No. _____

# In the Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department,
*Petitioners*,

v.

Equal Employment Opportunity Commission,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

This Petition involves a public employee retirement plan that includes normal and disability retirement benefits. A member who is eligible for normal retirement benefits based on attained age plus a minimum service requirement, or based on service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement, it is an indirect factor in determining eligibility for disability retirement. Moreover, the calculation of disability retirement benefits is based upon actual years of service plus the number of years remaining before the member reaches retirement age or eligibility based on years of service alone; age may thereby be an indirect factor in determining the amount of disability retirement benefits.

The question presented in this Petition is accordingly:

Whether any use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act?

## LIST OF PARTIES

Petitioners are the Kentucky Retirement Systems, the Commonwealth of Kentucky and the Jefferson County Sheriff's Department. Respondent is the Equal Employment Opportunity Commission.

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Kentucky Retirement Systems, the Commonwealth of Kentucky, and the Jefferson County Sheriff's Department petition for a Writ of Certiorari to review the October 31, 2006 en banc Opinion of the United States Court of Appeals for the Sixth Circuit wherein the state retirement plan was found to be facially discriminatory in violation of the Age Discrimination in Employment Act.

## OPINIONS BELOW

The September 4, 2003 Judgment and Order entered by the United States District Court for the Western District of Kentucky is unofficially published at *EEOC v. Jefferson County Sheriff's Department*, 2003 U.S. Dist. LEXIS 18998. It is reproduced herein in Appendix B. The Opinion of the three judge panel of the Sixth Circuit Court of Appeals which originally affirmed the Summary Judgment is reported at *EEOC v. Jefferson County Sheriff's Department*, 424 F.3d 467 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006). The October 31, 2006 en banc Opinion reversing and remanding is reported at *EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006) and is reproduced in Appendix A.

## JURISDICTION

This action originated in the United States District Court for the Western District of Kentucky. The Summary Judgment entered by the trial court on September 4, 2003 was reviewed by a three judge panel of the U.S. Court of Appeals for the Sixth Circuit which entered an Opinion affirming on September 19, 2005. The Equal Employment Opportunity Commission filed a Petition for Rehearing En Banc which was granted by the court on January 4, 2006. The court entered an Opinion on October 31, 2006 reversing and remanding. This Court has jurisdiction to review the October

31, 2006 en banc Opinion of the U.S. Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254.

## RELEVANT STATUTE

The focal point of the Petition is the term "arbitrary" as utilized in 29 U.S.C. § 621(b) and the impact which such qualifying term has on determining whether the challenged provisions of a retirement plan are facially discriminatory. 29 U.S.C. § 621(b) provides:

> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

## STATEMENT OF THE CASE

This action was originally brought by the Equal Employment Opportunity Commission ("EEOC") against Kentucky Retirement Systems, the Jefferson County Sheriff's Department and the Commonwealth of Kentucky (collectively referred to as "Kentucky Retirement") charging that the eligibility requirements and the manner in which disability retirement benefits are calculated under the state retirement plan violate the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. The Complaint alleged that "since at least October 16, 1992, Defendants have discriminated against a class of individuals age forty (40) or over on the basis of age by maintaining a disability retirement program which denies benefits or pays reduced benefits, because of age." The damages sought by the EEOC for the alleged violation included "back benefits with prejudgment

interest [dating back to 1992] and recalculated future benefits".

The challenged state retirement plan is a defined benefit plan which provides normal retirement benefits and disability retirement benefits from a single fund consisting of employee and employer contributions and the investment earnings on such contributions. For a hazardous duty member[1] the eligibility requirements for a normal retirement benefit consist of either (1) being fifty-five or older, and having the minimum requisite service credits or (2) having twenty years of service credit, regardless of age. The disability retirement benefit is designed to be a replacement benefit for those who become disabled before they are eligible for normal retirement. Consistent with that limited purpose, if a member is eligible for normal retirement benefits, he or she is not eligible for disability retirement benefits.

