No. 07-543

IN THE
Supreme Court of the United States

AT&T CORPORATION,
Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondents.

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

BRIEF IN OPPOSITION

Blythe Mickelson
Kerianne R. Steele
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Pkwy.
Suite 200
Alameda, CA 94501

Judith E. Kurtz
Counsel of Record
LAW OFFICES OF JUDITH KURTZ
192 Bocana Street
San Francisco, CA 94110
(415) 826-0244

Noreen Farrell
EQUAL RIGHTS ADVOCATES
1663 Mission Street
Suite 250
San Francisco, CA 94103

Mary K. O'Melveny
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO
501 Third Street, N.W.
Suite 800
Washington, D.C. 20001

(Additional counsel on inside cover)

Additional Counsel

Henry S. Hewitt
ERICKSON, BEASLEY &
HEWITT
483 Ninth Street, Suite 200
Oakland, CA 94607

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

QUESTION PRESENTED

The Ninth Circuit held that AT&T violated Title VII when, in calculating respondents' retirement benefits, it deducted time from their terms of employment for pregnancy disability leaves taken before the effective date of the Pregnancy Discrimination Act, while simultaneously granting employees full credit for all other temporary disability leaves taken during the same period. The question presented is:

Whether Title VII permits an employer, when setting retirement benefits, to discriminate between women who took pregnancy disability leaves before the Pregnancy Discrimination Act came into effect and other employees who took any other kind of temporary disability leave during that same period.

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STATEMENT OF THE CASE

The Pregnancy Discrimination Act ("PDA") of 1978 amended Title VII to clarify that discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" is discrimination "because of sex." PUB. L. NO. 95-555, § 995, 92 STAT. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)). The PDA further provides that "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 . . . ." *Id.*

Nevertheless, when AT&T[1] calculated respondents' pension benefits upon their retirements, it deducted time from their terms of employment for pregnancy disability leaves they took prior to the PDA's effective date (April 29, 1979). AT&T, however, granted full credit to retiring employees who took leaves for any other temporary disability during the same period. The Ninth Circuit, applying this Court's fresh guidance on the issue of when actionable discrimination occurs, held that AT&T's retirement-day decisions to award lesser pensions to women who took pre-PDA pregnancy leaves than it awarded to other similarly situated employees constituted an unlawful employment practice under Title VII.

1. When certain AT&T employees retire, AT&T awards them pension benefits. The amount of an employee's pension benefits, which AT&T does not calculate until retirement, is determined by his or her "term of employment"—that is, the length of time the employee worked for the company, adjusted for any

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[1] Respondents were initially employed by Pacific Telephone and Telegraph until either 1980 or 1984, when they were transferred to AT&T. For the sake of convenience, respondents' employer will be referred to as AT&T throughout.

leaves of absence for which the company does not give credit.

At all times relevant to this case, AT&T chose to calculate terms of employment according to its generalized seniority system, which it calls the Net Credited Service ("NCS") system. Under that system, AT&T gives employees full employment credit for all types of temporary disability leaves taken prior to the PDA's effective date, except one: pregnancy. Even today, when AT&T calculates women's pensions, it deducts from their terms of employment all time away from work beyond 30 days for pregnancy disability leaves prior to 1977, and all time beyond 72 days for certain pregnancy leaves taken between 1977 and 1979. Accordingly, when women who took (often forced) pregnancy leaves before April 29, 1979 retire, AT&T awards them smaller pensions than all other similarly situated employees who took any other type of temporary disability leave prior to that date.

There is no overriding company policy or principle of law that would preclude AT&T from giving its retiring employees full credit for their pre-PDA pregnancy disability leaves. Indeed, the record in this case shows that when its employees retire, AT&T has the power to correct errors in the NCS dates used to calculate terms of employment or to adjust such dates to comply with legal requirements. For example, on March 1, 2000, AT&T's Pension Plan Administrator informed respondent Elizabeth Snyder that AT&T was adjusting her NCS date to credit her with 30 days out of her 97 days of pregnancy leave, the amount that she would have received for personal leave time in 1974 if the policy then in effect had been correctly applied to her at the time of her pregnancy leave.

