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, and TAMMY ISLAND,

Plaintiffs-Appellants

v.

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

Defendant-Appellee

On Appeal from a Final Judgment of the
United States District Court for the Northern District of Texas
Case No. 3:20-CV-00313-N, Hon. David C. Godbey

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November 14, 2022

No. 21-10133

FELESIA HAMILTON, et al.,

Plaintiffs-Appellants,

v.

DALLAS COUNTY, d/b/a DALLAS COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellee.

Certificate of Interested Persons

The undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

Felesia Hamilton

Tashara Caldwell

Brenda Johnson

Arrisha Knight

Jamesina Robinson

Debbie Stoxstell

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Statement Regarding Oral Argument

The Court has scheduled oral argument for a date during the week of January 23, 2023.

Table of Contents

Certificate of Interested Persons i
Statement Regarding Oral Argument iii
Table of Authorities v
Introduction 1
Jurisdictional Statement 2
Issue Presented 3
Statement of the Case 3
Summary of Argument 5
Standard of Review 6
Argument 6
I. This Court's ultimate-employment-decision rule required the district court to uphold a policy that violates Title VII. 6
 A. The County's policy falls squarely within the ordinary meaning of Section 703(a)(1)'s prohibition. 6
 B. A slew of other potential sources of meaning confirm that Section 703(a)(1) covers shift assignments. 9
II. The ultimate-employment-decision rule is atextual and misguided. 14
 A. Congress did not limit Section 703(a)(1) to remedying what employers or courts view as serious injuries 15
 B. Congress did not limit Section 703(a)(1) to a subset of employer decisions. 22
III. This Court should abandon the ultimate-employment-decision rule 26
 A. The origins of this Court's ultimate-employment-decision rule confirm it has no place in a Section 703(a)(1) claim. 27
 B. The ultimate-employment-decision rule must go. 31
Conclusion 36
Certificate of Compliance ....
Certificate of Service ....

Table of Authorities

Cases **Page(s)**

Abbt v. City of Houston,
28 F.4th 601 (5th Cir. 2022) 31

Advertiser's Mfg. Co.,
280 N.L.R.B. 1185 (1986), *enforced*, 823 F.2d 1086 (7th Cir. 1987) 11

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 10

Alvarado v. Tex. Rangers,
492 F.3d 605 (5th Cir. 2007) 35

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 15, 26, 35

Brooks v. Firestone Polymers, L.L.C.,
640 F. App'x 393 (5th Cir. 2016) 16

Brown v. Brody,
199 F.3d 446 (D.C. Cir. 1999) 32

Burlington Indus. v. Ellerth,
524 U.S. 742 (1998) 18, 30, 31

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 19, 20, 21, 22, 30, 33

CBOCS W., Inc. v. Humphries,
553 U.S. 442 (2008) 21

Chambers v. District of Columbia,
35 F.4th 870 (D.C. Cir. 2022) (en banc) 6, 7, 9, 21, 25, 32, 33

Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media,
140 S. Ct. 1009 (2020) 12

Conolon Corp. v. N.L.R.B.,
431 F.2d 324 (9th Cir. 1970) 10

Page(s)

Dollis v. Rubin,
77 F.3d 777 (5th Cir. 1995) 27

Duncan v. Walker,
533 U.S. 167 (2001) 23

Ellis v. Compass Grp. USA, Inc.,
426 F. App'x 292 (5th Cir. 2011) 25

F & R Meat Co.,
296 N.L.R.B. 759 (1989) 11

Felton v. Polles,
315 F.3d 470 (5th Cir. 2002) 30

Firch Baking Co.,
199 N.L.R.B. 414 (1972), *enforced*, 479 F.2d 732 (2d Cir. 1973) 11

Food Mktg. Inst. v. Argus Leader Media,
139 S. Ct. 2356 (2019) 7

Ford Motor Co. v. N.L.R.B.,
441 U.S. 488 (1979) 11

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 22

Goodman Inv. Co.,
292 N.L.R.B. 340 (1989) 11

Harlston v. McDonnell Douglas Corp.,
37 F.3d 379 (8th Cir. 1994) 17

Harris v. Forklift Sys.,
510 U.S. 17 (1993) 18, 19

Harrison v. Brookhaven Sch. Dist.,
No. 21-60771 (5th Cir. argued May 9, 2022) 25

Hassen v. Ruston La. Hosp. Co.,
932 F.3d 353 (5th Cir. 2019) 17

Page(s)

Heckler v. Mathews,
465 U.S. 728 (1984) 16

Hishon v. King & Spalding,
467 U.S. 69 (1984) 1, 8, 10

Hohn v. United States,
524 U.S. 236 (1998) 34, 35, 36

Hooks v. Bank of Am.,
183 F. App'x 833 (11th Cir. 2006) 17

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 7

Johnson v. Manpower Pro. Servs.,
442 F. App'x 977 (5th Cir. 2011) 35

Kunik v. N.Y.C. Dep't of Educ.,
842 F. App'x 668 (2d Cir. 2021) 17

L.A. Dep't of Water & Power v. Manhart,
435 U.S. 702 (1978) 22

Landgraf v. USI Film Prods.,
511 U.S. 244 (1997) 24

Littell v. Hous. Indep. Sch. Dist.,
894 F.3d 616 (5th Cir. 2018) 6

Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.,
381 U.S. 676 (1965) 11, 13

McCoy v. City of Shreveport,
492 F.3d 551 (5th Cir. 2007) 17, 33

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 15, 16, 17, 26, 28

Page(s)

Meritor Sav. Bank v. Vinson,
477 U.S. 57 (1986) 18, 19, 21, 22, 25

Mid-South Bottling Co.,
287 N.L.R.B. 1333 (1988), *enforced*, 876 F.2d 458 (5th Cir. 1989) 11

Minor v. Centocor, Inc.,
457 F.3d 632 (7th Cir. 2006) 17, 35

N.L.R.B. v. Almet, Inc.,
987 F.2d 445 (7th Cir. 1993) 10

N.L.R.B. v. Buddy Schoellkopf Prods., Inc.,
410 F.2d 82 (5th Cir. 1969) 10

N.L.R.B. v. Moore Bus. Forms, Inc.,
574 F.2d 835 (5th Cir. 1978) 11

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 26

O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.,
380 U.S. 359 (1965) (per curiam) 13

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 22, 24

Page v. Bolger,
645 F.2d 227 (4th Cir. 1981) (en banc) 27, 28, 29

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 12, 13

Pegram v. Honeywell, Inc.,
361 F.3d 272 (5th Cir. 2004) 23

Peterson v. Linear Controls, Inc.,
757 F. App'x 370 (5th Cir. 2019) 2, 35

Pineda v. United Parcel Serv., Inc.,
360 F.3d 483 (5th Cir. 2004) 4

Page(s)

Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman,
981 F.3d 347 (5th Cir. 2020) (en banc) 33, 34

