No. 06-1037

In The Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
PETITIONERS,
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE [1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce such rights. Almost half of AARP's more than 39 million members are in the work force, most of whom are protected by the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, et seq., as well as by other federal and state work place civil rights laws. Vigorous enforcement of these laws is of paramount importance to AARP, its working members, and millions of other workers of all ages who rely on such laws to deter and to remedy illegal discrimination, including the discriminatory denial of employee benefits based on proximity to eligibility for retirement.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA

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[1] This Brief of Amici Curiae AARP and National Employment Lawyers Association (NELA) in support of Respondent is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, amici state that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than amici made a monetary contribution to the preparation or submission of this brief.

advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

Amici's concern in this case is that Petitioners are asking this Court to undermine the prohibitions of the ADEA by adopting the erroneous tenet that the statute permits employers to deny benefits to, or otherwise discriminate against individuals because they have reached the minimum eligibility age for retirement. Interpreting the ADEA's prohibition against age discrimination in such a way would turn the Act on its head and render it completely ineffective and unenforceable. Similarly, requiring age discrimination victims to prove that an employer was motivated by inaccurate, age-based stereotypes in order to establish a prima facie case, as urged by the Petitioners, will shield even the most blatant forms of age discrimination from liability. As this Court stated in another context, "We ought not to open the door to an evasion of the statute by this device." Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998).

For these reasons, Amici submit its brief amici curiae.

SUMMARY OF ARGUMENT

This case presents a textbook case of age discrimination in employment. Older workers are denied benefits completely or are provided inferior benefits to those provided to younger workers. The Kentucky Retirement System (KRS) Plan discriminates against older workers in violation of the ADEA in two ways. First, it disqualifies otherwise eligible workers from receiving disability retirement benefits if they have already reached the minimum age to receive normal retirement benefits at the time they become disabled. Second, for those employees who are not so disqualified, the KRS Plan's method of calculating disability retirement benefits favors younger employees over similarly situated older employees. Because age is a direct and deciding factor in determining eligibility for normal retirement, which in turn determines who is eligible for disability retirement benefits, the KRS Plan facially discriminates against older employees in violation of section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1).[2]

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[2] Section 4(a)(1) of the ADEA provides:

> (a) Employer practices It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> 29 U.S.C. § 623(a)(1).

KRS's rationale for denying benefits to older workers – "to provide assistance to members who are unable to continue working, but would not have a source of income through unreduced retirement benefits," Brief of Petitioners at 13, or in other words, to "provide a boost" to younger workers, id. at 23 – is completely irrelevant for two reasons. First, the EEOC has established KRS's liability under the ADEA by showing that its policy of denying or paying reduced benefits to employees simply because they reached, or were nearing the minimum eligibility age for normal retirement benefits, facially discriminates based on age. Nothing in the ADEA or its companion civil rights statutes absolves violators based on their beneficent motivation. Second, the only defense to a claim of unequal benefits based on age is the objective "equal benefit or equal cost"standard contained in section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i). An employer's subjective motivation for denying or paying inferior benefits to older workers is, therefore, irrelevant.

Finally, Petitioners' claim that its use of age to determine eligibility for benefits was not unlawful under the ADEA because it was not based on inaccurate age-based stereotypes must fail. It is the plain language of the statute and not the primary intent of Congress that guides this Court's interpretation of the ADEA. Congress prohibited employers from "discriminat[ing] . . . because of . . . age," 29 U.S.C. § 623(a)(1), not from discriminating because of age-based stereotypes.

I. DENYING DISABILITY BENEFITS TO EMPLOYEES BECAUSE THEY REACHED THE MINIMUM ELIGIBILITY AGE FOR RETIREMENT CONSTITUTES A FACIAL VIOLATION OF THE ADEA.

