No. 05-4594

In The 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

BRIEF OF *AMICUS CURIAE,* THE CHAMBER OF COMMERCE OF THE UNITED STATES, IN SUPPORT OF APPELLEE

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INTERESTS OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. Its membership consists of over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. Although many of the country's largest and most visible companies are active members of the Chamber, 96% of its membership is composed of businesses with fewer than 100 employees or organizations that represent such employers. The Chamber has been a voice for the business community for more than ninety years. To fulfill this role, the Chamber frequently files *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

Few issues are of more immediate concern to American business than the cost of health care. The unrestrained growth of health care costs has had a pernicious impact on employers that are struggling to remain competitive in a global marketplace while providing workers and their families with affordable health care coverage.

To meet escalating health care costs, employers have found it necessary to allocate carefully the scarce dollars available for employee benefits. For decades, one important mechanism used by employers to maximize the benefit received by employees, retirees, and their families from employer health care expenditures has

been to "dovetail" or "coordinate" employer-paid retiree health coverage with government-provided Medicare benefits. Specifically, many employers have traditionally provided health coverage to retirees until they become eligible for Medicare benefits, at which point employer-provided coverage ceases or diminishes.

This pervasive practice was universally understood to be lawful until this Court's decision in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001). In that case, the Court decided that this coordination of benefits runs afoul of the Age Discrimination in Employment Act ("ADEA") because it provides different, and less attractive, benefits to those who are eligible for Medicare (the vast majority of whom were aged 65 or older) than for those who are not. Because the Equal Employment Opportunity Commission ("EEOC") subsequently embraced that decision as its enforcement policy, the decision had nationwide ramifications, effectively destabilizing the settled expectations of companies, employees, and retirees across the country.

After a very brief experience attempting to implement the *Erie County* rule, however, the EEOC recognized the unintended, perverse incentives created by that decision (effectively encouraging employers to drop retiree coverage altogether), rescinded its enforcement guidance, and began a search for alternatives in the

public interest. That search ultimately led to the ADEA exemption at issue in this case.

Prompt implementation of that exemption is vitally important to the employer community, to the individuals who work for those employers, and to retired former employees who depend upon employer-sponsored health coverage to care for them until they can obtain Medicare benefits. Without this exemption, employers, which are increasingly finding it difficult to afford adequate benefits for *current* employees and their families, will be faced only with stark and unappealing choices: (a) cut back on benefits provided to *current* workers and their families in order to fund additional *retiree* health benefits who are already Medicare-eligible; or (b) reduce or eliminate retiree coverage altogether. Plaintiff AARP insists that there is a fourth alternative — leave matters as they are, and expect that employers will respond by spending more on benefits on everyone — but, as the EEOC has recognized, that is simply an unrealistic, even naïve, suggestion. Because employers are not compelled to provide these benefits *at all*, a rule that makes it far more expensive to provide these benefits will simply, and inevitably, accelerate the rate at which employers cancel their retiree benefits programs altogether.

In this brief, the Chamber seeks to assist the Court by highlighting the conundrum facing employers that seek to provide retiree coverage, a viewpoint

that neither the Plaintiffs nor the Government can provide. All parties have consented to the filing of this brief *amicus curiae*.

STATEMENT OF THE CASE

1. Employer-provided retiree health benefits are particularly important to "early" retirees. Employer-sponsored retiree health care plans provide health care coverage to approximately 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 (GAO Report) (App. 487). Employers are not required by law to provide this coverage, but traditionally have found that offering these benefits can help them attract and retain incumbent employees and reward former employees upon retirement for their years of committed service.

These benefits are particularly valuable to those who have not yet become Medicare eligible (typically, but not exclusively, relatively younger individuals) because they often find it difficult or impossible to find or afford adequate coverage to carry them until they do become Medicare eligible. GAO Report at 20-24. Accordingly, most employers that voluntarily provide their retirees with group health insurance coverage have traditionally taken Medicare eligibility into account either by (1) offering health coverage only as a "bridge" benefit that terminates once the retiree becomes Medicare-eligible, or (2) providing full

coverage until the retiree becomes Medicare-eligible, and thereafter a less generous plan that serves as a supplement to Medicare benefits.

Until this Court's decision in *Erie County*, no court, trial or appellate, had ever questioned the legality of this pervasive practice. For decades, and without meaningful challenge, employers have used this "coordination" of benefits to obtain the greatest "bang" for their benefit dollars, unions have negotiated for these arrangements to maximize the benefits received by all constituents, and retirees have depended on these arrangements to provide them with the best available coverage at the time they need it most.

