No. 06-1037

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
Petitioners

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent

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

BRIEF OF AMICUS CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association ("NSBA") was founded in 1940 as a not-for-profit federation of state school board associations from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the over 95,000 school board members who govern some 14,000 local school districts employing almost 6.4 million people, collectively one of the largest public employers in the Nation.

NSBA's mission is to foster excellence and equity in public education through school board leadership. As part of its mission, NSBA is dedicated to the establishment of a reasonable interpretation and application of anti-discrimination laws that balance the rights of public school employees against the relentless fiscal challenges facing public schools. Benefit packages like those provided by the Kentucky Retirement System, as well as the thousands of retirement plans offered by school districts, including early retirement incentive programs, many of which are contained in collective bargaining agreements, represent a crucial means by which the interests of both employees and employers alike are

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. S. Ct.R. 37.6. All parties have consented to the filing of this brief. Consent letters have been submitted to the Clerk.

served. That age may be a potential factor in the distribution of benefits to workers under these plans does not render such plans violative of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (2007) (ADEA) because the employer's decision is not motivated by age-based stereotypes and animus.

The Court of Appeals' *en banc* decision holding a retirement program facially discriminatory simply because age is a factor in the determination of benefits threatens thousands of public school district retirement benefit plans. If allowed to stand, the decision may adversely impact public school budgets and chill the collective bargaining process between school boards and labor unions.

SUMMARY OF ARGUMENT

The ADEA prohibits only arbitrary age discrimination. While age may be a correlative factor in the Kentucky Retirement System plan, as well as retirement plans used by public school districts, including early retirement incentive plans (ERIPs), these plans are not arbitrary as they are not based upon stigmatizing stereotypes or other age-based animus. ERIPs are commonly integrated into collective bargaining agreements, often at the urging of employee unions.

ERIPs provide employees with a special benefit or incentive to elect voluntarily to leave the workforce earlier than otherwise planned and through that election allow school districts to save much needed funds. Typically, employees near the top of the pay scale are the intended benefactors of ERIPs.

As a practical matter, these employees tend to be older employers for no other reason than it takes years to reach the top tiers of public wage tables.

School districts (and labor unions) utilize a variety of ERIPs to entice high wage earners to retire early. For example, Iowa school districts utilized a plan offering teachers with 10 years of continuous service $200 for each day of unused sick leave if they retired between the ages of 55 and 65. The Eighth Circuit found this type of plan discriminatory on its face because an employee over 65 was ineligible to receive the ERIP. *See Jankovitz v. Des Moines Ind. Comm. Sch. Dist.*, 421 F.3d 649 (8th Cir. 2005). The court rejected the school district's argument that the plan was not arbitrary age discrimination and instead was a "true incentive offered to give employees an opportunity to retire early." *Id*. at 653.

Another type of ERIP often found in collective bargaining agreements includes incentives intended to provide a means to pay for health insurance until the early retiree is eligible for Medicare. Mindful of this rationale, younger employees receive a greater benefit because they must wait longer before they become Medicare eligible. Although not based upon any age-based animus, courts have found these types of plans violative of the ADEA. *See, e.g., Overlie v. Owatonna Indep. Sch. Dist. No. 761*, 341 F. Supp. 2d 1081 (D. Minn. 2004).[2] Many school districts in several states continue to utilize similar types of ERIPs.

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[2]*See also Solon v. Gary Comm. Sch. Corp.*, 180 F.3d 844 (7th Cir. 1999) (holding ERIP violated ADEA despite school district's claim, in part, that declining benefit incentive provided "bridge" to eligibility for social security); *E.E.O.C. v. Hickman Mills Consol. Sch. Dist. No. 1*, 99 F.Supp.

Still other common early retirement incentives may include flat-dollar bonuses (e.g., $10,000 to employees electing early retirement), one-time termination bonuses (e.g., a percentage of final salary), length-of-service bonuses (e.g., $1000 for each year of service), imputing years of service under a retirement plan, or the purchase of service credit in the retirement system. *See Diane M. Juffras, Early Retirement Incentive Programs: Are they Legal for North Carolina Public Employers, Public Employment Law (June 2006) (http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/pelb33.pdf)*; Equal Employment Opportunity Commission Compliance Manual (Oct. 3, 2000) (http://www.eeoc.gov/policy/docs/benefits.html#N_1_) at ADEA Issues, Part VI.

ERIPs that contain provisions employing age, in part, as a basis to determine benefits, are far from arbitrary and capricious for the very fact that labor and management actively *bargain* for inclusion of these benefits. Yet it is public school districts, and the public monies provided to them, which are singled out by the Equal Employment Opportunity Commission ("EEOC") to "pay" for allegedly discriminatory (yet bargained-for) practices.

