No. 98-1524

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT, ET AL., PETITIONERS

v.

CLIFFORD DAVIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND 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. A1-A19) is reported at 162 F.3d 770. The opinion of the district court (Pet. App. A20-A28) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 23, 1998. The petition for a writ of certiorari was filed on March 23, 1999. 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).* 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 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced

* 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. III 1997). 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) (1994 & Supp. III 1997); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997). 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. III 1997). 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. III 1997) (state).

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 were faculty members employed by the University of Connecticut School of Law. Pet. App. A5. Respondents filed suit in federal district court alleging, *inter alia*, that petitioners had begun discriminating on the basis of age in granting salary increases, in violation of the ADEA. *Ibid.* Petitioners moved to dismiss on the ground of Eleventh Amendment immunity. *Id.* at A6, A21. The district court denied the motion to dismiss. *Id.* at A23-A27.

3. Petitioners took an interlocutory appeal as of right of the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court of appeals consolidated the appeal with two others raising the same issue and affirmed. Pet. App. A1-A9.

The court first "join[ed] the majority of the other circuits that have considered the question" (Pet. App. A12) in holding that Congress clearly expressed its intent to abrogate Eleventh Amendment immunity in "[t]he ADEA as a whole" (*id.* at A15). The court explained that "the combination of the amendments to 'employer' and 'employee'" in 1974, which explicitly expanded the ADEA's coverage to include the States and their employees (*id.* at A14); "the availability of private damage actions [that] makes it clear that States are intended to be subject to liability" (*ibid.*); and the

ADEA's incorporation of the FLSA enforcement provision that specifically authorizes suits against "a public agency" (*id.* at A17), made "unmistakably clear" (*id.* at A16) Congress's intent to abrogate Eleventh Amendment immunity.

The court of appeals also "agree[d] with the overwhelming weight of authority holding that the ADEA was adopted pursuant to § 5 of the Fourteenth Amendment" (Pet. App. A18) and that the statute "is sufficiently limited in scope to pass the *City of Boerne* [v. *Flores*, 521 U.S. 507 (1997)] test," which requires that Section 5 legislation reflect a congruence and proportionality between the injury prevented and the means adopted (*id.* at A19).

ARGUMENT

On January 25, 1999, this Court granted review in *United States* v. *Florida Board of Regents*, cert. granted, 119 S. Ct. 902 (1999) (No. 98-796), and *Kimel* v. *Florida Board of Regents*, cert. granted, 119 S. Ct. 901 (1999) (No. 98-791). As petitioner acknowledges (Pet. 9 n.5), the questions of abrogation of Eleventh Amendment immunity under the ADEA raised by this petition are identical to those presented in No. 98-796 and No. 98-791. Accordingly, this petition should be held pending the Court's decision in those consolidated cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, and disposed of in accordance with the decision in those cases.

Respectfully submitted.

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