No. 14-7

In the Supreme Court of the United States

BALTIMORE COUNTY, MARYLAND, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Baltimore County's mandatory retirement plan required employees who were older when hired to contribute a larger percentage of their salary to the plan than employees who were younger when hired. The question presented is whether that plan was lawful under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 747 F.3d 267. The court of appeals' order granting the county's petition for an interlocutory appeal (Pet. App. 19-20) and the district court's order certifying its decision for interlocutory appeal (Pet. App. 21-25) are not reported. The memorandum opinion of the district court (Pet. App. 26-39) is not published in the *Federal Supplement*, but is available at 2012 WL 5077631. The opinion of the court of appeals in the first appeal in this case (Pet. App. 40-47) is not published in the *Federal Reporter*, but is reprinted in 385 Fed. Appx. 322. The memorandum opinion of the district court at issue in the first appeal (Pet. App. 50-63) is reported at 593 F. Supp. 2d 797.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2014. The petition for a writ of certiorari was filed on June 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the application of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, to a mandatory defined-benefit pension plan that petitioner Baltimore County, Maryland operates for the benefit of its employees. The district court and court of appeals concluded that petitioner's plan violated the ADEA by unlawfully discriminating against older employees on the basis of age.

1. The ADEA prohibits age discrimination against persons who are 40 years old or older. 29 U.S.C. 623(a)(1), 631(a). The Act bars discrimination not only with respect to wages but also with respect to benefits, including pension benefits. 29 U.S.C. 630(*l*). It is not unlawful, however, to treat older workers differently when the motivating factor is something other than age. See *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609-612 (1993).

The ADEA includes two safe-harbor provisions that are potentially relevant to this case. First, the Act's "equal-cost" provision provides that

> It shall not be unlawful for an employer * * * to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title

29, Code of Federal Regulations (as in effect on June 22, 1989).

29 U.S.C. 623(f)(2)(B). Section 1625.10 states, in turn, that "[a]n older employee within the protected age group may not be required as a condition of employment to make greater contributions than a younger employee in support of [a mandatory] employee benefit plan." 29 C.F.R. 1625.10(d)(4)(i).

Second, the Act also includes an "early retirement" safe harbor provision, 29 U.S.C. 623(*l*)(1)(A)(ii)(I). That provision states that a defined-benefit retirement plan is not unlawful "solely because * * * [it] provides for * * * payments that constitute the subsidized portion of an early retirement benefit." 29 U.S.C. 623(*l*)(1)(A)(ii)(I). It applies if an employer both (1) allows his employees to retire early (*i.e.*, based on an age that is less than the normal retirement age); and (2) subsidizes the early-retiring employees' benefits by not fully adjusting those benefits downward to take account of the fact that those employees have contributed to the retirement plan for fewer years and will receive benefits for a longer period of time than if they had retired at the normal retirement age. See S. Rep. No. 263, 101st Cong., 2d Sess. 21 (1990). The portion of the benefit that the employer could have reduced on this basis—but chose not to—is the "subsidized portion of an early retirement benefit" for purposes of Section 623(*l*)(1)(A)(ii)(I). *Id.* at 21.[1]

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[1] Consider an employee who contributes to a defined-benefit plan and is entitled to retire at age 65 with a pension of $800 per month. If the employer offered a non-subsidized early-retirement option by which the employee could retire at age 55, that employee would receive a pension of only $288 per month. Section 623(*l*)(1)(A)(ii)(I)

2. Petitioner operates a defined-benefit pension plan known as the Employee Retirement System (ERS). All regular Baltimore County employees hired since 1945 have been required join the ERS, except for those employees who were 59 years old or older when hired. Pet. App. 4-5 & n.2. To help fund the pension benefits, petitioner requires its employees to contribute a fixed percentage of their salaries to the system. *Id.* at 4. Until 2007, petitioner determined that percentage with reference to the age of the employee at the time of hiring, requiring older new employees to contribute a greater percentage of their salaries to the ERS than younger new employees. *Id.* at 5-7; Pet. 6-7. Beginning in July 2007, petitioner implemented a new policy requiring all new employees to contribute the same percentage of their salary regardless of age. Pet. App. 28-29. But it did not alter the age-based contribution rates that applied to employees who were hired before that new policy took effect.

