Nos. 98-796 & 98-791

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA BOARD OF REGENTS, ET AL.

J. DANIEL KIMEL, JR., ET AL., PETITIONERS

v.

FLORIDA BOARD OF REGENTS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH 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. 1a-56a) is reported at 139 F.3d 1426.[1] The opinions of the district courts in *Kimel* v. *Florida Board of Regents* (Pet. App. 57a-62a), and *Dickson* v. *Florida Department of Corrections* (Pet. App. 72a-76a), are unreported. The opinion of the district court in *MacPherson* v. *University of Montevallo* (Pet. App. 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 (Pet. App. 77a-79a, 81a-83a). The petition for a writ of

[1] Throughout this brief, "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the United States in case No. 98-796.

certiorari was filed on November 13, 1998, and was granted on January 25, 1999. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT

1. *Statutory Framework.*

a. Congress began studying the problem of age discrimination in employment in the 1950s. See *EEOC* v. *Wyoming*, 460 U.S. 226, 229 (1983). Although Congress considered adding age to the list of presumptively prohibited bases for employment decisions in Title VII of the Civil Rights Act of 1964, see 110 Cong. Rec. 2596-2599, 9911-9913, 13,490-13,492 (1964), Congress ultimately chose, instead, to direct the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination * * *." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 715, 78 Stat. 265.

The Secretary of Labor issued his report in June 1965. See *The Older American Worker: Age Discrimination in Employment* (1965) (Labor Report), *reprinted in* Equal Employment Opportunity Comm'n (EEOC), *Legislative History of the Age Discrimination in Employment Act* 16-41 (1981). In that report, the Secretary uncovered "substantial evidence" (Labor Report 5) of "persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability" (*id.* at 21). See also *id.* at 5 (significant evidence of "discrimination based on unsupported general assumptions about the effect of age on ability * * * in hiring practices that take the form

of specific age limits applied to older workers as a group"). The Secretary found that more than half of all employers applied arbitrary age limits that were typically set from 45 to 55 years of age (*id.* at 6); that workers over 45 represented less than five percent of new hires for most establishments (*id.* at 7); and that one-fifth of employers hired no workers over 45 at all (*ibid.*). The Secretary further found that a "significant proportion" of the age limits in effect were "arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements," and were defended on pretextual grounds. *Ibid.* (emphasis omitted). The arbitrariness was underscored by the parallel finding that "[t]he competence and work performance of older workers are, by any general measures, at least equal to those of younger workers." *Id.* at 8. Finally, the Secretary called for federal legislation, explaining that "[t]he possibility of new *nonstatutory* means of dealing with such arbitrary discrimination ha[d] been explored." *Id.* at 21. "That area," however, proved "barren." *Ibid.*

Between 1965 and 1967, Congress's two relevant legislative committees and two select committees on aging conducted 18 days of hearings and compiled a record consisting of nearly 2100 pages of testimony and evidence about the problem of age discrimination in employment and the need for a national legislative response.[2] After that lengthy and

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[2] See, *e.g.*, *Employment Problems of Older Workers: Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor*, 89th Cong., 1st Sess. (1965); *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor*, 90th Cong., 1st Sess. (1967); *Age Discrimination in Employment: Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 90th Cong., 1st Sess.

exhaustive study, Congress passed the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Based on the evidence before it, Congress found that "arbitrary discrimination in employment" is a national problem and that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice." 29 U.S.C. 621(a)(2) and (4). A primary purpose of the ADEA was "to prohibit arbitrary age discrimination in employment." 29 U.S.C. 621(b).

b. The ADEA protects employees who are at least 40 years old, 29 U.S.C. 631(a), from employment discrimination on the basis of age.[3] The Act makes 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), unless age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(f)(1).[4] The ADEA expressly protects otherwise lawful employer action based on

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(1967); *Retirement and the Individual: Hearings Before the Senate Select Comm. on Aging*, 90th Cong., 1st Sess. (1967).

[3] The ADEA initially covered employees only up to age 65. In 1978, Congress raised the maximum age to 70 for state, local, and private employees and eliminated the cap entirely for federal workers. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189. In 1986, Congress also removed the cap for state, local, and private employees, prohibiting discrimination against virtually all workers over 40. See Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

[4] In addition, the ADEA forbids employers "to limit, segregate, or classify [their] employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," 29 U.S.C. 623(a)(2), or "to reduce the wage rate of any employee in order to comply with this chapter," 29 U.S.C. 623(a)(3).

any "reasonable factors other than age," *ibid.*, and preserves an employer's authority to "discharge or otherwise discipline an individual for good cause," 29 U.S.C. 623(f)(3).

As originally enacted, the ADEA applied only to private employers. See Pub. L. No. 90-202, § 11, 81 Stat. 605 (29 U.S.C. 630 (Supp. III 1965-1967)). In 1974, Congress extended the ADEA's coverage to the States and local governments, after concluding that "State and local governments have also been guilty of discrimination toward older employees." 118 Cong. Rec. 7745 (1972) (Sen. Bentsen). See also S. Rep. No. 846, 93d Cong., 2d Sess. 112 (1974) (same); S. Rep. No. 300, 93d Cong., 1st Sess. 57 (1973). Congress redefined a covered "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." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. 630(b)), and it defined a covered "employee" as "an individual employed by any employer," other than an elected official or high-level policymaker, adviser, or member of the personal staff of an elected official, not covered by civil service laws, 29 U.S.C. 630(f).[5] At the same time, Congress enacted a separate provision that extended the ADEA's protections to most federal employees. 29 U.S.C. 633a.[6] Mandatory age limits for federal law enforcement officers and firefighters were exempted from this prohibition, see 5 U.S.C. 3307, and in 1986

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[5] The ADEA also permits the compulsory retirement of persons employed, both in the public and private sector, in a "bona fide executive or a high policymaking position" under certain conditions. 29 U.S.C. 631(c)(1). Tenured professors were partially excluded from the ADEA's coverage from 1986 to 1993. Pub. L. No. 99-592, §§ 3(a), 6, 100 Stat. 3342, 3344.

[6] Congress subsequently 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).

Congress provided a similar exemption for state and local law enforcement officers and firefighters.[7]

An individual aggrieved by an employer's failure to comply with the ADEA may "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).[8] The ADEA (29 U.S.C. 626(b)) expressly incorporates many of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, one of which (29 U.S.C. 216(b)) authorizes individuals to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."[9] Sixty days before bringing such an action, however, the individual must both invoke any applicable state procedures, 29 U.S.C. 633(b), and file a complaint with the EEOC, 29 U.S.C. 626(d).[10]

2. *Factual Background.* The private petitioners are plaintiffs in three unrelated lawsuits that the court of appeals consolidated for decision. The plaintiffs in *Kimel* v.

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[7] See Pub. L. No. 99-592, §§ 3(a), 6, 100 Stat. 3342, 3344; Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208, Tit. I, § 119, subsec. 1(b), 110 Stat. 3009-23 (codified at 29 U.S.C. 623(j) (Supp. III 1997)).

[8] Suits against the federal government must be brought in federal district court. 29 U.S.C. 633a(c).

[9] Congress amended Section 216(b) to its present form after *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), "to overcome that part of * * * *Employees* * * * which stated that Congress has not explicitly provided * * * that newly covered State and local employees could bring an action [under the Fair Labor Standards Act] against their employer in a Federal court." H.R. Rep. No. 913, 93d Cong., 2d Sess. 45 (1974); see also S. Rep. No. 690, 93d Cong., 2d Sess. 27 (1974).

[10] The EEOC must "promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(d). A federal employee is required to give notice to the EEOC, but informal conciliation is not mandatory. 29 U.S.C. 633a(d).

Florida Board of Regents and *MacPherson* v. *University of Montevallo* are current and former employees of universities operated by the States of Florida and Alabama, respectively. In each case, the plaintiffs filed suit in federal district court and alleged, *inter alia*, that the universities had discriminated in the allocation of benefits, such as salaries, on the basis of age. Pet. App. 64a; J.A. 22-23, 29-30, 45. The universities moved to dismiss on the ground of Eleventh Amendment immunity. The district court in *Kimel* denied the motion, holding that the ADEA contained a clear abrogation of immunity, and that the abrogation was valid because the ADEA was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. Pet. App. 57a-62a. The *MacPherson* court granted the motion on the ground that the ADEA was not a proper exercise of Congress's authority to enforce the Fourteenth Amendment. Pet. App. 65a-71a.

In *Dickson* v. *Florida Department of Corrections*, a state correctional officer filed suit in federal district court and alleged that the state Department of Corrections had intentionally failed to promote him and otherwise discriminated against him on the basis of his age and a medical disability, in violation of both the ADEA and the Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.* Pet. App. 72a; J.A. 88-95. The respondent moved to dismiss on the ground of Eleventh Amendment immunity. The district court denied the motion, holding that both the ADEA and the Disabilities Act were proper exercises of Congress's Section 5 power. Pet. App. 73a-75a.

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). The United States intervened in each action to

defend the constitutionality of the ADEA's abrogation of 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. Pet. App. 1a-56a. The majority, however, was divided on the rationale for its decision.

Judge Edmondson found that Congress had failed to make its intent to abrogate the States' Eleventh Amendment immunity "as clear as is the summer's sun," Pet. App. 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 Judge Edmondson's view, the ADEA's enforcement provisions are consistent with the enforcement of the ADEA against States in federal court only by the federal government and by all private plaintiffs in state court. *Id.* at 4a n.4, 10a-11a & n.13.

Judge Cox did not reach the question of the clarity of Congress's intent to abrogate. He concluded instead that the ADEA was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment and therefore any abrogation would be ineffective. Judge Cox explained that, under Section 5 of the Fourteenth Amendment, Congress "may, if circumstances warrant," do no more than "tweak procedures, find certain facts to be presumptively true, and deem conduct presumptively unconstitutional in light of Supreme Court interpretation," but in his view the ADEA exceeds the limits of that power. Pet. App. 47a-48a.

