CASE NO. 05-4594

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AARP; JACK W. MACMILLAN; FRANK H. SMITH, JR; FRANK A. WHEELER; FRED DOCHAT; GERALD FOWLER; M. ELAINE CLAY,

Plaintiffs-Appellants,

V.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPELLANTS' OPENING BRIEF AND APPENDIX VOLUME I (Pages i-35)

STEPHEN G. CONSOLE
PA ID NO. 36656
CONSOLE LAW OFFICES, LLC
1525 Locust Street, Ninth Fl.
Philadelphia, PA 19102
(215) 545-7676

CHRISTOPHER G. MACKARONIS
BRICKFIELD, BURCHETTE, RITTS AND STONE
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007
(202) 342-0800

LAURIE A. MCCANN
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for Plantiffs-Appellants

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STATEMENT OF JURISDICTION

The Appellants brought this action in the district court pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 703, 705, and 706, and the Age Discrimination in Employment Act of 1967 as amended ("ADEA"), 29 U.S.C. §§621et seq. The district court had jurisdiction under 28 U.S.C. § 1331 and issued a final order on September 27, 2005. Appellants filed a timely notice of appeal on October 12, 2005. This Court has jurisdiction to review the final decision of the District Court under 28 U.S.C. § 1291.

STATEMENT OF RELATED CASES

The case on review has not previously been before this Court. The Appellants are not aware of any related cases currently pending before this Court or any other court.

ISSUES PRESENTED

1. Does the Equal Employment Opportunity Commission (EEOC) have the regulatory authority to exempt from the Age Discrimination in Employment Act a practice which the parties agree, and this Court has found, Congress intended to make unlawful?

2. Is the challenged "exemption" arbitrary and capricious under the APA when its only certain effect is to reduce employers' health care costs by allowing arbitrary discrimination against retirees age 65 and older, and when the EEOC

(a) issued an "exemption" that frustrates the ADEA's purposes, (b) did not consider any non-discriminatory options for cost-cutting, (c) failed to determine how many employers comply with the ADEA and how they manage their health care costs, and (d) did not analyze the magnitude of the harm or any savings compared to other alternatives?

3. Does the exemption satisfy the notice and comment requirements of the APA when there is virtually no written record of "stakeholder" meetings that admittedly spurned the agency's decision to proceed?

STATEMENT OF FACTS

Many of the facts and the legal issues relevant to this appeal flow from this Court's decision in Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193 (3d Cir. 2000) (hereafter "Erie County"). The issue in Erie County was whether it is unlawful under the Age Discrimination in Employment Act of 1967, as amended, "ADEA," to provide inferior health care benefits to retirees upon the attainment of Medicare eligibility – age 65.

The salient facts in Erie County were undisputed. The County provided to a select group of its employees - - defined in large part by date of hire, length of service and age - - health care benefits upon retirement. Erie County, 220 F.3d at 196-197. In 1997, apparently in response to escalating health care costs, the County decided to provide to all eligible retirees age 65 and older a new plan,

"SecurityBlue," which provided benefits that were inferior to the benefits provided to younger retirees. The plaintiffs alleged that the admittedly inferior health care benefits violated the ADEA, and that the County could not satisfy the ADEA's only applicable affirmative defense - - the "equal benefit or equal cost" standard. Id. at 198-99. The district court found that the plaintiffs "had made a 'prima facie showing of age-based discrimination.'" Id. at 220. Notwithstanding that finding, however, the district court granted summary judgment to the County. As this Court explained:

> In essence, it appears that the district court simply recognized an additional safe harbor for an employer who treats its Medicare-eligible retirees less favorably with respect to health care benefits than other retirees – a safe harbor which does not require the employer to satisfy the equal benefit or equal cost standard.

Id.

When the plaintiffs appealed, the EEOC participated as amicus curiae. In framing the issue, the EEOC emphasized that "the district court acknowledged that 'prospective retirees would be able to claim protection where an employer offered discriminatorily structured retirement health plans that were in effect at the time the prospective retirees were still employed.'" Brief Amicus Curiae of the EEOC at 17, quoting Erie County Retirees Ass'n v. County of Erie, 91 F.Supp.2d 860, 875 (W.D. Pa. 1999); Appendix ("App.") 185 (emphasis in original). Emphasizing that the dispute before this Court was narrowly drawn, the EEOC noted "[t]he [lower]

court opined that, if an employer were to implement a discriminatory change in a post-employment benefit, while an individual 'was still actively employed,' the individual would have a claim under the ADEA." App. 185 quoting 91 F.Supp. 2d at 878. From this, the EEOC correctly concluded: "It is clear that the ADEA covers discrimination in a post-employment benefit where the facially discriminatory policy is instituted while an individual is still an active employee." App. 189-190.

With that backdrop, the EEOC argued that the issue to be decided in Erie County was "whether an individual, otherwise protected against such discrimination, loses the protection of the statute upon retiring from employment, such that any subsequent change in the individual's employee benefits is immune from challenge under the ADEA." App. 185 (emphasis in original).

Having framed the issue in that fashion, the EEOC argued to this Court that, of course, employees do not lose their ADEA protections against discriminatory benefits when they retire. In the EEOC's words, "any other view of the statute would lead to irrational gaps in coverage that Congress could not have intended." App. 189 (emphasis added). As the EEOC argued:

> It is inconceivable that Congress would in the same breath 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.

App. 190 (emphasis added; citations omitted).

This Court embraced the EEOC's reasoning. "We find the EEOC's argument to be persuasive, and accordingly we conclude that the ADEA applies even when retiree benefits are structured discriminatorily after retirement." Erie County, 220 F.3d at 210. This Court acknowledged snippets of legislative history accompanying the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 (1990), indicating that certain "members of Congress viewed the ADEA as permitting employers to offer inferior health benefits to Medicare-eligible retirees." Id. at 200; see also id. at 204-208. But this Court rejected the suggestion that those legislative remarks were controlling on the fundamental ground that "we see nothing in the language of the ADEA to indicate that those statements are accurate and we do not find them to be persuasive." Id. at 210. So while the district court had, de facto, found a "safe harbor" for employers to terminate health care benefits for retirees at age 65, this Court emphatically disagreed. Again relying on the statutory language, this Court stated:

> We cannot, however, accept the district court's approach for the straightforward reason that it is not reflected in the actual language of the ADEA or the OWBPA. Congress knew how to craft exceptions to the ADEA, as there are several explicitly worded safe harbors in 29 U.S.C. § 623. Yet, aside from section 623(f)(2)(B)(i), there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility.

Id. at 214 (emphasis added).

Having ruled that the language of the ADEA plainly prohibits an employer from unlawfully reducing health care benefits in retirement, this Court ruled -- also consistent with the EEOC's urging — that the only safe harbor applicable to such a benefit reduction was the "equal benefit or equal cost" standard. Again, this Court's reasoning was grounded in the ADEA's plain language. As this Court observed, "[t]he plain language of section 623(f)(2)(B)(i). . .expressly adopt[s] the statement of the equal benefit or equal cost principle as set out in 29 C.F.R. § 1625.10(e) (1989)." Id. at 215. Perhaps even more to the point, the Court observed that "subsection (e) of that regulation expressly contemplates application of the equal benefit or equal cost standard in the Medicare eligibility situation." Id. Based on this statutory bedrock, this Court summarized: "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 benefits based on Medicare eligibility." Id. (emphasis added).

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. App. 204-212. The Compliance Manual provisions cited to the decision in Erie County, and explained that an employer cannot simply eliminate health coverage for retirees upon the attainment of Medicare eligibility. According

to the EEOC, the application of the equal benefit or equal cost standard to retiree health benefits "accords with the language and purpose of the ADEA." App.212.

