No. 98-796

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER
AND
J. DANIEL KIMEL, JR., ET AL.
v.
FLORIDA BOARD OF REGENTS

UNITED STATES OF AMERICA, PETITIONER
AND
WELLINGTON N. DICKSON, A/K/A "DUKE"
v.
FLORIDA DEPARTMENT OF CORRECTIONS

UNITED STATES OF AMERICA, PETITIONER
AND
RODERICK MACPHERSON AND MARVIN NARZ
v.
UNIVERSITY OF MONTEVALLO

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-56a) is reported at 139 F.3d 1426. The opinions of the district courts in *Kimel* v. *Florida Board of Regents* (App., *infra*, 57a-62a), and *Dickson* v. *Florida Department of Corrections* (App., *infra*, 72a-76a), are unreported. The opinion of the district court in *MacPherson* v. *University of Montevallo* (App., *infra*, 63a-71a) is reported at 938 F. Supp. 785.

JURISDICTION

The court of appeals entered its judgments on April 30, 1998. Petitions for rehearing were denied on August 17, 1998. App., *infra*, 77a-79a, 81a-83a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth at App., *infra*, 86a-102a.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "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). The ADEA defines "employer" to include "a State or political subdivi-

sion of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).[1] The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * *, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

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[1] The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. II 1996). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (Supp. II 1996); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. II 1996). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) & (b)(2) (Supp. II 1996). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (state) (Supp. II 1996).

2. In *Kimel* v. *Florida Board of Regents*, plaintiff J. Daniel Kimel and others are current and former faculty and librarians at Florida State University and Florida International University. They filed suit in federal district court alleging, *inter alia*, that the respondent's decision not to provide them with certain salary increases "was an intentional act of age discrimination" in violation of the ADEA. Kimel Complaint, C.A. J.A. 91-6. Respondent Florida Board of Regents moved to dismiss on the ground of Eleventh Amendment immunity. The district court denied the motion. The court held that the ADEA contained a clear abrogation of immunity, and the abrogation was valid because the ADEA was a proper exercise Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. App., *infra*, 57a-62a.

In *Dickson* v. *Florida Department of Corrections*, plaintiff Wellington N. Dickson is a correctional officer employed by respondent Florida Department of Corrections. He filed suit in federal district court alleging that respondent failed to promote him and took other adverse employment action against him in violation of the ADEA and the Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq*. App., *infra*, 72a. Respondent Florida Department of Corrections moved to dismiss on the ground of Eleventh Amendment immunity. The district court denied the motion. The court held that both the ADEA and the Disabilities Act contained clear abrogations of immunity, and that the abrogations were valid because the ADEA and the Disabilities Act were proper exercises of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. App., *infra*, 73a-76a.

Finally, in *MacPherson* v. *University of Montevallo*, the plaintiffs Roderick MacPherson and Marvin Narz are two associate professors employed by the University of Montevallo, which is an instrumentality of the State of Alabama. App., *infra*, 63a-64a. They filed suit in federal district court alleging, *inter alia*, that respondent University of Montevallo "has engaged in a pattern and practice of discrimination against them and a continuing practice of treating younger faculty members more favorably than older faculty members with regard to salaries and promotions," in violation of the ADEA. App., *infra*, 64a. Respondent University of Montevallo defended in part on the ground that the Eleventh Amendment barred the litigation. Although the district court ruled that Congress clearly intended to abrogate States' Eleventh Amendment immunity, the court also held that Congress had no power to do so because the ADEA could not have been enacted pursuant to Congress's authority to enforce the Fourteenth Amendment. App., *infra*, 65a-71a.

3. Plaintiffs in *MacPherson* appealed from the dismissal of their action, while the defendants in *Kimel* and *Dickson* took interlocutory appeals of right from the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). On appeal, the United States intervened in each action to defend the constitutionality of the ADEA's abrogation of States' Eleventh Amendment immunity. See 28 U.S.C. 2403(a). The court of appeals consolidated the cases for argument and concluded that the ADEA does not abrogate the States' Eleventh Amendment immunity. App., *infra*, 1a-56a.

