No. 19-1121

In the
Supreme Court of the United States

GUADALUPE A. WELSH,
Petitioner,
v.

FORT BEND INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Many of the material facts are not in dispute. Nonetheless, Welsh does not offer a full presentation of either the underlying facts or the procedural history of this case. Because this Court's consideration of Welsh's argument will necessarily hinge on a thorough presentation of the facts, the Fort Bend Independent School District (the District) presents a detailed factual summary.

This is a discrimination (national origin, gender, and age) and retaliation lawsuit brought under Title VII and the Age Discrimination in Employment Act (ADEA). ROA.9-17, 301-03. At all times relevant to this lawsuit, Welsh worked for the District as a high school science teacher. ROA.248-49.

Relevant Procedural Background: Welsh I.

On August 15, 2012, Welsh filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), and alleged that that District: (1) discriminated against her on the basis of her national origin, gender, and age; (2) subjected her to a hostile work environment; and (3) retaliated against her. ROA.304. On June 19, 2014, Welsh amended her charge and stated in total: "Since the filing of my previous EEOC charge of discrimination, I continue to suffer discrimination and retaliation by Fort Bend ISD in violation of Title VII of the Civil Rights Act of 1964, as amended, and in violation of the Age Discrimination in Employment Act of 1967, as amended. This continued discrimination and retaliation has created, and continues to create, a

hostile work environment." ROA.305. The EEOC issued Welsh a "no cause" right-to-sue letter on June 30, 2014. ROA.60, 199.

Welsh I was filed in Texas state court on September 26, 2014. ROA.199. Welsh alleged the District violated Chapter 21 of the Texas Labor Code (Texas' analog to Title VII) by discriminating against her and subjecting her to a hostile work environment on the basis of her national origin, gender, and age, and by retaliating against her after she filed her charge of discrimination. ROA.199.

The District filed a plea to the jurisdiction seeking dismissal of *Welsh I* on the grounds that the lawsuit was time-barred because Welsh's Chapter 21 claims were filed after the two-year statute of limitations set by Section 21.256 of the Texas Labor Code. ROA.199. On January 9, 2015, the state trial court granted the District's plea and dismissed *Welsh I* with prejudice. ROA.199. Welsh did not appeal the dismissal of her state court lawsuit.

Relevant procedural background: Welsh II.

On January 17, 2015, one week after *Welsh I* was dismissed, Welsh filed another EEOC charge against the District. ROA.301-03. Welsh again alleged that the District: (1) discriminated against her on the basis of her national origin, gender, and age; (2) subjected her to a hostile work environment; and (3) retaliated against her. ROA.199, 301-03. The EEOC, once again issued Welsh a right-to-sue letter. ROA.199. *Welsh II* (this lawsuit) was filed on May 12, 2015. ROA.9. Welsh's claims are based on the same allegations she

made in her January 2015 EEOC charge, which she states, "were done in retaliation of Plaintiff filing and amending her previous Charge of Discrimination on June 19, 2014." ROA.10-12.

The district court dismissed *Welsh II* on the grounds that this suit was barred by *res judicata*. ROA.151-53. On appeal, the Fifth Circuit reversed and reinstated only those claims that were brought in *Welsh II*. ROA.199-205. As such, Welsh's live claims are narrowly constrained to those that she included in her January 2015 charge of discrimination and repeated verbatim in her complaint – which are the only claims that survived the un-appealed state court dismissal of *Welsh I*. *See* ROA.205. Welsh's claims are, as summarized by the Fifth Circuit, based exclusively on the following purported adverse events:

> (1) On April 3, 2014, she was placed under a 'Teacher in Need of Assistance' ("TINA") Plan for reasons that were fabricated;
>
> (2) On April 29, 2014, she received a Professional Development and Appraisal System, Summative Annual Report ("PDAS"), which stated that she had been placed on a TINA Plan and FBISD 'would not remove the disparaging memoranda';
>
> (3) On July 9, 2014, Welsh requested a letter of recommendation from the principal but received no response;
>
> (4) During 'the Fall semester of 2013,' FBISD deliberately failed to provide her with accommodation information for her

> students as a means of fabricating another reprimand against her;
>
> (5) On September 16, 2014, Welsh filed a grievance requesting that the TINA Plan be removed from her file, that all mentions of the grievance be removed from her file, and that the school comply with PDAS standards; and
>
> (6) On December 19, 2014, Allison Pike 'made humiliating remarks' to Welsh in front of others.

