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 OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; ASIAN AMERICAN JUSTICE CENTER; THE NATIONAL COUNCIL OF LA RAZA AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

JOHN BRITTAIN
AUDREY WIGGINS
SARAH CRAWFORD
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave.
Suite 400
Washington, DC
20016

ELEANOR SMITH
COUNSEL OF RECORD
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

LAURA E. NEISH
ZUCKERMAN SPAEDER LLP
1540 Broadway
Suite 1604
New York, NY 10036

November 14, 2008
(Additional Counsel on next page)

Additional Counsel

AIMEE J. BALDILLO
ASIAN AMERICAN
JUSTICE CENTER
1140 Connecticut
Ave., NW
Suite 1200
Washington, DC
20036

RAUL GONZALEZ
NATIONAL COUNCIL
OF LA RAZA
1126 16th Street, NW
Washington, DC
20036

KATHRYN KOLBERT
PEOPLE FOR THE
AMERICAN WAY
FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC
20036

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law, the Asian American Justice Center, the National Council of La Raza, and People for the American Way Foundation respectfully submit this brief as *amici curiae* in support of Respondents pursuant to Supreme Court Rule 37.3(a), upon the consent of the parties.

Amici are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination. In this case, *Amici* seek to ensure Title VII's protection against discrimination in seniority benefits. *Amici* were actively involved in the passage of the Civil Rights Act of 1991, which clarified that an intentionally discriminatory seniority system (whether or not the discriminatory purpose is apparent on its face) can be challenged when a person is injured by the application of the seniority system. 42 U.S.C. § 2000e-5(e)(2). *Amici* are concerned that this case may impact the ability of workers to challenge discriminatory seniority systems, including racially discriminatory seniority systems.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or in part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

The Lawyers' Committee is a nonprofit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country. In an effort to assist the Court in its interpretation of the laws aimed at eliminating unlawful employment discrimination, the Lawyers' Committee has filed amicus briefs in other Title VII cases, including the related cases of *Ledbetter v. Goodyear Tire and Rubber Co.*, 127 S. Ct. 2162 (2007) and *AMTRAK v. Morgan*, 536 U.S. 101 (2002).

The Asian American Justice Center ("AAJC") is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal, public policy, advocacy, and community services and education on discrimination issues. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an

impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Council of La Raza ("NCLR") is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR believes that discrimination against pregnant women in setting pension benefits places women, including Hispanic women, at a disadvantage during their retirement years.

People for the American Way Foundation ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For has hundreds of thousands of members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women, issues which are directly involved in this case. People For seeks to participate in this case in order to help defend the important interests at stake, including the interest of every employee to be treated fairly and equally and free from unlawful discrimination in the workplace.

SUMMARY OF ARGUMENT

In 1991, Congress amended Title VII of the Civil Rights Act of 1964 to clarify that an employee may challenge an intentionally discriminatory seniority system, regardless of whether the system on its face is discriminatory, when the employee is injured by the application of the system. 42 U.S.C. § 2000e-5(e)(2). The plain language and legislative history of the statute evidence the clear intent of Congress to allow employees to challenge discriminatory seniority systems at the time of retirement. With the 1991 amendment, Congress sought to ensure that victims of discrimination had their day in court. Congress recognized that the most logical time for employees to challenge discriminatory seniority systems is the point at which they are actually injured by application of the policy. Congress also sought to prevent a glut of premature, speculative, and unnecessary litigation.

Here, AT&T's facially discriminatory policy denies full seniority credit to women who took pregnancy leave, while it awards full seniority credit to employees who took other forms of temporary disability leave. Respondents' claims are timely because they challenged AT&T's intentionally discriminatory seniority system at the time of retirement, when Respondents were injured by the application of the system. *Amici* respectfully ask the Court to affirm the Ninth Circuit's decision in keeping with Congress' intent to ensure that a cause of action accrues when employees are harmed by

seniority systems that discriminate on the basis of race, color, religion, sex or national origin.

ARGUMENT

I. IN 1991, CONGRESS AMENDED TITLE VII TO CODIFY THE RULE THAT AN EMPLOYEE MAY CHALLENGE AN INTENTIONALLY DISCRIMINATORY SENIORITY SYSTEM UPON RETIREMENT.