The majority was divided on the rationale for its decision, one judge finding that Congress did not clearly

state an intent to abrogate Eleventh Amendment immunity, and the other judge concluding that Congress lacked the power to abrogate Eleventh Amendment immunity because the ADEA is not a proper exercise of congressional power under Section 5 of the Fourteenth Amendment.

Judge Edmondson found that Congress did not make its intent to abrogate Eleventh Amendment immunity "as clear as is the summer's sun," App., *infra*, 9a, because the statute does not contain "in one place, a plain, declaratory statement that States can be sued by individuals in federal court." *Id.* at 7a. In his view, the ADEA's enforcement provisions, 29 U.S.C. 626(b) and (c), are consistent with the enforcement of the ADEA against state defendants by the federal government alone in federal court and by private plaintiffs in state court. App., *infra*, 4a n.4, 11a & n.13.

Judge Cox did not reach the question of the clarity of Congress's intent to abrogate, but concurred in part in the judgment on the ground that the ADEA was not a proper exercise of power under Section 5 of the Fourteenth Amendment and therefore could not give rise to authority to abrogate the States' Eleventh Amendment immunity. Reviewing the legislative history of the ADEA's extension to the States, Judge Cox concluded that "Congress did not enact the ADEA as a proportional response to any widespread violation of the elderly's constitutional rights," App., *infra*, 48a, and thus was not exercising the power to "enforce the Fourteenth Amendment rights the Supreme Court has recognized." *Id.* at 45a.

Chief Judge Hatchett, dissenting from the majority's disposition of the ADEA claims, disagreed on both points. Declining to require Congress to use "any 'magic words' to abrogate effectively," Chief Judge

Hatchett agreed with "virtually every other court that has addressed the question" that "Congress made an 'unmistakably clear' statement of its intent to abrogate the states' sovereign immunity in the ADEA." App., *infra*, 18a, 20a.

Chief Judge Hatchett also joined other courts in concluding "that the ADEA falls squarely within the enforcement power that Section 5 of the Fourteenth Amendment confers on Congress." App., *infra*, 24a. He found that Congress prohibited age discrimination in employment because it had determined that such discrimination "was generally based on unsupported stereotypes." *Id.* at 29a. He noted that the statutory scheme enacted by Congress was tailored to ferreting out such instances of arbitrary discrimination because it permits employers to defend their age-based decisions on the grounds that such distinctions are "bona fide occupational qualification[s] reasonably necessary to the normal operation of the particular business," or are based on "reasonable factors other than age." *Id.* at 32a n.12 (quoting 29 U.S.C. 623(f)(1)).[2]

REASONS FOR GRANTING THE PETITION

The judgment of the Eleventh Circuit has significantly eroded the scope and operation of important civil rights legislation. The decision, moreover, is in direct conflict with the rulings of five other circuits, which have upheld the ADEA's abrogation of States' Eleventh Amendment immunity. The issues have thus been

[2] With regard to the claim raised in *Dickson* involving the Disabilities Act, Judge Edmondson and Chief Judge Hatchett agreed that the Disabilities Act validly abrogated the States' Eleventh Amendment immunity. App., *infra*, 13a-15a, 21a, 33a-41a. Judge Cox dissented. *Id.* at 53a-56a. See also *Seaborn* v. *Florida*, 143 F.3d 1405, 1407 (11th Cir. 1998).

thoroughly aired in the courts of appeals; postponing review is not likely to contribute to the reasoned resolution of the questions presented. Furthermore, cases presenting the same issues are pending in three other circuits. The questions presented are thus of recurring importance, and conflicting decisions are likely to proliferate in the courts of appeals. Accordingly, this Court's review is warranted.