Ramos v. Louisiana,
140 S. Ct. 1390 (2020) 34

Randall, Div. of Textron, Inc. v. N.L.R.B.,
687 F.2d 1240 (8th Cir. 1982) 10

Shackelford v. Deloitte & Touche, LLP,
190 F.3d 398 (5th Cir. 1999) 30

Shaw v. Reno,
509 U.S. 630 (1993) 16

Speed Mail. Serv.,
251 N.L.R.B. 476 (1980) 11

Stewart v. Mo. Pac. R.R.,
121 F. App'x 558 (5th Cir. 2005) 30

Threat v. City of Cleveland,
6 F.4th 672 (6th Cir. 2021) 6, 7, 8, 9, 23, 27, 32, 33, 35

United States v. Burke,
504 U.S. 229.................... 24

Von Gunten v. Maryland,
243 F.3d 858 (4th Cir. 2001) 29

Walker v. City of Mesquite,
169 F.3d 973 (5th Cir. 1999) 16

Wallace v. Performance Contractors, Inc.,
No. 21-30482 (5th Cir. argued June 9, 2022) 25

Welsh v. Fort Bend Indep. Sch. Dist.,
941 F.3d 818 (5th Cir. 2019) 1, 14

Page(s)

Statutes

28 U.S.C. § 1291 3

28 U.S.C. § 1331 2

28 U.S.C. § 1367(a) 2

29 U.S.C. § 158(a)(3) 10, 11

29 U.S.C. § 158(d) 11

29 U.S.C. § 206(d)(1) 25

42 U.S.C. § 1981a(b)(3) 24

42 U.S.C. § 2000e-2(a)(1) 1, 3, 6, 23, 24

42 U.S.C. § 2000e-3(a) 19

42 U.S.C. § 2000e-5(f) 2

42 U.S.C. § 2000e-16(a) 28

Ca. Gov't. Code § 12940(a) 24

D.C. Code Ann. § 2-1401.01 24

Tex. Lab. Code Ann. § 21.051(1) 3

Other Authorities

Br. in Opp'n, *Forgus v. Shanahan*,
No. 18-942, 2019 WL 2006239 (May 6, 2019) 33

Br. of United States as Amicus Curiae, *Peterson v. Linear Controls, Inc.*,
No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020) 33

EEOC Compl. Man., § 613.1, 2006 WL 4672701 (2009) 13

EEOC Compl. Man., § 613.3, 2006 WL 4672703 (2009) 13

Page(s)

Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333 (1999) ... 16

Fed. R. App. P. 35(b)(1) ... 33

H.R. Rep. No. 102-40, pt. 1 (1991) ... 12

Theodore Strongin, *Work Conditions Believed Key Issue in Met Pact: Musicians Dissatisfied with Proposals They Consider Not Clearly Defined*, N.Y. Times, Oct. 9, 1964 ... 13

Webster's Third New Int'l Dictionary (1961) ... 7, 8

Introduction

As this case comes to this Court, on a grant of Defendant-Appellee Dallas County's motion to dismiss, the County admits that it subjected detention officers to a sex-based scheduling policy. ROA.104, 106. The County required female employees, including Plaintiffs-Appellants, to work at least one day every weekend but allowed their male counterparts to take full weekends off. And yet the district court held that this Court's precedent required it to conclude that Plaintiffs failed to state a claim for on-the-job discrimination under both Title VII of the Civil Rights Act of 1964 and the Texas Employment Discrimination Act. ROA.107. A panel of this Court, similarly bound by precedent, affirmed.

That precedent is wrong. Title VII forbids an employer from discriminating "with respect to" an employee's "compensation, terms, conditions, or privileges of employment" because of the employee's sex (and other protected characteristics). 42 U.S.C. § 2000e-2(a)(1). The plain meaning of those words extends to all of the "incidents of employment" and every "aspect of the relationship between the employer and employees." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984). The text does not target a subset of employer decisions. It is not limited to practices that courts view as particularly harmful. Even still, this Court has narrowed Title VII's broad prohibition to cover only those discriminatory employer practices that qualify as "ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019). In addition to blessing the women-work-weekends policy in this

case, that judicial gloss on the clear statutory text has so distorted the meaning of "terms, conditions, or privileges of employment" that an employer in this Circuit does not run afoul of Title VII if it forces Black employees to work outside in the summer heat with no water while allowing white employees to work inside with air conditioning. *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019).

This Court should jettison its ultimate-employment-decision rule. It cannot be reconciled with Title VII's text or purpose. Given this mismatch, it's no surprise that the rule's invention was accidental, having no more basis in the Fourth Circuit out-of-context decision from which this Court extracted it than it does in the statute's language. Other courts of appeals and the United States agree that abandoning the rule is the only appropriate course. As the panel observed, it is high time for this Court to "reexamine [its] ultimate-employment-decision requirement and harmonize [its] case law with [other] circuits' to achieve fidelity to the text of Title VII." Panel Op. 11. Now that the Court has granted en banc review, it should do just that.

Jurisdictional Statement

Plaintiffs sued Dallas County in the Northern District of Texas under Title VII and the Texas Employment Discrimination Act. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 2000e-5(f), and 28 U.S.C. § 1367(a). The district court's December 1, 2020 order granting judgment to Defendant disposed of all claims of all parties, ROA.102-107, and that judgment

became final on January 14, 2021, ROA.108. Plaintiffs filed a timely notice of appeal on February 15, 2021. ROA.109. This Court has jurisdiction under 28 U.S.C. § 1291.

Issue Presented

Title VII of the Civil Rights Act of 1964 and the Texas Employment Discrimination Act make 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 "compensation, terms, conditions, or privileges of employment" on the basis of sex. 42 U.S.C. § 2000e-2(a)(1); *see* Tex. Lab. Code Ann. § 21.051(1).

The issue presented is whether "terms, conditions, or privileges of employment" are limited to only hiring, firing, promotions, compensation, and other practices that this Court terms "ultimate employment decisions" or whether "terms, conditions, or privileges of employment" should be understood in conformity with that phrase's ordinary meaning.

Statement of the Case

Plaintiffs are female detention officers at the Dallas County jail. The County allows detention officers to take two days off per week. ROA.14. In April 2019, the County switched from setting schedules based on seniority to setting schedules based on sex. ROA.13-14. Under the new policy, male officers could enjoy full weekends off, but female officers could not. ROA.14. Instead, female officers were permitted to take two weekdays off or one weekday and one weekend day off. ROA.14. When female officers confronted the Sergeant about the policy, he admitted that it was "based on gender." ROA.14.

Plaintiffs prefer to schedule their days off on weekends. ROA.14. In addition to raising the discriminatory policy with the Sergeant, they brought it to the attention of the Lieutenant, Chief, and Human Resources. ROA.14. But management "agreed with the policy" and refused to revoke it. ROA.14. After the Equal Employment Opportunity Commission (EEOC) issued right-to-sue letters, ROA.13, Plaintiffs sued the County under Title VII and the Texas Employment Discrimination Act.[1] ROA.10.

The district court granted the County's motion to dismiss for failure to state a claim. ROA.102. Applying this Court's precedent, the district court held that Title VII requires a plaintiff to show that she suffered an "adverse employment action," a category that "consists of 'ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating.'" ROA.103-04. Because "the denial of weekends off" does not qualify as an "ultimate employment decision," the district court granted the County's motion to dismiss. ROA.105.

Plaintiffs appealed. Recognizing that a three-judge panel could not overrule this Court's ultimate-employment-decision rule, Plaintiffs sought initial hearing en banc. Pet. for Hr'g En Banc (filed Mar. 17, 2021). After the petition was denied, a panel considered the appeal.