Less than a year later, however, by notice published in the Federal Register on August 20, 2001, the EEOC rescinded the Erie County section of the Compliance Manual, announcing that it would "study further the relationship between certain employer practices regarding the provision of retiree health benefits and the [ADEA]." App. 213-214. The EEOC developed an "Internal Retiree Health Benefits Task Force" which, for almost two years met with "a wide range of Commission stakeholders," "reviewed available survey data," and "reviewed numerous professional articles." 68 Fed. Reg. 41542 (July 14, 2003) (Notice of Proposed Rulemaking). On July 14, 2003, the EEOC published a Notice of Proposed Rulemaking in the Federal Register announcing its intention to issue an "exemption" under Section 9 of the ADEA, 29 U.S.C. § 628, that "permits employee benefit plans to lawfully provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits" or state-sponsored retiree health benefits. 68 Fed. Reg at 41547. The notice referenced the EEOC's role in the Erie County litigation, confirming that the EEOC had argued that "based on the plain language of the ADEA . . . 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. at 41545 n. 25 (emphasis added).

Tens of thousands opposed the issuance of the EEOC "exemption," including AARP and the six individual plaintiffs. App. 75, ¶47. Prior to the publication of the proposed rule, AARP had sought through the Freedom of Information Act ("FOIA") documents pertaining to the "stakeholder" meetings that the EEOC had conducted in both 2001 and 2002. App. 339, ¶3; 344-345. Although the EEOC's FOIA response provided attendance lists from numerous "stakeholder" meetings, no documents were produced regarding their substance, despite the apparently pivotal role they played in prompting the development of the proposed exemption. App. 340, ¶4. It was not until after this litigation was filed that other documents pertaining to the stakeholder meetings were produced to the plaintiffs, under the EEOC's certification that they were part of the administrative record. App. 340-42, ¶¶ 7-11 and App. 354-357.

On April 22, 2004, the EEOC voted to issue its proposed exemption in final form. App. 133. The Notice of Proposed Rulemaking had indicated that the exemption "would become effective on the date of publication of a final rule in the Federal Register." 68 Fed. Reg. at 41547. And the exemption approved by the EEOC stated that it would "exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare...." App. 140. In late January, the EEOC was prepared to publish the rule. App. 88 at n.1 and App.143-149. The plaintiffs filed suit on February 4, 2005. App. 58.

THE PROCEEDINGS BELOW

The plaintiffs' complaint alleged that the challenged exemption was unlawful under the Administrative Procedure Act ("APA), the ADEA and the constitutional doctrine of separation of powers. App. 59. The plaintiffs alleged that the exemption went beyond the EEOC's statutory authority under the ADEA, was inconsistent with the EEOC's own regulations, and for both reasons was contrary to law under the APA. App. 71-72 at ¶¶ 37-38. Alternatively, the plaintiffs alleged that the exemption was arbitrary, capricious and an abuse of discretion and that the manner in which it was promulgated violated the APA's notice and comment rulemaking requirements. App. 79 at ¶¶ 53-54. The plaintiffs sought a declaratory judgment that the EEOC's action violated both the APA and the ADEA, and a permanent injunction barring publication of the exemption. App. 79-80.

Along with their complaint, the plaintiffs filed a motion for an ex parte temporary restraining order, a preliminary injunction and a stay of the effective date of the EEOC exemption. App. 82. In a hearing convened before the district court (Brody, J.) the day the complaint was filed, the EEOC agreed that it would refrain from publishing the exemption for sixty (60) days, and the district court established a briefing schedule and set March 31st as the date for argument on the plaintiffs' motion for a preliminary injunction. App. 215.

On February 9th, the plaintiffs served limited discovery (nine document requests and twelve admissions with two accompanying interrogatories), along with a motion to shorten the period from thirty to twenty-two days within which the EEOC should respond. App. 216-239. In support of their request, plaintiffs reminded the district court that their challenge alleged that the rulemaking was impermissibly infected by ex parte communications, and that the rulemaking was arbitrary because it relied on irrelevant considerations, and ignored relevant ones. App. 216-17. Along with their written discovery requests, plaintiffs noticed the deposition of the EEOC under Fed. R. Civ. P. 30(b)(6) to testify regarding the contents of the rulemaking record, the creation, work and communications of the EEOC's Internal Retiree Health Benefits Task Force, and the identity of all "stakeholders" with whom Task Force members had communications during the rulemaking period. App. 277-78. The EEOC, in turn, sought a protective order to prevent any of the requested discovery. App. 240.

After a hearing, on February 28th the district court granted the plaintiffs' motion to shorten the discovery period and denied the EEOC's request for a protective order. App. 336. The court ordered the EEOC to produce the Administrative Record by March 2, 2005, and also ordered the EEOC to respond to the plaintiffs' document requests, requests for admissions and interrogatories no later than March 3rd. Id. As for plaintiffs' request to take a Fed. R. Civ. P.

30(b)(6) deposition of the EEOC, the court provided that the plaintiffs could proceed if they chose after the receipt of written discovery. Id. On March 4, 2005, however, and before the deposition had been taken, the court amended its ruling by requiring the service of interrogatories prior to any deposition on the same subjects. App. 338.

On March 8, 2005, the plaintiffs moved to compel responses to the two interrogatories that accompanied their requests for admissions, neither of which was answered by the EEOC. App. 394-96. Consistent with the lower court's order of March 4th regarding depositions, the plaintiffs sought to shorten the time for the EEOC to respond to interrogatories that were served regarding the work and communications of the EEOC's internal task force. App. 381-82.

On March 18, 2005, the court heard argument (at its request) on the applicability of Erie County to the pending motions. App. 416. The EEOC agreed with the lower court that "the proposed reg[ulation] covers the same issue as Erie [County]…." App. 419. And the EEOC confirmed that it had "argued to the Court [in Erie County] that the practice of coordinating retiree benefits with Medicare eligibility was prohibited by the Act." App. 423; see also App. 427 ("the ADEA prohibits coordination of employee benefits…"). As the EEOC argued, "[b]ut for the exemption that we're proposing, the conduct would be illegal under the A.D.E.A.." App. 427. At the conclusion of the hearing, the court asked for a

summary judgment motion from the plaintiffs, App. 437, and suspended discovery. App. 440.

On March 30, 2005, the district court issued a memorandum opinion and order granting summary judgment to the plaintiffs. AARP et. al. v. Equal Employment Opportunity Commission, 383 F. Supp.2d 705 (E.D.Pa. 2005); App. 433-450. The lower court premised its decision on the application of Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, (1984). Applying Chevron's "two-step approach to judicial review of agency interpretations of acts of Congress," the lower court held that first it "must determine whether Congress expressed a clear and unambiguous intent in the statute concerning the precise question at issue." AARP v. EEOC, 383 F.Supp.2d at 708; App. 446. As the court observed, it should proceed to the second step of the Chevron analysis only "'if the statute is silent or ambiguous with respect to the specific issues.'" Id. quoting Chevron, 467 U.S. at 843.

In addressing the issue of congressional intent at the Chevron Step One analysis, the lower court deferred to this Court's hold in Erie County. As the court explained, "[b]ased upon a detailed statutory analysis of the Act, the Third Circuit held that it was clear from the face of the Act that Congress intended for the ADEA's prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare." 383

F.Supp. 2d at 707; App. 445 (emphasis added). Throughout its opinion, the lower court stressed that "the Third Circuit has already determined that Congress expressed a clear and unambiguous intent with regard to the precise question at issue." Id. at 709; App. 447; see also id. (the Third Circuit determined that "Congress intended for the ADEA to prohibit the practice"); id. at 710; App. 448 ("the Third Circuit held in Erie County that Congress intended the ADEA to apply to the exact same behavior that the EEOC would exempt"); id. at 711; App. 449 ("the Third Circuit held that Congress did not allow for ambiguity with regard to the applicability of the ADEA to retiree health benefits.").