In upholding Respondents' claims, the Court of Appeals for the Ninth Circuit correctly recognized Congress' intent to clarify, with the 1991 amendments to Title VII, that an unlawful employment practice occurs when an employee is injured by the application of a discriminatory seniority system, regardless whether it is facially discriminatory and regardless of how long the system has been in place. In the case of a system that discriminates with respect to the calculation of retirement benefits, the injury occurs upon retirement, when the employee's benefits are calculated. In the 1991 amendments, Congress added a new Section 706(e)(2) (codified at 42 U.S.C. § 2000e-5(e)(2)), which explicitly provides that an employee may challenge a discriminatory seniority system when it is adopted, when the employee becomes subject to the system, or when the employee is injured by the application of the system. Because both the plain language of the amendment and its legislative history demonstrate that Congress wished to preserve employees' rights to challenge longstanding discriminatory seniority systems, the

Ninth Circuit correctly found Respondents' claims to be timely.

A. The Plain Language of Section 706(E)(2) of Title VII Provides That an Unlawful Employment Practice Occurs When an Individual Is Actually Injured by the Application of the Seniority System, i.e., at the Time of Retirement When the Pension Is Set.

Section 706(e)(2) of Title VII ("the amendment"), added to the statute as part of the Civil Rights Act of 1991, provides 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 title (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) (emphasis added). The language of the amendment makes it clear that Congress intended to permit employees to challenge a seniority system that awards discriminatory

retirement benefits at the time of retirement, when the benefits are calculated.

Congress used the disjunctive "or" in the amendment to indicate that an employee can challenge a discriminatory seniority system at three separate junctures, including at the time of retirement. The amendment provides that an unlawful employment practice occurs at (1) the time at which the employer adopts the seniority system, (2) the time at which the plaintiff becomes subject to the system, or (3) the time at which the plaintiff is injured by the application of the system. Because these three events are connected by the term "or," Congress intended for employees to be able to challenge discriminatory seniority systems at any one of these three separate junctures. *See, e.g., Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979) ("[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings…"); *United States v. O'Driscoll*, 761 F.2d 589, 597 (10th Cir. 1985) (term "or" in a statute generally "presumed to be used in the disjunctive sense"). Pursuant to this clear legislative intent, an unlawful employment practice occurs at the time of retirement, when employees are actually injured by the receipt of lesser benefits due to the application of a discriminatory system.

The interpretive rule against surplus language, which requires that no part of a statutory provision should be construed so as to be redundant, further confirms this interpretation. *See Duncan v. Walker,*

533 U.S. 167, 174 (2001) ("We are [] 'reluctant to treat statutory terms as surplusage' in any setting.") (citing *Babbitt v. Sweet Home Chapter,* 515 U.S. 687, 698 (1995)). Under this canon of statutory construction, the Court must give independent significance to each word in a statutory provision. *See id.* (Court's duty is "to give effect, if possible, to every clause and word of a statute.") (internal quotes and citations omitted). Because the amendment lists three separate events, any one of which constitutes the occurrence of an unlawful employment practice, each of those three events must have a separate and distinct meaning. The "application" of a discriminatory system must therefore be an event distinct from the adoption of the system or the time at which an employee becomes subject to the system. And under the clear language of the amendment, this distinct event constitutes an independent violation of Title VII.

The common usage and understanding of the phrase "injured by the application" further indicates that Congress intended for individuals to have the opportunity to challenge discriminatory seniority plans at the time of retirement. "When interpreting a statute, we must give words their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (citing *Smith v. United States*, 508 U.S. 223, 228, (1993)). *See also BP America Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The common understanding of the phrase "injured by the

application" of a policy is the point in time at which a policy is imposed on an individual to her detriment. This Court has held that "it is too obvious to warrant extended discussion" that an employee is injured by the application of a discriminatory wage system each time she receives a paycheck. *Ledbetter v. Goodyear Tire & Rubber Co.,* 127 S. Ct. 2162, 2172 (2007) (quoting *Bazemore v. Friday*, 478 U.S. 385, 396 (1986)). The same principle applies to a retirement plan. With respect to retirement benefits, a worker is "subject to" the retirement plan throughout her employment, but "application" of that plan is a discrete act that occurs upon the calculation of benefits pursuant to the plan. Any other meaning would render the "injured by the application" language meaningless and be contrary to the ordinary understanding of the language of the statute.

Finally, the dictionary definition of the word "application" indicates that Congress intended for individuals to have the opportunity to challenge discriminatory seniority plans at the time of retirement. The American Heritage Dictionary defines "application" as "the act of applying," while "apply" means "[t]o bring into contact with" or "[t]o put into action." *American Heritage Dictionary* 41-42 (4th ed. 2001). An employee comes into contact with a retirement plan at the time benefits are set. The common sense understanding that a retirement plan's "application" is a discrete act that occurs when the benefits are actually calculated is further supported by the definition of the word "application."