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[1] The Texas Employment Discrimination Act, set forth in Chapter 21 of the Texas Labor Code, "provide[s] for the execution of the policies of Title VII," so this Court interprets the Act by applying Title VII caselaw. *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 487 (5th Cir. 2004) (citation omitted). For simplicity, Plaintiffs discuss Title VII only, but their arguments apply equally to their claims under Texas law.

The panel affirmed. It acknowledged that the women-work-weekends policy "fits squarely within the ambit of Title VII's proscribed conduct: discrimination with respect to the terms, conditions, or privileges of one's employment because of one's sex." Panel Op. 6. And it recognized that "the County would appear to have violated" the "generally accepted meaning" of that statutory text. *Id.* In the end, the panel affirmed the decision granting the County's motion to dismiss only because the panel felt "constrain[ed]" by this Court's ultimate-employment-decision precedent. *Id.* at 8.

But the panel also noted that its decision need not be the end of the road for Plaintiffs. It observed that the "strength" of Plaintiffs' allegations "coupled with the persuasiveness" of other circuits' decisions that have abandoned an adverse-employment-action requirement make this case an "ideal vehicle" for review by the full Court. Panel Op. 11. Plaintiffs then filed a petition for rehearing en banc, which this Court granted on October 12, 2022.

Summary of Argument

The County's women-work-weekends policy required Plaintiffs to work on Saturdays and Sundays because they are women. Plain meaning, dictionaries, other legislation, Supreme Court precedent, EEOC decisions, and common usage unanimously confirm that, by establishing this policy, the County altered the terms of Plaintiffs' employment based on their sex. It therefore violated Title VII.

The ultimate-employment-decision rule that led the panel to conclude otherwise cannot be sustained. The rule has no support in Title VII's text. It vitiates Congress's

intent. And it conflicts with Supreme Court precedent. This Court should join the Sixth Circuit and the D.C. Circuit and find "there is no sound basis for maintaining" it. *Chambers v. District of Columbia*, 35 F.4th 870, 882 (D.C. Cir. 2022) (en banc); *see Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021).

Standard of Review

This Court reviews dismissals for failure to state a claim de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018) (citation omitted).

Argument

I. This Court's ultimate-employment-decision rule required the district court to uphold a policy that violates Title VII.

Congress spoke clearly in Section 703(a)(1) of the Civil Rights Act of 1964. In an effort to eradicate employment discrimination from the workplace, the provision bans discrimination "with respect to" the "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Those words plainly make discriminatory work schedules unlawful. And instances of the same language in myriad other sources, from caselaw to other statutory iterations to common usage, confirm that conclusion.

A. The County's policy falls squarely within the ordinary meaning of Section 703(a)(1)'s prohibition.

When the County barred Plaintiffs from taking two weekend days off because they are women, it discriminated against them with respect to the terms, conditions,

or privileges of their employment because of their sex. Anyone reviewing the statutory text, layperson and lawyer alike, would conclude that the County failed to comply. "If the words of Title VII are our compass," as they should be, that ends the matter. *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021).

Though it is "not even clear we need dictionaries to confirm what fluent speakers of English know," *Threat*, 6 F.4th at 677, dictionaries are unsurprisingly confirmatory. Start with "discriminate." When the County prevented Plaintiffs from taking two weekend days off because they are women, it discriminated. The word "discriminate" has a "straightforward" definition. *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc). It means "differential treatment." *Id.* (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005)); *Threat*, 6 F.4th at 677. "Discriminate" has the same meaning today as it did when Title VII was enacted: "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third New Int'l Dictionary 647-48 (1961) (Webster's Third); *see Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (instructing courts to consider "ordinary, contemporary, common meaning" in the absence of a statute-specific definition). The County categorically treated men and women differently by allowing men to take weekends off but denying that option to women. Thus, there is "little room for debate" that the County discriminated. *Threat*, 6 F.4th at 677.

Next, consider "terms, conditions, or privileges." "Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*,

Webster's Third 2358. A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else," or "a mode or state of being." *Condition*, Webster's Third 473. And a "privilege" is "a right or immunity granted as a peculiar benefit, advantage, or favor." *Privilege*, Webster's Third 1805. Together, the "terms," "conditions," and "privileges" of employment comprise all of the attributes of the employee-employer arrangement.

Applying Section 703(a)(1)'s text to the issue presented here, shift scheduling qualifies as a term, condition, or privilege of employment. Indeed, for a person who is paid to be at work during certain times, there are few features of the job that are more fundamental.

As the Sixth Circuit put it: "How could the *when* of employment not be a *term* of employment?" *Threat*, 6 F.4th at 677. Under the County's policy, officers were required to work five days a week and were entitled to two days off. But Plaintiffs could not take their two days off on consecutive weekend days. ROA.14. Had Plaintiffs failed to work their assigned shifts, the County presumably could have disciplined them, including by firing them. The women-work-weekends policy thus injected new terms into Plaintiffs' employment.

The County's policy also altered Plaintiffs' privileges. Before the discriminatory policy took effect, officers with more seniority enjoyed preferential scheduling treatment. Afterward, the female officers with more seniority lost that benefit. Employment benefits "may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984). By dictating which

days women could take off, the policy interfered with Plaintiffs' privilege to select the shifts they preferred. *See Threat*, 6 F.4th at 677.

For these reasons, discriminatory shift scheduling "fits comfortably within" Section 703(a)(1)'s prohibition on discrimination with respect to "terms, conditions, or privileges of employment." *Threat*, 6 F.4th at 678. The conclusion that the County violated Title VII necessarily follows. "Once 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*, 35 F.4th at 874-75.

B. A slew of other potential sources of meaning confirm that Section 703(a)(1) covers shift assignments.

The dictionary definitions listed above are in good company. All of the remaining sources one might consult for the meaning of Title VII—other statutes, Supreme Court precedent, the EEOC manual, and contemporaneous common usage—point to the same result. Section 703(a)(1) covers the waterfront of employment discrimination, including necessarily a key attribute of any job: when the employee works.

1. In legislation enacted both before and after Title VII, Congress used the words "terms," "conditions," and "privileges" of "employment" to reach a broad array of employment practices. The consistently expansive meaning these words have carried helps dispel any notion that Congress meant to use them atypically and narrowly in Section 703(a)(1).

a. Congress passed Section 703(a)(1) against the backdrop of the National Labor Relations Act (NLRA). *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975). References to terms and conditions of employment appear in various NLRA provisions, and the "meaning of this analogous language sheds light" on Section 703(a)(1). *Hishon v. King & Spalding*, 467 U.S. 69, 76 n.8 (1984). Courts routinely interpret the relevant sections of the NLRA to cover all facets of the workplace, confirming that this Court should likewise read Section 703(a)(1) to sweep as broadly as its text indicates.

