UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP, JACK W. MACMILLAN, FRANK H. SMITH, JR., FRANK A. WHEELER, FRED DOCHAT, GERALD FOWLER, M. ELAINE CLAY,	)	
Plaintiffs,	)	
v.	)	**Case No.**
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND STAY OF THE EFFECTIVE DATE OF AGENCY REGULATIONS

Plaintiffs AARP, Jack W. MacMillan, Frank H. Smith, Frank A. Wheeler, Fred Dochat, Gerald Fowler and M. Elaine Clay (collectively "the plaintiffs"), by their counsel and pursuant to Rule 65 of the Federal Rules of Civil Procedure and Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, hereby move the Court for the entry of a temporary restraining order, a preliminary injunction and other necessary and appropriate equitable relief to enjoin the publication and effectiveness of a regulatory exemption by the defendant Equal Employment Opportunity Commission ("EEOC") under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. ("ADEA").

On April 22, 2004, the defendant Equal Employment Opportunity Commission voted to publish in the Federal Register a final regulatory "exemption" under the ADEA

which would permit employers to reduce – or to eliminate altogether – health insurance benefits for retirees age 65 and older. Exhibit A the Declaration of Christopher G. Mackaronis filed simultaneously herewith ("Mackaronis Decl."). In support of this regulatory initiative, the EEOC relied heavily on the nationwide trend of escalating health care costs that has prompted employers to reduce health care benefits provided to company retirees. According to the EEOC, allowing employers to arbitrarily eliminate health care for Medicare-eligible retirees will help "preserve" the health care benefits provided to younger (pre-65) retirees.

The EEOC's "exemption" is both illogical and unlawful. Under the guise of regulatory authority, the EEOC "exemption" (a) attempts to overturn the law of this Circuit directly on point; (b) contravenes both the express language and congressional intent behind the Older Workers Benefit Protection Act of 1990 ("OWBPA"); (c) constitutes an astonishing and impermissible 180-degree about face by the EEOC; (d) undermines the fundamental purposes that inspired the ADEA; (e) exceeds the EEOC's authority and expertise; and (f) is otherwise arbitrary and capricious.

The final "exemption" approved by the EEOC will become effective immediately upon publication, which appears imminent. Mackaronis Decl., Exhibit B[1] Employers nationwide are poised to change their health care practices immediately upon publication of the "exemption" in the Federal Register.[2] And when that occurs,

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[1] Exhibit B contains the EEOC's December 13, 2004 Semiannual Regulatory Agenda identifying the exemption, and a January 18, 2005, report appearing in the Daily Labor Report (BNA) in which the Chair of the EEOC, Cari Dominguez, is quoted as saying that the exemption is "'at the top of the list' and should be published shortly."

[2] Some benefit consulting firms have counseled their clients to await publication of the final exemption prior to making benefit changes. See Exhibit G to Mackaronis Declaration.

irreparable harm will surely befall hundreds of thousands of older Americans who rely on their employer-provided benefits to supplement Medicare's numerous shortcomings. Upon publication, the unlawful regulatory "exemption" will provide employers who rely on it with a "good faith defense" – meaning that they will be immune from liability for their actions even if the "exemption" is later declared unlawful by a reviewing court. Through this action, the plaintiffs seek to avoid this tragic double-whammy where not only are retired Americans targeted *precisely because of their age* for the elimination of their essential health care benefits, but they will be rendered legally helpless to correct the injustice.

FACTUAL BACKGROUND

AARP is a nonprofit, nonpartisan membership organization that helps people 50 and older have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. Complaint, ¶ 2. Approximately 47% of AARP's members are working. *Id.*, ¶ 4. Most of AARP's employed members are protected by the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 621 *et seq.* The proper interpretation and vigorous enforcement of the ADEA is of paramount importance to AARP and the millions of older workers who rely on the ADEA to deter and remedy invidious age bias in the work place. AARP was instrumental in the passage of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978, the provisions of which explicitly prohibit the unprecedented exemption approved by the EEOC. AARP pursues this case in both its organizational and representational capacities on behalf of millions of its members and others who likely will be harmed by the challenged "exemption."

Plaintiffs MacMillan, Smith, Wheeler, Dochat, Fowler, and Clay are all AARP members, over age 65, who currently receive health insurance benefits by virtue of their prior employment. *See* Complaint, ¶¶ 6-18. Each of them reside in the Third Circuit, and three of them reside in this judicial district. *Id.*

The defendant EEOC, of course, has the responsibility for administration and enforcement of the ADEA. On July 14, 2003, the EEOC published a Notice of Proposed Rulemaking in the Federal Register. 68 Fed. Reg. 41542 (July 14, 2003). The July publication announced for notice and comment rulemaking the proposed exemption which contained the following relevant language:

> (b) Exemption. Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plant. Pursuant to the authority contained in section 9 of the Act, and in accordance with the procedures provided therein and in Sec. 1625.30(b) of this part, it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

The text accompanying the proposed exemption announced that the EEOC proposal had been "*coordinated with other federal agencies* in accord with Executive Order 12067, and incorporated, where appropriate, agency comments in the proposal." 68 Fed. Reg. at 41547(emphasis added). Similarly, the EEOC stated that "the proposed rule has been drafted and *reviewed in accordance with Executive Order 12866,*" and indicated explicitly that "[t]his rule…was reviewed by the Office of Management and Budget (OMB)." *Id.* (emphasis added).

AARP, the named plaintiffs and thousands of other AARP members submitted written comments to the EEOC in opposition to the proposed "exemption." Business

organizations, labor unions and employers submitted comments in favor. *See* Complaint, ¶¶ 10, 48. On April 22, 2004, the EEOC convened a public meeting and approved the final rule which will become effective upon publication in the Federal Register. Exhibit A; *See also* Mackaronis Decl., Exhibit C at 1 (April 22, 2004 Transcript of EEOC Meeting) ("The purpose of our meeting today is to deliberate and vote on a proposed final rule that would exempt from the Age Discrimination in Employment Act the coordination of employer-sponsored retiree health benefits with Medicare eligibility."). The text of the exemption approved by the EEOC is identical in all substantive respects to the language in the proposed exemption. Compare § 1625.32(b) at 68 Fed. Reg. 41548-49 with § 1625.32.(b) in Exhibit A. Following approval of the final rule, and apparently prior to publication, the EEOC yet again invoked Executive Orders 12067 and 12866 as the basis for "coordination and review" by other federal agencies. That review now appears to have been completed, as indicated by the January 2005 statement of the EEOC Chair to the press that the exemption will be published shortly. Mackaronis Decl., Ex. B.

I. THE PLAINTIFFS ARE ENTITLED TO AN INJUNCTION TO PREVENT THE CHALLENGED EXEMPTION FROM BEING PUBLISHED AND BECOMING FINAL.

In their complaint, the plaintiffs ask the Court to issue a temporary restraining order and thereafter grant a preliminary injunction prohibiting the publication of the challenged exemption pending a final determination of this case. Complaint ¶ 1. The plaintiffs request this relief pursuant to 5 U.S.C. § 705 of the Administrative Procedure Act (APA) and Fed. R. Civ. Pro. 65.

Under the APA, a federal court

> [o]n such conditions as may be required and to the extent necessary to prevent irreparable injury . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. The legal test to be applied to a § 705 request for a stay of agency action is the same legal test applied to requests for preliminary injunctions and temporary restraining orders under Fed.R.Civ.Pro. 65. *See Corning Savings and Loan v. Federal Home Loan Bank Board*, 562 F. Supp. 279, 280-81 (E.D.Ark. 1983); *Getty Oil Co. v. Ruckelshaus*, 342 F. Supp. 1006, 1024 (D. Del. 1972); *see also Greene County Planning Board v. Federal Power Comm'n*, 490 F.2d 256, 260 (2d Cir. 1973); *Baggett Transp. Co. v. Hughes Transp., Inc*., 393 F.2d 710, 716-17 (8th Cir. 1968); *Hamlin Testing Laboratories, Inc. v. U.S. Atomic Energy Comm'n*, 337 F.2d 221, 222 (6th Cir. 1964) (decision under former version of APA); *Associated Securities Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir. 1960) (same); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *State of Delaware v. Bender*, 370 F. Supp. 1193, 1204-05 (D.Del. 1974); *Unglesby v. Zimny*, 250 F. Supp. 714, 716 (N.D.Cal. 1965); *Covington v. Schwartz*, 230 F. Supp. 249, 253 (N.D. Cal. 1964); *cf. Abbott Laboratories v. Gardner*, 387 U.S. 136, 155-56 (1967) (government can defeat request for § 705 stay by showing a "delay would be detrimental to the public health or safety.").

