CASE NO. 05-4594

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellants,

V.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,

Defendant-Appellee.

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

APPELLANTS' REPLY BRIEF

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Appellants AARP, Jack W. MacMillan, Frank H. Smith, Jr., Frank A. Wheeler, Fred Dochat, Gerald Fowler and M. Elaine Clay, by their counsel and pursuant to Federal Rule of Appellate Procedure 28(c), hereby reply to the arguments presented by Defendant-Appellee Equal Employment Opportunity Commission ("EEOC") and its amici.

ARGUMENT

The appellants first respond to non-legal rhetoric found in the brief of the EEOC as well as those of the amici that mischaracterizes various aspects of the dispute currently before the Court.

Since 1969, regulations issued under the ADEA have set forth a simple and workable rule for employers to provide non-discriminatory employee benefits. Employers could comply with the ADEA either (a) by providing equal benefits to all individuals without regard to age, or (b) by incurring equal cost to purchase benefits on behalf of both older and younger persons. 29 C.F.R. § 860.120 (1969); 34 Fed. Reg. 9709 (June 21, 1969). Permitting employers to comply with the ADEA by incurring equal cost for benefits ensured that the ADEA would not "discourage the employment of older workers or ....unduly burden the employer." 44 Fed. Reg. 30648 (May 25, 1979).

In passing the 1978 amendments to the ADEA, which extended the Act's upper age of coverage from 65 to 70, Congress instructed the Department of

Labor to issue more comprehensive guidance with respect to employee benefit plans. 44 Fed. Reg. 30648. While the "equal benefit or equal cost" principle remained the cornerstone of the subsequent regulation, 29 C.F.R. § 860.120(a)(1) (1979), the expanded regulation also provided detailed guidance to employers on how to provide non-discriminatory health care benefits to individuals eligible for Medicare. 29 C.F.R. § 860.120(f)(ii). In determining whether "equal benefits" were being provided, employers would get credit for those benefits provided by Medicare. Id. Consequently, employers could satisfy their ADEA obligations by purchasing either "carve out" or "supplemental" plans, both of which are considerably less expensive than the cost of full health care coverage for younger individuals. Id.; see also id. 29 C.F.R. § 860.120(f)(ii)(C) ("As a result of the savings to employers when benefits are available through Medicare, reductions in total health care benefits for employees age 65 to 70 will generally not be justified").

Congress found the "equal benefit or equal cost" principle so well-established that in passing the Older Workers Benefit Protection Act of 1990, it expressly adopted the entire regulation into the amended version of § 4(f)(2)(B) of the ADEA, 29 U.S.C. § 623(f)(2)(B).[1] Relying on business organizations,

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[1] Section 4(f)(2)(B) makes it lawful for an employer "to observe the terms of a bona fide employee benefit plan –(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger

some of whom are now before this Court, Congress noted that "the predictability and simplicity of the 'equal benefit or equal cost' principle resulted in business support for the rule as well." S. Rep. 101-263, 101st Cong., 2d Sess., at 12-13; see also H. Rep. 101-664, 101st Cong., 2d Sess., at 13-15. By the time this Court decided Erie County in 2000, the "equal benefit or equal cost" principle had been in effect for thirty-one years.

Those facts along with others, either ignored altogether or substantially distorted by both the EEOC and the amici, serve to expose both the legal and factual shortcomings of the challenged exemption. The most significant of which are the following:

1. The challenged exemption is not "narrow" in any respect. Both the EEOC (EEOC Br. 16 citing App. 500, 505) and the amici (EEAC Br. 10) repeatedly refer to the challenged exemption as "narrowly drawn." But the fact of the matter is that the exemption affects 10 million retirees age 55 and older (App. 138),[2] and would permit employers to arbitrarily eliminate *all* health care benefits for those individuals when they reach age 65, notwithstanding the undisputed fact that the employer cost for coverage drops

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worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989);"

[2] EEOC's Final Rule (App. 133-142) citing to U.S. General Accounting Office, "Retiree Health Benefits: Employer-Sponsored Benefits May be Vulnerable To Further Erosion," GAO Doc. No. GOA-01-347, at 1 (May 2001). App. 142 n. 12.

precipitously at that age precisely because of the availability of Medicare.[3] Pension benefits are the only comparable benefits received by retirees and those, of course, are governed by the Employee Retirement Income Security Act of 1974, "ERISA," 29 U.S.C. §1001 et seq. The scope of the exemption is virtually unprecedented.

2. This Court's decision in Erie County only affected employers who persisted in violating the ADEA. The alleged impetus for the challenged exemption was this Court's decision in Erie County Retirees Ass' v. County of Erie, 220 F.3d 193 (3d Cir. 2000), in which an employer was found in violation of the ADEA for providing inferior health care benefits to retirees age 65 and older. The EEOC claimed that as a result of Erie County "many employers" would drop health care coverage "if required to make a choice between paying more or less to comply with the ADEA." EEOC Br. 16 citing App. 504, 506. But the only employers faced with that decision were those still violating the ADEA, more than thirty years after promulgation of the "equal benefit or equal cost" principle.

Equally alarming, the EEOC's "pay more or pay less" dichotomy ignores a third, equally plausible, option. Employers violating the ADEA could "pay the same" and simply reallocate the benefits in a non-discriminatory

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[3] With the advent of prescription drug coverage under the newly-enacted Medicare Part D, the cost of post-65 health care coverage will decline significantly more in relation to the cost of pre-65 coverage.

fashion. For example, employers can comply with the ADEA by providing an equal cash stipend to all retirees for health care benefits, either in a lump sum or periodically. But the exemption failed to even recognize that possibility, much less explore it, perhaps because unions would still be prohibited from using age-based benefits as an incentive to encourage early retirement (AARP Br. 40-41). And in a tour de force of circular reasoning, the EEOC claims that it was prevented by the plain language of the ADEA from considering alternative methods of satisfying the "equal benefit or equal cost" standard (EEOC Br. 56), but persists in arguing that it can ignore the plain language of the ADEA in promulgating its exemption.

3. The EEOC does not know how many employers provide non-discriminatory health care benefits to their retirees. By the time Erie County was decided, the "equal benefit or equal cost" principle had been in effect for thirty-one years. Presumably, well-intentioned employers had long since brought themselves into compliance, especially since the cost of health care coverage at age 65 dropped significantly because the EEOC regulation allowed employers to take credit for the benefits that Medicare supplied. But, remarkably, the EEOC has admitted that it does not know how many employers comply with the ADEA when providing health care benefits to retirees. App. 401. The implications of this are staggering.

First, because the EEOC admittedly does not know how many employers comply with the ADEA, it could not know how many employers do not. Consequently, there is no factual basis for its claim that "many employers" would drop health care coverage "if required to make a choice between paying more or less to comply with the ADEA." EEOC Br. 16 citing App. 504, 506. Clearly, employers in compliance are not faced with any choice, and are already paying substantially less for their Medicare-eligible retirees.

Second, if the motivating concern for the exemption is that employers in violation of the ADEA will be prompted to drop benefits in order to come into compliance (the "pay more, pay less or pay the same" dilemma), there is no justification whatsoever for extending the exemption to the unknown number of employers already in compliance. Those employers provide coverage to millions of individuals age 55 and older, and are not faced with any "pay more, pay less or pay the same" decision. Consequently, extending an exemption to them would gratuitously give them the green light to eliminate post-65 benefits, but would not further the underlying rationale for the exemption in any way.

Against this background, the arguments of the EEOC and the amici for upholding the categorical "exemption" for health care benefits can properly be seen as insubstantial. Appellants turn next to those arguments.

