IN THE SUPREME COURT OF THE UNITED STATES

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AT&T CORPORATION, :

Petitioner :

v. : No. 07-543

NOREEN HULTEEN, ET AL. :

- x

Washington, D.C.

Wednesday, December 10, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner.

LISA S. BLATT, ESQ., Assistant Attorney General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

KEVIN RUSSELL, ESQ., Bethesda, MD.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-543, AT&T Corporation v. Hulteen.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

When Judge Wood on the Seventh Circuit addressed precisely the same issue that's before this Court, I think she correctly observed that the distinction between an ongoing violation that arises with each new use of a seniority system and the present effect of a past discrimination is a distinction that is subtle at best.

But it is the line that this Court has asked the lower courts to draw, and I think the majority of those courts have actually drawn that line appropriately, although you could actually probably argue that it's more a scatter plot than it is a line. And I think it's a scatter plot that essentially looks to three primary factors in evaluating whether or not this is a case that is more like Evans and Lorance and

Ledbetter, or a case that is more like Bazemore.

And those three factors are the stale nature of the claims, whether or not there is a seniority at stake, and whether or not the employees have fair and adequate notice at the time of the action of the employer.

Let's look at the staleness of the claim. In this particular case, we are talking about maternity leaves that were taken by -- taken by the Respondents between 1968 and 1976. The information that's available to AT&T today is simply whether or not these particular individuals were paid for periods of time. There is nothing more than that.

We have no way of knowing whether or not these were maternity leaves or not maternity leaves, whether these were leaves to go to school, leaves to take care of -- of parents, or leaves for any other particular purpose.

JUSTICE GINSBURG: But at the time -- at the time of the original reduction of credits, was there any right claimed that any of these women had? I mean, nothing had happened to them except there was a bookkeeping entry. They wouldn't be hurt until they sought retirement or sought some other benefit that increased seniority would give them. But could they

have come into court just from, on the books of AT&T, they were docked X number of days? Nothing has happened as a consequence of that.

MR. PHILLIPS: Justice Ginsburg, they not only could have, but they did. If you look at the Eighth Circuit's decision -- and, indeed, Respondents in this case did -- in the Communications Worker case out of the Eighth Circuit, which is 602 F.2d 304, they specifically alleged that one of the Bell operating companies, one of the subsidiaries, had, in fact, refused to grant these -- these exact service credits, sued on that basis pre-PDA, and alleged that they were entitled to relief.

The Eighth Circuit in that case looked at this Court's decision in Gilbert and looked at this Court's decision in Satty, and said specifically this case is more like Gilbert than it's like Satty, but never remotely questioned that that was an actionable claim at that point in time. And, candidly, it seems to me clear that that's an actionable claim because there -- there is very little that is quite as critical in this process -- in the employment relationship as seniority. And -- and we are not talking about simply benefits seniority here. We are talking about competitive seniority.

So whether you have a -- a better claim to a cushier job or -- or to better working conditions, all of those are determined on the basis of -- of seniority, which is being decided on an individualized basis.

JUSTICE GINSBURG: But it hadn't been applied in any of those situations yet. At -- at the -- at the point when the person returns from leave and is docked a certain number of days, it hasn't been applied to any of the situations you mentioned. I grant you the case would be totally ripe if there was a better job to bid for, if there was an early retirement opportunity. But here there was nothing -- nothing to be done.

MR. PHILLIPS: Well, Justice Ginsburg, I -- I question the premise that there was nothing to be done. I think the average person told that they have less seniority today than they had yesterday, and if they were told that on the basis of -- of gender-based discrimination or race-based discrimination, would say: I am entitled to go to court today.

Not only do I think that that's the way most people would react to it, but the reality is if you look at the way the litigation arose in the Eighth Circuit case that I alluded to earlier, these very -- the same union here made exactly that claim prior to the passage of the PDA. So the notion that the employees, one,

didn't have notice -- they clearly did have notice -- and, two, didn't have an incentive to act, they clearly did have an incentive to act.

And I think this is not much different from what the Court said in Ricks, which is that obviously you have more of an incentive when you feel the true pain of a -- of a discriminatory act, assuming the act was in -- was, in fact, discriminatory, but the obligation to respond more -- to respond sooner remains on the plaintiff.

And, again, to go back to the point I was trying to make initially, these are all claims that arose -- these are all actions taken between 1968 and 1976. And one of the --

JUSTICE GINSBURG: But you -- you have to, I think, recognize that there's a big difference between Evans, who was told, goodbye, you got married, you have to resign -- a definite act that had immediate consequences -- and this, where there -- there is a potential for future consequences but no immediate consequence of the kind that existed in your model case, Evans.

MR. PHILLIPS: I mean, Justice Ginsburg, there's -- there's no question that the impact in Evans is -- is stronger than the impact here. I will readily

concede that. But what I won't concede is that the importance of seniority is so far down the pecking order or so de minimis in its impact that it would be reasonable to assume that the average employee, told that I'm am taking away your seniority on the basis -- on the basis of your race, would then sit back and say: I'm not going to do anything; I'm going to wait until the impact of that is felt.

To the contrary, you would expect, given the -- the centrality of seniority as a term of employment, that any employee under those circumstances would respond, you know, almost immediately under those circumstances.

The -- the second factor in this case that, it seems to me, this Court has relied upon significantly in the prior decisions that have come out on the side of not allowing this kind of litigation to go forward is we are talking about a seniority system here. And the -- as I said a minute ago, it's not just the rights of the individual and what benefits she might be entitled to. The seniority system obviously affects the rights of all members of the -- of the seniority plan and all of the pension plan and the entire system that the seniority operates on. And so there are third-party interests that are involved here.

And, again, both Congress and this Court's decisions have consistently recognized that when that situation arises, the resolution of the question ought to be to say, no, these are present effects of past discriminatory acts; we should be loath to try to interfere with those -- with that seniority scheme under these circumstances.

And then the third factor that it seems to me the Court has been concerned about -- and it's one we have been discussing -- which is the -- the -- you know, the adequacy of the notice, where the employee is put on notice at the time that actions were being taken.

Now, we can quarrel about how serious the -- the actions were, how detrimental they might have been. But it seems to me there is no question that the -- that the injury here is real and that the average employee being told that you are being deprived of seniority on -- on a race-based or sex-based or any other condition that is protected would act immediately.

Now, it seems to me that the only argument that the -- that the Respondents offer on the other side -- and it's almost a mantra-like exposition by them and it was certainly the basis for the Ninth Circuit, and I think it's where the mistake arises -- is this claim that this is -- is a facially discriminatory policy.