To obtain a preliminary injunction in the Third Circuit, a plaintiff

> must establish (1) a reasonable likelihood of success on the merits, (2) irreparable harm absent the injunction, (3) that the harm to [the plaintiff] absent the injunction outweighs the harm to the Government of granting it, and (4) that the injunction serves the public interest.

Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219, 228 (3rd Cir. 2004) (directing district court to enter preliminary injunction against federal government). Applying this standard, under 5 U.S.C. § 705 the plaintiffs are entitled to a temporary restraining order and a preliminary and permanent injunction preventing the publication of the challenged exemption.

A. The Plaintiffs Are Likely To Prevail On The Merits.

The plaintiffs are likely to prevail on the merits of their challenge for numerous reasons. First, the challenged exemption is contrary to law; it is contrary to this Circuit's decision in *Erie County Retirees Assn v. County of Erie, PA,* 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001); it is contrary to the plain language of the ADEA and abundant legislative history; and it is admittedly contrary to longstanding EEOC regulations and the agency's own enforcement policy. Beyond that, the challenged exemption exceeds the EEOC's authority under § 9 of the ADEA. And finally, the rulemaking itself was legally flawed, both by the EEOC's lack of health care policy expertise and decision-making authority, and by the EEOC's failure to consider multiple factors essential to reasoned agency action. Each of these flaws will be addressed below.

In order to pass legal muster, the challenged exemption must comply with the requirements of the Administrative Procedure Act. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court explained the legal standards for assessing agency action. The Court held that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-

43; *see Appalachian States Low-Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 197-98 (3d Cir. 1997) ("The disputed language in the Act is not ambiguous. Thus our statutory interpretation is at an end, and we must give that language effect."); *Marincas v. Lewis*, 92 F.3d 195, 200 (3d Cir. 1996) ("If congressional intent is clear and unambiguous, then that intent is the law and must be given effect."). This is the "*Chevron* Step One" review. If Congress "has not directly addressed the precise question at issue, and the agency has acted pursuant to an express or implicit delegation of authority, the agency's interpretation of the statute is entitled to deference so long as it is 'reasonable' and not otherwise 'arbitrary, capricious, or manifestly contrary to the statute.'" *See Chevron*, 467 U.S. at 843-44. This is the "*Chevron* Step Two" review. *See, e.g., Marincas*, 92 F.3d at 200.

In order to determine whether the agency action is contrary to law, a court must look first to determine whether Congress has delegated to the agency the legal authority to take the action that is under dispute and then to whether "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2000); *see also Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 154 (3rd Cir. 2004).

The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters…. In such cases, the intention of the drafters, rather than the strict language, controls." *U.S. v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 242-43 (1989); *see Ki Se Lee v. Ashcroft*, 368 F.3d 218, 222 (3d Cir. 2004) ("if the statutory meaning is not clear, we must try to discern Congress' intent using the

ordinary tools of statutory construction."). To determine Congressional intent, a court must use "traditional tools of statutory construction." *Marincas*, 92 F.3d at 200 (*quoting Chevron*, 467 U.S. at 843 n. 9). The traditional tools of statutory construction used to discern a statute's plain meaning include "statutory language, context and legislative history." *Pennsylvania Medical Society v. Snider*, 29 F.3d 886, 902 (3d Cir. 1994) (finding statutory language clear and "that Congress has spoken on the issue" presented for APA review); *see Appalachian States*, 126 F.3d at 97-98 (meaning of undefined phrase in statute under APA challenge is determined using ordinary meaning of words used); *Marincas*, 92 F.3d at 200-01 (reading various sections of the same statute to determine that "the plain meaning of the Refugee Act is clear and unambiguous."). "Presented with the unambiguous language of [a law a court] need not, and ordinarily should not, look to its legislative history for clarification. Nevertheless, "[a] court may consider persuasive legislative history that Congress did not intend the words they selected to be accorded their common meaning. A construction inconsistent with a statute's plain meaning, however, is justifiable only when clear indications of a contrary legislative intent exist." *In re TMI*, 67 F.3d 1119, 1125 (3d Cir. 1995).

Once the Third Circuit divines a statutes' clear meaning, it must adhere to that determination under the doctrine of *stare decisis*, and judge an agency's later interpretation of the statute against the court's prior determination of the statute's meaning. *See Neal v. U.S.*, 516 U.S. 284, 295 (1996); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *U.S. v. Barbosa*, 271 F.3d 438, 464 (3d Cir. 2001) ("a court must adhere to its prior decisions interpreting an act of Congress, even in the face of a later, contrary interpretation or definition issued by the" agency).

In other words, an agency is entitled to deference under the *Chevron* standards only when Congress (or a court's interpretation of a statute) has left a gap for the agency to fill pursuant to an express or implied delegation of authority to the agency. *Chevron*, 467 U.S. at 843-44; *see also Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 152 (3d Cir. 2004) ("We owe no deference to an agency interpretation plainly inconsistent with the relevant statute.")(*citing Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989))**.** For example, regulations issued by the Environmental Protection Agency were found "contrary to law" because they were based on economic considerations that Congress did not authorize the EPA to consider in the promulgation of the rule. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 464 (2001). As the Court observed, "[t]he EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its [the agency's] discretion." *Id.* at 485. The foregoing fundamental legal principles apply to regulations issued by the EEOC. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress.") (*citing General Electric Co. v. Gilbert*, 429 U.S. 125, 140-142 (1976))

The EEOC's proposed exemption fails miserably under the foregoing legal standards.

1. The Exemption Is Contrary To The Law In This Circuit.

The challenged exemption is in irreconcilable conflict with the law of this Circuit as set forth in *Erie County Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193 (3d Cir. 2000). This direct conflict is the *raison d'etre* of the exemption itself. As the EEOC acknowledged in the text accompanying the proposed exemption, as a result of the decision in *Erie County*, "in every instance where employer-provided bridge coverage exceeds Medicare coverage, the employer would be prevented by the ADEA from ending its coverage when retirees become eligible for Medicare." 68 Fed. Reg. at 41546 (July 14, 2003). And, of course, this interpretation of the ADEA came as no surprise to the EEOC, since that very legal argument was successfully urged upon the Third Circuit by the EEOC itself.

In *Erie County*, the employer offered an admittedly inferior health care plan to retirees age 65 and older. "In a class action lawsuit, the Medicare-eligible retirees alleged that the county violated the ADEA by offering them health insurance coverage that was inferior to that offered to the county's younger retirees." 68 Fed. Reg. at 41545. On appeal, the EEOC argued "*based on the plain language of the ADEA*, that (1) retirees are covered by the ADEA and (2) employer reliance on Medicare eligibility in making distinctions in employee benefits violated the ADEA, unless the employer satisfied one of the Act's specified defenses or exemptions." 68 Fed. Reg. 41545 at n. 25 (emphasis supplied).

The Third Circuit agreed with the EEOC that the County's decision to offer its post-65 retirees an inferior health care plan constituted a violation of Section 4(a) of the ADEA. 220 F.3d at 213 ("In sum, we conclude that the County has treated appellants

differently than other retirees with respect to their 'compensation, terms, conditions, or privileges of employment, because of …age.'") Moreover, and also in agreement with the EEOC, the Third Circuit concluded that in order to avoid liability, the County would have to satisfy the "equal benefit or equal cost principle as set out in 29 C.F.R. § 1625.10 (1989)." *Id.* at 215. As the Court correctly found, "subsection (e) of that regulation expressly contemplates application of the equal benefit or equal cost standard in the Medicare eligibility situation." *Id.*

The Third Circuit's decision in *Erie County* greatly simplifies this Court's analysis here. As this Circuit found, "the plain language of [the ADEA] indicates that Congress intended section 623(f)(2)(B)(i) to apply when an employer reduces health care benefits based on Medicare eligibility." 220 F.3d at 215. Precisely because Congress has spoken directly on this issue, the EEOC has no statutory "gap" within which to regulate under the "*Chevron* Step One" analysis. As the Supreme Court ruled in *Chevron*, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Simply put, the EEOC has no authority to permit a form of arbitrary age discrimination that Congress expressly condemned. For this reason alone, the exemption is invalid.

