No. 07-543

In the Supreme Court of the United States

AT&T CORPORATION, PETITIONER

v.

NOREEN HULTEEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an employer violates Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA), when it determines eligibility for pensions and other benefits without granting service credit that female employees did not receive when they took pre-PDA pregnancy leave.

2. Whether finding such a violation would give impermissible retroactive effect to the PDA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Miscellaneous:

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This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). The statute also provides, in relevant part, that "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * *

provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(h).

In general, a Title VII plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). In states that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred" or within 30 days of when the plaintiff receives notification that agency proceedings have been terminated, whichever is earlier. *Ibid.* California, where this action arose, has such an agency, 29 C.F.R. 1601.74, and the charges filed in this case are subject to a 300-day limitations period.

Title VII, as amended, also provides that

> an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of [Title VII] * * *, when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. 2000e-5(e)(2). In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court held that an employer's disability plan did not violate Title VII's prohibition against sex discrimination because it denied benefits for disabilities arising from pregnancy. The Court held "that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination." *Id.* at

136; *id.* at 138 (the insurance package "covers exactly the same categories of risk, and is facially nondiscriminatory").

In response to *Gilbert*, Congress enacted the Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076, which amended Title VII to provide that discrimination "because of sex" or "on the basis of sex" includes pregnancy-based conditions. 42 U.S.C. 2000e(k). The PDA became effective on October 31, 1978—the date of its enactment—except that its provisions explicitly did "not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act." § 2(b), 92 Stat. 2076.

2. As early as 1914, petitioner AT&T and its predecessor companies used a service crediting system that, for purposes of pension and other benefits, relied on an employee's continuous employment in company service. Joint Stip. ¶ 17. To calculate continuous employment, petitioner and its predecessors used a "Net Credited Service" (NCS) date that is an employee's initial date of hire adjusted forward in time to exclude periods for which no service credit accrued. *Id.* ¶ 18. An earlier NCS date puts an employee in a superior position for service-related determinations such as job bidding, vacation time, and retirement benefits. Pet. App. 4a.

Before August 7, 1977, petitioner and its relevant predecessor company, Pacific Telephone & Telegraph (PT&T), classified pregnancy as personal leave. An employee on personal leave received a maximum of 30 days' NCS credit, while there was no limit on the amount of NCS credit for employees on temporary disability leave. Joint Stip. ¶¶ 66-68. On August 7, 1977, PT&T extended the maximum NCS credit for pregnancy to 30 days before delivery and up to six weeks after delivery. *Id.* ¶¶ 70-71. On April 29, 1979,

the date the PDA became effective for fringe benefit and insurance programs, PT&T began to provide service credit for pregnancy leave on the same terms as for other temporary disability leave. PT&T made no adjustments, however, to the existing NCS dates of female employees who had taken pregnancy leave before April 29, 1979. *Id.* ¶ 79.

3. Respondents are past or present employees of petitioner who took pregnancy leaves before April 29, 1979, while employed by PT&T. Joint Stip. ¶¶ 1, 2, 25, 35-38, 48, 57. When respondents returned from pregnancy leaves, PT&T adjusted their NCS date forward to reflect that a portion of their leave was not entitled to service credit. Those adjustments were made before the PDA became effective. *Id.* ¶¶ 28, 37, 39, 50, 59. From 1994 to 2000, three of the individual respondents were involuntarily terminated or retired pursuant to a voluntary incentive/termination offer. *Id.* ¶¶ 33, 44, 45, 64. Their adjusted NCS dates were used to calculate pension and other benefits. *Id.* ¶¶ 34, 46, 64. The fourth individual respondent is a current employee. Pet. App. 5a.

None of the respondents filed a charge of discrimination with the EEOC within 300 days of their pregnancy leaves or of the effective date of the PDA. Joint Stip. ¶ 98. Instead, they filed charges with the EEOC between 1994 and 2002—more than 15 years after the PDA took effect—when they applied for pension benefits and their benefits were calculated using their NCS date. Pet. App. 6a; Joint Stip. ¶ 93 & n.4. Respondent Communications Workers of America, the collective bargaining representative for most of petitioner's non-management employees, also filed a charge during this period. Pet. App. 6a & n.2; Joint Stip. ¶ 95.

