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,

Respondents.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This case presents an important and recurring issue on which the courts of appeals are in direct and acknowledged conflict—whether Title VII is violated when a seniority system gives present effect to a non-actionable past act of discrimination. As the petition demonstrated, this conflict has persisted despite this Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). Indeed, given a chance to reappraise its position in light of *Ledbetter* and conflicting decisions from the Sixth and Seventh Circuits, the majority below chose to evade *Ledbetter*'s holding and maintain the inter-circuit division. In doing so, moreover, it gave the Pregnancy Discrimination Act ("PDA") retroactive effect, creating a further (albeit unacknowledged) split.

Unable to refute AT&T's showing that the criteria for review are met, respondents resort to misstatement and misdirection. To reconcile the decision below with *Ledbetter*, respondents misrepresent the facts of the case—falsely claiming that AT&T "deducted" seniority when it calculated their pension benefits in the 1990s and 2000s. In fact, as respondents themselves conceded below, the service credit determinations that give rise to their claims occurred in the 1960s and 1970s. To justify further percolation of the "current violation" issue, respondents mischaracterize *Ledbetter*, claiming it altered "the controlling legal framework" in a way that will prompt the Sixth and Seventh Circuits to reconsider their decisions. But, any fair reading of *Ledbetter* and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), reveals that the Sixth and Seventh Circuit decisions are correct and that the majority

below circumvented this Court's decisions. Respondents also completely ignore that the decision below gives impermissible retroactive effect to the PDA—in direct conflict with every circuit court that has addressed the PDA's temporal scope.

Hoping to stave off review, respondents offer alternative bases for the decision below. But AT&T's NCS system plainly was not "facially discriminatory"; indeed, respondents' claim to the contrary depends on retroactive application of the PDA, and thus inescapably raises the second question presented. Their alternative claim that the NCS system was adopted with discriminatory intent is flatly time-barred. Ultimately, respondents ask the Court to ignore the conflict—and leave employers subject to conflicting rules governing pension benefits—because of a proposed bill that is stalled in the Senate and subject to a veto threat. None of these gambits should obscure the current split in the circuits, the misapplication of this Court's decisions, the importance of the issues or the necessity for this Court's prompt review.

ARGUMENT

1. The first issue presented is whether an employer engages in a current violation of Title VII when, in making post-PDA benefit determinations, it fails to *restore* seniority that female employees lost when they took pre-PDA pregnancy leaves. The decision below presents *this* issue—not the issue respondents suggest, compare Pet. at i with Opp. at ii—because AT&T denied full service credit to women who took pre-PDA pregnancy leaves shortly after they returned from those leaves, *not* decades later. When women who had taken pre-PDA pregnancy leaves retired, AT&T did not apply pre-PDA leave policies to

calculate their retirement benefits, as the majority below wrongly claimed. Pet. App. 21a-22a. Instead, AT&T calculated each employee's term of employment ("TOE") based on her retirement date and previously-adjusted NCS date; it then used the TOE to calculate the employee's pension. Thus, AT&T's seniority system merely gave present effect to seniority calculations that were made decades earlier and were embedded in gender-neutral NCS dates. It is the lawfulness of this conduct on which the circuits are in conflict.

Recognizing this fact—and that AT&T's continued reliance on pre-PDA service credit decisions is not a new violation of Title VII under *Ledbetter* or *Evans*—respondents resort to blatant misstatements of the facts. They claim that, when they returned from their pre-PDA pregnancy leaves, AT&T merely "advised them that it *would* deduct" service credit for those leaves sometime in the future, and that the loss of seniority did not occur until "AT&T calculated respondents' pension benefits *upon their retirements*." Opp. at 11, 1 (emphases added).[1] These statements are demonstrably false.

The parties' stipulation recites that, after her 1969 pregnancy leave, Hulteen's NCS date was changed "from January 5, 1965 to August 3, 1965." ER R 58, ¶ 28. When the Bell System broke up on January 1, 1984 and Hulteen was transferred from PT&T to AT&T, she "*maintained* the August 3, 1965 NCS date she *had had as an employee of PT&T*." *Id.* ¶ 29 (emphases added). Indeed, "[t]hroughout her employment with PT&T and AT&T, Hulteen periodically received documents that contained the August 3,

[1] The same mischaracterization is found in respondents' brief in different forms at ii, 2, 3, 4, 12.