2. Both The Text Of The ADEA And Congressional Intent Prohibit The Overt Discrimination Sanctioned By The Challenged Exemption.

In assessing the legality of the challenged exemption, the Court should commence with "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n. 9; *see also Erie County, supra*, 220 F.3d at 208 ("While the legislative history may

provide assistance in resolving ambiguity, the language of the statute must guide us in the first instance"); *Pennsylvania Medical Soc'y v. Snider*, 29 F.3d 886, 902 (3d Cir. 1994) ("statutory language, context and legislative history" are the tools of statutory construction used to determine whether a statute's meaning is clear). If the text of the ADEA speaks either directly or indirectly to the issue that is the subject of the exemption – age discrimination in health care benefits – then the plain meaning of the text is conclusive under "*Chevron* Step One". Neither the EEOC nor a reviewing court can rewrite the statute in a manner contrary to that chosen by Congress.

The irony of the EEOC's proposal lies in its own recognition that absent the challenged exemption, the ADEA unmistakably prohibits age discrimination in health care benefits. This fact is crystal clear from an examination of the statutory text, and is further underscored by numerous expressions of congressional intent in the legislative history. The icing on the cake is more than twenty years of EEOC administrative interpretations which embellish the obvious – that the ADEA prohibits age discrimination in all forms of employee benefits. For these reasons, the EEOC's exemption runs aground on the "*Chevron* Step One" analysis. There is no statutory "gap" in which the EEOC can permissibly regulate, a fact which the EEOC articulated persuasively in its brief to the Third Circuit in *Erie County*.

In *Erie County* the Third Circuit conducted precisely the type of statutory analysis of the ADEA that is required of a district court under "*Chevron* Step One". Properly so, the Court commenced with the language of § 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), which states that it shall not be unlawful for an employer:

> (B) to observe the terms of a bona fide employee benefit plan –
> (i) where, for each benefit or benefit package, the actual amount of

> payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989);

After exhaustive analysis of this text, and all of its accompanying legislative history, the Third Circuit concluded that "the plain language of section 623(f)(2)(B)(i) – through its express reference to 29 C.F.R. § 1625.10 – indicates that Congress intended section 623(f)(2)(B)(i) to apply when an employer reduces health care benefits based on Medicare eligibility." 220 F.3d at 215. Of course, this holding is binding on the Court here for the purposes of its *Chevron* analysis.

As became apparent to the Third Circuit as it plowed the ADEA's statutory landscape, with the notable exception of the Supreme Court's decision in *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), the ADEA and its implementing regulations have consistently made clear that age discrimination in health care benefits is prohibited by the statute.

a. <u>Pre-Betts Discrimination In Employee Benefits</u>.

From the date of its passage, Section 4(a) of the ADEA, 29 U.S.C. § 623(a) has made it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;…." While this statutory prohibition did not expressly mention employee benefits, another provision of the ADEA did. Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), under a heading captioned as "Lawful Practices," set forth an exception to the prohibitions of Section 4(a) which allowed an employer "to observe the terms of *any…bona fide employee benefit plan* such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this Act…"

(emphasis added). Reading these two provisions in tandem led the Department of Labor to the logical conclusion that the phrase "compensation, terms, conditions, or privileges of employment" encompassed not only wages, but all non-wage forms of compensation and employee benefits. *See, e.g., PA Dept. of Corrections v. Yeskey,* 524 U.S. 206, 211-212 (1998)(Americans with Disabilities Act provision making statute generally applicable to "institutions" included state penal institutions; "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'")(citations omitted), *Menkowitz v. Pottstown Mem. Medical Ctr.,* 154 F.3d 113, 121 (3d Cir. 1998)*; Engine Mfrs. Ass'n v. E.P.A.*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) ("The most traditional tool, of course, is to read the text; if it clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is silent in the *Chevron* sense.") (*quoting Chevron*, 467 U.S. at 843 n. 9).

As the Third Circuit observed (220 F.3d at 203 n.5), just two years after the passage of the ADEA, the Department of Labor issued an interpretive regulation entitled "Costs and Benefits Under Employee Benefit Plans." 29 C.F.R. § 860.120 (1969); 34 Fed. Reg. 9709, (June 21, 1969). The regulation announced the following rule, which has since become known as the "equal benefit or equal cost" rule:

> A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

29 C.F.R. § 860.120(a). According to the Department of Labor's contemporaneous interpretation, the ADEA prohibited the very type of arbitrary age discrimination in employee benefits permitted by the challenged exemption.

The regulation containing the "equal benefit or equal cost" rule remained unchanged until Congress amended the ADEA in 1978 to raise the upper age of coverage for the ADEA from 65 to 70 years of age, while at the same time amending Section 4(f)(2) with an express provision outlawing the common practice of mandatory retirement. The principal purpose of the 1978 amendment was to make clear that "the exception [§ 4(f)(2)] does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age." H. Rep. No. 95-950, at 8 (1978).

During congressional passage of the 1978 amendments, Congress "reaffirmed unequivocally that the employer's burden of proving 'equal benefit or equal cost' under Section 4(f)(2) was consistent with congressional intent when enacting Section 4(f)(2) in 1967." S. Rep. No. 101-263, at 9 (1990). As Congress observed during the 1990 passage of the Older Workers Benefit Protection Act, "[t]he 'equal benefit or equal cost' principle under section 4(f)(2) was repeatedly, and specifically, recited by managers of the amendments and other members of Congress as an employer's exclusive means of proving compliance with the ADEA." *Id.*

The 1978 amendments to the ADEA once again caused the Department of Labor to focus on an employer's obligations with regard to employee benefit plans. "The increase in the maximum age level of those covered [by the ADEA]… raised questions about many common benefit practices affecting employees at age 65." 44 Fed. Reg.

30648 (May 25, 1979). "In amending section 4(f)(2) Congress also made clear that the Department [of Labor] should issue more comprehensive guidance with respect to section 4(f)(2), particularly because of the increase in the maximum age level of those covered by the Act." *Id.*

The Department of Labor complied with congressional direction by issuing a comprehensive Interpretive Bulletin explaining in detail the manner in which employers could conform to the "equal benefit or equal cost" rule endorsed by Congress. Relevant to the provision of health care benefits to individuals at Medicare age, the 1979 regulation stated the following:

> An employer does not violate the Act [ADEA] by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare

29 C.F.R. §1625.10(e). As this Circuit concluded, "[t]his provision, and the Senate Committee's apparent approval of it, supports appellants' argument that the equal benefit or equal cost standard applies and must be satisfied when an employer reduces health benefits for retirees eligible for Medicare." *Erie County, supra.*, 220 F.3d at 205 (footnote omitted).[3]

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[3] The regulation explained in detail the manner in which employer-provided benefits could be coordinated with Medicare. The regulation, for example, permitted an employer to "'carve out' from its own health insurance plan those benefits actually paid for by Medicare." 29 C.F.R. § 860.120(f)(1)((ii)(A). And the regulation also approved the "supplemental" approach, where an employer will "place employees

The regulation was patently clear. Because an employer can take advantage of Medicare by reducing its own health care costs, the cessation of health care at Medicare age would never be justified under the statute. *See* 29 C.F.R. § 860.120 (f)((1)(ii)(C) ("As a result of the saving to employers when benefits are available through Medicare, reductions in total health benefits for employees age 65 to 70 will generally not be justified."). As this Circuit noted, "it was held prior to *Betts* that an employer could avail itself of the section 4(f)(2) safe harbor only if it provided either equal benefits to older and younger workers or incurred equal costs on behalf of each." *Erie County, supra.*, 220F.2d at 203.

b. <u>Betts And The Older Workers Benefit Protection Act.</u>

In *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), the Supreme Court ruled that "the general prohibitions of section 4(a)(1) of the ADEA …do not apply to employee benefit plans." S. Rep. No. 101-263, *supra*., at 14. The Court further ruled that the objective "equal benefit or equal cost" rule in effect from the ADEA's enactment could not be reconciled with the "subterfuge" language of the § 4(f)(2) exception for employee benefit plans ("bona fide employee benefit plan…which is not a subterfuge to evade the purposes of this chapter…."). The practical effect of the Court's ruling was to permit arbitrary age discrimination in all types of benefit plans except when "intended to serve the purpose of discriminating in some non-fringe benefit

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eligible for Medicare in a separate health insurance plan which supplements Medicare." Id. Under the supplemental approach however, the regulation specified that (1) the cost of the supplemental plan is no less than the cost for including the same individual in the regular plan with a Medicare "carve out," and (2) "the supplemental plan provides benefits which are no less favorable than an employee eligible for Medicare benefits would receive under the employer's regular health insurance plan." *Id.*

aspects of the employment relationship." *Id.; see also Erie County, supra.,* 220 F.3d at 203-204.