I. THE EEOC's APPLICATION OF CHEVRON IS UNPRECEDENTED AND INCORRECT.

A. The EEOC Concedes That No Statutory "Gap" Exists.

The irony of the EEOC's brief is that while it urges this Court to affirm the result reached by the lower court – holding that the challenged rule is valid under the ADEA and the APA – it does not endorse the rationale by which the lower court applied Chevron[4] in either of its two decisions.

Clearly, the EEOC can find no comfort in the rationale by which the lower court came to the decision now on appeal. As the appellants demonstrated (AARP Br. 31), it was error for the lower court to apply the analysis of Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005), because neither the appellants nor the EEOC disagreed with the relevant circuit precedent (Erie County). And, as the appellants also argued, it was error for the lower court to conclude (based on Brand X) that there was a statutory "gap" when the parties agreed that § 4 of the ADEA, 29 U.S.C. § 623, unmistakably prohibits discrimination in health care benefits (AARP Br. 31-34).

The EEOC effectively concedes both these points by not addressing them. Indeed, it was the EEOC that played a pivotal role in the development of the circuit precedent by arguing that § 4 of the ADEA prohibited discrimination

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[4] Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

in health care benefits, and that any other view of the statute would be "inconceivable" and "would lead to irrational gaps in coverage" (AARP Br. 4).

Nor does the lower court's application of Chevron in its first opinion support the EEOC. When the lower court confirmed in its initial opinion that the substantive provisions of the ADEA prohibited discrimination on the basis of age in health care benefits, the court properly concluded that there was no "gap" under Chevron in which the EEOC could regulate (AARP Br. 12-13). Consequently, the court held that the challenged regulation "is contrary to law and violates the clear intent of Congress in passing and amending the ADEA, as articulated in Erie County, 220 F.3d 193." AARP et al v. EEOC, 383 F.Supp. 2d 705, 712 (E.D. Pa. 2005); App. 450. Rather than embrace the lower court's application of Chevron, the EEOC avoids it by arguing (as it did unsuccessfully to the lower court) that the substantive provisions of the ADEA are "beside the point." App. 308.

B. Chevron Forecloses Agency Rules That Conflict With Congressional Intent.

Brand X affirmed the fundamental premise underlying Chevron: "[i]f congressional intent is clear and unambiguous, then that intent is the law and must be given effect." Marincas v. Lewis, 92 F.3d 195, 200 (3d Cir. 1996). On the other hand, "ambiguities in statutes within an agency's jurisdiction to

administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." Brand X, 125 S.Ct. at 2699.

As the lower court correctly held in its first decision "the EEOC's challenged exemption is contrary to congressional intent and the plain language of the ADEA." App. 448. Having properly applied Chevron to find no ambiguity -- and thus no room for agency action to the contrary -- the lower court's first decision should have been the end of the matter. Attempting to overcome this insurmountable Chevron hurdle, the EEOC nevertheless argues to this Court that "the relevant Chevron inquiry [here] focuses not on the general meaning of the substantive provision but on the statutory text authorizing the exemption." EEOC Br. 34. But EEOC's argument suffers from the same short-comings when first presented to the lower court.

1. The EEOC has not cited a single case to this Court or below to support its novel argument that the focus of the Chevron Step One analysis is the agency's rulemaking provision, not the substance of the statute. See App. 450 ("[t]he EEOC cited no relevant cases supporting its analysis of this case"). Indeed, EEOC's approach is at war with Chevron, as well as the manner in which the circuit courts, including this Court, have applied Chevron to the substantive provisions of statutes in question. See e.g., Chevron, 467 U.S. at 859-62 (attempting to determine Congressional intent by examining the statutory language defining "stationary source" and "major stationary source"

but not examining the statutory language delegating rulemaking authority to the Environmental Protection Agency); Marincas, 92 F.3d at 200 (determining Congressional intent from the phrase "irrespective of such alien's status" rather than from the provisions giving the INS authority to establish asylum application procedures); App. 449.

As the lower court correctly observed, ignoring the substantive provisions of the statute "would render meaningless the first step of Chevron." App. 449. Indeed, the focus on the substance of the statute is essential, since its purpose is to determine whether a statutory "gap" exists in which the agency can regulate. If, upon review of the substance of the statute, "congressional intent is clear and unambiguous, then that intent is the law and must be given effect." Marincas 92 F.3d at 200.

In circumstances very similar to those presented here, the District of Columbia Circuit relied on Chevron to reject an EPA regulation that "exempted" certain equipment replacement activity from the provisions of the Clean Air Act. State of New York v. EPA, No. 03-1380 (D.C. Cir. March 17, 2006) (Slip Opinion appended hereto). Under the Clean Air Act, sources of emissions "that undergo 'any physical change' that increases emissions are required to undergo the NSR [New Source Review] permitting process." Slip Op. at 6. A regulatory "exclusion has historically provided that routine maintenance, repair, and replacement do not constitute changes triggering

NSR." Id. The EPA's challenged regulation, however, "both defined and expanded that exclusion," to allow sources to replace up to 20% of the replacement value of the process unit and still remain within the exclusion. Id. As the D.C. Circuit observed, the exemption rule "would allow sources to avoid NSR when replacing equipment under the twenty-percent cap notwithstanding a resulting increase in emissions." Id. (emphasis added). The reasoning and holding of the D.C. Circuit in State of New York is directly applicable here for several reasons.

First, the plain effect of the challenged rule in State of New York was to create a regulatory exemption that would remove entirely and without further scrutiny a broad range of actions that were explicitly barred by the substantive provisions of the Clean Air Act. Here, EEOC's rule would remove entirely a broad range of discrimination in health care benefits from the explicit substantive protections of the ADEA. Applying the time-honored test of Chevron, the D.C. Circuit ruled that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Slip Op. at 9 quoting Chevron, 467 U.S. at 843 n. 9. Under Chevron Step One, the D.C. Circuit found that the challenged exemption was "contrary to the plain language of section 111(a)(4) of the Act," Slip Op. at 6, which evinced

Congress' clear intent to apply the Clean Air Act to any physical modifications of a source that increased emissions.

Second, acknowledging the Supreme Court's decision in Brand X, the D.C. Circuit relied on decisions in other Circuits, all of which ruled that an "expansive" reading of the Clean Air Act was appropriate since the statutory text was "clear" and "plain." As the appellants demonstrated in their opening brief (AARP Br. 33-34), this Court made that same determination in Erie County regarding the ADEA's broad applicability to health care benefits.

Third, the D.C. Circuit relied on the "strange" and "indeterminate" result that would occur if EPA's exemption were held to be lawful: "a law intended to limit increases in air pollution would allow sources operating below applicable emission limits to increase significantly the pollution they emit without government review." Slip Op. at 12. So too here, a law intended to prohibit discrimination that expressly permitted employers to adjust benefits when they were *more* expensive for older workers would allow employers to arbitrarily eliminate health care coverage for millions of Americans at age 65 when their benefits are admittedly *much less* expensive that those afforded to younger individuals.

In reaching its result, the D.C. Circuit made clear that a regulating agency cannot make policy determinations that conflict with choices made by Congress. "EPA may not 'avoid the Congressional intent clearly expressed in

the text simply by asserting that its preferred approach would be better policy.'" Slip Op. at 19 quoting Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075 (D.C. Cir. 1996). This, of course, is exactly what EEOC argues to this Court. And its argument should receive the same treatment as accorded the agency in State of New York.

