No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2000

COUNTY OF ERIE, PENNSYLVANIA, ***Petitioner***

v.

ERIE COUNTY RETIREES ASSOCIATION, et al., ***Respondent*****s**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, cover retirees so that a violation of the statute occurs when an employer decides after employees retiree to provide disparate health benefits based upon Medicare eligibility?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals, Third Circuit, were Erie County Retirees Association, Lyman A. Cohen, for himself and all others similarly situated, and the County of Erie, Pennsylvania.

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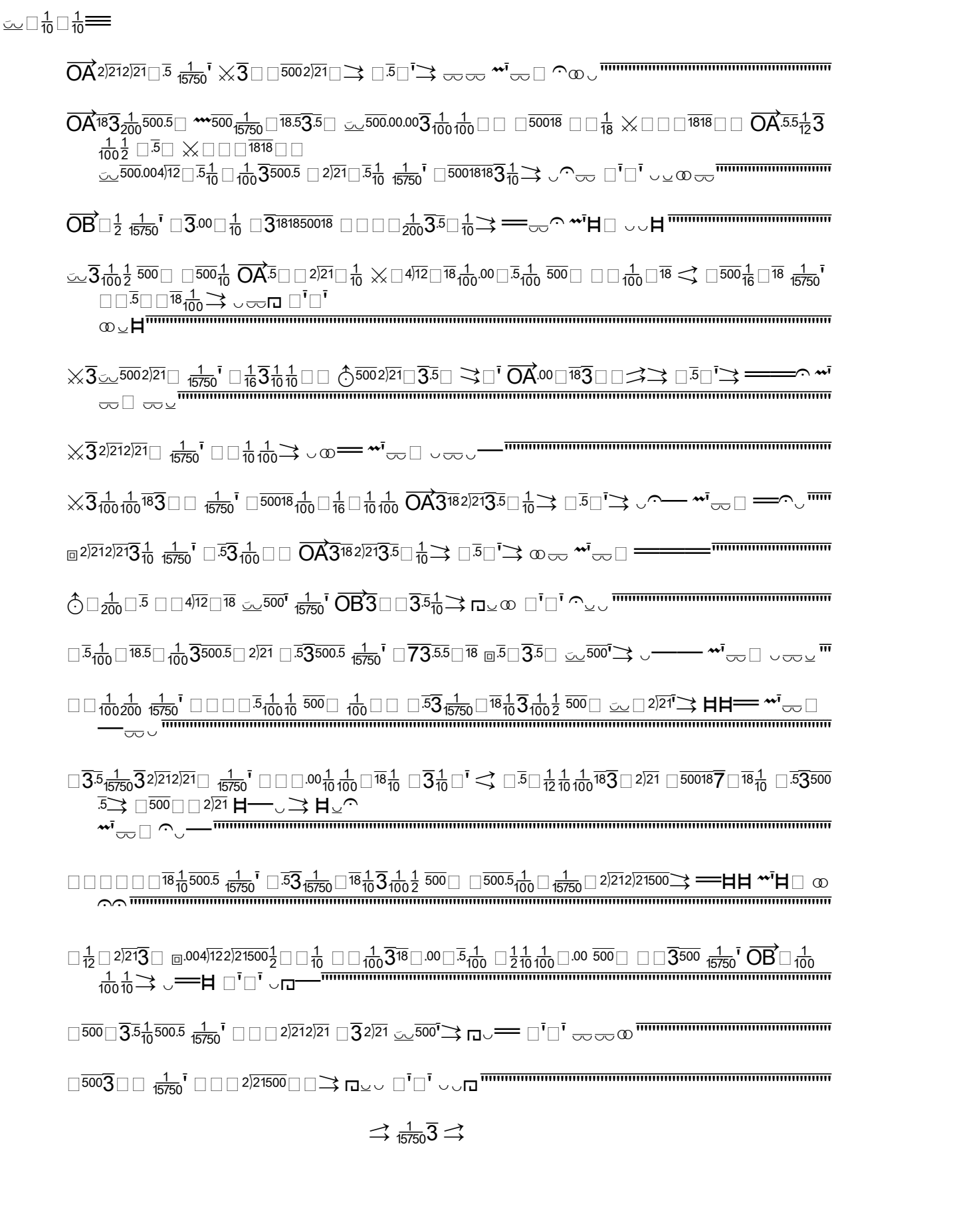

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

COUNTY OF ERIE, PENNSYLVANIA, *Petitioner*

v.

ERIE COUNTY RETIREES ASSOCIATION, et al., *Respondents*

On Petition for A Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

The County of Erie, Pennsylvania petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, __) is reported at 220 F.3d 193. The District Court's opinion is reported at 91 F. Supp. 2d 860 (App., *infra*, __).

JURISDICTION

The court of appeals entered its judgment on August 1, 2000. A petition for rehearing and suggestion for rehearing en banc was denied by the court of appeals on September 6, 2000 (App., *infra*, __), and is unreported. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant portions of the Age Discrimination in Employment Act of 1967, as amended by the Older Workers Benefit Protection Act, 29 U.S.C.A. §§ 621-634, are reproduced in Petitioner's Appendix, *infra*, at ____.

STATEMENT

This action arises out of changes to the medical coverage provided by the County of Erie, Pennsylvania ("the County") to its retirees over age 65 eligible for Medicare. Beginning in 1972, the County instituted a program whereby persons employed by the County for at least eight years would be entitled to hospitalization insurance benefits during their retirement. The policy was a change from the County's previous practice of providing hospitalization benefits only to active employees. In 1987, the County began using Blue Cross/Blue Shield of Western Pennsylvania ("Blue Cross/Blue Shield") to provide coverage for three groups of people: (1) current employees, (2) Medicare-eligible retirees and (3) retirees not eligible for Medicare. All three groups received traditional indemnity insurance.