"Congress acted quickly to overrule *Betts*." *Erie County, supra.*, 220 F.3d at 204.

> The Congress finds that, as a result of the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) *which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.*

Pub. L. 101-433, Title I, § 101 (Oct. 16, 1990; 104 Stat. 978) (emphasis added). In order to restore its intent that the ADEA prohibits age discrimination in the provision of employee benefits, Congress enacted several changes. First, Congress added Section 11(l) to make it unmistakably clear that "[t]he term 'compensation, terms conditions or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plans." 29 U.S.C. § 630(l). Second, Congress deleted the "subterfuge" provision in § 4(f)(2) and replaced it with the literal language of the "equal benefit or equal cost" rule, making it lawful for an employer to "observe the terms of a bona fide employee benefit plan (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)…" 29 U.S.C. §623(f)(2)(B). As Congress noted, "Employers invoking this defense [§ 4(f)(2)] are required to provide equal benefits to, or to incur equal cost for benefits on behalf of, all employees. The bill tracks the requirements set forth in ADEA regulations for over twenty years, requirements that had been approved by every

federal court of appeals to consider the defense in the 12 years preceding the decision in *Betts*." S. Rep. No. 101-263, *supra*., at 5. Stated emphatically otherwise, "the *only* justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals." *Id.* at 18 (emphasis in original).

With this extraordinarily explicit statutory backdrop, the EEOC's proposed exemption is nothing short of remarkable. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). "A construction inconsistent with a statute's plain meaning, however, is justifiable only when clear indications of a contrary legislative intent exist." *In re TMI*, 67 F.3d at 1125. Neither a reviewing court nor an enforcing agency "may 'correct' the text so that it better serves the statute's purposes, for it is the function of the political branches not only to define the goals but also to choose the means for reaching them." *Id.* at 1089.

3. The EEOC Has Acknowledged That The ADEA Prohibits The Cessation Of Health Care Benefits At Age 65.

In order to avoid a literal interpretation of the ADEA at the "*Chevron* Step One" analysis, the EEOC must demonstrate Congress did not mean what it appears to have said, through clear indications of a contrary legislative intent. *In re TMI*, 67 F.3d at 1125. The EEOC admittedly cannot meet this standard. Consistent with administrative regulations governing employee benefits under the ADEA since 1969 and the statutory text (as most recently amended by the OWBPA), the EEOC has pursued a litigation and enforcement policy the cornerstone of which has been the principle that health

insurance benefits may not be arbitrarily reduced or eliminated without a cost justification.

In its *amicus curiae* brief filed by the EEOC in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), the EEOC confirms that Congress plainly intended to prohibit discrimination on the basis of age in the provision of health care benefits to former employees. Mackaronis Decl., Exhibit D. The issue in *Erie County* was whether the County's decision to place Medicare-eligible retirees into an admittedly inferior health care plan violated the ADEA. The district court held that the ADEA did not apply to age-based changes in "retirement health benefits." *Eric County Retirees Ass'n v. County of Erie*, 91 F.Supp 2d 860, (W.D. Pa. 1999).

In its brief to the Third Circuit, the EEOC disagreed with the conclusion of the lower court, stating "we believe that the ADEA covers retirees who are subjected to discriminatory modifications in employment-related health benefits." Exhibit D at 8. In language that is directly applicable to the EEOC's proposed exemption, the EEOC announced that "[n]othing in the text of the statute supports the view that retirement health benefits, as a category of benefits, fall outside the reach of the statute." *Id.* at 18.

The Commission's position in *Erie County* was grounded on the bedrock of employment discrimination law. "So long as the discriminatory act touches upon a benefit for which the individual is eligible by virtue of his or her status as a current or former employee of the employer, the protections of the ADEA are implicated." Exhibit D at 19. In ignoring this fundamental axiom, the district court erred. As the EEOC noted, "any other view of the statute would lead to *irrational gaps in coverage that Congress could not have intended.*" *Id.* at 21 (emphasis added). Invoking

congressional intent in support of its view that post-retirement health care benefits were covered by the ADEA, the Commission argued:

> It is 'inconceivable' that Congress 'would in the same breadth expressly prohibit discrimination in [employee] benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees … at or after their retirement, although they had earned those [employee] benefits through years of service [with the employer].'

Id. at 22 quoting *Castellano v. City of New York*, 142 F.3d 58, 69 (2d Cir. 1998).

Finally, the EEOC's brief in *Erie County* also addressed the lower court's mistaken view that the legislative history of the OWBPA suggested that Congress intended to exempt retiree health benefits from the ADEA's coverage. The lower court had premised its view, at least in part, on the narrow "offset" provisions in the OWBPA that allowed an employer to offset severance pay with certain retiree health insurance benefits. *See* 29 U.S.C. § 623(l)(2)(D). As the EEOC observed, however, "if anything, the fact that Congress addressed the issue of retiree health benefits and did so only in the context of a statutory offset for severance benefits strongly supports the view that Congress did not intend, in general, to exempt discrimination in retiree health benefits from the reach of the statute." Exhibit D at 32. As the EEOC concluded, "it is clear from the legislative record that the political will for adopting an explicit limitation on [health care] coverage did not exist." *Id.* at 32-33.

Based on its success in *Erie County*, the EEOC formally amended its Compliance Manual to include a section explaining employers' obligations to provide health care benefits for employees and retirees who reach Medicare eligibility age. Mackaronis Decl., Exhibit E (EEOC Compliance Manual, Chapter 3: Benefits, Section IV

B).[4] The Compliance Manual provisions cited to the decision in *Erie County*, and explained that an employer cannot eliminate health coverage for retirees upon the attainment of Medicare eligibility. The Compliance Manual provisions were entirely consistent with the legal positions articulated by the Commission in *Erie County.* However, by notice published in the Federal Register on August 20, 2001, the EEOC abruptly rescinded the *Erie County* section of the Compliance Manual. Mackaronis Decl., Exhibit F.

4. The Challenged Exemption Exceeds The EEOC's Authority Under § 9 Of The ADEA, 29 U.S.C. § 628.

Section 9 of the ADEA, 29 U.S.C. § 628, authorizes the EEOC to "…issues such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest." The EEOC's own regulations indicate that

> "[t]he authority conferred on the Commission by section 9 …will be exercised with caution and due regard for the remedial purpose of the statute to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment. Administrative action consistent with this statutory purpose may be taken…when found necessary and proper in the public interest in accordance with the statutory standards."

29 C.F.R. § 1627.15(b) (emphasis added). According to the EEOC, "a reasonable exemption from the Act's provisions will be granted only if…*a strong and affirmative showing* has been made that such exemption is in fact necessary and proper in the public interest." *Id.* (emphasis added). The EEOC's current regulation is substantially

[4] The only available copy to the plaintiffs contains interlineations resulting from the subsequent rescission of the provisions.

similar to the regulation first issued by the Department of Labor in 1969. *See* 29 C.F.R. § 850.16 (34 Fed. Reg. 19193; (Dec. 4, 1969)).

