1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AT&T CORPORATION, :

4 Petitioner :

5 v. : No. 07-543

6 NOREEN HULTEEN, ET AL. :

7 - x

8 Washington, D.C.

9 Wednesday, December 10, 2008

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:06 a.m.

14 APPEARANCES:

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

16 the Petitioner.

17 LISA S. BLATT, ESQ., Assistant Attorney General,

18 Department of Justice, Washington, D.C.; on behalf of

19 the United States, as amicus curiae, supporting the

20 Petitioner.

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

22 Respondents.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE
3 CARTER G. PHILLIPS, ESQ.
4 On behalf of the Petitioner 3
5 LISA S. BLATT, ESQ.
6 On behalf of the United States, as amicus
7 curiae, supporting the Petitioner 16
8 KEVIN RUSSELL, ESQ.
9 On behalf of the Respondent 26
10 REBUTTAL ARGUMENT OF
11 CARTER G. PHILLIPS, ESQ.
12 On behalf of the Petitioner 55

13
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument next in Case 07-543, AT&T Corporation v.

5 Hulteen.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

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

10 and may it please the Court:

11 When Judge Wood on the Seventh Circuit

12 addressed precisely the same issue that's before this

13 Court, I think she correctly observed that the

14 distinction between an ongoing violation that arises

15 with each new use of a seniority system and the present

16 effect of a past discrimination is a distinction that is

17 subtle at best.

18 But it is the line that this Court has asked

19 the lower courts to draw, and I think the majority of

20 those courts have actually drawn that line

21 appropriately, although you could actually probably

22 argue that it's more a scatter plot than it is a line.

23 And I think it's a scatter plot that essentially looks

24 to three primary factors in evaluating whether or not

25 this is a case that is more like Evans and Lorance and

1 Ledbetter, or a case that is more like Bazemore.
2 And those three factors are the stale nature
3 of the claims, whether or not there is a seniority at
4 stake, and whether or not the employees have fair and
5 adequate notice at the time of the action of the
6 employer.
7 Let's look at the staleness of the claim.
8 In this particular case, we are talking about maternity
9 leaves that were taken by -- taken by the Respondents
10 between 1968 and 1976. The information that's available
11 to AT&T today is simply whether or not these particular
12 individuals were paid for periods of time. There is
13 nothing more than that.
14 We have no way of knowing whether or not
15 these were maternity leaves or not maternity leaves,
16 whether these were leaves to go to school, leaves to
17 take care of -- of parents, or leaves for any other
18 particular purpose.
19 JUSTICE GINSBURG: Mr. Phillips -- but at
20 the time -- at the time of the original reduction of
21 credits, was there any right claim that any of these
22 women had? I mean, nothing had happened to them except
23 there was a bookkeeping entry. They wouldn't be hurt
24 until they sought retirement or sought some other
25 benefit that increased seniority would give them. But

1 could they have come into court just when the -- on the
2 books of AT&T, they were docked X number of days?
3 Nothing has happened as a consequence of that.
4 MR. PHILLIPS: Justice Ginsburg, they not
5 only could have, but they did. If you look at the
6 Eighth Circuit's decision -- and, indeed, Respondents in
7 this case did -- in the Communications Worker case out
8 of the Eighth Circuit, which is 602 F.2d 304, they
9 specifically alleged that one of the Bell operating
10 companies, one of the subsidiaries, had, in fact,
11 refused to grant these -- these exact service credits,
12 sued on that basis pre-PDA, and alleged that they were
13 entitled to relief.
14 The Eighth Circuit in that case looked at
15 this Court's decision in Gilbert and looked at this
16 Court's decision in Satty, and said specifically this
17 case is more like Gilbert than it's like Satty, but
18 never remotely questioned that that was an actionable
19 claim at that point in time. And, candidly, it seems to
20 me clear that that's an actionable claim because there
21 -- there is very little that is quite as critical in
22 this process -- in the employment relationship as
23 seniority. And -- and we are not talking about simply
24 benefits seniority here. We are talking about
25 competitive seniority.

1 So whether you have a -- a better claim to a
2 cushier job or -- or to better working conditions, all
3 of those are determined on the basis of -- of seniority,
4 which is being decided on an individualized basis.
5 JUSTICE GINSBURG: But it hadn't been
6 applied in any of those situations yet. At -- at the --
7 at the point when the person returns from leave and is
8 docked a certain number of days, it hasn't been applied
9 to any of the situations you mentioned. I grant you the
10 case would be totally ripe if there was a better job to
11 bid for, if there was an early retirement opportunity.
12 But here there was nothing -- nothing to be done.
13 MR. PHILLIPS: Well, Justice Ginsburg, I --
14 I question the premise that there was nothing to be
15 done. I think the average person told that they have
16 less seniority today than they had yesterday, and if
17 they were told that on the basis of -- of gender-based
18 discrimination or race-based discrimination, would say:
19 I am entitled to go to court today.
20 Not only do I think that that's the way most
21 people would react to it, but the reality is if you look
22 at the way the litigation arose in the Eighth Circuit
23 case that I alluded to earlier, these very -- the same
24 union here made exactly that claim prior to the passage
25 of the PDA. So the notion that the employees, one,

1 didn't have notice -- they clearly did have notice --
2 and, two, didn't have an incentive to act, they clearly
3 did have an incentive to act.
4 And I think this is not much different from
5 what the Court said in Ricks, which is that obviously
6 you have more of an incentive when you feel the true
7 pain of a -- of a discriminatory act, assuming the act
8 was in -- was, in fact, discriminatory, but the
9 obligation to respond more -- to respond sooner remains
10 on the plaintiff.
11 And, again, to go back to the point I was
12 trying to make initially, these are all claims that
13 arose -- these are all actions taken between 1968 and
14 1976. And one of the --
15 JUSTICE GINSBURG: But you -- you have to, I
16 think, recognize that there's a big difference between
17 Evans, who was told, goodbye, you got married, you have
18 to resign -- a definite act that had immediate
19 consequences -- and this, where there -- there is a
20 potential for future consequences but no immediate
21 consequence of the kind that existed in your model case,
22 Evans.
23 MR. PHILLIPS: I mean, Justice Ginsburg,
24 there's -- there's no question that the impact in Evans
25 is -- is stronger than the impact here. I will readily

1 concede that. But what I won't concede is that the
2 importance of seniority is so far down the pecking order
3 or so de minimis in its impact that it would be
4 reasonable to assume that the average employee, told
5 that I'm am taking away your seniority on the basis --
6 on the basis of your race, would then sit back and say:
7 I'm not going to do anything; I'm going to wait until
8 the impact of that is felt.
9 To the contrary, you would expect, given the
10 -- the centrality of seniority as a term of employment,
11 that any employee under those circumstances would
12 respond, you know, almost immediately under those
13 circumstances.
14 The -- the second factor in this case that,
15 it seems to me, this Court has relied upon significantly
16 in the prior decisions that have come out on the side of
17 not allowing this kind of litigation to go forward is we
18 are talking about a seniority system here. And the --
19 as I said a minute ago, it's not just the rights of the
20 individual and what benefits she might be entitled to.
21 The seniority system obviously affects the rights of all
22 members of the -- of the seniority plan and all of the
23 pension plan and the entire system that the seniority
24 operates on. And so there are third-party interests
25 that are involved here.

1 And, again, both Congress and this Court's
2 decisions have consistently recognized that when that
3 situation arises, the resolution of the question ought
4 to be to say, no, these are present effects of past
5 discriminatory acts; we should be loath to try to
6 interfere with those -- with that seniority scheme under
7 these circumstances.
8 And then the third factor that it seems to
9 me the Court has been concerned about -- and it's one we
10 have been discussing -- which is the -- the -- you know,
11 the adequacy of the notice, where the employee is put on
12 notice at the time that actions were being taken.
13 Now, we can quarrel about how serious the --
14 the actions were, how detrimental they might have been.
15 But it seems to me there is no question that the -- that
16 the injury here is real and that the average employee
17 being told that you are being deprived of seniority on
18 -- on a race-based or sex-based or any other condition
19 that is protected would act immediately.
20 Now, it seems to me that the only argument
21 that the -- that the Respondents offer on the other side
22 -- and it's almost a mantra-like exposition by them and
23 it was certainly the basis for the Ninth Circuit, and I
24 think it's where the mistake arises -- is this claim
25 that this is -- is a facially discriminatory policy.

1 And their argument is if it's facially discriminatory,
2 then you can apply it now, and all of the reasons why
3 this Court has not applied these -- these kinds of
4 claims in the past in Evans and Lorance and Ledbetter is
5 -- is -- are off the hook in this circumstance.
6 But the truth is this is not a facially
7 discriminatory policy. In the first place, this exact
8 same policy was looked at in "SAH-tee" or "SAT-ee." I
9 don't know exactly how to pronounce it. And the Court
10 said these kinds of arrangements where you don't give
11 service credit for people who take pregnancy leave is
12 not facially discriminatory. So --
13 JUSTICE GINSBURG: But that was when Gilbert
14 was prevailing. Certainly, we would not regard it that
15 way today.
16 MR. PHILLIPS: Well, I don't know whether it
17 would be regarded as facially discriminatory today. I
18 think it would be regarded as illegal today. Whether it
19 would be facially discriminatory I think is a -- is a
20 trickier question, because again it seems to me that --
21 that the other side relies heavily on the statement in
22 Lorance about facially discriminatory plans.
23 But what the Court described as a facially
24 discriminatory plan in that day was it was -- in that
25 case, was a situation where every day a male worker is

1 credited with a full day of work for a day's -- a day's
2 effort, and a woman is credited with half a day's work
3 for a day's effort. And -- and the Court said, quite
4 rightly, that's a facially discriminatory plan.
5 Well, we don't have anything like that in
6 this case. This plan was changed in the wake of the
7 passage of the PDA to bring it completely in compliance.
8 So the plan, as it operates today, is -- is not only not
9 facially discriminatory; it is in no way discriminatory
10 --
11 JUSTICE BREYER: But you -- what about --
12 I'm trying to work with this distinction where I agree
13 with you that it's hard to see exactly what it is. But
14 if I look at Bazemore, I think there we have a large
15 number of employees. And if you look at a complicated
16 thing, a salary structure, earlier, you see that that
17 salary structure systemically paid black people less
18 than white people. And at the time, for whatever
19 reasons, there wasn't a statute -- we assume that that
20 was lawful at the time.
21 MR. PHILLIPS: Right.
22 JUSTICE BREYER: Then later it turns out
23 that they are keeping that salary structure, although
24 not for racially motivated reasons. They are keeping it
25 simply because that's what it was. And the Court says,

1 you've taken that complex structure, and you are
2 administering it now, and the administration of it now
3 is what is unlawful.
4 Then, look at your case. We had a
5 complicated structure involving seniority, really. And
6 part of that old seniority system was this rule which
7 was legal at the time. It is no longer legal.
8 Now, we move that structure over until now,
9 and we see we are administering the same complex
10 structure today in the same kind of way that was at
11 issue at Bazemore. It's a complicated set of rules that
12 you have to apply today in order to see who is entitled
13 to what, just as they did that in Bazemore. So I began
14 to think, doesn't that, on the key matter, look very
15 much like Bazemore? What is your response?
16 MR. PHILLIPS: Justice Breyer, I -- I -- in
17 looking at this case, I have long thought of it as kind
18 of an M.C. Escher picture, where you look at it from one
19 direction and it looks one way, and then you turn it and
20 you look at it the other way, and it looks completely
21 different to you.
22 But I think the right answer to -- to your
23 analysis is that the way to look at Bazemore is that
24 every day after the statute was enacted, every employee
25 who showed up to work who was black was paid less than

1 every employee who showed up to work who was white. And
2 that, it seems to me, as the Court said in Bazemore,
3 unanimously and without a whole lot of fanfare, is just
4 something simply illegal under Title VII under those
5 circumstances.
6 JUSTICE SOUTER: Yes, but why can't you make
7 exactly the same kind of analysis here? People here are
8 not showing up for work. They are staying home and
9 getting retirement benefits. And every day a person who
10 was out for 90 days because of a physical illness other
11 than pregnancy is getting a retirement benefit with an
12 extra dollar. And everybody who was out -- who was out
13 for 90 days for maternity is only getting an extra 33
14 cents. And -- and why isn't the payment of the
15 retirement benefit exactly on par with the payment of
16 the salary in Bazemore?
17 MR. PHILLIPS: I -- I mean, I think the
18 answer to that, Justice Souter, is that's not -- that's
19 certainly not an implausible way of trying to look at
20 this problem, but if you look at the language of this
21 Court two terms ago in Ledbetter, and I'll quote it for
22 you: "The fact that pre-charging period discrimination
23 adversely affects the calculation of a neutral factor
24 like seniority" -- which is what we are talking about
25 here -- "that is used in determining future pay" --

1 which is the benefits from this program -- "does not
2 mean that each new paycheck constitutes a new violation
3 and restarts the EEOC charging period."
4 JUSTICE SOUTER: Well, do you -- do you see
5 Ledbetter in effect as -- as overruling Bazemore?
6 MR. PHILLIPS: No, I think Ledbetter deals
7 with Bazemore in the context of a -- of a true seniority
8 system and an arrangement in which what you are looking
9 at -- because our case is a fortiori from -- from Evans
10 and -- and Ledbetter because, remember, we are talking
11 about a situation where what we did at the time, in our
12 judgment, was perfectly legal.
13 JUSTICE SOUTER: And -- and at the time, in
14 Bazemore, that the private employers discriminated for
15 racial purposes, that was not unconstitutional or
16 illegal, either.
17 MR. PHILLIPS: Right, I understand that, but
18 --
19 JUSTICE GINSBURG: At that time, even --
20 MR. PHILLIPS: But what --
21 JUSTICE GINSBURG: -- even more so. You --
22 you've said several times that it was perfectly legal,
23 but isn't it true that the law in all of the circuits
24 was the other way, and it wasn't until this Court
25 decided the Gilbert case that the law changed? But if

