IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

—v.—

DALLAS COUNTY,
DOING BUSINESS AS DALLAS COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS, *ET AL.*, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Coalition of Labor Union Women, AFL-CIO
Desiree Alliance
Equality California
Feminist Majority Foundation
GLBTQ Legal Advocates & Defenders
HOPE for All: Helping Others Prosper Economically
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Legal Voice
Lift Louisiana
National Association of Social Workers (NASW)
National Association of Women Lawyers
National Council of Jewish Women
National Crittenton
National Employment Lawyers Association
National Organization for Women Foundation
National Women's Political Caucus
National Workrights Institute
New Voices for Reproductive Justice
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Service Employees International Union (SEIU)
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, the undersigned counsel certifies that none of the *Amici Curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10 percent or more of its stock. This representation is made so that the judges of this Court may evaluate possible disqualification or recusal.[1]

Dated: May 21, 2021

/s/ Carolyn L. Wheeler
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[1] In accordance with Fed. R. App. P. 29(a)(4)(E) and Local Rule 29.1, *Amici* state that no party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than *Amici* or their members—contributed money that was intended to fund preparing or submitting the brief.

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INTERESTS OF *AMICI CURIAE*

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of the legal rights and opportunities of women and girls and all who are harmed by sex discrimination. Since its founding in 1972, NWLC has focused on issues of importance to women and girls, including education, income security, child care, workplace justice, and reproductive rights and health, with an emphasis on the needs of low-income women, women of color, and others who face multiple and intersecting forms of discrimination. As part of this work, NWLC fights for equal opportunities and fair treatment for women in all aspects of their employment. For example, NWLC works to ensure robust implementation of women's workplace rights under Title VII—including, as relevant here, the right to greater notice of and input into their work schedules, combating the unstable and unpredictable work hours that are detrimental to people with caregiving responsibilities, and that women, particularly women of color are more likely to experience. Finally, NWLC has participated as counsel or *amicus curiae* in a range of cases before U.S. Courts of Appeals and the U.S. Supreme Court to secure the equal treatment of women and other protected classes under the law.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than two million members dedicated to the

principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU Women's Rights Project (WRP), co-founded in 1972 by Ruth Bader Ginsburg, is a leader, as direct counsel and *amicus*, in the effort to ensure women and girls' full equality in society, including in the workplace, and specifically in male-dominated fields. Under Ginsburg's leadership, WRP litigated the foundational Supreme Court jurisprudence that won recognition of the heightened scrutiny applicable to state-sanctioned overt gender classifications, through its advocacy on behalf of a military servicewoman. *See Frontiero v. Richardson*, 411 U.S. 677 (1973); *see also Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). More recently, WRP challenged the U.S. Department of Defense's ban on women serving in combat roles and sought Supreme Court review of the Selective Service Administration's male-only registration requirement. WRP also was lead counsel in *Curto v. A Country Place Condominium Ass'n, Inc.*, 921 F.3d 405 (3d Cir. 2019), which applied Title VII sex discrimination doctrine to invalidate a private housing complex's sex-segregated swimming schedule.

The American Civil Liberties Union Foundation of Texas (ACLU of Texas) is a nonpartisan organization with approximately 56,000 members across the State. Founded in 1938, the ACLU of Texas is headquartered in Houston and is the one of the largest ACLU affiliates in the nation. The ACLU of Texas is the State's

foremost defender of the civil liberties and civil rights of all Texans as guaranteed by the U.S. Constitution and our nation's civil rights laws.

Other *amici* include civil rights and public interest organizations committed to preventing and addressing sex discrimination, including in the workplace.

Amici file this brief with the consent of all parties. Fed. R. App. P. 29(a)(2).

BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiffs are women who work as Detention Service Officers (DSOs) at the Dallas County Jail. They challenged the County's new scheduling policy that gave men in these positions the ability to take full weekends off but limited women to taking only weekdays or partial weekends off. When Plaintiffs asked why they could no longer take full weekends off, their supervisor stated that it would be "unsafe for all the men to be off during the week" and "safer for the men to be off on the weekends." ROA 14; RE 23, ¶ 21. Plaintiffs filed their sex discrimination suit challenging this facially discriminatory policy under Title VII of the Civil Rights Act of 1964 and the Texas Employment Discrimination Act.