2. Respondents are women who worked for AT&T and took pregnancy disability leaves between 1968 and 1976, as well as the union that represents AT&T's non-management employees. At the time of filing their complaint, all but one of the individual respond-

ents had terminated their long-term employment with AT&T; the final woman's retirement was impending.[2]

Respondent Noreen Hulteen took pregnancy leave in 1968-69, and was then hospitalized for a medical condition requiring surgery after giving birth. She missed a total of 240 days of work due to her pregnancy and surgery, but AT&T gave her only 30 days of NCS credit for personal leave time. Thus, when Hulteen retired in 1994, AT&T set her pension benefits by excluding 210 days that it would have credited if she had initiated her leave because of any disability besides pregnancy.

Respondent Eleanora Collet retired on December 31, 1998, after working at AT&T since August 30, 1965. She took two pregnancy leaves totaling 319 days in 1965 and 1975-76. Accordingly, when AT&T calculated her term of employment for purposes of setting her pension payments, it excluded 261 days from her total service, thus reducing her pension benefits.

Respondent Elizabeth Snyder terminated her employment with AT&T on April 28, 2000, after working for the company since May 23, 1966. Ms. Snyder took 97 days of pregnancy leave in 1974. When she retired, AT&T excluded 67 days from her pension calculation, denying her pension benefits based on this time away from work.

3. Respondents filed timely charges with the EEOC, claiming that AT&T discriminated against them in setting their retirement benefits. After receiving right-to-sue letters, respondents sued AT&T, alleging that its decision to pay them smaller pensions because of their pregnancy disability leaves constituted an unlawful employment practice under Title

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[2] Respondent Linda Porter began working at AT&T in 1967. She joined this action anticipating her impending retirement and AT&T's imminent exclusion of her pregnancy leave from the computation of her pension benefits.

VII and violated certain provisions of ERISA. The district court granted summary judgment to respondents on their Title VII claim. Pet. App. 106a-23a. The district court reasoned that AT&T's actions mirrored those that the Ninth Circuit found unlawful in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992), and that "*Pallas* remains binding on this Court." Pet. App. 123a.

4. Before the extent of AT&T's financial liability under Title VII could be determined, AT&T took an interlocutory appeal. A three-judge panel of the Ninth Circuit reversed the district court's grant of summary judgment for respondents. It declined to follow *Pallas*, contending that *Pallas*' holding gave retroactive effect to the PDA, and that this retroactivity was impermissible in light of this Court's intervening decision in *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994). Pet. App. 82a-85a. Judge Rymer dissented, asserting that nothing in *Landgraf* undercut the *Pallas* court's conclusion that the employer violated Title VII by "deny[ing] [the retiring plaintiff] benefits in the post-PDA world." Pet. App. 91a. Because the employer's "discrete act—the decision to deny a retirement benefit—[] gave rise to a current violation of the PDA," there was no need to consider whether the PDA applies retroactively. Pet. App. 91a.

5. On rehearing en banc, the Ninth Circuit reinstated the district court's grant of summary judgment in favor of respondents. Applying *Bazemore v. Friday*, 478 U.S. 385 (1986), and the guidance in this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), which had come down after the three-judge panel's opinion, the en banc panel's eleven-judge majority held that AT&T's discriminatory pension-setting decisions constituted unlawful employment practices that occurred when the pensions were set. Pet. App. 10a-11a. The fact that AT&T had previously forecast to respondents that they would not receive credit for their pregnancy leaves when their retirement benefits were later set

was irrelevant. "[T]he *calculation* of benefits" when employees retire is what triggers Title VII, and that calculation takes place long after the effective date of the PDA. Pet App. 11a.

The en banc dissent argued that respondents' Title VII claim was invalid because, by refusing to give respondents credit for pre-PDA pregnancy leaves, AT&T merely gave present effect to past discrimination—discrimination that may have been legal at the time. Pet. App. 63a. Drawing on this Court's decision in *United Air Lines v. Evans*, 431 U.S. 553 (1977), and interpreting *Ledbetter*'s guidance differently than the majority, the dissent asserted that the only relevant actions in this case were the actions AT&T took in the 1960's and 1970's. AT&T's calculation of respondents' pension benefits, in the dissent's view, was entirely neutral. Pet. App. 44a.

REASONS FOR DENYING THE WRIT

AT&T asks this Court to consider whether employers violate Title VII when they give smaller pensions to retiring women who took pregnancy disability leaves before 1979 than they award to other employees who took any other kind of disability leaves. This Court has twice denied certiorari on this very issue. The most recent denial (in 2001) occurred after the Seventh Circuit created the conflict with the Ninth Circuit that serves as the basis for AT&T's petition. *See Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), *cert. denied*, 531 U.S. 1127 (2001); *Pallas v. Pac. Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992).

