

No. 18-781

In the Supreme Court of the United States

BALTIMORE COUNTY, MARYLAND,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case involves a judicially-determined change in the law governing the Petitioner's 74 year old pension plan. The issue resulting in that change was not raised by Respondent, but was raised *sua sponte* by the Fourth Circuit in the first appeal from a liability determination in favor of the Petitioner. On remand from that first appeal, the district court characterized "[t]he problem identified by the Fourth Circuit" as "an unintended consequence, resulting from the interaction of the two separate and independently lawful provisions of the County Code enacted decades apart." *EEOC v Baltimore County*, 2012 WL 5077631 at *3 (D. Md. October 17, 2012). App. 24-26. This judicially-determined change was not supported by any actuarial testimony or evidence. In fact, the Petitioner's actuary confirmed the fact that the Petitioner's contribution rates were based on sound actuarial principles and did not discriminate against older workers. Nevertheless, the liability phase of this case is now over.

With respect to Respondent's claim for retroactive monetary relief, the cases that have considered retroactivity in the pension context are consistent and make clear that pension plans are uniquely protected. Given the unique character of pension plans, where there has been a change in the law, nonretroactivity is the rule rather than the exception. Applying these principles, the district court's denial of retroactive monetary relief was legally correct and the Fourth Circuit's contrary decision must be reversed.

ARGUMENT

1. *Manhart, Norris and Long* prohibit retroactive monetary relief against pension plans.

As stated in the Petition, the Fourth Circuit's holding is in direct conflict with this Court's instructions in a trilogy of cases not to award retroactive monetary relief against pension plans. See *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Comm. For Tax Deferred Com. Plans v. Norris*, 463 U.S. 1073 (1983); and *Florida v. Long*, 487 U.S. 233 (1988). App.71, 79, 84. In all three of these pension cases, this Court held that retroactive monetary relief was not appropriate. As previously noted, the Ninth Circuit has characterized this trilogy of cases as indicating a "clear Supreme Court disapproval of retroactive relief in pension cases." *Retired Pub. Employees' Ass'n of Cal, Chapter 22 v. State of Cal.*, 799 F.2d 511, 514 (9th Cir. 1986).

Respondent attempts to justify the Fourth Circuit's decision by claiming that it does not conflict with this Court's trilogy of pension cases. It asserts that "under the differently worded enforcement provision in Title VII, back pay awards are not always appropriate when a pension plan violates Title VII." Resp. 8. It then proceeds to conduct a lengthy analysis of the text of the four sentences of 29 U.S.C. § 626(b), the ADEA enforcement provision. Resp. 8-14. This analysis is flawed because it fails to account for the plain language of the statute, which gives the district court "jurisdiction to grant such legal or equitable relief as may be appropriate." Additionally, this analysis fails

to address the important policy reasons articulated in *Manhart, Norris and Long* for not granting retroactive monetary relief against pension plans.

Finally, Respondent fails to address this Court's holding that the rules governing pension plans "should not be applied retroactively unless the legislature has plainly commanded that result." *Manhart, supra* at 721; *Long, supra* at 236 (quoting *Manhart*). This holding is fatal to both the Respondent's arguments and the Fourth Circuit's decision, because the ADEA contains no such command.

2. The plain language of the statute gives discretion to the district court.

Respondent argues that an award of back pay is mandatory upon a finding of liability under the ADEA. It claims that the district judge did not have the discretion to deny retroactive monetary relief despite the fact that the ADEA's enforcement provision, 29 U.S.C. § 626(b), plainly states that "the court shall have jurisdiction to grant such legal and equitable relief as may be appropriate."

Respondent ignores this statutory grant of discretion to the district court based on its interpretation of the first four sentences of 29 U.S.C. § 626(b). It claims that the fourth sentence only provides discretionary authority to grant *additional* "legal or equitable relief as may be appropriate." Resp. 12. This interpretation is flawed because it removes from the district court the jurisdiction to determine whether *any* relief is appropriate in the first instance. If additional relief is appropriate then the district court

can make that determination, but logically it can also determine that *no* retroactive monetary relief is appropriate. Respondent fails to account for a determination that retroactive monetary relief may not be “appropriate” in pension cases as previously and repeatedly held by this Court. The reasoning of the Court in those pension cases applies irrespective of whether retroactive monetary relief is sought against a pension plan under Title VII or the ADEA.

3. The district court, not Respondent, has discretion under the statute.

Even though the ADEA enforcement provision provides “jurisdiction to the district court to grant such legal and equitable relief as may be appropriate,” Respondent argues that it, not the district court, should determine whether, and in what amount, a retroactive monetary award should be granted.

Respondent says that it will seek only a “reasonable” monetary award limited to the period following its 2006 determination statement. Resp. 14. This statement by itself flatly contradicts and undermines Respondent’s argument that retroactive monetary relief is mandatory once a liability determination has been made. Ignoring this contradiction, Respondent instead substitutes its “prosecutorial discretion” for the judgment of the district court to exercise discretion with respect to the amount, if any, of a retroactive monetary award. Admittedly, Respondent has the discretion to decide *whether* to bring an enforcement action. But, its argument that it, instead of the district court, has discretion to decide on its own an amount less than full

retroactive monetary relief refutes any assertion that full retroactive relief is mandatory. Accordingly, the argument that full retroactive relief is mandatory must fail. It would be an odd state of affairs for Respondent to make such determinations rather than an Article III judge, particularly when such determinations could have a potentially devastating impact upon local governments, their pension plans, their pensioners, and their taxpayers.

4. *Lorillard* is not on point.

This Court should reject the Respondent's reliance on *Lorillard v. Pons*, 434 U.S. 575 (1978), to support its argument, since *Lorillard* merely held that "in a private action under the ADEA a trial by jury [is] available where sought by one of the parties." *Id.* at 585. As previously noted, this Court did not hold in *Lorillard* that a retroactive award of compensation for amounts owing is mandatory under the ADEA. App. 30-31, 33-35. Rather, it stated in *Manhart* and repeated in *Long* that the rules governing pension plans "should *not* be applied retroactively unless the legislature has plainly commanded that result." In fact, Respondent has not cited a single case holding that retroactive monetary relief against a pension plan is mandatory under the ADEA, other than the Fourth Circuit's decision in this case.

5. The district court's analysis of the case law is correct.

Respondent disagrees with Petitioner's analysis of the circuit and district court case law. That analysis is based on the district court's analysis in its opinion.

Petitioner believes that the district court's analysis is correct, not Respondent's.

6. The contribution rates have been fully equalized.

The Respondent has already secured relief for the entire class it represents. First, as a matter of risk management, Petitioner voluntarily equalized the contribution rates for all new hires effective July 1, 2007. Second, the Petitioner and all six unions agreed to a Joint Consent Order, App. 104-122, which resolved all claims for injunctive relief, with the result that age will no longer be a factor in employee contribution rates beginning in July 2018. App. 109.

CONCLUSION

For the above reasons, and for the reasons stated in its Petition, Petitioner respectfully requests the Court to grant the writ, to reverse the Fourth Circuit's Per Curiam Published Opinion and Order of September 19, 2018, and to remand this case to the Fourth Circuit with instructions to follow this Court's holdings in *Manhart*, *Norris* and *Long* that retroactive monetary relief against pension plans is not appropriate. Alternatively, Petitioner respectfully requests the Court to grant the writ and to schedule this case for briefing and oral argument to consider the questions presented to the Court in its Petition and in this Reply.

Respectfully Submitted,

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