No. 07- 07-543 OCT 22 2007

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

PETITION FOR A WRIT OF CERTIORARI

WAYNE WATTS
SENIOR EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
AT&T Inc.
175 E. Houston Street
San Antonio, TX 78205
(210) 351-3300

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PANKAJ VENUGOPAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

EDWARD R. BARILLARI
SENIOR VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL
AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
(908) 532-1885

Counsel for Petitioner

* Counsel of Record

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QUESTIONS PRESENTED

Before the passage of the Pregnancy Discrimination Act of 1978 (PDA), it was lawful to award less service credit for pregnancy leaves than for other temporary disability leaves. *Gilbert* v. *Gen. Elec. Co.*, 429 U.S. 125 (1976). Accordingly, the questions presented are

1. Whether an employer engages in a current violation of Title VII when, in making post-PDA eligibility determinations for pension and other benefits, the employer fails to restore service credit that female employees lost when they took pregnancy leaves under lawful pre-PDA leave policies.

2. Whether the Ninth Circuit's finding of a current violation of Title VII in such circumstances gives impermissible retroactive effect to the PDA.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

AT&T Corporation ("AT&T") is a wholly owned subsidiary of AT&T Inc., a publicly traded company. No entity owns more than 10% of AT&T Inc. stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner AT&T Corporation ("AT&T") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Northern District of California, in which it granted summary judgment against AT&T, is unreported, and is reproduced in the Appendix to this Petition ("App.") at 98a-128a. The initial decision of the Ninth Circuit is reported at 441 F.3d 653 (9th Cir. 2006), and is reproduced at App. 64a-97a. The Ninth Circuit granted rehearing en banc in an order that is reported at 455 F.3d 973 (9th Cir. 2006), and is reproduced at App. 129a. The en banc decision of the Ninth Circuit—which is the judgment under review here—is published at __ F.3d __ (9th Cir. 2007), and is reproduced at App. 1a-63a.

JURISDICTION

The court of appeals, sitting en banc, entered judgment on August 17, 2007, App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), and other relevant statutes are reproduced at App. 130a-131a.

INTRODUCTION

This case presents a square and acknowledged conflict among the circuits on an important and recurring question of Title VII law—namely, whether

a seniority system may give present effect to a non-actionable past act of discrimination, or whether doing so constitutes a new violation of Title VII. The majority of the en banc panel below "perpetuate[d] a circuit split with the Sixth and Seventh Circuits" by adhering to a 1991 panel decision that "[n]o circuit has followed" in over 16 years. App. 29a & n.1 (O'Scannlain, dissenting). The majority acknowledged that its decision conflicted with the decisions in *Leffman* v. *Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007), and *Ameritech Benefit Plan Committee* v. *Communications Workers of America*, 220 F.3d 814 (7th Cir. 2000); indeed, *Ameritech* involved the very same seniority system at issue here. The majority believed, however, that these circuits had misconstrued Title VII's *bona fide* seniority system provision and this Court's seminal interpretations of Title VII in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (per curiam).

The en banc panel also divided sharply over the meaning of this Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). The dissenters read *Ledbetter* and *Evans* (correctly) to mandate dismissal of this suit. Indeed, the dissent demonstrated that there was "no meaningful basis for distinguishing *Evans* and this case," as the employers in both did nothing more than "g[ive] effect through [a] seniority system to past discriminatory acts." App. 49a. Moreover, in its strained attempt to distinguish *Ledbetter* and *Evans*, the majority had given an impermissibly retroactive effect to the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076. App. 45a-46a.

The issues raised in this case will arise with greater frequency in the future, and will affect

employers and employees across the nation. Many large employers treated pregnancy leaves differently than other leaves prior to the PDA, and the women affected by those policies are now reaching retirement age. It is fundamentally unfair to employers and employees for the same national benefits plan to result in different benefits solely as a function of geography. This Court's intervention is thus necessary to resolve the conflict in the circuits and to correct the Ninth Circuit's misapplication of the PDA.

STATEMENT OF THE CASE

A. Statutory Background

Title VII bars discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). This Court held in 1976, however, that the exclusion of pregnancy from a general disabilities plan did not constitute discrimination under the statute. *Gilbert* v. *Gen. Elec. Co.*, 429 U.S. 125 (1976). Two years later, Congress responded to *Gilbert* by passing the PDA, which amended Title VII to include discrimination based on pregnancy.

