No. 07-662

In the Supreme Court of the United States

AMERICAN ASSOCIATION OF RETIRED PERSONS, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
MARLEIGH D. DOVER
KELSI BROWN CORKRAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Age Discrimination in Employment Act (ADEA) provides, in relevant part, that the Equal Employment Opportunity Commission (EEOC) "may establish such reasonable exemptions to and from any or all provisions of [the ADEA] as it may find necessary and proper in the public interest." 29 U.S.C. 628. The questions presented are:

1. Whether 29 U.S.C. 628 authorizes the EEOC to promulgate reasonable exemptions from the ADEA for specific employment practices that, in the absence of an exemption, would be prohibited by the ADEA.

2. Whether 29 U.S.C. 628 violates the separation of powers doctrine.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Case—Continued: Page

In the Supreme Court of the United States

No. 07-662

AMERICAN ASSOCIATION OF RETIRED PERSONS, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 489 F.3d 558. The opinions of the district court (Pet. App. 17a-60a, 61a-75a) are reported at 390 F. Supp. 2d 437 and 383 F. Supp. 2d 705.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2007. A petition for rehearing was denied on August 21, 2007 (Pet. App. 76a-77a). The petition for a writ of certiorari was filed on November 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act (ADEA or Act), 29 U.S.C. 621 *et seq.*, *inter alia*, makes it unlawful for an employer to "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). Among other things, that statutory prohibition generally applies to age discrimination in connection with an employer's provision of "employee benefits," 29 U.S.C. 630(*l*), including health care benefits that an employer may offer to its employees and/or retirees.

The ADEA vests the Equal Employment Opportunity Commission (EEOC or Commission) with authority to "issue such rules and regulations as it may consider necessary or appropriate for carrying out [the Act]." 29 U.S.C. 628. In addition to that general grant of rulemaking authority, the statute further authorizes the EEOC to

> establish such reasonable exemptions to and from any or all provisions of [the ADEA] as it may find necessary and proper in the public interest.

Ibid. Congress's express delegation of such "exemption" authority to the EEOC under the ADEA is at issue in this case.

2. Many employers have voluntarily followed a long-standing practice of furnishing employees who elect early retirement with retiree health benefits that provide health insurance coverage between an employee's retirement date and the employee's subsequent eligibility (usually at age 65) for health insurance benefits from Medicare. In addition to such "bridge" coverage between retirement and Medicare eligibility, many em-

ployers also have provided their retirees with health insurance coverage supplementing Medicare benefits after the retiree becomes Medicare-eligible. Employers are not required by law to provide such retiree health benefit plans nor to maintain such plans once they have been established. Pet. App. 9a. Instead, employers that provide such retiree health benefit plans have done so voluntarily as a means of recruiting and retaining employees or in response to negotiated requests from unions. See Gov't C.A. Br. 8-9.

Many employer-sponsored retiree health plans either provide only "bridge" coverage until an employee becomes eligible for Medicare (at which point the employer's coverage ends) or provide supplemental Medicare coverage at a reduced level. See 136 Cong. Rec. 25,353 (1990); Gov't C.A. Br. 8-9. In *Erie County Retiree Ass'n* v. *County of Erie*, 220 F.3d 193 (3d Cir. 2000), cert. denied, 532 U.S. 913 (2001) (*Erie County*), the court of appeals held that such retiree health benefit plans that provide lower benefit levels once a retiree becomes eligible for Medicare were unlawful under the ADEA on the ground that they discriminate against former employees on the basis of age. The court concluded that employers offering such plans could escape ADEA liability only if their retiree health plans satisfied the ADEA's so-called equal benefit/equal cost defense in 29 U.S.C. 623(f)(2)(B). See *Erie County*, 220 F.3d at 215-216 & n.15.