The denial of an employee benefit to older workers based on their eligibility for retirement, when such eligibility is defined by age, is a clear violation of the ADEA, 29 U.S.C. § 623(a)(1) and 623(f)(2)(B)(i), as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990). The OWBPA expressly requires employers to provide equal benefits or to incur equal costs in providing benefits to older and younger employees. 29 U.S.C. § 623(f)(2)(B)(i).[3] Under the OWBPA, the discrimination is the difference in the benefits, plain and simple. If an employer provides a benefit to younger workers, but denies that benefit to older workers, the difference in benefits constitutes per se discrimination under the ADEA, regardless of the employer's subjective motivation for structuring the benefit package as it did.

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[3] Congress' articulated purpose behind the passage of the OWBPA was "to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Pub. L. No. 101-433, 104 Stat. 978, Title I, § 101(1990) (codified at 29 U.S.C. § 621).

A. Adverse Employment Actions Directed Against Individuals Because They Have Reached the Minimum Age to Receive Retirement Benefits are "Because of Age" and Violate the ADEA

Since the 1980's, courts uniformly have held that the practice of denying benefits to older employees because their age (sometimes combined with years of service) makes them eligible for retirement benefits violates the ADEA. See EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222-23 (3d Cir. 1983) ("If eligibility for . . . retirement can be used to justify the denial of [benefits] to older employees, the purpose of the ADEA will be defeated."); EEOC v. Borden's, Inc., 724 F. 2d 1390, 1393 (9th Cir. 1984) (rejecting arguments that a severance policy that denied benefits to retirement-eligible employees "distinguished employees on the basis of their retirement status, and not solely because of age . . . .").[4]

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[4] Accordingly, KRS's bold assertion, without reference to any legal authority, that "it is legal to base eligibility for disability benefits on whether an employee already has a retirement safety net," Brief of Petitioners at 49, could not be any further from the truth. KRS also makes the preposterous assertion that its facially discriminatory plan should be overlooked because it generously allows older workers to be eligible to retire after only five years of service and because those who are most disadvantaged by its plan are those older workers whom KRS was willing to hire despite their age. Brief of Petitioners at 51. The fallacy of this argument is obvious when put into the context of Title VII of the Civil Rights Act of 1964. An employer would never dare to suggest that it be absolved of

The issue was also of central concern to Congress when it enacted the OWBPA. In passing the OWBPA, Congress expressly condemned the very practice that the KRS insists is lawful. Congress declared that "it is per se age discrimination to use pension eligibility as a basis for denying an older worker any other benefits." H.R. Rep. No. 101-664, at 40 (1990); S. Rep. No. 101-263, at 23 (1990) ("[P]ension benefits are age-related. Pension-eligibility is a proxy for age. Accordingly, it is per se discrimination to use pension-eligibility as a basis for denying an older worker any other benefit.") (emphasis in original). In so stating, Congress cited with approval EEOC v. Borden's Inc., 724 F.2d 1390, 1393-95 (9th Cir. 1984), overruled in part, on other grounds by Public Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989),[5] which held that employment decisions based on retirement eligibility that is conditioned on attainment of a minimum age violates the ADEA. H.R. Rep. No. 101-664, at 38.

Petitioners rely on this Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) for the erroneous conclusion that the ADEA does not prohibit employment decisions based on retirement

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liability under Title VII for paying women less compensation than men because it was willing to hire women in the first place.

[5] The OWBPA was enacted to "overturn[ ] both the reasoning and holding" of the [Public Employees Ret. Sys. v.] Betts decision. S. Rep. No. 101-263, at 5 (1990). In the OWBPA's legislative history, Congress "specifically agree[d] with and reaffirm[ed]" the Ninth Circuit's holding in Borden's. Id. at 22.

eligibility. However, as explained above, Congress expressly prohibited such decisions in the OWBPA. Moreover, nothing in the Hazen Paper decision transforms age-based retirement eligibility into an age-neutral, legitimate consideration for employment decisions. The only issue resolved in Hazen Paper was "whether an employer violates the ADEA by acting on the basis of a factor, such as employee's pension status or seniority, that is empirically correlated with age." 507 U.S. at 608. This Court's holding was "simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." 507 U.S. at 613. The Court's rationale for its ruling was that "age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.' Id. at 611.

