

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 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

**EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: November 21, 2022

/s/ Brianne J. Gorod
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*¹

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of key federal statutes like Title VII of the Civil Rights Act.

CAC thus has a strong interest in ensuring that Title VII is understood, in accordance with its text, history, and Congress's plan in passing it, to prohibit an employer from discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin, regardless of whether that disparate treatment constitutes an ultimate employment decision. It therefore has an interest in this case.

¹ *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Plaintiff-Appellants and Defendant-Appellee have consented to the filing of this brief.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits an employer from “discriminat[ing] 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).² Notwithstanding this plain text which prohibits any discrimination with respect to the “compensation, terms, conditions, or privileges of employment,” plaintiffs within this Circuit are currently required to establish that they “suffered some adverse employment action” to state a claim for employment discrimination under Title VII. *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). This requires showing that they experienced discrimination with respect to “ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating.” *Id.* at 559-60 (quoting *Green v. Adm’rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)). Following this binding precedent, the district court

² While this brief focuses on the text and history of Title VII, the Texas Employment Discrimination Act, which is intended to “provide for the execution of the policies of Title VII,” similarly prohibits “discriminat[ing] in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment.” Tex. Lab. Code Ann. §§ 21.001(1), 21.051(1). The Texas Supreme Court has explained that Title VII case law “guide[s] [its] reading” of Section 21.051. *Mission Consol. Ind. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 633-34 (Tex. 2012). As such, this Court “evaluate[s] sex-discrimination claims under Texas state law and Title VII similarly.” *Sacchetti v. Optiv Sec., Inc.*, 819 F. App’x 251, 253 (5th Cir. 2020).

held that Plaintiffs-Appellants’ allegation that Dallas County barred them from taking full weekends off because of their sex did not state a claim of discrimination under Title VII because, while it “demonstrat[ed] unfair treatment,” it was not an “ultimate employment decision” and thus did not constitute an adverse employment action. ROA.104-07. As Title VII’s text and history make clear, however, its antidiscrimination provision contains no such requirement. This Court should therefore overrule its atextual Title VII precedents and reverse the decision of the district court.

Under the statute’s plain language, a plaintiff alleging discrimination under Title VII must show that an employer discriminated against her “with respect to [her] compensation, terms, conditions, or privileges of employment” because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). Employees who show that they were denied full weekends off because of their sex easily satisfy this standard, as the panel opinion acknowledged. *See* Panel Op. 6 (“The conduct complained of here fits squarely within the ambit of Title VII’s proscribed conduct”); *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (“[I]t is straightforward to say that a shift schedule . . . counts as a term of employment.”).

Title VII’s text, which prohibits discriminatory changes to the terms, conditions, and privileges of employment regardless of whether those changes constitute an ultimate employment decision, is consistent with Congress’s plan in

passing Title VII. Congress passed Title VII “to root out discrimination in employment,” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984), and “to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin,” *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982). Indeed, a bill that served as a precursor to the Civil Rights Act would have prohibited the denial of “equal employment opportunity” on the basis of a protected class and specifically defined “[e]qual employment opportunity” as “including but not restricted to” non-ultimate employment decisions such as “transfer,” “seniority,” “suspension,” and “equality of access to facilities and services provided in employment.” S. Rep. No. 88-867, at 24 (1964).

Although the Civil Rights Act that Congress ultimately passed did not include this itemized list detailing the extent of “terms, conditions, or privileges of employment,” the historical record makes clear that it was understood to operate in the same way. *See* 110 Cong. Rec. 7763 (Apr. 13, 1964) (statement of Sen. Hill) (explaining that Title VII “would control and regiment compensation, terms, conditions, and privileges of employment including but not restricted to” the actions listed in the Senate bill); *id.* at 7778 (Apr. 13, 1964) (statement of Sen. Tower) (lamenting that under Title VII, “[a]ll compensation, terms, conditions, or privileges of employment must be free from any discrimination” and therefore “every assignment of duty . . . could be subject to review”).

Because this Court’s precedent imposes requirements that are at odds with the text and history of the statute, this Court should overrule them and hold that an employer violates Title VII when it discriminatorily changes an employee’s “compensation, terms, conditions, or privileges of employment,” 42 U.S.C. § 2000e-2(a)(1), regardless of whether this act constitutes an “ultimate employment decision.” In doing so, it should reverse the district court’s judgment in this case.

