No. 06-1037

In The
Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS,
COMMONWEALTH OF KENTUCKY, AND
JEFFERSON COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE RETIREMENT ADMINISTRATORS ("NASRA"), THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS ("NCPERS") AND THE NATIONAL COUNCIL ON TEACHER RETIREMENT ("NCTR") AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBERT E. TARCZA
TARCZA AND ASSOCIATES, LLC
228 St. Charles Avenue
Suite 1310
New Orleans, Louisiana 70130
(504) 525-6696

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq*.

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INTEREST OF THE *AMICI CURIAE*[1]

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS"), the National Association of State Retirement Administrators (hereinafter "NASRA") and the National Council on Teacher Retirement (hereinafter "NCTR") are national organizations focused on the preservation, growth and stability of public pension plans and funds. The decision of the Sixth Circuit Court of Appeals in *EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006) undermines and frustrates these goals.

NASRA is a non-profit association whose members are the directors of this nation's state, territorial and largest statewide public retirement systems. These systems hold more than two trillion dollars in assets that provide pension and other benefits to more than two-thirds of all state and local government

[1] The parties have consented to the filing of this brief and letters reflecting that consent have been filed with the Clerk of the Supreme Court as required by Supreme Court Rule 37.2. Further as required by Supreme Court Rule 37.6, counsel certifies that this Brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae*, their members or undersigned counsel made a monetary contribution to the preparation or submission of this Brief. It should be noted that Robert D. Klausner, counsel of record for the Petitioners, is general counsel to *Amici,* NCPERS and NASRA. Mr. Klausner has also previously represented NCTR. However, he did not participate in the preparation or submission of this Brief or make any monetary contribution toward its submission or preparation.

employees. In addition to its membership, NASRA also has approximately 200 associate members. Associate members are private sector firms that work with governmental retirement systems.

Among other functions, NASRA maintains a standing survey of key characteristics of public retirement systems and maintains a clearinghouse of information and resources pertinent to public retirement administration and policy.[2]

The National Conference on Public Employee Retirement Systems ("NCPERS") is the largest national non-profit public pension advocacy organization, representing over 500 governmental pension funds having assets in excess of two trillion dollars. NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee education and providing essential pension information to trustees, administrators and public officials.[3]

The National Council on Teacher Retirement ("NCTR") traces its origins to 1924. NCTR became affiliated with the National Education Association in 1937. It has been an autonomous educational and

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[2] General information concerning NASRA as well as specific data regarding its activities can be found at its website, www.nasra.org.

[3] General information concerning NCPERS as well as specific data regarding its activities can be found at its website, www.ncpers.org.

advocacy organization since 1977. NCTR has 77 state, territorial, local and university retirement systems as members. These systems provide retirement benefits to over 16 million educational professional, non-teaching school employees and retirees. NCTR member funds are responsible for the management of $1.4 trillion in assets. NCTR maintains a professional staff who provide educational and management guidance to member funds. Likewise, NCTR provides a national forum for the discussion of issues of national and local concern to public educational employee retirement plans. NCTR regularly advises Congress, state legislatures and federal, state and local executives on the management and protection of member retirement systems and their funds. NCTR also assists member funds in the development and implementation of professional plan management and asset investment policies.[4]

The *Amici* regularly cooperate on joint educational and advocacy projects due to the identity of interests in preserving the integrity of state and local retirement systems and the common state law issues regulating these plans. All of the *Amici* are non-profit tax exempt entities under Section 501(c)(6) of the Internal Revenue Code.

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[4] General information concerning NCTR as well as specific data regarding its activities can be found at its website, www.nctr.org.

As the primary advocates for governmental retirement plans and the more than 25 million Americans whose financial security depends upon them, NASRA, NCPERS and NCTR have a direct stake in the outcome of this litigation. *Amici* and their member funds represent significant assets and millions of citizens which have an interest in this matter and will be adversely affected by the decision rendered by the Sixth Circuit *en banc* in this case. The Circuit Court's determination ultimately broadens the scope of the ADEA as it affects state and local governmental pension plans and will inevitably lead to additional litigation and concomitant expense in designing, preserving and protecting public pension funds. Likewise, as a result of the decision, member plans may be forced to modify or reduce retirement benefits to millions of public employees nationwide in conflict with state constitutional guarantees.