Despite acknowledging that the Plaintiffs had plausibly alleged that the denial of weekends off made their jobs "objectively worse," the district court dismissed the complaint for failure to state a sex discrimination claim under Title VII. ROA 106; RE 16. The court held the policy was not an "adverse employment action" in that the policy had not "affected the compensation, job duties, or

prestige of the Plaintiffs' employment," and so could not be challenged under Title VII. *Id.*

This Court should reverse and invalidate Dallas County's scheduling policy because it is facially discriminatory and a relic of the sex-based employer policies of the past. Although the scheduling policy does not affect Plaintiffs' compensation, it makes their working conditions objectively worse, thereby stating a Title VII claim for discrimination in the "terms, conditions, or privileges" of employment. Finally, the scheduling policy, by interfering with women's ability to control their schedules, is distinctly harmful to employees with caregiving obligations, which are frequently shouldered by women, and particularly women of color – like the Black women who are the Plaintiffs here.

ARGUMENT

I. Dallas County's scheduling policy facially discriminates against women in violation of Title VII's prohibition on discrimination because of sex.

Title VII outlaws hiring, firing, and a range of other employment decisions because of sex and other protected characteristics, including discrimination "with respect to [an individual's] . . . terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). *See also Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1740 (2020) (discriminate means "'To make a difference in treatment or favor (of one as compared with others).' . . . To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly

situated.") (internal citations omitted). Dallas County's policy, on its face, flunks this straightforward test.

In the nearly 60 years since Title VII's passage, the U.S. workplace has transformed from one in which women comprised just one-third of the paid labor force and were limited to a few low-paid, stereotypically "feminine" jobs to our current landscape, in which women comprise nearly half of all workers and are represented in every field, at every level. Yet under Dallas County's scheduling policy at the Jail, women have been, once again, explicitly relegated to second-class status.

The sex-segregated work world that Title VII sought to dismantle rested on entrenched assumptions about the kinds of jobs for which men and women were "innately" suited. At the time of Title VII's enactment, many state statutes, for instance, excluded women from certain employment opportunities based on sexist stereotypes that they were not capable of performing such jobs. *See*, *e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding state law preventing women from working as bartenders unless their husband or father owned the bar, because their "oversight. . . minimizes hazards that may confront a barmaid without such protecting oversight"); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (sustaining state maximum-hours law for women laundry workers because "woman's physical structure and the performance of maternal functions place her at a disadvantage in

the struggle for subsistence"); *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (approving Illinois's law against admitting women to practice of law, because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"). Other fields, such as law enforcement, were off limits to women simply because of employer biases. *See* Carol A. Archbold & Dorothy Moses Schulz, *Research on Women in Policing: A Look at the Past, Present and Future*, 6 SOCIOLOGY COMPASS 694, 695-96 (2012), *available at* https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1751-9020.2012.00501.x.

After Title VII became law, courts and the U.S. Equal Employment Opportunity Commission (EEOC) began to invalidate such facially discriminatory restrictions.[2] This Court, for instance, found unlawful discrimination in an employer's categorical refusal to allow women to work in telephone switchman jobs because workers in such positions had to lift over 30 pounds. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 231-32 (5th Cir. 1969); *see also Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715-18 (7th Cir. 1969) (invalidating employer ban on women bidding for factory jobs that required lifting of 35 pounds

[2] In a related challenge brought soon after the statute's passage that had wide-ranging symbolic and practical consequences, a federal court upheld the validity of EEOC's guideline outlawing newspapers' separation of "help wanted" ads into "male" and "female" sections as a violation of Title VII. *Am. Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968); *see also* 29 C.F.R. § 1604.5.

or more); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1227 (9th Cir. 1971) (invalidating ban on women holding railroad station agent jobs based on heavy lifting requirements); *cf. Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977) (extending Title VII disparate impact framework to strike minimum height and weight requirments for corrections officers that effectively barred women from such jobs).[3]

Other grounds for limiting employment opportunities on the basis of sex also were repudiated by the courts. For instance, in an early landmark ruling, this Court rejected an airline's policy of only hiring women as flight attendants because they supposedly were better at "'providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible.'" *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (quoting district court findings). And in *United Automobile Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991), the Supreme Court rejected the employer's "fetal protection policy" barring fertile women, but not men, from jobs involving contact with lead, based on the substance's reproductive hazards, which were not unique to women.