The Hazen Paper Court, however, specifically declined to extend its holding to situations where retirement eligibility is defined by a specific minimum age, 507 U.S. at 613, as is the case here. It is clear from the terms of the KRS Plan that "the employee's protected trait [here, age] actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." Hazen Paper, 507 U.S. at 610 citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) and City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, 704-18 (1978).

Subsequent to Hazen Paper, several courts of appeals have correctly held that the ADEA prohibits denying benefits and other privileges of employment based on retirement eligibility, when such eligibility is defined by age. In Huff v. UARCO, Inc., 122 F.3d 374 (7th Cir. 1997), the Seventh Circuit found that a pension plan setting age 55 as the minimum retirement age violated the ADEA by requiring retirement eligible employees who terminated employment to accept a payout of benefits over time, while offering a lump sum payout option to those employees who were terminated but were ineligible for retirement. The Huff court explained:

> Because age is an express condition of receiving a benefit, we think that the instant case presents a close approximation of the case Hazen Paper declined to decide. Nothing in Hazen Paper prohibits a finding that UARCO's expressly age-related policy violates the ADEA . . . . This is not a case where there is merely a correlation between age and the denial of a particular benefit. UARCO's policy draws an express line between workers over fifty-five and those under.

122 F.3d at 388 (citation omitted).

In Johnson v. State of New York, 49 F.3d 75 (2d Cir. 1995), the defendant sought to hide behind Hazen Paper to avoid liability for its practice of terminating its employees after they reached the Air

National Guard's mandatory retirement age of 60. In rejecting this ploy, the Second Circuit explained,

> The State's reliance on Hazen Paper is unavailing. The flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement at 60 . . . is not merely correlated with age; unlike Hazen Paper, the employer's decision here implements an age-based criterion. Regardless of the State's reasons for requiring that certain of its civilian employees maintain ANG membership, there can be no doubt that Johnson's age "actually played a role . . . and had a determinative influence" on the decision to terminate his employment.

49 F.3d at 79-80. See also Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193, 211 (3d Cir. 2000) ("Medicare status is a direct proxy for age. This case is therefore parallel to the 'special case' mentioned by the Court in Hazen Paper, where an adverse action is taken against a person because of a particular event (i.e. approaching pension vesting) and that event in turn occurs because the person has attained a certain age.").

Similarly, in EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641 (9th Cir. 1993), the defendant union had a policy that prohibited retired union members from seeking work through the

union's hiring hall. Reaffirming its decision in Borden's, 724 F.2d 1390 (9th Cir. 1984), the Ninth Circuit correctly held that age was a "but for" cause of the plaintiffs being denied a privilege of employment since the union's policy, on its face, discriminated on the basis of a factor [retirement status] that was itself defined by age. 998 F.2d at 646.

The Ninth Circuit also held in Arnett v. Cal. Pub. Employees Ret. Sys., 179 F.3d 690 (9th Cir. 1999), cert. granted, 528 U.S. 1111, vacated on other grounds by Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000), that a plan that provided greater benefits to employees who had more "potential years of service" was facially discriminatory because "potential years of service" was "a strict function of age." 179 F.3d at 695. In this case, KRS asserts that it is permissible to "calculate disability payments based upon how far an employee is from retirement eligibility." Brief of Petitioners at 33. But because retirement eligibility is defined by a minimum age, as it was in Arnett, "how far an employee is from retirement eligibility" is just another way of saying "potential years of service." And, because "how far an employee is from retirement eligibility" is a strict function of age, the KRS plan, like the plan in Arnett, is facially discriminatory.

One other way in which this case closely resembles Arnett is the employer's justification for its facially discriminatory plan. KRS suggests that the older employees who are denied benefits have

had more "years to devote to making money, providing for [themselves] and [their] famil[ies], saving funds for retirement, and accruing years that will increase [their] retirement benefits." Brief of Petitioners at 23. In short, according to KRS, younger employees "need more of a boost." Id. In response to the identical rationale, the Ninth Circuit stated in Arnett:

> PERS further claims that the system presumes that the younger employee, having been in the workforce less time than an older hire, does not have other resources to count on, 'unlike an employee who begins work in the public sector later in life.' Not only is this wholly speculative, since many employees first enter the workforce later in life, it epitomizes precisely the sort of class-based assumptions that the Supreme Court has repeatedly rejected. See, e.g., Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (employer violates Title VII's prohibition on discrimination against individuals where employer's retirement contribution scheme assumes that women generally live longer than men).