SUMMARY OF ARGUMENT

This Court has granted a Writ of Certiorari to determine whether the use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq*.

Amici file this brief in support of the Petitioner, the Kentucky Retirement Systems, and urge reversal of the decision of the Sixth Circuit on the following

grounds: (1) the decision of the Sixth Circuit will lead to instability in the design, management and protection of public retirement funds; (2) under the *en banc* analysis virtually all pension plans (as it relates to retirement or disability) would be "on their face" discriminatory solely because they contain a reference to "age"; (3) the Sixth Circuit's analysis is contrary to this Court's decision in *Hazen* and conflicts with decisions of other Courts of Appeals; (4) the decision has widespread adverse fiscal implications; and (5) the decision violates principles of federalism.

The decision of the Sixth Circuit ultimately forces the nation's state and local retirement systems to act at their and their systems' detriment based merely on the denial of the Motion for Summary Judgment.[5] This court, in reviewing this matter,

[5] The EEOC originally filed an action for declaratory, injunctive and monetary relief on behalf of Mr. Lickteig and others similarly situated who were allegedly excluded from disability retirement due to age. Petitioner moved to dismiss the actions on Tenth and Eleventh Amendment Immunity grounds. The District Court denied the motion and the Court of Appeals affirmed. The parties then filed cross-motions for summary judgment. Petitioner asserted that the EEOC had not established a prima facie case and that any "discrimination" fell within the ADEA's statutory exceptions. The District Court granted the Petitioner's motion for summary judgment and concluded the plan was not facially discriminatory and noted that to so hold would be "illogical" as age was always a factor in retirement plans. The District Court also indicated that the court could not reach the result requested by the EEOC "without undermining virtually every retirement policy in existence." The Sixth Circuit affirmed the decision. Then on rehearing, *en banc*,

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should reverse that decision in order to forestall the otherwise inevitable adverse reaction of the states to the Sixth Circuit's decision. Further, as the Sixth Circuit *en banc* decision is contrary to this Court's analysis of "disparate treatment" cases under the ADEA and is in conflict with decisions of other circuits, the decision should be reversed.

ARGUMENT

1. THE DECISION OF THE SIXTH CIRCUIT WILL LEAD TO INSTABILITY IN THE DESIGN, MANAGEMENT AND PROTECTION OF PUBLIC RETIREMENT FUNDS.

There are more than 25 million working and retired state and local government employees in the United States. Retired public employees live in virtually every city and town in the nation (90% retire and remain in the same jurisdiction where they worked).

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the court reversed the district court's granting of the motion for summary judgment and remanded. In so ruling, the *en banc* court found that the EEOC had established a prima facie violation of the ADEA as the Kentucky plan was facially discriminatory and that no further proof of discriminatory intent was necessary or required. The *en banc* court, in part, based its ruling on its finding that the Kentucky plan excluded employees over age 55 from a particular benefit because of their age. The *en banc* court ignored evidence that the plan was organized around "years of service" and not age. The *en banc* court in so finding overruled its previous decision in *Lyon* and brought its decision into conflict with this court's decision in *Hazen*.

Active public employees comprise more than 10% of the nation's workforce and two-thirds are employed in education, public safety, corrections and the judiciary. Retention of experienced and trained personnel in these positions is critical to the continuous and reliable delivery of public services.[6] In fact, this is one of the reasons that public retirement plans offer generous disability retirement plans for hazardous duty jobs such as police officers and firefighters. This was one of the express purposes and goals of the Kentucky plan.