1. Following this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), the courts of appeals have issued directly conflicting decisions on whether the ADEA abrogates the States' Eleventh Amendment immunity from suit in federal court. As this Court explained in *Seminole Tribe*, the abrogation inquiry contains two elements: "first, [we ask] whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, [we ask] whether Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe*, 517 U.S. at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)). The conflict in the courts of appeals embraces both the question of congressional intent and of congressional power to abrogate.

a. The opinion of Judge Edmondson below (App., *infra*, 2a-15a), like the Eighth Circuit's decision in *Humenansky* v. *Regents of the Univ. of Minn.*, 152 F.3d 822 (1998), has declared that the ADEA "does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity." *Humenansky*, 152 F.2d at 825. Five other circuits expressly disagree, finding Congress's intent to abrogate manifest in the ADEA's text. See App., *infra*, 12a n.14, and *Humenansky*, 152 F.3d at 825 & n.2 (both noting disagreement); see also *Migneault* v. *Peck*, No. 97-2099, 1998 WL 741545, at *3

(10th Cir. Oct. 23, 1998) (citing *Hurd* v. *Pittsburg State Univ.*, 109 F.3d 1540, 1543-1544, 1546 (10th Cir. 1997)) (Congress clearly expressed its intent to abrogate in the text of the ADEA); *Coger* v. *Board of Regents*, 154 F.3d 296, 301-302 (6th Cir. 1998) (same); *Keeton* v. *University of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998) ("We join the overwhelming majority of our sister circuits in holding that Congress clearly expressed its intention to abrogate states' immunity in private suits for violations of the ADEA."); *Scott* v. *University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998) ("[W]e hold that the language of § 626(b) and § 216(b) in conjunction with the specific extension of the ADEA to state employers unequivocally expresses Congress's intent that state employers may be sued under the ADEA in federal courts."); *Goshtasby* v. *Board of Trustees*, 141 F.3d 761, 765-766 (7th Cir. 1998) (adhering to *Davidson* v. *Board of Governors of State Colleges & Univs.*, 920 F.2d 441, 443 (7th Cir. 1990)). Two additional courts of appeals have indicated in dicta that Congress's intent to abrogate is sufficiently clear. See *Blanciak* v. *Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996); *Santiago* v. *New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir. 1991), cert. denied, 502 U.S. 1094 (1992). The issue is currently pending in three circuits. See, *e.g.*, *Jones* v. *WMATA*, No. 97-7186 (D.C. Cir.) (oral argument heard Sept. 9, 1998); *Davis* v. *University of Conn.*, No. 97-9367 (2d Cir.) (oral argument heard Sept. 16, 1998); *Young* v. *Pennsylvania House of Representatives*, No. 98-7130 (3d Cir.) (oral argument heard Oct. 27, 1998).[3]

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[3] The First Circuit also ruled, prior to *Seminole Tribe*, that Congress intended to abrogate the States' Eleventh Amendment

The question of Congress's intent to abrogate Eleventh Amendment immunity in the ADEA has thus been extensively evaluated and considered by the courts of appeals. Postponing review will not contribute measurably to analysis of the issue. The conflict is firmly entrenched and incapable of resolution except by this Court.

b. Judge Cox concluded (App., *infra*, 42a-56a) that, even if Congress's intent to abrogate were clear, Congress lacked power to effect such an abrogation because the ADEA is not a proper exercise of Congress's legislative power under Section 5 of the Fourteenth Amendment. The Eighth Circuit has similarly ruled that the ADEA could not have been enacted pursuant to Congress's Section 5 power. *Humenansky*, 152 F.3d at 826-828. Those decisions are in direct conflict with the rulings of the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, all of which have upheld the ADEA as proper Section 5 legislation. See *Migneault*, 1998 WL 741545, at **3-7 (citing *Hurd*, 109 F.3d at 1546); *Coger*, 154 F.3d at 302-307; *Keeton*, 150 F.3d at 1057-1058; *Scott*, 148 F.3d at 500-503; *Goshtasby*, 141 F.3d at 766-772.[4] The pendency of three other cases presenting the same question (see p. 9, *supra*) demonstrates that the conflict over the scope of Congress's Section 5 power is not likely to disappear.[5] This Court's review is necessary to

immunity for ADEA suits. See *Ramirez* v. *Puerto Rico Fire Serv.*, 715 F.2d 694, 700-701 (1st Cir. 1983).

[4] Prior to this Court's decision in *City of Boerne* v. *Flores*, *supra*, the First and Fourth Circuits had also ruled that the ADEA falls within Congress's Section 5 power. See *Ramirez*, 715 F.2d at 698-700; *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); see also *Blanciak*, 77 F.3d at 695 (dicta).