As originally established in 1945, the ERS provided that an employee turning 65 years old could retire and receive a full "service retirement allowance," without regard to the number of years that employee had worked for petitioner. Pet. App. 113. Petitioner calculated the age-based contribution rates on the assumption that each employee would continue working

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allows the employer to subsidize the early retirement option by paying the employee the full $800 per month if he retires at age 55. Without that provision, the subsidy would unlawfully treat younger employees more favorably than older employees. 29 U.S.C. 623(*l*)(1)(A)(ii)(I); *Joint Hearing on S. 1511 Before the Subcomm. on Labor of the Comm. on Labor and Human Res. and the Special Comm. on Aging*, 101st Cong., 1st Sess. 203-205 (1989); Resp. C.A. Br. 33-34.

until age 65 and then retire. *Id.* at 5. That assumption made sense in 1945, because turning 65 was the only way to become eligible for retirement benefits at that time. *Id.* at 4.

Over the succeeding decades, however, petitioner changed the ERS to allow employees to retire—and receive full benefits—when such employees either reached a certain retirement age *or* achieved a specified number of years of service. For example, starting in 1959, County police officers and firefighters could retire at age 60 or after 30 years of service irrespective of age. Pet. App. 6. By 1973, all general County employees could retire with full benefits at age 60 or after 30 years of service irrespective of age, and police and firefighters could retire either at age 55 or at age 50 with 20 years of service. C.A. App. 1109-1110. By 1988, police could retire after 20 years of service irrespective of age. *Id.* at 1114.

Notably, petitioner never adjusted the age-based ERS contribution rates to take account of the fact that many employees could retire—based on years of service—before reaching the otherwise-applicable retirement age. Between 1945 and 2007, it recalculated the employee contribution rates only once, in 1977, when it reduced those rates across the board to reflect the high rate of return being earned on the ERS's investments. Pet. App. 6.

Petitioner also provided an "early retirement" option for its general employees, separate and apart from the "normal service retirement" options described above. Pet. App. 6. In 1990, any employee who was at least 55 years old and had 20 years of service could retire early under this option and receive a reduced pension. *Ibid.*

3. In 1999 and 2000, Baltimore County correctional officers Richard Bosse and Wayne Lee each filed charges with respondent, the Equal Employment Opportunity Commission (EEOC), alleging that the ERS unlawfully discriminated on the basis of age. Pet. App. 43, 52. Respondent investigated, and in March 2006 it determined that the ERS had violated the ADEA by forcing older new employees to contribute a larger percentage of their salaries than younger new employees. *Id.* at 53. Conciliation proved unsuccessful, and in September 2007 respondent filed this lawsuit alleging that petitioner had engaged in discriminatory conduct prohibited by the ADEA "since January 1, 1996." *Id.* at 43, 53, 98. Respondent sought relief for the charging parties and all other "similarly situated aggrieved individuals within the protected age group." *Id.* at 101-103.

a. In January 2009, the district court granted summary judgment to petitioner. Pet. App. 50-61. The court ruled that even though petitioner expressly based the ERS contribution rates on each employee's age at time of hiring, the differential treatment was not actually motivated by the employees' ages. *Id.* at 54-59. The court held that petitioner lawfully based the contribution rates on legitimate economic considerations—specifically, the fact that older employees would reach the normal retirement age sooner than younger employees and thus would need to contribute a larger amount during their working career in order to fund the same pension benefits. *Id.* at 56-58. The court explained that the difference in contribution rates "is solely due to the time value of money," noting that "[o]lder new hires have less time to accumulate

earnings on both [petitioner's] and their personal contributions to the ERS." *Id.* at 57-58.

b. Respondent appealed, and in June 2010 the court of appeals vacated and remanded. Pet. App. 40-47. The court pointed out that the district court's time-value-of-money analysis was not valid with respect to employees who choose to retire based upon their years of service instead of their age. *Id.* at 45-46. The court posited an example in which two correctional officers—one 20 years old, the other 40 years old—enroll in the ERS at the same time. The court noted that both would become eligible for retirement at the same time, after 20 years of service, and that both (assuming that they had identical salary histories) would receive the same retirement benefit. *Ibid.* But despite being identical in all other respects, the older officer would be required to contribute a greater percentage of his salary to the ERS throughout his career, solely due to his age at the time he was hired. The court explained that "[t]his disparity is not justified by the time value of money because both employees contribute for the same twenty years." *Ibid.* It accordingly remanded the case for the district court to determine whether "permissible financial considerations" justified petitioner's requirement that older new employees contribute more to the ERS than younger new employees. *Id.* at 46.