The parties were in agreement on the substance of Erie County. Citing to the EEOC's briefs and concessions at oral argument, the lower court noted the "[t]he EEOC does not dispute the holding of Erie County, that the plain language of the ADEA prohibits the practice of coordinating retiree benefits with Medicare eligibility." Id. at 710; App. 448. Consequently, the lower court ruled that "[a]n administrative agency, including the EEOC, may not issue regulations, rules or exemptions that go against the intent of Congress." Id. The court concluded that the challenged regulation "is contrary to law and violates the clear intent of Congress in passing and amended the ADEA, as articulated in Erie County, 220 F.3d 193." Id. at 712; App. 450. The EEOC timely filed a notice of appeal. App. 451.

While the EEOC's appeal was pending, the Supreme Court decided National Cable and Telecomm. Ass'n v. Brand X Internet Servs., ____U.S.___, 125 S.Ct. 2688 (2005)("Brand X"). Based on Brand X, the lower court gave the EEOC leave to file a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). AARP et al v. Equal Employment Opportunity Commission, 390 F.Supp.2d 437, 442 (E.D.Pa.2005); App. 6. The parties remained in agreement about the holding in Erie County. See App. 455 ("Consistent with its position in Erie County as amicus curiae, the EEOC did not dispute that the ADEA prohibits the practice of coordinating retiree health benefits with Medicare eligibility."); see also App. 466 (chastising the plaintiffs for "continu[ing] to dwell on Section 4 of the ADEA, which prohibits employers from coordinating retiree health benefits with Medicare eligibility unless the employer satisfies the equal benefit or equal cost test."). Nevertheless, the EEOC relied on Brand X to resurrect the argument -- rejected by the lower court -- that as part of the first step of the Chevron analysis, "the court should focus on the language in section 9 [the EEOC's rulemaking authority] rather than on the substantive provisions [§ 4] of the ADEA." AARP v. EEOC, 383 F.Supp.2d at 710; App. 448. In the EEOC's words, "the starting point for the Court's Chevron analysis was not the plain language of Section 4, but the plain language of Section 9. . . ." App. 455. The EEOC's motion asked the lower court

to vacate its opinion "and consider whether Section 9 authorizes the EEOC to" issue the challenged exemption. App. 457.

The lower court concluded that "Brand X has done nothing to compel the EEOC's view of how Chevron should be applied. . . ." AARP v. EEOC, 390 F.Supp.2d at 452; App. 16. Nevertheless, the lower court granted the EEOC motion for relief, vacated its earlier opinion, and granted summary judgment to the EEOC. Although the parties agreed "that the plain language of the ADEA prohibits the practice of coordinating retiree benefits with Medicare eligibility," 383 F.Supp.2d at 710; App. 448, and although the lower court had previously characterized this Court's ruling in Erie County as holding that "Congress expressed a clear and unambiguous intent with regard to the precise question at issue," id. at 709; App. 447 (emphasis added), the lower court predicated its reversal on its conclusion that "Congress did not express a clear and unambiguous intent to prohibit Medicare coordination of retiree health benefits in the ADEA." 390 F.Supp.2d at 453; App. 17 (emphasis added). In explaining this about-face, the lower court stated that it could disregard the "plain language" holding in Erie County because this Court "did not state only one permissible interpretation of the statute, rather than merely the best interpretation." Id. at 455; App.19.

Having relied on Brand X to free itself from this Court's (a) ruling regarding the ADEA's "plain language" and "congressional intent" and (b) agreement (with

the EEOC) that any other view of the ADEA would "lead to irrational gaps in coverage" and would be "inconceivable," (220 F.2d at 210), the lower court announced that "there is a gap in the ADEA with respect to whether it applies to retiree benefits at all. . . ." 390 F.Supp.2d at 453-54; App. 17-18. Consequently, the lower court held that "the EEOC could promulgate a rule that interpreted the ADEA not to apply to any retiree benefits...." Id. at 454; App. 18 (emphasis in original); see also id. at 456; App. 20 ("Thus, the EEOC has the flexibility to decide whether retiree benefits are covered by the Act at all."). As the lower court reasoned, "[s]ince retiree health care benefits are merely a subset of a class of benefits that the EEOC could theoretically exclude from the protections of the ADEA, the EEOC's exemption of Medicare coordination of healthcare benefits is both a 'permissible construction of the statute' and a 'reasonable policy choice for the agency to make.'" Id. at 454; App. 18 (emphasis added) quoting Chevron, 467 U.S. at 843, 845.

Proceeding to Chevron Step Two, the lower court held that the challenged exemption was neither arbitrary nor capricious. The court held that the EEOC did, in fact, "consider the relevant factors," 390 F.Supp.2d at 457-59; App. 21-23, and that the EEOC had satisfied the obligation, set forth in its own regulations, to demonstrate that the exemption shows "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." Id. at 459-60; App. 23-24; 29 C.F.R. §1627.15(b). Finally, in addressing the plaintiffs' Count II argument that the EEOC failed to disclose critical communications that motivated the rulemaking, the lower court held that the plaintiffs failed "to point to any particular withheld information that was critical to the EEOC's rule and which the AARP was deprived of the opportunity to refute." 390 F.Supp.2d at 462; App. 26. The lower court held that the injunction prohibiting publication of the challenged exemption would remain in effect on appeal. App. 26-27.

AARP and the six individual plaintiffs timely filed a notice of appeal. App. 28. After this Court remanded the initial appeal to vest jurisdiction back in the lower court, the plaintiffs timely filed an amended notice of appeal. App. 33.

SUMMARY OF ARGUMENT

The underlying premise for the lower court's decision – that there is a "gap" in the ADEA regarding employee benefits in retirement – is manifestly wrong. The lower court erred in relying on Brand X to find a gap when the agency argued to the contrary. The stated purpose of the Older Workers Benefit Protection Act ("OWBPA") was to "restore the original congressional intent" of the ADEA "to prohibit discrimination against older workers in all employee benefits except when age-based reductions. . .are justified by significant cost considerations." Pub. L. 101-433; 104 Stat. 978, Sec. 101. Consistent with this unambiguous congressional

intent, both the appellants and the EEOC agree that the resulting plain language of the ADEA prohibits an employer from structuring retirement benefits unlawfully based on age during the employment period. Precisely this conduct would be made lawful by the challenged regulation.

Persuaded, in part, by the EEOC's argument that a contrary reading of the ADEA would be "inconceivable," and would lead to "irrational gaps in coverage that Congress could not have intended," this Court ruled in Erie County "that the ADEA applies even when retiree benefits are structured discriminatorily after retirement." 220 F.3d at 210. Confirming that the "plain language" of OWBPA expressly incorporated regulations that apply the ADEA to health care benefits for individuals eligible for Medicare, this Court found the ADEA applicable to the post-retirement reductions challenged in Erie County.

In light of the agreement by the parties regarding the applicability of the ADEA, and the holding of this Court regarding the ADEA's "plain language," it was error for the lower court to use Brand X to conclude that "there is a gap in the ADEA with respect to whether it applies to retiree benefits at all. . . ." The focus of Chevron is, and remains, determining congressional intent. If congressional intent is clear, by definition there is no statutory "gap" within which the agency can regulate. The lower court erred when it relied on Brand X to lose sight of this fundamental premise of Chevron. Moreover, it was error for the lower court to

rely on Brand X at all when EEOC agreed with the Circuit precedent - - Erie County. In addition, the EEOC's attempt to "exempt" conduct that Congress intended to prohibit under the ADEA goes beyond the EEOC's delegated authority under Section 9 because it did not show "due regard" for ADEA's purposes of promoting the employment of older persons, and prohibiting arbitrary age discrimination.