The challenged exemption even fails to satisfy the EEOC's own regulations. Conspicuously absent from the exemption – or its supporting rationale – is "due regard" for the fundamental purposes of the ADEA of "promoting" employment of older persons and prohibiting "arbitrary age discrimination" in employment. Indeed, the challenged exemption frustrates both of those purposes. Since the exemption, by its terms, only applies to retired employees it cannot be said to "promote" the employment of any class of individuals covered by the ADEA. If anything, the exemption will promote the *departure* of older workers from the labor force by allowing employers to arbitrarily offer to younger individuals – not older ones –generous health care benefits in retirement. And, curiously, EEOC Chair Dominguez claimed that the purpose of the exemption was to permit employers "to retain the best and brightest in their work force." Exhibit C at 14.[5]

According to the EEOC's rationale, the maintenance of generous health care benefits to younger retirees will be facilitated by permitting employers to arbitrarily

[5] Dominguez explained: "And if we don't give employers the flexibility to put recruitment programs, to put retention programs – the reason employers can retain the best and the brightest in their work force oftentimes has to do with the quality of the benefits program that they have. And if we tie their hands behind their back by not allowing them to do this and to have this specter of a violation continue to hover over them, I really think we're doing a tremendous disservice to the working men and women of our nation. And that is as simple as I can put it. This is not about discrimination. This is about enhancing and giving employers that opportunity." Exhibit C at 14.

reduce or deny health care to their older counterparts – the Medicare-eligible retirees.[6] But this concept of robbing Peter to pay Paul is precisely the form of arbitrary age discrimination that Congress intended to prohibit. Nor does it effectuate any of the ADEA's purposes by allowing employers to engage in rank discrimination against older retirees to facilitate their hiring and retention of the "best and the brightest" – a not too subtle reference to younger employees. The explanations present yet another insurmountable flaw in the exemption. Because it is antithetical to a fundamental statutory purpose, it does not even comply with the EEOC's own regulations governing the permissible scope of the agency's rulemaking authority under § 9 of the ADEA.

5. The Commission Has Failed To Supply A Reasoned Analysis Consistent With The Terms Of The ADEA.

Assuming, arguendo, that the EEOC theoretically can permit precisely what Congress intended to prohibit under the ADEA, the challenged exemption suffers from a myriad of other fatal rulemaking defects.

a. Congress Has Not Authorized The EEOC To Make Health Care Policy.

The proposed exemption is flawed because the EEOC lacks the authority to issue legislative rules that are designed to influence national health care policy. The purposes of the ADEA are set forth in § 2(b), 29 U.S.C. § 621(b), and EEOC action must be consistent with those purposes. Section 7 of the ADEA, 29 U.S.C. § 626, details the various recordkeeping, investigatory and enforcement functions of the EEOC. And § 9 contains a grant of rulemaking and exemption authority that may be

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[6] As we point out later, yet another fundamental flaw in the EEOC rationale is the unfounded assumption that permitting employers to discriminate against retirees age 65 and older will produce a corresponding beneficence for pre-65 retirees.

exercised in " the public interest." As the Commission's own regulations correctly require, any exercise of the exemption authority must show "due regard for the remedial purpose of the statute to promote the employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment." 29 C.F.R. § 1627.15(b). The Commission's regulation recognizes what is implicit in § 9 – that the "public interest" the EEOC must serve is interwoven with the purposes of the ADEA.

Precisely because the EEOC's challenged exemption frustrates the purposes of the ADEA, it is demonstrably not in the "public interest." Congress did not delegate to the EEOC any authority to analyze or influence national health care policy. Since the challenged exemption is admittedly predicated on the EEOC's desire to prevent the further erosion of retiree health care benefits, it is "contrary to law." The challenged exemption suffers from the same deficiencies that were fatal to regulations issued by the Environmental Protection Agency which were found by the Supreme Court to be "contrary to law" because they were based on economic considerations that Congress did not authorize the EPA to consider in the promulgation of the rule. *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 464 (2001). As the Court observed, "[t]he EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its [the agency's] discretion." *Id.* at 485.

The EEOC's explanation of the proposed exemption is based singularly on the premise that "employer-sponsored retiree health coverage is a valuable benefit for older persons that should be protected and preserved to the greatest extent possible." 68 Fed. Reg. at 41544 (July 14, 2003). Ironically, the Commission proposes to effectuate

this objective by permitting employers to engage in overt, and arbitrary, discrimination on the basis of age. The winners from the exemption may be individuals who retire "early," i.e. before age 65, while the losers will surely be individuals age 65 and older. This result is plainly at odds with the purpose of the ADEA "to prohibit arbitrary age discrimination in employment…." 29 U.S.C. § 621(b).

b. The Rulemaking Record is Irrational, Incomplete and Inadequate.

The rulemaking record for the challenged exemption is riddled with such fundamental flaws that it is "arbitrary, capricious and a abuse of agency discretion" under the APA.

1. The Proposed Exemption proceeds on a defective premise, viz. that in order to maintain current levels of retiree health insurance benefits, employers must be permitted to discriminate on the basis of age. This is both factually and logically wrong.

Factually, the Commission has apparently failed to consider the staggering number of employers nationwide who provide health care benefits to their retirees on a non-discriminatory basis. The vast numbers of employers who provide retiree health benefits without regard to age wholly undermine the logic of the proposed exemption by demonstrating that employers willing to provide health care benefits can also comply with the ADEA. Of course, the rising costs of health care affect the willingness of employers to provide discretionary benefits to retirees. But as the EEOC argued to the Third Circuit, "[t]he answer to this conundrum, however, is not to arbitrarily exclude a group of individuals from the protection of the statute." EEOC Brief, at 34. In other words, the answer is emphatically not to undermine a central purpose of the statute by permitting overt discrimination against individuals age 65 and older. Quoting the EEOC

again, "[e]mployers concerned with the costs of providing health care insurance to their employees, can structure their health insurance plans in a way that will reduce costs and still comport with the ADEA's requirements." *Id.*, at 35. There is no evidence cited in the proposed exemption to suggest that employers can no longer comply with the requirements of the ADEA and still provide retiree health benefits. This, after all, is not surprising because employers continue to benefit from the availability of Medicare benefits which, pursuant to the "equal benefit or equal cost" rule, permits them to purchase much less expensive "supplemental" coverage to Medicare for their older retirees.

The EEOC's legal position in *Erie County* explicitly recognized that the "equal benefit or equal cost" rule is sufficiently flexible to permit cost-conscious employers to comply with the requirements of the statute. Inexplicably, the EEOC's proposed exemption fails to explain why the EEOC has abandoned its *Erie County* position in favor of the draconian approach of the challenged exemption. The EEOC's position in *Erie County* is proof that the purposes of the statute can be harmonized with bona fide efforts by cost-conscious employers. At the same time, it demonstrates that the approach of the proposed exemption – to permit overt discrimination based on age – is "'arbitrary, capricious, or manifestly contrary to the statute.'" *Chevron*, 467 U.S. at 843-44.

2. Notably absent from the Commission's proposal is any discussion or evaluation of the harm that may result to older retirees from the exemption. Clearly, the exemption would allow employers to fail to provide any health care coverage to retirees age 65 and older. The EEOC implies that some employers are currently engaged in

this admittedly unlawful conduct, but does not quantify the number of individuals affected. The EEOC does not identify the number of suits currently pending on these possible claims, nor does it address how, if at all, any pending litigation would be affected by the exemption itself.

3. Just as important, the EEOC does not address the impact of the exemption on employers that currently provide non-discriminatory health care benefits to their retirees. If finalized, the rule will allow employers immediately to cease to provide health care benefits to retirees age 65 and older, regardless of the employer's prior intentions. But in promulgating its rule, the Commission has not even considered this likely result, which is an indispensable ingredient in the EEOC's evaluation of the "public interest."

The individuals for whom coverage is discontinued , including the plaintiffs, will suffer at least two distinct forms of harm, neither of which have been addressed by the Commission and both of which have very direct "public interest" implications. In its most benign form, individuals losing coverage will suffer financial harm when forced to purchase replacement health care coverage in the open market. The magnitude of this financial impact cannot be ignored because it may be, in fact, far greater than the value conferred on the younger retirees as a result of the rule.

