take full weekends off. ROA.14. Female DSOs were not allowed full weekends off and instead received only weekdays or partial weekends off. ROA.13-14. When plaintiffs asked a sergeant why this was so, he responded that shift scheduling was determined based on gender and that "it would be unsafe for all the men to be off during the week and that it was safer for the men to be off on the weekends." ROA.14. Male and female DSOs perform the same tasks, and the same number of inmates are present during the week as on weekends. ROA.14. Plaintiffs reported

[2] "ROA._" refers to the page numbers of documents in the record on appeal in this case. "Op. _" refers to the now-vacated panel opinion in this case.

the shift assignment policy to other supervisors and human resources, but they declined to change it. ROA.14.

Plaintiffs sued Dallas County for damages and injunctive relief, alleging, as relevant here, that the County's sex-based shift assignment policy violates Section 703(a)(1)'s prohibition on disparate treatment. ROA.15-16. The County moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), arguing that the complaint does not challenge an actionable adverse employment action under Section 703(a)(1), as interpreted by this Court's Title VII precedents. ROA.43-45.

b. The district court granted the County's motion to dismiss, explaining that, "[a]lthough Dallas County's alleged facially discriminatory work scheduling policy demonstrates unfair treatment, the binding precedent of this Circuit compel[led]" the court "to grant Dallas County's motion." ROA.104. The court stated that under circuit precedent, adverse employment actions under Title VII are limited to "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating" (ROA.104 (quoting *Felton*, 315 F.3d at 486)), and that "[c]hanges to an employee's work schedule, such as the denial of

weekends off, are not an ultimate employment decision" (ROA.105 (citing, *e.g.*, *Benningfield* v. *City of Houston*, 157 F.3d 369 (5th Cir. 1998))).

In dismissing the complaint, the district court rejected plaintiffs' argument that the challenged shift assignments are actionable even under circuit precedent. This Court has previously held that certain job transfers may be actionable if the transfer "makes the job objectively worse" through "a loss in compensation, duties, or benefits." *Pegram*, 361 F.3d at 283 (citation and internal quotation marks omitted). See ROA.104-105. The district court first observed that this Court has limited its "objectively worse" standard to Title VII claims involving job transfers or reassignments that are "the equivalent of a demotion." ROA.105 (citing *e.g.*, *Alvarado*, 492 F.3d at 612-615). It then determined that the County's scheduling policy, even if "objectively worse" for plaintiffs, does not constitute an "ultimate employment decision" because it does not affect "the compensation, job duties, or [the] prestige of the Plaintiffs' employment." ROA.106.

c. Plaintiffs timely appealed the dismissal of their complaint (ROA.109), and a panel of this Court affirmed. Op. 1. Relying on longstanding circuit precedent, the panel explained that it was "constrain[ed]" to conclude that "the denial of weekends off is not an ultimate employment decision," meaning "the district court correctly granted the County's motion to dismiss on the grounds that Plaintiffs-Appellants did not plead an adverse employment action." Op. 7-8

(citing, *e.g.*, *Welsh* v. *Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019), cert. denied, 141 S. Ct. 160 (2020); *Dollis* v. *Rubin*, 77 F.3d 777 (5th Cir. 1995) (per curiam)). While the panel agreed that the conduct complained of "fits squarely within the ambit of Title VII's proscri[ption]" of discrimination "with respect to the terms, conditions, or privileges of one's employment because of one's sex" (Op. 6), the panel explained that "[o]nly the en banc court" could properly resolve the case by reexamining the circuit's ultimate employment-decision rule (Op. 11).

d. On October 12, 2022, this Court vacated the panel opinion and granted rehearing en banc. Order.

SUMMARY OF ARGUMENT

This Court should overturn its "ultimate employment decision" requirement and hold that shift assignments based on sex (or any other Title VII protected characteristic) are actionable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). This conclusion is dictated by Section 703(a)(1)'s plain text. Title VII does not define the phrase "terms, conditions, or privileges of employment," and so that phrase is given its ordinary meaning. As the Sixth Circuit recently concluded in a similar case, "[i]f the words of Title VII are our compass, it is straightforward to say that a shift schedule

* * * counts as a term of employment." *Threat* v. *City of Cleveland*, 6 F.4th 672, 677 (2021).