The lower court also erred in holding that the challenged regulation was neither arbitrary nor capricious. While the stated objective of the regulation was the preservation of health care benefits for younger retirees, there is no evidence in the rulemaking record that allowing employers to target Medicare-eligible retirees for cost-cutting will cause employers to redirect any savings toward younger retirees, particularly since the permissive regulation did not link the two subjects in any way. Indeed, the only certain benefit from the regulation is that it permits employers to cut health care costs. And even if facilitating health care cost reductions is within the EEOC's purview, the regulation is patently arbitrary since no other cost-cutting measures were apparently considered. The EEOC never explained how the overt discrimination that it condemned in Erie County became the only solution in the battle against escalating health care costs. This about-face was particularly arbitrary in light of the EEOC's admission that it does not know

how many employers provide non-discriminatory health benefits to retirees, and how they do it.

Finally, the lower court erred when it concluded that the EEOC's refusal to include the substance of its "stakeholders" meetings in the rulemaking record was harmless. The EEOC admitted that the "stakeholder" meetings directly influenced the development of the challenged regulation, but refused to disclose the substance of these pivotal meetings to AARP during the notice and comment period. After this litigation was filed, the appellants learned that the only record of the stakeholder meetings was incomplete handwritten notes from an EEOC staffer in attendance. The EEOC's decision not to keep adequate records of these influential meetings renders the rulemaking record impermissibly inadequate. Because of this, it was an error for the lower court to prohibit reasonable discovery.

STANDARD OF REVIEW

The standard of review is plenary over grants of summary judgment. Gilles v. Davis, 427 F3d 197, 203 (3d Cir. 2005).

ARGUMENT

I. SINCE THERE IS NO "GAP" IN THE ADEA REGARDING EMPLOYEE BENEFITS IN RETIREMENT, THE CHALLENGED RULE IS UNLAWFUL.

A. Under Chevron, An Agency May Not Regulate Contrary To Congressional Intent.

In Chevron U.S.A. Inc. v. Natural Res. Def. 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, 198 (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.

On the other hand, 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.

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 Med. Soc'y 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 197-98 (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."). "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) (citation omitted). Once the Third Circuit divines a statute's 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 Med. Ctr. v. Thompson, 380 F.3d 142, 152 (3d Cir. 2004) ("We owe no deference to an agency interpretation plainly inconsistent with the relevant statute."). The foregoing fundamental legal principles apply to regulations issued by the EEOC. See Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980).

B. The Parties Agree That The Plain Language Of The ADEA Prohibits Discrimination In Retiree Benefits.

The challenged exemption would allow employers to reduce, or discontinue altogether, health care benefits for retirees upon the attainment of Medicare eligibility. By its terms, therefore, the exemption would permit overt age discrimination against both current employees (prospective retirees) and current retirees. As to the former class (current employees), there can be no bona fide dispute that the plain language of the ADEA prohibits discrimination against them. As to the latter class, the parties agree that the plain language of the ADEA

prohibits discrimination against them as well - - precisely the result reached by this Court in Erie County.

In Erie County and before the lower court in this case, the EEOC has repeatedly acknowledged that the ADEA prohibits the form of discrimination against both current and prospective retirees that would be permitted by the challenged exemption. Confirming the obvious, the EEOC stated to this Court: "[p]lainly, the ADEA covers discrimination in the provision of post-employment benefits." App. 185. The EEOC stated that "[i]t is clear that the ADEA covers discrimination in a post-employment benefit where the facially discriminatory policy is instituted while an individual is still an active employee." App. 189-90.

With regard to the class of current retirees affected by the post-employment benefit reductions in Erie County, the EEOC argued that, of course, they did not lose their ADEA protections when they retired. "[A]ny other view of the statute would lead to irrational gaps in coverage that Congress could not have intended." App. 189 (emphasis added). As the EEOC argued:

> It is inconceivable that Congress would in the same breath 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].

App. 190 (emphasis added; citations omitted).

The EEOC confirmed its view of the ADEA's plain language before the lower court in this litigation. In response to the argument that the exemption contravened the plain language of the ADEA under Chevron, the EEOC chided the plaintiffs, saying that "[p]laintiffs devote an inordinate amount of space in their brief stating the obvious, namely, that the proposed regulation exempts conduct that is prohibited by the ADEA and is contrary to binding case law in this Circuit." App. 308. As the EEOC explained, "[c]learly if that conduct were not proscribed by the ADEA there would be no need for an exemption." Id. And in response to the suggestion that the EEOC had inexplicably changed the position it espoused to this Court in Erie County, the EEOC answered: "Nothing could be further from the truth. Rather, it is precisely because the EEOC recognizes that such practices are prohibited by the ADEA, that they are potentially subject to an exemption from the ADEA. App. 308 n. 19 (emphasis in original).

C. Erie County Confirmed That The ADEA's Plain Language Reflects Congressional Intent To Prohibit Discrimination In Post-Retirement Benefits.

This Court's decision in Erie County confirmed the undisputed fact that the plain language of the ADEA prohibits precisely the discrimination against current and prospective retirees that would be permitted by the EEOC's exemption.

The Court's analysis started with the OWBPA, whose express purpose was to "restore the original congressional intent" to the ADEA, "which was to prohibit

discrimination against older workers in all employee benefits except when age-based reductions in employee benefits are justified by significant cost considerations." Erie County, 220 F.3d at 204. The Court noted the express statutory changes that accompanied this congressional objective. First, Section 102 of the OWBPA defined the term "compensation, terms, conditions, or privileges of employment" to include "all employee benefits." Id. Second, Section 103 of the OWBPA deleted the problematic "subterfuge" language of § 4(f)(2) and replaced it with the current provision, including the express codification of the equal benefit or equal cost standard. Id. Third, and equally important, the Court correctly observed that the regulations codified into the new § 4(f)(2)(B)(i) directly addressed the manner in which an employer could integrate its health care benefits with Medicare. Id. at 205. As the Court quoted, the codified regulation expressly stated that

> 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.

Id. quoting 29 C.F.R. § 1625.10(e).

The Court's legal analysis at all times remained grounded in the plain language of the ADEA. The Court's first task was to determine whether the plaintiffs "ha[d] established a claim of discrimination under section 4(a)(1) of the

ADEA." Id. at 208. Relying on the language added to the ADEA by the OWBPA, the Court concluded:

> We believe that the ordinary meaning of the term 'employee benefit' should be understood to encompass health coverage and other benefits which a retired person receives from his or her former employer.

Id. at 209. In response to arguments by Erie County, the Court acknowledged certain legislative statements suggesting that the ADEA protected only current employees (prospective retirees). Id. at 210. But the Court returned again to the language of the ADEA to dismiss them: "we see nothing in the language of the ADEA to indicate that these statements are accurate and we do not find them to be persuasive." Id. Agreeing with the EEOC that a contrary reading would be "inconceivable," and "would lead to irrational gaps in coverage," the Court concluded that both employees and current retirees are protected from discrimination in post-employment benefits. Id.

Moreover, based on the plain language of the ADEA, the Court rejected the district court's establishment of a safe harbor that permitted discrimination in health care benefits. Id. at 214 ("Effectively, then, the district court recognized a safe harbor in addition to any explicitly set forth in the ADEA or the OWBPA."). As the Court stated directly:

> We cannot, however, accept the district court's approach for the straightforward reason that it is not reflected in the actual language of the ADEA or the OWBPA. Congress knew how to craft exceptions to the ADEA, as there are several explicitly worded safe harbors in 29 U.S.C. § 623. Yet, aside from section 623(f)(2)(B)(i), there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility.

Id.

Finally, and yet again, the Court relied on the "plain language of section 623(f)(2)(B)(i)" to conclude that the equal benefit or equal cost safe harbor was the only defense applicable to Erie County. Id. at 215. The Court noted that section 623(f)(2)(B)(i) "expressly adopt[ed] the statement of the equal benefit or equal cost principle" which "expressly contemplates [its] application. . . in the Medicare eligibility situation." Id. (emphasis added). Not surprisingly, the Court concluded: "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 benefits based on Medicare eligibility." Id. (emphasis added). And by concluding that the plain language of the safe harbor was applicable to the challenged benefit reductions, the Court confirmed yet again that the basic prohibitions of the ADEA applied to the challenged conduct. For it would be nonsensical for Congress to craft a safe harbor for conduct that was not prohibited by ADEA § (4)(a)(1).