Public pension plans distribute more than $140 billion annually (an amount greater than the total economic output of 22 states) in benefits to nearly seven million retirees, beneficiaries and other recipients with an average pension benefit of roughly $20,400 annually. These payments are steady and continuous and provide a robust economic stimulus to local economies throughout the nation. Studies indicate that public pension funds and the benefits they distribute make important contributions to the local, state and national economies. Likewise, the assets of

[6] Data and statistics obtained from NASRA and are generally available through its website at www.nasra.org. See generally the resources section of NASRA web site. The site also has available general statistics and studies regarding retirees and retirement systems across the nation. Additional information regarding retirees and their demographic was obtained and is available from data, reports, statistical abstracts and briefs contained within the U.S. census bureau website at www.census.gov.

these plans are an important source of liquidity and stability for the nation's financial markets.[7]

Further, while private sector plans are subject to federal regulation through ERISA, state and local governmental plans are creatures of state constitutional, statutory and case law. These governmental plans must comply with a vast landscape of state and local requirements as well as industry accounting standards. These plans are accountable to the legislative and executive branches of the state; independent boards of trustees that include employee representatives; and ultimately the taxpaying public.[8]

The Sixth Circuit's finding that a public retirement plan is facially discriminatory simply because it considers age as a correlating factor in its retirement benefit formula undermines the funding and benefit framework of the nation's public pension plans. These public pension plans, upon which millions of retirees and their beneficiaries depend, will be subjected to great instability as the decision will: (1) upset the actuarial assumptions on which the states make funding decisions; (2) lead to huge expenses in designing, managing and protecting these plans; (3) require fundamental constitutional and statutory changes in virtually every state in the U.S.;[9] and (4)

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[7] See, Footnote 6, *supra*.

[8] See, Footnote 6, *supra*.

[9] The Kentucky Retirement Plan at issue in this case has a retirement formula common to many public retirement plans.

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foster uncertainty in the national financial markets as the plans attempt to discern the status of the law and come into compliance with it.

The plan offers both "normal" and "disability" retirement. The plan in order to provide a meaningful disability retirement option imputes years of service to a disabled employee to allow him to qualify for normal retirement. This is not an approach novel to or limited to the State of Kentucky. An overview of retirement provisions throughout the nation indicates that many states have provisions which impute "service years" during disability retirement in order to allow the disabled worker to qualify for normal retirement benefits. See, for example, Indiana Code, 36-8-8-13.3(b) and (c); Michigan C.L.A. 38.23 and 38.556(2)(d); North Carolina G.S.A. Sections 135-1 and 135-5 *et seq.*; Pennsylvania C.S.A. Sections 5102 and 5704; Tennessee C.A. Section 8-36-501(c)(3). Thus, if the Sixth Circuit decision is not reversed or modified by this Court, states will be forced to immediately redesign, re-formulate and re-legislate their disability and normal retirement plans. If "imputation of service" is not a valid methodology or legitimate actuarial remedy, then it would be virtually impossible to provide any meaningful disability retirement for young workers (with a minimum amount of actual service years) and at the same time provide a meaningful normal retirement to older workers (with a minimum amount of actual service years). More importantly, the legitimate goal and objective of the State of Kentucky (and other state and local systems) to provide a meaningful disability retirement for hazardous duty personnel is frustrated if not destroyed. Likewise, the legitimate state end of attracting qualified personnel (whether young or old) to risky and dangerous professions which serve society and are of benefit to the general public is lost. Ironically, the Sixth Circuit's decision would clearly place older workers at a disadvantage and deny them benefits available to younger workers. This can not be the intended goal of the ADEA for retirement benefits.

2. THE USE OF "AGE" AS A FACTOR IN A RETIREMENT PLAN DOES NOT RENDER THE PLAN DISCRIMINATORY UNDER THE ADEA.

The *en banc* decision of the Sixth Circuit finds that the Kentucky retirement plan is "facially discriminatory" simply because "age" is a factor in determining eligibility for a disability pension under the plan.[10] The District Court and the Sixth Circuit on prior hearing had both refused to make a finding of facial discrimination.[11] The District Court in its granting of the Petitioner's summary judgment noted:

> In a retirement policy, age is necessarily a factor, as the very nature of such a program requires age considerations. In this disability retirement policy, retirement eligibility is a product of age and years of service. However, finding a retirement policy facially discriminatory merely because age is a factor in the plan is illogical, and the court will not do so now. While discriminatory intent may

[10] The worker in this case (Mr. Lickteig) was already eligible for normal retirement benefits based on his age and accumulated years of service. There was no need for "imputation of service" years in order to qualify Mr. Lickteig for a disability pension as at the time of his disability he was already otherwise qualified for normal retirement benefits. Mr. Lickteig at the time of his disability was already over 55 years of age and had accumulated 17 years of service.

