

No. _____

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*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Fourth Circuit erroneously held that a retroactive award of monetary relief is mandatory under the ADEA in this *pension case*,
 - A. because the Fourth Circuit's holding is in conflict with this Court's instructions in a trilogy of pension cases not to award retroactive monetary relief against pension plans;
 - B. because this Court has previously held that the rules governing pension plans "should not be applied retroactively unless the legislature has plainly commanded that result" and there is no such legislative command in the ADEA;
 - C. because any award of retroactive monetary relief in this case involves the complex review of and individualized actuarial calculations for a class of approximately 12,000 pension beneficiaries, *not* the relatively simple calculation of unpaid minimum wages or overtime compensation contemplated by the enforcement provision of the FLSA;
 - D. because the ADEA's enforcement provision provides that the district court had "jurisdiction to grant such legal and equitable relief as may be appropriate;"
 - E. because the broad grant of discretionary authority in 29 U.S.C. § 626(b) has been repeatedly confirmed by the Circuit Courts of Appeal; and
 - F. because no other federal court has interpreted the enforcement provision of the ADEA, 29 U.S.C. § 626(b), as requiring that retroactive monetary relief be awarded for ADEA violations?

LIST OF PARTIES

The United States Equal Employment Opportunity Commission; Baltimore County, Maryland; Baltimore County Federation of Public Employees, FMT, AFT, AFL-CIO; Baltimore County Federation of Public Health Nurses; Baltimore County Professional Fire Fighters Association International Association Fire Fights Local 1311-AFL-CIO; Baltimore County Lodge No. 4 Fraternal Order of Police Incorporated; Baltimore County Sheriff's Office Fraternal Order of Police/Lodge Number 25; American Federation of State, County, and Municipal Employees, Local #921.

CORPORATE DISCLOSURE STATEMENT

Baltimore County, Maryland is a political subdivision of the State of Maryland. As a governmental entity, it has no publicly traded stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Baltimore County, Maryland, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 904 F.3d 330, and is reproduced in the Appendix hereto (“App.”) at 1-14. The opinion of the District Court for the District of Maryland is reported at 202 F. Supp. 3d 449, and is reproduced at App. 15-70.

JURISDICTION

The judgment of the Fourth Circuit was entered on September 19, 2018. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Fourth Circuit had jurisdiction of the EEOC’s appeal pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The ADEA enforcement provision, 29 U.S.C. § 626(b), reads in relevant part:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum

wages or unpaid overtime compensation for purposes of section 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. *In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate* to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section (emphasis supplied).

29 U.S.C. § 216(b) of the FLSA which Congress incorporated into the ADEA's enforcement provision, provides:

Any employer who violates the provision of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

STATEMENT OF THE CASE

The Employees' Retirement System

In 1945, Baltimore County established a mandatory Employees Retirement System (the “pension plan” or “ERS”) for all “general” County employees, under which employees were eligible to retire and receive pension benefits at age 65, regardless of their length of employment. *EEOC v. Baltimore County*, 747 F.3d 267, 270 (4th Cir. 2014). The County planned to fund half of the ERS on its own and relied on employee contributions to fund the other half. *Id.* The County required employees to contribute to the ERS over the course of their employment at contribution rates calculated by the County’s actuarial firm, Buck Consultants. App. 20.

To ensure that employee contributions were sufficient to fund the Plan, Buck Consultants “based its calculations for employee contribution rates on the number of years that an employee would contribute to the plan before being eligible to retire at age 65.” *Id.* “Using the retirement age of 65, Buck ultimately concluded that older employees who enrolled in the plan should contribute a higher percentage of their salaries, because their contributions would earn interest for fewer years than the younger employees’ contributions.” *Id.* The County adopted the Buck Consultants calculations and, accordingly, “the older that an employee was at the time of enrollment [in the ERS], the higher the rate that the employee was required to contribute.” *Id.*

The County modified the terms of the ERS several times. Most notably, in 1973 “[t]he County...added an

alternative term of retirement eligibility that permitted general employees to retire after 30 years of service irrespective of their age.” App. 21. The County lowered the employee contribution rates once in 1977 “based on expected increases to the rate of return on invested contributions.” *Id.* at 271. However, “[t]his reduction did not alter the fact that rates were based on an employee’s age at the time of plan enrollment and were higher for older employees.” *Id.* “Correctional officers later became eligible to retire after only 20 years of service, regardless of age, or at age 65 with 5 years of service.” *Id.*

