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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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The Solicitor General does not dispute that the petition for certiorari raises the same question upon which this Court has twice denied certiorari, most recently in *Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), despite the acquiescence of the respondent in that case. *See* BIO 5. The few developments the Solicitor General identifies since then provide no reason for a different result here.

I. The Government Fails to Show That the Petition Raises a Question Worthy of Interlocutory Review.

In acquiescing to certiorari in *Ameritech*, the respondent predicated that absent intervention by this Court, there would be pervasive litigation over the application of the Pregnancy Discrimination Act (PDA) to pension plans in a range of industries, leading to widespread conflict in the courts. *See* Brief for Respondents, No. 00-864, at 10-14. As the Solicitor General's brief illustrates, the past seven years have not borne out that prediction.

A. The Petition Presents No Question of Recurring Importance.

No one disputes that the question presented has no prospective importance; it is clear that an employer may not discriminate in calculating the pensions of women who took maternity leave after 1979. Moreover, there are many reasons, aside from the legal compulsion of the PDA, why a company

might forgo discrimination against women who took pregnancy leave *before* that date. Companies might, for example, believe that equal treatment is required by other state or federal laws,[1] or have agreed to equal treatment as part of a collective bargaining agreement, or they may simply believe that avoiding such discrimination is the right thing to do. The critical question, then, is how many employers actually follow petitioner's policy of discrimination and how many employees are potentially affected.

On this important question, the Solicitor General offers no guidance. The best the Government can say is that "the number of employees or employers affected by the decision in this case is unclear." Br. 19. At the same time, the Solicitor General candidly acknowledges that the question presented "presumably will have diminishing prospective application, given that the class of employees affected by pre-PDA pregnancy policies necessarily will dwindle over time." *Id*.

The Solicitor General nonetheless argues that the fact that three courts of appeals have addressed the question is reason enough to warrant certiorari. *Id*. But two of those courts had issued their conflicting

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[1] *See, e.g.*, *Pallas v. Pacific Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991) (finding that discrimination violated California law and the Employee Retirement Income Security Act); *Harriss v. Pan Am. World Airways*, 649 F.2d 670, 678-79 (9th Cir. 1980) (holding that similar discrimination in seniority system violated Title VII even prior to the effective date of the PDA) (citing *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977)).

decisions when this Court denied certiorari in *Ameritech*. And in acquiescing to certiorari in that case, the employer advised the Court of then-pending litigation in the Sixth Circuit on the same issue. *See* Ameritech Br. 8. Moreover, all three decisions arose from the telecommunications industry and none indicates that the challenged practice is common elsewhere.

The Solicitor General's inability to identify other employers or industries that discriminate against women who took pregnancy leave before 1979 is telling. As the Government acknowledges, Br. 9 n.1, the EEOC has long taken the position that such discrimination is unlawful. Moreover, the EEOC has responsibility for enforcing the PDA through litigation and evaluates tens of thousands of administrative charges of discrimination every year. *See* 42 U.S.C. § 2000e-5. Presumably, if the EEOC were aware of any evidence that the practice challenged in this case occurred on a regular basis, the Solicitor General would have so advised this Court.

B. The Solicitor General Principally Relies on the Same Division of Authority That Existed When This Court Denied Certiorari in *Ameritech*.

The Solicitor General's assertion that the legal conflict among the circuits warrants review is no more convincing now than when this Court rejected substantially the same argument in *Ameritech*.

The only relevant subsequent development is the Sixth Circuit's decision in *Leffman v. Sprint Corp.*,

481 F.3d 428 (6th Cir. 2007). But that decision added little to the debate; for the most part it simply followed the Seventh Circuit's holding in *Ameritech* without acknowledging, much less refuting, the Ninth Circuit's conflicting opinion in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991). *See Leffman,* 481 F.3d at 431-33; *see also Ameritech*, 220 F.3d at 821-23 (likewise failing to acknowledge *Pallas*). Nor did either the Sixth or Seventh Circuit consider deference owed to the EEOC's construction of the statute. Accordingly, the circuit conflict remains shallow and largely ill-considered.

With time, that might change. The Ninth Circuit's detailed and considered opinion in this case may prompt the Sixth and Seventh Circuits to reconsider their positions or, at the very least, to join issue with the contrary view of their sister circuit should the issue arise again.

C. The Solicitor General Has Not Made the Case for an Exception to the Court's General Rule Against Interlocutory Review.

The Government's brief highlights the need for further percolation in other respects as well.

1. The Solicitor General suggests that the EEOC may have changed its view of the statute, stating that although the "EEOC, both in its compliance manual and its amicus brief submitted to the Ninth Circuit panel in this case, has taken the position that an employer's failure to grant credit for pre-PDA pregnancy leave in the circumstances presented here violates Title VII," the Commission nonetheless "has

not made a recommendation to the Solicitor General on what position the United States should take in this case in this Court." Br. 9 n.1.