[11] The previous decision of the Sixth Circuit was vacated by the *en banc* decision. The vacated decision is included in the Joint Appendix, pp. J.A. 36 – J.A. 55.

> not be required to show that a statute is facially discriminatory, some indication beyond the fact that a retirement policy uses age and years of service in its retirement eligibility scheme is needed in this case. Without any such indication, the plaintiff is asking the court to hold that age cannot be explicitly referred to in a retirement policy without violating the ADEA, and the court cannot so hold without undermining virtually every retirement policy in existence.

Judgment and Order entered by the U.S. District Court for the Western District of Kentucky, Joint Appendix, pp. J.A. 24 – J.A. 35, p. J.A. 28.

The *en banc* ruling will in effect force retirement plans across the nation to review and re-design their retirement plans. Further, the review and re-design will be no easy task as (1) most pension plan benefits are guaranteed in the state's constitution;[12] and (2)

[12] Many states have constitutional provisions protecting against diminishing, impairing, encumbering or diverting public sector retirement funds for any reason or purpose whatsoever. Based on a recent survey, approximately 25 states have some form of constitutional provisions protecting these public retirement funds or such protections have been otherwise legislatively or judicially created. See, for example, Michigan Constitution, Article 9, Sections 19 and 24; New Mexico Constitution, Article XX, Section 22; South Carolina Constitution, Article X, Section 16. Likewise, many states consider membership in a state employee retirement system as a contractual relationship subject to statutory and constitutional protections which may be judicially enforced. See, for example, Alaska Constitution, Article 12, Section 7; Arizona Constitution, Article 29,

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the plan can make no reference to age without such reference being deemed "facially discriminatory," making actuarial analysis virtually impossible.[13]

The Sixth Circuit's ruling threatens all pension plans, in as much as all use "age" as a factor in determining retirement eligibility. Clearly, the ADEA, even as amended by the Older Workers Benefit Protection Act of 1990 ("OWBPA"), permits the establishment of a normal retirement age.[14] Further, age is always a factor in establishing retirement eligibility, along with years of service and the kind or type of service rendered.

All pension plans must establish some criteria for retirement. Most commonly and logically, these are years of service (whether actual or imputed), age and rate of pay. There are simply not many other obvious and legitimate factors or considerations in establishing

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Section 1; Michigan Constitution, Article 9, Section 19. Thus, the *en banc* decision, if not reversed, may force major revisions to state constitutional and statutory schemes. To the extent that the decision affects or impairs the guaranteed contractual rights of retirement fund members, the states or funds would be subject to a multiplicity of suits by retirees or future retirees for impairment of these contractual rights and obligations.

[13] Actuaries engaged by the nation's pension systems can determine accurately the normal pension benefits to be received by the participants at normal retirement age. Disability retirements are not predictable by definition and are based solely on past statistical experience.

[14] The Act also preserves defenses for the retirement system including "reasonable factors other than age", seniority systems and to preserve a bona fide employee benefit as long as the cost to the system does not vary by age.

a bona fide retirement plan. The Court of Appeals ignored these actuarial realities and evidence that the organizing principle of the Kentucky plan focused on the employees' eligibility for retirement based on their actual years of service. Likewise, the Court of Appeals ignored the fact the State of Kentucky had designed its retirement system as an accommodation to the disabled worker to provide a full and fair retirement benefit which would be comparable to the benefit received had the worker not been disabled and been able to proceed to normal retirement. Under the Kentucky plan, all public employees with at least five (5) years of service are ensured of a retirement benefit when they are no longer able to work, without regard to their age. Finally, the Sixth Circuit ignored the fact that the plan was designed to serve a legitimate state goal and purpose of attracting and retaining qualified applicants in high risk public jobs such as police officer and firefighter.