1 you were -- if you were an employer and you were
2 advising a client in, say, 1975, look to see where the
3 circuits were, the circuits said, yes, discrimination on
4 the basis of pregnancy is surely discrimination on the
5 basis of sex. It wasn't until this Court decided first
6 the Aiello case and then Gilbert that -- that that law
7 changed. But --
8 MR. PHILLIPS: I mean, I understand that,
9 Justice Ginsburg, and obviously we don't quarrel with
10 that. The problem obviously is the Court did decide
11 Gilbert; the Court didn't say the law changed. It was
12 the way the Court interpreted the statute at the time,
13 and under the interpretation of Gilbert and Satty, what
14 we did was perfectly legal, and when the statute
15 changed, what we did was to bring ourselves into
16 assiduous compliance with that position, Justice Souter,
17 which is what I think distinguishes --
18 JUSTICE SOUTER: No, but I mean, that --
19 with respect, I think that sort of begs the question
20 because if Bazemore is the right template for analyzing
21 this case, then you're not in compliance when you --
22 when your payment of the pension benefit reflects the
23 pregnancy differential.
24 MR. PHILLIPS: Justice Souter, there's no
25 question that you can read Bazemore that way. I just

1 think that the way this Court has read Bazemore and
2 Lorance and Ledbetter suggests that, in the context of
3 the case we have here, the right answer is this is more
4 like present effects of past allegedly discriminatory
5 acts and, therefore, not actionable at this time.
6 JUSTICE STEVENS: Let me just be sure I
7 understand one thing: Are you contending that the plan
8 is not unlawful or that the claim is untimely?
9 MR. PHILLIPS: We are -- well, both,
10 actually. We say it's not -- we say it's untimely, but
11 we also say that if --
12 JUSTICE STEVENS: At the time it was
13 adopted, it was lawful.
14 MR. PHILLIPS: Right, exactly. And that
15 otherwise it would have to be retroactive application of
16 the PDA.
17 I would like to reserve the balance of my
18 time.
19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Blatt.
21 ORAL ARGUMENT OF LISA S. BLATT
22 ON BEHALF OF THE UNITED STATES,
23 AS AMICUS CURIAE,
24 SUPPORTING THE PETITIONER
25 MS. BLATT: Thank you, Mr. Chief Justice,

1 and may it please the Court:
2 The Ninth Circuit's decision in this case
3 impermissibly imposes retroactive liability on
4 Petitioner, and Respondents' claims are in any event
5 time-barred.
6 JUSTICE GINSBURG: Miss Blatt, that was not
7 the position of the only representative of the United
8 States in the Ninth Circuit, as far as I know, the EEOC,
9 the brief in the Ninth Circuit. We don't hear from the
10 EEOC in this Court, but I think it was not just that
11 brief but in the EEOC manual, they are taking a position
12 that is 180 degrees opposite yours. Am I right in --
13 MS. BLATT: You are absolutely correct. You
14 are absolutely correct. And Ledbetter -- this Court's
15 decision in Ledbetter, which was issued after both the
16 compliance manual and after the EEOC filed their brief,
17 explained that the EEOC is entitled to no special
18 deference on the interpretation of this Court's cases.
19 And the EEOC's interpretation is based on a conclusion
20 whether this case is governed by Evans or Bazemore, and
21 the EEOC hasn't purported to even discuss the
22 retroactivity -- or the retroactive imposition of
23 liability because the pregnancy leaves in this case were
24 taken before the PDA and, as the EEOC acknowledged in
25 that compliance manual, that denial of service credit at

1 the time was lawful under this Court's decision.

2 JUSTICE SOUTER: Would you -- would you --

3 excuse me -- would you agree that if -- well, let me be

4 less rhetorical about it. What if Congress passed a

5 statute providing that, starting one year from the

6 effective date of the statute, no pension plan will

7 differentiate in computing pension benefits on leaves

8 taken between -- as between leaves taken for -- for

9 conventional sickness and leaves taken for pregnancy.

10 Would that statute be unconstitutional?

11 MS. BLATT: Unconstitutional?

12 JUSTICE SOUTER: Yes.

13 MS. BLATT: I think -- I mean, the way I

14 understand your case is that Congress can speak in clear

15 language to impose retroactive --

16 JUSTICE SOUTER: To make it retroactive.

17 Yes.

18 MS. BLATT: Retrospective liability. It's

19 just there's nothing in the PDA that indicates that

20 retroactive liability was imposed. And --

21 JUSTICE SOUTER: So your -- your argument

22 simply is a -- a purely statutory construction argument:

23 That isn't what Congress had in mind.

24 MS. BLATT: Right, and your hypothetical

25 statute would seem inconsistent with --

1 JUSTICE SOUTER: If Congress would have had
2 in mind, then there would be a question whether Congress
3 could do it, and you agree that it could. So the
4 question is simply: Did it or didn't it in this case?
5 MS. BLATT: That's right, and I think the --
6 the seniority system provision, 703(h), would just be
7 completely counter to that hypothetical provision
8 because Congress has taken special care to make sure
9 seniority systems can continue to exist, even though
10 they incorporate pre-Act discrimination.
11 JUSTICE KENNEDY: Was this statute effective
12 180 days after its -- after signature?
13 MS. BLATT: With respect to fringe benefit
14 programs, I think it was effective on the date it
15 passed. And there's no question -- everyone concedes --
16 that AT&T immediately came into compliance on the
17 effective date of the Act.
18 And the -- our key point on retroactivity is
19 the way to look at this is what the statute prohibited
20 and that is discrimination on the basis of pregnancy.
21 And the pregnancy discrimination occurred in this case
22 based on the discriminatory leave policies, and those --
23 those were all taken in the '60s and '70s before the PDA
24 was passed. And what the Ninth Circuit's decision does
25 is it orders Petitioner to restore service credit taken

1 for the pregnancy leave before the passage of the -- of
2 the PDA. And I --
3 JUSTICE SOUTER: Do you -- do you think
4 Ledbetter modified or overruled Bazemore?
5 MS. BLATT: No. It just put it in context,
6 and I don't think that Bazemore deals with the
7 retroactivity point, and let me explain why: The -- the
8 employer in Bazemore who continued to pay African
9 Americans less than whites was ordered prospectively to
10 start paying equal wages for equal work, but
11 specifically not ordered to make up for past wage
12 differentials. And I think it's for three reasons.
13 What this does is much -- much more prejudicial and
14 upsets expectations in three ways, and this is some of
15 the things that Mr. Phillips talked about. And at the
16 time the pregnancy leaves were taken, the Petitioner was
17 entitled and probably required to make planning and
18 funding decisions for its pension liabilities.
19 Second, the Petitioner should not, 30 to 40
20 years after the fact, have to defend claims about
21 whether these women were disabled and actually unable to
22 work due to pregnancy, when medical records and
23 personnel records are probably missing and memories long
24 since faded.
25 And, third, the retroactive scrambling of a

1 seniority system upsets the vested rights of other
2 employees.
3 And I just don't think you have any of that
4 in Bazemore. The employer said --
5 JUSTICE SOUTER: Well, why does it upset --
6 MS. BLATT: -- you me to pay out money
7 prospectively.
8 JUSTICE SOUTER: So far as pension benefits
9 are concerned, it doesn't upset any employee's
10 expectations. The ones who don't have a pregnancy
11 background are going to get the same pension that they
12 -- they bargained for.
13 MS. BLATT: Well, I think of a pension plan
14 as a zero-sum game. There's a more limited amount. But
15 more specifically, there --
16 JUSTICE SOUTER: Well, but that -- I mean,
17 that's -- that's an issue that you touched on, on your
18 second point. I don't know if it is a zero-sum game.
19 And if -- if I were faced with -- with a problem, and I
20 may be, in which I really have two choices -- I've got
21 two analogies in our cases, I can take either one, and
22 there were evidence in here that the -- that this was
23 going to be so traumatic to the pension system that it
24 would be manifestly unfair and perhaps endanger benefits
25 for others to force these benefits to be paid, that

1 would be a good reason to go one way. But I don't think
2 we have that in the case. And --
3 MS. BLATT: Well, I --
4 JUSTICE SOUTER: And if we don't have it in
5 the case, then this isn't a zero-sum game.
6 MS. BLATT: Well, we don't know what we have
7 in the case, because it was -- it was -- liability was
8 imposed on summary judgment. The class allegations are
9 15,000.
10 But my point on vested seniority rights is
11 that the class includes current employees. The
12 Respondent Porter is a current employee. The order in
13 this case is to restore seniority credit, I assume for
14 current employees, which will give them greater
15 seniority rights vis-a-vis other employees who have
16 planned their own issues about job bidding and
17 retirement and seniority based on 30 to 40 years of
18 expectations. So I --
19 JUSTICE GINSBURG: But this is not a
20 situation like Evans, somebody who was out of the
21 workforce for 4 years and then is going to come back and
22 bump some people who -- who filled in while she was not
23 working, and get that credit. This is quite different.
24 This is just a question of weeks.
25 MS. BLATT: No, I think some -- some of

1 these people had very significant disabilities, over 6,
2 7 months. But in terms of the fairness here, I mean,
3 the -- the female flight attendant was discharged on a
4 facially discriminatory policy of forcing married female
5 flight attendants to resign. Here, the two Supreme
6 Court cases have said that the decision -- as
7 inexplicable as it was, the decision not to treat
8 pregnancy as a disability was not on its face a
9 discriminatory policy.
10 Now, the PDA immediately overruled that, but
11 applied it prospectively, and now we are here 30 to 40
12 years later basically litigating the complaint that was
13 brought in the Eighth Circuit as well as the complaint
14 that was brought in the Second Circuit by the Respondent
15 here. They brought this case twice in the Second -- and
16 these are all cited on the Petitioner's brief and the
17 reply brief on page 17.
18 In the Second Circuit case, it was granted,
19 vacated, and remanded in light of Gilbert. And then in
20 the Eighth Circuit case, they actually lost on the
21 merits under Satty.
22 Now, the only thing that has changed is the
23 passage of 30 years and the PDA, which doesn't apply
24 retroactively. So I just think that --
25 JUSTICE STEVENS: Do I correctly understand

1 that -- that you would agree that if this plan were
2 adopted today it would be unlawful, but because it was
3 -- but at the time it was adopted, and the statute uses
4 the word "adopted," it was lawful?
5 MS. BLATT: Let me be very clear on this.
6 The seniority system in this case is facially neutral;
7 it just accords seniority to men and women on an equal
8 basis depending on whether they took disability leave or
9 personal leave. The leave policy that forced women to
10 take pregnancy leave as personal leave would be illegal
11 if it were adopted today, because the PDA says you can't
12 treat -- women affected by pregnancy have to be treated
13 for the same purposes.
14 So the seniority system is always just the
15 same. It says, based on total years of service, you get
16 pension benefits, men and women the same. In the
17 accrual policy, men and women were treated identically.
18 Just like in Evans, men and women were denied seniority
19 or service credit if they were terminated for -- for
20 charge, and there was a separate unlawful policy that
21 basically defined -- cause -- excuse me -- if you were
22 terminated for cause -- and a separate policy that
23 defined "cause" to say, well, if you were a female
24 flight attendant and you married, then you were forced
25 to resign. So obviously that policy was always

1 unlawful. It would be unlawful today. And similarly,
2 if AT&T hadn't had changed its leave policy, someone
3 could sue immediately. I mean, these women -- the
4 immediate --
5 CHIEF JUSTICE ROBERTS: I'm sorry, before
6 you -- do I understand your answer to Justice Stevens's
7 question to be yes, it would be legal to adopt this
8 seniority policy today?
9 MS. BLATT: Yes -- the seniority system is
10 their seniority system, and it's completely neutral and
11 completely lawful. AT&T's pre-PDA leave policy. That
12 if you were a woman and you take pregnancy --
13 CHIEF JUSTICE ROBERTS: I understand, but
14 we're --
15 MS. BLATT: -- that's unlawful today. That
16 would be facial discrimination on the basis of
17 pregnancy, and it would be unlawful.
18 CHIEF JUSTICE ROBERTS: But even adopting
19 the policy today -- which I thought was Justice
20 Stevens's question, and maybe it's not -- that
21 would be acceptable? In other words, it's not simply
22 the fact that this -- the leave policy -- the seniority
23 policy was adopted during the time prior to Gilbert?
24 MS. BLATT: I -- AT&T could not adopt their
25 leave policy today, and --

1 CHIEF JUSTICE ROBERTS: They couldn't adopt
2 the leave policy. Could they adopt today a leave -- a
3 seniority policy today based on -- today, based on the
4 pre-Gilbert situation?
5 MS. BLATT: Oh. Then I think you would have
6 a -- well, you would have an unlawful policy that
7 someone could sue on immediately, and it would be facial
8 discrimination, and we wouldn't be up here making a
9 retroactivity argument because no court would be
10 ordering them to undo decisions that were made before
11 the passage of the Act. They today would be making
12 decisions and there were nothing -- there would be no
13 retroactive imposition of liability.
14 Thank you.
15 CHIEF JUSTICE ROBERTS: Thank you, Ms.
16 Blatt.
17 Mr. Russell.
18 ORAL ARGUMENT OF KEVIN RUSSELL
19 ON BEHALF OF THE RESPONDENTS
20 MR. RUSSELL: Mr. Chief Justice, and may it
21 please the Court:
22 The distinction between Evans and this case
23 turns on the difference between discrimination outside
24 of the seniority system which affects an employee's
25 ability to provide service to the employer, and

1 discrimination within the seniority system itself that
2 gives unequal credit for equal service.
3 Congress drew that line, adopting one that
4 this Court had referred to in Lorance, when it passed
5 section 706(e)(2) of Title VII, which provided that a
6 facially discriminatory seniority system can be
7 challenged, not only when --
8 JUSTICE STEVENS: May I ask a question?
9 You've used the term "facially discriminatory system",
10 are you saying this is a disparate impact case or a
11 disparate treatment case?
12 MR. RUSSELL: This is a disparate treatment
13 case. This is a --
14 JUSTICE STEVENS: When did the -- when was
15 the intentional discrimination take place?
16 MR. RUSSELL: It took place when AT&T
17 applied an accrual rule to my clients' disability leave,
18 and said --
19 JUSTICE STEVENS: You do not -- you do not
20 contend that the plan was unlawful at the time it was
21 adopted?
22 MR. RUSSELL: We think that it was, but it
23 doesn't matter. Ultimately under 706(e)(2), what
24 matters is that the plan discriminated on its face. And
25 the insight beyond that -- and that doesn't turn on