II. THE LOWER COURT ERRED BY RELYING ON BRAND X TO FIND A STATUTORY "GAP."

Based solely on the Supreme Court's decision in Brand X, the lower court reversed itself, vacated its initial memorandum opinion and order, and entered summary judgment for the EEOC. In so doing, the lower court abandoned the conclusion it had oft repeated in its initial decision – that the plain language of the ADEA left no "gap" within which the EEOC could regulate – and relied on the remarkable contrary proposition (never espoused by the EEOC) that "there is a gap in the ADEA with respect to whether it applies to retiree benefits at all." 390 F.Supp.2d at 453-54; App. 17-18.

The issue before the Supreme Court in Brand X was whether the Federal Communications Commission's conclusion "that cable companies that sell broadband Internet service do not provide 'telecommunications servic[e]' as the Communications Act defines that term . . . [wa]s a lawful construction of the Communications Act under Chevron . . . and the Administrative Procedure Act, 5 U.S.C. § 555 *et seq*." Brand X, 125 S. Ct. at 2695. The Court of Appeals for the Ninth Circuit had refused to apply the Chevron framework "because it thought the Commission's interpretation of the Communications Act [was] foreclosed by the conflicting construction of the Act [that the Ninth Circuit] had adopted in [AT&T Corp. v.] Portland, [216 F.3d 871 (9th Cir. 2000)]." Id. at 2700. In its decision in

Portland, the Ninth Circuit had concluded, contrary to the challenged rule, that cable modem service was a "telecommunications service." Id. at 2701.

What the Supreme Court found determinative, however, was the manner in which the Ninth Circuit had reached its result. "Its prior decision in Portland held only that the best reading of §153(46) was that cable modem service was a 'telecommunications service,' not that it was the only permissible reading of the statute." Brand X, 125 S.Ct. at 2701 (emphasis in original). The Ninth Circuit's concession that the statute was subject to multiple interpretations was fatal since, as the Supreme Court held, "[b]efore a judicial construction of a statute. . .may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." Id. at 2702 (emphasis added). In reversing and remanding the Ninth Circuit's ruling, the Supreme Court stated, ". . . if [a] prior court decision holds that its construction follows from the unambiguous terms of the statute," there is "no room for agency discretion." Id. at 2700. The premise of Chevron is that agencies have the important task of resolving statutory ambiguities and filling statutory gaps. Chevron, 467 U.S. at 843-44. However, "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." Brand X, 125 S.Ct. at 2700. For several reasons, the lower court erred in relying on Brand X for its astounding about-face.

1. The fundamental premise of Brand X is inapplicable to the EEOC rulemaking here. In Brand X, the agency disagreed with the conclusion that the Ninth Circuit had reached in its Portland decision, and proceeded to enact a rule with a contrary interpretation of the same statutory provision. As the Court ruled, if both interpretations are "permissible," then a statutory "gap" exists in which the agency may regulate.

In stark contrast here, the EEOC does not disagree at all with the Circuit precedent -- Erie County. To the contrary, the EEOC actively urged that result, repeatedly proclaiming in Erie County and then to the lower court here that the ADEA's applicability to retiree benefits was the only permissible interpretation of the ADEA. And the icing on the cake is the EEOC's observation that were it not for the plain language of the ADEA, its "exemption" would be wholly unnecessary. See App. 308 ("[c]learly if that conduct were not proscribed by the ADEA there would be no need for an exemption."); see also id. n. 19 ("Rather, it is precisely because the EEOC recognizes that such practices are prohibited by the ADEA, that they are potentially subject to an exemption from the ADEA.").

2. Apart from the fact that the parties agree that retiree health benefits do not fall into a statutory "gap" – the lower court erred in relying on Brand X to create a "gap" where done exists. Prior to Brand X, the lower court had appropriately focused on both the plain language of the ADEA and congressional

intent. "Based on a detailed statutory analysis of the Act, the Third Circuit held that it was clear from the face of the Act that Congress intended for the ADEA's prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare." 383 F.Supp. 3d at 707; App. 445 (emphasis added); see also id. at 709; App. 447 ("Thus, in Erie County, the Third Circuit determined that Congress intended for the ADEA to prohibit the practice of coordinating employer-provided retiree health benefits with Medicare eligibility unless the employee could meet the equal cost or equal benefit defense."). Consequently, the lower court ended its inquiry at Chevron Step One, "because the Third Circuit has already determined that Congress expressed a clear and unambiguous intent with regard to the precise question at issue." Id. at 709; App. 447 (emphasis added). Relying on Chevron, the lower court ruled that because "the intent of Congress is clear, that is the end of the matter." Id. at 710; App. 448 quoting Chevron, 467 U.S. at 842.

Notwithstanding the foregoing, the lower court later ruled that there was, in fact, a "gap" in the ADEA "because Erie County's conclusion that [the ADEA applies to retiree benefits] is not the 'only permissible' construction of the statute." 390 F.Supp.2d at 454; App. 18. "Erie County did not hold that the ADEA's 'plain language' forbid the practice at issue because, under Brand X, it did not state only one permissible interpretation of the statute, rather than merely the best

interpretation." Id. at 455; App. 19 (emphasis added). In effect, the lower court held that because this Court did not invoke the "only permissible" incantation in its Erie County opinion, there is a "gap" under Brand X.

3. The lower court's rigid reliance on the "only permissible" language of Brand X was error. Indeed, it is clear from the Supreme Court's opinion that the "only permissible" phrase was used synonymously with the more traditional descriptive term "unambiguous." As the Court stated often with subtle variations:

> Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

Brand X, 125 S.Ct. at 2700 (emphasis added); see also id. (prior judicial construction trumps agency construction only if prior decision holds that its construction flows from "the unambiguous terms of the statute"); id. at 2702 (court must hold that the "statute unambiguously requires the court's construction"). And the Court's repeated use of the phrase "unambiguous" was no accident. As the Court explained:

> In Chevron, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.

Brand X, 125 S.Ct. at 2699.

Brand X confirmed the time-honored Chevron holding that if a provision of a statute is unambiguous, there is no gap within which the agency can regulate.

And that is precisely what this Court found in Erie County with regard to the ADEA's coverage of retiree health benefits. Five years before Brand X, there was no reason to expect this Court to use the "only permissible" incantation required by the lower court. See Eurodif S.A. v. United States, 423 F.3d 1275, 1278 (Fed. Cir. 2005) (although Court's prior decision "did not use the term 'unambiguous'", it "clearly foreclosed" a contrary interpretation of the statute); Abbott-Northwestern Hosp. v. Leavitt, 377 F.Supp.2d 119, 134 (D.D.C. 2005) (lack of statutory ambiguity established by circuit precedent holding that "the intent of Congress is clear"). By relying (a) on the "ordinary meaning" and the "plain language" of the ADEA, (b) by rejecting arguments "not reflected in the actual language of the ADEA or the OWBPA" and for which there was "nothing in the language of the ADEA" to support them, and (c) by finding that a contrary interpretation of the ADEA "would lead to irrational gaps" and would be "inconceivable," this Court conclusively answered the question posed by both Chevron and Brand X about "ambiguity." In the Court's words, "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 benefits based on Medicare eligibility." Erie County, 220 F.3d at 215. The lower court's contrary holding, that "the EEOC has the flexibility to decide whether retiree benefits are covered by the Act at all" (390 F.Supp.2d at 456; App. 20) is patently

incorrect as it is contrary to the plain language of the ADEA, flouts congressional intent, and even is contrary to the understanding of the EEOC.