2. *Erie County* undoes years of health benefits planning. These settled expectations collapsed in the wake of *Erie County,* in which a divided panel of this Court held that the practice of coordinating retiree health benefits with Medicare generally violates the ADEA. *Id.* at 216. The *Erie County* panel held that an employer could justify providing benefits to retirees who are eligible for Medicare different from those provided to pre-Medicare eligible retirees only by meeting the "equal benefit or equal cost" safe harbor established in Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), *i.e.*, by showing either (1) that the benefits it provided to its 65-and-over retirees (factoring in Medicare) were equal to or better in quality than those offered to their younger counterparts, or (2) that the employer

spent the same amount buying health insurance for each retiree, regardless of quality, *without* considering the value of the Medicare benefit. *Id.*

Although the *Erie County* decision remains, to this day, the *only* federal court decision to reach this conclusion, its impact on employers nationwide was profound. Shortly after the decision, the EEOC embraced its rationale as the Agency's enforcement policy, extending the reach of the decision far beyond the boundaries of this Circuit.

3. Congress has repeatedly and expressly acknowledged and approved of benefits coordination. Although no party has suggested that the Court revisit *Erie County*,[1] it is important to understand the tenuous ground on which that decision rested to appreciate (a) the wisdom inherent in the EEOC's subsequent decision to promulgate the exemption at issue in this case — *i.e.*, that the result of

[1] The *Erie County* panel rejected out of hand the employer's claim that Medicare eligibility was a "reasonable factor other than age" and thus lawful under 29 U.S.C. § 623(f)(1). *See Erie County*, 220 F.3d at 213-14. It did so because, the panel observed, "Medicare eligibility does not merely correlate to age, as does years of service. Rather, . . . Medicare eligibility follows ineluctably upon attaining age 65." *Id.* at 211 (internal citations omitted). This statement is inaccurate. According to the AARP's own website, Medicare covers 6 million people *under* the age of 65. *See* www.aarp.org/research/medicare/eligibility/the_medicare_program_a_brief_overview.html. Even for those 65 and older, Medicare is available only to citizens or permanent residents of the United States who have worked for at least 10 years in Medicare-covered employment. *See* http://www.medicare.gov/MedicareEligibility/home.asp?dest=NAV%7CHome%7CGeneralEnrollment&version=default&browser=Firefox%7C1%7CWinXP&language=English. Thus, while Medicare eligibility is unquestionably correlated with age, it is not, as the *Erie County* panel observed, a proxy for age. Under *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), and the Supreme Court's recent decision in *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536 (2005), an employer's decision to vary benefits on this ground is both reasonable and lawful. This issue was not raised below, or in the Government's brief on appeal, and is therefore not addressed further in this brief.

the exemption will be consistent with Congressional design — and (b) the undeserved jeopardy employers face in the absence of that exemption.

The *Erie County* decision took a strange, twisting road. The Court first concluded that individuals no longer employed by the Erie County school system were nonetheless "employees" for purposes of the ADEA's general proscription against age discrimination in "employee benefits." Perhaps recognizing the sweep of such a holding, the Court then extended to retiree medical plans the "equal cost/equal benefit" safe harbor provided in §4(f)(2)(B)(i). The panel acknowledged that the safe harbor applies, by its own terms, only to benefits provided to "older *workers*," not to "former workers" or even to "individuals" — indeed, that Congress had expressly *changed* the provision *from* applying to "individuals" *to* "workers" — but the panel claimed to be baffled as to why Congress might have done such a thing. *Erie County* at 206.

In fact, Congress could hardly have been clearer in stating why it made this change. Until 1990, the ADEA did not prohibit discrimination against older workers as to the terms of *bona fide* employee benefit plans at all.[2] Congress acted in 1990 to change this fact, by passing the Older Worker Benefit Protection Act or

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[2] *See Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 176-77 (1989) (ADEA's prohibition on discrimination with respect to "compensation, terms, conditions, or privileges of employment" in Section 4(a) did not prohibit discrimination regarding employee benefits such as health insurance unless a plan was a "subterfuge to evade the purposes of the Act.").

"OWBPA." After the Senate Committee on Labor and Human Resources issued its report on S. 1511 (which would become the OWBPA), the Senators debated whether the bill, as proposed, would *unintentionally* prohibit coordination of retiree benefits with Medicare. Senator Grassley noted on the record the concerns he had about the bill:

> Some companies do provide health insurance coverage for retirees, but cease such insurance coverage when the retiree becomes eligible for Medicare. Thus, such companies would be spending more for their younger retirees, who are not eligible for Medicare, than for their older retirees, who are receiving Medicare. If the bill is enacted, would such a company be in violation of the law? Is that the sponsors [sic] intention? If not, what provision in the bill protects employers in such circumstances?