179 F.3d at 696 (emphasis added).

Finally, the fact that some members of the ADEA's protected age group may not have been

harmed by the Petitioners' facially discriminatory policy is irrelevant. One of the cornerstones of employment discrimination law in this country is that an individual who alleges discrimination does not need to prove that all members of the statutorily protected group were discriminated against. And, the fact that the employer treated other members of the protected group favorably is also irrelevant to whether the employer discriminated against the plaintiffs. As this Court has stated, "It is clear that Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group." Connecticut v. Teal, 457 U.S. 446, 455 (1982).[6]

B. Because the KRS Plan is Facially Discriminatory, No Additional Proof of Discriminatory Intent is Required to Establish Liability.

As the Sixth Circuit correctly held, because of the facially discriminatory nature of the KRS plan, no additional proof of discriminatory intent was required. EEOC v. Jefferson County Sheriff's Dept., 467 F.3d 571, 581 (6th Cir. 2006). "Whether an

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[6] The Petitioners' argument that because retirement eligibility is not exclusively determined by age their plan does not violate the ADEA is equally unavailing. To prove age discrimination, an employee need not prove that age was the sole factor for the employer's acts, but must show that age made a difference. Kralman v. Illinois Dept. of Veterans' Affairs, 23 F.3d 150, 153 (7th Cir. 1994); Green v. Safeway Stores, Inc., 98 F.3d 554, 557 (10th Cir. 1996).

employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).[7] Accordingly, KRS's claims that it wasn't seeking to harm older employees but instead was only trying to provide a "boost" to younger employees who need it more than older employees is completely irrelevant to whether its policy of disqualifying retirement-eligible employees from receiving disability benefits violates the ADEA. This Court squarely addressed this issue in Manhart, 435 U.S. 702, 709 (1978) holding that the defendant's requirement that female employees make larger contributions to its pension fund than male employees, based on the fact that as a class women live longer than men, violated Title VII's prohibition of discrimination based on sex. The Court so held even though it acknowledged that the policy in question was based on notions of "fairness." Id.

Similarly, in Johnson Controls, although the defendant had a laudable reason for barring most women from lead-exposed jobs – the protection of the health of unborn children – this Court struck down the company's policy. "[T]he absence of a malevolent

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[7] See also EEOC v. Borden's, Inc., 724 F.2d at 1393 (because the employer denied severance benefits based on retirement status, the court "d[id] not require a showing of Borden's animus or ill will toward older people"); Johnson v. State of New York, 49 F.3d at 78 (same).

motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." 499 U.S. at 199. See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 129 (1985) (airline's transfer policy was discriminatory on its face, notwithstanding the fact that the airline acted reasonably and in good faith when drafting the policy).

C. The Only Defense to a Claim of Unequal Benefits Based on Age is the ADEA's "Equal Benefit or Equal Cost" Rule.

The OWBPA imposes the burden of proof on the employer to rebut a charge of age discrimination in benefits. 29 U.S.C. § 623(f)(2). The standard for determining whether unlawful age discrimination occurs in employee benefits is an objective one, specifically the "equal benefit or equal cost" standard, 29 U.S.C. § 623(f)(2)(B)(i), which requires employers "to provide equal benefits to, or to incur equal costs for benefits on behalf of, all employees." H.R. Rep. No. 101-664, at 7 (1990).

Congress specifically rejected a subjective standard focused on the employer's intent for determining whether providing unequal benefits based on age violates the ADEA. The codification of the "equal benefit or equal cost" standard replaced the subjective intent standard articulated by the Court in Public Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989). In Betts, the Court interpreted ADEA § 4(a)(1) in conjunction with the employee

benefit defense in ADEA § 4(f)(2) to "include a subjective element" that required a plaintiff to prove that the "discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." 492 U.S. at 181.