Procedural History

This case began in April of 1999 and January of 2000 with the filing of charges of age discrimination by two Baltimore County Correctional Officers alleging that they were being discriminated against based on age because they had to contribute more to the County’s pension plan to receive the same benefits as younger employees. The County denied the charges and provided the EEOC all requested information including Buck Consultants’ cost justification for the contribution rates. *Id.* That justification has never been challenged, because the EEOC has never produced an actuary throughout the course of this lengthy litigation to support any of its contentions.

As noted above, the contribution rates related to an employee’s age at the time of joining the retirement system and therefore to the number of years remaining until reaching retirement age to accumulate a sufficient reserve to pay for one-half of the employee’s retirement benefits, the other half being paid by the County. This approach is based on the “the time value

of money,” the same principle governing a savings account.

Five and one-half years passed with no further inquiry from the EEOC until March of 2006 when the EEOC issued violation notices to the County in both cases. Another year and one-half passed until the EEOC filed suit in September of 2007. *Id.* In the meantime, as a matter of risk management, the County equalized the contribution rates for all new hires effective July 1, 2007. On January 1, 2009, Judge Benson E. Legg granted the County’s motion for summary judgment on the issue of liability, based on the time value of money principle and on his analysis of the factors articulated by this Court in *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135 (2008). *EEOC v. Baltimore County*, 593 F. Supp. 2d 797 (D. Md. 2009).

At oral argument in the Fourth Circuit, Judge Dennis Shedd, *sua sponte*, raised the issue of whether the above-referenced early retirement options (which were fully subsidized by the County), had any effect on the time value of money analysis. This issue had not been previously raised by EEOC. The Fourth Circuit then vacated Judge Legg’s decision holding that a genuine issue of material fact remained as to whether the County’s “contribution rates [were] justified by permissible financial considerations.” *EEOC v. Baltimore County*, 385 Fed. Appx. 322, 325 (4th Cir. 2010).

On remand, Judge Legg granted partial summary judgment to the EEOC on the issue of liability. *EEOC v. Baltimore County*, No. L-07-2500, 2012 WL 5077631, at *1 (D.Md. Oct. 17, 2012). App. 24-26. He

characterized “[t]he problem identified by the Fourth Circuit” as “an unintended consequence, resulting from the interaction of two separate and independently lawful provisions of the County Code enacted decades apart.” *Id.* at *3. Judge Legg observed the following:

It is clear from the record that the age-based contribution rates, when put in place in 1945 until modified in 1977, were fully justified by the time value of money rationale identified by this Court in its prior opinion. Using projected years until retirement, Buck calculated the percentage of an employee’s pay that would be required to fund approximately one-half of his or her retirement benefit. Because all employees were eligible to retire at age 65, age served as a proxy for years until retirement. Thus, notwithstanding the fact that the ERS nominally based an employee’s contribution rate on the age at which he or she was hired, years until retirement was the real determining factor. In 1973 the County, at no additional cost to employees, added a generous early retirement option based on years of service. Such a benefit is explicitly authorized by § 4(l) of the ADEA, which provides that no violation occurs solely because “a defined benefit plan... provides for... payments that constitute the subsidized portion of an early retirement benefit.” 29 U.S.C. § 623(l)(1)(A)(ii)(I). A secondary effect of this provision, however, was to decouple an employee’s age from his or her years until retirement. Age of retirement is no longer yoked to chronological age because some employees take early retirement while others do not. *Id.*

Judge Legg concluded that “after the County adopted the early retirement option, the different contribution rates charged to different employees are explained by age rather than pension status.” *Id.* at *5. Therefore, he reasoned, “[p]ension status...cannot be the driving factor behind the disparate treatment, which is directly linked to an employee’s age.” *Id.* Judge Legg held that “because age [was] the ‘but-for’ cause of the disparate treatment, the ERS violated the ADEA.” *Id.* (quoting *Gross v. FBL Fin. Services, Inc.*, 557 U.S. 167, 177, 129 S. Ct. 2343, 174 L.Ed.2d 119 (2009)). However, Judge Legg granted the County leave to file an interlocutory appeal on the issue of liability, concluding that “the question presented [was] a novel one,” and that “the magnitude of the effort [related to the damages phase of the case] counsel[ed] in favor of making certain that the effort is necessary before it is undertaken.” Dec. 7, 2012 Letter Order, p. 4, ECF No. 206. App. 26.