Faced with increasing health insurance costs, the Erie County Employees' Retirement Board (the "Board"), which administered the medical coverage for the County's retirees, decided on January 23, 1992 that employees hired after that date would not be eligible for continued health insurance

benefits upon retirement.[1/] In December 1995, the Board further restricted eligibility by declaring that persons the County hired prior to January 23, 1992 would remain eligible for retiree health benefits only if they fell into one of four groups: employees unable to continue their employment due to a disability and who otherwise were eligible for a disability retirement pension; employees who retired from the County government with at least 20 years of service and 55 years of age; employees involuntarily terminated from County government employment with at least eight years of service; and employees who retired from the County with at least eight years of service and 60 years of age. The plaintiff class in this action is composed of retirees who are aged 65 or older--and thus eligible for Medicare--who remain eligible for retiree health coverage under these restrictions.

In 1997, a change in government accounting standards prevented the County from continuing to use the "excess interest" generated by its pension funds to pay the premiums for retiree health coverage; instead, the County began to pay the premiums from its regular budget. That year, the County took over the Board's responsibility to select retiree health plans.

In the fall of 1997, pressure to reduce costs was enhanced when Blue Cross/Blue Shield announced that it would increase the County's premiums for medical insurance coverage by an average of 48%. Due to the increase in costs, the County restructured its retiree health plans. The County selected a Blue Cross/Blue Shield plan called "SecurityBlue" for its Medicare eligible retirees. SecurityBlue provides coverage through a Health Maintenance Organization ("HMO") that would require retirees to continue to pay Medicare Part B Medical Insurance premiums. Effective February 1,

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[1/] The Board is a named defendant in this action but did not participant as a party in the proceedings in the court below.

1998, the County required all former County employees qualified for SecurityBlue to accept that program or lose all health coverage.

The County selected another Blue Cross/Blue Shield plan, "SelectBlue," for its retirees who were not eligible for Medicare and therefore not eligible for SecurityBlue. SelectBlue is a point-of-service plan that combines the features of an HMO and a traditional indemnity plan. It placed those retirees in SelectBlue effective October 1, 1998. Under SelectBlue, participants had the option to receive care through a managed care system of providers or through physicians of their own choice. Retirees who did not qualify for either SecurityBlue or SelectBlue because they did not reside within the western Pennsylvania service area were offered traditional indemnity health insurance by the County.

Because SecurityBlue did not offer the "self-referral" option available under SelectBlue, the SecurityBlue retirees sued the County and the Board in September 1998, asserting that this difference in treatment from February 1998 forward vis-a-vis both current employees and non-Medicare-eligible retirees and their required payment of Medicare premiums violated the Age Discrimination in Employment Act ("ADEA") and state law.

The district court certified the class as an opt-in class action in February 1999. The County and plaintiffs then filed cross-motions for summary judgment on the plaintiffs' ADEA claims. Plaintiffs did not seek summary judgment on the claim that they were treated less favorably than current employees; rather, they compared themselves only to retirees not eligible for Medicare. The district court granted partial summary judgment to the County, concluding that "the ADEA clearly was not intended to apply to retirees . . . who premise their complaint on alleged disparities in the retirement health benefits based on Medicare-eligibility." (App., *infra*, __).

Following the grant of partial summary judgment to the County, the plaintiffs withdrew any claim that they had *vis-a-vis* current employees. The district court then declined to exercise supplemental jurisdiction over the state law claims and dismissed those claims without prejudice.[1/] The plaintiffs appealed.

On August 1, 2000, a panel of the Third Circuit reversed the district court's order for partial summary judgment, holding that plaintiffs had established a claim under the ADEA, and remanded the case to the district court to determine whether the County can satisfy the safe harbor contained in 29 U.S.C. § 623(f)(2)(B)(i).[1/]

REASONS FOR GRANTING THE PETITION

[2/] A majority of the panel, over a dissent by Judge Shadur, held that the district court decision was a final order subject to an appeal even though the district court dismissed the pendent state claims without prejudice. Judge Shadur's dissent did not address the merits.

[3/] The Third Circuit has directed the district court on remand to consider the factual issue of whether the County can satisfy the "equal benefit" safe harbor recognized in 29 C.F.R. § 1625.10.

The court of appeals below mistakenly held that retirees are covered under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and that the ADEA prohibits employers from providing disparate health benefits to its retirees based on Medicare eligibility. Its ruling threatens serious harm to current and future retirees because it encourages employers to reduce or eliminate health benefits for all retirees provided by their former employers. The court of appeal's ruling is contrary to the statutory language of the ADEA, the express goals of the ADEA, the ADEA's legislative history, and the public policy that private funding of health coverage for retirees should be encouraged. This important issue of statutory construction has not been, but should be, settled by this Court. Indeed, the Equal Employment Opportunity Commission ("EEOC") has recently announced in its Compliance Manual a broad nationwide principle based on the decision below that "there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility" other than the equal cost or equal benefit defense. EEOC Compliance Manual No. 915.003 at ch. 3, § IV.B (Oct. 3, 2000).

THE COURT OF APPEALS' DECISION RAISES AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION THAT PROFOUNDLY AFFECTS THE ABILITY OF RETIREES TO RECEIVE HEALTH BENEFITS.