1965 NCS date." *Id.* ¶¶ 30-31.[2] Accordingly, respondents conceded below that, after the PDA took effect, AT&T simply "continued to use the NCS date *previously computed* for leave taken before April 29, 1979"—the PDA's effective date—and they challenged AT&T's failure to "*restore*[] time deducted due to pregnancy." See Appellees' 9th Cir. Br. at 10 (emphases added). The parties' stipulation and respondents' concessions directly contradict respondents' assertion that AT&T waited until they retired to "deduct" the time they spent on pregnancy leaves from their TOEs.

Under the actual facts of this case, therefore, respondents cannot equate AT&T's conduct to that of the hypothetical employer described in *Ledbetter*. See Opp. at 11. AT&T did not decide in 1969 to discriminate against respondents in the future, and then wait *three and a half decades* to "put that discriminatory intent into practice." *Id.* Here, "the specific employment practice[s] that [are] at issue," *Ledbetter*, 127 S. Ct. at 2167, were decisions to deny full service credit for pregnancy leaves by adjusting the NCS dates of those who took such leaves. These allegedly "discriminatory…decision[s] [were] made and communicated to" respondents, *id.* at 2169, *in the 1960s and 1970s*. And these decisions affected respondents long before they retired, as NCS seniority was used "for many employment-related purposes, including job bidding, shift preference, layoffs [and] eligibility for certain benefit programs." ER R 58 ¶ 19.

To be sure, respondents' pension benefits were not finally calculated until they retired. But the amount

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[2] The same was true for other respondents. *See* ER R 58, ¶¶ 39-42, 50-53, 59-61.

of benefits each received was merely a function of her TOE, which was determined by calculating the time between her NCS and retirement dates. "The fact that precharging period discrimination"—which in this case was lawful, see *infra*—"adversely affects the calculation of a neutral factor (like seniority) that is used in determining [retirement benefits] does not mean that [each pension-setting decision] constitutes a new violation." *Ledbetter*, 127 S. Ct. at 2174. To the contrary, all respondents have alleged is that AT&T "discriminated against [them] in the past," when it adjusted their NCS dates to deny them full service credit for pre-PDA pregnancy leaves, "and that this discrimination reduced the amount of later [pension benefits]." *Id.* *Ledbetter* and *Evans* make clear that these allegations do not state a claim for a current violation, and respondents cannot escape this fact—and avoid review of the erroneous ruling below—by mischaracterizing AT&T's pension-setting decisions as post-PDA decisions to "deduct" seniority.

In the end, therefore, respondents retreat to the invalid theory the majority embraced below. They argue that their service history "did not predetermine AT&T's present-day pension-setting decisions" because "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.'" Opp. at 10 (quoting Pet. App. 21a). This is simply another way of saying that AT&T violated Title VII by refusing to restore the seniority respondents lost decades ago. See Pet. App. 20a-21a. And this theory is squarely foreclosed by *Evans*. Pet. at 18-20.

Attempting to show otherwise, respondents disingenuously claim that *Evans* involved the same "paycheck" accrual theory rejected in *Ledbetter*. Opp.

at 11-12. In fact, the precise question presented in *Evans* was "whether the employer [was] committing a second violation of Title VII by refusing to credit [Evans] with seniority" she had previously lost. 431 U.S. at 554; see also *id.* at 556 n.7 (describing relief sought). In *Evans* (as here), seniority was measured by adjusted dates of hire, and loss of seniority affected many aspects of employment beyond wages. *Id.* at 555 n.5. *Evans* held (contrary to the decision below) that *a refusal to restore seniority was not a new violation of Title VII*, for otherwise "a claim for seniority credit" could be substituted "for almost every claim which is barred by limitations." *Id.* at 560.

In short, respondents cannot recast the facts of *Evans* or of this case, and thus cannot disguise the clear inconsistency between the decision below and the decisions in *Evans* and *Ledbetter*. That inconsistency, as well as the acknowledged conflict among the circuits on the precise issue presented in this case, plainly justifies this Court's review.