2. The EEOC argues (as it did unsuccessfully to the lower court) that congressional intent reflected in the substance of the ADEA cannot be controlling because, if it were, "no § 9 exemption could ever issue because the very predicate for an 'exemption' is the existence of a substantive ADEA provision that would (normally) regulate the exempted conduct." EEOC Br. 33. This overstatement is both legally and logically incorrect.

First, it is clear that the courts "must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate." Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980). In fact, a previous attempt by the EEOC to exempt conduct under the ADEA was rejected precisely because it conflicted with congressional intent. In Quinn v. New York State Electric and Gas Corp., 569 F. Supp. 655 (N.D. N.Y. 1983), the plaintiff challenged his age-based exclusion from an apprenticeship program under the ADEA. At issue in that case was the validity of an EEOC interpretive regulation stating that age limitations in apprenticeship programs were exempt from the coverage of the ADEA. Id. at 658. The district court rejected the

EEOC regulation, finding it directly contrary to congressional intent. Id. at 661 ("Congress indicated that it intended no such exemption"). Equally significant, while the court in Quinn acknowledged the EEOC's exemption authority, it concluded that the apprenticeship "exemption" would still not pass muster under § 9 because it was contrary to both the language of the ADEA and congressional intent. Id. As the court ruled, "the pertinent question is not whether the EEOC can make exceptions; it is, rather, whether this particular exception, for apprenticeship programs, finds support elsewhere in the language of the Act." Id.

Although the case law on regulatory exemptions is sparse, at least one other federal district court had no hesitation in applying Chevron in the manner suggested by the appellants here. The issue in American Maritime Officers v. Hart, No. 99-1054, 1999 WL 33839612 (D.D.C. Oct. 14, 1999), was whether the Secretary of Labor had the regulatory authority to exempt a RFP ("Request for Proposal") from the provisions of the Service Contract Act that required a "successor contractor to pay wages and fringe benefits no lower than those provided for in the predecessor contractor's contract for the full term of the contract." Id. at * 4 (emphasis added). Section 4(b) of the Service Contract Act authorizes the Secretary to "provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this chapter...but only [when]

necessary and proper in the public interest or to avoid the serious impairment of government business...." Id. at * 5. In granting the plaintiff's request for injunctive relief, the court ruled that under Chevron Step One, the plain language of the Service Contract Act prohibited the government's attempt to shorten compliance from the "full term of the contract." Id.

Second, it is a gross overstatement to suggest that applying Step One of Chevron to the substantive protections of the ADEA will nullify the exemption authority under § 9. To the contrary, as the lower court held, "it is possible to interpret the 'exemption' power that the EEOC has been given as a real provision rather than surplusage without giving the EEOC the power to legalize practices that directly contravene the intent of Congress." App. 449. While the EEOC cannot contravene the will of Congress, it retains the power "to issue rules, regulations and exemptions within these explicit, or implicit, gaps that Congress left in the ADEA." Id. Limiting the EEOC's exemption authority to the ADEA's statutory gaps does not pose a hardship, since that fundamental principle of Chevron is applicable to all federal agency rulemaking. And, as the lower court also noted (id.), "the EEOC's section 9 exemption power can be interpreted to allow the EEOC to issue exemptions in individual cases."[5]

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[5] Indeed, the issue of individual exemptions is raised in McManus v. Civil Aeronautics Board, 286 F.2d 414 (2nd Cir. 1961) a case cited by the EEOC (EEOC Br. 42). But issuing an individual exemption remains a far cry from wholesale invalidation of a statutory protection.

II. THE EXEMPTION AUTHORITY UNDER § 9 IS CIRCUMSCRIBED BY THE LANGUAGE OF THE STATUTE AND ITS PURPOSES.

The core of EEOC's defense is that § 9 allows the EEOC to exempt all employer practices from the ADEA "even though the targeted practices would have been deemed unlawful in the absence of an exemption." EEOC Br. 30. This result, the EEOC claims, "flows inescapably from [§ 9's] text and Congress's use of the word "exemption." Id. To reach this remarkable result – the authority to nullify explicit Congressional commands -- the EEOC is forced to ignore both the text of § 9 as well as the very purposes of the ADEA which circumscribe the agency's authority.

1. Section 9 authorizes the EEOC to issue "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). The EEOC argues that the "any and all" language justifies "any" exemption, including the broadest, from the prohibitions against age discrimination set forth in § 4 of the Act. EEOC Br. 33 & n. 15. But, on its quest for authority to override Congress, EEOC is forced to ignore the fact that with § 9 Congress conferred the authority to issue only "reasonable" exemptions. Only if an exemption is "reasonable" may it be used to avoid compliance with "any or all provisions of the ADEA." EEOC fails to offer any explanation for the meaning of "reasonable."

The challenged "exemption" is not reasonable. The challenged exemption would allow *every* employer covered by the ADEA (with 20 or more employees) to arbitrarily eliminate health care benefits for *all* retirees upon attainment of age 65 – currently 10 million individuals. The unprecedented scope of the exemption renders totally facile EEOC's repeated references to it as "narrowly drawn." More significantly, the EEOC's reading of § 9 would justify categorical exemptions from all of the ADEA's most fundamental statutory provisions: an exemption permitting mandatory retirement based on age despite amendments by Congress long ago outlawing that practice; an exemption permitting wage discrimination against older employees, notwithstanding the prohibitions of § 4; or an exemption permitting employers to deny severance benefits to pension eligible employees – a practice long ago found unlawful by this Court,[6] and later expressly prohibited by the Older Workers Benefit Protection Act. H.R. Rep. 101-644, 101st Cong., 2d Sess., at 40 (1990) ("it is *per se* age discrimination to use pension eligibility as a basis for denying an older worker any other benefits").

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[6] EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984). Of course, the severance benefits at issue in cases like Westinghouse were clearly post-employment benefits that were subject to ADEA scrutiny long before this Court decided Erie County. See e.g. EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) (severance benefits), and Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied, 486 U.S. 1044 (1988) (early retirement incentive benefits).

The language chosen by Congress in § 9 underscores the importance of the "reasonable" limitation, and the illogic of the EEOC's approach. After all, § 9 authorizes the EEOC to "issue such rules and regulations as it may consider necessary and proper for carrying out this chapter,...." 29 U.S.C. § 628. Although that rulemaking delegation is not conditioned by the "reasonable" limitation, it is patently clear under Chevron that the EEOC could not issue a "regulation" that conflicts with congressional intent at Step One of the Chevron analysis. Mohasco, 447 U.S. at 825; Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) (no deference is due EEOC interpretive regulation under the ADEA that is "at odds with the plain language of the statute itself"). More to the point, the EEOC cannot lawfully issue a "regulation" that either expands or contracts the scope of coverage of the ADEA in a manner inconsistent with clear congressional intent. State of New York, infra. at 16-18.

But, that is precisely the effect of EEOC's reading of § 9. Here, EEOC's reading of unlimited authority would deprive ten million individuals of the protections of § 4 of the Act expressly because of their age. And the logic of EEOC's argument goes even further, to effectively overturn Congress and Court opinions. It is implausible that Congress intended this result to depend solely on the EEOC's designation of its regulatory conduct as a "reasonable exemption" rather than a "regulation."

In sum, the EEOC cannot read the "reasonable" limitation out of § 9. A far more plausible reading of that limitation is that no exemption that conflicts with the clear intent of Congress can ever be reasonable, either under § 9 or under Chevron. See American Paper Institute v. American Electric Power, 461 U.S. 402, 421 (1983) (Court should not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other").