1. The statutory prohibition against age discrimination contained in Section 623(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, uses the term "individual," *i.e.*, to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The court below held that the term "individual" as used in the ADEA includes a "retiree"[1/] in conjunction with its holding that an employer

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[4/] The ADEA does not define "retiree." The term "retirees" appears in Section 623(l)(2)(D) which deals with the computation and deduction of the value of retiree health benefits from

violates the ADEA when it offers its Medicare-eligible retirees health insurance coverage inferior to retired employees not eligible for Medicare. (*See* Pet App., *infra*, at __) The ADEA does not contain a definition of the term "individual" so that a reviewing court can determine in a "plain and unambiguous" manner whether a "retiree" comes within that term and is covered by the statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Accordingly to make that determination, "reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" must be examined to decide the "plainness or ambiguity" of the statutory language in question. *Id.* at 341. A textual reading of the statute in conjunction with an understanding of its context indicates that Congress did not intend "retirees" to be included within the term "individual." The legislative history as well is consistent with this textual reading of the statute.

The broad, generic meaning of the term "individual" is of no help to the plaintiffs. This Court in *Robinson* stated that:

> To be sure "individual" is a broader term than "employee" and would facially seem to cover a former employee. But it would also encompass a present employee as well as other persons who have never had an employment relationship with the employer at issue. The term "individual," therefore does not seem designed to capture former employees, as distinct from current employees, and its use provides no

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a severance payment in conjunction with a layoff. *See infra* at __. This severance deduction is made while the "individual" (the term used in the statutory provision) is a current employee, not after the individual has left the employer's workforce, *i.e.*, a retiree. Section 623(l)(2)(F) provides a cause of action for specific performance for such payment if the employer subsequently fails to fulfill its obligation to a retiree with regard to that health benefit. This provision for a unique cause of action demonstrates that Congress knew when it had to provide a special cause of action for retirees where none otherwise existed. Moreover, Section 623(l)(2)(D) states that the term "retiree health benefits" is used "For the purposes of this paragraph and solely in order to make the deduction authorized under this paragraph . . . ." This specification is further evidence that coverage for retiree health benefits was limited to a *single* circumstance with respect to a setoff for severance benefits.

> insight into whether the term "employees" is limited only to current employees.

Id. at 345. Similarly, Section 630(l) defines "compensation, term, conditions, or privileges of employment" to encompass "*employee* benefits." The words "compensation, terms, conditions, or privileges of employment" that appear in Section 623(a)'s prohibition against age discrimination and are defined thereafter in the statute as "employee benefits" do not support plaintiffs' position that a "retiree" is included within the term "individual." This plain language means benefits granted to a person while they are an employee, not benefits granted to a person when they are already a retiree. The definition of "compensation, terms, conditions, or privileges of employment" is phrased in terms of "employee benefits" not benefits to retirees.

This confusion over what the term "individual" encompasses is also not cured by reference to the statutory definition of "employee" appearing in Section 630(f) which refers back to the term "individual": "the term 'employee' means an individual employed by any employer . . . ." A retired person is not employed by an employer. While this Court in *Robinson* previously construed "employee" in the context of Title VII's anti-retaliation provision to encompass "former employees," that decision provides no guidance here because the term "employee" is not used in either Sections 623(a) with respect to the meaning of "individual" or 623(f)(2)(B)(i) with respect to the meaning of "older" or "younger workers."

Moreover, the Court in *Robinson*, to determine whether to read the term "employee" broadly in the context of Title VII's anti-retaliation provision, looked at the "primary purpose" of that provision: "Maintaining unfettered access to statutory remedial mechanisms." *Id.* at 345. By contrast, the express purposes of the ADEA are "to *promote employment* of older persons based on their ability" and "to

prohibit arbitrary age discrimination *in* employment." 29 U.S.C. § 621(b) (emphasis added). Thus, while a broad reading of "employee" may have been appropriate to effectuate the purpose of Title VII's anti-retaliation provision, especially where the term is used in the statutory provision in question, such a reading is not consistent with the express purposes of the ADEA. *See infra* at ___. Thus, a retired person has no *employment relationship* with his employer, and the employer is therefore free to make distinctions amongst those persons without violating the ADEA. *See* § 623(f)(2)(A).

The next place to look to determine whether plainness or ambiguity exists, according to the Court's direction in *Robinson,* would be to examine the "specific context in which the language is used. . . ." That cannot occur here with regard to "retiree" because that term is not used in the relevant statutory sections, *i.e.*, Sections 623(a) or 623(f)(2)(B)(i), nor is the term "employee" used. Even if other sections of the ADEA, which do not contain the term "employee", are examined in the search for context, there can be no certain answer which would resolve the dispute in this case.[1/] This Court in *Robinson* further stated that in its examination of the term "employee" it did not find that the term had the same meaning in all sections of Title VII. 519 U.S. at 343-44. This, said the Court, indicates that the term is ambiguous and therefore "each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Id.* This is likewise true in the ADEA where the term "employee" in certain sections unambiguously refers to current employees. *See* Sections 623 (a)(2), 623 (a)(3), and 623(c)(2) as examples.

The court below held that the term "employee benefits" as used in Section 630(l) is broad enough to encompass retiree health benefits, citing *Arizona Governing Comm. for Tax Deferred*

[5/] "Retiree," likewise is not defined in the ADEA. *See, supra,* n.__.

Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1079 (1983). That case, as the court below recognized, dealt with decisions made about retirement plans while the employees were *current* employees. (App., *infra*, __) That is not the case here. The decisions about the choice of health plans for the County's retirees was made by the County *after* the retirees had left the County's employ. To bridge this crucial gap in reasoning, the court below adopted the EEOC's proposition that it would be anomalous that a decision, unlawful prior to the employee leaving the employer's workforce, becomes somehow lawful one day later when the employee is now retired. (*Id.* at __.) That result-oriented approach, not drawn from any reference to the statutory language, should be disregarded, especially given the conflicts in the legislative history.

