No. 05-4594

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AARP, *et al.*

Plaintiffs-Appellants,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant-Appellee.

On Appeal From The United States District Court
For The Eastern District Of Pennsylvania

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE HR POLICY ASSOCIATION, AMERICA'S HEALTH INSURANCE PLANS, THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, WORLDATWORK, THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES, AND THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT and STATEMENT OF FINANCIAL INTEREST

EQUAL EMPLOYMENT ADVISORY COUNCIL

HR POLICY ASSOCIATION

AMERICA'S HEALTH INSURANCE PLANS

AMERICAN BENEFITS COUNCIL

THE ERISA INDUSTRY COMMITTEE

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES

WORLDATWORK

AMERICAN COUNCIL ON EDUCATION

CORPORATE DISCLOSURE STATEMENT and STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Amici Curiae* the Equal Employment Advisory Council, the HR Policy Association, America's Health Insurance Plans, the American Benefits Council, The ERISA Industry Committee, the National Rural Electric Cooperative Association, the Society for Human Resource Management, the College and University Professional Association for Human Resources, WorldatWork, and the American Council on Education make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: None.

4) The instant appeal is not a bankruptcy appeal.

/s/ Ann Elizabeth Reesman

March 1, 2006 Ann Elizabeth Reesman

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The Equal Employment Advisory Council, the HR Policy Association, America's Health Insurance Plans, the American Benefits Council, The ERISA Industry Committee, the National Rural Electric Cooperative Association, the Society for Human Resource Management, the College and University Professional Association for Human Resources, WorldatWork, and the American Council on Education respectfully submit this brief as *amici curiae* with the consent of the parties. The brief urges this Court to affirm the decision below, and thus supports the position of Appellee, U.S. Equal Employment Opportunity Commission.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership now includes more than 330 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and

requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

HR Policy Association (HR Policy) is an organization of the senior human resource executives of more than 260 of the nation's largest private sector employers, collectively employing nearly 13 million Americans, more than 12 percent of the private workforce. HR Policy's principal mission is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the modern workplace. All of HR Policy's member companies provide health care benefits to employees, and a substantial number provide benefits to retirees. HR Policy is very concerned about the increasing numbers of uninsured Americans and is actively pursing private sector solutions to this problem. In terms of public policy solutions, HR Policy views the EEOC rule as a critical element in keeping the problem from growing worse.

America's Health Insurance Plans (AHIP) is the national association representing the private health plan and insurer community. AHIP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to its members. AHIP represents nearly 1,300 member companies that administer or insure benefits, including health, pharmaceutical, long-term care, disability, and supplemental coverage, to more than 200 million Americans. AHIP's member health insurance

plans work in partnership with employers to provide affordable health benefits for Americans during employment and after their retirement.

The American Benefits Council (ABC) is a broad-based, nonprofit trade association founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. ABC's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Its members also include employee benefit plan support organizations, such as actuarial and consulting firms, insurers, banks, investment firms, and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries.

The ERISA Industry Committee (ERIC) is a nonprofit organization representing America's largest private employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. All of ERIC's members do business in more than one state, and many have employees in all fifty states. ERIC frequently participates as *amicus* in cases with the potential for far-reaching effect on employee benefit plan design or administration.

The National Rural Electric Cooperative Association (NRECA) is a not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives that serve over 36 million Americans in 47 states. NRECA provides medical, dental, life, accidental death and dismemberment (AD&D), accident and sickness, and long-term disability programs for over 120,000 current employees and their families, including over 7,000 retirees. NRECA is the primary source of health insurance for the Cooperative community.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

WorldatWork is the leading global not-for-profit association for compensation, benefits, and work-life professionals. The membership of WorldatWork represents more than 90 percent of the Fortune 1000 and constitutes

nearly 25,000 members worldwide. Founded in 1955 as the American Compensation Association, WorldatWork today focuses specifically on the human resources disciplines associated with attracting, motivating and retaining employees.

The College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing over 7,300 human resource professionals at nearly 1,600 colleges and universities across the country. Colleges and universities employ over 2.3 million individuals working in a wide range of occupations.

Founded in 1918, the American Council on Education (ACE) is the nation's unifying voice for higher education. ACE serves as a consensus leader on key higher education issues and seeks to influence public policy through advocacy, research, and program initiatives. By fostering greater collaboration and new partnerships within and outside higher education, ACE helps colleges and universities anticipate and address the challenges of the 21st century and contribute to a stronger nation and a better world. Our members and associates are approximately 1,800 accredited, degree-granting colleges and universities and higher education-related associations, organizations, and corporations.

