COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NUMBER: 2015-SC-000506-WC

FANNIE L. CRUSE

APPELLANT,

vs.

HENDERSON COUNTY BOARD OF EDUCATION;
HON. JANE RICE WILLIAMS, ALJ; AND
WORKERS' COMPENSATION BOARD

APPELLEES.

COURT OF APPEALS
DOCKET NUMBER: 2014-CA-001439
WORKERS'COMPENSATION BOARD
CLAIM NUMBER: 2010-73734

BRIEF OF AMICUS CURIAE AARP IN SUPPORT OF REVERSAL

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December, 2015, a true and correct copy of the Brief of Amicus Curiae AARP in Support of Reversal was served or filed with: Diana Morgan, Appeals Section Supervisor, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky 40601; Hon. David L. Murphy, Attorney-at-Law, P.O. Box 7158, Louisville, Kentucky 40257; Austin P. Vowels, Attorney-at-Law, Vowels Law PLC, 126 North Main Street, P.O. Box 2082, Henderson, Kentucky 42419; Hon. Jane L. Rice, Administrative Law Judge, Prevention Park, 657 Chamberlin Ave, Frankfort, Kentucky 40601; the Kentucky Attorney General, Office of the Attorney

General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40301, and the original and ten (10) copies via [either express mail or registered carrier] to: Hon. Susan Stokley Clary, Clerk, Kentucky Supreme Court, Room 209, State Capital, 700 Capitol Avenue, Frankfort, Kentucky 40601-3488.

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Timothy J. Wilson

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

This case gives the Court an opportunity to rectify a longstanding injustice codified in Kentucky Workers' Compensation law, KRS 342.730(4). This statute arbitrarily requires employers to pay older workers who receive permanent partial disability awards far less in workers' compensation income benefits than their younger counterparts:

> All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act . . . or two (2) years after the employee's injury or last exposure, whichever last occurs.

KRS 342.730(4). Ordinarily, permanent partial disability income awards continue for 425 to 520 weeks – approximately eight to ten years. KRS 342.730(1)(d). But, under the statute, workers who are injured after age 57[1] are not entitled to income benefits for the maximum 520-week period. KRS 342.730(4). Instead, their income benefits will terminate before they have received a full ten years' worth of benefits, purely because of their age. *Id.* The older the worker is at the time of injury, the starker the disparity becomes, with the oldest and most vulnerable workers closest to retirement eligibility being entitled to only two years' worth of income benefits. *Id.* It makes no difference whether these workers actually draw retirement benefits; the statute lowers their award simply because they have become old enough to do so. *Id.*

[1] To be eligible for Social Security Retirement, a worker must have: (1) reached an age ranging from 65-67, depending on his or her birthdate; and (2) amass a certain number of Social Security credits. *See* Soc. Sec. Admin., *How You Earn Credits*, https://www.ssa.gov/pubs/EN-05-10072.pdf (last visited Dec. 17, 2015). Because this credit minimum is easily reached long before "normal" retirement age, for the overwhelming majority of workers, age and eligibility are synonymous. *See id.* (explaining that most workers reach the contribution minimum after ten years of work).

This discriminatory statute is based on the outdated, inaccurate, and stereotype-driven assumption that workers will retire and begin drawing Social Security retirement benefits shortly after reaching the age when they become eligible to do so. The law is legally unsound because it requires employers to discriminate against older workers in violation of the Age Discrimination in Employment Act ("ADEA") and fundamentally unfair because it arbitrarily disadvantages older workers. In short, KRS 342.730(4) is preempted and unconstitutional under both the federal and state constitutions, and it is time for the Court to invalidate it.

ARGUMENT

I. KRS 342.730(4) Is Preempted Because It Directly Conflicts With The ADEA And Presents An Obstacle To Accomplishing The ADEA's Goals

KRS 342.730(4) is preempted by the ADEA because an employer cannot comply with the demands of both state and federal law and because the Kentucky statute presents an obstacle to achieving Congress' purpose of eradicating age discrimination. The court below failed to recognize that KRS 342.730(4) requires employers to discriminate based on age in violation of the ADEA, and it failed to acknowledge that the state statute obstructs Congress' purpose in enacting the ADEA: to put older workers on equal footing with younger ones.