The EEOC found reasonable cause to believe that petitioner had discriminated against respondent Hulteen and a class of similarly situated female employees by refusing

to give them full service credit for pre-PDA pregnancy-related leaves and issued a right to sue notice. Pet. App. 6a; Joint Stip. ¶¶ 94, 96. Respondents then filed suit in district court, seeking relief on their own behalf and on behalf of other similarly situated employees. Pet. App. 100a; Joint Stip. ¶ 96. They alleged that the failure to credit them with time they were on disability leave due to pregnancy violated, *inter alia*, Title VII. Pet. App. 99a-100a.

4. The district court granted summary judgment in favor of respondents on the Title VII claim. Pet. App. 98a-128a. The court concluded (*id.* at 106a-123a) that the claim was controlled by *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), cert. denied, 502 U.S. 1050 (1992), which involved the same NCS system as implemented by one of petitioner's predecessor companies (Pacific Bell). *Pallas* held that Pacific Bell's failure to grant employees credit for pre-PDA pregnancy leaves when calculating retirement benefits after the PDA violated Title VII. *Id.* at 1326-1327.

The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b), and the Ninth Circuit granted petitioner permission to appeal. Pet. App. 69a.

5. A divided Ninth Circuit panel reversed. Pet. App. 64a-85a. The panel majority concluded that *Pallas* had been overcome by *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), which clarified that a statute has no retroactive application absent a clear expression of congressional intent. Pet. App. 71a, 83a. The panel majority concluded that it would give an impermissible retroactive effect to the PDA to hold that petitioner violated Title VII for not granting full credit for pre-PDA pregnancy leaves. *Id.* at 75a-76a. The court also held that respondents' claims were time-barred because they should have been brought when the initial accountings for pregnancy leaves were made before 1979 or at the latest when the PDA became effective in

1979. *Id.* at 81a-82a. Judge Rymer dissented; she agreed with the panel majority's analysis "on a fresh slate," but concluded that *Pallas* remained binding circuit law and dictated the opposite result. *Id.* at 86a-97a.

6. A divided en banc Ninth Circuit affirmed the district court's decision. Pet. App. 1a-63a. The majority looked to *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), and concluded that petitioner's seniority system was facially discriminatory, and therefore unlawful, "because it treat[s] similarly situated employees differently if the female employee took a pre-PDA pregnancy-related disability leave," Pet. App. 18a n.7; accord *id.* at 23a, and that petitioner intentionally discriminated on the basis of pregnancy each time petitioner used that system to calculate benefits. *Id.* at 10a-11a. The majority also pointed to 42 U.S.C. 2000e-5(e)(2), which provides that an unlawful employment practice occurs, *inter alia*, when a person is injured by application of an intentionally discriminatory seniority system. Pet. App. 19a-20a.

The majority acknowledged that the Sixth and Seventh Circuits had reached a contrary conclusion in considering a "nearly identical" Title VII challenge to similar NCS systems that, like the seniority system at issue in this case, "failed to credit time spent on pregnancy leave" before the PDA. Pet. App. 22a; see *id.* at 22a-27a & n.11 (discussing *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), cert. denied, 531 U.S. 1127 (2001), and *Leffman* v. *Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007)). But the majority disagreed with those decisions, reasoning that those courts incorrectly concluded that the NCS systems were not facially discriminatory and incorrectly relied on the exemption in 42 U.S.C. 2000e-2(h) for bona fide seniority systems. Pet. App. 23a-27a & n.11.

Four judges dissented. Pet. App. 29a-63a (O'Scannlain, J., dissenting). They concluded that the EEOC charges in this case were untimely under the line of cases beginning with *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), and culminating in *Ledbetter*. Pet. App. 37a-53a. In particular, the dissent concluded that petitioner's seniority system is facially neutral—and *non*discriminatory—unless the PDA is impermissibly given retroactive effect. *Id.* at 44a-47a. The dissent also concluded that the seniority system fell within the exemption in 42 U.S.C. 2000e-2(h) for bona fide seniority systems, and that 42 U.S.C. 2000e-5(e)(2) did not apply in this case because petitioner did not adopt its seniority system for an intentionally discriminatory purpose in violation of Title VII. Pet. App. 53a-63a.