c. In October 2012, the district court granted summary judgment to respondent with respect to liability, holding that the ERS's age-based differential contribution rates violate the ADEA. Pet. App. 26-37. The court explained that in the early years of the ERS, when retirement was permitted only at age 65—and not based on years of service—the varying contri-

bution rates were lawful because they were justified by the time value of money. *Id.* at 32. But when petitioner began to allow its employees to retire after a fixed number of years of service irrespective of age, that option "decouple[d] an employee's age from his or her years until retirement," thereby undermining the original (and, in the court's view, legitimate) rationale for treating new employees differently based on age. *Id.* at 33.

The district court then found that petitioner had never adjusted the contribution rates to take account of the service-based retirement option and "never submitted calculations that attempt to demonstrate that requiring higher contributions from older workers could be financially justified after the [service-based] retirement option was added." Pet. App. 33. The court therefore held that "there are no non-age-related financial considerations that justify the disparity in contribution rates between older and younger workers." *Id.* at 35. It concluded that "age is the 'but-for' cause of the disparate treatment" and that "the ERS violates the ADEA." *Id.* at 36.

4. The court of appeals affirmed. Pet. App. 1-16. First, the court rejected petitioner's argument that the time value of money reasonably justified the disparate contribution rates after the ERS began to permit retirement based on years of service, instead of on age. *Id.* at 10-14. The Court explained that petitioner "required that employees contribute [to the ERS] in accordance with the age-based rates regardless whether they chose to retire after reaching retirement age or after working the required number of years," and that, accordingly, "the number of years until an employee reached retirement age could not

have served as the basis for the disparate rates." *Id.* at 14. Because the disparities "were not motivated by either the 'time value of money' or other funding considerations," the court concluded that the ERS "treated older employees at the time of enrollment less favorably than younger employees 'because of' their age," in violation of the ADEA. *Ibid.*

The court of appeals also rejected petitioner's reliance on the "early retirement" safe harbor set forth in 29 U.S.C. 623(*l*)(1)(A)(ii)(I), which states that a defined-benefit plan is not unlawful "solely because" that plan "provides for * * * payments * * * that constitute the subsidized portion of an early retirement benefit." Pet. App. 15. The court stated that "[e]ven if we assume, without deciding, that the service-based pension benefits qualified as an 'early retirement benefit'" for purposes of the safe harbor provision, that provision "does not address employee contribution rates nor does it permit employers to impose contribution rates that increase with the employee's age at the time of plan enrollment." *Ibid.*

ARGUMENT

Petitioner requires older employees hired before 2007 to contribute a higher percentage of their salary to the ERS than younger employees, even though all employees can become eligible for the same retirement benefits based on the same number of years of service. The court of appeals correctly held that such discrimination violates the ADEA. Its decision does not conflict with any decision by this Court or by any other court of appeals, and further review is unwarranted.

1. The court of appeals correctly determined that petitioner violated the ADEA. That law prohibits

discrimination against any person over 40 years old "because of" that person's age. 29 U.S.C. 623(a)(1), 631(a). It covers discrimination with respect to the "compensation, terms, [and] conditions" of employment, including with respect to "all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 623(a)(1), 630(*l*). An employer violates the ADEA when the employer relies on a "formal, facially discriminatory policy requiring adverse treatment of employees" based on age. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993).

Here, the ERS facially discriminates against employees hired at older ages by requiring them to pay a greater percentage of their salary to fund their retirement benefits under the plan. Pet. App. 7, 13. As the court of appeals explained, the disparity in required contribution rates is not justified by the "time value of money." *Id.* at 10-14. The time value of money might be relevant if the ERS permitted employees to retire only upon reaching a certain age: employees hired at older ages would work fewer years before retiring, and higher contribution rates based on age would ensure that they paid the same amount to fund the same benefits. Here, however, petitioner allows employees to retire based entirely on their years of service, irrespective of age. As a result, older employees must pay higher rates even though they will often work the same number of years before retiring—and receiving the same benefits—as younger employees. The court of appeals was right to conclude that petitioner treated older employees less favorably than younger employees "because of" their age. *Id.* at 14.

