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

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether AT&T engaged in a current violation of Title VII when it implemented a facially discriminatory seniority system to set retiring workers' pensions.

2. Whether construing Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), to prohibit an employer from relying on pre-PDA service crediting decisions in making post-PDA pensions calculations gives the PDA an impermissible retroactive effect.

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BRIEF FOR THE RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (PDA), 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 . . . ." 42 U.S.C. § 2000e(k).

Respondents are retiring employees who took pregnancy disability leave in the 1960s and early 1970s. In establishing their pensions, petitioner AT&T has not treated respondents "the same for . . . purposes" of the receipt of pension benefits as other workers who were "similar in their ability or inability to work" but who took disability leave for reasons other than pregnancy. 42 U.S.C. § 2000e(k). Instead, when AT&T established the amount of respondents' pensions, it implemented a policy that facially discriminates on the basis of pregnancy by giving less credit toward retirement benefits for time spent on pregnancy disability leave than for any other kind of medical leave. In so doing, AT&T committed a present violation of Title VII.

I. Statutory Background

1. As enacted in 1964, Title VII prohibited private employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). While this provision addressed intentional disparate treatment, a companion provision further prohibited employment practices with an unjustified disparate impact on the basis of sex. 42 U.S.C. § 2000e-2(a)(2).

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court held that denying disability benefits to women on pregnancy leave did not violate Title VII's ban on intentional sex discrimination. *Id.* at 145-46. The Court further held that the plaintiffs in that case had failed to show that the employer's disability plan – under which women generally received greater benefits than did men – had an unjustified disparate impact on women simply because it failed to provide coverage for pregnancy-related disabilities. *Id.* at 136-40.

A year later, however, the Court made clear that the limited holding in *Gilbert* did not mean that employers were free to discriminate on the basis of pregnancy in all areas of the employment relationship. In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court clarified that a "policy of denying accumulated seniority to female employees returning from pregnancy leave," while not constituting intentional sex discrimination, did violate Title VII's prohibition against employment practices that have an unwarranted disparate impact on the basis of sex. *Id.* at 139.

Congress reacted to the Court's pregnancy discrimination rulings by passing the Pregnancy

Discrimination Act, Pub. L. No. 95-555, § 995, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)). In order to "reestablish the law as it was understood prior to *Gilbert*," H.R. REP. NO. 95-948, at 8 (1978), Congress declared that:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.

42 U.S.C. § 2000e(k). Moreover, consistent with the Court's decision in *Satty*, Congress further provided that:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

2. As a prerequisite for filing a Title VII claim in court, an employee must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-5(e)(1). Under the time limit applicable here, the employee must file the charge within 300 days "after the unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1).

In 1989, this Court held that the time limit for challenging a facially neutral but intentionally discriminatory seniority system begins to run when the policy is adopted and is not revived when the

policy is applied to the detriment of a particular employee. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 911-13 (1989). In so holding, the Court distinguished a neutral seniority system from one that is discriminatory on its face, explaining that 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.

Congress reacted to *Lorance* by embracing its holding with regard to facially discriminatory seniority systems and expanding it to encompass seniority systems that are intentionally discriminatory, but facially neutral. The Civil Rights Act of 1991 thus amended Title VII to provide that:

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2).

II. Factual Background And Procedural History

1. AT&T awards pension benefits to certain employees. J.A. 37 (¶¶ 9-10). The amount of the pension, which AT&T calculates upon the employee's retirement, depends in part upon her "term of

employment," defined as her "period of continuous employment in the service of the Company." J.A. 38-39 (¶ 17). Neither the terms of the pension plan nor any other source of authority requires AT&T to use any particular method of calculating a worker's "term of employment." J.A. 39-40 (¶¶ 20-23).

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. J.A. 39-40 (¶¶ 18-23). Under that system, the date an employee begins working for AT&T becomes her NCS start date. Anytime she takes leave, AT&T determines whether to give credit for the time she is absent. If the leave is uncredited, AT&T advances the NCS date by the number of days of uncredited leave. J.A. 39 (¶ 18).

Prior to the effective date of the PDA, AT&T gave employees full credit for all types of temporary medical leave, except one: leave taken for disabilities related to pregnancy. J.A. 47-50 (¶¶ 66-79). Women on pregnancy disability leave received no more than 30 days of credit prior to 1977, and up to 72 days between 1977 and 1979. J.A. 48 (¶¶ 67, 70).

AT&T has always retained the right to change its pension policies. Thus, for example, in 1977 and 1979, AT&T modified its service credit accrual rule with respect to pregnancy leave. J.A. 48, 50 (¶¶ 70, 79). And as part of its court-ordered divestiture in 1982, AT&T was required to revisit its pension policies in light of the reorganization, but decided to continue to award pensions using its prior discriminatory measure of service. J.A. 52-54 (¶¶ 89, 92).

2. Respondents are women who worked for AT&T and took pregnancy disability leave between 1968

and 1976, as well as the union that represents AT&T's non-management employees.

Noreen Hulteen began work on January 5, 1965. J.A. 40 (¶ 24). On November 11, 1968, she began her pregnancy disability leave and gave birth on January 12, 1969. J.A. 40 (¶ 25). While on pregnancy leave, Hulteen required treatment for a medical problem unrelated to her pregnancy. J.A. 40 (¶ 26). Hulteen requested to be allowed to return from pregnancy leave for one day so that the time taken for her new medical condition would be treated as creditable disability leave under petitioner's policies, but the request was denied. As a result, Hulteen was given a total of 30 days credit for the entirety of her pregnancy and unrelated disability leaves, thereby losing credit for 210 days of service. J.A. 40-41 (¶¶ 27-28).

Likewise, when respondents Eleanora Collett, Elizabeth Snyder, and Linda Porter returned from their pregnancy leaves, petitioner adjusted their NCS dates in accordance with its policy, giving each no more than 30 days service credit even though workers taking disability for any other purposes were entitled to credit for the entire length of their leave.[1]

When Hulteen, Collet, and Snyder retired, AT&T reviewed their employment records and set the amount of their pension.[2] Pet. App. 21a. In the

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[1] There is no dispute that the NCS adjustment took place at this time. Petitioner is wrong in reading respondents' brief in opposition to suggest otherwise. *See* Petr. Br. 42-44.

[2] Respondent Linda Porter joined this action anticipating her impending retirement and AT&T's imminent exclusion of

course of that review, AT&T relied on respondents' adjusted NCS dates to determine their term of employment. As a result, AT&T awarded respondents' lower pensions because of their prior pregnancy leaves. *See* Pet. App. 3a.

Within 300 days of being notified of their pension calculations, respondents filed charges with the EEOC, claiming that AT&T discriminated against them in setting their retirement benefits. After receiving a Letter of Determination finding reasonable cause that petitioner violated Title VII, respondents sued AT&T, alleging violations of Title VII and certain provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1104(a)(1). Pet. App. 123a-24a; J.A. 54 (¶ 94).

Relying on the Ninth Circuit's prior decision in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992), the district court granted partial summary judgment to respondents, holding that AT&T had violated Title VII, but that respondents' ERISA claims were time-barred. Pet. App. 106a-28a.

3. AT&T subsequently requested and was granted an interlocutory appeal to challenge the district court's Title VII ruling.[3] Agreeing with the position taken by the EEOC as amicus curiae, the three-judge panel reversed the district court's grant of

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her pregnancy leave from the computation of her pension benefits.

[3] The district court did not certify, and the court of appeals did not grant, interlocutory review of the denial of respondents' ERISA claims. Accordingly, those claims remain pending in the district court.

summary judgment for respondents. Pet. App. 82a-85a. However, on rehearing en banc, the court of appeals reversed course and affirmed.

The en banc panel first rejected AT&T's assertion that the court's prior decision in *Pallas* gave retroactive effect to the PDA. The court explained that *Pallas* had construed the PDA to govern an employer's post-PDA conduct – in *Pallas*, relying on a discriminatory NCS date in awarding early retirement benefits; in this case, relying on the same date to calculate pensions. Pet. App. 12a-15a. Because "[t]he decision to deny benefits was made in the post-PDA world," the court held that allowing respondents to challenge that benefits decision does not give the PDA retroactive effect. Pet. App. 13a, 15a.

The court further reaffirmed its determination in *Pallas* that an employer's reliance upon a discriminatory measure of employment service constitutes a present violation of Title VII. Pet. App. 18a-19a. That conclusion, the court continued, was reinforced by the 1991 Amendment to Title VII, which provides that an intentionally discriminatory seniority system gives rise to a new violation of the Act each time it is applied to the detriment of an employee. Pet. App. 19a-20a (citing 42 U.S.C. § 2000e-5(e)(2)). And, the court explained, AT&T's seniority system is intentionally discriminatory because it "facially discriminates against pregnant women." Pet. App. 23a.

Finally, the court held that by its terms, the PDA precluded AT&T's reliance on Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). *See* Pet. App. 23a-27a.