And their argument is if it's facially discriminatory, then you can apply it now, and all of the reasons why this Court has not applied these -- these kinds of claims in the past in Evans and Lorance and Ledbetter is -- is -- are off the hook in this circumstance.

But the truth is this is not a facially discriminatory policy. In the first place, this exact same policy was looked at in "SAH-tee" or "SAT-ee." I don't know exactly how to pronounce it. And the Court said these kinds of arrangements where you don't give service credit for people who take pregnancy leave is not facially discriminatory. So --

JUSTICE GINSBURG: But that was when Gilbert was prevailing. Certainly, we would not regard it that way today.

MR. PHILLIPS: Well, I don't know whether it would be regarded as facially discriminatory today. I think it would be regarded as illegal today. Whether it would be facially discriminatory I think is a -- is a trickier question, because again it seems to me that -- that the other side relies heavily on the statement in Lorance about facially discriminatory plans.

But what the Court described as a facially discriminatory plan in that day was it was -- in that case, was a situation where every day a male worker is

credited with a full day of work for a day's -- a day's effort, and a woman is credited with half a day's work for a day's effort. And -- and the Court said, quite rightly, that's a facially discriminatory plan.

Well, we don't have anything like that in this case. This plan was changed in the wake of the passage of the PDA to bring it completely in compliance. So the plan, as it operates today, is -- is not only not facially discriminatory; it is in no way discriminatory --

JUSTICE BREYER: Btu you -- what about -- I'm trying to work with this distinction where I agree with you that it's hard to see exactly what it is. But if I look at Bazemore, I think there we have a large number of employees. And if you look at a complicated thing, a salary structure, earlier, you see that that salary structure systemically paid black people less than white people. And at the time, for whatever reasons, there wasn't a statute -- we assume that that was lawful at the time.

MR. PHILLIPS: Right.

JUSTICE BREYER: Then later it turns out that they are keeping that salary structure, although not for racially motivated reasons. They are keeping it simply because that's what it was. And the Court says,

you've taken that complex structure, and you are administering it now, and the administration of it now is what is unlawful.

Then, look at your case. We had a complicated structure involving seniority, really. And part of that old seniority system was this rule which was legal at the time. It is no longer legal.

Now, we move that structure over until now, and we see we are administering the same complex structure today in the same kind of way that was at issue at Bazemore. It's a complicated set of rules that you have to apply today in order to see who is entitled to what, just as they did that in Bazemore. So I began to think, doesn't that, on the key matter, look very much like Bazemore? What is your response?

MR. PHILLIPS: Justice Breyer, I -- I -- in looking at this case, I have long thought of it as kind of an M.C. Escher picture, where you look at it from one direction and it looks one way, and then you turn it and you look at it the other way, and it looks completely different to you.

But I think the right answer to -- to your analysis is that the way to look at Bazemore is that every day after the statute was enacted, every employee who showed up to work who was black was paid less than

every employee who showed up to work who was white. And that, it seems to me, as the Court said in Bazemore, unanimously and without a whole lot of fanfare, is just something simply illegal under Title VII under those circumstances.

JUSTICE SOUTER: Yes, but why can't you make exactly the same kind of analysis here? People here are not showing up for work. They are staying home and getting retirement benefits. And every day a person who was out for 90 days because of a physical illness other than pregnancy is getting a retirement benefit with an extra dollar. And everybody who was out -- who was out for 90 days for maternity is only getting an extra 33 cents. And -- and why isn't the payment of the retirement benefit exactly on par with the payment of the salary in Bazemore?

MR. PHILLIPS: I -- I mean, I think the answer to that, Justice Souter, is that's not -- that's certainly not an implausible way of trying to look at this problem, but if you look at the language of this Court two terms ago in Ledbetter, and I'll quote it for you: "The fact that pre-charging period discrimination adversely affects the calculation of a neutral factor like seniority" -- which is what we are talking about here -- "that is used in determining future pay" --

which is the benefits from this program -- "does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period."

JUSTICE SOUTER: Well, do you -- do you see Ledbetter in effect as -- as overruling Bazemore?

MR. PHILLIPS: No, I think Ledbetter deals with Bazemore in the context of a -- of a true seniority system and an arrangement in which what you are looking at -- because our case is a fortiori from -- from Evans and -- and Ledbetter because, remember, we are talking about a situation where what we did at the time, in our judgment, was perfectly legal.

JUSTICE SOUTER: And -- and at the time, in Bazemore, that the private employers discriminated for racial purposes, that was not unconstitutional or illegal, either.

MR. PHILLIPS: Right, I understand that, but --

JUSTICE GINSBURG: At that time, even --

MR. PHILLIPS: And then --

JUSTICE GINSBURG: -- even more so. You -- you've said several times that it was perfectly legal, but isn't it true that the law in all of the circuits was the other way, and it wasn't until this Court decided the Gilbert case that the law changed? But if

you were -- if you were an employer and you were advising a client in, say, 1975, look to see where the circuits were, the circuits said, yes, discrimination on the basis of pregnancy is surely discrimination on the basis of sex. It wasn't until this Court decided first the Aiello case and then Gilbert that -- that that law changed. But --

MR. PHILLIPS: I mean, I understand that, Justice Ginsburg, and obviously we don't quarrel with that. The problem obviously is the Court did decide Gilbert; the Court didn't say the law changed. It was the way the Court interpreted the statute at the time, and under the interpretation of Gilbert and Satty, what we did was perfectly legal, and when the statute changed, what we did was to bring ourselves into assiduous compliance with that position, Justice Souter, which is what I think distinguishes --

JUSTICE SOUTER: No, but I mean, that -- with respect, I think that sort of begs the question because if Bazemore is the right template for analyzing this case, then you're not in compliance when you -- when your payment of the pension benefit reflects the pregnancy differential.

MR. PHILLIPS: Justice Souter, there's no question that you can read Bazemore that way. I just

think that the way this Court has read Bazemore and Lorance and Ledbetter suggests that, in the context of the case we have here, the right answer is this is more like present effects of past allegedly discriminatory acts and, therefore, not actionable at this time.

JUSTICE STEVENS: Let me just be sure I understand one thing: Are you contending that the plan is not unlawful or that the claim is untimely?

MR. PHILLIPS: We are -- well, both, actually. We say it's not -- we say it's untimely, but we also say that if --

JUSTICE STEVENS: At the time it was adopted, it was lawful.

MR. PHILLIPS: Right, exactly. And that otherwise it would have to be retroactive application of the PDA.