Chief Judge Hatchett dissented from the majority's disposition of the ADEA claims. He agreed with "virtually every other court that has addressed the question" that "Congress made an 'unmistakably clear' statement of its intent to abrogate." Pet. App. 18a, 20a. Chief Judge Hatchett also joined the majority of other courts in concluding "that the ADEA falls squarely within the enforce-

ment power that Section 5 of the Fourteenth Amendment confers on Congress." *Id.* at 24a. He found that Congress had prohibited age discrimination in employment because it had determined that such discrimination "was generally based on unsupported stereotypes," *id.* at 29a, and that the statutory scheme enacted by Congress was tailored to ferreting out those instances of arbitrary discrimination. *Id.* at 32a & n.12.[11]

SUMMARY OF THE ARGUMENT

I. Congress clearly expressed in the text of the Age Discrimination in Employment Act its intent to abrogate the States' Eleventh Amendment immunity to private suits. By defining the terms "employer" and "employee" to include the States, Congress manifested its intent to impose the ADEA's substantive obligations on the States. The ADEA also creates a private right of action for an employee to sue his employer. And the statute incorporates an express statement that those enforcement actions can be brought against "a public agency"—specifically defined as a state government or agency—in either a "Federal or State court of competent jurisdiction." 29 U.S.C. 216(b). Absent an explicit reference to the Eleventh Amendment—which is not required—Congress could hardly have made its intent clearer. To go further, as Judge Edmondson did here, and employ the clear-statement rule to police Congress's word choices and to dictate a statute's structure would loose the clear-statement rule from its historical moorings as a rule of judicial restraint and transform it into a rule for judicial regulation of congressional syntax.

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[11] With regard to the claim raised in *Dickson* involving the Disabilities Act, Chief Judge Hatchett and Judge Edmondson agreed that the Disabilities Act validly abrogated the States' Eleventh Amendment immunity. Pet. App. 13a-15a, 21a, 33a-41a. Respondent Florida Department of Corrections' petition for certiorari on that issue, No. 98-829, is pending.

II. The Age Discrimination in Employment Act is a proper exercise of Congress's broad and comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. The ADEA, like many other civil rights statutes, enforces the Equal Protection Clause's guarantee against arbitrary and irrational governmental distinctions in the workplace. While classifications based on age do not receive heightened judicial scrutiny, the Equal Protection Clause authorizes judicial review of all classifications—not merely suspect or semi-suspect ones—to ensure that they are rationally related to legitimate governmental purposes. Congress's power to enforce the Clause is at least equally broad. This Court has recognized that, under Section 5, Congress has an independent and vital role in (i) evaluating the impact of state action on Fourteenth Amendment rights through the collection of empirical data, information, and expert testimony in a manner unconstrained by limitations on judicial review; (ii) measuring the empirical conclusions from such studies against the standards set by this Court for identifying constitutional violations; and (iii) legislating to prevent and remedy those constitutional violations that Congress's unique institutional capacity has exposed. That is precisely what Congress did through the ADEA, when it found, after extensive study, that age discrimination by state employers is frequently sufficiently arbitrary to violate the Constitution, and is sufficiently pervasive to require a legislative response.

The ADEA reflects a reasonably tailored means of addressing the constitutional problem Congress identified. The statute places the burden on the plaintiff to show that age was a determinative factor in the employment decision. The State may avoid liability by showing either that age was not a factor in the decision or that age is a bona fide occupational qualification. The statute is thus structured to

flush out those acts of intentional age discrimination that create the greatest risk of violating the Equal Protection Clause. In addition, the ADEA focuses narrowly on the problem of arbitrary age discrimination in employment and thus neither interferes with a State's sovereign regulatory functions nor broadly affects its operations. The ADEA also contains exemptions and imposes pre-filing notification requirements that reflect Congress's sensitivity to the federalism implications of regulating state employment practices. While the ADEA inevitably prohibits some state employment decisions that would not violate the Equal Protection Clause, in practice such disparities are not likely to be substantial. Moreover, this Court has repeatedly held that legislation aimed at deterring or remedying constitutional violations falls within the broad sweep of Congress's Section 5 power even if it prohibits conduct that is not itself unconstitutional.

ARGUMENT

In determining whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, abrogates the States' Eleventh Amendment immunity to private suits in federal court, this Court "must answer two questions: 'first, whether Congress has unequivocally expresse[d] its intent to abrogate the immunity, . . . and second, whether Congress has acted pursuant to a valid exercise of power.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, No. 98-531 (June 23, 1999), slip op. 6 (quoting *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996)). The ADEA satisfies both requirements.[12]

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[12] Applying this two-part test, six courts of appeals have upheld the constitutionality of the ADEA's abrogation. See *Cooper* v. *New York State Office of Mental Health*, 162 F.3d 770, 774-778 (2d Cir. 1998), petition for cert. pending, No. 98-1524; *Migneault* v. *Peck*, 158 F.3d 1131, 1136-1139 (10th Cir. 1998), petition for cert. pending, No. 98-1178; *Coger* v. *Board of*

I. CONGRESS HAS UNEQUIVOCALLY EXPRESSED ITS INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY

This Court has adopted as a rule of construction the requirement that Congress make an "intention to abrogate the States' immunity unmistakably clear in the language of the statute." *Florida Prepaid*, slip op. 6 (internal quotation marks omitted). This requirement prevents courts from mistakenly expanding their own jurisdiction in a delicate area of federal-state relations.[13] The rule does not require Congress to mention the Eleventh Amendment or sovereign

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Regents, 154 F.3d 296, 301-307 (6th Cir. 1998), petition for cert. pending, No. 98-821; *Scott* v. *University of Miss.*, 148 F.3d 493, 501-503 (5th Cir. 1998); *Keeton* v. *University of Nev. Sys.*, 150 F.3d 1055, 1058 (9th Cir. 1998); *Goshtasby* v. *Board of Trustees*, 141 F.3d 761, 770-772 (7th Cir. 1998); see also *Ramirez* v. *Puerto Rico Fire Serv.*, 715 F.2d 694, 698-700 (1st Cir. 1983) (decided prior to *Seminole Tribe*); *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977) (same). Like the Eleventh Circuit in this case, the Eighth Circuit has also found no valid abrogation of Eleventh Amendment immunity. *Humenansky* v. *Regents of the Univ. of Minn.*, 152 F.3d 822, 824-828 (1998), petition for cert. pending, No. 98-1235.

[13] See, *e.g.*, *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 305 (1990) ("the Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States' sovereign immunity" because "States are unable directly to remedy a judicial misapprehension of that abrogation"); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced [the matter], and intended to bring [it] into issue.") (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985) ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment"; because "the courts themselves must decide whether their own jurisdiction has been expanded * * * it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power.").

immunity, or to incant particular words or phrases.[14] Nor does it require Congress to express its intent "in one place, [in] a plain declaratory statement" (Pet. App. 7a) or otherwise require Congress to structure its statement of intent in any particular fashion. See *Seminole Tribe*, 517 U.S. at 56-57 (references to States scattered throughout various statutory provisions sufficient to express clear congressional intent to abrogate); cf. *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 307 (1990) (reading venue and consent provisions together to find a clear waiver of the States' sovereign immunity). Rather, the statute need only clearly create a private cause of action against States and grant jurisdiction to federal courts to hear those claims. The ADEA does that.

It is undisputed that Congress clearly expressed its intent in the ADEA to require the States to comply with the ADEA's substantive provisions. See *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Congress also made clear that it expected all employees or prospective employees to be able to sue employers for violations of the ADEA. Section 626(c) authorizes "any person aggrieved"—*i.e.*, employees and job applicants—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." When an employee works for a state employer, the only possible defendant is the State. See *Lehman* v. *Nakshian*, 453 U.S. 156, 166 (1981) ("State and local governments were added as potential defendants by a simple expansion of the term 'employer' in the ADEA."). Nor is there any question that Congress intended suits under Section 626(c) to be heard in federal court. Section 626(c)'s grant of jurisdiction encom-

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[14] See *Seminole Tribe*, 517 U.S. at 56-57; *Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring); *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13 & n.4 (1989) (plurality), overruled by *Seminole Tribe*, *supra*; *id.* at 29-30 (Scalia, J., concurring in part and dissenting in part).

passes both federal and state courts. See, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991); *Yellow Freight Sys., Inc.* v. *Donnelly*, 494 U.S. 820, 825 (1990). In extending the ADEA to the States in 1974, therefore, Congress placed States as employers squarely within an existing enforcement scheme that specifically and expressly contemplated suits by employees against employers in federal court.

This Court has held that similar statutory indicia adequately conveyed congressional intent to abrogate the States' immunity in the 1972 amendments to Title VII of the Civil Rights Act of 1964. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 n.2, 452 (1976). Like the 1974 amendments to the ADEA, the Title VII amendments redefined an "employer" to include "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. 2000e(a), and defined "employee" in a manner that included "employees subject to the civil service laws of a State government, governmental agency or political subdivision," 42 U.S.C. 2000e(f). Also like the ADEA, Title VII provides that "a civil action may be brought against the respondent * * * by the person claiming to be aggrieved." 42 U.S.C. 2000e-5(f)(1). That statutory evidence "made clear" that Title VII's cause of action "was being extended to persons aggrieved by public employers." *Fitzpatrick*, 427 U.S. at 449 n.2.