The broader context of the statute as a whole -- the third area identified by this Court in *Robinson* to determine whether a statutory term is plain or ambiguous -- shows that the Older Workers Benefit Protection Act of 1990 ("OWBPA"), Pub. L. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C. §§ 623, 626, 628, 630 (1994)), which amended, *inter alia*, Section 623 (f)(2) of the ADEA, was aimed at prohibiting employee benefit discrimination that might discourage older workers from remaining in the workforce or punish older workers who remained in the workforce. *See, infra,* at __. See also Section 621 of the ADEA which states *inter alia*: "The Congress hereby finds that in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment . . . . It is therefore the purpose of this chapter to promote the employment of older persons . . . ." Likewise, Section 622 of the ADEA speaks in terms of "studies" about the "potential [of older workers] for continued employment," and that the Secretary of Labor shall undertake research "with a view to reducing barriers to the employment of older persons." This purpose of the ADEA was also recognized by this Court in *Hazen Paper Co. v.*

Biggins, 507 U.S. 604 (1973), where the Court stated that the passage of the ADEA "was prompted by its concern that older workers were being deprived of employment . . . ." 507 U.S. at 610.

Given that policy underlying the ADEA and especially the OWBPA, it is significant that the County's policy with regard to retirement health benefits did not discourage or punish the plaintiffs for remaining actively employed. To the contrary, the plaintiffs would have been better off had they continued employment with the County because they would have remained eligible for health coverage under the County's traditional indemnity plan. Congress did not enact the Age Discrimination in Retirement Act.

Resolution of the issue of the plainness or ambiguity of the term "individual" in terms of whether it encompasses retirees can be resolved as well by looking at the broader context of the statute in question, as was done in the *Robinson* case, and by looking at the statute's legislative history. As noted above, the statutory purposes of the ADEA and OWBPA would not be served by the plaintiff's interpretation of the term "individual." Should plaintiffs be correct, then employers would attempt to comply with the equal benefit/equal cost exception by simply eliminating or severely reducing health benefits for *all* retirees. This illogical result, together with the avowed purposes of the ADEA and OWBPA, would indicate that Congress did not intend for retired persons to come within the ADEA's coverage.

Any arguable lack in clarity is also resolved by resort to the legislative history. The "Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.'" *Toibb v. Radloff*, 501 U.S. 145, 161 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). The legislative history of the OWBPA indicates that

retirees were *not* intended to be covered. *See, e.g.*, 136 CONG. REC. 25,366 (1990) (colloquy between Senators Bentsen and Pryor: "The distinguished Senator is correct" that the ADEA "does not apply to retirees" and "applies only to employees and those individuals seeking employment"); 136 CONG. REC. 27,059 (1990) (Representative Clay during debates in the House of Representatives stated: "Since the ADEA covers only employees and those individuals seeking employment, nothing in the bill would apply the provisions of the ADEA to retirees."); 136 CONG. REC. H8,621 (daily ed. Oct. 2, 1990) (On the floor of the House, Representative Goodling specifically acknowledged that the compromise "bill also clarified that employers are not required to provide equivalent retiree health coverage to Medicare-eligible retirees."); 136 CONG. REC. H8,628 (daily ed. Oct. 2. 1990) (Representative Clay stated that the ADEA protects employees whose "retiree health benefits are discriminatorily structured on age at the time of retirement.").

The regulatory history of the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1982, Pub. L. 97-248, 96 Stat. 324 (1982), similarly demonstrates that retirees were not intended to be covered under the ADEA in the context of a now-repealed ADEA provision concerning group health coverage. TEFRA added a provision, Section 4(g) (codified as 29 U.S.C. § 623(g)), which required group health coverage to be offered under the same conditions for employees aged 65 though 69 as any employee under age 65. This amendment essentially nullified the "equal cost/equal benefit" rule with respect to group health plans and instead created the more stringent requirement that employers offer health coverage under any group health plan on the same terms and conditions to all of their employees, regardless of age. *See* 48 Fed. Reg. 26435 (June 7, 1983) ("The overall intent of Section 4(g) [is] to relieve Medicare of the responsibility of providing primary health insurance coverage for the working elderly.").

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The EEOC published interim regulations advising that "retirees would not be considered 'employees' covered by 29 U.S.C. § 623(g)." 48 Fed. Reg. 26434 (June 7, 1983). The EEOC further commented that:

> The issue has been presented concerning an employer's obligation to employees aged 65 through 69 who are at present not actively employed but who are receiving health benefits by virtue of extended coverage under an employer's health plan. In such a situation, the Commission will look to all the facts and circumstances to determine whether an employment situation still exists . . . *Retirees are not embraced by the term employee* and are, therefore, not covered by the literal wording of the new section . . . .

Id. at 26435 (emphasis added). Section 623(g) was later repealed in 1989. *See* Pub. L. 101-239, 103 Stat. 2233 (1989).

The EEOC's view now has changed. In the court below, the EEOC argued as an *amicus* that it would be anomalous to hold that an individual while employed could challenge a discriminatorily determined retiree health benefit, but could not do so one day later when that individual retired. (*See* App., *infra*, at ___.) The Third Circuit found this argument persuasive. (*Id.* at __.) Not only is the EEOC's present position inconsistent with its prior one, the EEOC's "one day later" argument fails to recognize that the Court of Appeal's ruling would permit an ADEA claim by a retiree against a former employer that he or she worked for twenty years ago.[1/]

[6/] The EEOC's recent Compliance Manual cites to the court below's decision stating, "if an employer eliminates health coverage for retirees who are eligible for Medicare -- or if it refuses to continue to cover its older retirees for the benefits it provides that are not offered by Medicare -- older retirees will get less coverage than younger retirees on the basis of their age. Unless the employer can meet the equal cost defense, the law does not permit this age discrimination." EEOC Compliance Manual No. 915.003 at ch. 3, § IV.B (Oct. 3, 2000).