The court of appeals also correctly held that petitioner's practice of charging differential rates on the basis of age was not protected by the ADEA's "early retirement" safe harbor, 29 U.S.C. 623(*l*)(1)(A)(ii)(I). That provision states that a defined benefit plan is not unlawful "solely because" an employer subsidizes a portion of an early-retirement benefit. *Ibid.* But respondent does not challenge the lawfulness of any subsidized early-retirement benefit offered by petitioner. Rather, respondent objects to petitioner's practice of requiring employees to contribute different percentages of their salary to fund the ERS on the basis of their age. Section 623(*l*)(1)(A)(ii)(I) does not address such discriminatory rates, and it therefore does not insulate petitioner's discriminatory practice from liability under the ADEA. See Pet. App. 15.

2. This case does not satisfy this Court's traditional criteria for certiorari. Most notably, petitioner does not allege that the court of appeals' holding conflicts with any decision by this Court or by any other court of appeals. See Sup. Ct. R. 10(a) and (c). That alone is a sufficient basis to deny further review.

Instead, petitioner seeks certiorari on the ground (Pet. 11-17) that the court's decision was wrong, asserting that different components of the ERS are valid under ADEA's "equal cost" and "early retirement" safe harbor provisions, 29 U.S.C. 623(f)(2)(B)(i) and (*l*)(1)(A)(ii)(I). Petitioner asks (Pet. i) this Court to grant review to consider whether "an employer who sponsors a pension plan and utilizes one safe harbor under the [ADEA is] categorically prohibited from utilizing another safe harbor provision." Petitioner's arguments for further review are flawed.

a. In the court of appeals, petitioner expressly disclaimed any reliance on the "equal cost" safe harbor set forth in Section 623(f)(2)(B)(i). See Pet. C.A. Reply Br. 5 (noting that "[t]he County has not advanced any * * * argument on summary judgment or on appeal" resting on "the cost-justification exception found in Section 4(f)(2) [*i.e.*, 29 U.S.C. 623(f)(2)]." Petitioner therefore cannot rely on that provision here. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below.").

In any event, Section 623(f)(2)(B)(i) does not support the validity of the ERS under the ADEA. That safe harbor provision is only available in circumstances where the employer's plan is "permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. 623(f)(2)(B)(i). And that regulation expressly states that "[a]n older employee within the protected age group *may not be required as a condition of employment to make greater contributions than a younger employee in support of [a mandatory] employee benefit plan*." 29 C.F.R. 1625.10(d)(4)(i) (emphasis added); see also Pet. C.A. Reply Br. 5 (acknowledging this constraint on the Section 623(f)(2)(B)(i) safe harbor). Because the ERS forces older new employees to make greater contributions than younger new employees—entirely due to their age when hired—it does not satisfy Section 1625.10(d)(4)(i).

b. Nor may petitioner rely on the "early retirement" safe harbor in 29 U.S.C. 623(*l*)(1)(A)(ii)(I). As explained above, that provision authorizes employers to subsidize early retirement benefits, but it is silent with respect to the discriminatory practice at issue

here—petitioner's requirement that older workers contribute a greater percentage of their salaries to fund the ERS than younger workers. See pp. 3, 10, *supra*; Pet. App. 15. Petitioner relies heavily (Pet. 12-13) on Section 623(*l*)(1)(A)(ii)(I), but it nowhere addresses (much less seeks to refute) the court of appeals' explanation of why that provision does not bear on this case.

c. For the reasons noted above, *neither* of the safe harbor provisions petitioner invokes to defend the ERS justify its discrimination against older new employees with respect to the mandatory contribution rates. Petitioner's question presented—which assumes that *both* safe harbors apply—is therefore not at issue in this case. The court of appeals did not hold that an employer is "categorically prohibited" (Pet. i) from simultaneously taking advantage of more than one of the ADEA's safe harbors. Indeed, respondent agrees that if petitioner's conduct were in fact covered by those provisions, petitioner would not liable under the ADEA.

In short, there is no reason to doubt that the court of appeals' decision in this case was correct. That decision creates no circuit conflict, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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