The NLRA makes it an unfair labor practice to encourage or discourage union membership through "discrimination in regard to … any *term or condition of employment*." 29 U.S.C. § 158(a)(3) (emphasis added). An employer can violate this provision by engaging in a wide range of practices, even ones that result in only "comparatively slight" changes for employees. *Randall, Div. of Textron, Inc. v. N.L.R.B.*, 687 F.2d 1240, 1249 (8th Cir. 1982). For decades, courts have read this language expansively. *E.g.*, *N.L.R.B. v. Buddy Schoellkopf Prods., Inc.*, 410 F.2d 82, 84, 88-89 (5th Cir. 1969) (withholding the "privilege of purchasing goods from the company" from employers); *N.L.R.B. v. Almet, Inc.*, 987 F.2d 445, 448 (7th Cir. 1993) (requiring an employee to take a drug test); *Conolon Corp. v. N.L.R.B.*, 431 F.2d 324, 329 (9th Cir. 1970) (reprimanding an employee). And particularly relevant here, this Court has held that discriminatorily assigning employees to work during particular shifts qualifies as discrimination in a "term or condition of employment."

N.L.R.B. v. Moore Bus. Forms, Inc., 574 F.2d 835, 840-41 (5th Cir. 1978); *see* 29 U.S.C. § 158(a)(3).[2]

The NLRA also imposes a duty on unions and employers to collectively bargain with respect to "wages, hours, and other *terms and conditions of employment*." 29 U.S.C. § 158(d) (emphasis added). Here, too, "terms and conditions" extend broadly across the entire employer-employee relationship. Employers and unions must collectively bargain over everything from insurance coverage to holidays to funeral leave to uniforms to the availability of workplace food and beverages. *Firch Baking Co.*, 199 N.L.R.B. 414, 418 (1972), *enforced*, 479 F.2d 732 (2d Cir. 1973); *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 493-94 (1979). Notably, the subjects that fall under "terms and conditions of employment" also include working hours. *Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (plurality opinion); *id.* at 699-700 (Goldberg, J., concurring in judgment).

b. In the aftermath of Title VII's enactment, an amendment to Section 1981 confirmed that Congress understood "terms, conditions, or privileges" of employment to cover workplace practices of all stripes. Consider Congress's

[2] For other examples, see *Mid-South Bottling Co.*, 287 N.L.R.B. 1333, 1342-43 (1988), *enforced*, 876 F.2d 458 (5th Cir. 1989) (refusing to allow an employee to borrow a dolly for personal use); *Goodman Inv. Co.*, 292 N.L.R.B. 340, 349 (1989) (eliminating an employee's free parking space); *F & R Meat Co.*, 296 N.L.R.B. 759, 767 (1989) (depriving employees of "the free coffee they had previously enjoyed"); *Advertiser's Mfg. Co.*, 280 N.L.R.B. 1185, 1190-91 (1986), *enforced*, 823 F.2d 1086 (7th Cir. 1987) (eliminating telephone privileges); *Speed Mail. Serv.*, 251 N.L.R.B. 476, 477 (1980) (distributing paychecks after lunchtime on Fridays instead of before lunch).

response to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Patterson* arose when an employer hired a Black woman to work as a teller and file coordinator but then relegated her to "sweeping and dusting." *Id.* at 178. It did not impose those duties on her white colleagues. *Id.* She sued under Section 1981, which then prohibited racial discrimination only in "the making and enforcement of private contracts." *Id.* at 171, 179.

The Supreme Court rejected her suit, holding that Section 1981 did not extend to discrimination after a contract's formation. *Patterson*, 491 U.S. at 179-80. The Court noted that her employer's conduct would have been "actionable under the more expansive reach" of Title VII's prohibition on discrimination in an employee's "terms, conditions or privileges of employment." *Id.* at 180. But, it held, Section 1981 did not by its terms regulate "working conditions." *Id.* at 177-78.

In direct response to that decision, Congress "promptly" fixed Section 1981's deficiency by extending it to cover the "terms," "conditions," and "privileges" of the employer-employee relationship. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1021 (2020) (Ginsburg, J., concurring). In other words, to ensure that Section 1981 covers "all phases" of employment, Congress added the very words that Section 703(a)(1) contains. H.R. Rep. No. 102-40, pt. 1, at 92 (1991). And legislators expected not only that the statute would cover "harassment, discharge, demotion, promotion, transfer, retaliation, and hiring" but also that it would "not be limited to" those enumerated actions. *Id.*

In short, Congress, like the Supreme Court, considered Title VII's "terms, conditions, or privileges of employment" language to have "expansive reach."

Patterson, 491 U.S. at 180. And it believed that this language would have covered Patterson's challenge to the conditions of her employment—conditions that would not amount to an "ultimate employment decision" under this Court's precedent.

2. Supreme Court precedent, the EEOC, and common usage confirm that the terms, conditions, or privileges of a person's employment are wide-ranging enough to include her work schedule. The Supreme Court has acknowledged 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." *Jewel Tea Co.*, 381 U.S. at 691. And it has described an employer who required employees to work on "Saturdays and Sundays" as imposing "exacting and unconventional conditions." *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 363-64 (1965) (per curiam).

The EEOC, for its part, specifies that the phrase "terms, conditions, and privileges" of employment "include[s] a wide range of activities and practices which occur in the workplace." EEOC Compl. Man., § 613.1, 2006 WL 4672701 (2009). And because "hours of work" and "attendance" fall within that wide range, employers may not discriminate with respect to either. EEOC Compl. Man., § 613.3, 2006 WL 4672703 (2009). Common use of "terms" and "conditions" contemporaneous to Title VII's enactment point in the same direction. For example, in an article about professional musicians who advocated that rehearsals should not start before 10:30 A.M., the *New York Times* specified that these scheduling demands about "working conditions" were separate from "the money package" the musicians negotiated. Theodore Strongin, *Work Conditions Believed Key Issue in Met Pact: Musicians*

Dissatisfied with Proposals They Consider Not Clearly Defined, N.Y. Times, Oct. 9, 1964, at 31.

* * *

No matter where one looks for the meaning of Section 703(a)(1)'s words, the result is the same. By design, the statute is not a precision instrument. Its target is employment discrimination in all incidents of the employer-employee relationship. It does not achieve its goal by specifying that only certain, limited employer decisions (like hiring and firing) must be free from discrimination. It achieves that goal by reaching for every last term, condition, or privilege of employment. One cannot reasonably conclude that the provision's expansive sweep falls short of including a core aspect of a person's job—when she is on and off the clock.

II. The ultimate-employment-decision rule is atextual and misguided.

To date, the County has disputed none of the above. It concedes that Plaintiffs "urge a purely textual reading" of Section 703(a)(1). Opp. to Pet. for Reh'g En Banc 4. It has never represented to this Court (or to the district court) that its policy is lawful under the statute's text.

Still, the County insists that Title VII contains a requirement that it admits is a "judicial construct[]": that Section 703(a)(1) redresses only what employers or courts view as particularly substantial harms and reaches only a subset of employer decisions. Opp. to Pet. for Reh'g En Banc 4; *see, e.g.*, *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019). But no basis exists for judicially limiting Title VII in either respect.

A. Congress did not limit Section 703(a)(1) to remedying what employers or courts view as serious injuries.

Title VII applies to workplace discrimination regardless of whether employers or courts view that discrimination as particularly detrimental. The Act establishes no minimum level of actionable harm. The basic demands of Article III of course require a plaintiff to show constitutional injury. But Section 703(a)(1) does not go above or beyond that bare minimum. Attempts to locate a heightened-harm requirement in either the text or Supreme Court precedent are equally fruitless. Section 703(a)(1) does not tolerate sex discrimination that others view as slight—the statute "tolerates no [sex] discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

1. Section 703(a)(1)'s use of the word "discriminate" does not generate a heightened-harm requirement. As explained above (at 7), "discriminate" connotes any differential treatment. To constitute differential treatment, the circumstances that an employer imposes on a person do not need to be significantly worse than the circumstances the employer imposes on employees outside the protected class; they do not need to be worse at all.