Amici's members are employers, representatives of employers, or health insurers and plans that work in partnership with employers that are subject to the

Age Discrimination In Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as well as other labor and employment statutes and regulations. *Amici's* members, therefore, have a direct and ongoing interest in the issues presented in this case.

Employers provide health care coverage to millions of retirees and their families nationwide. Of the employers who voluntarily extend group health insurance coverage to retirees, many take Medicare eligibility into consideration when designing their plans. Such plans were accepted and widely regarded as legal under the ADEA until 2000 when this Court concluded that the statute could be read to the contrary. The Equal Employment Opportunity Commission (EEOC) was in the final stages of promulgating a narrow exemption to the ADEA, which would have recognized that employers could continue offering Medicare-coordinated retiree health benefits, when AARP filed the instant action. This exemption is extremely important because without it many of these employers will have no choice but to cut back or eliminate retiree health benefits in order to come into compliance with this Court's decision.

STATEMENT OF THE CASE

Employer-sponsored retiree health care plans provide critically needed health care coverage to some 10 million retirees and their families. *See* U.S. General Accounting Office, *Retiree Health Benefits: Employer-Sponsored*

Benefits May Be Vulnerable to Further Erosion, GAO-01-374 (May 2001), at 1 (hereinafter "2001 GAO Report").[1] Employers are not required by any law to provide retiree health benefits or any health benefits at all. Nor is there any law that mandates "what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (citations omitted). Many employers choose to establish benefit plans for retirees, however, in order to attract and retain good employees, as well as to reward those employees for years of dedicated service.

Of the employers that voluntarily extend group health insurance coverage to retirees, many take Medicare eligibility into consideration when designing their retiree health plans. Coordinating retiree health benefits with Medicare is a long-standing practice. Coverage serves either as a bridge benefit available to early retirees that terminates once the retiree becomes eligible for Medicare or, for those who become eligible for Medicare benefits, as a supplement to Medicare.

For many years, private employers, State and local governments and labor unions widely believed that Medicare-coordinated retiree health plans were legal under the Age Discrimination in Employment Act (ADEA), and with good reason. The legislative history of the Older Workers Benefits Protection Act (OWBPA), which amended the ADEA to cover employee benefits, states that the law's

[1] *Available at* http://www.gao.gov/new.items/d01374.pdf

sponsors intended to allow employers to coordinate retiree health benefits with Medicare without running afoul of the ADEA. For years, employers and labor unions relied on this legislative history in developing and negotiating plan designs.

It was not until 2000 that the legality of coordinating retiree health benefits with Medicare was suddenly called into question. That year, this Court, in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), ruled that because workers automatically qualify for Medicare upon reaching age 65, Medicare eligibility "is a direct proxy for age." *Id*. at 211. Therefore, this Court concluded, an employer who coordinates its retiree health benefits with Medicare violates the ADEA if the result is that the employer provides lesser benefits to older Medicare-eligible retirees than to younger retirees. *Id*. at 216. In this Court's view, the only way an employer could justify providing different benefits to Medicare-eligible retirees would be to meet the "equal benefit or equal cost" safe harbor established in EEOC's regulations. *Id*.

The Equal Employment Opportunity Commission (EEOC), which is responsible both for enforcing the ADEA and developing ADEA policy, participated as *amicus curiae* in the *Erie County* case and urged this Court to adopt this interpretation of the law. Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of the Appellants.[2] The EEOC then

[2] *Available at* 2000 WL 33983611.

adopted the *Erie County* decision as its national enforcement policy, effectively extending the impact of the decision nationwide. U.S. Equal Employment Opportunity Comm'n, *Employee Benefits*, EEOC Compl. Man. (Oct. 3, 2000).[3] Around this same time, the EEOC also launched an aggressive law enforcement effort aimed at bringing employers into compliance with the *Erie County* decision.

This series of events led to disastrous results. Because employers could come into compliance with *Erie County* only by increasing benefits for retirees eligible for Medicare, by reducing benefits for retirees not yet eligible, or by eliminating benefits for *all* retirees, the *Erie County* decision created a strong incentive for employers trying to cope with spiraling health care costs to simply cut back on retiree health benefits.