If there were any lingering doubt about congressional intent, it would be laid to rest by Section 626(b). That Section expressly incorporates a provision of the Fair Labor Standards Act of 1938 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 also 29 U.S.C. 255(d) (tolling statute of limitations "with respect to any cause of action brought under section 216(b) of this title *against a State* or a political subdivision of a State *in a district court of the*

United States") (emphases added).[15] The "public agency" to which Section 216(b) refers is defined as "the government of a State" and any agency of a State, 29 U.S.C. 203(x). By placing in one provision the identity of the plaintiff (an employee), the defendant (a public agency employer), and the forum (federal court), Section 216(b) clearly expresses congressional intent to abrogate Eleventh Amendment immunity.[16]

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[15] See also *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 167-168 (1989) ("one of the provisions the ADEA incorporates" is the portion of Section 216(b) that provides that an action "may be maintained against any employer [including a public agency] in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated"); *Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978). The ADEA's adoption of the Fair Labor Standards Act enforcement provision by reference "make[s] it as much a part of the later act as though it had been incorporated at full length." *Engel* v. *Davenport*, 271 U.S. 33, 38 (1926). See also *Department of Energy* v. *Ohio*, 503 U.S. 607, 617 (1992).

[16] *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), is not to the contrary. First, Congress responded to *Employees* by amending the general enforcement provision of the Fair Labor Standards Act at issue in that case to add an express authorization for private suits in federal court against a "public agency," 29 U.S.C. 216(b). See note 9, *supra*. The ADEA expressly incorporates that authorization. 29 U.S.C. 626(b). Second, while, standing alone, Section 626(c) of the ADEA does not expressly reference public employers, the ADEA amendments of 1974 were direct and unambiguous in bringing state employers within the class of potential defendants for a preexisting federal court cause of action, unlike the more circuitous provisions at issue in *Employees*. See *Davidson* v. *Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990). Finally, the *Employees* Court found that "private enforcement of the [Fair Labor Standards] Act was not a paramount objective," and thus Congress would have no reason to abrogate immunity. 411 U.S. at 286. In contrast, private enforcement of the ADEA is a "vital element" in Congress's scheme to combat discrimination in the workplace. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).

The contrary views of Judge Edmondson here (Pet. App. 6a-13a) and of the Eighth Circuit in *Humenansky* v. *Regents of the University of Minnesota*, 152 F.3d 822, 825 (1998), petition for cert. pending, No. 98-1235, rest on a misunderstanding of this Court's clear-statement rule. By insisting on an elaborate explication of congressional intent, those opinions strain to impose unnatural readings on Congress's language and insist upon "magic words" in an effort, not to discern, but to avoid Congress's clear expression of its intent. Judge Edmondson, for example, stated 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." Pet. App. 10a-11a n.11. But that reasoning overlooks that the ADEA authorizes suits to be brought by "any" employee against "any employer (including a public agency)." 29 U.S.C. 216(b), 626(b) and (c)(1). The clear-statement rule is not a license to read the word "any" out of the statute. Furthermore, the reference to "public agency" appears before the statute's references to both of the designated fora, indicating that they are both available at the election of "any" employee bringing suit. Congress would have written the statute quite differently if its purpose were to allocate access to state and federal fora based upon who brought suit against which employer. In any event, Judge Edmondson's suggestion that Section 216(b) clearly expresses an intent only to allow private suits against States in state court fails to recognize that the same clear-statement rule is employed in deciding whether Congress intended to permit States to be sued in state court. See *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-206 (1991). If the language is

clear enough to permit suit in state courts,[17] the parallel statutory language is also clear enough to permit suit in federal court.

In *Humenansky*, the Eighth Circuit held that Congress's incorporation of Section 216(b) was not sufficient to abrogate Eleventh Amendment immunity for ADEA claims because Congress failed to amend Section 626(c) of the ADEA to repeat the same clear language. 152 F.3d at 825. But the most obvious reason for Congress not to amend Section 626(c) was that Congress knew that the ADEA incorporated Section 216(b) and thus saw no need to abrogate twice. *United Food & Commercial Workers Union* v. *Brown Group, Inc.*, 517 U.S. 544, 550 (1996) (a "natural reading of the statute's text * * * always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight").

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT AS APPLIED TO THE STATES IS A VALID EXERCISE OF CONGRESS'S ENFORCEMENT AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." That Section is a direct, affirmative, and independent grant of legislative power to Congress, beyond the authority embodied in Article I. *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997). Like Congress's authority under the Necessary and Proper Clause, congressional authority under Section 5 encompasses all legislation reasonably designed to enforce the guarantees

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[17] See *Alden* v. *Maine*, No. 98-436 (June 23, 1999), slip op. 2 (Section 216(b) "purport[s] to authorize private actions against States in their own courts").

of the Fourteenth Amendment. *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880). Section 5 of the Fourteenth Amendment thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 119 S. Ct. 1518, 1529 (1999), including the authority to abrogate Eleventh Amendment immunity, *Florida Prepaid*, slip op. 8. As applied to the States, the ADEA is appropriate Section 5 legislation because it enforces the established Fourteenth Amendment protection against arbitrary and irrational state-sponsored discrimination, and because it does so in a manner reasonably tailored to advance that interest.[18]

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[18] Although Congress did not employ the words "Section 5" or "Fourteenth Amendment," its intent to exercise that authority is clear. The primary sponsor of the ADEA's extension to the States explained that "the principles underlying the[] provisions in the EEOC [Title VII] bill are directly applicable to the [ADEA]," and he specifically referenced the Senate Report on Title VII (S. Rep. No. 415, 92d Cong., 1st Sess. (1971)), which this Court later cited in *Fitzpatrick* (427 U.S. at 453 n.9) as evidence of Congress's reliance on its Section 5 power. 118 Cong. Rec. 15,895 (1972) (Sen. Bentsen). Furthermore, Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *Wyoming*, 460 U.S. at 243 n.18. Rather, this Court's review "of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment" requires only that the Court "be able to discern some legislative purpose or factual predicate that supports the exercise of that power." *Ibid.*; see *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-478 (1980) (opinion of Burger, C.J.) (statute reflects a proper exercise of Section 5 power even though Congress never referenced that power); *id.* at 500-502 (Powell, J., concurring); see also *Union Gas Co.*, 491 U.S. at 30 (Scalia, J., concurring in part & dissenting in part) (it is not the Court's task "to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective"); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."); *United States* v. *Harris*, 106 U.S. 629, 636 (1883) (when "question[ing] the power of Congress to pass the law * * * [i]t is * * * necessary to search the Constitution to ascertain whether or not the power is conferred").

A. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ENFORCES THE EQUAL PROTECTION CLAUSE'S BAN ON ARBITRARY AND IRRATIONAL STATE ACTION

1. Classifications Based On Age Are Proper Subjects For Section 5 Enforcement Legislation

a. *The Equal Protection Clause forbids arbitrary distinctions based on age.* The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." At the core of the equal protection guarantee is the principle that, in legislating or undertaking governmental activities, a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996). The Equal Protection Clause thus prohibits state action predicated on "mere negative attitudes" and "vague, undifferentiated fears" (*Cleburne*, 473 U.S. at 448-449) "divorced from any factual context from which we could discern a relationship to legitimate state interests" (*Romer*, 517 U.S. at 635).

In both early and contemporary Equal Protection Clause cases, this Court has invalidated state laws and practices that reflected classifications which, although not subject to "heightened scrutiny," were too arbitrary and irrational to satisfy constitutional requirements.[19] The Equal Protection

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[19] See, *e.g.*, *Quinn* v. *Millsap*, 491 U.S. 95, 107 (1989); *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 345 (1989); *Williams* v. *Vermont*, 472 U.S. 14, 23 n.8 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 222 (1982); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (opinion of Blackmun, J.); *id.* at 443-444 (Powell & Rehnquist, JJ., concurring in

Clause likewise prohibits arbitrary and irrational distinctions based on age. In *Gregory* v. *Ashcroft*, 501 U.S. 452, 471-473 (1991), *Vance* v. *Bradley*, 440 U.S. 93, 98-112 (1979), and *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314-316 (1976), this Court subjected governmental distinctions based on age—mandatory retirement limits— to scrutiny under the Equal Protection Clause. Each of those statutes survived constitutional scrutiny only because, using a mode of judicial review that is extremely deferential to actual and possible legislative justifications, the Court found that the particular laws were rationally related to the States' asserted interests—and not because distinctions based on age are categorically immune from constitutional scrutiny.[20] Indeed, this Court has long acknowledged that age, like race, can be used in an invidious and unconstitutional manner. See *Gulf, Colo. & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155 (1897).

b. *Age discrimination in employment is an appropriate subject for Section 5 enforcement.* Both Judge Cox (Pet. App. 48a- 51a) and the Eighth Circuit in *Humenansky*, 152 F.3d at 827-828, suggested that, because distinctions based on age require only rational basis scrutiny under the Equal Protection Clause, such distinctions are not a proper subject for Section 5 enforcement legislation. But "[t]he 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

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judgment); *Turner* v. *Fouche*, 396 U.S. 346, 362-364 (1970); *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79, 114-115 (1901); *Chicago, Milwaukee & St. Paul Ry.* v. *Minnesota*, 134 U.S. 418, 458 (1890).

[20] In fact, in *Vance*, the Court did not squarely confront a constitutional challenge to an age classification per se, but rather to the distinction between Foreign Service personnel, who faced mandatory retirement at 60, and civil service personnel, who did not. 440 U.S. at 96 n.10; see also *id.* at 95 n.2 (no claim under ADEA pursued on appeal).

Sess. App. 83 (1871) (Rep. Bingham); cf. *Oregon* v. *Mitchell*, 400 U.S. 112, 143-144 (1970) (Douglas, J.) ("Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone."). It would be an extraordinary and unwarranted departure from both text and history to balkanize Congress's enforcement power based on legal classifications created by this Court more than a century after the constitutional text was written.