I would like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice,

and may it please the Court:

The Ninth Circuit's decision in this case impermissibly imposes retroactive liability on Petitioner, and Respondents' claims are in any event time-barred.

JUSTICE GINSBURG: Miss Blatt, that was not the position of the only representative of the United States in the Ninth Circuit, as far as I know, the EEOC, the brief in the Ninth Circuit. We don't hear from the EEOC in this Court, but I think it was not just that brief but in the EEOC manual, they are taking a position that is 180 degrees opposite yours. Am I right in --

MS. BLATT: You are absolutely correct. You are absolutely correct. And Ledbetter -- this Court's decision in Ledbetter, which was issued after both the compliance manual and after the EEOC filed their brief, explained that the EEOC is entitled to no special deference on the interpretation of this Court's cases. And the EEOC's interpretation is based on a conclusion whether this case is governed by Evans or Bazemore, and the EEOC hasn't purported to even discuss the retroactivity -- or the retroactive imposition of liability because the pregnancy leaves in this case were taken before the PDA and, as the EEOC acknowledged in that compliance manual, that denial of service credit at

the time was lawful under this Court's decision.

JUSTICE SOUTER: Would you -- would you -- excuse me -- would you agree that if -- well, let me be less rhetorical about it. What if Congress passed a statute providing that, starting one year from the effective date of the statute, no pension plan will differentiate in computing pension benefits on leaves taken between -- as between leaves taken for -- for conventional sickness and leaves taken for pregnancy. Would that statute be unconstitutional?

MS. BLATT: Unconstitutional?

JUSTICE SOUTER: Yes.

MS. BLATT: I think -- I mean, the way I understand your case is that Congress can speak in clear language to impose retroactive --

JUSTICE SOUTER: To make it retroactive. Yes.

MS. BLATT: Retrospective liability. It's just there's nothing in the PDA that indicates that retroactive liability was imposed. And --

JUSTICE SOUTER: So your -- your argument simply is a -- a purely statutory construction argument: That isn't what Congress had in mind.

MS. BLATT: Right, and your hypothetical statute would seem inconsistent with --

JUSTICE SOUTER: If Congress would have had in mind, then there would be a question whether Congress could do it, and you agree that it could. So the question is simply: Did it or didn't it in this case?

MS. BLATT: That's right, and I think the -- the seniority system provision, 703(h), would just be completely counter to that hypothetical provision because Congress has taken special care to make sure seniority systems can continue to exist, even though they incorporate pre-Act discrimination.

JUSTICE KENNEDY: Was this statute effective 180 days after its -- after signature?

MS. BLATT: With respect to fringe benefit programs, I think it was effective on the date it passed. And there's no question -- everyone concedes -- that AT&T immediately came into compliance on the effective date of the Act.

And the -- our key point on retroactivity is the way to look at this is what the statute prohibited and that is discrimination on the basis of pregnancy. And the pregnancy discrimination occurred in this case based on the discriminatory leave policies, and those -- those were all taken in the '60s and '70s before the PDA was passed. And what the Ninth Circuit's decision does is it orders Petitioner to restore service credit taken

for the pregnancy leave before the passage of the -- of the PDA. And I --

JUSTICE SOUTER: Do you -- do you think Ledbetter modified or overruled Bazemore?

MS. BLATT: No. It just put it in context, and I don't think that Bazemore deals with the retroactivity point, and let me explain why: The -- the employer in Bazemore who continued to pay African Americans less than whites was ordered prospectively to start paying equal wages for equal work, but specifically not ordered to make up for past wage differentials. And I think it's for three reasons. What this does is much -- much more prejudicial and upsets expectations in three ways, and this is some of the things that Mr. Phillips talked about. And at the time the pregnancy leaves were taken, the Petitioner was entitled and probably required to make planning and funding decisions for its pension liabilities.

Second, the Petitioner should not, 30 to 40 years after the fact, have to defend claims about whether these women were disabled and actually unable to work due to pregnancy, when medical records and personnel records are probably missing and memories long since faded.

And, third, the retroactive scrambling of a

seniority system upsets the vested rights of other employees.

And I just don't think you have any of that in Bazemore. The employer said --

JUSTICE SOUTER: Well, why does it upset --

MS. BLATT: -- you me to pay out money prospectively.

JUSTICE SOUTER: So far as pension benefits are concerned, it doesn't upset any employee's expectations. The ones who don't have a pregnancy background are going to get the same pension that they -- they bargained for.

MS. BLATT: Well, I think of a pension plan as a zero-sum game. There's a more limited amount. But more specifically, there --

JUSTICE SOUTER: Well, but that -- I mean, that's -- that's an issue that you touched on, on your second point. I don't know if it is a zero-sum game. And if -- if I were faced with -- with a problem, and I may be, in which I really have two choices -- I've got two analogies in our cases, I can take either one, and there were evidence in here that the -- that this was going to be so traumatic to the pension system that it would be manifestly unfair and perhaps endanger benefits for others to force these benefits to be paid, that

would be a good reason to go one way. But I don't think we have that in the case. And --

MS. BLATT: Well, I --

JUSTICE SOUTER: And if we don't have it in the case, then this isn't a zero-sum game.

MS. BLATT: Well, we don't know what we have in the case, because it was -- it was -- liability was imposed on summary judgment. The class allegations are 15,000.

But my point on vested seniority rights is that the class includes current employees. The Respondent Porter is a current employee. The order in this case is to restore seniority credit, I assume for current employees, which will give them greater seniority rights vis-a-vis other employees who have planned their own issues about job bidding and retirement and seniority based on 30 to 40 years of expectations. So I --

JUSTICE GINSBURG: But this is not a situation like Evans, somebody who was out of the workforce for 4 years and then is going to come back and bump some people who -- who filled in while she was not working, and get that credit. This is quite different. This is just a question of weeks.

MS. BLATT: No, I think some -- some of

these people had very significant disabilities, over 6, 7 months. But in terms of the fairness here, I mean, the -- the female flight attendant was discharged on a facially discriminatory policy of forcing married female flight attendants to resign. Here, the two Supreme Court cases have said that the decision -- as inexplicable as it was, the decision not to treat pregnancy as a disability was not on its face a discriminatory policy.

Now, the PDA immediately overruled that, but applied it prospectively, and now we are here 30 to 40 years later basically litigating the complaint that was brought in the Eighth Circuit as well as the complaint that was brought in the Second Circuit by the Respondent here. They brought this case twice in the Second -- and these are all cited on the Petitioner's brief and the reply brief on page 17.

In the Second Circuit case, it was granted, vacated, and remanded in light of Gilbert. And then in the Eighth Circuit case, they actually lost on the merits under Satty.