Although the law took effect on the date of its enactment, Congress expressly provided employers an additional 180 days to modify pre-existing benefits policies to treat pregnancy leaves the same as other forms of temporary disability. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 671 n.2 (1983) (interpreting §§ 2(a)-(b) of the PDA). Every court to have considered the issue has thus concluded that the Act does not apply retroactively. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 257 n.10 (1994) ("The only Courts of Appeals to consider whether the 1978 amendments [to the Civil Rights Act] applied to pending cases concluded that they did

not.").[1] This Court, moreover, noted that a nearly identical "effective-date" provision contained in the 1991 Civil Rights Act "impl[ied] nonretroactivity." *Id.*

B. The Underlying Dispute

AT&T's seniority system is called the Net Credited Service ("NCS") system.[2] An employee's first day on the job becomes her NCS date. The earlier the date, the better positioned the employee is for service-related determinations, such as vacation time and retirement benefits. That NCS date is then adjusted to correspond to the actual time worked. Accordingly, an employee's NCS date is moved forward in time to reflect any period of leave or other absences for which less than full service credit is given. Thus, for example, if an employee commenced employment on January 1, 1970, and took six months of uncredited leave in 1980, his NCS date would be moved to July 1, 1970. An NCS date draws no distinctions based on sex, pregnancy or any other characteristic; it is simply a date.

Prior to August 7, 1977, AT&T lawfully classified pregnancy leaves as personal leaves, not disability leaves. The distinction was significant because NCS adjustments were handled differently for those

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[1] *See also Ameritech*, 220 F.3d at 823; *Whitehead* v. *Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir. 1999); *Wambheim* v. *J.C. Penny Co.*, 642 F.2d 362, 363 n.1 (9th Cir. 1981); *Fields* v. *Bolger*, 723 F.2d 1216, 1219 n.4 (6th Cir. 1984); *Schwabenbauer* v. *Bd. of Educ.*, 667 F.2d 305, 310 n.7 (2d Cir. 1981); *Condit* v. *United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980).

[2] Respondents were originally employed by Pacific Telephone & Telegraph ("PT&T") and were later transferred to AT&T when the Bell telephone system dissolved in 1984. For the sake of convenience, respondents' employer will be referred to throughout as AT&T, *i.e.*, PT&T's successor-in-interest.

categories of leave. For personal leaves, employees were paid, and received service credit, for only the first 30 days of leave. Employees who took longer leaves did not accrue seniority for any time beyond 30 days. By contrast, no such limit existed for employees who missed work due to paid temporary disability. They received full service credit for the period of their absence, and their NCS dates were not adjusted as a result of such leaves.

On August 7, 1977, AT&T extended the maximum pregnancy NCS credit to 30 days before delivery and six weeks after delivery. When the PDA became effective on April 29, 1979, AT&T immediately began to provide the same full service credit for maternity leave that it provided for other types of disability leave. Indeed, from 1979 forward, AT&T's leave policies have treated maternity leave the same as all other paid disability leaves. App. 4a-5a.

AT&T did not, however, retroactively award additional service credit to (and re-adjust the NCS dates of) women who had taken maternity leave before 1979. Nor has AT&T done so in the time since the individual plaintiffs became its employees. The parties stipulated below that AT&T may adjust an employee's NCS date when "the date has been calculated incorrectly" or "the change is necessary to comply with legal requirements." ER R 58 ¶ 104.[3]

Respondents are current and former AT&T employees who took pregnancy leaves between 1968 and 1976 and who, as a consequence, did not accrue full service credit during those pre-PDA leaves.

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[3] AT&T adjusted the NCS date of respondent Snyder because she was not given the 30 days service credit she had been entitled to under the then-extant policy at the time of her pregnancy leave. ER R 58 ¶ 63.

When respondent Hulteen[4] retired in 1994, she had "210 days of uncredited pregnancy leave that resulted in reduced pension benefits." App. 5a. Arguing that her retirement benefits were therefore calculated unlawfully, she filed suit in the United States District Court of the Northern District of California.

C. The District Court's Opinion

Having stipulated to all of the material facts, the parties filed cross-motions for summary judgment. Hulteen chiefly relied on a prior Ninth Circuit decision, *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), in which the court found that an identical NCS system calculation violated the PDA. AT&T agreed that the facts were identical to those presented in *Pallas*, but argued that *Pallas* was no longer controlling law because intervening decisions from this Court, beginning with *Landgraf*, demonstrated that *Pallas* had given the PDA an impermissible retroactive effect.