True, the Supreme Court has explained that "discriminate against" under Title VII means "distinctions or differences in treatment *that injure* protected individuals." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020) (citation omitted) (emphasis added). But that limitation is the unremarkable threshold that is demanded of all federal-court plaintiffs. An employee who can satisfy Article III's standing requirement and show differential treatment on the basis of race, color, religion, sex,

or national origin has necessarily been injured. The stigma that flows from classification based on a protected characteristic "is an injury in and of itself." *Walker v. City of Mesquite*, 169 F.3d 973, 980 (5th Cir. 1999) (citing *Shaw v. Reno*, 509 U.S. 630, 643 (1993)); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (noting the "serious non-economic injuries" suffered by those who are "personally denied equal treatment solely because of their membership in a disfavored group"). Title VII requires no more.

The magnitude of the harm an employee endures, we acknowledge, may carry practical implications. If an employee can show that her employer treated her significantly worse than the employer treated colleagues outside of her protected class, that evidence will typically bolster her claim that the employer acted with discriminatory intent. Absent such evidence, she might struggle to convince a factfinder that she suffered discrimination. Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333, 368 (1999). But that empirical reality does not inject an additional heightened-harm element into Section 703(a)(1)—again, the only harm mentioned in Section 703(a)(1) is discrimination, which connotes any differential treatment.

2. At times, this Court has tried to ground the heightened-harm requirement in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Brooks v. Firestone Polymers, L.L.C.*, 640 F. App'x 393, 396-97 (5th Cir. 2016). *McDonnell Douglas* lays out a burden-shifting framework for determining whether a plaintiff who relies on circumstantial evidence of discrimination can survive summary judgment. 411 U.S.

at 802. An "adverse employment action" is one requirement of a prima facie case. *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). This Court, like others, has read the "adverse employment action" language from the *McDonnell Douglas* line of cases as creating an "adverse employment action" element in Section 703(a)(1) that amounts to a heightened-harm rule. *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994); *Kunik v. N.Y.C. Dep't of Educ.*, 842 F. App'x 668, 672 (2d Cir. 2021); *Hooks v. Bank of Am.*, 183 F. App'x 833, 835-36 (11th Cir. 2006).

But the decisions that make this last analytical move misread *McDonnell Douglas.* That case itself involved an allegedly discriminatory failure to hire. 411 U.S. at 801. Predictably, the Supreme Court held that to establish a prima facie case, the plaintiff had to show he was not hired. *Id.* at 802. As courts extended *McDonnell Douglas* outside the failure-to-hire context, they likewise expanded their understanding of what establishes a prima facie case, allowing a plaintiff to show that her "employer fired her *or took some adverse employment action*." *Hassen v. Ruston La. Hosp. Co.*, 932 F.3d 353, 356 (5th Cir. 2019) (emphasis added). But all this does is paraphrase the point that a plaintiff must identify some job-related decision before she can complain of discrimination with respect to the "terms, conditions, or privileges of employment." It does not create a new element of a discrimination claim. Whatever evidentiary route a plaintiff takes to prove her case, the source of her cause of action lies in Section 703(a)(1)'s text, not in off-handed descriptors of a particular method of proof. In an indirect evidence case—like in a direct evidence case—an employee must show the employer took some action that Section 703(a)(1) reaches. Just as a

direct-evidence plaintiff might point to a policy that expressly denies women the ability to take weekends off, an indirect-evidence plaintiff might do so by producing circumstantial evidence to show that the County was motivated by unlawful discrimination to block her particular scheduling request. The "adverse employment action" language is just shorthand. It does not modify the words of Section 703(a)(1) or limit the provision's substantive scope.

3. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems*, 510 U.S. 17 (1993), provide no more support for a heightened-harm requirement than *McDonnell Douglas* does. True, those cases hold that for a hostile-work-environment claim, an employee must show the harassment she suffered was "sufficiently severe or pervasive." *Meritor*, 477 U.S. at 67; *Harris*, 510 U.S. at 21. But that requirement exists because "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment." *Meritor*, 477 U.S. at 67. It is only when the workplace becomes infected with "discriminatory intimidation, ridicule, and insult," either due to pervasive mistreatment or a sufficiently severe instance of harassment, that enduring the environment becomes part of the terms and conditions of the victim's employment. *Id.* at 65-67. When an employer's practice actively and directly alters the terms, conditions, or privileges of a victim's employment, however, there is no need to engage in the inquiry that *Meritor* and *Harris* lay out. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998) ("Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and … *the latter* must be severe or pervasive." (emphasis added)). To ask the question whether harassment is sufficiently severe to alter the

terms of employment is legitimate. But to ask the question whether *altering the terms of employment* is sufficiently severe to *alter the terms of employment* is to answer it—discriminatorily altering the terms of employment always violates the statute.

To the extent that *Meritor* and *Harris* bear on the issue at hand, they support Plaintiffs. Those cases focus on the intensity of the harassment *solely* to evaluate whether the "conduct has … actually altered the conditions of the victim's employment." *Harris*, 510 U.S. at 21-22. They do not require the harassment "to cause a tangible psychological injury." *Id.* at 21. Indeed, the cases are explicit that "even without regard to [any] tangible effects" of the harassment, "the very fact that the discriminatory conduct … created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality." *Id.* at 22. *Harris* and *Meritor* make express that the "test is … whether working conditions have been discriminatorily altered" and that any heightened-harm requirement is disloyal to the statutory text. *Id.* at 25 (Scalia, J., concurring).

4. Another source sometimes cited, albeit incorrectly, for a heightened-harm requirement is *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). There, the Court interpreted Section 704(a) of the Civil Rights Act of 1964, Title VII's antiretaliation provision. Section 704(a) makes it unlawful to "discriminate against" an employee "because he has opposed" an employment practice prohibited by Title VII or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" authorized under Title VII. 42 U.S.C. § 2000e-3(a).

In *Burlington Northern*, the Supreme Court first considered the scope of the antiretaliation provision. The courts of appeals had taken differing views of whether retaliatory conduct has to be employment-related, mirroring Section 703(a)(1), or can occur outside the workplace as well. *Burlington N.*, 548 U.S. at 60-61. The Supreme Court sided with the latter camp, noting that Section 704(a) lacks Section 703(a)(1)'s "terms, conditions, or privileges of employment" language. *Id.* at 62-67. The Court then went on to hold that, under the antiretaliation provision, a plaintiff must show that the challenged action was "materially adverse," meaning that it could have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (citation omitted).

Though *Burlington Northern* has been cited in support of a limitation like the ultimate-employment-decision rule, neither of its holdings bears on the meaning of Section 703(a)(1). In finding that the antiretaliation provision is not limited to the "terms, conditions, or privileges of employment," the Court did mention that the courts of appeals use competing standards to define that phrase. *Burlington N.*, 548 U.S. at 60. But it did not endorse any particular court's view.