Now, the only thing that has changed is the passage of 30 years and the PDA, which doesn't apply retroactively. So I just think that --

JUSTICE STEVENS: Do I correctly understand

that -- that you would agree that if this plan were adopted today it would be unlawful, but because it was -- that at the time it was adopted, and the statute uses the word "adopted," it was lawful?

MS. BLATT: Let me be very clear on this. The seniority system in this case is facially neutral; it just accords seniority to men and women on an equal basis depending on whether they took disability leave or personal leave. The leave policy that forced women to take pregnancy leave as personal leave would be illegal if it were adopted today, because the PDA says you can't treat -- women affected by pregnancy have to be treated for the same purposes.

So the seniority system is always just the same. It says, based on total years of service, you get pension benefits, men and women the same. In the accrual policy, men and women were treated identically. Just like in Evans, men and women were denied seniority or service credit if they were terminated for -- for charge, and there was a separate unlawful policy that basically defined -- cause -- excuse me -- if you were terminated for cause -- and a separate policy that defined "cause" to say, well, if you were a female flight attendant and you married, then you were forced to resign. So obviously that policy was always

unlawful. It would be unlawful today. And similarly, if AT&T hadn't had changed its leave policy, someone could sue immediately. I mean, these women -- the immediate --

CHIEF JUSTICE ROBERTS: Before you -- do I understand your answer to Justice Stevens's question to be yes, it would be legal to adopt this seniority policy today?

MS. BLATT: Yes -- the seniority system is their seniority system, and it's completely neutral and completely lawful. AT&T's pre-PDA leave policy. That if you were a woman and you take pregnancy --

CHIEF JUSTICE ROBERTS: I understand, but we're --

MS. BLATT: -- that's unlawful today. That would be facial discrimination on the basis of pregnancy, and it would be unlawful.

CHIEF JUSTICE ROBERTS: But even adopting the policy today -- which I thought was Justice Stevens's question, and maybe it's not -- that would be acceptable? In other words, it's not simply the fact that this -- the leave policy -- the seniority policy was adopted during the time prior to Gilbert?

MS. BLATT: I -- AT&T could not adopt their leave policy today, and --

CHIEF JUSTICE ROBERTS: They couldn't adopt the leave policy. Could they adopt today a leave -- a seniority policy today based on -- today, based on the pre-Gilbert situation?

MS. BLATT: Oh. Then I think you would have a -- well, you would have an unlawful policy that someone could sue on immediately, and it would be facial discrimination, and we wouldn't be up here making a retroactivity argument because no court would be ordering them to undo decisions that were made before the passage of the Act. They today would be making decisions and there were nothing -- there would be no retroactive imposition of liability.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Blatt.

Mr. Russell.

ORAL ARGUMENT OF KEVIN RUSSELL

ON BEHALF OF THE RESPONDENTS

MR. RUSSELL: Mr. Chief Justice, and may it please the Court:

The distinction between Evans and this case turns on the difference between discrimination outside of the seniority system which affects an employee's ability to provide service to the employer, and

discrimination within the seniority system itself that gives unequal credit for equal service.

Congress drew that line, adopting one that this Court had referred to in Lorance, when it passed section 706(e)(2) of Title VII, which provided that a facially discriminatory seniority system can be challenged, not only when --

JUSTICE STEVENS: May I ask a question? If there is a facially discriminatory system, are you saying this is a disparate impact case or a disparate treatment case?

MR. RUSSELL: This is a disparate treatment case.

JUSTICE STEVENS: When did the -- when did the intentional discrimination take place?

MR. RUSSELL: It took place when AT&T applied an accrual rule to my clients' disability leave, and said --

JUSTICE STEVENS: You do not -- you do not contend that the plan was unlawful at the time it was adopted?

MR. RUSSELL: We think that it was, but it doesn't matter. Ultimately under 706(e)(2), what matters is that the plan discriminated on its face. And the insight beyond that -- and that doesn't turn on

whether it is unlawful or not. A plan that discriminates against short people discriminates on its face, intentionally discriminates on the basis of height every time it's applied; and when it does, whether it's lawful or not, is applied in accordance with the law that existed at the time of the application.

JUSTICE STEVENS: Well, let me ask you this question: At the time the plan was adopted, discrimination on the basis of pregnancy was not discrimination on the basis of sex, according to the majority in Gilbert.

MR. RUSSELL: That's correct.

JUSTICE STEVENS: Which I happen to disagree with.

So as a matter of law, it seems to me at the time the plan was adopted it was a lawful plan.

MR. RUSSELL: Well, we think it was unlawful for two reasons, and one is that it was unlawful under Satty. Now, I acknowledge --

JUSTICE STEVENS: Under what?

MR. RUSSELL: Under Satty, under the Court's decision in Satty that said discrimination with respect to seniority had an unlawful discriminatory impact on the basis of sex.

JUSTICE GINSBURG: That was -- that was

coming back to work and having all of your seniority stripped. Is that --

MR. RUSSELL: That is correct, but we don't think that there's a distinction because what the Court said was that the injury is cognizable because it affects employment opportunities.

JUSTICE SCALIA: Yes, but I thought the question was whether it was unlawful at the time, before the later statute.

MR. RUSSELL: Yes, and we think --

JUSTICE SCALIA: And -- and you say that, even though discriminating against pregnancy leave was itself lawful, a retirement plan that did not give you credit for the time of that pregnancy leave was unlawful?

MR. RUSSELL: No. Let me be clear. We think that at the time our clients took their leave, it was unlawful under Title VII and under Satty to discriminate on the basis of pregnancy with respect to seniority, whether it's the right to retain accrued seniority or the right to accumulate it in the first place.

JUSTICE SCALIA: And you say Gilbert had nothing to do with it?

MR. RUSSELL: Gilbert said that it wasn't

intentional discrimination on the basis of sex. Satty said it had an unlawful disparate impact on the basis of sex. But ultimately none of this matters, because under section 706(e)(2), the question is whether the system as a whole, which includes the accruable, discriminates on its face, whether it's intentionally discriminatory; and the insight behind that rule was, as I said before with the example of a height discrimination, a rule that discriminates on the basis of height intentionally discriminates on the basis of height every time it's applied.

CHIEF JUSTICE ROBERTS: Could you -- could I pause? I'd just trying to understand your earlier answer. It just took me a little while before you got off on the other point.

You're saying it was lawful at the time to deliberately discriminate on the basis of pregnancy -- Gilbert -- but that that was somehow unlawful if in fact your deliberate discrimination had a disparate impact?

