No. 07-543

In the Supreme Court of the United States

AT&T CORPORATION, PETITIONER

v.

NOREEN HULTEEN, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GRACE CHUNG BECKER
Acting Assistant Attorney General
GREGORY G. KATSAS
Assistant Attorney General
LISA S. BLATT
Assistant to the Solicitor General
DENNIS J. DIMSEY
DIRK C. PHILLIPS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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 regulation:

Miscellaneous:

In the Supreme Court of the United States

No. 07-543

AT&T CORPORATION, PETITIONER

v.

NOREEN HULTEEN, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

In 1978, Congress amended Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), to provide that Title VII prohibits discrimination based on pregnancy-based conditions. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000e(k)). This case concerns whether an employer violates Title VII 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, and whether finding such a violation would give impermissible retroactive effect to the PDA. The United States, as both the principal enforcer of the civil rights laws and the nation's largest employer

subject to Title VII (see 42 U.S.C. 2000e-16 (2000 & Supp. V 2005)), has a strong interest in the proper interpretation of Title VII. At the Court's invitation, the United States filed a brief at the petition for a writ of certiorari stage of this case.

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

In response to *Gilbert*, Congress enacted the PDA, which amended Title VII to provide that discrimination "because of sex" or "on the basis of sex" includes pregnancy-based conditions:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to

> work, and nothing in [42 U.S.C.] 2000e-2(h) * * * shall be interpreted to permit otherwise.

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 and its corporate predecessors used a service crediting system that, for purposes of pension and other benefits, relied on an employee's continuous employment in company service. J.A. 38-39 (¶ 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. J.A. 39 (¶ 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. J.A. 47-48 (¶¶ 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. J.A. 48-49 (¶¶ 70-71). On April 29, 1979, the date the PDA became effective for fringe benefits 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 em-

ployees who had taken pregnancy leave before April 29, 1979. J.A. 50 (¶ 79).

3. Respondents are past or present employees of petitioner who took pregnancy leaves before April 29, 1979, while employed by PT&T. J.A. 36, 40, 42, 44, 45 (¶¶ 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. J.A. 41-45 (¶¶ 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. J.A. 41-43, 46 (¶¶ 33, 44, 45, 64). Their adjusted NCS dates were used to calculate pension and other benefits. J.A. 42, 43-44, 46 (¶¶ 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. J.A. 55 (¶ 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; J.A. 54 & n.4 (¶ 93). 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; J.A. 55 (¶ 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; J.A. 54-55 (¶¶ 94, 96). Respondents then filed suit in dis-

trict court, seeking relief on their own behalf and on behalf of other similarly situated employees. Pet. App. 100a; J.A. 55 (¶ 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 further 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 panel majority 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 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," *id.* at 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 a seniority system adopted for an intentionally discriminatory purpose. Pet. App. 19a-20a.

The majority acknowledged that the Sixth and Seventh Circuits had reached a contrary conclusion in considering "nearly identical" Title VII challenges 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, Inc.* v. *Evans*, 431 U.S. 553 (1977).

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.

SUMMARY OF ARGUMENT

A. Title VII prohibits discrimination "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). In the PDA, Congress amended Title VII—in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976)—to provide that discrimination "because of sex" or "on the basis of sex" includes discrimination based on pregnancy-based conditions. 42 U.S.C. 2000e(k). Before the effective date of the PDA, however, it was not—according to this Court's decision in *Gilbert*—unlawful for employers to withhold service credit for pregnancy-related leave. By its terms, the PDA is not retroactive, and petitioner came into compliance with the PDA following its enactment.

Respondents' attempt to characterize petitioner's post-PDA benefit determinations as a *current* violation of Title VII fails under this Court's precedents, which preclude Title VII claims based on the lingering effects of past discrimination. In particular, respondent's position is foreclosed by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), which holds that Title VII is not violated every time an employment practice, including a seniority system, gives

present effect to past discrimination. Indeed, the unique feature of this case, compared with *Evans* and cases in the same line, 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. As in *Evans*, that past discrimination is "an unfortunate event in history," *id.* at 558, but it provides no basis for invalidating the seniority system at issue.

This Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), does not compel a contrary result. *Bazemore* involved a discriminatory pay structure that continued after Title VII was passed into the pertinent limitations period. This case does not involve the "mere continuation" (*id.* at 397 n.6) of discriminatory practices after the PDA was passed. Here, by contrast, petitioner changed its policy and came into compliance with the PDA immediately upon its passage. *Bazemore* therefore has no application here. Instead, this case is controlled by *Evans*.

B. Section 706(e)(2), which addresses the timing of unlawful employment practices with respect to seniority systems, does not authorize respondents' suit either. Section 706(e)(2) was enacted to overrule the Court's decision in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and thus by its terms applies only to "a seniority system that has been adopted for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2). Unless the PDA is to be given retroactive effect (which Congress declined to direct), petitioner's failure to adjust service dates to credit pre-PDA pregnancy leaves retroactively could not intentionally violate Title VII—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. Because petitioner's seniority system has

at all times complied with the then-applicable provisions of Title VII, it does not fall within Section 706(e)(2).

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER VIOLATED TITLE VII

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 taken before the PDA was enacted. Moreover, the decision cannot be reconciled with 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. This case follows a fortiori from cases like *Evans*, because (unlike *Evans*) the alleged past discrimination at issue—*i.e.*, not granting full credit for pregnancy leaves before the PDA was enacted—was not even proscribed by Title VII when it occurred. Accordingly, the court of appeals erred in holding that respondents have established a violation of Title VII.

A. The Ninth Circuit's Decision Gives The PDA An Impermissible Retroactive Effect And Directly Contravenes *Evans*

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.[1]

1. The Ninth Circuit's decision is premised on the notion 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. 16-17 (¶ 88(a)-(d)); see Br. in Opp. 8-13.

---

[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) § 3(b) tit. VII 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* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2177 n.11 (2007) ("Agencies have no special claim to deference in their interpretation of our decisions."). As the government explained at the certiorari stage (Br. 9 n.1), the EEOC did not make a recommendation to the Solicitor General on what position the United States should take in this case in this Court.

That analysis does not withstand scrutiny under either the PDA or this Court's precedents. When petitioner adopted its pre-PDA leave policies and applied those policies to respondents' pregnancy leaves, the law did not dictate that pregnancy leave be treated the same as leave for other temporary disabilities. As discussed, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), 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. This Court concluded that the plan's exclusion of disabilities arising from pregnancy was "facially non-discriminatory," and the Court similarly stated that it was "impossible to find any gender-based discriminatory effect in [a] scheme simply because women disabled as a result of pregnancy do not receive benefits." *Id.* at 138; accord *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143-146 (1977) (upholding employer's policy of not awarding sick-leave pay to pregnant employees).[2]

The PDA superseded the result reached in *Gilbert*, but Congress declined to make that law retroactive to events or policies in place before its enactment. Indeed, the PDA not only did not apply retroactively, it did not even apply pro-

---

[2] In respondents' brief in opposition (at 10 & n.3), they suggested in a footnote that petitioner's pre-PDA leave policies "arguably" constituted an unlawful employment practice under Title VII. Ultimately, to the extent the issue is even before this Court, any claim that petitioner's pre-PDA leave policy deprived them of pension benefits would be barred for the reasons that this Court gave in *Gilbert*. See 2 EEOC Compl. Man. (BNA) § 3(b) tit. VII at 627:0023 (Aug. 2001) ("Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions * * * Retirement Benefits") ("the denial of service credit to women on maternity leave was not unlawful" for employees who took leave before PDA's effective date); J.A. 146. And, in any event, any claim that the pre-PDA policy was unlawful accrued when respondents were denied credit before the PDA, and accordingly expired decades ago.

spectively to benefits programs "until 180 days after the enactment of th[e] Act." § 2(b), 92 Stat. 2076. Thus, when the PDA became effective for existing programs, it required employers—starting six months after its enactment—to treat pregnancy leaves on the same terms as other temporary disabilities only on a going forward basis.