DISCUSSION

The divided en banc Ninth Circuit held that an employer violates Title VII if it does not grant employees service credit for pregnancy-related leave taken *before* the PDA was enacted in calculating pension benefits decades *after* the PDA was enacted. That decision gives an impermissible retroactive effect to the PDA by imposing liability on employers for refusing to credit leave before the PDA was enacted. In addition, it directly contravenes this Court's precedents—in particular, *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)—holding that Title VII is not violated every time an employment practice, including a seniority system, gives present effect to past discrimination. Indeed, the distinguishing feature of this case is that the alleged past "discrimination" (*i.e.*, not granting full credit for pregnancy leaves before the PDA) was not proscribed by Title VII when it occurred. The result in this case therefore follows a fortiori from *Evans* and the principles reaffirmed by this Court in *Ledbetter*, *supra*.

The Ninth Circuit's decision in this case perpetuates a square conflict in the circuits on the questions presented and demonstrates that the Court's recent *Ledbetter* decision will not prompt the courts of appeals to eliminate the conflict. The en banc majority expressly acknowledged that the Sixth and Seventh Circuits had reached the opposite result in entertaining "nearly identical" (Pet. App. 22a) challenges to essentially the same seniority system, and sharply disagreed with those decisions. *Id.* at 22a-27a & n.11. This Court's decision in *Ledbetter* only reinforces the result reached by the Sixth and Seventh Circuits. And although *Ledbetter* should have prompted the Ninth Circuit to reconsider its circuit precedent, both the majority and dissenting opinions drew support from that decision. Accordingly, the circuit conflict is here to stay.

An en banc decision, like the one below, which misconstrues this Court's decisions and perpetuates a direct circuit conflict, warrants this Court's review. And employees and employers alike would benefit from a uniform application of Title VII to the questions presented.

A. The Ninth Circuit's En Banc Decision Is Out of Step With This Court's Precedents

The court of appeals held that petitioner "violated Title VII by failing to credit pre-PDA pregnancy leave when it calculated benefits owed [to respondents]." Pet. App. 7a. That holding is incorrect because it gives an unintended retroactive effect to the PDA. In addition, even assuming that petitioner violated Title VII by failing to give pre-PDA pregnancy leave the same treatment as leave taken for temporary disabilities, such a violation occurred, at the latest,

on the effective date of the PDA, and respondents' claims are accordingly time-barred.[1]

1. The en banc Ninth Circuit held that, in calculating respondents' retirement benefits between 1994 and 2000, petitioner committed an unlawful employment practice under Title VII because the seniority system used to calculate those benefits does not treat pre-PDA pregnancy leave the same way as leave for temporary disabilities. Pet. App. 7a-28a. (As discussed above, petitioner treats post-PDA pregnancy leave the same as leave taken for temporary disabilities.) The court of appeals reasoned that petitioner's seniority system was facially "discriminatory," *id.* at 23a, 26a-27a, emphasizing that petitioner, in making such post-PDA benefit decisions, did not adjust respondents' service date by treating pre-PDA pregnancy leave the same as post-PDA pregnancy leave, *id.* at 19a, 20a-22a, 27a n.11. In a similar vein, respondents argue that calculating pension benefits in a manner that does not credit pre-PDA leave "perpetuates a facially discriminatory system which originated prior to the passage of the [PDA]." Compl. ¶ 88(a)-(d); see Br. in Opp. 8-13.

That analysis is seriously flawed. When petitioner adopted its pre-PDA leave policies and applied those policies to respondents' pregnancy leaves, the law did not dic-

[1] The EEOC, both in its compliance manual and its amicus brief submitted to the Ninth Circuit panel in this case, has taken the position that an employer's failure to grant credit for pre-PDA pregnancy leave in the circumstances presented here violates Title VII. 2 EEOC Compl. Man. (BNA) tit. VII, § 3(b) at 627:0023 (Aug. 2001); EEOC Amicus C.A. Br. 6-26. For the reasons explained in this brief, that interpretation is based on a misreading of the relevant precedents of this Court, and therefore is not entitled to deference. *Ledbetter*, 126 S. Ct. at 2177 n.11. The EEOC has not made a recommendation to the Solicitor General on what position the United States should take in this case in this Court.

tate that pregnancy leave be treated the same as leave for other temporary disabilities. As discussed, *Gilbert*, *supra*, explicitly held that an employer's disability plan did not violate Title VII's prohibition against sex discrimination because it denied benefits for disabilities arising from pregnancy. The PDA overruled the result reached in *Gilbert*, but it did not do so retroactively. Indeed, the PDA not only did not apply retroactively, but it did not even apply prospectively to benefits programs "until 180 days after the enactment of th[e] Act." § 2(b), 92 Stat. 2076. When the PDA became effective for existing programs, it required employers going forward to treat pregnancy leaves on the same terms as other temporary disabilities.