There is even less reason now for review of this issue. Although the Seventh and Ninth Circuits squarely disagreed over the question presented in 2001, this Court's intervening decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), refines a major component of the controlling legal

framework and thus invites lower courts to reassess their positions. The interlocutory decision below is the only court of appeals decision thus far to do so. Moreover, it comports with *Ledbetter*'s guidance that a Title VII claim arises at the time of the relevant compensation-setting decision (in this case, when petitioners' pension was calculated years after the effective date of the PDA), and with this Court's recognition that a discriminatory compensation policy gives rise to a new Title VII claim each time it is implemented. Finally, even if AT&T were correct that the decision below contravenes *Ledbetter* because AT&T's pension-setting policy merely gives present effect to past discrimination, certiorari still would not be warranted because Congress currently is considering legislation to overturn *Ledbetter* and to establish a new statutory definition of when compensation-related Title VII violations occur. If that legislation fails to become law, and if AT&T's unsupported (and empirically dubious) suggestion that many more lawsuits like this are bound to arise proves correct, this Court will have ample opportunity to resolve any split of authority that develops then—without any prejudice to AT&T's ability to continue litigating this case to an appropriate final judgment.

I. The Ninth Circuit Correctly Held That AT&T's Pension-Setting Calculations Violated Title VII.

A. The Ninth Circuit Correctly Applied This Court's Newly Clarified Distinction Between Present Compensation Discrimination and a Neutral Act That Merely Gives Present Effect To Past Discrimination.

1. Title VII makes it an "unlawful employment practice" to "discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment because of such individual's . . . sex," including pregnancy or related conditions. 42 U.S.C. § 2000e-2(a)(1); *see also id.* § 2000e(k). In

implementing this guarantee, this Court recently emphasized the necessity of "identify[ing] with care the specific employment practice that is at issue." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2167 (2007).

In particular, this Court's cases distinguish between claims based on current practices that are discriminatory and claims based on currently neutral practices that give effect to past discriminatory or otherwise unsavory actions. The former category is exemplified by *Bazemore v. Friday*, 478 U.S. 385 (1986). There, an opinion for a unanimous Court explained that an employer's discriminatory policy adopted "*prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* [it] became covered by Title VII." 478 U.S. 385, 395 (1986) (Brennan, J., concurring). Thus, this Court held 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 the statute." *Id.* On the other hand, in a line of cases beginning with *United Air Lines v. Evans*, this Court has held 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 . . . past discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007) (interpreting "[t]he instruction provided" by *United Air Lines v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)).

This Court clarified the boundary between these two lines of cases last Term in *Ledbetter*. In that case, Ledbetter proved to a jury "that during the course of her employment several supervisors had

given her poor performance evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment." 127 S. Ct. at 2165-66. There were, accordingly, three points in time when Ledbetter might have alleged that her employer committed an unlawful employment practice under Title VII: (1) in giving her sub par performance reviews; (2) in setting her pay based on those reviews; and (3) in issuing paychecks based on those pay-setting decisions.

This Court held that the relevant unlawful employment practice occurred at the second stage, when the pay-setting decision was made. 127 S. Ct. at 2165, 2169. This Court explained that "[a] disparate-treatment claim [under Title VII] comprises two elements: an employment practice, and discriminatory intent." *Id.* at 2171. An employer violates Title VII at any "particular point in time" when these elements join together to form a discriminatory act. *Id.* at 2169. When an employer sets an employee's pay based on discriminatory performance reviews, it joins discriminatory intent with an act of awarding the employee a certain salary. Furthermore, when, as in *Bazemore*, "an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees." *Id.* at 2173 (citing *Bazemore*, 478 U.S. at 395). But when an employer simply issues paychecks according to a previously and individually established rate of pay, an employer treats an employee differently for a neutral reason—namely, that each employee is entitled to be paid only the amount at which their pay was set.