The Fourth Circuit affirmed Judge Legg’s liability ruling on appeal and remanded this case “for further proceedings to address the issue of damages.” *EEOC v. Baltimore County*, 747 F.3d 267, 274–75 (4th Cir. 2014). In their liability determinations, neither the district court nor the Fourth Circuit performed the multi-factor analysis articulated by this Court in *Kentucky Retirement Systems*, *supra* at 143-147. Judge Legg had in fact stated in his initial liability determination in favor of the County that this case was “controlled” by *Kentucky Retirement Systems*. This Court nevertheless denied the County’s petition for a writ of certiorari. *Baltimore County v. EEOC*, 135 S. Ct. 436 (Mem.), November 3, 2014.

The case was reassigned to Judge Richard D. Bennett on February 7, 2013 upon the retirement of Judge Legg from the district court. The parties and all six unions representing the County employees participating in the ERS agreed to a Joint Consent Order, which included a plan for equalization of pension plan contribution rates over the next two years. That Joint Consent Order, with respect to the injunctive portion of the case and the equalization of member contribution rates, was entered by the district court on April 26, 2016. App. 104-122. The Order 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.

The EEOC then moved for a determination by Judge Bennett on the availability of retroactive and prospective monetary relief. The district court, in a lengthy, thorough, and well-reasoned opinion, held that neither retroactive nor prospective relief was “appropriate.” App. 27-70.¹

The District Court’s Opinion

First, the district court held that a retroactive award of compensation for “amounts owing” was not mandatory under the ADEA. The EEOC had requested an award of “amounts owing,” *i.e.* “the amounts of contributions of employees age 40 or over, who were required to participate in [the ERS], in excess of the

¹ EEOC did not appeal the district court’s denial of prospective relief to the Fourth Circuit. *EEOC v. Baltimore County*, 904 F. 3d 330, 332, n.2 (4th Cir. 2018).

amounts they would have contributed if age were not a factor in employee contribution rates.” App. 27.

The district court analyzed 29 U.S.C. 626(b), the ADEA’s enforcement provision, and 29 U.S.C. § 216(b) of the FLSA, which is incorporated into the ADEA enforcement provision. App. 28-29. The district court rejected EEOC’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.” *Lorillard*, 434 U.S. at 585. 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.

Contrary to the EEOC’s representations, the district court determined that no court has held that a retroactive award of compensation for amounts owing is mandatory under the ADEA. App. 32. Additionally, the district court noted that this Court in *Lorillard* specifically cited the language in the ADEA’s enforcement provision that grants the court discretion to award retroactive relief: “[I]n any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief *as may be appropriate* to effectuate the purposes of this chapter.” *Id.* at 579, 98 S. Ct. 866, n. 5. This Court has not indicated that its holding in *Lorillard* invalidated, or in any way interfered with, this provision. App. 35.

On the contrary, several United States Circuit Courts of Appeal subsequently confirmed that the ADEA grants courts broad discretion to award appropriate remedies for ADEA violations. App. 35.

Second, the district court correctly placed emphasis on and followed the instructions of this Court in three cases where, like here, an employer's pension plan was found to violate a federal anti-discrimination statute. *See City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); and *Florida v. Long*, 487 U.S. 223 (1988).

Although all three cases involved violations of Title VII of the Civil Rights Act of 1964, as opposed to ADEA violations, their unique status as *pension plan* cases was central to those opinions. None of those cases held that retroactive monetary relief was mandatory. On the contrary, they emphasized that retroactive awards have the capacity to devastate pension systems. *See, e.g., Manhart*, 435 U.S. at 722, ("Courts have [] shown sensitivity to the special dangers of retroactive Title VII awards in this field....Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties."); *Norris*, 463 U.S. at 1106–07 ("As in *Manhart*, holding employers liable retroactively would have devastating results...the cost would fall on the state of Arizona."); *Long*, 487 U.S. at 236, ("Retroactive awards, applied to every employer-operated pension plan that did not anticipate our decision, would impose financial costs that would threaten the security of both the funds and their beneficiaries."). All three cases ultimately held that retroactive relief was inappropriate. App. 37-39, 45-57.