1 whether it is unlawful or not. A plan that
2 discriminates against short people discriminates on its
3 face, intentionally discriminates on the basis of height
4 every time it's applied; and when it does, whether it's
5 lawful or not, is applied in accordance with the law
6 that existed at the time of the application.
7 JUSTICE STEVENS: Well, let me ask you this
8 question: At the time the plan was adopted,
9 discrimination on the basis of pregnancy was not
10 discrimination on the basis of sex, according to the
11 majority in Gilbert.
12 MR. RUSSELL: That's correct.
13 JUSTICE STEVENS: Which I happen to disagree
14 with.
15 So as a matter of law, it seems to me at the
16 time the plan was adopted it was a lawful plan.
17 MR. RUSSELL: Well, we think it was unlawful
18 for two reasons, and one is that it was unlawful under
19 Satty. Now, I acknowledge --
20 JUSTICE STEVENS: Under what?
21 MR. RUSSELL: Under Satty, under the Court's
22 decision in Satty that said discrimination with respect
23 to seniority had an unlawful discriminatory impact on
24 the basis of sex.
25 JUSTICE GINSBURG: That was -- that was

1 coming back to work and having all of your seniority
2 stripped. Is that --
3 MR. RUSSELL: That is correct, but we don't
4 think that there's a distinction because what the Court
5 said was that the injury is cognizable because it
6 affects employment opportunities.
7 JUSTICE SCALIA: Yes, but I thought the
8 question was whether it was unlawful at the time, before
9 the later statute.
10 MR. RUSSELL: Yes, and we think --
11 JUSTICE SCALIA: And -- and you say that,
12 even though discriminating against pregnancy leave was
13 itself lawful, a retirement plan that did not give you
14 credit for the time of that pregnancy leave was
15 unlawful?
16 MR. RUSSELL: No. Let me be clear. We
17 think that at the time our clients took their leave, it
18 was unlawful under Title VII and under Satty to
19 discriminate on the basis of pregnancy with respect to
20 seniority, whether it's the right to retain accrued
21 seniority or the right to accumulate it in the first
22 place.
23 JUSTICE SCALIA: And you say Gilbert had
24 nothing to do with it?
25 MR. RUSSELL: Gilbert said that it wasn't

1 intentional discrimination on the basis of sex. Satty
2 said it had an unlawful disparate impact on the basis of
3 sex. But ultimately none of this matters, because under
4 section 706(e)(2), the question is whether the system as
5 a whole, which includes the accruable, discriminates on
6 its face, whether it's intentionally discriminatory; and
7 the insight behind that rule was, as I said before with
8 the example of a height discrimination, a rule that
9 discriminates on the basis of height intentionally
10 discriminates on the basis of height every time it's
11 applied.
12 CHIEF JUSTICE ROBERTS: Could you -- could I
13 pause? I'd just trying to understand your earlier
14 answer. It just took me a little while before you got
15 off on the other point.
16 You're saying it was lawful at the time to
17 deliberately discriminate on the basis of pregnancy --
18 Gilbert -- but that that was somehow unlawful if in fact
19 your deliberate discrimination had a disparate impact?
20 MR. RUSSELL: Had a disparate impact on the
21 basis of sex, yes. That's what Satty held -- that's
22 what Satty held clearly with respect to accrued
23 seniority.
24 CHIEF JUSTICE ROBERTS: Well, maybe I'm
25 missing it. Isn't it a bit unusual to say it's

1 perfectly all right to discriminate intentionally, but
2 if it has a disparate impact, that's not all right?
3 MR. RUSSELL: That's every disparate impact
4 case. It's not that it's all right. It's just that
5 it's not --
6 CHIEF JUSTICE ROBERTS: No, I -- I don't
7 think it's every disparate impact case. In a disparate
8 impact case, it's because you can't show, typically,
9 deliberate discrimination, so you look at what the
10 impact was. But I guess I've never heard of a case
11 where it's okay to do something intentionally, but it's
12 illegal -- to discriminate intentionally, but it's
13 illegal if that has a disparate impact.
14 MR. RUSSELL: Let me just be clear about the
15 terms. Gilbert said it was not unlawful intentional sex
16 discrimination, but Satty said that it constitutes --
17 that pregnancy discrimination with respect to seniority
18 credits constitutes -- has an unlawful disparate impact
19 on the basis of sex. In that sense --
20 CHIEF JUSTICE ROBERTS: Well, but Gilbert
21 said it wasn't discrimination on the basis of sex,
22 because it said that discrimination on the basis of
23 pregnancy was not discrimination on the basis of sex;
24 and yet you are saying if there is a disparate impact on
25 the basis of pregnancy, then it is discrimination on the

1 basis of sex.

2 MR. RUSSELL: Let me try one more time. And

3 maybe -- it's just to say that sometimes, intentional

4 discrimination on the basis of pregnancy can have a

5 disparate impact on the basis of sex. That's what Satty

6 said -- Satty said. But --

7 CHIEF JUSTICE ROBERTS: Is your -- is there

8 any other -- can you cite a case to me where we have

9 held there is discriminatory treatment, but that's

10 lawful, but the discriminatory impact of that is

11 unlawful?

12 MR. RUSSELL: Well, I think a height

13 requirement would be intentional discrimination on the

14 basis of height that could have an unlawful disparate

15 impact on the basis of sex. I think it's a parallel

16 construction.

17 But, ultimately, I -- I don't want to waste

18 too much time on this, because I don't think it matters

19 because the insight behind section 706(e)(2) is that

20 every act that implements a facially discriminatory

21 system constitutes a fresh act of that intentional

22 discrimination. And so there's no question --

23 JUSTICE STEVENS: But does the statute use

24 the term -- does the statute use the term "facially

25 discriminatory system"?

1 MR. RUSSELL: No. It uses the term
2 "intentionally discriminatory system."
3 JUSTICE STEVENS: Right.
4 MR. RUSSELL: And there's no dispute that a
5 facially discriminatory system discriminates
6 intentionally. And so --
7 JUSTICE STEVENS: But it is also clear that
8 -- is it also clear that a statute -- that -- that a
9 plan that does not intentionally discriminate may,
10 nevertheless, discriminate facially? I think the two
11 things --
12 MR. RUSSELL: Well, again, it's -- it's the
13 predicates that change. It's a -- it can be a plan that
14 doesn't intentionally discriminate on the basis of sex
15 at the time, in the past. But when it -- but it's clear
16 that it intentionally discriminates on the basis of
17 pregnancy.
18 And so then the question -- so then under
19 706(e)(2), under this Court's insight in Lorance, the
20 current application of that system constitutes a present
21 act --
22 JUSTICE STEVENS: Yes, but that was the
23 current application of a system that was plainly
24 discriminatory, intentionally discriminatory. Lorance
25 was. They intentionally discriminated against women.

1 MR. RUSSELL: Yes. The -- the intent behind
2 the system is imbued in every application of the system.
3 So a system that is intentionally discriminatory on the
4 basis of pregnancy discriminates intentionally on the
5 basis of pregnancy every time it's applied. And the
6 question --
7 JUSTICE SCALIA: Go on, finish. I --
8 MR. RUSSELL: And, under Section 706(e)(2),
9 the question is simply whether that discrimination is
10 unlawful at the time of application --
11 JUSTICE SCALIA: I don't understand why you
12 say that the retirement plan is facially discriminatory
13 now. You contend that right now it's facially
14 discriminatory.
15 MR. RUSSELL: Yes, it's --
16 JUSTICE SCALIA: It seems to me what the
17 retirement plan says is that there is deducted from your
18 seniority, for purposes of calculating what you get
19 under the plan, all periods in which you -- you were
20 lawfully not deemed to be -- to be working for the
21 company. Now, that doesn't seem to be facially
22 discriminatory at all.
23 MR. RUSSELL: I think it's -- the system is
24 facially discriminatory -- there are several parts. One
25 is: What set of rules constitutes a relevant seniority

1 system? And we think that the rule that says pregnancy
2 leave doesn't get full credit is as an accrual rule,
3 it's part of the seniority system. And that rule
4 discriminated on its face on the basis of pregnancy.
5 JUSTICE SCALIA: No, but it didn't. Not --
6 not during the period for which it is used in -- in the
7 retirement system.
8 MR. RUSSELL: There's no --
9 JUSTICE SCALIA: After the new legislation
10 was passed, yes, pregnancy leave counts for seniority.
11 But -- but during the period before that occurred, it
12 was not counted towards seniority, and it -- and it was
13 lawfully not counted towards seniority.
14 So what you have is a retirement plan that
15 says all lawful periods of work -- all periods of work
16 are -- that lawfully must be credited will be credited
17 to the -- to the employees. I don't see how that is
18 facially discriminatory.
19 MR. RUSSELL: It facially discriminates on
20 the basis of pregnancy and then does so whether the
21 pregnancy discrimination was unlawful at the time or
22 not. And under 706(e)(2), that -- that facially
23 discriminatory intent to discriminate on the basis of
24 pregnancy is carried forward today to every application.
25 And the whole point of the rule was simply to say that

1 we don't want to force employees to have to run into
2 court every time there's some discrimination --
3 JUSTICE SCALIA: Is -- is there a difference
4 between "facially discriminatory" and "discriminatory
5 impact"? I mean I can see how you could say it has a
6 discriminatory impact, but to say that on its face, when
7 all it says is that you are credited with all of the
8 periods for which you were lawfully working for the
9 company and you are not credited for periods in which
10 the company lawfully deemed you not to be working for
11 the company, I don't see how that is facially
12 discriminatory in -- in any sense.
13 MR. RUSSELL: Well, that scenario, I think,
14 is indistinguishable from what happened in Bazemore.
15 Recall, in Bazemore, that the basic rule is you get paid
16 now today what we paid you before Title VII, plus a
17 nondiscriminatory raise. And this Court said that that
18 is simply a perpetuation of the pre-Act intentional race
19 discrimination, which wasn't unlawful at the time. But
20 if you apply that system today, that constitutes a
21 present act of racial discrimination subject to the
22 present requirements of Title VII.
23 JUSTICE SCALIA: Did it say it was facially
24 discriminatory? I'm -- I'm just talking about your --
25 your assertion that it's facially discriminatory. Did

1 Bazemore say it was facially discriminatory?
2 MR. RUSSELL: No, Bazemore did not use that
3 term. But this Court, in Ledbetter, assumed that the
4 rationale of Bazemore was the rationale this Court gave
5 in Lorance, which was that it involved a --
6 intentionally a systematic system of discrimination
7 that, even though it was lawful when it was instituted
8 -- was first instituted, its carrying over into the
9 present era subjects it to the requirements of Title VII
10 now.
11 And I don't think it's -- it's fairly
12 distinguishable because what the employer in Bazemore
13 did is -- is simply what AT&T has done here. At the
14 time Title VII took effect, the employer in Bazemore
15 stopped giving discriminatory base salaries and stopped
16 giving discriminatory pay raises, but it just added to
17 that base salary in a nondiscriminatory manner, in the
18 same way that AT&T stopped discriminating in the amounts
19 that it added to accrued seniority.
20 JUSTICE STEVENS: No, but in Bazemore each
21 paycheck was discriminatory.
22 MR. RUSSELL: It was discriminatory in the
23 sense that it paid unequal wages for equal work. And
24 here our pension checks give unequal compensation for
25 equal amounts of service to the company.

1 JUSTICE STEVENS: But the reason for that is
2 because they adopted a plan a long time ago that was
3 lawful.
4 MR. RUSSELL: Well, the same thing was true
5 in Bazemore. They had adopted --
6 JUSTICE STEVENS: They're not applying a
7 plan in Bazemore. They're paying a current salary.
8 They're paying black people less than whites just
9 because they are black.
10 MR. RUSSELL: They were applying a pay
11 structure that was adopted --
12 JUSTICE STEVENS: Yes, they were still
13 paying -- each paycheck was a discriminatory paycheck.
14 It didn't depend on history; whereas, a pension plan --
15 they always look at the formation of the plan. At least
16 under subsection (h), I think you do.
17 MR. RUSSELL: The paychecks were in -- in
18 Bazemore were intentionally discriminatory only insofar
19 as you look back to the pre-Title VII --
20 JUSTICE STEVENS: And that's what I disagree
21 with. It seems to me if you look at the present in
22 Bazemore, you find they are getting different salaries
23 because of the difference in -- one is of one race, and
24 the other is of another race.
25 MR. RUSSELL: And the same is true here.