More invidious to the older retiree is the harm that may befall many who cannot afford, or cannot find, comparable replacement health care coverage. Medicare currently does not provide coverage for prescription drugs, which comprise a significant percentage of the cost of health care for older individuals. As a result of the EEOC's misdirected efforts, retirees who cannot replace their employer-provided health care will

be immediately saddled with substantial additional medical expenses (to be paid from customarily fixed incomes). This result simply cannot be reconciled with the "public interest." While the ill-health that may result from the exemption is, admittedly, difficult to quantify in dollar terms, it cannot simply be ignored as the Commission has done.

4. The EEOC has failed to assess the availability, accessibility and costs of alternative policies to complement Medicare for retirees. The absence of this information has at least two obvious ramifications. First, because of the availability of Medicare at age 65, it is clear that the costs incurred by employers for health care benefits for age-65 and older retirees are substantially less than the costs for non-Medicare eligible retirees. The relationship of the costs is important, because it may undermine the Commission's theory that it is the costs for Medicare eligible retirees that cause employers to eliminate coverage altogether.

Second, the costs and availability of plans supplemental to Medicare speaks to the harm that may befall older retirees as a result of the rule. This, again, is an essential part of the "public interest" that the Commission has failed to consider.

5. Although it invokes the "public interest," the proposed exemption has not assessed the impact it may have on the government's Medicare system or on the provision of health care by private insurers. For example, depending on the cost and availability of private insurance, older retirees previously dependent primarily on private insurance may become primarily, or exclusively, dependent on Medicare benefits. The resulting cost increases to Medicare could result in premium increases for employers which could more than offset any financial gains intended by the exemption.

As for private insurance companies, the proposed exemption contains insufficient information upon which to reasonably predict the manner in which the exemption could influence the cost, availability, and type of health care plans offered by insurers.

6. The proposed exemption announces that "quantifying the cost to employers of post-Medicare retiree health benefits under any formulation of the equal cost test would not be practical." This claim is neither accurate nor logical.

First, the Commission ignores the obvious, which is that the "cost" to the employer is exactly what the employer pays to the insurer on a per capita basis. The Commission doesn't address, or explain, why that information is not readily available to all employers who provide some form of health care benefits.

Second, the Commission ignores the equally obvious fact that determining the "cost" of coverage for retirees age 65 and older is wholly unnecessary if the benefits that they receive at a substantially reduced cost are comparable to those received by younger retirees. Put simply, the Commission's divergence into assessing "cost" is a red herring because it has long been recognized that the "cost" of providing a policy supplemental to Medicare is much less than the cost of providing full coverage to a younger retiree. For more than twenty years, the EEOC's own regulations have described how Medicare supplements and "carve-out" plans satisfy an employer's obligations to provide non-discriminatory benefits. *See* 29 C.F.R. § 1625.10(f)(1)(ii). And it was precisely those regulations that were adopted by Congress and incorporated into the ADEA. Since the "equal benefit" part of the test is satisfied by the admittedly less-expensive Medicare supplements, there is no logic whatsoever in focusing on the "cost" prong of the equation.

Third, even assuming that the cost of retiree health care coverage was germane, the Commission fails to reconcile its claim about determining "costs" with the mechanism chosen by Congress in the ADEA to do precisely that. In enacting the Older Workers Benefit Protection Act, Congress crafted an exception that permitted employers to offset the value of retiree health care costs against certain severance benefits. 29 U.S.C. §623(l)(2)(A). In fact, the statute itself contains specific values ascribed by Congress, *id.* at § 623(l)((2)(E), which are to be adjusted based on the Consumer Price Index. The Commission's proposed exemption fails to explain why the costs chosen by Congress are not the applicable ones to use in the rulemaking context.

7. Finally, the Commission's reliance on employer threats to reduce coverage when faced with compliance with the ADEA is patently arbitrary. The rulemaking record does not reveal what, if any, employers have committed to pursue that course of conduct. And conversely, the proposed exemption provides no reliable information on which employers, if any, are likely to either maintain or expand coverage for younger retirees if they can discriminate against those aged 65 and older. In sum, there is no reliable evidence cited by the EEOC that the rule will achieve the behavior modification that the EEOC envisions. Absent those assurances, the rule is arbitrary and clearly not in the public interest.

B. <u>The Plaintiffs Will Suffer Irreparable Harm Absent An Injunction</u>.

"The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages." *Adams v. Freedom Forge Corp*., 204 F.3d 475, 484-85 (3d Cir. 2000). Absent injunctive relief, the plaintiffs and innumerable others will suffer irreparable harm in two distinct forms. First, assuming as we should that the challenged

exemption has practical and not just an academic implications, its publication will prompt employers nationwide to control health care costs by either reducing or eliminating coverage for Medicare-eligible retirees. Second, employers who take these admittedly discriminatory actions in reliance on the challenged exemption likely will immunize themselves from liability pursuant to the good faith defense provisions of the ADEA. (29 U.S.C. § 626(e). Consequently, the injury caused by the abrupt cessation of health care coverage will be magnified because even if the challenged exemption is subsequently invalidated, the millions of victims may be precluded from recovering damages for their injuries.

1. The Inevitable Elimination of Health Care Coverage Will Injure Millions of Older Americans.

As the rulemaking record bears testimony, it appears inevitable that hundreds, if not thousands, of employers are poised to reduce or eliminate health care benefits for millions of Medicare-eligible retirees. The U.S. Chamber of Commerce, the ERISA Industry Committee, the Equal Employment Advisory Council and the American Benefits Council all filed rulemaking comments with the EEOC urging the adoption of the challenged exemption. Complaint, ¶¶ 10, 48. Collectively, those business organizations represent thousands of United States companies with millions of employees and retirees throughout the country. *Id.* With minor variations, each of those comments focused on the dilemma of escalating health care costs faced by employers, and urged adoption of the exemption as a means of facilitating cost control. If the challenged exemption is published, the employers on whose behalf those rulemaking comments were submitted – and others -- will be free to eliminate health care benefits without fear of liability under the ADEA.

In this Circuit, the denial of retiree health care benefits can constitute irreparable harm sufficient to support injunctive relief. *See United Steelworkers of America v. Fort Pitt Steel Casting*, 598 F.2d 1273, 1280 (3rd Cir. 1979)("the possibility that a worker would be denied adequate medical care as a result of having no insurance would constitute 'substantial and irreparable injury.' Moreover, the risk of irreparable injury was not appreciably lessened merely because the employees allegedly would remain covered for 30 days after premium payments were terminated and because the employees thereafter would have the option to convert to individual policies. . . . thus there was a significant risk that absent an injunction, the employees would be without insurance coverage."); *see Whelan v. Colgan*, 602 F.2d 1060, 1062 (2d Cir. 1979)("[T]hreatened termination of benefits such as medical coverage for workers and their families obviously raised the specter of irreparable injury."); *Risteen v. Youth for Understanding, Inc.*, 245 F.Supp.2d 1, 16 (D.D.C. 2002)("The loss of health insurance benefits – particularly for those who are unemployed – constitutes irreparable harm for purposes of a preliminary injunction."); *see also Johnson v. Plainville Casting Co.*, No. H-88-672(EBB), 1988 WL 167346, *2 (D.Conn. Nov. 7, 1988); *International Union, UAW v. Exide Corp.*, 688 F. Supp. 174, 186-88 (E.D.Pa. 1988) (finding reduction of employee health benefits to constitute irreparable harm when joined with reduction of employee wages precluding purchase of benefits), *Howe v. Varity Corp*., No. 88-1598-E, 1989 WL 95595, *14 (S.D.Iowa July 14, 1989)("the termination of insurance and disability benefits constitutes irreparable harm.").

In this case, the irreparable harm to the plaintiffs and thousands of AARP members and others flows from the inevitable cessation of health insurance benefits for

Medicare-eligible retirees. Medicare does not cover prescription drug costs. Smolka Declaration, ¶ 5. Consequently, affected Medicare-eligible retirees will be saddled with an often enormous financial burden that employer-provided health insurance previously deflected.