Third, the district court found that the union defendants had bargained with the County for the ERS

contribution rates since the 1970s and had already approved a settlement agreement in this case. App. 58.

Fourth, the district court found that the EEOC had unreasonably delayed the prosecution of this case. It denied retroactive relief based on the EEOC's unreasonable delay in prosecuting this action and the prejudice that delay caused the County in the form of substantially increased retroactive liability. App. 61-67.

In conclusion, the district court held that neither retroactive nor prospective monetary relief was mandatory under the ADEA and, under the circumstances of this case, neither form of relief was appropriate. Even if retroactive monetary relief were mandatory, the Court would still decline to award retroactive relief due to the EEOC's unreasonable delay in pursuing its claims. App. 67-68.

The Fourth Circuit's Opinion

In its opinion, the Fourth Circuit held that a retroactive monetary award of back pay under the ADEA was a mandatory legal remedy, upon finding of liability under the ADEA. *EEOC v. Baltimore County* 904 F.3d.330, 331 (4th Cir. 2018). App. 11. The Fourth Circuit did not "recite the facts underlying the claim of age discrimination because they are not relevant to this appeal". App. 3. It considered the issue to be one of statutory interpretation. App. 5. It examined the ADEA enforcement provision, 29 U.S.C. § 626(b), and 29 U.S.C. § 216(b), which Congress incorporated into the ADEA enforcement provision. App. 6-7. It observed that the ADEA is a remedial statute. App. 7. It determined that back pay is a mandatory legal remedy under the FLSA. App. 8. It then relied on *Lorillard v.*

Pons, 434 U.S. 575, 577 (1978), and the legislative history of the ADEA. It then stated:

And finally, we disagree with the County's reliance on a trilogy of Title VII pension decisions issued by the Supreme Court: *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983); and *Florida v. Long*, 487 U.S. 223, 108 S.Ct. 2354, 101 L.Ed.2d 206 (1988). In all three instances, the Supreme Court held that retroactive monetary awards are discretionary under Title VII. The Court declined to award any retroactive monetary relief based on the unique burdens that retroactive awards place on employee pension plans. App. 10-11.

Its disagreement was based on the assertion that "a back pay award under Title VII is a discretionary *equitable* remedy," whereas "back pay awards under the ADEA are mandatory legal remedies." It therefore concluded "that the Supreme Court's decisions in *Manhart*, *Norris*, and *Long* do not govern our interpretation of the ADEA." App. 11.

Notwithstanding this assertion by the Fourth Circuit, this Court's instructions in the trilogy of pension cases against retroactive monetary awards apply with equal force in this pension case, particularly in light of the fact that both Title VII and the ADEA grant to the district court the discretion to award such legal and equitable relief as may be appropriate.

REASONS FOR GRANTING THE PETITION**A. The Fourth Circuit's holding is in conflict with this Court's instructions in a trilogy of pension cases not to award retroactive monetary relief against pension plans.**

The Fourth Circuit's holding is erroneous because it is in direct conflict with this Court's instructions in a trilogy of pension cases not to award retroactive monetary relief against pension plans. *See City of Los Angeles, Dep't of Water & Power v. Mannhart*, 435 U.S. 702 (1978); *Arizona Governing Comm. For Tax Deferred Ammunity & Deferred Comp. 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 the retroactive monetary relief was not appropriate. In fact, 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).

The Fourth Circuit refused to follow this Court's holdings, concluding "that the Supreme Court's decisions in *Manhart*, *Norris*, and *Long* do not govern our interpretation of the ADEA." App. 11. The Fourth Circuit based its conclusion on the assertion that "a back pay award under Title VII is a discretionary *equitable* remedy," whereas "back pay awards under the ADEA are mandatory legal remedies." App. 11. This is a distinction without a difference. Back pay awards, either as an equitable remedy or as a legal remedy, constitute the type of retroactive monetary relief that is prohibited by *Manhart*, *Norris*, and *Long*.

B. This Court has previously held that the rules governing pension plans “should not be applied retroactively unless the legislature has plainly commanded that result” and there is no such legislative command in the ADEA.