Pallas, like respondents, took maternity leave prior to the effective date of the PDA. In 1987, Pallas's employer, Pacific Bell, initiated a new early retirement program available only to employees who had worked a minimum number of years for Pacific Bell. Pallas was ineligible for the retirement program because her pregnancy leave had left her with insufficient service credit. Consequently, Pallas sued Pacific Bell for violating the PDA.

On appeal, the Ninth Circuit held that Pallas stated a claim under Title VII. The court held that, although Pallas had been denied full service credit for

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[4] In addition to Hulteen, respondents include Eleanora Collet, Linda Porter, Elizabeth Snyder, and the Communications Workers of America, AFL-CIO.

a pregnancy leave taken prior to the PDA, Pacific Bell's continued reliance in 1987 on Pallas's NCS date perpetuated that earlier discrimination and rendered the NCS system itself facially discriminatory. The Ninth Circuit thus held that Pallas had stated a claim for a current violation of Title VII. *Pallas*, 940 F.2d at 1327 ("While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy.").

In this case, AT&T argued that *Pallas* had necessarily given the PDA impermissible retroactive effect. It could not be unlawful to rely on previously lawful service credit calculations unless the PDA had retroactively altered the legality of those earlier leave-treatment decisions. And, under *Landgraf* and its progeny, the PDA could not be given retroactive effect.

The district court reluctantly applied *Pallas* to sustain respondents' claim. It noted that AT&T's arguments had "great logical and legal force," App. 121a, but found itself constrained by *Pallas* to deny AT&T's motion for summary judgment and to grant respondents'. *Id.* at 123a, 128a. It certified the issue for interlocutory appeal. ER R 101.

D. The Initial Panel Opinion

The initial panel of the Ninth Circuit held that *Pallas* was no longer controlling law in light of *Landgraf* and subsequent retroactivity cases. The panel reasoned that:

> [t]he failure to award employees full service credit for their pregnancy leaves could be labeled facially discriminatory only if employees in both groups were similarly situated, e.g., if all were

> legally entitled to receive full credit for their leaves before the enactment of the PDA. But that would be true only if the PDA were given impermissible retroactive effect.

App. 80a.

Judge Rymer dissented solely on whether *Pallas* was "clearly irreconcilable" with intervening authority such that it no longer bound the panel. App. 88a. Notably, however, Judge Rymer did "not disagree with [her] colleagues' take on what a correct analysis, on a fresh slate, should look like." *Id.* at 86a.

E. The En Banc Decision

A sharply divided en banc panel reaffirmed *Pallas*'s holding that post-enactment reliance on pre-PDA service credit calculations violates Title VII. The majority adopted *Pallas*'s conclusion, App. 9a, that this case was controlled by *Bazemore*, where this Court held that an employer's decision to continue paying black workers less than similarly situated white workers after the employer became subject to Title VII constituted a new violation of Title VII. 478 U.S. at 395 (Brennan, J., joined by all other Members of the Court, concurring in part). The majority thus rejected AT&T's argument, App. 9a & n.4, that the relevant controlling authority is *Evans*, where this Court held that a new violation does not occur when a "seniority system gives present effect to [a time-barred] past illegal act and therefore perpetuates the consequences of forbidden discrimination." 431 U.S. at 557. The majority also rejected AT&T's argument that *Ledbetter* dictated dismissal of respondents' claim. The majority reasoned that *Ledbetter* involved a facially neutral policy, whereas the NCS system is, in the majority's view, facially discriminatory. App. 10a n.5.

The majority also rejected AT&T's argument that *Pallas* had given the PDA retroactive effect. The majority reasoned that "[o]nly one Supreme Court decision cast doubt on whether Title VII prohibited employers from discriminating on the basis of pregnancy," and that the "PDA therefore did not alter Hulteen's or AT&T's rights or liabilities under Title VII, but corrected *Gilbert*'s erroneous interpretation of Title VII." App. 11a n.6.