2. In addition to ignoring the "reasonable" limitation in § 9, the EEOC utterly ignores its own regulations governing the issuance of exemptions. As the appellants demonstrated (AARP Br. 39), any exercise of § 9 authority must show "due regard for the remedial purpose of the statute to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination." 29 C.F.R. § 1627.15(b) (emphasis added). Since the exemption under review directly frustrates both of these purposes, it is "not in accordance with law" as required by the APA. AARP Br. 43 citing Frisby v. U.S. Dept. of Housing and Urban Development. 755 F.2d 1052, 1055-56 (3d Cir. 1985).

Attempting to ignore the "due regard" standard, EEOC instead claims that the appellants' position "utterly fails to demonstrate that the EEOC's decision is irrational." EEOC Br. 26; see also id. 49 (claiming that the EEOC "acted rationally"). Regardless of whether the exemption is "irrational," it is

clear that the EEOC has not demonstrated any regard, much less due regard, for the two remedial purposes of the ADEA.

Moreover, EEOC's brief confirms the agency's abject disregard for its own self-imposed limitations by concluding, ipse dixit, that the core remedial purposes of the ADEA have been served (EEOC Br. 50), the same approach the EEOC took in the rulemaking. AARP Br. 41-42. The simple fact remains that the exemption frustrates, rather than promotes, both of the ADEA's central purposes. As appellants demonstrated in their opening brief (AARP Br. 38-39 & n. 2), agency rules that conflict with the statutory purposes, or which frustrate congressional policy, are invalid. While the EEOC hopes that the exemption will preserve health care benefits for younger retirees, that is not a statutory objective chosen by Congress.[7]

III. THE SECTION 9 AUTHORITY CANNOT CONSITUTIONALLY TRUMP CLEAR STATUTORY PROVISIONS.

The EEOC concedes that there is no "gap" in the ADEA, and that § 4 prohibits age discrimination against retirees in the provision of health care benefits. But the EEOC steadfastly argues that the rulemaking authority under

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[7] The legislative history cited by the EEOC in support of this argument (EEOC Br. 50-51) has no weight, of course, since it was not accompanied by a statutory change to the ADEA. As the EEOC argued to this Court in Erie County, "[t]he problem with this legislative history is that it has no anchor in the text of the statute." App. 194; see also Malloy v. Eichler, 860 F.2d 1179, 1188 (3d Cir. 1988) (declining to attribute significance to legislative history of legislation not passed by Congress) citing Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 382 n.11 (1969).

§ 9 allows the agency to trump the statutory mandates. This triggers an inalterable conflict with constitutional limitations on agency authority.

As the appellants have argued, the proper application of Chevron will avoid this constitutional conflict. So, too, will the proper application of the EEOC's own regulations, which require "due regard" for the purposes of the ADEA – none of which is present here. The issue can also be avoided by a harmonious interpretation of Chevron and the "reasonable exemptions" language of § 9.

Notwithstanding the foregoing, however, and in the event that the Court agrees that § 9 grants to the EEOC the authority to overturn the clear intent of congress, the provision is most certainly unconstitutional (AARP Br. 36-39), and none of the cases cited by the EEOC even remotely suggest to the contrary. In fact, none of the cases cited by EEOC address the issue presented here – whether any delegation of rulemaking authority can ever permit an agency to negate a clear statutory mandate.

For example, the issue in Touby v. United States, 500 U.S. 160 (1991) (EEOC Br. 40), was whether the Attorney General had acted pursuant to an unconstitutional delegation of authority by adding the drug called "Euphoria" as a Schedule I controlled substance under the Controlled Substances Act. Id. at 162-164. The Attorney General had acted under a 1984 delegation containing an expedited procedure "by which the Attorney General can

schedule a substance on a temporary basis when doing so is 'necessary to avoid an imminent hazard to the public safety.'" Id. at 163. The court concluded that the delegation contained an "intelligible principle" that satisfied "the constitutional requirements of the nondelegation doctrine." Id. at 167. There was no issue in Touby, as here, that the administrative action was in conflict with congressional intent or an explicit statutory provision.

A fair reading of Mistretta v. United States, 488 U.S. 361 (1989) (EEOC Br. 40-41) leads to the same conclusion. The issue in Mistretta was whether "in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine." Id. at 371. Relying on the "intelligible principle" test, the Court remarked that "'Congress simply cannot do its job absent an ability to delegate power under general broad directives." Id. at 372. There was no hint in Mistretta that in exercising its delegated authority, the Sentencing Commission had taken action in direct conflict with clear congressional intent.

EEOC also relies on Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) (EEOC Br. 42). That case, however, supports the appellants' position. The question in Addison was whether the employees were covered by the provisions of the Fair Labor Standards Act ("FLSA"). The FLSA contains

eleven statutory exemptions from coverage, one of which applied to individuals "employed within the area of production...engaged in [various tasks associated with the preparation] of agricultural or horticultural commodities for market...." Id. at 612 & n. 4. Pursuant to delegated rulemaking authority, the Administrator limited the "area of production" to locations where the "number of employees in such establishment does not exceed seven." Id. at 609. The Supreme Court held "invalid the limitations as to the number of employees" contained in the regulation. Id. at 618. As the Court explained, there was no evidence in the FLSA that Congress intended the Administrator to distinguish between smaller and larger establishments within the "area of production." Id. at 614. In language similar to that later used by the Court in Chevron, the Court acknowledged that "not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation," but "[t]he natural meaning of words cannot be displaced by reference to difficulties in administration." Id. at 617. As the Court ruled, "the ultimate question is what has Congress commanded." Id. at 617-618. In the clearest way possible, what Congress has commanded in the ADEA is that employee benefits may not be reduced or eliminated based solely on age, and the EEOC lacks the authority to overturn that plain proscription.

Similarly, Bowles v. Willingham, 321 U.S. 503 (1944), is of no help to the EEOC (EEOC Br. 41). The issue in Bowles was whether orders issued by

the Administrator under the Emergency Price Control Act of 1942 were constitutionally valid. The grant of regulatory authority permitted the Administrator to issue rent stabilization orders, but required "economic data and other facts of which the Administrator has taken official notice." Id. at 515. The Court ruled that the delegation was valid, and remarked that Congress could not perform its functions "if it were required to make an appraisal of the myriad facts applicable to varying situations, by area throughout the land, and then to determine in each case what should be done." Id.

Bowles serves to emphasize the appellants' point. First, that case did not involve any claim that the Administrator's actions contravened plain congressional intent. Second, imposing rent stabilization orders in Macon, Georgia during World War II was a task Congress chose to delegate. Here, Congress spent almost a year passing the OWBPA, in great detail, to ensure that employee benefits were not arbitrarily reduced, or eliminated, based on age.

For the same reasons, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940), also relied on by EEOC (EEOC Br. 41), is off the mark. Like the other cases relied on by EEOC, the issue in Sunshine was whether a delegation of authority to fix coal prices was constitutional, not whether the delegated authority had been exercised to contravene congressional intent.

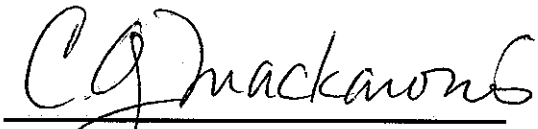
In United States v. Atchinson, T. & S.F. Ry. Co., 234 U.S. 476 (1914) (EEOC Br. 42), the very same statutory provision that prohibited long-haul discounts authorized applications to the Interstate Commerce Commission for waivers. In contrast, in passing the OWBPA Congress expressly chose to consider exemptions to the provisions of § 4 regarding employee benefits, and included each of them in the statute. See e.g. 29 U.S.C. § 623(l) (exemptions for "subsidized portion or an early retirement benefit" and "social security supplements"). Indeed, one of the exemptions provides for the deduction of "the value of any retiree health benefits" from "severance benefits made available as a result of the contingent event unrelated to age." 29 U.S.C. § 623(l)(2)(A). The fact that Congress considered exemptions, and that it specifically addressed health care benefits in one of them, provides a basis from which to infer that it did not approve of others.