The PDA did not create an obligation to grant employees credit for pre-PDA leave that Title VII did not require employers to grant before the passage of the PDA. That result would have required employers to adjust the service dates of female employees reaching back decades. Such an affirmative undertaking is far different from and far more burdensome than the PDA's basic injunction to refrain from discrimination on the basis of pregnancy. Congress could not have envisioned such a massive undertaking without acknowledgment. This Court's decision in *Landgraf*, *supra*, forbids such a retroactive effect without a clear textual directive. Yet the Ninth Circuit's decision in this case gives the PDA precisely the kind of retroactive effect forbidden by *Landgraf* by subjecting employers to liability for not crediting leave that was taken before the PDA.[2]

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[2] In a footnote (Br. in Opp. 10 & n.3) respondents suggest that petitioner's pre-PDA leave policies were unlawful. Respondents could have brought that claim when they were denied credit for pregnancy leave before the PDA was enacted. Ultimately, that claim would have been unsuccessful for the reasons that this Court gave in *Gilbert*. But, regardless of its merits, any claim that the pre-PDA policy was unlawful

2. a. The Ninth Circuit erred in believing that it could circumvent that result by simply holding that petitioner was required to credit pre-PDA pregnancy leaves whenever an employee benefit was calculated post-PDA on the basis of a NCS date predicated in part on pre-PDA leave policies. To be sure, the calculation of respondents' benefits had the effect of perpetuating petitioner's pre-PDA pregnancy-leave policies, and those policies were "discriminatory" insofar as they distinguished between leave taken for pregnancies and for other temporary disabilities—though before the PDA, that "discrimination" was not forbidden. That kind of perpetuation-of-past discrimination claim (even for discrimination that was unlawful when it occurred), however, is directly foreclosed by the *Evans-Ricks-Lorance-Ledbetter* line of precedents.

In *Evans*, a flight attendant was forced to resign her position based on an unlawful policy that prohibited female flight attendants from being married. 431 U.S. at 554-555. She was rehired by the same employer, but the employer used her rehiring date, rather than her original date of hire, to determine her seniority. *Id.* at 555. The employee brought suit alleging that the employer had violated Title VII "by refusing to credit her with seniority [based on her original date of hire]." *Id.* at 554. While acknowledging that the use of the employee's rehiring date to determine her seniority would perpetuate a past act of allegedly unlawful intentional discrimination, the Court rejected the employee's claim. *Id.* at 557-558. The Court explained that the critical inquiry under Title VII is not whether there are continuing consequences of a past act, but whether "any present *violation* exists." *Id.* at 558. The Court concluded

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accrued when respondents were denied credit, and accordingly expired decades ago.

that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of *a discriminatory act which occurred before the statute was passed.* It * * * is merely an unfortunate event in history which has no present legal consequences." *Ibid.* (emphasis added).

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the Court rejected a professor's claim that he could wait to challenge a decision to deny him tenure as intentionally discriminatory until after his employment contract expired, explaining that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.* at 258 (citation omitted). Likewise, in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the Court—citing *Evans* and *Ricks*—held that female employees could not resurrect their untimely challenge to an intentionally discriminatory change in a seniority system by claiming that an unlawful employment practice occurred not only when the seniority system was changed, but also each time its concrete effects were felt. *Id.* at 906.[3]

Last term, in *Ledbetter*, the Court followed the reasoning of its earlier decisions and held that a Title VII disparate pay claim is untimely when the disparate pay, although received within Title VII's charge-filing limitations period, is the result of intentionally discriminatory pay decisions that occurred outside that period. 127 S. Ct. at 2167-2172. The Court again rejected the "present effect" argument, explaining that "[a] new violation does not occur, and a new

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[3] In response to *Lorance*, Congress enacted 42 U.S.C. 2000e-5(e)(2), discussed pp. 16-17, *infra*. While *Lorance*'s specific holding on when the adoption of an intentionally discriminatory seniority system must be challenged has been superseded by statute, the decision's analysis of Title VII's timeliness requirement remains authoritative for other purposes. *Ledbetter*, 127 S. Ct. at 2169 n.2.

charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 2169.

b. Those decisions—and in particular, *Evans*—dispose of respondents' Title VII claim. As noted, this case follows a fortiori from those decisions because the predicate act of discrimination here was not forbidden when it occurred. And even to the extent respondents believe (contrary to *Gilbert*) that petitioner violated Title VII when it denied full service credit for pre-PDA pregnancy leaves, that purported violation occurred when the credit was denied (or, if the violation is the failure to adjust service dates in light of the PDA, then upon passage of the PDA). Respondents could have, but did not, challenge the denial of such leave when it occurred—decades ago. Thus, under *Evans*, petitioner "was entitled to treat that past act as lawful after respondent[s] failed to file a charge of discrimination" within the 300-day charging period. *Evans,* 431 U.S. at 558.