2. Recognizing this, respondents claim the decision below can be sustained on alternative grounds that do not warrant review. These claims are baseless.

The first alternative rationale, also propounded by the majority below, is that AT&T's NCS system is "facially discriminatory" because it "set respondents' retirement benefits at levels lower than other similarly situated employees." Opp. at 9; see also Pet. App. 9a. But, as AT&T and the dissent below explained, see Pet. at 23-24; Pet. App. 45a, women who took pregnancy leaves prior to the PDA were *not* similarly situated to employees who took paid disability leaves before the PDA: Employees in the latter group were entitled to accrue full seniority during their leaves, while (under AT&T's then-lawful

leave policies) employees in the former group were not. Had the PDA *retroactively* invalidated the lawful distinction between these two groups, they could be deemed "similarly situated"—but the PDA did not.[3]

It is thus no answer to assert that "an employer violates Title VII whenever it applies a facially discriminatory policy to one of its disfavored employees." Opp. at 13. Absent retroactive application of the PDA, respondents were not similarly situated to persons who took other types of pre-PDA disability leaves, and no amount of repetition can make respondents' *ipse dixit* claim of "facial discrimination" true.

Nor has AT&T conceded "that its NCS seniority system is a 'discriminatory polic[y].'" Opp. at 13 (alteration in original) (quoting Pet. at 18). AT&T acknowledged only that its *pre-PDA leave policies*

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[3] Respondents repeat the majority's manifestly erroneous claim that *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), did not establish the legality of AT&T's pre-PDA leave policies. Opp. at 10 n.3. They nowhere refute AT&T's showing, Pet. at 15 n.6, that *Gilbert* is the definitive statement of Title VII's meaning before the PDA, and that Congress could change Title VII's pre-PDA meaning only by giving the PDA retroactive effect—which it plainly did not do. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), did not overrule *Gilbert*. The policy at issue in *Satty* did not simply deny service credit to women on pregnancy leave (like the pre-PDA policies here and in *Gilbert*), but deprived women who took pregnancy leaves of service accrued before those leaves. *Satty*, 434 U.S. at 139. Even the Ninth Circuit recognized that, before the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men." *Pallas* v. *Pac. Bell*, 940 F.2d 1324, 1325 (9th Cir. 1991) (citing *Gilbert*). And while respondents cite EEOC regulations, Opp. at 10 n.3, the EEOC conceded below that "the denial of service credit to women on maternity leave was not unlawful" before the PDA. EEOC 9th Cir. Br. at 26.

"treated pre-PDA pregnancy leaves less favorably than other disability leaves," Pet. at 17. In the passage respondents quote, AT&T stressed that the NCS system itself, like the seniority system in *Evans*, was non-discriminatory, because it relied on dates created under policies that were legal at the time they were used and that in all events were no longer subject to challenge. Pet. at 18.

Alternatively, respondents claim that, even if the NCS system is facially neutral, their suit was timely under § 112 of the Civil Rights Act of 1991 (codified as § 706(e)(2)), which permits an employee to challenge a facially neutral seniority system adopted with an intentionally discriminatory intent whenever he or she is injured by the application of that system. Opp. at 13-15. The record lacks any evidence that AT&T adopted its NCS system with discriminatory intent, see ER R 58, and no such intent can be inferred to grant or sustain summary judgment against AT&T. Moreover, prior to 1991, the limitations period for challenging a "discriminatorily adopted" but facially neutral seniority system began to run "from the date the system was adopted," not from when its "effects" were "felt." *Lorance* v. *AT&T Techs., Inc.*, 490 U.S. 900, 906, 909, 912 n.5 (1989). Section 706(e)(2) changed that rule prospectively, but did not revive previously time-barred claims. *Chenault* v. *United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994); *FDIC* v. *Belli*, 981 F.2d 838, 842-43 (5th Cir. 1993). Thus, any "discriminatory adoption" claim was barred years before § 706(e)(2) was enacted and years before respondents filed this suit.