Despite the EEOC's enforcement efforts, unions have resisted the removal of ERIPs for the important reason that their members still want them because they facilitate early retirement. Employers do not object because ERIPs are intended to reduce

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2d 1070 (W.D. Mo. 2000) (holding ERIP benefits that decline after initial year of eligibility, which were based upon age and years of service, violated the ADEA).

labor costs and reward employees who have typically provided the districts with decades of service. The stark realities of dwindling public budgets, and public reluctance to approve more levies to make up operating costs, leave school districts desperate to reduce costs wherever possible. The common denominator substantiating the fairness of these plans is found in the desire for these programs by both unions and school boards, albeit for different, yet equally compelling, reasons.

The issue of whether the ERIPs described above and similar plans utilized by public school districts are consistent with the purposes of the ADEA, whether reviewed as a prima facie violation of the ADEA or as fitting within the early retirement exception, remains unresolved by this Court.

Concurring in an *en banc* Court of Appeals decision, Judge Rogers was careful to emphasize that the Court of Appeals "should make clear that . . . we take no position on whether the result in *Lyon*[3] can be supported by the early retirement exception to ADEA liability."[4] *EEOC v. Jefferson County Sheriff's Dep't*, 467 F.3d 571, 583 (6th Cir. 2006) (*en banc*). Judge Rogers explained that the Sixth Circuit's decision in *Lyon*, which the *en banc* Court in this case reversed, affirmed only the district court's finding

[3] *Lyon v. Ohio Educ. Ass'n and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995), *overruled by EEOC v. Jefferson County Sheriff's Dep't*, 467 F.3d 571 (6th Cir. 2006).

[4] The "early retirement exception" referenced by Judge Rogers is codified at 29 U.S.C. § 623(f)(2)(B)(ii) (2007).

that the plaintiffs had failed to establish a prima facie disparate treatment claim under the ADEA. *Id.*[5]

NSBA urges this Court to reverse the *en banc* decision of the Court of Appeals and confirm that retirement plans like those in Kentucky and many public school district plans across the country may refer to age in the computation of benefits. Using age in this manner is fair and an eminently necessary part of a school board's fiduciary obligations in the expenditure of public monies.

ARGUMENT

A. EARLY RETIREMENT INCENTIVE PLANS ARE VOLUNTARY, FISCALLY SOUND, AND DESIRED BY EMPLOYEES.

Public school districts employ approximately 6.4 million people nationwide. Recent funding figures[6] indicate public school districts annually spend $455 billion on all programs (over 4½% of gross domestic product), including $215 billion for salaries

[5] The ERIP in *Lyon* was included in a collective bargaining agreement. *Lyon*, 467 F.3d at 136. Similar to the plan in this case, the challenged benefit in *Lyon* involved an early retirement incentive that imputed years of service to eligible employees. *Id.* at 136-37. The Sixth Circuit rejected the plaintiffs' ADEA claim: "[T]he disparity that plaintiffs find objectionable is a product of their length of service and their age when originally hired []. 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). Since this factor was not being used as a "proxy" for age, it may not be considered evidence of discriminatory animus. *Id.* at 140 (footnote omitted).

[6] Fiscal Year 2003.

and benefits for teachers and instructional aides. Both enrollments and budgets are expected to increase at least through 2014. Growing budgetary shortfalls across the country are leading to difficult decisions involving sensitive cuts, including closing schools, increasing class sizes, shortening school days, increasing fees, freezing or cutting salaries, reducing or dropping certain non-core classes and programs, eliminating sports and other extra-curricular programs, outsourcing, reducing teacher training, eliminating technology improvements, taking commercial loans, reducing or eliminating transportation and maintenance projects, and eliminating teaching, counseling, administrative and other staff positions. States have also reduced per pupil funding and general education funding due to budget deficits at the state level. As a result, ERIPs represent more than a special benefit to employees. They allow school districts to save millions of dollars by providing voluntary incentives for high wage earner employees to comfortably exit the workforce.[7]

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[7] In some states, ERIPs have been statutorily authorized and for years have withstood the scrutiny of state courts. *See, e.g.,* Minn. Stat. §§ 122A.48 (2007) (early retirement incentives for teachers); 465.72 (severance pay to employees of county, city, township, school district or other political subdivision); *State by Beaulieu v. Independent Sch. Dist. No. 624*, 533 N.W.2d 393, 396 (Minn. 1995) (holding that section 465.72 reflected the Minnesota legislature's "broad grant of authority for school districts to manage their resources appropriately and ease employee transition out of the school district work force," including the authority to differentiate between employees whose ages qualify them for early retirement incentives and those who do not qualify).