The Sixth Circuit decision, if not reversed by this Court, may also open the floodgates to a multitude of claims which could cripple retirement programs. The EEOC in the case now under consideration has sought damages including back benefits with prejudgment interest dating to 1992. If the thousands of public pension plans nationwide are now subject to suit, literally billions of dollars of state and local pension funds will be at risk. Public pension plans should not be thrown open to scrutiny and found discriminatory simply because "age" is utilized as a factor in the plan. Clearly, the failure by this Court to

reverse this decision could have catastrophic and destabilizing results.

Ironically, the effect of the Sixth Circuit decision will be to harm older workers. Under the Kentucky plan at issue in this case, a hazardous duty worker is vested and eligible to retire after reaching age 55 with five (5) years of service. If Kentucky is forced to modify its plan and revert to a straight "years of service" formula, workers who begin work later in life will never receive a pension because from an actuarial standpoint it would be cost prohibitive to provide retirement benefits to all workers with five (5) years of service who retire at any age.

The Kentucky formula actually encourages the hiring of older workers, consistent with the congressionally stated purpose of the ADEA, because the older workers, even with limited service, can still receive a pension. Under a strict "years of service" formula (with no allowance for reference to age) it would be financially impossible to offer a lifetime pension to workers who begin service late in life, because it is not possible to offer a younger worker with five (5) years of service a similar lifetime pension.

This Court should consider the practical effect of the Sixth Circuit's decision, which is to eliminate pension benefits for millions of workers who begin public service late in life. This alone is reason enough for the judiciary to tread lightly in invoking any sweeping changes to the manner in which ADEA

cases and specifically "disparate treatment" cases are viewed and analyzed in dealing with public retirement systems. After consideration of the matter, *Amici* would request that this court reverse the decision of the Sixth Circuit *en banc*.

3. THE SIXTH CIRCUIT DECISION IS CONTRARY TO THE HOLDING OF THIS COURT IN *HAZEN*.[15]

The Sixth Circuit analyzes this case as one of "disparate treatment" not one of disparate impact.[16]

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[15] *Hazen Paper v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

[16] Under *Hazen*, in "disparate treatment" cases liability depends on whether the protected trait, i.e. age, actually motivated the employer's decision. In other words, the protected trait (age) must have actually played a role in and had a determinative influence on the employer's decision. In contrast, "disparate impact" claims under the ADEA may be established without demonstration of discriminatory motive or intent. See, *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). Disparate treatment and disparate impact cases are fundamentally different. As Justice O'Connor wrote in Hazen, this Court "has long distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." 507 U.S. at 607.

In the instant case, the EEOC has alleged a "disparate treatment" claim under the ADEA. Nonetheless, the Sixth Circuit has applied a "disparate impact" analysis to this "disparate treatment" claim. *Smith,* in which this Court first recognized *ADEA* "disparate impact" claims, recognizes that an employer has defenses in "disparate impact" cases and may base his decision or plan on "reasonable factors other than age." See, 29 U.S.C. § 623(f)(1). Even utilizing a "disparate impact"

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The Sixth Circuit *en banc* found the Kentucky plan to be "facially discriminatory" so that no additional proof of discriminatory intent or motive was necessary, as motive and intent were directly evidenced by the facially discriminatory nature of the policy itself. *See,* 467 F.3d at 578-579, 580-582. More importantly, the Sixth Circuit *en banc* decision holds that "an employer's intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy."[17] 467 F.3d at 580.

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analysis, Kentucky put forth sufficient evidence to establish an RFOA defense, which evidence the Sixth Circuit erroneously disallowed or ignored.

[17] It is unclear from the Sixth Circuit *en banc* decision whether the burden of production, burden of proof or burden of persuasion in an ADEA "disparate treatment" case has been affected. Petitioners in connection with their Motion for Summary Judgment put forth sufficient evidence to demonstrate that there were legitimate "factors other than age" which were considered in establishing the disability and regular retirement plans and in establishing the participants' eligibility criteria and requirements. As Chief Judge Boggs notes in the dissent, age was merely a correlating factor in establishing eligibility, not the motivating factor. Despite this showing by Petitioners, the *en banc* panel held there was a "prima facie" showing of discrimination (which was apparently not rebutted by the Petitioner's evidence). Accordingly, the Sixth Circuit remanded the matter to the District Court for further consideration. To the extent the *en banc* decision may affect and upset long lines of decisions of other Circuits and this Court regarding available defenses, burden of proof, burden of production or the burden of persuasion in ADEA "disparate treatment" claims, this Court should reverse the holding of the Sixth Circuit *en banc* and clarify these issues.