1 Our clients are giving --
2 JUSTICE SOUTER: Well, but the -- the point
3 that is not true that -- that Justice Stevens is
4 bringing out is that, in this case, you had a plan which
5 was established at a time when the plan was -- was
6 lawful. And, in effect, you are saying there is --
7 there is no value to be given to any reliance interest
8 on the part of the company that established the plan
9 when it funded according -- prior to the passage of the
10 Act, when -- when it -- it calculated it's funding on
11 the basis of what was, in fact, lawful conduct. And you
12 are saying that is irrelevant. You didn't have that
13 factor in Bazemore.
14 MR. RUSSELL: It's not irrelevant. It's
15 simply something that this Court has traditionally taken
16 into account at the remedial stage. The Court has --
17 JUSTICE SOUTER: Well, how would it do that?
18 MR. RUSSELL: Well, the -- in Florida v.
19 Long -- there's a long line of cases where this Court --
20 JUSTICE SOUTER: Well, you're -- you're not
21 asking the Court to do that, are you? You -- you're
22 saying, look, pay -- pay pension benefits to these
23 people exactly as they would have been calculated if, in
24 fact, their pregnancy had been treated as whatever the
25 regular sick leave was, so that they would get full

1 credit for the time they were out. You're -- you're not
2 asking for any remedial order that gives them anything
3 less than 100 percent of what they want.
4 MR. RUSSELL: We're not asking for that
5 because we don't think that there are substantial
6 reliance interests that are -- with respect to the --
7 the liquidity of the -- the pension plan that are
8 affected here. My point is simply that --
9 JUSTICE SOUTER: How -- how do we -- you
10 think that? How do we know that?
11 MR. RUSSELL: Well --
12 JUSTICE SOUTER: How do we know -- maybe --
13 maybe I can put the same question in a different way.
14 Let's assume -- and this isn't a bizarre assumption here
15 -- that we've got two lines of cases, and we could rely
16 on either of those lines of cases, go one way if -- if
17 we rely on line a, and go another way if we rely on line
18 b.
19 What are the good reasons, apart from simply
20 statements of the cases themselves, to go with the one
21 line or the other line? One reason would be reliance
22 interests in setting up a pension plan to distinguish
23 this from Bazemore. How are we in a position to make
24 that judgment?
25 MR. RUSSELL: I don't think you are, which

1 is why I do think that it's perfectly appropriate for
2 this Court to do what it did in cases like Manhart,
3 which is to say there's one definition of
4 "discrimination" under Title VII, and it's not going to
5 vary depending on whether we're talking about the
6 pension plan or something else.
7 JUSTICE KENNEDY: But -- but doesn't the
8 risk or the potential of a fixed-fund pension plan where
9 employees who are not parties to this action receive
10 less? Isn't there at least that possibility?
11 MR. RUSSELL: There's only that --
12 JUSTICE KENNEDY: And shouldn't that
13 possibility be weighed in the decision of this Court? I
14 think that's the line of questioning here.
15 MR. RUSSELL: And my suggestion is, number
16 one, that there's no realistic possibility of that here.
17 But, number two, that that's a --
18 JUSTICE KENNEDY: And there's no realistic
19 possibility that some pensions are based on a fixed fund
20 which has been established already?
21 MR. RUSSELL: I don't think so. If you are
22 talking about a defined benefit plan, which is what we
23 have here, any increases in liability simply mean that
24 the employer has to --
25 JUSTICE KENNEDY: But I take it that this

1 decision you want us to write applies across the board
2 to all plaintiffs.
3 MR. RUSSELL: I think that it does, but I
4 think that it could quite possibly apply differently,
5 for example, through a 401(k) plan where the
6 discrimination would have occurred at a time when people
7 are making running contributions. But ultimately, I
8 mean, I think that this Court has taken into account
9 those kinds of things at the remedial phase, where you
10 have an opportunity to look at the facts about how this
11 would affect the pension in this case and pensions
12 generally.
13 There's simply no evidence here to suggest
14 that there are those kinds of problems, because very few
15 employers as far as we can tell continue this kind of
16 discrimination. Most have eliminated it decades ago.
17 And we're talking about a small subset of employees and
18 relatively small amounts of money with respect to each
19 of them. But --
20 JUSTICE GINSBURG: Mr. Russell, what do you
21 say to Mr. Phillips' argument that you brought -- you
22 brought essentially this case way back when, that the
23 union said that this retirement plan is in violation of
24 Title VII?
25 MR. RUSSELL: Well, first of all, I mean, my

1 individual-named clients didn't bring those claims back
2 then; and they lost, the union that brought this claim.
3 And then there were -- if I recollect correctly, they
4 were challenging at that moment the denial of their
5 disability leave payments. They weren't coming in and
6 saying simply, you know, the only harm we're facing now
7 is the prospect in the future of a lower pension.
8 And that's the kind of hypothetical future
9 harm that we don't think Congress would have intended to
10 be the basis of a lawsuit, now -- one of the -- when the
11 entire purpose of enacting 706(e)(2) was that Congress
12 was concerned not to require employees to run to court
13 every time there is some discrimination that affects the
14 amount of their seniority, because that causes a
15 disruption to the employment atmosphere, it creates work
16 for the EEOC and the courts, and in many, many cases the
17 marginal difference in the amount of the seniority
18 credit we are talking about here will make no big
19 difference at all to anything.
20 JUSTICE KENNEDY: Well, when you say there's
21 relatively little amounts of money, can you tell us what
22 amount -- what the maximum amount would be involved?
23 Are you --
24 MR. RUSSELL: I think -- and we haven't had
25 discovery on this. I think there is a fairly linear

1 relationship between the amount of leave and the
2 percentage of the pension check, and so we're talking in
3 between --
4 JUSTICE KENNEDY: Would it be less than
5 $100,000?
6 MR. RUSSELL: Per person? Or total?
7 JUSTICE KENNEDY: Would it be -- for the
8 whole suit?
9 MR. RUSSELL: No. It would be more than
10 that. It would be about half of a percent to maybe two
11 and a half percent per person.
12 JUSTICE KENNEDY: Would that be a million --
13 a million dollars?
14 MR. RUSSELL: It could be millions of
15 dollars. And the plan that --
16 JUSTICE KENNEDY: But that -- that's a small
17 amount of money, a million -- millions of dollars?
18 MR. RUSSELL: It's a small amount of money
19 to a plan that has tens of billions of dollars in it.
20 AT&T's last report to the SEC said they had a
21 $17 billion surplus in that fund. There's no question
22 that this is going to bankrupt this particular fund.
23 JUSTICE SCALIA: What -- what do you do
24 about section 703(h) of Title VII, which -- which we
25 have held says that -- that makes it lawful for a bona

1 fide seniority system to perpetuate the effects of
2 pre-Act discrimination?
3 MR. RUSSELL: The distinction between 703(h)
4 and this case is that, in this case, we challenge a
5 system -- a seniority system that is itself facially
6 discriminatory, and 703(h) says that doesn't apply --
7 JUSTICE SCALIA: That hinges -- that hinges
8 on your "facially discriminatory."
9 MR. RUSSELL: It does. And in addition, we
10 also have the argument that the Ninth Circuit accepted,
11 but -- that the PDA on its own terms says, that 703(h)
12 doesn't apply to permit discrimination that the PDA
13 itself would forbid.
14 JUSTICE SCALIA: Well, yes, that's -- that's
15 rather implausible, but 70(h) covers sex discrimination
16 and even race discrimination, but it doesn't cover
17 pregnancy discrimination. I mean, I --
18 MR. RUSSELL: You may think that, but --
19 JUSTICE SCALIA: You need pretty clear
20 language to persuade me of that.
21 MR. RUSSELL: I think that in the end, I
22 mean, it's worthwhile to focus on the consequences of
23 accepting AT&T's view. On the better view, it depends
24 mightily on whether an employer keeps a running tab on
25 seniority, in which case it can avoid the application

1 of the PDA because it made the calculation beforehand,
2 and an employer who, at the end of an employee's career,
3 simply tabulates the term of employment, which I think
4 under their view subjects that employer to the current
5 requirements of the PDA. And we respectfully suggest
6 that Congress wouldn't intend Title VII to turn on such
7 trivial distinctions.
8 Moreover, under their view, an employer
9 who -- an employer would be able to pay black workers
10 today smaller pensions than white workers who provided
11 exactly the same amount of service, if those black
12 workers started working for it before Title VII was
13 enacted, at a time when the employer had no pension
14 system for blacks and didn't give them any seniority
15 credit. That employer could say the same thing AT&T
16 says here, which is that the present disparity in
17 pension benefits is simply the present effect of
18 discrimination that was lawful when it occurred.
19 JUSTICE SCALIA: You mean there are a lot
20 more suits coming behind this one --
21 MR. RUSSELL: Well, I don't think --
22 JUSTICE SCALIA: -- suits for any kind of
23 discrimination that preceded Title VII? When was Title
24 VII enacted?
25 MR. RUSSELL: 1964.

1 JUSTICE SCALIA: There may be still some of
2 those people around.
3 MR. RUSSELL: There are. There are. It's
4 very unlikely that there are very many of them subject
5 to this kind of --
6 JUSTICE SCALIA: I mean, you're scaring me.
7 (Laughter.)
8 MR. RUSSELL: Well, let me reassure you,
9 because I think most employers, unlike AT&T, have --
10 don't make those kinds of distinctions with respect to
11 their employees who were hired before and after the
12 effective dates of the relevant provisions of Title VII.
13 And I think it's --
14 JUSTICE BREYER: I take it you are not
15 saying anything that is in effect and is still there,
16 you do retro, you win. I take it -- maybe I am not
17 right, but I take it that what -- what the point is here
18 is that you -- you took a complicated superstructure of
19 rules that was creating boxes and those boxes were
20 created on the basis of discrimination. Then you move
21 it, whole cloth, into the post-new world. And it's the
22 administration of that complicated system of rules that
23 was created out of the discrimination, but it's
24 administration today that makes it like Bazemore.
25 MR. RUSSELL: Yes, that's -- that's right.

1 That the present implementation of the system subjects
2 it to the present-day requirements of Title VII.
3 JUSTICE BREYER: It does that, but what I
4 can't figure out is does that have a lot of implication
5 for other areas or not? And the other thing I'm not
6 sure of is how it squares with Ledbetter.
7 MR. RUSSELL: Well, the difference between
8 Ledbetter and this case is Ledbetter involved
9 discrimination entirely outside of the seniority system,
10 and as a result, it didn't -- 706(e)(2) didn't apply;
11 this Court's decision in Lorance didn't apply. And
12 Congress enacted this 706(e)(2) to provide a very
13 special rule to displace the rule of evidence. It was
14 -- it was unambiguously intended to displace the rule of
15 evidence with respect to intentionally discriminatory
16 seniority systems.
17 JUSTICE BREYER: Evans isn't a problem
18 because the rule they were administering in Evans is
19 whoever is hired is in fact hired at low seniority.
20 Now, it's hard to say that that's a complicated system
21 of rules that had a pre-existence, even though this
22 individual was where she was because of that earlier
23 system.
24 MR. RUSSELL: Again, I think the distinction
25 between Evans and this case is discrimination that

1 occurred entirely outside of a -- the seniority system
2 and discrimination within the seniority system that
3 gives unequal credit for equal service. And Congress
4 said of that kind of discrimination -- we're not going
5 to make you challenge immediately. We're going to let
6 you wait until the reduced seniority has a concrete
7 effect on your compensation or other terms and
8 conditions of employment, and then you can raise it
9 then.
10 And the underlying thought of the provision
11 is that if you are subject to intentional discrimination
12 with respect to seniority accrual, we are going to
13 impute that intent to the subsequent applications of
14 that seniority system when it's applied to injure you.
15 And if --
16 JUSTICE STEVENS: I still want to go back to
17 be sure that I've given you a fair opportunity to answer
18 this. You are relying on Nashville v. Satty, which was
19 a discriminatory impact case, and now you are arguing
20 that the key is the -- is the intent. Which is it?
21 MR. RUSSELL: We make alternative arguments.
22 JUSTICE STEVENS: Oh, okay.
23 MR. RUSSELL: We argue that to the extent it
24 matters whether this was lawful at the time our clients
25 took their leave, it was not unlawful, and we point to

1 Satty. But we say ultimately that doesn't matter
2 because under section 706(e)(2), so long as they
3 implement, so long as they rely on the diminished
4 seniority in the present, that constitutes a present act
5 of pregnancy discrimination, intentional pregnancy
6 discrimination, which is unlawful under the PDA.
7 JUSTICE STEVENS: Well, as soon as you get
8 back to the intentional, you get away from Satty.
9 MR. RUSSELL: Yes, I agree with that.
10 JUSTICE STEVENS: Oh, okay.
11 MR. RUSSELL: But I don't think there can be
12 any dispute that when my clients had their seniority
13 reduced, it was an act of facial pregnancy
14 discrimination; and under 702 -- 706(e)(2), that intent
15 to discriminate on the basis of pregnancy is --
16 JUSTICE STEVENS: But it was not unlawful at
17 the time it was done.
18 MR. RUSSELL: I do think it was unlawful,
19 but it doesn't matter with respect to 706(e)(2).
20 If I could turn briefly to the retroactivity
21 argument: It's important to be clear what the Ninth
22 Circuit held and what it didn't hold. It did not hold
23 that AT&T was liable for anything it did prior to the
24 effective date of the PDA. It didn't, for example, hold
25 that it was liable simply because it moved the NCS dates

1 or because it relied on them in any way before the
2 effective date of the PDA. All it said was that AT&T is
3 precluded from relying on that discriminatory measure of
4 service in the future.
5 And in that sense, this case is quite like
6 this Court's decision in Griggs v. Duke Power Company,
7 where the Court said Title VII prohibits employers from
8 relying on the results of discriminatory employment
9 tests. Now, nobody thought that that meant that Title
10 VII subjected to liability employers who administered or
11 relied on those tests before the effective date of Title
12 VII, but everybody understood that they couldn't rely on
13 those results after the effective date of Title VII, and
14 nobody thought that that gave the statute a retroactive
15 effect.
16 And that's all that the Ninth Circuit
17 interpreted the PDA to do here, is to prohibit AT&T from
18 engaging in the post-Act reliance on those pre-Act
19 discriminatory measures, that AT&T had every opportunity
20 to conform its -- to conform its conduct to the -- to
21 the requirements of the PDA, and a statute that simply
22 tells an employer how it has to treat past events for
23 future employment decision purposes is simply not a
24 statute that has a retroactive effect.
25 Finally, I'd like to -- if I have time, I'd

1 like to address this suggestion from the Solicitor
2 General's Office that this doesn't involve seniority
3 discrimination at all because what we are talking about
4 here is discrimination that occurred with respect to the
5 personnel policy about the classification of leave, as
6 opposed to discrimination within the seniority system
7 itself.
8 And this Court was clear in California
9 Brewers that an accrual rule that says how time counts
10 for seniority purposes is part of the seniority system.
11 And under AT&T's system, it's true you have to apply a
12 two-part rule. You have to know whether -- if you are
13 asked, does this pregnancy leave count, you have to ask,
14 well, is it personal leave? But that doesn't tell you
15 anything until you apply the second part of the rule
16 that says pregnancy leave counts as -- as personal
17 leave.
18 And because you need to know the answers to
19 -- to both of those questions, both parts of the rules
20 are properly considered to be part of the accrual rule
21 and part of the seniority system.
22 Finally, if I -- if I could return once
23 again to this alternative argument that we have, that
24 even setting aside Bazemore and section 706(e)(2), this
25 is not -- our clients weren't required to challenge this