The relationship between public school districts and their employees in approximately 33 states is governed by collective bargaining agreements (CBA).[8] The collective bargaining process is conducted in a collaborative manner whereby the parties make demands and offer concessions in an effort to reach a consensus on the terms and conditions that will govern the employment relationship. Interim agreements regarding particular issues are often memorialized in Memoranda of Understanding. The process culminates in the execution of a final collective bargaining agreement, incorporating each agreed-upon provision. When negotiating the details of some provisions, including ERIPs, union members may serve on board committees that function more collaboratively than traditional "at the table" bargaining. A CBA only becomes effective after being ratified by a majority vote of employees.

Public school districts and employee unions often bargain for retirement programs that utilize a combination of age and years of service in order to compute early retirement incentive benefits. In fact, most of the country's public retirement programs utilize formulas which use both age and years of service in the determination of retirement benefits. It is no surprise that after the forced removal of some ERIPs by the EEOC, labor unions commonly demand other benefits to replace the lost ERIPs. The

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[8] *See* Education Commission of the States, *State Collective Bargaining Policies for Teachers*, StateNotes – Unions/Collective Bargaining (June 2002) (http://www.ecs.org/clearinghouse/37/48/3748.pdf).

reason is simple: Labor unions believe that ERIPs provide a valuable asset to workers.

The Sixth Circuit in *Lyon* provided a compelling explanation of the collective desire for ERIPs:

> Early retirement plans enable employers and workers alike to avoid involuntary layoffs by accelerating the pension process, and such plans have proven very popular with labor and management--it is no accident that an early retirement plan was negotiated into the collective bargaining agreement as a "benefit." Therefore, it should be expected that one effect of such a plan is to encourage workers to retire early rather than continue to work. This is precisely what each side bargained for in the labor agreement. The fact that it may, in effect, take a higher benefit to buy out a worker with more to lose (the worker with more time until retirement) does not alter the analysis.

Lyon v. Ohio Educ. Ass'n and Professional Staff Union, 53 F.3d 135, 139 (6th Cir. 1995), *overruled by EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006).

In general, the purpose behind voluntary early retirement programs is to (1) reduce labor costs by replacing high income employees with lower income employees; (2) retain a mix of experience levels of teachers within the schools; and (3) provide incentives to teachers who voluntarily chose to retire

early. Moreover, teaching, like police work, can be a physically and emotionally demanding career. After teaching for a number of decades, teachers, like other workers, are often interested in pursuing second careers. ERIPs provide teachers the financial means to pursue other employment opportunities. As noted, early retirement incentive plans are voluntary, often created at the request of teachers.

Public school districts are generally mandated by state law to comply with CBAs, which are binding agreements, or risk litigation alleging unfair labor practices. The CBAs are agreements containing negotiated, and sometimes hotly contested, compensation systems. The status of a CBA as a contractual *agreement* is of significant consequence because it does *not* represent school board policy. As courts review CBAs, particular attention should be given to the context in which these agreements are negotiated and the intent of the negotiating parties. *See United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567, 80 S.Ct. 1343, 1346 (1960) ("In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."). Judge Williams, dissenting from the majority's allowance of a reverse age discrimination claim in a recent Sixth Circuit case, summed up the proper deference that should be given to the collective bargaining process:

> Finally, this dissent is based on a common sense understanding of collective

> bargaining agreements. I am of the opinion that the ADEA was not intended to interfere with the collective bargaining process or with collective bargaining agreements. The courts should not stand watch over labor unions who represent employees of a company and interfere with their negotiations with employers.

Cline v. General Dynamics Land Systems, 296 F.3d 466, 476 (6th Cir. 2002) (Judge Williams dissenting), *rev'd* 540 U.S. 581, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004). Judge Williams further warned that the majority's holding "could have a devastating effect on the collective bargaining process, calling into question the validity of seniority and early retirement programs contained in collective bargaining agreements across the country. If such is allowed, bargaining for all workers, regardless of age, would suffer." *Id.*

The collective bargaining process provides the parties with the freedom to openly and freely haggle for desired benefits. The ability of the parties to engage in this process unencumbered is improperly restrained by unfounded allegations of age discrimination, especially when the parties are equally seeking benefits which are not driven by age-based animus.[9]

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[9] Instead of being driven by animus, public bodies strive to negotiate agreements that optimize the use of public funds, and unions strive to optimize the benefits for their members. At the end of the day, however, a collectively bargained for agreement is the result of a give-and-take process in which both parties are stakeholders, and should equally bear responsibility for the

If upheld, the *en banc* Court of Appeals decision will permeate the bargaining process, hampering the ability to negotiate in good faith in reliance on each others' public commitment to strike a bargain through collective efforts.