[5] The courts of appeals have candidly acknowledged that their rulings are in conflict. See *Migneault*, 1998 WL 741545, at *7 ("We

resolve that conflict and to clarify the scope of Congress's "comprehensive remedial power" under Section 5 of the Fourteenth Amendment. See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (O'Connor, J.) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980)).

2. The questions presented are of broad and enduring importance and thus merit this Court's review. The ADEA is "part of a wider statutory scheme to protect employees in the workplace" from "invidious bias in employment decisions." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). As a consequence of the Eleventh Circuit's decision here and the Eighth Circuit's decision in *Humenansky* v. *Regents of the University of Minnesota*, *supra*, the operation of important civil rights legislation in one-fifth of the States has been significantly impaired. Unlike litigants in the circuits where the ADEA's abrogation of Eleventh Amendment immunity has been sustained, employees of state governments in the

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recognize there is a split in the circuits on this issue."); *Humenansky*, 152 F.3d at 826-827 (noting that the "circuits to consider the issue since *Flores* have reached conflicting conclusions"); *Coger*, 154 F.3d at 302 (citing *Kimel* with "*But see*"); *Keeton*, 150 F.3d at 1057 (same); *Scott*, 148 F.3d at 499 n.3 (noting that *Kimel* "reached the opposite result"). Indeed, subsequent to the Eleventh Circuit's decision in these cases, the Seventh Circuit expressly "reaffirm[ed]" its holding that "the ADEA is a proper exercise of Congress's § 5 enforcement power under the Fourteenth Amendment," and explained that "[t]he intervening and contrary decision from the Eleventh Circuit [in *Kimel*] has not given us reason to overrule *Goshtasby*." *Debs* v. *Northeastern Ill. Univ.*, 153 F.3d 390, 394 (7th Cir. 1998).

Eleventh and Eighth Circuits cannot fully enforce their federal rights under the ADEA in federal court.[6]

The questions of the clarity with which Congress must speak to abrogate state immunity and the scope of Congress's Section 5 enforcement power, moreover, are of great and recurring importance to the federal government. Judge Edmondson's opinion in this case, like the Eighth Circuit's decision in *Humenansky*, imposes stringent conditions on Congress's exercise of its legislative power, in the form of requiring elaborate verbal formulations to effect an Eleventh Amendment abrogation. Because those conditions do not apply in other circuits, this Court should grant review to establish a single, uniform test for effective abrogation by Congress of Eleventh Amendment immunity.

Furthermore, Eleventh Amendment issues similar to those presented by this case are being actively litigated in numerous cases arising under other federal statutes, such as the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. 206(d), and the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* See, *e.g.*, *Clark* v. *California*, 123 F.3d 1267, 1269-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 837-838 (6th Cir. 1997); *Garrett* v. *Board of Trustees*, No. 98-6069 (11th Cir.) (pending). While the provisions and scope of those statutes differ in many respects from those of the ADEA, the resolution of the abrogation issues under

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[6] The ability to enforce federal rights in state court is the issue presented in *Alden* v. *Maine* (cert. granted, No. 98-436 (Nov. 9, 1998)), reviewing the holding of the Maine Supreme Judicial Court that state courts may refuse to entertain private causes of action to enforce federal statutory rights on the basis of state sovereign immunity.

the ADEA may shed light on the resolution of those issues under other statutes.

3. This Court's review is necessary to correct the court of appeals' erroneous determination that Congress did not abrogate the States' Eleventh Amendment immunity in the ADEA.