Respondents attempt to distinguish *Evans* on the grounds that the seniority system in this case is "facially discriminatory," and that an employer who adopts a *facially* discriminatory seniority or pay policy can be regarded as engaging in intentional discrimination each time the policy is applied. See Br. in Opp. 8-13. But petitioner's seniority system is logically indistinguishable from the one in *Evans*, which this Court concluded was neutral and nondiscriminatory because it did not "treat[] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a nondiscriminatory reason." 431 U.S. at 558; *id.* at 557. And in *Ledbetter* this Court reaffirmed *Evans* and explained that the fact that past discrimination "adversely affects the calculation of a *neutral* factor (like se-

niority) that is used in calculating [benefits]" does not render the benefits system discriminatory on its face, or mean that "each new [benefits decision] constitutes a new violation." 127 S. Ct. at 2174 (emphasis added).

Petitioner's seniority system is neutral and nondiscriminatory because the NCS date does not treat employees who used personal leave and were denied credit for a "discriminatory" reason any differently from employees who used personal leave and were denied credit for other reasons. Pet. App. 43a-45a (O'Scannlain, J., dissenting); *Leffman*, 481 F.3d at 433 (finding *Evans* controlling because employer does not treat "employees who have taken non-credited maternity leave differently from employees who have taken other kinds of non-credited leave"); *Ameritech*, 220 F.3d at 823 (finding *Evans* controlling because "simplistic as it may seem, [the] case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time"). The only way in which petitioner's seniority system could be characterized as discriminatory is that the system "gives present effect to a past act of discrimination" (*Evans*, 431 U.S. at 558) insofar as it does not make an affirmative adjustment for pregnancy leaves taken before the PDA. But the same was true in *Evans*: the plaintiff there was forced to resign under the employer's discriminatory no-marriage policy and the employer's seniority system gave present effect to that discrimination by not "credit[ing] her with seniority for [her original hire period]." *Id.* at 554.

The only relevant difference between this case and *Evans* is that, here, the past "discrimination" (*i.e.*, not allowing full credit for pregnancy leave before the PDA) was not unlawful when it occurred, whereas the past discrimination in *Evans* (*i.e.*, forcing female employees who married to

resign) was unlawful when it occurred. See *Evans*, 431 U.S. at 554. A fortiori, petitioner's *lawful* pre-PDA discriminatory intent cannot be "shift[ed] * * * to a later act that was not performed with bias or discriminatory motive." *Ledbetter*, 126 S. Ct. at 2170.[4]

Respondents' reliance on *Bazemore* v. *Friday*, 478 U.S. 385 (1986) is inapposite. In that case, the Court held that the employer violated Title VII by continuing—after Title VII was enacted—to pay black employees less than white employees even though the pay disparities resulted from a pay structure that pre-dated Title VII. 478 U.S. at 395. The Court explained that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Ibid.* As the Court empha-

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[4] This result squares with the intent of Title VII. As this Court held in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352-354 (1977), a seniority system does not lose its "bona fide" character under Section 703(h), 42 U.S.C. 2000e-2(h), because it perpetuates pre-Act discrimination. To the contrary, an "unmistakable purpose" of Congress in enacting Title VII was "to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII," even where the seniority system "perpetuate[d] the effects of pre-Act discrimination [between employees of different racial groups]." 431 U.S. at 352-353. The court of appeals dismissed (Pet. App. 23a-27a) the significance of Section 703(h) because a proviso in the PDA states that Section 703(h) cannot be interpreted to permit discrimination prohibited by the PDA. See 42 U.S.C. 2000e(k). But as discussed, petitioner has not violated the PDA, and the proviso in any event was not intended to remove Title VII's protection for bona fide seniority systems in cases involving pregnancy, but rather to foreclose the possibility, raised in *Gilbert*, that the last sentence of Section 703(h) would permit wage discrimination on the basis of pregnancy. See Pet. App. 57a-59a (O'Scannlain, J., dissenting).

sized in *Ledbetter*, "the focus in *Bazemore* was on a current violation [*i.e.*, the continuation of a discriminatory pay structure], not the carrying forward of a past act of discrimination." 127 S. Ct. at 2173 n.5.