MR. RUSSELL: Had a disparate impact on the basis of sex, yes. That's what Satty held -- that's what Satty held clearly with respect to accrued seniority.

CHIEF JUSTICE ROBERTS: Well, maybe I'm missing it. Isn't it a bit unusual to say it's

perfectly all right to discriminate intentionally, but if it has a disparate impact, that's not all right?

MR. RUSSELL: That's every disparate impact case. It's not that it's all right. It's just that it's not --

CHIEF JUSTICE ROBERTS: No, I -- I don't think it's every disparate impact case. In a disparate impact case, it's because you can't show, typically, deliberate discrimination, so you look at what the impact was. But I guess I've never heard of a case where it's okay to do something intentionally, but it's illegal -- to discriminate intentionally, but it's illegal if that has a disparate impact.

MR. RUSSELL: Let me just be clear about the terms. Gilbert said it was not unlawful intentional sex discrimination, but Satty said that it constitutes -- that pregnancy discrimination with respect to seniority credits constitutes -- has an unlawful disparate impact on the basis of sex. In that sense --

CHIEF JUSTICE ROBERTS: Well, but Gilbert said it wasn't discrimination on the basis of sex, because it said that discrimination on the basis of pregnancy was not discrimination on the basis of sex; and yet you are saying if there is a disparate impact on the basis of pregnancy, then it is discrimination on the

base of sex.

MR. RUSSELL: Let me try one more time. And maybe -- it's just to say that sometimes, intentional discrimination on the basis of pregnancy can have a disparate impact on the basis of sex. That's what Satty said -- Satty said. But --

CHIEF JUSTICE ROBERTS: Is your -- is there any other -- can you cite a case to me where we have held there is discriminatory treatment, but that's lawful, but the discriminatory impact of that is unlawful?

MR. RUSSELL: Well, I think a height requirement would be intentional discrimination on the basis of height that could have an unlawful disparate impact on the basis of sex. I think it's a parallel construction.

But, ultimately, I -- I don't want to waste too much time on this, because I don't think it matters because the insight behind section 706(e)(2) is that every act that implements a facially discriminatory system constitutes a fresh act of that intentional discrimination. And so there's no question --

JUSTICE STEVENS: But does the statute use the term -- does the statute use the term "facially discriminatory system"?

MR. RUSSELL: No. It uses the term "intentionally discriminatory system."

JUSTICE STEVENS: Right.

MR. RUSSELL: And there's no dispute that a facially discriminatory system discriminates intentionally. And so --

JUSTICE STEVENS: It is also clear that -- is it also clear that a statute -- that -- that a plan that does not intentionally discriminate may, nevertheless, discriminate facially? I think the two things --

MR. RUSSELL: Well, again, it's -- it's the predicates that change. It's a -- it can be a plan that doesn't intentionally discriminate on the basis of sex at the time, in the past. But when it -- but it's clear that it intentionally discriminates on the basis of pregnancy.

And so then the question -- so then under 706(e)(2), under this Court's insight in Lorance, the current application of that system constitutes a present act --

JUSTICE STEVENS: Yes, but that was the current application of a system that was plainly discriminatory, intentionally discriminatory. Lorance was. They intentionally discriminated against women.

MR. RUSSELL: Yes. The -- the intent behind the system is imbued in every application of the system. So a system that is intentionally discriminatory on the basis of pregnancy discriminates intentionally on the basis of pregnancy every time it's applied. And the question --

JUSTICE SCALIA: Go on, finish. I --

MR. RUSSELL: And, under Section 706(e)(2), the question is simply whether that discrimination is unlawful at the time of application --

JUSTICE SCALIA: I don't understand why you say that the retirement plan is facially discriminatory now. You contend that right now it's facially discriminatory.

MR. RUSSELL: Yes, it's --

JUSTICE SCALIA: It seems to me what the retirement plan says is that there is deducted from your seniority, for purposes of calculating what you get under the plan, all periods in which you -- you were lawfully not deemed to be -- to be working for the company. Now, that doesn't seem to be facially discriminatory at all.

MR. RUSSELL: I think it's -- the system is facially discriminatory -- there are several parts. One is: What set of rules constitutes a relevant seniority

system? And we think that the rule that says pregnancy leave doesn't get full credit is as an accrual rule, it's part of the seniority system. And that rule discriminated on its face on the basis of pregnancy.

JUSTICE SCALIA: No, but it didn't. Not -- not during the period for which it is used in -- in the retirement system.

MR. RUSSELL: There's no --

JUSTICE SCALIA: After the new legislation was passed, yes, pregnancy leave counts for seniority. But -- but during the period before that occurred, it was not counted towards seniority, and it -- and it was lawfully not counted towards seniority.

So what you have is a retirement plan that says all lawful periods of work -- all periods of work are -- that lawfully must be credited will be credited to the -- to the employees. I don't see how that is facially discriminatory.

MR. RUSSELL: It facially discriminates on the basis of pregnancy and then does so whether the pregnancy discrimination was unlawful at the time or not. And under 706(e)(2), that -- that facially discriminatory intent to discriminate on the basis of pregnancy is carried forward today in every application. And the whole point of the rule was simply to say that

we don't want to force employees to have to run into court every time there's some discrimination --

JUSTICE SCALIA: Is -- is there a difference between "facially discriminatory" and "discriminatory impact"? I mean I can see how you could say it has a discriminatory impact, but to say that on its face, when all it says is that you are credited with all of the periods in which you were lawfully working for the company and you are not credited for periods in which the company lawfully deemed you not to be working for the company, I don't see how that is facially discriminatory in -- in any sense.

MR. RUSSELL: Well, that scenario, I think, is indistinguishable from what happened in Bazemore. Recall, in Bazemore, that the basic rule is you get paid now today what we paid you before Title VII, plus a nondiscriminatory raise. And this Court said that that is simply perpetuation of the pre-Act intentional race discrimination, which wasn't unlawful at the time. But if you apply that system today, that constitutes a present act of racial discrimination subject to the present requirements of Title VII.

JUSTICE SCALIA: Did it say it was facially discriminatory? I'm -- I'm just talking about your -- your assertion that it's facially discriminatory. Did

Basemore more say it was facially discriminatory?

MR. RUSSELL: No, Bazemore did not use that term. But this Court, in Ledbetter, assumed that the rationale of Bazemore was the rationale this Court gave in Lorance, which was that it involved a -- intentionally a systematic system of discrimination that, even though it was lawful when it was instituted -- was first instituted, its carrying over into the present era subjects it to the requirements of Title VII now.