1 discrimination before because it wasn't an completed,
2 unlawful employment practice at the time.
3 And, again, the point is that discrimination
4 with respect to a small amount of time going towards
5 seniority doesn't affect even the worker's actual
6 seniority, that is, her place in the seniority
7 hierarchy. A worker who is 2 years' junior to the
8 person who is next in line above her and 2 years' senior
9 to the person next in line below her -- 6 weeks of
10 service credit aren't going to make any difference with
11 respect to her place on the seniority hierarchy. It's
12 not going to make any difference with respect to her
13 ability to bid for jobs. And it's not necessarily even
14 going to make any difference with respect to her
15 pension, because at the time that these leaves are taken
16 typically, the person is years away, perhaps decades
17 away, from even vesting in their pension benefit.
18 And Congress reasonably would have thought,
19 I think, that that kind of harm is too speculative to
20 warrant immediate -- to warrant the requirement that the
21 employees have to immediately challenge that kind of
22 discrimination at the time it occurs. That's why
23 Congress enacted section 706(e)(2), to give employees an
24 opportunity to wait until the discrimination has a
25 concrete effect on their employment status, on their

1 compensation or terms of employment. And AT&T's view of
2 the statute --
3 JUSTICE GINSBURG: Are you -- are you making
4 a claim that they had the choice or that the claim
5 wasn't ripe until they felt the impacts of it?
6 MR. RUSSELL: I think they don't have a
7 choice. They can't bring the claim until it has a
8 concrete impact.
9 Now, if 706(e)(2) applies, they can
10 challenge the system as of -- when it's adopted or when
11 it's applied to them, but otherwise they have to wait
12 until it injures them within the meaning of section
13 706(e)(2). And that's a perfectly sensible rule.
14 Remember, we're talking here about facial
15 discrimination, and the concerns about stale evidence
16 are not particularly strong here because -- and, as a
17 result, we are able to stipulate to the underlying
18 facts. Everybody knows what the system was and what it
19 did. And there's no reasonable dispute about whether
20 the reduction in our clients' leaves was as a result of
21 pregnancy versus something else. And in any event, this
22 is simply a consequence Congress must have intended when
23 it said that discriminatory seniority systems are open
24 to challenge whenever they are applied to injure a
25 worker, even if that means that so long -- if an

1 employer implements a plan for 30 years, Congress
2 understood that that meant that they were subject to
3 suit for 30 years.
4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Russell.
6 Mr. Phillips, 3 minutes.
7 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
8 ON BEHALF OF THE PETITIONER
9 MR. PHILLIPS: Thank you, Mr. Chief Justice.
10 I'd just like to make a couple of points:
11 Justice Ginsburg, you asked a question about the earlier
12 litigation, and let me just quote from the first page of
13 Judge Bright's opinion where it says the appellants in
14 the class action allege that Southwestern Bell
15 discriminates against women by, quote, "refusing to
16 extend full seniority credit to female employees on
17 maternity leave." That is precisely the claim that's
18 being litigated in this particular case.
19 And contrary to my brother's position just a
20 few minutes ago, that these don't have any impact and
21 why would anybody act on the basis of them, it seems to
22 me that that lawsuit belies that fact. They recognize
23 the impact on seniority, and they acted immediately as a
24 consequence of that.
25 Justice Souter, I do agree with you. I

1 think the reason that Bazemore is not the -- I wouldn't
2 say "line" -- more the point of authority to be as the
3 departure in this particular case is because of the
4 implications for the seniority system.
5 Justice Kennedy, the problem here is we
6 don't know exactly what the impact's going to be. What
7 we do know is that all plans are funded on a set of
8 actuarial assumptions, and, you know, candidly, if they
9 say we were overfunded a couple months ago, given to
10 what has happened to my pension plans in the last couple
11 of months, I would worry a little bit about what the
12 situation is.
13 But the -- but the most fundamental point is
14 you don't know. And in that context, what we do
15 understand is that Congress routinely says protect the
16 seniority systems, protect the pension plans. You know,
17 my colleague says, well, but this is all form over
18 substance because what if they come back at the end and
19 decided to do all these calculations? That
20 fundamentally misunderstands the nature of the pension
21 process. You have to fund these in advance. You make
22 actuarial assumptions. No one is in a position where
23 they're going to allow the determination of seniority to
24 be made at the tail end without making assumptions about
25 what they are going to be like going in.

1 And, Justice Breyer, I think that is the
2 answer to your question because we are not taking this
3 complex system wholesale and just dumping it post-PDA.
4 What we did is we retained the specific rules with
5 respect to the accrual and the seniority, and we
6 eliminated the underlying distinctions between pregnancy
7 and other kinds of disabilities. And that's how we
8 apply it, and that, frankly, is fundamentally different
9 from Bazemore because we are not discriminating every
10 day in a way that harms them. We made a seniority
11 decision, like a pay decision, pre-Act; now we are
12 acting -- it's not a pay decision post-Act. And it's --
13 to my mind in that sense it is just like Evans and that
14 line of cases.
15 Finally, you asked the question, Justice
16 Souter, could Congress have done -- have done exactly
17 what the Respondents ask? And the answer to that is
18 yes. Congress could say today we're not going to allow
19 this. It would upset a lot of pension plans. It would
20 upset a lot of expectations.
21 Congress could have done it. Congress
22 didn't do it, or at least if it were going to upset all
23 of those reliance interests, Congress would have done so
24 in language that was much more explicit than what it has
25 done in the PDA and 706(e)(2).

1 If there are no further questions, Your
2 Honor, I urge you to reverse the judgment below.
3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Phillips.
5 The case is submitted.
6 (Whereupon, at 12:07 p.m., the case in the
7 above-entitled matter was submitted.)
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19
20
21
22
23
24
25

A

ability 26:25 53:13
able 46:9 54:17
above-entitled 1:11 58:7
absolutely 17:13 17:14
acceptable 25:21
accepted 45:10
accepting 45:23
accords 24:7
account 39:16 42:8
accruable 30:5
accrual 24:17 27:17 35:2 49:12 52:9,20 57:5
accrued 29:20 30:22 37:19
accumulate 29:21
acknowledge 28:19
acknowledged 17:24
act 7:2,3,7,7,18 9:19 19:17 26:11 32:20,21 33:21 36:21 39:10 50:4,13 55:21
acted 55:23
acting 57:12
action 4:5 41:9 55:14
actionable 5:18 5:20 16:5
actions 7:13 9:12,14
acts 9:5 16:5
actual 53:5
actuarial 56:8 56:22
added 37:16,19
addition 45:9
address 52:1
addressed 3:12
adequacy 9:11
adequate 4:5
administered 51:10
administering 12:2,9 48:18
administration 12:2 47:22,24
adopt 25:7,24 26:1,2
adopted 16:13 24:2,3,4,11 25:23 27:21 28:8,16 38:2,5 38:11 54:10
adopting 25:18 27:3
advance 56:21
adversely 13:23
advising 15:2
affect 42:11 53:5
African 20:8
ago 8:19 13:21 38:2 42:16 55:20 56:9
agree 11:12 18:3 19:3 24:1 50:9 55:25
Aiello 15:6
AL 1:6
allegations 22:8
allege 55:14
alleged 5:9,12
allegedly 16:4
allow 56:23 57:18
allowing 8:17
alluded 6:23
alternative 49:21 52:23
Americans 20:9
amicus 1:19 2:6 16:23
amount 21:14 43:14,17,22,22 44:1,17,18 46:11 53:4
amounts 37:18 37:25 42:18 43:21
analogies 21:21
analysis 12:23 13:7
analyzing 15:20
answer 12:22 13:18 16:3 25:6 30:14 49:17 57:2,17
answers 52:18
anybody 55:21
apart 40:19
APPEARAN... 1:14
appellants 55:13
application 16:15 28:6 33:20,23 34:2 34:10 35:24 45:25
applications 49:13
applied 6:6,8 10:3 23:11 27:17 28:4,5 30:11 34:5 49:14 54:11,24
applies 42:1 54:9
apply 10:2 12:12 23:23 36:20 42:4 45:6,12 48:10,11 52:11 52:15 57:8
applying 38:6 38:10
appropriate 41:1
appropriately 3:21
areas 48:5
argue 3:22 49:23
arguing 49:19
argument 1:12 2:2,10 3:4,7 9:20 10:1 16:21 18:21,22 26:9,18 42:21 45:10 50:21 52:23 55:7
arguments 49:21
arises 3:14 9:3 9:24
arose 6:22 7:13
arrangement 14:8
arrangements 10:10
aside 52:24
asked 3:18 52:13 55:11 57:15
asking 39:21 40:2,4
assertion 36:25
assiduous 15:16
Assistant 1:17
assume 8:4 11:19 22:13 40:14
assumed 37:3
assuming 7:7
assumption 40:14
assumptions 56:8,22,24
atmosphere 43:15
attendant 23:3 24:24
attendants 23:5
Attorney 1:17
AT&T 1:3 3:4 4:11 5:2 19:16 25:2,24 27:16 37:13,18 46:15 47:9 50:23 51:2,17,19
AT&T's 25:11 44:20 45:23 52:11 54:1
authority 56:2
available 4:10
average 6:15 8:4 9:16
avoid 45:25
a.m 1:13 3:2

B

b 40:18
back 7:11 8:6 22:21 29:1 38:19 42:22 43:1 49:16 50:8 56:18
background 21:11
balance 16:17
bankrupt 44:22
bargained 21:12
base 37:15,17
based 17:19 19:22 22:17 24:15 26:3,3 41:19
basic 36:15
basically 23:12 24:21
basis 5:12 6:3,4 6:17 8:5,6 9:23 15:4,5 19:20 24:8 25:16 28:3,9,10,24 29:19 30:1,2,9 30:10,17,21 31:19,21,22,23 31:25 32:1,4,5 32:14,15 33:14 33:16 34:4,5 35:4,20,23 39:11 43:10 47:20 50:15 55:21
Bazemore 4:1

11:14 12:11,13 12:15,23 13:2 13:16 14:5,7 14:14 15:20,25 16:1 17:20 20:4,6,8 21:4 36:14,15 37:1 37:2,4,12,14 37:20 38:5,7 38:18,22 39:13 40:23 47:24 52:24 56:1 57:9
began 12:13
begs 15:19
behalf 1:15,18 1:21 2:4,6,9,12 3:8 16:22 26:19 55:8
belies 55:22
Bell 5:9 55:14
benefit 4:25 13:11,15 15:22 19:13 41:22 53:17
benefits 5:24 8:20 13:9 14:1 18:7 21:8,24 21:25 24:16 39:22 46:17
best 3:17
Bethesda 1:21
better 6:1,2,10 45:23
beyond 27:25
bid 6:11 53:13
bidding 22:16
big 7:16 43:18
billion 44:21
billions 44:19
bit 30:25 56:11
bizarre 40:14
black 11:17 12:25 38:8,9 46:9,11
blacks 46:14
Blatt 1:17 2:5
16:20,21,25 17:6,13 18:11 18:13,18,24 19:5,13 20:5 21:6,13 22:3,6 22:25 24:5 25:9,15,24 26:5,16
board 42:1
bona 44:25
bookkeeping 4:23
books 5:2
boxes 47:19,19
Brewers 52:9
Breyer 11:11,22 12:16 47:14 48:3,17 57:1
brief 17:9,11,16 23:16,17
briefly 50:20
Bright's 55:13
bring 11:7 15:15 43:1 54:7
bringing 39:4
brother's 55:19
brought 23:13 23:14,15 42:21 42:22 43:2
bump 22:22

C

C 2:1 3:1
calculated 39:10 39:23
calculating 34:18
calculation 13:23 46:1
calculations 56:19
California 52:8
candidly 5:19 56:8
care 4:17 19:8
career 46:2
carried 35:24
carrying 37:8
CARTER 1:15 2:3,11 3:7 55:7
case 3:4,25 4:1,8 5:7,7,14,17 6:10,23 7:21 8:14 10:25 11:6 12:4,17 14:9,25 15:6 15:21 16:3 17:2,20,23 18:14 19:4,21 22:2,5,7,13 23:15,18,20 24:6 26:22 27:10,11,13 31:4,7,8,10 32:8 39:4 42:11,22 45:4 45:4,25 48:8 48:25 49:19 51:5 55:18 56:3 58:5,6
cases 17:18 21:21 23:6 39:19 40:15,16 40:20 41:2 43:16 57:14
cause 24:21,22 24:23
causes 43:14
centrality 8:10
cents 13:14
certain 6:8
certainly 9:23 10:14 13:19
challenge 45:4 49:5 52:25 53:21 54:10,24
challenged 27:7
challenging 43:4
change 33:13
changed 11:6 14:25 15:7,11 15:15 23:22 25:2
charge 24:20
charging 14:3
check 44:2
checks 37:24
Chief 3:3,9 16:19,25 25:5 25:13,18 26:1 26:15,20 30:12 30:24 31:6,20 32:7 55:4,9 58:3
choice 54:4,7
choices 21:20
Circuit 3:11 5:8 5:14 6:22 9:23 17:8,9 23:13 23:14,18,20 45:10 50:22 51:16
circuits 14:23 15:3,3
Circuit's 5:6 17:2 19:24
circumstance 10:5
circumstances 8:11,13 9:7 13:5
cite 32:8
cited 23:16
claim 4:7,21 5:19,20 6:1,24 9:24 16:8 43:2 54:4,4,7 55:17
claims 4:3 7:12 10:4 17:4 20:20 43:1
class 22:8,11 55:14
classification 52:5
clear 5:20 18:14 24:5 29:16 31:14 33:7,8 33:15 45:19 50:21 52:8
clearly 7:1,2 30:22
client 15:2
clients 27:17 29:17 39:1 43:1 49:24 50:12 52:25 54:20
cloth 47:21
cognizable 29:5
colleague 56:17
come 5:1 8:16 22:21 56:18
coming 29:1 43:5 46:20
Communicati... 5:7
companies 5:10
company 34:21 36:9,10,11 37:25 39:8 51:6
compensation 37:24 49:7 54:1
competitive 5:25
complaint 23:12 23:13
completed 53:1
completely 11:7 12:20 19:7 25:10,11
complex 12:1,9 57:3
compliance 11:7 15:16,21 17:16 17:25 19:16
complicated 11:15 12:5,11 47:18,22 48:20
computing 18:7
concede 8:1,1
concedes 19:15
concerned 9:9 21:9 43:12
concerns 54:15
conclusion 17:19

