No. 03-22

In the Supreme Court of the United States

YVONNE G. TROUT, ET AL., PETITIONERS

v.

HANSFORD T. JOHNSON, ACTING SECRETARY OF THE NAVY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

MARLEIGH DOVER
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 114(2) of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which authorizes awards of prejudgment interest against the United States in employment discrimination cases, waives sovereign immunity to permit an award of accrued interest on attorneys' fees and backpay for a period before the effective date of that provision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

No. 03-22

YVONNE G. TROUT, ET AL., PETITIONERS

v.

HANSFORD T. JOHNSON, ACTING SECRETARY OF THE NAVY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 317 F.3d 286. The opinion of the district court awarding prejudgment interest (Pet. App. 16a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2003. Petitions for rehearing were denied on March 28, 2003 (Pet. App. 14a, 15a). The petition for a writ of certiorari was filed on June 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, this Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, then did not waive the federal government's traditional sovereign immunity from awards of interest. *Library of Congress* v. *Shaw*, 478 U.S. 310, 323 (1986). In 1991, Congress enacted Section 114(2) of the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071, which amended Title VII to allow for awards of "the same interest to compensate for delay in payment" in employment discrimination suits brought against the federal government as is available "in cases involving nonpublic parties." 42 U.S.C. 2000e-16(d). Section 114(2) became effective on November 21, 1991. Pet. App. 6a.

2. Petitioners in this case are female civilian employees of the United States Navy who sued the Navy in 1973 in the United States District Court for the District of Columbia, alleging that they had been discriminated against on the basis of sex, in violation of Title VII. Pet. App. 2a. The individual suits were consolidated and the case was certified as a class action. *Id.* at 2a-3a. In 1981, the district court found the Navy liable for violating Title VII and awarded class members backpay. *Id.* at 3a. Following an appeal, this Court granted the government's petition for a writ of certiorari, vacated the court of appeals' decision, and remanded the case for new findings of fact. *Lehman* v. *Trout*, 465 U.S. 1056 (1984). In 1986, the district court, on remand, reinstated its earlier finding of liability. Pet. App. 3a.

In 1988, the district court granted class members an interim attorneys' fee award of $276,044 and $15,434 in costs. Pet. App. 3a. Later in 1988 and in 1989, the

district court determined that the class members are entitled to backpay relief and directed a special master to determine the most appropriate statistical methodology for establishing the amount of backpay owed to each claimant. *Id.* at 3a-4a. In 1990, the special master made recommendations. *Id.* at 4a.

On November 27, 1991, six days after Section 114(2) of the 1991 Act became effective, the district court granted class members an interim backpay award of $670,402 for the period from June 1970 through April 1979. Pet. App. 4a. In November 1992, citing "'inappropriate' delay tactics" on the part of the Navy, the court extended the period covered by the backpay award "to the present." *Ibid.*

In September 1993, the parties entered into a settlement agreement under which eligible class members were entitled to backpay through December 1991 and attorneys' fees through mid-May 1993. Pet. App. 5a. The class members reserved the right to seek interest on the backpay and attorneys' fees under Section 114(2) of the 1991 Act. For its part, the government reserved its position that Section 114(2) is not retroactive and, therefore, interest accrued on backpay and attorneys' fees only after Section 114(2)'s effective date of November 21, 1991. *Ibid.*

3. In July 1998, the district court agreed with the class members' view of Section 114(2)'s correct application, and held that petitioners are entitled to prejudgment interest accrued on the award of backpay and attorneys' fees before Section 114(2)'s effective date. Pet. App. 16a-20a. The court distinguished *Brown* v. *Secretary of the Army*, 78 F.3d 645 (D.C. Cir. 1996), in which the court of appeals had held that Section 114(2) is not retroactive. The court stated that *Brown* should be "[l]imited to its facts," which involved a case in

which litigation of the merits of the underlying action was complete before November 21, 1991. *Id.* at 17a. This case, the court said, "was very much alive and being actively litigated on that date." *Id.* at 17a-18a. The district court acknowledged that the "liability phase" of this case ended in April 1990, but it stated that "the award phase of the litigation was ongoing and picking up steam when § 114(2) became effective." *Id.* at 20a n.2. The district court later ordered the Navy to pay prejudgment interest, through July 31, 2001, of $8.6 million on the backpay award and $1.4 million on the attorneys' fee award. *Id.* at 30a.

4. The court of appeals reversed and remanded. Pet. App. 1a-13a. It concluded in pertinent part that the district court erred "by focusing on the procedural posture of [the instant] litigation rather than the conduct underlying the litigation." *Id.* at 8a. The court of appeals noted that *Brown* answered in the negative the question "whether § 114(2) applies retroactively 'to a case arising from conduct that occurred before it was enacted.'" *Id.* at 9a (quoting *Brown*, 78 F.3d at 648). The court also emphasized that its unwillingness in *Brown* to "'impose upon the United States a liability to which it had not explicitly consented,' 78 F.3d at 654, was in keeping with [this Court's instruction in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994),] not to 'impose[] new burdens on persons after the fact.' 511 U.S. at 270." Pet. App. 10a.