By 2001, experts in the field of employee benefits were pointing to the *Erie County* decision as a major contributing factor in the further decline of employer-sponsored retiree health benefits nationwide. 2001 GAO Report at 16-17. After hearing from organized labor, state and local governments, employers, benefits experts and others about the damaging consequences of *Erie County*, the EEOC decided to reexamine its national enforcement policy and strategy. In August of 2001, a bi-partisan Commission unanimously voted to rescind the section of the agency's enforcement guidance adopting the *Erie County* decision. U.S. Equal

[3] *Available* at http://www.eeoc.gov/policy/docs/benefits.html

Employment Opportunity Comm'n, *Rescission of Section IV(B) of EEOC Compliance Manual Chapter on "Employee Benefits,"* EEOC Compl. Man. (Aug. 20, 2001).[4]

In July 2003, after a careful look into both the legislative history of the OWBPA and the practical effects of *Erie County*, the agency proposed an exemption to the ADEA for retiree health benefits that are altered, reduced or eliminated when the participant becomes eligible for Medicare health benefits or benefits under a comparable State plan. 68 Fed. Reg. 41,542 (July 14, 2003). In proposing the exemption, the agency acknowledged the key fact that employers have no obligation to provide any retiree health care coverage at all. It also recognized that employers caught between potential ADEA liability and the cost of providing *additional* benefits to avoid ADEA compliance issues may simply choose the easier option of discontinuing the benefits entirely. *Id.* The EEOC also found that the application of the "equal benefit, equal cost" safe harbor in the context of retiree health "would not be practicable." *Id.* at 41,546.

The EEOC's proposed exemption is a narrow one. It applies only in the context of retiree health benefits and does not extend to benefits offered to current employees who also happen to be Medicare-eligible. *Id.* at 41,547. Significantly, the exemption will eliminate the strong incentive the *Erie County* decision created

[4] *Available at* http://www.eeoc.gov/policy/docs/benefits-rescind.html

for employers to reduce or eliminate retiree health benefits and thus promises to help preserve this valuable benefit for future retirees. In April of 2004, the EEOC finalized the proposed rule and was reportedly on the verge of publishing it in the Federal Register when the AARP filed the instant lawsuit.

Judge Anita B. Brody of the U.S. District Court for the Eastern District of Pennsylvania initially granted AARP's motion for summary judgment, denied the EEOC's summary judgment motion, and permanently enjoined the EEOC from publishing or otherwise implementing the regulation. *AARP v. EEOC*, 383 F.Supp.2d 705 (E.D. Pa. 2005) (vacated). Judge Brody later vacated her decision after the U.S. Supreme Court decided the case of *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005), in which the Court ruled that when a statute is ambiguous, an agency's interpretation must be given deference if it is "a reasonable policy choice for the agency to make," even if its interpretation "differs from what the court believes is the best statutory interpretation." *Id*. at 2699 and 2702 (citations and internal quotation omitted). Judge Brody explained that the *Erie County* decision found ambiguity in the statute and also concluded that the EEOC had made a "reasonable policy choice." *AARP v. EEOC*, 390 F. Supp.2d 437, 454 (E.D. Pa. 2005). Judge Brody issued a stay with respect to the permanent injunction pending the resolution of any appeal of the case. AARP appeals Judge Brody's decision.

SUMMARY OF ARGUMENT

Congress did not intend to create a disincentive for employers to continue offering retiree health benefits when it enacted the ADEA in 1967 and amended it in 1990 via the OWBPA. Yet, this has been the practical effect of the *Erie County* decision, which treats the coordination of employer-sponsored retiree health care benefits with Medicare as a violation of the ADEA. Rising costs of health care, together with increases in longevity and changes in accounting rules, have placed employers under ever-increasing pressure to reduce expenditures for benefits such as retiree health. By tying the hands of employers with respect to their ability to control those costs, *Erie County* has added considerably to the pressure to reduce costs by cutting or eliminating benefits.

The ADEA gives the EEOC broad authority to establish reasonable exemptions to the law that are necessary and proper in the public interest. 29 U.S.C. § 628. It is both necessary and proper in the public interest for the EEOC to remove any incentives for employers to reduce or eliminate retiree health benefits resulting from the *Erie County* decision. With the exemption, employers will no longer be incented to reduce or eliminate retiree health benefits in order to come into compliance with the law, and further erosion of these important benefits may be avoided.

The EEOC's narrow exemption for retiree health benefit programs that coordinate with Medicare is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Supreme Court recently held that prior judicial construction of a statute may trump a federal agency's statutory interpretation only if the statute in question is "unambiguous" on its face and "leaves no room for agency discretion." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005). As this Court recognized in *Erie County*, the ADEA does not directly address the legality of Medicare bridge plans. This Court also acknowledged that the statute could be interpreted to permit them. Accordingly, the EEOC was well within its authority to step in and fill statutory gap by crafting the exemption. The agency's exemption is also a "reasonable policy choice for the agency to make" because without it many workers who have yet to retire stand to lose valuable health benefits during their retirement years. *Id*. at 2702 (citation and internal quotation omitted). The EEOC's rulemaking fits squarely within the confines of an agency's discretion under the *Brand X* holding.