The majority acknowledged that its holding squarely conflicts with the decisions of the Seventh Circuit in *Ameritech* and the Sixth Circuit in *Leffman*. App. 22a, 27a n.11. The majority faulted the Seventh Circuit for failing to agree with *Pallas* that the NCS system is facially discriminatory. App. 22a-23a. And it faulted the Sixth Circuit for following *Ameritech*. *Id.* at 27a n.11. The majority argued that the Sixth Circuit had failed to appreciate that, if Leffman had been given full service credit for her pre-PDA pregnancy leave, "she would have qualified for early retirement benefits in 2000 like other employees who received credited leave time when they were similarly unable to work for reasons other than pregnancy." *Id.*

Judge O'Scannlain, joined by Judges Rymer, Bybee, and Callahan, dissented.[5] The dissent argued that, by characterizing respondents' claim as a current violation of Title VII, the majority "erroneously perpetuates a circuit split with the Sixth and Seventh Circuits," App. 29a, and contravenes decisions of this

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[5] Although Judge Rymer dissented from the initial opinion because she believed that *Pallas* was binding on panels, she joined the dissent without reservation when the court, sitting en banc, was able to consider the issue anew, no longer bound by *Pallas*.

Court, including *Evans* and *Ledbetter*, which hold that "'current effects alone cannot breathe life into prior, uncharged discrimination.'" *Id.* at 43a (quoting *Ledbetter*, 127 S. Ct. at 2169). Under the logic of these cases, respondents' claim should be dismissed.

The dissent explained that *Evans* and *Ledbetter* could not be avoided by labeling the NCS system "facially discriminatory." Eligibility and benefits are determined based on NCS dates, which are facially neutral. App. 44a. The majority's conclusion that the NCS system treats "similarly situated" employees differently "necessarily depends on a retroactive application of the PDA." *Id.* at 45a. Women who took pre-PDA pregnancy leaves were not "similarly situated" to workers who took leaves prior to 1979 for other reasons because, under AT&T's then lawful policies, those women were not entitled to the same full service credit for those leaves. *Id.* at 45a-46a. The two groups of workers could be deemed "similarly situated," therefore, only if the PDA retroactively eliminated this previously lawful distinction. *Id.*

Stripped of the false premise of "facial discrimination," the dissent explained, this case was indistinguishable from *Evans*. "Because of the past acts of discrimination, Evans and Hulteen had less seniority, and, not surprisingly, the determinations of their benefits . . . were adversely affected." App. 49a. Unlike the situation in *Bazemore*, moreover, AT&T did not simply continue a pre-enactment practice (granting less than full service credit for pregnancy leaves) after Congress had outlawed that practice; instead, AT&T had failed to remedy pre-enactment discrimination, which *Bazemore* expressly held was not required. *Id.* at 51a-53a.

REASONS FOR GRANTING THE PETITION

This case raises important and recurring questions of federal law that have persistently bedeviled and divided the lower courts. The first question is whether an employer may rely on a non-actionable past act of discrimination, or whether such reliance constitutes a new violation of Title VII. In examining this issue in the context of pre-PDA seniority calculations, 23 judges (including the initial panel below) have divided 12 to 11 on this question. In *Ameritech*, the Seventh Circuit observed that "the line between continuing violations that arise with each new use of [a] discriminatory act . . . and past violations with present effects . . . is subtle at best." 220 F.3d at 823. As the decision below makes clear, *Ledbetter* did not dispel the confusion: just months after its issuance, 15 judges of the Ninth Circuit could not agree on *Ledbetter*'s meaning or impact on this case.

The number of cases concerning the *Evans/Bazemore* line attests to the persistence of the issue and the difficulties it poses for lower courts. And, the particular variant of the issue raised in this case—past acts of (lawful) discrimination against women who took pregnancy leaves prior to the PDA—will continue to arise with frequency for the foreseeable future. As this case and *Gilbert* illustrate, many large employers treated pregnancy leaves differently than other temporary disability leaves prior to the PDA. A large number of women who took pregnancy leaves in their 20s and 30s in the 1970s are approaching retirement age and will soon be awarded pensions and other benefits based on their seniority. The division among the circuits thus creates great uncertainty as to whether employers can continue to

rely on service credit calculations they made decades ago under then-lawful pregnancy leave policies.

For AT&T and other national employers, the circuit split poses immediate and intractable problems. When determining eligibility for pension and other benefits, AT&T can rely on the NCS dates of its employees in the Sixth and Seventh Circuits, but will incur Title VII liability for this same conduct in the Ninth Circuit. Because a seniority system must operate uniformly for all employees, AT&T can avoid such liability only by recalculating the NCS dates of all formerly pregnant employees, regardless of whether they work in the states covered by the Ninth Circuit. Doing so, in turn, will affect the rights based on seniority of other employees, both male and female. It is unfair to AT&T and potentially many of its employees to compel such an undertaking when the majority of circuits, and the majority of federal judges, have concluded that the conduct at issue is not unlawful. Indeed, such a result is particularly unfair because, as the dissent explained cogently below, the decision in this case is fundamentally inconsistent with the decisions of this Court in *Evans* and *Ledbetter*.