In enacting the PDA, Congress did not obligate employers to grant employees credit for pre-PDA leave that Title VII did not (under *Gilbert*) require employers to grant before the passage of the PDA. That result would have required employers to adjust the service dates of female employees potentially reaching back decades. Such an affirmative undertaking is far different from the PDA's basic injunction to refrain from discrimination on the basis of pregnancy on a prospective basis. Congress did not specify that it was imposing such an affirmative obligation with respect to past events, and this Court's precedent forbids giving a statute such a retroactive effect without a clear textual directive to that effect. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994).

The presumption against retroactivity is "deeply rooted in our jurisprudence" and advances principles of fundamental fairness and settled expectations. *Landgraf*, 511 U.S. at 244; see *Republic of Austria* v. *Altmann*, 541 U.S. 677, 693 (2004); see also *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 723 (1978) ("Retroactive liability could be devastating for a pension fund."). The presumption is squarely implicated by this case because respondents in effect ask the Court to impose liability on petitioner for failing to grant credit for pregnancy leave taken before the PDA was enacted. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006) ("Statutes are disfavored as retroactive when their application 'would impair rights a party possessed when he acted, increase a party's liability for past

conduct, or impose new duties with respect to transactions already completed.' ") (quoting *Landgraf*, 511 U.S. at 280). Congress is of course free to override that presumption. But it plainly did not do so in the PDA.

2. a. The Ninth Circuit erred in believing that it was appropriate to give the PDA retroactive effect 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 an 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 (while certainly objectionable) was not forbidden by Title VII. That kind of perpetuation-of-past discrimination claim (even for discrimination that was unlawful when it occurred), however, is directly foreclosed by this Court's precedents, especially *United Air Lines, Inc.* v. *Evans*, *supra*.

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 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 college denied Ricks tenure and issued him a one-year contract after which his employment with the college would end. *Id.* at 252-253. Ricks failed to file a charge within 180 days of the denial of tenure, and instead filed a charge several months before his contract expired. *Id.* at 254-255. The Court rejected Ricks's claim that he could wait to challenge the tenure decision 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). The Court also emphasized that, under *Evans*, "[t]he emphasis is not upon the effects of earlier employment decisions; rather, it is [upon] whether any present *violation* exists." *Ibid.* (citation and internal quotation marks omitted; second pair of brackets in original).

Likewise, in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), female employees challenged a change in the seniority system on the ground that the system was intentionally altered in order to protect incumbent males. The employees did not do so, however, until more than three years after the change was made. *Id.* at 905-906. The Court held that the 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. Relying on *Evans* and *Ricks*, the Court explained that a Title VII plaintiff may not assert "a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations." *Id.* at 908.[3]

Most recently, in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), the Court—relying on its prior decisions—again rejected the "present effect" argument, explaining that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 2169. In so holding, the Court specifically reaffirmed its decision in *Evans* and stated that "[t]he fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation." *Id.* at 2174. Indeed, even the dissenters in *Ledbetter* did not question the rule against perpetuation-of-past-discrimination claims in the seniority-system context in which that claim arose in *Evans*. See *id.* at 2182-2183.[4]

---

[3] In response to *Lorance*, Congress enacted 42 U.S.C. 2000e-5(e)(2), discussed pp. 23-27, *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.