Moreover, this Court has sustained previous exercises of the enforcement power to prohibit classifications that were subject merely to rational basis scrutiny. Congress extended Title VII's ban on gender discrimination to the States in 1972, at a time when this Court had held that gender distinctions warranted only rational basis scrutiny. *Reed* v. *Reed*, 404 U.S. 71, 75-77 (1971). This Court upheld the 1972 abrogation as an appropriate exercise of the Section 5 power half a year before a majority of this Court ruled that gender discrimination warrants heightened scrutiny. Compare *Fitzpatrick*, 427 U.S. at 451-457, with *Craig* v. *Boren*, 429 U.S. 190, 197-199 (1976).[21] Similarly, in *Maher* v. *Gagne*, 448 U.S. 122 (1980), this Court ruled that Congress had validly employed its Section 5 power to abrogate Eleventh Amendment immunity for attorney's fees claims involving equal protection and due process claims that were subject only to rational basis review. *Id.* at 132; see also *Cleburne*, 473 U.S. at 439.

Any classification that is subject to judicial review for arbitrariness under the Equal Protection Clause must also

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[21] A year after the 1972 amendments, a plurality of this Court held that gender distinctions merited enhanced scrutiny. *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.). But the constitutionality of the statute did not turn upon that fact; *Fitzpatrick* cites neither *Frontiero* nor *Reed*, and omits any discussion of the applicable equal protection standard.

be subject to congressional review under Section 5; indeed, congressional power is broader, not narrower, than judicial power in this area because it includes the authority to engage in prevention, deterrence, and remediation of unconstitutional action, as well as simple prohibition of such action. "It is not said [in Section 5 that] the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. * * * It is the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. at 345.[22]

c. *Congress has a special legislative competence to protect against arbitrary state action that is subject to rational basis review.* This Court applies rational basis scrutiny to most classifications, but it does not do so because of doubts that unconstitutional discrimination occurs in those areas, or that it inflicts severe harm on the victimized class. To the contrary, in *Cleburne*, *supra*, the Court applied rational basis review to invalidate zoning restrictions that discriminated against the mentally retarded, acknowledging that "there have been and will continue to be instances of discrimination against the retarded that are in fact invidious," 473 U.S. at 446, and that irrational prejudice and "mere negative attitudes" underlay the governmental action at issue, *id.* at 448.

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[22] See also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation and emphasis omitted); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966) (Congress is "chiefly responsible for implementing the rights created in § 1 [of the Fourteenth Amendment]."); Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (Sen. Howard) (Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith.").

Rational basis scrutiny is designed, instead, to restrain the exercise of judicial power to invalidate legislation, whether enacted by state or federal legislatures. It reflects the notion that stringent judicial review is anti-democratic and should largely be reserved for the protection of those groups with limited access to the political process. See *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).[23] It would be ironic to conclude that the same legislative access that denies a group heightened scrutiny somehow disables Congress from acting.

With respect to enforcement of the Equal Protection Clause, Congress and the courts are engaged in the common endeavor of uncovering the arbitrary and irrational state action that this Court has held violates the Fourteenth Amendment. But when courts consider an equal protection challenge to legislation, they must be exceedingly deferential to the challenged legislative judgments and the factfinding that underlies them, requiring those challenging the laws to show that "the legislative facts on which the classification is apparently based could not *reasonably be conceived to be true* by the governmental decisionmaker." *Vance*, 440 U.S. at 111 (emphasis added); see also *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993). It is moreover, "irrelevant" to this Court's review whether the factual basis it can hypothesize "in fact underlay the legislative decision." *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980).

By contrast, because congressional enforcement does not share either the anti-democratic character of judicial review

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[23] See also *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (rational basis standard of review "is a paradigm of judicial restraint"); *Cleburne*, 473 U.S. at 441 ("courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices"); J. H. Ely, *Democracy and Distrust* 135-179 (1980).

or the limited capacity of courts to generate and compile information, Congress has "wide latitude" and a markedly different role from the courts when performing its "duty to make its own informed judgment on the meaning and force of the Constitution," *Flores*, 521 U.S. at 520, 535. Congress has a unique institutional capacity to gather information on a comprehensive basis, unconstrained by the limitations of particular litigation,[24] and a distinctive capacity to draw relevant information from the people and communities represented by its Members.[25] Accordingly, Congress, unlike the courts, is in a position to "amass and evaluate the vast amounts of data," *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985), that are essential given the heavily fact-bound character of Equal Protection Clause scrutiny. Congress can study a problem for decades (as it did here), hold fact-finding hearings (such as the 18 days of hearings that preceded enactment of the ADEA), and direct the Executive Branch to make reports on the state of a problem across the nation (see Secretary of Labor,

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[24] *Heller*, 509 U.S. at 320 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983) (Congress "may inform itself through fact-finding procedures such as hearings that are not available to the courts.").

[25] See, *e.g.*, 118 Cong. Rec. at 7745 (Sen. Bentsen) ("Letters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees."); 113 Cong. Rec. 34,746 (1967) (Rep. Dent) ("We have long known [age discrimination] existed. We know it because we see it happening in our home districts and because we have the factual evidence supplied by commission studies, those of private groups, and our own Government."); 110 Cong. Rec. 2597-2598 (1964) (Rep. Whitener) (information gathered about age discrimination by private industry and state agency by writing letter to the state office); *id.* at 2598 (Rep. Roosevelt) ("[T]here is very definitely a problem of discrimination because of age in the United States. Our own records of our own committees show that to be a fact.").

The Older American Worker: Age Discrimination in Employment (1965) (Labor Report)).

> The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.

Fullilove v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring); see also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 327 (1966).

Accordingly, the full spectrum of conduct that violates the Equal Protection Clause is not exhausted by the class of governmental actions that have been proven to be unconstitutionally discriminatory in a court of law. Rather, by drawing on a broad base of knowledge and experience, Congress is able to apply this Court's definition of the equal protection right to a set of legislatively determined facts and ascertain, in a way that courts cannot, whether and how often, as an empirical matter, governmental action entails the "indiscriminate imposition of inequalities" (*Romer*, 517 U.S. at 633) or otherwise imposes "invidiously discriminatory disqualifications" on the "federal constitutional right to be considered for public service" (*Turner* v. *Fouche*, 396 U.S. 346, 362 (1970)).[26]

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[26] To hold otherwise would "depreciate both congressional resourcefulness and congressional responsibility for implementing the [Fourteenth] Amendment" and would, contrary to this Court's rulings, consign Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic

Moreover, unlike courts, which ordinarily proceed by making across-the-board judgments about whether a particular class is a discrete and insular minority or otherwise in need of the protection of heightened judicial scrutiny, Congress can use its superior fact-gathering capacity to identify and attack the problem of discrimination in one particular segment of American life, such as employment. Combatting discrimination in employment is an area in which Congress's legislative expertise has long been established. This Court already has recognized that the ADEA is "part of a wider statutory scheme to protect employees in the workplace nationwide" from "invidious bias in employment decisions." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).[27] Indeed, the federal laws aimed at arbitrary discrimination in the workplace are more than a common scheme; they represent an interwoven latticework of prohibitions mutually dependent for their fulfillment on the existence of each other. The ADEA's legislative history contains numerous references to the overlap of gender and age discrimination. Congress, for example, was particularly concerned that women, whose rights in the workplace had only recently been given concrete legal recognition through the enactment of Title VII, not find that the same doors

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generalities' of § 1 of the Amendment." *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-649 (1966). Such a crabbed vision of Congress's power would suggest, for example, that Congress could not have employed its Section 5 powers to outlaw school segregation before this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). See also *Oregon*, 400 U.S. at 296 (opinion of Stewart, J.) (Congress can find invidious discrimination in state action "even though a court in an individual lawsuit might not have reached that factual conclusion").

[27] See also Senate Special Comm. on Aging, 95th Cong., 1st Sess., *The Next Steps in Combating Age Discrimination in Employment* 2 (Comm. Print 1977) (*The Next Steps*) ("ADEA is historically linked to title VII of the Civil Rights Act of 1964").

were once again closed due to their belated entry into the employment market or due to gender discrimination masked as an age limit.[28] Congress also noted the unique burden age discrimination inflicts on members of minority groups and the overlap between discrimination on the basis of disability and age.[29]

In sum, Congress has concluded, on a nationwide basis, that a criterion that was frequently used by government to make important employment decisions—age—in fact often represented an irrational and arbitrary outgrowth of baseless stereotypes and myths about a discrete class of people and that it unjustifiably imposed the "burden of invidiously discriminatory qualifications" on the "right to be considered

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[28] See *The Next Steps* 15-16 ("While female unemployment, at all ages, continues to rise relative to males, the share borne by older women is especially disturbing."); S. Rep. No. 784, 92d Cong., 2d Sess. xxii (1972) ("[m]ost older individuals are women"); H.R. Rep. No. 805, 90th Cong., 1st Sess. 13-14 (1967) (Supplemental Views) (retirement of airline stewardesses); Labor Report 3; 113 Cong. Rec. at 34,743 (Rep. Mink) (discussing discrimination in the application of mandatory retirement ages for airline stewardesses and stewards); *id.* at 34,742 (Rep. Steiger) (51-year-old domestic science teacher dismissed because school "wanted a prettier, more glamorous domestic science teacher"); 110 Cong. Rec. 9912 (Sen. Smathers) ("I refer to the form of discrimination practiced against those who are getting older, particularly women. For some reason, a woman who has become a widow and who happens to be 43, 44, or 45 years of age, or older, has a most difficult time getting a position. So there is the rankest type of discrimination against women who happen to be getting along in years.").