In contrast, this Court's existing rule that Section 703(a)(1) prohibits discrimination only in "ultimate employment decisions" has no foundation in Title VII's text, structure, or the statute's purpose. Under this Court's ultimate-employment-decision rule, only a handful of specific employment actions can be challenged under Title VII. But limiting the scope of Section 703(a)(1) only to "hiring, granting leave, discharging, promoting, or compensating," as under this Court's precedents, is not a viable reading of broad statutory language that "strike[s] at the entire spectrum of disparate treatment of men and women in employment." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986) (*Meritor*) (citation and internal quotation marks omitted).

Indeed, this Court's ultimate-employment-decision rule is contrary to Supreme Court precedent, which has repeatedly emphasized that Title VII is not limited to "economic" or "tangible" discrimination. *E.g.*, *Meritor*, 477 U.S. at 64 (citation omitted); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). The County's reliance on *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), is misplaced. Those decisions, which address the vicarious liability standard for hostile work environment claims and the standard for proving

retaliation, respectively, make clear that Section 703(a)(1)'s scope is not limited to ultimate employment decisions or other actions that cause a certain level of "adversity" or "significant and material" harm.

This Court should reject its ultimate-employment-decision rule and join other circuits that have recently reconsidered their own precedents to "achieve fidelity to the text of Title VII." Op. 11; see *Chambers* v. *District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc); *Threat*, 6 F.4th at 677. The result that both the district court and the panel were compelled to reach under this Court's precedents—that Title VII has nothing to say to an employer who requires women, because they are women, to work weekends, while allowing men those same days off—underscores how far this Court's ultimate-employment-decision requirement has veered from Title VII's statutory text and purpose.

ARGUMENT

DISCRIMINATORY SHIFT ASSIGNMENTS ARE ACTIONABLE UNDER SECTION 703(a)(1) OF TITLE VII

Section 703(a)(1) 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." 42 U.S.C. 2000e-2(a)(1). Plaintiffs do not allege that the County made a "hir[ing]" or "discharge" decision based on their sex, nor do they contend that sex played a role

in their "compensation." *Ibid.* Rather, the question in this appeal is whether a sex-based shift scheduling policy that allows only men to have weekends off, while requiring women, because they are women, to work weekends, involves discrimination "with respect to * * * terms, conditions, or privileges of employment." "[T]he answer provided by the straightforward meaning of the statute is an emphatic yes." *Chambers* v. *District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc).

A. Section 703(a)(1)'s Prohibition On Discrimination In The "Terms, Conditions, Or Privileges Of Employment" Reaches Discriminatory Shift Assignments

In interpreting Title VII, the starting point, as always, is "the language of" the statute. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986); see also *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President."). The "charge is to give effect to the law Congress enacted." *Lewis* v. *City of Chicago*, 560 U.S. 205, 217 (2010). 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).

Under Section 703(a)(1)'s ordinary meaning, a sex-based shift assignment policy that replaces a seniority-based shift assignment policy plainly "alters the

'terms' and the 'privileges' of * * * employment" under Section 703(a)(1). *Threat* v. *City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021); see also *id.* at 677-678 (collecting dictionary definitions of "terms" and "privileges" contemporaneous with Title VII's enactment). "If the words of Title VII are our compass, it is straightforward to say that a shift schedule * * * counts as a term of employment." *Id.* at 677; see also EEOC Compliance Manual, § 613.3 (2006), 2006 WL 4672703 (explaining that employers are prohibited from discriminating with respect to "hours of work, or attendance since they are terms, conditions, or privileges of employment").

Because the "when" of employment—including whether an employee works days or nights, weekdays or weekends—is plainly a term of employment, Section 703(a)(1) prohibits discrimination in shift assignments and work scheduling. See *Threat*, 6 F.4th at 677 ("How could the *when* of employment not be a *term* of employment?"); cf. *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (observing in a National Labor Relations Act case that "the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of * * * terms and conditions of employment") (internal quotation marks omitted). And when shift schedules are determined by seniority (ROA.13), losing such a benefit of seniority implicates the "privileges" of employment. As the Sixth

Circuit recently explained, "[b]enefits that come with seniority may count as privileges of employment. And losing out on a preferred shift may diminish benefits that a senior employee has earned." *Threat*, 6 F.4th at 677. The County's shift scheduling policy in this case therefore plainly falls within Section 703(a)(1)'s scope.