ARGUMENT

I. Title VII’s Plain Text Prohibits Making Employee Scheduling Decisions on the Basis of Sex.

Section 703(a)(1) of Title VII prohibits an employer from “fail[ing] or refus[ing] to hire,” “discharg[ing],” or “otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex” or other protected characteristic. 42 U.S.C. § 2000e-2(a)(1). In considering whether this provision proscribes an employer from making employee scheduling decisions based on sex, this Court’s “task is clear[:] [It] must determine the ordinary public meaning of Title VII’s command that it is ‘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.’” *Bostock*

v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). To discern that meaning, the Court should look “to the time of the statute’s adoption, here 1964, and begin by examining the key statutory terms.” *Id.* at 1738-39.

Under the original public meaning of Title VII’s text, it is plainly unlawful for an employer to prohibit certain employees from taking full weekends off because of their sex or another protected characteristic. At the time of Title VII’s passage, the ordinary meaning of “discriminate” was to “make a difference in treatment or favor (of one as compared with others),” *Webster’s New International Dictionary* 745 (2d ed. 1959) [hereinafter *Webster’s Second*], or to “make a difference in treatment or favor on a class or categorical basis in disregard of individual merit,” *Webster’s Third New International Dictionary* 648 (Philip Babcock Gove ed., 1961) [hereinafter *Webster’s Third*].³ Thus, Title VII “make[s]

³ Lawmakers defined the term similarly while debating Title VII. *See* 110 Cong. Rec. 7213 (Apr. 8, 1964) (Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Sens. Clark & Case, Floor Managers) (“To discriminate is to make a distinction, to make a difference in treatment or favor”); *id.* at 7218 (Apr. 8, 1964) (Sen. Clark Response to Dirksen Memorandum) (“To discriminate is to make distinctions or differences in the treatment of employees”); *id.* at 8177 (Apr. 16, 1964) (Sen. Tower reading Title VII Summary Prepared by National Association of Manufacturers) (“Presumably ‘discriminate’ would have its commonly accepted meaning which . . . is ‘to make a distinction’ or . . . ‘to make a difference in treatment or favor . . . as to discriminate in favor of one’s friends; to discriminate against a special class.’”); *id.* at 12617 (June 3, 1964) (statement of Sen. Muskie) (“Discrimination in this bill means just what it means anywhere: a

it unlawful for an employer to make any distinction or any difference in treatment of employees because of [a protected characteristic].” 110 Cong. Rec. at 8177 (Apr. 16, 1964) (Sen. Tower reading Title VII summary prepared by National Association of Manufacturers); *see also Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (“No one doubts that the term ‘discriminate against’ refers to distinctions or differences in treatment that injure protected individuals.” (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006))).

Specifically, the statute prohibits “mak[ing] a difference in treatment or favor,” *Webster’s Second, supra*, at 745, “with respect to [an individual’s] compensation, terms, conditions, or privileges of employment,” 42 U.S.C. § 2000e-2(a)(1), on the basis of a protected characteristic. In 1964, much like today, “terms” meant “[p]ropositions, limitations, or provisions, stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement.” *Webster’s Second, supra*, at 2604. Similarly, the word “conditions” referred to “[a]ttendant circumstances [or an] existing state of affairs,” and a “condition” meant “[s]omething established or agreed upon as a requisite to the doing or taking effect of something else.” *Id.* at 556. And a

distinction in treatment given to different individuals because of their [protected status].”).

“privilege” meant “[a] right or immunity granted as a peculiar benefit, advantage, or favor,” *id.* at 1969, or “such right or immunity attaching specif[ically] to a position or an office,” *Webster’s Third, supra*, at 1805.

Under the original public meaning of those words, Title VII prohibits an employer from setting employee schedules differently because of sex, even if the employees’ compensation remains the same and they continue to be employed. Such a scheduling policy necessarily changes the “terms” of an individual’s employment (that is, its “nature and scope,” *Webster’s Second, supra*, at 2604) because the employee who initially agreed to work under a particular schedule will instead be required to work on different days. *See Threat*, 6 F.4th at 677 (“How could the *when* of employment not be a *term* of employment?”).

For the same reasons, imposing a discriminatory scheduling policy also alters the “conditions” of an individual’s employment by changing the “attendant circumstances” and “established or agreed upon” characteristics of her job. *See Webster’s Second, supra*, at 556. Indeed, in this case, the “existing state of affairs,” *id.*, was upended by Plaintiffs-Appellants’ employer’s new scheduling policy: Plaintiffs-Appellants were no longer entitled to take leave on the weekends in accordance with their seniority.