136 Cong. Rec. S13,297-98 (daily ed. Sept. 18, 1990). Those concerns were addressed in the final bill. To do so, the bill's managers proposed to "[c]hang[e] the word 'individual' in section 4(f)(2)(B) [the equal cost, equal benefit standard] back to 'worker.'" 136 Cong. Rec. S13,599 (daily ed. Sept. 24, 1990). In their Statement of Managers[3] accompanying the legislation, the bill Managers explained, in the following passage titled "Retiree Health":

[3] While Statements of Managers do not amount to law, in that they are not sent to the President for signature, they nonetheless provide a particularly useful glimpse into legislative intent because they are attached to the bill, which receives an up-or-down vote in both Houses. *See, e.g., Advanta Corp. Securities Litigation*, 180 F.3d 525, 534 (3d Cir. 1999) (citing Statement of Managers at length as proof of legislative intent). A "Statement of Managers" is typically part of a conference report that accompanies the final version of a particular bill, after amendments have been made. *See* "How Our Laws are Made," Charles W. Johnson, Parliamentarian, U.S. House

> Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. *These practices are not prohibited by this substitute.*

136 Cong. Rec. S13,597 (daily ed. Sept. 24, 1990) (emphasis added).

After the Statement of Managers was entered into the record, Senator Hatch, one of the bill's architects, also stated that

> Many employers continue health benefits for persons who retire before they are eligible for Medicare and/or continue certain benefits that are supplemental to Medicare.

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of Representatives (rev. June 20, 2003) at 46-47; *also located at* Library of Congress website, http://thomas.loc.gov/home/lawsmade.toc.html. When the conferees — by majority vote of each group — have reached complete agreement, they submit the "report," which contains a statement that "must be sufficiently detailed and explicit to inform Congress of the effects of the report on the matters committed to conference." *Id.* at 47. The report is not subject to amendment in either body and must be accepted or rejected as an entirety. When the Senate agrees to the report, its managers are thereby discharged and it then delivers the original papers to the House with a message advising that body of its action. *Id.* When the OWBPA was passed, due to time exigencies, no conference was called, but the House adopted the Senate Statement of Managers in its entirety. *See* 136 Cong. Rec. at H8619-H8620 (Oct. 2, 1990) ("Today we are asking members of the House to accept the bill as it passed in the Senate. *We are also adopting the statement of managers on the part of the Senate.*") (emphasis added).

> This is a positive practice which helps provide important protections for retirees. *This compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages.*

136 Cong. Rec. S13,600 (daily ed. Sept. 24, 1990) (emphasis added).

When the Senate passed S. 1511, it was then sent to the House of Representatives. *See* 136 Cong. Rec. H8614 (daily ed. Oct. 2, 1990). In the House, Representative Clay introduced into the record an "Explanation of S. 1511," which included the Senate Statement of Managers ("Retiree Health" section included), and asked members of the House to accept the bill, and the Statement of Managers, as it passed in the Senate. 136 Cong. Rec. H8619-H8620 (daily ed. Oct. 2, 1990). After Representative Clay introduced the Statement of Managers, Representative Goodling introduced a summary of the "improvements" made in the final version of S. 1511. This summary explained that "[t]he bill also clarified that employers are *not required* to provide equivalent retiree health coverage to Medicare eligible and pre-Medicare eligible retirees." 136 Cong. Rec. H8621 (daily ed. Oct. 2, 1990) (emphasis added).

Finally if there were any doubt as to what Congress intended, there is more recent evidence — unavailable to the *Erie County* panel — that makes that intent unmistakable. *See, e.g.*, U.S. House of Representatives, Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce,

Hearing, Apr. 28, 2005, 109th Congress, Serial No. 109-12 (2005) (available at http://www.access.gpo.gov/congress/house) (Rep. Andrews, N.J. at p.4: *Erie County* "misunderstands the legislative history that led to enactment of this law.") (Rep. Kline, M.N. at p. 30: The *Erie County* Court "clearly, clearly avoided the congressional intent in the law. Another way of putting that is they overreached and created new policy that was never intended by the crafters of the legislation or the President who signed it."); *see also* Conference Report for the Medicare Prescription Drug Improvement and Modernization Act of 2003, P.L. 108-173, 117 Stat. 2066 (2003), H.R. Rep. No. 108-391 (2003) (Conf. Rep.), at 365 (emphasis added) ("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 participate in the Medicare program.*").