After extensive study and hearings (see *EEOC* v. *Wyoming*, 460 U.S. 226, 229-231 (1983)), Congress enacted the ADEA to redress a serious national problem of arbitrary discrimination against older workers by employers based on "inaccurate and stigmatizing stereotypes." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993); see also 29 U.S.C. 621. Recognizing that age may sometimes be a legitimate criterion for employment decisions, Congress created a calibrated prohibition that, in certain circumstances, bars the use of age as a proxy for the ability of workers over the age of 40 (29 U.S.C. 631(a)), unless age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(a) and (f)(1). The ADEA thus requires that employers either base their employment decisions on "reasonable factors other than age" (29 U.S.C. 623(f)(1)), or else demonstrate that age is a reasonably necessary employment consideration.

a. Congress has "unequivocally expresse[d] its intent to abrogate" the States' Eleventh Amendment immunity in the text of the ADEA. See *Seminole Tribe*, 517 U.S. at 55 (quoting *Green*, 474 U.S. at 68). In 1974, Congress extended the protections of the ADEA to state employees. See 29 U.S.C. 630(b) and (f); see also Act of Apr. 8, 1974, Pub. L. No. 93-259, § 28(a)(2),

88 Stat. 74.[7] In so doing, Congress placed States as employers squarely within an existing enforcement scheme that specifically and expressly contemplates suits by employees against employers in federal court. First, the ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). Second, the ADEA expressly incorporates some of the enforcement mechanisms of the Fair Labor Standards Act of 1938, including a provision that authorizes employees to file suit "against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction." 29 U.S.C. 216(b) (emphasis added). See 29 U.S.C. 626(b).[8]

To abrogate Eleventh Amendment immunity, Congress need not mention the Eleventh Amendment or

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[7] Neither respondents nor the court of appeals disputes that the purpose of the 1974 amendment was to render the States subject to the ADEA's substantive terms, or that the extension was a valid exercise of Congress's power under the Commerce Clause. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 467-468 (1991); *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983). The Commerce Clause, however, does not independently support Congress's abrogation of the States' Eleventh Amendment immunity from ADEA suits brought by individuals in federal court. See *Seminole Tribe*, 517 U.S. at 57-73. In both *Gregory*, 501 U.S. at 468, and *EEOC* v. *Wyoming*, 460 U.S. at 243 & n.18, the Court "reserved the questions whether Congress might also have passed the ADEA extension pursuant to its powers under § 5 of the Fourteenth Amendment, and whether the extension would have been a valid exercise of that power." *Gregory*, 501 U.S. at 468.

[8] "Public agency" is further defined to include "the government of a State or political subdivision thereof; any agency of * * * a State, or a political subdivision of a State." 29 U.S.C. 203(x).

incant particular words or phrases. The statute need only clearly create a cause of action against States and grant jurisdiction to federal courts to hear those claims. See *Seminole Tribe*, 517 U.S. at 47; *Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). In one sentence, Section 216(b) evinces Congress's intent that employees be permitted to sue state employers in federal court.[9] No more is required. By insisting on an elaborate explication of congressional intent, the decisions of the court of appeals here and in *Humenansky* v. *Regents of the University of Minnesota*, *supra*, impermissibly intruded on Congress's legislative authority and discretion.

b. In *Seminole Tribe*, this Court reiterated that Congress retained its power to abrogate Eleventh Amendment immunity when enacting "appropriate" legislation to "enforce" the provisions of the Fourteenth Amendment. See 517 U.S. at 65-66, 71-72 n.15 (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). Judge Cox's determination (App., *infra*, 48a-53a), echoed by the *Humenansky* court (152 F.3d at 826-828), that the ADEA is not proper Section 5 legislation reflects an incorrect application of this Court's precedents.

In *City of Boerne* v. *Flores*, *supra*, this Court explained what constitutes "appropriate" legislation under Section 5 of the Fourteenth Amendment. The Court emphasized that the authority to enforce the Fourteenth Amendment is a broad power to remedy

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[9] In the court of appeals, Judge Edmondson reasoned that "making it specific that suits can be brought in federal court does not make it more clear that suits against States by private parties in federal court are in order." App., *infra*, 11a n.11. But that argument overlooks Congress's specific direction that ADEA suits could be brought by "any" employee against "any employer (including a public agency)." 29 U.S.C. 216(b), 626(b) and (c)(1).

past and present discrimination and to prevent future discrimination. *Id.* at 2163, 2172. Accordingly, under Section 5, Congress can prohibit activities that themselves are not unconstitutional when it acts to enforce a constitutional right. *Id.* at 2163, 2167, 2169; see also *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980) (Congress may prohibit state conduct that "create[s] the risk" that constitutional rights will be infringed). The Court held, however, that there must be a "congruence and proportionality" between the identified constitutional harms and the statutory remedy. *Flores*, 117 S. Ct. at 2164.