Finally, when an employer replaces a seniority-based scheduling policy with a discriminatory sex-based policy, women necessarily receive different “right[s] or

immunit[ies] attach[ed] specif[ically] to a position or an office.” *See Webster’s Third, supra*, at 1805. Plaintiffs-Appellants were “prohibited . . . from exercising [their] seniority rights,” *Threat*, 6 F.4th at 678, because even if they had higher seniority than their male colleagues, they were barred from being scheduled with the entire weekend off.

Thus, an employer who sets employee schedules on the basis of sex violates Title VII, even if employees receive the same pay and benefits when working their new shifts. At a minimum, an employer who sets schedules in that way discriminates with respect to the “terms, conditions, *or* privileges of employment,” as expressly prohibited by Section 703(a)(1). 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see United States v. Woods*, 571 U.S. 31, 45-46 (2013) (emphasizing that the “ordinary use” of the word “or” “is almost always disjunctive,” so “the preceding items are alternatives”).

The Supreme Court has repeatedly emphasized that Title VII’s protections against discrimination should be read broadly in accordance with Congress’s plan in enacting the statute. The Court has explained that “the phrase ‘terms, conditions, or privileges of employment’ in [Title VII] is an expansive concept,” *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)), that “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 . . . in employment,” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (emphasis added) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (explaining that the Supreme Court has “repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition ‘is not limited to economic or tangible discrimination’” (internal quotation marks omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993))). It has also explained that “Title VII tolerates no . . . discrimination [on the basis of a protected characteristic], subtle or otherwise,” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973), including with respect to any “benefits that comprise the ‘incidents of employment’ . . . or that form ‘an aspect of the relationship between the employer and employees,’” *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984) (quoting S. Rep. No. 88-867, at 11, and *Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). Given that, decisions regarding employee scheduling that are made on the basis of sex necessarily affect the terms, conditions, or privileges of employment and accordingly violate Title VII.

II. This Court's Current Standard Imposes Requirements with No Basis in the Statutory Text.

Despite Title VII's straightforward language, which plainly bars discriminatory changes to the terms, conditions, or privileges of employment, this Court's precedent imposes additional requirements with no basis in Section 703(a)(1)'s text. Relying on that precedent, the district court concluded that a prima facie showing of discrimination requires Title VII plaintiffs to allege an "adverse employment action," which necessarily must affect "job duties, compensation, or benefits." ROA.104 (quoting *Pegram v. Honeywell, Inc.*, 351 F.2d 272, 282 (5th Cir. 2004)). Plaintiffs must therefore show that a discriminatory "ultimate employment decision[]" such as hiring, granting leave, discharging, promoting, [or] compensating" occurred. *Id.* (quoting *Felton v. Polles*, 315 F.3d 470, 486 (5th Cir. 2002)). The district court held that Plaintiffs-Appellants' allegation that their employer had a sex-based scheduling policy did not satisfy this requirement because "[c]hanges to an employee's work schedule, such as the denial of weekends off, are not an ultimate employment decision." ROA.105. It further explained that there was "no evidence . . . that Dallas County's practice affected the compensation, job duties, or prestige of the Plaintiffs' employment as required for a finding that an adverse employment action occurred"—even though it conceded that "it is at least plausible that the denial of

full weekends off . . . is objectively worse than getting whole weekends off.”

ROA.106.

This Court’s precedent is wrong to impose these requirements that do not exist anywhere in the text of the statute. Individuals “are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.” *Bostock*, 140 S. Ct. at 1749. Section 703(a)(1) of Title VII nowhere indicates that a plaintiff must show that she suffered an “adverse employment action” that affects “compensation, job duties, or prestige”—let alone that an “ultimate employment decision” occurred. *See Chambers*, 35 F.4th at 875 (holding that “any additional requirement, such as . . . ‘objectively tangible harm,’ is a judicial gloss that lacks any textual support”). Rather, as explained above, a Title VII plaintiff must simply show that she was treated differently because of her sex (or another protected characteristic) with respect to the compensation, terms, conditions, or privileges of her employment. *See Bostock*, 140 S. Ct. at 1743 (explaining that an “employer violated Title VII because . . . it could not ‘pass the simple test’ asking whether an individual female employee would have been treated the same regardless of her sex” (quoting *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978))). Once this fact is established, “the analysis is complete.” *Chambers*, 35 F.4th at 874-75. Plaintiffs-Appellants have pleaded sufficient facts to make this showing.

See ROA.102 (“Plaintiffs allege that Dallas County used a discriminatory work scheduling policy that gave only male employees full weekends off.”).