In enacting the amendment, Congress explicitly provided that employees may challenge a discriminatory seniority system when they are injured by its application. Because the calculation of retirement benefits pursuant to a seniority system is plainly an application of that system, Congress intended for employees to be able to challenge discriminatory retirement systems at the time of retirement, when their benefits are calculated.

B. The Legislative History of the Amendment Demonstrates That Congress Intended to Ensure That an Employee May Challenge an Intentionally Discriminatory Seniority System, Whether Facially Discriminatory or Facially Neutral, at the Time the Employee Receives a Retirement Benefit.

The legislative history of Section 706(e)(2) confirms that Congress intended to permit employees injured by a discriminatory retirement system to challenge the system upon retirement. Congress enacted the amendment in response to *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), which involved a challenge to a facially neutral seniority system that plaintiffs alleged intentionally discriminated against women. While recognizing that "[t]here is no doubt, of course, that a facially discriminatory seniority system … can be challenged at any time," *Lorance* held that the statute of limitations to challenge a facially neutral seniority system begins to run at the time the system is adopted. *Id.* at 912. Because the *Lorance* plaintiffs

did not file suit until they were actually affected by the facially neutral seniority system through demotions, their claims were held to be untimely. *Id.*

The *Lorance* decision was widely criticized as an undue curtailment of employees' rights to challenge discriminatory employment practices, and Congress moved quickly to overturn the ruling. The amendment modifying the *Lorance* rule was part of a series of revisions to the civil rights laws first introduced in Congress in 1989 and ultimately passed as the Civil Rights Act of 1991. One of the purposes of the Civil Rights Act of 1991 was to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." 105 Stat. 1071 § 3(4). As this Court has recognized, Congress enacted Section 706(e)(2) to "respond[] to *Lorance*…by expanding employees' rights to challenge discriminatory seniority systems…" *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994).

The legislative history of Section 706(e)(2) further demonstrates that civil rights advocates, the administration of President George H.W. Bush, and both majority and minority members of Congress agreed that the rule adopted in *Lorance* needed to be modified for at least three reasons: 1) it threatened to deprive employees of access to the courts to challenge discriminatory seniority systems, including those adopted before the passage of Title VII; 2) it encouraged speculative and premature litigation; and 3) it denied employees the right to challenge

discriminatory seniority systems at the most logical point in time – when they were actually injured by the system.

1. The Amendment Was Enacted to Overrule the *Lorance* Court's Restrictions on Employees' Rights to a Day in Court to Challenge Discriminatory Seniority Systems, Including Systems Put in Place Prior to the Enactment of Title VII.

The legislative history of the amendment reflects Congress' understanding that the effects of discriminatory seniority systems may not be felt until long after their enactment. By providing that employees could sue when they were actually harmed by the system, Congress intended to avoid the anomalous result that a discriminatory system could be insulated from challenge precisely because it had been in place for many years.

The Bush administration, which proposed the final text of the amendment, recognized that the *Lorance* rule threatened to deprive employees of the opportunity to challenge discriminatory seniority systems. Deputy Attorney General Donald B. Ayer testified that Congress should provide a remedy to "the parties in *Lorance* who under the Supreme Court decision do not get their day in court with regard to a discriminatory seniority provision." Civil Rights Act of 1990: Hearing on H.R. 4000 Before the H. Comm. on Educ. and Labor, 101st Cong. 392 (1990) (statement of Donald B. Ayer, Deputy

Attorney General, Department of Justice). Access to the courts was a necessary "check on a majority that may not be disposed to serve their interest." *Id.*

Civil rights advocates agreed with the Administration on this point. An advocate for the NAACP testified that the *Lorance* decision had placed "another hurdle before minority group members seeking to vindicate their rights to a workplace free of discrimination." Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. on Educ. and Labor, 101st Cong. 42-43 (1990) (statement of Benjamin Hooks, NAACP). Another advocate testified that overturning *Lorance* was necessary to "prevent the improper foreclosing of challenges to employer practices that may be discriminatory." Civil Rights Act of 1990: Hearing on H.R. 4000 Before the H. Comm. on Educ. and Labor, 101st Con. 61 (1990) (statement of John H. Buchanan, People for the American Way Foundation).