Plaintiff M. Elaine Clay of Blue Bell, Pennsylvania, is perhaps a typical Medicare-eligible retiree. Clay is 77-years-old, and receives health care coverage as a result of her husband's employment with the Budd Company. Clay Decl., ¶ 3. Her health care "supplements [her] Medicare coverage through Blue Cross & Blue Shield" and provides for "prescription medications, vision, hearing aids and dental." Clay Decl., ¶ 4. Although describing herself as "lucky enough to enjoy fairly good health," (*id.*, ¶ 5), Clay admits that she has hypothyroidism, a blood pressure condition, a neurological condition, and osteoporosis. *Id.* As Clay testifies, "I would sustain thousands of dollars per year in prescription drug costs if I was not provided with coverage from my husband's former employer." *Id.* Unfortunately Clay's income is limited to her deceased husband's social security, two small pension checks, and income from a few investments. *Id.*, ¶ 6. As she candidly admits about her health care benefits, "I absolutely need this compensation to live." *Id.*

Plaintiff Fred G. Dochat and his spouse, of Lancaster, Pennsylvania, would be in a similar bind. Dochat has retiree health care coverage supplied by his employer of forty-six years, Armstrong World Industries, for which his former employer doubled the premiums in January of 2004, and increased his out-of-pocket expenses again in January 2005. Dochat Decl., ¶¶ 3, 5. Dochat's income consists of his pension and social security. *Id.*, ¶ 6. Yet he and his wife both suffer from an array of ailments that

require “costly medications.” *Id.*, ¶ 5. As he states bluntly, “[t]he elimination of our retiree health benefits will cause my wife and I to endure a significant financial hardship for the remainder or our years.” *Id.*, ¶ 6.

Eighty-one year old plaintiff Frank H. Smith of Columbus, New Jersey, is yet another example of the hardship that will befall thousands if the exemption is not enjoined from publication. Smith has retiree health coverage provided by his former employer, American Cyanamid. Smith Decl., ¶ 3. Smith’s spouse suffers from osteoporosis which requires a daily injection of the medication Forteo, which costs $535. per month. *Id.*, ¶ 6. Smith himself suffers from a heart condition and asthma. *Id.* According to Smith, he “would be unable to meet [his] daily living expenses without the prescription drug coverage of [his] retiree health plan.” *Id.*, ¶ 7. And the reason is obvious. “The medications that [Smith and his spouse] are required to take would cost [them] over $10,000 per year.” *Id.*, ¶ 7. And Smith is living on a fixed income derived from his pension benefit plan, which “has remained the same for the 18 years since [he] retired.” *Id.*

Plaintiff Frank A. Wheeler is a 79-year old retiree of Ford Motor Company who lives in Philadelphia. Wheeler Decl., ¶¶ 1-3. Health care, including prescription drugs, are provided to Wheeler and his spouse by his former employer. Wheeler’s spouse suffers from osteoporosis, which is treated by “a very expensive prescription drug, Fosomax.” *Id.*,¶ 6. According to Wheeler, if his retiree health care was eliminated “the added expenses would mean cutting everything but the necessities.” *Id.*, ¶ 7.

Eighty-year-old plaintiff Gerald Fowler of Mill Hall, Pennsylvania, relies heavily on the health care he earned from his former employer Sandia National Laboratories.

Fowler Decl., ¶¶ 1-3. Fowler takes prescription medications Lipitor, Diovan, Atenolol, Furosemide, Flomax and Celebrex. *Id.*, ¶ 5. Not surprisingly, he testifies that his "[p]rescription medications would cost [him] thousands of dollars per year if they were not covered as part of [his] retiree health benefits." *Id.* Fowler states bluntly that he "would not be able to afford all of the prescription medication [he] is required to take." *Id.*

Sadly, Fowler also suffers from numerous physical ailments. Pulmonary Fibrosis affects 20% of one of his lungs. He has had two by-pass surgeries, and the left side of his heart is pumping at 40% of normal capacity. Fowler Decl., ¶ 6. He has a large aneurysm which will inevitably require surgery, a cataract, and recently had his shoulder replaced. As he testifies, "[m]edical treatment for these conditions will cost me thousands of dollars I do not have. *Id.* Stating the obvious, Fowler indicates that "[t]he expense of treating my medical conditions is financially impossible given my financial status. I need my retiree health to live." *Id.*, ¶ 7.

Plaintiff Jack W. MacMillan also depends heavily on retiree health care for himself and his spouse. MacMillan is a 78-year-old retiree living in State College, Pennsylvania with coverage provided by his former employer, Penn State University. MacMillan Decl., ¶¶ 1-3. MacMillan has recently had both shoulder surgery and surgery for carpal tunnel syndrome. *Id.*, ¶ 6. The shoulder surgery cost approximately $20,000, an amount that MacMillan would not have been able to afford without health care coverage. *Id.* Both MacMillan and his spouse "must take no less than six prescriptions each and every day of their lives." *Id.* Like many others, without health care coverage

MacMillan believes that he and his spouse "would have had to make difficult decisions to meet these burdens, and forego some medical treatments." *Id.*, ¶ 7.

Declarant Robert J. Leeder demonstrates the magnitude of the harm that is likely to befall many. As his declaration shows, if his health care coverage is dropped, Leeder and his spouse "will be forced to assume thousands of dollars per year in prescription drug costs…." Leeder Decl., ¶ 5. "This hardship would likely force us to forego basic essentials to compensate for the unexpected costs." *Id.* As Leeder concludes, "[m]y wife and I will not be able to meet the medical expenses we stand to incur should my retirement health benefits be eliminated." *Id.*, ¶ 6.

A similar sentiment was voiced by declarant Arthur F. Krumm of Manasquan, New Jersey. As Krumm testifies, "My wife and I rely heavily on these retiree health benefits to cover our substantial costs for necessary prescription drugs. If not for [those benefits], my wife and I would incur several thousands of dollars per year in prescription drug costs." Krumm Decl., ¶ 5. As Krumm states, "[t]he additional financial burden imposed upon my wife and I, in order to pay for these essential prescription drugs, would be unbearable. This financial obligation would be impossible for my wife and I to meet, given our modest fixed income. The resulting hardship will cause my wife and I to no longer be able to afford necessities such as our home, food and prescription drugs. *Id.* As Krumm concludes, "[i]t will be impossible for my wife and I to afford necessary medical treatment should my retiree health benefits be eliminated." *Id.*, ¶ 6.

Declarant Calvin Kazaks of Neptune, New Jersey, will find himself and his spouse in a similar posture. Kazaks relies on his insurance from his employment with New Jersey Bell to pay many expenses not covered by Medicare. Kazaks Decl., ¶¶ 3-4.

Without the benefits, like others Kazaks would incur "several thousands of dollars per year in prescription drug costs." *Id.*, ¶ 5. According to Kazaks, "[t]he resulting hardship will cause my wife and I to no longer afford necessities such as our home, food and perhaps some of the prescription drugs themselves." *Id.* As Kazaks fears, "it will be impossible for my wife and I to survive without my retiree health benefits." *Id.*, ¶ 6.

Declarant Gerald D. Rutledge is in a similar predicament. Rutledge is a 71-year old retiree living in Mount Lebanon, Pennsylvania. Rutledge worked for CONSOL Energy, Inc. from which he and his spouse receive health care benefits in retirement. Rutledge Decl., ¶¶1-3. In January of 2004, Rutledge's former employer imposed a $98 per month premium payment for benefits that were previously provided at no cost. *Id.*, ¶ 4. During the past year alone, Rutledge and his wife have had incurred medical treatment and purchased prescription drugs that, without coverage, would have cost approximately $5,000. As Rutledge indicates, "[a]t our age, regular trips to the doctor are quite normal." *Id.*, ¶ 5.

Simply put, the declarations supporting the plaintiffs' request for injunctive relief demonstrate that as a result of the challenged exemption the plaintiffs and many others would likely be forced to choose between medical care and other necessities. That showing is sufficient to justify injunctive relief. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475 (3d Cir. 2000). The likely loss of health care coverage is not the only harm to be suffered by the affected Medicare-eligible retirees, however. As we demonstrate below, the presence of the good faith defense under the ADEA will compound the harm

by making it impossible for the victims of the discriminatory exemption to recover damages, even if the exemption is found to be unlawful.[7]

2. The Good Faith Defense In The ADEA Will Likely Foreclose Any Subsequent Relief.

If published, the challenged exemption will hit Medicare-eligible retirees with a devastating one-two punch. In reliance on the exemption, thousands will have their health care benefits drastically slashed or eliminated altogether. The salt in their wounds, however, will be the legal effect of the ADEA's good faith defense. Employers who rely on the published exemption as the basis for their actions will likely immunize themselves from all ADEA liability. So, in addition to losing their health care because of an unlawful regulatory exemption, the plaintiffs and all others affected may be foreclosed from recovery of any damages – *even if the exemption is later ruled unlawful.* If this is not irreparable injury, it is hard to imagine what is.