In the end, the EEOC's terse effort to distinguish both Clinton v. City of New York, 524 U.S. 417 (1998) and INS v. Chadha, 462 U.S. 919 (1983) misses the mark (AARP Br. 36-37 & n. 1). The EEOC claims that they involved different delegations to the executive branch. EEOC Br. 43-44. But the point of both of them is, regardless of the terms of the delegation, the substance of any delegation may not authorize the executive branch to contravene congressional intent expressed in statutory provisions enacted by the legislative branch of the government. And that, in short, is precisely why §

9 cannot be read to authorize the EEOC to unravel the prohibitions of § 4 that Congress clearly intended.

CONCLUSION

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



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CERTIFICATE OF SERVICE

I, Christopher G. Mackaronis, certify that ten copies of the foregoing Appellants' Reply Brief were sent, via Federal Express, to the Clerk of Court, and that two copies of the brief were served by hand delivery on this 22nd day of March, 2006, on counsel for Appellee Equal Employment Opportunity Commission at the following address:

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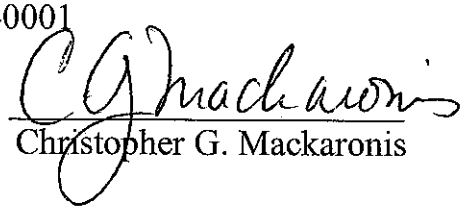
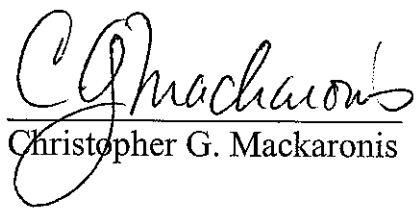


Christopher G. Mackaronis

CERTIFICATIONS

I, Christopher G. Mackaronis, certify that I am a member in good standing of the bar of this Court. I certify that the foregoing Appellants' Reply Brief, exclusive of the table of contents and the table of authorities, contains less than 7,000 words. I further certify that the PDF file is identical to the hard copy of the brief mailed to the Court, has been scanned by Trend Micro Office Scan for viruses and was mailed electronically to the Court this day, March 22, 2006.



Christopher G. Mackaronis

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 8, 2006 Decided March 17, 2006

No. 03-1380

STATE OF NEW YORK, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

CLEAN AIR IMPLEMENTATION PROJECT, ET AL.,
INTERVENORS

Consolidated with Nos.
03-1381, 03-1383, 03-1390, 03-1402, 03-1453, 03-1454,
04-1029, 04-1035, 04-1064, 05-1234, 05-1287

On Petitions for Review of Final Actions of the
Environmental Protection Agency

J. Jared Snyder, Assistant Attorney General, Attorney General's Office of the State of New York, argued the cause for

Government Petitioners. With him on the briefs were *Eliot Spitzer*, Attorney General, *Peter Lehner* and *Michael J. Myers*, Assistant Attorneys General, *Bill Lockyer*, Attorney General, Attorney General's Office of the State of California, *Matthew J. Goldman*, Deputy Attorney General, *Richard Blumenthal*, Attorney General, Attorney General's Office of the State of Connecticut, *Kimberly Massicotte* and *Matthew Levine*, Assistant Attorneys General, *M. Jane Brady*, Attorney General, Attorney General's Office of the State of Delaware, *Valerie S. Csizmadia*, Deputy Attorney General, *Lisa Madigan*, Attorney General, Attorney General's Office of the State of Illinois, *Thomas Davis*, Chief, *G. Steven Rowe*, Attorney General, Attorney General's Office of the State of Maine, *Gerald D. Reid*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General, Attorney General's Office of the State of Maryland, *Kathy M. Kinsey*, Assistant Attorney General, *Thomas F. Reilly*, Attorney General, Attorney General's Office of the Commonwealth of Massachusetts, *James R. Milkey*, Assistant Attorney General, *Kelly A. Ayotte*, Attorney General, Attorney General's Office of the State of New Hampshire, *Maureen D. Smith*, Senior Assistant Attorney General, *Peter C. Harvey*, Attorney General, Attorney General's Office of the State of New Jersey, *Stephanie Brand*, *Kevin Auerbacher*, *Jean Reilly*, and *Ruth Carter*, Assistant Attorneys General, *Patricia A. Madrid*, Attorney General, Attorney General's Office of the State of New Mexico, *Tracy M. Hughes*, General Counsel, *Robert A. Reiley*, Assistant Counsel, Commonwealth of Pennsylvania, Department of Environmental Protection, *Patrick C. Lynch*, Attorney General, Attorney General's Office of the State of Rhode Island, *Tricia K. Jedele*, Special Assistant Attorney General, *William H. Sorrell*, Attorney General, Attorney General's Office of the State of Vermont, *Erick Titrud* and *Kevin O. Leske*, Assistant Attorneys General, *Peggy A. Lautenschlager*, Attorney General, Attorney General's Office of the State of Wisconsin, *Thomas L. Dosch*, Assistant Attorney

General, *Robert J. Spagnoletti*, Attorney General, Attorney General's Office of the District of Columbia, *Edward E. Schwab*, Deputy Attorney General, *Donna M. Murasky*, Senior Litigation Counsel, *Barbara Baird*, District Counsel, South Coast Air Quality Management District, *Daniel C. Esty*, *Christopher P. McCormack*, *Christopher G. King*, Assistant Corporation Counsel, City of New York, *Kristine Poplawski*, Deputy City Attorney, City and County of San Francisco. *John V. Dorsey*, Assistant Attorney General, Attorney General's Office of the State of Maryland, *William L. Pardee*, Assistant Attorney General, Attorney General's Office of the Commonwealth of Massachusetts, *Eric Ames* and *J. Brent Moore*, Attorneys, Attorney General's Office of the State of New Mexico, and *Lisa S. Gelb*, Counsel, City and County of San Francisco, entered appearances.

Howard I. Fox argued the cause for Environmental Petitioners and Intervenor. With him on the briefs were *Keri N. Powell*, *John D. Walke*, *Jonathan F. Lewis*, *Ann B. Weeks*, *Leah Walker Casey*, and *Michael D. Fiorentino*. *Blair W. Todt* entered an appearance.

Richard E. Ayers was on the brief of *amicus curiae* Calpine Corporation in support of petitioners.

Hope M. Babcock was on the brief of *amici curiae* American Thoracic Society, et al. in support of environmental petitioners.

Victor B. Flatt was on the brief of *amici curiae* Senator Hillary Rodham Clinton, et al. in support of petitioners.

Geoffrey M. Klineberg was on the brief of *amicus curiae* Atlantic Salmon Federation in support of petitioners.

Angeline Purdy and *Cynthia J. Morris*, Attorneys, U.S. Department of Justice, argued the cause for respondent. With them on the brief was *John C. Cruden*, Deputy Assistant Attorney General. *Michael B. Heister*, Attorney, and *Carol S. Holmes*, Counsel, U.S. Environmental Protection Agency, entered appearances.

F. William Brownell argued the cause for Industry Intervenors in support of respondent. With him on the brief were *William H. Lewis, Jr.*, *Henry V. Nickel*, *Makram B. Jaber*, *David S. Harlow*, *Katherine D. Hodge*, *John L. Wittenborn*, *Leslie Sue Ritts*, *Lorane Hebert*, and *Charles H. Knauss*. *Russell S. Frye* entered an appearance.