The calculation of normal retirement benefits is based upon final compensation and years of service. Disability retirement benefits are calculated in the same manner except it is assumed that the disabled member would have continued working up until retirement age. Accordingly, the years of service earned by the member are increased by imputing service years up to the member's fifty-fifth birthday or up to twenty years of service, which ever would occur first. The

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[1] There are two types of members in the system, hazardous duty members and nonhazardous duty members. The EEOC's challenge to the retirement plan was raised in the context of a hazardous duty member but extends to include nonhazardous duty provisions as well. In the interest of brevity, the parties have throughout the appellate process confined the discussion to the provisions governing hazardous duty members; there are comparable provisions which apply to nonhazardous duty members which are likewise challenged by the EEOC.

number of imputed years cannot exceed the total service the member had on his or her last day of paid employment. This imputation of service years thus results in a benefit comparable in amount to the normal retirement benefit the member would have received had he or she not become disabled.

The EEOC relied upon 28 U.S.C. §§ 451, 1331, 1337, 1343, 1345 and 29 U.S.C. § 217 to invoke the jurisdiction of the District Court and assert an ADEA challenge against the retirement plan which the EEOC maintained was facially discriminatory because age was considered as a factor in the plan. The United States District Court for the Western District of Kentucky disagreed holding: "finding a retirement policy facially discriminatory merely because age is a factor in the plan is illogical". (Appendix B, p. 43a). The court enumerated the legitimate reasons why the retirement plan included age as a factor:

> Service credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled. The credits are an attempt to provide an employee who becomes disabled before normal retirement with benefits similar to those which, had the employee been capable of continuing work through normal retirement, he would have been entitled to receive. The service credit calculation takes age into consideration because the credits are intended only to provide the disabled employee with those benefits that would have been available through normal retirement had the employee not become disabled, not to provide the disabled employee with more benefits than normal retirement would have allowed. Thus, age comes into

> play in the determination only because age is one of the factors of retirement eligibility.

(Appendix B, p. 45a - 46a).

The court further noted that holding "a retirement policy discriminatory because it calculates retirement eligibility based on age and years of service does nothing to further the purpose of the ADEA, which is to prevent employers from making employment decisions (including provision of benefits) based on denigrating stereotypes about age." (Appendix B, p. 43a).

The matter was appealed to the Sixth Circuit Court of Appeals. A three judge panel affirmed, *EEOC v. Jefferson County Sheriffs Department,* 424 F.3d 467 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006), finding the ruling of the District Court to be consistent with *Lyon v. Ohio Education Ass'n and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995). Relying on *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701 (1993) the *Lyon* court found that an early retirement plan which included an imputation of service years was not facially discriminatory. The resulting disparity was not "because of age", but rather a result of an actuarial reality:

> [T]he disparity that plaintiffs find objectionable is a product of their length of service and their age when originally hired by OEA. Thus, any disparity merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age of 62 (the OWBPA allows employers to fix a minimum age for early or normal retirement.).

*Lyon v. Ohio Education Ass'n and Professional Staff Union,* 53 F.3d 135, 140 (6th Cir. 1995).

So too herein, the three judge panel found that the eligibility requirements and the use of imputed service years did not render the retirement plan facially discriminatory. (Appendix A, p. 11a).

The EEOC filed a Petition for Rehearing En Banc which was granted by the Sixth Circuit. In an Opinion dated October 31, 2006, the Court sitting en banc partially overruled *Lyon v. Ohio Education Ass'n and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995) and held that the retirement plan was facially discriminatory because the plan "excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age" and because "employees who become disabled when they are still 'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." (Appendix A, p. 16a and 17a). The court noted that "the Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations." (Appendix A, p. 19a).

Chief Judge Boggs, joined by Judges Batchelder, Gilman and McKeague, filed a dissenting opinion. Judge Boggs found that "a careful examination of the plan shows that it considers age only in combination with years of service and years to retirement age, and is a non-discriminatory way of providing workers with protection against disability before they have had an opportunity to earn a normal pension at retirement age." (Appendix A, p. 26a). He reasoned that considering age in combination with years of service and years to retirement age in this context is not illegal under the

teachings of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701 (1993). (Appendix A, p. 26a).