While the precise degree of deference owed to the EEOC's view is a matter of dispute, it is common ground that the Commission's position is relevant and entitled to respect. *See, e.g.*, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-57 (1991); *id*. at 259-60 (Scalia, J., concurring in part and concurring in the judgment). For that reason, this Court and the courts of appeals are entitled to a candid statement of the EEOC's interpretation of this statute before undertaking to authoritatively construe it. Denying certiorari at this interlocutory stage would permit the Commission an opportunity to clarify its position, either in this case on remand, in another case,[2] or through amendments to its Compliance Manual.

2. While the Solicitor General insists that interlocutory review is appropriate because further proceedings will not "refine the questions presented," Br. 20, remand proceedings may well shed light on whether those questions are worthy of this Court's attention in the first place. In reviewing respondents' motion for class certification, and in

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[2] Petitioners understand that the EEOC has a pending suit raising the same issues in *EEOC v. Lucent Technologies, Inc.*, No. 05-269 (N.D. Cal.), which is stayed pending the Court's resolution of this petition. Were the Court to deny certiorari here, the Commission presumably will clarify its position in that case, which therefore may present a better vehicle for resolving the question presented, if necessary.

calculating damages, the district court will determine how many employees are affected by AT&T's practices and the financial consequences of that discrimination. Given that AT&T now owns most of the telecommunication companies whose policies have previously given rise to litigation, and given that no one has identified any widespread practice beyond the telecommunications industry, that information is of vital importance to the exercise of this Court's discretionary jurisdiction.

3. Applying the Court's traditional presumption against interlocutory review also would avoid the possibility that the statutory basis for the decision could be altered in the midst of this Court's deliberations. *Contra* SG Br. 20-21.[3] While the mere prospect of legislative action would not be grounds for denying certiorari on an otherwise certworthy question, it is a reason to decline petitioner's request for an exception to the Court's general rule against interlocutory review.

4. This Court also would do well to wait until all the courts in the circuit split have had an opportunity to review their precedent in light of *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), which the Ninth Circuit rightly found to be relevant authority on the question presented. *See* Pet. App.

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[3] If the Ledbetter Fair Pay Act were to pass early in the next Congress, and the next President were to sign it, the new legislation could become effective after briefing and argument are completed in this case, but before the Court issues its decision.

10a-11a; BIO 7-8. As discussed below, the Solicitor General is wrong in thinking that *Ledbetter* adds nothing of relevance.

II. The Solicitor General Has Misconstrued the Statute.

Refusing to present and defend the EEOC's interpretation of the PDA, the Solicitor General eseentially reiterates petitioner's objections to the court of appeals' decision in this case. Respondents have already addressed those objections in their brief in opposition. *See* BIO 6-15. We emphasize a few points below.

A. Petitioner's Facially Discriminatory Seniority System Is Subject to Challenge at Any Time.

The Solicitor General recognizes that in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), this Court held that "a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time" because "a facially discriminatory system (*e.g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied." *Id*. at 912 & n.5. Prior to the decision in *Lorance*, this Court had applied the same principle in *Bazemore v. Friday*, 478 U.S. 385 (1986), to find that post-Title VII implementation of a facially discriminatory pay structure constituted a present unlawful employment practice even though adopted prior to the effective date of the Act. *See Ledbetter*, 127 S. Ct. at 2173.

And after *Lorance*, Congress passed the Civil Rights Act of 1991, adding Section 706(e)(2) to Title VII to codify and expanded the rule as applied to intentionally discriminatory seniority systems. *See* 42 U.S.C. § 2000e-5(e)(2).

1. The Solicitor General nonetheless asserts the rule of *Lorance* and Section 706(e)(2) does not apply because AT&T's seniority system is "logically indistinguishable from the one in *Evans*, which this Court concluded was neutral." Br. 13. That is incorrect. In *United Air Lines v. Evans*, 431 U.S. 553 (1977), the seniority system itself was neutral in all respects – it awarded job benefits based on seniority and its seniority accrual rules were entirely nondiscriminatory. *Id*. at 558. The plaintiff in *Evans* simply complained about discrimination entirely outside the seniority system – her prior termination – which had an *incidental* effect on her seniority. By contrast, in this case the rules of the seniority system *itself* are facially discriminatory, *see Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 607 (1980) (seniority accrual rules are part of seniority system), thus invoking the rule of *Lorance* and Section 706(e)(2).

2. The Solicitor General objects that AT&T's seniority system itself is not facially discriminatory because it calculates benefits based on accrued seniority (a neutral rule) and because the *current* seniority accrual rule is nondiscriminatory. Br. 14-15. But that is not the seniority system that was applied to respondents and it is not the one they challenge today. The relevant "seniority system" is the body of rules governing the plaintiffs' challenged

treatment, not the body of rules that will, in the future, govern the treatment of some *other* employee.

Adopting the Solicitor General's view would lead to absurd results and easy evasion of *Lorance* and Section 706(e)(2). Suppose, for example, an employer established a pension system in 1990 under which benefits depend on seniority and women are given half the seniority credit given to men for each day of service. Or suppose a *Bazemore*-like system in which black employees were given no seniority credit at all before the effective date of Title VII. Under the Solicitor General's interpretation, the employer could apply this system for years, then change its accrual rule before pensions became due and insist that neither *Lorance* nor Section 706(e)(2) applied because its system was no longer facially discriminatory. As a result, the female employees would be precluded from challenging the seniority system after its amendment and the black workers would simply have no right to equal pension treatment at all.