SUMMARY OF ARGUMENT

It is not uncommon, when an employee retires, for her employer to look back over her work history and calculate her term of service in order to determine the amount of the pension she is due. If, in doing so, the employer applies a rule that gives service credit for all forms of medical leave except pregnancy disability leave, it violates Title VII as amended by the PDA. *See* 42 U.S.C. § 2000e(k). While the leave may have taken place earlier, the only actionable discrimination occurs when the employer fails to treat the worker "the same for . . . purposes [of the] receipt of [pension] benefits . . . as other persons . . . similar in their ability or inability to work." 42 U.S.C. § 2000e(k). And for that reason, the worker's claim is timely so long as she files a charge of discrimination with the EEOC within 300 days of the benefit calculation.

AT&T insists that this case is different, for two reasons: (1) rather than making its initial determination of respondents' terms of employment at the time of their pension calculation, AT&T kept a running tally of seniority credits throughout respondents' careers; and (2) respondents took their leaves before the effective date of the PDA. AT&T argues that under those circumstances the only actionable discriminatory conduct took place when AT&T refused to record respondents' pregnancy leaves as creditable service. And because that act took place many years ago – and before the effective date of the PDA – AT&T insists that subjecting it to liability now would ignore Title VII's time limits for filing charges of discrimination and give the PDA impermissible retroactive effect.

The Ninth Circuit correctly held that neither fact is relevant.

1. The fact that AT&T makes adjustments to an employee's service credits on an on-going basis, rather than determining her term of employment at the time it sets her pension, has no bearing on the time limits for bringing Title VII pension discrimination claims.

First, although the denial of service credits may be discriminatory, it does not ripen into a challengeable adverse employment action until relied upon to the worker's detriment.

Refusing to give credit for a few weeks or months of service has no immediate impact on a worker's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Unless the short period of time is sufficient to change the worker's position in the seniority hierarchy, the crediting decision will not affect the worker's competitive seniority rights with respect to job bidding, shift preference, layoffs, etc. At the same time, whether it will have any effect on fringe benefits is also speculative, depending for example on whether the employee stays with the company long enough for her pension to vest and whether the employer retains or changes its pension benefit formula in the decades between the worker's leave and retirement.

Second, even if respondents could have challenged the initial denial of service credits, they also were entitled to challenge the use of that discriminatory measure of service when it was applied to calculate their pensions.

This Court has consistently recognized that by definition, a facially discriminatory system discriminates each time it is applied, and therefore gives rise to a new, independently actionable

violation with every application. Congress codified this principle in 1991, when it added Section 706(e)(2) to Title VII. The rule reflects a recognition that the discriminatory intent behind an application of a facially discriminatory policy is self-evident, and unlike an isolated and individualized discriminatory decision, the evidence of that intentional discrimination does not grow stale over time. It also minimizes unnecessary litigation, by allowing employees to wait to bring Title VII challenges until the system has had a concrete effect on their compensation or other working conditions.

AT&T's seniority system is facially discriminatory, and thus falls under this rule. The system is discriminatory because it calculates pension benefits in reliance on a measure of service that gives less credit to women who took pregnancy leave but provided the company the same service as others who took identical periods of leave for medical purposes unrelated to pregnancy. And that discrimination is facial because it arises from the rules of the seniority system itself.

AT&T insists that respondents' lower pensions are *not* the result of a facially discriminatory seniority system, but its reasons are unconvincing. The fact that it now gives equal service credit to other women taking post-PDA pregnancy leave shows that the system is less discriminatory than it used to be, but it does not render the system neutral. AT&T also argues that its system is neutral because it only discriminates against women who took pregnancy leave prior to the effective date of the PDA. But that just begs the question whether Title VII allows such discrimination against pre-PDA leave-takers, the subject of AT&T's meritless retroactivity objection.

2. The court of appeals read Title VII, as amended by the PDA, to prohibit AT&T from paying lesser pensions to women who took pregnancy leave before the effective date of the PDA. AT&T objects that this gave the PDA retroactive effect, but that is not so.

The Ninth Circuit made clear that AT&T was not liable for its pre-PDA actions, including its failure to pay respondents equal disability benefits during their pregnancy disability leave[4] or its failure to record that leave as creditable service. That is, the court did not apply the PDA to declare that anything AT&T did prior to the PDA was unlawful.

Instead, the court construed the PDA simply to prohibit AT&T from relying on its pre-PDA discriminatory measure of company service in calculating pensions decades after the PDA became effective. A statute that regulates how parties make post-Act decisions has no retroactive effect. The frustration of AT&T's plans to rely on its discriminatory NCS dates is an unremarkable consequence of the prospective application of the statute.

At any rate, AT&T's retroactivity objection fails for the independent reason that even prior to the enactment of the PDA, Title VII prohibited discrimination regarding seniority on the basis of pregnancy. While this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), held that

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[4] This case involves only pregnancy disability leave – which refers to the period of time during which the employee is unable to work as a result of pregnancy – as distinguished from maternity leave.

denial of equal disability benefits does not constitute intentional sex discrimination, the Court's subsequent decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), made equally clear that pregnancy discrimination relating to seniority has always been unlawful under Title VII's separate proscription against practices having an unjustified disparate impact on the basis of sex.

Finally, the fact that this case involves discrimination with respect to pensions does not render an otherwise prospective application of the statute impermissibly retroactive. While this Court has sometimes protected the financial integrity of pension plans by limiting the relief available for violations of unexpected interpretations of Title VII, the question of an appropriate remedy is not presented at this early stage in the case. And, in any event, there is every reason to believe that the effect of a straight-forward application of Title VII principles will have a very modest financial impact on pension plans.

3. Nothing in Section 703(h) of Title VII supports reversal either. AT&T acknowledges that the provision provides no protection for a facially discriminatory seniority system, and that is what the court of appeals confronted here. Moreover, by its terms, the PDA precludes reliance on Section 703(h) to defend fringe benefit pregnancy discrimination.

4. Finally, the court of appeals' ruling is consistent with the long-held and consistent position of the agency Congress charged with the administration and enforcement of Title VII. The EEOC's conclusion that Title VII has always proscribed pregnancy discrimination with respect to seniority and that such discrimination gives rise to

an unlawful employment practice when the pension setting decision is made, is worthy of deference.

ARGUMENT

I. AT&T Violated Title VII When It Awarded Respondents Smaller Pensions Because Of Their Prior Pregnancy Leaves.

The PDA requires 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 . . . ." 42 U.S.C. § 2000e(k).

This Court recently construed similar language in Title VII, prohibiting discrimination "against any individual with respect to his compensation . . . because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), to create a new cause of action "after each allegedly discriminatory pay decision [is] made." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007). The Court reasoned that it is at the moment of the pay decision that the two essential elements of a disparate-treatment claim – "an employment practice, and discriminatory intent" – come together. *Id.* at 2171.

AT&T does not appear to contest that, as a general matter, a Title VII violation occurs at the time of the pension-setting decision if that is when the employer looks back over the worker's attendance and records, and calculates her term of employment using a rule that gives credit for other kinds of medical leave, but not for pregnancy disability leave. But AT&T insists that the law applies in a

dramatically different way to an employer that keeps a running tab on a worker's term of employment, making service crediting decisions when the worker returns from leave. In that circumstance, AT&T argues, under this Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and its progeny, the adverse employment action occurs when the crediting decision is made and later reliance on that decision in setting the worker's pension does not give rise to a new unlawful employment action.

It is difficult to believe that Congress intended the time limits of Title VII to turn on whether an employer calculates the term of employment for the first time at retirement or, as AT&T apparently does, double-checks its prior calculations at retirement, *see* Pet. App. 21a. In fact, AT&T's reliance on *Evans* is misplaced for two independent reasons.

First, even if AT&T is right that its initial crediting decision constituted an independently actionable violation of Title VII, its seniority system is facially discriminatory and a facially discriminatory seniority system gives rise to a new violation every time the system is applied, even if the employee could have challenged the system at an earlier point.

Second, in any event, AT&T is wrong in asserting that a service crediting decision can constitute a completed, immediately actionable violation of Title VII. An employer's decision whether to credit a few weeks of service generally has no immediate effect on a worker's compensation, terms, conditions, or privileges of employment. And whether it ever will is entirely speculative.

A. AT&T's Seniority System Is Facially Discriminatory And Therefore Gives Rise To A New Cause Of Action Every Time It Is Applied.

1. AT&T does not appear to contest that "a facially discriminatory [seniority] system . . . by definition discriminates each time it is applied," *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 n.5 (1989), and as a result gives rise to a new, independently challengeable violation with every application, *id.* at 912; *see also Ledbetter*, 127 S. Ct. at 2173-74 (same); *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring and joined by all other members of the Court) (same rule for facially discriminatory pay structure).

Unlike an isolated and individualized discriminatory decision, for which the evidence of discriminatory intent may grow stale over time, the discriminatory intent behind an application of a facially discriminatory rule is self-evident. As a result, "[a]n employer that adopts and intentionally retains such a [policy] can surely be regarded as intending to discriminate . . . as long as the [policy] is used." *Ledbetter*, 127 S. Ct. at 2173.

The rule originally recognized in this Court's cases was codified by Congress in 1991, when it added Section 706(e)(2) to Title VII, providing that "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter . . . when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. 2000e-5(e)(2).