Judith Williams Jagdmann, Attorney General, Attorney General's Office of the Commonwealth of Virginia, *William E. Thro*, State Solicitor General, *D. Mathias Roussy*, Associate State Solicitor General, *Carl Josephson*, Senior Assistant Attorney General, *Troy King*, Attorney General, Attorney General's Office of the State of Alabama, *Robert D. Tambling*, Assistant Attorney General, *David W. Marquez*, Attorney General, Attorney General's Office of the State of Alaska, *Steven E. Mulder*, Assistant Attorney General, *Mike Beebe*, Attorney General, Attorney General's Office fo the State of Arkansas, *Teresa Marks*, Deputy Attorney General, *Lawrence E. Long*, Attorney General, Attorney General's Office of the State of South Dakota, *Roxanne Giedd*, Deputy Attorney General, *Mark L. Shurtleff*, Attorney General, Attorney General's Office of the State of Utah, *Fred Nelson*, Assistant Attorney General, *Patrick J. Crank*, Attorney General, Attorney General's Office of the State of Wyoming, *Vicci M. Colgan*, Senior Assistant Attorney General, *Phill Kline*, Attorney General, Attorney General's Office of the State of Kansas, *David W. Davies*, Assistant Attorney General, *Jeremiah W. (Jay) Nixon*, Attorney General, Attorney General's Office of the

State of Missouri, *James R. Layton*, State Solicitor, *Jon Bruning*, Attorney General, Attorney General's Office of the State of Nebraska, *Wayne Stenehjem*, Attorney General, Attorney General's Office of the State of North Dakota, and *Lyle G. Witham*, Assistant Attorney General, were on the brief of Intervening States. *Michael R. O'Donnell*, Assistant Attorney General, Attorney General's Office of the State of Wyoming, *R. Craig Kneisel*, Assistant Attorney General, Attorney General's Office of the State of Alabama, *Roger L. Chafee*, Senior Assistant Attorney General, Attorney General's Office of the Commonwealth of Virginia, entered appearances.

Jim Petro, Attorney General, Attorney General's Office of the State of Ohio, *Henry McMaster*, Attorney General, Attorney General's Office of the State of South Carolina, *Steve Carter*, Attorney General, Attorney General's Office of the State of Indiana, *Thomas M. Fisher*, Solicitor General, *Valerie Tachtiris*, Deputy Attorney General, and *John J. Bursch* were on the brief of *amici curiae* States of Indiana, Ohio, and South Carolina in support of respondent. *Steven D. Griffin*, Assistant Attorney General, Attorney General's Office of the State of Indiana, entered an appearance.

Daniel J. Popeo, *Paul D. Kamenar*, and *Paul M. Seby* were on the brief of *amicus curiae* Washington Legal Foundation in support of respondent.

Before: ROGERS, TATEL and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (*"New York I"*), the court addressed the first of two rules promulgated by the Environmental Protection Agency providing ways for stationary sources of air pollution to avoid

triggering New Source Review ("NSR"). The court upheld in part and vacated in part the first rule. *Id.* at 10-11. We now address the second rule, the Equipment Replacement Provision ("ERP"), which amends the Routine Maintenance, Repair, and Replacement Exclusion ("RMRR") from NSR requirements. Under section 111(a)(4) of the Clean Air Act, 42 U.S.C. § 7411(a)(4), sources that undergo "any physical change" that increases emissions are required to undergo the NSR permitting process. *See also id.* §§ 7501(4), 7479(2)(C)(cross-referencing *id.* § 7411(a)(4)). The exclusion has historically provided that routine maintenance, repair, and replacement do not constitute changes triggering NSR. The ERP both defined and expanded that exclusion. EPA explained:

> [The] rule states categorically that the replacement of components with identical or functionally equivalent components that do not exceed 20% of the replacement value of the process unit and does not change its basic design parameters is not a change and is within the RMRR exclusion.

Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,270 (Oct. 27, 2003) ("Final Rule"); *see also* 70 Fed. Reg. 33,838 (June 10, 2005)("Reconsideration"). Hence, the ERP would allow sources to avoid NSR when replacing equipment under the twenty-percent cap notwithstanding a resulting increase in emissions. The court stayed the effective date of the ERP on December 24, 2003. We now vacate the ERP because it is contrary to the plain language of section 111(a)(4) of the Act.

The Clean Air Act requires new and modified sources of pollution to undergo NSR, a permitting process that imposes specific pollution control requirements depending upon the

geographic location of the source.[1] Section 111(a)(4) of the Act describes when a source is to be considered "modified":

> The term "modification" means *any physical change* in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4) (emphasis added). Since the inception of NSR, RMRR has been excluded from the definition of "modification." *See* 39 Fed. Reg. 42,510, 42,514 (Dec. 5, 1974); 43 Fed. Reg. 26,388, 26,403-04 (June 19, 1978). Heretofore, EPA applied the RMRR exclusion through "a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors to arrive at a common sense finding." 67 Fed. Reg. 80,290, 80,292-93 (Dec. 31, 2002). Consistent with *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980), which recognized EPA's discretion to exempt from NSR "some emission increases on grounds of *de minimis* or administrative necessity," *id.* at 400,

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[1] NSR consists of two programs: prevention of significant deterioration ("PSD") and nonattainment NSR. *See New York I*, 413 F.3d at 11-14. New and modified sources in attainment areas, i.e., where air quality standards have been met, and in unclassifiable areas are required to follow PSD rules, which means they must obtain a preconstruction permit, prove that the construction will not cause violations of certain air quality standards, and show that their operations are in compliance with the Best Available Control Technology ("BACT") requirements. *See* 42 U.S.C. § 7475. In nonattainment areas, i.e., where air quality standards have not been met, new and modified sources are required to obtain preconstruction permits, to offset emissions increases with emissions reductions from other sources in the area, and to install "lowest achievable emissions rate" technology ("LAER"). *See id.* § 7503.

EPA has for over two decades defined the RMRR exclusion as limited to "*de minimis* circumstances." 68 Fed. Reg. at 61,272. The ERP provides a bright-line rule and expands the traditional scope of the RMRR by exempting certain equipment replacements from NSR. *See, e.g.,* 40 C.F.R. § 52.21(cc)(2005).[2]

The government and environmental petitioners contend that the ERP is contrary to the plain text of the Act because the statutory definition of "modification" applies unambiguously to any physical change that increases emissions, necessarily including the emission-increasing equipment replacements excused from NSR by the rule. They maintain that the word "any," when given its natural meaning, requires that the phrase "physical change" be read broadly, such that EPA's attempt to

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[2] The ERP provides:

> Without regard to other considerations, routine maintenance, repair and replacement includes, but is not limited to, the replacement of any component of a process unit with an identical or functionally equivalent component(s), and maintenance and repair activities that are part of the replacement activity, provided that all of the requirements in paragraphs (cc)(1) through (cc)(3)of this section are met.

40 C.F.R. § 52.21 (cc). Paragraph (cc)(1) establishes that the fixed capital cost of the replacement component cannot exceed twenty percent of the replacement value of the process unit. Paragraph (cc)(2) states that the replacement cannot change the basic design parameters of the process unit. Paragraph (cc)(3) requires that the replacement activity not cause the process unit to exceed any independent, legally enforceable emission limitation. The ERP also amends 40 C.F.R. §§ 51.165, 51.166, and 52.24, but given the similarity of the sections, the court will follow the practice of the parties in citing only section 52.21.

read "physical change" narrowly would relegate the word "any" to an insignificant role.