III. THE EEOC CANNOT, UNDER SECTION 9 OF THE ADEA, EXEMPT CONDUCT THAT CONGRESS INTENDED TO PROHIBIT.

Section 9 of the ADEA, 29 U.S.C. § 628, authorizes the EEOC to "establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest." Having acknowledged that the ADEA prohibits discrimination in the provision of retiree benefits, the EEOC argued that the plain language of § 9 authorized the EEOC to "exempt" conduct otherwise prohibited. The EEOC claimed "that in applying the first step of the Chevron analysis to the challenged exemption, the court should focus on the language in section 9" rather than on the substantive provisions of §4(a)(1). 383 F.Supp. 2d at 710; App. 448.

Relying on Chevron, the lower court rejected the EEOC's novel argument about § 9. As the Court explained, when "the intent of Congress is clear, that is the end of the matter." 383 F.Supp.2d at 710; App. 448 quoting Chevron, 467 U.S. at 842. Moreover, focusing on the rulemaking provisions – as opposed to the substantive prohibitions of the statute – "would allow every challenged rule and regulation to pass the first step of Chevron, regardless of the substantive provisions of the act in question." Id. at 711; App. 449. Harmonizing both the substantive

and rulemaking provisions, the lower court suggested that the EEOC was free to regulate in any statutory "gaps," and perhaps to issue exemptions in individual cases. Id. When the EEOC resurrected the argument in connection with Brand X, the lower court sidestepped it on the ground that the exemption did not contradict "the unambiguously expressed intent of Congress." 390 F.Supp.2d at 453; App. 17. The court did note, however, that the EEOC's argument would implicate separation of powers issues. Id.

The challenged exemption is unlawful because the Constitution does not permit the executive branch to overturn legislation enacted by Congress. And, to the extent that the ADEA's grant of rulemaking authority in § 9 authorizes the EEOC to repeal or rewrite the plain language of the ADEA, it too is unconstitutional.

U.S. Const., art. I, § 1, states that "all legislative Powers herein granted shall be vested in a Congress of the United States." This explicit separation of power from the Executive branch is clear. Simply put, "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." Clinton v. City of New York, 524 U.S. 417, 438 (1998); see also INS v. Chadha, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statues, no less than enactment, must conform with Art[icle] I."); *id.*, n. 18 ("There is no provision

allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.")

The EEOC's proposed exemption has both the legal and practical effect of repealing those portions of the OWBPA that mandated non-discriminatory health care benefits to all individuals covered by the ADEA. And while the EEOC argued to the lower court that the ADEA's unmistakable prohibition against discrimination in employee benefits was "beside the point," App. 308, the exemption inevitably runs afoul of Article I. The Executive branch EEOC lacks the authority under our Constitution to repeal or amend any of the explicit prohibitions chosen by Congress. As the Supreme Court confirmed in Clinton, 524 U.S. at 438, "[R]epeal of statutes, no less than enactment, must conform with Art. I."[1]

Moreover, it is no answer to the constitutional dilemma to suggest that the exemption authority granted to the EEOC by § 9 authorizes the repeal of explicit provisions of the ADEA so long as they are "in the public interest." In its opening brief in the proceedings below, the EEOC argued that § 9 is a lawful delegation of authority, claiming that the "public interest" standard of that provision provides the necessary "intelligible principle to which the [EEOC] is directed to conform."

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[1] If § 9 authorizes the EEOC to overturn statutory provisions, as the EEOC suggests, it also violates the Presentment Clause. U.S. Const., art. I, § 7; see Clinton, 524 U.S. at 442-47.

App. 313 *quoting* Whitman v. American Trucking Ass'n, 531 U.S. 457, 472 (2001). But the plaintiffs don't quibble with the "public interest" standard, and the EEOC's exclusive focus on it only begged the question of § 9's constitutionality. The correct focus for analyzing § 9 is determining precisely what the EEOC can do in the public interest. If, as the EEOC suggests, it can rewrite or repeal any of the ADEA's substantive provisions so long as they act in "the public interest," then § 9 is most certainly unconstitutional. "That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 , 673 (1980) (Rehnquist, J. concurring).

Finally, the constitutional issues presented by the EEOC's argument are apparent in its claim that the challenged regulation is "in the public interest." According to the EEOC, it is in the "public interest" to permit employers to discriminate on the basis of age against individuals age 65 and older, all in the "hope" that employers permitted to cut those expenses will beneficently maintain health care coverage for younger retirees. But what the EEOC believes is in the

"public interest" clashes head on with what Congress concluded when it passed the OWBPA in 1990.[2]

IV. THE EXEMPTION VIOLATES THE EEOC'S OWN GOVERNING REGULATIONS AND IS OTHERWISE ARBITRARY AND CAPRICIOUS.

A. By Frustrating the Remedial Purposes of the ADEA, the Exemption Is Contrary to Law.

Section 9 of the ADEA, 29 U.S.C. § 628, authorizes the EEOC to ". . . issue 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."

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2 The Supreme Court has ruled that courts "must reject administrative constructions of the statute, whether reached by adjudication or rule-making, that are inconsistent with the statutory purpose or that frustrate the policy that Congress sought to implement." Fed. Election Com'n v. Democratic Senatorial Campaign Com., 454 U.S. 27, 32 (1981).

29 C.F.R. § 1627.15(b). 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 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 exemption demonstrates blatant disregard - - not "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.

First, the exemption undermines the statutory purpose of prohibiting arbitrary age discrimination by allowing employers to specifically target individuals for the elimination of health care benefits based solely on their age. Rather than prohibit arbitrary age discrimination, the challenged exemption sanctions it.

Second, the challenged exemption cannot rationally "promote employment of older persons" because, by its terms, it only applies to retired employees. 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. This fact is confirmed by the

labor organizations that participated as amici in the court below, who argued that offering retiree health benefits to individuals not yet eligible for Medicare is an effective means of encouraging older workers to exit the labor force early. App. 364. And, significantly, EEOC Chair Dominguez claimed that the purpose of the exemption was to permit employers "to retain the best and brightest in their work force." App. 163.[3]

According to the EEOC's rationale, the maintenance of generous health care benefits to younger retirees will be facilitated by permitting employers to arbitrarily cut benefit costs for their older counterparts – the Medicare-eligible retirees. But this concept of robbing Peter to pay Paul is precisely the form of arbitrary age discrimination that Congress intended to prohibit.

Conspicuously absent from the rulemaking record is any evidence that the exemption shows "due regard" for the ADEA's purposes. Both the proposed and final exemption profess that these purposes are served, but do not explain how, or point to any evidence. In the Federal Register announcement of the proposed

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[3] 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." App. 163.

exemption, the EEOC stated that "[t]he proposed exemption shows due regard for the Act's prohibition against arbitrary age discrimination in employment – a central concern of Congress when it enacted the ADEA. The exemption is also consistent with the Act's purpose of promoting the employment of older persons. . . ." 68 Fed. Reg. at 41547 (July 14, 2003). However, these conclusory statements are bereft of any explanation as to how those critical statutory purposes are advanced by an exemption that permits wholesale discrimination against retirees on the basis of age.[4]

The lower court erred when it concluded that the EEOC had "made the 'strong affirmative showing' that the exemption is necessary and proper in the public interest." 390 F. Supp.3d 437 at 460l; App. 24. Like the EEOC, the lower court failed to explain how sanctioning overt age discrimination can possibly demonstrate due regard for the ADEA's overarching purposes of prohibiting arbitrary discrimination based on age and promoting the employment of older persons based on their ability and not their age.