And I don't think it's -- it's fairly distinguishable because what the employer in Bazemore did is -- is simply what AT&T has done here. At the time Title VII took effect, the employer in Bazemore stopped giving discriminatory base salaries and stopped giving discriminatory pay raises, but it just added to that base salary in a nondiscriminatory manner, in the same way that AT&T stopped discriminating in the amounts that it added to accrued seniority.

JUSTICE STEVENS: No, but in Bazemore each paycheck was discriminatory.

MR. RUSSELL: It was discriminatory in the sense that it paid unequal wages for equal work. And here our pension checks give unequal compensation for equal amounts of service to the company.

JUSTICE STEVENS: But the reason for that is because they adopted a plan a long time ago that was lawful.

MR. RUSSELL: Well, the same thing was true in Bazemore. They had adopted --

JUSTICE STEVENS: They're not applying a plan in Bazemore. They're paying a current salary. They're paying black people less than whites just because they are black.

MR. RUSSELL: They were applying a pay structure that was adopted --

JUSTICE STEVENS: Yes, they were still paying -- each paycheck was a discriminatory paycheck. It didn't depend on history; whereas, a pension plan -- they always look at the formation of the plan. At least under subsection (h), I think you do.

MR. RUSSELL: The paychecks were in -- in Bazemore were intentionally discriminatory only insofar as you look back to the pre-Title VII --

JUSTICE STEVENS: And that's what I disagree with. It seems to me if you look at the present in Bazemore, you find they are getting different salaries because of the difference in -- one is of one race, and the other is of another race.

MR. RUSSELL: And the same is true here.

Our clients are giving --

JUSTICE SOUTER: The -- the point that is not true that -- that Justice Stevens is bringing out is that, in this case, you had a plan which was established at a time when the plan was -- was lawful. And, in effect, you are saying there is -- there is no value to be given to any reliance interest on the part of the company that established the plan when it funded according -- prior to the passage of the Act, when -- when it -- it calculated it's funding on the basis of what was, in fact, lawful conduct. And you are saying that is irrelevant. You didn't have that factor in Bazemore.

MR. RUSSELL: It's not irrelevant. It's simply something that this Court has traditionally taken into account at the remedial stage. The Court has --

JUSTICE SOUTER: Well, how would it do that?

MR. RUSSELL: Well, the -- in Florida v. Long -- there's a long line of cases where this Court --

JUSTICE SOUTER: Well, you're -- you're not asking the Court to do that, are you? You -- you're saying, look, pay -- pay pension benefits to these people exactly as they would have been calculated if, in fact, their pregnancy had been treated as whatever the regular sick leave was, so that they would get full

credit for the time they were out. You're -- you're not asking for any remedial order that gives them anything less than 100 percent of what they want.

MR. RUSSELL: We're not asking for that because we don't think that there are substantial reliance interests that are -- with respect to the -- the liquidity of the -- the pension plan that are affected here. My point is simply that --

JUSTICE SOUTER: How -- how do we -- you think that? How do we know that?

MR. RUSSELL: Well --

JUSTICE SOUTER: How do we know -- maybe -- maybe I can put the same question in a different way. Let's assume -- and this isn't a bizarre assumption here -- that we've got two lines of cases, and we could rely on either of those lines of cases, go one way if -- if we rely on line a, and go another way if we rely on line b.

What are the good reasons, apart from simply statements of the cases themselves, to go with the one line or the other line? One reason would be reliance interests in setting up a pension plan to distinguish this from Bazemore. How are we in a position to make that judgment?

MR. RUSSELL: I don't think you are, which

is why I do think that it's perfectly appropriate for this Court to do what it did in cases like Manhart, which is to say there's one definition of "discrimination" under Title VII, and it's not going to vary depending on whether we're talking about the pension plan or something else.

JUSTICE KENNEDY: But -- but doesn't the risk or the potential of a fixed-fund pension plan where employees who are not parties to this action receive less? Isn't there at least that possibility?

MR. RUSSELL: There's only that --

JUSTICE KENNEDY: And shouldn't that possibility be weighed in the decision of this Court? I think that's the line of questioning here.

MR. RUSSELL: And my suggestion is, number one, that there's no realistic possibility of that here. But, number two, that that's a --

JUSTICE KENNEDY: And there's no realistic possibility that some pensions are based on a fixed fund which has been established already?

MR. RUSSELL: I don't think so. If you are talking about a defined benefit plan, which is what we have here, any increases in liability simply mean that the employer has to --

JUSTICE KENNEDY: But I take it that this

decision you want us to write applies across the board to all plaintiffs.

MR. RUSSELL: I think that it does, but I think that it could quite possibly apply differently, for example, through a 401(k) plan where the discrimination would have occurred at a time when people are making running contributions. But ultimately, I mean, I think that this Court has taken into account those kinds of things at the remedial phase, where you have an opportunity to look at the facts about how this would affect the pension in this case or pensions generally.

There's simply no evidence here to suggest that there are those kinds of problems, because very few employers as far as we can tell continue this kind of discrimination. Most have eliminated it decades ago. And we're talking about a small subset of employees and relatively small amounts of money with respect to each of them. So I think --

JUSTICE GINSBURG: Mr. Russell, what do you say to Mr. Phillips' argument that you brought -- you brought essentially this case way back when, that the union said that this retirement plan is in violation of Title VII?

MR. RUSSELL: Well, first of all, I mean, my

individual-named clients didn't bring those claims back then; and they lost, the union that brought this claim. And then there were -- if I recollect correctly, they were challenging at that moment the denial of their disability leave payments. They weren't coming in and saying simply, you know, the only harm we're facing now is the prospect in the future of a lower pension.

And that's the kind of hypothetical future harm that we don't think Congress would have intended to be the basis of a lawsuit, not -- one of the -- when the entire purpose of enacting 706(e)(2) was that Congress was concerned not to require employees to run to court every time there is some discrimination that affects the amount of their seniority, because that causes a disruption to the employment atmosphere, it creates work for the EEOC and the courts, and in many, many cases the marginal difference in the amount of the seniority credit we are talking about here will make no big difference at all to anything.

JUSTICE KENNEDY: Well, when you say there's relatively little amounts of money, can you tell us what amount -- what the maximum amount would be involved? Are you --

MR. RUSSELL: I think -- and we haven't had discovery on this. I think there is a fairly linear

relationship between the amount of leave and the percentage of the pension check, and so we're talking in between --

JUSTICE KENNEDY: Would it be less than $100,000?

MR. RUSSELL: Per person?

JUSTICE KENNEDY: Would it be -- for the whole suit?