4. The implications of *Erie County* become clear. The EEOC adopted the holding in *Erie County* as its enforcement policy in October of 2000, but was soon met with dissent from employers in the public and private sectors, unions, and retirees for whom the rule was proving to have draconian, unintended consequences. As a result, the EEOC abandoned the *Erie County* rule in August 2001, less than a year after it had been adopted, *Rescission of Section IV(B) of EEOC Compliance Manual Chapter on "Employee Benefits,"* EEOC Compl. Man.,

No. 915.003 (Aug. 20, 2001), and, in July 2003, it published a Notice of Proposed Rulemaking (NPRM) in the Federal Register proposing an exemption to the ADEA for retiree health benefits that are altered, reduced or eliminated when the retiree becomes eligible for Medicare health benefits or benefits under a comparable State plan. 68 Fed. Reg. 41,542 (July 14, 2003).

The administrative record made plain some unpleasant but inescapable facts. By 2001, employee benefits experts were citing the *Erie County* decision as a major contributing factor in the erosion of employer-sponsored retiree health benefits. This consequence of *Erie County* was undoubtedly unintended, but it cannot be ignored. A report by the General Accounting Office after the *Erie County* decision predicted dire consequences from the decision — employers were going to have to "make changes to their retiree health benefits . . . [that] could include eliminating retiree health benefits [or] reducing benefits to the lowest common level for all retirees." GAO Report at 17. The Employee Benefit Research Institute concluded that it was "unlikely that employers will increase the level of health benefits for Medicare-eligible retirees" in order to comply with the decision. Paul Fronstin, *Retiree Health Benefits: Trends and Outlook*, EBRI Issue Brief No. 236 (Aug. 2001) at 14. Rather, employers "are likely to cut back on benefits for early retirees or … [eliminate] retiree health benefits altogether." *Id.*

As explained in detail in the Government's brief in this case, the Agency received comments from a broad spectrum of interested parties. Employers and employer groups of every size and labor supported the EEOC's preliminary view that an exemption was needed to avoid the adverse consequences for business, labor, and retirees emanating from *Erie County*. Although there were contrary comments, none of those opposing the exemption disputed the material facts relied upon by the EEOC regarding the nature and extent of the problem, and none — including AARP — offered solutions for the dilemma beyond asking the EEOC to leave things as they were.

ARGUMENT

I. SECTION 9 OF THE ADEA AUTHORIZES THE EEOC TO EXEMPT COORDINATION OF RETIREE HEALTH BENEFITS

Appellants' brief suggests that this case raises difficult issues of public policy as well as administrative and constitutional law. In reality, the case presents only three questions, and all three are answered easily by reference to controlling authority from the Supreme Court and this Court: (1) whether the EEOC has the statutory authority to promulgate a narrowly targeted exemption to the ADEA's broad prohibition of age discrimination; (2) whether the exemption promulgated in this case meets the intelligible standard specified by Congress for such exemptions; and (3) whether the exemption authority granted by Congress to the EEOC is an

unconstitutional delegation of its legislative authority.[4] The Chamber addresses each point briefly below.

A. The Language of the ADEA Unambiguously Grants the EEOC Exemption Authority

AARP's brief rests on this simplistic syllogism: (a) Congress passed the ADEA to outlaw age discrimination in employment; (b) the exemption at issue in this case allows discrimination to occur in certain defined circumstances; therefore (c) the exemption contravenes Congress' intent and exceeds the scope of the Agency's authority under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

Congress, however, had no *single*, unqualified purpose in enacting the ADEA. The statute, read as a whole, evinces a great many different purposes.[5] Congress sought to promote the employment of older workers and "prohibit arbitrary age discrimination," 29 U.S.C. § 621(b), but it also understood that an absolute rule prohibiting all distinctions made on the basis of age would carry with it unacceptable adverse consequences. Congress was able to anticipate some of the potential problem areas, and thus explicitly adopted exemptions from liability for

[4] Plaintiffs also raise a handful of procedural issues relating to the EEOC's administrative process. Those issues are adequately addressed in the Government's brief and are not discussed in this brief.

[5] "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

bona fide seniority systems, bona fide employee benefit plans, certain mandatory retirement policies, and other "reasonable factors other than age." *See* 29 U.S.C. §§ 623(f)(1) – (f)(2), (j), (l).