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[3] As the Supreme Court later described the principle underpinning its conclusion in *Dothard*, "Title VII even forbids employers to make gender an *indirect* stumbling block to employment opportunities." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (citations omitted) (emphasis added).

In addition to striking down sex-based exclusions from certain jobs, the Supreme Court used Title VII to condemn employer policies that treated women worse than men once they were on the job. In *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Court invalidated an employer's requirement that women employees make larger pension contributions than men because of their average longer life expectancy, and explained, "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 707 n.13; *See also Nashville Gas Co. v. Satty*, 434 U.S. 136, 142-43 (1977) (ruling employer's policy of divesting women of accumulated seniority while on pregnancy leave, but maintaining seniority of those absent for different medical reasons, violates Title VII); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684-85 (1983) (holding employer's policy of providing pregnancy-related health coverage to female employees, but only limited coverage of pregnancy for male employees' wives, constitutes unlawful sex discrimination); U.S. Equal Employment Opportunity Commission, *Compliance Manual: CM-613 Terms, Conditions, and Privileges of Employment* (Apr. 1, 1982), https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment (detailing wide range of sex-specific practices barred by Title VII,

from automatically awarding men 12-month job contracts but women only 9-month contracts, to assigning only women to perform clerical tasks like watering plants and fetching coffee, and referring to women as "girls" but men as "men").

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court made plain that even when stereotypes motivate an individual employment decision, rather than a formal sex-specific policy, their use provides direct evidence of discrimination. The Court ruled it was sex discrimination to deny Ann Hopkins a promotion to partner because she used profanity, purportedly needed "a course at charm school," and did not "walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, and wear jewelry" – in short, because she did not look or act as a woman "should." *Id.* at 235, 257-58. The Court held that excluding Hopkins from the partner ranks because she was deemed the "wrong" kind of woman was no less discriminatory than a policy that deemed *all* women unsuited for partnership.

The nearly six decades of precedent interpreting Title VII's prohibition of sex discrimination could not be clearer: the law prohibits sex-based employment decisions, and the district court should have allowed Plaintiffs' claim to go forward.[4]

[4] Under Title VII, the only way an employer may proceed with an explicitly sex-based employment practice is to prove that it is a bona fide occupational qualification, or BFOQ, in that

II. Dallas County's scheduling policy violates Title VII by making women's "terms, conditions, or privileges" of employment objectively worse, despite not affecting "job duties, compensation, or benefits."

The district court recognized that Dallas County's scheduling policy was facially discriminatory, but nevertheless dismissed Plaintiffs' complaint, holding that the denial of weekends off did not constitute actionable discrimination on the grounds that it did "not affect job duties, compensation, or benefits" within the meaning of this Court's decision in *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004). *See* ROA 104; RE 14. The court was wrong as a matter of law and policy.

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it is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). This exception is narrow, and generally has been accepted only with respect to hiring or job assignment decisions that implicate the privacy and dignity of vulnerable individuals. *See*, *e.g.*, *Healey v. Southwood Psychiatric Hospital*, 78 F.3d 128, 133 (3d Cir. 1996) (both male and female health care specialists required on all shifts for care of sexually abused adolescents because teens may talk more freely with members of their own sex); *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (assigning women as guards in women's prison is a BFOQ to safeguard incarcerated people's personal security against sexual assault and invasions of privacy); *cf. Dothard*, 433 U.S. at 335 (approving BFOQ defense of hiring only men for certain correctional officer jobs in response to the specific dangers of defendant state's prison system, not women's inherent unfitness for those jobs).

Even assuming the BFOQ defense is available to justify discriminatory terms, conditions, or privileges of employment (as opposed to hiring or job assignment practices), an employer's mere incantation of sex-based stereotypes does not satisfy the exacting BFOQ standard. *See*, *e.g.*, *Rosenfeld*, 444 F.2d at 1224 (rejecting BFOQ defense where based on "a general assumption regarding the physical capabilities of female employees . . . as the 'weaker sex'"); *Weeks*, 408 F.2d at 235-36 (same); *Bowe*, 416 F.2d at 717, 718 (same); *Diaz*, 442 F.2d at 389 (rejecting BFOQ defense base on customer preference). Dallas County's purported safety concerns, ROA 104; RE 23, would not meet that standard.