In evaluating the petitioners' contention, we proceed under the familiar two-part test of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue . . . 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." *Id.* at 842-43. Only if the statute is silent or ambiguous do we defer to the agency's interpretation, asking "whether [it] is based on a permissible construction of the statute." *Id.* at 843. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

The petitioners and EPA agree that the phrase "physical change" is susceptible to multiple meanings, each citing dictionary definitions. However, "the sort of ambiguity giving rise to *Chevron* deference 'is a creature not of definitional possibilities, but of statutory context.'" *American Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)); *see California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 152 (7th Cir. 1994). As the parties point out, the ordinary meaning of "physical change" includes activities that "make different in some particular," "make over to a radically different form," or "replace with another or others of the same kind or class." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 373 (1981). To say that it is "physical," in this context, indicates that the change must be "natural or material," rather than "mental, moral, spiritual, or imaginary." *Id.* 1706. The

parties agree that in "[r]eal-world, common-sense usage," 68 Fed. Reg. at 61,271, "physical change" includes equipment replacements. They further agree that the ERP would excuse from NSR requirements certain emission-increasing activities that EPA has historically considered to be "physical changes." *See id.* at 61,270.

The parties' essential disagreement, then, centers on the effect of Congress's decision in defining "modification" to insert the word "any" before "physical change." According to the petitioners, the word "any" means that the phrase "physical change" covers any activity at a source that could be considered a physical change that increases emissions. According to EPA, "any" does nothing to resolve ambiguity in the phrase it modifies. EPA maintains that because "physical change" is "susceptible to multiple meanings," *id.* at 61,271, "identifying activities that are 'changes' for NSR purposes . . . requires an exercise of Agency expertise," "the classic situation in which an agency is accorded deference under *Chevron*," *id.* at 61,272. Under this approach, once EPA has identified an activity as a "physical change," the word "any" requires that the activity be subject to NSR. We conclude that the differences between the parties' interpretations of the role of the word "any" are resolved by recognizing that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997), and that courts must give effect to each word of a statute, *see, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Because Congress used the word "any," EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of "physical change."

In a series of cases, the Supreme Court has drawn upon the word "any" to give the word it modifies an "expansive meaning"

when there is "no reason to contravene the clause's obvious meaning." *Norfolk S. Rwy. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004); *see also Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 130-31 (2002); *Gonzalez*, 520 U.S. at 5. Indeed, the Court has read the word "any" to signal expansive reach when construing the Clean Air Act. In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the Court resolved a jurisdictional dispute under section 307(b)(1) by interpreting the phrase "any other final action," which the Court "discern[ed to have] no uncertainty." *Id.* at 588. The Court never suggested that the term "final action" was itself devoid of multiple meanings depending on the context, but rather stated that when Congress amended the Act in 1977, "it expanded its ambit to include not simply 'other final action,' but rather '*any* other final action.'" *Id.* at 589. "[I]n the absence of legislative history to the contrary," the Court held that the statutory phrase "must be construed to mean exactly what it says, namely, *any other* final action." *Id.*

Although EPA is correct that the meaning of "any" can differ depending upon the statutory setting, *see Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004), the context of the Clean Air Act warrants no departure from the word's customary effect. Unlike *Nixon*, the question of statutory interpretation here does not arise in a setting in which the Supreme Court has required heightened standards of clarity to avoid upsetting fundamental policies. *See id.* at 132-33, 140-41 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)). EPA points to no "strange and indeterminate results," *id.* at 133, that would emerge from adopting the natural meaning of "any" in section 111(a)(4) of the Act. Given Congress's goal in adopting the 1977 amendments of establishing a balance between economic and environmental interests, *see Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 909-10 (7th Cir. 1990)("*WEPCo*"), it is

hardly "farfetched," *Nixon*, 541 U.S. at 138, for Congress to have intended NSR to apply to any type of physical change that increases emissions. In this context, there is no reason the usual tools of statutory construction should not apply and hence no reason why "any" should not mean "any." Indeed, EPA's interpretation would produce a "strange," if not an "indeterminate," result: a law intended to limit increases in air pollution would allow sources operating below applicable emission limits to increase significantly the pollution they emit without government review.

Even without specific reliance on the effect of "any," this court has construed the definition of "modification" broadly. In *Alabama Power*, the court explained that "the term 'modification' [in section 111(a)(4)] is nowhere limited to physical changes exceeding a certain magnitude." 636 F.2d at 400. Although the legislative history indicated that one Senator intended the term to apply only to "major expansion program[s]," *id.* at 400 n.47, the court observed that "the language of the statute clearly did not enact such limit into law," *id.* at 400. The court further observed that "[i]mplementation of the statute's definition of 'modification' will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for *de minimis* increases." *Id.* More recently, in *New York I*, the court looked to the plain meaning of section 111(a)(4) and the absence of contrary legislative history in holding that even pollution control projects constituted "physical changes." *New York I*, 413 F.3d at 40-42. Likewise, the Seventh Circuit concluded in *WEPCo* that the purposes of the 1977 amendments to the Act required an expansive reading of the plain language of section 111(a)(4). *See WEPCo,* 893 F.2d at 908-10.

EPA's attempt to avoid the persuasive force of these

decisions and to find ambiguity in the phrase "any physical change" fails for a variety of reasons. Even assuming that the decisions construing section 111(a)(4) are not "judicial precedent holding that the statute unambiguously forecloses the agency's interpretation," *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005), *Brand X*, on which EPA principally relies, does not drain those decisions of all precedential value. The fact that previous judicial interpretations of section 111(a)(4) have all reached the conclusion that the text must be read broadly supports the petitioner's argument at *Chevron* step one, particularly because those decisions — both before and after *Chevron* — used language indicating the text was "clear" and "plain." *See New York I*, 413 F.3d at 40; *WEPCo*, 893 F.2d at 907; *Alabama Power*, 636 F.2d at 400.

Even in the absence of such precedent, EPA's approach to interpreting "physical change," as well as a similar approach by industry intervenors that focuses on the thirty-nine words following "any," contravenes several rules of statutory interpretation. EPA's position is that the word "any" does not affect the expansiveness of the phrase "physical change"; it only means that, once the agency defines "change" as broadly or as narrowly as it deems appropriate, everything in the agency-defined category is subject to NSR. To begin, that reading, contrary to "a cardinal principle of statutory construction," would make Congress's use of the word "any" "insignificant" if not "superfluous." *TRW*, 534 U.S. at 31 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Reading the definition in this way makes the definition function as if the word "any" had been excised from section 111(a)(4); there is virtually no role for "any" to play. Additionally, the approaches of EPA and industry would require Congress to spell out all the applications covered by a definition before a court could conclude that

Congress had directly spoken regarding a particular application, ignoring the fact that a definition, like a general rule, need not list everything it covers. *See NPR v. FCC*, 254 F.3d 226, 229 (D.C. Cir. 2001); *see also Shays v. FEC*, 414 F.3d 76, 108 (D.C. Cir. 2005). EPA's approach would ostensibly require that the definition of "modification" include a phrase such as "regardless of size, cost, frequency, effect," or other distinguishing characteristic. Only in a Humpty Dumpty world[3] would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view.