A. KRS 342.730(4) Directly Conflicts With The ADEA Because It Compels Employers To Discriminate Based On Age, Which The ADEA Forbids

KRS 342.730(4) is preempted by the ADEA because there is a direct conflict between the two laws. A direct conflict occurs when it is "physically impossible" for a private party to comply with both federal and state requirements. *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). In other words, a state cannot require any activity that federal

law forbids. *See PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2571 (2011) (explaining that a state statute cannot survive direct conflict preemption unless "the private party could independently do under federal law what state law requires of it").

The ADEA makes it "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise 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) (emphasis added). However, KRS 342.730(4) compels an employer to discriminate against older workers with respect to their compensation, because pursuant to KRS 324.730(4), employers must pay an individual less in workers' compensation income benefits based on the individual's older age. This is the hallmark of direct conflict: it is impossible for the Henderson County Board of Education to both pay less in workers' compensation benefits to older workers, as KRS 342.730(4) compels it to do, and comply with the ADEA's command that employers must 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); *see also PLIVA, Inc.*, 131 S. Ct. at 2577-8 (finding impossibility preemption where a state tort law would have created a duty for a drug manufacturer to change a generic drug's warning label, but the FDA required generic drug manufacturers to keep their labels identical to the name brand drug).

The court below attempted to dodge this inexorable conclusion by reasoning that there is no conflict because an employer does not have direct control over the workers' compensation laws, so it is not the agent doing the discrimination. *Cruse v. Henderson Cnty. Bd. of Educ.*, 2015 Ky. App. LEXIS 103, at *8 (Ky. Ct. App. 2015) ("Here, The

Henderson County Board of Education is not discriminating against Appellant, the state of Kentucky is."). The employer's "control" or lack thereof, however, is irrelevant under any relevant precedent;[2] the only question is whether the state law requires the employer to violate federal law. *PLIVA, Inc.*, 131 S. Ct. at 2571. Here, that question can only be answered in the affirmative.

Under Kentucky's workers' compensation law, employers – not the Workers' Compensation Board ("Board") – must provide the workers' compensation payments. KRS 342.020(1) states, "the employer shall pay for the cure and relief from the effects of an injury or occupational disease…The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits." Furthermore, employers are subject to penalties for failure to pay benefits. KRS 342.990. Therefore, the Henderson County Board of Education will take the discriminatory act itself when it pays Ms. Cruse less in workers' compensation income benefits than it would a similarly-situated younger worker. The fact that state law compels it to do so is of no consequence; indeed, it would not be a defense to liability in an ADEA case, but a "source of liability." *Quinones v. City of Evanston,* 58 F.3d 275, 277 (7th Cir. 1995).

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[2] The origin of the "control" theory appears to be a more than 30-year-old intermediate level appellate court decision in Florida, which relied on a long-repealed version of a U.S. Department of Labor regulation that the Florida court characterized as "implicitly support[ing] [the] argument that the prohibitions of 29 U.S.C. § 623(a) are limited to employment practices within the control of employers and do not encompass governmental action such as workers' compensation laws." *O'Neil v. Dep't of Transp.*, 442 So. 2d 961, 962-63 (Fla. Dist. Ct. App. 1st Dist. 1983) (citing 29 C.F.R. § 860.1, et seq. (1983)). The current Equal Employment Opportunity Commission regulations contain no analogous limitations and are phrased more comprehensively to cover all aspects of employment. 29 C.F.R. § 1625.2 ("[i]t is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older.").