To be sure, Section 703(a)(2)—the subsequent subsection in Title VII—uses the phrase “adversely affect” when it prohibits an employer from “limit[ing], segregat[ing], or classify[ing] his employees . . . in any way which would 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). Unlike Section 703(a)(1), this subsection has been interpreted to prohibit “disparate impact” discrimination, which does not require showing discriminatory intent. *Griggs v. Duke Power Co.*, 401 U.S. 424, 426, 431-32 (1971); Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1149-50 (1998) (arguing that the “adversity element makes sense” for disparate impact claims to limit which decisions made without discriminatory intent violate the law).⁴ But that provision is not at issue in this case, as Plaintiffs-Appellants’ claims are based on Section 703(a)(1) alone. In fact, Congress’s inclusion of the phrase “adversely affect his status as an employee” in Section 703(a)(2) only underscores that it knew how to include a

⁴ Thus, even when Section 703(a)(1) is properly interpreted to extend to all discrimination with respect to terms, conditions, and privileges of employment, Section 703(a)(2) is not rendered redundant because only that section has been interpreted to allow for disparate impact claims.

heightened requirement when it wanted to. It omitted similar language from Section 703(a)(1), and this Court’s precedent is wrong to import a similar requirement into this provision. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (“[I]t is a general principle of statutory construction that when ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Moreover, although the Supreme Court requires a showing of “material adversity” for a claim under Title VII’s *antiretaliation* provision in Section 704(a) (codified at 42 U.S.C. § 2000e-3(a)), that provision is “not coterminous” with Title VII’s *antidiscrimination* provision in Section 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)). *White*, 548 U.S. at 67-68 (emphasis omitted). Title VII’s antiretaliation provision “prohibits an employer from ‘discriminat[ing] against’ an employee or job applicant because that individual ‘opposed any practice’ made unlawful by Title VII or ‘made a charge, testified, assisted, or participated in’ a Title VII proceeding or investigation.” *Id.* at 56 (quoting 42 U.S.C. § 2000e-3(a)). Examining the two provisions’ “linguistic differences,” the Supreme Court has held that, unlike the antidiscrimination provision, the antiretaliation provision “is

not limited to discriminatory actions that affect the terms and conditions of employment.” *Id.* at 62-64.

“[O]nly after adopting this expansive interpretation of the antiretaliation provision” did the Supreme Court establish that provision’s limiting principle. *Chambers*, 35 F.4th at 876-77. It held that the antiretaliation provision “prohibit[s] employer actions that are likely ‘to deter victims of discrimination from complaining,’” *White*, 548 U.S. at 68 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)), in order to achieve the provision’s “primary purpose” of “[m]aintaining *unfettered access* to [Title VII’s] remedial mechanisms,” *Robinson*, 519 U.S. at 346 (emphasis added). Thus, the antiretaliation provision “covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant,” or actions that are “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *White*, 548 U.S. at 57.

Unlike the antiretaliation provision, Title VII’s antidiscrimination provision should not be read to impose a heightened material adversity requirement. Indeed, the Supreme Court has recognized that “the two provisions differ not only in language but in purpose as well.” *Id.* at 63. While the antiretaliation provision “seeks to prevent harm to individuals based on what they do,” *id.*, “[t]he antidiscrimination provision seeks a workplace where individuals are not

discriminated against because of their racial, ethnic, religious, or gender-based status,” *id.* The Supreme Court has explained that “[t]o secure [this] objective, Congress did not need to prohibit anything other than employment-related discrimination.” *Id.* Thus, neither Title VII’s text nor its purpose justifies imposing an additional adversity requirement for a claim of discrimination under Section 703(a)(1).

And finally, although the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), “sp[oke] of a Title VII requirement that violations involve ‘tangible employment action’ such as . . . ‘reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,’” *White*, 548 U.S. at 64 (quoting *Ellerth*, 524 U.S. at 761), that requirement has no bearing on this case. As the Supreme Court has made clear, it imposed that requirement “only to ‘identify a class of . . . cases’ in which an employer should be held vicariously liable . . . for the acts of supervisors.” *Id.* (quoting *Ellerth*, 524 U.S. at 760); *see Ellerth*, 524 U.S. at 760, 763 (explaining that under principles of agency, vicarious liability is appropriate when a “supervisor takes a tangible employment action against the subordinate”). Indeed, *Ellerth* permits employers to use an affirmative defense to avoid liability when no tangible employment action occurred, implicitly demonstrating that “there are cases covered by Title VII that are *not* tangible employment actions.” 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, 384 (1999).