[4] The dissenters in *Ledbetter* distinguished the *Evans-Ricks-Lorance* line of cases based on the "significant differences" that they perceived "between pay disparities" (the alleged discrimination in *Ledbetter*) and the types of discrimination at issue in the *Evans-Ricks-Lorance* line of cases. 127 S. Ct. at 2182; see *id.* at 2181-2182 (arguing that the "realities of the workplace" call for a different approach in evaluating claims of discriminatory pay disparities). The discrimination at issue in this

b. Those decisions—and, in particular, *Evans*—dispose of respondents' Title VII claim. Petitioner's pre-PDA leave policy is "a discriminatory act which occurred before the statute was passed * * * which has no present legal consequences" because the discrimination was not unlawful at the time. *Evans*, 431 U.S. at 558. Indeed, as noted above, this case follows a fortiori from those decisions because the predicate act of discrimination here was not forbidden by Title VII (as interpreted by this Court) when it occurred. That discrimination is "an unfortunate event in history," *ibid.*, but it does not support the Title VII claim here. 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 prior to the PDA (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. Thus, even assuming that petitioner violated Title VII by failing to give pre-PDA pregnancy leave

---

case, however, is directly analogous to that alleged in *Evans*. In addition, the concerns raised by the dissenters in *Ledbetter* about the ability of employees to detect "[c]ompensation disparities * * * hidden from sight" (*id.* at 2181) have no bearing here, where all employees had notice of the terms of the seniority and leave policies at issue. See *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000) (plaintiffs "knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off" and "[n]o later than the time when [the company] amended its plan in response to the PDA, they knew that their NCS had not been amended"), cert. denied, 531 U.S. 1127 (2001).

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 under *Evans*.

Respondents argue that *Evans* is distinguishable on the grounds that the seniority system in this case is "facially discriminatory," and therefore discriminates each time it is applied. See Br. in Opp. 8-13. But petitioner's seniority system is logically indistinguishable in operation 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 non-discriminatory reason." 431 U.S. at 558; *id.* at 557. This Court has repeatedly reaffirmed *Evans* and explained that the fact that past discrimination "adversely affects the calculation of a *neutral* factor (like seniority) that is used in determining [benefits]" does not render the benefits system discriminatory on its face, or mean that "each new [benefits decision] constitutes a new violation." *Ledbetter*, 127 S. Ct. at 2174 (emphasis added); see *id.* at 2182-2183 (Ginsburg, J., dissenting) (distinguishing *Evans* and claims alleging the discriminatory application of a seniority system from the pay disparity claim in *Ledbetter*).

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* v. *Sprint Corp.*, 481 F.3d 428, 433 (6th Cir. 2007) (finding *Evans* controlling because employer does not treat "employees who have taken non-credited maternity leave differ-

ently from employees who have taken other kinds of non-credited leave"); *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000) (*Ameritech*) (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"), cert. denied, 531 U.S. 1127 (2001); cf. *Satty*, 434 U.S. at 140 (employer's "decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy").

To be sure, petitioner's seniority 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. And even respondents do not contest "that the current consequences of a prior violation do not constitute a present unlawful employment practice under Title VII." Supp. Br. 11.

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*, 127 S. Ct. at 2170. Indeed, the court of appeals'

reliance on petitioner's purported ability from 1994 to 2000 to give respondents credit for their pre-PDA time spent on pregnancy leave "to thus avoid violating the PDA" (Pet. App. 19a) is yet another way of impermissibly giving the PDA retroactive effect. Pet. App. 45a-47a (O'Scannlain, J., dissenting). And respondents make a similar mistake in pointing out that "[t]he relevant seniority system is the body of rules governing [respondents'] challenged treatment." Supp. Br. 8-9 (internal quotation marks and citation omitted). Those rules can only be deemed facially discriminatory if the PDA retroactively required petitioner to recalculate service dates of female employees reaching back decades before the passage of the PDA.[5]

This Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), is not to the contrary. In that case, the Court held that the employer violated Title VII by continu-

---

[5] The above analysis 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 (to the contrary, it changed its leave policies to comply with 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).