Likewise, the Board's position in this case – that the ADEA does not prohibit discrimination in workers' compensation because workers' compensation is not a "term or condition of employment" – is untenable. As the name suggests, workers' compensation is compensation – an aspect of employment in which the ADEA expressly forbids age discrimination. 29 U.S.C. § 623(a)(1) (prohibiting age discrimination with respect to "compensation, terms, conditions, or privileges of employment"). Webster's II defines compensation as "something given or received as payment or reparation, as for goods, services or loss." Webster's II New Riverside University Dictionary (1988). Workers' compensation fits squarely within this definition, as it is given in reparation for the loss of a worker's ability to work due to an injury sustained because of his or her employment. Specifically, income benefits are a wage replacement program, filling exactly the role of compensation. *See* KRS 342.040 (describing workers' compensation awards as "disability income benefits"). Alternatively, it is equally intuitive to consider workers' compensation income benefits to be "benefits" – the term consistently used to describe them throughout the Kentucky statute. KRS 342.730. The ADEA expressly prohibits age discrimination in employee benefits. 29 U.S.C. § 630(l) ("The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits").

There is simply no logical or principled way to avoid the conclusion that KRS 342.730(4), which requires employers to discriminate based on age, cannot coexist with the ADEA, which forbids the exact same conduct.

B. KRS 342.730(4) Is Preempted By The ADEA Because It Creates An Obstacle To Congress' Goals Of Eradicating Age-Based Employment Discrimination And Keeping Older Workers in the Workforce

In its limited preemption inquiry, the court below did not consider whether KRS 342.730(4) was preempted by the ADEA through obstacle preemption. Obstacle preemption occurs when the state law presents an obstacle to the full accomplishment of Congress' purposes and objectives. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011). When evaluating whether a state law obstructs a federal law's purpose, courts must look not only to the state law's purpose but also to its effects. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Beyond its direct conflict with the ADEA, KRS 342.730(4) obstructs the ADEA's goal of eradicating unequal treatment for older workers.

Congress passed the ADEA to remedy pervasive discrimination against older individuals in employment. A Congressionally-commissioned U.S. Department of Labor report that was vital to the drafting of the ADEA recognized that older individuals face discrimination "because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions." Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 18 (1965).[3] Congress focused on protecting workers from these assumptions and "arbitrary discrimination" or stereotyping based on age. *Id.* at 21. These concerns are reflected in section 621 of the ADEA, where Congress found that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise

[3] The Supreme Court has recognized that Congress drew heavily on this report in crafting the ADEA. *See, e.g.*, *E.E.O.C. v. Wyoming*, 460 U.S. 226, 231 (1983) ("The product of the process of fact-finding and deliberation formally begun in 1964 was the Age Discrimination in Employment Act of 1967") (superseded by statute on other grounds).

desirable practices may work to the disadvantage of older persons" and that the purpose of the act is "to prohibit arbitrary age discrimination in employment." When Congress passed the Older Workers Benefit Protection Act ("OWBPA") in 1990, it reaffirmed the purpose of the ADEA by stating that the OWBPA was "necessary to restore the original Congressional intent in passing and amending the ADEA which was to prohibit discrimination against older workers in all employee *benefits*." Older Workers Benefit Protection Act, Pub. L. 101-433, 104 Stat. 978 (emphasis added).

Congress recognized consequences to individual workers and to the economy that resulted from older workers being excluded from the workforce. The findings note that "it is a fair estimate that a million man-years of productive time are unused each year because of unemployment of workers over 45; and vastly greater numbers are lost because of forced, compulsory, or automatic retirement." Report of the Secretary of Labor 18 (1965). Congress found that unemployment in the context of older workers leads to deterioration of that worker's skill and motivation. *Id.* at 19. Recognizing the damaging effects of older workers being discriminated against based on stereotypes and assumptions about their age, Congress sought to eradicate that stereotyping and to enhance employment opportunities for older workers.

KRS 342.730(4) obstructs Congress' goal to eradicate arbitrary discrimination based on age and protect older workers by limiting workers' compensation at retirement age. *See E.E.O.C. v. Westinghouse Elec. Corp.*, 725 F.2d 211, 222-23 (3d Cir. 1983) ("If eligibility for . . . retirement can be used to justify the denial of [benefits] to older employees, the purpose of the ADEA will be defeated."). By limiting workers' compensation based on Social Security Retirement eligibility, KRS 342.730(4) on its face