Finally, AARP's claims that individuals who are currently in retirement (including the six individual plaintiffs in this case) will immediately lose health coverage upon publication of the exemption are contradicted by current research and experience. Recent employer surveys show that, the vast majority of

companies have no plans to eliminate or significantly reduce current retiree health benefits in direct response to the exemption. Rather, companies trying to control health care costs typically reduce benefits offered to *future* retirees, while grandfathering benefits for current retirees and older workers near retirement.

Consequently, while publication of the exemption is not likely to result in any adverse consequences to the individual plaintiffs in this case, it will remove a disincentive for employers to continue offering health benefits to retirees in the future. It is in the best interest of the public, therefore, that the EEOC be allowed to proceed with the exemption.

ARGUMENT

I. THE EEOC'S PROPOSED EXEMPTION MEETS THE STATUTORY REQUIREMENTS UNDER SECTION 9 OF THE ADEA AND IS NEEDED TO HELP PRESERVE IMPORTANT EMPLOYER-SPONSORED BENEFITS FOR RETIREES

A. The Cost Pressures On Employers Today Make It Necessary And Proper In The Public Interest For The EEOC To Publish An Exemption Under Its Section 9 Authority That Will Stem Further Erosion Of Employer-Sponsored Health Benefits For Retirees

1. The ADEA Gives The EEOC Broad Authority To Establish Reasonable Exemptions To The Law That Are Necessary And Proper In The Public Interest

In Section 9 of the ADEA, Congress granted the EEOC broad authority to "establish such reasonable exemptions to and from any and all provisions of [the Act] as it may find necessary and proper in the public interest." 29 U.S.C. § 628.

The sole limitation on this delegation of authority is that such exemptions must be "reasonable." *Id.* The exemption proposed in this instance is eminently reasonable. In fact, the exemption is absolutely necessary to ensure that ADEA-based concerns do not cause more and more employers to reduce or eliminate health benefits for retirees — an effect Congress plainly did not intend the ADEA to have.

The EEOC conducted an in-depth study of the relationship between the ADEA and employer-sponsored retiree health benefit plans and developed a well-reasoned analysis of the problems posed by an interpretation of the ADEA that prohibits employers from coordinating such plans with Medicare. This careful analysis, coupled with the detailed factual record developed by the EEOC's internal Retiree Health Benefits Task Force, makes unassailable the conclusion that the proposed ADEA exemption is both reasonable and necessary, and within the EEOC's scope of authority.

2. Due To The Soaring Cost Of Health Care, Some Employers Have Had To Reduce Or Eliminate Retiree Health Benefits And More Are Likely To Do So

Although employer-sponsored retiree health plans provide critically needed benefits to millions of retirees, the continued availability of such plans is highly uncertain. The first-hand experience of the employer *amici's* member companies bears out the conclusions of the many scholarly studies and reports cited in the

EEOC's Notice of Proposed Rulemaking, which found that rising costs of health care, together with increases in longevity and changes in accounting rules,[5] have placed employers under ever-increasing pressure to reduce expenditures for benefits such as retiree health care coverage. Strong factual support for this conclusion can be found in a study by the Employment Policy Foundation (EPF), which projects that if current trends continue, the employer share of health benefit costs could increase by over 236 percent, from $3,262 per employee in March 2002 to over $10,946 per employee by the year 2010. Employment Policy Found., *Employer's Share of Health Benefit Costs Could Top $10,000 per Employee by Decade's End* (May 1, 2003). Indeed, employer spending on benefits has outpaced spending on wages in recent years, mainly due to rising health care costs. U.S. Government Accountability Office, *Employee Compensation: Employer Spending on Benefits Has Grown Faster Than Wages, Due Largely to Rising Costs for Health Insurance and Retirement Benefits*, GAO-06-285 (Feb. 2006), at 8, 12.

Likewise, a 2005 nationwide survey of 300 large private-sector employers found that the cost of providing retiree health benefits increased by an estimated

[5] A 1990 change in the accounting rules, commonly referred to as "FAS 106," requires companies to report retiree health benefit liabilities – both future claim payments, as well as actual paid claims – on financial statements. Because the reporting of future benefit claims has a direct (and negative) impact on how a company's financial health is assessed, companies are more likely to reduce or