To the extent an ERIP or other retirement benefit where age may be a factor in the calculation of benefits is available in a CBA or otherwise offered by a school district, the arbitrary stereotypes Congress intended to abolish through the ADEA are not present. To the contrary, ERIPs save school districts money and provide desirous benefits to employees, neither of which is proscribed by the ADEA. Similarly, the Kentucky Retirement System benefits are compliant with the ADEA, although the intent of that plan is not to save money, but to provide a safety net to employees in the event of a disability. In neither case is there a belief that ability declines with old age — the evil the ADEA seeks to prevent.

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agreed upon provisions, including retirement benefits. Yet, due to a fundamental unfairness in the law, targeted ADEA defendants end up bearing the entire economic burden for plans found to violate the law. *See, e.g., Overlie*, 341 F.Supp. at 1088-91 (holding, in part, the ADEA and federal common law did not permit defendant school district to maintain contribution claim against third party defendant labor union) (*citing Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) and *Northwest Airlines v. Transportation Workers Union of Am.*, 451 U.S. 77 (1985)). Thus, public entities are twice vexed. First, after negotiating in good faith in order to reach a fair labor agreement, public bodies may be subject to ADEA liability. Second, in the event of ADEA liability, public entities cannot call upon a jointly responsible party—the union—in order that all interested parties share the responsibility for that liability.

Further, at least with ERIPs at the school district level, such plans are not forced upon high wage earners, but are voluntary, highly desirable, and openly bargained-for benefits. Surely, such an approach cannot offend the spirit of the ADEA. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993) (noting the essence of the ADEA is the prohibition of age discrimination on the false premise that with old age comes incompetence and faltering productivity).

ERIPs are *voluntary* plans that provide workers, if they choose, the option to retire early. Employees that desire to continue working may do so, in which case they continue to collect their full wages and benefits. The traditional wrongs the ADEA is designed to address are not present in these plans: age is not the motivating force of the employment decision, although age may be a factor in the computation of benefits.

As explained by Judge Boggs in his well-reasoned dissent rejecting the EEOC's position, this Court has held, "under the ADEA, companies could make a decision based solely on the need to save money, even if that decision bore more heavily, on average, on older workers, so long as the factor relied on was only correlated with age, not determined by age." *Jefferson County Sheriff's Dep't*, 467 F.3d at 585 (Judge Boggs, dissenting) (*referring to Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)).

The reasonable solution in this case, one which is consistent with the mandates of the ADEA and fairness to the bargained-for desire of public employees, is to reverse the Court of Appeals and

embrace the rights of public employers *and public employees* to agree that a variety of factors in the computation of retirement benefits may be used, including age and years of service.

The retirement plan at issue in this case, as well as the plans available to thousands of public school employees throughout the Nation, are consistent with the ADEA because they do not deprive older workers "of employment on the basis of inaccurate and stigmatizing [age-based] stereotypes." *Jefferson County Sheriff's Dep't*, 467 F.3d at 585 (Judge Boggs, dissenting).

B. THE ADEA PROHIBITS ONLY ARBITRARY AGE BASED EMPLOYMENT DECISIONS.

Congress has declared that the purpose of the ADEA is 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.

29 U.S.C. § 621(b) (2007) (italics added). Section 623, subd. a(1) further states that employers may not "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) (2007).

In a disparate treatment case, as with the instant matter, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co.*, 507 U.S. at 610. "[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.*

"Disparate treatment," the Court continued, "captures the essence of what Congress sought to prohibit in the ADEA. 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." *Id.* "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." *Id.*

A retirement benefit is just that, a benefit. In many cases, benefit packages are negotiated and ratified by employees for the benefit of employees. They provide an enhancement to retirement security, smooth the transition from the workplace, and ease the financial burden on public employers of high wage earners. Neither the Kentucky plans at issue nor the retirement benefits commonly seen with public school districts embody provisions which compute benefits under formulae designed to eliminate older workers because of old-age falsehoods.

In summary, retirement benefits in which age may be a factor are not arbitrarily discriminatory *per se*. To hold otherwise threatens essentially every public retirement program, as they nearly univer-

sally base eligibility, in some manner, on age. *See United Airlines v. McMann*, 434 U.S. 192, 207, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977) (White, J., concurring) (noting "all retirement plans necessarily make distinctions based on age . . .")

CONCLUSION

The *en banc* decision of the Court of Appeals should be reversed, and the opinion of the District Court affirmed.

Respectfully submitted on this 13th day of November 2007.

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