[29] See S. Rep. No. 784, *supra*, at xii (noting the "multiple jeopardy" faced by older members of minority groups); *id.* at 8, 75-78 ("multiple jeopardy" faced by minority groups, such as Asian Americans and Spanish-speaking minorities, and particularly older African American women); *id.* at 116 (impact on aged African Americans); *id.* at 284 ("[A]ll of these difficulties are intensified, of course, for members of minority groups and for those who are blind or deaf or otherwise handicapped."); *id.* at 378 ("multiple jeopardy of minorities").

for public service" (*Quinn* v. *Millsap*, 491 U.S. 95, 105 (1989)).[30] 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," *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J.) (emphasis in original), and congressional action in this regard properly supplements and complements the Court's case-by-case approach.[31] That inter-branch process—by which the Court determines what the Constitution compels in individual cases, and Congress decides what society requires as a practical matter "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion" (*Ex parte Virginia*, 100 U.S. at 346)—is what Section 5 is all about.

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[30] "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice* v. *New York*, 264 U.S. 292, 294 (1924); see also *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) ("we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations").

[31] Cf. *Frontiero*, 411 U.S. at 687-688 (plurality) ("Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the [constitutional] question presently under consideration."); *Oregon*, 400 U.S. 112 (unanimously holding that Congress could bar literacy tests nationwide in lieu of the Court's case-specific approach).

2. Congress Determined, On An Ample Record, That Unconstitutional Discrimination Against Older Workers Is Sufficiently Widespread To Warrant Preventive And Remedial Legislation

Congress enacted the ADEA to combat the arbitrary and irrational discrimination on the basis of age that the Fourteenth Amendment forbids. *McKennon*, 513 U.S. at 357 ("The ADEA * * * reflects a societal condemnation of invidious bias in employment decisions."). The ADEA's text and legislative history are replete with expressions of Congress's intent in this regard. See 29 U.S.C. 621(a)(2), (a)(4) and (b) (ADEA designed to combat "arbitrary age limits," "arbitrary discrimination in employment because of age," and "arbitrary age discrimination in employment"). In extending the ADEA's coverage to state and local governments, both the Senate and House Reports echoed President Nixon's concerns about this national problem:

> Discrimination based on age—what some people call "age-ism"—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation the contribution they could make if they were working.

S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974).[32]

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[32] See also S. Rep. No. 1487, 89th Cong., 2d Sess. 78, 80 (1966) (Additional Views) (noting problem of "[a]rbitrary and unjust age limits on hiring, imposed by employers through prejudice or misunderstanding"; emphasizing lack of basis for employers' stereotypical assumptions about

The Secretary of Labor's report on *The Older American Worker*, which contributed to the legislative momentum for age discrimination legislation, documented "substantial evidence" of "arbitrary * * * discrimination based on unsupported general assumptions about the effect of age on ability." Labor Report 5; see also *id.* at 21 (noting "persistent and widespread" use of age in employment decisions that "in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability").

Further, in the course of its lengthy investigation of the problem of age discrimination, and again in connection with its consideration of the 1974, 1978, and 1986 amendments extending the ADEA's scope, substantial evidence before Congress demonstrated that "older workers were being deprived of employment on the basis of inaccurate and

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older workers); Senate Special Comm. on Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law* III (Comm. Print 1973) (*Improving the Law*) (employment decisions "should be made on the basis of facts, not blanket assumptions"); S. Rep. No. 784, *supra*, at 144 ("attitudes on aging suitable to the 19th century cannot meet the needs of the 20th century"); *id.* at 334 ("Now large numbers of older workers are finding themselves involuntarily retired because of subtle forms, and in some cases overt acts, of age bias."); S. Rep. No. 842, 92d Cong., 2d Sess. 46 (1972) (describing efforts to "dispel[] 'preconceived notions of myths' about the older worker"); *Aid for the Aged: Message from the President of the United States*, H.R. Doc. No. 40, 90th Cong., 1st Sess. (1967) ("Many who are able and willing to work suffer the bitter rebuff of arbitrary and unjust job discrimination."); H.R. Rep. No. 1370, 87th Cong., 2d Sess. 1 (1962) (noting "the problem of continuing arbitrary employment discrimination because of * * * age").

stigmatizing stereotypes." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993).[33] Congress credited that evidence,

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[33] See Labor Report 7-9; H.R. Rep. No. 756, 99th Cong., 2d Sess. 6 (1986); S. Rep. No. 493, 95th Cong., 1st Sess. 4 (1977); 113 Cong. Rec. at 34,742 (Rep. Burke); *id.* at 34,752 (Rep. Dwyer); *id.* at 31,254 (Sen. Javits); 112 Cong. Rec. 20,821 (1966) (Sen. Javits) (employers' reasons for not hiring older workers "do not hold up when examined closely"); *id.* at 20,822-20,823 (Sen. Murphy) (statistics on actual performance of older workers and employer satisfaction); *id*; at 20,824 (Sen. Smathers) (same); 113 Cong. Rec. at 7076 (Sen. Javits) (noting the "wholly fallacious, yet widely held belief that older persons are unqualified"); *Employment Problems of Older Workers: Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor*, 89th Cong., 1st Sess. 26 (1965) (1965 House Hearings) (Secretary of Labor); *id.* at 65, 70-71 (Rep. Long); *id.* at 83 (Rep. Randall); *id.* at 86-87 (Rep. Cramer); *id.* at 123 (Rep. Pepper); *id.* at 127 (Rep. Pepper); *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor*, 90th Cong., 1st Sess. 7, 13 (1967) (1967 House Hearings) (Secretary of Labor); *id.* at 45, 49, 51 (Norman Sprague, National Council on the Aging); *id.* at 66 (Peter J. Pestillo, Chamber of Commerce of the United States); *id.* at 85 (Dr. Harold L. Sheppard, Upjohn Inst. for Employment Research); *id.* at 154 (William D. Bechill, Commissioner on Aging); *id.* at 370-371 (California age discrimination study); *id.* at 416 (Kenneth A. Meiklejohn, AFL-CIO); *Age Discrimination in Employment: Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 90th Cong., 1st Sess. 34 (1967) (1967 Senate Hearings) (Sen. Murphy); *id.* at 369-370, 382-384 (report of the National Association of Manufacturers); *The Next Steps* 7; *Amendments to the Age Discrimination in Employment Act of 1967: Hearing on H.R. 14879, H.R. 15342 Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. & Labor*, 94th Cong., 2d Sess. 76 (1976) (Jack Ossofsky, National Council on the Aging); *Age Discrimination in Employment: Hearing on H.R. 2588 Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. & Labor*, 94th Cong., 2d Sess. 6 (1976) (1976 House Hearings II) (Rep. Findley); *id.* at 99-107 (survey of capabilities of older workers); *Amendments to the Age Discrimination in Employment Act of 1967: Hearings on H.R. 65, H.R. 1116 Before the Subcomm. on Equal Opportunity of the House Comm. on Educ. & Labor*, 95th Cong.,

determining that, contrary to stereotypes, intelligence does not decrease with age, older workers customarily perform as well or better than younger workers, and use better judgment, are absent less often, and have fewer accidents.[34] The "available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers." *Wyoming*, 460 U.S. at 231. Thus, even if "physical ability generally declines with age" (*Murgia*, 427 U.S. at 315), Congress found that it did not follow that age is a reliable predictor of ability for most jobs. "Throughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. * * * As a result, many older American workers perform at levels equal or superior

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1st Sess. 9 (1977) (1977 House Hearings) (Rep. Pepper); *Age Discrimination in Employment Amendments of 1977: Hearings on S. 1784 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 46 (1977) (1977 Senate Hearings) (Sen. Church); *id.* at 52 (Sen. Domenici); *id.* at 66, 71 (Donald E. Elisburg, Assistant Secretary of Labor); *id.* at 137 (Rep. Findley); *id.* at 354-388 (Department of Labor Report); *Inside Views of Corporate Age Discrimination: Hearing Before the House Select Comm. on Aging*, 97th Cong., 2d Sess. 117 (1982); *Prohibition of Mandatory Retirement and Employment Rights Act of 1982: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 97th Cong., 2d Sess. 87 (1982) (1982 Senate Hearings) (Edward Howard, National Council on Aging); *Hearing on Age Discrimination in Employment Act Amendments: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 98th Cong., 2d Sess. 115 (1984) (1984 House Hearing) (Clarence Thomas, EEOC); *Working Americans: Equality at Any Age: Hearing Before the Senate Special Comm. on Aging*, 99th Cong., 2d Sess. 107 (1986) (1986 Senate Hearings) (staff report).

[34] See H.R. Rep. No. 756, *supra*, at 6; H.R. Rep. No. 527, 95th Cong., 1st Sess. 4 (1977); S. Rep. No. 493, *supra*, at 3.

to their younger colleagues." *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 409 (1985).

The evidence before Congress also demonstrated that many employers nevertheless continued to use age arbitrarily as a proxy for ability. Labor Report 21 ("There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability.").[35] The prejudice was so irrational, Congress learned, that employers would lower their performance standards rather than hire older workers.[36] See

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[35] See H.R. Rep. No. 756, *supra*, at 6-7; S. Rep. No. 493, *supra*, at 2; Labor Report 9; 1965 House Hearings 20-21 (Secretary of Labor); 1967 Senate Hearings 52 (Secretary of Labor); *Adequacy of Services for Older Workers: Hearings Before the Subcomm. on Employment & Retirement Incomes and Subcomm. on Federal, State and Community Services of the Elderly of the Senate Special Comm. on Aging*, 90th Cong., 2d Sess. 105 (1968) (Sol Swerdloff, Bureau of Labor Statistics); 1976 House Hearings II, at 73, 80 (Jack Ossofsky, National Council on Aging); 1977 Senate Hearings 90 (Marc Rosenblum, Center on Work and Aging); *id.* at 170 (Dr. Albert E. Gunn); *id.* at 334 (Department of Labor report); *The Next Steps* 20- 21; *Hearing to Eliminate Mandatory Retirement: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 97th Cong., 2d Sess. 2 (1982) (Malcolm R. Lovell, Under-Secretary of Labor); 1982 Senate Hearings 7 (Sen. Heinz); 1984 House Hearing 17-18 (Dr. Paul O. David, Institute for Human Performance); 1986 Senate Hearings 83-84 (Raymond C. Fay); *id.* at 133-140 (T. Franklin Williams, National Institute on Aging); *The Removal of Age Ceiling Cap Under The Age Discrimination in Employment Act: Joint Hearing Before the Subcomm. on Employment Opportunities of the House Educ. & Labor Comm. and the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 99th Cong., 2d Sess. 43-44 (1986) (T. Franklin Williams); *id.* at 50 (American Association of Retired Persons).