As a threshold matter, the district court's ruling fails to explain how Plaintiffs could hope ever to achieve equal "job duties, compensation, or benefits" as DSOs where Dallas County apparently has deemed them incapable of performing their jobs without oversight from their male colleagues. As demonstrated above, facially discriminatory policies convey that members of the disfavored group are less qualified, less valued, and less desirable employees. Dallas County's policy conveys precisely such "less than" status. This stigma demonstrably impedes women's opportunities, with potential attendant economic effects ranging from deterring them from seeking promotions to driving them off the job altogether – and in the process, reinforcing the assumption that women are fundamentally unsuited for such work. *See*, *e.g.,* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 Denv. U. L. Rev. 995, 1106 & n.581 (2015) ("Once [facially] discriminatory practices are in place, they interact dynamically with the underlying stereotypes, to set in motion self-perpetuating and self-justifying cycles.").[5]

[5] Indeed, if the disputed scheduling policy is not deemed unlawful, Dallas County would be right in assuming that it could freely impose a range of unequal "terms, conditions, or privileges" on women DSOs that further diminish their status, from allowing only men to take holidays off, to seating women in the back of the DSO meetings, to calling women who are DSOs by their first name instead of "Officer," to forcing women to take more responsibility for cleaning the Jail.

A. Scheduling and a range of other workplace policies and practices constitute "terms, conditions, or privileges" of employment that can support a discrimination claim, even without changes in "job duties, compensation, or benefits."

The touchstone inquiry under Title VII is not whether the Plaintiffs suffered principally economic harm, but whether the policy treats women "worse" than men in the same roles. *Bostock*, 140 S. Ct. at 1740. As the Court put it in *Hishon v. King & Spalding*, 467 U.S. 69 (1984) – where it concluded that denials of partnership were subject to challenge under Title VII – "terms, conditions, or privileges of employment" include any and all benefits that are "part and parcel of the employment relationship," that are "'incidents of employment,'" or that "'form an aspect of the relationship between the employer and employees'" and they may "not be doled out in a discriminatory fashion, even if the employer would be free . . . simply not to provide the benefit at all." *Id*. at 74-75 (internal citations omitted).

Several courts of appeals have concluded that schedule and shift changes are employment actions affecting the "terms, conditions, or privileges" of employment and, accordingly, can constitute actionable discrimination under Title VII. In *Spees v. James Marine*, *Inc.*, 617 F.3d 380, 392 (6th Cir. 2010), for instance, the court held that the transfer of a female welder to a night shift job in the tool room constituted an adverse action even though there was no change in pay because work on that shift "adversely affected her ability to raise her daughter as a single mother." In *Ginger v. District of Columbia,* 527 F.3d 1340 (D.C. Cir. 2008), the

court held that switching police officers to a rotating morning/afternoon/night shift from a permanent night shift was an adverse employment action in violation of Title VII because it "severely affected their sleep schedules and made it more difficult for them to work overtime and part-time day jobs." *Id.* at 1344. Significantly, the court stressed that the difficulty resulting from a less favorable schedule can render an employment action "adverse" even if the employee's responsibilities and wages are left unchanged. *Id.*[6] Similarly, the Third Circuit recently held, under the Fair Housing Act (FHA) – which has a provision identical to that in Title VII prohibiting sex discrimination in "terms, conditions, or privileges" in the sale or rental of housing, 42 U.S.C. § 3604(b) – that a condominium association violated the FHA by enacting a facially discriminatory policy segregating the association's swimming pool by gender and relegating

[6] In other labor and employment law contexts, work schedules are demonstrably a key aspect of an employee's working conditions. For example, work schedules are a subject of mandatory bargaining under the National Labor Relations Act. 29 U.S.C. § 158(d); *see*, *e.g.*, *Beverly Health and Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 479-80, 483 (6th Cir. 2002). The Americans with Disabilities Act, 42 U.S.C. § 12111(9)(B), specifically lists a schedule modification as a potential reasonable accommodation, and the failure to provide such a modification violates the statute unless the employer can show it poses an undue hardship. *See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA* (2002) https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada; *also see Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 172 (1st Cir. 1998) (a modified schedule is a form of reasonable accommodation). Regulations under the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654, similarly state that employees should ordinarily be returned to "the same shift or the same or an equivalent work schedule" in order to comply with the statute's mandate that they be returned to an "equivalent position." 29 C.F.R. § 825.215(e)(2).