Members of Congress were particularly concerned that the *Lorance* rule would "bar all challenges to contemporary applications of discriminatory rules adopted prior to 1965 – that is, all the discriminatory rules in existence when Title VII became effective – because the deadline for a timely charge would have expired before Title VII ever came into effect." S. REP. NO. 101-315, pt. 4, at 28. (1990). *See also* H.R. REP. NO. 101-644 (I), pt. 5, at 36 (1990); H.R. REP. NO. 102-40 (I), pt. 3, at 61 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549. To protect employees' rights to

challenge such longstanding discriminatory rules, the Committee Reports of both houses found "a compelling need for legislation to overrule the *Lorance* decision." S. REP. NO. 101-315, pt. 4, at 28. (1990).

The House minority, which recommended the final language of the amendment, recognized that "seniority systems present a particular problem with respect to the advent of the limitations period because such systems often are adopted years before they have an impact on an individual's employment rights." H.R. REP. NO. 102-40 (I), pt. 11, at 153. The minority agreed that "a reversal of *Lorance* is warranted, as, in this area, the Court did restrict Federal civil rights protections in a manner that was inconsistent with the intent of Congress," but recommended altering the text of the amendment, which originally provided that the statute of limitations would begin to run "after the alleged unlawful employment practice occurred or has been applied to affect adversely the person aggrieved, whichever is later." *Id.* pt. 11, at 119. The minority proposed that "broader language" be applied to seniority systems, stating that, "[a]lthough we recognize that the effect of this provision would be to leave the validity of seniority systems unsettled for many years, we believe that it is in keeping with notions of fundamental fairness." H.R. REP. NO. 102-40 (II), pt. 3, at 68. This "broader language" was ultimately adopted as Section 706(e)(2).

2. In Enacting the Amendment, Congress Recognized That Permitting Employees to Sue When Injured by the Application of a Discriminatory Seniority Policy Offered a More Cost-Efficient Approach to Prevent a Glut of Premature, Speculative and Unnecessary Litigation.

Proponents of the amendment feared that the *Lorance* rule, in addition to barring meritorious claims arising out of longstanding discriminatory systems, would lead to needless litigation. The rule would effectively require employees to file suit to preserve their rights without knowing if the seniority system would ever actually harm them.

Both civil rights advocates and the Bush administration warned that the amendment was needed to prevent speculative and unnecessary litigation. A witness from the Association of the Bar of the City of New York Committee on Civil Rights testified:

> *Lorance* means that an employee must almost immediately sue over any policy that could conceivably affect her or him any time in the future. Thus, every worker must attempt to accurately predict the results of policies and treatment on the basis of incomplete and speculative evidence. At best, great numbers of cases would have to be brought so that workers

> preserved their rights. More likely, countless workers will be barred because they do not bring the case quickly enough.

Civil Rights Act of 1990: Hearing on H.R. 4000 Before the H. Comm. on Educ. and Labor, 101st Cong. 495 (1990) (report by Janice Goodman, et al., Assn. of the Bar of the City of New York).

The Deputy Attorney General concurred that "a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary and unfocused litigation. Employees will be forced to challenge the system before it has produced any concrete impact, or forever remain silent." Civil Rights Act of 1990: Hearing on S. 2104 Before S. Comm. on Labor and Human Res. 101st Cong. 112 (1990) (statement of Donald B. Ayer, Deputy Attorney General Department of Justice). *See also* Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. of Educ. and Labor, 101st Cong. 409 (1990) (statement by the Office of the Attorney General).

The House Committee Reports denounced this effect of the *Lorance* rule as both unfair and impractical. The Committee found that the rule "forces…victims to file speculative charges, and trigger legal processes, before a practice has been applied to harm them." H.R. REP. NO. 101-644 (I), pt. 6, at 73. This requirement "entails an undesirable risk that the suit or charge will prejudice the employee's informal efforts to resolve

the dispute short of such proceedings or litigation." H.R. REP. NO. 102-40 (I), pt. 3, at 60 (1991). The 1991 Report reiterated these concerns and observed that the need for employees to file premature suits to preserve their rights and "causes needless strain on employment relationships."

3. Congress Recognized That the Most Logical Point for Employees to Challenge a Discriminatory Seniority System Is When the Employees Are Actually Injured by the Application of the Policy.

A consensus emerged that the most practical and effective response to the problems posed by *Lorance* was to permit employees to sue when injured by the application of the discriminatory system. Such a rule would encourage employees to resolve grievances outside the courts and would ensure that any disputes that made it to court would be sharply focused on the actual harm to the employee.