B. This Court's "Ultimate Employment Decision" Requirement Conflicts With The Text, Structure, And Purpose Of Title VII

In dismissing plaintiffs' complaint, the district court relied on circuit precedent that limits Section 703(a)(1)'s scope to "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, and compensating." ROA.104 (quoting *Felton* v. *Polles*, 315 F.3d 470, 486 (5th Cir. 2002)). The district court also concluded that, under this Court's case law, plaintiffs failed to state a claim because they did not allege a discriminatory action that was sufficiently adverse so as to be the "equivalent" of an ultimate employment decision. ROA.104-105 (citing *Alvarado* v. *Texas Rangers*, 492 F.3d 605, 612-615 (5th Cir. 2007)). But this Court's "ultimate employment decision" requirement is fundamentally disconnected from Title VII's text, structure, and purpose and should be overturned.

1. This Court first adopted its "ultimate employment decision" rule in *Dollis* v. *Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (per curiam). *Dollis* posited, without reference to the statutory text, that "Title VII was designed to address ultimate

employment decisions." *Id.* at 781. *Dollis* then defined "ultimate employment decisions" based on another court of appeals' observation "that Title VII discrimination cases have focused upon ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." *Id.* at 782 (citing *Page* v. *Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981)).[3]

This Court's limitation of Section 703(a)(1) to "ultimate employment decisions" is flawed because "Title VII contains no such limitation." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773 (2015); see *ibid.* (declining to read an unstated limitation into Title VII). This is clear from the statute's text and structure. Section 703(a)(1) first makes it unlawful "to fail or refuse to hire or to discharge any individual" because of a protected trait, 42 U.S.C. 2000e-2(a)(1)—a prohibition that *does* involve "ultimate employment decisions." Section 703(a)(1) then makes it unlawful "*otherwise* to discriminate against any individual with respect to * * * terms, conditions, or privileges of employment." 42 U.S.C.

[3] *Dollis* arose under Title VII's federal-sector provision, which 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). Although that text differs from Section 703(a)(1)'s text, this Court has regularly applied *Dollis*'s "ultimate employment decision" limitation to Section 703(a)(1) cases. See, *e.g.*, *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (per curiam). 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.

2000e-2(a)(1) (emphasis added). The "terms, conditions, or privileges" statutory phrase—particularly when set apart from hiring and firing by the word "otherwise"—cannot be read as limited to "ultimate employment decisions." See *Begay* v. *United States*, 553 U.S. 137, 144 (2008) (explaining that "otherwise" means "in a different way or manner" (citation omitted)).

The five employer actions that this Court typically describes as "ultimate employment decisions" highlight the disconnect between circuit precedent and statutory text. Those actions are: "hiring, granting leave, discharging, promoting, or compensating." *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (per curiam) (citation omitted). Three of these actions—"hiring," "discharging," and "compensating"—are expressly covered by Section 703(a)(1). 42 U.S.C. 2000e-2(a)(1). As a result, this Court's precedents effectively read Section 703(a)(1)'s catch-all reference to "terms, conditions, or privileges of employment" to cover only decisions such as "granting leave" and "promoting." But that is not a plausible reading of language that "*strike[s] at the entire spectrum* of disparate treatment of men and women in employment." *Meritor*, 477 U.S. at 64 (emphasis added; citation and internal quotation marks omitted).

2. Nor is this Court's ultimate-employment-decision rule redeemed by cases allowing discrimination claims to go forward so long as they allege a sufficient amount of "adversity," *Pegram* v. *Honeywell, Inc.*, 361 F.3d 272, 283 (5th Cir.

2004) (citation omitted), or "significant and material" harm, *Thompson* v. *City of Waco*, 764 F.3d 500, 504 (5th Cir. 2014), that "objectively" resembles a recognized "ultimate employment decision," *Alvarado*, 492 F.3d at 614-615. The district court understood this line of cases to be limited to transfers that are equivalent to a demotion and not to other employment actions that make a job "objectively worse." ROA.104-105. Regardless of the narrowness or breadth of such a rule, it too is mistaken. Just as Section 703(a)(1)'s text is not limited to "ultimate employment decisions," it likewise is not limited to employment actions that cause "significant and material" harm or to actions that a court deems make a job "objectively worse." Such requirements are atextual and incorrect.