10.3 percent on average between 2004 and 2005 alone. Henry J. Kaiser Family Found. & Hewitt Assocs. LLC, *Prospects for Retiree Health Benefits as Medicare Prescription Drug Coverage Begins* (Dec. 2005) (hereinafter "2005 Kaiser/Hewitt Survey")[6], at 15. Together, these employers provided health benefits to approximately 5.7 million retirees and their dependent family members at an expected cost of $22.9 billion in 2005. *Id*. at vi and n.7. Despite the improvements in cost-containment made possible by managed-care techniques, national spending on health care surpassed 15% of GDP in 2003 to reach an all time high. National Coalition on Health Care, *Health Insurance Cost* (2004) ("NCHC Report").[7]

As health care costs continue to rise, some employers have had to raise retiree contributions to premiums and the amounts of the insureds' deductibles and co-payments. 2005 Kaiser/Hewitt Survey at 29. Of the companies surveyed in the Kaiser-Hewitt study, for example, 71% increased retiree contributions to premiums between 2004 and 2005, while another 34% increased retiree cost-sharing requirements during this time. *Id*. at 30. Other employers reported having to raise deductibles (24%) or increase retiree out-of-pocket limits (19%). *Id*. And 63% of

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eliminate retiree health benefits as a strategy for coming into compliance with *Erie County*, rather than increase them.

[6] *Available at* http://www.kff.org/medicare/upload/7439.pdf

[7] *Available at* http://www.nchc.org/facts/cost.shtml

the employers surveyed said that their firms had capped contributions to retiree health benefits in at least one of the plans they offer retirees, placing retirees in the position of having to shoulder the costs of medical expenditures in excess of the cap. *Id.* at 17.

In fact, the number of employers who offer any retiree health benefits at all is dwindling. While the percentage of employers with 200 or more employees offering retiree health benefits in 1988 was 66%, that number dropped to just 33% by 2005. *Id*. at v. Unfortunately, for many employers "the most effective way . . . to eliminate the costs associated with . . . retiree health benefit programs is to shut them down." Watson Wyatt Research Report, *Retiree Health Benefits: Time to Resuscitate?* (2002)[8], at 13 (finding that more than 20% of employers surveyed in 2001 completely eliminated retiree health benefits for new hires) (hereinafter "Watson Wyatt Report"). Indeed, 12% of the 300 employers who participated in the 2005 Kaiser/Hewitt Survey terminated all subsidized health benefits for future retirees between 2004 and 2005. 2005 Kaiser/Hewitt Survey at 29.

B. The *Erie County* Decision Forces Employers To Reduce Or Eliminate Benefits In Order To Comply With The Law

The problem with the *Erie County* decision is that, given the rapidly escalating costs of health care, it leaves employers with few options other than to

[8] *Available at* http://www.watsonwyatt.com/research/resrender.asp?id=w-559&page=1

restructure and reduce the benefits provided to retirees, thereby creating yet another incentive for employers to abandon retiree health benefits. An employer can come into compliance with *Erie County* in one of three ways. The employer can: 1) increase benefits for retirees who are eligible for Medicare; 2) reduce benefits for retirees who are not Medicare-eligible; or 3) simply terminate benefits for *all* retirees. In view of the cost pressures on employers, however, few employers are able to *raise* the benefit levels for Medicare-eligible retirees. Their only alternatives, then, are to reduce or eliminate benefits.

The *Erie County* case itself serves as an excellent illustration of its unfortunate effect. When *Erie County* was settled, rather than raise the level of benefits offered to Medicare-eligible retirees, the County simply downgraded its health plan for pre-Medicare retirees. Therefore, the Medicare-eligible retiree plaintiffs were no better off as a result of the *Erie County* lawsuit, while pre-Medicare-eligible retirees ended up with a much less generous health benefits package than they had before.

Those hardest hit by this policy are older workers who are not yet eligible for Medicare and wish to retire, as well as future generations of retirees. Many employers offer retiree health benefits to pre-Medicare retirees as an effective way to "bridge" the gap between retirement and eligibility for Medicare. Employers typically continue these retirees in the same employer plan as active employees.

Without employer-sponsored health benefits, most of these individuals would experience great difficulty obtaining health insurance coverage and many plans available to them may be prohibitively expensive. 2001 GAO Report at 4, 19-24.

This situation only further exacerbates a much larger problem – the growing ranks of the uninsured. People who are retired but not yet eligible for Medicare make up a considerable segment of the uninsured population in this country. In fact, more than *1 million retirees* not yet eligible for Medicare had no health insurance coverage for the entire year in 2002. HR Policy Ass'n, *Leadership Action Plan On The Uninsured* (2004), at 74. This problem may worsen in time. With the aging of the baby-boom generation, it is likely the number and proportion of Americans potentially affected by reductions in employer-sponsored benefits will increase. 2001 GAO Report at 17.