concrete 49:6 53:25 54:8
condition 9:18
conditions 6:2 49:8
conduct 39:11 51:20
conform 51:20 51:20
Congress 9:1 18:4,14,23 19:1,2,8 27:3 43:9,11 46:6 48:12 49:3 53:18,23 54:22 55:1 56:15 57:16,18,21,21 57:23
consequence 5:3 7:21 54:22 55:24
consequences 7:19,20 45:22
considered 52:20
consistently 9:2
constitutes 14:2 31:16,18 32:21 33:20 34:25 36:20 50:4
construction 18:22 32:16
contend 27:20 34:13
contending 16:7
context 14:7 16:2 20:5 56:14
continue 19:9 42:15
continued 20:8
contrary 8:9 55:19
contributions 42:7
conventional 18:9
Corporation 1:3 3:4
correct 17:13,14 28:12 29:3
correctly 3:13 23:25 43:3
counsel 16:19
count 52:13
counted 35:12 35:13
counter 19:7
counts 35:10 52:9,16
couple 55:10 56:9,10
court 1:1,12 3:10,13,18 5:1 6:19 7:5 8:15 9:9 10:3,9,23 11:3,25 13:2 13:21 14:24 15:5,10,11,12 16:1 17:1,10 23:6 26:9,21 27:4 29:4 36:2 36:17 37:3,4 39:15,16,19,21 41:2,13 42:8 43:12 51:7 52:8
courts 3:19,20 43:16
Court's 5:15,16 9:1 17:14,18 18:1 28:21 33:19 48:11 51:6
cover 45:16
covers 45:15
created 47:20,23
creates 43:15
creating 47:19
credit 10:11 17:25 19:25 22:13,23 24:19 27:2 29:14 35:2 40:1 43:18 46:15 49:3 53:10 55:16
credited 11:1,2 35:16,16 36:7 36:9
credits 4:21 5:11 31:18
critical 5:21
curiae 1:19 2:7 16:23
current 22:11 22:12,14 33:20 33:23 38:7 46:4
cushier 6:2

D

D 3:1
date 18:6 19:14 19:17 50:24 51:2,11,13
dates 47:12 50:25
day 10:24,25 11:1 12:24 13:9 57:10
days 5:2 6:8 13:10,13 19:12
day's 11:1,1,2,3
de 8:3
deals 14:6 20:6
decades 42:16 53:16
December 1:9
decide 15:10
decided 6:4 14:25 15:5 56:19
decision 5:6,15 5:16 17:2,15 18:1 19:24 23:6,7 28:22 41:13 42:1 48:11 51:6,23 57:11,11,12
decisions 8:16 9:2 20:18 26:10,12
deducted 34:17
deemed 34:20 36:10
defend 20:20
deference 17:18
defined 24:21,23 41:22
definite 7:18
definition 41:3
degrees 17:12
deliberate 30:19 31:9
deliberately 30:17
denial 17:25 43:4
denied 24:18
Department 1:18
departure 56:3
depend 38:14
depending 24:8 41:5
depends 45:23
deprived 9:17
described 10:23
determination 56:23
determined 6:3
determining 13:25
detrimental 9:14
difference 7:16 26:23 36:3 38:23 43:17,19 48:7 53:10,12 53:14
different 7:4 12:21 22:23 38:22 40:13 57:8
differential 15:23
differentials 20:12
differentiate 18:7
differently 42:4
diminished 50:3
direction 12:19
disabilities 23:1 57:7
disability 23:8 24:8 27:17 43:5
disabled 20:21
disagree 28:13 38:20
discharged 23:3
discovery 43:25
discriminate 29:19 30:17 31:1,12 33:9 33:10,14 35:23 50:15
discriminated 14:14 27:24 33:25 35:4
discriminates 28:2,2,3 30:5,9 30:10 33:5,16 34:4 35:19 55:15
discriminating 29:12 37:18 57:9
discrimination 3:16 6:18,18 13:22 15:3,4 19:10,20,21 25:16 26:8,23 27:1,15 28:9 28:10,22 30:1 30:8,19 31:9 31:16,17,21,22 31:23,25 32:4 32:13,22 34:9 35:21 36:2,19 36:21 37:6 41:4 42:6,16 43:13 45:2,12

45:15,16,17 46:18,23 47:20 47:23 48:9,25 49:2,4,11 50:5 50:6,14 52:3,4 52:6 53:1,3,22 53:24 54:15
discriminatory 7:7,8 9:5,25 10:1,7,12,17 10:19,22,24 11:4,9,9 16:4 19:22 23:4,9 27:6,9 28:23 30:6 32:9,10 32:20,25 33:2 33:5,24,24 34:3,12,14,22 34:24 35:18,23 36:4,4,6,12,24 36:25 37:1,15 37:16,21,22 38:13,18 45:6 45:8 48:15 49:19 51:3,8 51:19 54:23
discuss 17:21
discussing 9:10
disparate 27:10 27:11,12 30:2 30:19,20 31:2 31:3,7,7,13,18 31:24 32:5,14
disparity 46:16
displace 48:13 48:14
dispute 33:4 50:12 54:19
disruption 43:15
distinction 3:14 3:16 11:12 26:22 29:4 45:3 48:24
distinctions 46:7 47:10 57:6
distinguish 40:22
distinguishable 37:12
distinguishes 15:17
docked 5:2 6:8
dollar 13:12
dollars 44:13,15 44:17,19
draw 3:19
drawn 3:20
drew 27:3
due 20:22
Duke 51:6
dumping 57:3
D.C 1:8,15,18

E

E 2:1 3:1,1
earlier 6:23 11:16 30:13 48:22 55:11
early 6:11
EEOC 14:3 17:8 17:10,11,16,17 17:21,24 43:16
EEOC's 17:19
effect 3:16 14:5 37:14 39:6 46:17 47:15 49:7 51:15,24 53:25
effective 18:6 19:11,14,17 47:12 50:24 51:2,11,13
effects 9:4 16:4 45:1
effort 11:2,3
Eighth 5:6,8,14 6:22 23:13,20
either 14:16 21:21 40:16
eliminated 42:16 57:6
employee 8:4,11 9:11,16 12:24 13:1 22:12
employees 4:4 6:25 11:15 21:2 22:11,14 22:15 35:17 36:1 41:9 42:17 43:12 47:11 53:21,23 55:16
employee's 21:9 26:24 46:2
employer 4:6 15:1 20:8 21:4 26:25 37:12,14 41:24 45:24 46:2,4,8,9,13 46:15 51:22 55:1
employers 14:14 42:15 47:9 51:7,10
employment 5:22 8:10 29:6 43:15 46:3 49:8 51:8,23 53:2,25 54:1
enacted 12:24 46:13,24 48:12 53:23
enacting 43:11
endanger 21:24
engaging 51:18
entire 8:23 43:11
entirely 48:9 49:1
entitled 5:13 6:19 8:20 12:12 17:17 20:17
entry 4:23
equal 20:10,10 24:7 27:2 37:23,25 49:3
era 37:9
Escher 12:18
ESQ 1:15,17,21 2:3,5,8,11
essentially 3:23 42:22
established 39:5 39:8 41:20
ET 1:6
evaluating 3:24
Evans 3:25 7:17 7:22,24 10:4 14:9 17:20 22:20 24:18 26:22 48:17,18 48:25 57:13
event 17:4 54:21
events 51:22
everybody 13:12 51:12 54:18
evidence 21:22 42:13 48:13,15 54:15
exact 5:11 10:7
exactly 6:24 10:9 11:13 13:7,15 16:14 39:23 46:11 56:6 57:16
example 30:8 42:5 50:24
excuse 18:3 24:21
exist 19:9
existed 7:21 28:6
expect 8:9
expectations 20:14 21:10 22:18 57:20
explain 20:7
explained 17:17
explicit 57:24
exposition 9:22
extend 55:16
extent 49:23
extra 13:12,13

F

face 23:8 27:24 28:3 30:6 35:4 36:6
faced 21:19
facial 25:16 26:7 50:13 54:14
facially 9:25 10:1,6,12,17 10:19,22,23 11:4,9 23:4 24:6 27:6,9 32:20,24 33:5 33:10 34:12,13 34:21,24 35:18 35:19,22 36:4 36:11,23,25 37:1 45:5,8
facing 43:6
fact 5:10 7:8 13:22 20:20 25:22 30:18 39:11,24 48:19 55:22
factor 8:14 9:8 13:23 39:13
factors 3:24 4:2
facts 42:10 54:18
faded 20:24
fair 4:4 49:17
fairly 37:11 43:25
fairness 23:2
fanfare 13:3
far 8:2 17:8 21:8 42:15
feel 7:6
felt 8:8 54:5
female 23:3,4 24:23 55:16
fide 45:1
figure 48:4
filed 17:16
filled 22:22
Finally 51:25 52:22 57:15
find 38:22

finish 34:7
first 10:7 15:5 29:21 37:8 42:25 55:12
fixed 41:19
fixed-fund 41:8
flight 23:3,5 24:24
Florida 39:18
focus 45:22
forbid 45:13
force 21:25 36:1
forced 24:9,24
forcing 23:4
form 56:17
formation 38:15
fortiori 14:9
forward 8:17 35:24
frankly 57:8
fresh 32:21
fringe 19:13
full 11:1 35:2 39:25 55:16
fund 41:19 44:21,22 56:21
fundamental 56:13
fundamentally 56:20 57:8
funded 39:9 56:7
funding 20:18 39:10
further 58:1
future 7:20 13:25 43:7,8 51:4,23
F.2d 5:8

G

G 1:15 2:3,11 3:1,7 55:7
game 21:14,18 22:5
gender-based 6:17
General 1:17
generally 42:12
General's 52:2
getting 13:9,11 13:13 38:22
Gilbert 5:15,17 10:13 14:25 15:6,11,13 23:19 25:23 28:11 29:23,25 30:18 31:15,20
Ginsburg 4:19 5:4 6:5,13 7:15 7:23 10:13 14:19,21 15:9 17:6 22:19 28:25 42:20 54:3 55:11
give 4:25 10:10 22:14 29:13 37:24 46:14 53:23
given 8:9 39:7 49:17 56:9
gives 27:2 40:2 49:3
giving 37:15,16 39:1
go 4:16 6:19 7:11 8:17 22:1 34:7 40:16,17 40:20 49:16
going 8:7,7 21:11,23 22:21 41:4 44:22 49:4,5,12 53:4 53:10,12,14 56:6,23,25,25 57:18,22
good 22:1 40:19
goodbye 7:17
governed 17:20
grant 5:11 6:9
granted 23:18
greater 22:14
Griggs 51:6
guess 31:10

H

h 38:16
half 11:2 44:10 44:11
happen 28:13
happened 4:22 5:3 36:14 56:10
hard 11:13 48:20
harm 43:6,9 53:19
harms 57:10
hear 3:3 17:9
heard 31:10
heavily 10:21
height 28:3 30:8 30:9,10 32:12 32:14
held 30:21,22 32:9 44:25 50:22
hierarchy 53:7 53:11
hinges 45:7,7
hired 47:11 48:19,19
history 38:14
hold 50:22,22,24
home 13:8
Honor 58:2
hook 10:5
Hulteen 1:6 3:5
hurt 4:23
hypothetical 18:24 19:7 43:8

I

I'm 25:5
identically 24:17
illegal 10:18 13:4 14:16 24:10 31:12,13
illness 13:10
imbued 34:2
immediate 7:18 7:20 25:4 53:20
immediately 8:12 9:19 19:16 23:10 25:3 26:7 49:5 53:21 55:23
impact 7:24,25 8:3,8 27:10 28:23 30:2,19 30:20 31:2,3,7 31:8,10,13,18 31:24 32:5,10 32:15 36:5,6 49:19 54:8 55:20,23
impacts 54:5
impact's 56:6
impermissibly 17:3
implausible 13:19 45:15
implement 50:3
implementation 48:1
implements 32:20 55:1
implication 48:4
implications 56:4
importance 8:2
important 50:21
impose 18:15
imposed 18:20 22:8
imposes 17:3
imposition 17:22 26:13
impute 49:13
incentive 7:2,3,6
includes 22:11 30:5
inconsistent 18:25
incorporate 19:10
increased 4:25
increases 41:23
indicates 18:19
indistinguisha... 36:14
individual 8:20 48:22
individualized 6:4
individuals 4:12
individual-na... 43:1
inexplicable 23:7
information 4:10
initially 7:12
injure 49:14 54:24
injures 54:12
injury 9:16 29:5
insight 27:25 30:7 32:19 33:19
insofar 38:18
instituted 37:7,8
intend 46:6
intended 43:9 48:14 54:22
intent 34:1 35:23 49:13,20 50:14
intentional 27:15 30:1 31:15 32:3,13 32:21 36:18 49:11 50:5,8
intentionally 28:3 30:6,9 31:1,11,12 33:2,6,9,14,16 33:24,25 34:3 34:4 37:6 38:18 48:15
interest 39:7
interests 8:24 40:6,22 57:23

interfere 9:6
interpretation 15:13 17:18,19
interpreted 15:12 51:17
involve 52:2
involved 8:25 37:5 43:22 48:8
involving 12:5
irrelevant 39:12 39:14
issue 3:12 12:11 21:17
issued 17:15
issues 22:16