The decision is in direct conflict with *Hazen* where this Court stated:

> in a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment to employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Hazen, 507 U.S. at 609 (citations omitted).

In this case, it appears that age was nothing more than an incidental or correlating factor. It was not the motivating factor for the Kentucky plan. As the District Court noted in its granting of Summary Judgment and dismissal of the EEOC complaint: "Again, age will always be a factor in retirement plans. The fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a mask used to hide discrimination."[18] For the Sixth Circuit to find

[18] See, "Order" of the United States District Court for the Western District of Kentucky, filed September 3, 2003, Granting Kentucky's Motion for Summary Judgment and Dismissing the

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the plan facially discriminatory violates the "disparate treatment" analysis laid out by this Court in *Hazen*.[19]

Neither the intent nor the letter of the ADEA is violated by a retirement plan's reference to age when this is merely a correlating factor or an "actuarial reality." This court should reverse the decision of the Sixth Circuit *en banc* and ensure the decision conforms to its holding in *Hazen* and other "disparate treatment" cases under the ADEA.

4. THIS COURT SHOULD CONSIDER THE ADVERSE FISCAL CONSIDERATIONS WHICH FLOW FROM THE DECISION.

The Sixth Circuit in the instant matter seems concerned that Kentucky engages in the typical practice of not permitting persons who have already

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EEOC complaint. The "Order" is included in the Joint Appendix, pp. J.A. 24 – J.A. 35 and the quote is from page J.A. 32. See also, *Lyon v. Ohio Education Ass'n and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995) which found that imputation of service years in a retirement plan was not discriminatory but a reflection of an 'actuarial reality'. *Id.* at 140. The Sixth Circuit *en banc* decision which is now under review overrules *Lyon*.

[19] The Sixth Circuit *en banc* decision also favorably cites various cases from sister circuits as "mandating" its holding and overruling of *Lyons*. See, Joint Appendix, pp. J.A. 76 – J.A. 77. However, a close reading of those cases reveals that they are distinguishable on their facts and are not analogous to the case at bar nor do they "mandate" the decision of the *en banc* Court.

reached normal retirement age to receive disability benefits. Many plans nationwide actually convert disability retirees to normal retirement status upon attainment of normal retirement age, provided that no reduction in benefit payments occurs.

This practice is consistent with the purpose of disability benefits, particularly for public safety employees injured in the course and scope of hazardous duty. Without disability benefits, public safety officers injured on the job would be unable to survive financially until normal retirement age. Disability payments thus provide a needed bridge from active paid service to normal retirement.

The ADEA as amended by the OWBPA specifically permits states to establish a normal retirement age. Further, Congress has recognized that public servants in hazardous duty situations may have a lower retirement age than regular state employees and as a result has seen fit to eliminate the IRC Section 72t penalty for early withdrawal from retirement plans for public safety officers who retire after age fifty. For regular employees, the Congress has set normal retirement age for the 72t penalty at fifty-nine and one-half, or age fifty-five in the case of a separation from service.

Similarly the Congress has seen fit to tax disability benefits differently from normal retirement benefits. While the latter are generally taxable as ordinary income, the former are exempt from tax under IRC section 105. Forcing states to provide

disability benefits in lieu of normal retirement benefits after a worker reaches normal retirement age will have a direct negative effect on the public fisc, contrary to the express intent of Congress.

Thus, aside from the fiscal impact of the Sixth Circuit decision on the states, the decision affects the federal treasury as well.

