No. 07-543

IN THE

Supreme Court of the United States

AT&T CORPORATION,
Petitioner,

v.

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

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

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief urges reversal of the decision below and thus supports the position of Petitioner AT&T Corporation before this Court.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or their counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. ("Title VII"), and the other various statutes, federal orders, and regulations pertaining to nondiscriminatory employment practices. Most of EEAC's members have programs or policies whose eligibility requirements depend upon the length of service of employees. Also, many members have voluntary or collectively-bargained seniority systems where length-of-service requirements determine benefit eligibility or the relative benefit and employment status among covered employees under the system.

Thus, EEAC members have a direct interest in the issues presented for the Court's consideration in this case. The *en banc* Ninth Circuit held that AT&T violated Title VII when it calculated the individual respondents' retirement benefits based on accrued net credited service which did not include full credit for pregnancy leave taken prior to passage of the

Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k). The court below rejected AT&T's argument that the company's policy of awarding only partial service credit for pregnancy leave was legal when it occurred and had no present legal consequences when respondents sought to retire. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

EEAC's members are concerned that the Ninth Circuit's opinion departs from settled law and threatens to cause significant confusion. Employers with length-of-service requirements will face great uncertainty when computing benefit eligibility, because they cannot accurately predict when events that occurred in the distant past will resurface as the basis for challenging their benefit determinations. In addition, the rights of other employees whose own eligibility will be affected by service computations will be disrupted if the decision is allowed to stand. Indeed, major unforeseen demands on pension funds could have a potentially disruptive impact on available retirement funds.

Because of this interest, EEAC participated as *amicus curiae* in several of the cases that will be considered in this case. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Bazemore v. Friday*, 478 U.S. 385 (1986); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *superseded on other grounds*, 42 U.S.C. § 2000e-5(e)(2); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). EEAC also has filed briefs in a number of other relevant cases involving the interpretation of Title VII's timely filing requirements under Section 706(e), 42 U.S.C.

§ 2000e-5(e).[2] Moreover, EEAC has briefed numerous cases involving an analysis of the special protections that § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides to bona fide seniority systems.[3]

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

AT&T[4] uses a "net credited service" (NCS) seniority system to determine each employee's eligibility for a retirement pension and the amount of that pension, as well as other benefits. Pet. App. 66a. An employee's first day of employment becomes his or her initial NCS date. *Id.* During employment, the NCS date is adjusted forward based on actual time worked. *Id.*

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[2] *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980); *EEOC v. Commercial Office Prods. Co*, 486 U.S. 107 (1988).

[3] *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

[4] AT&T is the successor in interest to Pacific Telephone & Telegraph (PT&T), Respondents' original employer.

Before August 7, 1977, AT&T lawfully classified pregnancy leave as a "personal" leave of absence. *Id.* Employees who took personal leave of absence received NCS credit for only the first thirty days of leave, regardless of the actual length of the leave period. *Id.* Employees on paid temporary disability leave, in contrast, received full service credit for the entire time they were out of work. *Id.* at 66a-67a. Thus, pregnancy leave, but not disability leave, was subject to the 30-day service credit cap. *Id.* at 67a.

On August 7, 1977, AT&T began crediting women who took pregnancy leave with up to thirty days of service credit for leave taken before delivery and up to six weeks for leave taken after delivery. *Id.* When the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), took effect on April 29, 1979, AT&T began giving employees full service credit for pregnancy leave, just as it did for disability leave. *Id.* The company did not, however, retroactively adjust NCS dates to grant service credit for pregnancy leave taken prior to the effective date of the PDA. *Id.*

Respondents are four former or current employees of AT&T and their union, the Communications Workers of America, AFL-CIO (CWA). *Id.* at 66a. The individual respondents took pregnancy leaves of absence prior to passage of the PDA, and thus received less than full service credit for that time. *Id.* Accordingly, their retirement benefits are somewhat less than they would have been had AT&T granted them full service credit for their pregnancy leave. *Id.* at 68a-69a. Respondents sued AT&T under Title VII, contending that the company discriminated against them on the basis of sex when calculating their retirement benefits by not retroactively granting

them service credit for the full duration of their pregnancy leave. *Id.* at 69a.

The parties stipulated to the facts and filed cross-motions for summary judgment. *Id.*; Pet. App. 105a. The district court concluded that it was bound by the Ninth Circuit's decision in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), which invalidated the same NCS calculation system at issue in this case, and granted plaintiffs' motion for summary judgment. *Id.* at 106a. A three-judge panel of the Ninth Circuit reversed, holding that to the extent *Pallas* gave the PDA retroactive effect, it no longer is controlling in light of this Court's subsequent decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which held that absent express congressional intent to do so, a statute should not be read to apply retroactively. Pet. App. 64a-85a.

On rehearing, a divided Ninth Circuit *en banc* panel expressly reaffirmed *Pallas*, holding again that AT&T's failure to retroactively grant service credit for pre-PDA pregnancy leave in calculating the individual respondents' retirement benefits violates Title VII. Pet. App. 1a-63a. The majority explicitly disagreed with decisions of the Sixth and Seventh Circuits to the contrary. Pet. App. 27a n.11 (rejecting *Ameritech Benefit Plan Comm. v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), and *Leffman v. Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007)). Judge O'Scannlain, joined by three others, dissented, concluding that "*Pallas* invented a timely Title VII violation where the determination of benefits simply gave present effect to past, unchallenged acts, contrary to Supreme Court authority. . . ." Pet. App. 63a, and that "*Pallas* was wrong then and is wrong now." Pet. App. 29a.

AT&T filed a petition for certiorari with this Court on October 22, 2007, which was granted on June 23, 2008.

SUMMARY OF ARGUMENT

Employment actions long past are not actionable. This Court in *United Air Lines v. Evans* ruled that an alleged discriminatory act that has not been made the subject of a timely charge "is the legal equivalent of a discriminatory act which occurred before the statute was passed," or in other words, "merely an unfortunate event in history which has *no present legal consequences*." 431 U.S. 553, 558 (1977) (emphasis added). Since *Evans*, the Court has applied this rule consistently, in *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980) ("[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination"); in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989) ("a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations" is not actionable), *superseded on other grounds*, 42 U.S.C. § 2000e-5(e)(2); in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges"); and most recently in *Ledbetter v. Goodyear Tire & Rubber Co.,* 127 S. Ct. 2162, 2172 (2007) ("[w]e therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period"). Thus, even a challenge

to a discriminatory act is time-barred absent a timely charge of discrimination.

Here, the AT&T policy being challenged was not even unlawful, absent retroactive application of the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k). And the PDA is not retroactive. *Landgraf*, 511 U.S. at 257 n.10. Indeed, AT&T's calculation of respondents' retirement benefits is simply the application of a facially neutral seniority system, which is immune to challenge under Title VII. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 352-53 (1977).

A decision requiring retroactive awarding of service credit would disrupt existing pension plan funds and jeopardize the benefits available to employees and former employees covered by these plans. "Retroactive liability could be devastating for a pension fund" and, just as importantly, the "harm would fall in large part on innocent third parties." *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (footnote omitted).

Furthermore, because the use of length-of-service requirements is a staple of corporate employee benefit policies, a retroactivity requirement would severely upset other programs as well, such as those involving eligibility for promotions, severance pay, holidays, sick leave, group life and hospitalization insurance and health and welfare plans, selection for layoffs and priority for rehiring, shift preference, distribution of overtime work, transfers, vacation privileges, and selection of days off.

Moreover, a decision requiring employers to grant service credit for leave taken many years ago also would impose upon employers the burden of de-

fending against long stale claims, a result this Court has rejected repeatedly. *Ledbetter*, 127 S. Ct. at 2170-71 (citations omitted).

ARGUMENT

I. NEITHER PASSAGE OF THE PREGNANCY DISCRIMINATION ACT NOR SUBSEQUENT APPLICATION OF A NEUTRAL SENIORITY SYSTEM CAN RENDER UNLAWFUL SERVICE CREDIT DETERMINATIONS THAT WERE LAWFUL WHEN MADE

A. Under This Court's Decisions From *United Air Lines v. Evans* To *Ledbetter v. Goodyear*, Lingering Consequences Of Past Acts Have No Legal Effect

The Ninth Circuit below held that AT&T violated Title VII in 1994, and in various years thereafter with respect to the other individual respondents, by not crediting Respondents with service credit for pregnancy leave taken between 1966 and 1976. Because denial of such credit was permissible when the leave was taken, however, AT&T did not discriminate by applying its neutral seniority system to determine the proper amount of pension benefits for each Respondent. Accordingly, EEAC respectfully submits that this Court should reverse the decision below and adopt the reasoning of the Sixth and Seventh Circuits in *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), and *Leffman v. Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007).

As did *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007), this case "calls upon

[the Court] to apply established precedent in a slightly different context." This Court consistently has held that the lingering consequences of past acts, even past discriminatory acts, have no present legal effect and thus are not actionable. *United Air Lines v. Evans*, 431 U.S. 553 (1977), involved a situation strikingly similar to the instant case. The plaintiff there worked as a flight attendant from 1966 to 1968. When she married in 1968, she was required to resign under United's policy of refusing to allow its female flight attendants to be married. In 1972, United rehired Evans as a new employee. She was not given any seniority credit for her prior service, and "for seniority purposes, she [was] treated as though she had no prior service with United." 431 U.S. at 555 (footnote omitted).

Evans claimed that United was guilty of a present violation of Title VII because it did not give her credit after her rehire for service prior to her forced resignation in 1968. The Court explained that assuming her 1968 separation violated Title VII, "the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [when she was rehired]." *Id.* at 554. As the district court there noted, Evans was "seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation." *Id.* at 556 n.8.

This Court held that Evans had failed to file a timely charge of discrimination. 431 U.S. at 558 ("United Air Lines was entitled to treat that past act *as lawful* after respondent failed to file a [timely] charge") (emphasis added). The Court also rejected Evans' claim that her employer's failure to credit her

with past seniority could be considered a "present *violation*." *Id.* (emphasis added). An alleged discriminatory act that has not been made the subject of a timely charge, the Court held, "is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* Thus, the act was "merely an unfortunate event in history which has *no present legal consequences*." *Id.* (emphasis added).

Subsequent decisions of this Court have followed this principle. In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), this Court declined to allow an employee to challenge his denial of tenure at the time his employment was to be terminated—after the limitations period for filing a charge had expired—even though he did not feel the effects of the decision until his termination. Applying *Evans*, this Court explained that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257 (citation omitted). It found that "[the] proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added in *Ricks*).

Similarly, in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), *superseded on other grounds*, 42 U.S.C. § 2000e-5(e)(2), this Court concluded that "[l]ike Evans, petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing

violation." *Id.* at 908.[5] Relying again on *Evans* and *Ricks*, the Court restated this principle in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), concluding that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."

This Court recently reaffirmed *Evans, Ricks, Lorance*, and *Morgan* in *Ledbetter v. Goodyear Tire & Rubber Co.,* 127 S. Ct. 2162 (2007). Ledbetter sought to challenge pay decisions made throughout her nearly twenty-year career on the theory that the sum total led to her being paid substantially less than her male colleagues. Quoting the "no present legal consequences" statement from *Evans*, this Court said that "[i]t would be difficult to speak to the point more directly." *Id.* at 2168. Accordingly, this Court concluded in *Ledbetter* that "[w]e therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period." 127 S. Ct. at 2172.

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[5] Indeed, even the dissenting opinion in *Lorance* cited the *Evans* decision as applying where there is no allegation that the seniority system itself is discriminatory. 490 U.S. at 917. In the instant case, there can be no valid claim that the seniority system was adopted with a discriminatory intent.

Also, section 112 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e) (amended), does not affect the viability of this part of the *Lorance* decision, as section 112 merely deals with the timeliness of a charge alleging that a "seniority system was adopted with an intentionally discriminatory purpose." *Evans, Ricks,* and the reasoning of the *Lorance* decision remain in place. *Ledbetter*, 127 S. Ct. at 2169 n.2.

Importantly, this Court in *Ledbetter* distinguished its decision in *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam), rejecting the contention that *Bazemore* compels a different approach in compensation cases. *Bazemore* involved a facially discriminatory pay system that predated Title VII but continued after Title VII was passed. As the Court explained in *Ledbetter*, the employer in *Bazemore* committed a present violation of Title VII by paying employees of one race less than employees of another. *Bazemore* does not "stand[] for the proposition that an action not comprising an employment practice and alleged discriminatory intent is separately chargeable, just because it is related to some past act of discrimination." *Ledbetter*, 127 S. Ct. at 2174. On the contrary, "Title VII imposed 'no obligation to catch-up,' *i.e.*, affirmatively to remedy present effects of pre-Act discrimination, whether in composing a work force or otherwise." *Id.* at 2174 n.5 (quotations in original). Indeed, the *Bazemore* Court was careful to note, consistent with *Evans*, that it was "in no sense giv[ing] legal effect to pre-[Act] actions," or acts otherwise not actionable, but instead was "focuse[d] on the present salary structure." 478 U.S. at 396 n.6.

This Court consistently has held that past acts, even discriminatory ones, have "no present legal consequences." AT&T's policy before 1978 to grant less service credit for pregnancy leave than for disability leave—even if it were unlawful at the time—thus has no legal effect today.

B. Because The Pregnancy Discrimination Act Is Not Retroactive, A Policy That Awarded Only Partial Service Credit For Pregnancy Leave Prior To Its Effective Date Cannot Violate Title VII

As noted above, past acts, even unlawful ones, are not actionable once the limitations period has ended. In the instant case, the company policy in question, which afforded only partial service credit for pregnancy leave, was not even unlawful at the time it was applied.

In *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976), this Court ruled that exclusion of pregnancy from a disability benefits plan was "not gender-based discrimination at all." It was not until Congress passed the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k), which amended Title VII's definition of sex discrimination to include discrimination on the basis of "pregnancy, childbirth or related medical conditions," 42 U.S.C. § 2000e(k), and added nondiscrimination against "women affected by pregnancy" as to the "receipt of benefits under fringe benefit programs," that such a policy became unlawful. *Id*. When the PDA took effect on April 29, 1979, AT&T promptly changed its policy to comply with the requirements of the new law.

Thus, even if the current consequences of AT&T's policy were somehow actionable, which they are not under *Evans, Ricks, Lorance, Morgan,* and *Ledbetter*, the policy could not constitute unlawful discrimination under the PDA. There is a general presumption against the retroactive application of statutes, and "prospectivity remains the appropriate default rule" unless Congress has clearly indicated

that a statute is to have retroactive application. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

The PDA was intended to be prospective only and not to apply to events occurring prior to its enactment. As this Court has stated, "[t]he [PDA] amendment to Title VII became effective on the date of its enactment, October 31, 1978, but its requirements did not apply to any then-existing fringe benefits program until 180 days after enactment—April 29, 1979." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 671 n.2 (1983) (citation omitted). This language is a clear indication from Congress that the PDA was not intended to be retroactive. *Landgraf*, 511 U.S. at 257 n.10.

The Ninth Circuit was simply wrong in concluding that pregnancy discrimination was always prohibited by Title VII and that *Gilbert* was simply a temporary aberration. Pet. App. 11a-12a n.6. Under the doctrine of separation of powers, while the Congress makes the laws, it is the judiciary's exclusive authority to interpret them. "It is this Court's responsibility to say what a statute means . . . . A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express*, *Inc.*, 511 U.S. 298, 312-13 (1994) (footnote omitted). Congress cannot "legislatively overrule" a court decision; at most, it can amend the underlying statute. It may, subject to constitutional constraints, make the amendment retroactive, in an attempt to reach conduct prior to the amendment. But as this Court has pointed out, "[e]ven when Congress intends to supersede a rule of law embodied in one of our

decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the 'corrective' amendment must clearly appear." *Id.* at 313.

Accordingly, AT&T's leave policy when it was applied was not unlawful when it took effect, and subsequent legislation did not make those past practices unlawful. This Court held in *Evans* and its progeny that a Title VII violation could not be premised on the current effects of past discrimination. There is an even stronger argument in the instant case to apply the same rule when the act complained of was not even unlawful at the time.

C. Application Of A Facially Neutral Seniority System Based In Part On Lawful Service Credit Awards Thus Does Not Violate Title VII

When it calculated Respondents' retirement benefits, AT&T simply applied a facially neutral seniority system based on service credit awards that were lawful when made. Even if the policy granting only partial service credit for pregnancy leave had been unlawful at the time, the notion that present application of a seniority system on that basis constitutes a current Title VII violation was rejected by this Court three decades ago. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

In Title VII, Congress "afforded special treatment" to seniority systems. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). Section 703(h) provides in pertinent part that "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 . . . , provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(h). In so doing, Congress made explicit that it did not intend to "destroy or water down the vested seniority rights of employees" under neutral seniority systems. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353 (1977). As the Court stated in *Teamsters*:

> [O]ur reading of the legislative history [of Title VII] compels us to reject the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be 'bona fide.' *To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted*. It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. The consequence would be a perversion of the congressional purpose.

Id. (emphasis added). As the Court went on to explain, even a length-of-service requirement that perpetuates the effects of pre-Act discrimination will not violate Title VII:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of

> employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Id. at 352-53.

Although Title VII does not define the term "seniority system," this Court has held that the term should be defined broadly:

> In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase. . . . [T]he principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

California Brewers Ass'n v. Bryant, 444 U.S. 598, 605-06 (1980) (footnotes omitted). Thus, the length-of-service feature "promotes stability and certainty among employees, furnishing a predictable method by which to measure future employment position." 444 U.S. at 614 (Marshall, J., dissenting).

At the time it calculated respondents' retirement benefits, AT&T merely applied a numerical calculation to the amount of service credit accrued by each person, based on net credited service. The calculation was no different for respondents than it was for every other employee.

For this reason, the 1991 amendment to Title VII addressing the *Lorance* decision does not apply to the instant case. That amendment provides that in the case of "a seniority system that has been adopted for

an intentionally discriminatory purpose," an action is still viable "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). As this Court made clear in *Teamsters*, application of a seniority system that may give present effect to past discrimination does not constitute a current violation of Title VII.

Accordingly, this Court need only apply its existing precedent to conclude that AT&T's actions did not violate Title VII and thus reverse the Ninth Circuit's decision in this case.

II. ALLOWING CHALLENGES TO LONG-STANDING SERVICE CREDIT POLICIES WOULD DISRUPT THE ADMINISTRATION OF SENIORITY AND LENGTH OF SERVICE SYSTEMS, CAUSING CONFLICT WITH TITLE VII'S "SPECIAL TREATMENT" OF SUCH SYSTEMS AND JEOPARDIZING THE SENIORITY AND PENSION RIGHTS OF BENEFICIARIES OF EMPLOYEE BENEFIT PLANS

As sponsors of benefit plans, EEAC's members are concerned that a decision requiring retroactive awarding of service credit would disrupt existing plan funds and jeopardize the benefits available to employees and former employees covered by these plans. As this Court has explained:

> These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's [or employer's] likely liability. Risks that the insurer foresees will be included in the

> calculation of liability, and the rates or contributions charged will reflect that calculation. *The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits.* Drastic changes in the legal rules governing pension and insurance benefits, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 721 (1978) (footnote omitted) (emphasis added).[6] Thus, "[r]etroactive liability could be devastating to a pension fund" and, just as importantly, the "harm would fall in large part on innocent third parties." *Id.* at 722-23. The significance of this point cannot be overstated. As Justice Stevens observed in *Manhart*, "[f]ifty million Americans participate in retirement plans other than Social Security." 435 U.S. at 721.

The impact is not limited to retirement benefits. The use of length-of-service requirements in corporate employee benefit policies is widespread. Seniority often affects eligibility for promotions, severance pay, holidays, sick leave, group life and hospitalization insurance and health and welfare plans, selection for layoffs and priority for rehiring, shift preference, distribution of overtime work, transfers, vacation privileges, and selection of days off.

As a representative of a large and diverse group of major employers who use and administer such

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[6] *Accord Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1105-06 (1983); *Florida v. Long*, 487 U.S. 223, 235-36 (1988).

systems on a daily basis, EEAC urges this Court to consider the disruptive impact that the decision below could have on the whole range of employer programs based upon length-of-service and seniority requirements. If permitted to stand, the decision below will have the insupportable effect of compelling employers to anticipate recalculating numerous employee benefit and seniority rights in anticipation of unforeseen, outdated or time-barred claims for additional service credits based upon legal, pre-Act employment policies.

III. REQUIRING RETROACTIVE GRANTING OF SERVICE CREDIT TO REVERSE THE EFFECT OF LONG-EXTINCT LAWFUL POLICIES WOULD IMPOSE AN UNDUE BURDEN ON EMPLOYERS TO DEFEND AGAINST STALE CLAIMS

A decision requiring employers to grant service credit for leave taken many years ago also would impose upon employers the burden of defending against long stale claims, a result this Court has rejected repeatedly. Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). One such prerequisite is that aggrieved individuals must file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days after the alleged discriminatory event occurred. 42 U.S.C. § 2000e-

5(e).[7] Title VII makes only one exception to this requirement. Where the aggrieved individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. 42 U.S.C. § 2000e-5(e). No other exceptions extend the length of Title VII's limitations period.

Congress mandated that the time limitations would start with the date of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 259 (1980) (internal quotation omitted). In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), this Court clarified that a Title VII plaintiff who challenges a "discrete" discriminatory act (such as discipline, discharge, promotion, transfer, and hiring), first must file an EEOC charge within 180 or 300 days of when the act "occurred"—or, as *Morgan* instructs, the day that it "happened."[8] *Id.* at 110, 113.

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[7] The second prerequisite is that an individual must file suit within ninety days of receiving a notice of the right to sue from the EEOC. 42 U.S.C. § 2000e-5(f).

[8] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time—perhaps even years. *Morgan* at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, the Court said, the cumulative total may. *Id.* Therefore, this Court interpreted Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

Moreover, over the years this Court repeatedly has refused to sanction arguments in favor of lengthening the limitations period for discrete acts in certain cases beyond 180/300 days. Most recently, this Court recognized in *Ledbetter* that "we have repeatedly rejected suggestions that we extend or truncate Congress' deadlines." 127 S. Ct. at 2170. It observed:

> Statutes of limitations serve a policy of repose. They "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" The EEOC filing deadline "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." Certainly, the 180-day EEOC charging deadline is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.

127 S. Ct. at 2170-71 (citations omitted).

Even earlier, in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), the Court found that in choosing the length of Title VII's limitations period, Congress intentionally risked leaving some victims of discrimination without a remedy in order to further its goal of precluding stale claims. It stated:

> [I]t seems clear that the [limitations] provision to some must have represented a judgment that

> most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination.

447 U.S. at 820. It therefore concluded, "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 826.

Yet if this Court holds, as Respondents ask, that service credit discrimination plaintiffs may challenge their current service credit tally at any time, regardless of when policies affecting their accrued service credit were applied, the result will be the virtual elimination of a statute of limitations period for any policy application that either directly or indirectly affected the person's service credit. According to that logic, an employee could do as Respondents have done and wait two *decades* to challenge the application of a service credit policy that affects their retirement benefits.

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims. Indeed, they are "designed to assure fairness to defendants" and to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New*

York Cent. R.R., 380 U.S. 424, 428 (1965) (internal quotation and citation omitted). The interest of an individual who fails to undertake the "minimal" step of filing a charge to preserve his Title VII claim must therefore give way to the interest of avoiding stale claims. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

Even the EEOC recognized the right of employers to some measure of finality when it set the retention period for employers to keep certain personnel and employment records under Title VII at one year from the date the record is made or the personnel action involved occurs, whichever is later, unless a charge has been filed. 29 C.F.R. § 1602.14. The one-year retention period means employers will not destroy relevant documents as part of routine file maintenance before an individual has had the opportunity to file a charge of discrimination with the EEOC. Because Title VII gives some aggrieved individuals up to 300 days from the date of the allegedly discriminatory event to file such a charge, an employer will know whether a particular employment action is the subject of a charge before it destroys any relevant documents.

Expanding the limitations period well beyond 300 days in cases involving the granting of service credit many years ago would severely prejudice employers who reasonably have relied on the regulation to develop and implement reasonable record destruction policies. The employer will not have any documents

to support decisions it took years ago, which will hamper drastically its ability to defend itself against a subsequent discrimination claim. Moreover, such a ruling would going forward, effectively require employers to save *all* employment records forever, because they would not be able to anticipate which service credit policies would generate discrimination charges, or when. The EEOC expressly rejected placing such a burden on employers by limiting Title VII's recordkeeping requirements to one year, unless a charge has been filed.

This Court should reject the invitation to unravel the very important protection Title VII's statute of limitations affords employers against stale claims.

CONCLUSION

For the foregoing reasons, the *amicus curiae* urges the court to reverse the decision below and hold that AT&T is not required to give service credit for pregnancy leave taken prior to the 1978 effective date of the Pregnancy Discrimination Act.

Respectfully submitted,

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