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 THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

GWENDOLYN YOUNG REAMS
Acting General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel
ANNE NOEL OCCHIALINO
Senior Appellate Attorney
JEREMY D. HOROWITZ
Attorney, Appellate Litigation Services
Office of General Counsel
Equal Employment Opportunity Commission
131 M St. NE, Fifth Floor
Washington, D.C. 20002

PAMELA S. KARLAN
Principal Deputy Assistant Attorney General

BONNIE I. ROBIN-VERGEER
ANNA M. BALDWIN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4278

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Attorney General and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibility under Title VII. See 42 U.S.C. 2000e-5(a) and (f)(1). This case presents an important question regarding the scope of actionable

discrimination under Section 703(a)(1) of Title VII, an issue that the United States recently addressed in *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (cert. denied), and in *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily dismissed). The United States recently has filed amicus briefs in other circuits apprising courts of the views the United States expressed in *Forgus* and *Peterson*. See U.S. Br. as Amicus Curiae, *Lyons* v. *City of Alexandria*, No. 20-1656 (4th Cir.); U.S. Br. as Amicus Curiae, *Threat* v. *City of Cleveland*, No. 20-4165 (6th Cir.); U.S. Br. as Amicus Curiae, *Muldrow* v. *City of St. Louis*, No. 20-2975 (8th Cir.); U.S. Br. as Amicus Curiae, *Neri* v. *Board of Educ. for Albuquerque Pub. Schs.*, No. 20-2088 (10th Cir.); U.S. Br. as Amicus Curiae, *Chambers* v. *District of Columbia*, No. 19-7098 (D.C. Cir.).

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

STATEMENT OF THE ISSUE

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

> [i]t shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin[.]

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

This case presents the question of whether shift assignments, made on the basis of sex, may constitute actionable discrimination "with respect to * * * terms, conditions, or privileges of employment" under Section 703(a)(1). 42 U.S.C. 2000e-2(a)(1).[1]

STATEMENT OF THE CASE

1. Plaintiffs-appellants are women who are employed by the Dallas County Sheriff's Department and who work as Detention Service Officers (DSOs) at the Dallas County jail. ROA.21-10133.11-13.[2] Plaintiffs' complaint alleges that prior to April 2019, shift assignments and days off for DSOs were determined by seniority. Plaintiffs allege, however, that after April 2019, they were subjected to a discriminatory shift assignment policy based on sex. ROA.21-10133.13-14.

As alleged in the complaint, all DSOs are given two days off per week. ROA.21-10133.14. But plaintiffs allege that only men who work as DSOs are allowed to take full weekends off. ROA.21-10133.14. Female employees are not given full weekends off and receive only weekdays or partial weekends off. ROA.21-10133.14. When plaintiffs asked a sergeant why this was so, he allegedly responded that shift scheduling was determined based on gender, and that "it

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

[2] "ROA._" refers to the page numbers of documents in the record on appeal in this case.

would be unsafe for all the men to be off during the week and that it was safer for the men to be off on the weekends." ROA.21-10133.14. The complaint further alleges that male and female DSOs perform the same tasks and that the number of inmates is the same during the week as on weekends. ROA.21-10133.14. Plaintiffs reported the shift assignment policy to other supervisors and human resources, but they declined to change it. ROA.21-10133.14.

2. Plaintiffs filed a complaint against Dallas County alleging, as relevant here, that the County's sex-based shift assignment policy violates Title VII, and seeking damages and injuctive relief. ROA.21-10133.15-16. The County moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), arguing that the complaint does not challenge an actionable adverse employment action under this Court's Title VII precedents. ROA.21-10133.43-45.

3. The district court granted the County's motion to dismiss, explaining that, "[a]lthough Dallas County's alleged facially discriminatory work scheduling policy demonstrates unfair treatment, the binding precedent of this Circuit compel[led]" the court "to grant Dallas County's motion." ROA.21-10133.104. The court stated that under this Court's decisions, adverse employment actions under Title VII are limited to "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating," ROA.21-10133.104

(quoting *Felton* v. *Polles*, 315 F.3d 470, 486 (5th Cir. 2002)), and that "[c]hanges to an employee's work schedule, such as the denial of weekends off, are not an ultimate employment decision," ROA.21-10133.105 (citing *e.g.*, *Benningfield* v. *City of Houston*, 157 F.3d 369 (5th Cir. 1998)).