Civil rights advocates testified that the amendment was needed to "reestablish[] that the statute of limitations period for challenging employment practices generally does not commence until the concrete effects of the injury are felt by the charging party." Civil Rights Act of 1990: Hearing on S. 2104 before S. Comm. On Labor and Human Res., 101st Cong. 905 (1990) (statement of Norman Dorsen, American Civil Liberties Union). The amendment would therefore ensure that challenges

to discriminatory seniority systems could be brought "at a realistic point in time."

The Bush Administration also testified in favor of "restart[ing] the period for filing a charge each time an employee was injured by the application of a seniority system that was alleged to have been adopted with discriminatory intent." Civil Rights Act of 1990: Hearing on S. 2104 Before S. Comm. on Labor and Human Res. 101st Cong. 112 (1990) (Statement of Donald B. Ayer, Deputy Attorney General Department of Justice). *See also* Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. Of Educ. And Labor, 101st Cong. 3d Sess. 409 (1990) (statement by the Office of the Attorney General). The Attorney General admonished that it was not enough for employees to be able to challenge a system once it became applicable to them. In the case of employees who first became subject to seniority system when they joined a company, the Attorney General observed that as a practical matter, "most employees would be reluctant to begin their jobs by suing their employers." Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. of Educ. and Labor, 101st Cong. 409 (1990) (statement by the Office of the Attorney General).

The House Reports clarified that by "permit[ting] persons to challenge discriminatory employment practices when those practices actually harm them," Congress "intends to minimize unnecessary and divisive Title VII litigation between workers and employers, and to promote Title VII's goal of encouraging voluntary settlement of employment

discrimination disputes." H.R. REP. NO. 102-40 (II), pt. 3, at 62; H.R. REP. NO. 102-40 (I), pt. 3, at 62.

The legislative history of the amendment compels the conclusion that employees adversely affected by a discriminatory seniority system may file suit when they receive retirement benefits calculated pursuant to that system. Congress recognized that employees may not feel the impact of discriminatory seniority systems for many years, and the most practical and cost-effective approach to addressing the problem of discrimination is to allow employees to bring suit when they are adversely affected by the application of the system. In the case of a seniority system that determines the award of retirement benefits, the time of injury occurs when the benefits are calculated. *See Maki v. Allete, Inc.*, 383 F.3d 740, 742-44 (8th Cir. 2004) (statute of limitations to challenge discriminatory pension plan begins to run when pension benefits vest).

C. Respondents' Claims Are Timely Because AT&T's Seniority Policy Is Intentionally Discriminatory, and Respondents Challenged AT&T's Policy When They Were Injured by the Application of the Seniority System.

The Ninth Circuit correctly found Respondents' Title VII claims to be timely. *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1011-12 (9th Cir. 2007). There is no dispute that Respondents filed suit within 300 days of the calculation of their pension benefits. Resp. Br. 7. As demonstrated above, calculation of

pension benefits pursuant to a discriminatory seniority system is an unlawful employment practice under Section 706(e)(2).

The Ninth Circuit properly held that AT&T's seniority system is facially discriminatory, because it distinguishes between similarly situated employees: female employees who took pregnancy-related disability leave and employees who took other types of temporary disability leave. *Hulteen*, 498 F.3d at 1006, 1012 (citing *Pallas v. Pacific Bell,* 940 F.2d 1324, 1327 (9th Cir. 1991)).

As recognized in *Lorance* and confirmed by § 706(e)(2), "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." 490 U.S. at 913. Such a facially discriminatory policy is intentionally discriminatory. *See Int'l Union, United Auto. v. Johnson Controls*, 499 U.S. 187, 197-200 (1991) (company policy that "explicitly classifies on the basis of potential for pregnancy…evinces discrimination on the basis of sex").

Because AT&T's seniority system is intentionally discriminatory, and Respondents filed suit within 300 days of the calculation of their retirement benefits pursuant to the seniority system, Respondents' Title VII claims are timely.

1. AT&T's Seniority System Is Facially Discriminatory Because It Distinguishes Between Similarly Situated Employees.

AT&T's seniority system discriminates on the basis of sex. As the Ninth Circuit properly held, AT&T's seniority system is facially discriminatory, because it distinguishes between similarly situated employees. 498 F.3d at 1006, 1012. AT&T's seniority system undisputedly treated women who took pregnancy leave less favorably than other similarly situated employees. AT&T's Net Credit Service ("NCS") system distinguished between female employees who took leave due to a pregnancy-related disability and employees who took leave for other temporary disabilities. Pet. App. 9a. In fact, AT&T admits that its seniority policy "treated pre-PDA pregnancy leaves less favorably than other disability leave." Pet. for Cert. at 17. The NCS system "gave employees full credit for all types of temporary medical leave, except one: leave taken for disabilities related to pregnancy." *See* Pet'r Br. at 6.