J

job 6:2,10 22:16
jobs 53:13
Judge 3:11 55:13
judgment 14:12 22:8 40:24 58:2
junior 53:7
Justice 1:18 3:3 3:9 4:19 5:4 6:5,13 7:15,23 10:13 11:11,22 12:16 13:6,18 14:4,13,19,21 15:9,16,18,24 16:6,12,19,25 17:6 18:2,12 18:16,21 19:1 19:11 20:3 21:5,8,16 22:4 22:19 23:25 25:5,6,13,18 25:19 26:1,15 26:20 27:8,14 27:19 28:7,13 28:20,25 29:7 29:11,23 30:12 30:24 31:6,20 32:7,23 33:3,7 33:22 34:7,11 34:16 35:5,9 36:3,23 37:20 38:1,6,12,20 39:2,3,17,20 40:9,12 41:7 41:12,18,25 42:20 43:20 44:4,7,12,16 44:23 45:7,14 45:19 46:19,22 47:1,6,14 48:3 48:17 49:16,22 50:7,10,16 54:3 55:4,9,11 55:25 56:5 57:1,15 58:3

K

keeping 11:23 11:24
keeps 45:24
Kennedy 19:11 41:7,12,18,25 43:20 44:4,7 44:12,16 56:5
KEVIN 1:21 2:8 26:18
key 12:14 19:18 49:20
kind 7:21 8:17 12:10,17 13:7 42:15 43:8 46:22 47:5 49:4 53:19,21
kinds 10:3,10 42:9,14 47:10 57:7
know 8:12 9:10 10:9,16 17:8 21:18 22:6 40:10,12 43:6 52:12,18 56:6 56:7,8,14,16
knowing 4:14
knows 54:18

L

language 13:20 18:15 45:20 57:24
large 11:14
Laughter 47:7
law 14:23,25 15:6,11 28:5 28:15
lawful 11:20 16:13 18:1 24:4 25:11 28:5,16 29:13 30:16 32:10 35:15 37:7 38:3 39:6,11 44:25 46:18 49:24
lawfully 34:20 35:13,16 36:8 36:10
lawsuit 43:10 55:22
leave 6:7 10:11 19:22 20:1 24:8,9,9,10,10 25:2,11,22,25 26:2,2 27:17 29:12,14,17 35:2,10 39:25 43:5 44:1 49:25 52:5,13 52:14,16,17 55:17
leaves 4:9,15,15 4:16,16,17 17:23 18:7,8,9 20:16 53:15 54:20
Ledbetter 4:1 10:4 13:21 14:5,6,10 16:2 17:14,15 20:4 37:3 48:6,8,8
legal 12:7,7 14:12,22 15:14 25:7
legislation 35:9
Let's 4:7 40:14
liabilities 20:18
liability 17:3,23 18:18,20 22:7 26:13 41:23 51:10
liable 50:23,25
light 23:19
limited 21:14
line 3:18,20,22 27:3 39:19 40:17,17,21,21 41:14 53:8,9 56:2 57:14
linear 43:25
lines 40:15,16
liquidity 40:7
LISA 1:17 2:5 16:21
litigated 55:18
litigating 23:12
litigation 6:22 8:17 55:12
little 5:21 30:14 43:21 56:11
loath 9:5
long 12:17 20:23 38:2 39:19,19 50:2,3 54:25
longer 12:7
look 4:7 5:5 6:21 11:14,15 12:4 12:14,18,20,23 13:19,20 15:2 19:19 31:9 38:15,19,21 39:22 42:10
looked 5:14,15 10:8
looking 12:17 14:8
looks 3:23 12:19 12:20
Lorance 3:25 10:4,22 16:2 27:4 33:19,24 37:5 48:11
lost 23:20 43:2
lot 13:3 46:19 48:4 57:19,20
low 48:19
lower 3:19 43:7

M

majority 3:19 28:11
making 26:8,11 42:7 54:3 56:24
male 10:25
Manhart 41:2
manifestly 21:24
manner 37:17
mantra-like 9:22
manual 17:11 17:16,25
marginal 43:17
married 7:17 23:4 24:24
maternity 4:8 4:15,15 13:13 55:17
matter 1:11 12:14 27:23 28:15 50:1,19 58:7
matters 27:24 30:3 32:18 49:24
maximum 43:22
MD 1:21
mean 4:22 7:23 13:17 14:2 15:8,18 18:13 21:16 23:2 25:3 36:5 41:23 42:8,25 45:17,22 46:19 47:6
meaning 54:12
means 54:25

meant 51:9 55:2
measure 51:3
measures 51:19
medical 20:22
members 8:22
memories 20:23
men 24:7,16,17 24:18
mentioned 6:9
merits 23:21
mightily 45:24
million 44:12,13 44:17
millions 44:14 44:17
mind 18:23 19:2 57:13
minimis 8:3
minute 8:19
minutes 55:6,20
missing 20:23 30:25
mistake 9:24
misunderstands 56:20
model 7:21
modified 20:4
moment 43:4
money 21:6 42:18 43:21 44:17,18
months 23:2 56:9,11
motivated 11:24
move 12:8 47:20
moved 50:25
M.C 12:18

N

N 2:1,1 3:1
Nashville 49:18
nature 4:2 56:20
NCS 50:25
necessarily 53:13
need 45:19 52:18
neutral 13:23 24:6 25:10
never 5:18 31:10
nevertheless 33:10
new 3:15 14:2,2 35:9
Ninth 9:23 17:2 17:8,9 19:24 45:10 50:21 51:16
nondiscrimin... 36:17 37:17
NOREEN 1:6
notice 4:5 7:1,1 9:11,12
notion 6:25
number 5:2 6:8 11:15 41:15,17

O

O 2:1 3:1
obligation 7:9
observed 3:13
obviously 7:5 8:21 15:9,10 24:25
occurred 19:21 35:11 42:6 46:18 49:1 52:4
occurs 53:22
offer 9:21
Office 52:2
Oh 26:5 49:22 50:10
okay 31:11 49:22 50:10
old 12:6
once 52:22
ones 21:10
ongoing 3:14
open 54:23
operates 8:24 11:8
operating 5:9
opinion 55:13
opportunities 29:6
opportunity 6:11 42:10 49:17 51:19 53:24
opposed 52:6
opposite 17:12
oral 1:11 2:2 3:7 16:21 26:18
order 8:2 12:12 22:12 40:2
ordered 20:9,11
ordering 26:10
orders 19:25
original 4:20
ought 9:3
outside 26:23 48:9 49:1
overfunded 56:9
overruled 20:4 23:10
overruling 14:5

P

P 3:1
page 2:2 23:17 55:12
paid 4:12 11:17 12:25 21:25 36:15,16 37:23
pain 7:7
par 13:15
parallel 32:15
parents 4:17
part 12:6 35:3 39:8 52:10,15 52:20,21
particular 4:8 4:11,18 44:22 55:18 56:3
particularly 54:16
parties 41:9
parts 34:24 52:19
passage 6:24 11:7 20:1 23:23 26:11 39:9
passed 18:4 19:15,24 27:4 35:10
pause 30:13
pay 13:25 20:8 21:6 37:16 38:10 39:22,22 46:9 57:11,12
paycheck 14:2 37:21 38:13,13
paychecks 38:17
paying 20:10 38:7,8,13
payment 13:14 13:15 15:22
payments 43:5
PDA 6:25 11:7 16:16 17:24 18:19 19:23 20:2 23:10,23 24:11 45:11,12 46:1,5 50:6,24 51:2,17,21 57:25
pecking 8:2
pension 8:23 15:22 18:6,7 20:18 21:8,11 21:13,23 24:16 37:24 38:14 39:22 40:7,22 41:6,8 42:11 43:7 44:2 46:13,17 53:15 53:17 56:10,16 56:20 57:19
pensions 41:19 42:11 46:10
people 6:21 10:11 11:17,18 13:7 22:22 23:1 28:2 38:8 39:23 42:6 47:2
percent 40:3 44:10,11
percentage 44:2
perfectly 14:12 14:22 15:14 31:1 41:1 54:13
period 13:22 14:3 35:6,11
periods 4:12 34:19 35:15,15 36:8,9
permit 45:12
perpetuate 45:1
perpetuation 36:18
person 6:7,15 13:9 44:6,11 53:8,9,16
personal 24:9,10 52:14,16
personnel 20:23 52:5
persuade 45:20
Petitioner 1:4 1:16,20 2:4,7 2:12 3:8 16:24 17:4 19:25 20:16,19 55:8
Petitioner's 23:16
phase 42:9
Phillips 1:15 2:3 2:11 3:6,7,9 4:19 5:4 6:13 7:23 10:16 11:21 12:16 13:17 14:6,17 14:20 15:8,24 16:9,14 20:15 42:21 55:6,7,9 58:4
physical 13:10
picture 12:18
place 10:7 27:15 27:16 29:22 53:6,11

plainly 33:23
plaintiff 7:10
plaintiffs 42:2
plan 8:22,23 10:24 11:4,6,8 16:7 18:6 21:13 24:1 27:20,24 28:1 28:8,16,16 29:13 33:9,13 34:12,17,19 35:14 38:2,7 38:14,15 39:4 39:5,8 40:7,22 41:6,8,22 42:5 42:23 44:15,19 55:1
planned 22:16
planning 20:17
plans 10:22 56:7 56:10,16 57:19
please 3:10 17:1 26:21
plot 3:22,23
plus 36:16
point 5:19 6:7 7:11 19:18 20:7 21:18 22:10 30:15 35:25 39:2 40:8 47:17 49:25 53:3 56:2,13
points 55:10
policies 19:22
policy 9:25 10:7 10:8 23:4,9 24:9,17,20,22 24:25 25:2,8 25:11,19,22,23 25:25 26:2,3,6 52:5
Porter 22:12
position 15:16 17:7,11 40:23 55:19 56:22
possibility 41:10 41:13,16,19
possibly 42:4
post-Act 51:18 57:12
post-new 47:21
post-PDA 57:3
potential 7:20 41:8
Power 51:6
practice 53:2
preceded 46:23
precisely 3:12 55:17
precluded 51:3
predicates 33:13
pregnancy 10:11 13:11 15:4,23 17:23 18:9 19:20,21 20:1,16,22 21:10 23:8 24:10,12 25:12 25:17 28:9 29:12,14,19 30:17 31:17,23 31:25 32:4 33:17 34:4,5 35:1,4,10,20 35:21,24 39:24 45:17 50:5,5 50:13,15 52:13 52:16 54:21 57:6
prejudicial 20:13
premise 6:14
present 3:15 9:4 16:4 33:20 36:21,22 37:9 38:21 46:16,17 48:1 50:4,4
present-day 48:2
pretty 45:19
prevailing 10:14
pre-Act 19:10 36:18 45:2 51:18 57:11
pre-charging 13:22
pre-existence 48:21
pre-Gilbert 26:4
pre-PDA 5:12 25:11
pre-Title 38:19
primary 3:24
prior 6:24 8:16 25:23 39:9 50:23
private 14:14
probably 3:21 20:17,23
problem 13:20 15:10 21:19 48:17 56:5
problems 42:14
process 5:22 56:21
program 14:1
programs 19:14
prohibit 51:17
prohibited 19:19
prohibits 51:7
pronounce 10:9
properly 52:20
prospect 43:7
prospectively 20:9 21:7 23:11
protect 56:15,16
protected 9:19
provide 26:25 48:12
provided 27:5 46:10
providing 18:5
provision 19:6,7 49:10
provisions 47:12
purely 18:22
purported 17:21
purpose 4:18 43:11
purposes 14:15 24:13 34:18 51:23 52:10
put 9:11 20:5 40:13
p.m 58:6

Q

quarrel 9:13 15:9
question 6:14 7:24 9:3,15 10:20 15:19,25 19:2,4,15 22:24 25:7,20 27:8 28:8 29:8 30:4 32:22 33:18 34:6,9 40:13 44:21 55:11 57:2,15
questioned 5:18
questioning 41:14
questions 52:19 58:1
quite 5:21 11:3 22:23 42:4 51:5
quote 13:21 55:12,15

R

R 3:1
race 8:6 36:18 38:23,24 45:16
race-based 6:18 9:18
racial 14:15 36:21
racially 11:24
raise 36:17 49:8
raises 37:16
rationale 37:4,4
react 6:21
read 15:25 16:1
readily 7:25
real 9:16
realistic 41:16 41:18
reality 6:21
really 12:5 21:20
reason 22:1 38:1 40:21 56:1
reasonable 8:4 54:19
reasonably 53:18
reasons 10:2 11:19,24 20:12 28:18 40:19
reassure 47:8
REBUTTAL 2:10 55:7
Recall 36:15
receive 41:9
recognize 7:16 55:22
recognized 9:2
recollect 43:3
records 20:22 20:23
reduced 49:6 50:13
reduction 4:20 54:20
referred 27:4
reflects 15:22
refused 5:11
refusing 55:15
regard 10:14
regarded 10:17 10:18
regular 39:25
relationship 5:22 44:1
relatively 42:18 43:21
relevant 34:25 47:12
reliance 39:7 40:6,21 51:18 57:23

relied 8:15 51:1 51:11
relief 5:13
relies 10:21
rely 40:15,17,17 50:3 51:12
relying 49:18 51:3,8
remains 7:9
remanded 23:19
remedial 39:16 40:2 42:9
remember 14:10 54:14
remotely 5:18
reply 23:17
report 44:20
representative 17:7
require 43:12
required 20:17 52:25
requirement 32:13 53:20
requirements 36:22 37:9 46:5 48:2 51:21
reserve 16:17
resign 7:18 23:5 24:25
resolution 9:3
respect 15:19 19:13 28:22 29:19 30:22 31:17 40:6 42:18 47:10 48:15 49:12 50:19 52:4 53:4,11,12,14 57:5
respectfully 46:5
respond 7:9,9 8:12
Respondent 2:9 22:12 23:14
Respondents 1:22 4:9 5:6 9:21 17:4 26:19 57:17
response 12:15
restarts 14:3
restore 19:25 22:13
result 48:10 54:17,20
results 51:8,13
retain 29:20
retained 57:4
retirement 4:24 6:11 13:9,11 13:15 22:17 29:13 34:12,17 35:7,14 42:23
retro 47:16
retroactive 16:15 17:3,22 18:15,16,20 20:25 26:13 51:14,24
retroactively 23:24
retroactivity 17:22 19:18 20:7 26:9 50:20
Retrospective 18:18
return 52:22
returns 6:7
reverse 58:2
rhetorical 18:4
Ricks 7:5
right 4:21 11:21 12:22 14:17 15:20 16:3,14 17:12 18:24 19:5 29:20,21 31:1,2,4 33:3 34:13 47:17,25
rightly 11:4
rights 8:19,21 21:1 22:10,15
ripe 6:10 54:5
risk 41:8
ROBERTS 3:3 16:19 25:5,13 25:18 26:1,15 30:12,24 31:6 31:20 32:7 55:4 58:3
routinely 56:15
rule 12:6 27:17 30:7,8 35:1,2,3 35:25 36:15 48:13,13,14,18 52:9,12,15,20 54:13
rules 12:11 34:25 47:19,22 48:21 52:19 57:4
run 36:1 43:12
running 42:7 45:24
Russell 1:21 2:8 26:17,18,20 27:12,16,22 28:12,17,21 29:3,10,16,25 30:20 31:3,14 32:2,12 33:1,4 33:12 34:1,8 34:15,23 35:8 35:19 36:13 37:2,22 38:4 38:10,17,25 39:14,18 40:4 40:11,25 41:11 41:15,21 42:3 42:20,25 43:24 44:6,9,14,18 45:3,9,18,21 46:21,25 47:3 47:8,25 48:7 48:24 49:21,23 50:9,11,18 54:6 55:5