The second, and closely related, issue is whether the decision gives the PDA an impermissible retroactive effect. As the plethora of this Court's post-*Landgraf* cases demonstrates, the failure of many lower courts to recognize when they are giving statutes retroactive effect is a recurring and vexing problem. Here, the majority denied it was applying the PDA retroactively, but its analysis and the result it reached show the majority did just that, creating yet another (this time unacknowledged) circuit split. Because many women who took pre-PDA pregnancy leaves are reaching retirement age, it is critical that

this Court address the question whether post-PDA reliance on pre-PDA service credit calculations can render a seniority system facially discriminatory absent retroactive application of the PDA.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

This case presents a square and irreconcilable conflict among the circuits concerning the legality of seniority systems that give present effect to then-lawful pre-PDA leave policies that did not award full service credit for pregnancy leaves. Indeed, the decisional conflict with the Seventh Circuit is particularly disturbing. *Ameritech* involved the same legacy Bell System NCS system and the same Bell System pre-PDA leave policies at issue here. Because Ameritech (like AT&T) did not retroactively award service credits for women who took their maternity leave prior to the PDA, the employees raised precisely the same challenge that respondents asserted here. In *Leffman*, the Sixth Circuit addressed an identical discrimination claim (though not the exact same seniority system) as in this case and *Ameritech*. The Seventh and Sixth Circuits' analysis of these claims diverged in every relevant respect from that of the majority below.

In the decision below, the majority endorsed *Pallas*'s view that such a claim was governed by *Bazemore*. The Seventh Circuit, however, held that *Evans* and its progeny controlled. The Seventh Circuit noted that the relevant conduct was the computation of seniority "followed by a neutral application of a benefit package to all employees with the same amount of time." *Ameritech*, 220 F.3d at 822-23. *Evans* was the controlling authority, therefore, because it also involved a loss of seniority due to

earlier discrimination, followed by "[t]he continuing impact of the earlier action, within the context of an otherwise neutral system." *Id.* at 822. The Sixth Circuit followed this same reasoning in *Leffman*. Citing one of its earlier precedents, which in turn relied on *Evans*, the Sixth Circuit found it "clear that plaintiff[ ] present[s] claims of continuing effects of past discriminatory acts, and not do[es] not claim discriminatory acts within the statutory charging period." 481 F.3d at 433 (internal quotation marks omitted; alterations in original).

The Seventh Circuit also found § 703(h) supported rejection of the plaintiffs' claim because that provision "exempts discriminatory effects that flow from *bona fide* seniority systems from the definition of unlawful employment practices, as long as the differences are not the result of an intention to discrimination." *Ameritech*, 220 F.3d at 823. The NCS system was *bona fide*, *i.e.*, "facially neutral," the Seventh Circuit found, because *Gilbert* "held that Title VII did not prohibit distinctions based on pregnancy," and "the PDA has not been treated as a retroactive statute." *Id.* Accordingly, "Ameritech would have had no reason to think it had to reshuffle its NCS list after the Act had passed," *id.*—*i.e.*, to award retroactive service credit to women who took pre-PDA pregnancy leaves.

The Sixth Circuit likewise found that Sprint's similar seniority system was facially neutral.

> Leffman does not contend that Sprint treats employees who have taken non-credited maternity leave differently from employees who have taken other kinds of non-credited leave. Rather, all non-credited leave is excluded from Sprint's seniority calculations, and thus the effects of Sprint's past characterizations (whether

> justifiable or not) of leaves of absence as non-credited are now felt equally by men and women and by those with and without children.

Leffman, 481 F.3d at 433.

The majority below, by contrast, held that the NCS system is "facially discriminatory" precisely because it relies on pre-PDA service credit decisions. Indeed, the majority even disagreed with the Seventh Circuit over the legality of such pre-PDA decisions, making the astounding (and manifestly erroneous) claim that distinctions based on pregnancy were unlawful before the PDA, because "[o]nly one Supreme Court decision cast doubt on whether Title VII prohibited" such distinctions, and Congress "'expressed its disapproval of both the holding and the reasoning'" of *Gilbert* when it enacted the PDA. App. 11a n.6. See also *id.* at 18a (the PDA "clarified" Title VII).[6] And, the majority held that AT&T was required to grant retroactive service credit. *Id.* at 21a. (AT&T should have "simply credited the applicable number of days to each plaintiff's NCS date when it calculated [their] benefits").