2. Because a facially discriminatory seniority system gives rise to a new unlawful employment practice with every application, the rule of *Evans* does not apply to discrimination arising from the operation of such a system. As the Government has explained:

> Challenges to applications of a facially discriminatory policy do not depend on the theory that a practice is unlawful because it *perpetuates* a prior unchallenged discrete act. Rather, such challenges depend on the recognition that when a facially discriminatory policy remains in effect, unlawful intentional discrimination is *presently occurring* . . . .

U.S. Br. *Ledbetter*, No. 05-1074, at 13-14 (emphasis in original); *see also Lorance*, 490 U.S. at 912 n.5 (distinguishing *Evans* from cases involving facially discriminatory seniority systems); *Bazemore*, 478 U.S. at 396 n.6 (same).

3. Respondents' claims fall under the rule of *Lorance* and Section 706(e)(2), and not *Evans*, because the disparity in respondents' pensions stems from AT&T's decision to apply a facially discriminatory seniority system.

AT&T's seniority system, like all others, consists of two principal parts: an accrual rule that determines each worker's creditable term of service and a set of benefit rules that affords certain benefits and privileges in accordance with seniority. *See Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 607-08 (1980) (term "seniority system" includes both accrual rule and benefit provisions).

AT&T does not dispute that the seniority accrual rule that it used to determine respondents' term of

employment was discriminatory in precisely the way the PDA prohibits. Indeed, that is why it changed the rule as soon as the PDA went into effect. *See* Pet. App. 4a-5a. Nor does AT&T dispute that this discrimination was facial – the discriminatory treatment is apparent on the face of the rule. For that reason, there is no need to search out indirect and potentially stale evidence of whether those who enacted the policy intended to discriminate on the basis of pregnancy.

Furthermore, AT&T appears not to contest that a facially discriminatory seniority system necessarily constitutes a system "adopted for an intentionally discriminatory purpose" within the meaning of Section 706(e)(2). *See* 42 U.S.C. § 2000e-5(e)(2); Petr. Br. 44-47; *see also Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).[5] And it is clear that Congress intended Section 706(e)(2) to apply to both facially neutral systems enacted for a discriminatory purpose (as in *Lorance*) and facially discriminatory systems (as alleged here). *See* 42 U.S.C. § 2000e-5(e)(2) (applying to all intentionally discriminatory policies "whether or not that discriminatory purpose is apparent on the face of the seniority provision").

4. This case is thus materially indistinguishable from *Bazemore v. Friday*, 478 U.S. 385 (1986), one of the Court's early applications of the rule that would later be codified in Section 706(e)(2) as applied to seniority systems.

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[5] Respondents' claim that AT&T's seniority system is intentionally discriminatory is premised solely on the fact that the system is facially discriminatory. *Contra* Petr. Br. 45-46.

The employer in *Bazemore*, had long maintained a pay system that facially discriminated against black employees. Upon the enactment of Title VII, the employer began paying new hires the same starting salary regardless of race but did not go back and adjust the base salaries of its previously hired employees. Instead, it applied to all of its workers a pay-setting rule that, viewed in isolation, had the appearance of neutrality: it set each worker's salary to what he or she was paid the year before, plus a raise (which was given without regard to race). *See* 478 U.S. at 397 & nn.7-8; *Bazemore v. Friday*, 751 F.2d 662, 666-67 (4th Cir. 1984) (describing how the pay structure operated). That, the employer believed, was all that Title VII required. Under this Court's decision in *Evans*, it concluded, the continuing present disparity in the wages of some black workers (*i.e.*, those hired before the effective date of Title VII) was simply a continuing effect of past discriminatory decisions (*i.e.*, pre-Act wage decisions) that were lawful when made.

This Court easily rejected that reasoning. *Bazemore*, 478 U.S. at 395-96. The current pay system, the Court held, was facially discriminatory because it relied on the pre-Act discriminatory base salaries to determine post-Act pay. *Id.* That reliance, the Court explained, amounted to a "perpetuat[ion]" of the pre-Act discrimination, *id.* at 395, and the resulting salaries therefore were a "mere continuation of the pre-1965 discriminatory pay structure" which was rendered unlawful upon the passage of Title VII, *id.* at 397 n.6. The case was thus different from *Evans*, the Court noted, because the employer's reliance on a facially discriminatory pay structure gave rise to a present violation every

time it was implemented. *Id.*; *see also Lorance*, 490 U.S. at 912 n.5.

So, too, in this case, AT&T's pension structure is facially discriminatory because it relies upon a facially discriminatory measure of service to the company. Even if the pre-PDA crediting decisions were lawful when made (*but see infra* 44-48), the continued reliance upon them in setting compensation is no less a present violation of Title VII than was the *Bazemore* employer's reliance on its pre-Act measures of the value of its employees' labor when it set post-Act wages.

B. AT&T's Assertion That Its Seniority System Is Facially Nondiscriminatory Does Not Withstand Scrutiny.

AT&T nonetheless insists that the disparity in respondents' pensions is not the result of a facially discriminatory seniority system. But its reasons are unconvincing.

1. A Pension System That Relies Upon A Discriminatory Seniority Accrual Rule Is Facially Discriminatory.

AT&T argues first that its seniority system is neutral because its pension formula gives equal benefits to those with identical NCS dates. Petr. Br. 26, 36-37. But this Court has made quite clear that an accrual rule is part and parcel of a "seniority system" as the term is used in Title VII. *Cal. Brewers*, 444 U.S. at 607-08.[6] Indeed, when this

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[6] In *California Brewers*, the Court construed the term as used in Section 703(h), but AT&T has suggested no reason why

Court gave an example of a facially discriminatory seniority system in *Lorance*, it described a system with a discriminatory accrual rule. *See* 490 U.S. at 912 n.5. And the Court explained that a system that employs such a rule can be challenged when the lesser seniority is relied upon to the employees' detriment (as alleged in *Lorance*), without any suggestion that the benefit rule must be independently discriminatory. *See id.* at 912 & n.5.

As a result, this case is fundamentally different from *Evans*. In *Evans*, there was no allegation that the seniority system itself was facially discriminatory. *See*, *e.g.*, 431 U.S. at 558 ("Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex."). Instead, this Court explained, the present harm to the employee resulted from discrimination occurring entirely outside of the seniority system (her prior forced resignation) which prevented her from providing the same amount of service as other workers who had not suffered from such discrimination. *Id.* at 557-58. The fact that the neutral seniority system gave present effect to that past discriminatory action, occurring entirely outside the seniority system, did not give rise to a present violation. *Id.* at 558.

But this Court has made equally clear that when the challenged discrimination arises from the facially discriminatory seniority system itself, because the system gives unequal credit for equal service, as

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the same term would have a different meaning in Section 706(e)(2).

alleged here, the employee may challenge any difference in treatment that results from her lesser seniority. *See*, *e.g.*, *Lorance*, 490 U.S. at 912 & n.5. While an employer might try to frame such cases using the logic of *Evans* – asserting that the present treatment is simply a "present-day consequence of past discrimination" (*i.e.*, the recording of unequal seniority credit), Petr. Br. 34 – this Court and Congress have squarely rejected that view and concluded instead that every action in reliance upon a discriminatory measure of seniority gives rise to a new violation of Title VII. *Contra* Petr. Br. 34 & n.11.

2. AT&T's Abandonment Of Its Discriminatory Accrual Rule Does Not Render Its Seniority System Neutral When It Continues To Rely Upon The Prior Service Calculations In Awarding Present Day Benefits.

AT&T and the Solicitor General further insist that AT&T's seniority system is not facially discriminatory because the accrual rule it applies to post-PDA pregnancy leave is neutral. This argument fails because ceasing to discriminate against *some* women (*i.e.*, those who become pregnant after the passage of the PDA) does not alter the fact that AT&T's current seniority system continues to discriminate against others by setting pensions using a measure of service that gives those women less credit for the same time served simply because they took pregnancy leave rather than other forms of temporary disability leave.

Thus, as used in Section 706(e)(2) and *Lorance*, the term "seniority system" must be understood to include the body of rules that govern the complaining employee's treatment, including the accrual rules

that determined the worker's seniority, even if those rules have since been altered as applied to others.

AT&T's contrary construction runs directly counter to a core purpose of Section 706(e)(2), which was to avoid putting employees to the "Hobson's choice either to bring what may be an unnecessary and premature lawsuit against his employer, to the detriment of the employment relationship, or to forego any possibility of recovery in the event that the plan ever should operate to injure him." H.R. REP. NO. 102-40(I), at 61 (1991). Congress, in other words, intended Section 706(e)(2) to assure workers that they would not lose their right to equal treatment by waiting to see if discriminatory alteration of their seniority would have an actual adverse effect on their employment. AT&T's interpretation completely vitiates that salutary function. Under its interpretation, unless an employee immediately challenges the discriminatory denial of seniority credit, she runs the risk that her employer will change that accrual rule before the loss of seniority affects her compensation or other terms of employment, thereby immunizing its prior discrimination from all challenge.

No legitimate purpose would be served by such a system. Because the discrimination at issue is facial, there is no risk that evidence will grow stale. *Cf. Ledbetter*, 127 S. Ct. at 2171. Moreover, neither AT&T nor the Solicitor General identifies any reason why Congress would provide a cause of action to a retiring employee in respondents' position only if her employer continues to maintain a discriminatory accrual rule. Whether the accrual rule continues to be applied at the time an employee retires is of little incident to the retiring employee, who will no longer

be accruing seniority. That the accrual rule remains discriminatory in the present only means that the employer will also discriminate against other, future, retirees. And declining to apply the discriminatory accrual rule to *other* employees does not render the discrimination suffered by respondents any less intentional or any less facial.