Thus, the legislative history of the OWBPA and the EEOC's failure to have a consistent interpretation of the term "employee" support the County's position that retirees were not intended to be covered within the term "individual" under the ADEA, and provide ample justification for reversal of the decision below.

2. Further textual analysis supports the County's view that the meaning of the term "individual" does not include retirees. The ADEA contains a statutory exception for discrimination in employee benefits in Section 623(f)(2)(B)(i) whereby an employer may justify age-based disparities in employee benefit plans based on the value or the cost of the benefit received. That subsection does not speak in terms of "individuals" but states that "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide employee benefit plan where . . . 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 worker* . . . ." (emphasis added)[1/] Thus, the statute on one hand prohibits discrimination against "individuals" but frames an exception in much narrower terms with regard to "older" and "younger workers." Plaintiffs here want to be "individuals" protected by the statute but not "older workers" subject to the statutory exception based on the value or cost of the benefit. Such an inherent statutory inconsistency is resolved by the simple fact that someone who is a "worker" must be currently *working* and not be a "retiree."

[7/] The ADEA does not define "worker."

The legislative history of the OWBPA aids in interpreting the intent of Congress with respect to this subsection. As originally enacted, the ADEA provided a narrow exception under which it would not be unlawful for employers "to observe the terms of . . . any bona fide retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]." Age Discrimination in Employment Act of 1967, Pub. L. 90-202, § 4(f)(2), 81 Stat. 603 (codified at 29 U.S.C. § 623(f)(2) (1967)). Following the ADEA's enactment, the Department of Labor (which at that time had responsibility for enforcement of the ADEA) issued a regulation implementing § 4(f)(2). *See* 34 Fed. Reg. 9709 (June 21, 1969) (codified at 29 C.F.R. § 860.120(a)).[1/] The regulation, which became known as the "equal benefit or equal cost" principle, provided that

> A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

Id. Although the regulation underwent various permutations and responsibility for the implementation of the ADEA shifted to the EEOC, the "equal cost/ equal benefit rule" remained in effect as the basic interpretation of § 4(f)(2).

In 1989, this Court in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), rejected the EEOC's equal cost or equal benefit rule, finding the rule to be inconsistent with the

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[8/] The regulation has since been recodified at 29 C.F.R. § 1625.10, and authority for its enforcement has been transferred to the EEOC.

plain language of the statute -- namely, the word "subterfuge" -- because the regulation did not appear to acknowledge a subjective intent element. 492 U.S. at 171-72.

Congress responded to the *Betts* decision by passing the OWBPA, which specifically overruled the result and reasoning of the *Betts* decision. Among other things, the OWBPA amended the definitional section of the ADEA to clarify that employee benefits are included within the definition of "compensation, terms, conditions, or privileges of employment." Pub. L. 101-433, § 102, 104 Stat. 978 (codified as 29 U.S.C. § 630(l)). Additionally, the OWBPA redrafted § 4(f)(2) of the ADEA by eliminating the "subterfuge" language and essentially adopting the EEOC's articulation of the "equal cost/equal benefit" rule. Pub. L. 101-433, § 103, 104 Stat. 978 (codified as 29 U.S.C. § 623(f)(2)).

The legislative history of the OWBPA strongly indicates that it was Congress' intent to continue to allow the practice of retiree health benefit integration with Medicare, which could result in disparate benefits to retirees.

When the Senate version of the bill that eventually became the OWBPA was originally reported in the Senate Labor and Human Resources Committee in April 1990, the Senate Report contained the following passage that is consistent with the decision of the court below:

> The Committee intends to approve the parallel practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation. *See* 29 C.F.R. § 1625.10(e). The availability of Medicare benefits from the federal government will not justify a reduction in employer-provided retiree health benefits if the result is that, taking the employer-provided and government-provided benefits together, an older retiree is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger retiree. *See id.*

S. REP. NO. 101-263, at 21-22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1527.

The original version of S. 1511 and a nearly identical House Bill (H.R. 3200) were held off the floor because of opposition. For example, Senator Grassley raised the concern on the record that Senate Bill 1511 could "create havoc in the benefits area." 136 CONG. REC. 24,795 (1990). Senator Grassley entered into the record a number of "major questions" to be addressed by the sponsors of S. 1511, including the following:

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

Id.

Senator Grassley's concern was subsequently addressed during the course of proceedings held on September 24, 1990, when the Senate voted to pass an amended, compromise version of S. 1511. Specifically, one of the express compromise points was the decision to use "worker" in § 4(f)(2)(B)(i) of the ADEA, rather than the term "individual." 136 CONG. REC. 25,355 (1990) (EX. 1, "Summary of Pryor-Hatch-Metzenbaum-Heinz Agreement on Betts Legislation" at ¶ 8).

The "Statement of Managers," which accompanied the final substitute bill, sought to clarify and eliminate the existing controversy concerning the reduction of retiree medical benefits at Medicare-eligible age:

> Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage

> to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. *In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by this substitute.* Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree.

136 CONG. REC. 25,353 (1990) (emphasis added).

Senator Orinn Hatch explained that the compromise was intended to protect retired persons by avoiding the creation of a regulation that might discourage employers from offering health benefits to their retirees:

> Many employers continue health benefits for persons who retire before they are eligible for Medicare and/or continue certain benefits that are supplemental to Medicare.
>
> This is a positive practice which helps provide important protections for retirees.
>
> *This compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages.*
>
> * * *
>
> It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate such benefits.
>
> * * *
>
> We must be concerned about the impact on all employees of additional Federal requirements that unnecessarily complicate existing

> arrangements or that will shift a firm's resources from actual benefits into regulatory compliance or litigation.
>
> If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?