The Seventh Circuit also relied on this Court's decision in *Teamsters*, where this Court, interpreting § 703(h), "held that the fact that a seniority system perpetuates pre-Act discrimination does not preclude it from being *bona fide*." *Ameritech*, 220 F.3d at 823

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[6] Under settled law, *Gilbert* was the "authoritative statement of what the statute meant *before* as well as after" it was decided. *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added). Congress obviously disapproved of *Gilbert*, which is why it enacted the PDA. But to "clarify" that Title VII had *always* prohibited pregnancy discrimination, Congress would have had to give the PDA retroactive effect, which it did not do. *See infra*.

(citing *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352-53 (1977)). The majority below deemed this "error," based on its view that the PDA carves out pregnancy discrimination from the immunity that § 703(h) otherwise affords to seniority systems. App. 23a-27a.

Finally, the Seventh Circuit concluded that, because the NCS system was nondiscriminatory, the plaintiffs' claims were time-barred. The *Ameritech* plaintiffs knew

> the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off. No later than the time when Ameritech amended its plan in response to the PDA, they knew that their NCS had not been amended. It is no secret to any employee that seniority rolls like Ameritech's NCS make a difference for a host of employee benefits, some present, and some future. Ameritech informed each employee periodically of his or her accrued NCS. The time for bringing a complaint was therefore long ago . . . .

Ameritech, 220 F.3d at 823; see also *Leffman*, 481 F.3d at 433. Every one of these observations applies here because, at the time the PDA was enacted, the plaintiffs here and in *Ameritech* were employees of the then-still unified Bell System. Yet, the majority below reasoned that, "[w]hile Pacific Bell [in *Pallas*, and AT&T here] may have used unlawful [NCS] calculations in many prior employment decisions, its denial of early retirement was a discrete independent act," and a claim brought within the charging period from that act is timely. App. 16a.

In short, the conflict could not be more complete or the outcomes more irreconcilable. As a result,

companies like AT&T that treated pre-PDA pregnancy leaves less favorably than other disability leaves and that have employees both within and outside the Ninth Circuit can be held liable under Title VII for relying on such pre-PDA decisions depending on where an employee files suit. Accordingly, the Court should grant the petition to provide a uniform rule for national employers and their workforces.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

This clear and acknowledged conflict is more than sufficient, by itself, to justify review. But review is all the more necessary because the majority's decision clearly departs from this Court's precedents. Indeed, because, as the dissent noted below, "[t]here is no meaningful basis for distinguishing *Evans* and this case," App. 49a, it is difficult to avoid the conclusion that the majority sought intentionally to evade *Evans*, notwithstanding *Ledbetter*'s recent reaffirmation of it.

In *Evans*, respondent resigned her job in 1968 due to a policy that prohibited female flight attendants from being married. *Evans*, 431 U.S. at 554. Although that policy was later found to violate Title VII, Evans never challenged it. After the policy was rescinded, she was re-hired in 1972, but United did not restore the seniority she had lost as a result of her resignation. *Id.* at 555.

In rejecting her Title VII claim, this Court agreed

> that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a [timely] charge of discrimination . . . . 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.

Id. at 558. Thus, United did not violate Title VII when its seniority system gave present effect to a past act that is no longer actionably discriminatory. And, its seniority system was not discriminatory 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." *Id.*

The relevant facts of this case are indistinguishable. The seniority systems at issue in *Evans* and here relied on historical facts (resignations in *Evans*, adjusted NCS dates here) caused by discriminatory policies (the "no marriage" policy in *Evans*, the treatment of pregnancy leaves as personal leave here). Under *Evans*, a seniority system can rely on these historical facts if the policies that produced them are no longer subject to challenge (or, as here, were legal at the time). Indeed, AT&T was entitled to treat its pre-PDA service calculations "as lawful" because those calculations were not merely "the legal equivalent of a discriminatory act which occurred before the statute was passed," they were acts that actually occurred before the PDA was passed. Finally, like United's seniority system, the NCS system does not treat women who took pre-PDA pregnancy leaves (and who, as a result, did not receive full service credit) any differently than it treats male and female employees who took personal leaves for other reasons and thus did not receive full service credit for those leaves.

Moreover, *Ledbetter* re-affirmed *Evans* in terms directly applicable here. It held 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." 127 S. Ct. at 2174 (emphasis added). If the words "benefits award" are substituted for "pay" and "paycheck," the foregoing quotation describes this case precisely.