[36] See 1965 House Hearings 21 (Secretary of Labor). Studies show that employers attribute an older worker's good performance to "unstable" factors, like luck, while crediting younger workers' good performance to ability. Conversely, bad performance is attributed to older

Olmstead v. *L.C.*, No. 98-536 (June 22, 1999), slip op. 4 (Kennedy, J., concurring) ("[T]he line between animus and stereotype is often indistinct."). Finally, Congress determined that the problem of arbitrary and irrational age discrimination pervaded employment decisionmaking across the nation.[37]

As a result, Members of Congress repeatedly decried the imposition of arbitrary and baseless stereotypical assumptions about older workers:

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workers' lack of ability and to younger workers' bad luck. See, *e.g.*, E. Dedrick & G. Dobbins, *The Influence of Subordinate Age on Managerial Actions: An Attributional Analysis*, 12 J. Org. Behav. 367, 368, 374 (1991); S. Bieman-Copland & E. Ryan, *Age-Biased Interpretation of Memory Successes and Failures in Adulthood*, 53B J. Gerontology P105, P109-P110 (1998); G. Ferris et al., *The Influence of Subordinate Age on Performance Ratings and Causal Attributions*, 38 Personnel Psychol. 545, 552-553, 555 (1985); M. Kite & B. Johnson, *Attitudes Toward Older and Younger Adults: A Meta-Analysis*, 3 Psychol. & Aging 233, 240 (1988) (on the "question of whether attitudes toward older individuals are more negative than attitudes toward younger people," the answer continues to be "*yes*").

[37] See, *e.g.*, Labor Report 7-8 (workers over 45 represent less than 45% of new hires; 20% of employers hire no older workers; half of all job openings in the private economy are closed to workers over 55 years of age; a quarter of all such job openings are closed to workers over 45); 113 Cong. Rec. at 2199 (Sen. Javits) ("The steps already taken must be extended to cover the entire Nation, so that age discrimination can be fought universally and effectively."); 112 Cong. Rec. at 20,824 (Sen. Smathers) (statistics on pervasiveness of arbitrary age discrimination); *id.*, at 20,822 (Sen. Javits) (same); 110 Cong. Rec. at 13,490 (Sen. Smathers) (same, combined with discussion of governmental discrimination); *id.* at 9911-9912 (Sen. Smathers) (pervasiveness of discrimination in private industry and federal government); *id.* at 2598 (Rep. Pucinski) ("more than one-half of the people unemployed in America today are victims of discrimination because of age"); *id.* at 2597 (Rep. Pucinski) (statistics); *id.* at 2596 (Rep. Dowdy) ("more discrimination is practiced in this area than in any other").

> The widespread practice of mandatory retirement is as arbitrary, capricious, and discriminatory as a policy that dictates [that] blacks cannot be hired. To justify this practice, proponents resort to stereotypes—older workers are slower, older workers are out sick more often, older workers can't be retrained. These excuses recall the folklore of a bygone era when some said—blacks are less intelligent, women can't do men's work, and other such stereotypes used to justify previous forms of discrimination. All these stereotypes are equally false.

Age Discrimination in Employment Amendments of 1977: Hearings on S. 1784 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess. 137 (1977) (Rep. Findley). Members of Congress considered the ADEA necessary to eliminate the "regrettably widespread" and "invidious" employment policies that were "rooted in past prejudices," that were "as insidious, as damaging, and as deplorable as racial or religious discrimination," and that resulted in "cruel, senseless discrimination against older people" "without establishing any actual relationship of age to job requirements."[38]

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[38] 112 Cong. Rec. at 20,821 (Sen. Javits); 113 Cong. Rec. at 31,253 (Sen. Yarborough); *id.* at 34,741 (Rep. Steiger); *id.* at 31,257 (Sen. Young); 112 Cong. Rec. at 20,825 (Sen. Cannon); see also 113 Cong. Rec. at 34,745 (Rep. Eilberg) (noting "stereotyped thinking, thoughtlessness, and prejudice about the abilities of older workers"; "unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity"); *id.* at 34,751 (Rep. Dwyer) (debunking "the myth" that older workers "are too settled, too hard to retrain, and have too little time left to make valuable contributions to new employers. The facts are otherwise, however."); *id.* at 34,747 (Rep. Dent) (criticizing "discrimination which is the result of a deliberate disregard of a worker's value solely because of age"); *id.* at 34,746 (Rep. Daniels) (noting "the frequently unfair and unjustifiable attitudes of many employers against hiring anyone over age 40"); *id.* at 34,744 (Rep.

Congress further found that, whereas chronological age is a poor indicator of job performance, analytical tools are generally available to evaluate worker competence on a case-by-case basis, thus eliminating the need for most employers to use the unreliable proxy of age as a measurement of ability.[39]

Evidence before Congress demonstrated, moreover, that States as employers were not immune to the "age dis-

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Pucinski) (objecting to "arbitrary discrimination" based on "old beliefs and myths that have been proved untrue"); *id.* at 31,254 (Sen. Javits) ("almost all" age discrimination "was completely arbitrary"; "a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs"); *id.* at 7076-7077 (Sen. Javits) (national "cult" of youth results in "wholly irrational barriers to employment"); 112 Cong. Rec. at 20,822 (Sen. Javits) (noting lack of empirical basis for assumptions about older workers' abilities); *id.* at 20,824 (Sen. Smathers) (same); 110 Cong. Rec. at 13,491 (Sen. Long) ("[T]his is one of the worst and rankest forms of discrimination."); *ibid.* (Sen. Gore) ("the largest numbers who are suffering the most crushing form of discrimination are suffering it because of age"); *id.* at 13,490 (Sen. Smathers) ("I can establish that there is more discrimination in this area, without basis and without justification, than in any other area. That is discrimination with respect to age."); *id.* at 9912 (Sen. Sparkman) ("[I]f there is discrimination in employment in this country, none is more blatant than discrimination because of age."); *id.* at 2597 (Rep. Whitener) (similar).

[39] See, *e.g.*, H.R. Rep. No. 527, *supra*, at 3; 1965 House Hearings 58-59 (Sen. Javits); 1967 Senate Hearings 347-348 (report of the National Association of Manufacturers); *Economics of Aging: Toward A Full Share in Abundance: Hearings Before the Senate Special Comm. on Aging*, 91st Cong., 1st Sess. 1272-1291 (1969) (Dr. Leon Koyl); 1976 House Hearings II, at 81 (Jack Ossofsky, National Council on Aging); 1977 House Hearings 65 (Rep. Findley); *id.* at 8, 46 (Rep. Pepper); 1977 Senate Hearings 100-101 (Dr. Michael D. Batten); *id.* at 139 (Rep. Findley); House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 34-35 (Comm. Print 1977); 1982 Senate Hearings 8 (Sen. Heinz); *id.* at 86-87 (Edward F. Howard, National Council on the Aging).

crimination [that] is deeply ingrained in the American system," 118 Cong. Rec. at 24,397 (Sen. Bentsen). In fact, "Congress * * * established that [those] same conditions existed in the public sector." *Goshtasby* v. *Board of Trustees*, 141 F.3d 761, 772 (7th Cir. 1998). Senator Bentsen, the author of the amendment to extend the ADEA to the States, noted the "mounting evidence" that "the hiring and firing practices of governmental units discriminate against the elderly." 118 Cong. Rec. at 7745. Specifically, he noted that the evidence "revealed that State and local governments have also been guilty of discrimination toward older employees." *Ibid.*[40] The legislative record thus makes clear

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[40] See *Improving the Law* 14 ("There is also evidence that, like the corporate world, government managers also create an environment where young is somehow better than old."); S. Rep. No. 846, 93d Cong., 2d Sess. 112 (1974) (same); S. Rep. No. 300, 93d Cong., 1st Sess. 57 (1973) (expanding ADEA "will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment"); S. Rep. No. 690, *supra*, at 56 (same); H.R. Rep. No. 913, *supra*, at 40-41 (same); S. Rep. No. 842, *supra*, at 46 (same); 118 Cong. Rec. at 7745 (Sen. Bentsen) ("[T]he pressures directed against older Government employees constitute flagrant examples of age discrimination in employment, and as such, they should be outlawed."); 113 Cong. Rec. at 34,742 (Rep. Steiger) (school board refused to renew contract of a 51-year-old teacher "apparently because they wanted a prettier, more glamorous domestic science teacher"); *id.* at 34,749 (Rep. Donohue) ("Government itself feels that those citizens entering middle age are too old to begin any new employment."); 1967 House Hearings 168 (report of age discrimination in California public agencies that shows agencies using age in violation of state law and hiring authorities expressing doubts about the physical and mental capacities of older workers); 110 Cong. Rec. at 2596 (Rep. Beckworth) ("[T]he Government itself is a difficult place for an older man to obtain employment."); *id.* at 9912 (Sen. Sparkman) ("[A] person who is 40 or 45 years old finds it almost impossible to get a job, either in the Government or in private industry."); *id.* at 13,490 (Sen. Smathers) ("[E]ven the Federal Government itself and many State governments * * * say, 'We

that Congress found that the "invidious," "wholly irrational," "unjustifiable," and "completely arbitrary" myths and false stereotypes about older workers (see note 38, *supra*) pervading the private sector also infected state governments.