conditions an employment benefit on age. The law's purpose is to prevent an individual from receiving (purportedly) duplicative benefits. *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71, 79 (Ky. 2002). Even assuming that these benefits are duplicative – which they are not, as discussed in Part II, *infra* – as the Court of Appeals of Kentucky rightly pointed out in *Brooks v. Island Creek Coal Co.*, 678 S.W.2d 791,792 (Ky. Ct. App. 1984), duplication would occur only when an individual actually receives retirement benefits, not when he or she merely becomes eligible to receive retirement benefits. By conditioning workers' compensation on retirement age with no attention to whether an individual is actually receiving retirement benefits, the Commonwealth of Kentucky is relying on the assumption that older workers will necessarily receive retirement benefits as soon as they become retirement eligible. This is simply not true. In fact, research has shown that most workers do not take their benefits as soon as they reach retirement. *See* Melissa A.Z. Knoll and Anya Olsen, *Incentivizing Delayed Claiming of Social Security Retirement Benefits Before Reaching The Full Retirement Age*, 74 Soc. Security Bull, No. 4, 2014. Senator Grassley perfectly summed up this concern when, while speaking in support of the OWBPA, he stated that "[t]here is no reason to assume that, just because a worker reaches the age stipulated in a pension plan as the normal retirement age, that that worker should essentially be forced to stop working and take his or her pension." Comm. on Labor and Human Resources, *Legislative History of the Older Workers Benefit Protection Act*, at 82 (1991). The ADEA's focus has always been to protect workers' benefits from being adversely affected by assumptions and stereotypes. The ADEA recognizes that individuals age differently and requires individualized assessments of older workers and not blanket age-based assumptions and stereotypes about retirement.

Case law makes clear that KRS 342.730(4) must yield to the ADEA. For instance, the U.S. Court of Appeals for the First Circuit found that the ADEA preempted a state law very similar to the law involved in this case. *E.E.O.C. v. Massachusetts*, 987 F.2d 64, 66 (1st Cir. 1993). The state law required state employees age 70 and older to take a physical examination as a condition of continued employment, and the court held that it presented an obstacle to the ADEA's goals because "such action is not reconcilable with the plain purpose of [Section] 4(a) which prohibits employers from discrimination against [an] individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.* at 70. The court further explained that "Congress enacted the ADEA to prevent the arbitrary and socially destructive discrimination on the basis of age." *Id.* at 71. The court pointed out that individuals age in unique ways and that the unique process of aging warranted an individualized evaluation and not a blanket age-based determination. *Id*. at 71-72.

KRS 342.730(4) involves the same sort of blanket age restriction rejected in *E.E.O.C. v. Massachusetts*. Like the mandatory physical exams required at age 70 in *E.E.O.C. v. Massachusetts*, this case involves a mandatory reduction in workers' compensation based on age. Just as the First Circuit reasoned that an arbitrary, categorical age restriction denied older workers the individualized attention required by the ADEA, here, Kentucky's law reducing older workers' income benefits, which is based on a stereotypical assumption about when they will retire, robs those workers of the individualized treatment that the ADEA requires. Accordingly, in addition to its direct conflict with the ADEA's prohibition on age discrimination in employment, KRS 342.730(4) interferes with the heart of the goal Congress set to accomplish in enacting

the ADEA: ensuring that older workers are not deprived of the same benefits and opportunities afforded to younger workers.

II. KRS 342.730(4) Violates The Equal Protection Clause Of The U.S. and Kentucky Constitutions By Arbitrarily Lowering Workers' Compensation Income Benefits On The Basis Of Their Age

By terminating workers' compensation income benefits at the age of retirement eligibility, Kentucky's workers' compensation statute discriminates against injured older workers by awarding them fewer weeks of income benefits than similarly-situated younger workers. KRS 342.730(4). This arbitrary differentiation between workers based on age violates the guarantees of equal protection contained in both the federal and state constitutions.