women to daytime use, even though the total hours per week were the same for both genders. *Curto v. A Country Place Condominium Ass'n, Inc.*, 921 F.3d 405, 410-11 (3d Cir. 2019). Notably, the court observed that adoption of the pool scheduling policy denied women with "regular-hour jobs" access to the pool and thus reflected an impermissible reliance on "particular assumptions about the roles of men and women." *Id.*

Dallas County's scheduling policy also is analogous to a transfer to an objectively worse job, which this Court repeatedly has held can support a discrimination claim. The district court cited that line of cases with approval, but inexplicably deemed them inapposite. *See Alvarado v. Texas Rangers*, 492 F.3d 605, 612-15 (5th Cir. 2007) (woman who repeatedly sought transfer from state trooper position in Department of Public Safety to the Texas Rangers stated adverse employment action even though pay was the same, because Rangers are, objectively, an elite unit); *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996) (transfers of police officers from intelligence unit to night uniformed patrol positions constituted adverse actions where the positions involved less prestige and less favorable working hours); *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992) (transfers of deputy sheriffs from law enforcement division to jail guard positions could be considered demotions even though no change in pay because

guard jobs were less interesting and prestigious, and because "everybody" viewed a transfer from detention to law enforcement as a promotion).

In addition to schedule changes and transfers, courts have recognized a variety of other actionable "terms, conditions, or privileges" claims under Title VII. In *Wedow v. City of Kansas City*, 442 F.3d 661, 667 (8th Cir. 2006), for instance, firefighters were issued "bunker gear" that was supposed to fit closely to allow for protection and mobility, but women were given ill-fitting gear designed for men. *Id.* The fire station had restrooms located in the men's locker rooms, where doors were not secure and men had the keys. *Id.* The Eighth Circuit upheld the jury verdict for the women in their Title VII sex discrimination case, holding that "the terms and conditions of a female firefighter's employment are affected by a lack of adequate protective clothing and private, sanitary shower and restroom facilities" because the conditions "jeopardize her ability to perform the core functions of her job in a safe and efficient manner." *Id.* at 671-72. Other courts similarly have found the inadequacy of workplace bathroom facilities for female employees supports a sex discrimination claim under Title VII. *See*, *e.g.*, *Lynch v. Freeman*, 817 F.2d 380, 387-88 (6th Cir. 1987) (unhygienic portable toilets on construction site evidence of disparate impact sex discrimination); *James v. National R.R. Passenger Corp.*, No. 02-3915, 2005 WL 6182322, at *4-*5 (S.D.N.Y. Mar. 28, 2005) (same).

Here, the district court agreed that the express denial of full weekends off treated Plaintiffs "worse" than male DSOs. As demonstrated above, it also should have concluded that such a showing was sufficient to state a Title VII sex discrimination claim.

B. The broad scope of Title VII's "terms, conditions, or privileges" provision is illustrated by sexual harassment jurisprudence.

The Supreme Court embraced an expansive view of the "terms, conditions, or privileges" provision when it reached its historic conclusion that hostile work environment harassment violates Title VII, irrespective of whether such conduct results in an individual's being punished with job loss or other immediate economic harm for objecting to such conduct. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (noting that Title VII's prohibition on discrimination extends beyond "'terms' and 'conditions' in the narrow contractual sense," quoting 42 U.S.C. § 2000e-2(a)(1)).

This Court was the first to recognize that workplace harassment can constitute actionable discrimination under Title VII. *Rogers v. EEOC*, 454 F.2d 234, 238-39 (5th Cir. 1971) (Latina employee could claim hostile environment based on optometry practice's segregation of patients based on ethnicity). In the Court's principal opinion, Judge Goldberg wrote that employees' psychological welfare is as entitled to "protection from employer abuse" as their economic

welfare, and that "the phrase 'terms, conditions, or privileges of employment' in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Id.* at 238.

In the realm of sexual harassment cases, courts initially failed to see such conduct as actionable discrimination – even where it involved a clear adverse employment action such as discharge or the like. *See e.g., Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev'd sub nom Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *see also Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *rev'd*, 562 F.2d 55 (Table) (9th Cir. 1977). But as evidenced by the appellate reversals of these early decisions, the courts evolved in understanding that such conduct affects a term or condition of employment, whether or not there is an impact on an employee's earnings.

This jurisprudential shift was mirrored by the EEOC's 1980 update to its *Guidelines on Discrimination Because of Sex* declaring "hostile work environment" harassment to be unlawful sex discrimination. 29 C.F.R. § 1604.11(a) (1980).