5. THE SIXTH CIRCUIT DECISION VIOLATES PRINCIPLES OF FEDERALISM.

The ADEA defines an "employer" to include a state and a political subdivision of a state but not the United States. 29 U.S.C. § 630(b). However, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), this Court held that although Congress intended the ADEA to abrogate the States' Eleventh Amendment immunity, this abrogation exceeded Congress' authority under the Fourteenth Amendment. Specifically, this Court held that Congress could not impose certain substantive requirements on state and local governments when such requirements were disproportionate to any unconstitutional conduct which could be targeted under the ADEA.[20]

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[20] *Kimel* is an important decision in recognizing, upholding and furthering the principles of federalism. The decision centers on the Court's review of the Congressional intent and purpose in passing the ADEA and the power of Congress to abrogate the States' sovereign immunity under the Eleventh and Fourteenth

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Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), a 1989 decision of this Court, was legislatively modified by the OWBPA on the limited finding of Congress that younger workers could not be afforded a specific benefit which was not available to older workers. Contrary to the implied finding of the Sixth Circuit, OWBPA does not generally abrogate well established principles of federalism which discourage the federal government from interfering with the traditional police powers reserved to the states.

The decision of the Sixth Circuit turns federalism on its head and forces the states to show that their policies in the traditional area of state law enforcement do not violate non-binding guidelines issued by the EEOC.[21] This is an area which has always been

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Amendments to the United States Constitution. The Court ultimately held the ADEA's abrogation of state immunity invalid under Section 5 of the Fourteenth Amendment by disallowing suits against states by individuals under the ADEA in federal court.

[21] It is clear the EEOC has rule-making authority under the ADEA. However, rather than engaging in rule-making, the EEOC issues "guidelines" concerning the interpretation of and compliance with the ADEA. However, ADEA guidelines issued by the EEOC are only statements of EEOC policy and do not comply with the legal requirements for rule-making. The force and effect of such guidelines is merely a function of their persuasive effect. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000). Further, no deference is due to agency interpretations at odds with the plain language of the statute itself. The EEOC has brought suit against Kentucky based solely on the EEOC's staff interpretation of an ADEA provision, in a transparent attempt to bully the

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strictly construed in favor of the states, and this Court has never gone so far as to abrogate state sovereignty in favor of a federal agency's guidelines which have not attained the force of law.

The Tenth Amendment to the United States Constitution confirms the state's status as a sovereign. In deference to the sovereignty of the state, the federal government can neither: "issue directives requiring the states to address particular problems nor command the state's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).[22]

Through its enforcement actions, guidelines and advisory directives, the EEOC has sought in this and other enforcement actions to dictate to the states how to design and structure their public retirement plans. This is an affront to federalism principles embodied in the Tenth Amendment to the U.S. Constitution. Likewise, the efforts of the EEOC undermine and

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sovereign State of Kentucky into adopting the EEOC's staff interpretation of the law, without any true law making, formal publication or opportunity for public comment. This is directly at odds with the proper functioning of our federal system.

[22] In *Printz*, this Court found that the obligation to conduct background checks imposed on sheriffs by a federal gun law (the Brady Bill) was unconstitutional as it required the states to administer a federal regulatory program. Specifically, the law was violative of the principles of dual sovereignty established and contained in the U.S. Constitution.

frustrate a vast array of state constitutional and legislative provisions specifically involved with the establishment, design, funding and maintenance of these public retirement systems. The employment and payment of state officers enforcing the plenary police powers of a state is paramount to the sovereignty of that state.

The power of a state to regulate its own citizenry and to regulate relationships with its own employees and retirees is essential element of our system of federalism. Congress recognized this in exempting public retirement plans from the scope of ERISA in 1974.[23]

Likewise, this Court should strictly scrutinize decisions expanding the scope and application of the ADEA to public retirement systems and particularly plan design and participant eligibility. The Sixth Circuit's *en banc* decision directly and wrongly permits the federal government to regulate the states in the provision of traditional police and fire protection to their citizens. The Framers of the Constitution would be appalled.

[23] See, 29 U.S.C. § 1003(b)(1).

CONCLUSION

For the above and foregoing reasons, *Amici Curiae* urge that after consideration the decision of the Sixth Circuit *en banc* be reversed.

Respectfully submitted,

ROBERT E. TARCZA
TARCZA AND ASSOCIATES, LLC
228 St. Charles Avenue
Suite 1310
New Orleans, Louisiana 70130
Telephone: (504) 525-6696

Counsel of Record for Amici Curiae NASRA, NCPERS and NCTR