Congress also understood, however, that it could not anticipate every circumstance in which a broad, unqualified prohibition of discrimination might prove problematic, and so it explicitly and unambiguously authorized administratively promulgated exemptions where "necessary" and in "the public interest." 29 U.S.C. § 628. Indeed, when he wrote to Congress transmitting the draft bill that would become the ADEA to Congress, Secretary of Labor Willard Wirtz[6] singled out for emphasis the importance of this exemption provision. *See* Jan. 23, 1967 Letter, reprinted in 113 Cong. Rec. 1,377 (Jan. 24, 1967) ("[T]he [Act's] Secretary of Labor [later, the EEOC] would be given authority to establish reasonable exemptions as he finds necessary and proper in the public interest."). Likewise, Senator Yarborough, who introduced the bill in the Senate, stressed that "[t]he prohibitions are not directed to all instances of differentiation on the basis of

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[6] In 1964, after contemplating whether it should add "age" to Title VII of the Civil Rights Act of 1964, Congress concluded that it needed more information about age discrimination. Accordingly, it directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age…." Pub. L. No. 88-352, § 715 (1964). After studying the issue at length, Secretary Wirtz delivered his report a year later in June 1965. *See* W. Wirtz, *The Older American Worker: Age Discrimination in Employment,* Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (June 1965). The Supreme Court has recently underscored the importance of Sec. Wirth's comments regarding the proper interpretation of the ADEA. *Smith v. City of Jackson*, 125 S.Ct. at 1540.

age: that is, valid differentiations could be made in the case of a bona fide occupational qualification necessary to the normal operation of a business. The bill also permits other reasonable differentiations not based on age alone, *and the Secretary of Labor would have authority to set up other reasonable exceptions, if he finds them necessary in the public interest.*" 113 Cong. Rec. 2467 (Feb. 7, 1967) (emphasis added).

Thus, Congress expressly gave the EEOC authority to establish "reasonable exemptions *to and from any or all provisions* of this chapter as it may find necessary and proper in the public interest." 29 U.S.C. § 628 (emphasis added).[7] While an EEOC *regulation* that purports to construe existing language in the ADEA might properly be examined to determine whether it is "consistent" with the Act's general rule against discrimination, to "*exempt*" is, by definition, "to relieve, excuse or set free from a duty or service imposed upon the general class to which the individual exempted belongs." *American Paper Institute, Inc. v. American Elec. Power Service Corp.*, 461 U.S. 402, 421 (1983) (citing *Black's Law Dictionary* 513 (5th ed. 1979)). When it gave the EEOC the authority to exempt certain specific kinds of conduct from the ADEA's broad prohibitions, it

[7] Despite the lengthy Congressional debates prior to passage of the OWBPA in 1990, Congress did not contemplate a change to the exemption authority it delegated the ADEA in Section 9 of the original Act. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) ("[t]he fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.").

fully expected that the EEOC would use it to narrow the scope of the statute's broad prohibitions in certain instances. By acting consistently with its authority to promulgate an "exemption" from liability, the EEOC acted to fulfill Congress' design, not to frustrate it as Plaintiffs suggest.

II. THE PROPOSED EXEMPTION IS REASONABLE AND IN THE PUBLIC INTEREST, AND THE EEOC'S INTERPRETATION OF ITS EXEMPTION AUTHORITY IS ENTITLED TO *CHEVRON* DEFERENCE

A. The Exemption is Unquestionably Reasonable and In the Public Interest

The EEOC's authority to promulgate exemptions is not unlimited. To be valid, such an exemption must be reasonable, "necessary and proper in the public interest." *See* 29 U.S.C. § 628; 29 C.F.R. § 1627.15. Thus, the EEOC began the exemption process by undertaking an in-depth study of the issue to discern the public interest. *See* EEOC Br. at 13-19. The EEOC's research was supported by an alarming study by the Government Accounting Office about the rapidly diminishing availability of these benefits. Among the primary factors causing this crisis, the study cited "a recent circuit court ruling [*i.e.*, *Erie County*] allowing claims of violations of federal age discrimination law when employers make distinctions in health benefits they offer retirees on the basis of Medicare eligibility." *Id.* at 3, 16. The EEOC's research was also supplemented by numerous other benefits studies, and by the detailed factual record compiled by its

Retiree Health Benefits Task Force. This research definitively demonstrated that the proposed exemption is not only reasonable, it is unquestionably necessary and in the public interest.