Even apart from the direct evidence of state discrimination it identified, Congress also could reasonably have concluded that state governments were not immune to the "pervasive discrimination against the elderly" (*Johnson* v. *Mayor & City of Baltimore*, 472 U.S. 353, 369 (1985)) that Congress found in private industry and the federal government.[41] Thus, the legislative record amply provides "a factual basis on which Congress could have concluded that [government employers were engaging in] 'invidious discrimination in violation of the Equal Protection Clause.'"

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do not take on anyone who has reached the age of 35 or 45.'"). In addition, State officials reinforced and built upon the age biases of private employers. Representative Whitener described a state employment security commission that denied unemployment benefits to older workers by deeming such workers unavailable for work solely because the local industry imposed arbitrary age limits on hiring. 110 Cong. Rec. at 2597.

[41] For evidence of the widespread scope of the age-discrimination problem, see note 37, *supra*. Congress later determined, based on reports that government employers were increasingly identified as violators of the ADEA, that "not all governmental bodies are model employers." *The Next Steps* 7; see also A. Hopkins, *Perceptions of Employment Discrimination in the Public Sector*, 40 Pub. Admin. Rev. 131, 132-133 (1980) (12% of all public employees, and 17% of public employees over 50 years old, reported age discrimination on the job); cf. *Jefferson County Pharm. Ass'n* v. *Abbott Lab.*, 460 U.S. 150, 158 (1983) ("economic choices made by public corporations * * * are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders").

Flores, 521 U.S. at 528 (describing and quoting *Morgan*, 384 U.S. at 656).[42]

Congress's factual determination, after such lengthy study and deliberation, regarding the scope and extent of the problem of irrational and arbitrary age discrimination in general and as perpetrated by state actors is "entitled to much deference," *Flores*, 521 U.S. at 536. Because Congress bears primary responsibility for enforcing the Fourteenth Amendment, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it" (*United States* v. *Gainey*, 380 U.S. 63, 67 (1965)).

B. THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS REASONABLY TAILORED TO THE ELIMINATION OF UNCONSTITUTIONAL AGE DISCRIMINATION

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, slip op. 10. In applying this standard, however, it must be remembered that Section 5 allows Congress to "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove*,

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[42] See also *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.) ("The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body."); *Fullilove*, 448 U.S. at 503 (Powell, J.) ("One appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

448 U.S. at 501 n.3. Section 5 thus affords Congress broad discretion to determine "what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Flores*, 521 U.S. at 536. Once Congress has properly identified a problem of constitutional dimension, moreover, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.). Further, the "wide latitude" that Section 5 affords Congress permits it to prohibit activities that are not themselves unconstitutional in furtherance of its remedial and deterrent scheme. *Flores*, 521 U.S. at 518, 520, 525-527, 532. Ultimately, judicial scrutiny of congressional action under Section 5 is as deferential as it is under Article I:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. at 345-346.[43]

1. Congress carefully structured the ADEA, like other civil rights legislation in the employment arena, to expose and prevent arbitrary and irrational discrimination.

> The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination.

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[43] See also *Flores*, 521 U.S. at 517-518; cf. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

> The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees.

McKennon, 513 U.S. at 361.[44] Thus, the ADEA does not flatly prohibit the use of age in employment decisions; it just forbids States, like all other employers, including the federal government, from treating qualified older workers differently solely because they are viewed as "old."

To that end, the ADEA requires the plaintiff to identify a prohibited use of age, and then permits the employer to show either that age was a reasonably necessary consideration in the circumstances of the particular job or that the employer, in fact, relied on a reasonable factor other than age (29 U.S.C. 623(f)(1)); see also *Wyoming*, 460 U.S. at 229.[45] Liability for the disparate treatment will not attach unless age "actually motivated" the employer's decision.

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[44] 1967 Senate Hearings 37 (Secretary of Labor) ("The relevant inquiry" is whether the ADEA "permits administrative distinction between cases where there is good and sufficient reason for adjusting the incidents of a person's employment to his age and those cases where there is not * * *. This bill is drawn with close attention to this key distinction."); see also 1984 House Hearing 113 (Clarence Thomas, EEOC) ("The ADEA does not interfere with a state or local government's ability to prescribe reasonable qualifications for [employees] or to discharge those individuals unfit to perform adequately. * * * What the Act forbids is arbitrary age distinctions based on stereotyped assumptions rather than analysis or determinations based on individual merit.").

[45] This Court has left open the question whether the ADEA also prohibits actions with a discriminatory impact. *Hazen Paper*, 507 U.S. at 610. That issue of statutory construction was not raised in the questions presented by the petitions and no cross-petition was filed raising it. The EEOC has taken the view that the ADEA does prohibit some practices that have an adverse impact on older workers and that are not justified by business necessity. 29 C.F.R. 1625.7(d); cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 432 (1971).

Hazen Paper, 507 U.S. at 610. That standard permits a state employer to "assess the fitness of its [employees] and dismiss those * * * whom it reasonably finds to be unfit." *Wyoming*, 460 U.S. at 239. Thus, under the ADEA's enforcement scheme, "[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Hazen Paper*, 507 U.S. at 611. Having determined that most older workers are capable of continuing in their jobs, that the use of age as a proxy for worker ability often has been based on factually incorrect stereotypes and myths, and that tools are generally available to employers to measure worker capability directly without undue burden, Congress reasonably concluded that, in the absence of direct proof of age's relevance, a substantial risk would persist that age classifications would be based upon the arbitrary, baseless, or invidious stereotypes that the Constitution condemns.

Furthermore, given that at least 49 States have prohibited the use of age as a proxy for ability in most public employment decisions,[46] the ADEA has at most a minimal

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[46] See Alaska Stat. § 18.80.300(4) (Michie 1996); Ariz. Rev. Stat. Ann. § 41-1461(6) (West 1999); Ark. Code Ann. §§ 12-3501, 21-3-201 (Michie 1996); Cal. Gov't Code § 12926(d) (West Supp. 1999); Colo. Rev. Stat. § 24-34-401(3) (1998); Conn. Gen. Stat. §§ 46a-51(10), 46a-70(a) (1998); Del. Code Ann. tit. 19, § 710(3) (Supp. 1998); Fla. Stat. Ann. § 112.044(2)(a) (West 1992); Fla. Stat. Ann. § 760.02(6) (West 1997); Ga. Code Ann. § 45-19-22(5) (1990); Haw. Rev. Stat. § 378-1 (1993); Idaho Code § 67-5902(6)(b) (1998); 775 Ill. Comp. Stat. 5/2-101(B)(1)(c) (West 1993); Ind. Code Ann. § 22-9-2-1 (Michie 1997) (defining "employer" to include the State and all other governmental entities, but excluding from the definition "a person or governmental entity which is subject to the federal Age Discrimination in Employment Act"); Iowa Code Ann. § 216.2(7) (West 1994); Kan. Stat. Ann. § 44-1112(d) (1993); Ky. Rev. Stat. Ann. § 344.010(1) (Michie 1997); La. Rev. Stat. Ann. § 23-311(B) (West 1998); Me. Rev. Stat. Ann. tit. 5, § 4553(7) (West 1989); Md. Code Ann., Lab. & Empl. § 49B-15(b) (1998);

impact on legitimate state operations and decisionmaking.[47] Because the States have largely abolished mandatory retirement ages and other across-the-board uses of age in most employment matters, the ADEA no longer conflicts with an asserted state interest in avoiding individualized determina-

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Mass. Gen. Laws ch. 151, § 151B-4(1C) (1989); Mich. Comp. Laws Ann. § 37.2103(g) (West Supp. 1999); Minn. Stat. Ann. § 363.01(28) (West 1991); Miss. Code Ann. § 25-9-149 (1999); Mo. Ann. Stat. § 213.010(7) (West Supp. 1999); Mont. Code Ann. § 49-3-101(4) (1997); Neb. Rev. Stat. § 48-1002(2) (1993); Nev. Rev. Stat. § 613.310(5) (1997); N.H. Rev. Stat. Ann. § 354-A:2(VII) (1997); N.J. Stat. Ann. §§ 10:3-1, 10:5-5(e) (West 1993); N.M. Stat. Ann. § 28-1-2(A) (Michie 1996); N.Y. Exec. Law § 296(3-a)(f) (McKinney 1993); N.C. Gen. Stat. § 126-16 (1999); N.D. Cent. Code § 14-02.4-02(5) (1997); Ohio Rev. Code Ann. § 4112.01(A)(2) (Anderson 1998); Okla. Stat. tit. 25, § 1201(5) (1987); Or. Rev. Stat. § 659.010(6) (1997); 43 Pa. Cons. Stat. Ann. § 954(b) (West 1991); R.I. Gen. Laws §§ 28-5-6(6), 28-5-7.1 (1995); S.C. Code Ann. § 1-13-30(d) (Law. Co-op. 1986); S.D. Codified Laws § 20-13-1(11) (Michie 1995); Tenn. Code Ann. § 4-21-102(4) (1998); Tex. Lab. Code Ann. §§ 21.002(7), 21.126 (West 1996); Utah Code Ann. § 34A-5-102(7)(a) (1997); Vt. Stat. Ann. tit. 21, § 495d(1) (Supp. 1998); Va. Code Ann. § 2.1-116.06 (Michie Supp. 1998); Wash. Rev. Code § 49.60.040(1) (1994); W. Va. Code § 5-11-3(d) (Supp. 1998); Wis. Stat. Ann. § 111.32(6)(a) (West 1997); Wyo. Stat. Ann. § 27-9-102(b) (Michie 1991). The possible exception is Alabama, whose age discrimination law does not indicate whether the covered "employers" include governmental units. Ala. Code § 25-1-20(2) (Michie Supp. 1998). The Alabama State Personnel Board, however, has prohibited "[d]iscrimination against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action, because of * * * age * * * or any other nonmerit factor." Ala. Admin. Code r. 670-X-4.1 (Supp. 1990). This regulation has "the force and effect of law," Ala. Code § 36-26-9 (Michie 1991), and the Board's enforcement decisions may be reviewed in the state courts, see *Thompson* v. *Alabama Dep't of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985).