Since the challenged exemption does not comply with the EEOC's own regulation requiring "due regard" for the ADEA's purposes, it cannot pass muster

---

4 When the EEOC denied an admission that the purposes of the statute were not served by the exemption, and refused to respond to an interrogatory explaining the denial, the appellants moved to compel. App. 394-95. The lower court erred by not compelling a response and instead directing its focus to the more generic "public interest." 390 F. Supp.2d at 460; App. 24.

under the APA. 5 U.S.C. § 706(2)(a) (section requiring court to hold unlawful and set aside agency action "not in accordance with law."). As this Court held in Frisby v. U.S. Dept. of Housing and Urban Dev., 755 F.2d 1052 (3d Cir. 1985), a challenge to agency action under the APA, "the agency itself is bound by its own regulations. Failure on the part of the agency to act in compliance with its own regulations is fatal since it is 'not in accordance with law.'" Frisby, 755 F.2d at 1055-56 (citations omitted); see also Raymond Proffitt Found. v. EPA, 930 F. Supp. 1088, 1104 (E.D. Pa. 1996) ("When an agency fails to act in compliance with its own regulations, such actions are 'not in accordance with law.'").

B. The EEOC Has No Authority To Manipulate Health Care Policy.

In proposing its exemption, the EEOC abandoned the mission entrusted to it by Congress - - to assist in eradicating age discrimination in the workplace. The purpose of the exemption is not to protect the rights of older workers and retirees or to otherwise enforce the ADEA. Rather, the exemption is intended to influence employers to provide health care to a select group of retirees. The EEOC attempts to do this by permitting employers to overtly discriminate against older retirees in the hope that this will encourage employers to provide and improve health benefits offered to younger retirees.[5]

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[5] "The Equal Employment Opportunity Commission is publishing this final rule so that employers may create, adopt, and maintain a wide range of retiree

Nothing in the ADEA - - or any of its relevant enabling statutes - - authorizes the EEOC to issue legislative rules that are intended to influence the maintenance of retiree health benefits. As the EEOC's own regulations correctly require, any exercise of the exemption authority must show "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." 29 C.F.R. § 1627.15(b). The EEOC has no expertise in health care policy and yet has undertaken predictive forecasting of employer behavior in a very complex area – which is influenced by innumerable factors including rising health care costs, demographics, Federal Accounting Standards Board (FASB) accounting rules, to name a few. EEOC Commissioner Stuart Ishimaru objected to the exemption at the EEOC's public meeting on April 22, 2004, stating:

> "[The EEOC] ha[s] been entrusted to enforce the crown jewels of our civil rights laws involving employment, including the Age Discrimination in Employment Act. We don't have responsibility here for waging war in Iraq or protecting our homeland from attack or regulating pollutants in the air . . . There are many other responsibilities that other agencies have in the federal government. Ours is a very specific responsibility: Protecting people from discrimination. And in this case it's protecting people under the Age Discrimination in Employment Act. . . We are delving into a fundamental issue of health care policy, an area where we should not be delving."

App. 159.

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health plan designs . . . without violating the Age Discrimination in Employment Act of 1967 (ADEA)." App. 133.

The lower court glossed over the EEOC's leap into health care policy stating that although the proposed exemption "may have consequences for the provision of health care generally," the "question" the exemption was designed to address, "which employee benefits are covered by the ADEA - is surely within the agency's purview. . . . " 390 F.Supp.2d at 459; App. 23. The district court's attempt to rationalize the EEOC's actions ignores two important points. First, the parties at all times agreed that retiree health benefits are covered by the ADEA. And second, as stated by the EEOC, the purpose of the proposed exemption is to remove a perceived impediment to employers' willingness to continue to provide retiree health benefits. Because influencing employer behavior regarding health care benefits is outside the EEOC's expertise and wholly unrelated to its mission of eradicating employment discrimination, no deference is owed to the proposed exemption. National Mining Ass'n v. Secretary of Labor, 153 F.3d 1264, 1267 (11th Cir. 1998); Grunfeder v. Heckler, 748 F.2d 503, 505 (9th Cir. 1984) (en banc) (courts are the final authorities on issues of statutory construction, especially where the construction requires consideration of broad concerns beyond the agency's expertise).

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. Ironically, the Commission proposes to effectuate this objective by permitting employers to engage in overt and arbitrary discrimination based on age. The winners from this exemption may be individuals who retire "early," i.e., before age 65, while the losers will surely be individuals age 65 and older. However, protecting the relatively young at the expense of the relatively old is contrary to congressional intent and the purposes of the ADEA. As the Supreme Court recently held, "[t]he Age Discrimination in Employment Act . . . forbids discriminatory preference for the young over the old." General Dynamics v. Cline, 540 U.S. 581, 590 (2004). "[T]he text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern." Id. at 593.

In promulgating the challenged exemption the EEOC relied on factors that Congress did not intend for it to consider. The Commission's attempt to influence employer decisions regarding health care along with its efforts to protect the relatively young at the expense of the relatively old render the challenged exemption arbitrary and capricious.

C. The EEOC Failed to Consider Important Aspects of the Problem.

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

proposed exemption proceeds on a defective premise, viz. that in order to continue to provide retiree health insurance benefits, employers must be permitted to discriminate on the basis of age. This is wrong both factually and logically. Moreover, while wading into health care policy, the EEOC failed to ask and obtain answers to several significant questions.

1. The Rulemaking Record Does Not Reflect Consideration of Non-discriminatory Options.

Factually, the Commission has apparently failed to consider the number of employers nationwide who provide health care benefits to their retirees on a non-discriminatory basis. The large number of employers who provide retiree health benefits without regard to age wholly undermines the logic of the proposed exemption by demonstrating that employers willing to provide health care benefits can also comply with the ADEA.[6] 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." App. 202. In other words, the answer emphatically is not to undermine a central purpose of the statute by permitting overt discrimination against individuals

[6] In the court below, the EEOC admitted its failure to explore how many employers comply with the ADEA. App. 401 (Admission #4) (". . . admit that the EEOC does not know how many employers, if any, currently provide health care benefits to retirees in a way that complies with the ADEA.").

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." App. 203. Indeed, one author described the Erie County decision as presenting an opportunity for employers. After outlining several options for plans that terminate coverage at age 65 to bring their plans into compliance (none of which were mentioned by the EEOC as possible approaches), the author concludes, "Smart employers will use the [Erie County decision] as the catalyst for restructuring retiree health benefit programs to bring them into alignment with business needs while ensuring compliance with the requirements of ADEA." Richard Ostuw, Retiree Health Care Benefits: New Rules, New Strategies, BENEFITS QUARTERLY, Fourth Quarter 2001, at 57.

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. The EEOC's Claim that Quantifying Health Care "Costs" Is Impractical Is Arbitrary.

The proposed exemption announced that "quantifying the cost to employers of post-Medicare retiree health benefits under any formulation of the equal cost test would not be practical." 68 Fed. Reg. at 41546. This claim is neither accurate nor logical.

First, the EEOC ignores the obvious, which is that the "cost" to the employer is exactly what the employer pays to its insurer on a per capita basis. The EEOC 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 EEOC 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 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 EEOC fails to reconcile its claim about determining "costs" with the mechanism chosen by Congress in the ADEA to do precisely that. In enacting the OWBPA, Congress crafted a safe harbor 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, 29 U.S.C. § 623(l)(2)(E), which are to be adjusted based on the Consumer Price Index. The EEOC's proposed exemption fails to explain why the costs chosen by Congress are not the applicable ones to use in the rulemaking context.

Finally, the Commission's reliance on employer threats to reduce coverage when faced with compliance with the ADEA is patently arbitrary. There is no evidence whatsoever 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.

3. The EEOC's Evaluation of the Public Interest Did Not Factor In The Harm to Older Retirees.

Notably absent from the EEOC'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 cut costs by eliminating coverage to all 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.

Even more fundamental, 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 eliminate 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 to the "public interest."

The individuals for whom coverage is discontinued, including the appellants, will suffer at least two distinct forms of harm, neither of which have been addressed by the EEOC. Individuals losing coverage likely 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. 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 EEOC has done.