The EEOC initially adopted *Erie County* as its national enforcement policy, but soon discovered that its policy would have unintended and adverse consequences for the continued availability of employer-sponsored retiree health benefits. Because employers could comply with *Erie County* by simply reducing or eliminating

retiree health benefits altogether (in a manner that treated pre-Medicare-eligible and Medicare-eligible retirees equally), and in light of the rising cost of health care and the decline in employer-sponsored health plans more generally, the EEOC discovered that the *Erie County* rule had created a perverse incentive for employers to reduce, not increase, their retiree health benefits. Labor organizations, benefits experts, state and municipal governments all advised the EEOC that its actions were eroding the availability of such benefits by creating an additional incentive for employers to reduce or eliminate retiree health benefit plans altogether. See Gov't C.A. Br. 12-13.

After extensive study and notice-and-comment rulemaking, the EEOC exercised its "exemption" authority under 29 U.S.C. 628 to address this problem. Among other things, the Commission determined that many employers likely would either "reduce the overall level of health benefits they offer to retirees or cease providing such benefits altogether" when forced to choose between incurring additional costs to augment existing retiree health plans in order to comply with the *Erie County* rule or reducing or eliminating such benefit plans to achieve compliance. C.A. App. 137. This outcome, the Commission concluded, was "inconsistent with the Act's primary purpose of protecting older workers." *Ibid.*; see Gov't C.A. Br. 15-16, 52-54, 57-58. It further determined that, in this particular context, the equal benefit/equal cost defense of 29 U.S.C. 623(f)(2)(B) was not a feasible means for employers to comply with the ADEA. Pet. App. 14a; Gov't C.A. Br. 16-18, 55-56. The EEOC ultimately concluded that a narrow exemption from the ADEA's provisions for the practice of coordinating employer-sponsored retiree health benefits with

Medicare eligibility was "necessary and proper in the public interest," C.A. App. 137, and would not likely disrupt the market forces giving employers an incentive to retain their existing retiree health plans, *id.* at 138, 506; Gov't C.A. Br. 57-58. The EEOC accordingly promulgated an exemption from the ADEA for the specific practice of coordinating retiree health benefit plans with Medicare eligibility in order to eliminate the perverse "incentive for employers to eliminate or reduce" such benefit plans in order to comply with the Act, 72 Fed. Reg. 72,938, 72,945 (2007) (promulgating 29 C.F.R. 1625.32). See Gov't C.A. Br. 13-19, 47-48, 52-58 (discussing exemption process in detail).[1]

3. Petitioners brought suit in the United States District Court for the Eastern District of Pennsylvania to enjoin the EEOC from implementing its exemption. The district court found "persuasive[]" the EEOC's rationale that "employers will reduce or eliminate health benefits for all retirees" without the exemption, Pet. App. 63a, and, after initially holding the exemption unlawful, *id.* at 61a-75a, granted relief from that judgment based on the court's conclusion that the exemption was a lawful exercise of the EEOC's exemption authority under the ADEA. *Id.* at 17a-60a.

The court of appeals affirmed. Pet. App. 1a-16a. The court first held that the EEOC possessed authority under the ADEA to issue the regulatory exemption in this case. *Id.* at 6a-12a. The court concluded that, by "authoriz[ing] the EEOC to 'establish such reasonable exemptions to and from any or all provisions of [the Act]

[1] The EEOC's publication of the exemption in the *Federal Register* was delayed by the district court's issuance of a preliminary injunction, which the district court ordered maintained during the pendency of petitioners' appeal. Pet. App. 58a-60a.

as it may find necessary and proper in the public interest,'" Congress had "clearly and unambiguously" vested the Commission with authority to "provide, at least, narrow exemptions from the prohibitions of the ADEA" in order to make lawful "certain employer practices otherwise prohibited by the ADEA." *Id.* at 6a-8a (quoting 29 U.S.C. 628) (alteration in original). "The term 'exemption,'" it explained, "is ordinarily used to denote relief from a duty or service," and Section 628 by its own terms "unambiguously" granted the Commission authority to exempt specific practices from "any and all parts of the statute." *Id.* at 7a-8a & n.11 (quoting *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983)). Consequently, "the fact that the proposed regulation would allow certain practices not otherwise permitted under [29 U.S.C. 623] does not render the regulation invalid." *Id.* at 8a.