Respondents' position in this regard is consistent with the Court's decision in *Bazemore*, in which the employer's abandonment of its pre-Act policy of giving blacks lower starting wages and pay raises was not sufficient to render its pay structure nondiscriminatory. *See Bazemore*, 478 U.S. at 395-96. To the contrary, because the post-Act salary policy continued to rely on those pre-Act pay-setting decisions (by basing present salary on the previous year's pay), the Court concluded that the present pay structure was facially discriminatory and subject to challenge with every pay check. *Id.* at 395-96. As a result, the Court held that the court of appeals in *Bazemore*, "plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated." *Id.* at 396.

So, too, in this case, AT&T plainly errs in insisting that its abandonment of its discriminatory accrual rule insulates from challenge its continued reliance on the resulting discriminatory measure of service in making post-Act benefit decisions.

3. That AT&T's Seniority System Discriminates Only Against Women Who Took Pre-PDA Pregnancy Leave Does Not Render It Neutral.

In the context of it retroactivity argument, AT&T also asserts that its seniority system is not facially

discriminatory because respondents are not "similarly situated" to other workers who receive full pensions. *See* Petr. Br. 25. This is so, it claims, because its policy provides lower benefits only for the subset of women against whom it was lawful to discriminate against at the time they took their pregnancy disability leave. *Id.* Any suggestion that this argument would render respondents' claims untimely is misconceived.

As AT&T appears to recognize, this argument can only succeed if AT&T is right on the merits of its retroactivity argument. *See* Petr. Br. 25 (acknowledging that "these two groups of employees could . . . be deemed 'similarly situated'" if the PDA rendered discrimination between the groups unlawful). That is, if Title VII entitles respondents to the same pension as their coworkers who took other forms of medical leave or who took pregnancy leave post-PDA, then they *are* similarly situated to their co-workers in every respect material here.[7] And as discussed below, Title VII does in fact require such equal treatment. *See infra* 36-53. If it does not, respondents' claims fail on the merits and the timeliness of their charges is irrelevant.

AT&T's argument also fails for the independent reason that the rule of *Lorance* and *Bazemore* applies even when an employer discriminates solely against

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[7] This is true even if AT&T were right (which it is not, *see infra* 44-48), that at the time respondents took their leave, it was lawful to discriminate on the basis of pregnancy with respect to seniority. So long as it is clear that respondents are entitled to equal pensions now, there can be no argument that AT&T's policy of denying equal pensions is anything but facially discriminatory.

workers who were not protected prior to the effective date of the relevant provisions of Title VII. In *Bazemore*, for example, the employer could have made the same claim AT&T makes here: its pay system paid unequal wages only to those hired before the effective date of Title VII, whose base salaries were established at a time when Title VII provided them no protection. 478 U.S. at 390-91, 394-95. This Court has nonetheless recognized that the pay system was facially discriminatory. *See*, *e.g.*, *Ledbetter*, 127 S. Ct. at 2173.

The insight of cases like *Bazemore* and *Lorance* is that the intent behind an employment policy is fairly attributed to every application of the policy. A policy that says "no women in the company gym" discriminates on the basis of sex every time it is applied, even if it was first adopted in 1960, when women were differently situated from men in the sense that they were not protected from such discrimination. What changed in 1964 was the lawfulness of the discrimination, not the facially discriminatory nature of the policy. And this would be true even if the employer changed its policy to discriminate against only the subset of employees who were previously unprotected (*e.g.*, "no women hired before 1964 in the company gym" or "no one excluded from the gym in 1960 may enter").

Accordingly, AT&T's assertion that respondents are not "similarly situated" because they are not owed equal pensions is a defense on the merits, not a legitimate objection to the application of Section 706(e)(2) or *Lorance* to determine the timeliness of respondents' complaints.

4. Section 706(e)(2) Applies To Facially Discriminatory Seniority Policies That Predate The PDA And Title VII.

The Solicitor General makes a related argument specific to the text of Section 706(e)(2). That provision, he points out, applies only "with respect to a seniority system that has been adopted for an intentionally discriminatory purpose *in violation of this subchapter*." U.S. Br. 24-25 (quoting 42 U.S.C. § 2000e-5(e)(2) (emphasis added)). The provision thus has no application here, the Government argues, because at the time AT&T's system was adopted, discrimination on the basis of pregnancy was not yet "'in violation of [Title VII].'" U.S. Br. 24. Under that view, Section 706(e)(2) does not apply to any seniority system – even to a seniority system that discriminates on the basis of race on its face – enacted before the effective date of Title VII. That conclusion is inconsistent with the basic purposes of the provision and is not required by the statute's text.[8]

There is no question that the phrase "in violation of this subchapter" modifies the phrase it immediately follows ("intentionally discriminatory purpose"), requiring the plaintiff to allege that the challenged seniority system intentionally discriminates on a basis prohibited by Title VII (*e.g.*, race, sex, religion, etc.). The textual question posed

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[8] It is also ultimately immaterial. Even if the Court construed Section 706(e)(2) as addressing only post-enactment seniority systems, petitioner's system would be subject to challenge under the principle recognized in *Lorance*, which Section 706(e)(2) did not displace.

by the Solicitor General is whether the phrase "in violation of this subchapter" also modifies the more remote phrase "adopted for," requiring the plaintiff to show that Title VII prohibited the intentional discrimination behind the system at the time it was adopted.

As the Solicitor General has recently argued to this Court, "[t]he last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote." U.S. Br. at 8, *Mendoza-Gonzalez v. United States*, (No. 08-5316) (citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:33, at 369-72 (N. Singer, 7th ed. 2007)). Applying the last antecedent rule, the phrase "in violation of this subchapter" is best read to modify the word "intent," not "adopted."

In this case, ordinary usage is consistent with Congress's manifest intent. Although debate over other aspects of the 1991 Amendments was contentious, there was a broad consensus that Section 706(e)(2) was needed to overrule any aspects of *Lorance* that would function to time-bar workers from challenging "contemporary applications of discriminatory rules adopted prior to 1965 – that is, all the discriminatory rules in existence when Title VII was adopted." H.R. REP. NO. 102-40(I), at 61 (1991); *id.* at 104, 153. Congress made clear it never intended Title VII to operate in that manner and that Section 706(e)(2) would operate to prevent that possibility. *Id.* at 61.

Accordingly, the phrase "in violation of this subchapter" was intended simply as a short-hand reference to the kinds of discrimination addressed by Title VII (*i.e.*, on the basis of race or sex, but not age

or disability) not as an obscure method of establishing a grandfather clause. "To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights" of those protected by Title VII. *Bazemore*, 478 U.S. at 395.

5. Section 706(e)(2) Does Not Act To Retroactively Revive Expired Claims.

AT&T also argues that Section 706(e)(2) cannot be applied to this case to revive claims for which the limitations period has already expired. Petr. Br. 47.

It appears that this assertion may be addressed at an argument respondents do not make – namely, that AT&T's seniority system is facially neutral but intentionally discriminatory. *See* Petr. Br. 45-46. But to the extent AT&T suggests that Section 706(e)(2) cannot be applied to a system that is facially discriminatory, *see, e.g.*, Petr. Br. 33 n.10, that claim has no merit. As applied to facially discriminatory seniority systems, Section 706(e)(2) simply codifies the long-standing rule recognized in *Lorance* and *Bazemore*. Moreover, Section 706(e)(2) does not revive previously expired claims, but rather makes continued enforcement of an intentionally discriminatory seniority system a new unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(2). Such legislation proscribing post-enactment conduct is not retroactive. *See*, *e.g.*, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 45-46 (2006).

II. Discriminatory Denial Of Service Credit Is Not An Immediately Challengeable Unlawful Employment Practice.

Even setting aside the special rules for facially discriminatory seniority systems, the *Evans* line of cases is inapplicable for the independent reason that the discriminatory awarding of seniority credits is not an adverse employment action in itself and cannot be challenged until acted upon. Indeed, neither AT&T nor the Solicitor General is able to cite a single case in the forty-year history of Title VII in which a court or the EEOC has entertained a charge of discrimination with respect to a service crediting decision.

A. Title VII Allows A Challenge To Discrimination Only When It Alters Compensation, Terms, Conditions, Or Privileges Of Employment.

Title VII does not prohibit every act of discrimination within the employment relationship. In balancing employees' interest in freedom from discrimination against employers' interest in running their businesses without undue federal regulation, Congress set an important threshold: Title VII prohibits discrimination when it amounts to an "adverse employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993). That is, the discrimination must alter the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).[9]

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[9] As petitioner does not appear to contest, the rule of *Evans* does not apply if the prior act of discrimination was

Employers make numerous decisions, and take a variety of actions, that may *someday* affect an employee's terms, conditions, or privileges of employment. An adverse performance review or a disciplinary warning can affect promotion and pay raise decisions. So can a decision to record an absence as unexcused. The way in which an employer counts and records productivity data – for example, how many units a worker produced or a salesman sold – may eventually result in the alteration of salary or bonuses. But the effect is not certain. The worker might not qualify for the promotion on other grounds, or may not apply for it. And the marginal difference in the employee's credited attendance, sales, or productivity may not be enough to have a concrete effect on her pay or other terms and conditions of employment.