The EEOC has also 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 EEOC'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 EEOC has failed to consider.

V. THE RULEMAKING RECORD WAS CRITICALLY DEFICIENT.

According to the EEOC, the principal impetus for drafting the challenged exemption was a study by an "internal Retiree Health Benefits Task Force," which "met with a wide range of Commission stakeholders, including employers, employee groups, labor unions, human resource consultants, benefit consultants, actuaries and state and local government representatives." 68 Fed. Reg. 41542 (July 14, 2003). Although the communications that occurred during the Task Force meetings lead the EEOC to its about-face on retiree health benefits, there are virtually no records containing the substance of these meetings for the appellants, or the Court, to review.

In September 2002, after learning that the EEOC had reached a decision on its proposed rule, AARP, pursuant to the Freedom of Information Act ("FOIA"),

broadly requested any documents pertaining to the proposed exemption. App. 344-45. This FOIA request sought any documents that "were received," "considered," or "prepared" by the EEOC or which "concern, refer or relate" to the proposed exemption, so that AARP could develop "a better understanding of the basis for the Commission's consideration of an exemption . . . ." under the ADEA. Id. In response, the EEOC produced attendance lists of the "stakeholders" meetings, but nothing more about the meetings, App. 263-276, and claimed that "deliberative" documents were being held from disclosure.

In the course of this litigation, and long after the rulemaking was completed, the EEOC produced handwritten notes regarding the "stakeholder" meetings. Although these notes were never disclosed before, the EEOC designated them as part of the "rulemaking record." App. 354. The handwritten notes of unidentified individuals in attendance at some of the "stakeholder" meetings, however, failed to present an adequate administrative record of the content of the various critical meetings that caused the EEOC take the extraordinary action of exercising its exemption authority under the ADEA.

In an effort to discover what the EEOC considered and did not consider during the rulemaking, plaintiffs served Requests for Admissions and Accompanying Interrogatories. As part of their request for admissions, plaintiffs propounded two interrogatories designed to explore any denials regarding the

administrative record in this case. The EEOC refused to respond to either interrogatory. App. 403-04. Appellants, in turn, issued a deposition notice for an EEOC official under Fed. R. of Civ. P. 30(b)(6). App. 277-78. On March 4, 2005, the district court expressly authorized the plaintiffs to issue written interrogatories to the EEOC prior to a Fed. R. Civ. Pro. 30(b)(6) deposition. In response to the court's order, on March 8, 2005, plaintiffs filed a motion to compel the EEOC to provide full, complete, and non-evasive responses to the two interrogatories regarding the administrative record. App. 394-96. However, in a hearing approximately one week later, the district court stated that it was prepared to issue a ruling on the plaintiffs' claims and told the EEOC it need not respond to the outstanding discovery requests. App. 440.

On March 30, 2005, the district court ruled in plaintiffs' favor without having to reach Chevron Step Two. However, when the court later reversed its decision based on Brand X, it also granted summary judgment to the EEOC on plaintiffs claim that the proposed exemption is arbitrary and capricious despite the fact that the plaintiffs' discovery requests were still outstanding.

One of the bedrocks of administrative law is that "the Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule." Engine Mfrs. Ass'n v EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994); see

Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 131 (3d Cir. 1993) ("failing to place important date [relied upon by the agency in the rulemaking] on the record constitutes prejudicial error"); Sierra Club v. Costle, 657 F.2d 298, 397 n.484 (D.C. Cir. 1981) ("In general, factual or methodological information which is critical to a proposed rule should be available in such a way as to provide an adequate opportunity for comment."). "If the failure to notify interested persons of the [factual bases] upon which the agency was relying actually prevented the presentation of relevant comment, the agency may be held not to have considered all 'the relevant factors.'" United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 251 (2d Cir. 1977).

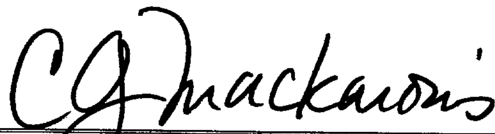
> The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rulemaking. In order to allow for useful criticism, it is especially important for an agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

Conn. Light and Power Co. v. Nuclear Reg. Comm'n, 673 F.2d 525, 530-31 (D.C. Cir. 1982); see also U. S. Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 540 ("the right to comment or the opportunity to be heard on questions relating to the public interest is of little or not significance when one is not apprised of the issues and positions to which argument is relevant. Only when the public is adequately informed can there be any exchange of view and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion.").

In granting summary judgment to the EEOC, the district court concluded that "AARP has failed to point to any particular withheld information that was critical to the EEOC's rule and which the AARP was deprived of the opportunity to refute." 390 F.Supp.2d at 462; App. 26. The court ignored, however, the fact that the appellants were in the process of discovering that there was no withheld information to be supplied. The precise problem is that there is no written record of these pivotal meetings.

CONCLUSION

Appellants respectfully request that the Court reverse the opinion of the lower court and remand the matter with instructions that judgment be entered for the appellants and that publication of the challenged exemption be permanently enjoined.



STEPHEN G. CONSOLE
PA ID NO. 36656
CONSOLE LAW OFFICES, LLC
1525 Locust Street, Ninth Fl.
Philadelphia, PA 19102
(215) 545-7676

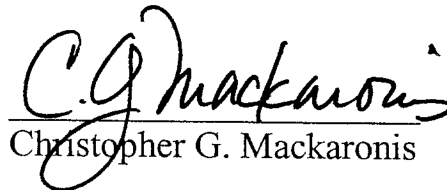
CHRISTOPHER G. MACKARONIS
BRICKFIELD, BURCHETTE, RITTS & STONE
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007
(202) 342-0800

LAURIE A. MCCANN
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2060

CERTIFICATE OF SERVICE

I, Christopher G. Mackaronis, certify that ten copies of the foregoing Appellants' Opening Brief and Appendix Volume I (pages i-35) along with four copies of Appendix Volume II were sent, via Federal Express, to the Clerk of Court, and that two copies of the brief and appendix were served by hand delivery on this 19th day of December, 2005, on counsel for Appellee Equal Employment Opportunity Commission at the following address:

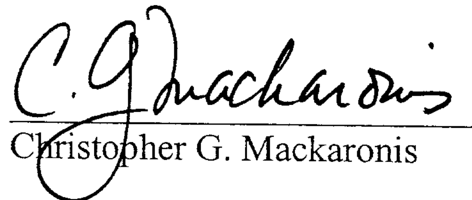
Anthony A. Yang, Esq.
Marleigh D. Dover, Esq.
U.S. Department of Justice
Civil Division
Room 7248
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001



Christopher G. Mackaronis

CERTIFICATIONS

I, Christopher G. Mackaronis, certify that I am a member in good standing of the bar of this Court. I certify that the foregoing Appellants' Opening Brief, exclusive of the table of contents and the table of authorities, contains less than 14,000 words. I further certify that the PDF file is identical to the hard copy of the brief mailed to the Court, has been scanned by Trend Micro Office Scan for viruses and was mailed electronically to the Court this day, December 19, 2005.



Christopher G. Mackaronis

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Case No. 05-4594

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AARP, JACK W. MACMILLAN, FRANK H. SMITH, JR., FRANK A. WHEELER, FRED DOCHAT, GERALD FOWLER, M. ELAINE CLAY,

Plaintiffs-Appellants,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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STEPHEN G. CONSOLE
PA ID No. 36656
CONSOLE LAW OFFICES, LLC
1525 Locust Street, Ninth Fl.
Philadelphia, PA 19102
(215) 545-7676

CHRISTOPHER G. MACKARONIS
BRICKFIELD, BURCHETTE, RITTS AND STONE
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007
(202) 342-0800

LAURIE A. MCCANN
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for Plaintiffs-Appellants

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