MR. RUSSELL: No. It would be more than that. It would be about half of a percent to maybe two and a half percent per person.

JUSTICE KENNEDY: Would that be a million -- a million dollars?

MR. RUSSELL: It could be millions of dollars. And the plan that --

JUSTICE KENNEDY: But that -- that's a small amount of money, a million -- millions of dollars?

MR. RUSSELL: It's a small amount of money to a plan that has tens of billions of dollars in it. AT&T's last report to the SEC said they had a $17 billion surplus in that fund. There's no question that this is going to bankrupt this particular fund.

JUSTICE SCALIA: What -- what do you do about section 703(h) of Title VII, which -- which we have held says that -- that makes it lawful for a bona

fide seniority system to perpetuate the effects of pre-Act discrimination?

MR. RUSSELL: The distinction between 703(h) and this case is that, in this case, we challenge a system, a seniority system that is itself facially discriminatory, and 703(h) says that doesn't apply --

JUSTICE SCALIA: That hinges -- that hinges on your "facially discriminatory."

MR. RUSSELL: It does. And in addition, we also have the argument that the Ninth Circuit accepted, but -- that the PDA on its own terms says, that 703(h) doesn't apply to permit discrimination that the PDA itself would forbid.

JUSTICE SCALIA: Well, yes, that's -- that's rather implausible, but 70(h) covers sex discrimination and even race discrimination, but it doesn't cover pregnancy discrimination. I mean, I --

MR. RUSSELL: You may think that, but --

JUSTICE SCALIA: You need pretty clear language to persuade me of that.

MR. RUSSELL: I think that in the end, I mean, it's worthwhile to focus on the consequences of accepting AT&T's view. On the better view, it depends mightily on whether an employer keeps a running tab on seniority, in which case they can avoid the application

of the PDA because it made the calculation beforehand, and an employer who, at the end of an employee's career, simply tabulates the term of employment, which I think under their view subjects that employer to the current requirements of the PDA. And we respectfully suggest that Congress wouldn't intend Title VII to turn on such trivial distinctions.

Moreover, under their view, an employer who -- an employer would be able to pay black workers today smaller pensions than white workers who provided exactly the same amount of service, if those black workers started working for it before Title VII was enacted, at a time when the employer had no pension system for blacks and didn't give them any seniority credit. That employer could say the same thing AT&T says here, which is that the present disparity in pension benefits is simply the present effect of discrimination that was lawful when it occurred.

JUSTICE SCALIA: You mean there are a lot more suits coming behind this one --

MR. RUSSELL: Well, I don't think --

JUSTICE SCALIA: -- for any kind of discrimination that preceded Title VII? When was Title VII enacted?

MR. RUSSELL: 1964.

JUSTICE SCALIA: There may be still some of those people around.

MR. RUSSELL: There are. There are, but it's very unlikely that there are very many of them subject to this kind of --

JUSTICE SCALIA: I mean, you're scaring me.

(Laughter.)

MR. RUSSELL: Well, let me reassure you, because I think most employers, unlike AT&T, have -- don't make those kinds of distinctions with respect to their employees who were hired before and after the effective dates of the relevant provisions of Title VII. And I think it's --

JUSTICE BREYER: I take it you are not saying anything that is in effect and is still there, you do retro, you win. I take it -- maybe I am not right, but I take it that what -- what the point is here is that you -- you took a complicated superstructure of rules that was creating boxes and those boxes were created on the basis of discrimination. Then you move it, whole cloth, into the post-new world. And it's the administration of that complicated system of rules that was created out of the discrimination, but it's administration today that makes it like Bazemore.

MR. RUSSELL: Yes, that's -- that's right.

That the present implementation of the system subjects it to the present-day requirements of Title VII.

JUSTICE BREYER: It does that, but what I can't figure out is does that have a lot of implication for other areas or not? And the other thing I'm not sure of is how it squares with Ledbetter.

MR. RUSSELL: Well, the difference between Ledbetter and this case is Ledbetter involved discrimination entirely outside of the seniority system, and as a result, it didn't -- 706(e)(2) didn't apply; this Court's decision in Lorance didn't apply. And Congress enacted this 706(e)(2) to provide a very special rule to displace the rule of evidence. It was -- it was unambiguously intended to displace the rule of evidence with respect to intentionally discriminatory seniority systems.

MR. RUSSELL: Evans isn't a problem because the rule they were administering in Evans is whoever is hired is in fact hired at low seniority. Now, it's hard to say that that's a complicated system of rules that had a pre-existence, even though this individual was where she was because of that earlier system.

MR. RUSSELL: Again, I think the distinction between Evans and this case is discrimination that occurred entirely outside of a -- the seniority system

and discrimination within the seniority system that gives unequal credit for equal service. And Congress said of that kind of discrimination -- we're not going to make you challenge immediately. We're going to let you wait until the reduced seniority has a concrete effect on your compensation or other terms and conditions of employment, and then you can raise it then.

And the underlying thought of the provision is that if you are subject to intentional discrimination with respect to seniority accrual, we are going to impute that intent to the subsequent applications of that seniority system when it's applied to injure you. And if --

JUSTICE STEVENS: I still want to go back to assure that I've given you a fair opportunity to answer this. You are relying on Nashville v. Satty, which was a discriminatory impact case, and now you are arguing that the key is the -- is the intent. Which is it?

MR. RUSSELL: We make alternative arguments.

JUSTICE STEVENS: Oh, okay.

MR. RUSSELL: We argue that to the extent it matters whethers this was lawful at the time our clients took their leave, it was not unlawful, and we point to Satty. But we say ultimately that doesn't matter

because under section 706(e)(2), so long as they implement, so long as they rely on the diminished seniority in the present, that constitutes a present act of pregnancy discrimination, intentional pregnancy discrimination, which is unlawful under the PDA.

JUSTICE STEVENS: Well, as soon as you get back to the intentional, you get away from Satty.

MR. RUSSELL: Yes, I agree with that.

JUSTICE STEVENS: Oh, okay.

MR. RUSSELL: But I don't think there can be any dispute that when my clients had their seniority reduced, it was an act of facial pregnancy discrimination; and under 702 -- 706(e)(2), that intent to discriminate on the basis of pregnancy is --

JUSTICE STEVENS: But it was not unlawful at the time it was done.

MR. RUSSELL: I do think it was unlawful, but it doesn't matter with respect to 706(e)(2).

If I could turn briefly to the retroactivity argument: It's important to be clear what the Ninth Circuit held and what it didn't hold. It did not hold that AT&T was liable for anything it did prior to the effective date of the PDA. It didn't, for example, hold that it was liable simply because it moved the NCS dates or because it relied on them in any way before the

effective date of the PDA. All it said was that AT&T is precluded from relying on that discriminatory measure of service in the future.