For that reason, the mere act of discrimination in such cases is not sufficient to establish Title VII liability. Thus, this Court recognized in *Ledbetter* that even when an employee claims (as Ledbetter did) that she was denied a raise because of a discriminatory performance evaluation, the unlawful employment practice occurred not when the performance review was completed, but rather when the review had a concrete effect on the setting of her pay. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165, 2169-71 (2007); *Accord*, *e.g.*, *Taylor v. Small*, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003); *Oest*

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unchallengeable at the time because it did not rise to the level of an adverse employment action. *Evans* applies only if the plaintiff had, and forewent, a prior opportunity to challenge the employer's discriminatory conduct. *See Evans*, 431 U.S. at 558; Petr. Br. 30-31, 38-42.

v. Illinois Dep't of Corr., 240 F.3d 605, 612-13 (7th Cir. 2001); *Spears v. Missouri Dep't of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000); *see also* 29 C.F.R. § 1614.107(a)(5) (as applied to federal sector claims, an EEOC charge alleging only a "preliminary step to taking a personnel action" must be dismissed).

B. Discriminatory Recording Of Service Credits Does Not Immediately Or Necessarily Alter A Worker's Compensation, Terms, Conditions, Or Privileges Of Employment.

In this case, AT&T's discriminatory failure to record full service credit for pregnancy leave did not constitute an actionable unlawful employment practice because it had no immediate impact on respondents' compensation, terms, conditions, or privileges of employment, and any such future effect was inherently speculative.

To be sure, an employee may immediately bring a lawsuit when an employer alters the rules of a seniority system for a discriminatory purpose. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905-06 (1989). But AT&T does not claim respondents were required to challenge its seniority rules when they were adopted; instead, it argues that employees are allowed – indeed required – to bring a Title VII claim every time an employer applies a settled accrual rule to determine whether to record a particular period of leave as creditable service. That action does not change the terms of a seniority

system, as in *Lorance* and all the National Labor Relations Act cases AT&T cites.[10]

Nor does such discrimination necessarily change a worker's seniority or affect any of the rights greater seniority gives. In contending otherwise, AT&T confuses service credits with seniority. Competitive seniority rights generally arise from an employee's relative position in the workplace seniority hierarchy, not from the precise number of days of service credited by the employer. For instance, denying six weeks of service credit to a worker who is separated by two years of service from the next most junior and senior employees at the firm will not immediately change the worker's seniority because it will not alter her relative seniority position. And it might never do so.

At the same time, the effect of such a crediting decision on noncompetitive seniority benefits – like a pension – is also uncertain. Many employees leave the company before their pensions vest. The amount of credit at issue could have no effect on a worker's pension in a company that rounds years of service up

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[10] None of those cases discuss individualized service crediting decisions, but instead talk more broadly about the requirement of negotiating over a seniority system. *See* Petr. Br. 40-41.

The only NLRA decision of which respondents are aware that touches upon the denial of service credit suggests that an immediate challenge is not required. *See NLRB v. District 23, United Mine Workers of America*, 921 F.2d 645, 649 (6th Cir. 1990) (reviewing NLRB decision providing relief to worker who challenged lay off on basis of assertedly discriminatory denial of seniority credit years earlier, without questioning timeliness of claim).

(or down) for pension purposes, particularly given the relatively small amounts of time at issue here. And during the many years between the initial recording of pregnancy leave and the pension-setting decision, the employer may change its policies. It might, for example, decide to restore the withheld service credit, as AT&T always had the right to do, because it decides that providing equal treatment is the right thing to do, because it comes to believe that equality of treatment is legally compelled (by state or federal law), or as a result of negotiations with a union.[11]

Accordingly, any injury suffered by employees at the time of a crediting decision is distinctly abstract and conjectural.[12] Whether or not such harms would be sufficient to satisfy Article III standing, *cf.*, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983), they are hardly the stuff of the "adverse employment action" Congress established as a threshold for invoking the machinery of Title VII's administrative process or the federal courts' jurisdiction.

Indeed, as noted above, it was precisely the speculative effect of seniority discrimination that lead Congress to provide in Section 706(e)(2) that workers need not challenge discriminatory seniority

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[11] In addition, at the time of the service crediting decision, the benefit program may not even be in existence. *See, e.g.*, *Pallas v. Pacific Bell*, 940 F.2d 1324, 1326 (9th Cir. 1991) (pre-PDA crediting decision affected early retirement program instituted in 1987).

[12] This case is thus distinguishable from *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which the plaintiff's termination was an "*inevitable* . . . consequence of the denial of tenure." *Id.* at 257-58 (emphasis added).

systems until the discrimination affects their compensation or other job benefits. A contrary rule, Congress concluded, "forces the filing of speculative charges and produces unnecessary litigation before a practice has been applied to employees. It also causes needless strain on employment relationships." H.R. REP. NO. 102-40(I), at 60 (1991). The same would be true of a rule that requires an immediate challenge to discriminatory recording of service credits.

C. The Fact That AT&T May Have Relied On Its NCS Dates For Other Purposes Prior To Setting Respondents' Pensions Does Not Render Their Pension Discrimination Claims Untimely.

AT&T suggests that even if respondents could not challenge the adjustment of their NCS dates when made, they could have challenged the alteration at some point before they retired because "NCS seniority was used 'for many employment-related purposes, including job bidding, shift preference, layoffs [and] eligibility for certain benefit programs.'" Petr. Br. 44 (quoting J.A. 39 (¶ 19)). That argument also fails.

First, AT&T does not claim, and the summary judgment record does not show, that respondents were ever denied job bids or shift preferences, or were otherwise injured in any concrete way by the reduction in their NCS credits before the calculation of their pensions.

Second, and in any event, the fact that an employee has foregone one opportunity to challenge a discriminatory employment practice does not give the

employer license to repeat the discrimination in the future, and with respect to other aspects of the employment relationship. "[I]f an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed." *Ledbetter*, 127 S. Ct. at 2169. "In other words, a freestanding violation may always be charged within its own charging period regardless of its connections to other violations." *Id.* at 2174. Thus, if an employer relies on an intentionally discriminatory performance evaluation to deny a bonus and later relies on the same evaluation to select the worker for layoff, each decision would be independently actionable. So, too, in this case: a worker's failure to challenge AT&T's reliance on a discriminatory measure of service to deny a shift preference would not preclude the worker from later filing a timely challenge to AT&T's reliance on the same NCS date to establish her pension.

III. Construing The PDA To Prohibit Post-Act Reliance On Pre-Act Service Calculations Does Not Give The PDA An Impermissible Retroactive Effect.

AT&T also complains that by construing the PDA to prohibit it from relying on its pre-Act NCS date calculations, the court of appeals gave the PDA an impermissible retroactive effect. *See* Petr. Br. 15. That claim is meritless as well.

A. The Court of Appeals' Interpretation Of The PDA Does Not Give It Retroactive Effect.

1. The first consideration in determining whether a statute has a retroactive effect is whether

the relevant activity prohibited by the statute – the "retroactivity event" – occurred before or after the passage of the statute. That is, "[t]he critical issue . . . is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates." *Republic of Austria v. Altmann*, 541 U.S. 677, 697 n.17 (2004) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring)); *Landgraf*, 511 U.S. at 265 ("'[T]he legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*'" (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring))) (emphasis added). This is so because the "branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 46 (2006).

Here, the Ninth Circuit did not construe the PDA to "change[] the legal consequences of acts completed before its effective date." Petr. Br. 19 (quoting *Landgraf*, 511 U.S. at 269 n.23). The court of appeals made clear that AT&T was not liable for its failure to pay respondents equal disability benefits during their pre-PDA pregnancy leave. Pet. App. at 16a. Nor did the court hold that AT&T was liable for the act of failing to record that leave as creditable service when it was taken. Instead, the court construed Title VII to prohibit AT&T from relying on those prior crediting decisions when setting pensions at the end of respondents' careers, decades after the PDA took effect.

AT&T nonetheless complains that this construction of the PDA disrupts its ability "to rely on

[its previously] adjusted NCS dates when making pension . . . benefit decisions." Petr. Br. 18. That is true, but it does not make the statute retroactive. "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds v. United States*, 292 U.S. 443, 448-49 (1934); *see also Landgraf*, 511 U.S at 269; *Cox v. Hart*, 260 U.S. 427, 435 (1922). For example, a statute that forbade public universities from relying on the SAT test in future admission decisions would not have a retroactive effect even if the school had been planning on relying on such tests and even if the testing was entirely lawful when undertaken.

Nor is a statute retroactive simply because it requires a defendant to incur expenses it did not previously anticipate. *See*, *e.g.*, *Reynolds*, 292 U.S. at 449 (no retroactive effect to statute precluding hospital from deducting cost of care from veteran's pension, even as applied to costs already incurred as of date of statute's enactment); *Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 73-74 (1915) (no retroactive effect to statute requiring railroads to maintain specified drainage features on track beds, even with respect to tracks constructed before the Act).