C. The EEOC's Narrow Exemption Permitting Employers To Continue Providing Retiree Health Benefits That Coordinate With Medicare Is Necessary And Proper In The Public Interest

The EEOC correctly concluded that prohibiting employers from coordinating retiree health plans with Medicare would be contrary to the interest of older workers because it would result in a significant decrease, not enhancement, of health care coverage they would receive in retirement. Further supporting the agency's conclusion, experts in the field of employee benefits now widely regard the *Erie County* decision as a major factor in the continuing decline of employer-

sponsored retiree health benefits. A 2001 report by the Employee Benefit Research Institute (EBRI), for example, concluded that in the wake of the *Erie County* decision, "it is unlikely that employers will increase the level of health benefits for Medicare-eligible retirees" and predicted that employers "are likely to cut back on benefits for early retirees or . . . [eliminate] retiree health benefits altogether." Paul Fronstin, *Retiree Health Benefits: Trends and Outlook*, EBRI Issue Brief No. 236 (Aug. 2001), at 14 (hereinafter "EBRI Issue Brief"). Even more recently, a Society for Human Resource Management (SHRM) survey of more than 300 human resources professionals found that of the participants whose firms offer retiree health benefits, 39% responded that their firms would stop providing retiree health care coverage if the law prohibited the coordination of an employer's health care plan with Medicare. SHRM Weekly Online Survey, *Retiree Health Benefits* (Jan. 3, 2006). Even the Government Accountability Office (formerly the General Accounting Office) has identified the *Erie County* decision as one of several factors possibly contributing to the continued erosion of employer-sponsored health benefits for retirees. 2001 GAO Report at 16-17.

The EEOC's narrow exemption is a significant step toward improving an otherwise adverse policy environment that operates to limit the availability of retiree health benefits. By establishing that the ADEA permits employers to coordinate retiree health benefits with Medicare, the exemption is necessary and

proper in the public interest to help counteract the disturbing trends discussed above and preserve this valuable benefit of employment.

II. THE EEOC'S NARROW EXEMPTION IS ENTITLED TO JUDICIAL DEFERENCE UNDER THE *CHEVRON* DOCTRINE

Nothing in the plain language of the ADEA explicitly addresses the question at issue in this case, and the EEOC's narrow exemption is a permissible and reasonable construction of the statute and in the public interest. Accordingly, the exemption must be given judicial deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

In *Chevron*, the Supreme Court set forth a two-part standard to be applied by courts in assessing the validity of an administrative statutory interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (1984) (footnotes omitted). More recently, in *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688

(2005), the Court explained further that "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 2700 (emphasis added). Filling "gaps" in ambiguous statutes, the Court reasoned, "involves difficult policy choices that agencies are better equipped to make than courts." *Id*. at 2699 (citation omitted).

To satisfy the *Chevron* standard, courts first must consider "whether the statute's *plain terms* 'directly addres[s] the precise question at issue.'" *Id*. at 2702 (citation omitted) (emphasis added). If a "statute is ambiguous on the point," the agency's interpretation must be given deference if it is "a reasonable policy choice for the agency to make." *Id.* at 2702 (citation and internal quotation omitted). Moreover, the agency's construction must prevail in such cases, even if it "differs from what the court believes is the best statutory interpretation." *Id*. at 2699 (citation omitted).

As this Court recognized in *Erie County*, the ADEA does not directly address the legality of coordinating retiree health benefits with Medicare. And although this Court took the view in *Erie County* that the best reading of the statute prohibits the practice, it also openly acknowledged that the statute could be interpreted to the contrary. The *Erie County* decision examined at length extensive

legislative history, for example, which supports the long and widely-held view of both business and labor that Congress meant to exempt the practice of coordinating retiree health benefits with Medicare.[9] *Erie County* at 203-08. The decision also acknowledged the possibility that "Congress intended Medicare eligibility to be a 'reasonable factor other than age,'" and, therefore, subject to a safe harbor. *Id*. at 214.

The agency's exemption is also a reasonable policy choice for the agency to make. Without the exemption a great many workers who have not yet retired stand to lose valuable health benefits during their retirement years. In light of what this Court considered an ambiguity in the statute, and given the very valuable benefits at stake, the EEOC's exercise of its Section 9 exemption authority in this case is entitled to judicial deference.

Of course, publication of the exemption would not require the reversal of this Court's decision in *Erie County*. To the contrary, an "agency's decision to construe [a] statute differently from a court does not say that the court's holding was legally wrong." *Brand X* at 2701. Rather, by permitting the agency to move

[9] Indeed, Congress reiterated this view as recently as 2003. The conference report accompanying H.R. I, The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, included the following language: "The conferees reviewed the ADEA and its legislative history and believe the legislative history clearly articulates the intent of Congress that employers should not be prevented from providing voluntary benefits to retirees only until they become eligible to

forward with the exemption, this Court merely recognizes, in accordance with *Chevron* and *Brand X*, the authority granted to EEOC by Congress to exempt from the ADEA's prohibitions the type of practice *Erie County* held unlawful in the absence of such an exemption.