The ADEA passes muster for three reasons. First, the ADEA seeks to redress and prevent unconstitutionally arbitrary discrimination against older workers and thus enforces a recognized constitutional right. While classifications based on age are subject only to rational basis review, see, *e.g.*, *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312-314 (1976), there can be no question that "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 83 (1988). In every case, the ADEA places the burden of persuasion on the employee to prove, in the first instance, that he or she was adversely affected "because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA's provisions thus are not triggered until an employee demonstrates unequal treatment and, concomitantly, a risk that unconstitutionally arbitrary action lurks.[10]

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[10] The Section 5 enforcement power is not confined to categorizations that already receive heightened scrutiny under the Equal Protection Clause. Section 5's plain text admits of no such

Moreover, Congress's extensively studied and exhaustively considered determination that there is a need to provide statutory protection for victims of age discrimination reflects a factual judgment, based upon a comprehensive legislative record that, while age can sometimes be used constitutionally in employment decisions, it has often been used arbitrarily and irrationality in that context. See *EEOC* v. *Wyoming*, 460 U.S. at 229-231. "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes" that physical and mental stamina invariably declined with age. *Hazen Paper Co.*, 507 U.S. at 610. It has long been recognized that Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 488 U.S. at 490 (O'Connor, J.). As an exercise of Congress's "specially informed legislative competence", the ADEA's cabined prohibition of age discrimination falls squarely within the Section 5 enforcement power. *Katzenbach* v. *Morgan*, 384 U.S. 641, 656 (1966); see also *Flores*, 117 S. Ct. at 2172 ("It is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.") (internal quotation marks omitted).

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distinction. "The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it." Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham).

Second, the ADEA provides a discrete and calibrated remedy for a narrowly defined range of governmental (and private) conduct. The ADEA applies only to employment. Congress has thus carefully confined its prohibition of age discrimination to an area of vital concern and importance to the affected individuals—their ability to earn a living and thus to subsist.[11]

Even within the area of employment, moreover, Congress has provided significant exemptions for States. See 29 U.S.C. 623(f) and (j) (permitting mandatory retirement ages for law enforcement officers and firefighters), 630(f) (excluding elected officials and their personal staffs, and persons "on the policymaking level") (1994 & Supp. II 1996). Furthermore, where age restrictions are in fact a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(f)(1), an employer may freely use age as a criterion for employment decisions. The primary obligation that the ADEA imposes on the State as employer, then, is not to treat qualified older workers differently simply because they

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[11] This Court has long recognized that the "right to work for the support of themselves and families" is a fundamental component of the liberty guaranteed by the Fourteenth Amendment. See *Smith* v. *Texas*, 233 U.S. 630, 636, 641 (1914) ("In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.").

are viewed as "old." See *Hazen Paper Co.*, 507 U.S. at 611.[12]

Third, Congress has acted in a context in which the consequences of state action have a direct impact on federal operations and the federal fisc. See *EEOC* v. *Wyoming*, 460 U.S. at 231 ("arbitrary age discrimination * * * deprive[s] the national economy of the productive labor of millions of individuals and impose[s] on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits"). The fact that the regulated state conduct reverberates far beyond the state's borders and is intertwined with independent federal governmental interests underscores the proportionality of Congress's remedial action in the ADEA.

In sum, given the serious consequences for individuals and the federal government of irrational age discrimination and the carefully measured remedy imposed on State employers, the ADEA manifests a "congruence" between the "means used" (*i.e.*, prohibiting employment decisions based on age unless the employer can show that using an employee's age, as opposed to actual indicia of ability, is reasonably necessary), and the "ends to be achieved" (*i.e.*, preventing arbitrary discrimination based on age). See *Flores*, 117 S. Ct. at 2169. As appropriate Section 5 legislation, therefore, the ADEA abrogated the States' Eleventh Amendment immunity from suit in federal court.

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[12] By contrast, the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb, which was at issue in *Flores*, "intru[ded] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Flores*, 117 S. Ct. at 2170.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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