In dismissing the complaint, the district court rejected plaintiffs' argument that the County's sex-based shift assignment policy is actionable under circuit precedent. This Court has previously held that certain job transfers "may qualify as an 'adverse employment action' if the change makes the job 'objectively worse.'" *Pegram* v. *Honeywell, Inc.*, 361 F.3d 272, 283 (5th Cir. 2004) (quoting *Hunt* v. *Rapides Healthcare Sys.*, 277 F.3d 757, 770 (5th Cir. 2001)). See ROA.21-10133.104-105. The district court reasoned that this "objectively worse" standard is available only for those Title VII claims involving job transfers or reassignments that are "the equivalent of a demotion." ROA.21-10133.105 (citing *e.g.*, *Alvarado* v. *Texas Rangers*, 492 F.3d 605, 612 (5th Cir. 2007)).

The district court determined that the scheduling policy here, even if "objectively worse" for plaintiffs, does not constitute an "ultimate employment decision" because it does not affect "the compensation, job duties, or [the] prestige of the Plaintiffs' employment." ROA.21-10133.106. To support this conclusion, the court cited this Court's decision in *Benningfield*, a case holding that a transfer to the night shift is not an actionable adverse employment action in the context of a

First Amendment retaliation claim. 157 F.3d at 377; see ROA.21-10133.106. The court also cited an unpublished Title VII decision of this Court holding that "oppressive changes of work hours for no legitimate reason" and "denial[s] of day shifts granted to all other lieutenants on light duty" are "not adverse employment actions." *Mylett* v. *City of Corpus Christi*, 97 F. App'x 473, 475 (5th Cir. 2004); see ROA.21-10133.105.

4. Plaintiffs timely appealed the dismissal of their complaint. ROA.21-10133.109. In addition, plaintiffs unsuccessfully sought initial hearing of this appeal by this Court sitting en banc. Order, *Hamilton* v. *Dallas Cnty.*, No. 21-10133 (5th Cir. Apr. 14, 2021).

SUMMARY OF ARGUMENT

The United States files this brief to inform the Court of its view that a policy of making shift assignments on the basis of sex is actionable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), and that no showing of an "ultimate employment decision" or an "objectively worse" harm tantamount to demotion is required. The United States recently explained its views on the scope of Section 703(a)(1) in an amicus brief in support of the petition for a writ of certiorari arising from a decision of this Court in *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily

dismissed), and in a brief in opposition to the petition for a writ of certiorari in *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (cert. denied).

ARGUMENT

SHIFT ASSIGNMENTS ARE ACTIONABLE UNDER SECTION 703(a)(1) OF TITLE VII, AND NO SHOWING OF AN "ULTIMATE EMPLOYMENT DECISION" OR HARM EQUIVALENT TO A DEMOTION IS REQUIRED

In *Peterson* v. *Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily dismissed), and *Forgus* v. *Esper*, 141 S. Ct. 234 (2020) (cert. denied), the United States addressed the scope of "terms, conditions, or privileges of employment" under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). In these cases, the United States explained its view that Section 703(a)(1) is not limited to "ultimate employment decisions," as this Court's precedents would have it, or to other employment actions having "a significant detrimental effect." See U.S. Br. at 7-17, *Peterson* v. *Linear Controls, Inc.*, No. 18-1401 (Mar. 20, 2020); Br. in Opp. at 12-16, *Forgus* v. *Esper*, No. 18-942 (May 6, 2019).