The OWBPA eliminated the subjective intent standard created by Betts for proving compliance with the ADEA in the context of a claim for unequal benefits based on age. The OWBPA specifies that the ADEA's prohibitions in § 4(a)(1) cover employee benefits and clarifies that § 4(f)(2)(B)(i) is an objective standard requiring the employer to demonstrate that it provides equal benefits to older and younger workers or to prove that any differential in benefits is due only to age-related costs. H.R. Rep. No. 101-664, at 6; S. Rep. No. 101-263, at 5.

In the face of a claim of unequal benefits based on age, the ADEA dictates that the employer's only defenses are to prove (1) equal benefits, or (2) that age-related costs justify the difference in benefits, 29 U.S.C. § 623(f)(2)(B)(i), or (3) one of the explicit safe harbors contained in 29 U.S.C. § 623(l) of the ADEA. The defenses are technical, objective standards. Thus, under the ADEA the employer's intentions in structuring a benefit or benefit plan, whether good, bad, or indifferent towards older workers, do not play any role. Indeed, during the passage of the OWBPA, Congress confirmed that an employer's motive in creating a benefit plan is irrelevant to the issue of liability under the ADEA

by adding a specific provision that benefit plans must comply with the OWBPA "regardless of the date of adoption of such system or plan." 29 U.S.C. § 623(k).[8] Accordingly, KRS's claim that it was merely trying to help younger employees who would not otherwise be eligible for retirement is unavailing to whether its plan violates the ADEA.

II. LIABILITY UNDER THE ADEA DOES NOT DEPEND ON EVIDENCE THAT THE EMPLOYER WASMOTIVATED BY INACCURATE AND STIGMATIZING STEREOTYPES CONCERNING OLDER WORKERS.

"The starting point in determining how a statute is to be applied is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). There is no basis in the language of the ADEA to restrict its reach to employment decisions based on stereotypes. To do so would thwart the will of Congress and eviscerate the ADEA's broad protections.

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[8] This provision made it unnecessary and irrelevant to inquire into an employer's state of mind at the time the benefit was created, an inquiry the Court in Betts and United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) had made critical in determining whether the benefit plan was a "subterfuge," meaning a scheme to evade the purposes of the ADEA. In the OWBPA, Congress expressly overruled McMann as well as Betts by eliminating the term "subterfuge" from ADEA along with an inquiry into the employer's subjective motive for denying a benefit. See H.R. Rep. No. 101-664, at 45-46.

In Hazen Paper, this Court observed that, "Congress promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." 507 U.S. 610. See also EEOC v. Wyoming, 460 U.S. 226, 231 (1983) ("Although age discrimination rarely was based on the sort of animus motivating other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes."). Petitioners, and unfortunately numerous lower courts, have seized upon that observation to argue that the ADEA prohibits only discrimination based on inaccurate stereotypes. However, as Justice Scalia wrote for a unanimous Court, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonable comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1988). See also Gonzales v. Oregon, 546 U.S. 242, 288 (2006) (emphasizing that this Court has "repeatedly observed that Congress often passes statutes that sweep more broadly than the main problem they were designed to address.").[9]

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[9] This Court has applied this bedrock principle in contexts other than employment discrimination. H.J. Inc. v. Northwestern Bell Telephone Co., rejected the argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) should be restricted to cover only "organized crime" because Congress including findings in RICO's preamble that only focused on that problem. After reviewing the legislative

In Kimel v. Florida Bd. of Regents, this Court rejected an invitation to limit the reach of the ADEA "only to arbitrary age discrimination, which in the majority of cases corresponds to conduct that violates the Equal Protection Clause." 528 U.S. 62, 86 (2001). Instead, this Court declared that:

> The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard. The ADEA makes unlawful, in the employment context, all 'discriminat[ion] against any individual . . . because of such individual's age.' 29 U.S.C. § 623(a)(1).