ing—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. *Id.* 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.* (emphasis added). As the Court emphasized 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 opposite of *Bazemore*. It 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. J.A. 50 (¶ 79). As explained by the en banc dissent: "*Bazemore* would only be analogous in this case if [petitioner] had continued to deny full NCS seniority credit to female employees who had taken pregnancy leave after the enactment of the PDA and attempted to defend that practice on the ground that it began before the enactment of that Act. But [petitioner] did no such thing." Pet. App. 51a-52a (footnote omitted). Rather, quite unlike the plaintiffs in *Bazemore* (see 478 U.S. at 396-397 n.6), respondents here are seeking to impose retroactive liability on the employer for its policies before they were made unlawful by the pertinent statute, and not for a present violation stemming from a *continuation* of such policies.

c. Respondents cannot 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, *e.g.*, *Evans*, 431 U.S. at 558 (employee argued she was challenging her seniority instead of her earlier forced resignation); *Ricks*, 449 U.S. at 257 (employee argued he was challenging the termination of his contract, rather than the earlier discriminatory denial of tenure). Indeed, that assertion was the principal argument rejected in *Evans*. See 431 U.S. at 557-558.

Respondents argue that they could not have sued before their benefits were calculated because a discriminatory maternity-leave policy is not an adverse employment practice in violation of Title VII until benefits are actually calculated under that policy. In their brief in opposition (at 10 n.3), however, respondents asserted that petitioner's pre-PDA leave policies themselves "arguably" constituted an "unlawful employment practice" that violated Title VII, thereby effectively acknowledging that respondents could have filed suit at the time they were required to take personal leave for their pregnancies. Their complaint similarly asserted that petitioner's pre-PDA maternity leave policies violated Title VII. Compl. 16-17 (¶ 88). Not until their supplemental brief at the certiorari stage (at 11) did respondents argue that petitioner's disparate treatments of pre-PDA leaves on account of pregnancy were simply "precursor decisions," akin to performance evaluations, "that [were] not themselves completed violations of Title VII

subject to immediate challenge." This Court does not ordinarily consider arguments that were not pressed or passed upon below, and there is no reason to do so here.

In any event, respondents' argument should be rejected. Respondents could have challenged petitioner's pre-PDA policies before the passage of the PDA because those policies gave women less NCS credit for pregnancy than for other temporary disabilities. That result had the immediate effect of placing pregnant women in an inferior position vis-a-vis other employees for future service-related decisions including job bidding, vacation time, and retirement benefits. Pet. App. 4a; Compl. 6-8 (¶ 29(a)-(d)) (cataloging adverse effects of leave policy). Respondents were thus entitled to sue when the policy was adopted and were not required to wait until the policy was applied with respect to a particular benefit determination.

Lorance likewise makes clear that the adoption of a discriminatory 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.3; *Riva* v. *Massachusetts*, 61 F.3d 1003, 1009-1013 (1st Cir. 1995) (finding ripe a claim brought by an employee whose retirement benefits would be reduced eight-plus years after he sued). Accordingly, respondents were not entitled to wait to sue at "the point at which the injury becomes 'most painful.'" *Lorance*, 490 U.S. at 907 n.9 (quoting *Ricks*, 449 U.S. at 258).

B. Section 706(e)(2) Does Not Aid Respondents

1. Both the Ninth Circuit (Pet. App. 19a-20a) and respondents (Br. in Opp. 14-15; Supp. Br. 8-10) rely on 42 U.S.C. 2000e-5(e)(2), quoted on p. 3, *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 706(e)(2) was enacted by Congress in 1991 in response to this Court's decision in *Lorance* and, as this Court recently recognized, the provision was designed "to cover the specific situation involved in that case," *Ledbetter*, 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. Section 706(e)(2) thus has no application to the seniority system at issue here.

Petitioner here 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]ecause the PDA is not retroactive, * * * [petitioner] 'would have no reason to think it had to reshuffle its NCS list after the Act was passed,' and therefore the continued reliance on the unadjusted NCS date cannot constitute intentional discrimination.") (internal citation omitted) (quoting *Ameritech*, 220 F.3d at 823). Section 706(e)(2) therefore is not applicable.