This case is the antithesis of *Bazemore*. This case does not involve the "mere continuation" (*Bazemore*, 478 U.S. at 397 n.6) of discriminatory practices after the PDA was enacted. To the contrary, as of the effective date of the PDA, petitioner changed its policy to *eliminate* its prior pregnancy leave policy and provide service credit for all prospective pregnancy leaves on the same basis as leave taken for other temporary disabilities. Joint Stip. ¶ 79. Unlike the plaintiffs in *Bazemore* (see 478 U.S. at 396-397 n.6), respondents here are seeking to impose liability retroactively on the employer for its policies before the pertinent statute was passed, and not for a present violation stemming from a *continuation* of such policies.

Nor can respondents escape the clear import of this Court's precedents simply by saying that they are challenging the denial of pension benefits as those benefits become due (because those benefits are calculated without granting credit for pre-PDA pregnancy leave), rather than the denial of pre-PDA leave. Br. in Opp. 11. This Court repeatedly has rejected attempts to shift an earlier discriminatory intent onto a later non-discriminatory act that merely perpetuates and gives present effect to the earlier intent. See *Ledbetter*, 126 S. Ct. at 2169-2172 (employee argued she was challenging her pay check, not an earlier discriminatory pay decision); *Ricks*, 449 U.S. at 257 (employee argued he was challenging the termination of his contract, rather than the earlier discriminatory denial of tenure); *Evans*, 431 U.S. at 558 (employee argued she was challenging her seniority instead of her earlier forced resignation). Moreover, *Lorance* makes clear that the adoption of a discrimi-

natory policy for accruing seniority constitutes a "concrete harm" even though at the time of adoption the effects of the policy are "by their nature speculative." 490 U.S. at 907 n.9.

3. Both the Ninth Circuit (Pet. App. 19a-20a) and respondents (Br. in Opp. 14-15) rely on 42 U.S.C. 2000e-5(e)(2), quoted on p. 2, *supra*, in arguing that respondents were free to challenge their benefit calculations when they were made between 1994 and 2000. That reliance is misplaced. Section 2000e-5(e)(2) was enacted by Congress in 1991 in response to this Court's decision in *Lorance* and, as this Court recognized in *Ledbetter*, the provision was designed "to cover the specific situation involved in that case," 127 S. Ct. at 2169 n.2, *i.e.*, the adoption of a seniority system "for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2); *Lorance*, 490 U.S. at 903. The provision accordingly has no application here.

Petitioner did not adopt or alter its seniority system "for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2). To the contrary, when petitioner adopted its pre-PDA pregnancy leave policy, that policy was lawful under Title VII (see *Gilbert*, *supra*), and when Congress enacted the PDA petitioner *eliminated* its prior leave policy and adopted a policy that credits pregnancy leaves on the same terms as leaves for other temporary disabilities. Unless the PDA is to be given retroactive effect, petitioner's failure to adjust service dates to credit pre-PDA pregnancy leaves retroactively did not intentionally violate the PDA, either on the effective date of the PDA or thereafter as petitioner calculated benefits based on NCS dates based in part on pre-PDA leaves. Pet. App. 56a (O'Scannlain, J., dissenting).

B. The Ninth Circuit's En Banc Decision Perpetuates An Acknowledged Circuit Conflict And Warrants Plenary Review

a. The Ninth Circuit's en banc decision squarely conflicts with the decisions of two other courts of appeals. As the en banc majority explicitly acknowledged, both the Sixth and Seventh Circuits have rejected "nearly identical" challenges to seniority systems that are essentially the same as the one at issue in this case. Pet. App. 22a. The Ninth Circuit flatly disagreed with those decisions and recognized the "inter-circuit conflict over this issue." *Id.* at 22a n.8; see *id.* at 22a-27a & n.11.