136 CONG. REC. 25,356 (1990) (emphasis added). Thus, the relevant legislative history demonstrates Congress recognized and continued to sanction the practice of providing disparate health benefits for Medicare-eligible and non-Medicare-eligible retirees, thereby providing further evidence of Congress' intent that retirees are not covered by the ADEA.

3. The court below's interpretation § 4(a)(1) of the ADEA, as modified by the OWBPA, which prohibits an employer from reducing or eliminating health benefits for Medicare-eligible retirees without satisfying the "equal benefit or equal cost" standard of 29 C.F.R. §1625.10, creates a conflict between § 4(a)(1), and § 4(l)(2) of the ADEA, 29 U.S.C. § 623 (l)(2), also added to the ADEA as part of the OWBPA. Among other things, § 4(l)(2) allows employers, in the event of "a contingent event unrelated to age" (*i.e.*, layoffs or plant shutdowns), to offset an employer's severance pay obligations by the amounts of any retiree health benefits and/or "pension sweeteners" to which the employee might be entitled. See 29 U.S.C. § 623(l)(2)(A). *See also* 136 CONG. REC. 27,059-27,060 (1990) (discussing the operation of § 4(l)(2) in more detail). Notably, § 4(l)(2)(D) and (E) contemplate that an employer will be able to avail itself of this setoff even if the employer does not provide retiree health benefits to retirees over the age of 65. 29 U.S.C. §§ 623(l)(2)(D), (E). Under § 4(l)(2)(D), an employer may claim a setoff of retiree health benefits against its severance pay obligations if it provides medical benefits to "retirees who are below age 65" or "retirees who are age 65 or above" or both classes of retirees. 29 U.S.C. § 623(l)(2)(D); *see also* 136 CONG. REC. H8,628 (daily ed. Oct. 2,

1990) (Representative Roukema: 623(l) "clarifies that in order to make a deduction for retiree health benefits from severance pay, an employer may have a retiree health plan that covers an employee prior to age 65 or after age 65; that an employer may have a health benefit that covers either age bracket or both age brackets, and still avail of the offset against severance.") (emphasis added); 136 CONG. REC. H8628 (daily ed. Oct. 2, 1990) (Representative Goodling: The severance offset "provides that, in order to use the offset for retiree health benefits, an employer is not required to offer health benefits to both pre-Medicare eligible and post-Medicare eligible retirees. An employer may offer health benefits only to pre Medicare eligible retirees.") (emphasis added).

In other words, § 4(l)(2) of the ADEA recognizes that an employer need not offer retiree health benefits to Medicare-eligible retirees in order to take advantage of the setoff authorized by that section. In contrast, the interpretation of § 4(a) of the ADEA by the court below expressly prohibits the structuring of retiree health benefits as contemplated by § 4(l)(2). Under its decision, such plans are *per se* illegal under the ADEA. Contrary to that interpretation of the ADEA, Sections 4(l)(2)(D) and (E) of the Act expressly contemplate that employers will spend less on, and provide fewer medical benefits to, Medicare-eligible retirees than retirees who have not reached Medicare age. To qualify for the setoff for medical benefits provided to retirees who are younger than age 65, § 4(l)(2)(D) requires that "the package of benefits" offered by the employer be "at least comparable to benefits provided under [Medicare]." 29 U.S.C. § 623(l)(2)(D)(i). However, for retirees who are age 65 or older, the employer need only provide a benefit package "at least comparable to that offered under a plan that provides a benefit package with *one-fourth the value of benefits provided under [Medicare]*." 29 U.S.C. § 623(l)(2)(D)(ii) (emphasis added).

Similarly, where an employer's plan provides medical coverage to both Medicare-eligible and non-Medicare-eligible retirees, § 4(l)(2)(E) of the ADEA specifies setoff amounts significantly greater for coverage provided to retirees under the age of 65 than for retirees age 65 and older. These distinctions, completely consistent with the legislative history of the OWBPA, recognize that employers typically provide fewer medical benefits to Medicare-eligible retirees, and pay less for those benefits, than for non-Medicare-eligible retirees because most employer-provided medical plans for retirees are integrated with Medicare. Congress could not have intended employers to be able to benefit in the manner authorized by § 4(l) from the offering of retiree health benefit plans that, according to the analysis by the court below, would be unlawful under the ADEA. This conflict and the confusion and disruption of retiree health plans it has engendered further demonstrate the significance of the issue presented by this appeal and the appropriateness of review by this Court.

4. The court below erroneously concluded that the County violated the ADEA when it adopted a health insurance plan for retirees which made distinctions between two groups of retirees based in part on whether an individual retiree was eligible for Medicare benefits. The court below concluded this amounted to unlawful disparate treatment in violation of 29 U.S.C. Section 623(a)(1) because the County had treated such individuals differently "because of . . . age." This conclusion directly contravenes this Court's teachings in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

In *Hazen Paper*, the Court observed that passage of the ADEA "was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 610. As a result, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 611. Accordingly,

"there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609.

Here, the County's use of distinctions amongst retirees based in part on Medicare eligibility was motivated by "some feature other than the [the retiree's] age." While Medicare eligibility and age are closely correlated, they are not identical. Thus, although attainment of age 65 is generally a prerequisite for Medicare coverage, that is not always the case. In particular, individuals under the age of 65 would be Medicare eligible (and thus, as County retirees, required to elect SecurityBlue) if they had received Social Security or Railroad Retirement Board disability benefits for 24 months, or if they were a kidney dialysis or kidney transplant patient. 42 U.S.C. §§ 426(b), 426-1 .[1/] Similarly, retirees age 65 or older would not be Medicare eligible (and, thus, as County retirees, not required to elect SecurityBlue) if they had not worked for at least 10 years in Medicare-covered employment or if they were neither a citizen nor permanent resident of the United States. 42 U.S.C. § 402.[1/] In other words, the status of being Medicare eligible is both under and over inclusive of the status of being age 65: not all retirees age 65 or older were required to elect SecurityBlue and not all individuals required to elect SecurityBlue were age 65 or older.[1/]

[9/] Indeed, the record below reflects that there were several retirees under the age of 65 who were placed in SecurityBlue because their disability (and not their age) qualified them for Medicare.