3. Finally, none of respondents' "prudential" reasons for denying the petition warrant ignoring a three-way circuit split and an en banc ruling that

flouts *Ledbetter* and *Evans*. Respondents argue the conflict will resolve itself because *Ledbetter* "refine[d] a major component of the controlling legal framework," the majority below took account of this new "guidance," and *Ledbetter* will prompt the Sixth and Seventh Circuits to see the errors of their ways. Opp. at 5-6, 15-16. Each premise is plainly wrong.

Far from refining the governing law, *Ledbetter* "appl[ied] *established precedent* in a slightly different context." 127 S. Ct. at 2165 (emphasis added). Canvassing its earlier opinions, the Court noted that "[i]t would be difficult to speak to the point more directly" than it had in *Evans*, *id.* at 2168, and that "[t]he instruction provided by *Evans*" and later cases "is clear." *Id.* at 2169. Nor did the majority below reassess its prior *Pallas* ruling in light of *Ledbetter*. See Pet. App. 10a n.5 (*Ledbetter* "is relevant, but does not control this appeal."). The primary "guidance" it gleaned from *Ledbetter* was that intentional discrimination within the charging period is actionable. *Id.* at 11a, 16a. That principle, however, is inapposite here, because the NCS system is not facially discriminatory and AT&T made no new decision to discriminate when determining pension benefits. The majority ignored the controlling import of *Evans*, as well as *Ledbetter*'s directly relevant observation that merely because "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." *Ledbetter*, 127 S. Ct. at 2174. Respondents do not and cannot refute AT&T's showing that, if the words "benefits award" were substituted for "pay" and "paycheck," the foregoing quotation describes this case precisely, and

compels the exact opposite ruling from the one reached below.

Ledbetter thus casts no doubt on *Leffman* v. *Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007), and *Ameritech Benefit Plan Comm.* v. *Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), both of which correctly anticipated its analysis. The Seventh Circuit deemed *Evans* the controlling authority where the relevant conduct is the computation of seniority and the alleged violation is "[t]he continuing impact of the earlier action, within the context of an otherwise neutral system." *Id.* at 822-23. The Sixth Circuit likewise relied on precedent citing *Evans* for the proposition that "claims of continuing effects of past discriminatory acts" do not state a current violation of Title VII. *Leffman*, 481 F.3d at 433.

Nor does pending legislation provide a basis for ignoring a square conflict and the misapplication of *Ledbetter* and *Evans*. Bills that, if enacted, could affect issues arising before the Court are frequently pending in Congress during litigation. This circumstance provides no basis for declining to review otherwise important issues of law dividing the lower courts. It is entirely uncertain that the Lily Ledbetter Fair Pay Act will ever be enacted into law, let alone in its current form. The Senate version has been stalled for months, and a presidential veto has been promised. See Statement of Administration Policy, H.R. 2831, Lily Ledbetter Fair Pay Act of 2007, at 1 (July 27, 2007). Review of a clear conflict on important legal issues should not be denied because a bill that might be enacted in a form that might affect a case is pending in the Congress.

Moreover, the fact that three circuits have weighed in on the issues presented (one circuit, twice) shows that these issues are recurring and important. No

"empirical evidence" supports respondents' claim that the questions raised by this case are unique to the telecommunications industry. The decisions in *Gilbert*, *Satty*, *Harriss* v. *Pan Am World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) and *Maki* v. *Allete, Inc.*, 383 F.3d 740 (8th Cir. 2004), demonstrate that employers in many industries denied full service credit for pre-PDA pregnancy leaves, and the latter two cases show that the effect of pre-PDA pregnancy policies on post-PDA pension awards has significance for employers other than telecommunications providers. Moreover, as previously shown, Pet. at 11-12, 22, the potentially thousands of women who lost service credit during pre-PDA pregnancy leaves are now retiring in significant numbers.

Finally, AT&T will plainly be prejudiced if review is denied. The damages phase of this case could take years, and during that time AT&T will have to make numerous benefit awards in administering a national seniority-based pension system. It is manifestly unfair to require AT&T to operate that system under directly conflicting legal requirements, particularly when the majority of circuits—and this Court's established precedents—clearly permit the conduct that the majority condemned below.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted.

Respectfully submitted,

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