Under the standard set forth in *Lorance*, this is a facially discriminatory policy, because it "treats similarly situated employees differently," by assigning one group less seniority for the same amount of time served as another. *Lorance*, 490 U.S. at 912, 913 n.5. *See also Maddox v. Grandview Care Center, Inc.,* 780 F.2d 987, 991 (11th Cir. 1986) (upholding district court's finding that leave of absence policy that limited duration of pregnancy

leave, but not leave due to "illness", was facially discriminatory).

2. AT&T's Seniority System Intentionally Discriminated Against Women Who Took Pregnancy-Related Leave in Violation of Title VII.

The facially discriminatory policy adopted by AT&T evidences an intent to discriminate. AT&T intentionally discriminated against Respondents by denying full credit for their pregnancy leave, while granting full credit to similarly situated employees who took other forms of disability leave. AT&T classified Respondents' pregnancy leave as personal leave instead of treating it like any other temporary disability. Pet'r Br. at 5. As such, AT&T set a maximum of 30 days service credit for women who took leave during and after pregnancy. Pet'r Br. at 5. By contrast, AT&T set no such limit for employees who took temporary disability leave. Employees who took disability leave for any reason other than pregnancy received unlimited service credit for the duration of their leave. Pet'r Br. at 5. AT&T's decision to adopt disparate leave policies that singled out one group of workers for less favorable treatment constitutes intentional discrimination. Such facial discrimination, which harms one group of employees and not another based on categories of race or sex, "can surely be regarded as intending to discriminate." *Ledbetter,* 127 S. Ct. at 2173.

It is no defense, as AT&T claims, that Respondents took pregnancy leave prior to the effective date of the Pregnancy Discrimination Act ("PDA"). Title VII always prohibited pregnancy discrimination. Prior to the passage of the PDA, the EEOC recognized that Title VII prohibited discrimination on the basis of pregnancy. The EEOC's 1972 Sex Discrimination Guidelines made clear that disability due to pregnancy must be accorded the same treatment as other forms of disability. Specifically, the guidelines provided 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).

The Supreme Court upheld this portion of the EEOC's guidelines in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977), recognizing that Title VII does not "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role" in child-bearing.

The PDA merely clarified the meaning of sex discrimination under Title VII. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 n.17 (1983) (citing legislative history of PDA stating original intent of Title VII was that discrimination on the basis of pregnancy constituted sex discrimination). The PDA simply confirmed the existing interpretation of the law, as exemplified in

the holding in *Satty*, that discrimination because of pregnancy was prohibited under Title VII. Therefore, AT&T's differential treatment of women who took pregnancy leave constituted unlawful discrimination after the enactment of Title VII in 1964.

Moreover, AT&T intentionally discriminated against Respondents at the time of retirement by purposefully denying full credit for pregnancy leave, while granting full credit to similarly situated employees who took other forms of leave. Both the Eighth and Ninth Circuits have found that an employer's refusal to credit pre-PDA pregnancy leave when calculating post-PDA retirement benefits is an unlawful employment practice under Title VII. In *Maki*, the Eighth Circuit held that a "bridging provision" in an employer's pension plan, which excluded women who were fired due to sex discrimination prior to 1964, violated Title VII. 383 F.3d at 742-43. Similarly, in *Pallas* the Ninth Circuit held that while Pacific Bell's 1972 denial of pregnancy-related benefits was not actionable, the company was "liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy" by denying credit for her pregnancy leave when it calculated eligibility for early retirement benefits. 940 F.2d at 1327.

3. AT&T Intentionally Discriminated Against Respondents at the Time of Retirement by Purposefully Denying Full Credit for Pregnancy Leave, While Granting Full Credit to Similarly Situated Employees Who Took Other Forms of Leave.

AT&T intentionally discriminated against Respondents at the time of their retirement. When Respondents retired, AT&T refused to reinstate the seniority credit that Respondents should have received during their pregnancy leave but for AT&T's intentionally discriminatory leave policy. AT&T admits that its seniority policy permits the "adjust[ment of] an employee's NCS date when 'the date has been calculated incorrectly' or 'the change is necessary to comply with legal requirements.'" JA 56 (¶ 104). Nevertheless, AT&T chose not to credit Respondents for their pregnancy leave as required by Title VII. In denying the full seniority benefits owed to Respondents at the time of their retirement, AT&T affirmatively violated Title VII's prohibition against discrimination on the basis of pregnancy. As such, AT&T engaged in intentional discrimination at the time of Respondents' retirement.