But that is plainly not the result intended by this Court's decisions or Section 706(e)(2). In *Bazemore* itself, this Court found liability despite the district court's finding that "Extension Service had conducted itself in a nondiscriminatory manner since it became subject to Title VII." 478 U.S. at 393. Moreover, the entire point of the 1991 amendment was to ensure that a seniority system infected with intentional discrimination would be subject to challenge not only when adopted, but also when implemented, often many years later. *See* H.R. Rep. No. 102-40, pt. II, at 23 (noting amendment was intended to forestall possibility that *Lorance* would be read to grandfather

in discriminatory seniority systems adopted prior to Title VII). Although Congress intended to provide special protection for the continuing consequences of pre-Act discrimination through a bona fide seniority system, it expressly declined to extend that protection when the seniority system itself was intentionally discriminatory. *See* 42 U.S.C. § 2000e-2(h).

3. The Solicitor General's further assertion (Br. 17) that Section 706(e)(2) is inapplicable by its plain terms is wrong as well.

The Government points out that Section 706(e)(2) applies to seniority systems "adopted for an intentionally discriminatory purpose *in violation of this subchapter*." 42 U.S.C. § 2000e-5(e)(2) (emphasis added). It urges this Court to construe this language to exclude cases in which a facially discriminatory seniority system – such as the *Bazemore*-based hypothetical above – is adopted prior to the effective date of Title VII, reasoning that at the time of adoption, the discriminatory purpose was not "in violation of this subchapter." *See* Br. 17.

The Government's construction is neither compelled by the text nor consistent with Congress's obvious purposes. The phrase "in violation of this subchapter" is best read to modify "intentionally discriminatory purpose" not the earlier word "adopted." *See* 42 U.S.C. § 2000e-5(e)(2). That is, the provision allows plaintiffs to challenge at any time a seniority system adopted for a purpose proscribed by Title VII at the time of the challenge. This reading is consistent with the provision's purposes – to ensure that intentionally

discriminatory seniority systems do not persist in perpetuity simply because they were not challenged when adopted – and with the sharp distinction the statute elsewhere draws between seniority systems that simply perpetuate pre-Act discrimination and seniority systems that are themselves intentionally discriminatory. *See* 42 U.S.C. § 2000e-2(h).

B. Respondents Challenge a Present Unlawful Employment Practice.

Even setting aside the special rules for facially discriminatory policies and intentionally discriminatory seniority systems, respondents' claims challenge a present-day unlawful employment practice and not, as the Solicitor General contends, the present effects of a past violation of Title VII.

The Solicitor General spends much of his brief belaboring the uncontested point that the current consequences of a prior violation do not constitute a present unlawful employment practice under Title VII. He then simply assumes the central contested point – that a discriminatory notation in a worker's employment file (here, a change in the worker's NCS date) without more, constitutes an unlawful employment practice that is actionable only when it occurs. This assumption is as wrong as it is undefended.

Many unlawful employment actions are preceded by precursor decisions that are not in themselves completed violations of Title VII subject to immediate challenge. As described in *Ledbetter*, employee pay decisions are often preceded by performance evaluations. *See* 127 S. Ct. at 2171. Likewise,

termination may follow from disciplinary warnings; productivity data are sometimes used in making promotion decisions; and records of unexcused absences may be used to deny a bonus. But that does not mean that discrimination with respect to these precursors is itself an unlawful employment action under Title VII. *See, e.g.*, *Oest v. Illinois Dep't of Corr.*, 240 F.3d 605, 612-13 (7th Cir. 2001) (negative performance evaluations and oral or written reprimands not actionable until resulting in "tangible job consequences"); *Taylor v. Small*, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003) (to same effect). To construe each step toward an adverse employment action as a separate, actionable unlawful employment practice would inundate the EEOC and the courts with minor disputes that may, or may not, someday materially affect the employee. Congress wisely provided that a Title VII cause of action is not complete until the employer's discriminatory intent is joined with a concrete adverse employment action that actually alters an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see Ledbetter*, 127 S. Ct. at 2171 n.3.

Whether discriminatory recording of seniority credits arises to the level of an actionable adverse employment action is a critical question in this case because the rule of *Evans* applies only when the current adverse action is the result of a prior discriminatory act that was, itself, subject to challenge under Title VII. *See* 431 U.S. at 558. Yet, tellingly, neither the Government nor petitioner has cited a single case from this Court or any other entertaining a Title VII claim against an employer's

adjustment of seniority credits in the absence of any other adverse employment action.[4] And absent any demonstration that respondents were entitled to challenge discriminatory leave notations in their employment records before they were acted upon, the foundation of the Government's *Evans* argument collapses.

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[4] *Lorance* dealt with the modification of the rules of the seniority system itself, 490 U.S. at 903; the Court did not hold, and has never intimated, that an employee can bring a Title VII suit every time an employer adjusts the worker's seniority credits in a way that may, or may not, affect working conditions in the future.

CONCLUSION

For the foregoing reasons, and those stated in respondents' brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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