Section 7(e)(1) of the ADEA incorporates Section 10 of the Portal-to-Portal Act of 1947, which is an amendment to the FLSA. Section 7(e)(1), 29 U.S.C. § 626(e), states in part: "Sectio[n] . . .259 of this title shall apply to actions under this chapter." Section

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[7] As demonstrated above, each of the individual plaintiff will sustain irreparable injury proximately caused by the EEOC's action. This more than satisfies each plaintiff's constitutional standing requirement. *See e.g. Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 283 (3d Cir. 2002). All of the individual plaintiffs are within the zone of interests to be protected by the ADEA, thereby satisfying the requirements of prudential standing. *See Nat'l Cred. Union Admin. v. First Nat'l Bank*, 522 U.S. 479, 488 (1998). The AARP, in addition to being injured by the EEOC's actions and having prudential standing in its own right, has associational standing to represent its members in this APA case. *Pennsylvania Psychiatric Society*, 280 F.3d at 283; *see Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). So long as any one of the plaintiffs has standing, the Court need not determine whether any other plaintiff has standing "when it makes no difference to the merits of the case." *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998); *see Village of Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 264 n.9 (1977).

259 provides that "no employers shall be subject to any liability or punishment…if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation,…." The defense "shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." Once good faith reliance on EEOC interpretation is established, the employer is not vulnerable to liability even if the interpretation is modified or rescinded, or is determined by a court to be invalid or of no legal effect. 29 U.S.C. § 259(a).

Indeed, the injury that an injunction would prevent here is precisely the injury that was suffered by the plaintiff in *Quinn v. New York State Electric and Gas Corp*., 569 F. Supp. 655 (N.D.N.Y. 1983), later proceeding, 621 F. Supp. 1086 (N.D.N.Y. 1985)

In *Quinn*, the good faith defense saved the defendant's facially discriminatory policy of refusing to allow anyone over age 31 to compete for positions in its construction and maintenance apprenticeship program. 569 F. Supp. at 656. The defendant allegedly retained its maximum entry age policy based on an EEOC interpretation which totally exempted admission into apprenticeship programs from the coverage of the ADEA.[8] In a 1983 decision, the district court concluded that the EEOC's apprenticeship exception interpretation was "inconsistent with the language,

[8] 29 C.F.R. § 1625.13 (1987). Significantly, the exemption for apprenticeship programs was *not* promulgated pursuant to 29 U.S.C. § 628. The interpretation was originally issued without notice or public comment and without any supporting rationale. The EEOC twice voted to rescind it, only to maintain the apprenticeship exemption later.

purpose, and history of the ADEA," and would be given no precedential weight in deciding if the employer violated the ADEA. 569 F. Supp. at 656.

The court then granted the employer permission to file an amended answer which set forth the good faith defense in § 626(e)(1). 621 F. Supp. 1086, 1089 (N.D.N.Y. 1985). In 1985, the employer was granted summary judgment based on § 626(e)(1). *Id*. at 1089-92. The court stated that in order to establish a good faith reliance defense, an employer must prove three interrelated elements:

(1) that its action was taken in reliance on the ruling of the EEOC;

(2) that it was in conformity with that ruling; and

(3) that the employer's action was in good faith.

621 F. Supp. at 1090 (*citing EEOC v. Home Ins. Co.*, 672 F.2d 252, 263 (2d Cir. 1982).

Although the case law is somewhat sparse, the legal implications of both the language of § 259 and the analysis of the *Quinn* case are quite clear. If the challenged exemption is published, employers will be free to reduce – or eliminate – their health care coverage "in good faith in conformity with and in reliance" on the exemption. Even if eventually invalidated by the Court, the exemption will likely prevent most retirees from recovering any damages flowing from the abrupt changes in their health care benefits. As the Third Circuit has observed, "[t]he irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary compensation." *Adams, supra.*, 204 F.3d at 484-85.

C. The Issuance Of An Injunction Is In The Public Interest And Will Not Harm The Government.

The EEOC's exemption has been in the regulatory process for more than eighteen months. No palpable harm will befall the government if, through the issuance of an injunction, the exemption is put on hold weeks more until the court can rule on the plaintiffs' request for a preliminary injunction. After all, the entire purpose behind the exemption is to permit employers to engage in conduct that is currently unlawful. No health or safety issues will be adversely affected by a short delay occasioned by injunctive relief.

In contrast, the harm that will befall the plaintiffs, and literally millions of others similarly situated, will be the reduction or total elimination of existing employer-sponsored health care coverage. And to make matters worse, the ADEA's good faith defense is likely to prevent these victims from ever recovering any damages, even if, as the plaintiffs argue, the exemption is contrary to law. For these reasons, it is obvious that the issuance of injunctive relief at this point would serve the public interest.

D. A Bond Should Not Be Required.

Fed.R.Civ.Pro 65(c) typically requires plaintiffs to post a bond as a condition precedent to the issuance of any restraining order or preliminary injunction. Neither the practical reasons behind a bond nor the law in this Circuit, however, require that the plaintiffs post a bond here.

The purpose behind the Rule 65 bond requirement is to protect the party against whom an injunction is entered from financial loss in the event that the issuance of the relief ultimately proves unwarranted. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2954 at 292-93 ("…it has been held that the court may dispense

with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). That concern is simply inapplicable here. The EEOC has no financial interest in the issuance of the exemption, and will not suffer any harm – financial or otherwise – in the event that the Court sees fit to enjoin the challenged exemption. For that reason alone, the Court should waive the bond requirement based on the circumstances present here.

Waiving the bond requirement here would be consistent with Circuit precedent which suggests that the Court engage in a two-part analysis. In *Temple Univ. v. White,* 941 F.2d 201, 219 (3d Cir. 1991), the Third Circuit stated that a court first "should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant." Second, courts should consider whether the underlying lawsuit seeks to "enforce important federal rights or 'public interests.'" *Id.* District courts in the Third Circuit, applying *Temple Univ*., have routinely waived all bond requirements when granting preliminary injunctions in cases involving the public interest. *See Planned Parenthood of Delaware v. Brady*, 250 F.Supp. 2d 405 (D.Del. 203) (involving enforcement of state law requiring 24-hour waiting period for abortions); *ACLU v. Reno*, 929 F.Supp. 824, 884 (E.D.Pa. 1996) (involving the Communication Decency Act); *McCormack v. Township of Clinton*, 872 F.Supp. 1320, 1328 (D.N.J. 1994) (involving a township ordinance that impaired First Amendment free speech rights); *Canterbury Career School, Inc. v. Riley*, 833 F.Supp. 1097 (D.N.J. 1993) (involving the Department of Education publishing cohort default rates under the Federal Family Education Loan program).

This case satisfied both elements of the *Temple Univ*. test. First, because there will be no loss to the EEOC if an injunction is issued, the first part of the test is easily satisfied. Second, this case seeks to enforce important federal rights and uphold the public interest through the proper enforcement of the plain language and intent of the ADEA. Based on the foregoing, the Court should waive all Rule 65(c) bond requirements in this case.

CONCLUSION

Based on the foregoing, the plaintiffs respectfully request that the Court issue a temporary restraining order, and then a preliminary injunction, enjoining the EEOC from publishing the challenged exemption.

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Respectfully submitted,

__s/ Stephen G. Console_____

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CERTIFICATE OF SERVICE

I, Stephen G. Console, hereby certify that on this 4th day of February, 2004, I caused copies of a Memorandum of Points And Authorities In Support of Plaintiffs' Motion For Temporary Restraining Order, Preliminary Injunction, And Stay of the Effective Date of Agency Regulations to be served in the following manner:

VIA HAND-DELIVERY

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___s/ Stephen G. Console_____
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