[10/] Because the Country provided retiree health benefits to individuals terminated involuntarily after at least eight years of service, as well as individuals who retired from the county with at least eight years of service and 60 years of age, these exclusions from Medicare eligibility are not merely of theoretical import.

[11/] The Court of Appeals also sought to analyze the Medicare-eligible criteria in a vacuum, without reference to the additional criterion established by the County that the retiree must reside in the SecurityBlue service area (most of Western Pennsylvania). Those Medicare-eligible retirees who lived

Accordingly, the court below was simply wrong in holding that "Medicare status is a direct proxy for age." Moreover, while the high correlation between age and Medicare eligibility might have significance under a disparate impact theory of discrimination, no such theory of liability was espoused in this case.[1/] Further, based on this Court's teachings *in Hazen Paper*, such a correlation, without more, is insufficient to support a finding that an employer has engaged in *intentional* age discrimination.

The recent decision in *Dilla v. West*, 179 F.3d 1348 (11th Cir. 1999), is instructive in this regard. There, the district court found that the appellants were rejected for employment as air traffic controllers in favor of a younger applicant (Nolan) because (1) they would be eligible to retire much sooner than Nolan and (2) they had achieved a higher pay grade than Nolan in previous employment, and therefore would require a higher salary than Nolan in the air traffic controller position. The district court acknowledged that both of these factors were directly correlated with age-older workers who are

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outside of that area were not required to select SecurityBlue but could instead elect traditional indemnity insurance. The effect of this was to create yet another group of retirees who, even though they were age 65 or older, were not required to elect SecurityBlue.

[1/] The circuit courts disagree as to whether a disparate impact claim is permitted under the ADEA. *Compare Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996) (ruling that disparate impact are not cognizable under the ADEA), *and*, *Dittrich v. Northwest Airlines, Inc.*, 168 F.3d 961, 966 (7th Cir. 1999) (same), *with MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (11th Cir. 1991) (ruling that disparate impact are cognizable under the ADEA); *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 835 (9th Cir. 2000) (same).

generally closer to meeting federal retirement criteria and further advanced in their pay grade than younger workers. The district court, however, relying on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1973), concluded that "the mere fact that there exists a perfect correlation, or even a direct link, between age and the factor purportedly relied upon by the employer does not perforce mean that the employer has impermissibly relied on age." *Dilla*, 4 F. Supp. 2d 1130, 1142-43 (M.D. Ala. 1998). Consequently, the district court ruled in favor of the defendant. The Court of Appeals affirmed, holding:

> Reliance on factors correlated with age does not by itself constitute age discrimination. To be sure, purported reliance on such factors may be a pretext for discrimination; if so, the defendant has violated the ADEA. *See id.* at 1142. The district court, however, concluded on the basis of substantial evidence that no such pretext was involved in this case.

Dilla, 179 F.3d at 1349.

There is not one shred of evidence in this case that the County sought to use Medicare eligibility as a pretext for intentional age discrimination. On the contrary, the evidence is undisputed that the County's motivation in using Medicare eligibility as a factor in allocating retiree health coverage was solely based on containing the costs of retiree health insurance so that it could continue to offer this benefit in some form to all retirees, regardless of their age.[1/] The use of this factor clearly did not rest on stereotypes, nor did it stigmatize older workers. Rather, "the prohibited stereotype ('Older employees are likely to be ___') would not have figured in [the County's] decision, and the attendant stigma would not ensue." *Hazen Paper*, 507 U.S. at 612. As such, "[t]he [County's] decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate

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[13/] Several courts have held that employers do not violate the ADEA when they discharge older employees because their salaries were higher than younger employees. *See, e.g.*, *Allen v. Diebold, Inc.*, 33 F.3d 674, 679 (6th Cir. 1994); *DiCola v. SwissRe Holding (N. Am.), Inc.*, 996 F.3d 30, 33 (2d Cir. 1993); *Bay v. Times Mirror Magazines*, 936 F.2d 112, 117 (2d Cir. 1991).

judgment about the employee - that he indeed is [eligible for federal reimbursement of the majority of his medical expenses]." *Id.*

5. The decision below holds that § 4(a)(1) of the ADEA prevents employers who have provided some degree of health care coverage to their retirees from reducing or eliminating altogether that coverage once the retirees are eligible for Medicare. That holding is contrary to the long-held understanding of employers and regulators alike that the only restrictions current law places on an employer's provision of retiree health benefits are those found in the employer's benefit plan or other contractual arrangements. For example, 1998 Congressional testimony from the United States Government Accounting Office (GAO) contained the following statement:

> When an employer has terminated retiree health benefits, federal courts have turned to the nature of the written agreements and other pertinent evidence covering the provision of retiree benefits to determine the legitimacy of the action. In essence, the issues before the court are often a matter of contract interpretation. If the employer explicitly

> reserved the right in plan documents to modify health benefits, the courts have generally upheld the termination of coverage.[1/]

U.S. Government Accounting Office, Testimony Before the Subcomm. on Oversight, House Committee on Ways and Mean, *Retiree Health Insurance: Erosion in Retiree Health Benefits Offered by Large Employers* 2-3 (GAO/T-HEHS-98-110) ("GAO Report") (emphasis added).