The federal constitution protects older individuals against discriminatory legislation that is not rationally related to legitimate purposes and prohibits arbitrary classifications that use aged-based distinctions to the detriment of older workers. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). Furthermore, this Court has recognized that Kentucky's Constitution broadly protects individual rights against "legislative interference," most specifically through the guarantees in Sections 2 and 3 of the state constitution. *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 466 (Ky. 2011) (citing *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 42-43 (Ky. 2009)) (distinguishing between federal equal protection rational basis review and Kentucky equal protection "reasonable basis" or "substantial and justifiable reason" review in a workers' compensation case). The unique nature of the

equal protection provisions in the state constitution has led this Court to treat this protection as a higher standard than the U.S. Constitution's Equal Protection guarantee, specifically when reviewing social or economic legislation such as the state workers' compensation statute. *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 418-19 (Ky. 2005). Thus, even if the Court finds that KRS 342.730(4) withstands federal constitutional scrutiny, it should invalidate the statute under the Kentucky Constitution.

This Court previously held that KRS 342.730(4) withstood equal protection challenges under the state and federal constitutions by finding that the statute avoids a "duplication of income benefits" and "reduces the overall cost of maintaining the workers' compensation system, thereby improving the economic climate for all the citizens of the state." *Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 697 (Ky. 1998); *see also McDowell v. Jackson Energy RECC*, 84 S.W.3d 71, 76-77 (Ky. 2002) (same). Some states have relied on *McDowell* to perpetuate this misguided notion, *see, e.g.*, *Caputo v. Workers' Comp. Appeal Bd.*, 34 A.3d 908, 914 (Pa. Commw. Ct. 2012) (relying on *McDowell*), while others applied similar reasoning in unrelated cases, *see, e.g.*, *Harris v. Dep't of Labor & Indus.*, 843 P.2d 1056, 1066-67 (Wash. 1993) (applying duplicative benefits rationale). Other states, however, have recognized that this rationale does not justify enshrining age discrimination in state law. *See, e.g.*, *Merrill v. Utah Labor Comm'n*, 223 P.3d 1089, 1096 (Utah 2009); *Reesor v. Mont. State Fund*, 103 P.3d 1019, 1023 (Mont. 2004); *Wal-Mart Stores, Inc. v. Keel*, 817 So.2d 1, 7-8 (La. 2002); *Golden v. Westark Comm. Coll.*, 969 S.W.2d 154, 159 (Ark. 1998); *Indus. Claim Appeals Office of Colo. v. Romero*, 912 P.2d 62, 68 (Colo. 1996).This Court should join the latter group and reconsider its justifications for Kentucky's discriminatory statute.

First and foremost, as discussed in Part IB, *supra*, KRS 342.730(4) does not serve its purported purpose of avoiding duplicative benefits because it terminates income benefits based on *eligibility* for Social Security Retirement, rather than on an injured worker's *actually* drawing retirement. KRS 342.730(4). The statute plainly cannot avoid duplicating benefits when a worker may not even be receiving those benefits. For this reason alone, the statute is unreasonable.

Moreover, even if an injured worker is drawing retirement benefits, those benefits are not duplicative of workers' compensation income benefits because the two serve different purposes: workers' compensation income benefits replace income, while retirement benefits supplement it. *See* 42 U.S.C. § 403 (providing that individuals may work without restriction while drawing retirement after full retirement eligibility). It is tempting to compare retirement benefits to Social Security disability benefits, which courts have found duplicative of workers' compensation benefits, allowing for an offset of one or the other. *See*, *e.g.*, *Richardson v. Belcher*, 404 U.S. 78, 82-83 (1971) (upholding constitutionality of reducing Social Security disability benefits where workers received state workers' compensation); *State ex rel. Beirne v. Smith*, 591 S.E.2d 329, 335-37 (W. Va. 2003) (discussing constitutionality of reducing state workers' compensation where workers received Social Security disability benefits). However, the two are not equivalent.

Social Security disability benefits are available to individuals who cannot engage in substantial gainful activity due to a physical or mental impairment. *See* 42 U.S.C. § 423. Social Security disability benefits are similar to workers' compensation awards in that they are intended to replace wages for an individual who is no longer able to be

gainfully employed due to his or her disability. *Compare id., with* KRS 342.040 (describing workers' compensation awards as "disability income benefits"). On the other hand, Social Security retirement benefits are an old-age benefit available to individuals who reach a certain age after meeting minimum contribution requirements. *See* 42 U.S.C. § 402. Retirement benefits are *additional* income, earned from contributions made through a certain period of participation in the national workforce, rather than compensation meant to replace income lost because of injury or disability. Unlike Social Security disability or workers' compensation, which are contingent on sustaining an impairment that makes employment difficult if not impossible, individuals can continue to work without restrictions or offsets while collecting Social Security retirement benefits after the normal retirement age. 42 U.S.C. § 403.