The fact that AT&T had formerly marked respondents for future discriminatory treatment (by advancing their NCS dates) does not render retroactive the PDA's frustration of that intention. For example, if an employer had, in 1960, recorded in each worker's file a pension formula that provided half the benefits to women allowed to men with the same service, there should be no question that Title

VII would prevent it from implementing that formula when she retired in 2008. Nor should there be any complaint that this would give Title VII an impermissible retroactive effect.

Likewise, Title VII does not operate retroactively when it prohibits a law firm from refusing to promote a woman to partner because of her sex, even if the firm had, prior to the Act, classified her into a "nonpartnership" track. The frustration of the firm's plans to rely on that prior classification decision, and the attendant higher cost of equal treatment, is simply a natural consequence of the prospective operation of the statute.

This Court's decision in *Bazemore* similarly illustrates that a prospective law may require changes in the way individuals and corporations treat past events for purposes of post-Act decisionmaking, without implicating the presumption against retroactivity. Although the Court construed Title VII to preclude an employer from relying on pre-Act salaries in setting post-Act wages, nowhere did the Court (or anyone else) suggest that this gave Title VII a retroactive effect. This is true even though "the day *before* the [Act] took effect, it was lawful to rely on" the employer's prior discriminatory decisions in making pay decisions. Petr. Br. 18 (emphasis in original); *see also Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998).

Similarly, requiring AT&T to use a different, nondiscriminatory measure of employment service in setting pensions does not subject AT&T to liability for "a past act that [it] is helpless to undo." *Fernandez-Vargas*, 548 U.S. at 30. Instead, AT&T was held liable for its present-day decision to violate the PDA's core requirement of equal treatment in the

"receipt of benefits under fringe benefit programs." 42 U.S.C. § 2000e(k).[13]

2. That this particular application of the PDA involves pension benefits does not warrant a different conclusion.

As AT&T's amici note, this Court has declined to authorize money damages awards in rare instances in which this Court's construction of Title VII constitutes an unexpected and "substantial departure" from prior understandings, and damages would "threaten the security of both the [pension] funds and their beneficiaries." *Florida v. Long*, 487 U.S. 223, 233, 236 (1988); *see* ERIC Br. 9-12. But the question of appropriate remedies is not before the Court – it does not fall within the question presented, was not raised in AT&T's opening brief or petition for certiorari, was not addressed by either of the lower courts, and falls outside the scope of the certified interlocutory appeal.

The question here, instead, goes to the meaning of Title VII's non-discrimination requirement. And on such substantive questions, this Court has not hesitated to construe Title VII to prohibit even long-established benefit and pension practices. *See Arizona Governing Comm. for Tax Deferred Annuity*

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[13] As the court of appeals recognized, Congress's adoption of Section 706(e)(2) reinforces the conclusion that the PDA has no retroactive effect here, as applied to a facially discriminatory seniority system. *See* Pet. App. 19a-21a. But in the end, for the reasons set forth above, construing the PDA to prohibit reliance on intentionally discriminatory measures of service does not give the statute retroactive effect whether the discriminatory seniority date is the result of an individualized decision or a systemic policy.

and Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1079-86 (1983); *see also City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707-18, 710 (1978) ("[T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage.").

In any event, despite AT&T and its amici's alarmist predictions, there is no reason to think that a ruling in respondents' favor would have any substantial deleterious effect on the administration and solvency of pension funds.

First, neither AT&T nor its amici suggest that a significant number of employers discriminate in pension benefits against women who took pre-PDA pregnancy leave. Despite respondents' repeated challenges – *see* BIO 17-18; Resp. Supp. Br. 2-3 – neither AT&T nor the Solicitor General (who has access to the extensive records and experience of the EEOC) has come forward with any evidence of a widespread business practice of such discrimination.[14] For all that appears, if it was ever

[14] While the ERISA Industry Committee and the Equal Employment Advisory Council make generic predications of catastrophe, neither represents that any of its members actually apply AT&T's discriminatory policy, or identify any other businesses that do. Nor have other industry groups – for example, the National Chamber of Commerce – seen the issue as sufficiently important to their members to warrant participation in this case. Indeed, as far as respondents have been able to determine – without significant contradiction from petitioner, *see* Petr. Reply Br. 10-11 – the practice originated with the Bell Telephone companies and has been adopted by its predecessor corporations and some of its direct competitors in the telecommunications field.

true that many companies followed AT&T's practices, almost all have abandoned them, perhaps in the immediate aftermath of Title VII (when the EEOC and the lower courts construed Title VII to prohibit pregnancy discrimination)[15] or in response to state laws that have long been construed to prohibit such discrimination, notwithstanding this Court's decision in *Gilbert*.[16]

Second, rather than affecting all female employees, as in *Manhart* and *Long*, this case affects only women who took pregnancy leave prior to the PDA and have remained with the company long enough for their pension to vest.[17]

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[15] Prior to *Gilbert*, "[e]ighteen Federal district courts and all seven Federal courts of appeals which ha[d] considered the issue ha[d] rendered decisions prohibiting discrimination in employment based on pregnancy, in accord with the [EEOC] guidelines." H.R. REP. NO. 95-948, at 2 (1978).

[16] *See*, *e.g.*, *Badih v. Myers*, 43 Cal. Rptr. 2d 229, 232-33 (Cal. Ct. App. 1995); *Michigan Dep't of Civil Rights ex rel. Jones v. Michigan Dep't of Civil Serv.*, 301 N.W.2d 12, 16 (Mich. Ct. App. 1980); *Minnesota Min. and Mfg. Co. v. State*, 289 N.W.2d 396, 398-99 (Minn. 1979); *Castellano v. Linden Bd. of Ed.*, 400 A.2d 1182 (N.J. 1979); *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 86-88 (1976); *W. Middlesex Area Sch. Dist. v. Comm'r, Penn. Human Relations Comm'n*, 394 A.2d 1301, 1303 (Pa. Commw. Ct. 1978); *Ray-O-Vac, Div. of E.S.B, Inc. v. Wisconsin Dep't of Industry, Labor and Human Relations*, 236 N.W.2d 209, 215 (Wis. 1975).

[17] Moreover, under the court of appeals' interpretation, those who have already retired without filing charges of discrimination within 300 or 180 days of the setting of their pensions are precluded from seeking relief now. *See* Pet. App. 20a-22a.

Third, the financial consequences of nondiscriminatory pension treatment in this context are predictably modest. In most cases, the amount of service at issue is a few weeks or months in a career long enough for a pension to vest. Moreover, the difference in service credits would have little or no financial consequence for employers with pension formulas that round workers' terms of employment to the nearest year or month.[18] And the modest cost of equal treatment would be spread out over many years, as eligible women retire.

Thus, while the difference is significant to women living on fixed incomes, there is no reason to think that the price of that equality is more than pension plans can bear.

Fourth and finally, the PDA did little to disrupt settled expectations because, at most, the PDA "merely reestablish[ed] the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts . . . ." H.R. REP. NO. 95-948, at 8 (1978). And to the extent that *Gilbert* may have given AT&T reason to think that it could save money by reducing pensions, that message was short lived – Congress proposed legislation to overrule *Gilbert* three months after the decision and passed it less than two years later. *See* H.R. REP. NO. 95-948 at 4 (1978). That legislation has been on the books for more than thirty years, giving employers ample opportunity to prepare to meet its requirements as they begin to set the

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[18] *See*, *e.g.*, The Kansas Public Employees Retirement System Website, http://kpers.orgretirementkcj.htm#unreduced.

pensions of women who took pregnancy leave before its enactment.[19]

B. The PDA Did Not Change The Law As It Relates To AT&T's Conduct.

In any event, AT&T's retroactivity objection fails for the additional reason that it is based on the false premise that prior to the enactment of the PDA, Title VII permitted employers to discriminate on the basis of pregnancy with respect to seniority accrual. *See* Petr. Br. 16-18.

1. In *Gilbert*, this Court held that the denial of disability benefits to women on pregnancy leave did not violate Title VII. 429 U.S. at 145-46. Such discrimination, the Court held, was not disparate treatment on the basis of sex. *Id.* at 136. The Court acknowledged, however, that pregnancy discrimination might be shown to have an unlawful disparate impact on women, although no such showing was made in the case before it. *Id.* at 135.

One year later, this Court held in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), that a "policy of denying accumulated seniority to female employees returning from pregnancy leave" has such an illegal disparate impact. *Id.* at 139. In that case, an employee lost her accumulated seniority upon taking pregnancy leave. Upon her return, she was given a temporary position but was unable to obtain

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[19] The law has been particularly clear in the Ninth Circuit for more than seventeen years, since AT&T's predecessor-in-interest, Pacific Bell, lost its appeal in *Pallas* in 1991. *See Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert denied*, 502 U.S. 1050 (1992).

permanent employment because of her lack of seniority. *Id.* at 139. This Court held that the employer's policy of denying accumulated seniority to women returning from pregnancy leave – which was the cause of Satty's termination – violated Title VII. *Id.* at 143.