If Congress had intended that Section 703(a)(1) reach only discriminatory conduct that results in a certain level of harm or "adversity" above and beyond the inherent harm that results from being subjected to intentional discrimination, it could have said so. Indeed, the very next subsection—Section 703(a)(2)—makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2) (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is

generally presumed that Congress acts intentionally and purposely." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (alteration in original; citation and brackets omitted).

C. This Court's "Ultimate Employment Decision" Requirement Conflicts With Supreme Court Precedent

The Supreme Court's Title VII decisions have repeatedly emphasized that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination." *Meritor*, 477 U.S. at 64 (citation omitted); 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 in "the narrow contractual sense" (citation omitted)). In particular, the Supreme Court's hostile-work-environment decisions have interpreted Section 703(a)(1) to support a claim that "the work environment [may be] so pervaded by discrimination that the terms and conditions of employment [a]re altered." *Vance* v. *Ball State Univ.*, 570 U.S. 421, 427 (2013). But those decisions do not limit such "terms and conditions of employment," *ibid.*, to "ultimate employment decisions," such as "discharging" an employee who is the victim of harassment. Instead, 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).

In opposing rehearing en banc, the County asserted that this Court's ultimate-employment-decision rule is consistent with the Supreme Court's decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006). See Resp. 8-10, Sept. 15, 2022. Not so. Instead, both decisions show that this Court's ultimate-employment-decision rule is erroneous.

1. *Ellerth* involved a claim against an employer alleging that a supervisor had created a hostile work environment—and thereby altered "the terms or conditions of employment"—through "severe or pervasive" sexual harassment of an employee. 524 U.S. at 752. The question in *Ellerth* did not involve the substantive standard for Section 703(a)(1) discrimination claims but instead asked under what circumstances "an employer has vicarious liability" for sexual harassment by a supervisor. *Id.* at 754. After reviewing agency-law principles, the Supreme Court explained that there are two paths under which vicarious liability must be imputed. First, the Supreme Court determined that vicarious liability exists, with no affirmative defense, "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* at 764-765. The Court reasoned that such a "tangible

employment action" by a supervisor necessarily "requires an official act of the enterprise," and therefore supports automatic imputation of vicarious liability on the employer. *Id.* at 761-762. Second, *Ellerth* held that an employer is liable for a hostile work environment created by a supervisor even in the *absence* of any tangible employment action, unless the employer can establish the "affirmative defense" that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 764-765.

Ellerth's "tangible employment action" path for automatically imputing vicarious liability to an employer in cases involving supervisory harassment says nothing about the meaning or scope of the phrase "terms, conditions, or privileges of employment" in Section 703(a)(1). 42 U.S.C. 2000e-2(a)(1). To the contrary, *Ellerth* makes clear that a tangible employment action is *not* a necessary ingredient of a Title VII discrimination claim. That is because *Ellerth* held that an employer is liable for a hostile work environment created by a supervisor even in the *absence* of any tangible employment action, where the employer cannot establish that it is entitled to an "affirmative defense" based on its prompt action to prevent and correct harassing behavior. 524 U.S. at 764-765. Moreover, the Supreme Court explicitly refused to endorse using a tangible-employment-action standard to

define or limit the substantive scope of discrimination claims brought under Section 703(a)(1). See *id.* at 761 (observing that the concept of a "tangible employment action appears in numerous [discrimination] cases in the Courts of Appeals," and, "[w]ithout endorsing the specific results of those decisions," determining it "prudent to import the concept" only for "resolution of the vicarious liability issue").

Consistent with this understanding, the Supreme Court in *White* expressly stated that *Ellerth* "did *not* discuss the scope of" Title VII's "general antidiscrimination provision," but rather invoked the concept of a "'tangible employment action' * * * *only* to 'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *White*, 548 U.S. at 64-65 (emphases added; brackets in original) (quoting *Ellerth*, 524 U.S. at 760-761).

2. That the Supreme Court in *White* held that *retaliation* claims under Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), may be based only on actions "that a reasonable employee would have found * * * materially adverse," 548 U.S. at 68, also provides no support for this Court's ultimate-employment-decision rule.