Retiree health care costs currently represent 29% of the total costs of employer-sponsored health coverage. *See* Henry J. Kaiser Family Found. & Hewitt Assocs., *Prospects for Retiree Health Benefits as Medicare Prescription Drug Coverage Begins* (Dec. 2005) at 15 ("Kaiser & Hewitt 2005 Survey"). In recent years, the cost of providing health benefits — for retirees and employees alike — has become a significant and growing concern for employers. Accelerated by increases in longevity, improvements in available medical treatments, and changes in accounting rules, the rate of increase in costs is staggering. Of large private-sector employers surveyed in 2004, the total cost of providing health benefits for both pre-65 and 65-and-over retirees and their dependents was an estimated $20.8 billion, up from $15.5 billion in 2003. *See* Kaiser & Hewitt 2005 Survey at 15; *see also* Henry J. Kaiser Family Found. & Hewitt Assocs., *Current Trends and Future Outlook for Retiree Health Benefits* (Dec. 2004) at vii. Projections estimate that the total of retiree health care costs for employers in 2005 was $22.9 billion. *See* Kaiser & Hewitt 2005 Survey at 15. According to employers surveyed, the total cost of providing retiree health benefits increased by an average of 10.3 % between 2004 and 2005. *Id.* at 15-16.

Not surprisingly, in light of these continually rising costs, the number of employers offering retiree benefits has been declining. For example, between 1988 and 2005, the share of employers with 200 or more employees offering retiree benefits declined dramatically — from 66 % to 33 %. *See* The Henry J. Kaiser Family Found. & Health Research & Educational Trust, *Employer Health Benefits: 2005 Summary of Findings* (Oct. 2005) at 6-7. To alleviate these cost pressures, more and more employers have been forced to impose caps on their future financial obligations for retiree health benefits, triggering increases in the contributions retirees must make to premiums. *See* Kaiser & Hewitt 2005 Survey at 15.

Unfortunately, the most effective way to eliminate costs associated with retiree health benefit programs is simply "to shut them down." Watson Wyatt Research Report, *Retiree Health Benefits: Time to Resuscitate?* (2002) at 13 (reporting that more than 20% of employers surveyed in 2001 eliminated retiree health benefits for new hires). Surveys taken in the wake of *Erie County* demonstrate that the erosion of retiree benefits is not only hypothesized — it is a concrete concern. An annual national survey shows that the percentage of employers with 500 or more employees that currently expect to continue offering health benefits to future early retirees declined from 46 % in 1993 to 28 % in 2004, while the portion expecting to offer such benefits to Medicare-eligible retirees

declined from 40% in 1993 to 20% in 2004. Paul Fronstin, *The Impact of the Erosion of Retiree Benefits on Workers and Retirees*, EBRI Issue Brief No. 279 (March 2005) at 4, 7 (figure 4) (citing Mercer Human Resources Consulting, *National Survey of Employer-Sponsored Health Plans*, 2004).

Health care for "early" retirees poses an especially thorny dilemma. Today, an estimated 3.6 million early retirees between the ages of 55 and 64 receive health care from a former employer or union. *See* Kaiser & Hewitt 2005 Survey at v. These retirees are particularly dependent on employer-sponsored coverage because "it is often difficult if not impossible [for them] to find comparable, affordable coverage in the individual market." *Id.* In the absence of the EEOC's exemption, these retirees will come out the biggest losers.

B. Alternative Equal Cost and Equal Benefit Tests are Wholly Unworkable

The *Erie County* panel suggested that employers rely on the equal benefit/ equal cost defense to shield plans that coordinate benefits with Medicare eligibility. As the EEOC concluded, that defense is simply impossible or impracticable for employers to apply, and is not the answer.

1. The Equal Benefit Test. Plaintiffs argue that the "equal benefit" test is satisfied so long as the benefits a retiree over 65 receives are "comparable" — as distinct from "equal" — to those received by Medicare-eligible retirees (App. Br. at 49-50), but they fail to reconcile "comparability" with the language of the

statute, and they offer no discussion, no suggestions, and no analysis as to the meaning of "comparable." Indeed, the AARP has *never* provided any suggestion as to how the equal benefit test could practicably be applied if employers were permitted to factor Medicare benefits into the equation, either in its brief, or in the comments it submitted in response to the EEOC's Notice of Proposed Rulemaking (App. 472-485).

The benefits provided by both private insurers and Medicare change continuously. Procedures that were "experimental" cease to be so classified, drugs move on to and off of plan formularies, generic drugs become available, old drugs become approved for (or disapproved for) alternative uses. Doctors that were associated with a particular insurance plan or with Medicare discontinue their participation and others join up. Employers could not possibly be expected to continually monitor these changes and calibrate its pre- and post-Medicare offerings to account for the incalculable number of changes that occur over time.