2. The Ninth Circuit here correctly applied the *Bazemore/Evans* dichotomy, as explicated in *Ledbetter*, to hold that AT&T violated Title VII when

it gave respondents smaller pensions than they would have received if they had taken their temporary disability leaves for any reason other than pregnancy. Setting an employee's pension is a discrete act just like setting her pay. *See, e.g., Maki v. Allete, Inc.*, 383 F.3d 740, 744 (8th Cir. 2004) ("[p]ension checks . . . are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application"). That being so, the Ninth Circuit reasoned that AT&T's pension-setting system "facially discriminates against pregnant women" by distinguishing between "female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities." Pet. App. 9a (quoting *Pallas*, 940 F.2d at 1327). Just as this Court explained that the employer discriminated against Ledbetter when its discriminatory intent joined with the act of setting her pay (but not when it later issued her paychecks), the Ninth Circuit concluded that when AT&T—long after the effective date of the PDA—used its facially discriminatory pension-setting policy to set respondents' retirement benefits at levels lower than other similarly situated employees, it engaged in intentional discrimination in violation of Title VII. Pet. App. 11a.

AT&T insists that its pension-setting decisions here did not constitute unlawful employment practices because all it did in setting the levels of respondents' pension benefits was to rely in a neutral manner "on historical facts"—namely, adjusted NCS dates—created by discriminatory policies that were "legal at the time." Pet. for Cert. 18. According to AT&T, therefore, the Ninth Circuit improperly "imposed liability on AT&T for failing to *restore* service credit to women who took pre-PDA pregnancy leaves." Pet. for Cert. 21.

In addition to improperly presuming that it was legal prior to 1979 to discriminate in this manner on

the basis of pregnancy,[3] AT&T's argument misapprehends how pension benefits operate and distorts the Ninth Circuit's reasoning. An employee's seniority may matter for many things during her employment, but it cannot affect her pension until she retires. Consequently, the relevant disparate treatment here occurred when "AT&T calculated [respondents'] retirement benefits . . . deliberately choosing to use an NCS date that would deprive [them] of benefits received by those who were not 'affected by pregnancy' by excluding earlier pregnancy leave from the . . . calculation of benefits." Pet. App. 19a (quoting 42 U.S.C. § 2000e(k)). Up until that moment, AT&T could have "credited the applicable number of days [from respondents' pregnancy leaves] to each plaintiff's NCS date when it calculated her benefits," Pet. App. 21a, just as it adjusted the NCS date that it had previously advised respondent Snyder it intended to use for calculating her benefits. ER R 58 ¶ 63. Respondents' prior service history did not predetermine AT&T's present-day pension-setting decisions any more than Ledbetter's discriminatory performance reviews pre-determined the salary-setting decisions this Court held actionable in that case.

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[3] AT&T's policy was arguably an unlawful employment practice under Title VII even prior to the passage of the PDA. In 1977, this Court held that a "policy of denying accumulated seniority to female employees returning from pregnancy leave violates § 703(a)(2) of Title VII." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139 (1977). And the EEOC's 1972 guidelines specifically forbade employers from discriminating in seniority accrual policies between employees disabled by pregnancy and those affected by other temporary disabilities. 29 C.F.R. § 1604.10(B) (1973). To the extent *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), suggested that AT&T's pension-setting system was lawful prior to 1979, "the views expressed in the dissenting opinions in that case . . . should be followed today" because Congress specifically "'overruled' that decision in the [PDA]," making clear that it always had intended Title VII to cover pregnancy discrimination. *Sutton v. United Air Lines,* 527 U.S. 471, 506 n.3 (1999) (Stevens, J., dissenting).

Even if AT&T's suggestion were accurate that its NCS policy when the respondents took their pre-PDA pregnancy disability leaves gave them unambiguous notice that AT&T intended to discriminate against them when it set their pension amounts in the future, that still would not assist AT&T. *Ledbetter* expressly recognized that "there may be instances where the elements forming a cause of action span more than 180 days" (Title VII's limitations period). 127 S. Ct. at 2171 n.3. When an employer "forms an illegal discriminatory intent towards an employee but does not act on it until 181 days later," the "charging period would not begin to run until the employment practice was executed on day 181 because until that point the employee had no cause of action." *Id.* At the very best, AT&T is in the same position as the hypothetical employer in *Ledbetter.* AT&T intended to discriminate against respondents when it advised them that it would deduct time from their pregnancy disability leaves when dispensing future seniority-based employment benefits, and AT&T put that discriminatory intent into practice when it established the amount of pension benefits they would actually receive.