The Court first distinguished *Gilbert*, explaining that its refusal to find a disparate impact in that case turned on the fact that "[n]o evidence was produced to suggest that men received more benefits from General Electric's disability insurance fund than did women." *Id.* at 141. In contrast, the employer in *Satty* did not "merely refuse[] to extend to women a benefit that men cannot and do not receive, but [rather] imposed on women a substantial burden that men need not suffer." *Id.* at 142. That burden, the Court explained, was the deprivation "of employment opportunities" that flows from the loss of accumulated seniority. *Id.* Nothing in *Gilbert*, the Court concluded, would allow the Court to read Title VII "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.* Because the employer's seniority policy had a disparate impact on women, and because "there was no proof of any business necessity adduced with respect to the policies in question," the Court held the policy unlawful under Title VII. *Id.* at 143.

In enacting the PDA in 1978, Congress codified the result in *Satty* by prohibiting pregnancy-based discrimination in the administration of seniority systems and the payment of fringe benefits. At the same time, this Court has explained, Congress "not only overturned the specific holding in [*Gilbert*], but also rejected the test of discrimination employed by

the Court in that case." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983).

2. There can be no assertion that the *holding* of *Gilbert* controls this case. Respondents do not challenge the denial of disability benefits. Instead, they assert that AT&T violated Title VII by setting pensions in reliance upon a seniority system that denies equal seniority credit for pregnancy leave. That question is more directly addressed by the Court's decision in *Satty*.

AT&T asserts that *Satty* is inapplicable because "an award of service credit or seniority is indisputably a 'benefit.'" Petr. Br. 23. But this Court necessarily rejected that claim in *Satty*, holding that the withdrawal of seniority credits is not simply the denial of a benefit, but rather an action that deprives women "of employment opportunities because of their different role." 434 U.S. at 142. And although *Satty* involved the denial of accumulated seniority, the denial of the right to accumulate seniority has the same effect – it does more than simply deny women a special benefit relating to pregnancy; it can "deprive them 'of employment opportunities' and . . . 'adversely affect [their] status as an employee.'" *Id.* at 141. Whether seniority credits are withheld or taken away, the discrimination can deny a woman "specific employment opportunities that she otherwise would have obtained," including in some cases, the "attendant relegation to less desirable and lower paying jobs, for the remainder of her career." *Id.* Moreover, both the denial of the right to keep, and to

accumulate, seniority credit can have an impact on forms of compensation, including pensions.[20]

3. In addition, AT&T's request that this Court extend the rationale of *Gilbert* beyond its holding is precluded by *Newport News*. In that case, the Court considered whether Title VII permitted an employer-provided insurance plan to exclude pregnancy coverage for the wives of male employees. The PDA itself addresses only pregnancy discrimination against employees; it is silent as to pregnancy discrimination against workers' spouses. *See* 42 U.S.C. § 2000e(k); *Newport News*, 462 U.S. at 687-88 (Rehnquist, J., dissenting). Accordingly, the question before the Court was not whether the PDA prohibited the employer's conduct, but whether Title VII's pre-existing prohibition against sex discrimination permitted such a policy. *See Newport News*, 462 U.S. at 675-76. Thus, the Court was faced with the same basic question posed here – whether the rationale of *Gilbert* should be applied to construe Title VII's general, pre-PDA proscription against sex discrimination.

This Court held that it should not. *Newport News*, 462 U.S. at 676. Although the Court recognized that the PDA did not, on its own terms, apply to the case before it, the Court noted that the PDA unambiguously reflected Congress's rejection of

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[20] This does not mean that the discriminatory denial of service credits is immediately challengeable. *See supra* 30-36. *Satty* did not discuss when the claim for unlawful seniority discrimination accrues. And, in fact, the employee in *Satty* did not file her charge of discrimination until her lost seniority prevented her from obtaining a permanent position upon returning from leave. 434 U.S. at 139.

both the holding and rationale of *Gilbert*. *Id.* at 678-79. For that reason, it declined to extend *Gilbert*'s test for disparate treatment outside the facts of that case. *Id.* at 684-85. As then-Justice Rehnquist observed in dissent, the decision reflected that, as a practical matter, "the Court . . . is now overruling *Gilbert*." *Id.* at 686.

C. The Court Of Appeals Properly Construed The PDA.

Other than complaining that the court of appeals' decision gives the PDA an impermissible retroactive effect, AT&T offers no other objection to the court's conclusion that Title VII as amended precludes discriminating against pre-PDA leave-takers in making post-PDA benefit decisions. *See* Petr. Br. 20-21. Accordingly, if the Court rejects AT&T's retroactivity challenge, the Court may accept, without deciding, that the PDA does in fact apply to prohibit that reliance.

In any event, even if AT&T were allowed to advance new objections to the court of appeals' reading of the statute for the first time in its reply brief, any such objection would be unfounded.

1. The text of the PDA expressly reaches AT&T's pension-setting decisions. In commanding that women affected by pregnancy "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," 42 U.S.C. § 2000e(k), Congress could not have been clearer that all post-enactment benefit decisions must ensure equal treatment regardless of pregnancy. The only basis the statute provides for unequal treatment is

differences in workers' "ability or inability to work," leaving no room for any argument that the Act nonetheless permits distinctions between those who took leave before and after the PDA's effective date.

2. The purpose and legislative history of the PDA support this reading.

Congress was painfully aware of the hardships visited upon American families when women who took pregnancy disability leave were financially disadvantaged as a result. *See*, *e.g.*, S. REP. NO. 95-331, at 9 (1977). The focus of the legislation – as reflected in its text – was upon ensuring equal "receipt of benefits" by workers "similar in their ability or inability to work," factors upon which the date of pregnancy leave has no bearing.

The legislative history also demonstrates that Congress believed that, as applied to discriminatory denial of service credit, the PDA simply codified existing law as established by this Court's decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Thus, the House Report explained that:

> Regarding seniority, the Supreme Court recently held in the *Satty* case that *denying seniority to absent pregnant employees during leave* as well as denying competitive seniority for job bidding when they return, does impose a substantial burden on women and is therefore prohibited by Title VII.

H.R. REP. NO. 95-948, at 6 (1978) (emphasis added). As discussed above, that understanding of *Satty* was well-founded. *See infra* 44-48. But for present purposes, it is enough that Congress believed (rightly or wrongly) that it was simply codifying pre-existing law in this context. Given that understanding, Congress would have had every expectation that the

PDA would not exempt from protection employees who took pregnancy leave before the PDA was enacted.

3. The fact that Congress delayed implementation of the PDA, as it applied to fringe benefit payments, does not undermine the court of appeals' conclusion. That delay simply reflected Congress's recognition that this Court's decision in *Gilbert* had relieved employers of the obligation to pay equal disability benefits and drew into question their obligation of equal treatment in other fringe benefit programs as well. *See* H.R. REP. NO. 95-948, at 3 (1978). The delay was intended simply to give employers time to adjust their practices; it did not reflect any intent to permanently disentitle women who took pre-PDA pregnancy leave from equal benefit treatment.

Indeed, as noted above, the legislative history makes clear that Congress believed that discrimination with respect to seniority accrual had always been unlawful under Title VII and, for that reason, the delay of the implementation of the PDA's fringe benefit provision did not displace employers' pre-existing obligation to allow women on pregnancy leave to accrue service credits at the same rate as other similarly situated workers. The House Report explains that "Section 2(a) provides for an immediate effective date insofar as the bill affects employment policies other than fringe benefits, including . . . denying seniority." *See* H.R. REP. NO. 95-948, at 8. "Many, if not all such policies," the report explained, were "presumably invalid under present law as interpreted by *Satty*." *Id.*

If anything, the delayed implementation date in Section 2(a) undermines AT&T's construction of the

Act. It demonstrates that Congress was aware that guaranteeing equal benefit treatment would impose costs that employers may not have been planning to bear after the Court's decision in *Gilbert*. But Congress did not respond to that fact by grandfathering established discriminatory practices or by phasing in the Act to apply only to those hired after its enactment. Instead, Congress gave employers 180 days to adjust their policies and budgets. When those 180 days expired thirty years ago, AT&T lost any ground it could have had for denying equal pensions to retiring workers.

IV. AT&T's Discriminatory Seniority Policy Is Not Immunized From Challenge By Section 703(h).

AT&T's reliance on Section 703(h) is misplaced because that provision does not protect a facially discriminatory seniority system like AT&T's and because, in any event, the provision does not apply to claims of pregnancy discrimination in fringe benefit programs.

1. AT&T acknowledges that Section 703(h) does not protect a facially discriminatory seniority system. *See* Petr. Br. 3; *see also United Air Lines, Inc. v. Evans*, 431 U.S. 553, 560 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 760 n.16 (1976); *cf. TWA, Inc. v. Thurston*, 469 U.S. 111, 124-25 (1985) (same for parallel provision of Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2)). And as

described above, AT&T's seniority system is facially discriminatory.[21]

2. In any event, Section 703(h) does not apply to claims of fringe benefit discrimination under the PDA.

The language of the PDA is clear: "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . and *nothing in section [703(h)] of this title shall be interpreted to permit otherwise*." 42 U.S.C. § 2000e(k) (emphasis added).[22] In this case, AT&T argues that even if it is otherwise guilty of violating this requirement of equal fringe benefit treatment, the Court should interpret Section 703(h) "to permit otherwise." That request simply cannot be squared with the plain language of the statute.

AT&T points to what it says is equally emphatic language in Section 703(h), stating that the provision provides a defense "notwithstanding any other provision of this subchapter." Petr. Br. 49 (citing 42 U.S.C. § 2000e-2(h)). But at most, this establishes a textual conflict between Section 703(h) and the PDA.

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[21] The Solicitor General's reliance (U.S. Br. 20 n.5) on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), is misplaced. That decision makes clear that a seniority system may be "bona fide" even if it perpetuates past discrimination. But it does not hold that a seniority system like AT&T's, the rules of which are facially discriminatory, is protected from challenge under Section 703(h).

[22] Because this case involves fringe benefit discrimination, the Court need not decide whether the PDA excludes reliance on Section 703(h) in cases involving other forms of pregnancy discrimination (such as refusal to hire).

And this Court's decisions are clear that any such conflict must be resolved in favor of the more recent, and more specific mandate of the PDA, which directly addresses the applicability of Section 703(h). *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (A "'specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.'") (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)).

AT&T delves into the legislative history in an attempt to show that Congress did not really mean what it said. But because the language of the PDA is unambiguous, there is no need to turn to the legislative history to aid in its interpretation. That history, moreover, does not support a counter-textual reading of the statute. To be sure, the legislative history reflects that Congress was concerned that courts not read the language in Section 703(h), arising from the Bennett Amendment, as an excuse for allowing pregnancy discrimination. Petr. Br. 52-53. But Congress plainly responded to that concern by enacting a provision that made the entirety of Section 703(h) – not simply its last sentence – inapplicable. *See* 42 U.S.C. § 2000e(k).

That decision was understandable. An employer can comply with the PDA's requirement of equal fringe benefit treatment without disrupting the settled expectations of other workers, the principal evil at which Section 703(h) is aimed. *See*, *e.g.*, *Bowman Transp. Co.*, 424 U.S. at 758-62 (describing purposes of provision); *id.* at 773 & n.33 (noting that the concern about interfering with the interests of other employees "has no application" with respect to awards of "pension benefits").

V. Respondents' View Is Consistent With The Interpretation Given Title VII By The Agency Charged With Its Enforcement.

Lest there be any doubt concerning the proper resolution of this case, the court of appeals' decision also comports with the long-held and consistent views of the EEOC, the agency Congress tasked with the administration and enforcement of Title VII and the PDA. As the agency entrusted by Congress to enforce Title VII, the Commission's views are entitled to respect. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991).

Shortly after Title VII's enactment in 1964, the EEOC issued Guidelines providing that "employment policies and practices involving matters such as . . . *the accrual of seniority* and other benefits and privileges . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disability." 29 C.F.R. § 1604.10 (1973).[23]

When Congress enacted the PDA, the Commission again issued Guidance reiterating its view that Title VII had always prohibited pregnancy discrimination with respect to seniority. The

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[23] This Court declined to defer to these regulations in *Gilbert* to the extent they addressed denial of equal disability benefits because they conflicted with other guidance the Commission and the Department of Labor had issued on that question. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976). However, no such conflict exists with respect to seniority discrimination. And, in fact, this Court relied on this regulation as applied to the denial of accumulated seniority in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977).

Guidance explained that to "the extent that Title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights." Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604, App. (1978) (Answer to Question 1). "For example," the Commission continued, "Title VII has always prohibited an employer . . . from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves." *Id.* As a result, although the effective date of the PDA was postponed "[w]ith respect to payment of benefits," the Commission took the view that "[w]ith respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention and accrual of seniority . . . equality of treatment was required by Title VII without the Amendment." *Id.* (Answer to Question 2).

The Commission's current Compliance Manual continues to provide that "employers must treat pregnancy-related leaves the same as other medical leaves in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement." EEOC Compliance Manual, ch. 3, Employee Benefits, Title VII/EPA Issues III.B (Oct. 3, 2000). And consistent with its long-held view that Title VII contained this requirement even before the PDA, the Commission has explained that "[t]hese principles also apply to pregnancy-related leaves taken before the effective date of the PDA, where an employer uses years of service to establish eligibility for retirement benefits." *Id.* The Manual proceeds to give an example materially indistinguishable from this case,

and instructs that the employee's "claim is timely and states a violation of the PDA." *Id.*[24]

The Commission has acted upon that position in litigation,[25] repeatedly suing employers for administering seniority and pension policies indistinguishable from AT&T's, *see AT&T v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001) (collecting cases), and filing amicus briefs supporting private litigants advancing the same claims, *see id.*, including in this case, *see* J.A. 121-46.

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[24] In the course of explaining that the employer in the example engaged in a present violation of Title VII, the Manual assumes in passing that the "denial of service credit to women on maternity leave was not unlawful" when the leave was taken. *Id.* That position is consistent with respondents' view that the discriminatory denial of service credits, standing alone, does not violate Title VII. In any case, it should not be read to cast doubt on the Commission's prior, and long-standing, view that even before the PDA, Title VII prohibited pregnancy discrimination in the administration of seniority systems.

[25] The fact that the Commission has not filed or signed on to a brief in this Court does not cast doubt on its position. *See Smith v. City of Jackson*, 544 U.S. 228, 243-45 (2005) (Scalia, J., concurring) (deferring to EEOC position even though Commission did not file brief). Although employees of the Commission may have decided to make no recommendation to the Solicitor General, see U.S. Br. 9 n.1, there is no indication that the Commission itself was consulted or that it has taken any action to reconsider the position it continues to hold out to the public in its regulations and Compliance Manual. (The records of the meetings for the Commission, which reflect no such consultation or consideration, are available at http://www.eeoc.gov/abouteeoc/meetings/index.html).

As described above, that view comports with the plain reading of the text of the statute, as well as the manifest purposes of Title VII and the PDA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, sitting en banc, should be affirmed.

Respectfully submitted,

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APPENDIX

FEDERAL STATUTES

Title VII of the Civil Rights Act of 1964 provides, in relevant part:

42 U.S.C. § 2000e: Definitions

* * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * * *

[Note] Effective Date of 1978 Amendment; Exceptions to Application

Section 2 of Pub. L. 95-555, 92 Stat. 2077, provides that:

(a) Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

(b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act. . . .

Approved October 31, 1978.

* * * *

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if

such differentiation is authorized by the provisions of section 206(d) of title 29.

* * * *

42 U.S.C. § 2000e-5. Enforcement provisions

* * * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such

charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

* * * *

FEDERAL REGULATIONS

29 C.F.R. § 1604.10(b) (1973), provides, in relevant part:

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 App. (1978), provides, in relevant part:

1. Q. What is the effective date of the Pregnancy Discrimination Act?

A. The Act became effective on October 31, 1978, except that with respect to fringe benefit programs in effect on that date, the Act will take effect 180 days thereafter, that is, April 29, 1979.

To the extent that Title VII already required employers to treat persons affected by pregnancy-

related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to October 31, 1978, or April 29, 1979. Most employment practices relating to pregnancy, childbirth and related conditions--whether concerning fringe benefits or other practices--were already controlled by Title VII prior to this Act. For example, Title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves.

2. Q. If an employer had a sick leave policy in effect on October 31, 1978, by what date must the employer bring its policy into compliance with the Act?

A. With respect to payment of benefits, an employer has until April 29, 1979, to bring into compliance any fringe benefit or insurance program, including a sick leave policy, which was in effect on October 31, 1978. However, any such policy or program created after October 31, 1978, must be in compliance when created.

With respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention and accrual of seniority, credit for vacation, and resumption of former job on return from sick leave, equality of treatment was required by Title VII without the Amendment.

COMPLIANCE MANUAL

EEOC Compliance Manual, ch. 3, Employee Benefits, Title VII/EPA Issues III.B (Oct. 3, 2000), provides in relevant part:

Employers must allow women who are on pregnancy-related leaves to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. Thus, if an employer allows employees who take medical leave to retain their accumulated seniority and to accrue additional service credit during their leaves, the employer must accord the same treatment to women on pregnancy-related leaves. Similarly, employers must treat pregnancy-related leaves the same as other medical leaves in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement.

These principles also apply to pregnancy-related leaves taken before the effective date of the PDA, where an employer uses years of service to establish eligibility for retirement benefits.

EXAMPLE - CP took maternity leave in 1975, before passage of the PDA. At the time, her employer's policy denied any accrual of service credit during maternity leaves, although it permitted employees on leave for other medical reasons to accrue service credit during their leaves. Although the employer changed its policy in 1979 to conform to the PDA and to treat maternity leave similarly to other medical leaves, it never gave CP credit for her pre-PDA leave.

In 1996, CP's employer implements an incentive program that authorizes employees with 25 or more years of service to take early retirement with full pensions. Because she took a maternity leave for which she accrued no years of service credit, CP falls short of the 25 year service requirement and files a charge challenging discrimination on the basis of pregnancy.

CP's claim is timely and states a violation of the PDA. In evaluating eligibility for early retirement in 1996, the employer has distinguished between 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. While the denial of service credit to women on maternity leave was not unlawful when CP took her leave in 1979, the employer's decision to incorporate that denial of service credit in calculating seniority in 1996 is discriminatory.