These problems have been exacerbated by the addition of prescription drug coverage under Medicare. In many localities, there are 40 or more available plans, each with its own formulary, its own rules regarding co-payments, and its own list of allied pharmacies. Are plans "equal" (or even "comparable") if they do not make drugs available at the same pharmacy? Are they "equal" if only generic

versions of a particular drug are available under a given plan, but brand name versions are available under the other?

Moreover, the subjective nature of benefits involved precludes any proof of "equality." (App. 504). For example, is greater choice in providers (PPO v. HMO) a benefit that must somehow be matched, even if benefits received are the same? Is some nursing home care superior to other forms of extended visit care? As is evident from these examples, factoring Medicare benefits into the equal benefit test is simply unworkable as an alternative to the EEOC's exemption.

2. The Equal Cost Test. As it has explained, the EEOC also evaluated alternative proposals that would have allowed employers to take the cost of Medicare into account when assessing whether they satisfied the equal cost test. The threshold question is: "cost to whom?" As the EEOC concluded, it would be effectively impossible to consider the Medicare tax obligation of the employer from whom the individual retired, because it would not tell nearly the whole story; most retirees have been employed by multiple employers over the years, and employer FICA contributions are paid into a general Medicare fund that is not employee-specific. (App. 504).

Neither would it be practicable to take into account the "cost" to the government of providing Medicare to any given individual. Retirees' needs differ dramatically by individual based on a host of variables, including, but not limited

to, their current health, their geographic location, and the availability of providers in their area. Is an employer to predict in advance how many times a retiree will need to visit a specialist outside of his or her geographic location and predict how much Medicare will cover for each of these necessary health costs?

Moreover, as the EEOC pointed out in its Notice of Proposed Rulemaking, the government's cost in providing Medicare services does not reflect what similar benefits would cost an employer in the marketplace. (App. 504). To calculate the amount it should expend to supplement Medicare so that the total costs expended (employer + Medicare) equal what it spends on pre-Medicare eligible retirees, *and to do so each year*, would not only be cost prohibitive for many, if not all employers, it would be an exercise in futility.

Finally, as the EEOC learned when it consulted with the American Academy of Actuaries during the rulemaking process (App. 562-564), there are many complications surrounding an employer's own valuation of the costs it expends. For small employers with few retirees, actuarial credibility in establishing plan costs is an issue because often small plans rely only on rate manuals and other imprecise methods rather than actual plan claims experience. The potential for variations in retiree cost-sharing could also make testing exceedingly difficult. Additionally, many employers offer several plans from which a retiree can choose — would all combinations of plans need to be tested, or would an employer pass if

one combination meets the cost test? (App. 563.) The EEOC considered these alternatives to an exemption, but properly rejected them as unworkable.

III. THE AUTHORITY CONGRESS GRANTED THE EEOC UNDER SECTION 9 IS CONSTITUTIONAL

Finally, Plaintiffs claim that 29 U.S.C. § 628 is unconstitutional on separation-of-powers grounds because it delegates legislative power to the EEOC. The Constitution vests all of the nation's legislative powers in Congress. *See* U.S. Const., art. I, § 1. The non-delegation doctrine is "rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). But "the separation-of-powers principle, and the non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate branches." *Mistretta*, 488 U.S. at 372. "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or legislative powers." *Touby v. United States*, 500 U.S. 160, 165 (1991). So long as Congress lays down an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta*,

488 U.S. at 372 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)).[8]

The Supreme Court has not upheld a constitutional challenge under the non-delegation doctrine since 1935. Indeed, "[i]n the [entire] history of the Court [it has] found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *See, e.g.*, *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 474 (2001), *citing Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). "In short, [the Supreme Court has] 'almost never felt [itself] qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman*, 531 U.S. at 474-75 (citations omitted).

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[8] The AARP relies heavily on *Clinton v. City of New York*, 524 U.S. 417, 438 (1998), for the proposition that Section 9 may amount to an impermissible "repeal" of a portion of the ADEA. This reliance is misplaced. In *Clinton*, the Court invalidated the Line Item Veto Act of 1996, which had given the President the authority to "cancel in whole" certain items of federal spending. Although the parties and *amici* in *Clinton* extensively briefed the question of whether the Line Item Veto violated the non-delegation doctrine, the Court found it unnecessary to reach the question, deciding that the statute was unconstitutional because it violated the Presentment Clause (Article I, Section 7). *Clinton*, 524 U.S. at 436-47. Only three justices reached the non-delegation question; all three would have held that the statute was constitutional under that doctrine. *Id.*. at 466-69 (Scalia, J. concurring in part and dissenting in part); *id.* at 484-96 (Breyer, J. dissenting).