The majority's attempts to distinguish *Evans* and *Ledbetter* do not withstand even cursory analysis. It held that *Evans* did not govern because "[AT&T] engages in intentional discrimination *each time it applies the policy* in a benefits calculation for an employee affected by pregnancy, even if the pregnancy occurred before the enactment of the PDA." App. 11a. *Evans* "would be controlling," the majority stated, "if [AT&T] credited neither pre-PDA pregnancy leave nor pre-PDA disability leave" when it made its benefits calculations. *Id.* at 9a n.4.

These arguments do not distinguish *Evans*; they ignore it. *Evans* is not controlling only where an employer *eliminates* the effects of its prior discrimination, which is what AT&T would be doing if, in making post-PDA benefit awards, it retroactively denied service credit to workers who took pre-PDA leaves for temporary disabilities other than pregnancy. The very reason Evans sued United was because it refused to restore seniority she lost as a result of the discriminatory "no marriage" policy. 431 U.S. at 555, 559 n.13. The fundamental holding in *Evans* is that the failure to remedy present effects of past discrimination is not a new act of intentional discrimination.

Indeed, for this reason, the majority's repeated statements that nothing prevented AT&T from crediting Hulteen in 1994 with service she had lost because of her pre-PDA pregnancy leave, App. 19a-

22a, are not merely irrelevant, they illustrate the majority's refusal to be faithful to *Evans*. This Court did not hold that Evans had failed to allege a current violation of Title VII because United "could not credit" her with the seniority she had lost. It ruled that United's refusal to restore that seniority was not a new act of discrimination.[7]

For many of these same reasons, the majority's reliance on *Bazemore* was entirely misplaced. In that case, this Court held that an employer committed a current violation of Title VII when it continued a practice (paying black workers lower salaries than similarly situated white workers) after Congress had outlawed that very practice by state employers in 1972. *Bazemore*, 478 U.S. at 395 (Brennan, J., joined by all other Members of the Court, concurring in part). Here, AT&T indisputably ceased its practice of treating pregnancy leaves differently than leaves for other temporary disabilities after the PDA prohibited that practice: AT&T "grants female employees who become pregnant after the enactment of the PDA full

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[7] Evidently recognizing this holding, the majority claimed AT&T did not merely give present effect to past discrimination but, when making eligibility decisions, "affirmatively cho[se] to apply 'the policy at the time' that the [pregnancy] leave occurred." App. 21a. This statement is flatly contradicted by the record. The parties stipulated that AT&T had discretion only to adjust NCS dates to correct errors or to comply with legal requirements, ER R 58 ¶ 104, not that it re-applied its pre-PDA leave policies to respondents when it made post-PDA benefit decisions. Indeed, respondents themselves argued only that AT&T had "discretion to adjust [their] NCS dates" but "refused to do so," and instead "chose to apply its facially discriminatory NCS system." Appellees Br. at 46-47. The parties expressly stipulated that "whether or not Snyder's NCS date was adjusted in the year 2000 *does not affect the outcome.*" ER R 58 ¶ 63 n.1 (emphasis added).

NCS seniority credit on the same terms as employees who become temporarily disabled." App. 44a (O'Scannlain, J., dissenting). The majority imposed liability on AT&T for failing to *restore* service credit to women who took pre-PDA pregnancy leaves. But *Bazemore* itself makes clear that Title VII does not impose liability for such a failure. It stated that "recovery may not be permitted for pre-1972 [*i.e.*, pre-enactment] acts of discrimination." *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring).

Whether it reflects the continuing difficulty lower courts face in discerning the "subtle" line drawn by *Evans/Bazemore*, see *Ameritech*, 220 F.3d at 823, or an unwillingness to adhere to that line, the decision below should be reviewed and corrected by this Court. The nation's largest circuit court, encompassing some of the nation's most populous regions, has misconstrued this Court's precedents in an en banc ruling. To allow such a decision to stand will invite further confusion in this important area of discrimination law, and will subject employers in the Ninth Circuit to liability for conduct that this Court has repeatedly made clear is not actionable.

III. THE DECISION BELOW GIVES IMPERMISSIBLE RETROACTIVE EFFECT TO THE PREGNANCY DISCRIMINATION ACT.

Finally, this Court should grant the petition to determine whether the majority below gave the PDA an impermissible, retroactive effect. The sheer number of retroactivity cases this Court has considered since *Landgraf* attests to the continuing need for guidance in this important and difficult area of the law,[8] as does the division in the en banc court below.