ROA.200 (internal quotations in original); *see also* ROA.9-17. While Welsh complains in her Petition of other events stretching back to 2010, no claim based on these events survived the dismissal of *Welsh I* or the limits imposed on her claims by *Welsh II*. *Compare* Petition at 18-21 (detailing alleged mistreatment that occurred between 2010 and 2013), 59a-67a, 72a-74a, 79a, 80a-82a (evidence related to 2010 to 2013 occurrences).

On remand, after discovery, the district court granted the District's motion for summary judgement and, on July 3, 2018, set forth its rationale in a detailed memorandum opinion. ROA.530-40; *see also* ROA.541. The district court found Welsh's "discrimination claims fail because she cannot raise an issue of fact as to whether she suffered an adverse employment action." ROA.537. Specifically, "[t]he actions Ms. Welsh complains of, while they may be frustrating to endure, are exactly the types of things that the Fifth Circuit does not consider adverse employment action."

ROA.536. In addition, the district court held that, even if Welsh had asserted a viable adverse employment action, "the District has articulated non-discriminatory reasons, and Ms. Welsh cannot establish discriminatory pretext" because "Ms. Welsh has offered no evidence of why these actions would be pretext for national origin, gender, or age discrimination." ROA.537. As to Welsh's Title VII retaliation claim, the district court held that Welsh failed to allege a viable adverse employment action, and recognized that "[e]ven if these were adverse actions, the causal link is insufficient to create an issue of material fact." ROA.539.

Welsh moved for reconsideration and a new trial on August 16, 2018. ROA.546. On March 12, 2019, the district court denied Welsh's motion for reconsideration, noting that it reaffirmed its previous finding that placement on a growth plan, under the circumstances, "does not qualify as an adverse employment action." ROA.641-42. Welsh, once again, appealed to the Fifth Circuit. ROA.643.

Factual background relevant to Welsh's surviving claims

Welsh began her employment as a teacher with the District in 1971. ROA.248-49. Other than a period when she voluntarily resigned to move overseas and raise her children, she has been continuously employed at the District. ROA.248-49. In fact, as of the time of her deposition in 2018, she was still employed by the District as a science teacher at Dulles High School. ROA.248. As noted above, Welsh argues that the following are adverse employment actions: "(1) 'the

unwarranted use of a TINA'; (2) refusal to remove the TINA from Ms. Welsh's professional record; (3) failure to write a recommendation letter; (4) Ms. Pike's loud instruction for Ms. Welsh to feed the fish; and (5) continuing to monitor and assess Ms. Welsh." ROA.535-36.

Welsh fails to properly document a special education student's needs and is placed on a growth plan.

In the fall of 2013, one of Welsh's students was entitled to receive special education services. ROA.286-98. Welsh claimed in the district court that the District deliberately failed to provide her with this student's special education paperwork and individualized education plan (IEP) as part of an elaborate scheme to set her up for failure so that it could reprimand her. ROA.11, 263. The student's parents complained about his academic progress. ROA.294-95. As a result of the complaint, Dr. Terra Smith, an associate principal, determined Welsh was aware of the need for accommodation and failed to properly document the student's special education services. ROA.294-95.

After an exchange of memoranda between Smith and Welsh, Smith placed Welsh on a teacher in need of assistance plan (TINA) – i.e., a growth plan. ROA.296, 533. A "teacher in need of assistance" plan is a term of art under the teacher appraisal system for Texas educators. *See* 19 Tex. Admin. Code § 150.1004 (2016). It is an intervention plan cooperatively developed by the supervisor and teacher with the goal of improving the teacher's performance to a satisfactory level, and can require a teacher to take steps to improve

performance outside of the appraisal process. *See id.; see also Koehler v. La Grange Indep. Sch. Dist.,* No. 092-R10-801, *8 (Comm'r Educ. 2002) (noting that the Texas Administrative Code does not limit intervention plans exclusively to when a teacher receives a low appraisal and stating that intervention plans may be created when a district believes they would be helpful to the teacher).

The growth plan here required that Welsh receive training in special education, which Welsh promptly sought and received. ROA.268, 296-98. Smith then noted in Welsh's annual performance appraisal that Welsh had completed the TINA. ROA.300.