The Fourth Circuit’s holding is also in direct conflict with *Manhart and Long’s* holdings that the rules governing pension funds “should not be applied retroactively unless the legislature has plainly commanded that result.” *Manhart, supra* at 721; *Long, supra* at 236 (quoting *Manhart*). In this case, there is no such legislative command in the ADEA. Nor has Congress taken any action since the decisions in *Manhart, Norris, and Long* to enact legislation to permit awards of retroactive monetary relief against pension plans for violations of the ADEA. That lack of Congressional action would logically indicate Congress’ concurrence with the Court’s trilogy of pension cases, particularly given Congress’ ability to change the law when it disagrees with this Court’s holdings.

Furthermore, this Court in *Manhart* cautioned that “[r]etroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties.” *Manhart, supra* at 723-24.

This Court also concluded in *Norris* that the “finding of a statutory violation provide[d] no basis” for retroactive relief, “which would be both unprecedented and manifestly unjust.” *Norris, supra* at 1105.

Additionally, this Court stated in *Long* that it was inequitable to impose retroactive monetary relief against a local government like the County that offers its employees a pension plan: This Court stated:

Finally, we conclude here, as in *Manhart and Norris*, that the imposition of retroactive liability on the States, local governments, and other employers that offered sex-based pension plans to their employees is inequitable.

* * *

In *Norris*, we reaffirmed our conclusion that retroactive liability was inappropriate in Title VII pension plan cases. 463 U.S., at 1105-1107, 103 S.Ct., at 3510-3511. Retroactive awards, applied to every employer-operated pension plan that did not anticipate our decision, would impose financial costs that would threaten the security of both the funds and their beneficiaries.

The same logic applies in this case to the allegedly age-based rates of the Employees' Retirement System.

Finally, the district court cogently summarized its analysis of this case in the light of *Manhart*, *Norris* and *Long*, as follows:

Like in *Manhart*, Baltimore County had reason to believe that its pension plan contribution scheme was entirely lawful prior to the determination of liability in the present case. When the County implemented its 30 year early retirement option in 1973, no one advised the County that adding that option would “decouple”

the time value of money from the contribution rates, causing the scheme to violate the ADEA. In fact, Buck Consultants, the County's actuarial consultant, advised the County in 1988 that the contribution rates did not violate the ADEA. *See* Joint Appendix 17-19. Furthermore, in response to the charges of age discrimination filed against the County in 1999 and 2000, the County sought the advice of its actuary, Buck Consultants, who specifically advised the County in August of 2000 that "a bona-fide employee benefit plan does not discriminate against older employees, even if older employees must pay more for their benefit, so long as older employees do not have to bear a greater percentage of the cost of the benefit than a younger employee." *Id.* at 6-10. Therefore, like in *Manhart*, there is "no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices." *Manhart*, 435 U.S. at 720-21, 98 S.Ct. 1370. While this Court ultimately held that the County's contribution rates were unlawful, the fund's administrators "did not have the benefit of the extensive briefs and arguments" presented to this Court and "may well have assumed that" their contribution scheme "was entirely lawful." *Id.* at 720, 98 S.Ct. 1370.

App. 53-54.

The district court also noted that Judge Legg had initially granted summary judgment to the County on the issue of liability based on *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 128 S. Ct. 2361 (2008);

that Judge Legg had concluded that the magnitude of the effort related to the damages phase of the case counseled in favor of making certain that the effort is necessary before it is undertaken; that the issue presented in this case was a novel one; that the EEOC failed to cite any case where there was a decoupling of the time value of money concept from contribution rates as the result of the implementation of an employer-funded, early retirement option; that the decoupling issue had been first raised not by EEOC but by the Fourth Circuit during oral argument in the first appeal; and that *Manhart*, *Norris*, and *Long* all indicated that retroactive awards pose a grave threat to the security of public employers' pension funds.

Based on this analysis, the district court correctly concluded that *Manhart*, *Norris* and *Long* counseled against any award of retroactive monetary relief in this case.

C. Any award of retroactive monetary relief in this case involves the complex review of the files of and individualized actuarial calculations for a class of approximately 12,000 pension beneficiaries, *not* the relatively simple calculation of unpaid minimum wages or overtime compensation contemplated by the enforcement provision of the FLSA.