Nor did *Burlington Northern* require a heightened showing of harm under Section 703(a)(1). Only the antiretaliation provision was before the Court. And the case's reasoning indicates that the Court's conclusion was specific to that provision. The Court found Section 704(a)'s material-adversity requirement in Title VII's structure, in the fact that the antiretaliation provision exists to "prevent employer interference with unfettered access" to Title VII's processes for remedying the core employment practices it makes unlawful. *Burlington N.*, 548 U.S. at 68 (citation omitted). Like any

antiretaliation provision, it protects "the enforcement of" the underlying substantive guarantee. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452 (2008) (emphasis omitted) (construing Section 1981). If there is no actual risk of interference with enforcement—because there is no likelihood the employer's conduct would "dissuade employees from complaining or assisting in complaints about discrimination"—the antiretaliation provision has no role to play. *Burlington N.*, 548 U.S. at 70. But that reasoning is unique to the retaliation context. It does not justify atextually limiting the scope of Section 703(a)(1), which does not play the same prophylactic role in Title VII's structure and is itself the Act's principal substantive antidiscrimination provision.

The other reasons that supported a materiality requirement in Section 704(a) likewise do not apply to Section 703(a)(1). As for Section 704(a), the Supreme Court found it "important to separate significant from trivial harms." *Burlington N.*, 548 U.S. at 68. But it was motivated by a fear of transforming the "petty slights" and "minor annoyances" that "all employees experience" into potential retaliation claims. *Id.* No such concern plagues Section 703(a)(1). Slights and annoyances only give rise to liability under Section 703(a)(1) if they rise to the level of a hostile work environment. *Meritor*, 477 U.S. at 67. The limitation to terms, conditions, or privileges of employment thus keeps the floodgates closed for Section 703(a)(1) claims in the same way that the material-adversity requirement does for Section 704(a) claims. *See Chambers v. District of Columbia*, 35 F.4th 870, 876-77 (D.C. Cir. 2022) (en banc).

Burlington Northern's justifications for adopting an objective standard for Section 704(a) claims likewise do not apply here. The Court looked to what a reasonable employee would find chilling because a reasonable-person standard is more "judicially administrable." *Burlington N.*, 548 U.S. at 68-69. But in the context of a Section 703(a)(1) claim, the most administrable—and legitimate—way for judges to proceed is to follow the text and ask only whether the employee's treatment is different, instead of assuming the authority to decide whether the treatment is different enough.

B. Congress did not limit Section 703(a)(1) to a subset of employer decisions.

Section 703(a)(1) "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)). This effort to eliminate "all" discriminatory employment practices "in whatever form" covers the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on or grants to an employee. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *see L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). Congress did not write the statute to target only "'economic' or 'tangible' discrimination." *Meritor*, 477 U.S. at 64. It instead intended to eliminate those "irrational impediments to job opportunities and enjoyment which have plagued women in the past." *L.A. Dep't of Water*, 435 U.S. at 707 n.13. Any suggestion that this Court should reach outside of

Section 703(a)(1)'s text for an ultimate-employment-decision limitation runs directly contrary to not only that text but the Act's overall design as well.

1. The contention that Section 703(a)(1) applies only to what courts view as particularly important or final employment decisions is belied by Title VII's structure. In effect, the ultimate-employment-decision rule largely limits recovery to cases where an employee can point to lost compensation. *See, e.g.*, *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 283-84 (5th Cir. 2004) (holding employee showed an ultimate employment decision because he "assert[ed] more than the mere loss of subjective prestige" and pointed to a lost opportunity to "accrue … higher incentive compensation"). But that renders the phrase "terms, conditions, or privileges" nearly meaningless, because Section 703(a)(1) prohibits discrimination with respect to "*compensation*, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Limiting its coverage to monetizable decisions would effectively erase "terms, conditions, or privileges" from the statute, *see Threat v. City of Cleveland*, 6 F.4th 672, 680 (6th Cir. 2021), running afoul of the instruction that statutory interpretation should "give effect, if possible, to every clause and word," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citation omitted).

2. Amendments to the Civil Rights Act confirm that Section 703(a)(1) redresses injuries in cases where no compensation-related employment decision occurs. In 1991, Congress expanded the monetary relief available under that provision by amending Title VII to authorize compensatory and punitive damages. Previously, plaintiffs could recover monetary relief only if the workplace practice had "some concrete effect on the plaintiff's employment status, such as a denied promotion, a

differential in compensation, or termination." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1997). Monetary relief was thus limited to back pay and, in some courts, front pay. *United States v. Burke*, 504 U.S. 229, 237 n.8, 239 & n.9 (1992); *Landgraf*, 511 U.S. at 253. After the amendment, a plaintiff could recover compensatory awards for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). As a result, plaintiffs today can recover damages "in circumstances in which there has been unlawful discrimination in the 'terms, conditions, or privileges of employment' … even though the discrimination did not involve a discharge or a loss of pay." *Landgraf*, 511 U.S. at 254 (citation omitted). The 1991 amendments thus made clear that plaintiffs are entitled to relief even when the discrimination they endure relates to aspects of their employment that do not affect compensation and that this Court would not call ultimate employment decisions.

3. This Court can reject a restrictive, compensation-focused ultimate-employment decision rule and apply Title VII to the full range of employer practices that the words of Section 703(a)(1) cover without transforming the provision into a "general civility code for the American workplace." *Oncale*, 523 U.S. at 80. That concern "is adequately met by careful attention to the requirements of the statute." *Id.* Title VII targets only discrimination that occurs on the basis of five protected characteristics—race, color, religion, sex, and national origin. *Id.*; *see* 42 U.S.C. § 2000e-2(a)(1). Relative to other antidiscrimination laws, that constraint serves as a significant limiting principle. *See, e.g.*, D.C. Code Ann. § 2-1401.01 (listing 23 characteristics protected under D.C. antidiscrimination law); Ca. Gov't. Code

§ 12940(a) (listing 17 characteristics protected under California antidiscrimination law). And though "terms, conditions, or privileges of employment" is expansive, it does not cover every nasty look or fraught exchange that occurs in the workplace. *Cf. Meritor*, 477 U.S. at 67. Nor does it cover employer conduct unrelated to the workplace. "By tethering actionable behavior to that which affects an employee's 'terms, conditions, or privileges of employment,' the antidiscrimination provision by its terms provides the necessary limiting principle." *Chambers*, 35 F.4th at 877. Rather than converting Title VII into a civility code, enforcing the statute as written would permit it to reach troubling instances of discrimination like the women-work-weekends policy here, or "routinely" requiring a Black employee to "handle a heavier workload," *Ellis v. Compass Grp. USA, Inc.*, 426 F. App'x 292, 296 (5th Cir. 2011), or declining to pay for a Black woman's job training, *Harrison v. Brookhaven Sch. Dist.*, No. 21-60771 (5th Cir. argued May 9, 2022), or refusing to permit a woman to perform important, career-advancing duties, *Wallace v. Performance Contractors, Inc.*, No. 21-30482 (5th Cir. argued June 9, 2022)—practices which cannot fairly be described as merely "uncivil."