II. THE RULE THAT AT&T ASKS THE COURT TO ADOPT WOULD CONTRAVENE CONGRESS' INTENT TO GUARANTEE THAT A CAUSE OF ACTION ACCRUES WHEN EMPLOYEES ARE HARMED BY SENIORITY SYSTEMS THAT DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN.

A. Discriminatory Seniority Systems Continue to Plague the Workplace.

This Court has recognized that the harm caused by discriminatory seniority practices "cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination." *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 768 n.28 (1976). A decision in AT&T's favor in this case would have significant negative effects on employees victimized by seniority systems that discriminate on the basis of race, color, religion, sex or national origin. It would also negate Congress' efforts to ensure employees' rights to challenge these practices in court.

It is beyond dispute that discriminatory seniority systems continue to adversely affect groups protected by Title VII. Of particular concern to *Amici* is the persistence of race-based discrimination in seniority systems today. *See, e.g., City of Hialeah, Florida v. Rojas*, 311 F.3d 1096, 1099 (11th Cir. 2002) (employer classified Latino employees as temporary workers in order to deny benefits); *Harvey by*

Blankenbaker v. United Transp. Union, 878 F.2d 1235, 1244 (10th Cir. 1989) (railroad's seniority system discouraged black chair car attendants from transferring to more desirable positions as brakemen/switchmen); *Casillas v. Federal Express Corp.*, 140 F. Supp. 2d 875, 886 (W.D. Tenn. 2001) (upholding allegations of race and age discrimination in seniority system). Access to the judicial system is an essential tool in effectively eliminating discrimination from the workplace.

As Congress observed in passing the 1991 amendment, seniority systems by their very nature pose unique problems with respect to statute of limitations issues, because the harm they inflict is often felt years after the system's creation. *See* H.R. Rep. No. 102-40 (I), pt. 11, at 153. Discriminatory practices in seniority systems—particularly those that relate to the calculation of retirement benefits—may go unchallenged for years because employees do not know how, or whether, these practices will affect them at retirement. Employees far from retirement age may be reluctant to challenge policies that will affect them years in the future, if at all. *See Heiar v. Crawford County*, 746 F.2d 1190, 1194 (7th Cir. 1984) ("People do not want to begin their employment by suing an employer" over an injury they may suffer in the future).

In enacting Section 706(e)(2) of Title VII, Congress intended to address these difficulties by preserving a right to challenge discriminatory seniority systems at retirement. AT&T urges the Court to reject this rule, maintaining that

Respondents should have challenged its seniority crediting practices decades before these practices adversely affected their retirement benefits. The rule AT&T proposes would eviscerate the scheme Congress adopted in Section 706(e)(2). As a practical matter, it would have the effect of denying many victims of discrimination their day in court, while encouraging others to file speculative and unnecessary lawsuits. Employees who bring such speculative suits would face a substantial risk of dismissal. *See Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007) (to survive a motion to dismiss, plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level"); *Auerbach v. Bd. of Educ.*, 136 F.3d 104, 109 (2d Cir. 1998) (dismissing discrimination challenge against retirement plan because employees had not yet retired).

AT&T's proposed rule is unfair, impractical and would deprive employees of the right to challenge illegal policies at the time of injury. It would do nothing to further Congress' intent to eradicate discrimination in seniority systems.

B. A Decision in AT&T's Favor Would Undermine Congress' Intent to Preserve a Right to Relief for Employees Harmed by Discriminatory Seniority Systems Adopted Prior to the Enactment of Title VII.

AT&T further seeks to nullify Congressional intent and restrict employees' rights to challenge

unlawful discrimination by claiming that Section 706(e)(2) only applies to intentionally discriminatory seniority systems adopted after 1991. *See* Pet'r Br. at 46-47. Nothing could be further from the actual purpose behind the provision. Section 706(e)(2) did not, as AT&T claims, purport to alter a preexisting statute of limitations; it merely clarified that an unlawful employment practice occurs when an employee is injured by the application of a discriminatory seniority system.

Before the *Lorance* decision, courts routinely sustained challenges to intentionally discriminatory seniority systems enacted years earlier, including those adopted prior to the enactment of Title VII. *See Pullman v. Swint*, 456 U.S. 273, 278-79 (1982) (seniority system adopted in 1954 could be held unlawful if structured for a discriminatory purpose); *Wattleton v. Int'l Bhd. of Boiler Makers*, 686 F.2d 586 (7th Cir. 1982) (challenge to discriminatory seniority system brought by employees hired between 1948 and 1968); *Myers v. Gilman Paper,* No. CV 1120, 1981 WL 141, at *9 (S.D. Ga. Feb. 18, 1981) (upholding challenge to discriminatory seniority system that evolved between 1941 and 1965); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 517 (E.D. Va. 1968) (finding seniority lists established before 1966 were intentionally discriminatory).