Finally, the court of appeals concluded that this Court's decisions in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and *Martin* v. *Hadix*, 527 U.S. 343 (1999), "remove any doubt that the conduct underlying the complaint, rather than the procedural posture of the litigation, has significance in this context." Pet. App. 10a. Those decisions, the court of appeals explained, emphasize

that retroactivity analysis turns in significant part on "considerations of fairness" to parties who "should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 10a-11a (quoting *St. Cyr*, 533 U.S. at 316, and citing *Martin*, 527 U.S. at 360-361).

Accordingly, the court of appeals held that the district court erred in awarding prejudgment interest under Section 114(2) for periods prior to the November 21, 1991, effective date of Section 114(2). Pet. App. 12a-13a.

On March 28, 2003, the court of appeals denied petitioners' petitions for rehearing. No judge voted in favor of panel rehearing or requested a vote on rehearing en banc. Pet. App. 14a, 15a.

ARGUMENT

Petitioners argue that Section 114(2) of the Civil Rights Act of 1991 (Pub. L. No. 120-166, 105 Stat. 1071) expressly waives the sovereign immunity of the United States with respect to an award of prejudgment interest on backpay and attorneys' fees in a case that was pending in the district court on the effective date of Section 114(2), for periods before that effective date. The court of appeals correctly rejected petitioners' argument. Its decision does not conflict with any decision of this Court or any other court of appeals and raises no issue of substantial prospective importance. Review by this Court therefore is not warranted.

1. Petitioners attempt to identify "differences in [the] approaches" (Pet. 11) that the circuits have taken when determining, in various contexts, whether waivers of the federal government's sovereign immunity are retroactive. See Pet. 19-28. Yet every other circuit to address the retroactivity *vel non* of Section 114(2) has

concluded, in agreement with the D.C. Circuit in *Brown* v. *Secretary of the Army*, 78 F.3d 645 (1996), and the instant case, that Section 114(2) is not retroactive and prejudgment interest is not available for periods before November 21, 1991. See *Arneson* v. *Callahan*, 128 F.3d 1243, 1246 (8th Cir. 1997) ("[T]he 1991 amendment does not apply retroactively."), cert. denied, 524 U.S. 926 (1998); *Woolf* v. *Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) ("[S]ection 114 does not apply retroactively."); *Huey* v. *Sullivan*, 971 F.2d 1362, 1365-1366 (8th Cir. 1992), cert. denied, 511 U.S. 1068 (1994); see also *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 n.1 (10th Cir. 1994) (stating in dictum that this Court's cases "support[] a presumption against retroactive application of § 114"), cert. denied, 516 U.S. 963 (1995).

Those uniform decisions of other circuits cannot be distinguished on the basis that this case "was pending [in the district court] on the merits on November 21, 1991." Pet. 10. That assertion is factually questionable. See pp. 2-3, *supra* (discussing case history). More fundamentally, there is no question after this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), that a provision that increases liability is retroactive if it is applied to underlying conduct that pre-dated the 1991 Act's passage. See *id.* at 265-280.

In any event, the importance of the question presented in this case is inherently limited and diminishing over time. It has been nearly a decade since this Court heard argument in *Landgraf* about the retroactivity of the 1991 Act. While a decade ago there were numerous pending cases addressing pre-1991 conduct, the number of such cases has necessarily diminished. Morever, Section 114(2) applies only to employment-discrimination suits against the federal government. See 42 U.S.C. 2000e-16(a). The question of how Section 114(2)

should be applied to the subset of government employment-discrimination suits that were pending in a district court on November 21, 1991, is unlikely to arise with any frequency in the future. The question arises at the present time only because the instant case has been "extremely protracted" (Pet. App. 2a). Whether or not Section 114(2) is retroactive has no significance in any case filed after November 1991—that is, within the last 12 years.

2. The decision below is correct. As the court of appeals explained, "[s]tatutes waiving the sovereign immunity of the United States are subject to the rule of strict construction." Pet. App. 6a (citing *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)). The court of appeals also correctly noted that, as stated in *Shaw*, "the historical 'no-interest rule' bars recovery of interest against the government 'unless the award of interest was affirmatively and separately contemplated by Congress.'" *Id.* at 7a (quoting *Shaw*, 478 U.S. at 315, 318-319). Consistent with those principles, the court of appeals concluded in this case that the "rule of strict construction, enhanced by the no-interest rule, applies whether the court is examining a statute's substantive scope or its temporal reach." *Ibid.*

The court of appeals also correctly applied "the traditional presumption * * * against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." Pet. App. 10a (quoting *Landgraf*, 511 U.S. at 278). Because there is no evidence (much less clear evidence) of a congressional intent that Section 114(2) of the 1991 Act should apply before its effective date, see *id.* at 12a; *Brown*, 78 F.3d at 648, the court of appeals determined that prejudgment interest may not be awarded against

the United States for any period before November 21, 1991. Pet. App. 12a-13a.

3. Finally, there is no force to petitioners' invocation (Pet. 28) of Congress's general "statutory goals of * * * ending discrimination in employment by the federal government and providing full relief." As the Court noted in *Landgraf*, such policy arguments for retroactive application of remedial provisions "[are] not sufficient to rebut the presumption against retroactivity." 511 U.S. at 286.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARLEIGH DOVER
MARY K. DOYLE
Attorneys

OCTOBER 2003