For much the same reason, AT&T's suggestion that the Ninth Circuit "sought intentionally to evade *Evans,*" Pet. for Cert. 17, lacks merit. In *Evans,* United Air Lines fired Evans because of her sex, giving immediate rise to a mature disparate-treatment claim. But Evans declined to file a claim. United later rehired her, and set her seniority at zero, pursuant to its policy of resetting the seniority clock whenever it rehired any former employee. Evans did not file a claim based on that act either.[4] Instead, Evans

[4] This Court did not address whether Evans could have made out a claim against United for "the single act of failing to assign her seniority credit for her prior service at the time she was rehired," because she filed her discrimination charge with the EEOC outside the limitation period for challenging that act. 431 U.S. at 557 n.9. This Court held only that Evans could not make out a

brought a claim more than one year later alleging that United violated Title VII by paying her less than she would have received if she had not been fired for a discriminatory reason. This Court rejected Evans' argument, holding that United's issuance of her paychecks merely gave present effect to a past discriminatory firing. *Evans,* 431 U.S. at 558. Having let United's genuine act of discrimination go unaddressed, Evans could not complain of its lingering effects years later with respect to her pay because her salary was a function solely of the company's neutral seniority resetting policy. *Id.*

By contrast, AT&T's mere tallying of days respondents took for disability leave did not have any immediate discriminatory effect on their pensions. Just as a critical note in an employee's file is not actionable until it is given concrete effect in a subsequent pay raise decision, a notation recording disability leave does not give rise to a claim for pension discrimination unless and until the employer gives it discriminatory effect in establishing the worker's pension benefits. Furthermore, AT&T's refusal to credit pregnancy disability leave time in calculating pensions is not a function of any facially neutral seniority rule. To the contrary, AT&T intentionally discriminated between women disabled by pregnancy and other temporarily disabled employees when it adopted a service credit accrual method that denied equal service credit to women who took pregnancy disability leaves. And AT&T acted on precisely this discriminatory intent when it chose to use this policy to calculate employees' pension benefits and gave respondents smaller pensions than their similarly situated coworkers. Accordingly, those pension-setting decisions constituted unlawful employment practices. *See Ledbetter*, 127 S. Ct. at 2173.

Title VII violation for United's issuance of paychecks paying her according to the seniority level it assigned her when it rehired her.

3. It adds nothing to argue, as AT&T does, that the Ninth Circuit "gave impermissible, retroactive effect" to the Pregnancy Discrimination Act in deciding this case. Pet. for Cert. 21. *Ledbetter* makes clear that an employer violates Title VII whenever it applies a facially discriminatory policy to one of its disfavored employees. *See* 127 S. Ct. at 2173. AT&T engaged precisely in such prescribed behavior when it calculated the respondents' pension benefits. That AT&T adopted its facially discriminatory seniority policy "*prior* to the time it was covered by [the PDA] does not excuse perpetuating that discrimination *after* [it] became covered by [the PDA]." *Bazemore*, 478 U.S. at 395. Respondents' claim is directed to actions AT&T took when they retired, long after the PDA became the law, so there is no retroactivity issue here.

B. The Ninth Circuit Properly Recognized That the Seniority System AT&T Used in Setting Respondents' Pensions Also Permits Them to Bring Their Claims.

Even if AT&T's refusals in the 1960's and 1970's to give respondents service credit for their pregnancy disability leaves were the discriminatory acts on which respondents' claims rested, that still would not undermine the Ninth Circuit's decision. In *Lorance v. AT&T Technologies, Inc.,* 490 U.S. 900 (1989), this Court explained that "a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged *at any time.*" *Id.* at 912 (emphasis added). "[A] facially discriminatory system . . . by definition discriminates each time it is applied." *Id.* at 912 n.5. AT&T concedes that its NCS seniority system is a "discriminatory polic[y]," Pet. for Cert. 18, and the Ninth Circuit properly recognized that this is facially apparent. Pet. App. 9a.

To be sure, *Lorance* itself involved a facially neutral seniority system, and this Court held, relying on *Evans,* that employees could not challenge current employment decisions based on such a system after

the limitations period running from the system's initial application to them had expired. But even if AT&T's NCS system could somehow be characterized as facially neutral, it would not matter. In response to *Lorance*, Congress passed the Civil Rights Act of 1991. Section 112 of the Act, codified at 42 U.S.C. § 2000e-5(e)(2), establishes a special rule for discriminatory seniority systems, which the *Ledbetter* Court recently made clear does not apply to "other types of employment discrimination" such as pay discrimination. *Ledbetter,* 127 S. Ct. at 2169 n.2. That section provides that a seniority system adopted for an intentionally discriminatory purpose may be challenged "when the seniority system is adopted, when the 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*." § 2000e-5(e)(2) (emphasis added). The Ninth Circuit noted that Congress passed this legislation because it "was concerned that, '[t]aken to its logical conclusion, the *Lorance* rule would bar all challenges to present day applications of discriminatory practices in existence when Title VII became law since, under the *Lorance* rule, the deadline for a timely charge would have expired before Title VII became effective.'" Pet. App. at 20a (quoting H.R. REP. NO. 102-40, pt. II, at 23).

