No. 98-1178

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, PETITIONER

v.

JOANNE MIGNEAULT

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH 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-19a) is reported at 158 F.3d 1131. The opinion of the district court (Pet. App. 20a-46a) is reported at 973 F. Supp. 1295.

JURISDICTION

The court of appeals entered its judgment on October 23, 1998. The petition for a writ of certiorari was filed

on January 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).[1] The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the

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[1] The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. II 1996). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (Supp. II 1996); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. III 1997). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (Supp. II 1996) (state).

enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * *, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

2. Respondent was employed by the University of New Mexico from 1982 until 1994. Pet. App. 21a. When her position was slated for elimination due to budgetary constraints, respondent applied for two open positions in the University. *Id.* at 21a-22a. In each case, a younger person was hired for the job. *Id.* at 22a. Respondent filed suit in federal district court alleging, *inter alia*, that petitioner had failed to hire her because of her age, in violation of the ADEA. *Id.* at 22a-23a.[2] Petitioner moved to dismiss on the ground of Eleventh Amendment immunity. *Id.* at 24a- 26a. The district court denied the motion to dismiss the ADEA claim, *id.* at 26a, and found there were material issues of fact that precluded summary judgment for petitioner, *id.* at 40a.

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[2] Respondent also sued a number of university officials in their individual capacities for constitutional violations under 42 U.S.C. 1983. Pet. App. 23a. The district court dismissed the claims against all but one of those defendants. *Id.* at 27a-34a. The court found, however, that respondent had stated a claim and had raised material issues of fact as to whether the remaining defendant's conduct amounted to unconstitutional age discrimination, *id.* at 42a-44a. On an interlocutory appeal from the denial of qualified immunity, the court of appeals held that the ADEA preempted the Section 1983 equal protection claim. *Id.* at 18a-19a. Review has not been sought of that aspect of the court of appeals' decision.

3. Petitioner took an interlocutory appeal as of right of the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court of appeals affirmed in pertinent part. Pet. App. 1a-19a.

The court reaffirmed its prior holding in *Hurd* v. *Pittsburg State University*, 29 F.3d 564 (10th Cir.), cert. denied, 513 U.S. 930 (1994), that Congress intended to abrogate Eleventh Amendment immunity under the ADEA. Pet. App. 8a-9a n.3. The court also joined "the majority of other appellate courts that have addressed this issue" in holding that "Congress acted within its authority under the Fourteenth Amendment to abrogate Eleventh Amendment immunity from suits under the ADEA." *Id.* at 15a. Applying *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the court held that Congress had a basis in fact for concluding that "arbitrary age discrimination is a real problem in the workplace," and that Congress "recognized age discrimination was occurring in the *public* sector as well." Pet. App. 13a, 14a. The court of appeals noted that the statutory scheme enacted by Congress in the ADEA was "narrowly confined" to ferret out and remedy such instances of arbitrary discrimination by requiring employers generally to make employment decisions based on the actual qualifications of an employee, rather than simply on the employee's age. *Id.* at 14a-15a.

ARGUMENT

On January 25, 1999, this Court granted review in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791.

The questions of abrogation of Eleventh Amendment immunity under the ADEA raised by this petition are identical to those presented in No. 98-796 and No. 98-791. Accordingly, this petition should be held pending the Court's decision in those consolidated cases.

CONCLUSION

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

Respectfully submitted.

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