Id. (emphasis added). The Court went on to pronounce that the ADEA's substantive provisions sweep so broadly that they are "at a level akin to our heightened scrutiny cases under the Equal Protection Clause." Id. at 88. And, directly relevant to this case, the Court declared that "the State's use of age [in Kimel] is prima facie unlawful." Id. at 87 citing 29 U.S.C. § 623(a)(1).

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history, this Court ruled that even though "[t]he occasion for Congress' action was the perceived need to combat organized crime, . . . Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." 492 U.S. 229, 248 (1989).

Congress may have been concerned with "inaccurate and stigmatizing stereotypes," but Congress chose to address all forms of age discrimination and adopted Title VII's prohibitions "in haec verba." Lorillard v. Pons, 434 U.S. 575 U.S. 575, 584 (1978). The ADEA's legislative history, which was the basis of the language regarding stereotypes in the Court's Hazen Paper decision, cannot revise and limit the Act's express statutory prohibitions.[10] See Zuni Pub. Schools Dist. No. 89 v. Dept. of Educ., 127 S.Ct. 1534, 1536-37 (2007); Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 83, 842-433 (1984).

In the 1965 Report, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, on which Congress drew heavily in crafting the ADEA, Secretary of Labor Willard Wirtz declared:

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[10] In City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702(1978), the Court held that even the use of stereotypes that were accurate and nonstigmatizing violated Title VII. Since the prohibitions of the ADEA and Title VII are identical, liability under either statute clearly does not depend on whether the employer is motivated by inaccurate stereotypes or accurate facts. Indeed, the ADEA prohibits an employer from denying or reducing benefits based on age, despite the fact that when it enacted the ADEA Congress was well aware of the fact that the cost of providing certain benefits to older workers can be higher than providing the same benefits to younger workers. S. Rep. No. 90-723, at 14 (1967). However, denying an employee benefit based on age, even if motivated by accurate cost data and not unfounded stereotypes, violates the ADEA unless the employer satisfies 29 U.S.C. 623(f)(2)(B)(i).

> It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

U.S. Secretary of Labor, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 21 (June 1965), reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT. Yet, that would be the precise result if the reach of the ADEA were to be limited to discrimination motivated only by inaccurate and stigmatizing stereotypes concerning older workers.

Indeed, a review of some lower court decisions that have erroneously restricted the ADEA to such actions demonstrates the preposterous results that ensue when courts require plaintiffs to prove that the employer's discriminatory actions were on account of "inaccurate and stigmatizing stereotypes." For example, in Sperling v. Hoffmann-La Roche, Inc., 924 F. Supp. 1346 (D.N.J. 1996), there was undisputed evidence that the employer fired employees based on their "proximity to retirement" and/or whether or not they were eligible for "ample retirement benefits." 924 F. Supp. at 1388. The court ruled that this action did not violate the ADEA despite the fact that the definition of "ample retirement benefits" mandated that the employee be at least 50 years old and that "Proximity to Voluntary Retirement was defined by a two-part

test: (1) plaintiff's actual age at termination was 50 or over and (2) plaintiff's number of years of remaining employment was less than 8 years, determined by subtracting plaintiff's age from his or her regular retirement age of 65. Id. n. 25.

Astoundingly, the court ruled that although both proximity to retirement and eligibility for retirement benefits were functions of age, the employer's decision to target individuals for its reduction-in-force if they met either definition did not violate the ADEA. The court explained its holding by saying that there was no evidence that the decisions to target older employees for the reduction-in-force "were based on denigrating stereotypes about older workers. Rather, the testimony suggests that the managers were using proximity to retirement and eligibility for retirement benefits as a means to minimize the effect that [the reduction-in-force] would have on [the employer's] employees" Id. at 1390. Indeed, one manager admitted that he believed one of the older workers he fired based on eligibility for retirement benefits was "better in the performance of his job," than younger workers who were retained, "but we felt that he would be the least hurt by being let go because he was somewhat near retirement anyway." Id. n. 27. Clearly, requiring evidence of "inaccurate and stigmatizing stereotypes" deprived that older worker of the ADEA's promise that he be judged "based on [his] ability rather than age . . . ." 29 U.S.C. § 621(b).