Medicare eligibility is often the point at which employers reduce or eliminate retiree health coverage because such coverage is typically provided to allow early retirement and/or as a "bridge" to Medicare coverage. As the GAO reported in 1998, "early retirees are more likely than those who are Medicare-eligible to be offered health benefits by a former employer." (GAO Report at 4). Similarly, the American Association of Retired Persons (AARP) recently noted that reaching age 65 is "often a sharp transition point in health care coverage not only because it is the age of Medicare eligibility, but because employers may drop coverage for retirees once they become eligible for Medicare . . . ." AARP, *Health Coverage Among Persons Age 50 Through 64* (1998).

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The statistical data compiled by the GAO and private organizations support these findings concerning the flexibility afforded to employers with regard to providing retirees health benefits. According to the GAO, in 1997, "only 31 percent of Medicare-eligible retirees were offered health benefits compared with 38 percent of early retirees." GAO Report at 4. In its year 2000 survey of employer health benefits, the Kaiser Family Foundation and Health Research Educational Trust found that, among all large employers (200 or more workers) offering retiree health benefits, 92% offered such benefits to early retirees, and only 67% to Medicare-eligible retirees.[1/] Kaiser Family Foundation and Health Research and Educational Trust, Employer Health Benefits 2000 Annual Survey ("Kaiser Survey") at 140, 141 (2000). As reflected in the Kaiser Survey, the percentage of employers providing medical benefits to early retirees, but not to Medicare-eligible retirees varied somewhat by industry. Among state and local government employers, for example, 99% provided health benefits to early retirees in 2000, while only 73% of such employers provided those benefits to Medicare eligible retirees in that same year. *Id.* at 145. The disparity in the service sector was 94% to 59%; in the health care sector, 94% to 51%; and in the manufacturing sector, 83% to 59%. *Id.*[1/] These statistics demonstrate that the finding regarding retiree health plans adopted by the Senate Managers in the legislative history of the OWBPA remains true today: "Many employer-sponsored medical plans provide medical coverage

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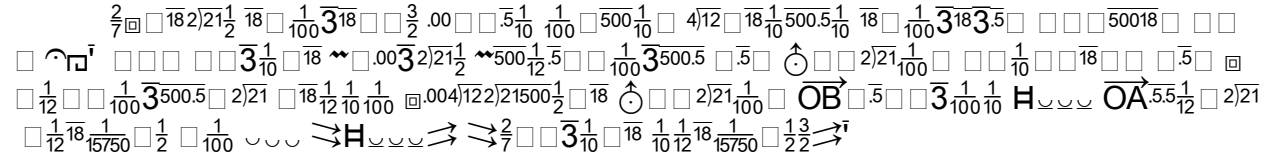

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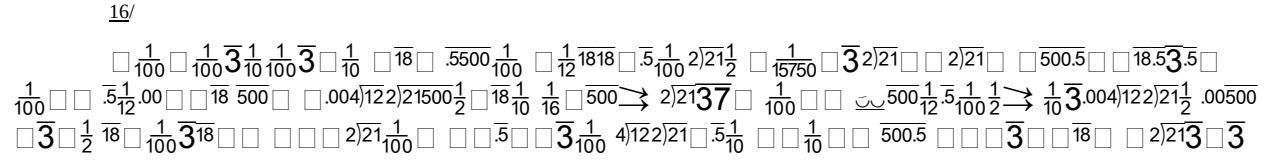

for retirees only until the retiree becomes eligible for Medicare… ." 136 CONG. REC. S13,597 (daily ed. Sept. 24, 1990).

These statistics further demonstrate the impact of the decision below beyond this case. The court below has interpreted the OWBPA in a manner that renders illegal all plans that terminate retiree medical benefits based on Medicare eligibility. In the health care industry, for example, over 43% of employer-sponsored retiree health plans terminate benefits when the retiree becomes eligible for Medicare.[1/] Moreover, such statistics do not fully account for the significance of the decision in this case. In addition to retiree health plans that terminate benefits based upon Medicare eligibility, the decision also invalidates countless retiree health plans similar to the one offered by the County, that simply modify benefits to take advantage of cost savings provided by Medicare.

[illegible]

17/ [illegible]

If the ruling below stands, affected plan sponsors will be forced to redesign their post-employment benefit packages either by (1) increasing benefits for Medicare-eligible retirees, (2) decreasing benefits for pre-Medicare retirees, or (3) eliminating retiree coverage altogether.[1/] This uncertainty comes at a time of a general decline in the number of employers providing any retiree health benefits. The percentage of mid-size employers (200-999 workers) offering retiree health benefits, for example, is at its lowest level since 1993, down six percentage points from 1999 and 31 percentage points since 1988. Kaiser Survey at 140.

Given the steady rise in the cost of retiree health care, a significant number of employers may choose to comply with the ruling below by eliminating entirely retiree health benefits. Ironically, this is precisely the result that Congress sought to avoid in the compromise language of the OWBPA. *See, e.g.,* 136 CONG. REC. 25,356 (1990) (Senator Hatch: "It has been our policy to encourage employers to provide generous employee benefits."); 136 CONG. REC. S13,253 (daily ed. Sept. 17, 1990) (Senator Kassenbaum: "We should be encouraging employers to offer benefit programs to workers, not discouraging or eliminating popular and beneficial employee benefit programs."). Thus, Congress determined that prohibiting the practice of terminating or reducing retiree health care benefits based on Medicare eligibility would likely result in less retiree health care benefits, not more.

[1/] A survey conducted by Hewitt Associates found that while 56% of employers continue to provide post-65 health coverage for all or most of their retirees, 30% are considering terminating retiree coverage prospectively. Hewitt Associates LLC, *Health Care Expectations: Future Strategy and Direction* (Jan. 2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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