In both *Peterson* and *Forgus*, the United States further explained that while retaliation claims under Section 704(a), 42 U.S.C. 2000e-3(a), may be based only on actions "that a reasonable employee would have found * * * materially adverse," *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 68 (2006), there is no such material harm or detrimental-effect requirement for discrimination

claims under Section 703(a)(1) of Title VII. *Peterson*, U.S. Br. at 17-18 n.5; *Forgus*, Br. in Opp. at 18 & n.6. Instead, Section 703(a)(1) prohibits all discrimination with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). A shift assignment is a term or condition of employment. As the United States' brief in *Peterson* put it: "A typical employee asked to describe his 'terms' or 'conditions * * * of employment,' 42 U.S.C. 2000e-2(a)(1), would almost surely mention where he works and what he does." U.S. Br. at 8; see also *ibid.* ("Work assignments are part-and-parcel of employees' everyday terms and conditions of employment.") (quoting *EEOC Compliance Manual* § 15-VII(B)(1) (2006)). A policy governing the shifts when an employee works is likewise part of an employee's terms and conditions of employment.

Accordingly, the district court applied an erroneous legal standard when it held that shift assignments, made on the basis of sex, are not actionable under Section 703(a)(1) because they are not "ultimate employment decisions." ROA.21-10133.104. This Court's "ultimate employment decision" standard is irreconcilable with the statutory text of Section 703(a)(1) and should be reconsidered. See *Peterson*, U.S. Br. at 12-14. The district court further erred in concluding that a shift assignment policy is not actionable even if it makes the job "objectively worse," because a work schedule policy alone does not affect job

duties or cause a loss of compensation or prestige. ROA.21-10133.106. Neither an "objectively worse" standard nor any restriction of that standard to cases involving job transfers or reassignments—whether or not tantamount to a demotion—has any basis in the text of Section 703(a)(1). See *Peterson*, U.S. Br. at 14-16 & n.3. The United States' brief in *Peterson* can be found at https://www.justice.gov/sites/default/files/briefs/2020/03/23/18-1401_peterson_ac_pet.pdf, and the United States' brief in *Forgus* can be found at https://www.justice.gov/sites/default/files/briefs/2019/05/07/18-942_forgus_opp.pdf.[3]

[3] The D.C. Circuit has granted rehearing en banc on its own motion, for the explicit purpose of reconsidering its Title VII precedents, in a pending case in which the United States filed an amicus brief similar to the one here. See *Chambers* v. *District of Columbia*, No. 19-7098, 2021 WL 1784792, at *1 (D.C. Cir. May 5, 2021) (requesting briefing on whether the court should retain its "objectively tangible harm" standard for actionable Title VII job transfers).

In the now-vacated panel opinion in *Chambers*, both members of the two-judge panel that decided the case issued a separate concurrence urging that it be reheard en banc and stating that "statutory text, Supreme Court precedent, and Title VII's objectives make clear that employers should never be permitted to transfer an employee or deny an employee's transfer merely because of that employee's race, color, religion, sex, or national origin." *Chambers* v. *District of Columbia*, 988 F.3d 497, 506 (D.C. Cir.) (Tatel and Ginsburg, JJ., concurring), vacated at 2021 WL 1784792 (D.C. Cir. May 5, 2021). No other court of appeals in which the United States has filed a similar amicus brief has yet issued a decision.

CONCLUSION

The United States respectfully urges this Court to reconsider, at an appropriate juncture, any precedent limiting its interpretation of Section 703(a)(1) to "ultimate employment decisions," or to actions that cause "objectively worse" harm that is the equivalent of a demotion.[4]

Respectfully submitted,

GWENDOLYN YOUNG REAMS
Acting General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel
ANNE NOEL OCCHIALINO
Senior Appellate Attorney
JEREMY D. HOROWITZ
Attorney, Appellate Litigation Services
Office of General Counsel
Equal Employment Opportunity Commission
131 M St. NE, Fifth Floor
Washington, D.C. 20002

PAMELA S. KARLAN
Principal Deputy Assistant Attorney General

s/ Anna M. Baldwin
BONNIE I. ROBIN-VERGEER
ANNA M. BALDWIN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4278

[4] Title VII's federal-sector provision, 42 U.S.C. 2000e-16(a), applies to claims against the federal government. That provision contains different statutory language than Section 703(a)(1), and the United States does not with this filing urge this Court to reconsider any of its precedent interpreting 42 U.S.C. 2000e-16(a).

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 1995 words according to the word processing program used to prepare the brief.

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

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Date: May 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney