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 FOR THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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The ERISA Industry Committee ("ERIC") respectfully submits this *amicus curiae* brief in support of the Petitioner, AT&T Corporation ("AT&T"). Correspondence reflecting the consent of the parties to the filing of *amicus curiae* briefs has been filed with the Clerk of the Court.[1]

[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity other than *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

ERIC is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans providing benefits to millions of active workers, retired persons, and their families nationwide. ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit design or administration.[2] This is such a case.

ERIC has a strong interest in the issue presented, which could require pension plans sponsored by its member companies to pay out benefits substantially exceeding the benefits that their sponsors anticipated, with a reasonable degree of certainty, when they funded these plans over the years. A sizeable increase in a plan's benefit payment obligations could substantially increase the sponsor's funding obligations and in some instances could cause a plan to be inadequately funded. In addition, a decision requiring a plan administrator to re-visit and re-create leave and service records that are over thirty years old and to re-calculate thousands of employees' and former employees' pension and other benefits would impose enormous

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[2] *See, e.g., LaRue v. DeWolff, Boberg & Assocs.,* 128 S. Ct. 1020 (2008); *Beck v. PACE Int'l Union,* 127 S. Ct. 2310 (2007); *General Dynamics Land Sys. v. Cline,* 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

costs and administrative burdens on plans and their sponsors and administrators. Given the finite amount of money that employers can spend on these arrangements, these costs will ultimately be borne by plan participants in the form of reduced wages, decreased future benefits, and the like.

All of ERIC's member companies, even those for whom service credit calculation under the Pregnancy Discrimination Act ("PDA") is not an issue, are concerned about any precedent that would require retroactive application of legislation to pension plans. "Rewriting history" by requiring alteration of the factors that determine the size of pension distributions can put the funding of those plans in grave danger and threatens the benefit security of current and future plan participants and their beneficiaries.

Because of the importance of these issues to its member companies, ERIC respectfully urges that the decision below be reversed.

SUMMARY OF ARGUMENT

Imposition of retroactive liability in this case is improper for at least two reasons. The first reason, explained by Petitioner AT&T in its brief, is that there has been no violation of Title VII of the Civil Rights Act of 1964. The second, addressed in this *amicus curiae* brief, is that even if there has been a violation of Title VII, the retroactive relief sought by respondents is improper. In support of this point, this brief makes two arguments:

1. The stability of pension and other employee benefit plans is of the utmost importance to the millions of workers, retirees, and family members who currently depend upon plan benefits or expect to receive them in the future. The financial soundness of pension and other benefit plans depends, in turn, upon adequate funding, which itself requires the ability to predict with a reasonable degree of certainty what the plans' obligations to their current and future participants and beneficiaries will be. These funding obligations are reflected in statute. When the reasonable assumptions and data upon which a plan's funding decisions have been based—including, in this case, calculations concerning length of service—are suddenly altered by a judicial decision leading to an increase in the plan's benefit obligations, there is a significant risk that the plan will have insufficient resources to cover the new obligations. In the best case, this underfunding would require unanticipated additional expenditures by the plan; in the worst case, it could jeopardize the plan's stability and even lead to its termination. On a nationwide scale, retroactive adjustments of the factors that determine the size of pension distributions could pose a serious threat to pension plans, their sponsors, and their participants and beneficiaries.

2. This Court has already addressed the specific type of retroactive liability at issue in this case: a pension plan's liability under Title VII for discrimination on the basis of sex. At least three decisions establish this Court's recognition that in the context of pension plans, retroactive liability for sex-based discrimination is rarely (if ever)

appropriate. *See City of Los Angeles, Dep't of Water & Power v. Manhart,* 435 U.S. 702 (1978); *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *Florida v. Long,* 487 U.S. 223 (1988).

ARGUMENT

I. A Retroactive Change to Service Calculations Such as That Ordered by The Ninth Circuit Poses a Real Threat To Pension Plan Funding.

The Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.,* imposes on pension and other employee benefit plans a number of complex rules designed to protect the integrity of those plans and the expectations of their participants and beneficiaries. ERISA's statement of purpose notes that "many employees with long years of employment are losing anticipated retirement benefits," that employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that statutory protection is necessary to "assur[e] the equitable character of such plans and their financial soundness." *Id.* § 1001(a).

ERISA does not require employers to establish employee benefit plans, nor does it define the benefits that must be provided or the method of calculating those benefits. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). Rather, ERISA seeks "to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits" by making as certain as possible that pension fund assets will be adequate to provide expected benefits payments. *Lockheed*, 517 U.S. at 887; *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

In order to achieve the goal of "protect[ing] . . . the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. § 1001(b), Title I of ERISA "requires administrators of all covered pension plans to file periodic reports with the Secretary of Labor, mandates minimum participation, vesting and funding schedules, establishes standards of fiduciary conduct for plan administrators, and provides for civil and criminal enforcement of the Act." *Nachman Corp.*, 446 U.S. at 361 n.1. Title IV of the Act, 29 U.S.C. § 1301 *et seq.*, "created the Pension Benefit Guaranty Corporation (PBGC) and a termination insurance program to protect employees against the loss of 'nonforfeitable' benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full." *Nachman Corp.*, 446 U.S. at 361 n.1. *See also Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6-7 (2004); *Mead Corp.* v. *Tilley,* 490 U.S. 714, 717 (1989).

ERISA requires employers who sponsor defined benefit plans—*i.e.*, plans that promise a benefit based on a specified formula set forth in the plan—to fund those plans in accordance with statutory minimum funding requirements. *See* 29 U.S.C. § 1082; 26 U.S.C. § 412. The amount of contributions required for a plan year under the minimum funding rules is generally the amount needed to fund benefits earned during that year plus that year's portion of other liabilities that are amortized over a period of years. The funding requirements are intended to ensure that the employer sets aside funds that are estimated to be sufficient, with cumulative investment earnings, to provide the benefits promised under the plan. This undertaking entails an estimate of the plan's actuarial liability, *i.e.*, the amount of benefits that will be paid under the terms of the plan. "The estimate of benefits paid depends on three things: the benefit provisions of the pension plan; the characteristics of the participants in the plan (age, sex, salary, and length of service); and the actuarial assumptions used to predict the amount of future benefit payments." Everett T. Allen, Jr. *et al.*, *Pension Planning* 155 (6th ed. 1988); *see also* Dan M. McGill *et al.*, *Fundamentals of Private Pensions* 595-616 (8th ed. 2005).[3]

While the funding obligations include some estimates and are recalibrated from year to year based on actual experience, a retroactive adjustment to service credits alters one of the key factors (length of service) on which a plan would have relied in calculating future benefit payments and, therefore, the sponsor's current funding obligations. *Cf.* 29 U.S.C. § 1084(c)(6)(D) (treating "service," together with age, compensation, death, and disability as

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[3] The Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 ("PPA"), amended ERISA to provide a new set of rules for determining minimum required contributions for plan years beginning after December 31, 2007. Both the new and old rules turn on a reasonable estimate of benefit liability.

events that are "reasonably and reliably predictable"). Consequently, if the length of service is retroactively adjusted as ordered by the court below, an employer with a plan similar to AT&T's would have consistently under-estimated its plan's benefit liabilities (for the thirty years since the PDA was enacted) when it calculated its funding obligations under ERISA. This circumstance could cause a plan to be inadequately funded, triggering additional funding requirements under ERISA, 29 U.S.C. § 1082.[4] In the worst case, it could lead to plan termination and an assumption of liabilities by the Pension Benefit Guaranty Corporation. In both situations, the adverse consequences are ultimately borne by plan participants and plan beneficiaries.

II. This Court Has Established That Retroactive Liability Presents "Special Dangers" to Pension Plans.

Recognizing the important funding considerations discussed above, this Court has repeatedly reached the "conclusion that retroactive

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[4] Plans that are "at risk" (generally meaning a large plan that is less than 80% funded using regular assumptions and 70% funded using special funding assumptions) are subject to more rapid funding requirements, and employers whose plans are at risk are prohibited from funding nonqualified plans for corporate insiders. *See* PPA, Pub. L. No. 109-280, §§ 102, 112, 116; 120 Stat. 780, 789, 826, 856, *codified at* 26 U.S.C. §§ 409A(b)(3), 430(i). In addition, regardless of whether a plan is at risk, a plan that is less than 80% funded generally cannot be amended to increase liabilities and cannot make certain benefit payments, and plans that are less than 60% funded must also cease all benefit accruals. *See* PPA, Pub. L. No. 109-280, §§ 103, 113; 120 Stat. 780, 809, 846, *codified at* 26 U.S.C. § 436.

liability [is] inappropriate in Title VII pension plan cases." *Florida v. Long,* 487 U.S. 223, 236 (1988). On at least three occasions, this Court "identified three criteria for determining whether retroactive awards are appropriate in Title VII pension cases involving" discrimination on the basis of sex, *id.* at 230, and on each occasion, this Court held that the unique situation of pension plans made it particularly inappropriate to subject them to retroactive awards.

A. This Court Has Recognized that Retroactive Liability Is Inappropriate in Title VII Pension Plan Cases.

This Court first addressed the application of Title VII's remedial principles to pension plans in *City of Los Angeles, Department of Water & Power v. Manhart,* 435 U.S. 702 (1978). In *Manhart*, the defendant's female employees were required to make larger contributions to the pension fund than were their male coworkers. This Court held that this practice constituted discrimination on the basis of sex, in violation of Title VII. 435 U.S. at 711, 717. But it further held that the retroactive relief sought by the plaintiffs—restitution of their excess contributions—was inappropriate. *Id.* at 723.

In so holding, this Court recognized the "presumption in favor of retroactive relief" for Title VII violations, but stressed several reasons why that presumption should not apply to the case before it, particularly given the "special dangers" that retroactive relief presents to pension plans. *Id.* at 719, 721-23 & n.40. First, although the Court determined that the defendant's practice was unlawful, the state of the law until the Court's holding was unclear, so that "conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the [defendant's] was entirely lawful." *Id.* at 720. Second, there was no reason to think that the prospect of a retroactive award was "needed to cause other administrators to amend their practices to conform to this decision." *Id.* at 720-21. And third, permitting retroactive relief would pull the rug out from under countless insurance and pension plans throughout the nation: retirement plans "depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer'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." *Id.* at 721.

The Court explained that "[t]he occurrence of major unforeseen contingencies . . . jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect." *Id.* It therefore held that it would be an "abuse of discretion" to require retroactive compliance with its interpretation of Title VII—even though the retroactive liability for the individual plan before the Court would not have been especially severe. *See Manhart v. City of Los Angeles, Dep't of Water & Power,* 553 F.2d 581, 592 (9th Cir. 1977) ("The impact of returning the excess contributions to the plaintiffs in this case is far from oppressive. The amount involved is only 15% of the contributions made by a minority of the Department's employees for the 33-month period from April 5, 1972 to December 31, 1974."), *rev'd,* 435 U.S. 702 (1978).

The Court concluded that "*the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result*." *Manhart*, 435 U.S. at 721 (emphasis added); *see also id.* at 721-22 ("The EEOC itself has recognized that the administrators of retirement plans must be given time to adjust gradually to Title VII's demands. Courts have also shown sensitivity to the special dangers of retroactive Title VII awards in this field.") (footnote omitted).

Subsequent decisions of this Court have reaffirmed *Manhart* and confirmed that the three factors identified in that decision will, in general, militate against retroactive relief in pension plan cases. Hence, in *Norris*, the Court held that offering retirement *benefits* that differed based on sex violated Title VII (just as requiring *contributions* that differed based on sex violated Title VII in *Manhart*), but it still held that "benefits derived from contributions made prior to this decision may be calculated as provided by the existing terms of the [challenged] plan." *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1075 (1983) (per curiam). In an opinion joined in relevant part by a majority of the Court, Justice Powell explained that retroactive relief was improper for the same reasons cited in *Manhart:* "Reserves normally are sufficient to cover only the cost of funding and administering [a] plan. Should an unforeseen contingency occur, such as a drastic change in the legal rules governing pension and insurance funds, both the insurer's solvency and the insured's benefits could be jeopardized." *Id.* at 1106 (Powell, J., joined by Burger, CJ, and Blackmun, Rehnquist, and O'Connor, JJ., dissenting in part and concurring in part).

Finally, in *Long*, this Court not only held it improper in the particular case before it to require retroactive adjustments to retirement benefits, 487 U.S. at 229-40, but also explained that *Manhart* and *Norris* had established a general presumption that pension plans should not be subject to retroactive awards. *See id.* at 235 ("In the pension context, we have considered whether retroactive awards are necessary to further the purposes of Title VII and to ensure compliance with our decisions, and we have concluded that retroactivity is not required."); *id.* at 236 ("[W]e concluded, in general terms, that the '[usual] presumption in favor of retroactive relief' should not be applied to this type of Title VII pension plan suit." (quoting *Manhart*, 435 U.S. at 723)).

B. The Criteria Identified by This Court Establish that Retroactive Liability Would Be Improper In This Case.

The premise of the *Manhart* line of decisions is that the defendant engaged in conduct that violated Title VII—albeit conduct that, at the time, was reasonably thought to be lawful, making it inequitable to impose retroactive relief. AT&T's brief explains why AT&T has not violated Title VII: its imposition of a cap on the service credit available to employees taking pregnancy leave was lawful at the time the cap was implemented, in the years before the PDA was enacted; and its recent determinations of eligibility for pension and other benefits based on service credits previously awarded are not new violations of Title VII.[5] Br. for Pet'r at 15-47. It goes without saying that if there has been no violation of Title VII, there can be no relief under Title VII. But even if this Court determines that AT&T has in fact violated Title VII, it should still hold that the relief sought is retroactive and therefore inappropriate under the *Manhart* factors.

"The first criterion [is] the extent to which new principles of law have been established," that is, whether the employer was "on notice" that its pension plan was providing benefits in violation of Title VII. *Long*, 487 U.S. at 230. This factor weighs against retroactivity in the instant case for at least two reasons: (1) If it was unlawful at all to cap service credits for employees taking pregnancy leave but not for employees taking other types of disability

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[5] In connection with the question of whether AT&T has committed any recent act of discrimination, it is worth noting this Court's rejection of the notion that a plan sponsor should be liable on a continuing basis for all past conduct. *See Long*, 487 U.S. at 239 ("It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation. . . . In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct, regardless of [when] the liability principle was first announced . . . . We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.").

leave, that unlawfulness was not clearly established at the time the cap was implemented (*i.e.*, in the years prior to the enactment of the PDA). *See General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (pre-PDA decision holding that excluding pregnancy-related disabilities from disability benefits plan was not sex-based discrimination under Title VII); *see also Pallas v. Pacific Bell*, 940 F.2d 1324, 1325 (9th Cir. 1991) (citing *Gilbert* for proposition that prior to the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men"); *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000); *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845, 848 (8th Cir. 1979). (2) If it is unlawful at all to make current eligibility determinations for pension and other benefits based on previously made awards of service credits (where the awards were either lawful or reasonably believed to be lawful when made, and where the awards were made decades ago), this unlawfulness has not yet been clearly established. This uncertainty is clear from the circuit split that this Court is being asked to resolve in this case.

The second criterion is "whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance." *Long*, 487 U.S. at 230. As this Court has explained, the answer is generally no "[i]n the pension context." *Id.* at 235. The answer is also no in this case. When the PDA was enacted, AT&T (like all other responsible employers) promptly stopped making distinctions on the basis of pregnancy in the award of service credits. *See id.*

(noting that defendant had "acted immediately" to modify its pension plans after the controlling law was clarified by the Court); *Manhart*, 435 U.S. at 706 (while action was pending, defendant amended its plan to eliminate sex-based distinctions). Therefore, as in *Manhart,* an award of retroactive relief in this case is not necessary to prompt any change in prospective conduct.

The third criterion is "whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by [the Court's] decision." *Long*, 487 U.S. at 230. As this Court has explained, "[r]etroactive liability could be devastating for a pension fund." *Manhart*, 435 U.S. at 722. If a pension plan is obliged to meet increased payment obligations with assets that were accumulated on the basis of assumptions that did not anticipate the plan's increased payment obligations , and "[i]f the reserve proves inadequate," then an employer will have to commit additional resources to address the inadequate funding or, in the worst case scenario, may be forced to terminate the plan altogether. Moreover, this Court looks not only to the burden on the defendant's pension fund, but also to the burden on pension funds nationwide. *Long*, 487 U.S. at 237; *Norris*, 463 U.S. at 1106-07 (Powell, J., joined by Burger, CJ, and Blackmun, Rehnquist, and O'Connor, JJ, dissenting in part and concurring in part); *Manhart*, 435 U.S. at 722 n. 42.

As set forth in Part I, above, the adverse consequences of the decision below extend well beyond AT&T, the telecommunications industry, and companies that have not applied the PDA retroactively. Plan sponsors rely on the effective date specified in legislation as the point at which they should modify their behavior going forward. A decision by this Court holding that they cannot rely on the rules used to measure employee service or compensation before an act's effective date would be inconsistent with Congress's intent, would require plan sponsors to recalculate employees' prior service or compensation, and could cause plans to be underfunded. *Cf.* Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, 122 Stat. 1624, § 105(b) ("HEART Act") (requiring pension plans to treat military differential payments as compensation, and providing that this amendment "shall apply to years beginning after December 31, 2008"). Where Congress has mandated new service crediting rules and has intended them to apply retroactively, it can and has said so explicitly. *See* ERISA, Pub. L. No. 93-406, 88 Stat. 829, § 203(b)(1) (1974) (prescribing detailed rules regarding effective date of provisions and applicability to existing plans).

The decision below diminishes employers' confidence in their ability to make reliable estimates of both their plans' future benefit obligations and their own future funding obligations. Such uncertainty could further weaken the private pension system by giving employers additional reasons to terminate their plans, to cease benefit accruals under their plans, or to close their plans to new entrants. An imposition of retroactive liability therefore threatens adverse consequences not only for plans like AT&T's that did not award service credit for pregnancy leave, but for all plans concerned about retroactive adjustment to factors used in estimating their future benefit liability.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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