[47] *Wyoming*, 460 U.S. at 253 (Burger, C.J., dissenting) ("To decide whether a challenged activity is an attribute of sovereignty, it is instructive to inquire whether other government entities have attempted to enact similar legislation.").

tions, such as this Court sought to protect in *Murgia*, *Vance*, and *Gregory*. The practice now challenged in most ADEA cases (including at least two of the instant cases and most of the cases cited in note 12, *supra*) is the unauthorized use of age as part of an ad hoc, individualized assessment by an employer. Cf. *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 344 n.4 (1989) (suggesting that an "aberrational" policy of assessor contrary to state law is not entitled to same measure of constitutional deference). Arbitrary uses of age as a deciding factor by a public employer raise serious equal protection concerns independent of the ADEA.[48] The ADEA accordingly imposes few new constraints on the States' employment practices. Moreover, it does not at all prevent the States from engaging in any regulatory function on behalf of their citizens, or in any other primary conduct constitutionally reserved to the States. The State's "discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard." *Wyoming*, 460 U.S. at 240 (emphasis in original).[49]

2. The ADEA's procedural and remedial provisions are also tailored. The Act does not regulate all state activities —-only employment. The remedies the ADEA allows for a proven violation narrowly focus on "restor[ing] the employee to the position he or she would have been in absent the discrimination." *McKennon*, 513 U.S. at 362. ADEA relief is thus confined to back pay (doubled if the violation was

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[48] See *Logan*, 455 U.S. at 438 (opinion of Blackmun, J.); *id.* at 443-444 (Powell & Rehnquist, JJ., concurring in judgment); *Gulf*, 165 U.S. at 159 ("But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this.").

[49] See also *Wyoming*, 460 U.S. at 241 ("In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances.").

"willful"), injunctive, and other equitable relief, see 29 U.S.C. 626(b).[50]

Furthermore, the ADEA manifests a respect for States by requiring that state age discrimination remedies be invoked (29 U.S.C. 633(b)) and that the EEOC be afforded the opportunity to address any alleged problem through voluntary conciliation (29 U.S.C. 626(d)). The ADEA thus ensures that the State is given the opportunity to resolve the problem, under its own law or otherwise, before being haled into federal court. See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755-757 (1979).

In addition, Congress legislated in a manner that minimizes the intrusiveness of the ADEA on the States' sovereign functions. The ADEA excludes from its protection any person not subject to the civil service laws of a state government who (1) is elected to public office in any State or political subdivision of any State by the qualified voters thereof; (2) is chosen by such officer to be on such officer's personal staff; (3) is an appointee on the policymaking level; or (4) is an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. 29 U.S.C. 630(f). Those exemptions embody a congressional decision not to regulate the qualifications of a State's "most important government officials" because those are "decision[s] of the most fundamental sort for a sovereign entity" that raise special federalism concerns. *Gregory*, 501 U.S. at 463, 440.

The ADEA currently permits state employers to establish mandatory retirement ages for "firefighter[s] or law enforce-

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[50] Although the ADEA authorizes all "legal or equitable relief as may be appropriate," 29 U.S.C. 626(b), "the Courts of Appeals have unanimously held * * * that the ADEA does not permit * * * compensatory damages for pain and suffering or emotional distress." *Commissioner* v. *Schleier*, 515 U.S. 323, 326 (1995).

ment officer[s]" who are 55 or older.[51] 29 U.S.C. 623(j)(1)(B) (Supp. III 1997); see also *ibid.* note (Study and Guidelines for Performance Tests). In addition, the EEOC has exercised its administrative authority, 29 U.S.C. 628, to exempt entirely from the ADEA programs and activities carried out by state employers designed exclusively to provide or promote the employment of persons with special employment problems, such as the long-term unemployed, people with disabilities, or members of minority groups, 29 C.F.R. 1627.16(a).

3. Despite Congress's careful and studied efforts to tailor the statute, in some instances the ADEA may prohibit conduct that is not itself unconstitutional. It is not at all clear, however, precisely how much more disparate treatment by the States the ADEA prohibits than the Constitution already proscribes of its own force. The Constitution requires age distinctions to be rational, and the ADEA requires that employment decisions based on age be "reasonably necessary," 29 U.S.C. 623(f)(1). See generally *Criswell*, 472 U.S. at 407-408; see also 29 C.F.R. 1625.6.

While it is certainly possible to conceive of an age-based state employment policy that is "rational" but not "reasonably necessary," such policies cannot be prevalent because every State has by legislation disclaimed any interest in using age as an easy-to-administer line for most employment

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[51] Mandatory retirement ages of less than 55 are permissible if they were in effect on March 3, 1983. See 29 U.S.C. 623(j)(1)(A). Thus, as an illustration of the ADEA's tailored coverage, each of the employee groups (law enforcement officers, judges, and Foreign Service Officers) for which this Court found that the Fourteenth Amendment did not constitutionally proscribe mandatory retirement (see *Murgia*, *Gregory*, and *Vance*) is also exempted from the ADEA's ban on mandatory retirement ages. See *Gregory*, 501 U.S. at 470; *Vance*, 440 U.S. at 97 n.12; *Strawberry* v. *Albright*, 111 F.3d 943, 947 (D.C. Cir. 1997), cert. denied, 522 U.S. 1147 (1998).

decisions. See note 46, *supra*. The EEOC advises that most claims of age discrimination today involve not general policies based on age, but rather ad hoc, individualized employment decisions, in which the employer contends not that the use of age was justified, but that age was not the basis of decision. If a court determines, nonetheless, that age in fact motivated a state employer's decision, then, because no justification for the use of age has been offered, the decision will ordinarily violate both the ADEA and the Constitution. Indeed, it will most often violate state law as well, though as Congress found—based in part on the testimony of state officials themselves—state laws have often been ineffective due to lack of resources and enforcement capability.[52] Thus, the ADEA does not necessarily impose extensive new restraints on the States that are not already imposed by the Constitution and their own laws.

Some of the ADEA's overinclusiveness, moreover, is the inevitable consequence of Congress's attempt to fill the gap between real-world discrimination and an individual plaintiff's capacity to prove it in court by shifting burdens of proof. This mechanism for enforcing constitutional rights has been adopted by Congress not only in the area of employment discrimination (see, *e.g.*, *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.8 (1981) ("In a Title VII case, the allocation of burdens * * * sharpen[s]

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[52] Labor Report 10 ("inadequate funds and staff have limited the effectiveness of these laws in most States"), 22; *Improving the Law* 9; S. Rep. No. 1487, *supra*, at 78; 113 Cong. Rec. at 2199 (Sen. Javits); *id.* at 34,743 (Rep. Matsunaga) ("absence of uniformity"); 118 Cong. Rec. at 24,397 (Sen. Bentsen); 1967 House Hearings 168 (report of age discrimination in California public agencies that shows agencies using age in violation of state law). For precisely that reason, many state officials supported the enactment of national age discrimination legislation to reinforce their own efforts. See H.R. Rep. No. 805, *supra*, at 3; *Improving the Law* 9.

the inquiry into the elusive factual question of intentional discrimination.")), but also in the area of voting rights (see, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 174 (1980)). And it has been upheld as an appropriate use of the Section 5 enforcement power. See generally, *e.g.*, *Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999) ("[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional") (quoting *Flores*, 521 U.S. at 518); cf. *Fitzpatrick*, 472 U.S. at 451-457.

Congress, moreover, has 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[53] and their "federal constitutional right to be considered for public service" free from arbitrary discrimination, *Turner*, 396 U.S. at 362; see also *Quinn*, 491 U.S. at 104-105; *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952) ("[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."). Congress thus focused the ADEA on an area in which state discretion is already constrained by distinct constitutional and state statutory rights of the individual.[54]

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[53] 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 (1914) ("In so far as a man is deprived of the right to labor, his liberty is restricted * * * 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.").

[54] Contrast *Flores*, 521 U.S. at 532 (the Religious Freedom Restoration Act's (42 U.S.C. 2000bb *et seq.*) "[s]weeping coverage ensure[d] its intru-

Finally, Congress has acted in a context in which the consequences of unconstitutional state action have a direct impact on federal operations and the federal fisc. See *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"); Labor Report 18. The fact that any unconstitutional state conduct reverberates far beyond the State's borders and is intertwined with independent federal governmental interests both diminishes the legitimate state objections to the statute's protective operation and underscores the proportionality of Congress's limited remedial action in the ADEA.

In sum, the ADEA provides a discrete and calibrated remedy to a narrowly defined range of governmental conduct. It reflects a measured and proportionate response to a constitutional problem that Congress identified through a decades-long process of extensive study, application of this Court's equal protection standard to expert and thoroughly documented legislative factual judgments, and consultation and dialogue with the States. This studiously constructed statute falls well within the "wide latitude" (*Flores*, 521 U.S. at 520) afforded Congress when it exercises its "comprehensive remedial power" (*Fullilove*, 448 U.S. at 483) under Section 5 of the Fourteenth Amendment.

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sion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter"); see also *Florida Prepaid*, slip op. 18 (patent legislation applies to an "unlimited range of state conduct").

CONCLUSION

The judgments of the court of appeals should be reversed, and the cases remanded for further proceedings.

Respectfully submitted.

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JULY 1999