Although the EEOC's rule is entitled to deference under the *Chevron* analysis, we further point out that the agency possesses more than just the authority to interpret the substantive provisions of the ADEA. Indeed, the EEOC has the express authority of Congress to exempt otherwise unlawful employment practices from the ADEA where, as is the case here, such an exemption is reasonable and in the public interest. To forbid the EEOC from the reasonable exercise of this exemption authority would contradict both the express terms of the statute and the will of Congress.

III. THE PUBLIC INTEREST IS NOT SERVED BY DELAYING PUBLICATION OF THE EXEMPTION, AS DELAYS WILL ONLY CAUSE MORE AND MORE OLDER WORKERS TO LOSE HEALTH BENEFITS IN RETIREMENT

Amici are concerned that for every day publication of the EEOC's exemption is delayed, more and more retirees will stand to lose important employer-sponsored health benefits. The ramifications of the *Erie County* decision are still being felt not just in the Third Circuit, but nationwide. Employer *amici's* member companies

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participate in the Medicare program." H.R. Conf. Rep. No. 108-391, at 816 (2003).

conduct business in multiple states across the nation, and they seek to establish uniform, company-wide policies and employee benefit plans that are consistent with the federal employment nondiscrimination laws. This effort is undermined if there is inconsistency and instability in the federal employment laws that apply to employees located at different geographic locations.

Simply put, employers cannot develop retirement programs for their workers across the country if they face age discrimination claims challenging Medicare-coordinated health plans by employees who work at sites located in the Third Circuit. Employers who offer Medicare-coordinated health benefits to retirees are vulnerable to suit elsewhere in the country as well. The increased likelihood that employers will face lawsuits under the ADEA over differences in benefit plans only exacerbates the pressure to control cost by eliminating these programs altogether. Moreover, many employers located in the Third Circuit also operate in other circuits, in many cases all other circuits. These employers operate national plans that are dependent on national uniformity. A decision by this Court, therefore, will have ramifications well beyond its judicial jurisdiction.

Moreover, any attempt to comply with *Erie County* while continuing to offer retiree health benefits would be prohibitively expensive with no promise of success. The *Erie County* decision says an employer could defend itself only by showing compliance with the equal cost/equal benefit safe harbor, which would

require highly factual benefit calculations involving complex issues, such as the comparability and relative "value" of managed care and "point-of-service" benefits like those involved in the *Erie County* case, and without factoring in the value of Medicare benefits. Even if making such a showing were possible, and the *amici* believe that it is not, evaluating benefit plans in this manner would be cost-prohibitive and, as the EEOC correctly concluded, would "not be practicable." NPRM, 68 Fed. Reg. at 41,546.

While some employers might be willing to incur such costs, few would then risk the cost of having to defend against a discrimination charge or lawsuit challenging the employer's calculations. Moreover, each time there is a change in the cost or characteristics of one or more of the employer's health plans, calculations would have to be done all over again, with each plan change subject to challenge. Accordingly, the more cost-effective and rational response to an employer faced with the current state of the law is to either reduce the level of coverage for pre-65 retirees or eliminate coverage for all retirees.

While the EEOC's decision to rescind its enforcement guidance was a positive first step toward fixing these problems, it is not enough. With no regulatory protection, employers are still vulnerable to suit all across the country. The publication of the EEOC's exemption will restore the legal certainty employers need to continue providing these important benefits.

IV. PURELY SPECULATIVE AND UNWARRANTED CONCERNS ABOUT POSSIBLE HARM TO THE INDIVIDUAL PLAINTIFFS IN THIS CASE SHOULD NOT DELAY THIS IMPORTANT RULEMAKING

AARP argues that publication of the EEOC's exemption will prompt employers nationwide to immediately reduce or eliminate health care coverage for Medicare-eligible retirees, thereby causing irreparable harm to the six individual appellants in this case, all of whom are currently in retirement. AARP Opening Brief at 51. AARP's claims, in addition to being entirely speculative, are simply overblown. In fact, current research suggests that the opposite is true and that the individual appellants will likely experience *no change* in their health plans as a result of the exemption's publication.