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[8] *See Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006); *Fernandez-Vargas* v. *Gonzalez*, 126 S. Ct. 2422 (2006); *Republic of Austria*

Moreover, the precise question of whether the majority applied the PDA retroactively is itself an important one. Thousands of women who received no or reduced service credit for pregnancy leaves they took in the 1970s will soon reach retirement age, and can (except in the Sixth and Seventh Circuits) raise precisely the same type of claim that the Ninth Circuit has now accepted in an en banc ruling.

As the dissent noted below, the majority sought to escape *Evans* and *Ledbetter* by repeatedly labeling the NCS system "facially discriminatory." That label, however, necessarily rests "on a retroactive application of the PDA." App. 45a. *Landgraf* established that a statute has retroactive effect if, among other things, it "creates a new obligation," "changes the legal consequences of acts completed before its effective date," or "gives a quality or effect to acts or conduct which they did not have . . . when they were performed," 511 U.S. at 269 n.23 (internal quotation marks omitted). As the majority construed it, the PDA has all of these consequences.

Prior to the PDA, AT&T could lawfully deny employees full service credit for time spent on pregnancy leave and adjust their NCS dates accordingly. Thus, the day *before* the PDA took effect, it was lawful to rely on such adjusted NCS dates when making pension and other seniority-based benefit decisions. Under the majority's reasoning, however, a decision to rely on that same NCS date for that

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v. *Altmann*, 541 U.S. 677 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 314-26 (2001); *Martin* v. *Hadix*, 527 U.S. 343 (1999); *E. Enters.* v. *Apfel*, 524 U.S. 498, 528-29 (1998) (plurality opinion); *Regions Hosp.* v. *Shalala*, 522 U.S. 448 (1998); *Lindh* v. *Murphy*, 521 U.S. 320 (1997); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 896-97 (1996); *Rivers*, 511 U.S. 298.

same purpose one day *after* the PDA took effect constitutes "facial discrimination" and is a "current" violation of the PDA. As the majority construed it, therefore, the PDA "create[d] a new obligation"—*i.e.*, it required AT&T to give full service credit for pre-PDA pregnancy leaves when, prior to the PDA's effective date, AT&T was under no such obligation. Similarly, under the majority's reading, the PDA "change[d] the legal consequences of acts completed before its effective date"—*i.e.*, service credit calculations that did not give rise to legal liability before the PDA do give rise to such liability now. And, as the majority construed it, the PDA "g[ave] a quality or effect to acts or conduct which they did not have . . . when they were performed"—*i.e.*, previously lawful NCS date calculations became unlawful.

Moreover, as the dissent explained below, the majority's reasoning confirms that it gave the PDA retroactive effect. It deemed the NCS system "not facially neutral" on the ground that "[t]he system distinguishes between *similarly situated* employees: 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." App. 9a (internal quotation marks omitted; emphasis added). Absent retroactive application of the PDA, however, these two groups were *not* "similarly situated": Employees in the latter group were entitled to accrue seniority for the duration of their pre-PDA disability leaves, while (under AT&T's lawful pre-PDA leave policies) employees in the former group (like employees who took personal leave to finish college) were not entitled to accrue seniority for the duration of their pre-PDA leaves. Only if the PDA retroactively invalidated the previously lawful

distinction between these two groups of employees can they be deemed "similarly situated."

The majority denied it was giving the PDA retroactive effect because every circuit to consider the question—including the Ninth Circuit itself—has held that the PDA applies only prospectively. See, *e.g.*, *Wambheim* v. *J.C. Penny Co.*, 642 F.2d 362, 363 n.1 (9th Cir. 1981) (Ninth Circuit case finding that PDA is prospective only); see also *supra* at 4 n.1 (collecting cases). But the result it reached and the reasoning it employed refute that claim. Indeed, the application of the PDA in this case squarely conflicts with the Seventh Circuit's application of the law on essentially identical facts. This Court should grant the petition to resolve this actual conflict, particularly as many courts will soon confront similar claims.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

WAYNE WATTS
SENIOR EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
AT&T Inc.
175 E. Houston Street
San Antonio, TX 78205
(210) 351-3300

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PANKAJ VENUGOPAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

EDWARD R. BARILLARI
SENIOR VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL
AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
(908) 532-1885

Counsel for Petitioner

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* Counsel of Record