This evolution was completed in 1986, when the Supreme Court ruled in *Vinson* that conduct creating a sexually hostile work environment violates Title VII by altering the "terms, conditions, or privileges" of employment. *Vinson*, 477 U.S. at 63-67. The plaintiff, Mechelle Vinson, was repeatedly coerced into having sexual relations with her supervisor; Vinson suffered grievous emotional and psychological harm, but kept her job and in fact received promotions. *Id.* at 60. Rejecting the employer's defense that the absence of quantifiable income loss doomed her Title VII claim, the Court held that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64. As the Court later explained in *Harris v. Forklift*, 510 U.S. 17, 22 (1993):

> A discriminatorily abusive work environment, . . .can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it 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.

If a supervisor at the Dallas County Jail withheld a woman's desired schedule unless she had sex with him, that conduct would clearly constitute sexual harassment in violation of Title VII. That form of harassment is illegal because it "expose[s] [the person] to disadvantageous terms or conditions of employment." *Oncale*, 523 U.S. at 80, quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

While Plaintiffs here, of course, do not allege that the scheduling policy constitutes harassment, the policy confers a similar second-class status, based on sex. Women who work as DSOs at the Dallas County Jail do not have access to full weekends off solely because they are women; men who work in the exact same job do have such access, solely because they are men. That constitutes clear sex discrimination in violation of Title VII.

III. Dallas County's scheduling policy is distinctly harmful to women who are caregivers, particularly women of color like Plaintiffs.

As detailed above, Dallas County's policy is facially discriminatory, and materially affects the terms and conditions of women's employment, mandating reversal of the district court's decision. In addition, this policy, by its very nature, imposes hardships on women because these objectively worse work schedules negatively impact caregivers, the majority of whom are women.

Despite historic gains in the paid labor force, women continue to shoulder the majority of family caregiving responsibilities.[7] Such caregiving includes not

[7] *See, e.g.,* AARP Family Caregiving & Nat'l Alliance for Caregiving, *Caregiving in the U.S. 2020* at 11 (May 2020) (showing women are 61 percent of unpaid family caregivers for adults), https://www.caregiving.org/wp-content/uploads/2021/01/full-report-caregiving-in-the-united-states-01-21.pdf; U.S. Dep't of Labor Bureau of Labor Statistics, *American Time Use Survey*, Table A-9 (2020): Time adults spent caring for household children as a primary activity by sex, age, and day of week, average for the combined years 2015-19 (showing that in households with children, women spend roughly twice the amount of time that men do caring for children), https://www.bls.gov/news.release/atus.htm. Indeed, the increase in female participation in the labor force since Title VII's enactment has been most significant for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 43 years ago. *See* U.S. Dep't of Labor Bureau of Labor Statistics, *Women in the Labor Force: A Databook*,

only care for children but also for older family members and family members with disabilities; one recent account estimated that around one in six people provide unpaid care to an older adult.[8] *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (working women provide two-thirds of the nonprofessional care for older, chronically ill, and disabled individuals); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 355-60 (2004). Studies show that women with young children in the paid labor force spend, on average, up to six hours a day providing primary or secondary child care. *See* Sarah Jane Glynn, *An Unequal Division of Labor,* CTR. FOR AM. PROGRESS (May 2018).[9]

Caregiving responsibilities fall especially heavily on women of color, like the Black women who are the Plaintiffs in this case. *See*, *e.g.*, Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Effects of the Coronavirus Pandemic on Women of Color*, CTR. FOR AM. PROGRESS (Apr. 23,

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Table 7 (2019) (62% of mothers with children under 3 were in the civilian labor force in 2018, compared with 34% in 1975), https://www.bls.gov/opub/reports/womens-databook/2019/pdf/home.pdf.

[8] *See* AARP Family Caregiving, *supra* note 7 at 9 ("Approximately 41.8 million Americans have provided unpaid care to an adult age 50 or older in the prior 12 months (16.8 percent), up from 2015 (14.3 percent).").