Chief Judge Boggs noted that this Court in *Hazen* explained: "'It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.' *Ibid.* '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.' *Ibid.*" (Appendix A, p. 27a). Chief Judge Boggs noted: "This type of stereotyping is nowhere found in the plan under consideration . . .". (Appendix A, p. 27a).

In the Dissenting Opinion, Chief Judge Boggs additionally distinguished *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 83 L.Ed.2d 523, 105 S. Ct. 613 (1985), relied upon by the Majority. At issue therein was TWA's pilot transfer policy wherein "captains who were disqualified from serving in that capacity for reasons other than age were allowed to transfer to the position of flight engineer, and in the process to 'bump' less senior flight engineers. Pilots who were going to be disqualified from continuing to serve as captains because they had reached the age of 60, however, had to resort to bidding procedures in order to become a flight engineer. . ." (Appendix A, p. 28a - 29a). Chief Judge Boggs noted that the transfer policy "implicates a stigmatizing and inaccurate stereotype—that pilots over age 60 are less capable, or at least less valuable as employees, even than younger workers who have been relieved for incompetence." (Appendix A, p. 29a). He found that "no such stereotype is implicated" in the retirement plan. (Appendix A, p. 29a). To the contrary, the plan "has nothing whatever to do with 'inaccurate and stigmatizing stereotypes' surrounding the relative ability of older employees to do the job—that is to

say, Congress's reason for enacting the ADEA . . . . There is no intimation in any part of the KRS plan of any demeaning or inappropriate stereotyping of older workers." (Appendix A, p. 36a).

Moreover, Chief Judge Boggs found the disability retirement benefit to be "a very reasonable benefit". (Appendix A, p. 33a).

> Under the KRS plan, a 'disability' retirement is intrinsically no different from the 'normal' retirement pension available to every worker. Benefits are based on years of credited service (augmented to a maximum of 20 for disabled workers ineligible for normal retirement), multiplied by a factor related to final salary. If 'normal' benefits are greater than the augmented benefits for disability, of course, the greater benefits are provided. The plan simply provides that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service.

(Appendix A, p. 33a).

Chief Judge Boggs criticized the Majority Opinion for labeling such plan facially discriminatory when the policy underlying the retirement plan "lies far from the 'essence' of the ADEA—and, in fact, does not implicate that essence at all. Age in relation to years of service performed for this employer is not the same as age qua age." (Appendix A, p. 37a).

## REASONS FOR GRANTING THE PETITION

Granting the Petition for Writ of Certiorari will enable this Court to provide much needed guidance on what constitutes "arbitrary" discrimination under the ADEA and to correct the apparent misunderstanding of the Sixth Circuit Court of Appeals as well as several other Circuits that every consideration of age as a factor in a retirement plan is "arbitrary" and thereby renders such plan facially discriminatory under the ADEA.

### I. A Finding of Facial Discrimination Requires a Determination that the Distinctions Drawn Under the Plan are "Arbitrary"

The analysis used by the Sixth Circuit Court of Appeals in determining whether or not the retirement plan was facially discriminatory included but one step. The court looked to whether age was considered as a factor in the plan. Finding that age, in combination with years of service and years to retirement age, was a factor in the retirement plan, the court held that the plan was facially discriminatory. Absent from this analysis is any consideration as to whether the distinctions drawn under the plan are "arbitrary". The one step analysis ignores the fact that "not all age discrimination in employment is 'arbitrary.'" *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2866 (1989).

Guidance in construing the ADEA is often taken from the Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, commonly referred to as "the Wirtz Report" which preceded the enactment of the Act. In Section 715 of the Civil Rights Act of 1964 Congress commissioned the Wirtz Report, asking the

Secretary of Labor to make recommendations "for legislation to prevent **arbitrary** discrimination in employment because of age". (emphasis added). The use of the qualifying phrase "arbitrary" was no accident. As recognized in the Wirtz Report, "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race." (Wirtz Report, p. 2). It was noted that "not all discrimination in this area is 'arbitrary'" and there are circumstances where "there is in fact a relationship between his age and his ability to perform the job." (Wirtz Report, pp. 1, 2). Discrimination under those circumstances is not "arbitrary". Wirtz indeed cautioned that it would be "contrary to the public interest . . . to conceive of all age restrictions as 'arbitrary'". (Wirtz Report, p. 21).