Indeed, in addressing statutes similar to KRS 342.730(4), several state courts have rejected the notion that Social Security retirement benefits serve the same purpose – and are thus duplicative of – wage replacement such as Social Security disability benefits or workers' compensation. *See, e.g., Merrill*, 223 P.3d at 1096 ("Neither social security retirement benefits nor workers' compensation are solely wage-replacement measures; each serve additional purposes. Furthermore, retirement benefits and disability benefits utilize entirely different means to accomplish those purposes."); *Reesor*, 103 P.3d at 1023 ("[S]ocial security retirement benefits, unlike workers' compensation, provide the recipient with supplemental income *after* he [or she] contributes to the program throughout his working life . . . This is in direct contrast to workers' compensation benefits, which are available *only* if a worker is injured while in the course and scope of employment and experiences wage loss as a result of such injury."); *Wal-Mart Stores*,

Inc., 817 So.2d at 7-8 ("Social security old age benefits . . . are not intended to replace wages lost solely by an employee's inability to work . . ."); *Golden*, 969 S.W.2d at 159 (finding "no logical premise for the legislative conclusion that social security retirement benefits and workers' compensation benefits are duplicative and should offset one another"); *Indus. Claim Appeals Office of Colo.*, 912 P.2d at 68 ("[W]ithholding workers' compensation benefits from persons age sixty-five and older because they presumably receive retirement benefits is not rationally related to the goal of preventing duplicate benefits because workers' compensation benefits do not serve the same purpose as retirement benefits.").

Additionally, as the court below suggested, while the goal of improving the economic climate of the state may be reasonable, the means chosen by the Commonwealth are not, and, therefore, they are unconstitutional. *Cruse*, 2015 Ky. App. LEXIS 103 at *8-*11. The state's method of saving money both disadvantages vulnerable, injured older workers and impedes the Social Security retirement scheme as a whole. Workers benefit from claiming Social Security retirement benefits at a date later than normal retirement age, as delayed retirement credits enhance the ultimate Social Security payment an individual will receive for the rest of his or her life. *See* Soc. Sec. Admin., *Retirement Planner: Delayed Retirement Credits*, https://www.ssa.gov/planners/retire/delayret.html (last visited December 18, 2015) (noting an 8% yearly increase in benefits for certain individuals who delay collecting Social Security retirement benefits). However, when workers' compensation awards are terminated at the normal retirement age, most older workers have no recourse but to collect Social Security retirement benefits. Therefore, they are denied the opportunity to earn delayed retirement credits and

enhance their final award and spousal survivor benefit. Encouraging later retirement also serves public policy goals by ensuring the long-term solvency of the Social Security program, increasing income tax revenues, and keeping experienced employees in the workforce. Justin Zimmerman, "Incentivizing Work at Older Ages: The Need for Social Security Reform," 19 Elder L.J. 485, 487-88 (2012) (noting that an increase in the median retirement age by two years would add $13 trillion to the economy over 30 years). KRS 342.730(4) frustrates these broader societal goals while depriving older individuals of much-needed income.

Kentucky should join other states – such as Utah, Montana, Louisiana, Arkansas, and Colorado – in recognizing that the termination of workers' compensation awards on the basis of age contradicts the guarantees of equal protection in the federal and state constitutions. *Merrill*, 223 P.3d at 1094-95; *Wal-Mart Stores, Inc.*, 817 So.2d at 7-8; *Golden*, 969 S.W.2d at 159; *Romero*, 912 P.2d at 69; *Reesor*, 103 P.3d at 1023.

CONCLUSION

For these reasons, this Court should invalidate the statute and reverse the lower court's decision.

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