[9] https://www.americanprogress.org/issues/women/reports/2018/05/18/450972/unequal-division-labor

2020).[10] Black women and Latinas are more likely to be both the primary breadwinner and the primary caregiver for children: for instance, nearly 70 percent of Black mothers and roughly 40 percent of Latina mothers are the primary breadwinners in their families – either because they are unmarried or they earn as much or more than their husbands – in contrast to white women, who are less likely to the primary economic support for their families. *See* Sarah Jane Glynn, *Breadwinning Mothers Are Critical to Families' Economic Security*, CTR. FOR AM. PROGRESS (March 2021).[11] Families of color also are more likely to live in homes with an older relative who may be in need of care.[12] Notably, the caregiving needs of an older relative are especially unpredictable, given the potential for emergent health crises, which, of course, increase over time, as the relative ages.[13]

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[10] https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home.

[11] https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm.

[12] National Partnership for Women and Families, *Paid Family and Medical Leave: A Racial Justice Issue – and Opportunity* (Aug. 2018), at 6, https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf.

[13] U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, text at notes 8-10 (May 23, 2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities.

Given the lack of access to universal child care in the U.S., working parents face considerable challenges in finding affordable, high-quality care, relying on a patchwork of schools and pre-K programs, child care centers, and in-home care. For instance, more than 60 percent of all children under age five are in some form of child care. Angela Rachidi, *Child Care Assistance in the United States and Nonstandard Work Schedules*, AEI ECONOMIC POLICY WORKING PAPER 2015-13 (Nov. 2015).[14] As with caregiving generally, working women are more likely to shoulder the responsibility when gaps in child care arise;[15] according to one recent study, mothers were 40 percent more likely than fathers to report that difficulties finding child care negatively impacted their careers. *See* Leila Schochet, *The Child Care Crisis is Keeping Women Out of the Workforce*, CTR. FOR AM. PROGRESS (Mar. 28, 2019).[16] Again, Black and Latina mothers experience more difficulties: Black mothers, for instance, are more likely to cite cost as a barrier to finding care,

[14] https://www.aei.org/research-products/working-paper/child-care-assistance-in-the-united-states-and-nonstandard-work-schedules

[15] According to a recent study in New York State, over half of working women report that child care responsibilities cut back on their paid work hours--compared with only one third of men--and women were twice as likely to report needing time off from work because of child care responsibilities. *See* New York City Comptroller & A Better Balance, *Our Crisis of Care: Supporting Women and Caregivers During the Pandemic and Beyond* at 6 (Mar. 2021), https://www.abetterbalance.org/wp-content/uploads/2021/03/Crisis_of_Care_Report_031521.pdf.

[16] https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce.

whereas Latinas are more than twice as likely as white mothers to report difficulty in finding child care centers located in their communities. *Id.*

The hurdles faced by caregivers – especially those who are providing such care without a spouse or partner[17] – are already considerable and complex, and thus are exponentially magnified for those faced with the need to obtain weekend coverage. The exodus of millions of women from the paid workforce during the COVID-19 pandemic, when schools and care providers have been unavailable to working parents, speaks volumes about the degree to which women – even in two-parent households – are overwhelmingly the caregivers of default.[18] If these difficulties prove insurmountable, or the out-of-pocket costs too high,[19] women may decide they have no choice but to drop out of the workforce entirely, putting

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[17] This reality particularly harms Black women, who are more likely to be single mothers. *See* Sarah Jane Glynn, *Breadwinning Mothers Continue To Be the U.S. Norm*, CTR. FOR AM. PROGRESS 4 (May 2019) https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/.

[18] *See e.g.*, Kathryn A. Edwards, *Women are Leaving the Labor Force in Record Numbers*, DALLAS MORNING NEWS (Nov. 22, 2020), https://www.dallasnews.com/opinion/commentary/2020/11/22/women-are-leaving-the-labor-force-in-record-numbers.

[19] As detailed above, it is not necessary to show an economic harm to bring a Title VII discrimination case. However, as illustrated in this Section, it is also likely that the scheduling policy at issue here is likely to have an economic impact on the Plaintiffs, further demonstrating that this schedule is objectively "worse" for women and therefore results in actionable harm.

major financial strain on themselves and their families.[20] Alternatively, those workers may experience conflicts between their jobs and caregiving demands that fuel damaging gender stereotypes about female caregivers' dependability and commitment – stereotypes that are well-documented as causing myriad forms of disparate treatment. *See*, *e.g.*, 140 S. Ct. at 1747 (noting "motherhood discrimination" as an acknowledged Title VII violation); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120-21 (2d Cir. 2004) (employer's discrimination against woman based on stereotypes about mothers is prohibited by Title VII); U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007) (and cases cited in notes 43-65); Joan C. Williams, *The Maternal Wall*, HARVARD BUSINESS REVIEW (Oct. 2004), https://hbr.org/2004/10/the-maternal-wall.[21]