The Wirtz Report did however find that older workers were being rejected from employment "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*." (emphasis in original) (Wirtz Report, p. 2). As a result of these findings, the ADEA was drafted to prohibit older workers from being deprived of employment "on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993). "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993). The ADEA accordingly "commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.' *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422, 105 S. Ct. 2743, 2756, 86 L.Ed.2d 321 (1985)." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338,113 S. Ct. 1701, 1706 (1993). "The

employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338,113 S. Ct. 1701, 1706 (1993).

In accordance with the caution contained in the Wirtz Report, the ADEA does not prohibit every discriminatory act on the basis of age. To the contrary, 29 U.S.C. § 621(b) provides: "It is therefore the purpose of this chapter . . . to prohibit **arbitrary** age discrimination in employment . . . ." (emphasis added). Consistent with the Congressional directive, this Court has repeatedly defined the conduct prohibited by the ADEA in terms of "**arbitrary** discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 574, 55 L.Ed.2d 40, 98 S. Ct. 866 (1978); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120, 83 L.Ed.2d 523, 105 S. Ct. 613 (1985) (emphasis added). *See also* Justice O'Connor's concurring opinion in *Smith v. City of Jackson*, 544 U.S. 228, 161 L.Ed.2d 410, 125 S. Ct. 1536 (2005) ("The ADEA's structure confirms Congress' determination to prohibit only 'arbitrary' discrimination (*i.e.*, disparate treatment based on unfounded assumptions)." Giving due recognition to the "statutory object" "to prohibit arbitrary age discrimination in employment", *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct. 1236, 1242 (2004), this Court has explained that under the ADEA there are "legitimate reasons as well as invidious ones for making employment decisions on age." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct. 1236, 1240 (2004). Clearly where there is a legitimate reason behind an employment decision based upon age such decision is not "arbitrary" and is thus not prohibited by the ADEA.

The Sixth Circuit Court of Appeals nonetheless maintained that a determination of facial discrimination under the ADEA required but one step, i.e, establish whether the plan considers age as a factor; the court's analysis gave no consideration as to whether the reason for relying upon age was legitimate or invidious. The Sixth Circuit Court of Appeals noted that its analysis was supported by Opinions from several other circuits:

> [T]he Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations. *See Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005)(stating that a retirement plan is 'discriminatory on its face' because 'it is undisputed that an employee is ineligible for early retirement benefits [under the plan] if he or she is over the age of 65'); *Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.* 374 F.3d 66, 73 (2d Cir. 2004) (finding prima facie case of age discrimination under the ADEA when age 'is the effective trigger for eligibility' for retirement policy); *Arnett v. Cal. Publ. Employees Ret. Sys.*, 179 F.3d 690, 695 (9th Cir. 1999) (recognizing prima facie disparate-treatment claim when it 'is unquestionable that the [e]mployees would have received greater disability retirement benefits but for their older ages at hire'), *cert. granted*, 528 U.S. 1111, *vacated on other grounds by Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Huff v. UARCO, Inc.*, 122 F.3d 374, 387-88 (7th Cir. 1997) (finding employer not entitled to summary judgment on disparate-treatment claim because the early retirement policy 'draws an express line between workers over fifty-five and those under').

(Appendix A, p. 19a - 20a).

Contrary to this Court's precedent, these courts ignore the requirement that the distinctions drawn for the purpose of making an employment decision must be "arbitrary" before there can be an ADEA violation. Legitimate reasons for relying on age as a factor in the decision-making process must be distinguished from invidious reasons. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct. 1236, 1240 (2004). Accordingly, the mere reliance upon age as a factor does not alone render the plan facially discriminatory.

## II. Including Age As A Factor In a Retirement Plan Is Not Always "Arbitrary"

The simplistic reasoning that any retirement plan which includes age as a factor is facially discriminatory ignores the fact that "all retirement plans necessarily make distinctions based on age. . ." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 54 L.Ed.2d 402, 98 S. Ct. 444, 452 (1977) (concurring opinion by Justice White). Again, the issue posed by an ADEA challenge is whether the distinctions based on age are "arbitrary". There is nothing "arbitrary" about designing a plan to provide a disabled member with a replacement for the normal retirement benefits which he or she can no longer earn.