In any event, the decision to write Title VII as it did was Congress's to make. Congress knows how to limit a statute to address only certain employer practices. In the Equal Pay Act, for example, Congress specifically addressed discrimination with respect to "paying wages." 29 U.S.C. § 206(d)(1). Congress did not take that approach in Title VII. Instead, it used broad language in a "plain" effort to "eliminate those discriminatory practices and devices which have fostered …

stratified job environments." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

* * *

In the end, this Court's judicial gloss on Section 703(a)(1) relies on the unsubstantiated suspicion that "Congress really [only] meant to say" that employers may not seriously disadvantage employees when making important employment decisions. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018). But "judicial humility" requires courts to "refrain from diminishing" broadly worded statutes, even when they think the plain language operates too bluntly. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020). Section 703(a)(1) unambiguously extends to all differential treatment on the basis of a protected characteristic that affects the terms, conditions, or privileges of employment. The judicially created ultimate-employment-decision rule "override[s] Congress' considered choice by rewriting the words of the statute." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632 (citation omitted).

III. This Court should abandon the ultimate-employment-decision rule.

The lack of support for the ultimate-employment-decision rule in the traditional benchmarks of statutory construction leads one to wonder where it came from. In theory, tracing the doctrine back could reveal some forgotten justification.

But the requirement's genealogy only confirms that it has always lacked a proper foundation in the statute's text. These questionable roots, coupled with the rising chorus that has recently rejected comparable requirements, confirm that this Court should overrule its ultimate-employment-decision precedent.

A. The origins of this Court's ultimate-employment-decision rule confirm it has no place in a Section 703(a)(1) claim.

The ultimate-employment-decision rule descends from two distinct sources. Neither supports this Court's caselaw.

1. Some decisions trace this Court's ultimate-employment-decision rule to the Fourth Circuit's en banc decision in *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981) (en banc). *See* Panel Op. 8. *Page* was cited by this Court when it first mentioned that Title VII requires a plaintiff to show an "ultimate employment decision." *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995). But since *Page*, the ultimate-employment-decision doctrine has taken on a life of its own. Like a message in "the children's game of telephone," *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021) (citation omitted), the meaning of the phrase has morphed over time and strayed from how the Fourth Circuit first used it.

In *Dollis*, this Court cited *Page* for the proposition that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." 77 F.3d at 781-82. The cited portion of *Page* noted that disparate-treatment theories of Title VII liability have "consistently focused on the question of whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." 645 F.2d at 233. But *Page* itself did not suggest that Section 703(a)(1) is *limited* to those types of employment decisions. As we will explain, it expressly disclaimed that notion.

Moreover, *Page*'s language must be understood in the context of the argument it actually addressed. In *Page*, a federal postal employee claimed he was denied promotions based on his race. 645 F.2d at 228. He sued under Section 717 of the Civil Rights Act, which prohibits "'discrimination' in respect of 'personnel actions affecting (covered) employees.'" *Id.* at 233 (quoting 42 U.S.C. § 2000e-16(a)). Applying the *McDonnell Douglas* burden-shifting analysis for determining whether employer conduct is causally linked to discrimination, the court held that the employee could not resist summary judgment because he had failed to demonstrate that the employer's legitimate reason for declining to promote him was pretextual. *Id.* at 231. Page maintained that the *McDonnell Douglas* analysis should focus not on the denial of his promotions but on how the promotion review committees were constituted. *Id.* at 232. He posited that because the committee members were all white, he should prevail unless the employer could provide a nondiscriminatory reason for the absence of any nonwhite members. *Id.*

The Fourth Circuit rejected this argument, explaining that the "appropriate object of inquiry" in a disparate-treatment claim under *McDonnell Douglas* is the employment decision itself, not an intermediate procedural step. *Page*, 645 F.2d at 232-33. The denial of Page's promotion was at the "general level of decision" that the statute, Supreme Court precedent, and scholarship "consistently focused on." *Id.* at 233. The composition of the review committee, by contrast, was just an "interlocutory" decision that had "no immediate effect upon employment conditions." *Id.* The Court explained that such interstitial "steps in a process," unlike the "ultimate" decision the process produces, do not fall under Title VII. *Id.* The

court was careful, though, to "suggest no general test" for a covered employment practice, reasoning that "certainly" others aside from hiring, granting leave, discharging, promoting, and compensating would qualify. *Id.*

The principles the Fourth Circuit articulated in *Page* provide no basis for this Court's ultimate-employment-decision rule. At its core, *Page* held that when an employee challenges an employment decision, a disparate-treatment claim focuses on the decision made rather than the procedures used to get to those decisions. It did not define the universe of covered decisions. Instead, it expressly caveated that "myriad" employer decisions "constantly being taken at all levels and with all degrees of significance in the general employment contexts" can give rise to liability under Title VII. *Page*, 645 F.2d at 233.

Not even the Fourth Circuit reads *Page* for the rule this Court extracted from it. After this Court cited *Page* for the ultimate-employment-decision rule, the Fourth Circuit held that *Page* "provides no basis for such a restriction." *Von Gunten v. Maryland*, 243 F.3d 858, 866 n.3 (4th Cir. 2001). For one thing, *Page* relied in part on Section 717's application to discriminatory "personnel actions," *id.*, words that do not appear in Section 703(a)(1). Further, *Page* "fundamental[ly] concern[ed]" whether the pretext inquiry should "focus on the employment decision itself" or the "racial composition of a selection committee." *Id.* The use of the adjective "ultimate" merely differentiated between the two. And finally, the court noted, "*Page* did not hold, as [the Fifth Circuit does], that 'hiring, granting leave, discharging, promoting, and compensating' was an exhaustive list'" of covered practices but "expressly explained" that others qualify. *Id.* In short, although *Dollis* adopted the

Fourth Circuit's "ultimate employment decision" descriptor from *Page*, this Court's interpretation of those words is wholly its own.

2. Another possible culprit for the ultimate-employment-decision rule is *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). *See, e.g.*, *Stewart v. Mo. Pac. R.R.*, 121 F. App'x 558, 561-62 (5th Cir. 2005); *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999). But *Ellerth* provides no support.

For starters, *Ellerth* "did not discuss the scope of" a Section 703(a)(1) disparate-treatment claim. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65 (2006) (discussing *Ellerth*'s holding). In *Ellerth*, the Supreme Court addressed the standards for attributing a hostile work environment created by a supervisor to the employer. The Court held that the employer had an affirmative defense if it used reasonable care to prevent and correct the harassment. *Ellerth*, 524 U.S. at 765. But it also noted that the affirmative defense would be unavailable to an employer if the harassing supervisor took a "tangible employment action" that resulted in "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761, 765.

Transforming the *Ellerth* list into an element of a disparate-treatment claim makes no sense. Consider the context. *Ellerth* concerned a challenge to a hostile work environment, the lone form of Section 703(a)(1) claim where this Court does not apply its ultimate-employment-decision rule. *See Felton v. Polles*, 315 F.3d 470, 484 (5th Cir. 2002) (listing the elements of a hostile-work-environment claim). Thus,

this Court applies a rule purportedly derived from *Ellerth* only to the exact set of Section 703(a)(1) cases that *Ellerth* did not involve.