III. Requiring a Plaintiff Alleging Disparate Treatment to Show an Ultimate Employment Decision Is Contrary to Congress's Plan in Passing Title VII and the Statute's History.

The now-vacated panel decision in this case explained that this Court's Title VII "ultimate employment decision" requirement originated in *Dollis v. Rubin* when it "adopted dictum from a Fourth Circuit case involving a different provision of Title VII" and concluded 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." Panel Op. 7-8 (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995)). However, limiting protection from discrimination to certain "ultimate employment decisions" is at odds not only with Title VII's text, but also with Congress's plan in passing Title VII.

As the Supreme Court has stated time and again, and as Title VII's text makes clear, "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977), and ensuring that "similarly situated employees are not . . . treated differently solely because they differ with respect to race, color,

religion, sex, or national origin,” *id.* at 71; *see also Shell Oil Co.*, 466 U.S. at 77 (“The dominant purpose of [Title VII], of course, is to root out discrimination in employment.”); *Kremer*, 456 U.S. at 468 (“Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin.”); *McDonnell Douglas*, 411 U.S. at 801 (“[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”).

Despite this broad mandate, “employment discrimination decisions by the federal courts,” including decisions by this Court, “have created a body of law that patently contradicts Title VII’s aim of equal employment opportunity” by adding atextual requirements. Esperanza N. Sanchez, Note, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 *Cath. U. L. Rev.* 575, 579 (2018). “In seeking to determine which employment actions are actionable, the lower federal courts have aggressively narrowed the scope of the ‘terms, conditions, or privileges of employment’ provision.” *Id.* at 584.

A recent decision illustrates just how far this Court’s decisions have strayed from the statutory text and Congress’s plan for Title VII. In *Peterson v. Linear Controls, Inc.*, this Court held that a plaintiff alleging that he and other Black employees at his workplace “had to work outside and were not permitted water breaks, while the white employees worked inside with air conditioning and were

given water breaks” failed to state a claim of racial discrimination under Title VII because “these working conditions are not adverse employment actions because they do not concern ultimate employment decisions.” 757 F. App’x 370, 372-73 (5th Cir. 2019) (per curiam), *pet. dismissed*, 140 S. Ct. 2841 (2020) (mem.). In doing so, this Court took as true that the plaintiff’s employer discriminated against him as to his “*working conditions*”—plainly satisfying the terms of the statute—but it nevertheless affirmed the dismissal of his case based on the imposition of wholly atextual requirements. *Id.* at 373 (emphasis added). This decision was flatly contrary not only to the plain language of Title VII—which was never cited in the opinion—but also to Congress’s plan in passing the statute to ensure that “similarly situated employees are not . . . treated differently solely because they differ with respect to race, color, religion, sex, or national origin,” *Trans World Airlines*, 432 U.S. at 71.

This decision and others have ignored that the “terms, conditions, and privileges” of employment can be altered in more subtle ways than by implementing “*ultimate employment decisions* such as hiring, granting leave, discharging, promoting, or compensating.” Panel Op. 7 (quoting *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019), *cert denied*, 141 S. Ct. 160 (2020)). But Congress carefully drafted the statute to make “abundantly clear that Title VII tolerates no . . . discrimination [on the basis of a protected

characteristic], *subtle or otherwise.*” *McDonnell Douglas*, 411 U.S. at 801 (emphasis added). Thus, employer actions short of what this Court considers “ultimate employment decisions” are actionable under Title VII. *See Threat*, 6 F.4th at 679 (“[E]mployer-required shift changes from a preferred day to another day . . . exceed any de minimis exception, any fair construction of the anchoring words of Title VII, and for that matter any Article III injury requirement.”); *Chambers*, 35 F.4th at 872 (“[A]n employer that transfers an employee or denies an employee’s transfer request because of the employee’s . . . sex . . . violates Title VII.”); *Ortiz-Diaz v. U.S. Dep’t of Hous. & Urban Dev., Office of Inspector Gen.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (“As I see it, transferring an employee because of the employee’s race . . . plainly constitutes discrimination . . . in violation of Title VII.” (quoting 42 U.S.C. § 2000e-2(a))).⁵

Title VII’s history confirms that it prohibits a wide swath of discriminatory employer actions that alter the terms, conditions, or privileges of an individual’s