At the very least, respondents' suit is precisely the kind of case whose viability Congress meant to ensure. Even if respondents' claims truly concerned AT&T's past maintenance of its discriminatory NCS system instead of its current "term of employment" calculations in its pension-setting decisions, the NCS system is an intentionally discriminatory seniority system subject to the Civil Rights Act of 1991. AT&T's NCS system intentionally discriminated against women inasmuch as it explicitly denied women credit for pregnancy disability leaves, while awarding full NCS credit for all other temporary disability leaves. Consequently, the Civil Rights Act of 1991 enabled respondents to file their claims at the time of their

retirements, when AT&T "appli[ed]" the discriminatory NCS dates to calculate their pension benefits. § 2000e-5(e)(2).

II. Neither the State of Law in Other Federal Courts Nor Any Other Prudential Circumstance Counsels in Favor of Review.

AT&T argues that certiorari is warranted because the Ninth Circuit's decision purportedly conflicts with decisions from the Sixth and Seventh Circuits. It further contends that the question presented is significant because "[m]any large employers treated pregnancy leaves differently than other leaves prior to the PDA." Pet. for Cert. 3. Neither of these arguments withstands scrutiny. Not only is it unnecessary to consider the question presented but it would be unwise to do so without awaiting further developments in this case and in the legal landscape in general.

1. The Sixth and Seventh Circuits have issued decisions holding that employers that calculated pensions in the same manner as AT&T did not violate Title VII. *See Leffman v. Sprint Corp.,* 481 F.3d 428 (6th Cir. 2007); *Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), *cert. denied*, 531 U.S. 1127 (2001). Unlike the Ninth Circuit's decision here, however, the Sixth and Seventh Circuits issued their decisions before this Court refined the *Bazemore/Evans* dichotomy in *Ledbetter*. Consequently, neither court focused, as *Ledbetter* directs, on the "specific employment practice that is at issue" or on when the employer's discriminatory intent "joined" with the act (awarding a smaller pension) that harmed the employees. 127 S. Ct. at 2167, 2171 n.3. Rather, the Seventh Circuit reasoned simply that because the plaintiffs "knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off" that "[t]he time for bringing a complaint was . . . long ago." *Ameritech,* 220 F.3d at 823. The Sixth Circuit said even less about exactly when a specific

employment practice at issue occurs that gives rise to a ripe claim for discrimination in setting pension benefits. Quoting a concurring opinion from an earlier case dealing with a different issue, the court of appeals asserted without elaboration that the "plaintiff[] present[s] claims of continuing effects of past discriminatory acts and do[es] not claim discriminatory acts within the statutory time period." *Leffman,* 481 F.3d at 433 (6th Cir. 2007) (quoting *Cox v. City of Memphis*, 230 F.3d 199, 206 (6th Cir. 2000) (Moore, J., concurring)).

Given the opportunity to reconsider these rather skeletal opinions in light of *Ledbetter,* the Sixth and Seventh Circuits may well see the error in their reasoning – namely, that discrimination occurs when employers' discriminatory intent joins with the act of awarding the affected women smaller pensions than other similarly situated employees. Whatever other complaints women such as the respondents may have had when their employers told them they did not receive full NCS credit for their pregnancy leaves, they did not have any claim with respect to *the amounts of their pensions* until those pensions were calculated and awarded.