S

S 1:17 2:1,5 3:1 16:21
SAH-tee 10:8
salaries 37:15 38:22
salary 11:16,17 11:23 13:16 37:17 38:7
Satty 5:16,17 15:13 23:21 28:19,21,22 29:18 30:1,21 30:22 31:16 32:5,6 49:18 50:1,8
SAT-ee 10:8
saying 27:10 30:16 31:24 39:6,12,22 43:6 47:15
says 11:25 24:11 24:15 34:17 35:1,15 36:7 44:25 45:6,11 46:16 52:9,16 55:13 56:15,17
SCALIA 29:7 29:11,23 34:7 34:11,16 35:5 35:9 36:3,23 44:23 45:7,14 45:19 46:19,22 47:1,6
scaring 47:6
scatter 3:22,23
scenario 36:13
scheme 9:6
school 4:16
scrambling 20:25
SEC 44:20
second 8:14 20:19 21:18 23:14,15,18 52:15
section 27:5 30:4 32:19 34:8 44:24 50:2 52:24 53:23 54:12
see 11:13,16 12:9,12 14:4 15:2 35:17 36:5,11
senior 53:8
seniority 3:15 4:3,25 5:23,24 5:25 6:3,16 8:2 8:5,10,18,21 8:22,23 9:6,17 12:5,6 13:24 14:7 19:6,9 21:1 22:10,13 22:15,17 24:6 24:7,14,18 25:8,9,10,22 26:3,24 27:1,6 28:23 29:1,20 29:21 30:23 31:17 34:18,25 35:3,10,12,13 37:19 43:14,17 45:1,5,25 46:14 48:9,16 48:19 49:1,2,6 49:12,14 50:4 50:12 52:2,6 52:10,10,21 53:5,6,6,11 54:23 55:16,23 56:4,16,23 57:5,10
sense 31:19 36:12 37:23 51:5 57:13
sensible 54:13
separate 24:20 24:22
serious 9:13
service 5:11 10:11 17:25 19:25 24:15,19 26:25 27:2 37:25 46:11

49:3 51:4 53:10
set 12:11 34:25 56:7
setting 40:22 52:24
Seventh 3:11
sex 15:5 28:10 28:24 30:1,3 30:21 31:15,19 31:21,23 32:1 32:5,15 33:14 45:15
sex-based 9:18
short 28:2
show 31:8
showed 12:25 13:1
showing 13:8
sick 39:25
sickness 18:9
side 8:16 9:21 10:21
signature 19:12
significant 23:1
significantly 8:15
similarly 25:1
simply 4:11 5:23 11:25 13:4 18:22 19:4 25:21 34:9 35:25 36:18 37:13 39:15 40:8,19 41:23 42:13 43:6 46:3,17 50:25 51:21,23 54:22
sit 8:6
situation 9:3 10:25 14:11 22:20 26:4 56:12
situations 6:6,9
small 42:17,18 44:16,18 53:4
smaller 46:10
Solicitor 52:1
somebody 22:20
soon 50:7
sooner 7:9
sorry 25:5
sort 15:19
sought 4:24,24
Souter 13:6,18 14:4,13 15:16 15:18,24 18:2 18:12,16,21 19:1 20:3 21:5 21:8,16 22:4 39:2,17,20 40:9,12 55:25 57:16
Southwestern 55:14
speak 18:14
special 17:17 19:8 48:13
specific 57:4
specifically 5:9 5:16 20:11 21:15
speculative 53:19
squares 48:6
stage 39:16
stake 4:4
stale 4:2 54:15
staleness 4:7
start 20:10
started 46:12
starting 18:5
statement 10:21
statements 40:20
States 1:1,12,19 2:6 16:22 17:8
status 53:25
statute 11:19 12:24 15:12,14 18:5,6,10,25 19:11,19 24:3 29:9 32:23,24 33:8 51:14,21 51:24 54:2
statutory 18:22
staying 13:8
Stevens 16:6,12 23:25 27:8,14 27:19 28:7,13 28:20 32:23 33:3,7,22 37:20 38:1,6 38:12,20 39:3 49:16,22 50:7 50:10,16
Stevens's 25:6 25:20
stipulate 54:17
stopped 37:15 37:15,18
stripped 29:2
strong 54:16
stronger 7:25
structure 11:16 11:17,23 12:1 12:5,8,10 38:11
subject 36:21 47:4 49:11 55:2
subjected 51:10
subjects 37:9 46:4 48:1
submitted 58:5 58:7
subsection 38:16
subsequent 49:13
subset 42:17
subsidiaries 5:10
substance 56:18
substantial 40:5
subtle 3:17
sue 25:3 26:7
sued 5:12
suggest 42:13 46:5
suggestion 41:15 52:1
suggests 16:2
suit 44:8 55:3
suits 46:20,22
summary 22:8
superstructure 47:18
supporting 1:19 2:7 16:24
Supreme 1:1,12 23:5
sure 16:6 19:8 48:6 49:17
surely 15:4
surplus 44:21
system 3:15 8:18 8:21,23 12:6 14:8 19:6 21:1 21:23 24:6,14 25:9,10 26:24 27:1,6,9 30:4 32:21,25 33:2 33:5,20,23 34:2,2,3,23 35:1,3,7 36:20 37:6 45:1,5,5 46:14 47:22 48:1,9,20,23 49:1,2,14 52:6 52:10,11,21 54:10,18 56:4 57:3
systematic 37:6
systemically 11:17
systems 19:9 48:16 54:23 56:16

T

T 2:1,1
tab 45:24
tabulates 46:3
tail 56:24
take 4:17 10:11 21:21 24:10 25:12 27:15 41:25 47:14,16 47:17
taken 4:9,9 7:13 9:12 12:1 17:24 18:8,8,9 19:8,23,25 20:16 39:15 42:8 53:15
talked 20:15
talking 4:8 5:23 5:24 8:18 13:24 14:10 36:24 41:5,22 42:17 43:18 44:2 52:3 54:14
tell 42:15 43:21 52:14
tells 51:22
template 15:20
tens 44:19
term 8:10 27:9 32:24,24 33:1 37:3 46:3
terminated 24:19,22
terms 13:21 23:2 31:15 45:11 49:7 54:1
tests 51:9,11
Thank 3:9 16:19 16:25 26:14,15 55:4,9 58:3
thing 11:16 16:7 23:22 38:4 46:15 48:5
things 20:15 33:11 42:9
think 3:13,19,23 6:15,20 7:4,16 9:24 10:18,19 11:14 12:14,22 13:17 14:6 15:17,19 16:1 17:10 18:13 19:5,14 20:3,6

20:12 21:3,13 22:1,25 23:24 26:5 27:22 28:17 29:4,10 29:17 31:7 32:12,15,18 33:10 34:23 35:1 36:13 37:11 38:16 40:5,10,25 41:1,14,21 42:3,4,8 43:9 43:24,25 45:18 45:21 46:3,21 47:9,13 48:24 50:11,18 53:19 54:6 56:1 57:1
third 9:8 20:25
third-party 8:24
thought 12:17 25:19 29:7 49:10 51:9,14 53:18
three 3:24 4:2 20:12,14
time 4:5,12,20 4:20 5:19 9:12 11:18,20 12:7 14:11,13,19 15:12 16:5,12 16:18 18:1 20:16 24:3 25:23 27:20 28:4,6,8,16 29:8,14,17 30:10,16 32:2 32:18 33:15 34:5,10 35:21 36:2,19 37:14 38:2 39:5 40:1 42:6 43:13 46:13 49:24 50:17 51:25 52:9 53:2,4,15 53:22
times 14:22
time-barred 17:5
Title 13:4 27:5 29:18 36:16,22 37:9,14 41:4 42:24 44:24 46:6,12,23,23 47:12 48:2 51:7,9,11,13
today 4:11 6:16 6:19 10:15,17 10:18 11:8 12:10,12 24:2 24:11 25:1,8 25:15,19,25 26:2,3,3,11 35:24 36:16,20 46:10 47:24 57:18
told 6:15,17 7:17 8:4 9:17
total 24:15 44:6
totally 6:10
touched 21:17
traditionally 39:15
traumatic 21:23
treat 23:7 24:12 51:22
treated 24:12,17 39:24
treatment 27:11 27:12 32:9
trickier 10:20
trivial 46:7
true 7:6 14:7,23 38:4,25 39:3 52:11
truth 10:6
try 9:5 32:2
trying 7:12 11:12 13:19 30:13
turn 12:19 27:25 46:6 50:20
turns 11:22 26:23
twice 23:15
two 7:2 13:21 21:20,21 23:5 28:18 33:10 40:15 41:17 44:10
two-part 52:12
typically 31:8 53:16

U

ultimately 27:23 30:3 32:17 42:7 50:1
unable 20:21
unambiguously 48:14
unanimously 13:3
unconstitutio... 14:15 18:10,11
underlying 49:10 54:17 57:6
understand 14:17 15:8 16:7 18:14 23:25 25:6,13 30:13 34:11 56:15
understood 51:12 55:2
undo 26:10
unequal 27:2 37:23,24 49:3
unfair 21:24
union 6:24 42:23 43:2
United 1:1,12,19 2:6 16:22 17:7
unlawful 12:3 16:8 24:2,20 25:1,1,15,17 26:6 27:20 28:1,17,18,23 29:8,15,18 30:2,18 31:15 31:18 32:11,14 34:10 35:21 36:19 49:25 50:6,16,18 53:2
untimely 16:8 16:10
unusual 30:25
upset 21:5,9 57:19,20,22
upsets 20:14 21:1
urge 58:2
use 3:15 32:23 32:24 37:2
uses 24:3 33:1

V

v 1:5 3:4 39:18 49:18 51:6
vacated 23:19
value 39:7
vary 41:5
versus 54:21
vested 21:1 22:10
vesting 53:17
view 45:23,23 46:4,8 54:1
VII 13:4 27:5 29:18 36:16,22 37:9,14 38:19 41:4 42:24 44:24 46:6,12 46:23,24 47:12 48:2 51:7,10 51:12,13
violation 3:14 14:2 42:23
vis-a-vis 22:15

W

wage 20:11
wages 20:10 37:23
wait 8:7 49:6 53:24 54:11
wake 11:6
want 32:17 36:1 40:3 42:1 49:16
warrant 53:20 53:20
Washington 1:8 1:15,18
wasn't 11:19 14:24 15:5 29:25 31:21 36:19 53:1 54:5
waste 32:17
way 4:14 6:20 6:22 10:15 11:9 12:10,19 12:20,23 13:19 14:24 15:12,25 16:1 18:13 19:19 22:1 37:18 40:13,16 40:17 42:22 51:1 57:10
ways 20:14
Wednesday 1:9
weeks 22:24 53:9
weighed 41:13
weren't 43:5 52:25
we're 25:14 40:4 41:5 42:17 43:6 44:2 49:4 49:5 54:14 57:18
we've 40:15
white 11:18 13:1 46:10
whites 20:9 38:8
wholesale 57:3
win 47:16
woman 11:2 25:12
women 4:22 20:21 24:7,9 24:12,16,17,18 25:3 33:25

55:15
Wood 3:11
word 24:4
words 25:21
work 11:1,2,12 12:25 13:1,8 20:10,22 29:1 35:15,15 37:23 43:15
worker 5:7 10:25 53:7 54:25
workers 46:9,10 46:12
worker's 53:5
workforce 22:21
working 6:2 22:23 34:20 36:8,10 46:12
world 47:21
worry 56:11
worthwhile 45:22
wouldn't 4:23 26:8 46:6 56:1
write 42:1

X

x 1:2,7 5:2

Y

year 18:5
years 20:20 22:17,21 23:12 23:23 24:15 53:7,8,16 55:1 55:3
yesterday 6:16
You've 27:9

Z

zero-sum 21:14 21:18 22:5

$

$100,000 44:5
$17 44:21

0

07-543 1:5 3:4

1

10 1:9
100 40:3
11:06 1:13 3:2
12:07 58:6
15,000 22:9
16 2:7
17 23:17
180 17:12 19:12
1964 46:25
1968 4:10 7:13
1975 15:2
1976 4:10 7:14

2

2 53:7,8
2008 1:9
26 2:9

3

3 2:4 55:6
30 20:19 22:17 23:11,23 55:1 55:3
304 5:8
33 13:13

4

4 22:21
40 20:19 22:17 23:11
401(k) 42:5

5

55 2:12

6

6 23:1 53:9
60s 19:23
602 5:8

7

7 23:2
70s 19:23
70(h) 45:15
702 50:14
703(h) 19:6 44:24 45:3,6 45:11
706(e)(2) 27:5 27:23 30:4 32:19 33:19 34:8 35:22 43:11 48:10,12 50:2,14,19 52:24 53:23 54:9,13 57:25

9

90 13:10,13