In *Ameritech*, the Seventh Circuit addressed the same NCS system used by petitioner and unanimously held that employees' claims relating to the effect of their pre-PDA pregnancy leaves on their NCS date and current benefits were untimely. 220 F.3d at 823. The Sixth Circuit unanimously reached the same conclusion with regard to an analogous seniority system in *Leffman*, 481 F.3d at 433. The Sixth and Seventh Circuits reached their decisions in *Ameritech* (2000) and *Leffman* (2006) in the wake of the Ninth Circuit's decision in *Pallas* (1991) and the Ninth Circuit below reached its decision in the wake of *Ameritech* and *Leffman*. The circuit conflict thus is clear.[5]

Respondents argue that the conflict does not warrant this Court's review because *Ledbetter* "refines a major component of the controlling legal framework and thus invites lower courts to reassess their positions." Br. in Opp. 5-6.

[5] The en banc majority observed that "the Eighth Circuit has rejected an analysis similar to that found in *Ameritech*," Pet. App. 22a n.8 (*Maki* v. *Allete, Inc.*, 383 F.3d 740 (2004)), suggesting that the circuit conflict is even deeper. While the employment practice at issue in *Maki* (*i.e.*, the "bridging" of a pension plan) differs from the practice at issue here and in *Ameritech* and *Leffman*, *Maki* illustrates that the questions presented can arise in other contexts.

As discussed above, however, *Ledbetter* reaffirmed and reinforced the principles articulated in *Evans* and *Ricks*, on which the Sixth and Seventh Circuits relied in reaching their decisions. *Leffman*, 481 F.3d at 431-433; *Ameritech*, 220 F.3d at 822-823. Given that *Ledbetter* reinforces their decisions, there is no reason for the Sixth or Seventh Circuit to reconsider their decisions in the wake of *Ledbetter*. Likewise, there is no reason to believe that the Ninth Circuit will correct its decision in this case after having issued this decision en banc and with the benefit of *Ledbetter*.

b. The proper application of Title VII to employment practices that give present effect to alleged past discrimination is important and, indeed, already is the subject of several decisions by this Court. The decision in this case presumably will have diminishing prospective application, given that the class of employees affected by pre-PDA pregnancy policies necessarily will dwindle over time. However, while the number of employees or employers affected by the decision in this case is unclear, the issue has reached three circuits in the last eight years in cases involving seniority systems that are essentially identical to the one here, and a fourth circuit in a case involving similar issues. See note 5, *supra*. Employees and employers alike would benefit from a uniform application of Title VII to such employment practices. There is no more reason to permit an erroneous construction of Title VII to subject employers to retroactive obligations in the Ninth Circuit that employers do not bear in other circuits than there would be to permit an erroneous construction of Title VII to deny benefits to employees in the Sixth or Seventh Circuits that are enjoyed by employees in the Ninth Circuit.

Moreover, because the en banc Ninth Circuit seriously misread this Court's *Evans-Ricks-Lorance-Ledbetter* line of cases, its en banc decision in this case could spawn confu-

sion concerning the extent to which employees may bring otherwise time-barred claims on the theory that an employer's perpetuation of alleged past discrimination gives rise to a new violation of Title VII. In that regard, it is significant that the Ninth Circuit issued its decision in the wake of *Ledbetter*, which reaffirmed the applicability of the same principles that the Ninth Circuit misapplied here. The Ninth Circuit's misreading of *Ledbetter* in this case could contribute to the erroneous application of the basic principles reaffirmed in *Ledbetter* in the variety of contexts in which those principles have been applied. Accordingly, the issue that has divided the circuits and split the Ninth Circuit en banc in this case appears to be of sufficient continuing importance to warrant this Court's review.

In these circumstances, neither the interlocutory posture of the case nor the proposed legislation cited by respondents provides a sufficient basis for denying certiorari. The court of appeals' decision in this case finally resolves "a controlling question of law" (28 U.S.C. 1292(b)), *i.e.*, whether "plaintiffs have established that they are entitled to judgment as a matter of law on their allegations of a violation of Title VII." Pet. App. 128a. The class certification and remedial issues that remain for remand under the Ninth Circuit's decision would in no way refine the questions presented for this Court's resolution, or alter the circuit's liability determination. Likewise, the proposed legislation failed to pass during the current session of Congress and is the subject of a presidential veto threat; the possibility that it will be enacted into law at some point in the future provides no reason to deny certiorari here. That is particularly true because it is not clear that the proposed

legislation would govern where, as here, the alleged discrimination was not unlawful when it occurred.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] The proposed bill (H.R. 2831) would amend 42 U.S.C. 2000e-5(a) to provide that an unlawful employment practice occurs, *inter alia*, "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid." 110th Cong., 1st Sess. § 3 (2007).