Dissatisfied with the notation in her performance appraisal, Welsh filed an administrative grievance with the District seeking to have the reference to the TINA removed from her appraisal. ROA.286-88. After reviewing the grievance, an assistant superintendent, Xochitl Rodriguez, denied Welsh's request, finding that there was evidence to support the need for the TINA. ROA.286-88. Welsh did not appeal Rodriguez's decision to the District's Board of Trustees. ROA.269.

Welsh does not receive a recommendation.

Welsh next claims that on July 9, 2014, she asked her campus principal for a recommendation letter, but never received one. ROA.12. In her deposition, Welsh explained that her request was made in passing during a conversation in a hallway. ROA.270, 533. Welsh concedes that it is possible that her principal simply forgot her request. ROA.270. But, in any event, once she learned that her principal had not written her a

recommendation, she admitted she never took any further action. ROA.269, 533. In fact, she testified, "I didn't follow through." ROA.269, 533.

Welsh is told to feed the fish in her classroom.

As an aquatic science teacher, Welsh had 14 to 15 tanks of fish in her classroom and it was Welsh's responsibility to care for the fish. ROA.260, 533-34. On December 19, 2014, when faculty were checking out for the semester, one of the associate principals at Dulles, Allison Pike, purportedly told Welsh, in front of other coworkers, "Ms. Welch [sic], you need to take care of your fish." ROA.260, 534. Welsh inferred from this statement that Pike did not want Welsh to rely on the District's maintenance staff to feed the fish. ROA.260, 534. Despite the fact that Welsh found Pike's comments hurtful, it is undisputed that Welsh remained employed at Dulles as a teacher, at the time of her deposition in 2018, and her "title, hours, salary, and benefits did not suffer." ROA.534, 540.

SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI

Welsh asks this Court to determine whether her placement on a Texas-specific, statutorily created, teacher growth plan (a TINA) constitutes an ultimate adverse employment action for her discrimination claim. A growth plan simply fails to meet the requirements of an adverse employment action that are dictated by the plain statutory text of Title VII. That alone is reason for this Court not to review this case. And, even if were not, this Court should not waste its resources reviewing whether a specific type of growth

plan employed only in Texas could ever rise to the level of an ultimate adverse employment action.

Welsh further argues that the TINA was an adverse employment action for purposes of her retaliation claim. Welsh claims to identify a Circuit split as to what constitutes an adverse employment action for purposes of a Title VII retaliation claim, warranting this Court's review. Welsh's contention is mistaken for the simple reason that the Circuit split she identifies ceased to exist 14 years ago when this Court addressed the very same question in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) that Welsh now asks this Court to decide. Since this Court's decision in *Burlington*, the Fifth Circuit has faithfully followed this Court's retaliation jurisprudence. Without a Circuit split to harmonize, Welsh simply asks this Court to engage in error correction. Not only would that be a waste of this Court's resources, there is no error to correct. Critically, however, the Fifth Circuit never addressed this question finding, instead, that Welsh's retaliation claim failed on causation grounds. Accordingly, this question is not even properly before this Court.

In short, Welsh offers this Court no reason – much less any compelling reason – to review the Fifth Circuit's well-reasoned and manifestly correct decision. Consequently, this Court should deny Welsh's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Contrary to Welsh's contention, there is no Circuit split as to what constitutes an adverse employment action for purposes of a Title VII retaliation claim.

Welsh informs the Court that the Circuits are in a three-way split as to what constitutes an adverse employment action for purposes of a retaliation claim. Petition at 7, 10. Welsh apparently identified this split based on her reading of the Ninth Circuit's decision in *Ray v. Henderson*, 217 F.3d 1234, 1241-43 (9th Cir. 2000); *see* Petition at 10-11. *Ray* does, in fact, state that the Circuits are split in three ways, but that is no help to Welsh. *Ray*, 217 F.3d at 1240-42. That is because this Court, in *Burlington Northern*, eliminated the Circuit split. 548 U.S. at 53. Specifically, this Court rejected the Sixth Circuit's (as well as the Fifth Circuit's) prior approach to retaliation claims – which required that a plaintiff suffer an ultimate adverse employment action in order to state a retaliation claim – and, instead, held that a retaliation plaintiff (distinct from a discrimination plaintiff) need not suffer an ultimate adverse employment action in order to press their claim. *Id.* at 53-54. Rather, a retaliation plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 67-68 (internal quotations omitted).

Welsh's extensive discussion of the Fifth Circuit's pre-*Burlington* retaliation jurisprudence, thus, misses the mark. *See* Petition at 11-16. That is because, since *Burlington*, the Fifth Circuit has faithfully applied the standard articulated by this Court. And, even in Welsh's own case, the Fifth Circuit recited the correct standard. *Welsh II*, 941 F.3d at 826-27. Stated simply, the Circuit split Welsh identifies no longer exists.