More to the point, the Supreme Court has, on more than one occasion, approved delegations to administrative agencies tied to the same "public interest" standard at issue here. *See Whitman,* 531 U.S. at 474 (citing *National Broadcasting Co. v. United States,* 319 U.S. 190, 225-226 (1943) (Federal Communications Commission's power to regulate airwaves) and *New York Central Securities Corp. v. United States,* 287 U.S. 12, 24-25 (1932) (Interstate Commerce Commission's power to approve railroad consolidations).[9] *National Broadcasting*, cited favorably by the Supreme Court just recently in *Whitman*, explained that the "public interest, convenience or necessity" criterion "is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." *National Broadcasting,* 319 U.S. at 216 (citations omitted).[10]

[9] Neither is the ADEA unique in the breadth of its delegation. For example, under the Telecommunications Act of 1996, Congress gave the FCC broad authority to "forbear" from applying "any regulation or any provision of [the] Act" where the FCC determines that it was not necessary to assure just, reasonable, nondiscriminatory charges or otherwise to protect consumers and further determined that forbearance was "consistent with the public interest." 47 U.S.C. § 160(a) (emphasis added). This forbearance authority is strikingly similar to the EEOC's Section 9 exemption authority, yet it has never been questioned. At least three members of the Supreme Court have noted the FCC's forbearance authority without suggesting that the Telecommunications Act violates the nondelegation doctrine. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services,* __ U.S. __, 125 S. Ct. 2688, 2717 (2005) (Scalia, J., dissenting, joined by Souter, J. and Ginsburg, J.) (suggesting that the statutory criteria for forbearance, "necessary for the protection of consumers," and "consistent with the public interest" should have been considered by the FCC as a means to justify its construction of "telecommunications service.").

[10] Numerous courts, including the Supreme Court, have cited Section 9 without ever questioning its constitutionality. *See, e.g., Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 356 (1985) ("The Act ... empowers the Equal Employment Opportunity Commission (EEOC) to ... establish general exemptions from the ADEA if it finds them to be reasonable and 'necessary and proper in the public interest.'"); *Rand v. CF Indus., Inc.*, 797 F. Supp. 643, 645 (N.D. Ill.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed, though, as explained by the EEOC and expanded upon above, for slightly different reasons than those set forth by the district court. *See, e.g., Freedom Card, Inc. v. JPMorgan Chase & Co.*, 432 F.3d 463, 474 (3d Cir. 2005) ("[I]t is a long-established principle of appellate review, that we may affirm a correct decision of the district court on grounds other than those relied upon by the district court.") (internal quotations omitted).

Respectfully submitted,

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1992) ("Congress delegated to the Equal Employment Opportunity Commission the power to 'establish such reasonable exemptions … as it may find necessary and proper in the public interest.' … These provisions demonstrate that Congress did contemplate and act upon a perceived need for exempting certain types of employment relationships … from the coverage of the statute."); *Quinn v. New York State Electric and Gas Corp.*, 569 F. Supp. 655, 660 n.3 (N.D.N.Y. 1983) ("The ADEA does contain an explicit delegation of rulemaking authority to the [EEOC], including the authority to establish exemptions from the Act … [If the EEOC had] promulgate[d] the exemption … pursuant to 29 U.S.C. § 628 … the rule would be entitled to greater deference."); *Kodish v. United Airlines, Inc.*, 463 F. Supp. 1245, 1249 (D. Colo. 1979)("[U]nder 29 U.S.C. § 628 the [EEOC] is empowered to establish exemptions from any provision of the Age Discrimination Act.").

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Barbara Berish Brown is a member of the Bar of this Court. Neal D. Mollen and Carson H. Sullivan have applications for admission pending with the Bar of this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief complies with the type-volume limitation in Rule 32(a)(7)(B) as follows: the type face is Times New Roman, proportional spacing, fourteen-point font (11 characters per inch), and the number of words in this brief is 6,923.

CERTIFICATE OF E-BRIEF COMPLIANCE

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: McAfee Virus Scan Enterprise v.8.0I (updated March 3, 2006).

/s/ Barbara Berish Brown

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 2006, I caused to be sent via overnight courier one (1) original and nine (9) copies of the foregoing Brief of Amicus Curiae in Support of Appellee to this Court at the following address:

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