The Fourth Circuit's holding is erroneous because it fails to recognize the havoc it will cause to the County's pension plan administrators. The calculation of "amounts owing" is not a simple matter of calculating unpaid minimum wages or overtime compensation as contemplated by the enforcement provision of the

FLSA. Rather, the County has estimated that it will involve the complex review of the files of and individualized actuarial calculations for a class of approximately 12,000 current and future pension beneficiaries. The time, expense and disruption caused by such an undertaking is another factor supporting Judge Bennett's decision.

Simply "deeming" the claimed "amounts owing" as unpaid wages is not the end of the story. It is only the beginning. The first question is who among the 12,000 potential candidates is entitled to any "amount owing?" Those who were 40 years old when they joined the system? Those who turned 40 when the Fourth Circuit affirmed the grant of retroactive relief? Some other benchmark? Retroactive to when? The list of questions goes on. These questions only highlight the wisdom of this Court's prior decisions not to allow retroactive monetary relief against pension plans. They also highlight the need for this Court to grant the petition in this case.

D. The ADEA's enforcement provision provides that the district court had "jurisdiction to grant such legal and equitable relief as may be appropriate."

The Fourth Circuit's holding is erroneous because the ADEA's enforcement provision, 29 U.S.C. § 626(b), provides that the district court had "jurisdiction to grant such legal and equitable relief as may be appropriate". The meaning of this provision is plain on its face and authorized the district court to exercise its judicial discretion not to allow retroactive monetary relief in accordance with this Court's instructions in its trilogy of pension cases. The Fourth Circuit's decision

not only withdrew this jurisdictional grant of discretionary authority from the district court, it handed it to the EEOC. To understand this fully, it is necessary to go back to the EEOC's Memorandum in support of its motion in the district court for retroactive and prospective relief. At the Conclusion of that Memorandum, EEOC made the following concession:

The EEOC understands that the amount of an award of monetary relief in this case could be substantial, that "[r]etroactive liability could be devastating for pension funds," and the "harm would fall on innocent third parties," including county tax payers, as well as current and retired employees. *See Manhart*, 435 U.S. at 722-23. The EEOC has no desire to inflict such hardship on Defendant, its residents or its employees, and is committed to exploring ways to reduce such an impact after a decision is reached on the threshold issue presented in this motion. For the reasons explained above, the law requires that retroactive and prospective monetary relief be awarded in this case. Accordingly, the EEOC respectfully requests that the Court grant EEOC's Motion and schedule further proceedings to calculate such monetary relief.

(EEOC Memorandum, ECF Document 241-1 at page 20).

In its Brief in the Fourth Circuit, EEOC made the following additional concessions. First, it conceded that the five-year delay in its investigation was unreasonable and that it would not seek monetary relief for excessive deductions that the County made

before the Commission issued its letter of determination. (EEOC Brief, page 5, footnote 2).

Second, this same concession was repeated later in its Brief, where EEOC assured the Fourth Circuit that it would “seek reasonable monetary relief in this case, as it has in its other ADEA actions against public entities.” It then clarified that it did “not intend to seek back pay that accrued before March, 2006, when the Commission issued its letter of determination (EEOC Brief, page 41).

Third, the EEOC conceded that the “district court therefore had discretion under laches to deny back pay that accrued during the Commission’s unjustified delay” (EEOC Brief, page 38).

Based on these concessions, it would appear that the EEOC, with good reason, did not whole-heartedly subscribe to its own arguments that retroactive monetary relief is *mandatory*. Instead, the EEOC recognized the damage that mandatory enforcement efforts will cause to the County’s retirement system. Thus, in contradiction of its main argument, *i.e.*, that full retroactive relief is mandatory under the ADEA, the EEOC then urged the Fourth Circuit – as it did the district court – to trust EEOC to use its alleged discretion and good faith to go easy on the County because “[t]he Commission has a track record of seeking reasonable ADEA back pay awards from public pension plans” (EEOC Brief, pages 39-40).