The Commonwealth of Kentucky made a commitment to the members of the state retirement plan not only to provide a normal retirement benefit, but also to provide a replacement benefit to members who due to disability are stricken from the work force before having an opportunity to earn a retirement benefit. Because age is a factor in achieving eligibility for a normal retirement benefit, it necessarily is a factor in fashioning a disability retirement benefit that is intended to provide **no more** than what the member would have received

had he or she worked until the date when eligibility for a normal retirement benefit would have been attained. Age and years of service are considered as factors in determining the amount of benefits made available to the disabled member, not because of any effort to limit the benefits available to the older members, but rather to ensure that each disabled member receives a sufficient amount of funds to replace the lost retirement benefits while at the same time preserving the financial stability of the retirement fund.

The state retirement plan is funded by contributions made by employee members and participating employers. The amount of the contributions to the fund is calculated by the plan's actuaries in accordance with generally accepted actuarial principles. These contributions and their investment earnings are the sole source of funding for both the normal retirement benefits and the disability retirement benefits.

In contrast to a defined contribution plan, providing the promised benefit under a defined benefit plan requires a careful balancing of funding considerations against the policy decision to provide adequate benefits to members who have been stricken from the workforce before having the opportunity to earn a retirement. The state retirement plan must therefore limit the availability of disability benefits which are enhanced through the imputation of service years to those who are not otherwise eligible for normal retirement benefits. It must additionally limit the amount of benefits paid out to disabled members so as to ensure that the enhancement of benefits provides no more than was originally anticipated with the normal retirement benefits. Age (in terms of eligibility for normal retirement benefits and with regard to the number of years remaining until a member is eligible for normal retirement) is thus legitimately, not arbitrarily, taken into consideration.

The Sixth Circuit Court of Appeals nonetheless relied upon *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854 (1989) and the subsequent enactment of the Older Workers Benefit Protection Act, Pub. Law 101-433 ("OWBPA") to strike down the retirement plan as being facially discriminatory. It cited an isolated sentence in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2860 (1989) ("[o]n its face, the [employee benefit] scheme renders covered employees ineligible for disability retirement once they have attained age 60") as evidence that this Court found a similar retirement plan in *Betts* to be facially discriminatory. (Appendix A, p. 18a). The Sixth Circuit noted "[i]n response to *Betts*, Congress promptly amended the ADEA to remove the need for proof of subterfuge and to clarify its intent '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.' Older Workers Benefit Protection Act ('OWBPA'), Pub. Law 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621)." (Appendix A, p. 18a). The court reasoned "this legislative history is compelling evidence that when revising the ADEA in response to *Betts*, Congress intended to prohibit the very sort of age-based discrimination that the original panel, bound by *Lyon*, condoned in this plan." (Appendix A, p. 19a).

The Sixth Circuit Court of Appeals clearly misread *Betts* which contains no discussion of facial discrimination and equally misunderstood the legislative history of the OWBPA. Without question the OWBPA was passed in reaction to the holding in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854 (1989). There is also no dispute that the legislative history of the Act specifically refers to *Betts* and the equal cost defense.

The quotation from the legislative history relied upon by the Sixth Circuit however must be placed in the context of the *Betts* ruling.

The issue addressed by this Court in *Betts* was not whether the retirement plan was facially discriminatory, but whether the § 623(4)(f)(2) defense was applicable. At that time 29 U.S.C. § 623(4)(f)(2) provided "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act is exempt from the prohibition of the ADEA. Betts argued that this provision protected age-based distinctions in employee benefit plans only when justified by the increased cost of benefits for older workers. The Court rejected such argument finding "[t]he requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2863 (1989). It found "construing § (4)(f)(2) to include a cost-justification requirement is contrary to the plain language of the statute and is invalid." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2865 (1989).