⁵ Congress’s plan to protect against all discrimination affecting the “compensation, terms, conditions, or privileges of employment” means that the language “otherwise to discriminate” in Section 703(a) is not limited to employer actions closely related to “fail[ing] or refus[ing] to hire” or “discharg[ing].” To be sure, in *Babb v. Wilkie*, in the context of discussing a different statute, the Supreme Court noted that the verb “discriminate” “refer[s] to end results.” 140 S. Ct. 1168, 1176 (2020). But that means only that there must be some effect on “end results,” that is, the “compensation, terms, conditions, or privileges of employment.” Here, Plaintiffs are challenging a discriminatory “end result”: the bar on being scheduled for a full weekend off due to their gender.

employment that are not “ultimate employment decisions.” A Senate bill precursor to the Civil Rights Act would have prohibited the denial of “equal employment opportunity to any individual because of race, color, religion, or national origin” and explicitly stated that:

[e]qual employment opportunity shall include all the compensation, terms, conditions, and privileges of employment *including but not restricted to: hiring, promotion, transfer, and seniority; discharge, suspension, and retirement; recruitment advertising and methods of recruitment; referrals for employment; apprenticeship training and other educational opportunity for or in employment; equality of access to facilities and services provided in employment; and equality of participation and membership in employee organizations and labor organizations.*

S. Rep. No. 88-867, at 24 (emphases added). The Supreme Court has observed that that bill “contained language similar to that ultimately found in the Civil Rights Act,” but that the Senate “postponed [the bill] indefinitely after it amended a House version of what ultimately became the Civil Rights Act of 1964.” *Hishon*, 467 U.S. at 75 n.7.

Although the bill that became the Civil Rights Act (H.R. 7152) did not define “terms, conditions, or privileges of employment,” the historical record demonstrates that those terms should have the same expansive meaning as in the Senate bill. Indeed, after H.R. 7152 was passed in the House of Representatives and reached the Senate, Senator J. Lister Hill of Alabama, an opponent of the bill, lamented that “[t]he legislation would give the chairman of the Equal Employment

Opportunity Commission [EEOC] almost a free hand to interfere with virtually every aspect of employer-employee relationships.” 110 Cong. Rec. 7763 (Apr. 13, 1964). He worried that the EEOC Chair “would control and regiment compensation, terms, conditions, and privileges of employment including but not restricted to” actions including “transfer,” “seniority,” and “equality of access to facilities and services provided in employment,” echoing verbatim the broad list the Senate had included in its bill. *Id.*

Indeed, in a debate a few weeks before Congress passed the Civil Rights Act, Senator Edmund Muskie twice read aloud the text of H.R. 7152’s Section 703(a)(1) banning “discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment”—language that remained unchanged in the final Act—and queried, “What more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation?” 110 Cong. Rec. 12618 (June 3, 1964); *cf. First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981) (“Congress deliberately left the words ‘wages, hours, and other terms and conditions of employment’ [in the National Labor Relations Act (NLRA)] without further definition, for it did not intend to deprive the [NLRB] of the power further to define those terms in light of specific industrial practices.” (quoting 29 U.S.C. § 158(d))); *see also Hishon*, 467 U.S. at 76 n.8 (explaining that “certain sections of Title VII were expressly

patterned after the NLRA”); Lidge, *supra*, at 399 n.414, 403-04 (making this comparison and explaining the NLRA provision’s comprehensive breadth).

This history shows that this Court was wrong to conclude in *Dollis* that Title VII was designed to address a narrow set of “ultimate employment decisions.” Indeed, Senator John Tower, bemoaning the bill’s expansive scope, explained that under Title VII “[a]ll compensation, terms, conditions, or privileges of employment must be free from any discrimination,” and this meant that “[e]very promotion, *every assignment of duty, every privilege granted an employee . . .* could be subject to review by the Federal commission.” 110 Cong. Rec. 7778 (Apr. 13, 1964) (statement of Sen. Tower) (emphasis added).

Thus, even though Title VII does not enumerate every action that could constitute discrimination with respect to an individual’s “terms, conditions, or privileges of employment,” it plainly covers more than discrimination regarding “hiring, firing, granting leave, promoting, or compensating,” just as the precursor Senate bill would have done explicitly. The statute’s text and history, consistent with Congress’s plan in passing the statute, make that clear. Title VII protects employees from far more than discriminatory “ultimate employment decisions”—and this protection extends to employees whose employer bars them from taking full weekends off on the basis of sex.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on November 21, 2022.

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

Executed this 21st day of November, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 5,461 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* 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 14-point Times New Roman font.

Executed this 21st day of November, 2022.

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