Further, the ultimate-employment-decision rule places a heavier thumb on the scale than does the tangible-employment-action principle that *Ellerth* actually announced. *Ellerth* did not limit *liability* to cases where a tangible employment action occurs. Instead, it held only that when the defendant meets its burden of showing such an action did not occur, to ascribe liability to the employer, a plaintiff must show that the employer acted negligently in not addressing the hostile work environment. *Ellerth*, 524 U.S. at 765; *accord id.* at 771 (Thomas, J., dissenting). But if she does so successfully, she can recover. *See Abbt v. City of Houston*, 28 F.4th 601, 610 (5th Cir. 2022) (applying the negligence standard). By contrast, in this Circuit, disparate-treatment plaintiffs are denied even that form of recourse because the *Ellerth* list of tangible actions for imputing liability to employers in certain circumstances has been misbranded as a required element of a disparate-treatment claim.

B. The ultimate-employment-decision rule must go.

The lack of historical justification for this Court's ultimate-employment-decision rule provides additional support for what Plaintiffs have already demonstrated. The requirement is at war with Title VII's text. It finds itself on the wrong side of all three branches of government, in opposition to congressional intent, Supreme Court precedent, and the EEOC's longstanding, considered views. *See also* Br. of United States as Amicus Curiae 7-9 (filed May 21, 2021). And the County's only

defense of the rule's merits has been that Congress wrote a broader statute than it should have.

For these reasons, in the past two years, both the D.C. and Sixth Circuits have made clear that Title VII contains no ultimate-employment-decision requirement. In *Chambers v. District of Columbia*, the en banc D.C. Circuit answered the question whether Section 703(a) covers a discriminatory transfer with "an emphatic yes." 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc). *Chambers* overruled *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999), which had layered an "objectively tangible harm" requirement atop Section 703(a)(1)'s text. *Chambers*, 35 F.4th at 872. The court held *Brown*'s atextual gloss was "fundamentally flawed," prioritizing "policy concerns" over "plain text." *Id.* at 879-80.

The Sixth Circuit, too, repudiated the notion that Section 703(a)(1) contains an adverse-employment-action requirement any more muscular than that connoted by the "operative words in the statute." *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021). Chief Judge Sutton found no "gap" separating "the words of Title VII" and the court's prior use of the phrase "adverse employment action." *Id.* at 678. He summarized the court's adversity requirement as merely ensuring that a discrimination claim "involves a meaningful difference in the terms of employment" and "an Article III injury." *Id.* Section 703(a)(1) simply "means what it says." *Id.* at 680.

The United States has likewise concluded that the ultimate-employment-decision rule belongs in the rearview mirror. The Solicitor General has argued to the Supreme Court that the rule "has no foundation in Title VII's text, Congress's purpose, or

[the Supreme] Court's precedents." Br. of United States as Amicus Curiae 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020). And it has dismissed the idea that Title VII contains an implicit heightened-harm requirement as "misguided" and "untenable." Br. in Opp'n 13-14, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019). As the Solicitor General explained, permitting "transparently disparate treatment with respect to a formal aspect of employment" is "irreconcilable" with Section 703(a)(1)'s "text" and "objective," full stop. *Id.* at 14.

This Court should reach the same conclusion. The ultimate-employment-decision rule is even more flawed than the rule that the D.C. Circuit discarded in *Chambers* and the defendant's position rejected by the Sixth Circuit in *Threat*. Even among various circuits' atextual formulations of the statute's purported adverse-employment-action requirement, this Court's rule is an outlier. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 60 (2006); *McCoy v. City of Shreveport*, 492 F.3d 551, 560 (5th Cir. 2007) (retaining "ultimate employment decision" rule in Section 703(a)(1) claims even after *Burlington Northern* rejected it for Section 704(a) claims).

That remains true even though this Court's rule has been on the books for decades. Panel opinions do not "bind the en banc court." *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020) (en banc). And this Court does not grant en banc review lightly. *See* Fed. R. App. P. 35(b)(1). As a result, after the Court has agreed to hear a case en banc, the doctrine of stare decisis is less "exacting" than the inquiry the Supreme Court applies when deciding whether to overturn its precedent. *Planned Parenthood*, 981 F.3d at 369.

When a decision is "seriously" mistaken and "fail[s] to apply" Supreme Court precedent faithfully—as is true for the decisions that gave rise to the ultimate-employment-decision rule, *see supra* at 14-26—that "alone warrants overruling" by the full Court. *Planned Parenthood*, 981 F.3d at 370.

If any doubt persisted, stare decisis considerations support consigning the ultimate-employment-decision rule to the scrap heap. As a general matter, courts prefer to follow precedent because doing so "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Hohn v. United States*, 524 U.S. 236, 251 (1998) (citation omitted). Retaining the ultimate-employment-decision rule serves none of those interests. Perhaps one could have argued five years ago that eliminating the requirement in favor of a position no circuit had then adopted would undermine the "evenhanded" and "predictable" development of the law (though even then it would have required this Court to stick with a rule that allows discrimination to go without remedy). But the courts of appeals to have considered the issue anew in the past two years have agreed with Plaintiffs' position. Staying the course does not promote consistency when courts are breaking the other way.

Nor do reliance interests favor keeping the requirement on the books. To the extent that employers in this Circuit have relied on the Court's precedent to discriminate—and we don't know that they have to any meaningful degree—the "discriminatory effects" of such reliance "count heavily in favor of overruling" precedent, not against it. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020)

(Kavanaugh, J., concurring in part). What is more, workers have reliance interests of their own—they "are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020).

Considerations of the "integrity of the judicial process," *Hohn*, 524 U.S. at 251, likewise support reversal. The ultimate-employment-decision rule is an extreme anomaly, unmatched by even the other circuits that apply their own atextual glosses. And it permits a host of detestable results. The requirement would allow an employer to require that all of its Black employees work under white supervisors, that women bring coffee to meetings, that people of certain religions wear distinguishing patches on their clothing, or that people of certain races enter the premises through specified entrances. And these concerns are far from hypothetical. By this Court's own pen, the ultimate-employment-decision rule—what one court has politely called a judicial "innovation[]," *Threat*, 6 F.4th at 679; *see also Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (Easterbrook, J.)—has effectively authorized employers to relegate their Black employees to the hot Louisiana sun while their white employees enjoy water in the air-conditioned indoors. *Peterson v. Linear Controls*, 757 F. App'x 370, 372-73 (5th Cir. 2019). It has failed to hold accountable employers who administer drug tests to Black job applicants but not white job applicants. *Johnson v. Manpower Pro. Servs.*, 442 F. App'x 977, 983 (5th Cir. 2011). It has insulated discriminatory job reassignments or denials of transfers unless they amount to a demotion or a denial of a promotion. *Alvarado v. Tex. Rangers*, 492 F.3d 605, 612 (5th Cir. 2007). And, in the case before the Court, it has to this point

effectively permitted the County to give men weekends off while invariably requiring women to work weekends. Results like these undermine, and do not in any way further, the "actual and perceived integrity of the judicial process," *Hohn*, 524 U.S. at 251.

Conclusion

This Court should overrule the ultimate-employment-decision rule, reverse the district court's decision, and remand with instructions to return the case to the district court for further proceeding on the merits.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,410 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 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 2016 in 14-point Garamond.

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Certificate of Service

I certify that, on November 14, 2022, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

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