The Court then sought to define the meaning of the term subterfuge as used in § 623(4)(f)(2). It reaffirmed the finding in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 54 L.Ed.2d 402, 98 S. Ct. 444 (1977) that an employee benefit plan adopted prior to the enactment of the ADEA could not be a subterfuge to circumvent the prohibitions of the Act. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2862 (1989). The Court also determined that "Congress left the employee benefit battle for another day, and legislated only as to hiring and

firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2867 (1989). It thus construed § 623(4)(f)(2) to exempt "the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2866 (1989).

Accordingly, in order to challenge a benefit plan as a subterfuge to evade the purposes of the Act, an employee was required to prove that the challenged plan provision "actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2868 (1989). Betts was found not to have met this burden. *Public Employees Retirement of Ohio v. Betts,* 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2869 (1989).

Congress subsequently enacted the OWBPA, deleting from § 623(4)(f)(2) the reference to subterfuge and among other revisions, adding section (k) which provides: "A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan." 29 U.S.C. § 623(k). This language clearly provides that all employee benefit plans fall within the scope of the ADEA regardless of when enacted. Congress also added § 623(4)(f)(2)(B) which codified the equal cost defense. It did not however remove the term "arbitrary" from the ADEA.

The ADEA even as amended prohibits only "arbitrary" discrimination. This Court has continued to give meaning to that term after the enactment of the OWBPA. It has continued to recognize that the ADEA was enacted to address concerns "that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993). "When 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." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993) (emphasis in original).

Notwithstanding the amendments contained in the OWBPA, the Court has continued to distinguish between "legitimate" and "invidious" reasons "for making employment decisions on age." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct 1236, 1240 (2004). Accordingly, any finding of a facial violation must necessarily include a consideration as to whether the reliance upon age as a factor is "arbitrary". "Arbitrary" must be defined in terms of the conduct the ADEA was designed to prohibit. That conduct is clearly outlined by this Court in *Hazen*. The "prohibited stereotype" described by the Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1707 (1993) ("Older employees are likely to be ___"), played no role in the design of the retirement plan challenged herein. The reasons for the reliance on age as a factor when determining eligibility for disability retirement benefits and in calculating the amount of benefits are legitimate and therefore under the precedent of this Court belie a finding of facial discrimination.

The conclusion of the Sixth Circuit Court of Appeals that reliance upon age as a factor in the retirement plan renders the plan facially discriminatory thus conflicts with the relevant decisions of this Court and warrants review on a writ of certiorari in accordance with Supreme Court Rule 10 (c). Moreover, such review is warranted by the significant exposure to state retirement programs across the country. The retirement plan of the Commonwealth of Kentucky, with a membership of over 267,000 state and local government employees is but one of several state retirement programs which have been subjected to this challenge by the EEOC. The EEOC's exorbitant monetary demands (seeking relief back to 1992) have forced some settlements, *e.g.*, *Arnett v. California Public Employee Retirement System,* No. 95-03022 (Northern District of California) and *EEOC v. Massachusetts Public Employees Retirement System*, 99cv11233 (District of Massachusetts), but remain a threat to the financial stability of an undisclosed[2] number of other state retirement plans in addition to Kentucky Retirement Systems.

The impact of the question presented on the retirement programs of state and local government cannot be understated. The United States Census Bureau reports that there are 2,656 state and local government retirement plans covering 18 million workers and nearly 7 million retirees. Collectively, these funds have annual receipts in excess of $350 billion and total assets in excess of $2.6 trillion. *U.S. Census Bureau, The 2005 State and Local Government - Employee Retirement System Survey, Tables 1, 2 and 5a, http://www.census.gov/govs/retire/.* The effect on state and local government budgets and the retirement security of millions of American workers is substantial. If the ability to

[2] The EEOC refused to respond to discovery requests seeking identification of these other state retirement programs.

create and maintain retirement programs which provide protection for high risk workers is adversely affected, state and local governments will lack the ability to attract and retain qualified workers in critical services necessary for public safety and security.

## CONCLUSION

For these reasons, Kentucky Retirement Systems, the Commonwealth of Kentucky and Jefferson County Sheriff's Department ask that this Petition for Writ of Certiorari be granted so that this Court can define what constitutes a facial violation under the ADEA in the context of a retirement plan.

Respectfully submitted on this the 23rd day of January, 2007.

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