The court of appeals further ruled that Section 628's grant of exemption authority to the Commission was consistent with the Constitution's separation of powers. Pet. App. 8a-9a n.13. It concluded that the provision did not contravene the non-delegation doctrine because Congress provided an "intelligible principle" to guide the Commission's exercise of its exemption authority by imposing the "clear limitation[]" that "exemptions be 'reasonable' and 'necessary and proper in the public interest.'" *Ibid.*

Thus, while recognizing that the EEOC's exemption authority was curtailed by those statutory requirements, the court held that the EEOC demonstrated that its exemption was necessary and proper in the public interest. Pet. App. 8a-10a. Given that retiree health benefits were already in decline and because "employers are not required to provide any retiree health benefits, or to

maintain such plans once they have been established," the court recognized that employers had chosen "to reduce all retiree health benefits to a lower level" in order to comply with the ADEA and that, "under these constraints," "[r]etiree benefits often face elimination." *Id.* at 9a; see also *id.* at 13a-14a. The EEOC's exemption, the court explained, was designed to "permit[] employers to offer [retiree] benefits to the greatest extent possible" and was "a reasonable, necessary and proper exercise" of the Commission's exemption authority because, over time, "it will likely benefit all retirees." *Id.* at 9a-10a (alteration in original).

ARGUMENT

The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this case therefore is not warranted.

1. Section 628 of the ADEA expressly states that EEOC may establish "reasonable exemptions" from "any or all" provisions of the ADEA when the Commission finds it "necessary and proper in the public interest." 29 U.S.C. 628. The plain language of this provision vests the EEOC with discretion to promulgate limited exemptions authorizing employers to engage in specific employment practices that would otherwise be prohibited under the Act. As the court of appeals recognized, this interpretation of the ADEA flows inescapably from the statute's use of the term "exemption," whose plain meaning "denote[s] relief from a duty," *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983), and, thus, "connotes a lessening of regulation" or "a decrease in regulatory burdens." *Brae Corp.* v. *United States*, 740 F.2d 1023, 1054 (D.C. Cir.

1984), cert. denied, 471 U.S. 1069 (1985); see also *Black's Law Dictionary* 681 (rev. 4th ed. 1968) (defining "exemption" as "[f]reedom from a general duty" and "immunity from a general burden"). The very concept of an "exemption" depends upon the existence of a general obligation from which the "exemption" grants relief.

Accordingly, by providing the EEOC with express authority to issue "exemptions" from "any or all provisions" of the Act, Congress manifested its intent that the ADEA's substantive prohibitions will *generally* apply to employer conduct, but that the EEOC may displace their *specific* application to particular employment practices by issuing "exemptions" under Section 628. Courts that have confronted analogous grants of statutory exemption authority have reached similar conclusions. See, *e.g.*, *Schiller* v. *Tower Semiconductor Ltd.*, 449 F.3d 286, 296-297 (2d Cir. 2006) (upholding SEC rule issued under 15 U.S.C. 78c(a)(12)(A)(vii) and 78*l*(h) exempting class of securities issuers from application of securities laws); *AFL-CIO* v. *Donovan*, 757 F.2d 330, 352-353 (D.C. Cir. 1985) (upholding regulation issued under 41 U.S.C. 353(b) exempting category of contracts from requirements of the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*); see also Gov't C.A. Br. 30-39.

Petitioners do not acknowledge, much less discuss, the express statutory exemption authority upon which the court of appeals based its decision. Instead, petitioners assert (Pet. 12-14) that Section 628 merely confers the EEOC with ordinary "rulemaking authority" and that, under this Court's *Chevron* jurisprudence,[2] regulations promulgated under such authority may fill

---

[2] *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

statutory "gaps" by resolving textual ambiguity but cannot contravene a statute's "substantive provisions." Petitioners thus contend (Pet. 10, 13) that the decision below is in "direct conflict * * * with every other circuit court of appeals" because the EEOC's exemption permits what the ADEA's substantive provisions would normally prohibit. No such conflict exists. While an agency normally cannot grant exemptions from statutory prohibitions based on a general grant of rulemaking authority, the EEOC did not issue the exemption in this case under such general authority. The exemption was issued pursuant to express statutory authority in 29 U.S.C. 628 to issue "exemptions" from "any or all provisions" of the Act. By contrast, not one of the cases that petitioner cites involves either the EEOC's express exemption authority or a congressional grant of analogous authority under other statutes.

