No. 98-821

In the Supreme Court of the United States

OCTOBER TERM, 1998

TENNESSEE BOARD OF REGENTS, ET AL., PETITIONERS

v.

DALVAN M. COGER, ET AL.

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

BRIEF FOR THE UNITED STATES

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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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 154 F.3d 296. The opinion of the district court (Pet. App. 26-41) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 17, 1998. The petition for a writ of certiorari was filed on November 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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 subdivision 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.* See 29 U.S.C. 626(b)

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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) and (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) (Supp. II 1996) (state).

("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."

2. Respondents are seventeen faculty members employed by petitioner Memphis State University (which is now known as the University of Memphis). Pet. App. 4. In 1989, respondents filed suit in federal district court alleging, among other things, that petitioners engaged in individualized disparate treatment against them, undertook a pattern or practice of discrimination, and adopted policies with a disparate impact, all in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 4. Following discovery and a bench trial, the district court entered partial findings rejecting the individual disparate treatment claims of eight faculty members. Petitioners subsequently moved to dismiss on the ground that the Eleventh Amendment barred the litigation, citing this Court's intervening decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). Pet. App. 5.

The district court granted the motion to dismiss, holding that the ADEA lacks a clear textual statement evidencing Congress's intent to abrogate the States' Eleventh Amendment immunity. Pet. App. 34-35. In the alternative, the court found that any abrogation would be invalid because Congress did not intend to exercise its authority under Section 5 of the Fourteenth Amendment when it enacted the ADEA. *Id.* at 35-41.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Elev-

enth Amendment immunity in the ADEA. The court of appeals reversed. Pet. App. 1-25.

The court first held that the ADEA made "eminently clear" Congress's intent to abrogate Eleventh Amendment immunity by "expanding the definition of 'employer' to encompass 'a State or political subdivision of a State and any agency or instrumentality of a State,'" knowing that "the ADEA provides that an employer who violates the statute is liable for legal and equitable relief." Pet. App. 9-10, 11 (citations omitted). While noting that the Eleventh Circuit, in *Kimel* v. *Florida Board of Regents*, 139 F.3d 1426 (1998), had reached the opposite conclusion, the court of appeals "join[ed] other appellate courts which have addressed this issue since the *Seminole Tribe* decision and have also determined that the definitional and enforcement provisions of the ADEA contain the necessary clear statement of Congress's intent to abrogate state sovereign immunity." Pet. App. 12.

The court of appeals also agreed with a number of other courts of appeals in concluding that "Congress did not exceed the scope of its Section 5 authority" in extending the ADEA to the States. Pet. App. 20. Applying *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the court held that Congress had a basis in fact for concluding that older workers in the public sector "were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," Pet. App. 22 (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993)), and that Congress also could have determined that the use of age in public sector employment often "violated the Constitution because such classifications are arbitrary and discriminatory." *Id.* at 23. The court of appeals noted that the statutory scheme enacted by Congress in the ADEA was carefully tailored to ferret

out and remedy such instances of arbitrary discrimination by requiring employers generally to make employment decisions based on the actual qualifications of an employee, rather than simply on the employee's age. *Id.* at 23-24.

ARGUMENT

The court of appeals correctly ruled that the language of the ADEA clearly expresses Congress's intent to abrogate the States' Eleventh Amendment immunity. The court of appeals also properly concluded that the ADEA's abrogation falls within the "wide latitude" (*City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)) accorded Congress when it exercises its "comprehensive remedial power" under Section 5 of the Fourteenth Amendment (*City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) (emphasis and quotation marks omitted)).

We, however, agree with petitioner (Pet. 9-10) that the courts of appeals are divided on those questions. In fact, the conflict has grown since the filing of the petition. On December 23, 1998, the Second Circuit joined the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits (and disagreed with the Eighth and Eleventh Circuits) in holding both that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in the text of the ADEA and that Section 5 of the Fourteenth Amendment supports Congress's extension of the ADEA to the States and abrogation of their immunity. *Cooper* v. *New York State Office of Mental Health*, No. 97-9433, 1998 WL 898290, at *6 (2d Cir.).

Recognizing that the conflict is widespread and well-entrenched, the United States has already filed a petition for a writ of certiorari in *United States* v. *Florida*

Board of Regents, No. 98-796, raising the same questions presented in this petition.[2] Private plaintiffs in that case have also petitioned for a writ of certiorari in *Kimel* v. *Florida Board of Regents*, No. 98-791. For the reasons stated in our petition and reply brief in No. 98-796, we believe that those cases present the appropriate vehicle to resolve the split in the circuits. The *Florida Board of Regents* cases also provide a better context in which to decide the abrogation issues because those three consolidated cases present the Court with a broader range of factual contexts in which to evaluate the operation of the ADEA and its abrogation provisions.

[2] We have furnished counsel for petitioners a copy of our petition and reply brief in No. 98-796.

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of the petitions in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, and, in the event one or both of those petitions is granted, the petition in this case should continue to be held pending this Court's decision. In the alternative, the petition should be denied.

Respectfully submitted.

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