[20] In the majority of states, workers who leave the paid workforce to provide care to a family member are ineligible for unemployment insurance when they are able to resume searching for work. Liz Ben-Ishai, Rick McHugh, & Kathleen Ujvari, *Access to Unemployment Insurance Benefits for Family Caregivers: An Analysis of State Rules and Practices*, AARP PUBLIC POL'Y INST. 10 (Apr. 2015), https://www.nelp.org/publication/access-unemployment-insurance-benefits-family-caregivers-analysis-state-rules-practices.

[21] Social science confirms these examples drawn from litigation – that is, that employers discriminate against mothers based on stereotypes that they are less committed and capable employees. *See* Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297 (2007), https://sociology.stanford.edu/sites/g/files/sbiybj9501/f/publications/getting_a_job-_is_there_a_motherhood_penalty.pdf.

Stereotypes aside, it is clear that the policy Dallas County adopted significantly burdens women's ability both to do their jobs and fulfill their family responsibilities. For those women working for Dallas County Jail who are caregivers, the categorical denial of full weekends off means that they will have to obtain at least one day of weekend child care, elder care, or other family-related care. Schools are closed on weekends, as are most child care and day program senior centers[22]; indeed, one survey concluded that just three percent of early education and child care centers offer weekend hours.[23] Accordingly, unless a DSO has a partner available to provide care, she will likely face challenges accessing reliable, high-quality care during the weekend – and if she can find it, she may not be able to afford it.[24] The County's policy effectively imposes a 21st century version of the policy at issue 50 years ago in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*), when the Supreme Court considered a

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[22] Three quarters of adult day service facilities are open just five days a week and only 6% are open seven days a week. *See National Study of Adult Day Services, 2001-2002*, at 15, WAKE FOREST UNIVERSITY SCHOOL OF MEDICINE http://www.iadsa.com/Nationalstudyofadultdayservices.pdf.

[23] Anisha Ford and Abbie Lieberman, *Making Child Care Work Beyond 9 to 5*, SLATE (June 1, 2018), https://slate.com/human-interest/2018/06/child-care-options-for-parents-working-outside-traditional-hours-are-limited.html?wpsrc=sh_all_dt_tw_ru.

[24] *See generally* Julia R. Henly and Gina Adams, *Insights on Access to Quality Child Care for Families with Nontraditional Work Schedules*, URBAN INSTITUTE (Oct. 2018), https://www.urban.org/research/publication/insights-access-quality-child-care-families-nontraditional-work-schedules.

refusal to hire mothers of preschool-aged children, but not fathers of children the same age, to be facially discriminatory.[25]

What Dallas County has denied only to the women it employs is the right to choose and control their work schedules; in short, it has denied women the same freedom it has granted to men in the same positions. Accordingly, its policy deprives all women of the ability to use full weekends to go on vacation, attend children's sports events, attend other family events like reunions and weddings, participate in continuing education, or otherwise pursue their personal interests, hobbies, and goals.

For the many women with caregiving responsibilities in their families, however, Dallas County's policy constitutes an even more harmful adverse employment action: those women will both face burdens in providing for weekend care, and experience diminished access to leisure time with their children that their colleagues who are fathers will not.

CONCLUSION

Dallas County's scheduling policy is a relic of a sex-segregated, pre-Title VII world premised on women's second-class status. By imposing "terms, conditions, or privileges" of employment that are "objectively worse" for women,

[25] The *Phillips* Court remanded the case for consideration of a potential BFOQ defense of the disputed policy, 400 U.S. at 498, but, as discussed *supra*, the BFOQ defense was sharply circumscribed in subsequent years, and Dallas County will not be able to satisfy it here.

it facially violates the statute. And for those women who are caregivers – disproportionately women of color – the inability to manage their schedules on the same terms as men imposes an additional, sex-specific harm.

For all of the foregoing reasons, *Amici* urge reversal of the district court's order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because this brief contains 6494 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, Times New Roman 14-point.

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CERTIFICATE OF SERVICE

I certify that on May 21, 2021, I filed a copy of the Brief of *Amici Curiae* National Women's Law Center, *et al.*, supporting Plaintiffs' appeal seeking reversal, *via* the Court's ECM/ECF filing system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

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