In enacting Section 706(e)(2), Congress made clear that these decisions were correctly decided, and the original intent of Title VII was to allow "challenges to contemporary applications of discriminatory rules adopted prior to 1965…." S.

REP. NO. 101-315, pt. 4, at 28; H.R. REP. NO. 101-644 (I), pt. 5, at 36; H.R. REP. NO. 102-40 (I), at 62. *See also Bazemore,* 478 U.S. at 396-96. Because the *Lorance* decision threatened to bar such claims, Congress found there was a "compelling need" to overturn the decision. *Id.*

The rule AT&T urges the Court to adopt would lead to the anomalous result of providing additional protection to the worst offenders under Title VII—those whose discriminatory practices have survived for years and continue to injure employees today. This rule must be rejected as contrary to the clear legislative intent of Title VII.

C. This Court's Interpretation of a Seniority Plan "Adopted for a Discriminatory Purpose" Will Have a Profound Effect on Race Discrimination Cases.

AT&T argues that its seniority system is immune from challenge under Section 706(e)(2) because it was not "adopted for a discriminatory purpose." *See* Pet'r Br. at 14. Once again, AT&T incorrectly interprets the statute. Its seniority system on its face discriminates on the basis of sex between similarly situated employees. As such, there can be no question that the policy was adopted for a discriminatory purpose. A contrary interpretation would not only bar Respondents' claims in this case, but would also significantly curtail employees' rights to challenge discriminatory systems rooted in racial discrimination.

Section 706(e)(2) did not alter the rule this Court announced in *Lorance* that "a facially discriminatory seniority system … can be challenged at any time." 490 U.S. at 912. This is because a facially discriminatory system "by definition discriminates each time it applies." *Id.* at 913 n.5. Section 706(e)(2) extended this rule to facially neutral systems, providing that intentionally discriminatory systems could be challenged when they cause injury, "whether or not [the] discriminatory purpose is apparent on the face of the seniority provision."

The language of Title VII and AT&T's own brief demonstrate that Section 706(e)(2) applies to facially discriminatory seniority systems. Section 703(h) of Title VII provides that an employer may "apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merits system," so long as these 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). An intentionally discriminatory system is, by definition, not bona fide. AT&T concedes that Section 703(h) does not apply to facially discriminatory seniority systems. Pet'r Br. at 3. It would be an odd result indeed if the same conduct were considered "intentionally discriminatory" for the purposes of the merits of a Title VII claim, but not for the purposes of determining if the claim is timely.

In the context of racially discriminatory seniority systems, courts have long held that a seniority

system's origins in discriminatory practices—even those that predated Title VII— constituted evidence of discriminatory intent for purposes of Section 703(h). *See Harvey,* 878 F.2d at 1247-48 (in determining whether a seniority system dating back to 1892 was bona fide, court should not "discount evidence of the employer's racially discriminatory practices at the time [the] seniority system was adopted…"); *Quarles*, 279 F. Supp. at 517 (seniority lists established before 1966 and still maintained by the employer had "genesis in racial discrimination" and were intentionally discriminatory).

In denying seniority credit to employees who took pregnancy leave, AT&T plainly intended to discriminate on the basis of sex. The fact that this conduct occurred prior to the enactment of the PDA does not change its purposeful character. Simply put, any seniority system that facially discriminates on the basis of race, color, religion, sex or national origin was adopted for a discriminatory purpose. This is so even if the plan was adopted before the particular form of discrimination explicitly came within the ambit of Title VII. A contrary interpretation would curtail Congress' efforts to eradicate present-day injuries caused by the pervasive discrimination in employment that led to the passage of Title VII.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

John Brittain
Audrey Wiggins
Sarah Crawford
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., Suite 400
Washington, DC 20016

Eleanor H. Smith
Counsel of Record
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

Laura E. Neish
ZUCKERMAN SPAEDER LLP
1540 Broadway
Suite 1604
New York, NY 10036

Aimee J. Baldillo
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036

Raul Gonzalez
NATIONAL COUNCIL OF LA RAZA
1126 16th Street, NW
Washington, DC 20036

Kathryn Kolbert
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC 20036

Attorneys for Amici Curiae