Employers surveyed by Kaiser/Hewitt in 2004, for example, were specifically asked whether publication of the EEOC's exemption would lead them to make changes to their retiree health benefit plans. The overwhelming response of these employers was that it would not. In fact, the vast majority of surveyed employers (92%) said that they would make absolutely "*no changes* to their retiree health plans as a direct result of the rule." Henry J. Kaiser Family Found. & Hewitt Assocs. LLC, *Current Trends and Future Outlook for Retiree Health Benefits* (Dec. 2004), at 43 (hereinafter "2004 Kaiser/Hewitt Survey") (emphasis added). Only 1% of the companies surveyed said that they would eliminate retiree health benefits for Medicare-eligible retirees. *Id*.

Moreover, first-hand experience of the employer *amicis'* member companies suggests that companies trying to get a handle on health care costs typically alter health benefits offered to *future* retirees — not persons who are *currently* in retirement, like the individual appellants in this case. Many employers cutting back on retiree health benefits grandfather benefits for current retirees, as well as for older workers who are near retirement. Watson Wyatt Report at 13-14. Indeed, as one report found, while some "plans implemented before the mid-1980s expressly stated or implied that health benefits were guaranteed for life . . . many employers that had not made such commitments to current retirees [are] still reluctant to eliminate their plans." *Id*. at 14 (footnote omitted). The Government Accountability Office made a similar finding recently, observing that employers "generally avoided making changes for current retirees rather than for future retirees, who may be in a position to make other arrangements." U.S. Government Accountability Office, *Retiree Health Benefits: Options for Employment-Based Prescription Drug Benefits Under The Medicare Modernization Act*, GAO-05-205 (Feb. 2005), at 26.

These conclusions are supported by the 2004 Kaiser/Hewitt survey, which reported that while 11% of employers thought it either very or somewhat likely that they would terminate coverage for future retirees, only a very small number of employers (1%) predicted that they would eliminate health benefits for current

retirees. 2004 Kaiser/Hewitt Report at 41. In fact, Kaiser/Hewitt concluded that there is "virtually no interest in terminating subsidized benefits for current retirees in 2005." *Id*. at xvi. *See also* EBRI Issue Brief, at 19-20 ("[T]he changes that employers have made to retiree health benefits have not yet had a huge impact on *current* retirees. . . . The changes that employers have made to retiree health benefits will likely have a greater impact on *future* retirees").

AARP's grossly exaggerated claims concerning employer intentions if the exemption is published have had the unfortunate affect of lulling many people (including many of AARP's own members) into the false belief that by blocking publication, employers will then be prohibited from cutting back or eliminating health benefits for retirees in the future. AARP seems to operate under the incorrect assumption that employers otherwise would be legally required to provide health benefits to retirees, and threatens that the challenged exemption, if published, "will allow employers immediately to eliminate health care benefits to retirees age 65 and older." Appellant's Opening Brief at 51.

AARP misses the point. In fact, employers generally *are* free to eliminate retiree health benefits at *any* time — without fear of liability under any law, including the ADEA. Employers are under absolutely no legal obligation to provide health benefits to retirees. And it is this important fact that drives the need

for this exemption. Companies will not offer health insurance benefits to retirees if providing those benefits becomes too costly or subjects them to a spate of lawsuits.

The unfortunate irony in this case is that if AARP succeeds in blocking the publication of the exemption, many of its members who have not yet retired, as well as future generations of retirees, will likely lose these important benefits, while at the same time, the many thousands of other AARP members who are currently enjoying their retirement, including the individual appellants in this case, very likely would have experienced no change to their own benefits if the exemption had been published.

This would be an injustice indeed, and *amici*, as well as many other experts, are quite at a loss as to explain why AARP would want to visit such an injustice upon its own membership. Nonetheless, we ask this Court to put back on track this important rulemaking effort by the EEOC, which will help protect and preserve this important employee benefit for retirees both now and in the future.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that this Court affirm the lower court's decision.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

March 1, 2006

/s/ Ann Elizabeth Reesman
Ann Elizabeth Reesman

CERTIFICATE OF COMPLIANCE

I, Ann Elizabeth Reesman, hereby certify that this BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE HR POLICY ASSOCIATION, AMERICA'S HEALTH INSURANCE PLANS, THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, WORLDATWORK, THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES, AND THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B). This brief is written in Times New Roman 14-point typeface using MS Word 10.0 and contains 6,960 words.

I further certify that the text of the electronic brief in .pdf format and the text of hard copies of this brief are identical and that a virus check was performed using the following virus software: Symantec Anti-Virus Corporate Edition 10.0 (updated March 1, 2006).

March 1, 2006 /s/ Ann Elizabeth Reesman
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March 2006, two (2) true and correct copies of the foregoing brief were served by U.S. first class Mail, postage prepaid, addressed as follows:

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