In contrast, the petitioners' approach, by adopting an expansive reading of the phrase "any physical change," gives natural effect to all the words used by Congress and reflects both their common meanings and Congress's purpose in enacting the 1970 and 1977 amendments. *See New York I*, 413 F.3d at 11-13; *WEPCo*, 893 F.2d at 909. To improve pollution control programs in a manner consistent with the balance struck by Congress in 1977 between "the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality," *Chevron*, 467 U.S. at 851, Congress defined the phrase "physical change" in terms of increases in emissions. After using the word "any" to indicate that "physical change" covered all such activities, and was not left to agency interpretation, Congress limited the scope of "any physical change" to changes that "increase[] the amount of any air pollutant emitted by such source or which result[] in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Thus, only physical changes that do not result in

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[3] *See TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978) (quoting *Through the Looking Glass, in* THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939)).

emission increases are excused from NSR. Because Congress expressly included one limitation, the court must presume that Congress acted "intentionally and purposely," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)), when it did not include others. *Cf. New York I*, 413 F.3d at 39. So construed, each word in the phrase "any physical change" has a meaning consonant with congressional intent and the scope of the definitional phrase is limited only by Congress's determination that such changes be linked to emission increases.

The expansiveness of the petitioners' approach does not leave the definition of "any physical change" without limits. The modifier "any" cannot bring an activity that is never considered a "physical change" in ordinary usage within the ambit of NSR. But when Congress places the word "any" before a phrase with several common meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them. EPA, through its historical practice and its words, has acknowledged that the equipment replacements covered by the ERP are "physical changes" under one of the ordinary meanings of the phrase. *See* 68 Fed. Reg. at 61,271-72. EPA may not choose to exclude that "[r]eal-world, common-sense usage of the word 'change.'" *Id.* at 61,271. Moreover, a physical change is not the sole criterion for triggering NSR under the definition of "modification." The expansive meaning of "any physical change" is strictly limited by the requirement that the change increase emissions. *See* 42 U.S.C. § 7411(a)(4).[4]

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[4] The court has no occasion to decide whether part replacements or repairs necessarily constitute a "modification" under the definition taken as a whole.

The fact that EPA, through the RMRR exclusion, has historically interpreted "any physical change" to exclude changes of trivial regulatory concern on a *de minimis* rationale, *see Alabama Power*, 636 F.2d at 360-61, does not demonstrate that the meaning of "physical change" is ambiguous. Rather, it reflects an agency's inherent power to overlook "trifling matters," *id.* at 360, a "principle [that] is a cousin of the doctrine that, notwithstanding the 'plain meaning' of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to 'absurd or futile results,'" *id.* at 360 n.89 (citations omitted). As the Supreme Court has instructed, "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). Reliance on the *de minimis* doctrine invokes congressional intent that agencies diverge from the plain meaning of a statue only so far as is necessary to avoid its futile application. Thus, the court in *Alabama Power* acknowledged that "EPA does have discretion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity." 636 F.2d at 400. As applied, the court explained that *de minimis* standards served to alleviate "severe" administrative and economic burdens by lifting requirements on "minuscule" emission increases. *See id.* at 405. While the court today expresses no opinion regarding EPA's application of the *de minimis* exception, given the limits on the scope of the *de minimis* doctrine, *see Shays,* 414 F.3d at 113-14, EPA appropriately has not attempted to justify the ERP as an exercise of *de minimis* discretion. As EPA has disclaimed the assertion that its prior expansive interpretations of "any physical change" were "absurd or futile," 70 Fed. Reg. at 33,842, it is in

no position to claim that the ERP is necessary to avoid absurdity.

EPA's remaining arguments also fail to demonstrate that the phrase "any physical change" is ambiguous. The fact that the court concluded that the word "increases" in section 111(a)(4) is ambiguous, *see New York I*, 413 F.3d at 23, does not suggest that the phrase "any physical change" is also ambiguous; unlike the latter, the former is unaccompanied by a qualifier signaling Congress's intent. Congress's use of the word "increases" necessitated further definition regarding rate and measurement for the term to have any contextual meaning. No such further definition of "physical change" is required because Congress's use of the word "any" indicates the intent to cover all of the ordinary meanings of the phrase, as evidenced by EPA's decades-long understanding and practice. Also, because the court in *New York I* rejected industry's contention that Congress ratified the New Source Performance Standards ("NSPS") regulations on "modification" in the 1977 amendments, *see id.* at 19-20, EPA's reliance on its NSPS regulations to demonstrate the ambiguity of "any physical change" is unavailing. As discussed, the early emergence of a RMRR exclusion based on a *de minimis* rationale does not blur the clarity of the phrase "any physical change." To the extent industry intervenors rely on the NSPS regime to reargue their position that "modifications" require an increase in maximum emission rates, that issue was resolved in *New York I*, 413 F.3d at 19-20, 40; *see also New York v. EPA*, 431 F.3d 801, 802-03 (D.C. Cir. 2005) (Williams, J., concurring in denial of rehearing), and is irrelevant because it does not address what constitutes a "physical change."

"Therefore, for EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of

historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). The discussion in *New York I*, 413 F.3d at 12-13, and *WEPCo*, 893 F.2d at 909 (quoting H.R. REP. NO. 95-294, at 211, (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1290)), of Congress's basic goals in enacting the 1977 amendments — to intensify the war against air pollution, to establish a permit program that struck a balance between economic and environmental interests, and to stimulate technology to control pollution — demonstrate the futility of EPA's endeavor. EPA cannot show that historical fact prevents a broad reading of "any physical change" inasmuch as EPA for decades has interpreted that phrase to mean "virtually all changes, even trivial ones, . . . generally interpret[ing] the [RMRR] exclusion as being limited to *de minimis* circumstances." 68 Fed. Reg. at 61,272.

As for logic, EPA cannot show any incoherence in Congress requiring NSR for equipment replacements that increase emissions while allowing replacements that do not increase emissions to avoid NSR. EPA acknowledges the reasonableness of its past expansive interpretation of "any physical change." *See id.*; 70 Fed Reg. at 33,842; Respondent's Br. at 29. To the extent that EPA relies on the argument that allowing ERP projects has the potential to lower overall emissions through increased efficiency even if emissions increase at a source, the court in *New York I* rejected EPA's similar argument in support of an exemption from NSR for pollution control projects. The court stated that "Congress could reasonably conclude, for example, that tradeoffs between pollutants are difficult to measure, and thus any significant increase in emissions of any pollutant should be subject to NSR." *New York I*, 413 F.3d at 41. Absent a showing that the policy demanded by the text

borders on the irrational, EPA may not "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Engine Mfrs.*, 88 F.3d at 1089.

Likewise, EPA offers no reason to conclude that the structure of the Act supports the conclusion that "any physical change" does not mean what it says. EPA does not address the Act's structure except in defending the reasonableness of the ERP as a policy choice. In that context, EPA points to the Act's "many other systematic air programs," particularly "model market-based programs," as support for its view that economic and environmental interests can be effectively balanced while limiting the application of NSR to existing sources. *See* 70 Fed. Reg. at 33,844. Although EPA might prefer market-based methods of controlling pollution, Congress has chosen a different course with NSR.

Accordingly, we hold that the ERP violates section 111(a)(4) of the Clean Air Act in two respects. First, Congress's use of the word "any" in defining a "modification" means that all types of "physical changes" are covered. Although the phrase "physical change" is susceptible to multiple meanings, the word "any" makes clear that activities within each of the common meanings of the phrase are subject to NSR when the activity results in an emission increase. As Congress limited the broad meaning of "any physical change," directing that only changes that increase emissions will trigger NSR, no other limitation (other than to avoid absurd results) can be implied. The definition of "modification," therefore, does not include only physical changes that are costly or major. Second, Congress defined "modification" in terms of emission increases, but the ERP would allow equipment replacements resulting in non-*de minimis* emission increases to avoid NSR. Therefore,

because it violates the Act, we vacate the ERP.