II. This case is a poor vehicle for review because the Fifth Circuit affirmed the district court's dismissal of Welsh's retaliation claim on causation grounds, not because it found that she did not suffer an adverse employment action.

Even if Welsh had identified an existing Circuit split (and she did not), the legal definition of an adverse employment action in the context of a retaliation claim is immaterial to her claim. That is because both the district court and the Fifth Circuit disposed of her claim that her placement on a TINA was an adverse employment action on the grounds that she could not meet the causation prong of her retaliation claim. *Welsh II*, 941 F.3d at 827 ("We need not decide whether the TINA was a retaliatory adverse employment action because there is no causal relationship between the TINA and Welsh's protected activities."); Petition at 30a-33a. And, because Welsh does not challenge the Fifth Circuit's holding on causation, this Court should not grant certiorari to answer a fact-specific question that was not even raised by Welsh.

With respect to the remaining bases of Welsh's retaliation claim, the Fifth Circuit properly found she failed to press and, thus, forfeited, any claim that the District's decision to assign her to special needs students was retaliatory. *Welsh II*, 941 F.3d at 828. This Court should not waste either its own resources or the resources of the parties deciding a question that was not properly preserved.

And none of the remaining adverse actions Welsh identifies – (1) a forgotten letter of recommendation, (2) a directive to feed her fish, and (3) the District's refusal to remove the TINA from her record – could support a retaliation claim. *Id*. As to the letter, Welsh conceded her principal may simply have forgotten. ROA.270. Whether Welsh found a directive to feed her fish humiliating or not, it is exactly the sort of trivial slight employees must sometimes endure. *See Burlington*, 548 U.S. at 67-68. Likewise, the District's refusal to remove the TINA was not pressed by Welsh to a final decision maker – the District's elected Board of Trustees. Thus, she failed to exhaust her administrative remedies and should not be able to base her claim on it. ROA.269; *Pacheco v. Mineta*, 448 F.3d 783, 788 (5th Cir. 2006).

III. Not only is a teacher's placement on a TINA not an adverse employment action, this Court should not waste scarce resources reviewing a type of teacher growth plan that is specific to Texas.

The rest of Welsh's Petition is dedicated to the proposition that the District's decision to place her on a TINA was an adverse employment action. While

Welsh's Petition is not always clear whether she is challenging the dismissal of her discrimination claim, as well as her retaliation claim, either way, a teacher's placement on a TINA is not an adverse employment action. *Welsh II*, 941 F.3d at 824.

Under both this Court's and the Fifth Circuit's settled jurisprudence, a discrimination plaintiff must identify an ultimate employment action which includes: hiring, granting leave, discharging, promoting, or compensating. *Compare Welsh II*, 941 F.3d at 824 (noting that a discrimination plaintiff must identify an ultimate employment action in order to meet the adverse employment action prong of a discrimination claim), *with Burlington*, 548 U.S. at 62 (noting that the statutory text of Title VII limits discrimination claims to ultimate employment actions). Despite Welsh's protestations, a teacher's placement on a TINA does not involve hiring, leave, discharge, promotion, or compensation. Consequently, Welsh's placement on a TINA cannot support the adverse employment action prong of her discrimination claim.

And, as explained above, whether a teacher's placement on a TINA suffices for a retaliation claim (and it does not) is immaterial because neither the district court nor the Fifth Circuit ever addressed this issue below.

Finally, the TINA is a statutory and regulatory creature that is unique to the Texas Education Code. As such, it is used only in Texas in conjunction with Texas' contract-based and statutorily governed teacher employment system. This Court should not commit its scarce resources to review whether a teacher's

placement on a type of growth plan, that is rooted in the law of a single state, can constitute an adverse employment action. What is more, Welsh does not say that a teacher's placement on a TINA is always an adverse employment action – nor could she. Rather, she says that she was placed on a TINA for pretextual reasons. Petition at 22. Not only is this argument unsupported by the facts, but it requires exactly the sort of highly specific factual review that is appropriately final in the Circuit courts. This Court should not devote its resources to reviewing the specific facts in a case that will essentially be a "one off."

CONCLUSION

For the above reasons, the Court should deny Welsh's Petition for a Writ of Certiorari.

Respectfully submitted,

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