And in that sense, this case is quite like this Court's decision in Griggs v. Duke Power Company, where the Court said Title VII prohibits employers from relying on the results of discriminatory employment tests. Now, nobody thought that that meant that Title VII subjected to liability employers who administered or relied on those tests before the effective date of Title VII, but everybody understood that they couldn't rely on those results after the effective date of Title VII, and nobody thought that that gave the statute a retroactive effect.

And that's all that the Ninth Circuit interpreted the PDA to do here, is to prohibit AT&T from engaging in the post-Act reliance on those pre-Act discriminatory measures, that AT&T had every opportunity to conform its -- to conform its conduct to the -- to the requirements of the PDA, and a statute that simply tells an employer how it has to treat past events for future employment decision purposes is simply not a statute that has a retroactive effect.

Finally, I'd like to -- if I have time, I'd like to address this suggestion from the Solicitor

General's Office that this doesn't involve seniority discrimination at all because what we are talking about here is discrimination that occurred with respect to the personnel policy about the classification of leave, as opposed to discrimination within the seniority system itself.

And this Court was clear in California Brewers that an accrual rule that says how time counts for seniority purposes is part of the seniority system. And under AT&T's system, it's true you have to apply a two-part rule. You have to know whether -- if you are asked, does this pregnancy leave count, you have to ask, well, is it personal leave? But that doesn't tell you anything until you apply the second part of the rule that says pregnancy leave counts as -- as personal leave.

And because you need to know the answers to -- to both of those questions, both parts of the rules are properly considered to be part of the accrual rule and part of the seniority system.

Finally, if I -- if I could return once again to this alternative argument that we have, that even setting aside Bazemore and section 706(e)(2), this is not -- our clients weren't required to challenge this discrimination before because it wasn't an completed,

unlawful employment practice at the time.

And, again, the point is that discrimination with respect to a small amount of time going towards seniority doesn't affect even the worker's actual seniority, that is, her place in the seniority hierarchy. A worker who is 2 years' junior to the person who is next in line above her and 2 years' senior to the person next in line below her -- 6 weeks of service credit aren't going to make any difference with respect to her place on the seniority hierarchy. It's not going to make any difference with respect to her ability to bid for jobs. And it's not necessarily even going to make any difference with respect to her pension, because at the time that these leaves are taken typically, the person is years away, perhaps decades away, from even vesting in their pension benefit.

And Congress reasonably would have thought, I think, that that kind of harm is too speculative to warrant immediate -- to warrant the requirement that the employees have to immediately challenge that kind of discrimination at the time it occurs. That's why Congress enacted section 706(e)(2), to give employees an opportunity to wait until the discrimination has a concrete effect on their employment status, on their compensation or terms of employment. And AT&T's view of

the statute --

JUSTICE GINSBURG: Are you -- are you making a claim that they had the choice or that the claim wasn't ripe until they felt the impacts of it?

MR. RUSSELL: I think they don't have a choice. They can't bring the claim until it has a concrete impact.

Now, if 706(e)(2) applies, they can challenge the system as of -- when it's adopted or when it's applied to them, but otherwise they have to wait until it injures them within the meaning of section 706(e)(2). And that's a perfectly sensible rule.

Remember, we're talking here about facial discrimination, and the concerns about stale evidence are not particularly strong here because -- and, as a result, we are able to stipulate to the underlying facts. Everybody knows what the system was and what it did. And there's no reasonable dispute about whether the reduction in our clients' leaves was as a result of pregnancy versus something else. And in any event, this is simply a consequence Congress must have intended when it said that discriminatory seniority systems are open to challenge whenever they apply to injure a worker, even if that means that so long -- if an employer implements a plan for 30 years, Congress understood that

that meant that they were subject to suit for 30 years.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Russell.

Mr. Phillips, 3 minutes.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice.

I'd just like to make a couple of points: Justice Ginsburg, you asked a question about the earlier litigation, and let me just quote from the first page of Judge Bright's opinion where it says the appellants in the class action allege that Southwestern Bell discriminates against women by, quote, "refusing to extend full seniority credit to female employees on maternity leave." That is precisely the claim that's being litigated in this particular case.

And contrary to my brother's position just a few minutes ago, that these don't have any impact and why would anybody act on the basis of them, it seems to me that that lawsuit belies that fact. They recognize the impact on seniority, and they acted immediately as a consequence of that.

Justice Souter, I do agree with you. I think the reason that Bazemore is not the -- I wouldn't say "line" -- more the point of authority to be as the

departure in this particular case is because of the implications for the seniority system.

Justice Kennedy, the problem here is we don't know exactly what the impact's going to be. What we do know is that all plans are funded on a set of actuarial assumptions, and, candidly, if they say we were overfunded a couple months ago, given to what has happened to my pension plans in the last couple of months, I would worry a little bit about what the situation is.

But the -- but the most fundamental point is you don't know. And in that context, what we do understand is that Congress routinely says protect the seniority systems, protect the pension plans. You know, my colleague says, well, but this is all form over substance because what if they come back at the end and decided to do all these calculations? That fundamentally misunderstands the nature of the pension process. You have to fund these in advance. You make actuarial assumptions. No one is in a position where they're going to allow the determination of seniority to be made at the tail end without making assumptions about what they are going to be like going in.

And, Justice Breyer, I think that is the answer to your question because we are not taking this

complex system wholesale and just dumping it post-PDA. What we did is we retained the specific rules with respect to the accrual and the seniority, and we eliminated the underlying distinctions between pregnancy and other kinds of disabilities. And that's how we apply it, and that, frankly, is fundamentally different from Bazemore because we are not discriminating every day in a way that harms them. We made a seniority decision, like a pay decision, pre-Act; now we are acting -- it's not a pay decision post-Act. And it's -- to my mind in that sense it is just like Evans and that line of cases.

Finally, you asked the question, Justice Souter, could Congress have done -- have done exactly what the Respondents ask? And the answer to that is yes. Congress could say today we're not going to allow this. It would upset a lot of pension plans. It would upset a lot of expectations.

Congress could have done it. Congress didn't do it, or at least if it were going to upset all of those reliance interests, Congress would have done so in language that was much more explicit than what it has done in the PDA and 706(e)(2).

If there are no further questions, Your Honor, I urge you to reverse the judgment below.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

The case is submitted.

(Whereupon, at 12:07 p.m., the case in the above-entitled matter was submitted.)

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