These concessions completely undermined EEOC’s argument that back pay is a mandatory legal remedy under the ADEA. It is the district court judge, not the EEOC, who has the discretion regarding an award of

back pay in this case. The district judge thoughtfully exercised his discretion to deny that relief. Unfortunately, the Fourth Circuit disagreed. The Fourth Circuit stated as follows:

Our conclusion is not altered by the County's contention that the EEOC unduly delayed in the investigation, which delay the EEOC concedes was unreasonable. This multi-year delay caused the County to incur substantial additional back pay liability. Exercising its prosecutorial discretion, the EEOC has represented to this Court that the EEOC "will not seek monetary relief for the excessive deductions that the [C]ounty made before the [EEOC] issued its letter of determination." Op. Br. 5 n.2; see *Massachusetts v. E.P.A.*, 549 U.S. 497, 527, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). The EEOC has further represented that it has secured reasonable back pay awards from public pension plans in over thirty ADEA lawsuits and that it will do the same here. Thus, the EEOC's actions in this case do not affect our analysis here. App. 12.

Thus, the Fourth Circuit removed from the district court its statutory discretion to grant what it considered to be appropriate relief and gave it to EEOC. That unprincipled action is yet another reason to grant the petition in this case.

E. The broad grant of discretionary authority in 29 U.S.C. § 626(b) has been repeatedly confirmed by the Circuit Courts of Appeal.

The broad statutory extension of discretionary authority to the district court “to grant such legal and equitable relief as may be appropriate” has been repeatedly confirmed by Circuit Courts of Appeal. As noted by the district court, several United States Circuit Courts of Appeal have confirmed that the ADEA grants courts broad discretion to award appropriate remedies for ADEA violations.

The United States Court of Appeals for the Second Circuit in *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727–28 (2d Cir. 1984), observed the following:

While the enforcement provisions of the ADEA were generally modeled after the remedies in the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 211(b), 216, and 217, which were incorporated by reference into the ADEA’s § 626(b), *see Lorillard v. Pons*, 434 U.S. 575, 577–78, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), congress did more than merely incorporate that statute’s back pay and limited injunctive remedies. It expressly authorized the district courts to grant an ADEA claimant such legal or equitable relief as may be appropriate to effectuate the purposes of [the act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts [owing to a person as a result of the violation of the ADEA]. 29 U.S.C. § 626(b).

Guided by this broad grant of remedial authority, we have previously encouraged district judges in this circuit to fashion remedies designed to ensure that victims of age discrimination are made whole. *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir.1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981).

Whittlesey, 742 F.2d at 727–28. Similarly, the United States Court of Appeals for the Eleventh Circuit concluded as follows in *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988):

Once a verdict has been rendered in favor of an ADEA plaintiff, Sec. 7(b), 29 U.S.C. Sec. 626(b), authorizes the district court to “grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts [owing a person as a result of the violation of the ADEA].” This is a broad grant of remedial authority. [citing *Whittlesey*, 742 F.2d at 727]. The selection of remedies is a matter of the trial court’s discretion, so long as the relief granted is consistent with the purposes of the ADEA.

Castle, 837 F.2d at 1561; *see also Leftwich v. Harris–Stowe State Coll.*, 702 F.2d 686, 693 (8th Cir.1983) (“The ADEA provides legal and equitable remedies....The Act affords the district court discretion to fashion appropriate relief, and its remedy can be set aside only if that discretion is abused”); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th

Cir.1985) (“[T]he selection of remedies for an ADEA violation is a matter of the trial court’s discretion, so long as the relief granted is consistent with the purposes of the Act [citing *Leftwich*, 702 F.2d at 693].”).

F. No other federal court has interpreted the enforcement provision of the ADEA 29 U.S.C. § 626(b), as requiring that retroactive monetary relief be awarded for ADEA violations.

Neither the Fourth Circuit nor the EEOC has cited a case holding that the district court lacked discretion to deny retroactive monetary relief, nor have they cited any case in which a retroactive award was an appropriate remedy for a discriminatory pension plan. The only case they have cited is *Lorillard*. As previously noted, that case is inapposite because it merely held that “in a private action under the ADEA a trial by jury [is] available where sought by one of the parties.” *Lorillard*, 434 U.S. at 585. This Court did not hold in *Lorillard* that a retroactive award of compensation for amounts owing is mandatory under the ADEA.

CONCLUSION

For all of the above reasons, the 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*. 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 this Petition.

Respectfully Submitted,

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