2. Even if there were merit to AT&T's suggestion that this case really involves nothing more than the present effects of past discrimination, it would still be advisable for this Court to refrain from intervening in light of pending legislation that would definitively resolve this dispute even if this case is characterized on AT&T's terms. In the wake of *Ledbetter*, members of Congress introduced The Lily Ledbetter Fair Pay Act of 2007. The Act, which would cover all claims pending on or after May 28, 2007, H.R. 2831 § 6, passed the House and has been placed on the Senate calendar. It proposes to amend Title VII to state that a claim can be brought for discrimination in compensation "when an individual is affected by application of a discriminatory compensation decision." H.R. 2831, 110th Cong. § 3 (2007). The House Report

explains that the Ledbetter Act "includes benefits as a form of compensation which could trigger the statute of limitations when paid." H.R. REP. NO. 110-237 (2007). Accordingly, to the extent that AT&T is correct that a previous discriminatory alteration to an NCS date resembles the prior discriminatory pay-setting decisions the employer made in *Ledbetter*, the Act would uphold the result reached by the Ninth Circuit and permit respondents to proceed with their suit regardless of the outcome of a Supreme Court decision in this case.

To be sure, the Ledbetter Act states that it "is not intended to change current law treatment of when pension distributions are considered paid." H.R. 2831 § 2. But the House Report explains this language by noting that pension benefits under law are considered paid only once, "upon entering retirement and not upon the issuance of each annuity check." H.R. REP. NO. 110-237. In other words, while the Act would leave in place law governing whether a retired employee can sue an employer based on the receipt of a pension check pursuant to a previously set rate, nothing in this language would change the Act's dictate that an employee may bring a claim for discrimination based on the setting of her benefits at the time of retirement. Respondents in this case each satisfy this proposed rule. Each timely challenged the calculation of their pension benefits at the time of retirement.

3. Finally, all available empirical evidence indicates that the question presented lacks any pressing significance. The number of women potentially affected by the question presented is capped and is necessarily decreasing over time. Only women who took pregnancy disability leave before the PDA took effect on April 29, 1979, and who have continued to work for an employer that awards pensions but refuses to credit such leaves equally to other temporary disability leaves, have any stake in this dispute. This

class of women gets smaller every day, as its members move beyond retirement and pass away.

Furthermore, the number of employers potentially subject to such a suit appears to be quite limited. No *amici* have filed in support of AT&T's petition. Furthermore, over the past sixteen years, the federal courts of appeals have had occasion to decide only five Title VII cases involving the question presented.[5] All five involved telecommunications companies, presumeably because this was one of the only industries that (a) was unionized in the 1960's and 1970's; (b) employed a substantial number of women; and (c) had pension plans then that companies have carried forward to the present day. And even within this group, some employers have changed their pension policies and voluntarily decided to award women such as respondents full retirement benefits. *See, e.g., E.E.O.C. v. Bell Atlantic Corp.*, Nos. 97 Civ. 6723, 98 Civ. 3427, 99 Civ. 5197, 2002 WL 31260290 (S.D.N.Y. Oct. 9, 2002).

AT&T nonetheless asserts, without citing any evidence, that "[m]any large employers treated pregnancy leaves differently than other leaves prior to the PDA." Pet. for Cert. 3. This assertion is hard to square with the fact that it has been primarily telecommunications companies that have been subject to the handful of lawsuits such as this one. But to whatever extent some women affected by policies such as AT&T's may still retire in the future and sue their employers, that circumstance would only reinforce the reasons for denying review here. This case is on interlocutory review (the extent of AT&T's liability, among other things, has not yet been determined), so allowing it to proceed to a final judgment in the district court would not risk prejudicing AT&T. AT&T could bring this issue back to this Court at the close of this case if it wishes. In the meantime, if any new

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[5] In addition to the cases discussed above, see *E.E.O.C. v. Ameritech*, 156 Fed. Appx. 953 (6th Cir. 2005).

cases were brought, other courts would be able to consider the issue in light of *Ledbetter* and any new legislation that is enacted. If any conflict developed, this Court could address it in due course.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Judith E. Kurtz
Counsel of Record
LAW OFFICES OF JUDITH KURTZ
192 Bocana Street
San Francisco, CA 94110
(415) 826-0244

Mary K. O'Melveny
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO
501 Third Street, N.W.
Suite 800
Washington, D.C. 20001

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Blythe Mickelson
Kerianne R. Steele
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501

Noreen Farrell
EQUAL RIGHTS ADVOCATES
1663 Mission Street
Suite 250
San Francisco, CA 94103

Henry S. Hewitt
ERICKSON, BEASLEY & HEWIT
483 Ninth Street
Suite 200
Oakland, CA 94607

Amy Howe
Kevin Russell
HOWE & RUSSELL, P.C.
4607 Asbury Place, N.W.
Washington, D.C. 20016