Section 704(a) makes it an "unlawful employment practice for an employer to discriminate against * * * any individual * * * because he has opposed any

practice made an unlawful employment practice by this title." 42 U.S.C. 2000e-3(a). "Unlike the antidiscrimination provision, the antiretaliation provision is not expressly limited to actions affecting the terms, conditions, or privileges of employment." *Chambers*, 35 F.4th at 876. As such, the Supreme Court in *White* adopted a limiting principle for retaliation claims. Explaining that it is "important to separate significant from trivial harms," 548 U.S. at 68, only a retaliatory act that is "materially adverse" to the plaintiff is actionable under Section 704(a), *id.* at 67-68.

Because Section 703(a)(1) already "tether[s] actionable behavior to that which affects an employee's 'terms, conditions, or privileges of employment,'" a further, court-created limiting principle for Title VII's anti-discrimination provision is unnecessary. *Chambers*, 35 F.4th at 877. As already explained, Section 703(a)(1)'s language delineates the scope of prohibited conduct. Under that plain text, no amount of race, sex, religion, or national origin discrimination that affects the terms, conditions, or privileges of employment is lawful (absent affirmative defenses that are not at issue in this appeal). That is because, unlike Section 704(a), which protects individuals based on their actions, Section 703(a)(1) works to "prevent injury to individuals based on who they are." *White*, 548 U.S. at 63. To hold otherwise and conclude that Title VII prohibits only "ultimate employment decisions" or decisions that cause a certain level of "adversity" or

"significant and material" harm would undermine "the important purpose of Title VII—that the workplace be an environment free of discrimination." *Ricci* v. *DeStefano*, 557 U.S. 557, 580 (2009).

D. This Court's Ultimate-Employment-Decision Rule Leads To Unsupportable Results And Should Be Overturned

Under this Court's Title VII precedents, brazen acts of workplace discrimination—such as the policy at issue in this case, granting weekends off to men, but denying the same to women, because of their sex—cannot give rise to an actionable discrimination claim under Section 703(a)(1). ROA.103-104. While this result is clearly wrong under the ordinary meaning of the statutory text, it is nonetheless compelled under this Court's existing case law. This Court should thus join other circuits that have recently revisited their precedents interpreting "terms, conditions, or privileges of employment" and overturn its "ultimate employment decision" rule, including the requirement that plaintiffs challenging other employment actions under Section 703(a)(1) allege an equivalent amount of "adversity" or "significant and material" harm.

As Chief Judge Sutton explained in *Threat*, any 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." 6 F.4th at 678-679.

As such, "employer-required shift changes from a preferred day to another day" fall well-within "any fair construction of the anchoring words of Title VII, and for that matter any Article III injury requirement." *Id.* at 679.

The D.C. Circuit, sitting en banc, recently overturned a similar, atextual "objectively tangible harm" requirement for Section 703(a)(1) claims. See *Chambers*, 35 F.4th at 872 (overruling *Brown* v. *Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)). As Judges Ginsburg and Tatel explained in *Chambers*, "[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." *Id.* at 874-875. While the D.C. Circuit had previously held that the forced acceptance or denial of a lateral job transfer was not actionable without an additional showing of "objectively tangible harm," *Chambers* rejected that rule as a "judicial gloss that lacks any textual support." *Id.* at 875 (citation and internal quotation marks omitted). Indeed, the importance of adhering to Title VII's plain text is why then-Judge Kavanaugh had previously urged the D.C. Circuit to "definitively establish" the "clear principle" that conduct that "plainly constitutes discrimination" and alters an employee's "terms, conditions, or privileges of employment" violates

Title VII. *Ortiz-Diaz* v. *United States Dep't of Hous. & Urb. Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (citation omitted).

In short, this Court should join the Sixth and D.C. Circuits in aligning its precedent with Title VII's text and hold that any discriminatory conduct that affects an employee's "terms, conditions, or privileges of employment" violates Section 703(a)(1).

CONCLUSION

The United States respectfully urges this Court to reject its precedent limiting the scope of Section 703(a)(1) to "ultimate employment decisions" and hold that shift assignments based on protected characteristics are actionable under Section 703(a)(1) of Title VII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5544 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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