Respondents' argument to the contrary (Supp. Br. 10-11) fails. Respondents assert that "[t]he phrase 'in violation of [Title VII]' is best read to modify 'intentionally discriminatory purpose,'" rather than "the earlier word 'adopted.'"

Supp. Br. 10. Under this proposed reading, a party may challenge a seniority system at any time if the employer's purpose for adopting the policy is determined to violate Title VII's *current* prohibitions, even if the purpose was entirely lawful at the time of the seniority system's adoption. See Supp. Br. 10 ("[T]he provision allows plaintiffs to challenge at any time a seniority system adopted for a purpose proscribed by Title VII at the time of the challenge."). That reading is untenable. The phrases "for an intentionally discriminatory purpose" and "in violation of [Title VII]" are part of a single explanatory phrase, both of which modify the operative statutory term "adopted."

The statute thus permits actions against seniority systems "adopted for an intentionally discriminatory purpose in violation of [Title VII]"—*i.e.*, seniority systems that intentionally violate Title VII at the time they are adopted. See Pet. App. 61a-63a (O'Scannlain, J., dissenting). A contrary reading would give an impermissible retroactive effect to the PDA as it would force employers to recalculate NCS dates made before the PDA was passed. That result not only would contravene the settled understanding that statutes should not be given retroactive effect unless Congress clearly says so, but would extend far beyond Congress's limited purpose in enacting Section 706(e)(2) to overrule the specific result in *Lorance* and would directly conflict with the prospective-only effect of the PDA.

2. Respondents' assertion that the government's reading of the statute "would lead to absurd results and easy evasion of *Lorance* and Section 706(e)(2)" (Supp. Br. 9) also is without merit. The government's interpretation would not, as respondents contend, permit an employer to utilize a seniority system that gives women "half the seniority credit given to men for each day of service." Supp. Br. 9. Such a system would be facially discriminatory, and,

as noted above, could be challenged at any time under *Lorance*. See 490 U.S. at 912 & n.5 ("[A] facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time.").

Nor would the government's reading of the statute permit an employer to maintain "a *Bazemore*-like system * * * for years," only to change the system "before pensions became due and insist that neither *Lorance* nor Section 706(e)(2) applied because its system was no longer facially discriminatory." Resp. Supp. Br. 9. Assuming that "a *Bazemore*-like system in which black employees were given no seniority credit at all before the effective date of Title VII" continued after the effective date of Title VII, as respondents suggest in their hypothetical (*ibid.*), such a facially-discriminatory system would have become actionable upon Title VII's effective date, just as the discriminatory pay scale at issue in *Bazemore* immediately became actionable, *Bazemore*, 478 U.S. at 395, and would remain actionable under *Lorance*. 490 U.S. 912 & n.5.[6] And to the extent respondents assert that an employer utilizing a *Bazemore*-like system would be required retroactively to award seniority credit for the period before Title VII's effective date, that argument is foreclosed by *Bazemore* itself, which did not permit recovery for pre-enactment pay disparity. See *Bazemore*, 478 U.S. at 395 ("While recovery may not be permitted for pre-1972 acts of discrimination, to

---

[6] Indeed, as noted by the en banc dissent, the existence of such a factual scenario would be controlled by *Bazemore*. Pet. App. 51a-52a ("*Bazemore* would only be analogous in this case if [petitioner] had continued to deny full NCS seniority credit to female employees who had taken pregnancy leave after the enactment of the PDA and attempted to defend that practice on the ground that it began before the enactment of that Act.").

the extent that this discrimination was perpetuated after 1972, liability may be imposed.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GRACE CHUNG BECKER
Acting Assistant Attorney General
GREGORY G. KATSAS
Assistant Attorney General
LISA S. BLATT
Assistant to the Solicitor General
DENNIS J. DIMSEY
DIRK C. PHILLIPS
Attorneys

SEPTEMBER 2008