For instance, petitioner relies heavily on *Orca Bay Seafoods* v. *Northwest Truck Sales, Inc.*, 32 F.3d 433 (9th Cir. 1994) (*Orca Bay*), *Diersen* v. *Chicago Car Exchange*, 110 F.3d 481 (7th Cir.), cert. denied, 522 U.S. 868 (1997), and *New York* v. *EPA*, 443 F.3d 880 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 2127 (2007), to demonstrate a split of authority. See Pet. 18-20, 29-30. Both *Orca Bay* and *Dierson*, however, explain that the Department of Transportation's decision to exempt certain vehicles from statutory requirements regarding odometer disclosures was invalid "because Congress did not delegate to the Secretary of Transportation the power to exempt [such vehicles]" from the relevant statute. *Orca Bay*, 32 F.3d at 436; accord *Diersen*, 110 F.3d at 486 (Congress "did not authorize—either explicitly or implicitly—the creation of exemptions to the law."). *New York* similarly addressed a statute that did not ex-

pressly authorize the EPA to grant exemptions from pertinent statutory requirements. Instead, the court stated that agencies do not need express authority to disregard *de minimis* violations of a statute, but that the EPA's regulation at issue was not justified on a *de minimus* rationale. 443 F.3d at 888. Nothing in *Orca Bay*, *Dierson*, or *New York* suggests that an agency would lack authority to issue exemptions from statutory requirements where, as here, Congress itself has expressly authorized the agency to issue "exemptions" from any or all provisions of the relevant statute.

2. Petitioners additionally contend (Pet. 24-30) that the court of appeals interpreted 29 U.S.C. 628 in a manner that violates "constitutional separation of powers" because it permits the EEOC to "repeal" portions of the ADEA. That contention is without merit and does not warrant further review. The Commission's exemption does not "repeal" any portion of the ADEA; every word of the Act continues to have effect. In fact, the ADEA continues to prohibit age discrimination with respect to retiree benefits generally and retiree health benefits specifically. The exemption here applies only to the narrow practice of coordinating employer-sponsored retiree health insurance plans with Medicare eligibility. See C.A. App. 135 ("ADEA coverage of any other aspect of an employer-sponsored retiree health plan * * * is not affected."); *id.* at 140 (Question 2); *id.* at 505 ("No other aspects of ADEA coverage * * * are affected.").

Moreover, petitioner's assertion (Pet. 25) that Section 628 authorizes the EEOC to "overturn plain congressional intent" ignores the fact that Congress intended to grant the EEOC authority to issue "exemp-

tions" from "any or all" provisions of the Act.[3] As the court of appeals correctly recognized, the statutory requirement that the Commission determine that an exemption is "necessary and proper in the public interest," 29 U.S.C. 628, provides the "intelligible principle" needed to satisfy the non-delegation doctrine and the separation of powers principles underlying it. Pet. App. 9a n.13; see, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (explaining that this Court has consistently "found an 'intelligible principle' in various statutes authorizing regulation in the 'public interest'"); see also Gov't C.A. Br. 40-44.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

MARLEIGH D. DOVER
KELSI BROWN CORKRAN
Attorneys

FEBRUARY 2008

---

[3] Congress's decision to grant the EEOC exemption authority in the ADEA is consistent with Congress's recognition that there sometimes are "legitimate reasons * * * for making employment decisions [based] on age," *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 586-587 (2004), and that there are "[t]oo many different types of situations" involving age-based considerations for a "strict application of [the Act's] general prohibitions" to be desirable in all of them, H.R. Rep. No. 805, 90th Cong., 1st Sess. 7 (1967).