As this decision aptly demonstrates, if this Court engrafts a new criterion of proof onto the ADEA that an employer must be motivated by "inaccurate or stigmatizing stereotypes" about older workers before they can be found liable, we will be returned to the era when mandatory retirement was lawful in this country. Employees who reach the minimum age for retirement benefits will be vulnerable for termination with no recourse available to them. The ADEA's express prohibition of age discrimination will become less and less effective because employers will be free to eliminate older workers so long as their stated rationale for doing so does not implicate stereotypes about older workers.

Another decision illustrates how requiring age discrimination victims to prove that the employer was motivated by stereotypes about older workers will turn back the clock to the time when maximum hiring ages, one of the evils the ADEA was enacted to address, and has in fact eliminated were commonplace. In Dilla v. West, 4 F. Supp. 2d 1130 (M.D. Ala. 1998), aff'd per curiam, 179 F.3d 1348 (1999), it was undisputed that the plaintiffs were not hired as air traffic controllers "based upon an assessment of the years remaining before each candidate became eligible for retirement." Id. at 1141. The court addressed what it considered to be a "difficult legal question . . . whether consideration of the candidates' retirement eligibility status . . . constituted age discrimination under the ADEA because one cannot consider that status without taking into account the candidates' ages." Id.

Remarkably, the court ruled that despite the fact that the employer refused to consider the plaintiffs for employment because of their retirement eligibility which was "inextricably linked" with age, id. at 1142, the plaintiffs did not establish that they were denied employment because of their age because they failed to show that the employer "exploited the perfect . . . correlation between retirement or pension status and age to mask his true reliance on age and age-based stereotypical thinking." Id.

Prior to the ADEA's enactment in 1967, approximately half of all private job openings explicitly barred applicants over age fifty-five and a quarter barred those over forty-five. 113 Cong. Rec. 1089-90 (Jan. 23, 1967). If this Court accepts the Petitioners' invitation to limit the scope of the ADEA's prohibitions to actions motivated by "inaccurate or stigmatizing stereotypes" about older workers, those job advertisements may be replaced with employers simply refusing to hire any applicant whose age is relatively close to their retirement plan's minimum eligibility age. If the hiring criterion was challenged, the employer would need only assert that it did not refuse to hire older workers because of concerns about age-related declines in productivity (the prohibited stereotype), but instead was legitimately concerned that the older workers might leave upon reaching retirement age. If this Court condones such an extremely narrow interpretation of the ADEA, the potential experience, energy, and dedication that older workers bring to the work place will once again be

extinguished by that "harsh[ ] verdict . . . that they are no longer worth their keep . . . when the answer at the hiring gate is "You're too old." THE OLDER AMERICAN WORKER at 1.

Congress addressed this problem forty years ago when it enacted the ADEA and prohibited all forms of discrimination "because of . . . age," 29 U.S.C. § 623(a)(1), and did not limit the scope of the Act to decisions motivated by age-based stereotypes. Congress should not have to do so again because of the misguided actions by lower courts to limit the ADEA's plain and unambiguous language based on this Court's observation that Congress was concerned about "inaccurate and stigmatizing stereotypes." Hazen Paper, 507 U.S. at 610.

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 357 (1995), a unanimous Court emphasized that the ADEA "reflects a societal condemnation of invidious bias in employment decisions . . . [that is] part of a wider statutory scheme to protect employees in the workplace nationwide." This strong language belies the Petitioners' attempt to limit the reach of the ADEA to stereotypical thinking alone. To the contrary, the ADEA is a broad remedial statute and should be construed liberally in order to further its purposes. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765-66 (1979) (Blackman, J. concurring); see also Thurston, 469 U.S. at 120 quoting Lorillard v. Pons, 434 U.S. 575, 577 (1978) ("The ADEA 'broadly prohibits arbitrary discrimination in the workplace based on age.'").

CONCLUSION

For the foregoing reasons, amici AARP and NELA respectfully submit that the judgment of the Unites States Court of Appeals for the Sixth Circuit should be affirmed.

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